

THE INDIAN LAW REPORTS ALLAHABAD SERIES



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1. Application under Section 482 Cr.P.C. No. 5389 of 2023 has been filed by the applicant Anil Kumar Singh challenging validity of (i) the Charge-sheet no. 6 arising out of Crime No. RC 216 2022 A 0012 dated 10.09.2022 under

Sections 120-B, 7, 8, 9, 10 and 12 of the Prevention of Corruption Act, 1988, Police Station CBI/AC-I, New Delhi, so far as it relates to him (ii) prosecution sanction order dated 27.03.2023, (iii) the cognizance and summoning order dated 06.04.2023 passed by the learned Special Judge, Anti Corruption, C.B.I., West, Lucknow in Session Case No. 709 of 2023 and (iv) the consequential proceedings of Session Case No. 709 of 2023 pending in the court of Special Judge, C.B.I., West, Lucknow.

2. Application under Section 482 Cr.P.C. No. 5391 of 2023 has been filed by the applicants - (1) Bedram Sharma, (2) Parsuram Sharma and (3) Anand Mohan Sharma challenging validity of (i) the Charge-sheet no. 6 arising out of Crime No. RC 216 2022 A 0012 dated 10.09.2022 under Section 120-B I.P.C. and Sections 7, 8, 9, 10 and 12 of the Prevention of Corruption Act, 1988, Police Station CBI/AC-I, New Delhi, so far as it relates to them (ii) the cognizance and summoning order dated 06.04.2023 passed by the learned Special Judge, Anti Corruption, C.B.I., West, Lucknow in Session Case No. 709 of 2023 and (iii) the consequential proceedings of Session Case No. 709 of 2023 pending in the court of Special Judge, C.B.I., West, Lucknow.

3. As both the applications challenge the same proceedings on the same set of grounds, both the applications are being decided by a common judgment.

4. Heard Sri Raju Ramchandran Senior Advocate, assisted by Sri Purnendu Chakravarty and Sri Anuj Tandon Advocates, the learned counsel for the applicant and Sri Anurag Kumar Singh, the learned counsel for the respondent - C.B.I.

assisted by Sri Dharmendra Pratap Singh and perused the record.

5. The aforesaid case has been registered on the basis of an F.I.R lodged on 10.09.2022 alleging that Anil Kumar Singh operates from the local office of M/s Voyants Solution Pvt. Ltd. and the co-accused Bedram Sharma of M/s S.R.S.C Infra Pvt. Ltd. approached Anil Kumar Singh for clearing pending bills and Anil Kumar Singh assured him of favorable clearance in lieu illegal gratification demanded by him and in pursuance of the aforesaid conspiracy, certain bills of M/s S.R.S.C Infra Pvt. Ltd. were cleared by Anil Kumar Singh.

6. The F.I.R alleges commission of offence under Section 120- B I.P.C read with Section 7, 8, 9, 10 and 12 of the Prevention of Act, 1988, by the named accused persons and other unknown public servants and private persons.

7. The charge-sheet submitted by the C.B.I. states that Anil Kumar Singh was performing public duties while functioning as the Resident Engineer for the project and he had the authority to certify payments of the contractors. Anil Kumar Singh dishonestly demanded and accepted bribe as a motive/reward for recommending interim payment of bills.

8. Sri Raju Ramchandran Senior Advocate, the learned Counsel for the applicants has submitted that the applicant in Application No. 5389 of 2023 Anil Kumar Singh, is not a 'public servant' as per the definition of the term given in Section 2(c) of the National Highway Authority of India Act (hereinafter referred as 'N.H.A.I.' Act) and, therefore, he cannot be prosecuted under the Prevention of

Corruption Act, which contains provisions for offences committed by public servants only.

9. The learned Counsel for the applicant has further submitted that the applicants in Application under Section 482 Cr.P.C. No. 5391 of 2023 - (1) Bedram Sharma, (2) Parsuram Sharma and (3) Anand Mohan Sharma have been charged for commission of offences under Section 120-B I.P.C. and Sections 7, 8, 9, 10 and 12 of the Prevention of Corruption Act, 1988, for entering into a criminal conspiracy with Anil Kumar Singh (the applicant in Application No. 5389 of 2023) and because Anil Kumar Singh is not a public servant and he cannot be tried for offences under Sections 7, 8, 9, 10 and 12 of the Prevention of Corruption Act, 1988, consequently the applicants (1) Bedram Sharma, (2) Parsuram Sharma and (3) Anand Mohan Sharma, cannot be charged for commission of offence of criminal conspiracy with Anil Kumar Singh.

10. A copy of the contract entered into between N.H.A.I and M/s Voyants Solutions Pvt. Ltd in joint venture with Yongma Engineering Company Ltd. and associate member Cho & Kim Engineering Pvt. Ltd. for “Supervision Consultancy Services for the Construction of Balance Works of two inning with paved shoulders of Sitarganj-Bareilly Section of NH-74 from 254.820 to 329.280 in the State of Uttar Pradesh & Uttarakhand” has been annexed. The Appendix to the aforesaid consultancy agreement mentions that N.H.A.I. would pay Rs. 3,47,31,000/- towards remuneration for local professional staffs and it specifically mentions payment of Rs.1,60,000/- to resident-cum -highway engineer of M/s Vyoants Solutions Pvt. Ltd. in joint venture with Yongma Engineering Company Ltd.

11. A copy of a retainer-ship letter dated 10.03.2020 issued by M/s Yongma Engineering Company Ltd. has been annexed with the affidavit which states that Anil Kumar Singh has been employed by M/s Yongma Engineering Company Ltd. for the project in question and his designation is Resident-cum-Highway Engineer and the Annexure to the aforesaid letter indicates that Anil Kumar Singh has been appointed on a monthly fixed retainer-ship fee of Rs. 1,31,000/-.

12. The respondent – C.B.I. has filed a counter affidavit inter alia stating that Anil Kumar Singh had demanded undue advantage from Anand Mohan Sharma, an employee of M/s SRSC Infra Pvt. Ltd. for clearance of some bills of the company. Anand Mohan Sharma informed Bedram Sharma, a Director of the Company and Bedram Sharma directed Anand Mohan Sharma to deliver the amount to Anil Kumar Singh. C.B.I. received a reliable information of the demand / delivery and acceptance of bribe, registered an F.I.R. and laid a trap in presence of two independent witnesses and it arrested Anil Kumar Singh and Anand Mohan Sharma when the latter had handed over the amount to the former at his residence and the former had returned Rs.1,00,000/- to the latter as his share/commission. Rs.1,00,000/- were recovered from a pocket of Anand Mohan Sharma and he was taken to the house of Anil Kumar Singh, from where Rs.14,00,000/- were recovered

13. Sri Raju Ramchandran, the learned Senior Advocate for the applicants, has submitted that Anil Kumar Singh is a Resident Engineer appointed on a fixed retainer-ship fee by a private company M/s Yongma Engineering Company Ltd. - the consultancy agency engaged appointed by

the Authority. Anil Kumar Singh is not paid any remuneration by the Government or by the N.H.A.I. He has submitted that the advisers/consultants have been expressly excluded from the definition of 'public servant' given in Section 27 of the N.H.A.I. Act by virtue of Regulation 20 falling under Chapter III of the N.H.A.I. (Recruitment, Seniority and Promotion) Regulations, 1996, which provides that the provision of Section 27 relating to public servant shall not apply to an advisor or a consultant appointed by the authority.

14. The learned counsel for the applicants has further submitted that it is a settled principle of law that a special statutory provision over-rides the general provisions. His submission is that the National Highway Authority of India and the statutory regulations framed there under are special provisions and the definition of 'public servant' under the aforesaid Act would override upon the definition of 'public servant' given in the Indian Penal Code or the Prevention of Corruption Act, 1988 which are general laws.

15. The learned Counsel for the applicants has further submitted that the N.H.A.I. Act was enacted subsequent to the Prevention of Corruption Act and yet it contains a definition of the term 'public servant' which is different from the definition of the term given in the Prevention of Corruption Act and, therefore, the definition given in the latter special Act will prevail upon the definition given in the former Act.

16. Per contra, Sri. Anurag Kumar Singh, the learned Counsel for the respondent – C.B.I. has submitted that the Prevention of Corruption Act, 1988 is a special law which contains special

provisions for prevention of corruption and prosecution of persons committing the offence of corruption whereas the definition of the term given in N.H.A.I. Act would be relevant for the general purposes of conditions of employment only. His submission is that the definition of the term 'public servant' given in the Prevention of Corruption Act, 1988 would prevail for the purpose of applicability of the law relating to prevention of corruption upon the definitions given in any other law.

17. Before proceeding any further, it would be appropriate to have a look at the relevant provisions of different Statutes, which have been placed by the learned Counsel for the parties.

18. The term 'public servant' is defined in Section 21 of the Penal Code, and the relevant part of Section 21 reads as follows: -

"21. "Public servant".—*The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely:—*

*** * ***

*Twelfth.—Every person—
in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government;*

*** * ***

Explanation 1.—Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Explanation 2.—Wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

* * * .”

19. Thus all persons remunerated by fees or commission for the performance of any public duty by the Government are ‘public servants’, whether appointed by the Government or not. A person performing a public duty, who is being paid retainership fee by the Government will be a public servant, even if he has been employed by a private company, and he will be a public servant irrespective of any legal defect in his right to hold that situation.

20. However, Section 5 of the I.P.C. specifically states that: -

“5. Certain laws not to be affected by this Act.—*Nothing in this Act shall affect the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service of the Government of India or the provisions of any special or local law.”*

21. Therefore, the definition given in Section 21 of the I.P.C. will give way to the definition given in any special law.

22. Section 27 of the N.H.A.I. Act, 1988 provides that the employees of the Authority shall be deemed to be ‘public servants’. It reads as follows: -

27. Employees of the Authority to be public servants.—*All members, officers and employees of the Authority shall, when acting or purporting to act in pursuance of the provisions of this Act or of any rule or regulation made thereunder, be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code (45 of 1860).*

23. The word ‘employee’ is defined in Section 2 of the N.H.A.I. Act as follows: -

“2.—In this Act, unless the context otherwise requires,—“employee” means a person in the full-time service of the Authority;

24. Section 35 of the N.H.A.I. Act empowers the Authority to make regulations to carry out the provisions of the Act. In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for **the terms and conditions of service, method of recruitment and the remuneration of officers and other employees appointed by the Authority.** Section 37 of N.H.A.I. Act provides that, every rule and every regulation made under the Act shall be laid before each House of Parliament.

25. In exercise of the aforesaid power conferred under Section 35 of the N.H.A.I. Act, the N.H.A.I. has framed the **National Highway Authority of India (Recruitment, Seniority and Promotion) Regulations, 1996.** Chapter II of the aforesaid regulation deals with ‘Terms and Conditions of Employment of Officers and Employees’ and Chapter III thereof deals with ‘Terms and Conditions of Employment of Advisers/Consultants’. Regulations 20 and 21 falling under Chapter III provide as follows:-

“20. Advisers/consultants not to be public servants Provision of section 27 of the Act, relating to public servants shall not apply in case of an adviser or a consultant appointed by the Authority.

21. Provisions of Chapter-II not to apply—No provision of Chapter-II of these regulations shall apply to an adviser

or a consultant appointed by the Authority under this Chapter.”

26. On the basis of the aforesaid provisions, Sri. Raju Ramchandran has submitted that the N.H.A.I has entered into an agreement with M/s Voyants Solutions Pvt. Ltd in joint venture with Yongma Engineering Company Ltd. and associate member Cho & Kim Engineering Pvt. Ltd. for supervision and consultancy services for the construction of a highway. The consultancy agreement stipulates that N.H.A.I. would pay Rs. 3,47,31,000/- towards remuneration for local professional staffs and it specifically mentions payment of Rs.1,60,000/- to Resident-cum-Highway engineer of M/s Vyoants Solutions Pvt. Ltd in joint venture with Yongma Engineering Company Ltd. M/s Yongma Engineering Company Ltd. has retained Anil Kumar Singh as the Resident-cum-Highway Engineer for the project on a monthly fixed retainer-ship fee of Rs. 1,31,000/-. His submission is that Anil Kumar Singh is not an employee of the N.H.A.I. as per Section 2 (c) of the N.H.A.I. Act and, therefore, Anil Kumar Singh is not a public servant under Section 27 of the N.H.A.I. Act. He submits that this situation is further fortified by Regulation 20 aforesaid which provides that the provision of Section 27 of the Act, relating to public servants shall not apply in case of an adviser or a consultant appointed by the Authority.

27. The submission appears to be prima facie impressive and on the basis of the aforesaid submission, interim orders were passed in favour of the applicants in both the applications on 04.07.2023 staying proceedings of the trial. However, a closer scrutiny reflected by the following discussion would reveal that the submission is misconceived.

28. N.H.A.I. Act, 1988 is an Act “to provide for the constitution of an Authority for the development, maintenance and management of national highways and for matters connected therewith or incidental thereto.” The Statement of Objects and Reasons of the Act states that the development and maintenance of national highways is fully financed by the Central Government as this function comes within Entry 23 of the Union List of the Seventh Schedule to the Constitution. Section 5 of the National Highways Act, 1956 provides that the Central Government may direct that any function in relation to the development or maintenance of national highways shall also be exercisable, among others, by any officer or authority subordinate to the Central Government. Under this provision, the function of execution of the activities had been delegated to the State Governments. Since the Central Government had no direct administrative control over the executing agencies, several problems were being faced. For this reason, National Highways Authority was created to take over development and maintenance of the national highway system. The main function of the Authority is to develop and maintain national highways whose management and operation is vested in the Central Government.

29. On the other hand, the Prevention of Corruption Act, 1988 is “*An Act to consolidate and amend the law relating to the prevention of corruption and for matters connected therewith*”. The statement of objects and reasons of the Statute states that: -

“Statement of Objects and Reasons—1. The Bill is intended to make the existing anti-corruption laws more

effective by widening their coverage and by strengthening the provisions.

*2. The Prevention of Corruption Act, 1947, was amended in 1964 based on the recommendations of the Santhanam Committee. There are provisions in Chapter IX of the Indian Penal Code to deal with public servants and those who abet them by way of criminal misconduct. There are also provisions in the Criminal Law Amendment Ordinance, 1944, to enable attachment of ill-gotten wealth obtained through corrupt means, including from transferees of such wealth. **The Bill seeks to incorporate all these provisions with modifications so as to make the provisions more effective in combating corruption among public servants.***

3. The Bill, inter alia, envisages widening the scope of the definition of the expression “public servant”, incorporation of offences under Sections 161 to 165-A of the Indian Penal Code, enhancement of penalties provided for these offences and incorporation of a provision that the order of the trial court upholding the grant of sanction for prosecution would be final if it has not already been challenged and the trial has commenced. In order to expedite the proceedings, provisions for day-to-day trial of cases and prohibitory provisions with regard to grant of stay and exercise of powers of revision on interlocutory orders have also been included.

4. Since the provisions of Sections 161 to 165-A are incorporated in the proposed legislation with an enhanced punishment, it is not necessary to retain those sections in the Indian Penal Code. Consequently, it is proposed to delete those sections with the necessary saving provision.

5. The notes on clauses explain in detail the provisions of the Bill.”

(Emphasis Supplied)

30. Thus it is clear that the Prevention of Corruption Act, 1988 is a Special Statute which has been enacted with the specific object of consolidating and amending the law relating to the prevention of corruption, to make the existing anti-corruption laws more effective by widening their coverage and by strengthening the provisions so as to make the provisions more effective in combating corruption among public servants and to widen the scope of the definition of the expression “public servant”. N.H.A.I. Act is also a Special Statute enacted with the object of regulating construction and management of National Highways only. It does not contain any provision for imposing any punishment for commission of any offence, particularly the offence of corruption.

31. In **Ashoka Marketing Ltd. v. Punjab National Bank**, (1990) 4 SCC 406, the Hon’ble Supreme Court enunciated the principle of interpretation that in the case of inconsistency between the provisions of two enactments, both of which can be regarded as special in nature, the conflict has to be resolved by reference to the purpose and policy underlying the two enactments and the clear intendment conveyed by the language of the relevant provisions therein.

32. In **Essa @ Anjum Abdul Razak Memon versus The State of Maharashtra, through STF, CBI Mumbai**, 2013 SCC OnLine SC 255, the question was as to whether the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 as well as of Terrorist And Disruptive Activities (Prevention) Act, 1987 provide for over-riding effect on any other law for the time being in force; and as to whether the provisions of JJ Act would be applicable in

case of TADA. Admittedly, the TADA Act 1985/1987 and JJ Act, 1986/2000, both contained provisions providing over-riding effect on any other law for the time being in force. The Hon'ble Supreme Court held that *"where there is inconsistency between the provisions of two statutes and both can be regarded as special in nature, the conflict has to be resolved by reference to the purpose and policy underlying the two enactments and the clear intendment of the legislature conveyed by the language of the relevant provisions therein"*.

33. In **State of M.P. v. Ram Singh**, (2000) 5 SCC 88, the Hon'ble Supreme Court explained the object of the Prevention of Corruption Act 1988 thus: -

"10. The Act was intended to make effective provisions for the prevention of bribery and corruption rampant amongst the public servants. It is a social legislation intended to curb illegal activities of the public servants and is designed to be liberally construed so as to advance its object. Dealing with the object underlying the Act this Court in R.S. Nayak v. A.R. Antulay [(1984) 2 SCC 183] held:

"18. The 1947 Act was enacted, as its long title shows, to make more effective provision for the prevention of bribery and corruption. Indisputably, therefore, the provisions of the Act must receive such construction at the hands of the court as would advance the object and purpose underlying the Act and at any rate not defeat it. If the words of the statute are clear and unambiguous, it is the plainest duty of the court to give effect to the natural meaning of the words used in the provision. The question of construction arises only in the event of an ambiguity or the plain meaning of the words used in the statute would be self-defeating. The court is

entitled to ascertain the intention of the legislature to remove the ambiguity by construing the provision of the statute as a whole keeping in view what was the mischief when the statute was enacted and to remove which the legislature enacted the statute. This rule of construction is so universally accepted that it need not be supported by precedents. Adopting this rule of construction, whenever a question of construction arises upon ambiguity or where two views are possible of a provision, it would be the duty of the court to adopt that construction which would advance the object underlying the Act, namely, to make effective provision for the prevention of bribery and corruption and at any rate not defeat it."

11. Procedural delays and technicalities of law should not be permitted to defeat the object sought to be achieved by the Act. The overall public interest and the social object is required to be kept in mind while interpreting various provisions of the Act and deciding cases under it."

34. In **Subramanian Swamy v. Manmohan Singh**, (2012) 3 SCC 64, the Hon'ble Supreme Court observed: -

"68. Today, corruption in our country not only poses a grave danger to the concept of constitutional governance, it also threatens the very foundation of Indian democracy and the rule of law. The magnitude of corruption in our public life is incompatible with the concept of a socialist secular democratic republic. It cannot be disputed that where corruption begins all rights end. Corruption devalues human rights, chokes development and undermines justice, liberty, equality, fraternity which are the core values in our Preambular vision. Therefore, the duty of

the Court is that any anti-corruption law has to be interpreted and worked out in such a fashion as to strengthen the fight against corruption. That is to say in a situation where two constructions are eminently reasonable, the Court has to accept the one that seeks to eradicate corruption to the one which seeks to perpetuate it."

(emphasis supplied)

35. N.H.A.I. Act, 1988 is an Act to provide for the constitution of an Authority for the development, maintenance and management of national highways and for matters connected therewith or incidental thereto, and it does at all deal with corruption and punishment therefor. Section 2 of the N.H.A.I. Act specifically states that the definitions given in that section are for the purposes of the N.H.A.I. only and, therefore, those definitions are not to be read in other enactments and the definitions under the N.H.A.I. Act would certainly not be relevant for the purpose of the Prevention of Corruption Act, 1988.

36. On the other hand, the relevant part of Definitions contained in Section 2 of the Prevention Act, 1988 provides that: -

2. Definitions.—In this Act, unless the context otherwise requires,—

(b) "public duty" means a duty in the discharge of which the State, the public or the community at large has an interest;

Explanation.—In this clause "State" includes a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a Government company as defined in S. 617 of the Companies Act, 1956 (1 of 1956);

(c) "public servant" means—

(i) any person in the service or pay of the Government or remunerated by the Government by fees or commission for the performance of any public duty;

*** * ***

(viii) any person who holds an office by virtue of which he is authorised or required to perform any public duty;

*** * ***

Explanation 1.—Persons falling under any of the above sub-clauses are public servants, whether appointed by the Government or not.

Explanation 2.—Wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

37. Section 2 (b) of the Prevention of Corruption Act, 1988 provides that "**public duty" means a duty in the discharge of which the State, the public or the community at large has an interest;**

38. Development and maintenance of national highways is fully financed by the Central Government and this function comes within the purview of Entry 23 of the Union List of the Seventh Schedule to the Constitution. Section 5 of the National Highways Act, 1956 provides that the Central Government may direct that any function in relation to the development or maintenance of national highways shall also be exercisable by any authority. The N.H.A.I. has been created under the N.H.A.I. Act, 1988 for discharge of the Central Government's duty of construction and maintenance of National Highways, which is a public duty. The N.H.A.I. has engaged Yongma Engineering Company Ltd. for performing supervision and providing consultancy services regarding

construction of a Highway and Anil Kumar Singh is discharging the duty of the Resident Engineer in the Project as an employee of the Company. Therefore, Anil Kumar Singh is performing a public duty, as defined under Section 2 (b) of the Prevention of Corruption Act, 1988.

39. Any person remunerated by the Government by fees or commission for the performance of any public duty or who holds an office by virtue of which he is authorised or required to perform any public duty, is a 'public servant' within the meaning of the term given in Section 2 (c) of the Prevention of Corruption Act, 1988. Anil Kumar Singh is a person remunerated for the performance of the public duty by the fees paid by the Government to Yongma Engineering Company Ltd. - the company, which has engaged him and he is authorised and required to perform a public duty and, therefore, he is a public servant within the meaning of the term given in Section 2 (c) of the Prevention of Corruption Act, 1988.

40. This position is further clarified by the Explanations appended to Section 2 (c) of the Prevention of Corruption Act, 1988, which provide that for deciding whether the person is a 'public servant' or not, it is not relevant whether he has been appointed by the Government or not and only this much is relevant whether he is in actual possession of the situation of a public servant. Thus for the purpose of applicability of Section 2 (c) of the Prevention of Corruption Act, 1988, it is wholly irrelevant that Anil Kumar Singh has been appointed by Yongma Engineering Company Ltd. and not by the Government and what is relevant is that Anil Kumar Singh is in actual possession of the situation of a public servant, as he has

the authority to approve bills for payments regarding construction of National Highways.

41. After hearing the submissions of the learned counsel for the parties, the judgment was reserved on 17.08.2023. The case was listed on 22.08.2023 for delivery of judgment, but on the said date, before pronouncement of the judgment, the learned counsel for the applicants supplied his written submissions along with a compilation of photocopies of case-laws and, therefore, pronouncement of judgment was deferred and the case laws submitted by the learned counsel for the applicants subsequently were also taken into consideration.

42. The learned Counsel for the applicants has relied upon the judgment in the cases of **State of Gujarat v. Mansukhbhai Kanjibhai Shah**, (2020) 20 SCC 360. Brief facts of that case were that an FIR was filed against four accused persons, including the respondent **Mansukhbhai Kanjibhai Shah**, alleging he had demanded bribe for allowing the complainant's daughter to take the M.B.B.S. examination. A charge-sheet was filed against several persons, including the respondent, for offences under Sections 7, 8, 10 and 13(1)(b) and 13(2) of the Prevention of Corruption Act, 1988. The respondent filed a discharge application under Section 227 of Code of Criminal Procedure, which was rejected by the Session Court, but the High Court of Gujarat allowed the revision filed against that order and discharged the Respondent on the ground that Section 2(c) (xi) was inapplicable as the said Institution was a "deemed to be university". The Hon'ble Supreme Court allowed the appeal and set aside the order passed by the High Court

and restored the order rejecting the discharge application of the accused. The Hon'ble Supreme Court held that: -

“44. As discussed earlier, the object of the PC Act was not only to prevent the social evil of bribery and corruption, but also to make the same applicable to individuals who might conventionally not be considered public servants. The purpose under the PC Act was to shift focus from those who are traditionally called public officials, to those individuals who perform public duties. Keeping the same in mind, as rightly submitted by the learned senior Counsel for the Appellant-State, it cannot be stated that a “Deemed University” and the officials therein, perform any less or any different a public duty, than those performed by a University simpliciter, and the officials therein.

45. Therefore, for all the above reasons, we are of the opinion that the High Court was incorrect in holding that a “Deemed University” is excluded from the ambit of the term “University” Under Section 2(c)(xi) of the PC Act.”

43. The judgment in **Mansukhbhai Kanjibhai Shah** (Supra) does not render any support to the applicants' case, rather it supports the respondent.

44. The learned Counsel for the applicants next relied upon the judgment in the case of **Gopinath versus The Superintendent of Police and Others**, 2014 (2) Kar.L.J. 216 = 2014 (4) KCCR 3668.

46.1 The question in that case was *“with respect to the petitioner who is a Project Manager of Nirmithi Kendra which is neither enunciated by the State Government or Central Government,*

except a Society registered under the Societies Registration Act and the case of the petitioner does not fall within the definition of Section 2(12) of Lokayukta Act, so as to initiate action under Section 13(1)(e) of the Prevention of Corruption Act.

46.2 The Court found that *“except a provision that has been made in the bye-laws of Nirmithi Kendra to receive the funds etc., by the State Government or Central Government, in the absence of any such fund being received from the State Government or Central Government and without there being any misuse of power or misuse of the amount so available with the society, there was no scope for the investigation officer to file a complaint to the Lokayukta and the said complaint even if it filed, is non-est.”*

46.3 S.L.P. (Crl.) No. 20494 of 2014 filed against the aforesaid order was dismissed by the following order: -

“Special Leave Petition is dismissed.”

45. The aforesaid decision of an Hon'ble Single Judge of the Karnataka High Court is based on the peculiar facts of the case noted above, where the petitioner was employed in a co-operative society which did not receive any funds from the Government and where the Government did not exercise any control over the society. The present case arises out of allegation of demand and acceptance of bribe for approval of bills for certain works regarding construction of a National Highway on behalf of the N.H.A.I., which is State within the meaning of the term used in Article 12 of the Constitution of India and, therefore, **Gopinath versus The Superintendent of Police and Others** (Supra) has no application to the facts of the present case.

46. The next judgment placed by the learned Counsel for the applicants is **UPSC v. Girish Jayanti Lal Vaghela**, (2006) 2 SCC 482. Facts of that case were that the respondent 1 Girish Jayanti Lal Vaghela was appointed as Drugs Inspector on 11.03.1996 on short-term contract basis on a fixed salary for a period of six months from the date of joining or till the date the candidate selected by the Union Public Service Commission (UPSC) joined duty on regular basis, whichever was earlier. The appointment of respondent 1 was renewed after every six months with short breaks and it continued for over five years. An advertisement was issued by UPSC on 24-3-2001 for making regular selection on the post of Drugs Inspector. Under the relevant recruitment rules made in exercise of powers conferred by the proviso to Article 309 of the Constitution, the upper age-limit for making direct recruitment is 30 years, which is relaxable for government servants up to five years in accordance with the instructions or orders issued by the Central Government. Respondent 1 had become overage by two years at the time when the advertisement was issued and he submitted an application seeking age relaxation and thereafter he filed an original application before the Central Administrative Tribunal. The Tribunal directed the Administrator to decide the representation made by the respondent 1. Meanwhile, the respondent 1 was provisionally allowed to appear in the interview. Nearly 5 months after the interview, UPSC cancelled the candidature of respondent 1 and his contract appointment came to an end on 30-9-2002. The Bombay High Court allowed his Writ Petition and directed to issue an age relaxation certificate to the respondent 1 and UPSC was directed to consider the claim of the respondent 1 and to make a recommendation for his appointment as Drugs Inspector. Allowing the appeal filed

against the order passed by the High Court, the Hon'ble Supreme Court held that: -

"19. It, therefore, follows that employment under the Government is a matter of status and not a contract even though the acquisition of such a status may be preceded by a contract, namely, an offer of appointment is accepted by the employee. The rights and obligations are not determined by the contract of the two parties but by statutory rules which are framed by the Government in exercise of power conferred by Article 309 of the Constitution and the service rules can be unilaterally altered by the rule-making authority, namely, the Government.

20. There is no dispute that Respondent 1 was engaged or hired on contract to work as Drugs Inspector for a period of six months from the date of joining or till a candidate selected by UPSC joined on regular basis, whichever was earlier. The contract further stipulated that even if a regularly selected candidate did not join, Respondent 1 shall stand relieved on the expiry of six months. In Director, Institute of Management Development v. Pushpa Srivastava (1992) 4 SCC 33, it was held that where the appointment is purely on ad hoc basis and is contractual and by efflux of time the appointment comes to an end, the person holding such post can have no right to continue in the post. It was further held that this is so even if the person is continued from time to time on ad hoc basis for more than a year... .. It is, therefore, clear that Respondent 1 did not have any right to continue as Drugs Inspector after expiry of the six months' period for which he had been appointed."

47. Lastly, the learned Counsel for the applicants relied upon the judgment of the Hon'ble Supreme Court in **Roshan Lal**

Tandon v. Union of India, (1968) 1 SCR 185, wherein also it was held that: -

“It is true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. In other words, the legal position of a Government servant is more one of status than of contract. The hallmark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties. The emolument of the Government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee. It is true that Article 311 imposes constitutional restrictions upon the power of removal granted to the President and the Governor under Article 310. But it is obvious that the relationship between the Government and its servant is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties. The duties of status are fixed by the law and in the enforcement of these duties society has an interest. In the language of jurisprudence status is a condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned. The matter is clearly stated by Salmond and Williams on Contracts as follows:

“So we may find both contractual and status-obligations produced by the same transaction. The one transaction may result in the creation not only of obligations defined by the parties and so pertaining to the sphere of contract but also and concurrently of obligations defined by the law itself, and so pertaining to the sphere of status. A contract of service between employer and employee, while for the most part pertaining exclusively to the sphere of contract, pertains also to that of status so far as the law itself has seen fit to attach to this relation compulsory incidents, such as liability to pay compensation for accidents. The extent to which the law is content to leave matters within the domain of contract to be determined by the exercise of the autonomous authority of the parties themselves, or thinks fit to bring the matter within the sphere of status by authoritatively determining for itself the contents of the relationship, is a matter depending on considerations of public policy. In such contracts as those of service the tendency in modern times is to withdraw the matter more and more from the domain of contract into that of status.”

48. Both the aforesaid cases related to service law claims of employees and in none of the aforesaid cases cited by the learned Counsel for the applicants, the question as to whether the employee was a “public servant within the meaning of the term given in Section 2 (c) of the Prevention of Corruption Act, 1988, was involved and the aforesaid cases are not at all relevant for the point involved in the present case.

49. It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion

based upon facts, more particularly when the facts are not even remotely similar. In the present case, there is a world of difference between the facts of the present case and the facts of the cases relied upon by the learned Counsel for the applicants, which related to service disputes and where the question of interpretation of Section 2 (c) of the Prevention of Corruption Act, 1988 was not even remotely involved. By citing absolutely irrelevant cases, the learned Counsel for the applicants has wasted the precious time of the Court.

50. In view of the aforesaid discussion, I am of the considered view that Anil Kumar Singh is a public servant for the purpose of the Prevention Act, 1988 and he is being rightly prosecuted for commission of offences under the Act.

51. As the plea of the applicants in Application under Section 482 Cr.P.C. No. 5391 of 2023 (1) Bedram Sharma, (2) Parsuram Sharma and (3) Anand Mohan Sharma, who have been charged with the offences under Section 120-B I.P.C. and Sections 7, 8, 9, 10 and 12 of the Prevention of Corruption Act, 1988, for entering into a criminal conspiracy with Anil Kumar Singh is based on the plea that Anil Kumar Singh is not a public servant, which plea has already been turned down, consequently the Application No. 5389 of 2023 also has no merit.

52. There is no illegality in the charge-sheet no. 6 arising out of Crime No. R.C. 2162022A0012 dated 10.09.2022 under Section 120-B I.P.C. and Section 7, 8, 9, 10 and 12 of the Prevention of Act, 1988, Police Station C.B.I. AC-1, District New Delhi, or the

prosecution sanction order or the cognizance order dated 06.04.2023 passed by the learned Special Judge, Anti Corruption, C.B.I., West, Lucknow in Session Case No. 709 of 2023 summoning the applicants to face trial for offences under Section 120-B I.P.C. and Section 7, 8, 9, 10 and 12 of the Prevention of Act, 1988. There is no ground for quashing the proceedings of Session Case No. 709 of 2023 pending in the court of Special Judge, C.B.I., West, Lucknow.

53. Both the applications under Section 482 Cr.P.C. – **5389 of 2023** and **5391 of 2023**, are misconceived and the same are dismissed and the interim order dated 04.07.2023 is vacated.

54. Keeping in view the fact that the proceedings of the trial remained stayed because of the interim orders dated 04.07.2023 passed in these applications and also that precious time of the Court has been wasted in deciding the misconceived applications and going through voluminous irrelevant judgments cited on behalf of the applicants, the applicant Anil Kumar Singh in Application under Section 482 Cr.P.C. No. 5389 of 2023 and the applicants - (1) Bedram Sharma, (2) Parsuram Sharma and (3) Anand Mohan Sharma in Application under Section 482 Cr.P.C. No. 5391 of 2023, are ordered to pay Rs.25,000/- each as the cost of the litigation, which shall be deposited with the registry of this Court within a period of 30 days, failing which the Senior Registrar shall initiate proceedings for recovery of the amount by sending a Recovery Certificate to the Collector concerned, who shall recover the amounts as arrears of land revenue and shall remit the same to this

Court within a period of three months from the date of issuance of the Recovery Certificate.

(2023) 8 ILRA 22
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 21.08.2023

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482 No. 5520 of 2023

Arun Kumar Singh @ Munna & Ors.
...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
 Meenakshi Singh Parihar, Abhiuday Pratap Singh, Chetna Singh

Counsel for the Opposite Parties:
 G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections 419, 420, 467, 468 & 471 - The Code of criminal procedure, 1973 - Section 195 - Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence - power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases - court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint - extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice. (Para -40)

F.I.R. lodged by Sub-Divisional Magistrate - against two officials of the revenue department

- and unnamed beneficiaries of the offence - in compliance of an order passed by this Court – allegation - without any proceedings having been initiated and conducted in the Court - applicants fabricated a fake order purportedly passed by the Court - Final report submitted after investigation - victim filed a protest petition - trial court rejected Final report. **(Para - 3,21,32)**

HELD: Victim had the right to file a protest petition against the Final Report, and the trial court did not make any errors in entertaining the petition and rejecting the Final Report. F.I.R. was filed after S.D.M. discovered that the paper book of Case No. 301 was prepared through forgery and fabrication. Applicants are the beneficiaries of the commission of forgery and fabrication of the Court's records, which constitutes an offense and is not a civil dispute, thus the proceedings cannot be quashed on this ground. No merit in the application. **(Para - 30,38,41)**

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:-

1. St. of Karn. Vs Hemareddy, (1981) 2 SCC 185
2. St. of Har Vs Bhajan Lal, 1992 Supp (1) SCC 335
3. Sheila Sebastian Vs R. Jawaharaj, (2018) 7 SCC 581,
4. Mir Naqvi Askari Vs C.B.I., (2009) 15 SCC 643
5. Mohd. Ibrahim Vs St. of Bihar, (2009) 8 SCC 751
6. Iqbal Singh Marwah Vs Meenakshi Marwah, (2005) 4 SCC 370
7. Bhagwant Singh Vs Commr. of Police, (1985) 2 SCC 537.
8. Iqbal Singh Marwah Vs Meenakshi Marwah, (2005) 4 SCC 370
9. Bhagwant Singh Vs Commr. of Police, (1985) 2 SCC 537

10. Sudha Singh Vs St. of U.P., (2021) 4 SCC 781

11. Jagjeet Singh Vs Ashish Mishra, (2022) 9 SCC 321

12. St. of Karn. Vs Hemareddy, (1981) 2 SCC 185

13. Mitesh Kumar J. Sha Vs St. of Karn., 2021 SCC OnLine SC 976

14. Randheer Singh Vs St. of U.P., (2021) 14 SCC 626

15. St. of Har. Vs Bhajan Lal, 1992 Supp (1) SCC 335

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

1. Heard Sri H.G.S. Parihar, learned Senior Counsel, assisted by Ms. Meenakshi Singh Parihar, for the applicant, Sri Manish Kumar Pandey, learned A.G.A.-1 and Sri Rajendra Pratap Singh, learned counsel for the opposite party no. 3.

2. By means of the instant application filed under Section 482 Cr.P.C., the applicant have challenged validity of the order dated 12.05.2023 passed by the learned Special Judge (M.P., M.L.A.) / Additional Session Judge, Court No. 5, Pratapgarh in Criminal Revision No. 129 of 2022 and the cognizance and summoning order dated 18.08.2022 and the entire proceedings of Case No. 129 of 2015 in the Court of Special Judge M.P. M.L.A. / Civil Judge (S.D.) / F.T.C. II, Pratapgarh, which arose out of F.I.R. No. 61 of 2015 lodged by the Sub-Divisional Magistrate, Kunda, Pratapgarh on 21.03.2015 in Police Station Kunda, District Pratapgarh, against two officials of the revenue department – an Ahalmad and a Registrar Kanoongo, and unnamed beneficiaries of the offence, in compliance of an order dated 15.09.2014

passed by this Court in Writ Petition No. 7611 of 2014 – Kamlesh Singh versus State of U. P. and others.

3. F.I.R. No. 61 of 2015 was lodged by the Sub-Divisional Magistrate, Kunda, Pratapgarh on 21.03.2015 under Sections 419, 420, 467, 468, 471 I.P.C. against two officials of the revenue department – an Ahalmad and a Registrar Kanoongo, and unnamed beneficiaries of the offence, in compliance of an order dated 15.09.2014 passed by this Court in Writ Petition No. 7611 of 2014 – Kamesh Singh versus State of U. P. and others. The F.I.R. states that a forged paper-book of Case no. 301 of 2000 in the Court of the S.D.M. Kunda and an order dated 15.05.2001 were prepared and mutation was carried out in furtherance of the aforesaid order in the Khatauni on 08.05.2012. When irregularities committed in the aforesaid proceedings came to light, the District Magistrate got an enquiry conducted by the S.D.M., who submitted an enquiry report dated 06.02.2015 against the two named accused officials and the beneficiaries of the offence.

4. The enquiry report dated 06.02.2015 submitted by the S.D.M. Sadar, Pratapgarh stated that paper book of Case No. 301 under Section 229 B of the Zamindari Abolition and Land Reforms Act, titled “Arun Kumar Singh alias Munna and others versus Kamlesh Kumar Singh”, decided on 15.05.2001, was prepared by committing forgery and fabrication, as in the case institution register, case title “Samai versus Gram Sabha, Gram Malava Chhajaipur” is recorded against Case No. 301 under Section 229 B of the Zamindari Abolition and Land Reforms Act. The entire order-sheet of the paper-book is in one hand-writing and it mentions that the submissions of both the parties were heard,

whereas the defendant Kamlesh Kumar Singh had not put in appearance in the case. Moreover, Arun Kumar Singh filed a caveat in the Court of the Divisional Commissioner 11 years after passing of the order, which also establishes that the paper-book has been fabricated.

5. Initially the Investigating Officer submitted a Final Report dated 27.03.2016 stating that previously the investigation was carried out by Sub-Inspectors Sir. Kedar Singh and Sri. Ghanshyam Nishad and after their transfer, the investigation was handed over to Senior Sub-Inspector Kripa Shankar Rai. The then S.D.M. had died and for this reason, no concrete evidence could be collected on the basis whereof any person can be charged of commission of any offence.

6. The opposite party no. 3 Kamlesh Kumar Singh filed objections against the Final Report stating that his valuable land had been grabbed by the accused persons under a criminal conspiracy. The previous Investigating Officer had recorded statements of several witnesses from which commission of the offences is clearly established but the subsequent Investigating Officer has submitted the Final Report without looking into the material available on the Case Diary, after taking undue advantage from the accused persons.

7. By means of an order dated 01.07.2017, the Additional Chief Judicial Magistrate, Kunda, Pratapgarh rejected the Final Report and took cognizance of commission of offences under Sections 120-B, 419, 420, 467, 468, 471, 472 and 474 I.P.C. by the accused persons Arun Kumar Singh alias Munna, Kiran Kumar Singh, Satish Kumar Singh, Dinesh Kumar

Singh, Satish Kumar Tripathi, Ramakant Dwivedi and Pratap Bahadur Singh.

8. The applicants challenged the aforesaid order dated 01.07.2017 by filing Criminal Revision No. 171/2017 which was allowed by means of an order dated 02.06.2018 passed by the Additional Session Judge, Pratapgarh on the ground that the trial Court had not discussed the prima facie evidence before summoning the accused persons. The order dated 01.07.2017 was set aside by the Revisional Court and the matter was remanded for being decided afresh.

9. After remand, the trial court passed an order dated 18.08.2022, again rejecting the objections filed by the applicants against the charge sheet. The trial Court took cognizance of the offences against the applicants and one Satish Kumar Tripathi and summoned them to face the trial.

10. The applicants challenged the order dated 18.08.2022 by filing Criminal Revision No. 129 of 2022, which has been rejected by the learned Special Judge M.P./M.L.A. / Additional Session, Judge Court No. 5, Pratapgarh.

11. The main ground of revision was that the F.I.R. was lodged by a Sub-Divisional Magistrate and he did not file any objection against the Final Report. The person who had filed the objections was not the informant and he had no *locus standi* to file objection against the Final Report.

12. The revisional was dismissed by means of a judgment dated 12.05.2023 holding that the F.I.R. was lodged in furtherance of the order dated 15.09.2014 passed by this Court in Writ Petition No. 7611 of 2014, which had been filed by

Kamlesh Kumar Singh. The revisionists have themselves stated in paragraph 8 of the memo of Revision that a sale deed of the land in dispute had been executed in favour of Kamlesh Kumar Singh. In his enquiry report, the Sub-District Magistrate has recorded that paper book of Case No. 301 under Section 229 B of the Zamindari Abolition and Land Reforms Act, titled “Arun Kumar Singh alias Munna and others versus Kamlesh Kumar Singh”, decided on 15.05.2001, was prepared by forgery and fabrication, as in the case institution register, case title “Samai versus Gram Sabha, Gram Malava Chhajaipur” is registered against Case No. 301 under Section 229 B of the Zamindari Abolition and Land Reforms Act. The order-sheet mentions that the submissions of both the parties were heard, whereas the defendant Kamlesh Kumar Singh had not put in appearance in the case. Therefore Kamlesh Kumar Singh is not a stranger to the dispute.

13. The learned revisional Court further held that the statement of the Enquiry Officer Sri. J. P. Mishra was recorded under Section 161 Cr.P.C. The Final Report was filed on the ground that the then S.D.M. had died. The revisional Court held that investigation could not be nullified on this ground as the informant was a Government Officer and his signatures can easily be proved even after his death.

14. Assailing the aforesaid cognizance and summoning order dated 18.05.2022 and the revisional order dated 12.05.2023, Sri. H. G. S. Parihar Senior Advocate, the learned Counsel for the applicants has submitted that Section 195 Cr.P.C. provides that no Court shall take cognizance of any offence described in Section 463 or

punishable under Section 471, Section 475 or Section 476 of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, except on the complaint in writing of that Court or by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that Court is subordinate. He has submitted that although the F.I.R. giving rise to the present case was lodged by the S.D.M., the informant S.D.M. did not challenge the final report. The objections filed by the opposite party no. 3 Kamlesh Kumar Singh are in the nature of a complaint and the same are barred by Section 195 Cr.P.C. In support of this submission, Sri. Parihar has relied upon the decisions of **State of Karnataka v. Hemareddy**, (1981) 2 SCC 185 and **State of Haryana v. Bhajan Lal**, 1992 Supp (1) SCC 335.

15. The second submission of the learned Counsel for the applicants is that there is no allegation that any of the applicants had committed forgery and, therefore, the offences under Sections 415, 420, 463, 464, 468 and 471 I.P.C. are not made out against the applicants. He has relied upon the judgments in the cases of **Sheila Sebastian v. R. Jawaharaj**, (2018) 7 SCC 581, **Mir Naqvi Askari v. CBI**, (2009) 15 SCC 643 and **Mohd. Ibrahim v. State of Bihar**, (2009) 8 SCC 751.

16. The third submission advanced by the learned Counsel for the applicants is that the dispute is purely of civil nature and the Magistrate has taken cognizance of the offence in a mechanical manner without there being sufficient material, only on the protest application filed by a private person. He has submitted that the cognizance and summoning of the

applicants amounts to an abuse of the process of law.

17. While replying to the aforesaid submissions, Sri. Rajendra Pratap Singh, the learned Counsel for the opposite party no. 3 - Kamlesh Kumar Singh, has submitted that the opposite party no. 3 is the victim of the offence committed and the F.I.R. was lodged in furtherance of a Writ Petition filed by the opposite party no. 3 and, therefore, the opposite party no. 3 is not a stranger to the proceedings and he has the right to challenge the Final Report. He has placed judgments of the Hon'ble Supreme Court in the cases of **Iqbal Singh Marwah v. Meenakshi Marwah**, (2005) 4 SCC 370 and **Bhagwant Singh v. Commissioner of Police**, (1985) 2 SCC 537.

18. Having recorded the submissions made by the learned Counsel for the parties, I proceed to discuss the points involved in the matter.

19. The relevant part of Section 195 Cr.P.C., which puts a bar against the Courts taking cognizance of certain offences in certain conditions, is being reproduced below: -

“195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.—(1) No Court shall take cognizance—

(a) ...;

(b) (i) ...,

(ii) of any offence described in Section 463, or punishable under Section 471, Section 475 or Section 476, of the said Code, when such offence is alleged to have been committed in respect of a document

produced or given in evidence in a proceeding in any Court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub-clause (ii),

except on the complaint in writing of that Court or by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that Court is subordinate.

* * *

(3) In clause (b) of sub-section (1), the term “Court” means a Civil, Revenue or Criminal Court, and includes a tribunal constituted by or under a Central, Provincial or State Act, if declared by that Act to be a Court for the purposes of this section.”

20. In **Iqbal Singh Marwah v. Meenakshi Marwah**, (2005) 4 SCC 370, the Hon'ble Supreme Court held that: -

10. ... *The offences mentioned in this clause clearly relate to giving or fabricating false evidence or making a false declaration in any judicial proceeding or before a court of justice or before a public servant who is bound or authorised by law to receive such declaration, and also to some other offences which have a direct correlation with the proceedings in a court of justice (Sections 205 and 211 IPC). This being the scheme of two provisions or clauses of Section 195 viz. that the offence should be such which has direct bearing or affects the functioning or discharge of lawful duties of a public servant or has a direct correlation with the proceedings in a court of justice, the expression “when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any court” occurring in*

clause (b)(ii) should normally mean commission of such an offence after the document has actually been produced or given in evidence in the court. The situation or contingency where an offence as enumerated in this clause has already been committed earlier and later on the document is produced or is given in evidence in court, does not appear to be in tune with clauses (a)(i) and (b)(i) and consequently with the scheme of Section 195 Cr.P.C.. This indicates that clause (b)(ii) contemplates a situation where the offences enumerated therein are committed with respect to a document subsequent to its production or giving in evidence in a proceeding in any court.

11. Section 195(1) mandates a complaint in writing to the court for taking cognizance of the offences enumerated in clauses (b)(i) and (b)(ii) thereof. Sections 340 and 341 Cr.P.C. which occur in Chapter XXVI give the procedure for filing of the complaint and other matters connected therewith. The heading of this Chapter is — “Provisions as to Offences Affecting the Administration of Justice”. Though, as a general rule, the language employed in a heading cannot be used to give a different effect to clear words of the section where there cannot be any doubt as to their ordinary meaning, but they are not to be treated as if they were marginal notes or were introduced into the Act merely for the purpose of classifying the enactments. They constitute an important part of the Act itself, and may be read not only as explaining the sections which immediately follow them, as a preamble to a statute may be looked to explain its enactments, but as affording a better key to the constructions of the sections which follow them than might be afforded by a mere preamble. (See *Craies on Statute Law*, 7th Edn., pp. 207, 209.) The fact that the procedure for filing

a complaint by court has been provided in Chapter XXVI dealing with offences affecting administration of justice, is a clear pointer to the legislative intent that the offence committed should be of such type which directly affects the administration of justice viz. which is committed after the document is produced or given in evidence in court. Any offence committed with respect to a document at a time prior to its production or giving in evidence in court cannot, strictly speaking, be said to be an offence affecting the administration of justice.

* * *

25. An enlarged interpretation to Section 195(1)(b)(ii), whereby the bar created by the said provision would also operate where after commission of an act of forgery the document is subsequently produced in court, is capable of great misuse”...

21. The allegation in the present case is not that the applicants fabricated any document in proceedings pending in the Court. The allegation is that without any proceedings having been initiated and conducted in the Court, the applicants fabricated a fake order purportedly passed by the Court. In these circumstances, in view of the law laid explained by the Hon’ble Supreme Court in **Iqbal Singh Marwah** (Supra), the bar contained in Section 195 Cr.P.C. would not apply in the facts of the present case.

22. The submission of the learned Counsel for the applicant is that after a Final Report was submitted after investigation conducted in furtherance of the F.I.R., the same provision will apply to filing of the objections against the Final Report and the objections could only be

filed by the Court, and not by the opposite party no. 2.

23. The words used in Section 195 Cr.P.C. are that no Court shall take cognizance of any offence described in Section 463, or punishable under Section 471, Section 475 or Section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub-clause (ii), except on the complaint in writing of that Court or by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that Court is subordinate. This provision imposes a restriction against taking cognizance of certain offences except upon a complaint made by the Court. The F.I.R. regarding commission of the offences in the present case was made by the Court. The F.I.R. in the present case was lodged by the Sub-Divisional Magistrate, in whose Court the alleged forged document was filed. Therefore, even if the bar of Section 195 Cr.P.C. would apply to the present case, the condition contained in Section 195 Cr.P.C., that the Court can take cognizance of certain offences only upon the complaint made by the Court, stands satisfied.

24. In **Bhagwant Singh v. Commr. of Police**, (1985) 2 SCC 537, the Hon'ble Supreme Court held that *"The injured person or any relative of the deceased, though not entitled to notice from the Magistrate, has locus to appear before the Magistrate at the time of consideration of the report, if he otherwise comes to know that the report is going to be considered by the Magistrate and if he wants to make his*

submissions in regard to the report, the Magistrate is bound to hear him".

25. The opposite party no. 3 being the victim of the offence and he having suffered a legal injury due to commission of the offence, had every right to file protest petition against the Final Report and the Court has rightly accepted his protest petition and rejected the Final Report.

26. The words used Section 195 Cr.P.C. are plain and unambiguous and are not open to be interpreted differently. It is one of the basic principles of interpretation of Statutes that while interpreting Statutes, neither any words should be added nor should the same be subtracted. The words used regarding lodging of a complaint, cannot be interpreted in a vast manner so as to include a restriction regarding filing of a protest petition against a Final report so as to defeat the rights of the victims of offences.

27. The recent trend in law indicates increasing recognition of the rights of the victims of the offences, and their right to participate in the proceeding is acknowledged, even if they themselves are not the informants.

28. In **Sudha Singh v. State of U.P.**, (2021) 4 SCC 781, the Hon'ble Supreme Court entertained an Appeal filed by the wife of a deceased victim of a predicate offence under Section 302 I.P.C., against an order passed by the High Court granting bail to a person accused of committing an offence under Section 3 (1) of the U. P. Gangsters and Anti Social Activities Prevention Act, although neither she, nor her deceased husband was the informant in the case under the Gangsters Act.

29. In **Jagjeet Singh v. Ashish Mishra**, (2022) 9 SCC 321, while discussing the development of law regarding the rights of the victims of offences, the Hon'ble Supreme Court enunciated the following principles: -

“15. Until recently, criminal law had been viewed on a dimensional plane wherein the courts were required to adjudicate between the accused and the State. The “victim”—the de facto sufferer of a crime had no participation in the adjudicatory process and was made to sit outside the Court as a mute spectator. However, with the recognition that the ethos of criminal justice dispensation to prevent and punish “crime” had surreptitiously turned its back on the “victim”, the jurisprudence with respect to the rights of victims to be heard and to participate in criminal proceedings began to positively evolve.

* * *

20. It is pertinent to mention that the legislature has thoughtfully given a wide and expansive meaning to the expression “victim” which “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”.

21. This Court in Mallikarjun Kodagali v. State of Karnataka (2019) 2 SCC 752, while dealing with questions regarding a victim's right to file an appeal under Section 372 CrPC, observed that there was need to give adequate representation to victims in criminal proceedings. The Court therein affirmed the victim's right to file an appeal against an order of acquittal. In Mallikarjun Kodagali [Mallikarjun Kodagali v. State of

Karnataka, though the Court was primarily concerned with a different legal issue, it will be fruitful in the present context to take note of some of the observations made therein :

“3. What follows in a trial is often secondary victimisation through repeated appearances in court in a hostile or a semi-hostile environment in the courtroom. Till sometime back, secondary victimisation was in the form of aggressive and intimidating cross-examination, but a more humane interpretation of the provisions of the Evidence Act, 1872 has made the trial a little less uncomfortable for the victim of an offence, particularly the victim of a sexual crime. In this regard, the judiciary has been proactive in ensuring that the rights of victims are addressed, but a lot more needs to be done. Today, the rights of an accused far outweigh the rights of the victim of an offence in many respects. There needs to be some balancing of the concerns and equalising their rights so that the criminal proceedings are fair to both.

8. The rights of victims, and indeed victimology, is an evolving jurisprudence and it is more than appropriate to move forward in a positive direction, rather than stand still or worse, take a step backward. A voice has been given to victims of crime by Parliament and the judiciary and that voice needs to be heard, and if not already heard, it needs to be raised to a higher decibel so that it is clearly heard.”

22. It cannot be gainsaid that the rights of a victim under the amended CrPC are substantive, enforceable, and are another facet of human rights. The victim's right, therefore, cannot be termed or construed restrictively like a brutum fulmen [Ed. : The literal translation from the Latin

approximates to “meaningless thunderbolt or lightning”, and is used to convey the idea of an “empty threat” or something which is ineffective.] . We reiterate that these rights are totally independent, incomparable, and are not accessory or auxiliary to those of the State under the CrPC. The presence of “State” in the proceedings, therefore, does not tantamount to according a hearing to a “victim” of the crime.

23. A “victim” within the meaning of CrPC cannot be asked to await the commencement of trial for asserting his/her right to participate in the proceedings. He/She has a legally vested right to be heard at every step post the occurrence of an offence. Such a “victim” has unbridled participatory rights from the stage of investigation till the culmination of the proceedings in an appeal or revision. We may hasten to clarify that “victim” and “complainant/informant” are two distinct connotations in criminal jurisprudence. It is not always necessary that the complainant/informant is also a “victim”, for even a stranger to the act of crime can be an “informant”, and similarly, a “victim” need not be the complainant or informant of a felony.

24. The abovestated enunciations are not to be conflated with certain statutory provisions, such as those present in the Special Acts like the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, where there is a legal obligation to hear the victim at the time of granting bail. Instead, what must be taken note of is that:

24.1. First, **the Indian jurisprudence is constantly evolving, whereby, the right of victims to be heard, especially in cases involving heinous**

crimes, is increasingly being acknowledged.

24.2. Second, **where the victims themselves have come forward to participate in a criminal proceeding, they must be accorded with an opportunity of a fair and effective hearing.** If the right to file an appeal against acquittal, is not accompanied with the right to be heard at the time of deciding a bail application, the same may result in grave miscarriage of justice. **Victims certainly cannot be expected to be sitting on the fence and watching the proceedings from afar, especially when they may have legitimate grievances. It is the solemn duty of a court to deliver justice before the memory of an injustice eclipses.**

(Emphasis supplied)

30. Therefore, I am of the considered view that the victim of the offence had the right to file a protest petition against the Final Report and the trial Court has not committed any error in entertaining the protest petition and rejecting the Final Report.

31. The learned Counsel for the applicant has relied upon the judgment in the case of **State of Karnataka v. Hemareddy**, (1981) 2 SCC 185, wherein the Hon’ble Supreme Court held that: -

“8. ...in cases where in the course of the same transaction an offence for which no complaint by a court is necessary under Section 195(1)(b) of the Code of Criminal Procedure and an offence for which a complaint of a court is necessary under that sub-section, are committed, it is not possible to split up and hold that the prosecution of the accused for the offences not mentioned in Section

195(1)(b) of the Code of Criminal Procedure should be upheld.”

32. Since I have already held that the F.I.R. for all the offences was lodged by the Court and not by the victim and the offences alleged were not committed regarding any documents that had been filed in the Court, but the offence was committed by forging the entire proceedings of the Court without any proceeding having actually been initiated in the Court, the bar of Section 195 is not attracted to the present case and the victim had rightly filed a protest petition against the Final report submitted after investigation, I am of the view that the aforesaid principle of law is not attracted to the facts of the present case.

33. The learned Counsel for the applicant next submitted that the offence of forgery is made out only against the maker of the false document and there is no allegation that the applicants had forged any document themselves. In support of this submission, he has relied upon the decision in the case of **Sheila Sebastian v. R. Jawaharaj**, (2018) 7 SCC 581, wherein the Hon'ble Supreme Court held that *“a charge of forgery cannot be imposed on a person who is not the maker of the same”*.

34. In the present case, the Additional Chief Judicial Magistrate, Kunda, Pratapgarh had rejected the Final Report and took cognizance of commission of offences under Sections 120-B, 419, 420, 467, 468, 471, 472 and 474 I.P.C. by the accused persons Arun Kumar Singh alias Munna, Kiran Kumar Singh, Satish Kumar Singh, Dinesh Kumar Singh, Satish Kumar Tripathi, Ramakant Dwivedi and Pratap Bahadur Singh by means of an order dated 01.07.2017. The applicants had challenged

the aforesaid order dated 01.07.2017 by filing Criminal Revision No. 171/2017 which was allowed by means of an order dated 02.06.2018 passed by the Additional Session Judge, Pratapgarh on the ground that the trial Court had not discussed the prima facie evidence before summoning the accused persons. The order dated 01.07.2017 was set aside by the Revisional Court and the matter was remanded for being decided afresh. After remand, the trial court passed an order dated 18.08.2022, again rejecting the objections filed by the applicants against the charge sheet. The trial Court took cognizance of the offences under Sections 120-B, 419, 420, 467, 468, 471, 472 and 474 I.P.C. against the applicants and one Satish Kumar Tripathi and summoned them to face the trial. The trial Court has noted in its order that the employee Satish Kumar Tripathi has been held guilty of committing forgery in the records and he has been punished in departmental proceedings by reverting him to the original post of Junior Assistant in the lowest of pay scale. The trial Court has further held that the employee had committed the offence under a criminal conspiracy with the applicants, who are the beneficiaries of the offence.

35. For being charged with commission of the offence of criminal conspiracy alongwith the commission of the substantive offences committed in furtherance of the conspiracy, it is not necessary that the accused person should himself have committed the substantive offences also. Therefore, I am unable to accept the second submission of the learned Counsel for the applicant.

36. The learned Counsel for the applicants has lastly submitted that the dispute between the parties is purely a civil

dispute and the criminal proceedings initiated for the same is an abuse of process of Court. He has relied upon the judgment in the case of **Mitesh Kumar J. Sha versus State of Karnataka**, 2021 SCC OnLine SC 976, wherein the Hon'ble Supreme Court reiterated that *"this Court has at innumerable instances expressed its disapproval for imparting criminal color to a civil dispute, made merely to take advantage of a relatively quick relief granted in a criminal case in contrast to a civil dispute. Such an exercise is nothing but an abuse of the process of law which must be discouraged in its entirety."*

37. Similarly, in **Randheer Singh v. State of U.P.**, (2021) 14 SCC 626 the Hon'ble Supreme Court again held that: -

33. ... *It is reiterated at the cost of repetition that **the FIR does not disclose any offence so far as the appellant is concerned. There is no whisper of how and in what manner, this appellant is involved in any criminal offence and the charge-sheet, the relevant part whereof has been extracted above, is absolutely vague. There can be no doubt that jurisdiction under Section 482 Cr.P.C. should be used sparingly for the purpose of preventing abuse of the process of any court or otherwise to secure the ends of justice. Whether a complaint discloses criminal offence or not depends on the nature of the allegation and whether the essential ingredients of a criminal offence are present or not has to be judged by the High Court. There can be no doubt that a complaint disclosing civil transactions may also have a criminal texture. The High Court has, however, to see whether the dispute of a civil nature has been given colour of criminal offence. In such a situation, the High Court should not***

hesitate to quash the criminal proceedings as held by this Court in Paramjeet Batra [Paramjeet Batra v. State of Uttarakhand, (2013) 11 SCC 673 : (2012) 4 SCC (Cri) 76] extracted above."

38. However, in the present case the F.I.R. was lodged after the S.D.M. Sadar, Pratapgarh found in an enquiry that paper book of Case No. 301 had been prepared by committing forgery and fabrication. The applicants are the beneficiaries of the commission of forgery and fabrication of the Court's records. This allegation clearly makes out commission of an offence and it is not at all a dispute of a civil nature. Therefore, the proceedings cannot be quashed on this ground also.

39. In **State of Haryana v. Bhajan Lal**, 1992 Supp (1) SCC 335, the Hon'ble Supreme Court had given the following categories of cases by way of illustration, wherein the inherent power under Section 482 Cr.P.C. should be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice: -

"(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.”

40. I am of the considered view that the present case does not fall in any of the aforesaid categories. Moreover, the Hon’ble Supreme Court had added a note of caution in Bhajan Lal (Supra) in the following words:

“103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified

in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice.”

41. In view of the foregoing discussion, I find no merit in the application under Section 482 Cr.P.C. filed by the applicants. Accordingly, the application is **dismissed**.

42. Before parting with the case, I deem it appropriate to observe that the date mentioned by the Presiding Officer of the Revisional Court in the revisional order is 12.05.2022 whereas the date printed on the order is 12.05.2023. The entries made by the copying official on the certified copy filed with the application shows the application for obtaining a certified copy of the order was filed on 15.05.2023 but the Head Copyist has signed the certified copy on 12.05.2023, i.e. three days prior to filing of the application for obtaining a certified copy of the order. This order should be communicated to the District Judge, Pratapgarh so that he may look into by the matter and take appropriate steps to avoid recurrence of such mistakes.

(2023) 8 ILRA 33

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 12.06.2023

BEFORE

THE HON’BLE SAURABH SRIVASTAVA, J.

Application U/S 482 No. 15925 of 2023

Shivanshu Mudgal

...Applicant

Versus

State of U.P. & Anr.

...Opposite Parties

Counsel for the Applicant:

Sri Ajay Kumar Pandey, Sri Satish Trivedi,
Senior Counsel

Counsel for the Opposite Parties:

G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections 147, 148, 149, 302, 307 & 506 - The U.P. Advocates Welfare Fund Act, 1974 - Section 9(1) - Welfare stamp on Vakalatnama - In case the Welfare Stamp referred to in sub-section (1) is not affixed on the Vakalatnama or is not filed by any Advocate, the Court shall not permit such Advocate for further proceeding in that case.(Para - 23)

Vakalatnama filed by Opposite party no.2 - Advocate Welfare Ticket with required stamp not affixed to the Vakalatnama - Advocate not provided with any case documents or instructed to appear on behalf of the opposing party during trial - did not oppose accused's bail application or present arguments on behalf of opposing party - application for withdrawal of Vakalatnama - claiming it defective and incomplete - applicant filed an application in Court - counsel he hired had submitted an application that had not been decided - opposite party filed a Vakalatnama, misleading the Advocates by not affixing the Advocate Welfare Ticket - application was kept pending without any orders - trial court failed to recognize the U.P. Advocates Welfare Fund Act, 1974 - which mandates Advocates to affix a Welfare Stamp of ten rupees to their Vakalatnama - no court or authority can receive it without this stamp.(Para -2 to 12)

HELD:- In absence of Advocate Welfare Stamp from the Vakalatnama which has been submitted by the opposite party no.2 before the learned trial court, no counsel who put his signatures over the same, is permitted to proceed in the matter. Trial court had limited time to comment on the conduct of an Advocate during the application for withdrawal of Vakalatnama, as the same application had already been approved by the Bar Council of U.P., making the matter out of the judge's

jurisdiction. Order passed by trial court quashed and set aside. **(Para -23,27,28)**

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:-

S.C.B.A. Vs U.O.I. & anr. , Writ Petition (Civil) 200 of 1995

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

1. Heard Sri Satish Trivedi, learned Senior Counsel assisted by Sri Ajay Kumar Pandey, learned counsel for the applicant and Sri Karunakar Singh, learned AGA.

2. The present application under Section 482 Cr.P.C. has been filed with a prayer to quash the impugned order dated 05.04.2023 passed by the learned Sessions Judge, Agra in Sessions Trial No.235 of 2022 (State vs. Shivanshu Mudgal and others), arising out of Case Crime No.478 of 2021, under Sections 147, 148, 149, 302, 307, 506 IPC at Police Station Shahganj, District Agra.

3. It is the case of the applicant that a first information report has been lodged on 03.11.2021, under Sections 147, 148, 149, 302, 307 IPC at Police Station Shahganj, District Agra in Case Crime No.478 of 2021 by the first informant against 11 accused persons pertaining to the alleged occurrence dated 02.11.2021.

4. On dated 07.01.2022, the opposite party no.2 filed his Vakalatnama to privately oppose the defense in the sessions trial by engaging five Advocates, who are all leading Senior Advocates of the District Court at Agra, two Vakalatnama were filed on the same date wherein a total of ten Advocates were shown to be engaged by the opposite party no.2, again on

22.04.2022 and 20.05.2022, two more Vakalatnama were filed on behalf of the opposite party no.2 showing the engagement of Sri Ashok Kumar Gupta, Sri Shishupal Singh Yadav and Sri Naresh Pal Singh Yadav as his Advocates, opposite party no.2 had virtually engaged the entire Criminal Bar of the District Court at Agra, most of the said Advocates being the leading criminal law practitioner of the District Court at Agra.

5. The very relevant aspect as highlighted by the Senior Counsel appearing on behalf of the applicant that in the aforesaid Vakalatnama dated 07.01.2022, the Advocate Welfare Ticket with the required stamp was not affixed, in which out the five Advocates, the name of Sri Arvind Kumar Sharma, Advocate was also there.

6. The Vakalatnama as submitted by the opposite party no.2 only got the signatures of the Advocate on the Vakalatnama but so far as Sri Arvind Kumar Sharma, Advocate is concerned, no documents pertaining to the case were provided to him by the opposite party no.2 and neither he was ever instructed to appear on behalf of the opposite party no.2 during the trial.

7. In absence of complete instructions, Sri Arvind Kumar Sharma, Advocate neither opposed the bail application of the accused and nor did he advanced any arguments on behalf of the opposite party no.2, moreover, Sri Arvind Kumar Sharma, Advocate never got any instructions from the opposite party no.2 inasmuch as neither the facts of the case was discussed by the opposite party no.2 with the aforesaid Advocate, nor any documents pertaining to the case were

given by the opposite party no.2 and as such, Sri Arvind Kumar Sharma, Advocate who never appeared on behalf of the opposite party no.2 on any date fixed by the learned court concerned at the time of hearing of the trial, only he was engaged on dated 13.02.2023 through Vakalatnama numbered as 47-B on behalf of the applicant by Sri Arvind Kumar Sharma, Advocate and Sri Manish Pathak, Advocate.

8. The co-accused person, namely, Syed Zafar Rizvi @ Shanu also engaged Sri Arvind Kumar Sharma, Advocate along with Sri Manish Pathak, Advocate as their counsels before the Sessions Trial No.235 of 2022 through Vakalatnama dated 03.03.2023 and the said Vakalatnama was numbered as 56-B.

9. The Vakalatnama dated 07.01.2021 as filed by the opposite party no.2 was not only defective but also Sri Arvind Kumar Sharma, Advocate was not being given complete instructions by way of any documents relevant to the case by the opposite party no.2, Sri Arvind Kumar Sharma, Advocate submitted an application on 06.03.2023 before the learned District and Sessions Judge, Agra and the same was numbered as Application No.58-B with the prayer for withdrawal of his Vakalatnama earlier preferred in Sessions Trial No.235 of 2022 on behalf of the opposite party no.2.

10. The abovementioned application was kept pending and no orders were passed thereupon. Under such circumstances, an application was filed by the applicant through his Pairokar Vineet Sharma on 01.04.2023 in the Court of learned District and Sessions Judge, Agra stating therein that the counsel engaged and

authorized by him had submitted an application dated 06.03.2023 which has not yet been decided, it was also pointed out in the application dated 01.04.2023 that the opposite party no.2 had filed Vakalatnama dated 07.01.2022 by misleading the Advocates through engaging them inasmuch as the Advocate Welfare Ticket had not been affixed in the said Vakalatnama and therefore, the said Vakalatnama, being defective, was liable to be rejected.

11. While entertaining the Application No.58-B, the same was rejected vide order dated 05.04.2023 which impugned the present application.

12. For substantiating the stand taken up by the learned Senior Counsel, it has been pointed out that the learned trial court absolutely lost sight of the fact that the U.P. Advocates Welfare Fund Act, 1974, inter-alia provides under Section 9(1) of the said Act that every Advocate shall affix on the Vakalatnama accepted by him a Welfare Stamp of the value of ten rupees and no court, tribunal, authority or person shall receive any Vakalatnama in favour of such Advocate unless it is so stamped in addition to any stamp required under any other law for the time being in force.

13. It has been further argued by Sri Satish Trivedi, learned Senior Counsel that Section 5 of the said Act provides that wherein any case the Welfare Stamp referred to in sub-section (1) is not affixed on the Vakalatnama or is not filed by any Advocate, the Court shall not permit such Advocate for further proceeding in that case.

14. It has also been contended by learned Senior Counsel that learned trial court miserably failed to appreciate that

without effective and genuine representation by a counsel on his behalf, the applicant could not be afforded a fair trial.

15. As a corollary to the aforesaid, it is submitted that engagement of Sri Arvind Kumar Sharma, Advocate by the opposite party no.2 was a farce, sham and was illusory and he had not been genuinely and effectively engaged by the opposite party no.2.

16. With regard to the aforesaid question, the matter was also deliberated upon by the Bar Council of U.P. and it was decided vide order dated 05.04.2023 that under the circumstances, permission to withdraw the Vakalatnama was granted to Sri Arvind Kumar Sharma, Advocate and he was further granted permission to appear on behalf of the accused/applicant before the Sessions Trial No.235 of 2022, the order dated 05.04.2023 passed by the Bar Council of U.P. is appended along with the present applicant as Annexure-12 available at Page No.139.

17. Even after considering all the vital facts as narrated by learned Senior Counsel appearing on behalf of the applicant, learned court of District and Sessions Judge, Agra rejected the prayer of the applicant vide order dated 05.04.2023 which impugned the present application under Section 482 Cr.P.C.

18. Per contra, Sri Karunakar Singh, learned Additional Government Advocate-I vehemently opposed the prayer as made in the present application on the ground that once the Vakalatnama has been executed by learned counsel, the prayer for withdrawing the same, was rightly rejected by the learned District and Sessions Judge, Agra.

19. Considering the prayer as made in the application, after hearing the learned counsels for rival parties at length, certain questions available to be answered by this Court pertaining to the instant matter are as under:-

(i) Whether Sri Arvind Kumar Sharma, Advocate was entitled to withdraw his Vakalatnama which has already been executed in favour of the opposite party no.2?

(ii) The essential ingredient for establishing a relation of an Advocate and client is mere signing the Vakalatnama?

(iii) Effect of Section 9 of the U.P. Advocates Welfare Fund Act, 1974 in the instant matter?

20. So far as regarding the first question, it is crystal clear that in a random and fashionable manner, signatures of so many Advocates have been taken on different Vakalatnama and the same have already been submitted before the sessions trial wherein one of the counsel was Sri Arvind Kumar Sharma, Advocate, in pursuance of the execution of Vakalatnama, no brief has ever been given in shape of relevant documents and papers by the opposite party no.2 to Sri Arvind Kumar Sharma, Advocate. More so, Sri Arvind Kumar Sharma, Advocate never appeared and argued the matter on behalf of the opposite party no.2 before the learned trial court and as such, the Vakalatnama cannot be treated merely a piece of paper which creates right of holding for certain Advocates from appearing on behalf of the opposite party, in absence of any specific instructions, the counsel cannot be treated as bonded and handcuffed to the client who sought signatures over Vakalatnama, which was itself defective in nature, since the

same was not having the Advocate Welfare Ticket.

21. Answering the second question as mentioned above, the essential ingredients which are required for establishing the relationship of client and Advocate are the discussion of the matter for which the Advocate is going to appear before any court of law for protecting the interest of his client by way of assisting the court on the basis of relevant documents and the correct proposition of law. In the instant matter, it is admitted case of both the parties that at no point of time, any brief or documents has ever been handed over from the opposite party no.2 to Sri Arvind Kumar Sharma, Advocate and as such, only by obtaining the signatures over the defective piece of paper cannot establish a relation between the client and his counsel.

22. Ultimately, the legal question which involves the crux of the matter and vital to be adjudicated in pursuant to the controversy as raised through the instant application preferred under Section 482 of Cr.P.C., for ready reference, the extract of the Section 9 of the U.P. Advocate Welfare Fund Act, 1974 are reproduced hereinbelow:-

"9. Welfare stamp on Vakalatnama. - (1) Every member of the Scheme shall affix on the Vakalatnama accepted by him a Welfare Stamp of the value of five rupees in the case of Vakalatnama filed in the High Court or a Tribunal or any other authority or person and two rupees in any other case and no court, tribunal, authority or person shall receive any Vakalatnama in favour of such member unless it is so stamped in addition to any stamp required under any other law for the time being in force.

(2) The value of the Welfare Stamp shall neither be taxable cost in the suit or proceeding nor be collected in any event from a party to such suit or proceeding.

(3) Any contravention of the provisions of sub-section (2) by any member shall disentitle him to the benefits of the Scheme and shall be deemed to be a misconduct and the Trustees Committee shall report the matter to the State Bar Council for appropriate action.

(4) Every Welfare Stamp affixed on a Vakalatnama under sub-section (1) shall be cancelled in the manner provided in Section 30 of the Court Fees Act, 1870.

(5) wherein any case the Welfare Stamp referred to in sub-section (1) is not affixed on the Vakalatnama or is not filed by any Advocate the Court shall not permit such Advocate for further proceeding in that case."

23. By bare perusal of the Section 9(5) of the said Act, it is crystal clear that in case the Welfare Stamp referred to in sub-section (1) is not affixed on the Vakalatnama or is not filed by any Advocate, the Court shall not permit such Advocate for further proceeding in that case, meaning thereby, if the Advocate Welfare Stamp is absent from the Power/Vakalatnama submitted before the court concerned, the Vakalatnama signed by the concerned Advocate cannot be permitted to proceed in the matter and as such, in absence of Advocate Welfare Stamp from the Vakalatnama which has been submitted by the opposite party no.2 before the learned trial court, no counsel who put his signatures over the same, is permitted to proceed in the matter.

24. The abovementioned factual and legal points were undiscussed by the

learned District and Sessions Judge, Agra while passing the order dated 05.04.2023 which is under challenge in the instant application.

25. The arguments as raised by learned Senior Counsel appearing on behalf of the applicant is also relied upon the judgment passed by Hon'ble the Apex Court in the case of **Supreme Court Bar Association Vs. Union of India and another** [Writ Petition (Civil) 200 of 1995, decided on 17.04.1998] wherein it has been held that this court cannot in exercise of its jurisdiction under Article 142 read with Article 129 of the Constitution, while punishing a contemner for committing contempt of court, also impose a punishment of suspending his licence to practice, where the contemner happens to be an Advocate. Such a punishment cannot even be imposed by taking recourse to the appellate powers under Section 38 of the Act while dealing with a case of contempt of court (and not an appeal relating to professional misconduct as such). To that extent, the law laid down in *Re: Vinay Chandra Mishra*, (1995) 2 SCC 584 is not good law and we overrule it.

26. An Advocate who is found guilty of contempt of court may also, as already noticed, be guilty of professional misconduct in a given case but it is for the Bar Council of the State of Bar Council of India to punish that Advocate by either debarring him from practice or suspending his licence.

27. In the instant matter, there was hardly any occasion available before the learned District and Sessions Judge, Agra to comment upon the conduct of an Advocate while adjudicating the application for withdrawal of Vakalatnama

preferred by Sri Arvind Kumar Sharma, Advocate, since the same application has already been allowed by the Bar Council of U.P. and as such, the matter was out of judicial ambit of learned District and Sessions Judge,

28. In view of the aforementioned facts and circumstances, the order dated 05.04.2023 passed by the learned District and Sessions Judge, Agra is hereby quashed and set aside.

29. The present application stands **allowed** accordingly.

(2023) 8 ILRA 39
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.07.2023

BEFORE

THE HON'BLE GAJENDRA KUMAR, J.

Application U/S 482 No. 24499 of 2023

Mahesh & Ors. ...Applicants
 Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Aishwarya Pratap Singh

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Section 155(4) - Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable - Indian Penal Code, 1860 - Sections 504 & 506 - an offence under Section 506 IPC, if committed in the State of U.P. is a cognizable offence.(Para -14, 16)

Quashing of - charge sheet, cognizance as well as summoning order - accused-applicants and informant-opposite party no.2 are accused of illegally grabbing a portion of land - belonging to opposite party no.2 - despite a land mark set by Sub Divisional Magistrate - opposite party no. 2 was allegedly abused and manhandled by applicants - leading to FIR - Case involved an offense under Section 504 and Section 506 IPC - Section 506 was initially non-cognizable - Uttar Pradesh Government issued Notification No. 777/VIII-9 4(2)-87 in 1989 - making Section 506 IPC cognizable and non-bailable - despite non-cognizable status in the first schedule.

(Para -7)

HELD:-Accused, charged under Sections 504 and 506 IPC, must be tried in the manner prescribed for for trial of cognizable offences. **(Para -17)**

Application u/s 482 Cr.P.C. rejected. (E-7)

List of Cases cited:-

1. Santosh Kumar & ors. Vs St. of U.P. & anr., 2019:AHC:18156
2. Anurag Yadav & ors. Vs St. of U.P. & anr, 2020:AHC:39811
3. Rama Shankar Upadhayay & ors. Vs St. of U.P. & anr., 2022:AHC:190995
4. Virendra Singh Vs St. of U.P., 2002 ILR All India Series , 653 2002 (2) UC 453
5. Meta Sewak Upadhyay Vs St. of U.P., 1995 CJ (All) 1158
6. Aires Rodrigues Vs Vishwajeet P. Rane, (2017) 11 SCC 62

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

1. Heard learned Counsel for the applicants and learned AGA for the State-respondents.
2. By means of the present application under Section 482 of the Criminal

Procedure Code the applicants have prayed for quashing of the charge sheet dated 05.08.2022 and cognizance as well as summoning order dated 21.12.2022 in Criminal Case No. 24449 of 2022 (State vs. Mahesh and others) arising out of Case Crime No.207 of 2022, under Sections 504 and 506 IPC, Police Station Soro, District Kasganj, pending in the Court of Chief Judicial Magistrate, Kasganj.

3. The accused-applicants and the informant-opposite party no.2 have their lands beside each other. It is being alleged that the aforesaid applicants tried to illegally grab the portion of the land which belongs to opposite party no.2 inspite of the land mark fixed by the Sub Divisional Magistrate concerned demarcating the area of land belonging to the opposite party no.2. It is further alleged that when the opposite party no.2 tried to intervene and defend the aforesaid he was abused and manhandled by the applicants. In furtherance thereof, a First Information Report dated 05.06.2022 was lodged.

4. An investigation was carried out pursuant to the aforesaid FIR and statements of witnesses were recorded. After completion of investigation, the police has submitted the charge sheet on 05.08.2022 stating that upon investigation, from the statements of the witnesses and inspection of the site of occurrence, commission of the offence under Sections 434 and 447 IPC were not found and merely offences under Sections 504 and 506 IPC were found to have been committed. The implication of the two named accused in the FIR *i.e.* Sanjay and Radheysham was not found during investigation due to lack of evidence against them and therefore they were exonerated from the charge sheet. The

charge sheet has been forwarded to the court for trial of the applicant.

5. Learned counsel for the applicant has argued that although originally the first information report was lodged under Sections 434, 447, 504, 506 IPC but during investigation, the allegation with regard to commission of offence under Sections 434 and 447 IPC was found to be false and only a case under Sections 504 and 506 IPC was found to be made out against the applicants, both of which are non-cognizable offences and, therefore, the case against the applicants can only proceed as a complaint. In support of his submission, he has invited attention of the Court to the Explanation appended to Section 2 (d) of Cr.P.C. In order to appreciate his submission, the relevant provision of Cr.P.C. is being reproduced below: -

"(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"

6. Learned counsel for the applicants has placed reliance on a judgments of this Court in (i) **Santosh Kumar and 2 Others vs. State of U.P. And Another 2019:AHC:18156**, and (ii) **Anurag Yadav And 2 Ors. vs. State of U.P. And Anr 2020:AHC:39811**, in these two cases originally the FIR was lodged under

sections 323, 504 IPC whereas in, **(iii) Rama Shankar Upadhyay And 3 Others vs. State of U.P. And Another 2022:AHC:190995** in which FIR was lodged under sections 323, 504 and 427 IPC. In this backdrop a coordinate Bench of this Court held that the Magistrate shall not proceed with the case as a State case but he shall proceed with it as a complaint case as provided in the explanation to Section 2(d) Cr.P.C.

7. However, in the present case, apart from an offence under Section 504, an offence under Section 506 IPC has also been found to have been committed. Although in the first schedule appended to the code of criminal procedure, 1973 Section 506 is mentioned to be a non-cognizable offence, the Uttar Pradesh Government has issued a Notification No. 777/VIII-9 4(2)-87, dated July 31, 1989, published in U.P. Gazette, Extra Part-4, Section (Kha), dated 2nd August, 1989 by which the Section 506 IPC was made cognizable and non bailable.

8. The aforesaid Notification No. 777/VIII 9-4 (2)-87 dated July 31, 1989, published in the U.P. Gazette, Extra, Part-4, Section (kha) dated 2nd August, 1989 states as follows:

"In exercise of the powers conferred by Section 10 of the Criminal Law Amendment Act, 1932 (Act No. XXIII of 1932) read with Section 21 of the General Clauses Act, 1897 (Act No.10 of 1897) and in super session of the notifications issued in this behalf, the Governor is pleased to declare that any offence punishable under Section 506 of the Indian Penal Code when committed in any district of Uttar Pradesh, shall notwithstanding anything contained in the

Code of Criminal Procedure, 1973 (Act No.2 of 1974) be cognizable and non-bailable."

9. The aforesaid notification has been issued under Section 10 of the Criminal Law Amendment Act, 1932 (Act No. 23 of 1932), which provides as follows: "10. Power of State Government to make certain offences cognizable and non-bailable.--

(1) The State Government may, by notification in the Official Gazette, declare that any offence punishable under section 186, 188, 189, 190, 228, 295A, 298, 505, 506 or 507 of the Indian Penal Code (45 of 1860), when committed in any area specified in the notification shall, notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), be cognizable, and thereupon the Code of Criminal Procedure, 1898, shall, while such notification remains in force, be deemed to be amended accordingly.

(2) The State Government may, in like manner and subject to the like conditions and with the like effect, declare that an offence punishable under section 188 or section 506 of the Indian Penal Code (45 of 1860), shall be non-bailable."

10. The validity of the aforesaid Notification dated 31-07-1989 was examined by a Division Bench of this Court in **Virendra Singh versus State of U.P., 2002** Indian Law reports Allahabad Series **653 2002 (2) UC 453** and in that case, this Court held as follows: -

"6. Section 10 of the Criminal Law Amendment Act, 1932 does not give power to the State Government to amend by a notification any part of the Code of Criminal Procedure, 1973. Since the Code of Criminal Procedure of 1898 has been

repealed by Section 484 of the Code of Criminal Procedure. Act, 1973 we are of the opinion that Section 10 of the Criminal Law Amendment Act, 1932 has become redundant and otiose. Hence in our opinion no notification can now be made under Section 10 of the Criminal Law Amendment Act, 1932. Any such notification is illegal for the reason given above. Hence we declare notification No. 777/VIII-94(2)-87, dated July 31, 1989, published the U.P. Gazette, Extra Part-4, Section (kha), dated 2nd August, 1989 by which Section 506 I.P.C. was made cognizable and non-bailable to be illegal. Section 506 I.P.C. has to be treated as bailable and non-cognizable offence."

11. However, in the case of **Meta Sewak Upadhyay versus State of U.P., 1995 CJ (All) 1158**, a Full Bench of this Court examined the validity of the aforesaid Notification. It may be relevant to note that although the Full Bench has at some places mentioned the date of the Notification as August 2, 1989, which is actually the date of publication of the Notification in the Official Gazette and at some places the date of the Notification is mentioned as July 31, 1989 but the contents of the Notification are the same as those which have been reproduced above. The Full Bench held as follows: -

"61. There are two notifications of December 29, 1932 and August 2, 1989 which came to be issued in exercise of the powers conferred by Section 10 of the Act of 1932. Whereas, the first notification was made applicable only to a few districts, mentioned therein, the second notification of August 2, 1989 which was issued in super session of the notifications earlier issued in this behalf, states that the Governor is pleased to declare that any

offence punishable under Section 506 of the Indian Penal Code (IPC) when committed in any district of Uttar Pradesh, shall notwithstanding anything contained in the Criminal Procedure Code, 1973, be cognizable and non-bailable. From the second notification it is, therefore, clear that that was issued in super session of the notification of December 29, 1932 and the effect of this notification is that the offence punishable under Section 506, IPC when committed at any place through, out the Uttar Pradesh, shall notwithstanding anything contained in the Criminal Procedure Code, be cognizable and non-bailable. In the first Schedule to the Criminal Procedure Code, 1973, the offence under Section 506 IPC is described as non-cognizable and bailable, but by virtue of Sec. 10 of the Act of 1932, the same has been declared for the entire Uttar Pradesh as cognizable and non-bailable by the notification of August 2, 1989. Sec. 10 of the Act of 1932 confers powers of the State Government to declare by notification in the official Gazette that an offence punishable under Section 506 IPC inter alia when committed in any area specified in the notification, shall notwithstanding anything contained in the Code of Criminal Procedure, 1898, be cognizable and non-bailable and thereupon the Code of Criminal Procedure, 1898 shall while such notification remain in force, be deemed to be amended accordingly. The submission is that by the Act of 1932, an amendment was made in the Code of Criminal Procedure, 1898, which stood repealed by virtue of Section 484 of Code of Criminal Procedure, 1973, which was assented by the President of April 1, 1974. The Act of 1932 having been passed simply to amend the Cr. P.C. of 1889, the argument of Sri Misra is that the former could not survive beyond the life of the Cr. P.C. of 1898,

which came to an end after being repealed in April, 1974. In short, he submits that the life of the Amending Act cannot be more than the principal act and that the amending act is co-extensive and co-terminus with the Principal Act and that Cr. P.C. of 1898 which was amended by the Act of 1932, having been repealed in April, 1974, the Act of 1932 could not have survived thereafter. Sri Tulsi argues that it is a misnomer to say that the Act of 1932 is simply an Amending Act. He submits that the Act of 1932 is named as "The Criminal Law Amendment Act, 1932." because that has made some amendment in the general body of criminal law and, in fact, the Act of 1932 is not only an Amending Act but a unique blend of substantive law as well as of the provisions making an amendment in the Cr. P.C., 1898 and that it having contained substantive provisions as well, cannot be said to be co-terminus with the Cr. P.C. of 1898 in which certain amendments were made, says Sri Tulsi. From perusal of the Act of 1932, the submission of Sri Tulsi appears to be correct that the said enactment is not merely an Amending Act but that is a blend of substantive provisions as well as the **provisions amending Cr. P.C. of 1898. So the Act of 1932 is still on the statute book, notwithstanding the repeal of Cr. P.C. 1898.**

62. Therefore, the contention of Sri Misra that impugned notification of August 2, 1989, having been issued under a dead enactment is invalid, has to be rejected.

Then Sri Trivedi whose assistance was sought by Sri R. R. Dwivedi submits that Section 10 of the Act of 1932 is violative of **Article 14 of the Constitution**, inasmuch as it is bereft of any guideline in respect of an area to be specified in the notification. He submits that the State Government is given free hand with

unguided, unchannelised and arbitrary power to issue notification for any area and, therefore, Section 10 suffers from the vice of excessive delegation. Section 10 of the Act of 1932 is reproduced as under :

"10 Power of Local Government to make certain offences cognizable and non-bailable.-(1) The Local Government may, by notification in the local official Gazette, declare that any offence punishable under Section 186, 188, 189, 190, 228, 295A, 298, 505, 506 or 507 of the Indian Penal Code, when committed in any area specified in the notification shall, notwithstanding anything contained in the Code Criminal Procedure, 1898, be cognizable and thereupon the Code of Criminal Procedure, 1898, shall, while such notification remains in force, be deemed to be amended accordingly.

(2) The Local Government may, in like manner and subject to the like conditions and with the like effect, declare that an offence punishable under **Section 188 or Section 506 of the Indian Penal Code** shall be non-bailable."

12. The Full Bench proceeded to hold that "Section 10 of the Act of 1932 and Notification No. 777/VIII-9-4 (2) (87) dated July 31, 1989 are valid.

13. The aforesaid Full Bench decision in **Meta Sewak Upadhyay (Supra)** has been approved by the Hon'ble Supreme Court in **Aires Rodrigues versus Vishwajeet P. Rane (2017) 11 SCC 62.**

14. The validity of the aforesaid notification dated 31st July 1989 having been upheld by a Full Bench of this Court in **Meta Sewak Upadhyay (Supra)** and the Full Bench decision having been approved by the Hon'ble Supreme Court in **Aires Rodrigues (Supra)**, there is no

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.07.2023

BEFORE

Application U/S 482 No. 41434 of 2022

Counsel for the Applicant:
Sri Anwar Hussain

Counsel for the Opposite Parties:
G.A., Sri Pawan Kumar Shukla, Sri Manish
Trivedi

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - The Negotiable Instruments Act, 1881 - Section 138 - Dishonour of cheque for insufficiency, etc., of funds in the account, Section 142 - Cognizance of offences , Section 146 - Bank's slip prima facie evidence of certain facts - In case cheque return memo is not having signature and stamp of the bank, but it is validly issued by the bank, that would not render the proceeding of Section 138 of Act, 1881 as invalid or illegal.(Para-13,14)

Complaint case was filed by opposite party no.2 under Section 142 - ground - bouncing of cheque - no official mark, signature and seal of the Bank - in absence of seal or signature, letter cannot be treated valid document - cognizance order passed - bad and liable to quashed - hence application. **(Para-3)**

HELD:-Letter is not forged document and cheque was produced before the Bank and dishonoured due to insufficient fund, therefore, requirement of Section 146 of Act is fulfilled . Unsigned letter so issued by the Bank cannot be ground for rejecting the proceedings under Section 138 of Act, 1881. **(Para -11)**

"Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable."

17. In view of the aforesaid provisions of law, since the accused had been charged under Sections 504 and 506 IPC, they have to be tried for both the offences in the manner prescribed for trial of cognizable offences.

18. Therefore, the application lacks merit and it is accordingly **rejected**.

Application u/s 482 Cr.P.C. dismissed. (E-7)**List of Cases cited:-**

Guneet Bhasin Vs St. of NCT of Delhi & ors. ,
(2023) 296 DLT 401

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Anwari Hussain, learned counsel for the applicant, learned AGA for the State-opposite party no.1, Sri Pawan Kumar Shukla, learned counsel for the opposite party no.2 and Sri Manish Trivedi, learned counsel for the ICICI-Bank.

2. The present 482 Cr.P.C. application has been filed to quash the entire proceedings of Criminal Complaint Case No. 36644 of 2022 (Anuj Kumar Gupta vs. Mohd. Yunus Malik) under Section 138 of Negotiable Instrument Act, 1881 (*hereinafter referred to as Act, 1881*) as well as summoning order dated 20.6.2022.

3. Learned counsel for the applicant submitted that complaint case was filed by the opposite party no.2 under Section 142 of Act, 1881 on the ground of bouncing of cheque. He next submitted that alongwith complaint, letter of Bank dated 20.4.2022 has also been annexed having no seal or signature. He firmly submitted that in absence of seal or signature, letter cannot be treated as valid document. He further submitted that relying upon such letter, cognizance order has been passed, which is bad and liable to quashed.

4. Per contra, Sri Pawan Kumar Shukla, learned counsel for the opposite party no.2 has opposed and submitted that he has received the very same letter from the bank and on that basis and he has filed complaint alongwith said letter, therefore, he is not at fault in all eventuality. He further submitted that if the cheque and letter are not bearing

any official stamp of the bank, it does not render the said letter as invalid or illegal. In support of his contention, he has placed reliance upon the judgment of Delhi Court in the case of ***Guneet Bhasin vs. State of NCT of Delhi and others reported in (2023) 296 DLT 401.***

5. *Earlier this Court vide order dated 4.7.2023 impleaded the ICICI Bank and directed the bank to file counter affidavit.*

6. In compliance of that, Sri Manish Trivedi, learned counsel for the ICICI-Bank has filed counter affidavit and clearly stated that this letter was issued by the Bank, but inadvertently, same could not be signed. Further, bank has tendered unconditional apology with the undertaking that bank would be more conscious in future and such mistakes shall not be repeated again.

7. Sri Anwar Hussain, learned counsel for the applicant in his rejoinder argument submitted that Section 146 of Act, 1881 clearly provides that notice of information of dishonored cheque must have official mark and in light of that no proceeding can be initiated against the applicant.

8. I have considered the rival submissions advanced by the learned counsel for the parties and perused the letter issued by the Bank.

9. The issue is before this Court about the interpretation of Section 146 of Act, 1881, which is being quoted hereinbelow:-

"Section 146 in The Negotiable Instruments Act, 1881

The Court shall, in respect of every proceeding under this Chapter, on production of bank's slip or memo having thereon the official mark denoting that the

cheque has been dishonoured, presume the fact of dishonour of such cheque, unless and until such fact is disproved."

10. From perusal of the aforesaid provision, the intention of legislation is very much clear i.e. to verify the fact as to whether the cheque was produced before the Bank and dishonoured for some reasons or not. So far as present case is concerned, bank has informed that cheque was dishonoured due to 'Insufficient Funds', but there is no official mark, signature and seal of the Bank in the said letter dated 20.4.2022. Bank has filed counter affidavit and clearly approved the letter and submitted that inadvertently signed was left out. Relevant paragraph of the counter affidavit is quoted hereinbelow:-

"3. That the deponent very fairly submits that the cheque presented by the complainant Anuj Kumar Gupta was presented for clearing in the ICICI Bank which was sent to the clearing Bank and it bounced on account of "Insufficient Funds" and the bouncing memo dated 20.4.2022 was issued by the ICICI Bank and was sent to the account holder by DTDC courier vide POD No.5311190k which inadvertently was left out to be signed.

4. That the aforesaid bouncing memo was electronically generated as per CTS guidelines where it clearly bears the remark of "Insufficient Funds" however inadvertence in issuing the memo is highly regretted by the ICICI Bank and the bank apologizes for the same and undertakes that it will never happen in any future transaction.

5. That the ICICI Bank being a responsible law abiding and prudent bank is issuing another bouncing memo of the same date in order to regularize the irregularity in issuing the bond memo and

further undertakes not to repeat its inadvertent mistake in future. Photocopy of the duplicate bouncing memo is being filed herewith as Annexure-SCA 1 to this short counter affidavit. (Original fresh bouncing memo will be presented before this Hon'ble Court at the time of hearing)."

11. Now in light of averments made by the Bank in the counter affidavit, it is very much clear that letter is not forged document and cheque was produced before the Bank and dishonoured due to insufficient fund, therefore, requirement of Section 146 of Act is fulfilled and unsigned letter so issued by the Bank cannot be ground for rejecting the proceedings under Section 138 of Act, 1881.

12. I have also perused the judgment of Delhi Court in the case of **Guneet Bhasin (Supra)**. Relevant paragraph of the said judgment is quoted hereinbelow:-

"9 The cheque return memo is a memo informing the payee's banker and the payee about the dishonour of a cheque. When the cheque is dishonoured, the drawee bank immediately issues a cheque return memo to the payee's banker mentioning the reason for non-payment. The purpose of the cheque return memo is to give the information of the holder of the cheque that his cheque on presentation could not be encashed due to the variety of reasons as mentioned in the cheque return memo. As per the Section 146 of the N.I. Act, the cheque return memo on presentation presumed the fact of dishonour of the cheque unless and until such fact is disproved. Neither section 138 nor the Section 146 of the NI Act has prescribed any particular form of cheque return memo. The Section 138 of the NI Act does not mandate any particular form of cheque

return memo which is nothing but a mere information given by the Banker of the due holder of a cheque that the cheque has been returned as unpaid. If the cheque return memo is not bearing any official stamp of the bank, it does not render the cheque return memo as invalid or illegal. The cheque return memo is not a document which is not required to be covered under Section 4 of the Bankers Book (Evidence) Act, 1891. If there is any infirmity in the cheque return memo, it does not render entire trial under Section 138 of NI Act as nullity."

13. From perusal of the same, it is apparently clear that if the cheque return memo is not bearing any official stamp of the bank, it does not render the cheque as invalid or illegal. Further, if there is any infirmity in the cheque or letter, it does not render entire trial under Section 138 of Act, 1881 as nullity.

14. After going through the provision of Section 146 of Act, 1881, counter affidavit filed on behalf of bank and judgment of Delhi Court in the case of ***Guneet Bhasin (Supra)***, this Court is of the firm view that in case cheque return memo is not having signature and stamp of the bank, but it is validly issued by the bank, that would not render the proceeding of Section 138 of Act, 1881 as invalid or illegal.

15. In view of above facts mentioned hereinabove as well as law discussed hereinabove, this Court finds no good ground to entertain the application and same lacks merit and is, **dismissed**. No order as to costs.

16. So far as bank is concerned, there is carelessness on its part, therefore, this

Court is issuing direction to Highest Authority of Bank i.e. CEO/M.D. of ICICI., Bank to issue order/letter/circular to all Branch Managers for being more careful while issuing such letters maximum within two weeks from the date of production of certified copy of this order. In case such type of mistake is repeated by any officer of the Bank, he is directed to take strict action against the erring officer or employee in accordance with law.

17. Sri Manish Trivedi, learned counsel for the ICICI-Bank is directed to send the copy of this order to CEO/M.D. of ICICI Bank forthwith for immediate compliance.

(2023) 8 ILRA 47

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 02.08.2023

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Criminal Misc. Anticipatory Bail Application U/S
438 CR.P.C. No. 8059 of 2023

Dr. Rajni Tripathi

...Applicant

Versus

State of U.P.

...Opposite Party

Counsel for the Applicant:

Ms. Kanchan Sharma, Sri Prashant Vyas, Sri V.P. Srivastava (Sr. Adv.), Sri Virendra Singh

Counsel for the Opposite Party:

G.A., Sri Prakash Dwivedi, Sri Amrendra Nath Singh

Criminal Law - Indian Penal Code, 1860 - Sections 419, 420, 467, 468, 471 & 204 - Criminal Procedure Code, 1973 - Sections 313, 482, 438(6)(a) & (b) & 439- Anticipatory Application for Bail - the applicant,

a Principal at a Degree College, was accused of misuse of funds allocated for a National Seminar on Hindi and Economics - The seminar was organized using financial aid from the University Grants Commission (UGC), New Delhi, and other sources - FIR - The allegations led to her suspension from the position, and further criminal proceedings ensued - Examination of Accused – U/Section 313 of CrPC - Statement was recorded - the court stipulated that, the applicant must file an undertaking stating that she will not seek adjournments when evidence and witnesses are scheduled for examination - if the applicant defaults, conditions deliberately or without sufficient cause, the trial court may treat this as abuse of bail liberty and take appropriate actions – Accordingly, the applicant's bail application is disposed of with the directions - applicant shall ensure her presence in court on dates fixed for evidence and witness examination, - In case of default on this condition, the trial court may revoke bail and proceed in accordance with the law. (Para – 24, 25, 26)

Application Disposed of. (E-11)

List of Cases cited:

1. Amrawati & anr.Vs St. of U.P., 2004 (57) ALR 290
2. Lal Kamendra Pratap Singh Vs St. of U.P., 2009 (3) ADJ 322
3. Hussain & anr.Vs U.O.I., (2017) 5 SCC 702
4. Brahm Singh & ors. Vs St. of U.P. & ors., Criminal Misc. Writ Petition No.15609 of 2016, dated 08.07.2016
5. Arnesh Kumar v. St. of Bihar & anr., (2014) 8 SCR 128
6. Sushila Aggarwal & ors. Vs St. (NCT of Delhi) & anr., (2020) 5 SCC 1
7. Sunil Kallani Vs St. of Raj., 2022 0 Cr. L.J. 1378
8. Sunil Kallani Vs St. of Raj., 2021 SCC Online Raj 1654

9. Shri Gurbaksh Singh Sibbia & ors. Vs St. of Punjab, AIR 1980 SC 1632

10. Shri Gurbaksh Singh Sibbia & ors. Vs St. of Punjab, AIR 1980 SC 1632

11. Rajesh Kumar Sharma Vs C.B.I., 2022 0 Supreme (All) 1331

12. Narinderjit Singh Sahni Vs U.O.I., (2002)2 SCC 210

13. Md Asfak Alam Vs The St. of Jharkhand & anr.(Criminal Appeal Nos, 2207 of 2023 arising out of Special Leave Petition (Criminal) No. 3433 of 2023 dated 31.07.2023

14. Vinod Kumar Sharma & anr.Vs St. of U.P.& anr., 2022 1 Crimes (SC) 193

15. Sushila Aggarwal Vs St. (NCT of Delhi)-2020 SCC Online SC 98

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. Vakalatnama on behalf of applicant has been filed by Mr Virendra Singh, Advocate today, which is taken on record.

2. Heard Sri V. P. Srivastava, learned Senior counsel assisted by Mr Prashant Vyas and Mr Surendra Kumar, learned counsel for the applicant, Sree Prakash Dwivedi & Mr Amrendra Nath Singh, learned counsels for the informant and Mr Amrit Raj Chaurasiya, learned Additional Government Advocate for the State.

3. Supplementary affidavit filed today is taken on record.

4. This anticipatory bail application (under section 438 Cr.P.C.) has been moved seeking bail in Case Crime No. 676 of 2013, under sections 419,420,467,468,471 IPC, P.S. Civil Lines, District Prayagraj, during the pendency of trial.

5. In short, the prosecution allegation is that the applicant, who is said to be Principal of Prayag Mahila Vidyapeeth Degree College, was placed under suspension since February, 2013. It is alleged that a National Seminar on Hindi and Economics was organized on 21, 22 and 23 February 2009 in the College with funds received from University Grant Commission, New Delhi and other sources. Dr. Madhu Tandon was the co-ordinator of National Seminar and the applicant was its director. Dr. Madhu Tandon, through her complaint dated 20.04.2009 informed that she had spent Rs. 12,500/- in the printing of souvenirs in the said Economics Seminar at the behest of the Principal, but the payment has not been made by the Principal/applicant. It is further alleged that in the meeting of the Managing Committee dated 16.07.2009, the Principal assured to pay the expenses incurred by Dr. Madhu Tandon and to present the details of the income expenditure of the Seminar, but neither she made the expenditure incurred by Dr. Madhu Tandon nor presented the details of income-expenditure and kept on procrastinating the matter on one pretext or the other, due to which the matter is said to be pending since long. Meanwhile, Dr. Madhu Tandon is said to be transferred to DAV College, Lucknow and from there she also sent several requests but the Principal did not reply. It is further alleged that in the audit from year 2008-09 up to year 2011-12, objection was raised that in the seminar held in the year 2008-09, money was withdrawn by opening a new account by Principal but neither the expenditure certificate nor the proceedings register were presented at the time of inspection/audit and the Principal is said to have withdrawn money from the annual festival fund in the year 2009, 2010 and 2011, but its expenditure certificates were not presented

at the time of audit. Thereafter, the Principal informed the Managing Committee in its meeting on 05.10.2012 that she has received the bills / vouchers / documents of the Seminar 2009 and in compliance with the decision taken in the previous meeting of the Management Committee, she is presenting it to the Chairman. It is also alleged that after the meeting was over, the Managing Committee produced the photocopies of Bill Vouchers to the clerk in the college office. It is further alleged that again, in the meeting of the Management Committee dated 24.11.2012, Principal was directed to produce the original bill vouchers of Seminar 2009 then the Principal on 29.11.2012 is said to have produced the original bill vouchers of Seminar 2009 and Annual Festival year 2009 and 2011 in the college office. Thereafter, due to expenditure on items other than those prescribed by U.G.C. New Delhi and cash memos of more than Rs.20,000/-, the Management committee instructed the Manager to submit a report after preliminary investigation on the vouchers produced by Principal. After preliminary investigation, the Manager, found various vouchers suspicious, thereafter, a three-member inquiry committee was constituted by the Management Committee of the college to investigate the matter and the Principal was placed under suspension. It is also alleged that the Inquiry Committee issued the charge sheet to the Principal on 12.03.2013 which was replied by the applicant/Principal. The inquiry committee after conducting inquiry submitted its inquiry report dated 17.08.2013. In compliance of the decision taken in the meeting of the Managing Committee on 05.09.2013, a copy of the investigation report was sent to the applicant/Principal as well as the Vice Chancellor of Chhatrapati

Sahu Ji Maharaj University, Kanpur for information. It is also alleged that the Principal submitted her written statement on 20.09.2013 in the office and also got her oral statement recorded in the meeting of the Management Committee dated 21.09.2013 and after considering the submissions of the applicant, the inquiry report was accepted. It is alleged that after investigation by the Inquiry Committee, it was duly found that the UGC account of the College has already been opened in UCO Bank Civil Line, but the applicant/Principal voluntarily opened a new account in the same bank and deposited a sum of Rs. 90,000/- received from UGC, New Delhi and on 03.02.2009, without the consent/approval of the Management Committee, and in connivance with the Bank Officials is said to have withdrawn a sum of Rs.90,000/- and misappropriated it and also concealed the entry of payment received in the UGC Cash book. It is also alleged that the vouchers submitted by the applicant in the office for different sums were found forged and fabricated. It is thus alleged that the applicant/Principal by misusing her position grabbed the entire money.

6. Record would further reveal that applicant after filing of the FIR approached this Court by filing Criminal Misc Writ Petition (being CMWP No. 9412 of 2014), in which applicant has been granted interim protection till the submission of the charge sheet vide order dated 2.6.2014. Thereafter, charge sheet in the matter was submitted on 19.01.2015, whereupon the court below took cognizance on 7.2.2020 and summoned the applicant to face the trial. The applicant again approached this Court by way of filing Criminal Misc Application u/s 482 No. 10577 of 2023 challenging the charge sheet and the summoning order,

which came to be disposed of vide order dated 6.4.2023 with the following observation:-

*".....However, this application stands **disposed of** with the direction that the court below would extend the benefit of interim bail (if the court concerned deems it fit according to the merit of each case) as contemplated in the law laid down by this Court in the case of **Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290** as well as judgement passed by Hon'ble Apex Court reported in **2009 (3) ADJ 322 (SC) Lal Kamendra Pratap Singh Vs. State of U.P.** after the applicant surrenders within two weeks before the court and if her bail application is filed, the same shall be adjudicated and decided by the courts below with speaking and reasoned order, strictly in accordance with law, in the light of the judgment given by Hon'ble Apex Court in the case of **Hussain and another Vs. Union of India reported in (2017) 5 SCC Page-702**, relevant extract of which reads as under :-*

*"?.....**Judicial service as well as legal service are not like any other services. They are missions for serving the society. The mission is not achieved if the litigant who is waiting in the queue does not get his turn for a long time**"..... **"Decision of cases of under-trials in custody is one of the priority areas. There are obstructions at every level in enforcement of right of speedy trial; vested interests or unscrupulous elements try to delay the proceedings**"..... **"In spite of all odds, determined efforts are required at every level for success of the mission"**..... **"The Presiding Officer of a court cannot rest in a state of helplessness. This is the constitutional responsibility of the State to provide necessary infrastructure and of the High***

Courts to monitor the functioning of subordinate courts to ensure timely disposal of cases."

To satiate speedy disposal of the cases, the courts below are issued following directions in accordance with the observations made in the case of Hussain and another (Supra):

(i) Bail applications be disposed of normally within one week :

(ii) Magisterial trials, where accused are in custody, be normally concluded within six months and sessions trials where accused are in custody be normally concluded within two years.

(iii).....

.....;

(iv).....

....."

The above timelines may be the touchstone for assessment of judicial performance in annual confidential reports.

For the period of two weeks from today, no coercive action shall be taken against the applicant in the aforementioned case.

It is made clear that no time extension application would be entertained for extending the period of two weeks.

*The ratio mentioned above is the last word for every judicial officers for abiding with the directions of the Hon'ble Apex Court. In the aforesaid scenario, it would be pertinent to refer the case of **Brahm Singh and others Vs. State of U.P. and others** decided on 08.07.2016 in Criminal Misc. Writ Petition No.15609 of 2016 whereby co-ordinate Bench of this Court, while taking into account the concerns of most of the counsels with regard to the long pending bail applications at lower courts' stage has expressed their anguish and concern.*

*In the aforesaid backdrop, learned Sessions Judge/the concerned Trial Judge is directed to ensure that the guidelines given in the case of **Hussain and another (supra)** as well as in **Brahm Singh and others (Supra)** has to be carried out in its letter and spirit, failing which an adverse inference would be drawn against the erring officers and this Court would be compelled to take appropriate action against them, if found that there is laxity in adhering the above directions.*

In the event, the bail application is not decided within seven days as contemplated above, the learned Judge will have to spell out the justifiable reasons and record the same on the order sheet of such cases."

7. Thereafter, applicant is said to have approached the court below by filing anticipatory bail application, which came to be rejected vide order dated 31.05.2023, hence the present anticipatory bail application before this Court.

8. Learned senior counsel for the applicant submits that applicant has been falsely implicated in the present case. She is a lady and is aged about 61 years. It is also submitted that in the alleged matter a disciplinary proceeding was also initiated by the Management of the Institution and the matter went up to the Vice Chancellor of the Chhatrapati Sahu Ji Maharaj University, Kanpur wherein certain favourable observations were made with regard to the applicant. It is further submitted that the involvement of the applicant in the present false criminal case is nothing but just to harass the applicant at the fag end of her retirement, whereas prima facie the nature of dispute appears to be a 'Service Dispute.'

9. It is strenuously submitted by learned Senior counsel for the applicant that the applicant has joined the investigation as and when required by the Investigating Officer. He further submitted that there is not even an iota of admissible evidence against the applicant and she has been falsely implicated. He further submitted that now the charge sheet stands filed, so there is no requirement of any sort of custody or custodial interrogation of the applicant. It is further submitted by the learned Senior Counsel for the applicant that the applicant has also not misused the interim protection granted to her by the Court. There is definite apprehension that she might be arrested in the present case. In support of his argument, learned senior counsel relied upon the judgements of **Shri Gurbaksh Singh Sibbia and others Vs state of Punjab, AIR 1980 SC 1632; Sushila Aggarwal and others Vs State (NCT of Delhi) and another, (2020) 5 SCC 1.**

10. On the other hand, learned counsel for the informant as well as learned counsel for the State have vehemently opposed the prayer for bail by contending that applicant has been taken into custody in another case being Case Crime No. 158 of 2004, under Sections 468, 467, 471, 420, 379 IPC, and in Case Crime No. 38 of 2004, under Sections 204, 506 IPC, P.S. Civil Lines, District Prayagraj, therefore, the present anticipatory bail application is not maintainable. In this regard, learned counsels have placed reliance on the case of **Narinderjit Singh Sahni Vs Union of India, (2002) 2 SCC 210; Sunil Kallani Vs State of Rajasthan, 2021 SCC Online Raj 1654 (Rajasthan High Court).** It is further submitted by learned counsel for the informant and learned AGA for the State that while

disposing of the application u/s 482 Cr.P.C., the applicant was directed to surrender and apply for bail before the court below within two weeks but the said order has not been complied with by the applicant.

11. Refuting the said contention, learned Senior counsel submitted that merely because it was directed by this Court while disposing of the application under Section 482 Cr.P.C. to the applicant to surrender and apply for bail does not dilute the applicant's right to file anticipatory bail under Section 438 Cr.P.C. In support of his argument learned counsel relied upon the case of **Vinod Kumar Sharma and Another Vs State of Uttar Pradesh and another, 2022 1 Crimes (SC) 193.**

12. In the case of **Vinod Kumar Sharma (supra)**, the Hon'ble Supreme Court observed that "Merely because it was kept open for the petitioners to surrender and apply for Regular Bail after filing of the charge sheet, the same does not preclude the petitioners to apply for anticipatory bail under Section 438 Cr.P.C. after filing of the charge sheet".

13. So far as the question of maintainability of the present anticipatory bail application is concerned, this issue has not been addressed by the Hon'ble Apex Court as yet although a co-ordinate Bench of this Court in **Rajesh Kumar Sharma Vs CBI, 2022 0 Supreme (All) 1331**, has examined the issue of maintainability of anticipatory bail where the accused was already arrested in another case and hold that the anticipatory bail would not lie and would not be maintainable, if a person is already arrested and is in custody of police or judicial custody in relation to another criminal case, which may be for similar

offence or for different offences. Similar view has also been expressed in the case of **Sunil Kallani Vs State of Rajasthan, 2022 0 Cr. L.J. 1378** by the Rajasthan High Court.

14. Section 438 Cr.P.C. provides an opportunity to a person to move an application for direction that if he is to be arrested in a case and the said person has **reasons to believe** that he shall be arrested then he may be released on bail. It is cardinal principle of law that every law is designed to promote and further the ends of justice. Statutory interpretation, purpose and the spirit of the provision must be gathered from its intendment. A plain reading of the provision of Section 438 Cr.P.C. as amended in State of Uttar Pradesh would show that the only restriction provided is under Section 438 (6) of the Cr. PC, which says that the provision will not apply to accusations of offences which are stated in Section 438 (6) (a) & (b) of the Cr.P.C. and in absence of any specific restrictions on the exercise of the power to grant anticipatory bail clearly indicates that the legislature intended to confer and has in fact conferred a very wide discretion on the High Court and the Court of Sessions to grant anticipatory bail. The Law Commission of India in the 41st Report reiterated the principles concerning bail. One of the relevant principles in this regard is that "bail is a matter of discretion if the offence is non-bailable". Discretion in Section 438 Cr.P.C. should not be exercised with regard to an offence punishable with death or imprisonment for life unless the Court at that very stage is satisfied that such a charge is false or groundless. Under Section 438, Cr.P.C., discretionary power has been conferred on the Court to grant pre-arrest bail. The judicial discretion vested in the Court requires it to be

appropriately exercised with the proper application of mind in determining whether a case is a fit case for grant of anticipatory bail or not.

15. If the non-maintainability of the application for the grant of anticipatory bail is accepted as the correct position, then the element of discretion, which is available with the court, would be taken away. Even if there may be multiple FIRs against the accused, the court is very much within its competence to consider those factors within the existing statutory framework. Section 438(1) Cr.P.C., inter alia, provides the nature and gravity of the accusation read with the antecedents of the accused as factors that have to be taken into consideration by the court exercising its discretion to grant anticipatory bail. And as is true for any matter requiring the exercise of discretion, the same ought to be done not capriciously, but rather judiciously and within the well-accepted and well-established parameters.

16. In the case of **Shri Gurbaksh Singh Sibbia and others Vs state of Punjab, AIR 1980 SC 1632**, the Hon'ble Apex Court has made the following observation:-

"39. Fifthly, the provisions of Section 438 cannot be invoked after the arrest of the accused. The grant of "anticipatory bail" to an accused who is under arrest involves a contradiction in terms, insofar as the offence or offences for which he is arrested, are concerned. After arrest, the accused must seek his remedy under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested"

17. As per the aforesaid decision of Hon'ble Apex Court it is very much clear that anticipatory bail will not be maintainable in case a person is in custody in the same offence for which pre-arrest bail is sought, the restriction, if any, upon maintainability of pre-arrest bail will be there only if a person is in custody in that particular offence itself.

18. While going through the various pronouncements of the Hon'ble Apex Court as well as plain reading of the provision of Section 438 Cr.P.C., there is no such bar in Cr.P.C. or any statute which prohibits Session or the High Court from entertaining and deciding an anticipatory bail, when such person is already in judicial or police custody in some other offence. The restriction cannot be stretched to include arrest made in any other offence as that would be against the object and spirit of the provision.

19. In the present case, the applicant is in custody with respect to another case crime as afore-stated and she is yet to be arrested by police in the present case. As per the judgment of the Hon'ble Apex Court in the case of **Shri Gurbaksh Singh Sibbia and others (supra)**, the restriction is only when the pre-arrest bail is sought for the same offence in which arrest is already made.

20. The case of **Narinderjit Singh Sahni and Another (supra)** relied upon by the learned counsel for the State as well as informant was in respect of maintainability of Article 32 wherein relief in the nature of Section 438 was sought. Even, the said judgment does not hold in very clear terms that a person arrested in one offence cannot seek the relief provided under Section 438 Cr.P.C. in another offence merely on the

ground that he has been taken into custody in another offence.

21. A person apprehending arrest on accusation of having committed a non bailable offence has every right, even if he is arrested in number of cases, to move in each of offence registered against him irrespective of the fact that he is already in custody but for different offence, for the reason that every such application will have to be heard and decided on merits independent of another crime in which he is already in custody. Thus, the stand taken by learned State counsel regarding non-maintainability of the application cannot be approved.

22. Learned Senior counsel has also drawn attention of the Court towards a recent judgement of Hon'ble Apex Court in the case of **Md Asfak Alam Vs The State of Jharkhand and another (Criminal Appeal Nos, 2207 of 2023 arising out of Special Leave Petition (Criminal) No. 3433 of 2023 decided on 31.07.2023**, wherein the Apex Court emphasizes the paramount importance of personal liberty and issued landmark guidelines regarding anticipatory bail. In the said case, the appellant, Md. Asfak Alam, had sought anticipatory bail after facing allegations under various sections of the Indian Penal Code and the Dowry Prohibition Act. However, his plea was dismissed by the High Court, and further directed him to surrender before the Trial Court and seek regular bail. The Apex Court has held that arrest should not be made routinely, and the exercise of this power must be guided by the necessity of custodial investigation or preventing the accused from tampering with evidence or influencing witnesses. The Apex Court, referring to various cases,

including **Arnesh Kumar v. State of Bihar and Another, (2014) 8 SCR 128**, to lay down the guidelines for granting anticipatory bail, emphasizes that such bail should be granted unless there are exceptional circumstances.

23. Having considered the arguments advanced by learned counsel for the parties, judgements relied upon by the learned counsel for the parties, and considering the nature of accusations and antecedents of applicant, since the charge sheet has been filed without the arrest of the applicant all the material evidence and documents have been collected, the applicant was also granted interim protection and there are no allegations that during the period of interim protection she ever tried to influence the witnesses or tamper with the evidence, in these circumstances, the bail application is allowed. She is directed to be enlarged on anticipatory bail as per the Constitution Bench judgment of the Apex Court in the case of ***Sushila Aggarwal vs. State (NCT of Delhi)- 2020 SCC Online SC 98***. The future contingencies regarding anticipatory bail being granted to applicant shall also be taken care of as per the aforesaid judgment of the Apex Court.

24. In the event of arrest, the applicant shall be released on anticipatory bail. Let the applicant Dr. Rajni Tripathi, involved in the aforesaid crime be released on anticipatory bail on furnishing a personal bond of Rs. 50,000/- with two sureties each in the like amount to the satisfaction of the trial court concerned with the following conditions:-

(1) The applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from

disclosing such facts to the Court or to any police officer; and

(2) The applicant shall not leave the country during the currency of trial without prior permission from the concerned trial Court.

(3) The applicant shall surrender her passport, if any, to the concerned Court forthwith. Her passport will remain in custody of the concerned Court.

(4) The applicant shall file an undertaking to the effect that she shall not seek any adjournment on the dates fixed for evidence and 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 to ensure presence of the applicant.

(5) In case, the applicant misuses the liberty of bail, the Court concerned may take appropriate action in accordance with law and judgment of Apex Court in the case of ***Sushila Aggarwal vs. State (NCT of Delhi)- 2020 SCC Online SC 98***.

(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 his in accordance with law.

25. In default or misuse of any of the conditions, the Public Prosecutor/ Investigating Officer/ first informant-complainant is at liberty to file appropriate application for cancellation of anticipatory bail granted to the applicant.

applicant is entitled to be released on bail –
direction issued, accordingly. (Para – 7, 8, 9)

Bail Application disposed of. (E-11)

List of Cases cited:

1. Monish Vs St. of U.P. & ors., Criminal Misc.
Bail Application No.55026 of 2021

2. P. Yuvaprakash Vs St. Rep. by Inspector of Police, 2023 LiveLaw (SC) 538.

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

1. Heard Shri Prabhat Kumar Mishra, Advocate holding brief of Shri Rahul Kumar Shukla, learned counsel for the applicant, Shri Rajesh Kumar Singh, learned AGA-I for the State and Shri Dilip Kumar Pandey, learned counsel for the complainant and perused the record.

2. The present bail application has been filed by the applicant Sandeep Kumar with a prayer to enlarge him on bail in Case Crime No.055 of 2022, under Sections-363, 366, 376(3) I.P.C., and Section 5/6 of The Protection of Children from Sexual offences (POCSO) Act, Police Station - Shivratanganj, District Amethi.

3. Learned counsel for the applicant has submitted that the First Information Report was lodged by mother of the prosecutrix under Sections 363, 504 IPC on 06.04.2022. As per version of the First Information Report, she has stated that her daughter was missing. She further stated that she had gone to the house of Kusma, wife of Vinay Rawat and asked whereabouts of her daughter but she was scolded by her and her family members.

4. Learned counsel submitted that the prosecutrix was recovered after one month

(2023) 8 ILRA 56
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.08.2023

BEFORE

THE HON'BLE BRIJ RAJ SINGH, J.

Criminal Misc. Bail Application No. 10246 of
2022

Sandeep Kumar ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:

Bhoomika Bajpai, Chandra Bhanu Singh,
Prashant Singh, Rahul Kumar Shukla

Counsel for the Opposite Parties:

G.A., Dilip Kumar Pandey

Criminal Law – Indian Penal Code,1860 – Sections 174-A, 229-A, 363, 366, 376(3) & 504 - Protection of Children from Sexual offences (POCSO) Act,2012 - Sections 5 & 6 – Criminal Procedure Code,1973 - Sections 82, 164 & 313 - Evidence Act, 1872 – Section 35- Bail Application - FIR - offence of Kidnapping, abducting, inducing women to compel her marriage as well as Rape – Charge-sheet - Bail application – court finds that, plea has been taken by complainant that as per school leaving certificate, age of prosecutrix is below 16 years therefore, it is presumed that she is minor – held, without expressing any opinion on merits of case and after considering the argument that as per medical report as well as Parivar register, age of the prosecutrix is found to be 18 years and St.ment of prosecutrix under section 164 Cr.P.C. indicates that it is a case of consent and argument that applicant having no criminal history is languishing in jail since and looking to law points cited above, Court of opinion that

26 days and in her statement recorded under Section 164 Cr.P.C., she has deposed that she had gone to Haryana with the applicant out of her own free will. She has performed marriage in the temple and used to reside with the applicant as his wife. She has further deposed that police had taken her in custody on 28.05.2022 and took her to Raebareilly Station and deposed that she did not want to contest the case.

5. Learned counsel further submitted that the prosecutrix refused for internal medical examination. As per ossification test, it was found that the prosecutrix was more than 18 years and was major. It is further submitted that as per Pariwar register, the date of birth of the applicant is recorded as 2004 and she is more than 18 years of age. Learned counsel for the applicant has submitted that though school leaving certificate indicates the date of birth as 12.05.2006 and appears to be minor but looking to the other relevant documents i.e. Pariwar Register and ossification test, it is evident that the prosecutrix is more than 18 years of age. Learned counsel submitted that it is a case of consent and as per the statement of the prosecutrix, it has come on record that she has performed marriage with applicant and she had gone along with the applicant to Haryana.

6. In support of his contention, learned counsel for the applicant has placed reliance upon a judgment of the Apex Court reported in **2023 LiveLaw (SC) 538 P. Yuvaprakash vs. State Rep. by Inspector of Police**. The relevant para nos. 14 and 19 of the judgment are quoted below :

"14. Section 94 (2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned

examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through "an ossification test" or "any other latest medical age determination test" conducted on the orders of the concerned authority, i.e. Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate or matriculation or equivalent certificate was considered. Ex. C1, i.e. the school transfer certificate showed the date of birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness, i.e., CW-1. The burden is always upon the prosecution to establish what it alleges; therefore, the prosecution could not have been fallen back upon a document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the records for the year 1997 in respect to the births and deaths were missing. Since it did not answer to the description of any class of documents mentioned in Section 94 (2)(i) as it was a mere transfer certificate, E C-1, could not have been relied upon to hold that M was below 18 years at the time of commission of the offence."

.....

19. It is clear from the above narrative that none of the documents produced during the trial answered the description of "the date of birth certificate from the school" or "the matriculation or equivalent certificate" from the concerned examination board or certificate by a corporation, municipal authority or a Panchayat. In these circumstance, it was

incumbent for the prosecution to prove through acceptable medical tests/examination that the victim's age was below 18 years as per Section 94 (2)9iii) of the JJ Act. PW-9, Dr. Thenmozhi, Chief Civil Doctor and Radiologist at the General Hospital at Vellore, produced the X-ray reports and deposed that in terms of the examination of M, a certificate was issue stating " that the age of the said girl would be more than 18 eyars and less than 20 years". In the cross examination, she admitted that M's age could be taken as 19 years. However, the High Court rejected this evidence, saying that "when the precise date of birth is available from out of the school records, the approximate age estimated by the medical expert cannot be the determining factor". This finding is, in this court's considered view, incorrect and erroneous. As held earlier, the documents produced, i.e., a transfer certificate and extracts of the admission register, are not what Section 94(2)(i) mandates; nor are they in accord with Section 94 (2)(ii) because DW-1 clearly deposed that there were no records relating to the birth of the victim, M. In these circumstances, the only piece of evidence, accorded with Section 94 of the JJ Act was the medical ossification test, based on several X-rays of the victim, and on the basis of which PW-9 made her statement. She explained the details regarding examination of the victim's bones, stage of their development and opined that she was between 18-20 years; in cross examination she said that the age might be 19 years. Given all these circumstances, this Court is of the opinion that the result of the ossification or bone test was the most authentic evidence, corroborated by the examining doctor, P-9."

7. Learned counsel for the applicant has also placed reliance upon the judgment in the case of **Monish vs. State of U.P. and**

others passed by the coordinate Bench of this Court in Criminal Misc. Bail Application No.55026 of 2021. He has relied upon para Nos.12, 13, 14, 15, 43, 54 to 67, 59, 60, 91 92, 93, 94. The relevant para nos. 54 and 93 are quoted hereasunder:

"54. *With the advantage of good authorities, the discussion on this issue can now be concluded with the following summation:*

1. *The presumptions contemplated by law may vary from statute to statute as regards their nature and manner of applicability.*

2. *Application of the presumptions contemplated in statutes does not preclude the courts from considering peculiar facts and circumstances of a case, nor do they compel the courts to accept the prosecution version as a gospel truth without due application of mind.*

3. *The stage and manner in which the presumption shall apply will depend on the statutory scheme, facts and circumstances of a case and the nature of evidence.*

4. *All presumptions are rebuttable. A challenge can weaken or rebut the presumption.*

5. *The presumptions shall be applied in a manner that they are consistent with the first principles of fair trial in criminal jurisprudence and due process in constitutional processual jurisprudence.*

6. *The condition precedent for triggering the presumption is that the primary or foundational facts have to be established by the prosecution by attaining standard of evidence which is beyond reasonable doubt and in accordance with law.*

7. *Presumptions created in a statute will be attracted by the following*

process. In the first instance after the primary or foundational facts have to be established by applicable standards of evidence. At this stage, the accused will be alerted to his right to assail the presumption. The accused has to be afforded an opportunity to rebut the presumption. After these prerequisites are satisfied, the presumption may ripen into an established fact and made the basis of a judicial finding upon consideration of evidences in the facts and circumstances of a case.

7. The manner and stage of triggering the presumption regarding age related documents under Section 94 of the JJ Act for a juvenile offender shall differ from the case of a minor victim and against an adult accused under the POCSO Act.

8. Prematurely triggering the presumptions under Section 94 of the JJ Act, 2015 and Section 29 of the POCSO Act, 2012 or inappropriately applying them at the stage of bail will violate the law and cause miscarriage of justice.

93. In wake of the preceding narrative, the manner of consideration of age of a victim in a bail application under the POCSO Act shall be guided as follows:

I. The procedure for determination of a victim's age provided in Section 94 of the JJ Act, 2015 read with JJ Rules, 2016 shall not apply to bail applications, though the documents therein are liable to be considered. Age of victim as per procedure prescribed in Section 94 of the JJ Act, 2015 is determined conclusively only in the trial.

II. The line of enquiry and relevant factors to assess the age of the victim in a bail application under the POCSO Act offences are these. The consideration of the age related documents mentioned in Section 94 of the JJ Act, 2015 i.e. school certificate (including

matriculation), date of birth certificate issued by a local body, and medical report for age determination as produced by the prosecution is a good start point in the process.

III. The accused has a right to assail the veracity of the age of the victim as stated in the prosecution case.

IV. The court while deciding the said bail application is obligated to independently:

A. Examine the challenge laid to the victim's age by the accused applicant.

B. Evaluate credible doubts about the age of the victim.

V. The assessment of age in a bail order is of a tentative nature, and is based on probative value of documents which are yet to be proved or statements of witnesses who are still to be examined in court. Such determination by a court is not conclusive and is made only for the limited purpose for deciding the bail application.

VI. Same parameters shall apply to the bail applications filed at a different stages of trial. However, with each stage of the trial, the threshold of the satisfaction of the court may be raised in the facts and circumstances of the case. Heightened threshold of satisfaction means the duty of the court to give full weight to prosecution evidence, and due regard to the defence case while considering grant of bail.

VII. It is not advisable to lay down an inflexible or a straitjacket formula for grant of bail which will fit all cases. Practices and precedents in point are a reliable guide for the Court while exercising its judicial discretion in bail proceedings and a good defence against arbitrary decisions.

4. Learned counsel for the applicant has further relied upon Section 35 of the Evidence Act and has submitted that

medical report as well as Parivar register are public documents and the same are important facts as per Evidence Act and the benefit of doubt will go in favour of the applicant so far as bail is concerned.

5. On the other hand, Shri Dilip Kumar Pandey, learned counsel for the complainant has submitted that as per school leaving certificate, the age of the prosecutrix is below 16 years therefore, it is presumed that she is minor. He has further submitted that though it is a case of consent but if the girl is minor, consent has no meaning, thus the bail is liable to be rejected. It is further submitted that Juvenile Justice Act, 1994 will prevail and it should be inferred that the prosecutrix is minor.

6. Shri Rajesh Kumar Singh, learned AGA-1 has also opposed the prayer for bail and has invited attention of this Court towards the fact that as per school leaving certificate, the age of the girl is 16 years and she is minor and consent of minor has no value, therefore, the bail of the applicant is liable to be rejected.

7. Without expressing any opinion on the merits of the case and after hearing learned counsel for the parties and considering the argument that as per medical report as well as parivar register, the age of the prosecutrix is found to be 18 years and the statement of the prosecutrix under section 164 Cr.P.C. indicates that it is a case of consent and the argument that the applicant having no criminal history is languishing in jail since 01.06.2022 and looking to the the law points cited above, I am of the opinion that the applicant is entitled to be released on bail.

8. Let the applicant, **Sandeep Kumar**, be released on bail in the above

case crime number on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of Court concerned with the following conditions :-

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under Section 82 Cr.P.C. is issued and the applicant fails to appear before the court on the date fixed in such proclamation, then the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

9. It is made clear that the observations made in this order are limited to the purpose of determination of this bail application and will in no way be construed

as an expression on the merits of the case. The Trial Court shall be absolutely free to arrive at its independent conclusions on the basis of evidence led unaffected by anything in this order.

(2023) 8 ILRA 61
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.08.2023

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Misc. Bail Application No. 14783 of
2022

Anil Kumar Tulsiani ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:

Vaibhav Kalia, Abhinav Mishra, Vidhu
Bhushan Kalia

Counsel for the Opposite Party:

G.A., Pranjal Krishna

Criminal Law - Criminal Procedure Code, 1973 – Sections 156(3), 482 & 438 - Indian Penal Code, 1860 – Sections 120B, 323, 504, 506, 406, 420, 467, 468 & 471-

Application for bail – FIR - offence of criminal breach of trust, cheating, forgery and criminal conspiracy – allegations of financial irregularities and fraud related to a real eSt. project - and accused-applicant and his brother failed to deliver flats booked in a housing scheme, mortgaging the property to a bank, and defaulting on the loan, leading to the bank taking possession of the flats - the applicant claimed innocence, stating that the dispute was civil in nature and that he had been falsely implicated - The St. opposed the bail, citing the applicant's criminal history involving multiple similar cases – court finds that, the law provides civil remedies for redressal of grievances alleged in the FIR – impugned proceedings have been initiated with an oblique motive to coerce the

accused persons to redress the civil grievances of the veiled commercial corporate entity being represented by the complainant – held, (i) tendency of misusing the criminal proceedings for claiming enforcement of civil rights by indirect methods and evading payment of stamp duty., registration fee and court fee cannot be appreciated – and (ii) applicant is languishing in jail for more than one year and without making any observations, which may affect the merits of the case, - hence, applicant is entitled to be released on bail – accordingly, bail application is allowed. (Para – 16, 17, 18)

Application Allowed. (E-11)

List of Cases cited:

1. Indian Oil Corpn. Vs NEPC India Ltd., (2006) 6 SCC 736
2. G. Sagar Suri Vs St. of U.P., (2000) 2 SCC 636

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

1. Heard Sri Vaibhav Kalia Advocate, the learned counsel for the applicant, Sri Gyanendra Singh, the learned AGA for the State and Sri Nandit Srivastava Senior Advocate assisted by Sri Panjal Krishna Advocate, the learned counsel for the complainant.

2. The instant application has been filed seeking release of the applicant on bail in Case Crime No. 595 of 2021, under Sections 409, 420, 504, 506, 467, 468, 471 & 120-B IPC, Police Station Vibhuti Khand, District Lucknow.

3. The aforesaid case has been registered on the basis of an F.I.R. lodged on 08.11.2021 against the applicant and his brother Mahesh Tulsiyani, alleging that the complainant had booked three flats in the name of his company in Golf View Apartment Scheme in the year 2012. The flats were not constructed within the

stipulated period and the flats had not been finished properly. No penalty was paid for the delay in handing over the flats. The complainant had sold away one flat in the year 2015. The FIR categorically states that some consideration remains to be paid by the complainant. It is further alleged that the entire building had been mortgaged by the accused persons with a bank and the loan account was declared N.P.A. and the bank took over possession of the flats.

4. In the affidavit filed in support of the bail application, it has been stated that the applicant is innocent and he has falsely been implicated in the present case. In para 60 of the affidavit, the applicant's involvement in 7 other cases have been disclosed.

5. The State and the complainant have filed counter affidavits opposing the bail application.

6. The applicant has filed a rejoinder affidavit.

7. Regarding the criminal history, the learned counsel for the applicant has stated that the applicant has been implicated in a total of 15 cases of similar nature. Although the State has claimed that the applicant is involved in 17 cases, the learned counsel for the applicant has submitted that 6 of the cases have already been quashed by this Court and copies of the orders have been annexed as Annexure No. 10 of the affidavit filed in support of the application.

8. The learned counsel for the applicant has submitted that the dispute is entirely of civil nature regarding which no civil proceedings have been initiated by the complainant.

9. Sri. Nandit Srivastava Senior Advocate, the learned counsel for the complainant has vehemently opposed the bail application and he submits that on the basis of advertisement given in newspapers and allurements given by the applicant, who is a Director of Tulsiani Construction and Developers Private Limited, the complainant had booked three flats in the year 2012 in Golf View Apartment Scheme in the year 2012 in the name of his Company. The complainant paid Rs.1.25 Crores to Tulsiani Construction and Developers Private Limited for the flats after taking loan from a Bank. The complainant had sold one of his flat in the year 2015. Thereafter he deposited Rs. 68 Lakhs and 1 Crore 24 Lakh respectively for the two other flats. Tusiani Builders issued allotment letter and builder buyer agreement to ensure allotment of flats. As per builder buyer agreement, fine was to be imposed in delay in giving the possession. Flats were not constructed on time and after delay of about four years, possession was offered in three towers without the works inside the flat having been finished and the services which were offered at the time of booking viz. club, parking pool play area were not completed. Penalty of flat which was sold by Complainant in the year 2015 was not given to the Complainant. In the year 2016, Subsequently the applicant told that loan of Bank of Baroda was pending against said flats wherein all the flats were mortgaged and he demanded Rs. 10 Lakh per flat i.e. Rs. 20 Lakh and also asked for Rs. 33 Lakh as interest on both the flats to which Complainant objected. The applicant threatened the Complainant that if money would not be given as per demant, he would sell the flat to someone else and would usurp his whole money. As the applicant failed to repay the loan amount, the loan account was declared as NPA and

possession over the flats has been taken over by the Bank. No information in this regard was given by the applicant to any of the flat buyer which is cheating. When Complainant talked about the same to Anil Tulsiani and Mahesh Tulsiani they used filthy language, abused him and threatened him to pay the demanded money otherwise his whole money would go in vain.

10. The learned Counsel for the applicant has further submitted that after considering the entire facts of the case, the learned Sessions Judge, Lucknow has rejected the bail application of the applicant after recording that the accused-applicant and some others have prepared forged documents with regard to ownership of property Khasra No. 22, 35, 38, 44, 46, 47, 65, 66 and thus, at the time of booking of the aforesaid flats, accused-applicant had no land as such and nor any lay-out plan was passed Lucknow Development Authority and accordingly.

11. What prima facie appears from the averments made in the FIR is that the complainant's company had entered into an agreement to purchase three flats in Golf View Apartment Scheme launched by Tulsiani Construction and Developers Private Limited, of which the applicant is a director. The complaint has not disclosed the name of the company which had booked the flats, although the allottee company would be a separate juristic person. From the material available before the Court at this stage prima facie it appears that no registered agreement had been executed between the parties regarding purchase of flats where any agreement for purchase of immovable property of value exceeding Rs. 100/- can only be made through a registered agreement, after payment of the

prescribed stamp duty and registration fee.

12. The corporate entity which had entered into agreement for purchasing three flats and evaded payment of stamp duty and registration fee payable in respect of the agreement for purchase of the flats, and which has kept itself veiled, has committed an offence of evasion of stamp duty payable to the public exchequer, thereby illegally depriving the public at large of the benefits of that amount, which affects every single citizen of the country.

13. Although the amount of stamp duty and registration fee payable in respect of three agreements may prima facie appear to be small, the Court cannot restrain itself from observing that now-a-days a trend is developing very fast that persons acquire interest in immovable properties evade payment of stamp duty and registration fee and the cumulative effect thereof causes a significant loss to the public exchequer. Thereafter when some disputes occur, the purchasers initiate criminal prosecution for putting pressure on the seller to transfer the property or to repay their amount, because they cannot invoke the civil remedies for the reason that the unregistered agreement is inadmissible in evidence and no rights can be claimed in respect thereof in civil proceedings.

14. As far back as in the year 2006, the Hon'ble Supreme Court had observed in **Indian Oil Corpn. v. NEPC India Ltd.**, (2006) 6 SCC 736, that: -

“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. Such a tendency is seen in several family disputes also, leading to irretrievable breakdown of marriages/families. 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 through criminal prosecution should be deprecated and discouraged. In G. Sagar Suri v. State of U.P. (2000) 2 SCC 636, this Court observed:

“It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice.”

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. One

positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under Section 250 CrPC more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may.”

15. However, instead of being checked and restrained, the tendency of entangling opponents in criminal cases to indirectly pressurize them to enter into a settlement for redressal of their grievances of infringement of civil rights is ever growing. A very large share of the judicial time of the Courts is consumed in dealing with matters involving allegations of disputed contractual rights, for which no civil proceedings for recovery of money, cancellation of agreement, specific performance of contract etc., are initiated, which require payment of court fee. The amount paid as court fee would obviously add to the public exchequer and would be used for the benefit of public at large.

16. This tendency of misusing the criminal proceedings for claiming enforcement of civil rights by indirect methods and evading payment of stamp duty, registration fee and court fee cannot be appreciated by the Courts and it should not be encouraged. It is nothing but cheating committed against the public exchequer and the persons who would stand benefited thereby.

17. Although the acts alleged in the F.I.R. may make out commission of some offence punishable under criminal law, the dispute between the parties predominantly appears to be of the civil nature. The law provides civil remedies for redressal of grievances alleged in the FIR that the

possession of the flats was not delivered within the stipulated period and that the flats were not finished in a proper manner. It is not that the complainant has initiated the criminal proceedings for merely punishment of the accused persons and he has initiated civil proceedings separately for enforcement of his rights, the complainant has initiated criminal proceedings only which prima facie indicates that the criminal proceedings have been initiated with an oblique motive to coerce the accused persons to redress the civil grievances of the veiled commercial corporate entity being represented by the complainant.

18. Having considered the aforesaid facts and circumstances of the case, coupled with the fact that the applicant is languishing in jail for more than one year and without making any observation, which may affect the merits of the case, I am of the view that the applicant is entitled to be released on bail in the aforesaid crime.

19. Accordingly, this bail application stands allowed.

20. Let the applicant Anil Kumar Tulsiani be released on bail in Case Crime No. 595 of 2021, under Sections 409, 420, 504, 506, 467, 468, 471 & 120-B IPC, Police Station Vibhuti Khand, District Lucknow on furnishing a personal bond and two sureties each in the like amount to the satisfaction of magistrate/court concerned, subject to following conditions:-

(i) the applicant shall not tamper with the prosecution evidence;

(ii) the applicant shall not pressurize the prosecution witnesses;

(iii) the applicant shall appear on each and every date fixed by the trial court.

(2023) 8 ILRA 65
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 28.08.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Appeal No. 213 of 2019

Smt. Shraswati		...Appellant
	Versus	
State of U.P.		...Respondent

Counsel for the Appellant:
Piyush Kumar Singh

Counsel for the Respondent:
Govt. Advocate

Criminal Law - Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 8, 17, 20, 35 & 54 - Code of Criminal Procedure, 1973 - Sections 161 & 313 - Appeal against conviction - Rigorous imprisonment with fine - As per recovery memo, during search, opium along with nepali currency recovered from possession of appellant. (Para 2, 3)

Statement of P.Ws.1 to 3 shows non-compliance of Section 50, NDPS Act, as mandatory, prosecution not assigned any reason for not producing other members of raiding team as prosecution witness - Non-compliance of Section 57, NDPS Act and Standing Instructions - Link evidence not complete as malkhana register not produced - No independent eye-witness to alleged recovery - Appellant prior to search not produced before Magistrate, nor effort made by P.W.1 and P.W.2 to produce her - Prosecuting agency produced only two witnesses of fact despite fact that as per prosecution case itself, other witnesses of fact present at place of occurrence, prosecution failed to

give justification - Prosecution case based on sole testimony of PW-1 and PW-2 - The seal, used for sealing samples of contraband substance, not sent to FSL rather kept by PW-1 himself - Recovery of contraband not proved by prosecution - Impugned order set aside. (Para 30 to 35)

Appeal allowed. (E-14)

List of Cases cited:

1. Arif Khan alias Agha Khan Vs St. of Uttarakhand, AIR 2018 SC 2123, (Para 28)
2. Vijaysinh Chandubha Jadeja Vs St. of Guj. reported in 2011 (1) SCC 609, (Para 32)
3. Ram Pal Yadav Vs St. of U.P. reported in 2008 (1) JIC 776, (Para 10, 11)
4. St. of Punj. Vs Balbir Singh reported in (1994) 3 SCC 294, (Para 24)
5. Union of India Vs Bal Mukund & ors., 2009 (12) SCC 161, (Para 36)
6. Valsala Vs St. of Kerala, AIR 1994 S.C. 117, (Para 4)
7. St. of Raj. Vs Gurmail Singh, 2005 (1) JIC 844 (SC), (Para 3)

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

(1) Heard Shri Piyush Kumar Singh, learned Counsel for the appellant and Ms. Nikita Mishra, learned A.G.A. for the respondent State.

(2) This criminal appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 has been preferred by the appellant, **Smt. Shraswati**, challenging the judgment and order dated 27.01.2017 passed by the Additional Session Judge, F.T.C.-II, Bahraich in Special Sessions Trial No. 48 of 2012 : *State of U.P. vs. Smt. Shraswati*, arising out of Case Crime No.

403 of 2012, under Sections 8/17/20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "**N.D.P.S. Act, 1985**"), police station Rupaideeha, district Bahraich, whereby the appellant was convicted under Sections 8/17/20 N.D.P.S. Act, 1985 and sentenced him to undergo 12 years' rigorous imprisonment and a fine of Rs.1,25,000/ and in default of payment of fine to undergo additional one year simple imprisonment.

(3) The prosecution case as per the recovery memo (Ext. Ka.1), is that on 29.7.2012, at 15.00 hours, an information was received from reliable sources that one Nepalese woman wearing red saree would reach to India from Nepal via Rupaideeha main road with opium. Taking this information seriously and on the direction of Assistant Commandant Shri Ashwani Singh, S.I. Janak Singh along with Constable Ganesh Singh, Umesh Prasad Yadav, Neeraj Kumar Srivas, Suvita T., Neetu Pal, Sunita and Shyam Pratap Singh had constituted a special search team; reached at the check post of Armed Border Force located at Nepalganj-Rupaideeha main road along with informer; and started waiting there for the said woman to come. Around 17.15 hours, resembling the description given, one Nepali woman was seen coming from Nepal to India on a rickshaw. Upon a signal of the informer, the said Nepali woman was stopped by the woman constable for search. During search, something seemed to be tied around the waist of the said woman. Thereafter, following the orders of Human Rights and High Court, the said woman was told that bringing and carrying opium anywhere is an offence under Sections 8/20/17 of N.D.P.S. Act. The said woman was asked that whether she wants her search to be

made before Magistrate or any other place, then, the said woman told that when it is certain that she is carrying opium then they may take the search. Thereafter, on the spot, consent form was got prepared; it was read over to her; and got her signature/thumb impression on it. Thereafter, in the presence of Assistant Commandant, woman Constable Suvita T. and Sunita, who were present on the spot, searched each other but no incriminating material was found from them. After that, according to the order of Assistant Commander, Sunita T. was asked to search the said woman. On being asked during the search, the said woman stated her name as Saraswati wife of Hom Bahadur, resident of Ghorai New Bazar Gawisa Gorai, district Dang Nepal, aged about 28 years, and from her search, apart from the opium tied near the waist in red cloth, nepali currency amounting to 100/- and 20/- was recovered. After testing the recovered opium with the available drug testing kit, *prima facie* opium was found. Thereafter, on being weighed with the available beam scale, total weight of the recovered opium was 3kg 500gram. From the recovered opium a sample of 24x2 grams were drawn and the samples were sealed in a white cloth with the seal of SSB (Shashatra Seema Bal). Upon enquiry, the Nepali woman said that in the morning one man, namely, Pravesh Budha came and said her that if she delivers the maal (opium) to Rupaideeha (India) bus stop, he will give her nepali currency amounting to 6000/- and on this assurance, she agreed to do this work. Thereafter, on completing all necessary formalities, she was handed over to Police Station Rupaideeha for further action under N.D.P.S. Act. The copy of the recovery memo was read over to the appellant and her signature/thumb impression was taken on it. A copy of the recovery memo (Ext.

Ka.2) was also handed over to her, but she torned it and threw away.

(4) On the basis of aforesaid recovery memo (Ext. Ka.2), on 29.07.2012, at about 07:15 p.m., case crime no. 403 of 2012, under Section 8/20/17 N.D.P.S. Act was registered against the appellant Saraswati at police station Rupaideeha, district Bahraich. Head Moharrir Umesh Kumar Bhardwaj had scribed the chik F.I.R. (Ext. Ka-1), which has been mentioned in rapat no. 41 of the general diary of police station Rupaideeha and Ext. Ka. 10 has been entered on the carbon copy of it. During the investigation, the Investigating Officer had mentioned copy of the recovery memo, copy of rapat and the statements recorded under Section 161 Cr.P.C. of the scribe of F.I.R. Constable Moharrir Umesh Kumar Bhardwaj, accused/appellant Saraswati, complainant S.I. Janak Singh, Umesh Kumar Yadav, Head Constable Ganesh Singh Rawat, Niraj Kumar Srivas, Constable Suvita T., Constable Nitu Bala, Constable Sunita, Constable Shyam Pratap Singh, Aswani Kumar, Rasul, Moin, Constable Indresh Kumar in the general diary and after conducting inspection of the place of occurrence, site plan was prepared, which has been mentioned as Ext. Ka.7. For testing of recovered item, docket no. A-8/2 was prepared and filed the same on Forensic Science Laboratory, Mahanagar, Lucknow under serial no. 5830/12. After completion of the investigation, charge-sheet (Ext. Ka.8) was filed against the accused/appellant Saraswati and on receipt of the report from Forensic Science Laboratory, U.P., Lucknow, the same i.e. paper No. A-8/3 was filed.

(5) On 07.08.2014, the Additional Sessions Judge, Court No.4, Bahraich had framed charges against accused/appellant

Saraswati under Section 8/17/20 of N.D.P.S. Act. The charges were read out to the accused/appellant and explained. Accused/appellant pleaded not guilty to the charges and claimed to be tried.

(6) During trial, in all, the prosecution examined three witnesses, namely, P.W.1-Janak Singh, who is the complainant of the case; P.W.2-Suvita T., who searched the accused/appellant on the date of the incident; and P.W.3-Subhash Yadav, who is the Investigating Officer of the case. In support of its case, the prosecution has also produced the documentary evidence viz. consent form of accused Saraswati to search her during the course of search (Ext. Ka.1), Chik recovery memo (Ext. Ka.2), the arrest form of the accused Saraswati (Ext. Ka.3), memo of weight of recovered opium (Ext. Ka.4), memo of search (Ext. Ka.5), memo of the marks of fingers of left and right hand of accused (Ext. Ka.6), site-plan (Ext. Ka.7), charge-sheet (Ext. Ka.8), Chik F.I.R. (Ext. Ka.9), carbon copy of GD (Ext. Ka.10).

(7) After the completion of the prosecution evidence, the statement under Section 313 Cr.P.C. of the accused Saraswati was recorded, wherein her defence was of denial. She stated that charges are false and false recovery has been made. She stated that due to enmity, the complainant used to take begar from her and upon demand of her wages, he refused and due to this enmity, she has been falsely implicated by showing the recovery.

(8) P.W.1-Janak Singh, who is the complainant of the case and also the recovery witness, had reiterated the recital contained in the F.I.R. However, making improvement from the recovery memo, he had deposed that on the signal of the informer, the woman

Constable stopped her and asked her, then, she told that she is carrying opium tied in her waist. She was told that she has right to be searched before any Gazetted Officer or any Magistrate. P.W.1 had deposed that the Nepali woman said that she does not want to go anywhere and upon her consent, the consent letter (Ext. Ka.1) was prepared. He directed woman Constable Suvita T. (P.W.2) and Sunita, who after taking search of each other and after finding, no incriminating article each other, Suvita T. (P.W.2) conducted the search of the Nepali woman and found opium tied in her waist wrapped in red cloth and also nepali currency amounting to 100/- and 20/-. The recovered contraband was tested by the drug testing kit and it was found opium, which was weighed by beam scale and total weight of the recovered opium was 3 kg 500 grams, out of which, sample of 24 x 24 grams was taken from the recovered opium in a white cloth and sealed it and rest of the recovered opium were also sealed in a white cloth. After that describing the offence of Section 8/20 of the N.D.P.S. Act, the woman was taken into custody and recovered contraband was taken under police custody and sample seal was prepared. He also prepared the recovery memo (Ext. Ka.2). A copy of the recovery memo was also given to the accused/appellant Saraswati. He also prepared memo of notice of arrest as well as memo of search. He proved arrest memo (Ext. Ka.3), memo of weight of recovered opium (Ext. Ka.4), memo of search (Ext. Ka.5). He took the recovered contraband, the accused and the other documents prepared on the spot to police station Rupiadeeha and were deposited in the police station Rupiadeeha. He also deposited the recovered contraband to Malkhana.

In the cross-examination, P.W.1 had deposed that the Nepali woman was not searched before the Gazetted Officer or

the Magistrate rather she was searched in the presence of his Senanayak. The recovery memo was in the handwriting of Constable Shyam Pratap. On the recovery memo, all the eight persons of the search team have signed the recovery memo, which was prepared at 05:15 p.m. in the headquarter office and the signature of Commandant was not in the recovery memo as he was not present at that time and was out of station. The Investigating Officer did not went to inspect the place of occurrence.

(9) PW-2 Suvita T., who was posted as Constable in 7th Battalion S.S.B., Nanpara Company at Rupaideeha, had also repeated the same prosecution story. She had deposed before the trial Court that recovery memo was prepared by common person, namely, Shyam Pratap Singh upon the dictation of Janak Singh (P.W.1). She had deposed that the recovered contraband from accused Saraswati, which is brought in the Court, is the same which was recovered by her from the accused Saraswati and identified her signature on the same, which is Ext.1.

In cross-examination, P.W.2 had deposed that the search of the accused was not conducted by any Gazetted Officer rather search was taken by them (special team). During the general search, they (special team) had caught Saraswati (appellant) at the Border. She further deposed that the entire documentation and proceedings were done at the place where Saraswati was caught i.e. Rupaideeha Check Post. On the recovery memo, apart from her, all the other members of the search team signed on it. The signature of the Assistant Commander is not on the recovery memo as he was not present at the time of recovery of contraband. The sample

seal was prepared. She did not remember that after how much time, the recovered contraband and the accused were sent to the police station. She also not knew the name of the person who took the accused to the police station. She denied the suggestion that opium has not been recovered from Saraswati (appellant).

(10) P.W.3 S.I. Subhash Yadav (P.W.3), the Investigating Officer, in his examination-in-chief, had deposed that he had entered the copy of the chik report in CD-1 and recorded the statement of Constable Moharrir Umesh Kumar Bhardwaj, scribe of the chik F.I.R. and the statement of the accused Saraswati on the same day and mentioned in the CD-2 on 01.08.2012. He took the statement of the prosecution witness. He inspected the place of occurrence and prepared the site plan and said that the same site plan on which Ext. Ka7 is written. On 9.8.2012 prayer for remand was made. On 10.8.2012, he had written the CD-4 in which he has registered the receipts of the sample in the Forensic Science Laboratory and took the statement of constable Indresh in CD. After completing the investigation he filed the charge-sheet against the accused Saraswati and proved Ext. Ka-9. On 13.12.2012 SCD-1 was issued and report of the FSL Laboratory was mentioned in the SCD in which opium was found.

In the cross-examination, P.W.3 has stated that he inspected the site and prepared the site plan. He deposed that he is not aware whether the accused was searched before the Magistrate or not as this fact could be stated by S.S.B. personnel, however, he wanted to know this fact from the witnesses during the investigation, then, witnesses told him that accused had consented to give her search

from the staff who caught her, therefore, after preparing consent letter, search was conducted. He deposed that incident was of 29.07.2012 and he recorded the statement of complainant and witnesses on 01.08.2012. He prepared the docket of sample, which was sent to the Forensic Science Laboratory for testing on 8.8.2012 and the same was received in the Forensic Science Laboratory on 9.8.2012. He also deposed that the cost of the recovered contraband according to SSB was to the tune of Rs.35,00,000/-. He denied the suggestion that he had conducted the entire investigation while sitting at the police station and he did not go to the place of occurrence for conducting the investigation.

(11) Learned counsel for the appellant has submitted that there is no compliance of Section 50 of the NDPS Act. The report of arrest and seizure have not been sent within 48 hours to the immediate superior officer although prior information was received, however, the same has not been reduced in writing. According to him, malkhana register has not been produced; the date of deposit in Malkhana is not known; when the contraband deposited in Malkhana is also not known; test sample is missing; and sample seal was not produced before the trial Court. He also submitted that the secret prior information received has not been reduced into writing nor sent a copy of the same to the Senior Officer as mandated under Section 42 (2) of the NDPS Act.

(12) Learned A.G.A. has opposed the contention of the learned counsel for the appellant. It is submitted on behalf of the State that 3 kg 500 gm opium was found from the personal search of the

accused/appellant by the search team. The consent letter was prepared.

(13) So far as the first contention of learned counsel for the appellant that there is complete non-compliance of Section 50 NDPS Act is concerned, this Court has taken note of the fact that in the recovery memo dated 29.7.2012, the accused/ appellant was searched first and after it appeared to the searched team that there is something tied up in her waist, she was asked for the same and then she told that there is opium in it. After that giving reference to the provision of NDPS Act and human rights as well as orders of the Courts, she was asked whether she wanted to be searched in front of Magistrate or anywhere else, then she stated that once it is certain that there is a opium with her, then, they may take her search. The fact that as per the recovery memo, the accused/appellant was searched first and upon a suspicion arose that she is carrying opium in her waist, she was given the option to be searched before the Magistrate or anywhere else, thus, corroborated with the statement of P.W.2 Constable Suvita T, who, in her cross-examination, has stated that during the general search on the border, they had caught Saraswati. Both PW1-S.I. Janak Singh and PW2-Savita T. had stated that the appellant was informed of her right to be searched before the Gazetted Officer or the Magistrate in their examination-in-chief, however, both of them had admitted that search was not in front of any Gazzeted Officer or Magistrate. PW1-Janak Singh, in her cross-examination, had stated that in the closed room, she was searched by Constable Suvita T. (P.W.2) and she was not searched before any Magistrate or any Gazetted Officer rather she was searched before her Senanayak. PW 2-Suvita T., in

her cross-examination, had stated that the accused was not searched by any Gazetted Officer rather she was searched by them. It is clear from the recovery memo as well as the evidence of PW1-Janak Singh and PW2-Suvita T. that she was not searched before the Gazetted officer or the Magistrate. It is also clear that she was not searched before any independent witnesses.

(14) From the statement of PW1-Janak Singh and PW2-Suvita T., it is also clear that none of the police officials of the police party, who recovered the contraband opium, were Gazetted Officer. Thus, they were not empowered to make search the applicant as provided under Section 50 of the NDPS Act except in the presence of either Magistrate or Gazetted Officer. The search of the recovery of the alleged contraband opium has to be in direct authorization and confirmation that is requirement of Section 50 NDPS Act. It is incumbent and mandatory for the prosecution to prove that search and recovery were made from the applicant in presence of Magistrate or a Gazetted Officer.

(15) Hon'ble Supreme Court in the case of **Arif Khan alias Agha Khan v. State of Uttarakhand** : AIR 2018 SC 2123 has held in para 28 as under :-

"28. First, it is an admitted fact emerging from the record of the case that the appellant was not produced before any Magistrate or Gazetted Officer; Second, it is also an admitted fact that due to the aforementioned first reason, the search and recovery of the contraband "Charas" was not made from the appellant in the presence of any Magistrate or Gazetted Officer; Third, it is also an admitted fact that none of the police officials of the raiding party,

who recovered the contraband "Charas" from him, was the Gazetted Officer and nor they could be and, therefore, they were not empowered to make search and recovery from the appellant of the contraband "Charas" as provided under Section 50 of the NDPS Act except in the presence of either a Magistrate or a Gazetted Officer; Fourth, in order to make the search and recovery of the contraband articles from the body of the suspect, the search and recovery has to be in conformity with the requirements of Section 50 of the NDPS Act. It is, therefore, mandatory for the prosecution to prove that the search and recovery was made from the appellant in the presence of a Magistrate or a Gazetted Officer."

(16) In the case of **Vijaysinh Chandubha Jadeja Vs. State of Gujrat** reported in **2011 (1) SCC 609**, Hon'ble Supreme Court in para 32 has held that at the first instance, an effort should be made by the prosecuting agency to produce the suspect before the Magistrate to ensure generating more confidence of common man as compared to any other officer as it will add legitimacy to the search proceedings and will also strengthen the prosecution case as well.

(17) It is not disputed rather admitted that none of the members of the raiding officer is gazetted officer. No effort whatsoever was made by the raiding team to produce the accused before the Gazetted Officer or the Magistrate, hence it is a case of total non-compliance of Section 50 of NDPS Act which vitiates the search.

(18) So far as the contention of learned counsel for the appellant that Section 57 of the NDPS Act has not been complied with as no report of seizure of

property has been sent within 48 hours after the arrest to his immediate superior officer by the arresting officer is concerned, PW1-Janak Singh, PW2-Suvita T. and PW3-S.I. Subhash Yadav, in their statement, had nowhere stated that a report to the superior officer under the provisions of NDPS Act was sent. Thus prosecution has failed to prove compliance of Section 57 of the NDPS Act.

(19) This Court in the case of **Ram Pal Yadav Vs. State of U.P.** reported in 2008 (1) JIC 776 has held that to avoid any reasonable doubt of ante time reports, the report under Section 57 of the NDPS Act must be sent within 48 hours. Relevant paragraphs 10 and 11 are extracted below :-

"10. Section 57 deals with report of arrest and seizure. Even the Criminal Procedure Code is based on a system of "checks and balances" and in that Code it has been provided that at least in respect of a serious offence when a report is lodged at the police station a special report should be sent immediately to the higher officers. Such provision has been inserted to rule out any possibilities of ante-timed reports. Similarly in the N.D.P.S. Act also section 57 provide that whenever any person makes any arrest or seizure he shall submit report thereof to his superior officer within 48 hours of such arrest or seizure. But in the present case no such report has been brought on record which also creates a reasonable doubt, I find substance in these submissions.

11. It is true that these provisions are not mandatory and are merely directory as was held in the case of Babubhai Odhavji Patel and Ors Vs. State of Gujrat, reported in 2006(1) JIC 732 (SC) : (2005) 8 SCC 725, relied upon by the learned A.G.A. But these lapses shatter the value of

evidence and in such cases the possibilities of plantation of the contraband and cannot be ruled out as was held by this Court in the case of Roshan Lal Vs. State of U.P., reported in 2007(2) JIC 650 (SC) : 2007 (58) ACC 723. Even if the aforesaid provisions are directory it does not mean that those should be given a complete go by. In the present case these lapses do create a ring of doubt and possibility of plantation of contraband material as suggested by defence cannot be ruled out."

(20) It has been submitted by learned A.G.A. that compliance of Section 57 NDPS Act is not mandatory. As regards Section 57 NDPS Act, the Hon'ble Supreme Court in **"State of Punjab Vs. Balbir Singh"** reported in (1994) 3 SCC 294 has held in para 24 as under:-

"24. Sections 52 and 57 come into operation after the arrest and seizure under the Act. Somewhat similar provisions are also there in the CrPC. If there is any violation of these provisions, then the Court has to examine the effect of the same. In that context while determining whether the provisions of the Act to be followed after the arrest or search are directory or mandatory, it will have to be kept in mind that the provisions of a statute creating public duties are generally speaking directory. The provisions of these two sections contain certain procedural instructions for strict compliance by the officers. But if there is no strict compliance of any of these instructions that by itself cannot render the acts done by these officers null and void and at the most it may affect the probative value of the evidence regarding arrest or search and in some cases it may invalidate such arrest or search. But such violation by itself does not invalidate the trial or the conviction if

otherwise there is sufficient material. Therefore it has to be shown that such non-compliance has caused prejudice and resulted in failure of justice. The officers, however, cannot totally ignore these provisions and if there is no proper explanation for non-compliance or where the officers totally ignore the provisions then that will definitely have an adverse effect on the prosecution case and the courts have to appreciate the evidence and the merits of the case bearing these aspects in view. However, a mere non-compliance or failure to strictly comply by itself will not vitiate the prosecution."

(21) It is, therefore, clear that non-compliance of Section 57 of NDPS Act is not mandatory but if its non-compliance prejudices the accused, it will certainly have an adverse effect on the prosecution case keeping in view the stringent punishment under the provisions of NDPS Act.

(22) The next submission of learned counsel for the appellant is that the Standing Instructions No. 1/88 and 1/89 issued by the Narcotics Control Bureau, New Delhi have not been complied with. He submits that sample has neither been drawn nor sent as per the aforesaid Standing Instructions.

(23) According to the prosecution case, the incident took place on 29.7.2012 at 5.15 p.m. The samples were drawn on the spot and the same were sent to the Forensic Science Laboratory on 8.8.2012, which was received in the Forensic Science Laboratory on 9.8.2012 and the report of the Forensic Science Laboratory have been received on 17.11.2012.

(24) As per Clause 1.13 of the Standing Instruction No.1/88 dated

15.03.1988, the samples must be dispatched to the laboratory within 72 hours of seizure to avoid any legal objection, whereas in this case, admittedly, samples, which were drawn on 29.7.2012, have not been sent within 72 hours but it was sent beyond 72 hours i.e. on 8.8.2012.

(25) Para 1.21 of the aforesaid Standing Instruction No. 1/88 further provides that duplicate sample of seized narcotic drugs and psychotropic substances must be preserved and kept safely in the custody of Investigating Officer along with the case property. Para 2.9 of the Standing Instruction No. 1/89 provides that the sample in duplicate shall be kept in heat-sealed plastic bags. The duplicate envelope containing the sample is required to have a reference of the test memo as well as are required to be legible. However, in this case, samples have not been sent within 72 hours from the date of seizure. There is no evidence led by the prosecution as to on which date and time, the recovered contraband was deposited in the Malkhana although in the statement of P.W.1-Janak Singh, it has come that recovered contraband was deposited in the Malkhana, however, time and date on which the alleged contraband was deposited in the Malkhana, has not been disclosed by the prosecution. The test sample has not been produced, which is mandatory requirement under para 1.13 of the Standing Instruction No. 1/88. The Malkhana register has not been produced before the Court to show when maal (opium) was deposited in the Malkhana. Clause 1.13 of the Standing Instruction No. 1/88 provides mode and time limit for discharge of the sample of the laboratory and it provides that sample should be dispatched to the laboratory within 72 hours. The relevant para 1.13 is extracted below:-

"13. Mode and time limit for dispatch of sample to Laboratory:- The samples should be sent either by insured post or through special messenger duly authorized for the purpose. Dispatch of samples by registered post or ordinary mail should not be resorted to. Samples must be dispatched to the Laboratory within 72 hours of seizure to avoid any legal objection."

(26) Taking note of the serious infirmity in not following the Standing Instructions, Hon'ble Supreme Court in **Union of India Vs. Bal Mukund and others** : 2009 (12) SCC 161 has held in para 36 as under :-

"36. There is another aspect of the matter which cannot also be lost sight of. Standing Instruction 1/88, which had been issued under the Act, lays down the procedure for taking samples. The High Court has noticed that PW 7 had taken samples of 25 gm each from all the five bags and then mixed them and sent to the laboratory. There is nothing to show that adequate quantity from each bag had been taken. It was a requirement in law."

(27) Hon'ble Supreme Court in the aforesaid case has held that compliance of Standing Instruction is a requirement in law and non-compliance of the said Standing Instructions causes serious doubt in the prosecution case. The link evidence for want of production of the Malkhana register, the sample seals and date of the said sample deposited in the Malkhana is incomplete. Malkhana register has not been produced. The original seal, which was used for sealing at the place of seizure, has not been deposited in the Malkhana nor has been given in the custody of anyone.

(28) Taking into of the importance of the link evidence, Hon'ble Supreme Court in the case of **Valsala Vs. State of Kerala** : AIR 1994 S.C. 117 has held in para-4 as under :-

"4. We have seen the report of the Chemical Examiner and there no doubt it is mentioned that one sealed parcel was received containing a powder and it was analysed to be Brown Sugar. But from the records it is clear and it is also noted by both the courts below that the seized article was produced in the court only on 14.1.88 i.e. after a period of more than three months and there is no evidence whatsoever at all to show with whom the seized article was lying and even assuming that it was in the custody of P.W.6, the Officer-in-charge of the Police Station who seized it, there is again nothing to show whether it was sealed and kept there. The learned Counsel for the State no doubt argued that the provisions of Section 55 of the Act are not mandatory but only directory. We need not go into this legal question in this case. Suffice it to say that the article seized appears to have been not kept in proper custody and proper form so that the court can be sure that what was seized only was sent to the Chemical Examiner. There is a big gap and an important missing link. In the mahazar Ex.P.2 which is immediately said to have been prepared, there is nothing mentioned as to under whose custody it was kept after seizure. Unfortunately for the prosecution even P.W.6 does not say that he continued to keep it in his custody under seal till it was produced in the court on 14.1.88. The evidence given by P.W.6 Police Sub-Inspector, who seized the article is absolutely silent as to what he did with the seized article till it was produced in the court. As a matter of fact he did not

produce it in the court. P.W.3, A.S.I. is supposed to have produced the same in the court. But P.W.3 does not say anything about this. It is only P.W.7. the Circle Inspector who comes into the picture at a later date, who admitted in the cross-examination that the seized article was sent by P.W.3 (A.S.I.) to the court and P.W.7 in his cross-examination further admitted that he did not even see if the recovered material object was sealed but still he claims that he made the necessary application for sending the material object for chemical examination and it is only through P.W.7 that the Chemical Examiner's Report is marked. P.W.7 further admitted that he did not even know when it reached the court We are constrained to say that the investigation in this case has been perfunctory and on important aspects the evidence of the concerned officers is highly discrepant and unconvincing and does not throw much light. Therefore the evidence adduced is wholly insufficient to conclude that what was seized from the appellant alone was sent to the Chemical Examiner. Though this is purely a question of fact but this is an important link. Both the courts below have not examined this aspect in a proper perspective. No doubt the trafficking in narcotic drugs is a menace to the society but in the absence of satisfactory proof, the courts can not convict."

(29) In the case of **State of Rajasthan Vs. Gurmail Singh** : 2005 (1) JIC 844 (SC) upheld the acquittal order of the High Court. *"3. We have perused the judgment of the High Court. Apart from other reasons recorded by the High Court, we find that the link evidence adduced by the prosecution was not at all satisfactory. In the first instance, though the seized articles are said to have been kept in the malkhana on 20th May, 1995, the Malkhana register*

was not produced to prove that it was so kept in the malkhana till it was taken over by PW-6 on June 5, 1995. We further find that no sample of the seal was sent along with the sample to Excise Laboratory, Jodhpur for the purpose of comparing with the seal appearing on the sample bottles. Therefore, there is no evidence to prove satisfactorily that the seals found were in fact the same seals as were put on the sample bottles immediately after seizure of the contraband. These loopholes in the prosecution case have led the High Court to acquit the respondent." The High Court as malkhana register was not produced by the prosecution to prove its case along with sample to the excise laboratory. Relevant para 3 of the said judgment is extracted below:-

"3. We have perused the judgment of the High Court. Apart from other reasons recorded by the High Court, we find that the link evidence adduced by the prosecution was not at all satisfactory. In the first instance, though the seized articles are said to have been kept in the malkhana on 20th May, 1995, the Malkhana register was not produced to prove that it was so kept in the malkhana till it was taken over by PW-6 on June 5, 1995. We further find that no sample of the seal was sent along with the sample to Excise Laboratory, Jodhpur for the purpose of comparing with the seal appearing on the sample bottles. Therefore, there is no evidence to prove satisfactorily that the seals found were in fact the same seals as were put on the sample bottles immediately after seizure of the contraband. These loopholes in the prosecution case have led the High Court to acquit the respondent."

(30) In view of the discussion made hereinabove and the statement of P.Ws.1, 2

and 3, it is evident that there is definite non-compliance of Section 50 of NDPS Act, which are mandatory, coupled with the fact that the prosecution has not assigned any reason for not producing the other members of the raiding team as the prosecution witness.

(31) There is also non-compliance of Section 57 NDPS Act and Standing Instructions No. 1/88 and 1/89, which have been held to be requirement in law by the Hon'ble Supreme Court in the case of Bal Mukund (supra). The link evidence is not complete as malkhana register has not been produced. The prosecution has miserably failed to prove its case beyond reasonable doubt against the appellant. There is no independent eye-witness to the alleged recovery.

(32) Admittedly, the appellant prior to her search has not been produced before the Gazetted Officer or the Magistrate, nor any effort has been made by P.W.1 and P.W.2 to produce the appellant before any Gazetted Officer or the Magistrate as required under Section 50 of NDPS Act and as has been held by the Hon'ble Supreme Court in the case of **Vijaysinh Chandubha Jadeja (supra)**. The manner in which the appellant has been searched, is doubtful.

(33) Considering the severe punishment provided in the NDPS case, the prosecuting agency has produced only two witnesses of fact despite the fact that as per the case of the prosecution itself, apart from P.W.1 and P.W.2, other witnesses of fact were also present at the place of occurrence and the prosecution has failed to give any germane reason or justification to not call other witnesses in the witness box during the trial.

(34) The entire prosecution case is based on the sole testimony of PW-1 and PW-2. The seal, which was used for sealing the samples of contraband substance, has not been sent to Forensic Science Laboratory rather it seems that the same was kept by PW-1 himself. Had it been sent for Forensic Science Laboratory, it would have ensured as to whether the sample belongs to the same contraband/substance which was recovered from the accused-appellant from the spot and whether the remainder of the contraband/substance was sealed and sample seal was produced before the Court or not at the time of recording the statement of PW-1 to prove beyond doubt that the contraband, which was produced before the Court, was the same, which has been extracted from accused-appellant from the spot.

(35) It is also noted that since the recovery of contraband/substance could not be proved by the prosecution beyond reasonable doubt from the accused/appellant, no burden can be shifted on the accused/appellant to explain as to how she came in the possession of the contraband/substance under Sections 35 and 54 of NDPS Act. Thus, I am of the opinion that the prosecution has miserably failed to prove its case beyond reasonable doubt and the learned trial Court has failed to properly appreciate the evidence in a right prospective.

(36) For the aforesaid reasons, the instant appeal is **allowed**. The judgment and order dated 27.01.2017 passed by the Additional Session Judge, F.T.C.-II, Bahraich (supra) is hereby set-aside. The appellant is acquitted from all charges leveled against her by the learned trial court.

(37) The accused-appellant is on bail. Her bail bonds are canceled and sureties are discharged.

(38) Office is directed to transmit the lower court record along with a copy of the judgment to the Court concerned forthwith for information and follow up action.

(2023) 8 ILRA 77
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.08.2023

BEFORE

**THE HON'BLE SURYA PRAKASH
KESARWANI, J.
THE HON'BLE MS. NAND PRABHA SHUKLA, J.**

Criminal Appeal No. 259 of 1982

Ram Kishore **...Appellant**
Versus
State of U.P. **...Respondent**

Counsel for the Appellant:

Sri Rajesh Kumar Singh, Sri Raghvendra Dwivedi, Sri Satish Chandra Dubey, Sri Chandra Prakash Garg, Sri N.K. Roy, Sri B.P. Singh

Counsel for the Respondent:
D.G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 302 & 394 - Punishment for murder - Dying declaration - Relevancy of - Code of Criminal Procedure, 1973 - Sections 161, 232 & 313 - Indian Evidence Act, 1872 - Section 32(1) - Deceased lodged FIR against three accused persons, alleged that appellant fired gun at deceased - During treatment, his condition became critical - Doctor called Tehsildar for recording St.ment. (Para 2, 5, 7)

PW-12, accompanied deceased at time of occurrence, supported prosecution but

refused to identify accused persons - Rest of persons, who were seen with deceased instead of being cited as witnesses, arraigned as accused - No other person present at time of occurrence - Only direct evidence was dying declaration, basis of conviction - According to doctor, injuries in ordinary course sufficient to cause death of any man, thus deceased was murdered. (Para 15)

PW-8 St.d injured was in condition to speak, doctor given same opinion, when Statement was recorded, only doctor was present - PW-8 proved dying declaration, prepared in his own handwriting, bears opinion of PW-7 about his health condition - PW-7 St.d patient was conscious at time of recording of Statement by PW-8, entry was made on Bed Head Ticket - Thus Statement was trustworthy, not tutored. (Para 20)

Appeal dismissed. (E-14)

List of Cases cited:

1. Khushal Rao Vs St. of Bombay 1958 SCR 552:
AIR 1958 SC 22: 1958 Cri LJ 106
2. Laxman Vs St. of Mah., (2002) 6 SCC 710
3. Poonam Bai Vs St. of Chhattisgarh, (2019) 6
SCC 145
4. Jayamma & anr. Vs St. of Karn., (2021) 6 SCC
213

(Delivered by Hon'ble Surya Prakash
Kesarwani, J.
&
Hon'ble Ms. Nand Prabha Shukla, J.)

1. Heard Sri Satish Chandra Dubey, learned counsel for the appellant and Sri Jitendra Kumar, learned A.G.A. for the State-opposite party.
2. The present appeal under Section 374 (2) Cr.P.C. has been preferred by the

sole appellant Ram Kishore assailing the judgment and order of conviction and sentence dated 07.01.1982 passed by the learned Trial Court in Sessions Trial No. 252 of 1980 (State vs. Ram Kishore and Others) arising out of Case Crime No. nil of 1979, under Sections 307, 394 IPC, P.S. Baberu, District- Banda whereby the appellant has been convicted for the offences under Sections 302 and 394 of the IPC and sentenced which is as follows:

1. To undergo life imprisonment under Section 302 IPC.

2. To undergo rigorous imprisonment for seven years for the offences under Section 394 IPC.

3. All the punishments shall run concurrently.

3. The trial had proceeded against all the three accused under Section 302 read with Section 34 IPC, 307 read with Section 34 IPC and Section 394 IPC.

4. Out of the total three accused, only Ram Kishore has been convicted and the rest two accused Iqbal Bahadur and Ram Gopal were acquitted at the stage of 232 Cr.P.C. The acquittal orders have not been subjected to challenge.

5. Brief facts of the prosecution case are that:

Ramanand lodged an FIR on 18.07.1979 at 06:15 p.m. at Police Station- Baberu, District- Banda, under Sections 307 and 394 IPC against three accused persons, namely, Ram Kishore, Ram Gopal and Iqbal Bahadur stating that on the date of the incident at around 07:00 a.m., he proceeded for his Sasural at Village Amwa, Police Station- Biseda, District- Banda on his bicycle carrying his gun bearing Licence No.

1581 along with 32 cartridges. He reached at Agausi Ghat at about 09:30 a.m., he met three persons, namely, Ram Kishore, Raj Gopal Bhujwa and Iqbal. All the four persons together crossed the river by one boat. After reaching Agausi, they could not get the Bus, therefore, detained at Agausi. The other three wanted to go to Village Patvan but as the Bus did not come, they went to the place of Pheran Bhujwa situated near Agausi Bus Stand. There they took the meals and again went to the Bus Stand at 06:00 p.m. They met a person working in the Malaria Department, who used to live at Village Nimor. In the meantime, accused Ram Kishore took his gun and cartridges. Ram Gopal sat at the bicycle of the first informant while accused Iqbal Bahadur Singh and Ram Kishore sat at the bicycle of the person said to have serving in Malaria Department. When they covered the distance of about one kilometer towards Kazi Tola, near the culvert, on the road side, Ram Kishore fired the gun at Ramanand. The first informant sprang towards the Mahua tree in the field. All the three chased him, then Ram Kishore again fired at him. Hearing the noise, Pheran Bhujwa, Devi Dayal Master and number of other persons reached there. All the three accused persons fled away from the spot with his gun and cartridges. The persons who reached there, took him to Baberu to some distance by *Tonga* and the rest by a Bus.

6. After reaching the hospital at Baberu, Dr. P.C. Chandel examined the injuries of Ramanand in the intervening night of 18.07.1979 and 19.07.1979 at 12:05 a.m. at Sadar Hospital, Banda. The injuries found by Doctor on the body of Ramanand are as under:

"1. Lacerated wound 13 cm x 2.5 cm x muscle deep on Rt side of face (on cheek) & extending to Back below ear

lobule & up to back of neck. Margins lacerated. Skin lost and muscle torn. Blackening and tatooing present on Rt cheek. Adv x-Ray wound is gutter shaped and direction from front to back & slightly downwards.

2. Abrasion 2.5 cm x 0.5 cm on lateral part of external ear including ear lobule.

3. Multiple Abrasions in an area 7 cm x 1.5 cm on upper margin of wound of Injury no. 1 behind the ear lobule.

4. Lacerated wound 9 cm x 7 cm x muscle deep on upper most part of back of Rt. side chest 2 cm below the margin of Injury No. (1) and 4 cm lateral to Achromion process of Rt scapula. Skin lost & tissues are lacerated & muscle torn. Adv x-Ray.

5. Multiple gun shot wounds of entry four in number in an area of 5 cm x 1.5 cm on lateral aspect of left side Abdomen each measuring 0.5 cm x 0.5 cm x cavity deep 2 cm above Iliac chrest and 16 cm away from umblicus at 3 o' clock position. Margins inverted with Abraded collar. No blackening or tatooing or charring present. Adv. x-Ray abdomen. Direction from left to right inward, medially and slightly downwards.

6. Abrasion 7 cm x 1 cm obliquely placed 3 cm above Injury No. 5.

7. Lacerated wound (G.S.W. of exit) 0.6 cm x 0.6 cm x cavity deep on Rt side front of abdomen. 3 cm away from umblicus at slightly lower level to Injury No. (5) margin everted & lateral to it foreign body (Hard) is palpable.

Opinion: Injury No. 1, 4 & 5 kept U.O. Adv. x-Ray face with Neck, x-Ray upper chest & x-Ray Abdomen. Rest are simple.

Duration- Fresh

Caused by Abrasion by friction & rest by firearm."

7. While treatment, Ramanand was identified and brought by C.P. Sujana Singh No. 196, P.S.-Baberu, Banda. During treatment, the condition of the first informant became critical. The Doctor called the Tehsildar, Banda for recording the dying declaration. This dying declaration was recorded on 19.07.1979 at 1:20 a.m. by Sri Shiv Murti Singh Tehsildar/ Magistrate, Banda. The contents of the dying declaration as recorded by Tehsildar, Banda is quoted below:

"बयान किया कि मुझे रामकिशोर बाप का नाम मुझे नहीं पता है जो औगासी में रहता है जो कि थाना मरका में है ने मेरी बन्दूक लेकर औगासी से आगे लगभग एक किलोमीटर पुलिया के आगे मुझ पर फायर कर दिया। पहला फायर मुझे पेट पर लगा फिर मैं भागकर महुआ के बाग की ओर गया फिर वहीं पहुँच कर रामकिशोर ने ही फिर फायर किया। मैं बचने के लिए झुका तो मेरे चेहरे और गर्दन पर फायर से चोट आयी। राम किशोर के साथ राजगोपाल गुप्ता निवासी देवलान थाना गाजीपुर तथा इकबाल निवासी देवलान थाना-गाजीपुर थे। इनके बाप का नाम मुझे नहीं मालूम है। ये लोग मुझे घाट पर मिले थे तथा मेरे साथ ही इन्होंने सुर्ती नाव से औगासी घाट पार किया उसके बाद भुजवा के पास सबने खाना बनवाकर खाया खाना भुजवा ने बनाया था नाम मुझे याद नहीं आ रहा है। हम सब लोग साइकिल पर थे बन्दूक राम किशोर ने औगासी में ले ली थी फिर पुलिया के आगे रामकिशोर ने मेरे ऊपर फायर कर दिया। मैंने हाथ पांव जोड़े कहा कि मुझे न मारो फिर भी मार दिया और पश्चिम की ओर भाग गया। मैं गिर पड़ा फिर कुछ देर बाद गांव के लोग आये और मुझे बबेरू अस्पताल ले गये। बबेरू से मुझे यहां लाया गया। बयान सुनकर तस्दीक किया।"

8. Before recording the dying declaration, the Medical Officer of the Sadar Hospital, Banda gave a certificate that Ramanand was fully conscious at the time of recording of the dying declaration and remained conscious throughout the recording of dying declaration. This document was exhibited as Exhibit Ka-18.

The first informant took his last breath on 19.07.1979 at 11:30 a.m. The post-mortem of Ramanand was conducted on 20.07.1979 and the following ante mortem injuries were found on the body of the deceased:

“1. Gutter shaped gun-shot wound of Entry-15 cms x 3 cms x muscle deep over Right side of cheek & lateral aspect of Right side of neck. 7.5 cms from left angle of Rt. Eye & 7.5 cms from Rt angle of mouth. Tatooing and charring present around the wound, margins inverted and lacerated. Direction-Backward downwards & medially.

2. Gutter shaped gun-shot wound of entry- 9 cms x 4 cms x muscle deep over superior aspect of right shoulder 3 cms back to Achromian process of Rt scapula.

Injuries No. (1) and (2) are produced one shot they are superimposed to each other.

3. Abrasion- 3 cms x 1 cms over lateral aspect left chest. 17 cms below the left nipple and 17 cms from umblicus.

4. 4 gunshot wound of entry- in an area of 5 cms x 2 cms. Over lateral aspect of left side of abdomen. 0.5 cm x above the Left Iliac crest 14 cms from umblicus. No tatooing or charring part margin inverted, Direction- medially & forward.

5. Gun shot of wound of exit- 0.6 cm x 0.6 cm over Ant. aspect of Rt side of abdomen. 3 cms for umblicus at 9 o' closed position. Margins everted.”

9. The cause and manner of death was due to shock and haemorrhage. During the course of investigation, incriminating material was collected and the charge sheet was filed, cognizance was taken and the charges were framed under Section 302/34 IPC, 307/34 IPC and Section 394 IPC against all the three accused persons.

10. **Prosecution Witnesses:** During the trial, prosecution examined 12 witnesses as under:

P.Ws.	Names of Prosecution Witnesses	Status
PW-1	Sri Rampal	Scribe of the First Information Report
PW-2	Sri Pheran	Cooked food for the deceased and accused
PW-3	Sri Devi Dayal Singh	Accompanied with Ramanand on Bus to admit him in the hospital
PW-4	Sri Mitran Ram Sub-Inspector	Proved the inquest report prepared by him at Sadar Hospital, Banda.
PW-5	Sri Naipal Singh, S.O. Marka	First Investigating Officer who partly investigated the crime
PW-6	Dr. Vikash Chandra	Conducted the post-mortem examination of the dead body of the deceased.
PW-7	Sri P.C. Chandel Medical Officer, Sadar Hospital, Banda	Admitted the injured, examined his injuries and in whose presence dying declaration of the deceased was recorded
PW-8	Sri Shiv Murti Singh, Tehsildar/Magistrate II Class, Banda.	Recorded the dying declaration of the deceased.
PW-9	Sri Ram Bahadur Singh, Constable, P.S. Baberu, Banda	proved Chik FIR which was sent to P.S. Marka, Banda

PW-10	Sri Kaptan Singh Head Constable, P.S. Marka	Head Muharir of PS Marka. Proved the GD Entry.
PW-11	Sri Devi Dayal Prajapati, S.I., Marka	Second investigating Officer who submitted the Charge Sheet
PW-12	Sri Sukuru Lal Varma, House Visitor	Working in Malaria Department/injured Eye witness

F.I.R. registered, so on that very spot, Ramanand dictated the contents and PW-1 noted down the application and went to the Police Station, on the basis of which FIR was registered. PW-1, who is a scribe of FIR, has proved the application as Exhibit Ka-1. He further deposed that the deceased Ramanand was at the hospital himself for the treatment and PW-1 alone came to the Police Station, Baberu for lodging the FIR and a Constable was sent to the hospital for identifying injured.

11. Documents exhibited and proved:

Documents	Exhibits
First Information Report	Ex.Ka-19
Dying Declaration of Ramanand	Ex.Ka-18
Tehrir/Report	Ex.Ka-1
Injury report	Ex.Ka-15
Post-mortem examination report of Ramanand	Ex.Ka-13
X-Ray Report of Ramanand	Ex.Ka-17
Statement of Pheran Bhujwa	Ex.Ka-2
Statement of Devi Dayal Master	Ex.Ka-3
Statement of Ramanand under Section 161 Cr.P.C.	Ex.Ka-11
Site Plan	Ex.Ka-12
Application of Sukru Lal PW-12 given to PS Baberu	Ex.Ka.22

12. Now, we proceed to examine the prosecution witnesses and the records exhibited :

PW-1 Sri Rampal in his testimony deposed that the deceased Ramanand reached Baberu crossing along with Pheran and Devi Dayal on a Bus, Pheran called him for medical treatment of the deceased Ramanand. PW-1 along with the deceased Ramanand and others went to the hospital but as he asked to first get the

PW-2 Pheran deposed that his place lies at Bus-stop, Agausi. He runs an *Ikka* also. About two years and one month back, Ram Kishore and three others came to his place who were hungry. All four had the meals and went away. Amongst them, one was carrying gun and cartridge. After the meal, all four at around 6:00 to 6:30 p.m. went away. When PW-2 went on his *Tonga* for about one and a half miles, he saw an injured person lying on the road and could recognise that he is the one who accompanied Ram Kishore and had meals at his place. PW-2 carried the injured on his *Tonga* and went towards Baberu. Devi Dayal and 4-5 other people also accompanied him. On the way, they saw a Bus passing-by, the injured sat on the Bus, even PW-2 and Devi Dayal came along with the injured to Baberu Chauraha where they met PW-1 Rampal of Village-Agausi. The injured was admitted in the hospital for the treatment where he narrated the incident which was scribed by Rampal (PW-1). Rampal took that report to the Police Station, Baberu from where a home-guard reached to the hospital. The Constable, PW-2 and a person from Patvan took the injured for medical examination at 12:00 mid night to Sadar Hospital, Banda. In his cross-examination, PW-2 had deposed that he knew Ram Kishore, who

along with Ram Gopal and Iqbal Bahadur came on his place for the meals.

PW-3 Devi Dayal Singh deposed that about two years back, while he was present at the Baberu Chauraha at about 09:00 p.m., where Rampal PW-1 was also present, a Bus came carrying 15-25 passengers, a person came and informed that there is an injured man, who needs to be admitted in the hospital. He went to the Hospital for the treatment and again accompanied Rampal to the Police Station. In his cross-examination, he denied the suggestion that he was present at Agausi or he was present at the place of the incident nor he saw Ram Kishore firing at the deceased or running away with the gun and cartridge. He also deposed that the distance of the hospital from the Bus Stand was about 70-80 steps away. He saw the injured whining with pain and seeking medical aid.

PW-4 Sub Inspector Mitran Ram prepared the Inquest Report and collected the Post-Mortem Report. In his cross-examination, he deposed that the injured Ramanand died on 19.07.1979 at 11:30 p.m. at District- Sadar Hospital, Banda.

PW-5 S.O. Naipal Singh deposed that on the date of incident he was posted as SHO Police Station, Marka. On that same day, he received relevant documents i.e. FIR, General Diary with regard to registration of the crime from PS-Baberu. As per this GD, the FIR was registered at Police Station-Baberu, which is the part of the GD at P.S.-Marka. At Parcha No. 11, the said witness proved the original GD. On 19.08.1979 itself, the offence under Sections 307 and 394 IPC was converted into offence under Sections 302 and 394 IPC, which is also the part of the Case Diary and proved the Exhibit Ka-10. PW-5 took over the investigation on the same date and recorded the statements of

the Head Constable Kaptan Singh, Constable Hari Shankar Tiwari and the statement of the injured Ramanand at Sadar Hospital, Banda under Section 161 Cr.P.C. On the same date, he recorded the statement of Pheran, Shree Pal, who made the spot inspection, prepared the site plan (Exhibit ka-12). He also deposed that Ramanand was in a fit condition, who could speak while recording the statement. He did not make any effort to get his statement recorded by the Magistrate as he could not infer that he may die. Neither he ask the Doctor whether he may die, nor did he enquire Doctor about his health condition. In his cross-examination, he categorically denied that Ramanand was not in a position to speak.

PW-6 Dr. Vikash Chandra proved the post-mortem Report of the deceased Ramanand and found following ante mortem injuries on the body of the deceased which are as under:

“मेरी राय में इस मृतक की मौत सदमें तथा उपरोक्त चोटों से उत्पन्न रक्तस्राव के कारण हुई थी।

वरवक्त मुआयना मैंने पोस्ट मार्टम की इक्जमीनेशन रिपोर्ट प्रदर्श क-१३ जो मेरे लेख व हस्ताक्षर में तैयार किया था।

मेटैलिक 9 शाट्स व वेड्स कागज के पैकेट में सील मोहर दुरुस्त आए सिपाही को साथ एस.पी. के यहां भेज दिया था।

अकेजन चोट नं- 3 गिरने से आ सकती है।

मेरी राय में चोट नं- 1 व दो एक ही शाट से आई थी। चोट नं- 1 व चोट नं-2 खड़े आदमी पर तब आयेगी जब मरने वाला चोटैल से ऊंचे 9 स्थान पर हो। यह चोट लेते हुये आदमी पर मारने से आ सकती है। यदि दो साइकिलों पर हो और मारने वाला पीछे की साइकिल से बन्दूक चलाये तो आगे वाले पर नं-1 व नं-2 चोटें आ सकती है। यदि गर्दन को बेस मानकर नाक पर मेनडिकुलर मान कर कोड बनाये तो 45 या 60 डिगरी का कोड बनेगा। मारने वाले की स्थिति ऊंची हर हालत में होनी चाहिए। यह चोट तो पीछे से आ ही नहीं सकती। चोट नं-4 भी पीछे से नहीं आ सकती।

यदि सड़के के किनारे पड़े हो और उसी सड़क से आदमी साइकिल से जा रहा हो तो साइकिल वाले आदमी को पेड़ से ऊपर से फायर करने पर चोट नं-1 व 2 आ सकती है।

इतनी चोटों के बाद भी आदमी बोलने की स्थिति में रह सकता है। चोट नं-4 ऐसे थी जिसके कारण ज्यादा दर्द रहा होगा।"

PW-7 Dr. P.C. Chandel deposed that he was posted as Medical Officer, Sadar Hospital, Banda and was on emergency duty. On the intervening night of 18/19.07.1979 at 12:05 a.m., he examined the injuries of Ramanand who was brought and identified by Constable Sujan Singh, C.P. 196 and was initially treated and referred by Dr. Khan of Primary Health Center, Baberu. He also proved the ticket brought by Dr. Khan as Exhibit Ka-14. After the medico-legal examination, the Doctor found injuries on the body of Ramanand.

The Doctor opined that Injury Nos. 1, 4 and 5 were kept under observation, rest other injuries were simple. All the injuries were fresh and must have been caused at around 6:00 hours. The abrasion must have been caused due to friction. Rest other injuries were caused due to fire-arm. These injuries could have caused on 18.07.1979 at about 06:00 p.m. He entered the injury in the Injury Register and obtained the signatures of Ramanand and proved it as Exhibit Ka-15. He himself admitted Ramanand in the hospital and proved his bed head ticket as Exhibit Ka-15, which was prepared in his own handwriting. Thereafter, the patient was attended by Dr. D.S. Rana. On 19.07.1979 at 11:20-11:30 a.m., Dr. S.K. Gupta attended the patient proved as Exhibit Ka-16. The names of Dr. D.S. Rana and Dr. S.K. Gupta were mentioned. The patient died at Sadar Hospital, Banda on 19.07.1979 at 11:30 a.m. At the time of admission, the condition of the patient was not good. His blood pressure was low (80/50), but the patient was conscious. During his treatment, the said witness made an effort to get his dying declaration

recorded as a result of which on 19.07.1979 at 1:20 a.m., the dying declaration of Ramanand was recorded by Tehsildar, Banda, whose entry is mentioned on the Bed Head Ticket. He witnessed recording of dying declaration and certified the ticket on 19.07.1979 at 1:15 a.m. with a noting that the patient was in a condition to speak.

PW-8 Shiv Murti Singh deposed that he was posted as Tehsildar-cum-Magistrate-II Class at District-Banda. On that same day, he received an information from Sadar Hospital, Banda to get the dying declaration recorded of an injured. He reached the emergency ward of Sadar Hospital, Banda, where the injured was under treatment of Dr. Chandel. The injured was in a condition to speak. The Doctor gave his opinion that the injured was in a condition to speak. Whatever was narrated, he noted it down. After recording the statement, his thumb impression, was obtained on it except the Doctor no other person was present at the time while recording the statement. The said statement was proved as Exhibit Ka-18 which has been prepared in his own hand-writing and bears the information of the Dr. Sri P. C. Chandel about his health condition. He had put his initials of the said dying declaration as was recorded on 19.07.1979 at 1:20 a.m. in mid night.

PW-9 Ram Bahadur Singh Constable C.P. 561 deposed that on 18.07.1979, he was posted at P.S. Baberu, District-Banda as Constable on that day at 09:30 p.m., Ram Pal of Village Agausi came with the Tehrir Report (Exhibit Ka-1). On the basis of which an FIR (Exhibit Ka-19) was registered. The said witness proved the Chik FIR (Exhibit Ka-19). The necessary information was entered into the General Diary which was brought and proved in the original. This information was at once passed to Police Station-Marka

on the RT Set at that very moment. At the time of lodging of the FIR, the first informant Ramanand was in the hospital. He sent Constable Sujan Singh and Home guard Ram Sahay to the hospital along with the letter so that the Doctor may treat the injured accordingly. On the very next day, all the relevant documents relating to the case, were sent to the P.S.-Marka. The said witness in his cross-examination stated that he was not aware whether any dying declaration are recorded or not? At that time, S.O. Rajpal Singh was present. Rampal, who brought the Tehrir Report, stated that the condition of the injured was not good.

PW-10 Kaptan Singh deposed that on 19.07.1979, he was posted as Head Muharir, P.S.- Marka, District- Banda and on the same date, he entered the Chik FIR (Exhibit Ka-19), which was registered at Police Station Baberu on 18.07.1979 in his General Diary as Report No. 31, and same was received on 19.07.1979 at 12:15 p.m. This original diary was proved as Exhibit Ka-9. This case was registered in the presence of S.O. Naipal Singh, who took over the investigation. In his cross-examination, the said witness deposed that in case, any information would have been received on RT Set, the same would have been registered in the RT Set Register.

PW-11 Devi Dayal Prajapati, is the second Investigating Officer and was posted as S.H.O., P.S.- Marka, District- Banda. He deposed that initially the investigation was entrusted to the then S.O. Naipal Singh, after his transfer, he took over the investigation on 22.10.1979 and recorded the statement of the accused and other witnesses and filed the charge-sheet and proved it as Exhibit Ka-21. In his cross-examination, he deposed that he forgot to record the statement of the person working in the Malaria Department. He did

not even try to find out the licence of the gun. He even did not find the application given by Sukuru Lal Verma.

PW-12 Sukuru Lal Verma was examined as an injured witness and deposed that on 18.07.1979 i.e. on the date of the occurrence, he was posted in Agausi area as a house visitor. He used to collect blood from individuals for examination and analysis and also used to distribute Malaria tablets. He stated that he had gone to Agausi on 18.07.1979 in connection with discharge of his duties. He stated that he kept his bicycle at the place of Bhujwa who lives near Agausi Bus Stand. He returned from Agausi at about 6:00 to 6:30 pm. He collected his bicycle from the place of said Bhujwa and when he had gone only a distance of 10 steps, he met three persons. He did not know them from before, he stated that one of them had bicycle and one of them had a gun and third was empty handed. His residential house was situated in Nimore, a place near Kazi Tola. He was going to Nimore. They requested him to accompany them upto Kazi Tola and gave one of them to sit on his bicycle. One of them started driving his bicycle and the rest two rode the other bicycle. The said rest two persons followed his bicycle. When they covered a distance of about 1¼ or 1½ kms., one of the said two persons, who were on bicycle behind him, fired a gun, which hit him at his left thumb. The other person who was driving his bicycle left his bicycle and ran towards west of the road. While he was running towards Agausi, he heard another voice of gun. He accompanied two persons from Agausi and again went back to the place of occurrence. He did not find any person there. He with the help of those two persons whom he had accompanied from Agausi, rode his bicycle and went away to his residential place. On 19.07.1979, he went to Baberu Hospital

and along with the Doctor he went to the Police Station and handed over an application marked as Exhibit Ka-22. He stated that these accused persons are not the one who were with him and the deceased at the time of the occurrence. He refused to recollect names of persons who accompanied with him to the place of occurrence and also the name of Bhujwa.

13. Statement of the accused recorded under Section 313 Cr.P.C.:

After the closure of the prosecution evidence further statements of the accused under Section 313 Cr.P.C. were recorded. The accused pleaded the innocence and stated that they have been falsely implicated in this case. Accused/appellant Ram Kishore stated that he had heard that such an occurrence had taken place. On hearing about this occurrence, he also went to Bus Stand but heard that some persons had taken the injured to Baberu Hospital. He further stated that one Ram Das is inimical to him and he got him falsely implicated in this case.

14. *Per contra*, learned A.G.A. Sri Jitendra Kumar vehemently opposed the argument raised by the counsel for the appellant and argued that judgment passed by the Trial Court does not contain any infirmities and it is based on evidence and testimony of the prosecution witnesses. Trial Court has rightly convicted the appellant after considering and evaluating the facts and law. There is dying declaration against the appellant regarding his involvement in the crime. Learned A.G.A. has supported the judgment, conviction and the sentence.

15. Findings and Analysis:

After the meticulous examination of the evidence on record, it can be safely concluded that both sides agreed that Ramanand was murdered. Accused persons have not challenged the place of occurrence. There was no dispute between the parties about the time or place of the occurrence and in his dying declaration, injured/informant stated that he was fired near a Puliya (Culvert) about one kilometer away from Agausi. Accused persons have not challenged this place and have admitted that an occurrence, as he had heard, did happen, at the said place. There is an eye witness account of the incident. Pheran Bhujwa examined as P.W.-2 and few others of the Village found the deceased in an injured condition at the said place. All these evidence taken together clearly establish the place of occurrence on the road side on Agausi, Baberu Road at a distance of one kilometer from Agausi. Sukuru Lal Verma PW-12, injured/eye witness who accompanied the deceased at the time of the occurrence, has supported the prosecution so far the fact as to when where and how the occurrence took place but he refused to identify the accused persons. Rest of the persons, who were seen with the deceased instead of being cited as witnesses, have been arraigned as accused. There was no other person present at the time of occurrence. Under these circumstances, the only direct evidence against the accused appellant available if at all, is the dying declaration of Ramanand which can be made a basis of conviction. Dr. P.C. Chandel examined the injuries of the deceased in the intervening night of 18/19.07.1979 at Sadar Hospital, Banda. He found three abrasions and gun shot wounds at four places, two of entry and two of exit. Dr. Vikas Chandra, who conducted the post-mortem examination on the dead body of deceased found these gun shot

injuries at the time of the post-mortem examination. According to him, death of the deceased was caused due to the shock and haemorrhage. These injuries in the ordinary course were sufficient to cause the death of any man. Under these circumstances, it can be safely concluded that deceased Ramanand was murdered.

16. It has further been noticed that the FIR was dictated by Ramanand. His statement under Section 161 Cr.P.C. was recorded by the Investigating Officer and a dying declaration was also recorded by the Magistrate. Exhibit Ka-18 is a dying declaration of the deceased Ramanand which was recorded by P.W.-8 Shiv Murti Singh Tehsildar, Banda on 19.07.1979 in the hospital premises. It bears the certificate of the Doctor that Ramanand, the injured, was fully conscious at the time of recording his statement and remained conscious throughout the process of the said recording. There was no chance of any tutoring at all. Thus, the deceased was in a fit state of mind to make the statement, he clearly identified the assailant and voluntarily made a true statement without any foreign influence or rancour. The said statement is also corroborated by medical evidence and the statements of P.W.-2 and P.W.-12. The deceased had no enmity with any of the accused, therefore, it cannot be expected to have mentioned any wrong facts against any of the accused persons. The deceased stated that it was only accused Ram Kishore who attacked him and in spite of his request did not spare, and gave another fire shot. He has also stated the manner in which the injuries were received. He stated that at the first shot, he fell upon when he was on a bicycle and in the second impact he again fell upon when he was in a crouching position. After carefully considering the injury report, post-mortem

report, seat of the injuries and the opinion of the Doctor, it can be concluded that Ramanand received two gun shot injuries at two places, one could have been caused in straight line while he was sitting on the bicycle and other could be caused in a crouching position. The fact that accused Ram Kishore fired two shots at the injured and ran away with the gun and 32 cartridges, has also been proved. His statement well corroborates with the medical evidence establishing the guilt of the accused appellant.

17. Case Laws cited and relied:

The law on the subject of dying declaration has been clearly and explicitly enunciated by the Apex Court.

1. In **Khushal Rao vs. State of Bombay 1958 SCR 552: AIR 1958 SC 22: 1958 Cri LJ 106** which held as under:

"On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration

which has been recorded by a competent Magistrate in the proper manner; that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character; and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination."

2. In Laxman vs. State of Maharashtra (2002) 6 SCC 710, it has been held that:

"The situation in which a man is on the deathbed is very solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason that the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-

examination, the Courts insist that the dying declaration should be of such a nature as to inspire full confidence of the Court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the

court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

3. In Poonam Bai vs. State of Chhattisgarh (2019) 6 SCC 145, it has been held that:

"A dying declaration can be the sole basis for convicting the accused. However, such a dying declaration should be trustworthy, voluntary, blemishless and reliable. In case the person recording dying declaration is satisfied that declarant is in a fit medical condition to make the statement and if there are no suspicious circumstances, dying declaration may not be invalid solely on the ground that it was not certified by the doctor"

4. In Jayamma and Another vs. State of Karnataka (2021) 6 SCC 213 it has been held that:

"When a dying declaration has been recorded in accordance with law, and it gives a cogent and plausible explanation of the occurrence, the court can rely upon it as the solitary piece of evidence to convict the accused. It is for such reason that Section 32 of the Evidence Act, 1872 is an exception to the general rule against the admissibility of hearsay evidence and its Clause (1) makes the statement of the deceased admissible. Such statement, classified as a "dying declaration" is made by a person as to the cause of his death or as to the injuries which culminated to his death or the circumstances under which injuries were inflicted. A dying declaration is thus admitted in evidence on the premise that the anticipation of brewing death breeds the same human feelings as that of a conscientious and guiltless person under oath. It is a statement comprising of last

words of a person before his death which are presumed to be truthful, and not infected by any motive or malice. The dying declaration is therefore admissible in evidence on the principle of necessity as there is very little hope of survival of the maker, and if found reliable, it can certainly form the sole basis for conviction."

18. Section 32(1) of the Evidence Act, 1872 provides for the relevance of the statement made by a person who is dead. Section 32(1) of the Evidence Act, 1872 is reproduced below:

"32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.- Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:-

(1) when it relates to cause of death. —When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

19. Series of judgments of Hon'ble Supreme Court laying down the law on "dying declaration" reveals that a dying declaration can be the sole basis of conviction if it is trustworthy, voluntary,

blemishless and reliable. A dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence. To test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested party. The situation in which a man is on the deathbed is very solemn and serene, is the reason in law to accept the veracity of his statement. Since the accused has no power of cross-examination, the Court insist that the dying declaration should be of such a nature as to inspire full confidence of the Court in its truthfulness and correctness. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially

required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise. When a dying declaration has been recorded in accordance with law, and it gives a cogent and plausible explanation of the occurrence, the court can rely upon it as the solitary piece of evidence to convict the accused. Such statement, classified as a "dying declaration" is made by a person as to the cause of his death or as to the injuries which culminated to his death or the circumstances under which injuries were inflicted. A dying declaration is thus admitted in evidence on the premise that the anticipation of brewing death breeds the same human feelings as that of a conscientious and guiltless person under oath. As per Sub-Section (1) of Section 32 of the Evidence Act, 1872, 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, then such statements are relevant whether the person who made them was or was not under expectation of death, at the time when they were made.

20. Applying on the facts and circumstances of the present case the provisions of Section 32(1) of the Evidence Act, 1872 and the principles of law settled by Hon'ble Supreme Court as briefly

summarised above, we find that the dying declaration of the deceased was recorded by a Magistrate who deposed as PW-8. In his testimony, he stated that the injured was in a condition to speak and the doctor has given his opinion that the injured was in a condition to speak and when the deceased's statement was recorded, no one except the doctor was present. The PW-8 has proved the "dying declaration" (Ex. ka-18) which was prepared by the PW-8 in his own handwriting and bears the opinion of Dr. P.C. Chandel (PW-7) about his health condition. The statement of the deceased was recorded on 01:20 A.M. on 19.07.1979. The PW-7 Dr. P.C. Chandel has stated in his evidence that the patient was conscious at the time of recording of his statement by the PW-8 and entry to this effect was made on the Bed Head Ticket with a noting that the patient was in a condition to speak. The learned trial court has found the dying declaration to be trustworthy and not tutored. Under the circumstances, the dying declaration (Ex.ka-18) as proved by the PW-8 and corroborated with the evidence of PW-7, has to be given due weight. Considering the evidence of prosecution witnesses as noted in paragraph-12 of this judgment, we are of the view that the "dying declaration" of the deceased was voluntary and trustworthy. Therefore, it can be safely concluded that the accused Ram Kishore committed the offence under Section 302 and 394 I.P.C. Accordingly, his conviction and sentence under Sections 302, 394 I.P.C. deserves to be confirmed.

21. For all the reasons stated herein above, this Court finds no reason to interfere with the impugned judgment and order dated 7.1.1982 passed by the Trial Court in Session Trial No. 252 of 1980 convicting and sentencing the sole

appellant Ram Kishore for the offences under Sections 302 and 394 IPC. This Court is in complete agreement to the view taken by the Trial Court and affirms the same. The appeal is, accordingly, **dismissed**. Accused/appellant Ram Kishore has already been arrested and sent to jail on 20.07.2023. He shall serve out the remaining period of sentence in terms of the impugned judgment and order dated 07.01.1982 passed by the Trial Court.

22. Office is directed to transmit a certified copy of this judgment and order to the concerned Court for necessary information and compliance. It is further directed that the original record of the case be returned forthwith which shall be kept safely by the trial Court.

(2023) 8 ILRA 90
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.08.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Appeal No. 563 of 2000

Gudun & Ors.		...Appellants
	Versus	
The State of U.P.		...Respondent

Counsel for the Appellants:

Balram Yadav, Ashwini Kumar Tripathi,
 Indra Pratap Singh, Umesh Kumar Yadav

Counsel for the Respondent:

Govt. Advocate

**Criminal Law - Indian Penal Code, 1860 -
 Sections 376/511, 354 & 506 -
 Punishment for rape - Appeal against
 conviction - Rigorous imprisonment with
 fine - Code of Criminal Procedure, 1973 -
 Sections 161 & 164 - Indian Evidence Act,**

1872 - Sections 53, 114 (g) & 155(4) - FIR lodged for commission of offence of molestation and attempt to commit rape on victim - None of independent witnesses came forward in support of prosecution version, all accused persons belonged to same family with whom there was enmity on account of civil litigation with informant - Delay in lodging FIR - Medical evidence not in support of prosecution version, no injury on external or internal part of victim except crust on base of little finger of right hand, established she was habitual of sexual intercourse - Two real brothers may not commit such offence together - Time of occurrence and going alone out of house for defecation by victim appears concocted - Therefore, some roles assigned to all appellants - Prosecution failed in establishing prosecution case against appellants regarding commission of alleged crime - Thus, impugned order set aside. (Para 2, 60)

Appeal allowed. (E-14)

List of Cases cited:

1. Aman Kumar Vs St., AIR 2004 SC 1497
2. Tukaram Vs St. of Mah., AIR 1979 SC 185
3. Nilambar Goudo Vs St. of Orissa, 1982 Cri LJ NOC 172 (Ori)
4. Joginder Singh Vs St. of Punj., 1974 CrLJ 117
5. Ram Kali Vs St. of U.P., AIR 1947 All 191
6. Vimal Suresh Kambley Vs Chaluverapinake, AIR 2003 SC 818
7. St. of Raj. Vs Biram Lal, 2005 CrLJ 2561 (SC)
8. St. of Karn. Vs Manjanna, AIR 2000 SC 2231
9. Santosh Prasad @ Santosh Kumar Vs St. of Bihar, (2020) 3 SCC 443
10. Lalta Prasad Vs St. of M.P., AIR 1979 SC 1276

11. Charan Singh Vs St. of Har., (1988) 3 Crimes 85 (P&H)
12. Zahoor Ali Vs St. of U.P., 1989 CrLJ 1177 (All)
13. Sakariya Vs St. of M.P., 1991 CrLJ 1925 (MP)
14. Mah. Vs Abdul Hafees Faroki, 1998 CrLJ 3603 (SC)
15. Joseph Vs St. of Kerala, 2000 CrLJ 2467 (SC)
16. Sampad Vs St. of Orissa, 2001 CrLJ 793 (Ori)
17. St. of Orissa Vs Rama Swain & ors., 2007 CrLJ 714 (Ori)
18. Goverdhan Vs St. of M.P., 2006 CrLJ 4118
19. Mansingh Vs St. of M.P., 2007 CrLJ 201 (MP)
20. St. of Mah. Vs Rameshwar Sridhar Jaware, 2008 CrLJ 675 (Bom)
21. Suresh Govinda Nagdeve Vs St. of Mah., 2008 CrLJ 2943 (Bom)

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

1. Heard Sri Indra Pratap Singh, learned counsel for the appellants, Ms. Anupriya Jaiswal, learned AGA for the State and perused the record.

2. This appeal has been preferred by the convicts Gudun, Suresh, Jangay and Harish Chandra to set aside the judgment and order of conviction and sentencing dated 03.06.2000 passed by the XI-Additional Sessions Judge, Faizabad in ST No.827 of 1997 (State Vs. Gudun and others) arising out of Case Crime No.55 of 1997, under Sections 376, 354, 506 IPC, Police Station Khandasa, District Faizabad whereby the accused persons had been

convicted under Section 376/511 IPC for five years rigorous imprisonment and fine of Rs.2,000/- each and in case of non-payment of fine to undergo six months additional incarceration; under Section 354 IPC for one year's rigorous imprisonment each; under Section 506(2) IPC for one year's rigorous imprisonment each. It was also directed that all the sentences shall run concurrently.

3. In brief, facts of the case are that informant Shreepal lodged an FIR on 08.03.1997 that in the night of 03.03.1997 at about 09:00 p.m. his daughter had gone outside the house to attend the call of nature. Gudun and Musey sons of Radhey Shyam, Suresh son of Jagram, Harish Chandra son of Salikram and Jangay son of Keshri threw his daughter on the ground. Gudun caught her breast and when Harish Chandra opened her saree with ill intentions, she cried, upon which Ram Dulare Yadav, Ramdev and Chandrika Prasad Tiwari and some other persons of his village reached on the spot and saw the accused escaping therefrom. As the matter was about his daughter, he did not approach the police but when they started threatening to kill him, he requested to lodge an FIR and protect him.

4. In this case the accused 'Musey' was declared juvenile and his case was transmitted to the Juvenile Justice Board, Faizabad for trial. The case of rest of the accused persons was committed and the charges were framed under Sections 376/511, 354, 506 IPC. Accused persons denied the charges and sought trial.

5. Prosecution examined following witnesses in its support:-

1	PW-1	Shreepal, informant

2	PW-2	Smt. Kusuma
3	PW-3	Dr. P. Nath
4	PW-4	Ramesh Chand Tiwari, constable moharrir
5	PW-5	SI Ram Nagina Yadav
6	PW-6	Dr. Sushma Singh

6. Following documentary evidences have been adduced by the prosecution:-

1	Ex.Ka-1	Written complaint
2	Ex.Ka-2	Injury report of the victim
3	Ex.Ka-3	Chik FIR
4	Ex.Ka-4	Carbon copy kaymi GD
5	Ex.Ka-5	Map
6	Ex.Ka-6	Charge sheet
7	Ex.Ka-7	Age determination report of the victim

(I) Grounds of Appeal

7. The grounds taken by the accused persons are that: (i) the trial court failed to examine and evaluate the evidence on record correctly and judicially and has mistaken in passing the impugned order; (ii) the trial court could not consider that the story of the case was concocted and the same could not be substantiated by the prosecution; (iii) the impugned judgment has been passed on conjunctures and surmises; (iv) the trial court could not come to the conclusion that it was a malicious prosecution on account of enmity, the evidences are itself contradictory and the story is imaginary, the trial court failed to appreciate the main evidence which is falsifying the whole case; (v) the punishment is excess and the judgment and order is illegal and arbitrary and is not sustainable in the eyes of law. Hence, the impugned judgment and order of

conviction and sentencing be set aside and the appeal be allowed.

(II) Brief discussion on the statements of prosecution witnesses

8. PW-1, informant, Shreepal has deposed that at about 09:00-10:00 p.m. on the date of incident when he was making jaggery, Ram Dulare and Chandrika were sitting at the house of Rampal, he heard the screams of his 14-15 years old daughter to save her. He ran there with a torch. Ram Dulare, Chandrika, Rampal and Ramdev had also reached after him and saw that accused Musey was doing dirty things with his daughter and accused Gudun had caught her hand and breast on the point of a country-made pistol. Harish Chandra had opened her saree and she was lying in naked position. This incident had taken place in the field of Ram Jiyavan. His daughter told that accused Musey raped her. Rest of the accused persons were doing bad things with her. The girl narrated the story in front of her mother Dashrath Dei, Ram Dulare, Chandrika Tiwari and Ramdev. This witness has testified/recognized the signature on the written complaint Ex.Ka-1.

9. PW-2, Kusuma has deposed that the incident occurred about one year and ten months ago. It was 10 o'clock in the night she had gone outside the house to attend the call of nature in Ram Jiyavan's field. Accused Harish Chandra, Gudun, Chandrika, Musey and Suresh residents of her village reached and first caught her and threw her on the ground. Gudun was threatening with a country-made pistol. Accused Musey committed misdemeanour with her by his penis in her urethra/urinary tract. When he was doing that thing, rest of the accused persons had held her. When she

raised alarm, her father and thereafter her mother and wife of Chhote Lal, Ram Dulare, Ramdev, Rampal and Baba reached there. First of all, Gudun had lit the torch. Her father also had lit the torch. When they approached the accused, they ran away. Her father had opened her tied legs.

10. PW-3, Dr. P. Nath had examined the victim and found hard crust in an area of 0.5cm x 0.5cm on the base behind the little finger of the right hand and opined that it would have come from a blunt object. It may also occur if any one is thrown on the ground.

11. PW-4, Chandrika Tiwari has proved chik FIR Ex.Ka-3 and carbon copy kaymi GD Ex.Ka-4 regarding lodging of the FIR.

12. PW-5, SI Ram Nagina Yadav has deposed that the case was lodged in his absence. He had copied the chik FIR and GD, recorded the statements of Ram Dulare, Ramdev and mother of the victim. Prepared map Ex.Ka-5 and recorded the statement of the informant and the victim on 18.03.1997, copied the medical report and added Section 376 IPC, arrested the accused Harish Chandra, Musey Yadav and Gudun and recorded their statements and after finding sufficient evidence submitted the charge sheet Ex.Ka-6 under Sections 376, 354, 506 IPC.

13. PW-6, Dr. Sushma Singh has deposed that she had medically examined the victim on 10.03.1997 at about 06:00 p.m. The victim was telling injury to be on her right hand. There was no injury on her private part. Hymen was old torn and healed. Two fingers were easily entering into her vagina. Vaginal smear was collected and sent to the pathologist. The

victim was referred to the CMO who determined her age to be 17 years. (No pathological report regarding presence of live or dead sperm was produced/found).

(III) Discussion on Merit

14. The first argument advanced by the learned counsel for the appellants is that there is undue delay in lodging the FIR. According to the prosecution, the offence occurred in the night of 03.03.1997 and the FIR had been lodged in the night of 08.03.1997. As per the FIR it was mere a case of molestation and an attempt to commit rape but after investigation the charge sheet was submitted under Section 376, 354, 506(2) IPC. The informant deposed that on 04.03.1997 he went to the concerned SHO but he did not lodge the FIR and when he moved an application to the DIG only then FIR could be lodge but in support of these facts no independent oral evidence has been produced. So far as the submission of written report to the DIG is concerned, no such report has been proved during the examination-in-chief. However, during the course of cross-examination the witness was asked about the application submitted to the DIG in which some different facts have also been mentioned which is not the case of the prosecution. It has also come out that according to this witness he had already moved an FIR which had been torn by the SHO and when he moved another FIR it was considered for sending her daughter for medical examination. However, in absence of proof of letter to DIG in accordance with law, it can be said that when there was enmity between both the parties the case was lodged after an unreasonable delay though in cases of rape and molestation five days' delay is not fatal for the prosecution but the circumstances in

which the concerned FIR has been lodged would also to be considered before concluding as to whether the FIR has been lodged with an unreasonable delay or not.

15. This Court has also considered the fact that in this case all the alleged witnesses of the FIR (who have not been examined in the court) were either relatives or the residents of remote distance. Out of the witnesses mentioned in the FIR, Ramdev Yadav was brother-in-law (*bahnoi*) of the informant who stated in his statement under Section 161 CrPC that he had not seen the occurrence. He had heard that the accused threw the victim on the ground. Chandrika Prasad Tiwari was residing 10 kms away from his village. Ram Dulare was the resident of his village but he has not been examined in the court. He has not supported the prosecution version in his statement under Section 161 CrPC but has stated that he saw the victim coming with her mother from the fields. He did not see any one escaping from the spot. He heard that accused persons had thrown the victim on the ground for molesting her.

16. Though, the victim of such case is at par to the injured witnesses and her evidence should be considered if she is found to be trustworthy and a sterling witness but it is not so and the circumstances and the medical evidence are not in support of the prosecution case, therefore, corroboration from the independent evidence would be necessary to convict the accused.

17. In this case all the accused persons are the family members and there was enmity on account of a civil case with the informant. Out of them Musey and Gudun were the real brothers. According to this Court, such offence cannot be

committed by the two real brothers together in presence of their senior family members. In this regard defence has submitted documentary evidence regarding the civil case pending between the parties i.e. Case No.64 of 1984 which was instituted by the father of the accused Gudun and Musey against the family members of the informant. The enmity is double edged weapon. On account of enmity an offence can be caused and an innocent person may also be falsely implicated in a false and concocted case. In this case considering the facts, circumstances, medical and oral evidence and improvement from the original case, during the course of trial, it can be safely concluded that on account of enmity the accused persons have falsely been implicated as father of the accused Musey and Gudun had purchased a land which was claimed by the informant as his sahan land.

18. According to this Court, if the victim had gone to the fields lonely and accused Musey wanted to rape and molest her, there was no need of any other person. A young boy is strong enough to overpower a girl of tender age for molesting and committing rape upon her. Involving all the family members and assigning role to all of the accused persons that one has caught hold her one hand, another caught hold her second hand, some other accused had caught hold her left leg, her right leg and the accused Musey was committing rape with the victim in presence of his elder brother and his other elder family members, appears to be a concocted story away from the reality.

19. It has also been argued that the victim was not a girl of good moral character. She had illicit relation with a boy of her village. On the day of occurrence she

was seen in an inebriated/objectionable condition with him for which a propaganda spread in the village, therefore, only to save the honour of the victim this false story had been concocted by the informant taking the victim and her mother into confidence with the assistance of his brother-in-law, Ramdev Yadav. In this regard Section 53 of the Indian Evidence Act, 1872 (in short 'the Act, 1872') is material. For ready reference Section 53 of the Act, 1872 reads as under:-

“53. In criminal cases, previous good character relevant.—In criminal proceedings, the fact that the person accused is of a good character, is relevant.”

20. It is noteworthy that it is a case of molestation and attempt to commit rape as the charge was framed under Section 376/511 IPC, therefore, amended Section 53A of the Act, 1872 which was inserted by the Act of 2013 would not apply.

21. At this score Section 155 of the Act, 1872 is relevant and the same is reproduced herein below:-

“155. Impeaching credit of witness.—The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him—

(1) 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 a 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.”

22. Since it is a case of the year 1997, therefore, the sub-section (4) of Section 155 of the Act, 1872 which was deleted by Amendment Act of 2002 would be relevant and applicable which reads as under:-

“(4) When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.”

23. Thus, this Court is of the view that sub-section (4) of Section 155 of the Act, 1872 was into existence at the time of commission of the alleged crime, therefore, this case would have also to be seen in the light of the omitted sub-section (4) of Section 155 of the Act, 1872 because the medical report and the evidence of PW-3 and PW-6 are not in support of the prosecution version.

24. It would be expedient to discuss the norms regarding rape as defined under Section 375 IPC which is punishable under Section 376 IPC. Sections 375 and 376 IPC reads thus:-

“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.

376. Punishment for rape.—*(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.*

(2) Whoever,—

(a) being a police officer commits rape—

(i) within the limits of the police station to which he is appointed; or

(ii) *in the premises of any station house whether or not situated in the police station to which he is appointed; or*

(iii) *on a woman in his custody or in the custody of a police officer subordinate to him; or*

(b) *being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or*

(c) *being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or*

(d) *being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or*

(e) *commits rape on a woman knowing her to be pregnant; or*

(f) *commits rape on a woman when she is under twelve years of age; or*

(g) *commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.*

Explanation 1.—Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2.—“Women's or children's institution” means an institution,

whether called an orphanage or a home for neglected woman or children or a widows' home or by any other name, which is established and maintained for the reception and care of woman or children.

Explanation 3.—“Hospital” means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.”

25. Section 375 IPC requires two essentials; (i) sexual intercourse with a woman; (ii) sexual intercourse must be under the circumstances following under any of the six clauses of the aforesaid section.

26. It is not a case of consent though in 1993 the age of consent was above 16 years as per description six of Section 375 IPC. Hence, the age of the victim is immaterial though according to PW-6, the victim was about 17 years old. The intention or expression or even an indecent assault upon a woman does not amount to attempt to rape unless the determination of accused to gratify his passion at all events and in spite of the resistance is established.

27. In **Aman Kumar Vs. State, AIR 2004 SC 1497** the Apex Court held that 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 led hold of the prosecutrix, not only desired to gratify his passion but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnitude into attempt of rape in order to come to the conclusion that the conduct of the accused was indicative of a determination to gratify

his passion at all events, and in spite of resistance. Material must exist. Surrounding circumstances many times through becom light that aspect. To convict a accused under Section 376 IPC the prosecution must prove; (i) that the accused had sexual intercourse with a woman in question; (ii) that the act was done under circumstances falling under any of the six descriptions specified in Section 375 IPC; (iii) that such woman was not the wife of the accused or, if she was his wife, she was under 15 years of age; (iv) that there was penetration (Explanation-I of Section 375 IPC).

28. As per second explanation there is no need of full penetration of penis with emission of semen and rapture of hymen. Partial penetration within a labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape.

(IV) Burden of Proof

30. In **Tukaram Vs. State of Maharashtra, AIR 1979 SC 185** it has been held that in a case of rape, the onus is always on the prosecution to prove affirmatively each ingredient of the offence it seeks to establish and such onus never shifts.

31. In **Nilambar Goudo Vs. State of Orissa, 1982 Cri LJ NOC 172 (Ori)** it was held that it is duty of the defence to explain as to how and why in a rape case the victim and her mother have falsely implicated the accused. The evidence of prosecution witnesses cannot be accepted merely because an accused persons has not been able to say as to why they have come forward to depose against them.

32. In **Joginder Singh Vs. State of Punjab, 1974 CrLJ 117** it is held that however the great suspicion against the accused and however strong the moral belief and conviction of the judge, unless the offence of the accused is established beyond reasonable doubt or beyond the possibility of reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for the offence. There is an initial presumption of innocence of the accused and the prosecution has to bring the offence whom to the accused by reliable evidence, the accused is entitled to the benefit of every reasonable doubt. In the instant case, it could not be established beyond doubt that the sexual intercourse was committed by the accused with the victim girl without her consent or against her will. Consequently the offence under Section 376 IPC was not established.

33. Here the appellants have not taken the defence that an offence of attempt to commit rape or an offence of rape had been committed by either of the accused.

(V) Medical Evidence

34. In this case no medical examination of any accused had been conducted even Musey who alleged to have committed the offence has also not been medically examined to establish the commission of crime by him. The accused is entitled to say that if medical examination of the vital or the material part of his body would have been conducted, he would have been in a position to show that the condition of those parts negatived the possibility of his guilt, (**Ram Kali Vs. State of UP, AIR 1947 All 191**).

35. It is difficult to believe that after prolonged forcible sexual intercourse no injury might be caused to the private parts or other parts of the prosecutrix. However absence of injury on person of the accused and particularly penis cannot be sole ground for discarding prosecution evidence.

36. The absence of the injuries on the body of the prosecutrix, generally, gives rise to an inference that she was consenting party to coitus.

37. In **Tuka Ram** (supra) it had been held that in absence of any injury on the person of the victim indicates that the alleged intercourse was a peaceful affair and the story of a stiff resistance put up by the prosecutrix is false or an afterthought.

(VI) Evidence of the Prosecutrix

38. It is no doubt that true law in conviction of an accused on the basis of a testimony of the prosecutrix alone is permissible but that is in a case where the offence of a prosecutrix inspires confidence and appears to be natural and truthful, (**Vimal Suresh Kambley Vs. Chaluverapinake, AIR 2003 SC 818**).

39. Similar principle was laid down in **State of Rajasthan Vs. Biram Lal, 2005 CrLJ 2561 (SC)** the Apex Court has held that in several cases that once the statement of the prosecutrix inspires confidence and is expected by the courts as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Minor contradictions or insignificant discrepancies should not be a

ground for throwing out and otherwise reliable prosecution case. In practice a conviction for rape almost entirely depends on the credibility of the woman. All that is required is that there must be some additional evidence rendering it probable that the story of the complainant is true and that it is reasonably safe to act upon it. However, if the court of facts may find it difficult to accept the version of the prosecutrix on its face value it may search for evidence, direct or substantial, which may lend assurance to her testimony. The court has first to assess the trustworthiness of the evidence adduced and available on record and if the court finds the evidence adduced worthy of being relied on then the testimony of prosecutrix has to be accepted and acted on though there may be other witnesses available who could have examined but were not examined. Conviction for an offence of rape can be based on the sole testimony of the prosecutrix corroborated by the medical evidence and other circumstantial evidence such as the report of chemical examination, etc. The evidence, no doubt, should not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with the crime. Corroboration may be by the facts and circumstances.

40. In **State of Karnataka Vs. Manjanna, AIR 2000 SC 2231** it was held that the narration of the incident to so many independent witnesses without any discrepancy soon after the incident was held correctly admitted by the court under Section 157 of the Act, 1872 as corroborative of prosecutrix's testimony. Here the informant and the victim have changed their case from time to time. Initially it was a case of molestation and attempt to rape which had been converted

later on into a case of rape with molestation which was not accepted by the concerned court and the charge under Section 376 read with Section 511 IPC had been framed against which no revision had been preferred by the informant or the State and accepting the modification done by the concerned court the informant and the prosecutrix have adduced the evidence which is against the factum of charge framed by the concerned court. It has also been established that there was enmity on account of civil litigation between both the family members and no local witness or witness of remote area came forward to testify himself in support of the prosecution version.

41. On the other hand, the medical evidence is also not in support of the prosecution except a healed injury on the base of the little finger of the right hand of the victim, no injury even simple in nature such as abrasion or contusion were found on the person of the victim. Even no injury was found on the private parts of the victim but PW-6 found that the victim was habitual of sexual intercourse and two fingers were easily entering inside the vaginal cavity. It was also not found in a tightened position. On account of observation made by PW-6, Dr. Sushma Singh it can be concluded that the alleged offence has not been corroborated with the medical or an independent evidence even the prosecution story and the evidence has been improved from time to time which creates doubt and the court is bound to accept the defence version that due to enmity on account of civil litigation between the parties two real brothers alongwith other senior family members of the same family have been falsely implicated in a case of rape or attempt to commit rape. Even the prosecution is not clear that as to whether it is a case of attempt to rape or is a case of rape.

42. In **Santosh Prasad @ Santosh Kumar Vs. State of Bihar, (2020) 3 SCC 443** it was alleged that after committing an offence of house trespass accused committed rape with a married lady. There were material contradictions in deposition of the prosecutrix. Neither the indecent witness nor the medical witness was supporting the prosecution case. FSL report was also not supporting prosecution case. There was variation in prosecutrix's version about the given complaint. Prosecutrix failed to pass test of becoming "sterling witness". There is also delay in lodging the FIR. There was also enmity/dispute between both the parties with respect to land. Any other supportive evidence and the accused was given benefit of doubt and conviction was reversed. The fact of the aforesaid case and the case in hand are almost similar except the fact that the victim of this case was not a married lady but it has been concluded by PW-6, Dr. Sushma Singh that she was habitual of sexual intercourse, therefore, two fingers were easily entering and the vagina was found to be loose.

43. In **Lalta Prasad Vs. State of MP, AIR 1979 SC 1276**, it could not be established that the prosecutrix was ever subjected to any sexual intercourse by the accused against her will. On the other hand, there was the evidence of the Doctor that when she was examined after the occurrence, the Doctor found old torn hymen and no sign of any rape or any forcefully intercourse with her. That being so, the conviction of the appellant under Section 376 IPC was set aside.

44. In **Charan Singh Vs. State of Haryana, (1988) 3 Crimes 85 (P&H)** it was case of a girl above 16 years who was allegedly raped. In this case also the

question was whether when she admitted of having suffered some injuries on her back during the incident and when the same were not found then what had to be done. The lady doctor, however, who examined her did not find any injury on her private parts or on her body during the medico legal examination. No tenderness, swelling or blood was found in the vagina. She further found that two fingers could easily be admitted into the vagina. During the cross-examination, she rightly admitted that the prosecutrix would have suffered tenderness and swelling of the vagina if she was subjected to rape by two young boys. The gap between the occurrence and her medico legal examination ruled out any possibility of any abrasion being healed. Giving the benefit of doubt the accused were acquitted.

45. In **Zahoor Ali Vs. State of UP, 1989 CrLJ 1177 (All)** the doctor did not find any recent injury on the private parts of the girl. Hymen was found to be torn from before and healed. Therefore, the charge was held to be not proved.

46. In **Sakariya Vs. State of MP, 1991 CrLJ 1925 (MP)** there was an allegation of rape upon a married women who was alleged to have been dragged towards the place of occurrence and then raped but the report of medical examination was in the negative so far as the seminal stains and presence of spermatozoa in the vagina was concerned and to top it all there was not even a scratch on her body and the accused was acquitted.

47. In **Maharashtra Vs. Abdul Hafees Faroki, 1998 CrLJ 3603 (SC)**, eight persons were accused for raping a girl twice by turns and pushing the girl out of the running train. However, when no

serious injury was found on the person of the girl and evidence showed that there was possibility of prosecutrix going with the accused willingly, the acquittal of the accused was held proper.

48. In **Joseph Vs. State of Kerala, 2000 CrLJ 2467 (SC)**, the dhoti of the accused contained no blood or semen stains and there was no injury caused to the private part of the body of the victim. The conviction was sought to be proved by the fact that vaginal smear's examination confirmed the presence of semen and spermatozoa. It was held that this was not a ground for conviction of accused for the offence of rape and the accused was entitled to acquittal on the basis of benefit of doubt.

49. In **Sampad Vs. State of Orissa, 2001 CrLJ 793 (Ori)**, there was charge of gang rape against the accused persons who allegedly had forcibly lifted the victim to a nearby river bank on knife point and had committed sexual intercourse with her but no sign of forcible intercourse or mark of violence was found either on the spot or during the medical examination of prosecutrix. It was held that in the absence of a proper proof they could not be convicted under Section 376 (2)(g).

50. In **State of Orissa Vs. Rama Swain and others, 2007 CrLJ 714 (Ori)** the accused persons were alleged to have committed a rape forcibly on the prosecutrix one after another but the evidence showed that there was dispute between the victim and the accused persons regarding damage of crop by the cattle of the victim over the land cultivated by the accused persons. There was no semen stain on the apparels of the victim found. Thus the evidence of prosecutrix did not inspire

confidence and the judgement of acquittal was upheld.

51. In **Goverdhan Vs. State of MP, 2006 CrLJ 4118**, the parties were not keeping good relations in the past and had lodged FIRs against each other. Medical report did not corroborate the version given by the prosecutrix. It was held that guilt was not proved and conviction was improper.

52. Similarly due to non support of medical report, in **Mansingh Vs. State of MP, 2007 CrLJ 201 (MP)**, the conviction of the accused was set aside as the prosecution case was not supported by the medical report.

53. In **State of Maharashtra Vs. Rameshwar Sridhar Jaware, 2008 CrLJ 675 (Bom)**, the accused persons were alleged to have committed rape on a girl of 16 years. Medical report as well as the report of the chemical analyst was contrary to the evidence of prosecutrix. It was held that the possibility of a false accusation could not be ruled out and the accused was entitled to acquittal.

54. In **Suresh Govinda Nagdeve Vs. State of Maharashtra, 2008 CrLJ 2943 (Bom)**, the allegation was that the prosecutrix was subjected to rape by three accused person. It was alleged that in the night, the crime was committed in an open field but no injury on the private part or on the back of the prosecutrix was found and the Doctor could not confirm the theory of sexual intercourse. Similarly no corresponding injury was there on the private parts or on the body of the accused. Giving the benefit of doubt, the accused persons were acquitted.

55. All the above judicial pronouncements are applying in favour of the appellants and against the prosecution.

(VII) Material improvement and embellishment and non-examination of material and independent witnesses

56. The FIR had been lodged for commission of the offence of molestation and attempt to commit rape on the victim. Witnesses Ram Dulare (not examined) has given a hearsay statement to the investigating officer (IO) that he had heard that accused persons had thrown the victim on the ground for humiliation. Ramdev (not examined) has also given similar statement. Mother of the victim (not examined) has also given a hearsay statement to the IO that when she reached on the spot she found her daughter lying in the field who informed that some persons of the village had thrown for humiliating her. Hearing her screams she reached there. Only her daughter may disclose the real name of the accused persons. She refused to have seen any person fleeing from the spot. She also stated that her husband has lodged FIR after a thoughtful consideration. Thus, upto the stage of recording statement after lodging the FIR this case was only with regard to throwing the victim on the ground for humiliating her. If accused persons would have committed rape or an attempt to commit rape, the victim would certainly have informed her mother first about the incident occurred with her but she was willingly not examined by the prosecution in the court. In this context Section 114(g) of the Indian Evidence Act, 1872 is material which reads as under:-

“114 Court may presume existence of certain facts. —x x x

(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it."

57. After few days delay the victim has stated in her statement under Section 164 CrPC that at 10 p.m. on 03.03.1997 when she had gone outside the house to attend the call of nature, Harish Chandra reached and shut her mouth, Gudun kept country-made pistol at her breast and threatened that if she screamed, he would shoot her, Suresh tied her leg from the jute. Jangay caught hold her hands and threw her on the ground. Her saree was lifted by Musey and he started committing rape with her. After finding opportunity, she cried for help, on which her father and villagers and wife of Chhotelal reached there. Accused persons had run away as soon as she screamed. It is noteworthy that generally ladies in a village do not go out of their house to attend call of nature at 10:00 p.m. Generally villagers go for defecation in the evening or maximum upto 07:00 or 08:00 o'clock and young girls or women generally used to go in a group. Unless and until there is no dysentery, a young lady does not go for defecation at 10:00 p.m. and in case of emergency she would certainly be accompanied by another female member. It is not a case of the prosecution that there was indigestion or dysentery to the victim. Similar statement has given by the victim under Section 161 CrPC.

58. There is a contradiction about reaching of the victim's father or her mother on the spot. According to her mother Dashrath Dei she had reached on the spot and the victim had been taken back by herself. It is nowhere mentioned in the FIR that the informant had a torch in his

hand and neither such torch had been produced by the informant to the IO nor the IO had taken such torch in possession. The victim has deposed that before reaching her father, the accused persons had run away while making an improvement, the informant PW-1 has deposed that he saw that the accused Musey was committing rape with his daughter and all the accused persons were performing their allocated act as alleged in the FIR. PW-1 informant admitted that he had not written in the complaint that he had seen the incident after reaching on the spot. Further, he admitted that IO has not written in his statement that he was having a torch at the time of the incident. It has also not been written in the FIR that the legs of the victim had been tied with jute. Even this fact has not been deposed by the informant PW-1 in his examination-in-chief. Contrary to the fact already deposed regarding watching the incident, the informant PW-1 has deposed at page-9 that when he reached near the place of occurrence, accused had run away when he was 15 steps away from them. He admitted that all the accused persons belonged to the same family.

59. PW-2, the victim had deposed that first of all the accused persons caught her and threw her on the ground. Gudun threatened to kill her with a country-made pistol if she screamed. Accused Musey had committed rape with her. At the time of commission of rape, accused Harish Chandra, Suresh and Jangay had caught hold her. The victim has denied any intercourse before commission of the alleged offence but this fact is falsified from the evidence of PW-6 who has deposed that her vagina was found to be loose, hymen was found to be old torn and already healed and two fingers were easily entering in the vagina and she was habitual

to the sexual intercourse, (that time two finger test was prevalent but not now). Thus, it has been established that the victim was telling a lie.

60. On the basis of above discussion and considering the fact that none of the independent witnesses came forward in support of the prosecution version; that all the accused persons belonged to the same family with whom there was enmity on account of civil litigation with the informant; that there was delay in lodging the FIR; that the medical evidence was not in support of the prosecution version and there was no injury on the external or internal part of the victim except a crust on the base of little finger of the right hand rather it has been established that she was habitual of sexual intercourse as concluded in paragraph-59; that generally the two real brothers may not commit such offence together; that the time of occurrence and going alone out of the house for defecation at 10:00 p.m. by the victim appears to be concocted and fixed for the purposes of false implication of the appellants. Therefore, some roles have been assigned to all of the appellants. Thus, this Court is of the conclusion that the prosecution has been miserably failed in establishing and proving the prosecution case against the appellants regarding commission of the alleged crime. The Sessions Judge has been miserably failed in properly assessing the prosecution story and the evidence and in applying the correct proposition of law. Thus, there is force in this appeal and it deserves to be allowed and the impugned order of conviction and sentencing passed by the learned trial court is liable to be set aside.

61. Accordingly, this appeal is allowed.

62. The judgment and order of conviction and sentencing dated 03.06.2000 passed by the XI-Additional Sessions Judge, Faizabad in ST No.827 of 1997 (State Vs. Gudun and others) arising out of Case Crime No.55 of 1997, under Sections 376/511, 354, 506 IPC is set aside.

63. The appellants would be set free, if they are in jail and if they are not wanted in any other criminal case.

64. The lower court record alongwith a copy of this judgment be sent back to the court concerned for its consignment.

(2023) 8 ILRA 104

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: LUCKNOW 29.08.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 657 of 2021

Vishwapal Singh & Ors.	...Appellants
Versus	
State of U.P. & Anr.	...Respondents

Counsel for the Appellants:

Pradeep Kumar Singh, Sushil Kumar Singh

Counsel for the Respondents:

G.A., Anil Kumar Shukla

Criminal Law - Indian Penal Code, 1860 - Sections 452, 323, 427, 504 & 506 - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3(1)(Gha) - Code of Criminal Procedure, 1973 - Section 319 - Summoning order - Quashing of - Impugned F.I.R. lodged by complainant under aforesaid Sections against five persons including present appellants, thereafter, matter investigated, nothing found against them. (Para 2)

After perusal of record, appears that charge-sheet not filed against appellants, summoned on application given by complainant before court below, civil suit was pending between them, prosecution tried to give colour of criminal nature to civil dispute - Application not supported with any affidavit nor any cogent reason given so that appellants be summoned - Names of appellants expunged during investigation, complainant not filed protest petition, however, after long gap, application filed without assigning any reason - Allegation are same in application and first information report, trial court did not consider this aspect - Thus, impugned order passed without application of judicial mind, set aside. (Para 11, 12, 13, 20)

Appeal allowed. (E-14)

List of Cases cited:

1. Hardeep Singh Vs St. of Punj. & ors., (2014) 3 SCC 92, (Para 105, 106)
2. Labhuji Amratji Thakor & ors. Vs The St. of Guj. & anr., 2018 (0) Supreme (SC) 1147, (Para 9)
3. Brijendra Singh & ors. Vs St. of Raj., (2017) 7 SCC 706, (Para 13, 15)
4. Periyasami & ors. Vs S. Nallasamy, (2019) 4 SCC 342, (Para 14, 15)
5. Brindaban Das & ors. Vs St. of West Bengal, 2009 (66) ACC 273

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Sri Sushil Kumar Singh, learned counsel for the appellants, Sri Anil Kumar Shukla, learned counsel for the opposite party no.2 and Sri Bhasker Mal, learned A.G.A. for the State.

2. The instant appeal has been moved by the appellants, namely, Vishwapal Singh, Adarsh Singh and Vipin Singh with a prayer to

quash the impugned summoning order dated 04.03.2020 passed by the Additional Sessions Judge, Court No.3, Sitapur, whereby the appellants have been summoned under Section 319 Cr.P.C. in Special Trial No.181/2017 (State Vs. Shivpal Singh & Others), under Sections 452, 323, 427, 504, 506 I.P.C. and Section 3(1)(Gha) of The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, Police Station Kotwali, District Sitapur.

3. Before opening the arguments, learned counsel for the appellants informed that appellant no.1, Vishwapal Singh died, as such, the appeal in respect of appellant no.1 Vishwapal Singh stands **abated**. This Court is proceeding in respect of appellant no.2, Adarsh Singh and appellant no.3, Vipin Singh.

4. Learned counsel for the appellants submitted that initially an impugned F.I.R. was lodged by the opposite party no.2, complainant on 29.02.2016 at Case Crime No.0143 of 2016, under Sections 323, 147, 452, 504, 506, 427 I.P.C. and Section 3(1)(xi) of S.C./S.T. Act against the five persons including the present appellants. Thereafter, the matter was thoroughly investigated and nothing was found against the present appellants and they were expunged by the Investigating Officer.

5. Learned counsel for the appellants further submitted that opposite party no.2 moved an application dated 16.09.2019 under Section 319 Cr.P.C. before the court below for summoning the appellants to face trial. He further submitted that against the application under Section 319 Cr.P.C., objection was filed by the appellants on 04.10.2019.

6. Learned counsel for the appellants further submitted that there is a civil dispute pending between the parties before the Civil Judge (Senior Division), Sitapur

bearing O.A. No.602/2015 (Shivpal Singh & Others Vs. Ram Swaroop & Others), as such, the prosecution has tried to give colour of criminal nature to a civil dispute.

7. Learned counsel for the appellants further submitted that the appellants have not committed any offence as alleged by the complainant and from a bare perusal of the evidence collected by the Investigating Officer, it is crystal clear that the appellants have not participated in the alleged offence.

8. Learned counsel for the appellants further submitted that the application dated 16.09.2019 moved by the opposite party no.2, complainant under Section 319 Cr.P.C. is not supported with any affidavit nor any cogent reason has been given as to why the appellants be summoned after a long time of lodging of the first information report, as such, it shows the malafide arbitrary intention of the complainant just to harass the appellants.

9. Learned counsel for the appellants further submitted that the impugned order dated 04.03.2020 passed by the learned Additional Sessions Judge, Court No.3, Sitapur, by which the appellants were summoned, is also non speaking as the Magistrate has not considered any material available before him while summoning the appellants to face the trial. As such, the impugned order dated 04.03.2020 on the face of record appears to be unjustified and is passed without application of judicial mind, therefore, the same is liable to be set aside by this Court and the present appeal be allowed.

10. Learned A.G.A. for the State as well as learned counsel for the opposite party no.2 have opposed the argument raised by the learned counsel for the

appellants and have jointly submitted that the impugned order dated 04.03.2020, summoning the appellants under Section 319 Cr.P.C., was rightly passed, as such, the same is not liable to be quashed and the instant appeal is liable to be rejected.

11. After hearing learned counsel for the parties and perusal of record, it reveals that the charge-sheet has not been filed against the present appellants. The appellants have been summoned merely on the application given by the opposite party no.2, complainant under Section 319 Cr.P.C. It also reveals that a Civil Suit bearing O.A. No.602/2015 (Shivpal Singh & Others Vs. Ram Swaroop & Others) is pending between the parties, as such, the prosecution has tried to give colour of criminal nature to a civil dispute.

12. Further, this Court finds that the application dated 16.09.2019 filed by the opposite party no.2, complainant under Section 319 Cr.P.C. before the learned court below is not supported with any affidavit nor any cogent reason has been given so that the appellants be summoned by the court below. Even though when the names of the appellants were dropped/expunged during the investigation, the opposite party no.2, complainant has not filed any protest petition against the same, however, after a long gap, the application under Section 319 Cr.P.C. was filed that too without assigning any cogent reason.

13. It is further observed by this Court that in application dated 16.09.2019 filed by the opposite party no.2, complainant under Section 319 Cr.P.C., the same allegation has been leveled which was leveled in the first information report and further that the learned trial court, while passing the impugned order dated

04.03.2020 did not consider this aspect that the power under Section 319 Cr.P.C. is a discretionary and extraordinary power, which should be sparingly used and only in those cases where the circumstances of the case so warrant, has passed the order in cursory manner and without application of judicial mind.

14. The Constitution Bench judgment of the Hon'ble Apex Court in the case of **Hardeep Singh Vs. State of Punjab & others, (2014) 3 SCC 92** was pleased to observe in paragraph 105 and 106 of the aforesaid judgment as under :-

"105. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC the purpose of providing if "it appears from the evidence

that any person not being the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused". The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused."

15. Further, the Constitution Bench judgment was duly considered by the Hon'ble Apex Court in the case of **Labhuji Amratji Thakor & others Vs. The State of Gujarat and another, 2018 (0) Supreme (SC) 1147** and the Hon'ble Supreme Court in paragraph 9 of the aforesaid judgment was pleased to observe as under :-

"9. The Constitution Bench has given a caution that power under Section 319 Cr.P.C. is a discretionary and extraordinary power, which should be exercised sparingly and only in those cases where the circumstances of the case so warrant. The crucial test, which has been laid down as noted above is "the test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction." The present is a case, where the trial court had rejected the application filed by the prosecution under Section 319 Cr.P.C. Further, in the present case, the complainant in the F.I.R. has not taken the names of the appellants and after investigation in which the statement of victim was also recorded, the names of the appellants did not figure. After carrying investigation, the Charge Sheet was submitted in which the appellants names were also not mentioned as accused. In the

statement recorded before the Police, the victim has named only Natuji with whom she admitted having physical relations and who took her and with whom she went out of the house in the night and lived with him on several places. The mother of victim in her statement before the Court herself has stated that victim girl returned to the house after one and a half months. In the statement, before the Court, victim has narrated the entire sequence of events. She has stated in her statement that accused Natuji used to visit her Uncle's house Vishnuji, where she met Natuji. She, however, stated that it was Natuji, who had given her mobile phone. Her parents came to know about she having been given mobile phone by Natuji, then they went to the house of Natuji and threatened Natuji."

16. Further, the Hon'ble Apex Court in the case of **Brijendra Singh and others vs. State of Rajasthan, (2017) 7 SCC 706** and in para 13 and 15 was pleased to observe as under :-

"13. In order to answer the question, some of the principles enunciated in Hardeep Singh's case may be recapitulated:

Power under Section 319 Cr.P.C. can be exercised by the trial court at any stage during the trial, i.e., before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that there is some ?evidence? against such a person on the basis of which evidence it can be gathered that he appears to be guilty of offence. The evidence? herein means the material that is brought before the Court during trial. Insofar as the material/evidence collected by the IO at the stage of inquiry is concerned, it can be utilised for corroboration and to support

the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C. No doubt, such evidence that has surfaced in examination-in-chief, without cross-examination of witnesses, can also be taken into consideration. However, since it is a discretionary power given to the Court under Section 319 Cr.P.C. and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrants. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom chargesheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the Court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity.

xx xx xx

15. This record was before the trial court. Notwithstanding the same, the trial court went by the deposition of complainant and some other persons in their examination-in-chief, with no other material to support their so-called verbal/ocular version. Thus, the ?evidence? recorded during trial was nothing more than the statements which was already there under Section 161 Cr.P.C. recorded at the time of investigation of the case. No doubt, the trial court would be competent to exercise its power even on the basis of such statements recorded before it in examination-in-chief. However, in a case like the present where plethora of evidence was collected by the IO during investigation which suggested otherwise, the trial court was at least duty bound to look into the same while forming prima facie opinion and to see as to whether

?much stronger evidence than mere possibility of their (i.e. appellants) complicity has come on record. There is no satisfaction of this nature. Even if we presume that the trial court was not apprised of the same at the time when it passed the order (as the appellants were not on the scene at that time), what is more troubling is that even when this material on record was specifically brought to the notice of the High Court in the Revision Petition filed by the appellants, the High Court too blissfully ignored the said material. Except reproducing the discussion contained in the order of the trial court and expressing agreement therewith, nothing more has been done. Such orders cannot stand judicial scrutiny."

17. Further, the Hon'ble Apex Court in the case of **Periyasami and others vs. S. Nallasamy, (2019) 4 SCC 342** and in paragraph 14 and 15 of the aforesaid judgment was pleased to observe as under:-

"14. In the First Information Report or in the statements recorded under Section 161 of the Code, the names of the appellants or any other description have not been given so as to identify them. The allegations in the FIR are vague and can be used any time to include any person in the absence of description in the First Information Report to identify such person. There is no assertion in respect of the villages to which the additional accused belong. Therefore, there is no strong or cogent evidence to make the appellants stand the trial for the offences under Sections 147, 448, 294(b) and 506 of IPC in view of the judgment in Hardeep Singh case (supra). The additional accused cannot be summoned under Section 319 of the Code in casual and cavalier manner in the absence of strong and cogent evidence.

Under Section 319 of the Code additional accused can be summoned only if there is more than prima facie case as is required at the time of framing of charge but which is less than the satisfaction required at the time of conclusion of the trial convicting the accused.

15. The High Court has set aside the order passed by the learned Magistrate only on the basis of the statements of some of the witnesses examined by the Complainant. Mere disclosing the names of the appellants cannot be said to be strong and cogent evidence to make them to stand trial for the offence under Section 319 of the Code, especially when the Complainant is a husband and has initiated criminal proceedings against family of his in-laws and when their names or other identity were not disclosed at the first opportunity."

18. In the present case, it is apparent that the order under Section 319 Cr.P.C. is based on the statement of P.W.1 without considering the relevant facts and without recording any satisfaction that there is some cogent evidence which may lead to their conviction even otherwise the appellants were already expunged by the Investigating Officer and final report was submitted against them. In the matter of **Hardeep Singh & Bijendra Singh (supra)** and other judgments, the Apex Court is clearly of the view that evidence should be more prima facie, if un rebutted, would lead to conviction, here no such satisfaction has been recorded by the Additional Sessions Judge, Court No.3, Sitapur while passing the summoning order dated 04.03.2020.

19. Hon'ble Apex Court in the case of **Brindaban Das and others vs. State of West Bengal, 2009 (66) ACC 273**, held that in matters relating to invocation of powers under section 319 Cr.P.C., the Court

is not merely required to take note of the fact that the name of a person who has not been named as an accused in the FIR has surfaced during the trial, but the Court is also required to consider whether such evidence would be sufficient to convict the person being summoned. The Apex Court further observed that the fulcrum on which the invocation of section 319 Cr.P.C. rests is whether the summoning of persons other than the named accused would make such a difference to the prosecution as would enable it not only to prove its case but to also secure the conviction of the persons summoned.

20. Thus, in view of the law laid down by the Hon'ble Apex Court and the facts and circumstances, as narrated above and from the perusal of the record, the impugned summoning order dated 04.03.2020 passed by the learned Additional Sessions Judge, Court No.3, Sitapur, summoning the appellants under Section 319 Cr.P.C., is against the spirit and directions issued by the Hon'ble Apex Court and is liable to be set aside.

21. Accordingly, the order dated 04.03.2020 passed by the learned Additional Sessions Judge, Court No.3, Sitapur, whereby the appellants have been summoned under Section 319 Cr.P.C. in Special Trial No.181/2017 (State Vs. Shivpal Singh & Others), under Sections 452, 323, 427, 504, 506 I.P.C. and Section 3(1)(Gha) of The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, Police Station Kotwali, District Sitapur is hereby **set aside** and **reversed**.

22. For the reasons discussed above, the appeal is **allowed** in respect of appellant no.2, Adarsh Singh and appellant no.3, Vipin Singh.

23. No order as to the costs.

(2023) 8 ILRA 110

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 04.08.2023

BEFORE

**THE HON'BLE DR. KAUSHAL JAYENDRA
THAKER, J.**

THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Appeal No. 1045 of 2016

With

Criminal Appeal No. 1044 of 2016

Puneet Tripathi

...Appellant

Versus

State of U.P.

...Respondent

Counsel for the Appellant:

Sri Radhey Shyam Shukla, Sri Rajesh Kumar Mishra, Sri Noor Mohammad, Sri Rudra Pratap Pandey, Sri Vidhu Bhushan Singh, Sri Kamal Krishna (Sr. Advocate)

Counsel for the Respondent:

G.A., Sri Prashant Kumar Singh

Criminal Law - Indian Penal Code, 1860 - Sections 498-A & 304-B - Dowry Prohibition Act, 1961 - Section 3/4 - Appeal against conviction - Quashing of - Code of Criminal Procedure, 1973 - Section 357 - Indian Evidence Act, 1872 - Sections 73, 106, 113-A, 113-B & 114(g) - Allegation of abusing, torturing for non-fulfilment of demand of dowry and killing of deceased within seven years of marriage against accused - Held, relation between deceased and accused not cordial, institution of suit for restitution of conjugal rights shows that accused wanted to keep relation intact - When accused was medical representative, promoted as area manager, no such meagre amount and ordinary articles demanded as dowry - None of independent witnesses examined by trial Court, trial concluded without summoning actual witnesses present on

spot who carried deceased to Hospital - Not consider whether divorce petition was result of impersonation or not and not attempt to send alleged suicide note for expert opinion when admitted signature of deceased available - Except evidence of P.W.2 and P.W. 4, no iota of evidence to convict accused persons - On date, time and place of occurrence, accused was there, admitted quarrelling with deceased, admitted deceased in hospital but presence of rest of accused persons not proved beyond reasonable doubt. (Para 21 to 25)

Appeal partly allowed. (E-14)

List of Cases cited:

1. Bable Vs St. of Chhatisgarh, AIR 2012 SC 2621
2. Bhagwan Jagannath Markad Vs St. of Mah., (2016) 10 SCC 537
3. Jarnail Singh Vs St. of Punj., (2009) 9 SCC 719
4. Nagraj Vs St., (2015) 4 SCC 739, (Para 13)
5. Babu Vs St. of Kerala (2010) 9 SCC 189
6. Nathuni Yadav Vs St. of Bihar (1998) 9 SCC 238
7. G.Parshwanath Vs St. of Karn., AIR 2010 SC 2914
8. Jagdish Vs St. of M.P., 2009 (9) SCC 495
9. Sanjeev Vs St. of Har., (2015) 4 SCC 387, (Para 16)
10. Radha Mohan Singh @ Lal Saheb Vs St. of U.P., 2006 (2) SCC 450
11. Brahm Swaroop Vs St. of U.P., AIR 2011 SC 280
12. George Vs St. of Kerala, AIR 1998 SC 1376
13. St. of U.P. Vs Mohd. Iqram, (2011) 3 SCC (Cri.) 354

14. V.K. Mishra Vs St. of Uttrakhand, (2015) 9 SCC 588 (Three Judge Bench)
15. Panchanand Mandal Vs St. of Jharkhand, (2013) 9 SCC 800
16. Sanjay Kumar Jain Vs St. of Delhi, (2011) 11 SCC 733
17. Harish Kumar Vs St. of Har., 2015 (88) ACC 640 SC
18. Surinder Singh Vs St. of Har., (2014) 4 SCC 129
19. Manohar Lal Vs St. of Har., (2014) 9 SCC 645
20. Satbir Singh Vs St. of Har., AIR 2005 SC 3546
21. Eshwaraiah Vs St. of Karn., (1994) 2 SCC 677
22. St. of H.P.Vs Raj Kumar, (2018) 2 SCC 69
23. Balram Prasad Agrawal Vs St. of Bihar, (1997) 9 SCC 338
24. Kailash Chand Vs St. of Raj., (2017) 11 SCC 268
25. Dhari & ors. Vs St. of U.P., AIR 2013 SC 308
26. Shyamal Ghosh Vs St. of West Bengal, AIR 2013 SC 3539
27. Prithi Vs St. of Har., (2010) 8 SCC 536
28. Suchha Singh Vs St. of Punj., (2003) 7 SCC 643
29. Mukesh Vs St. of N.C.T of Delhi & ors., AIR 2017 SC 2161 (Three Judges Bench)
30. Ashok Kumar Chaudhary Vs St. of Bihar, 2008 (61) ACC 972 SC
31. Dharnidhar Vs St. of U.P., (2010) 7 SCC 759
32. Dalbir Kaur Vs St. of Punj., (1976) 4 SCC 158

33. Nand Kumar Vs St. of Chhatisgarh, (2015) 1 SCC 776

34. Union of India Vs Mahadeolal Prabhudayal, AIR 1965 SC 1755

35. Moinuddin Vs St. of U.P., 2004 (50) ACC 244

36. Geeta Mehrotra & anr. Vs St. of U.P. & anr. reported in AIR 2013 Supreme Court 181

37. Kahkashan Kausar @ Sonam & ors. Vs. St. of Bihar & ors. reported in 2022 0 Supreme (SC) 117, (Para 18)

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

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

2. The present appeals have been preferred by the appellants against the judgment and order of conviction and sentencing dated 3.2.2016 in S.T. No. 34 of 2012, Crime No. 440 of 2011 under Section 498-A, 304 B I.P.C. and Section 3/4 of D.P. Act, Police Station- Banda, District-Shahjahanpur and S.T. No. 216 of 2013 (State Vs. Shivkumar Tripathi and Others). The learned Additional Sessions Judge, Court No.VII, Shahjahanpur, has convicted the accused-husband for commission of offence under Section 304-B I.P.C. for life imprisonment, under Section 498-A for three years imprisonment and under Section 4 of the Dowry Prohibition Act, for two years imprisonment with fine of Rs. 10,000/- with default stipulation. In connected S.T. the accused Sujeet Tripathi, Shivkumar Tripathi, Smt. Bineshwari and Asha Tripathi have been convicted under Section 304- B for seven years each, under Section 498-A I.P.C. for two years with fine of Rs. 5,000/- each and under Section 4 of the Dowry Prohibition Act, for six months

with fine of Rs. 5,000/ each, with default stipulation. It was also directed that out of the aforesaid amount Rs. 75,000/- shall be paid as compensation to the father of the informant and deceased under Section 357 Cr.P.C.

3. Grounds of appeal :

The appellants in both the appeals have taken grounds that the conviction of the appellants is against the weight of evidence on record and is bad in law; on the facts and circumstance, no offence is proved against the appellant; the order passed by the trial Court dated 3.2.2016 is wholly illegal, arbitrary and not sustainable in the eye of law and is liable to be quashed by this Court; the trial Court has erred in law in convicting the appellants without considering the facts and circumstances of the case, and the evidence adduced by the prosecution are contrary to each other; the impugned judgment and order has been passed without application of mind in a mechanical manner; the impugned judgment and order has been passed without application of mind in a mechanical manner; that in any case on the basis of the record of the case, the appellants are liable to be acquitted and the appeal is liable to be allowed as the prosecution has failed to prove their case beyond reasonable doubt; and that the sentence and fine awarded is too excessive and severe.

4. In brief, facts of the case are that informant Km. Pooja Vajpayee moved a written complaint Ex. Ka-1 on 23.8.2022 that her sister Smt. Vandana Vajpayee (deceased) was married to Puneet Tripathi about two years ago. Her parents had given dowry as per their capacity in the marriage but accused persons were not satisfied and

were demanding a Wagon R Car. When the aforesaid demand could not be fulfilled, they started beating and torturing her sister. Her sister was posted as a Primary Teacher in Banda District Shahjahanpur and used to live in a rented house of one Anil Jaiswal with her son namely Achintya aged about one and half year. Her mother Smt. Shashi Vajpayee was also living with Vandana. On 22.08.2011 at about 10:30 AM, accused Puneet and his family members came to the house of Vandana and at about 4:00 P.M. ousted her mother from the house saying that they did not provide the Car, today, you taste the fun. Her mother remained at the house of landlord and at about 7:00 PM on hearing her daughter's screaming, she went there and saw that Puneet and his family members had caught the deceased and administered some material from a bottle to her. After drinking, Vandana started vomiting, all the accused persons after administering poison, fled away. Her father was keeping ill much before the incident. Puneet and his family members used to threaten that if Car was not provided, they would kill Vandana and also that Puneet shall marry someone else.

5. On the aforesaid application, the F.I.R. was registered and chick F.I.R., Ex. Ka-10 and G.D., Ex. Ka-11, were prepared. The I.O. prepared site plan, Ex. Ka-3, and recorded the statement of witnesses and arrested the accused and submitted charge-sheet No. 32 of 2011, Ex. Ka-4, against Puneet under Section 498A, 304 B I.P.C. and $\frac{3}{4}$ D.P. Act. The investigation was kept pending against rest of the accused persons. Thereafter the investigation was entrusted to Sri Vikas Kumar Vaidhya, C.O., who after recording the statements of the witnesses submitted charge-sheet No. 32A/2011 dated 01.08.2012, Ex. Ka-5, against rest of the accused persons.

6. The C.J.M. Shahjahanpur took cognizance and committed the case to the Court of Sessions. Learned Addl. Sessions Judge, Court No. 6, Shahjahanpur, framed charges on 14.5.2012 against accused Puneet Tripathi under Section 498-A, 304-B I.P.C. and Section $\frac{3}{4}$ of the Dowry Prohibition Act. The accused denied the charges and sought trial.

7. So as to bring home the charge, the prosecution has examined 9 witnesses who are as under :

1	Km. Pooja Vajpayee	PW1
2	Smt. Shashi Vajpayee	PW2
3	Raj Narain	PW3
4	Pinki Srivastava	PW4
5	Dr. Manoj Kumar Srivastava	PW5
6	I.O./C.O. Rajesh Kumar Sonkar	PW6
7	I.O./C.O. Vikas Kumar Vaidhya	PW7
8	Nayab Tehsildar Gajendra Singh	PW8
9	Constable Virendra Singh	PW9

8. So as to give credence to these oral testimonies following documents were also filed by the prosecution to bring home:

1	Written complaint	Ex.Ka.1
2	Post-mortem report of deceased Vandana	Ex.Ka.2
3	Site Plan	Ex. Ka. 3
4	Charge-sheet No. 32 of 2011	Ex. Ka. 4
5	Charge-sheet No. 32A/11	Ex. Ka. 5
6	Panchnama	Ex. Ka. 6
7	Photo Lash	Ex. Ka.7
8	Post-mortem Form	Ex. Ka. 8
9	Post-mortem letter	Ex. Ka.9
10	Chick F.I.R.	Ex. Ka.10
11	Kayami G.D.	Ex. Ka.11
12	Marriage Card	M. Ex-1

9. In brief, evidence of the witnesses are reproduced hereinbelow:

(a) **P.W.-1**, Km. Pooja, informant deposed that, her sister Smt. Vandana Vajpayee (deceased) was married to Puneet Tripathi about two years ago. Her parents had given dowry as per their capacity in the marriage but accused persons were not satisfied and were demanding a Wagon R Car. When the aforesaid demand could not be fulfilled, they started beating and torturing her sister. On 22.8.2011, Puneet and other family members came to the house of Vandana and at about 4:00 PM, they ousted her mother from the house of Vandana saying that she could not provide a wagon R car now enjoy the taste. Her mother came down from the room and stayed in the house of landlord. At about 7:00 PM, screams were heard upon which her mother ran out and saw that the family members of Puneet had caught her sister and Puneet having some substance in a vial, gave it to Vandana. All the accused persons ran away after pushing her mother. Her sister started vomiting. Her mother took Vandana to the Banda, hospital, Puneet also reached there wherefrom she was referred to District Hospital, Shahjahanpur where she died. Panchayatnama was filled in the afternoon. She told the whole incident to the S.O. in police station, then she got it typed by narrating to a typist. C.O. had not not investigated the case properly, he had not recorded the statement of her mother, father and maid Pinki. She complained to D.G. & I.G. Police. Witness Anil Jaiswal, Geeta Jaiswal and Apoorva Mishra were in connivance with the accused persons. Before this incident, accused persons used to tender threats to kill her sister and get Puneet remarried. Her sister had filed a divorce petition no. 544 of 2011 in Kanpur

Nagar. The marriage was solemnized on 01.12.2008. This witness is not an eyewitness of the main incident.

(b) **P.W.2**, Smt. Shashi Vajpayee, has also given similar statement to that of P.W.-1. In addition to that she has deposed that her son-in-law was M.R. in Cipla Company. She saw that accused persons were putting something in the mouth of her daughter, when accused persons pushed her, she fell down and they ran away. As she started crying. Anil Kumar came up and took her daughter to hospital and from there to District Hospital, Shahjahanpur where she died in the morning. She had informed her daughter Pooja and her husband who reached in the morning and after seeing the dead body, Pooja lodged the F.I.R.

(c) **P.W.-3**, Raj Narain, father of the deceased has also given similar statement to that P.W.1. He is not an eye witness.

(d) **P.W.-4**, Pinki Srivastava, has deposed that she was working at the house of the deceased since a year before the incident. She used to take care of son of the deceased on payment of Rs. 1500/- per month. Accused Puneet used to come there at 8-10 days and stay there for 2-4 day. They often used to quarrel. Puneet used to demand Wagon R Car and money from her. Both of them quarrel about this matter. She has seen and heard them quarreling with her eyes. When Puneet used to come and stay there, she used to go to her house. Puneet also used to quarrel with his mother-in-law for not fulfilling the demand of Car. On the day of incident at about 10:30 AM, Puneet, his mother, father, brother and sister-in-law had come to the house of Vandana. She did not know the name of the rest of the accused persons. The above persons had beaten the deceased and drove her mother away at about 4:30

PM, she went down to the part of landlord and sat down there till 5:30. The deceased told her to go to market with her son Achchu and gave her Rs.20 that is why she went to the market and returned at 5:30 PM. When she came back, mother of the deceased met there and took Achchu from her. At about 8:00 PM she came to know that Vandana was in the Government Hospital Banda, she went there. She was not permitted to meet Vandana by Neelu, Anil and Minku.

(e) **P.W.-5**, Dr. Manoj Kumar Srivastava, proved post-mortem report, Ex. Ka-2, and stated that he had conducted post-mortem on the body of the deceased. No injury was found before the death of the deceased. The cause of the death could not be ascertained and Viscera was preserved

(f) **P.W.-6**, Rajesh Kumar Sonkar, C.O., has proved the site plan and charge-sheet, Ex. Ka3 and Ex. Ka-4 and deposed that he had investigated the case and entered the viscera report in paper no. 7 of the charge-sheet and after recording the statement of the witnesses, he submitted charge-sheet against the accused Puneet.

(g) **P.W. -7**, I.O, Vikas Kumar Vaidhya, proved the material exhibit-1 and charge-sheet Ex. Ka-5 and has deposed that he had written statements of the witnesses. He had exonerated accused Neelam.

(h) **P.W.-8**, S.I. Gajendra Singh, has proved the inquest report Ex. Ka-6, photolash, Ex. Ka-7, challan lash, Ex.Ka-8, letter to C.M.O. Ex. Ka-9.

(i) **P.W.-9**, Constable, Virendra Singh, proved F.I.R., Ex. Ka-10 and Kayami G.D., Ex. Ka-11, to be in his handwriting and signature.

10. From the defence side D.W.-1, Smt. Kalpna Singh, Assistant Teacher, Primary School, Dharmapur, Block- Banda,

Shahjahanpur has been examined. She has proved Ex. Kha-1 and Kha-2.

11. This case is decided as under:

F.I.R.: As per prosecution version the incident occurred at about 7: 00 P.M. on 22.8.2011, the deceased was taken to Banda Hospital just after the incident wherefrom she was admitted to the District Hospital Shahjahanpur and in the morning on 23.8.2011 she died. The informant Km. Pooja Vajpayee, sister of the deceased, Vandana, moved the written complaint, Ex. Ka-1, for lodging the F.I.R. which was registered at 3:45 P.M. and chick F.I.R., Ex. Ka-10 was prepared.

According to this Court there is no delay in lodging the F.I.R. In the F.I.R. all the necessary facts have been incorporated. It is settled principle of law that F.I.R. is not an encyclopedia, it is not a substantive piece of evidence, it can be used only for contradiction of the informant. It has been proved from the evidence that at the time of evidence only mother, P.W.-2. Smt. Shashi Vajpayee and P.W.-4, Pinki Srivastava, were there. When Smt. Shashi Vajpayee informed her daughter and husband at Kanpur, they reached to Shahjahanpur and saw the dead body of the deceased, thereafter the informant wrote the complaint and produced in the concerned police station for lodging the F.I.R. and taking action.

In *Bable Vs. State of Chhatishgarh*, AIR, 2012 SC 2621; *Bhagwan Jagannath Markad Vs. State of Maharashtra*, (2016) 10 SCC 537; *Jarnail Singh Vs. State of Punjab*, (2009) 9 SCC 719, it has been held that *F.I.R. registered under Section 154 Cr.P.C. is not a substantive piece of evidence, it is not the encyclopedia of all the facts relating to crime. The only requirement is that at the*

time of lodging the F.I.R., the informant should state all those facts which normally strike to mind and help in assessing the gravity of the crime or identity of the culprit briefly.

On the basis of the above discussion it is concluded that there is no delay or discrepancy in lodging the impugned FIR.

12. Motive:

As per F.I.R. and prosecution, the marriage between the deceased and the accused was solemnized about two and half year ago, her parents had given dowry as per their capacity but the accused persons were not satisfied with the dowry given in the marriage and after the first farewell of the marriage, all the accused persons started demanding Maruti Wagon R Car in dowry. Due to non-fulfillment of demand, Vandana's husband Puneet and his family members started beating and torturing her in various ways. The deceased was employed as a teacher in Banda Basic Primary School Shahjahanpur and lived with her son Achintya, aged about one and a half year, in the rented house of Anil Jaiswal, near cooperative Bank Banda Shahjahanpur. For about a month, Smt. Shashi Vajpai, mother of the deceased was living with her. The accused Puneet husband of the deceased works in Kanpur Nagar and keeps coming to district Shahjahanpur to her wife. The informant P.W.1 has deposed about the demand of dowry, abuse and torturing with regard to the demand. She has also deposed that in Chauth farewell, Puneet asked for a Wagon R Car and one lakh cash from the deceased which she conveyed to the family members. It is admitted to the accused persons that the deceased had instituted a divorce petition no. 544 of 2011 in the

Family Court Kanpur Nagar and accused Puneet had also filed a suit for restitution of conjugal rights in Lucknow.

According to the accused Puneet Tripathi, the divorce petition was instituted by making overwriting of the deceased's signature as on the date of institution i.e. 25.04.2011, she was on duty at Shahjahanpur. The trial Court did not consider overwriting on the divorce petition such as 2010 has been corrected as 2011, age of Puneet Tripathi has been corrected from 35 to 32, there is cutting in para 3 and also overwriting on the date, month and the year. It has been corrected by making overwriting as 25.4.2011 on which date she was teaching in her school at Shahjahanpur. From these facts, it is proved that someone else appeared as Vandana and had filed the divorce petition through impersonation.

It has been admitted to the accused persons that the suit for restitution of conjugal rights had been dismissed. According to the accused, it had been got dismissed on the assurance of the deceased as she was also frustrated due to intervention of her family members. Though it has not been proved that the case of restitution of conjugal rights had been not pressed by the accused on the assurance of the deceased. However, there is no evidence or writing left by the deceased to show that she was not aware about the pendency of aforesaid divorce petition. It is common and mandatory practice in Family Courts that after institution of any petition, notices are sent to the opposite parties and in view of judgment of the Apex Court and also according to Section 89 C.P.C. first of all parties are sent to Reconciliation Centre and if the matter is not reconciled only then the family Court proceeds to decide the case on merit. In this case no evidence has been adduced by either side to prove that after institution of the alleged divorce

petition any notice was served upon accused Puneet and he was called by the Reconciliation Centre of the Family Court, Kanpur Nagar, on any particular date. However, when it is admitted to both the parties that a suit under Section 9 of the Hindu Marriage Act, had been filed by the accused Puneet, it goes to show that certainly there were some fractions between both of them and the deceased was not living with her husband either voluntarily or due to her service conditions. But if compromise as alleged by the accused would have taken place between both the parties, the divorce petition would have also been dismissed on the application of the deceased. Thus this Court is of the view that the marital dispute between the accused persons and the deceased was still existing.

In Nagraj Vs. State, (2015) 4 SCC 739 (para 13); Babu Vs. State of Kerala (2010) 9 SCC 189; Nathuni Yadav Vs. State of Bihar (1998) 9SCC 238, it has been held that prosecution should prove motive of the accused if the case is based on circumstantial evidence and not in the cases which are based on direct evidence.

In G.Parshwanath Vs. State of Karnataka, AIR 2010 SC 2914; Jagdish Vs. State of M.P., 2009 (9) SCC 495, it has been held that if chain of circumstances are complete, absence of motive is not of much consequence.

In Sanjeev Vs. State of Haryana, (2015) 4 SCC 387 (para 16), it is held that it is settled principle of law that to establish an offence of murder by an accused, motive is not required to be proved, motive is something which prompts a man to form an intention. The intention can be formed even at the place of incident at the time of commission of crime. It is only either intention or knowledge on the part of the accused which is required to be seen in

respect of the offence of culpable homicide. In order to read either intention or knowledge, the Courts have to examine the circumstances, as there can not be any direct evidence as to the state of mind of the accused.

In this case it has been proved that the deceased was living separately in Shahjahapur because of her service and she had also filed a suit for a decree of divorce against the accused Puneet Tripathi in Kanpur Nagar and probably no monetary gain was tendered to the accused persons and the demand of providing a Wagon R Car was not fulfilled. The accused Puneet Tripathi has admitted in his bail application that on the day of occurrence, he had visited the house of the deceased where a quarrel had taken place. Thus it can not be said that there was no motive behind the commission of the alleged crime.

On the basis of the above discussion, this Court is of the view that there was a motive behind the commission of crime and it has also been proved from the oral and documentary evidence as well. Though it is a case of direct evidence based on the evidence of P.W.2 and P.W.4, therefore, the prosecution is not duty bound to prove any motive behind the commission of crime.

13. Inquest:

From the inquest exhibit Ka-6, it transpires that the report about commission of crime and death of the deceased was communicated to police station Banda on 23.8.2011 at 7:30 a.m. The dead body was transmitted to District Hospital Mortuary at 11:30 A.M. And the I.O. started the inquest proceeding at 1:00 PM, he annexed copy of the F.I.R. but as per chick F.I.R., the F.I.R. was reduced in writing at 3:45 PM. If it is true either only a copy of the information

would have been provided to the concerned S.I. Or the concerned constable Moharrir had wrongly mentioned 3:45 PM as time of preparation of chick F.I.R. However, it is immaterial for the purposes of this case as it is not affecting the merit of the case. It is settled law that the inquest is not a substantive piece of evidence and it has only corroborative piece of evidence. However, in the opinion of punchas, and the I.O. and Nayab Tehsildar Sadar, the deceased would have been died due to poison.

In *Radha Mohan Singh @ Lal Saheb Vs. State of U.P., 2006 (2) SCC 450*, three Judges Bench, it has been held that argument advanced regarding omissions, discrepancies, overwriting, contradiction in inquest report should not be entertained unless attention of the author thereof is drawn to the said fact and opportunity is given to him to explain when he is examined as a witness. There is no requirement in law to mention details of F.I.R., names of accused or the names of eyewitnesses or the gist of the their statements in inquest report, nor is the said report is required to be signed by any eyewitness.

In *Brahm Swaroop Vs. State of U.P., AIR 2011 SC 280*, it has been held that the basic purpose of holding inquest is to report regarding the apparent cause of death namely whether it is suicidal, homicidal, accidental or by some mechanary etc. It is therefore not necessary to enter all the details of the overt acts in the inquest report.

In *George Vs. State of Kerala, AIR 1998 SC 1376*, it has been held that the details that how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of such proceedings.

In view of the above judgments, this court does not find any illegality or substantive irregularity in the inquest report.

14. Post-mortem :-

In this case after the inquest, the dead body was given to the concerned doctor for post-mortem who conducted the post-mortem and could not ascertain the cause of death, hence, preserved the viscera which was sent for chemical examination. As per chemical examination report, there was pesticides in the internal organs of the deceased which caused her death. Thus, the opinion of punchan, Nayab Tehsildar, I.O. finds support from the FSL report. The post-mortem was conducted at 4:00 P.M., the post mortem doctor opined that the deceased would have died about half a day prior to the post-mortem. The witness also opined that there could be variation of about six hours. In this case the time of death of the deceased is not in question, hence, any variation in the time of the death of the deceased is immaterial. It is settled principle of law that the opinion of doctor and doctor's report is mere an opinion and subject to the scrutiny of the court.

In *State of U.P. Vs. Mohd. Iqram, (2011) 3 SCC (Cri.) 354*, it is held that post mortem report is not a substantive piece of evidence, if it is proved it does not mean that its each and every content thereof is also proved or can be held admissible.

15. Burden of proof :-

It is admitted and has also been proved that the deceased had died unnatural death within three years of the marriage, hence, in this respect Section 113-A and

Section 113-B of **The Indian Evidence Act** become relevant which are as follow :

“Section 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.

Explanation. — For the purposes of this section, “cruelty” shall have the same meaning as in section 498-A of the Indian Penal Code (45 of 1860).

Section 113-B. *Presumption as to dowry death. —When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall*

presume that such person had caused the dowry death.

Explanation. — For the purposes of this section, “dowry death” shall have the same meaning as in section 304B of the Indian Penal Code (45 of 1860).”

In this case there is allegation of abusing, torturing for non fulfillment of demand of dowry and killing of the deceased within seven years of marriage hence, Section 113-B would be attracted and burden would be upon the accused persons that how the deceased died of unnatural death as it has been established that on the date and time of occurrence

accused and deceased were together and the deceased was under the custody of the accused.

In *V.K. Mishra Vs. State of Uttrakhand*, (2015) 9 SCC 588 (Three Judge Bench), *Panchanand Mandal Vs. State of Jharkhand*, (2013) 9 SCC 800, *Sanjay Kumar Jain Vs. State of Delhi*, 2011, (11) SCC 733, the Apex Court has held that before recording conviction of an accused under Section 304-B, I.P.C. The following conditions must be proved;

(i) *That the death of woman was caused by burns or bodily injury or otherwise than under the normal circumstances;*

(ii) *That such a death should have occurred within seven years of a marriage;*

(iii) *that the woman must have been subjected to cruelty or harassment by her husband or any relative of her husband.*

(iv) *That such cruelty or harassment should be for or in connection with demand of dowry.*

(v) *That such cruelty or harassment is shown to have been meted out to the woman soon before her death.*

In *Harish Kumar Vs. State of Haryana*, 2015 (88) ACC 640 SC, it has been held that in the event of presumption under Section 113-B of the Evidence Act, burden shifts on the accused to rebut it.

In *Surinder Singh Vs. State of Haryana*, (2014) 4 SCC 129; *Manohar Lal Vs. State of Haryana*, (2014) 9 SCC 645, it has been held that for presumptions contemplated under Section 304-B I.P.C. And 113-B of the Evidence Act, to spring into action, it is necessary to show that the cruelty was caused soon before victim's death. The question is how much 'soon before' would obviously depend on facts and circumstances of each case.

In *Satbir Singh Vs. State of Haryana*, AIR 2005 SC 3546, it is held that

where the prosecution established the ingredients of dowry death under Section 304-B I.P.C. It was held that onus was on the accused to rebut the presumption under Section 113-B.

Since, it has been proved from the evidence of P.W.2 and P.W.4 that at the time of commission of crime the accused persons were in the house of deceased with her, hence, actually what happened and in what circumstances and in which manner, a hale and hearty lady died would have to be explained by the accused persons, therefore, according to this Court the accused persons are also under the obligation and burden to explain the cause of death of the deceased under Section 106 of the Evidence Act.

Section 106 Indian Evidence Act is as under:

“Section 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.”

According to this Section where a fact is specially within the knowledge of a party, the burden of proving that fact lies upon him.

In Eshwaraiah Vs. State of Karnataka, (1994) 2 SCC 677, the facts were that a man and a woman were found hiding under a bed in the bedroom of the person who was laying dead of injuries, it was held that the burden lay upon them to explain their presence and, also the circumstances in which the deceased met his death.

In State of Himachal Pradesh Vs. Raj Kumar, (2018) 2 SCC 69, it has been held that if an accused does not throw light on a fact which is within his knowledge, his failure to offer any explanation would become a strong militating circumstance against him.

In Balram Prasad Agrawal Vs. State of Bihar, (1997) 9 SCC 338, a house wife was drown to death in the well in the court-yard of the house of her in-laws who were the only people present in the house at that time. Cruelty by the in-laws for over years was also an established fact. Accordingly the Supreme Court held that the burden lay upon the accused in-laws to show as to what happened during the night which brought about her death.

Though this Court is well aware that the initial burden for proving a case against the accused persons rests upon the prosecution and if the initial burden is discharged only then the liabilities under Section 106 or Section 113-B commence.

Though it is settled principle of law that it is trite that the prosecution has to stand on its own legs and sufficient evidence should be produced to prove the allegation, no aid of Section 106 can be taken by the trial Court. **Kailash Chand Vs. State of Rajasthan, (2017) 11 SCC 268.**

16. Place of occurrence:

In this case it is not denied by the accused-appellants that the place of occurrence is not the same as described by the prosecution. There is no objection from the side of accused persons regarding this aspect of the case.

17. Non-examination of the alleged independent eyewitnesses and examination of interested and related witnesses:

In this case P.W.-1 to P.W.-3 are the sister, mother and father of the deceased and P.W.-4 is the maid of the deceased. It has been argued that the independent eyewitnesses such as Anil Jaiswal, Geeta Jaiswal, Rinku, Manisha and Mamta,

teachers, living near the deceased and Apoorva Mishra @ Neelu who took the deceased to the hospital are not examined. According to P.W.2 they had become hostile and were not ready to depose in favour of the prosecution. It has also been blamed that Neelu did not permit her to go inside the Banda Hospital when her daughter was admitted before her death.

In Bhagwan Jagannath Markad (supra), in Dhari and Others Vs. State of U.P. AIR 2013 SC 308, Shyamal Ghosh Vs. State of West Bengal, AIR 2013 SC 3539, Prithi Vs. State of Haryana, (2010) 8 SCC 536, Suchha Singh Vs. State of Punjab, (2003) 7 SCC 643, it has been held that the testimony of a witness in a criminal trial can not be discarded merely because the witness is a relative or family member of the victim of the offence, in such a case Court has to adopt a careful approach in analysing the evidence of such witness and if the testimony of the related witness is otherwise found credible, accused can be convicted on the basis of testimony of such related witness. Similar principles have been laid down in respect of the inimical witness.

In Bhagwan Jagannat Markad (supra), Mukesh Vs. State of N.C.T of Delhi and Others, AIR 2017 SC 2161 (Three Judges Bench), Ashok Kumar Chaudhary Vs. State of Bihar, 2008 (61) ACC 972 SC, it has been held that non-examination of independent witness is not a mathematical formula for discarding the weight of the testimony available on record, however, natural, trustworthy and convincing it may be. It is settled law that non examination of eyewitness can not be pressed into service like a ritualistic formula for discarding the prosecution case with a stroke of pen. Court can convict an accused on the statement of a sole witness even if he is relative of the deceased and

non-examination of independent witness would not be fatal to the case of prosecution.

In Dharnidhar Vs. State of U.P., (2010) 7 SCC 759; Dalbir Kaur Vs. State of Punjab, (1976) 4 SCC 158, it has been held that non-examination of independent eyewitnesses is inconsequential if the witness was won over or terrorised by the accused.

In Bhagwan Jagannath (Supra) and in Nand Kumar Vs. State of Chhatisgarh, (2015) 1 SCC 776, it has been held that prosecution is not bound to examine its all witness. Discretion lies with the prosecution whether to tender or not witness to prove its case. Adverse inference against prosecution can be drawn only if withholding of witness was with oblique motive.

In this case it has been accepted by the accused during the trial that P.W.-2, mother of the deceased, was there. It is an undisputed fact that in connection of service the deceased was living on the place of occurrence near service place with her infant. It has also been proved that her mother P.W.-2 sparing sometime used to visit her daughter and stay there. As the deceased was in service, a maid servant P.W.-4 Pinki was kept in service by the deceased to look after her household affairs and the infant. In the aforesaid circumstances it can not be said that on the date and time of occurrence, P.W.-4, Pinki, was not there. It has come in evidence of P.W.1 that after death of the deceased, Pinki was serving to the family members of the deceased at Kanpur.

Learned counsel for the appellants submitted that since the above mentioned independent witnesses have not been examined and it has not been proved that they were connected in any way with the accused persons therefore in this case

no fair and impartial trial has been conducted by the trial Court. The trial Court has considered the statements of the interested and partial witnesses who have not adduced truthful evidence. P.W.4, Pinki, was won over by the informant and her family members and when she deposed in the Court, she was working in their house in Kanpur Nagar. Learned counsel heavily pressed Section 114 (g) of the **Indian Evidence Act**, which is as under:

“Section 114 (g) - That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it”

In Union of India Vs. Mahadeolal Prabhudayal, AIR 1965 SC 1755, it has been held that the law permits the Court to draw such a presumption when the best evidence will be kept away from the Court.

18. Ocular and medical evidence :-

Here the prosecution case is that the accused persons administered poison to the deceased due to which she died in the hospital during the treatment. Though from the inquest report and post-mortem report it had not been confirmed that the deceased had died due to poison but from the viscera report obtained from the F.S.L it has been established that it was pesticide which caused death of the deceased. Thus, in this case the prosecution version, ocular evidence and the medical evidence are in consonance with each other.

In *Moinuddin Vs. State of U.P., 2004 (50) ACC 244*, it has been held that in the case of death by poisoning prosecution is required to prove following ingredients against the accused;

(i) That the death took place by poisoning

(ii) That the accused had poison in his/their possession

(iii) That the accused had an opportunity to administer the poison;

As per the F.S.L. Report Part-D, 000 592 dated 23.11.2013, there was insecticide poison in viscera.

19. Suicide note theory from the side of defence -

The accused had taken ground that the deceased had written a suicide note before her death. In this regard they had moved an application 99A before the lower court and had also provided a suicide note. In the suicide note following words have been transcribed in Hindi alleged to be written by the deceased Vandana Vajpayee Tripathi which is as under:

“मैं वन्दना बाजपेयी त्रिपाठी अपने पूरे होश में यह कहती हूँ कि मैं गृह कलह की वजह से आत्महत्या करने जा रही हूँ। इसके लिए न ही पुनीत त्रिपाठी जी और न ही मेरे माता पिता जिम्मेदार हैं।

यह मेरा स्वैच्छिक कदम है।”

About this suicide note a statement had been given by the accused-husband stating therein that after knowing death of her wife when he visited Banda, the landlord had given this suicide note to him. Its photocopy was sent by him to higher police officials but in this regard both the I.Os. P.W.-6 and P.W.-7 have denied that any such suicide note was provided to them. It is noteworthy that in bail application Puneet Tripathi has admitted his presence and quarrel in the house of the deceased on the alleged date and time and as per bed head ticket, the deceased was brought to the hospital by him but during the trial he denied his and his family members visit and presence on the date, time and place of occurrence. However, the landlord has not been

examined and under Section 233 Cr.P.C. the accused could prove the alleged suicide note in favour of the accused persons.

20. Appreciation of evidence :-

In this case P.W.-1 is not the eyewitness, she reached in the morning of 23.8.2011 after getting information from her mother P.W.-2 in the evening of 22.8.2011. After seeing the dead body of her elder sister, she lodged the F.I.R. She has proved the contents of the F.I.R. and has deposed in favour of the prosecution. She has also deposed that first C.O. Was in favour of the accused persons and he was not properly investigating the case, even he did not record the statements of P.W.2 , herself and P.W.4. She has deposed that landlord Anil Jaiswal, Geeta Jaiswal and Apoorva Mishra@ Neelu turned in favour of the accused persons, hence they were not examined by the prosecution. This witness has also proved the written complaint Ex.Ka-1, demand of Wagon R Car and abusing and torturing by several means and also the threatening tendered by accused Puneet to remarry after killing her sister.

According to this Court from the side of accused persons an absurd suggestion has been given to this witness during the cross examination that the relations between the deceased and accused Puneet had vanished when the deceased joined the service as it has been proved from the evidence that the deceased was a government teacher and was in training since before her marriage. She was posted at Shahjahanpur, Government Education Department in the month of April 2008 while her marriage was solemnized with the accused on 01.12.2008 and later on she had been posted as Teacher in Dharmapur Primary School. It is also noteworthy that no clearcut suggestion had been given to

this witness that the accused persons had not visited the place of occurrence, house of the deceased, on the alleged date and time of occurrence.

P.W.-2, mother of deceased had categorically supported the prosecution version and she has also given intact evidence during the cross-examination. No suggestion has been given to this witness regarding previous torturing and atrocities caused by the accused persons. Similarly no suggestion has been given to this witness that the accused persons had not visited the deceased on the date and time of occurrence but a suggestion has been given that before joining education department at Shahjahanpur, deceased was working as a computer clerk in an eye clinic of Dr. Awadh Dubey and had illicit relation with him. According to this Court if it was so, why accused Puneet had solemnized marriage with her is a considerable point as a defence has also been set up by the accused persons that accused Puneet Tripathi used to visit the aforesaid clinic as MR and love relations had developed between both of them. It is also noteworthy that no such suggestion has been given to P.W.1, P.W.3 and P.W.4. It is also a matter of concern that if the accused Puneet Tripathi was knowing subsistence of such illicit relation, why instead of filing a petition of divorce, a case for restitution of conjugal rights had been filed by him in Lucknow.

On the basis of the above discussion, this Court is of the conclusion that either the question/suggestion regarding illicit relation with doctor Dubey is based on incorrect fact or the case under Section 9 of the Hindu Marriage Act was only to make a show off.

P.W.-3, father of the deceased, has also deposed in favour of the prosecution and has proved the prosecution

case. He has given intact evidence even in cross-examination. He has proved demand of dowry, cruelty, torturing and threatening to the deceased to remarry after killing her. No suggestion has been given to this witness regarding demand of dowry, torturing, cruelty or illicit relations with Dr. Dubey and the deceased. Thus the depositions made by this accused in examination-in-chief upon which the witness has not been cross-examined, becomes absolute.

P.W.-4, Pinki Srivastava, maid, has deposed about arrival of the accused persons on the date and time of the occurrence and has also proved the fact that accused Puneet Tripathi used to visit the deceased frequently and quarrel usually occur between both of them. No suggestion has been given to this witness that on the date and time of occurrence deceased's mother was not there and no demand of dowry was made regarding Wagon R Car from the deceased.

A self contradictory suggestion has been given to this witness at page 4 of the cross-examination where the learned counsel for the accused suggested the witness that after death of Vandana, Pooja Vajpayee and her father Raj Narain were bearing her expenditure. According to this Court by giving such suggestion the accused persons have admitted that P.W.4, Pinki, was the maid of the deceased during her lifetime and therefore her presence on the place of occurrence on the alleged date and time can not be denied.

Just after another question contrary to the above noted suggestion, a suggestion has been given by learned counsel for the accused for which she replied that it is wrong to say that she had not served ever in the house of the deceased Vandana Vajpayee.

21. From the overall discussion, it has been proved that the relation between the deceased and her husband were not cordial, however, institution of a suit for restitution of conjugal rights goes on to show that accused Puneet Tripathi wanted to keep the relation intact. The defence version is that it was a love marriage and the love affair arose between both of them when the deceased was working as a computer clerk in the eye clinic of Dr. Awadh Dubey at Kanpur Nagar which resulted into an arranged marriage. In this regard, learned counsel for the appellant, pointed out the case of the prosecution that when the accused was medical representative (MR) had also been promoted as area manager no such meager amount and ordinary articles would have been demanded as dowry. It has also been argued that for an Area Manager of a renowned medicine pharma company, purchasing a Wagon R car is not a big task when such cars are available on minor down payments.

22. It is noteworthy that none of the above noted independent witnesses were examined by the trial Court and in the garb of High Court's order passed on bail application, the learned trial Court concluded the trial in hurried manner without summoning the actual witnesses present on the spot who also carried the deceased to the Banda Hospital and District Hospital Shahjahanpur. The learned trial Court did not consider as to whether the divorce petition was the result of impersonation or not and the learned trial Court also did not attempt to send the alleged suicide note for expert opinion when the admitted signature of the deceased were very much available in records. Even the learned trial Court did not try to compare the signature and hand writing of the alleged suicide note with the

available writing and signature of the deceased under Section 73 of the Evidence Act.

23. It is further pointed out that except the evidence of alleged eyewitnesses P.W.2 and P.W. 4, there is no iota of evidence to record the conviction of the accused persons under the alleged charge of dowry death, cruelty and demand of dowry.

24. It is has also been pointed out that in first page of the cross-examination, P.W.-2, mother of the deceased has admitted that she had met to Neelam Shukla, sister of the accused Puneet Tripathi, in his marriage and thereafter at the time of death of his brother Ajeet Tripathi who had died in a road accident on 17.12.2010. It is argued that Neelam Shukla who had been married 25 years before the incident had also been falsely implicated in this case to be present with rest of the accused persons at the date and time and place of occurrence. According to learned counsel for the appellants, if this lady may state and depose falsely against Neelam Shukla who was exonerated by the IO and against whom no charge-sheet had been submitted, this lady may also falsely implicate rest of the family members in addition to Puneet Tripathi.

25. At this juncture, learned counsel relied on the judicial precedents of ***Geeta Mehrotra and another Vs. State of U.P. And another reported in AIR 2013 Supreme Court 181*** and ***“Kahkashan Kausar @ Sonam and others Vs. State of Bihar and others reported in 2022 0 Supreme (SC) 117”*** in which it has been held by the Apex Court that it is common tendency to falsely implicate the whole of the family members of the husband in a matrimonial disputes and also in cases of

dowry death. For ready reference the relevant parts of these two precedents are reproduced herein below;

In Geeta Mehrotra (supra) the Hon'ble Supreme Court has held that;

“in F.I.R. the allegations as to active involvement of the applicants is absent, mere casual reference to their names in F.I.R. is not sufficient to take cognizance. It is further submitted that in F.I.R., charge-sheet and statement of witnesses, there is no specific and distinct allegations made against the applicant no.1 and applicant no.2, the allegations are general and omnibus and can be said to have been made out on account of small skirmishes. In above circumstances, the order of taking cognizance on the charge-sheet, charge-sheet and the proceeding of the lower court is liable to be quashed.”

In Kahkashan Kausar @ Sonam (Supra) the Hon'ble Apex Court has been pleased to hold as follows:

“18. The above-mentioned decisions clearly demonstrate that this court has at numerous instances expressed concern over the misuse of section 498A IPC and the increased tendency of implicating relatives of the husband in matrimonial disputes, without analysing the long term ramifications of a trial on the complainant as well as the accused. It is further manifest from the said judgments that false implication by way of general omnibus allegations made in the course of matrimonial dispute, if left unchecked would result in misuse of the process of law. Therefore, this court by way of its judgments has warned the courts from proceeding against the relatives and in-laws of the husband when no prima facie case is made out against them.”

It has also been argued that P.W.-4, father of the deceased was anyhow

pulling on his family and he had become dependent upon the deceased after she got the service as Teacher. In this regard several suggestions have been given and on several points witnesses of fact have been cross-examined by the defence, that when the deceased received salary amount cumulatively for several months, it was misutilised by her family members and even a forged will dated 17.4.2009 alleged to be executed by the deceased, in favour of her father regarding her house no. L 849 Awas Vikas Colony Kanpur Nagar, had been manufactured committing forgery. It is true that generally wills are executed at the later stage of life in anticipation of death and seldom by a person so young.

It has also been argued that if all the accused persons had visited the deceased on the alleged date and time of occurrence with an object to administer poison to the deceased, why was the door left open by them. On this ground, learned counsel for the appellants argued that the mode and manner of administering poison as alleged by the prosecution is quite unnatural and being a hale and hearty person accused Puneet Tripathi was himself capable in administering the poison to the deceased if he had such intention or whenever he used to visit the deceased he could have administered poisoned food to the deceased.

On the basis of above discussions this Court is of the considered view and conclusion that on the date, time and place of occurrence, only accused Puneet Tripathi was there who has also admitted quarrelling with the deceased and who had admitted the deceased in hospital but the presence and participation of the rest of the accused persons about the incident dated 22.08.2011 has not been proved beyond reasonable doubt. However, the offence under Section 498-A and Section 4 of the

D.P. Act have been proved against them beyond the reasonable doubt but they are not found guilty for committing the crime under Section 304-B I.P.C.

26. So far as the commission of crime with regard to Section 304-B, 498-A I.P.C. and Section 4 of the D.P. Act is concerned, on the basis of dispute present between Puneet Tripathi and the deceased, pendency of cases from both the side, his presence on the date, time and place of occurrence and abstaining to inform the police in case of suicide, goes against him and therefore, charges under Section 304 B, 498-A I.P.C. and Section 4 of the D.P. Act are proved beyond reasonable doubt against the accused Puneet Tripathi.

27. Heard on the quantum of sentence. According to this Court till now accused Puneet Tripathi has remained in prison for 11 years 9 months 28 days and with remission about 13 years 5 month, therefore, if the accused Puneet Tripathi is sentenced under Section 304-B for the imprisonment already undergone, would meet the ends of justice.

28. So far as Section 498-A is concerned, he has already undergone the sentence of two years and also six months sentence awarded under Section 4 of the D.P. Act.

29. So far as the accused Shivkumar Tripathi and Bindeshwari Tripathi are concerned, they are the senior citizens and the accused elder brother Sujeet Tripathi and his wife Smt. Asha Tripathi are concerned, they have also served several months imprisonment, their presence has not been established on the actual date of occurrence, therefore, the period of their incarceration in jail appears to be sufficient

in absence of any pre or post criminal antecedent or conviction in any other case.

30. So far as the imposition of fine is concerned, all the accused persons have been fined Rs. 5,000/- each under Section 498-A I.P.C. and Section 4 of the D.P. Act also.

31. A compensation for Rs. 75,000/- has also been awarded upon all the accused persons cumulatively under Section 357 Cr.P.C. According to this Court, the fine imposed by the trial Court and also the compensation awarded by it, is not liable to be interfered with. Hence, this appeal is liable to be decided accordingly.

Order

(i) Criminal Appeal no. 1045 of 2016 (Puneet Tripathi Vs. State) is dismissed partly in respect of conviction and is **allowed** with regard to the sentence as under:

The sentence awarded to the accused-appellant Puneet Tripathi under Section 498- A I.P.C. and Section 4 of the D.P. Act, is maintained. The sentence awarded under Section 304-B I.P.C. is modified to the extent that instead of life imprisonment, he is sentenced to the period already undergone.

(ii) Criminal Appeal No. 1044 of 2016 (Shiv Kumar Tripathi and 3 Others Vs. State) is allowed in respect of conviction and sentencing under Section 304-B I.P.C. and the conviction under Section 498-A I.P.C. and Section 4 of the D.P. Act is maintained. However, sentencing is **modified** to the extent that they are sentenced to the period already undergone by them.

(iii) In case of non-payment of fine and compensation imposed by the trial

Court, the accused persons shall undergo to the period specified by the trial Court, if the same is not deposited within thirty days from today.

(2023) 8 ILRA 127
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.08.2023

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Capital Case No. 3809 of 2015
 With
 Reference No. 10 of 2015

Jugal

...Appellant

Versus

State of U.P.

...Respondent

Counsel for the Appellant:

From Jail, Sri A.K. Dwivedi (Amicus Curiae),
 Sri Rajrshi Gupta (A.C.)

Counsel for the Respondent:

Govt. Advocate

Criminal Law - Indian Penal Code, 1860 - Sections 302 & 504 - Code of Criminal Procedure, 1973 - Sections 161 & 313 - Dying declaration - Relevancy of - Deceased and her son both were burnt alive by accused-appellant - Incident occurred in day when accused came to house of deceased, enquired about his wife (PW-4) and daughter - Informed they have not come to house of deceased, he hurled abuses and taking advantage of night committed offence - Neither genesis proved by prosecution nor exact reason for discord placed on record - Accused arrested at 6 PM, not proved by P.W.-1 to P.W.-3, all St.d arrest prior to registration of F.I.R - Regarding night incident, prosecution relied upon testimony of P.W.-1 to P.W.-3, not support to prosecution case, in addition to dying

declaration of deceased son - The dying declaration made to Magistrate, not reliable as factual assertion with regard to having gone to room of his mother to see TV, other facts contradicted by evidence on record, also feigned ignorance about reason for which accused poured petrol and set him and his mother ablaze - Thus, dying declaration not correctly evaluated. (Para 2, 27, 31, 32, 34, 35, 39, 44, 45)

Appeal allowed. (E-14)

List of Cases cited:

1. Motilal & ors. Vs St. of Raj., 2009 (8) SCR 303, (Para 6)
2. Surendra Singh Vs St. of U.P.; 2019 1 Allahabad Law Journal 290
3. Sharda Vs St. of Raj., 2010 (68) ACC 274 (SC)
4. St. of Guj. Vs Jayrajibhai Puniabhai Varu, AIR 2016 SC 3218 (Para 10 & 11)

(Delivered by Hon'ble Ashwani Kumar
Mishra, J.
&
Hon'ble Syed Aftab Husain Rizvi, J.)

1. Additional Sessions Judge, Fast Track Court, Lalitpur has made a reference to this Court on 13.08.2015 under Section 366 of the Code of Criminal Procedure, consequent upon death sentence awarded to the accused Jugal on the charge that he has poured petrol on his mother-in-law and brother-in-law and set them ablaze. The reference has been registered as Reference No. 10 of 2015. An appeal has also been filed at the instance of accused being Capital Criminal Appeal No. 3809 of 2015. The appeal and the reference have been heard together and are being disposed of by this common judgment.

2. Dinesh (PW-1) is the first informant in the present case, who happens to be the son of deceased Chameli Bai wife of

Udaiya and brother of Deepchand, who too has died, stating that on 17.06.2013 at about 4.00 in the afternoon his brother-in-law Jugal son of Kashi belonging to Chamar caste came to the house and enquired about his wife Meena and daughter Seema. The family members informed that these two have not come to the house. For this reason, the accused started abusing them and kept roaming in the village and at about 1.00 in the night, he poured petrol and set ablaze the deceased. On hearing the commotion of villagers, Tiju (PW-2) and Karan Singh (not produced) came on the spot and tried to douse the fire. Deceased Chameli Bai and Deepchand were sleeping in the dallan (kind of a verandah attached to the house). Both the persons were taken for treatment to the hospital where the informant's mother has died and the brother was in injured condition. Appropriate action was requested to be taken in the matter. On the basis of such written report (Ex.Ka.1), a First Information Report came to be lodged at PS Banpur, District Lalitpur at about 12.30 PM on 18.06.2013. The distance between the place of occurrence and the police station is five kilometres.

3. Record reveals that prior to lodging of F.I.R. inquest was started on 18.06.2013 at about 10.30 AM and concluded at around 11.30 AM at the mortuary situated in District Hospital. As per the inquest, the information was given by the ward-boy and the deceased died during the course of treatment. The inquest specifically records that information with regard to death was received at 6.20 in the morning itself. The inquest witnesses included the first informant also. In the opinion of the inquest witnesses, the deceased died on account of burnt injuries and for ascertaining the correct cause of death the

postmortem was necessary. The body was ultimately sealed and the postmortem was conducted on 18.06.2013 at 4.30 PM. As per the opinion of the autopsy surgeon, the deceased was 44 years old female with average body built and rigor mortis had passed from neck towards lower limbs. The cause of death as per postmortem is shock as a result of ante-mortem burn injuries. Following ante-mortem injuries have been noticed in the postmortem:-

“Whole body mixed burn present except in lateral aspect of left thigh.”

4. Investigation proceeded in the matter and the place of occurrence was inspected by the Investigating Officer, who collected a two litres plastic container, wherein smell of petrol was present. A lamp was also found near the place of occurrence. Ashes and plain earth etc. were also collected in a separate bag vide Ex.Ka.2 by the Investigating Officer. This recovery has been proved by the independent witness Shanker Singh, who appeared as PW-3.

5. Deepchand, who allegedly was sleeping close to his mother and had also sustained burnt injuries was hospitalized in the District Hospital, Lalitpur where his dying declaration has been recorded by the concerned Naib Tehsildar Awadhesh Kumar Nigam, who has appeared as PW-5. Before recording such dying declaration the Emergency Medical Officer Dr. Pawan Sood (PW-9) certified that the injured is in fit mental state to make his declaration. The dying declaration is in the question answer form and is extracted hereinafter:-

“ बयान दीपचन्द एस/ओ श्री ऊदई, उम्र लगभग 15 साल निवासी-ग्राम अजनौरा, थाना- बानपुर, ललितपुर

दि० 18.6.2013, समय 16.55 पी०एम०

प्रश्न- क्या नाम है, कहाँ के हो

उत्तर- दीपचन्द, अजनौरा के

प्रश्न- कैसे जल गये?

उत्तर- रात को मैं अपनी माँ के साथ सो रहे थे जुगले जो मेरे जीजा लगता है उसने हम दोनों के ऊपर पेट्रोल फेंक कर आग लगा दी।

प्रश्न- जीजा ने क्यों जलाया।

उत्तर- क्या पता सहाब, जुगला ने जलाया।

प्रश्न- जुगला कहाँ रहता है।

उत्तर- खोंखरा रहता है।

प्रश्न- जुगला से झगड़ा हुआ था?

उत्तर- मैं खेल रहा था उसने एक बार मेरे गले में लात रखी थी।

प्रश्न- तुम्हारी माँ से उसकी लड़ाई हुयी थी

उत्तर- क्या पता सहाब

प्रश्न- तुम्हें किसने बचाया?

उत्तर- जब आग लगी तो मैं उठकर आंगन में भागा, पानी बरसा था इसलिये आंगन में पानी भरा था, मैं उसमें कूद गया खुद बचा।

प्रश्न- जब जलाया उस समय घर में कौन-कौन था।

उत्तर- हम, दिनेश मेरा भाई, डबला जो मेरा भइया लगता है, तथा मेरी माँ तथा मेरे बड़े भाई आशा का? लड़का नीलेश

प्रश्न- जलते हुये किसने देखा

उत्तर- मैं टी०वी० देखने माँ के कमरे में गया था वही उनके पास लेट गया था, जब वह मेरी माँ के ऊपर पेट्रोल डाल रहा था तो मैंने देख लिया, मैंने कहा तू यह क्या कर रहा तो उसने मेरे ऊपर भी पेट्रोल डालकर आग लगा दी।

प्रश्न- ओर कुछ कहना है?

उत्तर- नहीं क्या करे? उसने मेरी माँ को मार डाला साहब, उसे सजा दो।"

6. The investigation further proceeded in the matter and statement was recorded of Deepchand under Section 161 Cr.P.C. The statement in that regard has not been exhibited but its Scontents have been disclosed by the Investigating Officer, who has appeared during the course of trial as PW-13. He has disclosed that Deepchand

informed him that he could identify the accused from his voice.

7. The other deceased, namely, Deepchand remain hospitalized with superficial and deep facial burn up to an extent of 60 %. Deepchand also died later, on 30.06.2013 in respect of which inquest was prepared and the postmortem was also conducted, wherein his age has been assessed as 17 years. The autopsy surgeon has found that the cause of death is septicaemic shock due to ante-mortem burn injuries and found following injuries on the deceased:-

“Burn injury on face, neck all over the back, front and back of abdomen. Both upper limb, part of hip and right foot, superficial to deep, slough present. Pus present in plural cavity and pus pocket present in left lung and abdominal cavity.”

8. Statement was also recorded of the wife of the accused, namely, Meena PW-4, whereafter a charge-sheet came to be submitted against the accused under Sections 302, 504 IPC. The Magistrate took cognizance and committed the case to the court of Sessions where it got registered as Sessions Trial No. 109 of 2013. Charges were framed under Sections 302 and 504 I.P.C. and read out to the accused and explained in Hindi. The accused pleaded not guilty and claim to be tried. The charge framed by the court reads as under:-

“CHARGE

I, Shyam Sunder, Sessions Judge, Lalitpur hereby charge you : Jugal son of Kashi, resident of village Khokhra, P.S. Kotwali Lalitpur, District Lalitpur as follows:-

FIRSTLY:- That on 17.6.2013 at about 4.00 p.m. at the house of complainant

Dinesh, situated in village Ajnora, P.S. Banpur, District Lalitpur, you intentionally insulted and thereby gave provocation to Dinesh intending or knowing it to be likely that such provocation would cause him to break the public peace or to commit any other offence and thereby committed an offence punishable u/s 504 IPC and within the cognizance of this court.

SECONDLY:- That in the intervening night of 17/18.6.2013 at about 1.00 at the aforesaid place, you did commit murder by intentionally or knowingly causing the death of Smt. Chameli Bai and Deep Chandra and thereby committed an offence punishable u/s 302 IPC and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.”

9. Trial proceeded in the matter in which the prosecution has produced following documentary evidence:-

- “1. Written Report Ext.Ka.1
2. Recovery memo of Plastic ‘Katti’, Ash, Cot and Plain Earth as Ext.Ka.2
3. Dying Declaration of Deep Chand Ext.Ka.3
4. P.M. Report of Chameli Bai Ext.Ka.4
5. P.M. Report of Deep Chand Ext.Ka.5
6. Medical Examination Report of Deep Chand Ext.Ka.12
7. Inquest Report of Chameli Bai and Autopsy related papers Ext.Ka.13 to Ka.18
8. Chik F.I.R. Ext.Ka.19
9. Copy of G.D. Ext.Ka.20
10. Inquest Report of Deep Chand and Autopsy related papers. Ext.Ka.21 to Ka.25
11. Site Plan Ext.Ka.26

12. Charge-sheet Ext.Ka.27”

10. In addition, informant Dinesh has appeared as PW-1, wherein he has disclosed that the accused came at around 4:00 to his house on 17.06.2013 and enquired about his wife and daughter from him and his mother. Accused was informed that they have not come, on which accused left, hurling abuses to them. On the same night when the two deceased were sleeping in the verandah whereas informant alongwith Ravi and Nilesh were sleeping in a room at a little distance. The witness heard screams of his mother and brother. Accused had poured kerosene on the two deceased and set them on fire and fled from the place of occurrence. This incident has been seen by Tiju and Karan Singh. PW-1 also saw the accused fleeing in the light on account of fire caused by him. The fire was doused with the help of the villagers and the witness took his mother and brother to the hospital where his mother died at about 4.00 in the morning. Brother was sent for treatment to Gwalior. He died 10-12 days later. This witness has proved the written report which is exhibited as Ex.Ka.1. PW-1 has been cross-examined, wherein he admitted that he studied up to class 9. He has disclosed that the written report was not scribed by him but was got scribed by someone else. He had not written the report as he was perplexed. He had reached the police station at about 12:00-1:00 in the afternoon and Tiju and Karan Singh had accompanied him. He has admitted that in the written report he has not disclosed that Tiju and Karan Singh had seen the accused fleeing in the light of fire. He has also denied that his statement is based upon the advice received later. As per him, the accused got married to his sister long back and out of such wedlock three children were born. Accused used to harass his

sister, however, no complaint was ever made to police about such harassment. In reply to a specific query, PW-1 has stated that till date, he has not been able to know as to on the date of incident where were the wife and daughter of the accused. He has also feigned ignorance about the fact that his bhanji (sister's daughter) was getting married on that day. At the time when the accused came to the house, the deceased mother as well as Deepchand (deceased brother) were at home and that the accused came in their presence at the house. This witness has specifically stated that there are two rooms in the house and there is no television in the house. In the further cross-examination, this witness has stated that his mother and brother were sleeping on the same cot and that there is no lock put on the door on account of which anyone could come inside the house, particularly, as the height of wall is only 4 feet. He has also disclosed that it was raining when the incident occurred. He has also stated that he had tried to douse the fire by putting the cloth on his mother and brother. He has specifically stated that fire was not doused by water. The house of Tiju and Karan Singh is in front of his house. He has also stated that when he arrived at the place of occurrence by then Tiju and Karan Singh were already present at the dallan. He has also stated that dying declaration of his brother was recorded in his presence. He has also stated that the accused was arrested at about 8-9 in the morning itself. He has also stated that from the hospital he had gone straight to the police station at about 8-9. He has also admitted that he had not seen accused coming with the petrol can. He has denied the suggestion that because there was a matrimonial dispute between his sister and the accused on account of which a false report is being lodged against him.

11. Teeju son of Gorelal is PW-2 and has supported the prosecution case. As per this witness, daughter of accused got married at Amjhara Temple during summers of the previous year. On the same day at about 4:00 the accused came to his in-laws house and finding that his wife and daughter were not present, the accused hurled abuses and also extended threats to the deceased. The accused thereafter kept roaming in the village. As per this witness, he came out of the house at about 12 in the night to ease himself when he saw the accused coming out of the house of the deceased. The witness could hear screams and that he saw alongwith Karan Singh the accused coming out of the house. When he entered the house, the witness saw Chameli Bai engulfed in fire and her son Deepchand was also in fire. PW-2 and Karan doused the fire. He claims to have been informed by Chameli Bai and Deepchand that Jugal had entered the house and had poured petrol upon them. There was a burnt kuppi at the place of occurrence and he could smell petrol from it. In the cross-examination, PW-2 has stated that the IO recorded his statement on the next morning. The police had come at about 10:00 and the accused was already arrested by then. He has been confronted with his statement under Section 161 Cr.P.C., wherein he has not disclosed the IO that accused was roaming around the well or that he had come out of the house at 12:00 to ease himself. He has also been confronted with his previous statement, wherein there is no reference of the accused coming out of the house. On the date of incident wife and daughter of accused were at home and that only Asha Ram (another son of deceased Chameli Bai) alone had gone to Amjhara Temple in the marriage. Deceased had also not attended the marriage. PW-2 has stated that there was nobody at home at 4:00 PM

as Chameli Bai had gone to the well which is at a distance of about half a kilometre from his house. Accused came to the house first and when he found none, he went towards the well and that he had not seen the accused thereafter. He has stated that at the time of incident informant was sleeping in the house and he arrived after PW-2 had reached the place of occurrence. He has also stated that there is no wall around house of Chameli Bai. He has emphatically stated that there is no television in the house of the informant. He has also stated that it was raining and there was no electricity.

12. PW-3 is Shanker Singh, who has also supported the prosecution case. He claims that the accused had come to the village at 4:00 when his wife had gone for the marriage of her daughter at Amjhara Temple. Accused enquired from the deceased Chameli Bai about the incident and when he could elicit no reply, he started abusing his mother-in-law. Several persons came on the spot and the accused was forced to flee from the house. As per this witness, accused came at about 1:00 in the night carrying petrol in kuppi from Banpur. He claims that there was a burnt kuppi near the place of occurrence which smelt of petrol. He also claims to have seen accused fleeing from the place of occurrence. As per this witness also, he arrived inside the house and saw the two deceased in a burnt state. This witness has also proved the recovery memo Ex.Ka.2. In the cross-examination, PW-3 has stated that his statement was recorded at about 7:00-8:00 in the next morning. This witness has been confronted with his previous statement under Section 161 Cr.P.C., wherein there is no reference to the fact that daughter of accused was getting married at Amjhara Temple or that the

accused was forced to flee from the house or that he kept roaming around the house of Chameli Bai; or that he saw the accused fleeing from the house of the deceased. As per this witness, his house is at 50-60 paces from the house of Chameli Bai. In his further cross-examination, PW-3 has stated that he saw the accused crossing from his house and as he was trying to save the injured he could not apprehend the accused. He claims that accused fled from the front of his house. As per him, he had seen the accused in the light of electricity as well as fire. He has stated that the informant came at the place of occurrence after hearing the screams/commotion. As per this witness also, the accused was arrested at about 10:00-11:00 in the morning. The witness has further stated that a five litre plastic can was recovered from the place of occurrence, which smelt of petrol.

13. PW-4 is Smt. Meena, who happens to be the wife of the accused. She has stated that his eldest daughter is already married. She claims that the accused used to say that he would keep her daughter and would often beat them on account of which he started residing in Lalitpur city. She had also married her daughter in Lalitpur. She has alleged that her daughter got married at Amjhara Temple and she was present on the date of marriage. It was on the same day that the accused came to her mother's house and abused her after she was not found there. She has also supported the prosecution case of the accused pouring petrol upon the two deceased. This witness has been cross-examined as per which her statement was recorded at the hospital two days after the incident. The witness has been confronted with his previous statement, wherein she has not disclosed the I.O. that accused wanted to keep her daughter. She has also been confronted

with her previous statement where she had not alleged that on account of torture, she had started living at Lalitpur. She stated later that she was assaulted by accused two days prior to the incident, whereafter she came to Lalitpur. She has also alleged that the accused alleged about two days prior to the incident that he would keep her daughter. The witness also could not correctly disclose the name of her son-in-law.

14. Awadhesh Kumar Nigam (Naib Tehsildar) has appeared as PW-5, who has proved the dying declaration of Deepchand. He has alleged that he had removed the family members from the place where the deceased was kept in the hospital before recording the dying declaration. He also feigned ignorance about the fact that the family members were talking to the deceased when he came to the hospital. This witness has proved the dying declaration (Ex.Ka.3).

15. PW-6 is Dr. D.K. Raj, who has proved the postmortem of Chameli Bai. This witness has not alleged existence of thermal burn on the deceased and as per him the deceased had sustained about 93% burnt injuries. The witness has proved the postmortem report.

16. PW-7 is Dr. Rajesh Tripathi, who has proved the postmortem report of deceased Deepchand. Deepchand had sustained 70 % burnt injuries.

17. Dr. Shailesh Ranjan has appeared as PW-8, who had examined Deepchand when he was brought to the hospital. As per him, the injured was in a serious condition and he was administered vobvaran to subside the pain. He has also proved the injury report of Deepchand. According to

injury report Ext.Ka12 Deepchand was brought to hospital by Dinesh (brother) and was examined on 18.06.2013 at 3:05 AM. There was superficial to deep facial burn about 60%.

18. PW-9 is Dr. Pawan Sood, who has certified that Deepchand was in fit, physical and mental state for making his declaration.

19. PW-10 is Man Singh Pal, who was posted as Sub-Inspector and has proved the inquest of Smt. Chameli Bai. He has also proved other police papers. This witness in the cross-examination has stated that the inquest was conducted between 10:30 to 11:30 in the morning and that the informant had not disclosed the fact that the accused had poured petrol on the deceased or that he had seen any such incident.

20. PW-11 is also a police personnel, who has proved the chik FIR. As per him, the informant came alone at 12:30 at the police station and had given the written report, which was incorporated in the GD. This witness has denied the suggestion that the F.I.R. was written on the dictates of the SHO or that the F.I.R. was written with the consultation and advice of the SHO.

21. PW-12 is Sub-Inspector, Gajraj Prasad, who has proved the inquest of Deepchand.

22. PW-13 is the Investigating Officer. As per him, on 18.06.2013 the case was registered in his presence at police station on the written report of complainant Dinesh that his mother and brother have been set on fire by his brother-in-law Jugal and his mother has died. He has alleged that the accused was arrested at about 6:00 in the evening. Statement of Deepchand

was recorded by him on 19.06.2013, whereas the statement of PW-4 was recorded on 20.06.2013. Statement of Karan Singh and Tiju Kushwaha was recorded on 29.06.2013. In the cross-examination, PW-13 has stated that the informant is not an eye-witness and his statement was recorded at the police station. He has clearly disclosed that Karan Singh and Tiju Kushwaha had disclosed the informant of having seen the accused running from the place of occurrence in the fire. He has denied the suggestion that the statements of witnesses were recorded on the next day and has reasserted that the statement of PW-2 was recorded on 29.06.2013. I.O. has proved the site plan and has admitted that there is no electricity pole shown therein. It is also admitted that from the statement of witnesses any source of light had not surfaced. He has further stated that the kuppi mentioned as 'kutti' in the cross-examination of PW-13, denotes a can. As per him, the can was of two litres and not of five litres. He has also admitted that PW-4 never disclosed him that the accused had asserted of keeping her daughter with him.

23. The evidence produced during trial by the prosecution has been confronted to the accused for recording his statement under Section 313 Cr.P.C. The accused has denied his implication and has stated that at the instance of the in-laws, he has been falsely implicated. No defence witness, however, has been produced.

24. Trial court on the basis of evidence led in the matter has come to the conclusion that the accused had poured kerosene on the deceased and had killed them. The motive for such a ghastly act is alleged to be the desire of the accused to keep his daughter, which was objected to

by her in-laws and the wife. The wife of the accused had got her daughter married on the date of incident and apparently the accused was enraged by such act on account of which he committed the ghastly act resulting in brutal death of two persons. The trial court, therefore, found the charges under Sections 302, 504 IPC to have been proved against the accused-appellant. The severity of the offence has been considered while awarding sentence of death penalty upon the accused. It is in that context that the reference has been made by the trial court for confirmation of death sentence. The appeal preferred by the accused is thus being considered alongwith the confirmation proceedings.

25. Shri Rajrshi Gupta, Advocate has been appointed as Amicus Curiae in the present case to represent the accused-appellant. Learned counsel for the accused-appellant submits that the court below has grossly erred in returning a finding of conviction against the accused, inasmuch as the evidence on record do not justify such conclusion and consequential conviction of the accused. Learned counsel for the accused-appellant has further urged that the dying declaration of deceased Deepchand is tutored and is not reliable, particularly as the facts narrated therein are contrary to the admitted material available on record. He further submits that there is a contradiction in the other dying declaration recorded by the I.O. under Section 161 Cr.P.C. Various contradictions in the statements of witnesses have been highlighted, which shall be dealt with while analysing the evidence on record. Learned counsel for the accused-appellant submits that the only material on record against the accused-appellant would at best justify a suspicion against him and in view of the settled law that suspicion howsoever strong

cannot be a substitute for evidence to establish the guilt of the accused, the conviction and sentence cannot be sustained. Learned counsel for the accused-appellant has also placed reliance upon the judgment of the Supreme Court in **Motilal & Others Vs. State of Rajasthan 2009 (8) SCR 303** in order to submit that the inquest of Smt. Chameli Bai shows that police was made aware of the incident much prior to registration of the FIR and the delay in lodging of the FIR has not been explained. Observations of the Court contained in para 6 have been referred to in order to discredit the prosecution case. So far as the motive for commissioning of the offence is concerned, learned counsel for the accused-appellant submits that the allegation against the accused of wanting to keep his daughter is a clear improvement and a result of afterthought inasmuch as none of the witnesses have made any such disclosure to the police during recording of their statements under Section 161 Cr.P.C. and it is only when PW-4 appeared in the witness box that such a case has been set up. It is further argued that the motive in that regard has not been confronted to the accused for recording his statement under Section 313 Cr.P.C. and, therefore, this circumstance cannot be read against the accused. Reliance is placed upon a Division Bench judgement of this Court in **Surendra Singh Vs. State of U.P.; 2019 1 Allahabad Law Journal 290** in order to submit that the dying declaration is not reliable in the facts of the present case. So far as the testimony of eye-witnesses are concerned, learned counsel for the accused-appellant strenuously urges that their presence at the place of occurrence or their statements of having seen the accused fleeing from the place of occurrence is not reliable. It is lastly urged that the accused-appellant has already suffered enough on account of

being kept in a solitary confinement for ten years and that he is entitled to be set free by granting him the benefit of doubt.

26. Ms. Archana Singh appearing for the State, on the other hand, submits that this is a case of brutal murder of a lady and her son by her son-in-law, who wanted to keep his daughter as his mistress. It is submitted that this is one of those rarest of rarest cases where the father enraged by marriage of his daughter against his wishes and has ultimately killed his mother-in-law and brother-in-law and that the conclusion of guilt recorded by the court below is clearly borne out from the evidence on record. Learned A.G.A., therefore, submits that this being a case of rarest of rare nature justifies the award of death punishment on the accused and that such punishment is liable to be confirmed by this Court by rejecting the appeal of the accused.

27. We have heard learned counsel for both the parties and have carefully perused the records including the records of the trial court. The prosecution case has already been noticed by us, according to which, the deceased Chameli Bai and her son Deepchand both were burnt alive by the accused-appellant, as he was annoyed with them. As per the prosecution case an incident occurred prior in the day at 4.00 PM, when the accused came to the house of the deceased Chameli Bai and enquired about his wife (PW-4) and daughter. The accused was informed that they have not come to the house of the deceased thereafter the accused hurled abuses and taking advantage of the night ultimately poured petrol upon the two deceased and set them ablaze.

28. The prosecution case is apparently in two parts. The first part relates to the

incident at 4.00 PM, when the accused came to the house looking for his wife and daughter and not finding them got annoyed and hurled abuses upon his mother-in-law and other family members. The second part relates to the actual offence of pouring kerosene upon the two deceased and setting them ablaze. We propose to deal with the two distinct parts of the prosecution case with reference to the evidence on record.

29. So far as the incident occurred at 4.00 PM on the fateful day is concerned, the written report of PW-1 states that the accused came from his village Khokhra and enquired about his wife Meena and daughter Seema. The family members informed that these two are not there after which the accused started abusing the family members. This part of the prosecution case is supported by the testimony of PW-1, which merely states that the accused came to the house of the deceased and enquired about the whereabouts of his wife and children. On being informed that they have not come to the house of the deceased, the accused abused them and left. Similar statements have been made by PW-2 and PW-3. PW-4 has also supported the prosecution case in that regard. We have carefully examined the testimony of these witnesses in order to decipher as to what exactly was the conversation made by the accused, which ultimately enraged the accused to such an extent that he went on to commit the second part of the offence.

30. The testimony of witnesses is limited to the statement of fact about the accused coming to the house of the deceased and making inquiries about his wife and daughter. What exactly transpired at this stage or what was the contents or exchange of words between the witnesses

and accused has not been elaborated. From the evidence on record, this much is clear that the wife and daughter of accused were not traceable to the accused. The testimony of witnesses have been examined by us in order to ascertain as to what exactly may have happened. P.W.-1 who is the first informant and is the son of the deceased has categorically stated that till date he does not know where was the wife and daughter of the accused. This witness says nothing about the marriage of the daughter of P.W.-4 on that day. In the cross-examination, he emphatically denies any knowledge of the marriage of the daughter of accused and P.W.-4. We find it somewhat difficult to accept the testimony of P.W.-1 about his not knowing the whereabouts of his sister or her daughter. This is particularly shown, as P.W.-2 who is the neighbour of the deceased has specifically disclosed that on the date of incident the daughter of P.W.-4 got married at Amjhara Temple. If the P.W.-2 who is the neighbour is aware that the daughter of accused was getting married on the date of incident, it is difficult to accept that such fact was not within the knowledge of P.W.-1. P.W.-2 has further stated that only Asharam had attended the marriage of daughter of accused. Asharam is brother of P.W.-1 but has not been produced by the prosecution. Asharam is elder to P.W.-1 and had gone to Vanpur as per P.W.-1. P.W.-3 has also supported the prosecution case but his name neither figures in the first information report nor has his presence been disclosed by the other two prosecution witnesses i.e. P.W.-1 and P.W.-2. P.W.-3 is the primarily the witness of recovery of articles seized from the place of occurrence. On the aspect relating to marriage of the daughter of the accused, P.W.-3 has not disclosed much. The only other person who has thrown some light on the cause of annoyance of

accused or render evidence on the aspect of motive or cause of the incident is P.W.-4. P.W.-4 has for the first time stated during her statement in Court that the accused wanted to keep his daughter. She has not disclosed such fact even in her statement under Section 161 Cr.P.C. The I.O. has also admitted that such facts have not been disclosed by P.W.4 to him.

31. Having analyzed the evidence led by the prosecution with regard to first part of the incident we, therefore, find that neither the genesis is proved by the prosecution nor the exact reason for discord has been placed on record. We also find substance in the contention of Sri Rajarshi Gupta about admissibility of evidence on the point of motive inasmuch as the accused has not been confronted with the statement of P.W.-4 about his stated wish to keep his own daughter. We also find substance in the contention of Sri Gupta that this part of the evidence was later introduced to portray a horrific picture of the accused as being a person who wanted to keep his own daughter and thereby to suggest that he could go to any extent to commit a brutal and barbaric act. The evidence on this aspect of the matter, however, is absolutely sketchy and does not inspire the confidence of the Court. None of the witnesses except P.W.-4 has disclosed the desire of the accused to keep his own daughter. Even the statement of P.W.-4 in that regard surfaces for the first time when she appeared in the witness box. The statement of P.W.-4 has also not been confronted to the accused for recording his statement under Section 313 Cr.P.C. We, therefore, disbelieve the prosecution case founded on the premise that the accused wanted to keep his daughter and as the daughter got married elsewhere he

committed the barbaric act of killing the deceased.

32. The prosecution has otherwise not disclosed as to what exactly transpired when the accused went to her-in-law's house at 4 O' clock. The substance of conversation has not been narrated by any of the witnesses. Even if we accept the prosecution case that the wife and daughter of the accused were missing and he suspected them to present in the house of the deceased and having not found them there, he felt annoyed yet this part of the evidence would not lead to an inference that the accused felt so enraged as to have committed the kind of act as has been attributed to him in the second part of the incident.

33. Before proceeding to second part from the evidence led by the prosecution on the second part of the incident, we would like to refer to some features of the present case which have material bearing upon its outcome. It is not in issue that the incident occurred at around 12:30-1:00 in the night intervening 17/18 June, 2021. The injured were taken to the district hospital on the same night. It also transpires that Smt. Chameli Devi died at around 4 O'clock. Information with regard to death of Smt. Chameli Devi reached the police at 6:30 in the morning through the wardboy. SI Man Singh Pal (PW-10) in his statement has stated that he conducted the inquest at about 6:20 in the morning. The inquest report (Ext.23Ka) has been proved by this witness. In the cross-examination, the witness claims that inquest commenced at 10:30 and concluded at 11:30. It is, therefore, quite apparent from the evidence brought on record that the police had received information with regard to incident much prior to the time when the F.I.R. itself was lodged.

34. According to prosecution, the accused was arrested at 6 P.M. in the evening. However, the prosecution witnesses have taken a different stand in their deposition made before the Court. P.W.-1 has stated that he came to the police station from the hospital at 8-9 in the morning. He has also stated that accused was arrested at 8-9 in the morning. Similarly, P.W.-2 has asserted that the I.O. came at about 10 along with the accused. P.W.-3 has also stated that the I.O. had arrested accused in the morning. From the weight of evidence on record, it is quite clearly established that accused was already arrested in the morning even prior to lodging of the F.I.R. There is another aspect which needs special mention at this stage. According to prosecution, the written report was made by P.W.-1 at 12:30 P.M. on 18.06.2013. P.W.-1 states that he had not scribed the written report and that it was got scribed through someone else. P.W.-11 has however stated that the F.I.R. was lodged on the basis of written report given by P.W.-1. He has also stated that P.W.-1 came all alone with written report. A specific suggestion has been given to P.W.-11 that in fact the written report was got written on the instructions of the S.H.O. at police station. The written report allegedly has been signed by P.W.-1. P.W.-1, however, admits that he has not written the report. It is, therefore, not clear as to who is the scribe of the written report. This fact assumes significance inasmuch as the record clearly shows that the police had received information with regard to the unfortunate death of Smt. Chameli Devi early in the morning hours. The accused was also arrested in the morning hours. Once that being the situation, the subsequent lodging of F.I.R. was expected to have contained narration with regard to such steps already taken that is preparation

of inquest or arrest of accused etc. The Investigating Officer, however, has been produced as P.W.-13 and as per his statement the first entry in the case diary is after the registration of the F.I.R. No details/ records have been produced to the police with regard to receiving of information; steps taken by the prosecution during course of inquiry; arrest of accused etc. Had these facts been placed by the prosecution, it could have been ascertained as to what exactly was the manner in which the police received information about the incident and the manner in which the inquiry and latter investigation proceeded. The fact that such facts have been suppressed and concealed by the prosecution, creates doubt upon the authenticity of the prosecution case itself. The prosecution version that accused was arrested at 6 PM is not believable in view of the consistent case of prosecution witnesses P.W.-1 to P.W.-3, all of whom have testified about arrest of the accused prior to the registration of F.I.R. This Court, therefore, views the prosecution version with some circumspection.

35. So far as night incident is concerned, the prosecution has relied upon oral testimony of P.W.-1 to P.W.-3 in addition to the dying declaration recorded of Deep Chand.

36. P.W.-1 in his written report has referred to the presence of P.W.-2 and Karan Singh soon after the incident at the place of occurrence. In the written report, P.W.-1 has not shown his presence. He has also not stated about any receipt of information regarding the incident either from Deep Chand or from Smt. Chameli Devi. Investigating Officer has also categorically admitted that P.W.-1 had not informed him that he was a witness to the

incident. P.W.-1, P.W.-2 and P.W.-3, who are the witnesses of fact, have consistently asserted that they saw the accused running from the place of occurrence in the light of fire. P.W.-1 in his statement under Section 161 Cr.P.C. has not alleged that he had seen the accused fleeing from the place of occurrence in the light of fire along with Tiju and Karan Singh. What has been stated by him under Section 161 Cr.P.C. is that on hearing the commotion, he came out of the room and saw his mother and brother burning. P.W.-1 has also admitted that when he came to the place of occurrence, P.W.-2 was already present. P.W.-1 has not disclosed in his initial statement that he saw the accused pouring petrol on the deceased. P.W.-1 is the son of the deceased and his presence in the house cannot be doubted. However, it transpires that P.W.-1 was sleeping at different location when the incident occurred. P.W.-1, therefore, came much later on hearing the commotion and his subsequent version that he saw the accused fleeing from the place of occurrence is a clear improvement from what was disclosed earlier by him to the police. P.W.-1 although had taken his mother and brother to the hospital but has not alleged that he received any information from his mother or brother about the culprit of crime. We, therefore, are not inclined to attach much weight to the testimony of P.W.1 as he is neither a eye-witness nor his version of having seen the accused fleeing from the place of occurrence is consistent and the testimony in that regard is an apparent improvement.

37. So far as P.W.-2 is concerned, he is a neighbour and claims that he had come out of the house only to ease himself when he claims to have seen the accused coming out of the house and he could hear the screams from inside the house. P.W.-2,

therefore, states that he came inside the house and made attempts to douse the fire. P.W.-2 admits that P.W.-1 came to the place of occurrence after he had already reached. So far as the statement of P.W.-2 is concerned, we find that his version with regard to first part of the incident is at variance from the statement of other witnesses. He came out of the house to ease himself is an improvement over what was disclosed by him to police under Section 161 Cr.P.C. The Investigating Officer has also admitted that such a disclosure was not made by him. P.W.-2 has also not disclosed in his statement under Section 161 Cr.P.C. that he saw the accused coming out of house in the light of fire. This part of the statement is also an improvement over what was disclosed by him earlier. The statement of P.W.-2 has been recorded by the I.O. for the first time on 29th June, 2013 which is after 11 days of the incident. No reason whatsoever has been disclosed for the delayed recording of the statement of P.W.-2. The I.O. has also not given any plausible explanation for the delay occurred in recording of the statement of P.W.-2 who otherwise is the first to know this. In the context of various improvements and enhancements made by P.W.-2, the delay of 11 days in recording of his statement lends credence to the defence argument that his testimony is not entirely reliable. P.W.2 has also stated that none of the family members of Chameli Bai had accompanied her to the hospital and that there were three other Karan Singh, Raja Babu and Bal Kishan who have taken the injured to the hospital. This statement of P.W.-2 is also found incorrect in view of the admitted evidence on record which shows that it was the first informant who had taken his injured brother to the hospital. Viewed in context of above discussions, we do not deem it appropriate to attach much weight to the

testimony of P.W.-2. We have fortified in taking such view from the observation of Supreme Court contained in Para 6 of the judgment in *Motilal (supra)* which is extracted hereinafter:-

“6. It is true as observed by the High Court that if the FIR is timely lodged and investigation is undertaken immediately, in a given case, the delayed receipt of the report by the Elaq Magistrate would not be fatal to the prosecution. It would depend upon the facts of each case. There cannot be any generalisation. There is a purpose behind the enactment of Section 157 of the Code of Criminal Procedure, 1973 (in short the 'Code'). The statutory requirement that the report has to be sent forthwith that itself shows that the urgency attached to the sending of the report. In a given case it is open to the prosecution to indicate reasons for the delayed despatch or delayed receipt. This has to be established by evidence. Apart from that, the unexplained discrepancy in the timings as recorded in the inquest report and the FIR has to be kept in view. It is prosecution version that the FIR was lodged at 10.50 a.m. If was so it was required to be explained by investigating officer by plausible evidence on record, as to how the inquest was undertaken at 10.30 a.m. at a point of time when the FIR was not in existence. The High Court has lightly brushed aside the plea of the appellants that it may be the lapse on the part of the investigating officer. It is true that a faulty investigation cannot be a determinative factor and would not be sufficient to throw out a credible prosecution version. But in the instant case there is no explanation offered even to explain the discrepancies cumulative effect of the factors highlighted above would show that the prosecution has

miserably failed to establish the accusations. The appeal succeeds. The bail bonds executed to give effect to the order of bail dated 12.7.2004 shall stand discharged."

38. So far as P.W.-3 is concerned, his presence is neither mentioned in the F.I.R. nor his presence is referred to in the testimony of P.W.-1 or P.W.-2. He is merely a witness to the recovery i.e. Ext. Ka-2 and Ka-3. In the statement of P.W.-3 recorded in the case diary, P.W.-3 is only mentioned as a witness to the recovery and is not shown to be an eye-witness. Even in the charge-sheet, P.W.-3 is described as the witness of the recovery. The statement of P.W.-3 that he saw the accused fleeing from the place of occurrence is something which has surfaced only at the stage of recording of statement before the Court. The Investigating Officer has also admitted that P.W.-3 is merely a witness of recovery and not of the incident.

39. So far as P.W.-4 is concerned, we have already noticed that she is not claiming to be a witness of fact but her testimony is only on the aspect of motive which cannot be read or relied upon as the accused has not been confronted on that aspect of the matter. The deposition of P.W.-4, on the aspect of motive, is otherwise a clear improvement to what was disclosed earlier by her to the I.O. while recording her statement. The testimony of witnesses of fact, therefore, does not lend much support to the prosecution case. We may also note that P.W.-1 while supporting the prosecution case on the aspect of recovery has specified the plastic can containing petrol to be of 5 liters whereas the prosecution claims plastic can to be of 2 liters. The testimony of P.W.-3, on the aspect of recovery of plastic can in which

petrol was allegedly kept, is also not much inspired.

40. This leads us to the dying declaration of deceased Deep Chand. The contents of the dying declaration have already been extracted above. The doctor has clearly certified his physical and mental condition for recording of his declaration. The declaration, otherwise, is recorded by the Naib Tehsildar who was vested with magisterial powers. There is, thus, no deficiency in the recording of dying declaration on the procedural aspect. It is otherwise settled that in the event dying declaration is found trustworthy then we can consider at the sole basis for recording conviction of the accused in appropriate manner. The Apex Court in the case of **Sharda vs. State of Rajasthan, 2010 (68) ACC 274 (SC)** has held that "a dying declaration made by a 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 guarantee of the truth of the statement of the deceased regarding the circumstances leading to his death. But at the same time, the dying declaration like any other evidence has to be tested on the touchstone of credibility to be acceptable. It is more so, as the accused does not get an opportunity of questioning the veracity of the statement by cross-examination."

41. In order to evaluate the credit-worthiness of the dying declaration, we have examined its contents with the attending circumstances and the evidence on record. The first and foremost it is to be noticed that the deceased Deep Chand had mentioned that he went to the room of his mother to watch television and lied there on the cot next to her. The Investigating

Officer has not found any television set at the place where the incident occurred. P.W.-1 who is the son of the deceased has categorically admitted that there was no television in his house. P.W.-2 who is the neighbour has also admitted that there was no television in the house. We have also seen the site plan in which no television is shown to exist. In fact the place of incident is not a room but is a verandah. The photograph of the place of incident is available in the original records of the case which also shows the place of incident to be a verandah and not a room. The last answer of Deep Chand in his dying declaration that he had gone to her mother's room to watch T.V. is, therefore, contradicted by the weight of evidence on record.

42. The deceased Deep Chand was specifically asked as to whether any quarrel took place with the accused in response to which he stated that once while playing the accused had kept his feet on his neck. The deceased has not stated anything about the first part of the incident which allegedly occurred. This assumes significance inasmuch as the prosecution case is that Deep Chand was also present when the accused came to his in-laws house. A specific question was then posted to Deep Chand as to whether any quarrel occurred with his mother to which he answered that he does not know. The deceased Deep Chand has also stated that after he was set on fire, he ran towards the court yard and jumped into a pool of water. This part of the testimony of the statement in the dying declaration is contradicted by the prosecution witnesses of fact P.W.-1 & 2, as per which the fire was doused by putting cloth on the deceased and the injured and not by pouring water. None of the witnesses have stated that Deep Chand had

jumped in the pool of water. The statement of Deep Chand is, therefore, contradicted on this part also. So far as the version of Deep Chand in response to the first question is concerned, the deceased has admitted that he was sleeping with his mother. He has stated that accused happens to be his brother in law who poured petrol on them and set them ablaze. There is nothing on record to indicate that there was any light or electricity in the house. In the last question also Deep Chand has claimed that when the accused was pouring petrol on his mother then he saw him. We view with some suspicion, the statement of Deep Chand inasmuch as it is not clear as to how he knew that the liquid, poured upon him or his mother was petrol. There is not even an iota of evidence on record to show that the deceased were burnt by the use of petrol. It is difficult to conceive that as to how Deep Chand could know about the identity of inflammable substance. It is in that context that we attach some importance to the argument of defence that infact the dying declaration was a result of tutoring inasmuch as P.W.-1 has admitted that he was present when the statement of his brother was being recorded. Although P.W.-5 has stated that he had removed all family members present near Deep Chand yet the inference of tutoring cannot entirely be eliminated as the presence of family members prior to the recording of statement is admitted. P.W.-1 has otherwise stated that he was present when the statement of his brother was recorded. P.W.-5 has also stated that he does not remember when he arrived at the hospital to record the declaration whether family members of Deep Chand were talking to him. There is also a material contradiction in the dying declaration recorded by the Magistrate viz-a-viz the statement recorded by the Investigating Officer inasmuch as

the Investigating Officer has stated that the Deep Chand informed him that from the voice of accused, he could identify him whereas in the dying declaration made to the Magistrate, there is no such disclosure.

43. The Apex Court, in the case of *State of Gujarat v. Jayrajibhai Puniabhai Varu AIR 2016 SC 3218 (PARA 10 & 11)*, has laid down that, “courts have to be extremely careful while dealing with a dying declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused person. The Court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration. The Court has to weigh all the attendant circumstances and come to the independent finding whether the dying declaration was properly recorded and whether it was voluntary and truthful. Once the court is convinced that the dying declaration is so recorded, it may be acted upon and can be made a basis of conviction. The courts must bear in mind that each criminal trial is an individual aspect. It may differ from the other trials in some or the other respect, and therefore a mechanical approach to the law of dying declaration has to be shunned. A mechanical approach in relying upon a dying declaration just because it is there, is extremely dangerous.”

44. The dying declaration made to the Magistrate, therefore, does not appear to us to be entirely reliable inasmuch as the factual assertion made therein with

regard to Deep Chand having gone to the room of his mother to see TV and other facts being contradicted by the evidence on record. Deep Chand has otherwise feigned ignorance about the reason for which the accused had poured petrol and set him and his mother ablaze. In the totality of the facts and circumstances, we are therefore not inclined to rely upon the dying declaration so as to record the conviction of the accused appellant.

45. We find in the facts of the case that the court below has not subjected the testimony of witnesses to a careful scrutiny and has accepted the prosecution case on its basis. The law with regard to evaluation of the dying declaration has also not been applied correctly in the facts of the present case.

46. Considering the fact that the accused appellant has already undergone incarceration of more than 10 years, we are of the view that he is entitled to benefit of doubt. The finding of the court below that the guilt of the accused appellant has been established beyond reasonable doubt is, therefore, reversed. The reference is answered accordingly. The accused appellant shall be released unless he is wanted in any other case subject to compliance of section 437 A Cr.P.C.

47. Before parting the record, our appreciation for a sincere effort made by the Amicus Curiae, Shri Rajrshi Gupta in highlighting the facts of the case which has enabled us to arrive at our above conclusion. We also record our appreciation for the gesture showed by learned Amicus Curiae in not accepting any fee.

(2023) 8 ILRA 144
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.08.2023

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Appeal No. 5169 of 2003
 With
 Criminal Appeal No. 5259 of 2003

Deepak @ Pilla & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
 Sri Manish Tandon

Counsel for the Respondent:
 Govt. Advocate

Criminal Law - Indian Penal Code, 1860 - Sections 498-A & 304-B - Dowry Prohibition Act, 1961 - Sections 3 & 4 - Appeal against conviction - Life imprisonment with fine - Code of Criminal Procedure, 1973 - Section 313 - Dowry death - Deceased died within seven years of her marriage - Husband of deceased and her in-laws took due care in taking her to hospital, informed her family members about incident - Family members of deceased present till parents of deceased arrived at hospital - Regarding allegation of demand of dowry by husband and brother-in-law, no specific date, time or place was attributed to them. (Para 2, 22 to 24)

Discord arose in marital life of deceased on account of role played by her brother-in-law - Discord went to extent of lodging of complaint, after compromise, issue resolved - On account of objection of in-laws in visits of deceased to house of her brother-in-law, she committed suicide - No specific allegations of physical harassment or torture by in-laws of

deceased - No injury marks on body of deceased - Poison found in viscera report, supports defence version - Testimony of mother of deceased acknowledging objection of in-laws, not examined carefully - Impugned order, set aside. (Para 26, 27)

Appeal allowed. (E-14)

(Delivered by Hon'ble Ashwani Kumar Mishra, J.
 &
 Hon'ble Syed Aftab Husain Rizvi, J.)

1. As per the office report, appellant No. 2, Ganga Sagar Tiwari in Criminal Appeal No. 5169 of 2003, who has been convicted in Session Trial No. 1453 of 2000, State Vs. Udai Narain and others, arising out of Case Crime No. 150 of 2000, under Sections 498-A, 304-B I.P.C. read with Section 3/4 of Dowry Prohibition Act, Police Station Chakeri, District Kanpur Nagar and sentenced to life imprisonment, had died on 04.10.2009. Learned counsel for the appellant also supports such statement. In that view of the matter, Criminal Appeal No. 5169 of 2003 abates as against appellant No. 2-Ganga Sagar Tiwari.

2. As per the office report, appellant No. 1-Lakhan @ Satya Narain in Criminal Appeal No. 5259 of 2003, who has been convicted in Session Trial No. 1453 of 2000, State Vs. Udai Narain and others, arising out of Case Crime No. 150 of 2000, under Sections 498-A, 304-B I.P.C. read with Section 3/4 of Dowry Prohibition Act, Police Station Chakeri, District Kanpur Nagar and sentenced to life imprisonment, had died on 03.12.2021. Learned counsel for the appellant also supports such statement. In that view of the matter, Criminal Appeal No. 5259 of 2003 abates

as against appellant No. 1-Lakhan @ Satya Narain.

3. These two appeals have been filed challenging the judgment of conviction and sentence passed by the court below dated 17.09.2003 in Sessions Trial No. 1453 of 2000, State Vs. Udai Narain and others, arising out of Case Crime No. 150 of 2000, under Sections 498-A, 304-B I.P.C. read with Section 3/4 of Dowry Prohibition Act, Police Station Chakeri, District Kanpur Nagar. By the impugned judgment the trial court has convicted and sentenced four accused, namely, Deepak alias Pilla (Devar), Ganga Sagar Tiwari (father-in-law), Lakhan alias Satya Narain (Devar) and Udai Narain @ Kallu (husband).

4. The appeals at the instance of Ganga Sagar Tiwari and Lakhan @ Satya Narain have been dismissed as having abated on account of their death. Thus, these two appeals, therefore, survive at the instance of Deepak alias Pilla (Devar) and Udai Narain @ Kallu (husband of the deceased).

5. By the impugned judgment, the accused-appellants, Deepak alias Pilla (Devar) and Udai Narain @ Kallu (husband) have been convicted and sentenced to rigorous life imprisonment under Section 304-B I.P.C., three years rigorous imprisonment along with a fine of Rs. 2,000/- each under Section 498-A I.P.C. and on failure to deposit the fine to undergo additional simple imprisonment for three months each; two years simple imprisonment along with a fine of Rs. 2,000/- each under Section 3 of Dowry Prohibition Act and on failure to deposit the fine to undergo additional simple imprisonment for two months each; and two years simple imprisonment along with

a fine of Rs. 2,000/- each under Section 4 of Dowry Prohibition Act and on failure to deposit the fine to undergo additional simple imprisonment for two months each.

6. Informant, who happens to be the father of the deceased, has given a written report on 10th of March, 2000 (Ex.Ka.1), stating that he had married his daughter with Udai Narain @ Kallu on 12.06.1995 as per Hindu traditions after giving adequate dowry as per his capabilities. After marriage the accused demanded dowry of Rs. 10,000/- and a gold chain on account of which the deceased was harassed and tortured. Such facts were disclosed by the deceased when she came to her house. The informant requested the accused not to harass his daughter since he has no means to arrange such dowry. A complaint was also given to the Incharge S.H.O., Civil Lines on 17.08.1998. On 07.03.2000 the in-laws of the deceased informed the first informant that his daughter is unwell and is hospitalized in K.P. Ganj Hospital. On receiving such information he came to the hospital along with his wife and found his daughter dead. Apprehension has been expressed that the deceased was done to death by the accused by administering some poison on account of dowry. Based on such written report a first information report came to be lodged as Case Crime No. 150 of 2000, under Sections 498-A, 304-B I.P.C. read with Section 3/4 of Dowry Prohibition Act. The deceased was hospitalized at 09:10 a.m. on 07.03.2000 by the husband of the deceased. The deceased ultimately died at 04:55 p.m. on 07.03.2000. Inquest, however, was conducted on 09.03.2000 at 12:30 in the afternoon. The inquest report records that information with regard to the death of the deceased was received on 07.03.2000 at 06:05 p.m. Father of the deceased, Hari

Shankar and brother of the deceased were witnesses of inquest. In order to ascertain the cause of death the inquest witnesses opined that postmortem be conducted. Body of the deceased was sealed and sent along with the police papers for postmortem which was also conducted on 09.03.2000 at 02:30 p.m. In the postmortem report the deceased is found to be a 24 years old lady. Cause of death could not be ascertained and the viscera was preserved. No injuries, however, have been found on the body of the deceased. The viscera report dated 03.08.2000 has been brought on record, as per which Baygon insecticide was found in the viscera and, therefore, cause of death is determined as poisoning. Statements of witnesses were recorded, whereafter charge sheet came to be submitted against the four accused on 08.07.2000. The Magistrate took cognizance and committed the case to the court of Sessions, where it got registered as Session Trial No. 1453 of 2000.

7. Charges were framed by the court of Sessions on 06.01.2001 against the four accused under Sections 498-A, 304-B I.P.C. read with Section 3/4 of Dowry Prohibition Act. The accused denied the charges and demanded trial.

8. At the stage of trial the prosecution has adduced following documentary evidence:

(i) F.I.R. dated 10.03.2000 (Ex. Ka.-4), (ii) Written Report dated 10.03.2000 (Ex. Ka.-1), (iii) Postmortem Report dated 09.03.2000 (Ex. Ka.-3), (iv) Inquest Report dated 09.03.2000 (Ex. Ka.-2), (v) Chargesheet dated 08.07.2000 (Ex. Ka.-10) and (vi) Site Plan with Index dated 14.03.2000 (Ex. Ka.-11).

9. In addition to above, oral testimonies have also been brought on record by the family members of the deceased.

10. P.W.1 happens to be the father of the deceased has been examined and in his examination-in-chief he has supported the prosecution case with regard to the marriage having been solemnized on 12.06.1995, as also claim of demand of dowry from the deceased. It is also alleged that the deceased was harassed since desired items were not given to the accused persons. P.W.1 has proved the inquest and asserted that the last rites were performed by him. He has also admitted that information with regard to the illness of his daughter was received from the in-laws of the deceased. In his cross-examination, P.W.1 has admitted that marriage was solemnized without any dowry item given to the in-laws, the deceased happily went to her in-laws' house, however, father-in-law of the deceased demanded gold chain as it was required to have been given during marriage and one of the ceremonies. He has also admitted that there was no complaint made by the deceased against her in-laws. In his further cross-examination, P.W.1 has stated that demand of gold chain was made after an year of marriage and apart from it no other demand was made. Allegations, however, of ill treatment are made against the father-in-law. The deceased has left behind a two and half year old daughter who is living with her father and grand father. This witness has denied the suggestion that the deceased has illicit relations with her brother-in-law (Jeeja) at whose place she previously lived for a quite sometime at Shuklaganj and it was on account of such dispute that the deceased actually committed suicide by consuming poison. P.W.1 has referred an incident of

1998 when the dispute between the deceased and her husband (Udai Narain @ Kallu) was resolved at Chakeri Police Station.

11. Mother of the deceased, Smt. Manorama, has appeared as P.W.2. In her examination-in-chief she has alleged that marriage was solemnized 5-6 years back in which dowry items were given and her younger daughter had also accompanied the deceased to her in-laws place. The younger daughter of P.W.2 remained in in-laws house of the deceased for about one and half months. The younger daughter complained about the bad habits of father-in-law, who would often make lured remarks against the deceased. In her cross-examination, P.W.2 has reiterated the demand of dowry of Rs. 10,000/- and a gold chain. P.W.2 has further asserted during cross-examination that the marriage of deceased was arranged by Sunil Chandra Bajpayee, who happened to be the elder son in-law and was residing at Shuklaganj. She has stated that there was no dowry given at the time of marriage and that the deceased had made no grievance/complaint with regard to the dowry. P.W.2 has also referred to some incident which took place two years after the marriage in which a report was lodged at Police Station Chakeri, where a compromise was arrived at. This witness has denied the suggestion that in-laws of the deceased objected to visits of deceased to Shuklaganj or that the deceased regularly visits Shuklaganj against the wishes of her in-laws. This witness has admitted that the in-laws of the deceased had objected to her visits to Shuklaganj and it was in that context that the dispute occurred and was resolved at Police Station Chakeri. The statement of P.W.2 in that regard is extracted hereinafter:

यह सही है कि प्राची के ससुराल वालों ने प्राची को शुक्ला गंज जाने से मना किया था। इसका समझौता प्राची की शादी के दो साल बाद हुआ था चकरी थाने में हुआ था समझौते के बाद प्राची शुक्ला गंज नहीं जाती थी प्राची के पति ही शुक्ला गंज लेकर जाते थे। मेरे सामने प्राची अपने पति के साथ शुक्ला गंज कभी नहीं गई।

12. Younger sister of the deceased, Smt. Priti @ Binti has appeared as P.W.3, who has made allegations against the father-in-law of the deceased. This witness has also referred to the involvement of brother-in-law of the deceased, who lived at Shuklaganj and was in the affairs with the deceased.

13. P.W.4 is Dr. P. V. S. Chauhan, who conducted postmortem and has proved the postmortem report. P.W.5 is a formal witness, who is an employee of the police department and has proved the police papers. P.W.6 is also a formal witness, who has proved the inquest proceedings.

14. P.W.7 is the brother of the deceased and has made allegations with regard to the demand of dowry by the in-laws of the deceased. In his cross-examination he has admitted that marriage of the deceased was got solemnized by his brother-in-law residing at Shuklaganj and has admitted that the deceased often used to visit at Shuklaganj. This witness has also received information about the death of the deceased from his brother-in-law at Shuklaganj. Although a previous complaint is alleged to have been made but details in respect thereof has not been produced.

15. P.W.8 is the Investigating Officer, who has proved the F.S.L. report, as per which the viscera of the deceased contained Baygon insecticide. He has also explained

various steps which have been taken during the course of investigation.

16. On the basis of evidence collected by the prosecution the statement of accused has been recorded under Section 313 Cr.P.C. The accused have denied their involvement and have asserted that they have been falsely implicated. A specific case has been set up of illicit relations between the deceased and her brother-in-law who lived at Shuklaganj, on account of which she allegedly committed suicide. It has also been alleged by the accused, Deepak alias Pilla that on objecting to the relations of deceased with her brother-in-law she committed suicide.

17. A defence evidence has been adduced on behalf of appellants as a testimony of D.W.1-Shiv Kumar, who has alleged that no dowry was given at the time of marriage. This defence witness is a neighbour and claims to know the family members of the accused for the last 15 years. He has alleged that the deceased had consumed poison and after facts came to have been notice of the family members the deceased was rushed to the hospital by her in-laws. Same statement has been made by Samar Singh, who has appeared as D.W.2.

18. The trial court on the basis of evidence led in the matter has come to conclusion that the charges levelled against the accused are proved inasmuch as the marriage has been performed within seven years seven years of the date of death which occurred in unnatural circumstances and that there was a demand of dowry. The appellants have been convicted and sentenced as per above.

19. Shri Manish Tandon appearing for the appellants submits that it is a case of

suicide by the deceased on account of an objection raised by her in-laws to her relations with her brother-in-law.

20. Learned counsel further submits that, in fact, no dowry was ever demanded nor was paid and all such allegations have been levelled, subsequently, as an afterthought merely to implicate the family members, after the deceased committed suicide.

21. Learned A.G.A. for the State, on the other hand, contends that the evidence on record may prove the commissioning of offence for which the accused-appellants have been charged and convicted by the Court below and that the appeal itself has no merit.

22. We have heard both the parties and perused the material on record. It is not in dispute that the marriage of the deceased was solemnized with accused Udai Narain @ Kallu on 12.06.1995. The deceased has died on 07.03.2000 and, therefore, the death of the deceased is within seven years. It is also admitted from the viscera report that the cause of death is poisoning. Prosecution witnesses have also alleged that there was a demand of dowry on account of which the deceased has been done to death. The defence, however, has come out with a distinct version of the incident, according to which, the deceased used to visit her brother-in-law at Shuklaganj on account of which there were differences between the deceased and her husband, on account of which, she ultimately committed suicide. On the basis of evidence adduced by the parties, this Court is, therefore, primarily required to determine as to whether this is a case of homicidal death or suicide?

23. We have perused the postmortem report which clearly goes to show that there

existed no injury on the body of the deceased, when the postmortem was conducted. The evidence on record further goes to show that the deceased was taken to the hospital at about 09:10 a.m. on 7th March, 2000 by the husband of the deceased. This is clearly reflected from the treatment card which has been duly proved by the I.O., i.e., P.W.-8. The prosecution witnesses have clearly admitted that the information of illness of deceased was given to her father and other family members on 7th March itself and they also arrived at the hospital on the same evening. It appears that the family members of deceased were at the hospital while the deceased was receiving the medical attention, this is clearly reflected from the statement of P.W.-7, who happens to be the brother of the deceased. Similar statement has been made by P.W.-1 also. These facts taken cumulatively gives an indication that the husband of the deceased as well as her in-laws took due care in taking her to the hospital and also informed the family members of the deceased about the incident. It is also admitted that family members of the deceased were present till the parents of the deceased arrived at the hospital. It is thereafter that the body of the deceased was retained by the parents who later lodged the report.

24. So far as the demand of dowry by the father-in-law and husband is concerned, the allegation made by prosecution witnesses is contradictory and vague. P.W.-1 and P.W.-2, who are the parents of the deceased, at one stage, have alleged demand of dowry from them but in the same statement have also stated that the marriage was solemnized without any dowry and that the deceased was happily living with her in-laws. The demand of gold chain is attributed to the father-in-law

of the deceased and such demand is alleged to have been made a year after the marriage. So far as, father-in-law is concerned, he has already died. Most of the allegations have been levelled by the other prosecution witnesses against father-in-law of the deceased and since he has already died, we are not required to examine such allegations in any further detail. So far as the demand of dowry by husband and the brother-in-law is concerned, the allegation is absolutely vague and contradictory. No specific date, time or place for such demand of dowry from the husband is attributed to husband or brother-in-law. We are, therefore, not impressed by the evidence on record with regard to demand of dowry by the husband and brother-in-law. So far as brother-in-law Deepak alias Pilla is concerned, none of the witnesses have ever referred to his name for any specific allegation of demand of dowry by him.

25. We have also examined the records and we find that the role of brother-in-law of deceased figures prominently right from the stage of the marriage of the deceased. The prosecution witnesses have admitted that the marriage was arranged by the brother-in-law of deceased who lived at Shuklaganj. It is also admitted that the deceased had stayed for several years in the house of her brother-in-law at Shuklaganj. It appears that there was an issue with regard to frequent visit of deceased to Shuklaganj at the house of her brother-in-law. Mother of the deceased has admitted that frequent visits of deceased to Shuklaganj was the cause of marital discord, in respect of which, a complaint was made at police station Chakeri and a compromise was worked out as per which the deceased was not allowed to go to Shuklaganj alone and, whenever, she visits

her brother-in-law, she would be accompanied by her husband. The mother of deceased has also admitted that in-laws of the deceased did not like the act of deceased's visiting her brother-in-law frequently to Shuklaganj. This fact is more or less admitted to all the prosecution witnesses. The specific defence pleaded by the accused is that the deceased had relations with her brother-in-law and as her in-laws objected her frequent visit to the brother-in-law, she committed suicide in a fit of anger. Defence witnesses have also supported such claim by stating that the marriage, otherwise, was solemnized between the parties without any demand of dowry.

26. We have carefully examined the two versions which have surfaced on record before us and in view of the admission made by the prosecution witnesses, we are inclined to accept the defence version that there was a discord in the marital life of the deceased on account of the role played by her brother-in-law residing at Shuklaganj. It is also admitted that the discord went to the extent of lodging of a police complaint and it was only after a compromise worked out at the police station when the issue ultimately was resolved. The defence version that it was on account of such objection of the in-laws in the visits of deceased to the house of her brother-in-law that she committed suicide has been probalitized on the basis of evidence led by the defence. Even otherwise, we find that there are no specific allegations of physical harassment or torture by the in-laws of the deceased, which may have caused her death. The fact that there are no injury marks on the body of the deceased, supports such view of ours. The fact that

poison has been found in the viscera report, therefore, clearly supports the defence version as per which the deceased committed suicide.

27. Trial Court while convicting and sentencing the accused, has not carefully examined the evidence on record and that testimony of mother of deceased acknowledging the objection of in-laws in frequent visits to Shuklaganj has been overlooked. The fact that there were no previous complaints and no marks of physical injury on the deceased have also been worked out. The trial Court, therefore, fell in error in accepting the prosecution case without subjecting the testimony of witnesses of a careful analysis. In that view of the matter, we set aside the finding of the Court below, as per which, the prosecution has succeeded in establishing the guilt of the accused beyond reasonable doubt.

28. Consequently, these appeals succeed and are **allowed**. Judgment and order dated 17.09.2003 passed by the learned Additional Sessions Judge, Fast Track Court No. 5, Kanpur Nagar in Sessions Trial No. 1453 of 2000, State Vs. Udai Narain and others, arising out of Case Crime No. 150 of 2000, under Sections 498-A, 304-B I.P.C. read with Section 3/4 of Dowry Prohibition Act, Police Station Chakeri, District Kanpur Nagar, is set aside. The appellants are acquitted from the charges of offence. Since the appellants, Deepak alias Pilla and Udai Narain @ Kallu have already been released on bail, as such, their sureties and bonds shall stand discharged subject to compliance of Section 437A Cr.P.C.

**(2023) 8 ILRA 151
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.07.2023**

BEFORE

**THE HON'BLE DR. KAUSHAL JAYENDRA
THAKER, J.
THE HON'BLE UMESH CHANDRA SHARMA, J.**

Criminal Appeal No. 5220 of 2021
With
Criminal Appeal No. 5221 of 2021

Jeetu **...Appellant**
Versus
State of U.P. **...Respondent**

Counsel for the Appellant:

Sri Ajay Kumar Mishra, Sri Ashwini Kumar Srivastava, Sri Birendra Singh Khokher, Sri Sunil Kumar Yadav, Sri Yogesh Kumar Srivastava

Counsel for the Respondent:

G.A.

Criminal Law - Indian Penal Code, 1860 - Section 302/34 - Punishment for murder - Appeal against conviction - Life imprisonment with fine - Code of Criminal Procedure, 1973 - Sections 313 - As per complaint, deceased was called by appellants to settle dispute, set ablaze by appellants at house which was sold by appellants to deceased but possession was not given to her. (Para 2, 3, 4)

Death caused by accused not premeditated, accused had no intention to cause death, injuries sufficient in ordinary course of nature to have caused death - Incident occurred on spur of moment when deceased demanded money for house - Evidence of P.W.- 1 doesn't testify this fact - P.W.-3 and P.W.-4 didn't support prosecution - P.W.-4 expressed ignorance about knowing co-accused - Medical evidence proved deep burn injuries which was 40% on body, both

hands, chest, stomach and thorax region had burn injuries - Homicidal death not amounting to murder - Incident occurred in house of co-accused, dying declaration truthful, not case of circumstantial evidence - Deceased was taken for treatment at hospital by P.W.-2, facts led to alter sentence. (Para 13, 15)

Appeals partly allowed. (E-14)

List of Cases cited:

1. Maniben Vs St. of Guj., 2009 LawSuit (SC) 1380
2. Bengai Mandal @ Begai Mandal Vs St. of Bihar, 2010 (1) Supreme 49
3. Chirra Shivraj Vs St. of Andhra Pradesh, 2010 LawSuit (SC) 843
4. Smt. Rama Devi alias Ramakanti Vs St. of U.P. (Criminal Appeal No.1438 of 2010) decided on 7.10.2017
5. Banwari & Another Vs St. of U.P., (Criminal Appeal No.26 of 2007) decided on 20.8.2015
6. Pramod Kumar Vs. St. of U.P., (Criminal Appeal No.318 of 2015) decided on 28.2.2019
7. Tukaram and Ors Vs St. of Mah., reported in (2011) 4 SCC 250
8. B.N. Kavatakar & anr. Vs St. of Karn., reported in 1994 SUPP (1) SCC 304
9. Veeran & ors. Vs St. of M.P. Decided, (2011) 5 SCR 300
10. Gautam Manubhai Makwana Vs St. of Guj., (Criminal Appeal No.83 of 2008) decided on 11.9.2013, (Para 12 to 17)

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

1. Heard Sri Ajay Kumar Mishra, learned counsel for the appellant and learned A.G.A. for the State.

2. Both these appeals challenge the judgment and order dated 17.1.2018 passed by Additional District and Sessions Judge, Court No. 15, Meerut in Sessions Trial No.713 of 2015 convicting and sentencing the appellants in both the appeals under Section 302 read with Section 34 of Indian Penal Code, 1860 (hereinafter referred to as 'I.P. Code') for life imprisonment with fine of Rs.20,000/- each and, in case of default of payment of fine, further to undergo simple imprisonment for six months.

3. Brief facts as culled out from the record are that the deceased was set ablaze by the appellants on 20.11.2014 at the house which was sold by the appellants to the deceased but possession was not given to the deceased. So as to settle the dispute deceased was called by the appellants. The appellants set ablaze the deceased as a result of which she was severely burnt and died in the hospital on 28.11.2014 namely after about eight days during treatment. A complaint to that effect was lodged which was registered as Case Crime No.595 of 2014 against the accused-appellants. Dying Declaration of the deceased was recorded in the hospital on the very same day of incident.

4. Investigation was moved into motion and after recording statements of various persons, the Investigating Officer submitted the charge-sheet against Raja and Jeetu (both accused) to the competent court.

5. The accused were facing charges which were exclusively triable by the Court of Sessions, hence, the case was committed to the Court of Sessions.

6. On being summoned, the accused pleaded not guilty and wanted to be tried,

hence, the trial started and the prosecution examined about 9 witnesses who are as follows:

1	Deposition of Ravi	PW
2	Deposition of Rani	PW
3	Deposition of Usha	PW
4	Deposition of Sheela	PW
5	Deposition of Ravindra Singh	PW
6	Deposition of Rajiv Kumar Malik	PW
7	Deposition of Dr. Sachin Gupta	PW
8	Deposition of Devraj Singh	PW
9	Deposition of Jitendra Singh	PW
10	Deposition of Tilak Chand	PW
11	Deposition of Gajendra Pal Singh	PW
12	Deposition of Dr Sunil Gupta	PW
13	Deposition of Dr. Yashveer Singh	PW
14	Deposition of Rakesh Kumar	PW
15	Deposition of Ranjeet	PW
16	Deposition of Dr Rajkumar	PW

In support of ocular version following documents were filed:

1	Written Report	Ex.Ka.1
2	F.I.R.	Ex.Ka.2
3	Dying Declaration	Ex. Ka. 5
4	Postmortem Report	Ex. Ka. 4
5	Panchayatnama	Ex.Ka.7
6	Charge-sheet	Ex. Ka.15
7	Site Plan with Index	Ex. Ka.6
8	Medical Certificate	Ex. Ka. 17
9	Injury Report	Ex. Ka. 18
10	Medical Report	Ex. Ka. 19

7. At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing

arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the appellants as mentioned aforesaid. Being aggrieved by and dissatisfied with the aforesaid judgement and order passed by the Sessions Court the appellants have preferred the present appeal.

8. Learned counsel for the appellants has relied on the decisions in **Maniben Vs. State of Gujarat, 2009 LawSuit (SC) 1380, Bengai Mandal @ Begai Mandal Vs. State of Bihar, 2010 (1) Supreme 49, Chirra Shivraj Vs. State of Andhra Pradesh, 2010 LawSuit (SC) 843**, and the decisions of this High Court in **Criminal Appeal No.1438 of 2010 (Smt. Rama Devi alias Ramakanti Vs. State of U.P.)** decided on 7.10.2017, **Criminal Appeal No.26 of 2007 (Banwari & Another Vs. State of U.P.)** decided on 20.8.2015 and **Criminal Appeal No.318 of 2015 (Pramod Kumar Vs. State of U.P.)** decided on 28.2.2019 so as to contend that life could not be till the last breath. It is submitted that the conviction under Section 302 of I.P.C. is not sustainable and is bad as the incident occurred without common object and as the offence occurred on spur of moment is not that heinous. In alternative, it is submitted that at the most punishment can be under Section 304 II or Section 304 I of I.P.C. If the Court holds that accused have committed murder, as the accused have been in jail for more than 10 years without remission, they may be granted fixed term punishment of incarceration.

9. It has been vehemently objected by learned A.G.A. for the State. He has taken us through the evidence on record and the manner in which the appellants and his

brother, set ablaze the deceased in the disputed house.

10. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellants. 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.”

11. 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 the death of the person to whom the harm is caused;

KNOWLEDGE

(c) with the knowledge that the act is likely to cause death.	KNOWLEDGE (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.

12. 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.

13. 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.

14. 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.

20s. 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."

15. While considering the facts as narrated herein above the deceased was 30

years of age as in her dying declaration given on 20.11.2014 has declared that when she demanded a sum of Rs. 1,30,000/- from accused Raja and his brother Jeetu, Jeetu poured the kerosene and she got burnt and therefore the dying declaration cannot be said to be such which cannot be acted upon and has been rightly been acted upon as opined by us. Unfortunately, the incident occurred on the spur of the moment when the deceased demanded the money for the house, however, the act cannot be said to in furtherance of the common object to do away with the deceased. Even evidence of P.W.-1 does not testify to this fact. The deceased died on 28.11.2014, consistent version of all the witnesses will not permit us to accept the submission of the learned counsel for the appellant that the accused are innocent. P.W.-3 and P.W.-4 did not support the prosecution, however, P.W.-4, expressed ignorance about knowing Raja the accused. Further, the medical evidence will not permit us to accept the submission of the learned counsel for the appellant that the accused are not guilty, there was deep burn injuries which was 40% on the body, both the hands, chest, stomach and the thorax region were having burn injuries. The deceased died out of septicemic death, the judgment herein above will permit us to concur with the learned Judge as it was homicidal death but not amounting to murder. Circumstances will also show that the incident occurred in the house, the dying declaration is truthful dying declaration, however, this was not a case of circumstantial evidence that the learned Judge has discussed the principles of same. The incident occurred at the house of Raja where they had called the deceased. The deceased was taken for treatment at hospital by P.W.-2, all these facts will permit us to alter the sentence. Even if we consider the facts and hold that it was not

illegal but irregularity which has crept in, in no circumstances; the accused could have been convicted under Section 302 of I.P.C.

16. In view of the aforementioned discussion, we are of the view that both these appeals have to be partly allowed, hence, are partly allowed.

17. The conviction of the appellants under Section 302 read with Section 34 of I.P.C. of Indian Penal Code is converted to conviction under Section 304 (Part I) of Indian Penal Code and the appellants are sentenced to undergo 10 years of incarceration with fine which is reduced to Rs.1,000/- for each appellant-accused.

18. If period of incarceration is over, the accused shall be released forthwith, if not required in any other case. The judgment and order dated 17.1.2018 of trial court shall stand modified accordingly.

19. Let a copy of this judgment along-with the trial court record be sent to the Court and Jail Authorities concerned for compliance.

20. This Court is thankful to the learned Advocates for ably assisting the Court.

(2023) 8 ILRA 157

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: LUCKNOW 28.08.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Revision Defective No. 308 of 2023

Ramdeen Yadav

...Revisionist

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:

Shashank Shukla, Prachi Shukla

Counsel for the Opposite Parties:

G.A.

(A) Criminal Law – Revision – Defective - The Limitation Act, 1963 – Section 5 – delay condonation - "sufficient cause" - to receive a liberal construction so as to advance substantial justice and generally a delay in preferring appeal/revision may be condoned in interest of justice where no gross negligence or deliberate inaction or lack of bona fide is imputable to parties, seeking condonation of delay - if delay has occurred for reasons which does not smack of mala fide, the Court should be reluctant to refuse condonation - The Code of criminal procedure, 1973 - Section 25 – maintenance. (Para - 6,16)

(B) Words/Phrases/Maxims – 'Interest reipublicae up sit finis litium' - it is for the general welfare that a period be put to litigation - when an action becomes barred by time - Court should be slow to ignore delay for the reason that once limitation expires, other party matures his rights on the subject with attainment of finality. (Para -8)

Revision filed with delay of 1088 days - revisionist/applicant was in court below - aware of the proceedings in court below - complete careless and reckless long delay - on the part of revisionist/applicant - remain virtually unexplained at all.**(Para -16)**

HELD:-Reasons given in the affidavit not justified and convincing. No reason to exercise judicial discretion exercising judiciously so as to justify condonation of delay in the present case. Application for condonation of delay deserves to be dismissed. **(Para -16)**

Delay condonation application dismissed.

Revision dismissed. (E-7)

List of Cases cited:-

1. Collector, Land Acquisition Vs Katiji, 1987(2) SCC 107
2. P.K. Ramachandran Vs St. of Kerala, AIR 1998 SC 2276
3. Shakuntala Devi Jain Vs Kuntal Kumari, AIR 1969 SC 575
4. Privy Council in Brij Indar Singh Vs Kanshi Ram ILR (1918) 45 Cal 94
5. Vedabai @ Vijayanatabai Baburao Vs Shantaram Baburao Patil & ors., JT 2001(5) SC 608
6. Pundlik Jalam Patil (dead) by LRS. Vs Executive Engineer, Jalgaon Medium Project & anr. (2008) 17 SCC 448
7. Maniben Devraj Shah Vs Municipal Corporation of Brihan Mumbai, 2012 (5) SCC 157

(Delivered by Hon'ble Shamim Ahmed, J.)

(Order on C.M. Application No. 1 of 2023)

1. Heard Shri Shashank Shukla, learned counsel for revisionist, Shri S.P. Tiwari, learned A.G.A-I for the State-opposite party No.1 and perused the material placed on record. No counsel appeared on behalf of the opposite party No.2.

2. As per the report of the Stamp Reporter of this Court, this revision is barred by limitation and has been filed with delay of 1088 days.

3. Learned Counsel for the revisionist/applicant submits the present application has been filed with prayer to condone the delay in filing the present

revision. He further submits that the revisionist immediately filed an objection but he became ill and was not in contact with his counsel and thereafter, when he came to know that an ex-parte order had been passed by learned court below, immediately a recall application was filed and then the Covid-19 outbreak happened, thereafter, he was informed that his case has been dismissed. He further submits that when the revisionist received a recovery certificate, then he contacted a new counsel and he came to know about the impugned order. He further submits that due to aforementioned reasons, the delay in filing this revision is not intentional or deliberate, thus, the present application may be allowed. He further submits that impugned order dated 15.06.2018 under Section 125 Cr.P.C. passed by learned Additional Sessions Judge/ Family Judge FTC New, Gonda to pay the maintenance of amount of Rs.2000/- per month from the date of application filed by the opposite party No.2 is illegal and passed without application of mind, thus, it is liable to be set aside and reversed.

4. Learned A.G.A-I has opposed the contention of learned Counsel for the revisionist/applicant and submits that there is no plausible reasons given in the affidavit filed in support of the delay condonation application for delay in filing the present revision and he further submits that the order impugned in this revision was passed in the year 2018, since, then more than five years have passed but there was no step taken by the revisionist for challenging the impugned order and now this revision has been filed only with the intention to harass the opposite party No.2 and to deny her rightful claim of maintenance as provided under Family Courts Act. The amount fixed for

maintenance was Rs. 2000/- per month for the opposite party no. 2, which in the present days of high price rise cannot be said to be either excessive or disproportionate. The provisions of Section 125 of Cr.P.C are beneficial provisions which are enacted to stop the vagrancy of a destitute wife and provide some succour to her, who is entitled to get the maintenance which has been wrongly denied, thus, the present application for condonation of delay may be dismissed.

5. After considering the arguments of learned Counsels for the parties made at the Bar, it transpires that the explanation as given in the affidavit filed in support of delay condonation application in filing the present revision is neither acceptable nor trustworthy since revisionist/applicant was already in court below, therefore, it cannot be said that he was not aware of the proceedings in court below. In my view, there is no explanation what to say of satisfactory explanation as to why the matter was not taken with due earnest and reasonable expediency and the present case was filed after delay of 1088 days before this Court.

6. The expression "sufficient cause" in Section 5 of Act, 1963 has been held to receive a liberal construction so as to advance substantial justice and generally a delay in preferring appeal/revision may be condoned in interest of justice where no gross negligence or deliberate inaction or lack of bona fide is imputable to parties, seeking condonation of delay. In **Collector, Land Acquisition Vs. Katiji, 1987(2) SCC 107**, the Court said, that, when substantial justice and technical considerations are taken against each other, cause of substantial justice deserves to be preferred, for, the other side cannot claim to

have vested right in injustice being done because of a non deliberate delay. The Court further said that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

7. In **P.K. Ramachandran Vs. State of Kerala, AIR 1998 SC 2276** the Court said:

"Law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribe and the Courts have no power to extend the period of limitation on equitable grounds."

8. The Rules of limitation are not meant to destroy rights of parties. They virtually take away the remedy. They are meant with the objective that parties should not resort to dilatory tactics and sleep over their rights. They must seek remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The statute relating to limitation determines a life span for such legal remedy for redress of the legal injury, one has suffered. Time is precious and the wasted time would never revisit. During efflux of time, newer causes would come up, necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The statute providing limitation is founded on public policy. It is enshrined in the maxim *Interest reipublicae up sit finis litium* (it is for the general welfare that a period be put to litigation). It is for this reason that when an action becomes barred by time, the Court

should be slow to ignore delay for the reason that once limitation expires, other party matures his rights on the subject with attainment of finality. Though it cannot be doubted that refusal to condone delay would result in foreclosing the suiter from putting forth his cause but simultaneously the party on the other hand is also entitled to sit and feel carefree after a particular length of time, getting relieved from persistent and continued litigation.

9. There is no presumption that delay in approaching the court is always deliberate. No person gains from deliberate delaying a matter by not resorting to take appropriate legal remedy within time but then the words "sufficient cause" show that delay, if any, occurred, should not be deliberate, negligent and due to casual approach of concerned litigant, but, it should be bona fide, and, for the reasons beyond his control, and, in any case should not lack bona fide. If the explanation does not smack of lack of bona fide, the Court should show due consideration to the suiter, but, when there is apparent casual approach on the part of suiter, the approach of Court is also bound to change. Lapse on the part of litigant in approaching Court within time is understandable but a total inaction for long period of delay without any explanation whatsoever and that too in absence of showing any sincere attempt on the part of suiter, would add to his negligence, and would be relevant factor going against him.

10. I need not to burden this judgment with a catena of decisions explaining and laying down as to what should be the approach of Court on construing "sufficient cause" under Section 5 of Act, 1963 and it would be suffice to refer a very few of them besides those already referred.

11. In **Shakuntala Devi Jain Vs. Kuntal Kumari**, AIR 1969 SC 575 a three Judge Bench of the Court said, that, unless want of bona fide of such inaction or negligence as would deprive a party of the protection of Section 5 is proved, the application must not be thrown out or any delay cannot be refused to be condoned.

12. The **Privy Council in Brij Indar Singh Vs. Kanshi Ram ILR (1918) 45 Cal 94** observed that true guide for a court to exercise the discretion under Section 5 is whether the appellant acted with reasonable diligence in prosecuting the appeal. This principle still holds good inasmuch as the aforesaid decision of Privy Council as repeatedly been referred to, and, recently in **State of Nagaland Vs. Lipok AO and others**, AIR 2005 SC 2191.

13. In **Vedabai @ Vaijayanatabai Baburao Vs. Shantaram Baburao Patil and others**, JT 2001(5) SC 608 the Court said that under Section 5 of Act, 1963 it should adopt a pragmatic approach. A distinction must be made between a case where the delay is inordinate and a case where the delay is of a few days. In the former case consideration of prejudice to the other side will be a relevant factor so the case calls for a more cautious approach but in the latter case no such consideration may arise and such a case deserves a liberal approach. No hard and fast rule can be laid down in this regard and the basic guiding factor is advancement of substantial justice.

14. In **Pundlik Jalam Patil (dead) by LRS. Vs. Executive Engineer, Jalgaon Medium Project and Anr. (2008) 17 SCC 448**, in para 17 of the judgment, the Court said :

"...The evidence on record suggests neglect of its own right for long

time in preferring appeals. The court cannot enquire into belated and state claims on the ground of equity. Delay defeats equity. The court helps those who are vigilant and "do not slumber over their rights."

15. In **Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai, 2012 (5) SCC 157**, in para 18 of the judgment, the Court said as under:

"What needs to be emphasized is that even though a liberal and justice oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the Courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost. What colour the expression 'sufficient cause' would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the Court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay. In cases involving the State and its agencies/instrumentalities, the Court can take note of the fact that sufficient time is taken in the decision making process but no premium can be given for total lethargy or utter negligence on the part of the officers of the State and / or its agencies/instrumentalities and the applications filed by them for condonation

of delay cannot be allowed as a matter of course by accepting the plea that dismissal of the matter on the ground of bar of limitation will cause injury to the public interest."

16. In my view, the kind of explanation rendered herein does not satisfy the observations of Apex Court that if delay has occurred for reasons which does not smack of mala fide, the Court should be reluctant to refuse condonation. On the contrary, I find that here is a case which shows a complete careless and reckless long delay of 1088 days on the part of revisionist/applicant which has remain virtually unexplained at all and the reasons given in the affidavit is not justified and convincing. Therefore, I do not find any reason to exercise my judicial discretion exercising judiciously so as to justify condonation of delay in the present case.

17. In the result, the application for condonation of delay deserves to be dismissed.

18. Accordingly, the present application for condonation of delay is hereby ***dismissed***.

(Order on memo of Revision)

1. The application seeking condonation of delay in filing the present revision having been dismissed vide order of date, this revision being barred by limitation, is accordingly ***dismissed***.

2. The court below is at liberty to proceed in the matter in accordance with law.

3. The Senior Registrar of this Court is directed to send a copy of this order to

the concerned court below for its compliance.

4. No order as to cost(s).

(2023) 8 ILRA 162
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.08.2023

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Revision No. 935 of 2023

Mahant Prasad Ram Tripathi @ M.P.R. Tripathi
...Revisionist

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:

Prateek Tewari

Counsel for the Opposite Parties:

Shiv P. Shukla

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 - Revision, Section 27 - Discharge, Prevention of Corruption Act, 1988 - Section 7 - Offence relating to public servant being bribed, The Indian Telegraph Act, 1885 - Section 5 - Power for Government to take possession of licensed telegraphs and to order interception of messages, Indian Telegraph Rules, 1951 - Rule 419 - Any evidence cannot be refused to be admitted by the Court on the ground that it had been obtained illegally.(Para - 25)

(B) Words and Phrases - 'intercept' - 'to stop and catch something or someone before that thing or person is able to reach a particular place' - 'to stop, seize or interrupt in progress or before arrival, receive (a communication or signal directed elsewhere) usually secretly' - 'to stop, deflect or seize on the way from one

place to another, prevent from arriving or proceeding.(Para -19)

Conversation made between accused persons through their mobile phone - co-accused was directed by CBI officials to make phone call to applicant - make a conversation with him regarding the payment of bribe - communication received by putting mobile phone of co-accused on speaker mode - recorded in another device called 'digital voice recorder' - applicant sought discharge under Section 227 of Cr.P.C. - digital voice recorder conversation was inadmissible in evidence - trial court rejected the application - hence revision.(Para -17)

HELD:- No illegality in the order rejecting the discharge application filed by the revisionist. Telephonic conversation between the two accused persons was intercepted or not and whether it was done legally or not, would not affect the admissibility of the recorded conversation in evidence against the applicant. **(Para -21,29)**

Revision dismissed. (E-7)

List of Cases cited:-

1. People's Union for Civil Liberties (PUCL) Vs. U.O.I. & anr. , (1997) 1 SCC 301
2. Sanjay Pandey Vs Directorate of Enforcement, 2022 SCC OnLine Del 4299
3. Rayala M. Bhuvaneswari Vs Nagaphanender Rayala, AIR 2008 AP 98
4. St. Vs N.M.T. Joy Immaculate, (2004) 5 SCC 729
5. St. (NCT of Delhi) Vs Navjot Sandhu, (2005) 11 SCC 600
6. Sanjay Pandey Vs D.O.E., 2022 SCC OnLine Del 4299
7. Rayala M. Bhuvaneswari Vs. Nagaphanender Rayala, AIR 2008 AP 98
8. Gayatri Prasad Prajapati Vs D.O.E. 2023 SCC OnLine All 376

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

1. Heard Sri Prateek Tewari Advocate, the learned counsel for the revisionist and Sri Shiv P. Shukla, the learned counsel for the Central Bureau of Investigation and perused the records.

2. This revision under Section 397/401 Cr.P.C. has been filed by the revisionist challenging the validity of an order dated 25.05.2023, passed by the learned Special Judge, C.B.I. Court No.4, Lucknow, whereby the application under Section 227 Cr.P.C. praying for discharge of the applicant has been rejected.

3. Briefly stated, facts of the case are that one Haider Ali @ Mantu had filed a complaint against one Shashi Mohan, Member, Fatehgarh Cantonment Board, on the basis whereof Case No.RC0062015A0009 under Section 7 of Prevention of Corruption Act, 1988 was registered by the Central Bureau of Investigation on 09.05.2015. The complainant had alleged that Shashi Mohan had demanded Rs.1,56,000/- as bribe on behalf of the applicant Mahant Prasad Tripathi, who was the C.E.O. of Cantonment Board Fatehgarh, for payment of certain bills, at the rate of 6% of the bill amount.

4. The C.B.I. has recorded a telephonic communication between two accused persons on a digital voice recorder, wherein the co-accused told the applicant on phone that 'Haider had come and he has paid the amount of 6%', which was acknowledged by the applicant by merely saying 'yes' and when the co-accused Shashi Mohan tried to carry the conversation forward, the applicant forbade him to talk on the issue and asked him to talk in the office.

5. The applicant had sought his discharge under Section 227 of Cr.P.C. on the ground that the telephonic conversation recorded on the digital voice recorder was not admissible in evidence, but the learned trial court has rejected the application.

6. Sri Prateek Tewari Advocate, the learned counsel for the revisionist has drawn attention of the Court towards the provisions contained in Section 5 of Indian Telegraph Act, which provide as follows: -

*"5. Power for Government to take possession of licensed telegraphs and to order **interception of messages.**—*

(1) On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government, or any officer specially authorised in this behalf by the Central Government or a State Government, may, if satisfied that it is necessary or expedient so to do, take temporary possession (for so long as the public emergency exists or the interest of the public safety requires the taking of such action) of any telegraph established, maintained or worked by any person licensed under this Act.

(2) On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially authorised in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought

for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order:

Provided that the press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section."

7. The learned counsel for the revisionist drawn attention of the Court towards Rule 419 of Indian Telegraph Rules, 1951, which provides as follows: -

"419. Interception or monitoring of telephone messages. - It shall be lawful for the Telegraph Authority to monitor or intercept a message transmitted through telephone, for the purpose of verification of any violation of these rules or for the maintenance of the equipment."

8. The learned counsel for the applicant has submitted that Section 5 of the Telegraph Act permits interception of telegraph messages only in certain contingencies only, and that too under the orders of the Government. He has submitted that in the present case there was no such order and therefore interception of telephonic conversation between the accused persons was wholly illegal and the telephone conversation recorded in an illegal manner cannot be admitted in evidence in support of the prosecution case.

9. In support of his contention, learned counsel for the applicant has relied upon a judgment of Hon'ble the Apex Court in the case of **People's Union for**

Civil Liberties (PUCL) Vs. Union of India and another: (1997) 1 SCC 301.

10. **PUCL** (Supra) was a public interest Writ Petition filed under Article 32 of the Constitution of India in the wake of a report on "Tapping of politicians' phones" by the Central Bureau of Investigation (CBI). It was mentioned in the C.B.I. report that the Director Intelligence Bureau, Director General Narcotics Control Bureau, Revenue Intelligence and Central Economic Intelligence Bureau and the Director Enforcement Directorate had been authorised by the Central Government to do interception for the purposes mentioned in Section 5 of the Telegraph Act. In addition, the State Governments generally give authorisation to the Police/Intelligence agencies to exercise the powers under the Act. The petitioner had challenged the constitutional validity of Section 5(2) of the Indian Telegraph Act, 1885 (the Act), in the alternative it was contended that the said provisions be suitably read down to include procedural safeguards to rule out arbitrariness and to prevent the indiscriminate telephone-tapping. The Hon'ble Supreme Court took note of Section 7 (2) (b) of the Telegraph Act, which gives rule-making power to the Central Government is as under: -

"7. Power to make rules for the conduct of telegraphs.—(1) The Central Government may, from time to time, by notification in the Official Gazette, make rules consistent with this Act for the conduct of all or any telegraphs established, maintained or worked by the Government or by the persons licensed under this Act.

(2) Rules under this section may provide for all or any of the following among other matters, that is to say:

(a) * * *

(b) *the precautions to be taken for preventing the improper interception or disclosure of messages.*”

11. The Hon’ble Supreme Court noted that: -

“It is for the Central Government to make rules under Section 7 of the Act. Section 7(2)(b) specifically provides that the Central Government may make rules laying down the precautions to be taken for preventing the improper interception or disclosure of messages. The Act was enacted in the year 1885. The power to make rules under Section 7 of the Act has been there for over a century but the Central Government has not thought it proper to frame the necessary rules despite severe criticism of the manner in which the power under Section 5(2) has been exercised. It is entirely for the Central Government to make rules on the subject but till the time it is done the right to privacy of an individual has to be safeguarded. In order to rule out arbitrariness in the exercise of power under Section 5(2) of the Act and till the time the Central Government lays down just, fair and reasonable procedure under Section 7(2)(b) of the Act, it is necessary to lay down procedural safeguards for the exercise of power under Section 5(2) of the Act so that the right to privacy of a person is protected.”

12. In the aforesaid background, the Hon’ble Supreme Court issued the following directions: -

“1. An order for telephone-tapping in terms of Section 5 (2) of the Act shall not be issued except by the Home Secretary, Government of India (Central

Government) and Home Secretaries of the State Governments. In an urgent case the power may be delegated to an officer of the Home Department of the Government of India and the State Governments not below the rank of Joint Secretary. Copy of the order shall be sent to the Review Committee concerned within one week of the passing of the order.

2. The order shall require the person to whom it is addressed to intercept in the course of their transmission by means a public telecommunication system, such communications as are described in the order. The order may also require the person to whom it is addressed to disclose the intercepted material to such persons and in such manner as are described in the order.

3. The matters to be taken into account in considering whether an order is necessary under Section 5 (2) of the Act shall include whether the information which is considered necessary to acquire could reasonably be acquired by other means.

4. The interception required under Section 5 (2) of the Act shall be the interception of such communications as are sent to or from one or more addresses, specified in the order, being an address or addresses likely to be used for the transmission of communications to or from, from one particular person specified or described in the order or one particular set of premises specified or described in the order.

5. The order under Section 5 (2) of the Act shall, unless renewed, cease to have effect at the end of the period of two months from the date of issue. The authority which issued the order may, at any time before the end of two month period renew the order if it considers that it is necessary to continue the order in terms

of Section 5 (2) of the Act. The total period for the operation of the order shall not exceed six months.

6. The authority which issued the order shall maintain the following records:

(a) the intercepted communications,

(b) the extent to which the material is disclosed,

(c) the number of persons and their identity to whom any of the material is disclosed.

(d) the extent to which the material is copied and

(e) the number of copies made of any of the material.

7. The use of the intercepted material shall be limited to the minimum that is necessary in terms of Section 5 (2) of the Act.

8. Each copy made of any of the intercepted material shall be destroyed as soon as its retention is no longer necessary in terms of Section 5 (2) of the Act.

9. There shall be a Review Committee consisting of Cabinet Secretary, the Law Secretary and the Secretary, Telecommunication at the level of the Central Government. The Review Committee at the State level shall consist of Chief Secretary, Law Secretary and another member, other than the Home Secretary, appointed by the State Government.

(a) The Committee shall on its own, within two months of the passing of the order by the authority concerned, investigate whether there is or has been a relevant order under Section 5 (2) of the Act. Where there is or has been an order whether there has been any contravention of the provisions of Section 5 (2) of the Act.

(b) If on an investigation the Committee concludes that there has been a contravention of the provisions of Section 5 (2) of the Act, it shall set aside the order

under scrutiny of the Committee. It shall further direct the destruction of the copies of the intercepted material.

(c) If on investigation, the Committee comes to the conclusion that there has been no contravention of the provisions of Section 5 (2) of the Act, it shall record the finding to that effect."

13. However, the question of admissibility of an intercepted telephonic conversation in evidence was not raised before the Hon'ble Supreme Court and this question was not decided in PUCL case. Therefore, PUCL case (Supra) is not an authority for adjudging the admissibility of a telephonic conversation allegedly intercepted without following the due process of law.

14. The learned Counsel for the applicant has placed reliance upon a judgment in the case of **Sanjay Pandey versus Directorate of Enforcement**, 2022 SCC OnLine Del 4299, wherein while deciding a bail application, an Hon'ble Single Judge of the Delhi High Court recorded his prima facie of the view that "tapping phone lines or recording calls without consent is a breach of privacy. The right to privacy enshrined under Article 21 of the Constitution demands that phone calls not be recorded. Only with consent of the individuals concerned, can such activity be carried out otherwise it will amount to breach of the fundamental right to privacy".

15. The learned Counsel for the applicant has relied upon the following passage from the judgment in the case of **Rayala M. Bhuvaneshwari Versus Nagaphanender Rayala**, AIR 2008 AP 98, wherein an Hon'ble Single Judge of the

Andhra Pradesh High Court expressed the following belief: -

“13. For all these reasons, I believe that the act of tapping itself by the husband of the conversation of his wife with others was illegal and it infringed the right of privacy of the wife. Therefore, these tapes, even if true, cannot be admissible in evidence. Hence, Ex.P-18 itself is not admissible in evidence and there is no question of forcing the wife to undergo a voice test and then ask the expert to compare the portions denied by her with her admitted voice.”

16. Per contra, Sri Shiv P. Shukla, the learned counsel for the respondent has opposed the revision and he has submitted that recording of conversation between two persons without interfering in the communication system will not amount to interception of the messages. He has further submitted that the recording of telephonic conversation between two accused persons is not the sole evidence relied upon by the prosecution against the applicant and there are some other evidences also including the statement of co-accused person and some independent persons.

17. The conversation in question was made between the accused persons through their mobile phone. The co-accused Shashi Mohan was directed by the Central Bureau of Investigation officials to make phone call to the applicant and make a conversation with him regarding the payment of bribe. The communication between the mobile phone devices of the two accused persons was received by putting the mobile phone of the co-accused on speaker mode and it was recorded in another device called ‘digital voice recorder’.

18. It appears that the communication made by one accused person to the other reached him and it was thereafter that it was recorded by on another device called digital voice recorder. Can it be said in these circumstances that the communication between the two accused persons was ‘intercepted’?

19. The word ‘intercept’ has been defined in Cambridge dictionary as **‘to stop and catch something or someone before that thing or person is able to reach a particular place’**. Merriam-Webster dictionary defines ‘intercept’ as **‘to stop, seize or interrupt in progress or before arrival, receive (a communication or signal directed elsewhere) usually secretly’**. Collins dictionary defines ‘intercept’ as **‘to stop, deflect or seize on the way from one place to another, prevent from arriving or proceeding’**.

20. From the aforesaid facts, it appears the communication between the two accused persons reached its destination and it was not stopped while it was in the process of reaching the other person, before reaching the other person. Therefore, from the plane meaning of the word ‘intercept’ it appears that the communication was not ‘intercepted’.

21. Therefore, I am of the view that the provisions of law regarding interception of telephonic communication would not apply to the facts of the present case.

22. However, as elaborate submissions have been made by the learned Counsel for the revisionist on the issue of admissibility of the recorded conversation, I proceed to examine the same.

23. In **State v. N.M.T. Joy Immaculate**, (2004) 5 SCC 729, the Hon'ble Court was deciding an appeal passed by the High Court of Madras holding that the order granting custody of the accused to police was illegal and the recovery made consequent to confession made during the illegal custody has no evidentiary value. A question arose whether the High Court was right in making the aforesaid observations, even if it is assumed that the order dated 6-11-2001 granting police custody was illegal. Answering the aforesaid question, the Hon'ble Supreme Court held that: -

“The admissibility or otherwise of a piece of evidence has to be judged having regard to the provisions of the Evidence Act. The Evidence Act or the Code of Criminal Procedure or for that matter any other law in India does not exclude relevant evidence on the ground that it was obtained under an illegal search and seizure.

15. The law of evidence in our country is modelled on the rules of evidence which prevailed in English law. In *Kurumav.R.*, 1955 AC 197, an accused was found in unlawful possession of some ammunition in a search conducted by two police officers who were not authorised under the law to carry out the search. The question was whether the evidence with regard to the unlawful possession of ammunition could be excluded on the ground that the evidence had been obtained on an unlawful search. The Privy Council stated the principle as under:

The test to be applied, both in civil and in criminal cases, in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how it was obtained.

15.1. This question has been examined threadbare by a Constitution Bench in *Pooran Mal v. Director of Inspection (Investigation)*, (1974) 1 SCC 345, and the principle enunciated therein is as under:

If the Evidence Act, 1872 permits relevancy as the only test of admissibility of evidence, and, secondly, that Act or any other similar law in force does not exclude relevant evidence on the ground that it was obtained under an illegal search or seizure, it will be wrong to invoke the supposed spirit of our Constitution for excluding such evidence. Nor is it open to us to strain the language of the Constitution, because some American Judges of the American Supreme Court have spelt out certain constitutional protections from the provisions of the American Constitution. So, neither by invoking the spirit of our Constitution nor by a strained construction of any of the fundamental rights can we spell out the exclusion of evidence obtained on an illegal search.

So far as India is concerned its law of evidence is modelled on the rules of evidence which prevailed in English law, and courts in India and in England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure. Where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out.

15.2. This being the law, Direction (b) given by the High Court that the confession and alleged recovery has no evidentiary value is clearly illegal and has to be set aside. The effect of the confession and also the recovery of the incriminating

article at the pointing out of the accused has to be examined strictly in accordance with the provisions of the Evidence Act.”

24. In **State (NCT of Delhi) v. Navjot Sandhu**, (2005) 11 SCC 600, a question arose regarding the legality and admissibility of intercepted telephone calls in the context of telephone conversation between accused Shaukat and his wife Afsan Guru and the conversation between accused Gilani and his brother Shah Faizal. The Hon'ble Supreme Court dealt with the question in the following words: -

“153. ... On the relevant day, the interception of messages was governed by Section 5(2) of the Telegraph Act, 1885 read with Rule 419-A of the Telegraph Rules, 1951. The substantive power of interception by the Government or the authorised officer is conferred by Section 5. The modalities and procedure for interception is governed by the said Rules. It is contended by the learned Senior Counsel appearing for the two accused Shaukat and Gilani, that even Rule 419-A, has not been complied with in the instant case, and, therefore, the tape-recorded conversation obtained by such interception cannot be utilised by the prosecution to incriminate the said accused. It is the contention of the learned counsel for the State Mr Gopal Subramaniam, that there was substantial compliance with Rule 419-A and, in any case, even if the interception did not take place in strict conformity with the Rule, that does not affect the admissibility of the communications so recorded. In other words, his submission is that the illegality or irregularity in the interception does not affect its admissibility in evidence there being no specific embargo against the admissibility in the Telegraph Act or in the Rules. Irrespective of the merit

in the first contention of Mr Gopal Subramaniam, we find force in the alternative contention advanced by him.

*154. In regard to the first aspect, two infirmities are pointed out in the relevant orders authorising and confirming the interception in respect of specified telephone numbers. It is not shown by the prosecution that the Joint Director, Intelligence Bureau who authorised the interception, holds the rank of Joint Secretary to the Government of India. Secondly, the confirmation orders passed by the Home Secretary (contained in Vol. 7 of the lower court record, p. 447, etc.) would indicate that the confirmation was prospective. We are distressed to note that the confirmation orders should be passed by a senior officer of the Government of India in such a careless manner; that too, in an important case of this nature. **However, these deficiencies or inadequacies do not, in our view, preclude the admission of intercepted telephonic communication in evidence.** It is to be noted that unlike the proviso to Section 45 of POTA, **Section 5(2) of the Telegraph Act or Rule 419-A does not deal with any rule of evidence. The non-compliance or inadequate compliance with the provisions of the Telegraph Act does not per se affect the admissibility.** The legal position regarding the question of admissibility of the tape-recorded conversation illegally collected or obtained is no longer res integra in view of the decision of this Court in *R. M. Malkani v. State of Maharashtra*, (1973) 1 SCC 471. In that case, the Court clarified that a contemporaneous tape record of a relevant conversation is a relevant fact and is admissible as res gestae under Section 7 of the Evidence Act. Adverting to the argument that Section 25 of the Telegraph Act, 1885 was contravened the learned Judges held that there was no violation. At*

the same time, the question of admissibility of evidence illegally obtained was discussed. The law was laid down as follows: (SCC p. 477, para 24)

“There is warrant for the proposition that even if evidence is illegally obtained it is admissible. Over a century ago it was said in an English case where a constable searched the appellant illegally and found a quantity of offending article in his pocket that it would be a dangerous obstacle to the administration of justice if it were held, because evidence was obtained by illegal means, it could not be used against a party charged with an offence. See *Jones v. Owens* [(1870) 34 JP 759]. The Judicial Committee in *Kurumav. R.* [(1955) 1 All ER 236 : 1955 AC 197 : (1955) 2 WLR 223 (PC)] dealt with the conviction of an accused of being in unlawful possession of ammunition which had been discovered in consequence of a search of his person by a police officer below the rank of those who were permitted to make such searches. The Judicial Committee held that the evidence was rightly admitted. The reason given was that if evidence was admissible it matters not how it was obtained. There is of course always a word of caution. It is that the judge has a discretion to disallow evidence in a criminal case if the strict rules of admissibility would operate unfairly against the accused. That caution is the golden rule in criminal jurisprudence.”

155. We may also refer to the decision of a Constitution Bench of this Court in *Pooran Mal v. Director of Inspection (Investigation)*, (1974) 1 SCC 345, in which the principle stated by the Privy Council in *Kuruma case*, (1955) 1 All ER 236, was approvingly referred to while testing the evidentiary status of illegally obtained evidence. Another decision in which the same approach was adopted is a

recent judgment in *State v. N.M.T. Joy Immaculate*, (2004) 5 SCC 729. It may be mentioned that *Pooran Mal* case was distinguished by this Court in *Ali Mustaffa Abdul Rahman Moosav. State of Kerala*, (1994) 6 SCC 569, which is a case arising under the NDPS Act on the ground that contraband material seized as a result of illegal search and seizure could by itself be treated as evidence of possession of the contraband which is the gist of the offence under the said Act. In the instant case, the tape-recorded conversation which has been duly proved and conforms to the requirements laid down by this Court in *Ram Singh v. Col. Ram Singh*, 1985 Supp SCC 611, can be pressed into service against the accused concerned in the joint trial for the offences under the Penal Code as well as POTA. Such evidence cannot be shut out by applying the embargo contained in Section 45 when on the date of interception, the procedure under Chapter V of POTA was not required to be complied with. On the relevant date POTA was not in the picture and the investigation did not specifically relate to the offences under POTA. The question of applying the proviso to Section 45 of POTA does not, therefore, arise as the proviso applies only in the event of the communications being legally required to be intercepted under the provisions of POTA. The proviso to Section 45 cannot be so read as to exclude such material in relation to the POTA offences if it is otherwise admissible under the general law of evidence.

25. The law is clear that any evidence cannot be refused to be admitted by the Court on the ground that it had been obtained illegally. The judgment of Delhi High Court in the case of **Sanjay Pandey versus Directorate of Enforcement**, 2022 SCC OnLine Del 4299 and the judgment of

Andhra Pradesh High Court in **Rayala M. Bhuvaneswari Versus Nagaphanender Rayala**, AIR 2008 AP 98 have not taken into consideration the above referred law laid down by the Hon'ble Supreme Court and, therefore, those are per incuriam judgments and those are not binding precedents.

26. Therefore, whether the telephonic conversation between the two accused persons was intercepted or not and whether it was done legally or not, would not affect the admissibility of the recorded conversation in evidence against the applicant.

27. Moreover, the telephonic conversation recorded in the digital voice recorder is not the solitary evidence relied upon by the prosecution and it appears that the prosecution proposes to produce other evidences as well during trial.

28. In **Gayatri Prasad Prajapati vs. Directorate of Enforcement 2023 SCC OnLine All 376**, this Court held that: -

“the law regarding the approach to be adopted by the court while considering an application for discharge of the accused persons under Section 227 and approach while framing charges under Section 228 of the Code, is that while considering an application for discharge of the accused under Section 227 of the Code, the Court has to form a definite opinion, upon consideration of the record of the case and the documents submitted therewith, that there is not sufficient ground for proceeding against the accused. However, while framing charges, the Court is not required to form a definite opinion that the accused is guilty of committing an offence. The truth of the matter will come

out when evidence is led during the trial. Once the facts and ingredients of the Section exist, the court would presume that there is ground to proceed against the accused and frame the charge accordingly and the Court would not doubt the case of the prosecution.”

29. In the present case, no such material or ground is present from which the Court may form a definite opinion that there no sufficient ground for proceeding against the applicant. Therefore, I do not find any illegality in the order rejecting the discharge application filed by the revisionist.

30. The revision lacks merit and the same is, accordingly, **dismissed**.

(2023) 8 ILRA 171
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.08.2023

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Second Appeal No. 1555 of 1983

Padam Prakash Gupta	...Appellant
Versus	
Chhotey Lal	...Respondent

Counsel for the Appellant:

Sri M.P. Bajpai, Sri A.K. Rai, Sri Amit Sharma, Sri P.N. Saxena, Sri P.N. Saxena, Sri Padmaker Pandey, Sri Suresh Chandra Varma, Sri V.K. Singh, Sri Vishnu Kumar Singh

Counsel for the Respondent:

Sri R.C. Shukla, Sri Lalji Sinha, Sri Pankaj Bhatia, Sri Pankaj Bhattia, Sri R.K. Mishra

(A) Civil Law - The Code of Civil Procedure, 1908 - Section 100 - Second

Appeal - Original Suit filed by plaintiff-respondent - against his own brother - allegations in plaint - plaintiff-respondent and defendant real brothers - proposed to purchase plot jointly - plaintiff negotiated sale with the owner - agreed to sell plot in question for a consideration of Rs. 20,000/- - agreement to sell was also executed between plaintiff and owner - plaintiff-respondent paid from time to time - obtained receipts of amounts - which were paid to proposed seller - receipts find mention in plaint - plaintiff had paid all money - paid before sale deed was executed - payment of Rs. 4,000/- on 24.6.1972 not denied in any manner by defendant/appellant - First Appellate court found that these receipts were there - reason given by Trial Court to disbelieve the payment was disbelieved by First Appellate Court in toto - defendant did not mention the payments made in their written statement - responded to their notice before filing the suit. **(Para - 2,3,17)**

HELD:- Plaintiff proved the plaint allegation to the hilt. First Appellate Court's findings unassailable. Substantial question of law framed not required to be answered due to the First Appellate Court's findings. Second Appeal is concluded by findings of fact. **(Para-17,18)**

Second appeal dismissed. (E-7)

List of Cases cited:-

1. Bans Narain Vs Chandrani Kuer, 1944 0 AIR Alld 130

2. P. Satyanarayan Murthi Vs The St. of A.P. , JT 1992 (4) 454

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

1. The instant second appeal has been filed by the defendant for the setting aside of the judgement of the First Appellate Court dated 18.3.1983 passed in Civil Appeal No. 477 of 1981.

2. A suit being Original Suit No. 249 of 1978 was filed by one Chhotelal Gupta,

the plaintiff-respondent against his own brother Sri Padam Prakash Gupta. The allegations in the plaint were that the plaintiff-respondent and the defendant who were real brothers and had a great affection for each other proposed to purchase a plot no. 290, Block K Scheme II, Kidwai Nagar, jointly. It has been alleged in the plaint that the plaintiff negotiated the sale with the owner Smt. Ahmadi Begam who had agreed to sell the plot in question for a consideration of Rs. 20,000/- and for that purpose, an agreement to sell was also executed on 15/17.6.1971 between the plaintiff and Smt. Ahmadi Begam.

3. The plaintiff-respondent's further case had been that the plaintiff-respondent had paid Rs. 11,000/- from time to time and had obtained receipts of the amounts which were paid to the proposed seller. As per the plaint allegations, on 17.6.1971 Rs. 1,000/-; on 14.7.1971 Rs. 4,000/-; on 24.10.1971 Rs. 300/-; on 3.6.1972 Rs. 200/- and on 14.6.1972 Rs. 5,500/- were paid.

4. Further case of the plaintiff-respondent was that considering the financial position of the plaintiff-respondent, the defendant, the brother, had concluded that making a construction over the plot would be difficult unless the defendant who was a Government Employee applied for a loan and, therefore, the sale deed was got executed on 24.6.1972 in the name of the defendant. The plaintiff-respondent further had stated that he had again paid a sum of Rs. 4,000/- to the vendor on the date of the execution of the sale deed. This amount was the balance of the consideration which had to be paid. The plaint allegation therefore is that the sale deed was executed in the name of the defendant, benami.

5. The defendant-appellant in the instant case filed a written statement and though he admitted his relationship with the plaintiff-respondent, he denied the other allegations of the plaint. He had stated that the plaintiff had earlier entered into an agreement with Smt. Ahmadi Begam but when he could not make the payment then the defendant had agreed to buy the property from Smt. Ahmadi Begam. He further claimed that he paid Rs. 6,000/- to Smt. Ahmadi Begam on 12.6.1972 before the execution of the sale deed and that he had paid Rs. 9,000/- at the time of the execution of the sale deed and, therefore, he claimed that he was the sole owner of the plot in question. He claimed that he was buying the land at Rs. 15,000/- which was earlier being sold to the brother for Rs. 20,000/-.

The Trial Court framed three issues which were as follows:-

1. Whether the plaintiff is co-owner of the disputed plot no. 290 situated in Block K, Scheme II, Kidwai Nagar, as alleged in Plaint?

2. Whether the defendant is the exclusive owner of the disputed plot as contended in written statement.

3. To what relief, if any, is the plaintiff entitled?

6. With regard to issues no. 1 and 2, the Trial Court held that the defendant was the actual owner of the plot no. 290 situate in Block K, Scheme II, Kidwai Nagar, and decided the issues in favour of the defendant and against the plaintiff. In view of the finding so given, the Suit was dismissed 28.4.1981.

7. The plaintiff filed an Appeal which was numbered as Civil Appeal No. 477 of 1981. The Appellate Court looked into the

evidence de-novo and concluded that the plaintiff had a case and, therefore, allowed the appeal and decreed the Suit. While decreeing the Suit it formulated a point for determination which was whether the plaintiff is a co-owner of the disputed plot or not. The First Appellate Court adverted to the various documentary evidence and also to the oral evidence which were there on record. The First Appellate Court upon looking at exhibit -1 which was the agreement to sell entered into between Smt. Ahmadi Begam and the plaintiff found that the agreement was there and that it further showed that a sum of Rs. 5,000 was paid in advance out of which Rs. 1,000/- was paid to Smt. Ahmadi Begam at the time of the execution of the deed itself on 17.6.1971. The First Appellate Court further relied upon the exhibit-11 which was the receipt of Rs. 4,000/- and concluded that Rs. 4,000/- were again paid to Smt. Ahmadi Begam on 4.7.1971. This receipt was at the back of the agreement deed itself. The First Appellate Court relying upon the exhibit – 4 which is a letter dated 24.10.1971 by Smt. Ahmadi Begam to the plaintiff held that, in fact, Rs. 300/- more were paid to Smt. Ahmadi Begam by the plaintiff. By adverting to exhibit – 8, the Appellate Court found that the seller Smt. Ahmadi Begam on 3.6.1972 had prayed for time for getting permission from the Nagar Palika and that she had also requested the plaintiff to give to her Rs. 200/- for meeting petty expenses and by that letter she had also expressed her willingness to adjust that amount towards the sale consideration. In fact on 3.6.1972 by exhibit – 9, Smt. Ahmadi Begam had also executed a receipt in favour of the plaintiff. Exhibit – 10 was relied upon by the First Appellate Court to conclude that on 13.6.1972 the seller had asked the plaintiff to further advance to her Rs.5,500/-. The exhibit -11 was the receipt

issued by her upon the receipt of Rs.5,500/- . Thereafter, the sale deed was executed on 24.6.1972 i.e. after 10 days of the payment of Rs. 5,500/- by the plaintiff to Smt. Ahmadi Begam.

8. The First Appellate Court also relied upon the statements of the plaintiff-P.W.-1 and the P.W. 2 Sri Roop Narayan Bajpayee to conclude that the plot was purchased by both the brothers and that the plaintiff had paid Rs. 15,000/- for the purchase of the plot. The First Appellate Court upon looking into the documentary evidence as were filed by the plaintiff and by the defendant concluded that the agreement was executed between the plaintiff and Smt. Ahmadi Begam for the sale of plot. The receipts clearly went to show that the plaintiff from time to time was investing money for the purpose of getting the sale deed executed and that since the receipts could not be disbelieved it was concluded that Rs. 11,000/- were paid by the plaintiff to Smt. Ahmadi Begam before the sale was executed.

9. The First Appellate Court disbelieved the statement of the defendant which had stated that the plaintiff had not been able to raise resources enough for purchasing the plot and, therefore, he had sent words to him for negotiating the sale with Smt. Ahmadi Begam. The First Appellate Court found that Rs. 5,500/- were paid on 14.6.1972 and if the plaintiff was unable to proceed with the transactions then it would have taken some time for the defendant to collect money and to enter into the transaction. The First Appellate Court also disbelieved the statement of the defendant that he had paid Rs. 6,000/- to Smt. Ahmadi Begam before the date of the sale and that the amount was brought by his wife after she had taken it from her mother

at Hardoi. The First Appellate Court refused to believe this statement of the defendant as the receipt of Rs. 5,500/- on 14.6.1972 was in favour of the plaintiff and if the wife of the defendant had brought that amount for being paid to Smt. Ahmadi Begam then she would have resented to the execution of the receipt in favour of the plaintiff (exhibit-12). The First Appellate Court also disbelieved the payment of Rs. 5,500/- by the wife of the defendant as this fact was also not stated in the sale deed.

10. Further, the First Appellate Court disbelieves the statement of the defendant saying that he had paid Rs. 6,000/- through his wife because when the plaintiff had sent the defendant a notice before the filing of the suit and when the defendant had replied to it on 5.8.1977, he had not mentioned anything about the giving of Rs. 6,000/- by his wife to Smt. Ahmadi Begam. In the reply to the notice though the allegation was that the relationship between the two brothers were strained, there was no mention about the fact that the defendant's wife had paid Rs. 6,000/- to Smt. Ahmadi Begam.

11. Another reason for the Trial to conclude that the plaintiff had not paid the money was the statement of the bank account of one Chhotelal of the Hindustan Commercial Bank. The First Appellate Court re-assessed the evidence and had given a finding of fact that the Bank account which the Trial Court had relied upon was of some other Chhotelal, different from the plaintiff and therefore no reliance on the bank account of that Chhotelal could be placed. The First Appellate Court also disbelieved the statement of Smt. Phoolmati Devi, the mother-in-law of the defendant. It also disbelieved the statement of DW-5, the

contractor of PWD who had stated that he had lent Rs. 5,000 to the defendant and therefore the First Appellate Court, upon finding that definitely a large amount of money had been paid by the plaintiff, concluded that the plaintiff had also contributed towards the sale consideration and decreed the Suit and declared the plaintiff a co-owner of the disputed plot. When the second Appeal was filed, this Court had framed a question of law which was to the following effect:

“ The substantial question of law involved in the case is whether the finding of the lower Appellate Court that the plaintiff is the co-owner in the plot of land in Suit, although it was purchased in the name of the defendant-appellant alone, is vitiated in law.”

12. Learned counsel for the appellant Sri S.C. Verma assisted by Sri Padmakar Pandey argued that a transaction could not be partly Benami and partly genuine. Learned counsel for the appellant further argued that the first appellate court had wrongly interpreted the decision reported in **1944 0 AIR Allahabad 130 (Bans Narain vs. Chandrani Kuer)**. Learned counsel for the appellant further submitted that there was a definite burden upon the plaintiff to prove the plaint allegation that the transaction was a Benami one and in this regard, he has relied upon a judgement of the Supreme Court reported in **JT 1992 (4) 454 (P. Satyanarayan Murthi vs. The State of Andhra Pradesh)**. Learned counsel further stated that the plaintiff and the defendant could not have agreed that the plot would be purchased in the name of the defendant for the purpose of construction of the building on the plot in question. He submits that the defendant was still a temporary employee and a

temporary employee never gets a loan. Learned counsel for the defendant/appellant further submitted that the plaintiff had not provided any proof of the source of his income.

13. Learned counsel for the plaintiff-respondent Sri. R.K. Mishra, however, submitted that the receipts which were there on record dated 17.6.1971 for Rs. 1,000/-, 4.7.1971 for Rs. 4,000/-, 24.10.1971 for Rs. 300/-, 3.6.1972 for Rs. 200/- and 14.6.1972 for Rs. 5,500/- were definitely there on record. These receipts had gone unrebutted. He further relied upon the findings of the First Appellate Court and has submitted that none of the receipts were denied and also the signatures of the receipts of Smt. Ahmadi Begam were not denied.

14. Learned counsel for the plaintiff-respondent has also submitted that the loan was applied after the defendant had become a permanent employee and, therefore, the case which the plaintiff had taken that the defendant's name was there on the sale deed for the purposes of getting a loan gets credence.

15. Learned counsel for the plaintiff-respondent also submitted that defendant had not filed any documentary evidence to show that he had contributed towards the sale consideration. He submits that the finding of the First Appellate court that the story of the wife bringing some money was disbelieved was a finding of fact which could not be disturbed by this Court. He also reiterates the reasons given by the First Appellate Court for disbelieving this finding and he laid much stress upon the fact that when the defendant had replied to the notice given by the plaintiff before the filing of the Suit, he had not mentioned

about the payment of the Rs.6,000/- which had been allegedly lent by his mother-in-law.

16. Having heard the learned counsel for the defendant -appellant and learned counsel for the plaintiff-respondent, this Court is of the view that he Second Appeal lacks merit and is liable to be dismissed.

17. The plaintiff has proved the plaint allegation to the hilt. The receipts which find mention in the plaint; all the money the plaintiff had paid on 17.6.1971, 4.7.1971, 24.10.1971, 3.6.1972 and 14.6.1972 totalling Rs. 11,000/- which were paid before the sale deed was executed and the payment of Rs. 4,000/- on 24.6.1972 have not been denied in any manner whatsoever by the defendant/appellant. In fact, the First Appellate has found that these receipts were there and the reason given by the Trial Court to disbelieve the payment have been disbelieved by the First Appellate Court in toto. What goes further in favour of the plaintiff is that the defendant, when had replied to his notice dated 17.6.1977 before filing of the Suit had not mentioned about the payments made by the defendant, as has been alleged in the written statement, and therefore, this Court is also of the view that the findings as have been arrived at by the First Appellate Court are unassailable. In fact, the substantial question of law as was framed on 3.8.1983 by this Court is thus not required

to be answered in view of the findings of the First Appellate Court.

18. The Second Appeal is concluded by findings of fact. No interference is warranted and thus the appeal is dismissed.

APPELLATE JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 08.08.2023

BEFORE

THE HON'BLE JASPREET SINGH, J.

First Appeal From Order No. 551 of 2019

The United India Insurance Co. Ltd.

...Appellant

Versus

Smt. Suraj Kala & Ors.

...Respondents

Counsel for the Appellant:

Anil Kumar Srivastava

Counsel for the Respondents:

Ravindra Pratap Singh

A. Civil Law - Motor Vehicle Act, 1988-Section 173--Challenge to-In the instant case, it is found that the policy in question is an Act Policy-deceased was an employee of the owner -The said employee was not as if, he was a casual employee but was a regular driver and therefore, he would be covered in terms of Section 147 (1) proviso (a) as mentioned in the Act- In terms of Section 167 of the Act option is available for a party to either file the claim petition before the Claims Commissioner under the Act of 1923 or before the M.A.C.T.-However, the difference would be that if a party chooses to file his claim before the Motor Accident Claims Tribunal and the Tribunal awards an amount which is higher than the amount which is computed under the Compensation Act of 1923, then the liability of the insurance company would only be to the extent of the amount which is payable in terms of the Act of 1923 and the excess amount would be payable by the owner.-However, if an additional sum or premium is paid to cover or enhance the liability, then the entire award would be payable by the insurance company-In the instant case, since it was an Act policy and the Tribunal has also awarded the amount computing it in context with the

Compensation Act of 1923 as evident from the award itself. Accordingly, this liability of Rs.3,36,000/- is liable to be indemnified by the insurance company- Thus, the decision rendered by the Tribunal does not suffer from an error to persuade this Court to arrive at any other finding- accordingly, the award d is affirmed.(Para 1 to 35)

B. The true import of Section 147 and the proviso appended thereto is that the Act Policy would cover third party risks, but it would also cover the liability arising out of death or bodily injury in respect of such persons which have been indicated in the proviso as (a), (b), (c) and that too, to a limited extent as determined in terms of the Employees Compensation Act, 1923. Therefore, any liability relating to such specified individuals as mentioned and described in the proviso on account of death or bodily injury, their claims can be limited only to the extent which is determined in terms of the Compensation Act of 1923, but the moment any additional premium is paid towards such category of persons then, the liability can be enhanced and would be made unlimited.(Para 33)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Oriental Ins. Co. Ltd. Vs Devireddy Konda Reddy (2003) 2 SCC 339: 2003 SCC (Cri) 540
2. National Ins. Co. Ltd. Vs Prembai Patel (2005) 6 SCC 172 : 2005 SCC (L&S) 819
3. National Ins. Co. Ltd. Vs Cholleti Bharatamma (2008) 1 SCC 423 : (2008) 1 SCC (Cri) 224 : (2008) 1 SCC (Civ) 280
4. New India Assr. Co. Ltd. Vs Vedwati (2007) 9 SCC 486] , (SCC p. 490
5. New India Assr. Co. Ltd. Vs Asha Rani (2003) 2 SCC 223 : 2003 SCC (Cri) 493

6. New India Assr. Co. Vs Satpal Singh (2000) 1 SCC 237 : 2000 SCC (Cri) 130

(Delivered by Hon'ble Jaspreet Singh, J.)

1. The instant appeal has been preferred by the Insurance company assailing the award dated 10.07.2019 passed in C.P. No.646 of 2013 whereby in a death case, the Tribunal has awarded a sum of Rs.3,36,000/- along with 7% interest in favour of the claimants-respondents.

2. Shri Anil Kumar Srivastava, learned counsel for the appellant submits that the Tribunal has erred in fastening the liability on the insurance company for the reason that in terms of Section 147 of the *Motor Vehicles Act, 1988*, the deceased was not covered as the policy in question was merely an 'Act Policy' and in terms whereof only third party claims could have been indemnified. Since in the instant case, the driver was not covered and he caused the accident by his own negligence, therefore, not being a third party, the insurance company was not liable for the award. It is only the owner of the vehicle who could be made responsible and this aspect has not been appropriately considered by the Tribunal who has fixed the liability on the insurance Company.

3. It has further been urged that the Tribunal has misconstrued the decision of the Apex Court in the case of *National Insurance Co. Ltd. vs. Prembai Patel and others AIR 2005 SC 2337* and without considering the contention of the insurance company that under the 'Act Policy', it was only a third party claim which could be covered and not the claim of the driver, hence, the award is bad.

4. Further elaborating his submissions, it is also urged that in the policy it was clearly mentioned that no premium had been taken for the driver. Accordingly, the liability of the insurance company was limited and it could not be extended to cover such risks which were not covered by the policy and ignoring this aspect, the award has been delivered, fastening the liability on the appellant-company, which is not in consonance with law, accordingly, the award deserves to be set aside.

5. The learned counsel for the appellant in support of his submissions has relied upon the decision of the Apex Court in *Oriental Insurance Co. Ltd. vs. Meena Variyal and others* (2007) 5 SCC 428 and *National Insurance Co. Ltd. vs. Balakrishnan and another* (2013) 1 SCC 731.

6. Per contra, Shri Ravindra Pratap Singh, learned counsel for the claimants-respondents while defending the award submits that in the instant case, the claim petition was filed under Section 163-A of the Motor Vehicles Act, 1988.

7. It is further urged that Section 167 of the Motor Vehicles Act permits a person to opt for the forum to file a claim petition either under the *Workmen's Compensation Act, 1923* or under the *Motor Vehicles Act, 1988*, but not both.

8. It is further submitted that in the instant case, the claimants chose to file the claim petition under the Motor Vehicles Act and since, the deceased was the driver of the owner of the vehicle and he sustained injuries which led to his death and being a petition under Section 163-A of the Motor Vehicles Act, it was not incumbent on the

claimants to establish the negligence and once, it was proved that the accident occurred on account of use of a motor vehicle, then in terms of Section 163-A of the Act of 1988, the claimants were entitled to the compensation.

9. It is further urged by the counsel for the claimants-respondents that in terms of Section 147 of the Act, the insurance company is liable under the 'Act Policy' to cover the driver and in the instant case, it is not disputed that the deceased was a driver, therefore, the claimants were entitled to compensation and the insurance company was duty bound to indemnify the award in terms of Section 149 of the Motor Vehicles Act.

10. It is further pointed out that this aspect of the matter was considered by the Apex Court in *Prembai Patel* (supra) and the same has rightly been relied by the Tribunal and as such it cannot be said that the award passed by the Tribunal is erroneous.

11. It is also submitted that the decisions which have been cited by the learned counsel for the appellant in *Meena Variyal* (supra) and *Balakrishnan* (supra), they were considered by the Apex court in various other decisions including the full Bench decision of the Gujarat High Court in *Valiben Laxmanbhai Thakore (Koli) and others vs. Kandla Dock Labour Board and others* 2021 ACJ 2262 and the aforesaid decision also clearly establishes that it is the liability of the insurance company to satisfy the award. It is thus urged that the issue No.6 was correctly decided by the Tribunal and the award is liable to be indemnified by the insurance company. Accordingly, the appeal lacks merit and deserves to be dismissed.

12. The Court has heard the learned counsel for the parties and also perused the material on record.

13. Before adverting to the respective submissions of the counsel for the parties, it will be appropriate to take a glance at the events giving rise to the instant appeal.

14. The claimants-respondents No.1 and 2 instituted a claim petition under Section 163-A of the Motor Vehicles Act, 1988 before M.A.C.T./A.D.J., Court No.6, Barabanki registered as C.P. No. 646 of 2013.

15. It was pleaded that the deceased-Luv Kush Kumar was working as a driver with the respondent No.3. On the fateful day i.e. 28.11.2013, he was driving a mini truck belonging to the respondent No.3 bearing No. U.P. 41 T 9561 and around 11.30 AM, when he had reached the cold storage, Pratapganj under P.S.- Safdarganj, District- Barabanki, a truck which was moving ahead of the mini truck being driven by Luv Kush suddenly slammed its brakes and as a result, the mini truck being driven by Luv Kush dashed and its front portion was badly damaged and on account of the said accident, the deceased sustained injuries and later succumbed to his injuries.

16. It is in respect of the aforesaid accident that the claim petition was filed which was contested both by the owner as well as the insurance company. The owner while filing his written statement admitted that the vehicle in question was a new vehicle which was duly insured with the United India Insurance Company Ltd. It was also admitted that the truck in question had all valid documents and its driver Luv Kush also possessed the valid driving license with the endorsement to drive a transport vehicle. The

mini truck in question had the requisite permit, fitness certificate and as such in case, if any liability is assessed, it was to be indemnified by the insurance company.

17. The insurance company while contesting the claim petition raised the plea that the policy in question was merely an 'Act Policy'. Since the driver was not covered and no extra premium was paid for the aforesaid purpose, hence, only third party claims could be covered. Since, the driver cannot be treated as a third party and he was responsible for the accident himself, accordingly, the insurance company was not liable.

18. The Tribunal considering the respective contentions framed seven issues and after permitting the parties to lead oral as well as documentary evidence, it recorded its finding and concluded that Luv Kush died on account of an accident while driving the truck bearing No. U.P. 41 T 9561. It also concluded that the driver had a valid and subsisting license and the truck was duly insured with the insurance company. While dealing with the issue regarding liability of the insurance company, it considered Section 147 of the Motor Vehicles Act and relying upon the decisions of the Apex Court in case of *Prembai Patel* (supra), it computed the compensation of Rs.3,36,000/- and awarded the same along with 7% interest per annum by means of its award dated 10.07.2019.

19. This award is under challenge on the ground raised by the insurance company and as already noticed hereinabove.

20. In order to appreciate the contentions of the respective parties, it will

be first relevant to notice the statutory provisions with the aid of relevant cases of the Apex Court on the aforesaid subject.

21. Section 145 which is contained in Chapter 11 of the Motor Vehicles Act, 1988 relates to definitions and certain relevant words/terms which have been defined are being noticed hereinafter:-

Chapter XI

Insurance of Motor Vehicles against third party risks

“145. Definitions.—*In this Chapter,—*

(a)
 (b) *“certificate of insurance” means a certificate issued by an authorised insurer in pursuance of sub-section (3) of section 147 and includes a cover note complying with such requirements as may be prescribed, and where more than one certificate has been issued in connection with a policy, or where a copy of a certificate has been issued, all those certificates or that copy, as the case may be;*

(c) *“liability”, wherever used in relation to the death of or bodily injury to any person, includes liability in respect thereof under section 140;*

(d) *“policy of insurance” includes “certificate of insurance”;*

(e)

(f)

(g) *“third party” includes the Government.”*

22. Section 146 of the Act, 1988 clearly prohibits any person to use, except as a passenger, or cause or allow any other person to use a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the

requirements of this chapter. This clearly indicates that the effort is to ensure that no vehicle is plied on the road without an effective insurance policy.

23. The requirements of a policy and the limits of liability is contained in Section 147 of the Act of 1988, which is relevant for the adjudication of the instant controversy and as such is being reproduced hereinafter:-

“147. Requirements of policies and limits of liability. —*(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which—*

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

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

(i) against any liability which may be incurred by him in respect of the death of or bodily 27 [injury to any person, including owner of the goods or his authorised representative carried in the vehicle] or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

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

Provided that a policy shall not be required—

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

death of, or bodily injury to, any such employee—

(a) engaged in driving the vehicle, or

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

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

(ii) to cover any contractual liability.

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

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

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

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

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

(3) A policy shall be of no effect for the purposes of this Chapter unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate of insurance in the prescribed

form and containing the prescribed particulars of any condition subject to which the policy is issued and of any other prescribed matters; and different forms, particulars and matters may be prescribed in different cases.

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

(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons.”

(Note:- The underlining in the aforesaid provision has been done by this Court to emphasize certain aspects which shall be dealt with in the body of this judgment.)

24. Section 149 casts a duty on the insurer to satisfy the judgment and award against persons insured in respect of third party risks. From the perusal of the aforesaid Sections, it would indicate that it is mandatory for every vehicle owner to get his vehicle insured before plying it on the road.

25. Section 147 clearly provides the minimum requirements of an insurance policy. The policy which is issued by an

authorized insurer must comply with the minimum standards which is called an 'Act Policy'. However, since a contract of insurance is like any other contract, the parties are free to pay a higher premium and get the limits enhanced. It is in the aforesaid backdrop, it is always open for a party to pay higher premium and get various other risks covered. Generally, when various other risks are covered and the liability is unlimited of the insurance company, such policies are termed as 'comprehensive' or 'package policies'.

26. In the aforesaid backdrop, the controversy which emerges in the instant case is whether the 'Act Policy' would cover the driver or not? It is in this context that Section 147 of the Act assumes significance and in order to understand the said provision better, the Court has underlined the proviso and the explanation which has been appended to the said section.

27. At this stage, it will also be relevant to notice the decisions of the Apex Court and in *Meena Variyal* (supra), a claim petition was preferred under Section 166 of the Act of 1988 and the deceased in question had died in a car accident and was an occupant of the said car. The car was being driven by its driver Mahmood Hasan. The car was being used for the benefit of its employee. The stand of the insurance company was that since the deceased himself was driving the vehicle, he was not entitled to any claim on account of his own negligence. The Tribunal had awarded a sum of Rs.7,20,000/- and held that since the vehicle was being driven by the deceased himself and was an employee of the owner of the car and the insurance did not cover such an employee, thus, he was made to pay the amount. The claimants

have preferred an appeal before the High Court where the High Court directed the insurance company to pay the amount as awarded by the Tribunal and leaving it open for the insurance company to recover the aforesaid amount from the owner. This matter went up to the Apex Court wherein the Apex Court considering the decisions found that there was no finding that Mahmood Hasan, another employee of the owner was driving the vehicle. It further held that the victim was the regional manager of the company that owned the car and since he was using the car given for his own use by the company, hence, the insurance policy in question which did not cover any special risk including to satisfy the award under the Workmen's Compensation Act, hence, the insurance company was not held liable. Relevant paragraphs of the aforesaid decision are being reproduced hereinafter for ready reference:-

"13. As we understand Section 147(1) of the Act, an insurance policy thereunder need not cover the liability in respect of death or injury arising out of and in the course of the employment of an employee of the person insured by the policy, unless it be a liability arising under the Workmen's Compensation Act, 1923 in respect of a driver, also the conductor, in the case of a public service vehicle, and the one carried in the vehicle as owner of the goods or his representative, if it is a goods vehicle. It is provided that the policy also shall not be required to cover any contractual liability. Uninfluenced by authorities, we find no difficulty in understanding this provision as one providing that the policy must insure an owner against any liability to a third party caused by or arising out of the use of the vehicle in a public place, and against death

or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of vehicle in a public place. The proviso clarifies that the policy shall not be required to cover an employee of the insured in respect of bodily injury or death arising out of and in the course of his employment. Then, an exception is provided to the last foregoing to the effect that the policy must cover a liability arising under the Workmen's Compensation Act, 1923 in respect of the death or bodily injury to an employee who is engaged in driving the vehicle or who serves as a conductor in a public service vehicle or an employee who travels in the vehicle of the employer carrying goods if it is a goods carriage. Section 149(1), which casts an obligation on an insurer to satisfy an award, also speaks only of award in respect of such liability as is required to be covered by a policy under clause (b) of sub-section (1) of Section 147 (being a liability covered by the terms of the policy). This provision cannot therefore be used to enlarge the liability if it does not exist in terms of Section 147 of the Act.

14. The object of the insistence on insurance under Chapter XI of the Act thus seems to be to compulsorily cover the liability relating to their person or properties of third parties and in respect of employees of the insured employer, the liability that may arise under the Workmen's Compensation Act, 1923 in respect of the driver, the conductor and the one carried in a goods vehicle carrying goods. On this plain understanding of Section 147, we find it difficult to hold that the Insurance Company, in the case on hand, was liable to indemnify the owner, the employer Company, the insured, in respect of the death of one of its employees, who according to the claim, was not the driver. Be it noted that the liability is not

one arising under the Workmen's Compensation Act, 1923 and it is doubtful, on the case put forward by the claimant, whether the deceased could be understood as a workman coming within the Workmen's Compensation Act, 1923. Therefore, on a plain reading of Section 147 of the Act, it appears to be clear that the Insurance Company is not liable to indemnify the insured in the case on hand.

15. The argument that the proviso does not keep out employees from coverage though the claims under the Workmen's Compensation Act are specified, cannot be accepted on the plain language of the proviso. The proviso enacts an exemption and carves out an exception to that exemption. The suggested interpretation would result in ignoring the effect of the language employed by the proviso, exempting the owner from covering his employees under insurance except in cases where the liability in respect of them is, one arising under the Workmen's Compensation Act, obviously, as determined by that Tribunal.

23. We are thus satisfied that based on the ratio in National Insurance Co. Ltd. v. Swaran Singh and others [(2004) 3 SCC 297 : 2004 SCC (Cri) 733] the Insurance Company cannot be made liable in the case on hand to pay the compensation first and to recover it from the insured, the owner of the vehicle. The deceased being an employee not covered by the Workmen's Compensation Act, of the insured, the owner of the vehicle, has not to be covered compulsorily under the Act and only by entering into a special contract by the insured with the insurer could such a person be brought under coverage. There is no case that there is any special contract in that behalf in this case.

24. It was argued by learned counsel for the appellant that since on the

finding that the deceased was himself driving the vehicle at the time of the accident, the accident arose due to the negligence of the deceased himself and hence the insurer is not liable for the compensation. Even if the case of the claimant that the car was driven by Mahmood Hasan was true, then also, the claimant had to establish the negligence of the driver before the insured (sic insurer) could be asked to indemnify the insured. The decision in Minu B. Mehta v. Balkrishna Ramchandra Nayan [(1977) 2 SCC 441 : (1977) 2 SCR 886] of a three-Judge Bench of this Court was relied on in support.

25. In that decision, this Court considered the question whether in a claim for compensation under the Motor Vehicles Act, 1939, proof of negligence was essential to support a claim for compensation. On the facts in that case, their Lordships found that the appeal was liable to be dismissed subject to certain directions issued therein. But their Lordships, in the light of the fact that the High Court had discussed the law on the question and it was of some importance, felt that it was necessary to state the position in law. Noticing that the liability of the owner of the car to compensate the victim in a car accident due to negligent driving of his servant is based on the law of tort, the Court discussed the scheme of the Act of 1939 and the law on the question. Regarding the view of the High Court that it was not necessary to prove negligence, the Court held : (Minu B. Mehta case [(1977) 2 SCC 441 : (1977) 2 SCR 886] , SCC pp. 455-56, para 33)

“33. The reasoning of the two learned Judges is unacceptable as it is opposed to basic principles of the owner's liability for negligence of his servant and is based on a complete misreading of the

provisions of Chapter VIII of the Act. The High Court's zeal for what it considered to be protection of public good has misled it into adopting a course which is nothing short of legislation.”

Their Lordships also noticed that proof of negligence remained the lynchpin to recover compensation. Their Lordships concluded by saying : (Minu B. Mehta case [(1977) 2 SCC 441 : (1977) 2 SCR 886] , SCC pp. 456-57, para 37)

“37. We conclude by stating that the view of the learned Judges of the High Court has no support in law and hold that proof of negligence is necessary before the owner or the insurance company could be held to be liable for the payment of compensation in a motor accident claim case.”

29. On the facts of this case, there is no finding that Mahmood Hasan, another employee of the owner was driving the vehicle. Even if he was, there is no finding of his negligence. The victim was the Regional Manager of the Company that owned the car. He was using the car given to him by the Company for use. Whether he is treated as the owner of the vehicle or as an employee, he is not covered by the insurance policy taken in terms of the Act—without any special contract—since there is no award under the Workmen's Compensation Act that is required to be satisfied by the insurer. In these circumstances, we hold that the appellant Insurance Company is not liable to indemnify the insured and is also not obliged to satisfy the award of the Tribunal/Court and then have recourse to the insured, the owner of the vehicle. The High Court was in error in modifying the award of the Tribunal in that regard.”

28. The learned counsel for the appellant has also relied upon the decision

of *BalaKrishanan* (supra) wherein the issue of an 'Act Policy' and the requirements in terms of Section 147 has been considered including the earlier decision of *Meena Variyal* (supra). The Apex Court after noticing the various earlier decisions of the Apex Court on the aforesaid point including certain tariff circulars held as under:-

"26. In view of the aforesaid factual position, there is no scintilla of doubt that a "comprehensive/package policy" would cover the liability of the insurer for payment of compensation for the occupant in a car. There is no cavil that an "Act policy" stands on a different footing from a "comprehensive/package policy". As the circulars have made the position very clear and IRDA, which is presently the statutory authority, has commanded the insurance companies stating that a "comprehensive/package policy" covers the liability, there cannot be any dispute in that regard. We may hasten to clarify that the earlier pronouncements were rendered in respect of the "Act policy" which admittedly cannot cover a third-party risk of an occupant in a car. But, if the policy is a "comprehensive/package policy", the liability would be covered. These aspects were not noticed in Bhagyalakshmi [(2009) 7 SCC 148 : (2009) 3 SCC (Civ) 87 : (2009) 3 SCC (Cri) 321] and, therefore, the matter was referred to a larger Bench. We are disposed to think that there is no necessity to refer the present matter to a larger Bench as IRDA, which is presently the statutory authority, has clarified the position by issuing circulars which have been reproduced in the judgment by the Delhi High Court and we have also reproduced the same."

Since the issue whether the policy in question was an 'Act Policy' or a comprehensive policy was not considered by the Tribunal and the High Court, the Apex Court further remanded the matter as shall be evident from para 27 and 28 of the aforesaid decision which reads as under:-

"27. In view of the aforesaid legal position, the question that emerges for consideration is: whether in the case at hand, the policy is an "Act policy" or "comprehensive/package policy"? There has been no discussion either by the Tribunal or the High Court in this regard. True it is, before us, Annexure P-1 has been filed which is a policy issued by the insurer. It only mentions the policy to be a "comprehensive policy" but we are inclined to think that there has to be a scanning of the terms of the entire policy to arrive at the conclusion whether it is really a "package policy" to cover the liability of an occupant in a car.

28. In view of the aforesaid analysis, we think it apposite to set aside the finding of the High Court and the Tribunal as regards the liability of the insurer and remit the matter to the Tribunal to scrutinise the policy in a proper perspective and, if necessary, by taking additional evidence and if the conclusion is arrived at that the policy in question is a "comprehensive/package policy", the liability would be fastened on the insurer. As far as other findings recorded by the Tribunal and affirmed by the High Court are concerned, they remain undisturbed."

29. The Tribunal as well as the counsel for the claimants-respondents has placed reliance upon the decision of the Apex Court in *Prembai Patel* (supra), wherein a truck was being driven by one Sundar Singh. This truck was insured with

the National Insurance Company and since the truck had overturned which resulted in the death of its driver, a claim petition came to be filed. The same was contested mainly on the ground that the accident took place on account of the fault of the driver, hence, the liability was denied. The Claims Tribunal considering the evidence, awarded a sum of Rs.2,10,000/- along with 12% interest directing the insurance company to satisfy the award. The High Court also affirmed the judgment of the Tribunal. The judgment of the High Court was assailed before the Apex Court only on the ground that since the insurance policy was restricted one, therefore, the entire liability could not be satisfied by the insurance company but its liability was restricted only to cover the liability under the Workmen's Compensation Act. The issue before the Apex Court was crystallized in paragraph 8 and thereafter considering the provisions of Section 147, the effect of the proviso has been noticed in the subsequent paragraphs and noticing the difference in the liability relating to an 'Act Policy' and to what extent the insurance company would be liable has been dealt with in the subsequent paragraphs which have been reproduced hereinafter:

"8. The main question which requires consideration in this appeal is, whether the appellant Insurance Company is liable to pay the entire amount of compensation awarded to the claimants or its liability is restricted to that which is prescribed under the Workmen's Act. In this connection learned counsel for the appellant has drawn our attention to the insurance policy, which had been taken by the owner for the vehicle concerned, and, especially to the following endorsements made therein:

- 1. Policy No. 320801/31—92-93/21/01753 a policy for act liability*
- 2. Premium (Act Liability) Rs.1245/-*

- 3. Limitation as to use For Act only cover*

At the end of the policy the following is written:

"IMPORTANT NOTICE

The insured is not indemnified if the vehicle is used or driven otherwise than in accordance with this Schedule. Any payment made by the Company by reason of wider terms appearing in the certificate in order to comply with the Motor Vehicles Act, 1988 is recoverable from the insured. See the clause headed AVOIDANCE OF CERTAIN TERMS AND RIGHT OF RECOVERY in the policy.

NOTE :— This Schedule, the attached policy and the endorsements mentioned here above shall be read together and any word or expression to which a specific meaning has been attached in any part of this policy or the Schedule shall bear the same meaning wherever it may appear."

- 9. The learned counsel for the appellant has submitted that the owner of the truck had got his vehicle insured by paying only that much amount of premium which, so far as his employees were concerned, covered the liability to the extent it is provided under the Workmen's Act. It has been submitted that the words "a policy for Act Liability" or "Act Liability" clearly indicate that the liability of the Insurance Company was not an unlimited one but that which was mandatorily required under the Act so as to cover the liability under the Workmen's Act and no further. Learned counsel has further submitted that in order to cover unlimited liability the owner has to pay higher amount of premium and in such a case the*

words “a policy for Act Liability” or “Act Liability” are not written. The insurance policy being in the nature of a contract, the parties are bound by it and, therefore, the appellant cannot be saddled with any extra liability to pay the entire amount of compensation, which has been awarded to the claimants.

11. The contentions raised turn on the interpretation of sub-section (1) of Sections 147 and 149 of the Act and the same are being reproduced below:-

“147. Requirements of policies and limits of liability.—(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which—

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

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

(i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

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

Provided that a policy shall not be required—

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

(a) engaged in driving the vehicle, or

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

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

(ii) to cover any contractual liability.

Explanation.—*** (omitted as not relevant)

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

12. The heading of Chapter XI of the Act is Insurance of Motor Vehicles Against Third Party Risks and it contains Sections 145 to 164. Section 146(1) of the Act provides that no person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that

person or that other person, as the case may be, a policy of insurance complying with the requirements of Chapter XI. Clause (b) of sub-section (1) of Section 147 provides that a policy of insurance must be a policy which insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him in respect of death of or bodily injury to any person or passenger or damage to any property of a third party caused by or arising out of the use of the vehicle in public place. Sub-clauses (i) and (ii) of clause (b) are comprehensive in the sense that they cover both "any person" or "passenger". An employee of owner of the vehicle like a driver or a conductor may also come within the purview of the words "any person" occurring in sub-clause (i). However, the proviso (i) to clause (b) of sub-section (1) of Section 147 says that a policy shall not be required to cover liability in respect of death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Act if the employee is such as described in sub-clauses (a) or (b) or (c). The effect of this proviso is that if an insurance policy covers the liability under the Workmen's Act in respect of death of or bodily injury to any such employee as is described in sub-clauses (a) or (b) or (c) of proviso (i) to Section 147(1)(b), it will be a valid policy and would comply with the requirements of Chapter XI of the Act. Section 149 of the Act imposes a duty upon the insurer (insurance company) to satisfy judgments and awards against persons insured in respect of third-party risks. The expression — "such liability as is required to be

covered by a policy under clause (b) of sub-section (1) of Section 147 being a liability covered by the terms of the policy" — occurring in sub-section (1) of Section 149 is important. It clearly shows that any such liability, which is mandatorily required to be covered by a policy under clause (b) of Section 147(1), has to be satisfied by the insurance company. The effect of this provision is that an insurance policy, which covers only the liability arising under the Workmen's Act in respect of death of or bodily injury to any such employee as described in sub-clauses (a) or (b) or (c) to proviso (i) to Section 147(1)(b) of the Act is perfectly valid and permissible under the Act. Therefore, where any such policy has been taken by the owner of the vehicle, the liability of the insurance company will be confined to that arising under the Workmen's Act.

13. The insurance policy being in the nature of a contract, it is permissible for an owner to take such a policy whereunder the entire liability in respect of the death of or bodily injury to any such employee as is described in sub-clauses (a) or (b) or (c) of proviso (i) to Section 147(1)(b) may be fastened upon the insurance company and insurance company may become liable to satisfy the entire award. However, for this purpose the owner must take a policy of that particular kind for which he may be required to pay additional premium and the policy must clearly show that the liability of the insurance company in case of death of or bodily injury to the aforesaid kind of employees is not restricted to that provided under the Workmen's Act and is either more or unlimited depending upon the quantum of premium paid and the terms of the policy.

14. The aforesaid interpretation of the relevant provisions applicable to the

case in hand is in consonance with the view expressed by a Constitution Bench in *New India Assurance Co. Ltd. v. C.M. Jaya* [(2002) 2 SCC 278 : 2002 SCC (Cri) 325] where, while interpreting the provisions of Section 95(2) of the Motor Vehicles Act, 1939, the Court held as under in para 10 of the Report :- (SCC p. 285)

“.....The liability could be statutory or contractual. A statutory liability cannot be more than what is required under the statute itself. However, there is nothing in Section 95 of the Act prohibiting the parties from contracting to create unlimited or higher liability to cover wider risk. In such an event, the insurer is bound by the terms of the contract as specified in the policy in regard to unlimited or higher liability as the case may be. In the absence of such a term or clause in the policy, pursuant to the contract of insurance, a limited statutory liability cannot be expanded to make it unlimited or higher. If it is so done, it amounts to rewriting the statute or the contract of insurance which is not permissible.”

The Bench also referred to earlier decisions rendered in *New India Assurance Co. Ltd. v. Shanti Bai* [(1995) 2 SCC 539] and *Amrit Lal Sood v. Kaushalya Devi Thapar* [(1998) 3 SCC 744] and observed that in case of an insurance policy not taking any higher liability by accepting a higher premium, the liability of the insurance company is neither unlimited nor higher than the statutory liability fixed under Section 95(2) of the Motor Vehicles Act, 1939. It was further observed that it is open to the insured to make payment of additional higher premium and get higher risk covered in respect of third party also. But in the absence of any such clause in the insurance policy, the liability of the insurer cannot be unlimited in respect of third

party and it is limited only to the statutory liability.

15. Though the aforesaid decision has been rendered on Section 95(2) of the Motor Vehicles Act, 1939 but the principle underlying therein will be fully applicable here also. It is thus clear that in case the owner of the vehicle wants the liability of the insurance company in respect of death of or bodily injury to any such employee as is described in sub-clauses (a) or (b) or (c) of proviso (i) to Section 147(1)(b) should not be restricted to that under the Workmen's Act but should be more or unlimited, he must take such a policy by making payment of extra premium and the policy should also contain a clause to that effect. However, where the policy mentions “a policy for Act Liability” or “Act Liability”, the liability of the insurance company qua the employees as aforesaid would not be unlimited but would be limited to that arising under the Workmen's Act.

16. The High Court, in the impugned judgment, has held that if the legal representatives of the deceased employee approach the Motor Accidents Claims Tribunal for payment of compensation to them by moving a petition under Section 166 of the Act, the liability of the insurance company is not limited to the extent provided under the Workmen's Act and on its basis directed the appellant Insurance Company to pay the entire amount of compensation to the claimants. As shown above, the insurance policy taken by the owner contained a clause that it was a policy for “Act Liability” only. This being the nature of policy the liability of the appellant would be restricted to that arising under the Workmen's Act. The judgment of the High Court, therefore, needs to be modified accordingly.

17. *The judgment of the High Court insofar as it relates to quantum of compensation and interest, which is to be paid to the claimants (Respondents 3 to 6 herein) is affirmed. The liability of the appellant Insurance Company to satisfy the award would be restricted to that arising under the Workmen's Act. Respondents 1 and 2 (owners of the vehicle) would be liable to satisfy the remaining portion of the award.*

18. *The record shows that no stay order was passed in favour of the appellant. In case the appellant Insurance Company has deposited the entire amount awarded by the High Court with the Motor Accidents Claims Tribunal or has paid the said amount to the claimants, it will be open to it to recover the amount, which exceeds its liability under the Workmen's Act, from the owner of the vehicle in accordance with law."*

30. It will be relevant to notice that it is relying upon the aforesaid decision of *Prembai Patel* (supra) has the Tribunal awarded the sum in context with the liability arising under the Workmen's Compensation Act and has fastened the same on the insurance company.

31. Before proceeding further, it will also be relevant to notice another decision of the Apex Court which throw light on the aforesaid subject and is ***Sanjeev Kumar Samrat vs. National Insurance Company Ltd. (2014) 14 SCC 243***, wherein the scope of Sections 146, 147 and its proviso has been considered by the Apex Court. The facts involved in the said case indicated that a truck was hired by one Shri Durga Singh, who was traveling along with his two labourers. The said truck met with an accident, as a consequence, the labourers sustained injuries and died. The issue that

cropped up was whether the insurer is obliged under law to indemnify the owner of the goods, when the employees engaged by the hirer of the vehicle, driver with the owner of the goods on the foundation that they should be treated as employees covered under the policy issued in accordance with the provisions contained under Section 147 of the Motor Vehicles Act. The Apex Court noticing the provisions of Section 147 and earlier decisions on the aforesaid point in paragraph 11, 13, 15, 16, 17, 18, 19, 21 and 23 held that in terms of Section 147 (1) (b) proviso (I), it refers to the employees which are being carried in the vehicle covered by the policy. It was further explained that the legislature had intended to cover the injury to any person including the owner of the goods or his authorized representative carried in the vehicle and an employee who has carried in the said vehicle. It also held that a policy is not required to cover the liability of the employee except an employee covered under the Act of 1923 and that too in respect of employee carried in a vehicle. It clarified that on a contextual reading and the scheme of the Act the statutory policy i.e. 'Act Policy' covers the employees of the insured either employee or engaged by him in a goods carriage. The relevant paragraphs are reproduced hereinafter:-

"11. Be it noted, before Section 147(1)(b)(i) came into existence in the present incarnation, it stipulated that a policy of insurance must be a policy which insured the person or classes of persons to the extent specified in sub-section (2) against the liability incurred by him in respect of the death of or bodily injury to any person or damage to any property or third party caused by or arising out of the use of the vehicle in public place.

13. The correctness of the said decision in *Satpal Singh* case [(2000) 1 SCC 237 : 2000 SCC (Cri) 130] came up for consideration before a three-Judge Bench in *New India Assurance Co. Ltd. v. Asha Rani* [New India Assurance Co. Ltd. v. Asha Rani, (2003) 2 SCC 223 : 2003 SCC (Cri) 493]. The learned Chief Justice, speaking for himself and H.K. Sema, J. took note of Section 147(1) prior to the amendment and the amended provision and the objects and reasons behind the said provision and came to hold as follows: (*Asha Rani* case [New India Assurance Co. Ltd. v. Asha Rani, (2003) 2 SCC 223 : 2003 SCC (Cri) 493], SCC p. 232, para 9)

“9. ... The objects and reasons of clause 46 also state that it seeks to amend Section 147 to include owner of the goods or his authorised representative carried in the vehicle for the purposes of liability under the insurance policy. It is no doubt true that sometimes the legislature amends the law by way of amplification and clarification of an inherent position which is there in the statute, but a plain meaning being given to the words used in the statute, as it stood prior to its amendment of 1994, and as it stands subsequent to its amendment in 1994 and bearing in mind the objects and reasons engrafted in the amended provisions referred to earlier, it is difficult for us to construe that the expression ‘including owner of the goods or his authorised representative carried in the vehicle’ which was added to the pre-existing expression ‘injury to any person’ is either clarificatory or amplification of the pre-existing statute. On the other hand it clearly demonstrates that the legislature wanted to bring within the sweep of Section 147 and making it compulsory for the insurer to insure even in case of a goods vehicle, the owner of the goods or his authorised representative being carried in

a goods vehicle when that vehicle met with an accident and the owner of the goods or his representative either dies or suffers bodily injury.” (emphasis supplied)

S.B. Sinha, J., in his concurring opinion, stated thus: (*Asha Rani* case [New India Assurance Co. Ltd. v. Asha Rani, (2003) 2 SCC 223 : 2003 SCC (Cri) 493], SCC p. 235, paras 27-28)

“27. Furthermore, sub-clause (i) of clause (b) of sub-section (1) of Section 147 speaks of liability which may be incurred by the owner of a vehicle in respect of death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place, whereas sub-clause (ii) thereof deals with liability which may be incurred by the owner of a vehicle against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place.

28. An owner of a passenger-carrying vehicle must pay premium for covering the risks of the passengers. If a liability other than the limited liability provided for under the Act is to be enhanced under an insurance policy, additional premium is required to be paid. But if the ratio of this Court's decision in *New India Assurance Co. v. Satpal Singh* [(2000) 1 SCC 237 : 2000 SCC (Cri) 130] is taken to its logical conclusion, although for such passengers, the owner of a goods carriage need not take out an insurance policy, they would be deemed to have been covered under the policy wherefor even no premium is required to be paid.” (emphasis supplied)

Being of the aforesaid view, the three-Judge Bench [New India Assurance Co. Ltd. v. Asha Rani, (2003) 2 SCC 223 : 2003 SCC (Cri) 493] overruled the

decision in Satpal Singh [(2000) 1 SCC 237 : 2000 SCC (Cri) 130] .

15. In *New India Assurance Co. Ltd. v. Vedwati [(2007) 9 SCC 486]* , (SCC p. 490, para 6), after referring to the scheme of the Act and the earlier pronouncements, it has been held that the provisions of the Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods carrier and the insurer would have no liability therefor.

16. In *National Insurance Co. Ltd. v. Cholleti Bharatamma [(2008) 1 SCC 423 : (2008) 1 SCC (Cri) 224 : (2008) 1 SCC (Civ) 280]* the Court laid down that the provisions engrafted under Section 147 of the Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods vehicle and hence, any injury to any person in Section 147(1)(b) would only mean a third party and not a passenger travelling in a goods carriage, whether gratuitous or otherwise.

17. At this juncture, we may refer with profit to the decision of a three-Judge Bench in *National Insurance Co. Ltd. v. Prembai Patel [(2005) 6 SCC 172 : 2005 SCC (L&S) 819]* wherein the legal representatives of the driver of the truck had succeeded before the High Court and were granted compensation of Rs 2,10,000 repelling the contention of the insurer that the liability was restricted as provided under the Workmen's Compensation Act, 1923 (for short "the 1923 Act"). After discussing the schematic postulates of the provision, the Court ruled that where a policy is taken by the owner of the goods vehicle, the liability of the insurance company would be confined to that arising under the 1923 Act in case of an employer. It further observed that the insurance policy being in the nature of a contract, it is

permissible for an owner to take such a policy whereunder the entire liability in respect of the death of or bodily injury to any such employee as is described in clauses (a), (b) or (c) of proviso (i) to Section 147(1)(b) of the Act may be fastened upon the insurance company and the insurer may become liable to satisfy the entire award. But for the said purpose, he may be required to pay additional premium and the policy must clearly show that the liability of the insurance company is unlimited.

18. Keeping in view the aforesaid enunciation of law, it is to be seen how the term "employee" used in Section 147 of the Act is required to be understood. Prior to that, it is necessary to state that as per Section 147(1)(b)(i), the policy is required to cover a person including the owner of the goods or his authorised representative carried in the vehicle. As has been interpreted by this Court, an owner of the goods or his authorised agent is covered under the policy. That is the statutory requirement. It does not cover any passenger. We are absolutely conscious that the authorities to which we have referred to hereinbefore lay down the principle regarding non-coverage of passengers. The other principle that has been stated is that the insurer's liability as regards the employee is restricted to the compensation payable under the 1923 Act. In this context, the question that has been posed in the beginning to the effect whether the employees of the owner of goods would come within the ambit and sweep of the term "employee" as used in Section 147(1), is to be answered. In this context, the proviso to Section 147(1)(b) gains significance. The categories of employees which have been enumerated in clauses (a), (b) and (c) of proviso (i) to Section 147(1) are the driver of a vehicle, or the conductor

of the vehicle if it is a public service vehicle or in examining tickets on the vehicle, if it is a goods carriage, being carried in the vehicle. It is submitted by the learned counsel for the appellant that clause (c) of proviso (i) is of wide import as it covers employees in a goods carriage being carried in a vehicle. The learned counsel for the insurer would submit that it should be read in the context of the entire proviso, regard being had to the schematic concept of the 1923 Act and the restricted liability of the insurer. It is further urged that contextually read, the meaning becomes absolutely plain and clear that employee which is statutorily mandated to be taken by the insured only covers the employees employed or engaged by the employer as per the policy.

19. It is the settled principle of law that the liability of an insurer for payment of compensation either could be statutory or contractual. On a reading of the proviso to sub-section (1) of Section 147 of the Act, it is demonstrable that the insurer is required to cover the risk of certain categories of employees of the insured stated therein. The insurance company is not under statutory obligation to cover all kinds of employees of the insurer as the statute does not show command. That apart, the liability of the insurer in respect of the said covered category of employees is limited to the extent of the liability that arises under the 1923 Act. There is also a stipulation in Section 147 that the owner of the vehicle is free to secure a policy of insurance providing wider coverage. In that event, needless to say, the liability would travel beyond the requirement of Section 147 of the Act, regard being had to its contractual nature. But, a pregnant one, the amount of premium would be different.

21. Coming to the scheme of the 1923 Act, it is worth noticing that under Section 3 of the said Act, the employer is liable to pay compensation to the workman in respect of personal injury or death caused by an accident arising out of or in the course of his employment. Section 4 provides the procedure how the amount of compensation is to be determined. In this context, we may usefully quote a passage from Oriental Insurance Co. Ltd. v. Devireddy Konda Reddy [(2003) 2 SCC 339 : 2003 SCC (Cri) 540] : (SCC pp. 342-43, para 9)

“9. ... Section 147 of the Act mandates compulsory coverage against death of or bodily injury to any passenger of ‘public service vehicle’. The proviso makes it further clear that compulsory coverage in respect of drivers and conductors of public service vehicle and employees carried in goods vehicle would be limited to liability under the Workmen's Compensation Act, 1923 (in short ‘the WC Act’). There is no reference to any passenger in ‘goods carriage’.” (emphasis supplied)

23. It is worthy to note that Section 147(1)(b) proviso (i)(c) refers to an employee who is being carried in the vehicle covered by the policy. Such vehicle being a goods carriage, an employee has to be covered by the statutory policy. On an apposite reading of Sections 147 and 167 the intendment of the legislature, as it appears to us, is to cover the injury to any person including the owner of the goods or his authorised representative carried in a vehicle and an employee who is carried in the said vehicle. It is apt to state here that the proviso commences in a different way. A policy is not required to cover the liability of the employee except an employee covered under the 1923 Act and that too in respect of an employee carried in a vehicle.

To put it differently, it does not cover all kinds of employees. Thus, on a contextual reading of the provision, schematic analysis of the Act and the 1923 Act, it is quite limpid that the statutory policy only covers the employees of the insured, either employed or engaged by him in a goods carriage. It does not cover any other kind of employee and therefore, someone who travels not being an authorised agent in place of the owner of goods, and claims to be an employee of the owner of goods, cannot be covered by the statutory policy and to hold otherwise would tantamount to causing violence to the language employed in the statute. Therefore, we conclude that the insurer would not be liable to indemnify the insured."

32. In the full Bench decision of the Gujarat High Court in **Valiben Laxmanbhai Thakore** (supra), the issue which was referred to the full Bench was, whether in view of the insured paying additional premium for liability of a paid driver, the insurance company is liable to pay compensation under the Motor Vehicles Act computed upon the death or injury caused to the driver out of the negligence which arises solely on account of driver's own negligence. After considering the respective submissions, provisions of the Act including the decisions of the Apex Court in *Meena Variyal* (supra), *Prembai Patel* (supra) amongst others, it concluded that where the policy is only an 'Act Policy' and additional premium is not paid then, the liability would be limited only to the extent as covered under the Employees' Compensation Act of 1923, however, the insurance company once it accepts the additional premium then its liability gets unlimited. The relevant paras are reproduced hereinafter:-

.....
 "13. Thus, when the owner of a vehicle pays additional premium and is accepted by the insurance company, liability of the insurance company gets extended under the Motor Vehicles Act. Section 147 of the same Act clearly prescribes for statutory liability to cover risk of paid driver and conductor under the insurance policy, which is a matter of contract. On payment of such additional premium by the owner, the liability of the owner shifts upon the insurance company. Thus, the risk of paid driver and conductor would be covered under the insurance policy. Only when the additional premium is not paid, liability would be as per the Employee's Compensation Act, 1923 and in such cases, compensation would be computed as prescribed under the Act which is limited to the extent provided under provisions of the Act. However, when owner pays additional premium to cover the legal liability of his paid driver and conductor to the insurance company, as such, the insurance company is enlarging the scope for unlimited liability for payment of compensation, when additional premium is accepted. The liability of the insurance company gets extended and it has no right to raise issue of self-negligence or otherwise of such class of the driver of the insured vehicle. By accepting additional premium as per IMT 28, the insurance company expressed its willingness to extend its liability under the clause of legal liability to the paid driver and conductor as envisaged under section 147 of the Act. Thus, in our opinion, insurance company has no legal right to avoid its legal liability under the indemnity clause arising from the contract of insurance towards the insured-owner of such classes of vehicles."

33. Having taken note of the aforesaid decisions and the statutory provisions, what can be culled out is that in terms of Section 147 (1), the proviso appended thereto is being once again reproduced hereinafter for clarity:-

“Provided that a policy shall not be required—

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

(a) engaged in driving the vehicle, or

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

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

(ii) to cover any contractual liability.”

and this has been clearly noticed by the Apex Court in *Prembai Patel* (supra) as well as in *Sanjeev Kumar Samrat* (supra) and also by the full Bench of the Gujarat High Court in *Valiben Laxmanbhai Thakore* (supra). From the reading of the aforesaid decisions and the crux which has been explained and reproduced hereinabove in the preceding paragraphs, it leaves no manner of doubt that the true import of Section 147 and the proviso appended thereto is that the Act Policy would cover third party risks, but it would also cover the liability arising out of death or bodily injury in respect of such persons which have been indicated in the proviso as

(a), (b), (c) and that too, to a limited extent as determined in terms of the Employees Compensation Act, 1923. Therefore, any liability relating to such specified individuals as mentioned and described in the proviso on account of death or bodily injury, their claims can be limited only to the extent which is determined in terms of the Compensation Act of 1923, but the moment any additional premium is paid towards such category of persons then, the liability can be enhanced and would be made unlimited.

34. Now, applying the aforesaid dictum and the ratio culled out to the facts of the instant case, it would be found that the policy in question is an Act Policy. It is also clear that Luv Kush was an employee of the owner Sultan. The said employee was not as if, he was a casual employee but was a regular driver and therefore, he would be covered in terms of Section 147 (1) proviso (a) as mentioned in the Act. In terms of Section 167 of the Act option is available for a party to either file the claim petition before the Claims Commissioner under the Act of 1923 or before the M.A.C.T. However, the difference would be that if a party chooses to file his claim before the Motor Accident Claims Tribunal and the Tribunal awards an amount which is higher than the amount which is computed under the Compensation Act of 1923, then the liability of the insurance company would only be to the extent of the amount which is payable in terms of the Act of 1923 and the excess amount would be payable by the owner. However, if an additional sum or premium is paid to cover or enhance the liability, then the entire award would be payable by the insurance company. In the instant case, since it was an Act policy and the Tribunal has also awarded the amount computing it in

context with the Compensation Act of 1923 as shall be evident from the award itself. Accordingly, this liability of Rs.3,36,000/- is liable to be indemnified by the insurance company.

35. In view of the aforesaid, this Court has no hesitation to hold that the decision rendered by the Tribunal does not suffer from an error to persuade this Court to arrive at any other finding. No other issue was raised before this Court, accordingly, the award dated 10.07.2019 passed in C.P. No. 646 of 2013 is affirmed and the appeal being devoid of merits is **dismissed**. In the facts and circumstances, there shall be no order as to costs. Record of the Tribunal be sent to the Court concerned.

(2023) 8 ILRA 196
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.05.2023

BEFORE

**THE HON'BLE DR. KAUSHAL JAYENDRA
 THAKER, J.**

First Appeal From Order No. 636 of 1998

Smt. Sarojini Devi & Ors. ...Appellants
Versus
Oriental Insurance Co. Ltd., Mainpuri &
Ors. ...Respondents

Counsel for the Appellants:
 Sri B.R. Singh

Counsel for the Respondents:
 Sri Arun Kumar Sinha

**A. Civil Law-Motor Vehicles Act,1988-
 Section 173-quantum of compensation-
 his income can be considered to be
 Rs.1500/- per month- the deceased was
 36 years at the time of accident, 40% of**

**the income would have to be added as
 future loss of income to the deceased,
 deduction would have to be of 1/3rd as
 there are two minor children, a mother
 and a widow, multiplier of 16 as deceased
 was 36 years of age and Rs. 70,000/- +
 Rs. 50,000/- each for two minor children-
 Thus, the Total compensation Rs.
 4,38,800/- is granted at the rate of 7%
 from the date of filing of the claim petition
 till decision of the claim petition and 6%
 thereafter. (Para 1 to 16)**

The appeal is partly allowed. (E-6)

List of Cases cited:

1. A.V. Padma Vs Venugopal (2012) 1 GLH SC 442
2. Smt. Hansaguri P. Ladhani Vs The Oriental Ins. Co. Ltd. (2007) 2 GLH 291
3. Smt. Sudesna & ors. Vs Hari Singh & anr. FAFO No.23 of 2001
4. Bajaj Allianz Gen. Ins. Co. Pvt Ltd. Vs UOI & ors.
5. Gobald Motor Services Ltd. & anr. Vs R.M.K.Veluswami & ors. (1962) SCR(1) 929
6. National Ins. Co. Ltd. Vs Pranay Sethi & ors. (2017) LawSuit SC 1093

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

1. Heard Sri B.R. Singh, learned counsel for the appellants and Sri A.K. Shukla, learned counsel for respondents.

2. This appeal, at the behest of the claimants, challenges the judgement and order dated 7.11.1997 passed by M.A.C.T/Special Judge (E.C. Act), Mainpuri (hereinafter referred to as "Tribunal") in M.A.C.P. No. 167 of 1996. The accident is not in dispute. His death by the accident is not in dispute. The issue of

negligence decided by the Tribunal is not in dispute. The only issue to be decided is, the quantum of compensation awarded.

3. Brief facts as culled out from the record are that on 05.03.1996 deceased Jagdish Singh was travelling in Tempo no. U.T.M. 9478. At about 10:00 A.M in front of Shankar cold storage Bewar on G.T. road the said tempo collided with truck no. H.R. 26/6368 resulting in the death of many persons including Sahab Singh. It is alleged that truck no. H.R. 26/6368 was being driven very rashly and negligently by its driver as a result of which accident occurred.

4. The deceased Jagdish Singh was 36 years of age was earning Rs. 2000/- p.m from agricultural and animal husbandary and his legal heirs consist of his father, mother, widow and two minor sons. The tribunal considered the income of the deceased Rs. 1500/-p.m to which the deduction was 1/3rd, 20% was deducted as lum sum compensation was granted and at the end applied multiplier of 12 and granted Rs. 1,19,200/- with 12% interest.

5. It is submitted by Sri B.R. Singh, learned counsel for the appellants that according to the oral statement of the widow of deceased income of the deceased was Rs. 2000/- p.m to which 40% be added as per the judgment of **Gobald Motor Services Ltd. and another Vs. R.M.K.Veluswami and other, 1962, SCR(1) 929** which had presidential values even in those days, the deduction of 20% lum sum has been deprecated by the Supreme Court time and again, the deduction of 1/3rd is not assailed, multiplier of 15 and non pecuniary damages be granted as per the judgment of the Apex Court **National Insurance Co.**

Ltd. Vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093 or as per the rules applied in U.P and the interest of 12% is maintained. It is further submitted by Sri B.R.Singh, learned counsel for the appellants that no amount under the head of future loss of income has been granted.

6. Per contra, As against this, it is submitted by Sri A.K.Shukla, learned counsel for the respondents that in absence of any proof except the certificate there is no error which calls for any interference, however, Sri A.K. Shukla, learned counsel for the respondent could not point out as to non grant of future prospects and that multiplier of 15 be applied.

7. After hearing the counsel for the parties and perusing the judgment and order impugned, this Court feels that his income can be considered to be Rs.1500/- per month. To which as the deceased was 30 years at the time of accident, 40% of the income would have to be added as future loss of income to the deceased, deduction would have to be of 1/3rd as there are two minor children, a mother and a widow, multiplier of 16 as deceased was 36 years of age and Rs. 70,000/- + Rs. 50,000/- each for two minor children. The oral objection of Sri A.K.Shukla, learned counsel is accepted.

8. Further, this Court feels that the quantum/compensation requires to be recalculated. Hence, the total compensation payable to the appellants is computed herein below:

- i. Income : Rs.1500/-
- ii. Percentage towards future prospects : 40% namely Rs.600/-
- iii. Total income : Rs. 1500 + 600 = Rs. 2100/-

- iv. Income after deduction of 1/3rd : Rs. 1400/-
- v. Annual loss : Rs. 3266 x 12 = Rs. 16,800/-
- vi. Multiplier applicable : 16
- vii. Total loss : Rs. 16,800 x 16 = Rs. 2,68,800/-
- xii. Amount under non-pecuniary head : Rs. 70,000/-+50,000/-+50,000/-
- xiii. Total compensation : Rs. 4,38,800/-

9. As far as issue of rate of interest is concerned, 7% from the date of filing of the claim petition till decision of the claim petition and 6% thereafter.

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

11. In view of the above, the appeal is partly allowed. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the recalculated amount within a period of 12 weeks from today with interest as directed above.

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

13. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguri P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291**, total amount of interest, accrued on the principal amount

of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income-Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (**Smt. Sudesna and others Vs. Hari Singh and another**) while disbursing the amount.

14. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and judgment of **A.V. Padma (supra)**. The same is to be applied looking to the facts of each case.

15. The Tribunal shall follow the guidelines issued by the Apex Court in **Bajaj Allianz General Insurance Company Private Ltd. v. Union of India and others** vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. As more than 10 years have elapsed, the amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

16. Record be sent back to the tribunal.

17. This Court is thankful to Sri B.R.Singh, learned counsel for the appellants and Sri A.K.Shukla, learned counsel for respondents for ably assisting this Court.

(2023) 8 ILRA 199
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.07.2023

BEFORE

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

First Appeal From Order No. 1063 of 1998

The New India Assurance Co. Ltd. , M.G.
Marg, Allahabad ...Appellant
Versus
Ramesh Kumar & Ors. ...Respondents

Counsel for the Appellant:

Sri Avnish Mishra, Sri Aditya Singh Parihar,
Ms. Poonam Srivastava

Counsel for the Respondents:

Sri M.R. Jaiswal, Sri B.N Pandey

**A. Civil Law-Motor Vehicles Act,1988-
Section 173-Challenge to-award of
compensation-Tribunal has fallen in error
in considering the disability certificate -
claimant was a driver by profession- There
is an amputation of lower limb which is
below the thigh-the physical disability
caused due to an accident has to be
judged with reference to the nature of
work being done by the injured for
assessing award of compensation which is
given in a decade old judgment of Apex
Court in *Mohan Soni*- In the instant case
the physical disability which has resulted
from the accident requires to be judged
with the work being performed by a
person-The respondent in this case
suffered injury on his right lower limb had
to be amputated on account of accident as
a result of accident and amputation of his**

**right lower limb, he would not be in a
position to perform his routine work of
driver- The amount awarded holds that he
was earning Rs.1,000/- and that is how
Rs.12000/- have been calculated and
granted multiplier of 13 which comes to
Rs.2,00,000/- The award of the year 1998
and the rate of interest was normally at
the rate of 9% but as future loss is not
granted, looking to the other amount
which are also on the lower side, interest
at the rate of 10% cannot be said on
higher side.(Para 1 to 10)**

The appeal is dismissed. (E-6)

List of Cases cited:

Mohan Soni Vs Ram Avtar Tomar & ors. (2012)
2 SCC 267

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

1. By way of this appeal, the New India Assurance Co. Ltd. has challenged the judgment and award dated 29.8.1998 passed by IXth Additional and Session Judge, Kanpur Dehat in MACP No.317 of 1993 awarding compensation of Rs.2,00,000/- with interest at the rate of 10% to the respondent-claimants.

2. The brief facts as culled out from the record are that the the claimant-Ramesh Chandra was employed as a driver on Truck No. UP-78/9655 and on 19.12.1992 at about 6:00 a.m. when he was going towards Hamirpur, his truck met with an accident with another truck bearing Truck No. U.A.N.-8577. The claimant-Ramesh Chandra sustained serious injuries which resulted in amputation of his leg.

3. The accident is not in dispute and, therefore, the said aspect is not is caused. The policy being in vogue is also not in dispute and their liability is not in dispute.

The only dispute is regarding percentage of disability and the interest. No other grounds are raised except these two grounds.

4. According to counsel for appellant the Tribunal has fallen in error in considering the disability certificate which showed that there was 50% of disability despite that the Tribunal has considered the disability of the injured to be 100% which is bad in eye of law.

5. While going through the record it is very clear that the claimant was a driver by profession. There is an amputation of lower limb which is below the thigh. It is a question of fact that the physical disability caused due to an accident has to be judged with reference to the nature of work being done by the injured for assessing award of compensation which is given in a decade old judgment of Apex Court in *Mohan Soni Vs. Ram Avtar Tomar and others* (2012) 2 SCC 267. In our case the physical disability which has resulted from the accident requires to be judged with the work being performed by a person. The respondent in this case suffered injury on his right lower limb had to be amputated on account of accident as a result of accident and amputation of his right lower limb, he would not be in a position to perform his routine work of driver.

6. The amount awarded holds that he was earning Rs.1,000/- and that is how Rs.12000/- have been calculated and granted multiplier of 13 which comes to Rs.2,00,000/- have been awarded. This Court has considered the oral submission on behalf of appellant. The amount awarded cannot be said to be on the higher side.

7. In that view of the matter the injured would not be in a position to continue with his vocation of driver, this finding cannot be said to be perverse.

8. The multiplier of 13 has been invoked. The Tribunal has not granted any amount under the head of future loss of income and, therefore, it cannot be said that the Tribunal has fallen in error in not granting what can be said to be just compensation.

9. The award of the year 1998 and the rate of interest was normally at the rate of 9% but as future loss is not granted, looking to the other amount which are also on the lower side, interest at the rate of 10% cannot be said on higher side.

10. In view of the above, this appeal sans merit and is dismissed.

11. Record and proceeding be sent back to the Tribunal forthwith who shall immediately disburse the amount to the claimants after ascertaining his identity.

(2023) 8 ILRA 200

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 10.07.2023

BEFORE

**THE HON'BLE DR. KAUSHAL JAYENDRA
THAKER, J.**

First Appeal From Order No. 1287 of 1998
And

First Appeal From Order No. 1178 of 1998

Smt. Sushma Devi & Anr. ...Appellants
Versus
The National Insurance Company & Ors.
...Respondents

Counsel for the Appellants:

Sri Rakesh Kumar Porwal

Counsel for the Respondents:

Sri Anand Kumar Sinha

A. Civil Law-Motor Vehicles Act,1988-Section 173-Challenge to-award of compensation-The deceased being trained Junior Engineer, his income in the year of accident can be considered to be Rs. 1500/- per month to which 40% should be added towards future loss of income-The deduction towards personal expenses of the deceased would be 1/3rd as the deceased was survived by widow and one other legal heir-The deceased being 25 years of age, the multiplier applicable would be 18-As far as amount under the head of non pecuniary damages are concerned, Rs.70,000/- is granted- Thus, the total compensation of Rs.3,72,400/- is granted-The Tribunal has awarded 12% rate of interest which is reduced to 9% per annum. The additional amount would carry interest at the rate of 9% from the date of filing of the claim petition till the date of award and 6% thereafter.(Para 1 to 24)

B. It is a cardinal principle that if it is a question of composite negligence then only both owner and drivers of both the vehicle would be liable. In our case, the finding is very clear that the driver of the bus was solely negligent and there is no negligence on the part of the driver of motorcycle. Once it is held that the driver of the motorcycle is not negligent, the insurer of motorcycle cannot be held liable. (Para 13)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Gobald Motor Services Ltd. & anr. Vs R.M.K. Velusamy (1962) SCR 1 929

2. New India Assr. Co. Ltd. Vs Bismillah Bai (2009) 5 SCC 112

3. Samundra Devi Vs Narendra Kaur (2008) 9 SCC 100

4. Oriental Ins. Co. Ltd. Vs Sudhakaran K.V. (2008) 7 SCC 428

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

6. Smt. Hansaguri P. Ladhani Vs The Oriental Ins. Co. Ltd (2007) 2 GLH 291

7. Smt. Sudesna & ors. Vs Hari Singh & anr. FAFO No. 23 of 2001

8. Bajaj Allianz Gen. Ins. Co. Pvt. Ltd. Vs UOI & ors.

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

1. Heard Sri Rakesh Kumar Porwal, learned counsel for the appellant, Sri Anand Kumar Sinha, learned counsel for the respondent-Insurance Company and perused the judgment and order impugned.

2. Both these appeals challenges the judgment and award dated 31.8.1998 passed by Motor Accident Claim Tribunal/VII Additional District Judge, Etawah in M.A.C. No. 353 of 1994 (Sushma Devi and another vs. Om Prakash Gupta and others) & 354 of 1994 (Rameshwari Devi and others vs.Om Prakash Gupta and others).

3. F.A.F.O. No.1287 of 1998 has been filed against the Claim Petition No. 353 of 1998 whereby the Tribunal has awarded compensation of Rs. 1,35,000/- to the respondent-claimants with interest at the rate of 12%. F.A.F.O. No. 1178 of 1998 has been filed against claim petition No. 354 of 1993 which was dismissed in terms of amount awarded under no fault liability.

4. A very fanciful argument in the rejoinder has been raised by Sri R.K. Porwal which is only raised for being rejected outright. The claim petition was under Section 140 & 166 of Motor Vehicles Act. It is submitted by Sri Porwal that the claim petition should be considered under Section 163A of Motor Vehicles Act by this Court and the liability should be fasten on the National Insurance Co. Ltd. namely the insurer of the motorcycle on which the deceased were travelling though the driver of motorcycle is held to have not contributed to accident having taken place.

5. This fanciful argument is made because by learned counsel for the appellant Sri Sinha, learned counsel for Insurance Company supported the judgment of the Tribunal. The Tribunal has held that the driver of bus was negligent and granted recovery right from the owner and driver of the bus as the vehicle seems to be uninsured or rather the owner and driver did not give the details of Insurance policy of bus.

6. This takes this Court to the aspect of compensation as that is the sole aspect which requires to be considered. It was contended by Sri Porwal that the Tribunal dismissed the claim petition being Claim Petition No. 354 of 1993 preferred by widow of one of the deceased. The Tribunal with due respect to Sri Porwal had not dismissed the claim petition rather it has over zealously granted amount of no fault liability to the widow of the deceased who as per the postmortem report was 75 years of age. The submission of Sri Sinha, learned counsel for Insurance Company is that the amount under no fault liability which has already been paid is rightly paid as just compensation. Sri Sinha has submitted that impugned order cannot be

found fault with as the deceased was above 70 years, the Tribunal considered his income to be Rs.10,000/- per annum and applied multiplier of 5. It is submitted that for no fault liability, the Insurance Company has already deposited the amount in claim petition filed under Section 140 of Motor Vehicles Act, 1988.

7. However, Rs.20,000/- under the head of non pecuniary damage to widow-Rameshwari Devi would be payable with interest as directed herein below. The claimant being non tortfeasor can collect the amount from any of the tortfeasors.

8. This takes this Court to First Appeal From Order No. 1287 of 1998 preferred against Claim Petition No. 353 of 1993. A young man of 25 years breathed his last when he was a trained Junior Engineer. The Tribunal has considered his income to be Rs. 15,000/- per year and granted multiplier of 18 after considering that Rs. 750/- would be the datum figure. The Tribunal has granted only Rs. 7000/- towards non pecuniary damages and has not granted any amount under future loss of income is the submission of learned counsel for the appellants and are the facts emerged from impugned judgment.

9. The amount requires to be recalculated as even in the year of accident i.e. 1993, the decision of the Apex Court in **Gobald Motor Services Ltd. and another v. R.M.K. Velusamy, 1962 SCR (1) 929** was very much there and future prospects were granted. In this case, future prospects had to be granted to a junior engineer who has lost his life leaving behind his widow and children.

10. The deceased being trained Junior Engineer, his income in the year of accident

can be considered to be Rs. 1500/- per month to which 40% should be added towards future loss of income. The deduction towards personal expenses of the deceased would be 1/3rd as the deceased was survived by widow and one other legal heir. The deceased being 25 years of age, the multiplier applicable would be 18. As far as amount under the head of non pecuniary damages are concerned, Rs.70,000/- is granted.

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

- i. Income: Rs.1500/-per month namely Rs. 18000/- per year.
- ii. Percentage towards future prospects : 40% namely Rs.7200/-
- iii. Total income : Rs.18000 + 7200 = Rs.25,200/-
- iv. Income after deduction of 1/3rd towards personal expenses : Rs.16,800/-
- v. Multiplier applicable : 18
- vi. Loss of dependency: Rs.16,800 x 18 = Rs.3,02,400/-
- vii. Amount under non pecuniary heads : Rs.70,000/-
- viii. Total compensation : Rs.3,72,400/-

12. As far as issue of interest is concerned, the Tribunal has awarded 12% rate of interest which is reduced to 9% per annum. The additional amount would carry interest at the rate of 9% from the date of filing of the claim petition till the date of award and 6% thereafter till the amount is deposited.

Liability

13. It is a cardinal principle that if it is a question of composite negligence then

only both owner and drivers of both the vehicle would be liable. In our case, the finding is very clear that the driver of the bus was solely negligent and there is no negligence on the part of the driver of motorcycle. Once it is held that the driver of the motorcycle is not negligent, the insurer of motorcycle cannot be held liable.

14. As per the ratio laid down in the case of "**New India Assurance Co. Ltd. v/s. Bismillah Bai, (2009) 5 SCC 112**", liability of Insurance Company insuring vehicle not responsible for or not contributing to accident. In the said case, a Jeep colliding with a truck. Truck involved in accident not insured. Tribunal recording that driver of Jeep not negligent in driving Jeep and not contributing to accident. High Court fastening liability on insurer of Jeep. Unsustainability. Held. only because truck was not insured, appellant could not be made liable to pay compensation where liability being incurred by driver and owner of truck and not by driver and owner of Jeep".

15. As per the ratio laid down in case of "**Samundra Devi v/s. Narendra Kaur, (2008) 9 SCC 100**", a contract of insurance as is well known is a contract of indemnify. In a case of accident, the primary liability under law for payment of compensation is that of the driver. The owner of the vehicle also becomes vicariously liable therefor. In a case involving a third party to the contract of insurance in terms of Section-147 of Motor Vehicle Act, 1988, providing for a compulsory insurance, the insurer becomes statutorily liable to indemnify the owner. Indisputably, the insurance company would be liable to indemnify the insured in respect of loss suffered by a third party or in respect of damages or property. In a case, therefore, where the liability is fastened

upon the insurer would be bound to indemnify the insured unless the exceptions contained in Section-149 of the Act are attached. (Para-15). In certain situation when the Insurance Company would not be liable to reimburse the insured, a direction upon the Insurance Company to pay the amount of compensation to the third party and recover the same from the owner of the vehicle is permissible. Such a direction was not under challenge. (para-16).

16. As per the ratio laid down in case of "**Oriental Insurance Co. Ltd. v/s. Sudhakaran K.V. (2008) 7 SCC 428**", a distinction has to be made between a contract of insurance in regard to a third party and the owner or the driver of the vehicle. In term of Section-147 of the Act a contract of insurance must be taken by the owners of the vehicle only in regard to reimbursement of the claim to a third party. Section-147 is imperative in nature. When, however, an owner of a vehicle intends to cover himself from other risks, it is permissible to enter in to a contract of insurance in which event the insurer would be bound to reimburse the owner of the vehicle strictly in terms thereof. The liability of the insurer to reimburse the owner in respect of a claim made by the third party, thus, is statutory whereas other claims are not. (para-16, 13 & 14). The provisions of the Act and in particular, Section-147 of the Act were enacted for the purpose of enforcing the principles of social justice. It, however, must be kept confined to a third party risk. A contract of insurance which is not statutory in nature should be construed like any other contract.

17. In view of the above, it is clear that no further order can be passed so as to saddle the Insurance Company of the motorcycle with any liability. The liability

has to be saddled on the owner and driver of the bus. It was not brought on record before the Tribunal nor before this Court whether bus was insured or not. Be that as it may, the said finding that the Insurance Company of motorcycle would pay cannot be furthered for the remaining amount as there is clear finding that the driver of the bus was solely negligent. The driver and owner of the bus have absented themselves for a period of 25 years since filing of this appeal.

18. However, being already deposited the amount under no fault liability, the insurer of motorcycle may not be directed to deposit any amount. The amount should be recovered from the driver and owner of the bus who have absented themselves and have not appeared before this Court for 23 years.

19. In view of the above, both the appeals are partly allowed. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent shall deposit the amount within a period of 12 weeks from today with interest as directed above. The amount already deposited be deducted from the amount to be deposited. Record and proceedings be sent back to the Tribunal forthwith.

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

21. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of

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

22. 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.

23. The Tribunal shall follow the guidelines issued by the Apex Court in **Bajaj Allianz General Insurance Company Private Ltd. v. Union of India and others** vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. As long period has elapsed, the amount be

deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

24. This Court is thankful to both the counsels for getting this matter decided.

(2023) 8 ILRA 205

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 21.03.2023

BEFORE

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

First Appeal From Order No. 3826 of 2009

Ashish Kuar Yadav ...Appellant

Versus

Aatma Nand Singh & Anr. ...Respondents

Counsel for the Appellant:

Sri Ram Singh, Sri Amit Kumar Sinha

Counsel for the Respondents:

Sri Amit Manohar

A. Civil Law-Motor Vehicle Act, 1988-Section 173-enhancement of compensation- At the time of the accident, the claimant was a young man of 22 years and a student. In consequence of the injuries, the claimant turned from an able-bodied man to a permanently handicapped - During treatment, the claimant's right lower limb had to be amputated above the knee, leading him to develop a permanent handicap, which was assessed by the Chief Medical Officer as 50% permanent disability-the claimant has earned his high school and intermediate certificate in the second division and was reading as a private candidate to earn his bachelor's degree- The Tribunal awarded Rs. 9,52,000/- the injured falls in the bracket of 21-25 years, wherefor, a multiplier of '18' is envisaged- The Tribunal has fallen in error in adopting the multiplier of 17- Adding 40% for the future prospects, it

works to be Rs 6784.40 per month i.e. 81,412.80 p.a- Applying the multiplier of 18, it works out to Rs 14,65,430 and Damages for pain, suffering and trauma in consequence of the injuries Rs. 2,00,000/- and Loss of amenities of life and loss of expectation of life or pain in future Rs. 2000/- Thus, the claimant granted total sum of Rs. 16,79,000/- at the rate of 7% per annum.(Para 1 to 32)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. R.D. Hattangadi Vs Pest Control (India) (P) Ltd.(1995) 1 SCC 551 : 1995 SCC (Cri) 250
2. Govind Yadav Vs New India Ins. Co. Ltd. (2011) 10 SCC 683 : (2012) 3 SCC (Civ) 1082 : (2012) 1 SCC (Cri) 82 : (2012) 1 SCC (L&S) 422
3. Oriental Ins. Co. Ltd., Gzb. Vs Lokesh @ Lovesh & anr.
4. K. Suresh Vs New India Assr. Co. Ltd. (2012) 12 SCC 274 : (2013) 2 SCC (Civ) 279 : (2013) 4 SCC (Cri) 638 : AIROnline 2012 SC 633
5. Raj Kumar Vs Ajay Kumar (2011) 1 SCC 343 : (2011) 1 SCC (Civ) 164 : (2011) 1 SCC (Cri) 1161 : AIROnline 2010 SC 125
6. India Ins. Co. Ltd. Vs Nirmala Devi (1979) 4 SCC 365 : 1979 SCC (Cri) 996 : 1980 ACJ 55 : AIR 1979 SC 1666
7. UPSRTC Vs Smt. Madhu Sharma & ors. (2003) 4 AWC 2620
8. Lakshmi Narayan Guin & ors. Vs Nirranjan Modak (1985) AIR SC 111
9. Amarjit Kaur Vs Pritam Singh (1974) AIR SC 2068
10. Dayawati Vs Inderjit (1966) AIR SC 1423
11. Mula Vs Godhu (1971) AIR SC 89
12. Ram Sarup Vs Munshi (1963) AIR SC 553

13. Sushil Kumar & ors. Vs M/s. Sampark Lojastic Pvt. Ltd & ors.

14. Sushil K. Jagdish Vs Mohan & ors.

15. National Ins. Co. Ltd. Vs Pranay Sethi

16. New India Assr. Co. Ltd. Vs Urmila Shukla & ors.

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

This is a claimant's appeal, arising out of the judgment and award passed by the Motor Accidents Claims Tribunal/Additional District Judge, Court No. 1, Allahabad dated 09.04.2009 in Claim Petition No. 638 of 2005, seeking enhancement of the compensation awarded.

2. The facts giving rise to this appeal, as set out in the claim petition, are :

On 1st June, 2005, Ashish Kumar Yadav, the claimant-appellant1 was riding pillion on motorcycle UP 70 AF 6420, that had, in the rider's seat, Rajesh Kumar Yadav. At about 06:30 a.m., when the two reached Village Rangpura, falling under the local limits of Police Station Soraon, District Allahabad (now Prayagraj), a dumper truck bearing Registration No. UP 70 AT 1665, driven at a high speed and negligently, approached from the opposite direction. It hit the motorcycle without sound of horn. The accident led the claimant to sustain grievous injuries. In consequence, the claimant has become permanently handicapped. At the time of the accident, the claimant was a young man of 22 years and a student. In consequence of the injuries, the claimant turned from an able-bodied man to a permanently handicapped and disabled individual. During treatment, the claimant's right lower limb had to be amputated above the

knee, leading him to develop a permanent handicap, which was assessed by the Chief Medical Officer as 50% permanent disability. The claimant had earned his bachelor's degree and was preparing to write his competitive examinations and look for a job. The accident has left him permanently crippled to the extent that he is no longer in a position to secure a job or do business to earn his livelihood. His future has turned painful and bleak. The claimant suffers from constant pain at the *situs* of the grievous injury, that gives him pain and suffering permanently. It is still being treated and in future, would also require treatment and expenditure on medicines, in all likelihood. The claimant has to depend upon a special diet and take nourishing food, such as juices, fruits and tonics. He has to bear additional expenditure to buy the nourishing food required. There is inconvenience, difficulty, pessimism, that have become part of the claimant's life. The injuries sustained in the accident and the after-effects are such that the appellant cannot live life the way he would and he cannot do his daily needs. He has to depend upon others. The likelihood is that this difficulty and dependency would continue for the remainder of his life. The injuries have caused such debilitation that the claimant cannot move about the way he earlier did, or use a vehicle for conveyance himself, as he would earlier do. The claimant, in order to compensate himself for the permanent injuries sustained, claimed a sum of ₹30 lacs under Section 166 of the Motor Vehicles Act, 1982 and ₹25,000/- under Section 140 of the said Act towards no-fault liability. The sum of money claimed in compensation has been sought to be awarded with interest at the rate of 18% per *annum* from the date of institution of the claim petition until realisation.

3. Atmanand Singh is the owner of Dumper Truck No. UP 70 AT 1665. He is opposite party No. 1 to the claim petition and respondent No. 1 to this appeal. He shall hereinafter be referred to as 'the owner'. The New India Assurance Company Limited, Regional Office, 9th Floor, Indira Bhawan, Civil Lines, Prayagraj are the insurers of the offending dumper. They are arrayed as opposite party No. 2 to the claim petition and respondent No. 2 to this appeal. The aforesaid insurance company shall hereinafter be referred to as 'the Insurers'.

4. The owner has put in a written statement, generally denying the allegations in the claim petition, except the fact that he is the owner of the offending vehicle. It is asserted that it was insured with the Insurers. The insurance policy was valid and effective from 24.01.2005 to 23.01.2006. It is also asserted that the driver had a valid driving licence, effective from 18.09.2004 to 17.09.2007. It is averred that the motorcycle rider and its owner have not been arrayed as parties, rendering the claim petition bad for non-joinder of necessary parties. It is further pleaded that the accident took place due to rash and negligent riding by the motorcycle rider, and it had happened an hour before the offending dumper truck reached the site of accident. The offending vehicle was framed in the accident on account of local political pressure.

5. The Insurers have put in a separate written statement, also denying the allegations in the claim petition. It is averred that they had no information about the accident. It is also pleaded that the offending dumper was driven by a driver, who did not hold a valid driving licence. The offending vehicle did not have a

registration certificate or a fitness certificate. It was being operated in violation of the terms and conditions of the insurance policy and the Insurers are entitled to claim benefit of Section 64VB of the Insurance Act, 1938. The further case of the Insurers was that the accident had not taken place in the manner alleged but due to the motorcycle rider's fault.

6. On the pleadings of parties, the following issues were framed by the Tribunal :

1. Whether on 1.6.2005 when the claimant was travelling on a motorcycle No. U.P. 70 AF 6420 and when he reached in village Rangpura P.S. Soraon at 6-30 a.m. a truck No. U.P. 70 AT 1665 (Dumper) which was coming from opposite side was being driven in rash and negligent manner hit the motor cycle causing grievous injuries to the claimant ?

2. Whether the said truck was not insured with the O.P. Company ?

3. Whether the truck driver did not possessed valid D.L. on the day of accident ?

4. Whether the truck was being plied against the conditions of insurance policy ?

5. Whether the insurance company is entitled to get benefit of section 64 V.B. of Insurance Act?

6. Whether the said accident was caused due to rash and negligent driving of the motor cycle driver?

7. Whether the petition is defective as owner and driver of the motorcycle have not been arrayed as party as alleged in para 16-17 of W.S. 12 A?

8. Whether the claimant is entitled to any relief? If yes then how much and from whom?

7. The claimant has filed photostat copies of 14 documents, including a check F.I.R., two discharge cards, the physical handicap certificate, his educational certificates, the registration certificate of the offending vehicle and its fitness certificate. The Insurers have filed two documents, to wit, the certificate of the ARTO, Palamu, Jharkhand regarding the driving licence of the offending vehicle's driver and the certificate of insurance issued by them.

8. The Tribunal answered Issue No. 1 in favour of the claimant, holding that the accident was caused partly on account of rash and negligent driving by the driver of the offending vehicle, the dumper truck. Issue No. 2 was decided against the Insurers and in favour of the claimant and the owner. Issue No. 3 was also decided in favour of the claimant and the owner and against the Insurers, holding that there is no evidence to show that the driving licence of the dumper truck's driver is fake or forged. Issue No. 4 was also decided against the Insurers and in favour of the claimant and the owner, holding that the offending vehicle was not being plied against the conditions of the insurance policy. Issue No. 5 was decided against the Insurers and in favour of the claimant and the owners. Issue No. 6 was decided against the owner and the Insurers, holding that the accident was not caused due to rash and negligent driving by the motorcyclist. Issue No. 7 was decided against the owner, at whose instance, it was framed and in favour of the claimant. It was held that given the findings on the other issues, it was not necessary to implead the owner, the rider and the Insurers of the motorcycle as parties to the claim petition. Issue No. 8 relates to the quantum of compensation payable and the party obliged to satisfy the award.

9. It must be remarked that this is an appeal by the claimant, and as already noticed, effectively it is the finding on Issue No. 8 alone that is up for consideration in this appeal. Since liability to satisfy the award has been fastened on the Insurers, the appeal has been effectively heard, with the claimant supporting his case of enhancement, and, the Insurers, opposing it. The owner has not contested before this Court.

10. Heard Mr. Amit Kumar Sinha, learned Counsel for the claimant, Mr. Amit Manohar, learned Counsel appearing on behalf of the Insurers. No one appears for the owners.

11. The Tribunal has considered the fact that the claimant has earned his high school and intermediate certificate in the second division and was reading as a private candidate to earn his bachelor's degree. The Tribunal has, in view of the contemporary prospects of the injured, assessed his monthly income at a sum of ₹5,000/-. On that basis, the annual income has been assessed as a sum of ₹60,000/-. The 50% physical handicap certificate has been considered as a 50% permanent loss of income. The Tribunal has also remarked that in future, the claimant can secure a job or undertake business and may get benefit of employment under the Physically Handicapped quota.

12. For the multiplier to be adopted, the Tribunal has fallen back upon the Second Schedule to the Act and looking to the age of the injured, a multiplier of '17' has been chosen. Thus, multiplying the annual income with the chosen multiplier of 17, the substantive entitlement on account of loss of income has been determined at a figure of ₹5,10,000/-. The

expenses towards treatment and medical procedures with reference to vouchers and receipts on record have been found by the Tribunal to be a sum of ₹4,11,648.76 which the Tribunal has rounded off to ₹4,12,000/-. Under the head of special diet, which the claimant had to consume, the Tribunal has awarded a sum of ₹25,000/-. Under the head of mental shock and pain, bearing in mind that the right lower limb of the claimant has been amputated, he has been awarded a sum of ₹5,000/-. It is in this way that a total sum of ₹9,52,000/- has been awarded to the claimant in compensation.

13. Mr. Amit Kumar Sinha, learned Counsel for the claimant has argued that the compensation awarded is far below entitlement. What he does not dispute is the monthly income assessed by the Tribunal and the extent of loss of earning capacity caused by the accident. He submits that going by the age of the claimant, a multiplier of '18' ought to have been adopted. It is also argued that the Tribunal has erred in not granting anything towards total loss of income for six months that the injured was under treatment and bedridden. It is also submitted that the Tribunal has erred in not granting anything towards future prospects as also attendant charges for the six months of treatment. There is no objection to the award under the head of medical expenses, money spent on special diet and nourishing food. Learned Counsel, however, claims that a sum of ₹2,50,000/- ought to have been awarded in compensation towards permanent disability and ₹2 lacs towards pain and suffering. In this connection, reliance has been placed by the learned Counsel on the decision of the Supreme Court in **K. Suresh v. New India Assurance Company Limited and another**³ and as regards compensation under the head of pain and suffering, upon

the decision of the Supreme Court in **V. Mekala v. M. Malathi and another**⁴. A sum of ₹2 lacs has been further claimed under the head of loss of amenities, and a further sum of ₹3 lacs on ground of bleak prospects of marriage. In support of both the last mentioned heads of claim, learned Counsel for the claimant has relied upon **V. Mekala** (*supra*). As regards future medical expenses and the price of an artificial limb, a sum of ₹2 lacs has been claimed. In this regard, learned Counsel for the claimant has placed reliance upon the decision of the Supreme Court in **Subulaxmi v. Managing Director, Tamil Nadu State Transport Corporation and another**⁵. The claimant says that the award ought to be appropriately enhanced.

14. Mr. Amit Manohar, on the other hand, says that the impugned award is a just and fair award, which need not be disturbed. It is particularly argued that the injured is a student and did not have any income *in presenti*. The income has been determined by the Tribunal notionally on the basis of education and other circumstances of the injured, which is a liberal figure of ₹5000/- per month.

15. Upon hearing learned Counsel for parties, this Court finds that so far as the monthly income of the injured is concerned, the parties are *ad idem*. Thus, in order to work out the compensation payable, this Court proceeds on the assumption that the claimant had an income or notional income of ₹5,000/- per month. It is also not much in the realm of doubt that the 50% medical disability, that has been made basis by the Tribunal to infer a 50% functional disability, is correct assessment. The reason is that the disablement is no doubt permanent. It is the loss of a limb for a young man, who has

just earned his bachelor's degree. The remarks of the Tribunal that the claimant might get employment under the handicapped quota is a mere possibility, and nothing more. It has to be borne in mind that for a young man, or for that matter, a person of any age, his health and physical fitness are the most fundamental features of his capability to earn. No doubt, in certain kinds of employ, such as clerical job, the loss of a limb may lead to an inference about a lesser percentage of functional disability, compared to a person requiring physical exertions, like a mechanic or a driver. In the case of a driver, the loss of a limb may result in 100% physical disability. But, between these extremes, for a man yet to start off his venture of life, losing one of the lower limbs at the most conservative estimate, would be a 50% physical disability. We are in agreement with the Tribunal's opinion on this point. In this connection, reference may be made to the decision of the Supreme Court in **Raj Kumar v. Ajay Kumar and another**⁶ where it has been held :

12. Therefore, the Tribunal has to first decide whether there is any permanent disability and, if so, the extent of such permanent disability. This means that the Tribunal should consider and decide with reference to the evidence:

(i) whether the disablement is permanent or temporary;

(ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement;

(iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire

body, that is, the permanent disability suffered by the person.

If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.

14. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of

earning capacity may virtually be hundred per cent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of "loss of future earnings", if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not be found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity.

16. In the circumstances obtaining here, the principle in **Raj Kumar** (*supra*) would apply to infer a 50% disability, considering that the deceased was not yet employed but on the brink of it, aged just 22 years. Any further reduction of the numerical value of the functional disability based on some kind of a hypothesis about a possible future employment would be too conjectural. This Court, therefore, affirms the Tribunal's finding about the 50% permanent functional disability and a corresponding permanent loss of income.

17. Now, so far as the multiplier to be adopted is concerned, this Court is of

opinion that the Tribunal has erred in falling back upon the Second Schedule of the Act. The law in this regard is well settled and it is, that the multiplier to be adopted is the one indicated in the table in Paragraph No. 40 of the report of the decision in **Sarla Verma (Smt.) and others v. Delhi Transport Corporation and another**⁷. Going by the aforesaid table, the injured falls in the bracket of 21-25 years, wherefor, a multiplier of '18' is envisaged. Therefore, this Court holds that the Tribunal has fallen in error in adopting the multiplier of 17. It should be 18.

18. So far as the future prospects are concerned, it is too well settled to brook doubt that the claimant must be held entitled to compensation for the loss of future prospects, whether he secured a job or pursued self-employment. In case of a self-employed man, who was a carpenter, the Supreme Court in **Jagdish v. Mohan and others**⁸ granted future prospects to the tune of 40% of the income, following the decision of the Constitution Bench in **National Insurance Co. Ltd. v. Pranay Sethi**⁹. In the State of Uttar Pradesh, going by the decision in **New India Assurance Co. Ltd. v. Urmila Shukla and others**¹⁰ future prospects are to be awarded in accordance with Rule 220A(3) of the U.P. Motor Vehicles Rules, 1998¹¹ and not the principle in **Pranay Sethi (supra)**. In **Urmila Shukla (supra)** it was held :

9. It is to be noted that the validity of the Rules was not, in any way, questioned in the instant matter and thus the only question that we are called upon to consider is whether in its application, sub-Rule 3(iii) of Rule 220A of the Rules must be given restricted scope or it must be allowed to operate fully.

10. The discussion on the point in **Pranay Sethi** was from the standpoint of arriving at "just compensation" in terms of Section 168 of the Motor Vehicles Act, 1988.

11. If an indicia is made available in the form of a statutory instrument which affords a favourable treatment, the decision in **Pranay Sethi** cannot be taken to have limited the operation of such statutory provision specially when the validity of the Rules was not put under any challenge. The prescription of 15% in cases where the deceased was in the age bracket of 50-60 years as stated in **Pranay Sethi** cannot be taken as maxima. In the absence of any governing principle available in the statutory regime, it was only in the form of an indication. If a statutory instrument has devised a formula which affords better or greater benefit, such statutory instrument must be allowed to operate unless the statutory instrument is otherwise found to be invalid.

12. We, therefore, reject the submission advanced on behalf of the appellant and affirm the view taken by the Tribunal as well as the High Court and dismiss this appeal without any order as to costs.

19. The accident here took place in the year 2005, and the Rules of 1998 came into effect on 26.09.2011. The question whether these rules would apply retrospectively to an accident that happened before the amendment has been answered by a Division Bench of this Court in **Sushil Kumar and others v. M/s. Sampark Lojastic Private Limited and others**¹². In **Sushil Kumar (supra)** it was held :

31. Rule 220-A was inserted in the Uttar Pradesh Motor Vehicles Rules,

1998 in view of the various decisions of the law courts for providing benefit on account of future prospects of the injured/deceased. It provides for addition of certain percentage of the income of the injured/deceased in his actual income depending upon the age of the injured/deceased for the purposes of determination of the compensation. The aforesaid Rule came into effect on 26.09.2011 after the decision of the claim petition but before filing of the appeal though the accident took place on 08.05.2010 much before the enforcement of the above Rule.

32. It is in view of the above that an argument is being raised that Rule 220-A of the Rules which came into effect on 26.09.2011 would not apply to the accident which had taken place on 08.05.2010.

33. In *Ram Sarup Vs. Munshi* AIR 1963 SC 553 it was laid down that a change in law during the pendency of an appeal has to be taken into account and will cover the rights of the parties.

34. The view expressed above was followed by the Supreme Court in *Mula Vs. Godhu* AIR 1971 SC 89.

35. In *Dayawati Vs. Inderjit* AIR 1966 SC 1423 the court had observed as under:-If the new law speaks in language, which expressly or by clear intendment, takes in even pending matters, the court of trial as well as the court of appeal must have regard to an intention so expressed, and the court of appeal may give effect to such a law even after the judgment of the court of first instance.

36. In *Amarjit Kaur Vs. Pritam Singh* AIR 1974 SC 2068 effect was given to the change in law during the pendency of an appeal as the hearing of an appeal under the procedural law of this country is in the nature of rehearing of the suit by superior court.

37. It was in the light of the above decisions that in *Lakshmi Narayan Guin and others Vs. Niranjan Modak* AIR 1985 SC 111 it was held that a change in law during the pendency of an appeal has to be taken into account and will cover the right of the parties.

38. The aforesaid decision was followed by a Division Bench of this court in *U.P. State Road Transport Corporation Vs. Smt. Madhu Sharma and others*, 2003 (4) AWC 2620 which was a case in relation to the provisions of the Motor Vehicles Act and it was observed that it is apparent that the change in law during the pendency of the original proceedings has to be taken into account so as to cover the rights of the parties.

39. In view of above decision the view expressed by the Division Bench of this court in *ICICI Lombard (Supra)* is not of good law as it does not takes into account the decisions referred to above in holding that the Rule 220-A of the Rules which came into effect on 26.09.2011 would not apply to the accident that took place prior to the said date only for the reason that the Rule was not specifically stated to be retrospective in nature.

20. In view of the law laid down in **Sushil Kumar**, the award of future prospects is to be made in accordance with Rule 220-A(3) of the Rules of 1998, even if the accident happened prior to the amendment. The said rule provides an addition of 50% of the income towards future prospects. The rule, no doubt, speaks about future prospects of the deceased, but there is no reason why it should be confined to the dependants of a dead man alone, and not a man living, who suffers the loss of a percentage of his income for the whole of his life. Considering that the injured here was aged 22 years, that is to

say, below 40 years, an addition of 50% towards future prospects to his lost income has to be made.

21. The next head of compensation is in respect of attendant charges. The claimant was hospitalized from 01.06.2005 to 19.07.2005 and 01.08.2005 to 09.08.2005, that is to say, a total period of 1 month and 27 days. It has been stated by the claimant, while testifying as P.W.1 in his deposition on affidavit in lieu of his examination-in-chief, that he has suffered a permanent handicap and is unable to undertake daily activities. It is difficult for him to move about. He always needs the support of another. It is also stated that he has to make special arrangements in case he has to go out somewhere, which involves expenditure. It has been averred that the claimant cannot walk without another's support. In his cross-examination at the instance of the Insurers, nothing material has been elicited, which may dispel the above assertions. The claimant before this Court has demanded attendant charges for a period of six months after the accident at the rate of ₹5,000/- per month. Given the nature of the injury and looking to the fact that the right lower limb of the injured had to be amputated, this Court is of opinion that attendant charges for six months at the rate of ₹5,000/- per month ought to be awarded. The medical bills, that have been accepted for a figure of ₹4,12,000/- by the Tribunal, have not been disputed by the claimant, as also the sum of ₹25,000/- towards special and extra-nourishing diet. Therefore, the award of the Tribunal on these two counts need not be disturbed.

22. Learned Counsel for the claimant has asserted further claims under the head of permanent disability in the sum of

₹25,000/-, for pain and suffering in the sum of ₹2 lacs, ₹2 lacs for loss of amenities, ₹3 lacs for bleak prospects of marriage and ₹2 lacs for future medical expenses and the cost of artificial limb. So far as the heads under which damages are to be granted in case of permanent disability, including the award of future prospects in an injury case, the question fell for consideration in **Pappu Deo Yadav v. Naresh Kumar**¹³. After a survey of previous authority, it was held by their Lordships in **Pappu Deo Yadav** (*supra*) thus :

11. Yet later and more recently in an accident case, which tragically left in its wake a young girl in a life-long state of paraplegia, this court, in Kajal v. Jagdish Chand, reiterated that in addition to loss of earnings, compensation for future prospects too could be factored in, and observed that:

"14. In Concord of India Insurance Co. Ltd. v. Nirmala Devi [Concord of India Insurance Co. Ltd. v. Nirmala Devi, (1979) 4 SCC 365 : 1979 SCC (Cri) 996 : 1980 ACJ 55 : (AIR 1979 SC 1666)], 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."

15. In R.D. Hattangadi v. Pest Control (India) (P) Ltd. [R.D. Hattangadi v. Pest Control (India) (P) Ltd., (1995) 1 SCC 551 : 1995 SCC (Cri) 250 : (AIR 1995 SC 755)], dealing with the different heads of compensation in injury cases this Court held thus : (SCC p. 556, para 9)

"9. Broadly speaking while fixing the amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has

actually incurred and which are capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations.

In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far as non-pecuniary damages are concerned, they may include : (i) damages for mental and physical shock, pain and suffering, already suffered or likely to be suffered in the future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters i.e. on account of injury the claimant may not be able to walk, run or sit; (iii) damages for loss of expectation of life i.e. on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life."

16. In **Raj Kumar v. Ajay Kumar** [Raj Kumar v. Ajay Kumar, (2011) 1 SCC 343 : (2011) 1 SCC (Civ) 164 : (2011) 1 SCC (Cri) 1161 : (AIROnline 2010 SC 125)] , this Court laid down the heads under which compensation is to be awarded for personal injuries : (SCC p. 348, para 6)

"6. The heads under which compensation is awarded in personal injury cases are the following:

Pecuniary damages (Special damages)

(i) Expenses relating to treatment, hospitalisation, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."

17. In **K. Suresh v. New India Assurance Co. Ltd.** [K. Suresh v. New India Assurance Co. Ltd., (2012) 12 SCC 274 : (2013) 2 SCC (Civ) 279 : (2013) 4 SCC (Cri) 638 : (AIROnline 2012 SC 633)] , this Court held as follows : (SCC p. 276, para 2)

"2. ... There cannot be actual compensation for anguish of the heart or for mental tribulations. The quintessentiality lies in the pragmatic computation of the loss sustained which has to be in the realm of realistic approximation. Therefore, Section 168 of the Motor Vehicles Act, 1988 (for brevity "the Act") stipulates that there should be grant of "just compensation". Thus, it becomes a challenge for a court of law to determine "just compensation" which is

neither a bonanza nor a windfall, and simultaneously, should not be a pittance."

Loss of earnings

20. Both the courts below have held that since the girl was a young child of 12 years only notional income of Rs 15,000 p.a. can be taken into consideration. We do not think this is a proper way of assessing the future loss of income. This young girl after studying could have worked and would have earned much more than Rs 15,000 p.a. Each case has to be decided on its own evidence but taking notional income to be Rs 15,000 p.a. is not at all justified. The appellant has placed before us material to show that the minimum wages payable to a skilled workman is Rs 4846 per month. In our opinion, this would be the minimum amount which she would have earned on becoming a major. Adding 40% for the future prospects, it works to be Rs 6784.40 per month i.e. 81,412.80 p.a. Applying the multiplier of 18, it works out to Rs 14,65,430.40, which is rounded off to Rs 14,66,000.

(emphasis by Court)

23. Now, reckoning the heads as laid down in **Raj Kumar** and endorsed in **Pappu Deo Yadav**, this Court has dealt with all the heads of entitlement for the claimant under pecuniary damages (special damages) except future medical expenses. The claimant before this Court has demanded a sum of ₹2 lacs towards future medical expenses and price of artificial limb. There is nothing said in the evidence of the injured about the use of an artificial limb, but this Court cannot ignore from consideration the fact that the permanent disability certificate and the parole evidence show that the right lower limb of the claimant has been amputated in

consequence of the accident. Even if he has not yet resorted to an artificial limb, he is certainly in need of it and would use one anytime in future to improve the quality of life. The expenses for securing such a limb are not a remote cause, but a direct impact of the accident that he has suffered. There is testimony to the effect that whenever there is pain, the appellant has to be treated for it. The condition of the claimant shows that he would incur medical expenses to take care of the condition emergent on account of accident in future also. Regarding the cost of replacement of an artificial limb, which would also take in its fold the acquisition of one for the first time, I have held in **Oriental Insurance Co. Ltd., Ghaziabad v. Lokesh alias Lovesh and another**¹⁴ :

25. It has not been doubted or disputed before this Court that the claimant would indeed require replacement of his artificial limb every two years. The cost of the replacement at the time when the Tribunal heard the matter was Rs. 11,000/-. That was a long time ago and the rising price index has to be born in mind while estimating the future expense on the replacement of this facility. In the Court's opinion, the compensation towards expenses for future and current replacement of the artificial limb has to be enhanced from Rs. 35,000/- to Rs. 2 lacs. The sum of Rs. 50,000/- awarded for the mental and physical pain sustained on account of the accident and the loss of his job by the claimant, estimated by the Tribunal, is also unexceptionable....

24. Taking into account the potent likelihood of the injured requiring an artificial limb at any time and future medical expenses, which appear to be recurrent, it would be appropriate to award

a sum of ₹2 lacs towards future medical expenses and cost of the artificial limb, including future replacements, if necessary. The Court cannot, in such matters, take a very pedantic view based on pleadings and evidence, as the learned Counsel for the Insurers wants.

25. Thus, this Court would have to take a realistic view about the imminent possibility of the injured requiring an artificial limb at any time in future and the future medical expenses involved, given that he has lost his right lower limb to the accident, amputated above the knee.

26. This would bring in consideration of the non-pecuniary damages/general damages. The appellant has demanded a sum of ₹2 lacs for pain, suffering and trauma as a consequence of the accident. Learned Counsel for the claimant has placed reliance upon the decision in **V. Mekala** to say that the compensation under this head should be enhanced to ₹2 lacs. He has invited the attention of the Court to Paragraph No. 21 of the report, where it has been held :

21. The compensation under the head pain and suffering and mental agony was awarded by the High Court after recording concurrent findings with the award passed by the Tribunal. However, the courts below have not recorded the nature of the permanent disablement sustained by the appellant, while awarding Rs 1,00,000 under this head which is too meagre an amount and is contrary to the judgment of *R.D. Hattangadi* [*R.D. Hattangadi v. Pest Control (India) (P) Ltd.*, (1995) 1 SCC 551 : 1995 SCC (Cri) 250] and *Govind Yadav* [*Govind Yadav v. New India Insurance Co. Ltd.*, (2011) 10 SCC 683 : (2012) 3 SCC (Civ) 1082 : (2012) 1 SCC (Cri) 82 : (2012)

1 SCC (L&S) 422] cases. The relevant paragraphs of *Govind Yadav case* [*Govind Yadav v. New India Insurance Co. Ltd.*, (2011) 10 SCC 683 : (2012) 3 SCC (Civ) 1082 : (2012) 1 SCC (Cri) 82 : (2012) 1 SCC (L&S) 422] read as under: (SCC p. 695, paras 25-26)

“25. The compensation awarded by the Tribunal for pain, suffering and trauma caused due to the amputation of leg was meagre. It is not in dispute that the appellant had remained in the hospital for a period of over three months. It is not possible for the tribunals and the courts to make a precise assessment of the pain and trauma suffered by a person whose limb is amputated as a result of accident. Even if the victim of accident gets artificial limb, he will suffer from different kinds of handicaps and social stigma throughout his life. Therefore, in all such cases, the tribunals and the courts should make a broad guess for the purpose of fixing the amount of compensation.

26. Admittedly, at the time of accident, the appellant was a young man of 24 years. For the remaining life, he will suffer the trauma of not being able to do his normal work. Therefore, we feel that ends of justice will be met by awarding him a sum of Rs 1,50,000 in lieu of pain, suffering and trauma caused due to the amputation of leg.”

Therefore, under this head the amount awarded should be enhanced to Rs 2,00,000 as the doctor PW 2 has opined that at the time of walking with support of crutches, the appellant claimant will be suffering pain permanently. Therefore, under this head it has to be enhanced from Rs 1,00,000 to Rs 2,00,000.

27. Going by the principle in **V. Mekala**, there is absolutely no hindrance in awarding a sum of ₹2 lacs under the head

of pain, suffering and trauma occurring in consequence of the accident. So far as loss of amenities and loss of expectation of life (shortening of life) which includes bleak prospects of marriage are concerned, I had considered the issue in **Lokesh** (*supra*) where it was held, following the decision of the Supreme Court in **Raj Kumar**, as follows :

25. However, the compensation awarded for the loss of future amenities and mental pain yet to come, would not be admissible in view of the fact that the claimant now seeks some addition to the substantive loss of income under the head of future prospects.

26. In **Raj Kumar** (*supra*), it has been held :

"15. It may be noted that when compensation is awarded by treating the loss of future earning capacity as 100% (or even anything more than 50%), the need to award compensation separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may have to be awarded under the head of loss of amenities or loss of expectation of life, as otherwise there may be a duplication in the award of compensation. Be that as it may."

27. This Court is, therefore, of opinion that for the loss of amenities or loss of expectation of life or pain in the future, a token sum of Rs. 2,000/- ought to be awarded instead of Rs. 50,000/-.

28. Therefore, in the opinion of this Court, so far as loss of amenities or loss of expectation of life or pain in future are concerned, a token sum of ₹2,000 ought to be awarded in this case.

29. Therefore, the award passed by the Tribunal is required to be revised and determined as follows :

(A) PECUNIARY DAMAGES (SPECIAL DAMAGES) :

(1) Expenses relating to treatment, hospitalization and medicines = **₹4,12,000/-**

(2) Expenses incurred on special diet and nourishing food = **₹25,000/-**

(3) Attendant charges = **₹30,000/-**

(4) Compensation towards expenses for future and current replacement of artificial limb = **₹2,00,000/-**

(5) Loss of earning suffered by the injured on account of the accident :

(i) Loss of monthly income (to the claimant) = ₹2500/-

(ii) Lost monthly income + future prospects (lost monthly income x 50%) = ₹2500 + 1250 = ₹3750/-

(iii) Lost annual income to the claimant = ₹3750 x 12 = ₹45,000/-

(iv) Total income lost = ₹45,000 x 18 = **₹8,10,000/-**

(B) NON-PECUNIARY DAMAGES (GENERAL DAMAGES) :

(1) Damages for pain, suffering and trauma in consequence of the injuries = **₹2,00,000/-**

(2) Loss of amenities of life and loss of expectation of life or pain in future = **₹2000/-**

TOTAL COMPENSATION PAYABLE = ₹4,12,000 + 25,000 + 30,000 + 2,00,000 + 8,10,000 + 2,00,000 + 2,000 = ₹16,79,000/-

(Rupees Sixteen Lacs Seventy Nine Thousand only)

30. The impugned award is **modified** and it is ordered that the Insurers shall pay in compensation to the claimant a sum of ₹16,79,000/-. The aforesaid sum of money

shall carry simple interest at the rate of 7% per *annum* from the date of institution of claim petition, until realization.

31. The sum of money already deposited with the Tribunal pursuant to the impugned award, or the interim order passed by this Court, shall be adjusted against the award. The other direction of the Tribunal shall remain intact.

32. In the result, this appeal stands **allowed in part.**

33. Costs easy.

(2023) 8 ILRA 219

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 24.07.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Matters U/A 227 No. 6926 of 2023
With other related cases

Mahendra Singh **...Petitioner**
Versus
C/M Rastriya Sabha Khair & Ors.
...Respondents

Counsel for the Petitioner:

Sri Pankaj Agarwal, Sri Shekhar Gangal,
Ms. Utkarshni Singh

Counsel for the Respondents:

Sri Ankit Kumar Rai

Held:

Even if the office bearers of a registered society are not formally approved on the date of suit, yet where there is no rival claim and they are in effective and actual control of the institution, they can validly maintain a suit for eviction. The doctrine of *de facto* applies and lends legitimacy to the actions of such office bearers. Where the

building is part of a recognized educational institution, exemption under Section 2(1)(b) of the U.P. Act No.13 of 1972 applies. The eviction suit filed by the Society was validly maintainable in law.

Case Law Discussed:

1. Committee of Management Dayanand Arya Kanya Degree College Vs Director of Higher Education, (1998) 4 SCC 104

2. Mehendi Hasan Vs St. of U.P., 2014 (3) ADJ 437 (DB)

3. Committee of Management Gangadin Ram Kumar Inter College Vs Deputy Director of Education, 2006 (4) ADJ 381 (DB)

4. Committee of Management, Pt. Jawaharlal Nehru Inter College Vs Deputy Director of Education, AIR 2005 All 101 (FB)

Laws Applied:

1. Societies Registration Act, 1860, Sections 5, 6

2. Civil Procedure Code, 1908, Order VII Rules 1(b), 4

3. Transfer of Property Act, 1882, Section 105

4. U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, Section 2(1)(b)

5. Provincial Small Cause Courts Act, 1887, Sections 15, 16 (as amended in U.P.)

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. This bunch of petitions under Article 227 of the Constitution of India involve common questions of fact and law and, therefore, all these petitions are being decided by a common judgment. For the purpose of judgment, Matter under Article 227 of the Constitution of India No.6926 of 2023 (Mahendra Singh v. Committee of Management Rastriya Sabha Khair & 2 others) is being treated as a leading case.

2. As per pleadings contained in the petition and the material annexed thereto, the petitioner was a tenant in the shop bearing No.36 forming part of a building belonging to Khair Kanya Mahavidyalaya Khair, District Aligarh. A suit bearing S.C.C. Suit No.38 of 2014 (Committee of Management Rastriya Sabha Khair & others v. Mahendra Singh) claiming a decree for eviction was filed by the Committee of Management, Rastriya Sabha Khair, Aligarh with the description that it is a Society registered under the provisions of the Societies Registration Act, 1860 (hereinafter referred to as 'the Act, 1860') through its Manager/Secretary Dr. Vishal Sharma; by Vishal Sharma himself as a person in the capacity of Manager/Secretary of Rastriya Sabha Khair and also by Committee of Management, Khair Kanya Mahavidyalaya, Khair, Aligarh respectively as plaintiff Nos.1, 2 and 3.

3. The aforesaid suit was filed with the averments that the property in dispute belongs to an educational institution which is recognised under the provisions of the Uttar Pradesh State Universities Act, 1973 (hereinafter referred to as 'the Act, 1973') and the said Institution is run by a Society registered under the Act, 1860. It was alleged that the provisions of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent & Eviction) Act, 1972 (hereinafter referred to as 'the U.P. Act No.13 of 1972') were not applicable to the shop in dispute and since the Institution felt a great need of space to construct its building, the shop in dispute alongwith various shops (forming subject matter of litigation in the connected petitions) was required. It was further alleged that tenancy of the petitioner was determined by serving a registered notice dated 13.06.2014 but

since the shop was not vacated, suit for ejectment claiming decree of eviction was filed.

4. The petitioner filed written statement and admitted the landlord-tenant relationship in between the petitioner and the Society but denied the said relationship in relation to Khair Kanya Mahavidyalaya, Khair, Aligarh. The written statement was amended during the course of proceedings and it was alleged that the plaintiff-Committee/Society was not registered under the Act, 1860; the office bearership of the persons described in the plaint was not approved by the University; no rent was due on the date of issuance of notice; the notice was invalid and that the suit having been filed by unauthorized persons was liable to be dismissed.

5. The parties led evidence in support of their respective cases and I find from the record that apart from other documents, the plaintiffs filed Scheme of Administration of the Institution, list of office bearers approved by the University pertaining to year 2014-2015; certain letters issued by the authorities in this regard; the Bye-laws and also Certificate of renewal of registration of the Society. In oral evidence, Vishal Sharma appeared as PW-1 in the capacity of Manager/Secretary of the Committee of Management of the Society and was cross-examined on behalf of the defendant-petitioner.

6. After analysing the case of the parties, the Judge Small Causes Court, by impugned judgment and decree dated 06.09.2022, decreed the suit and directed the defendant-petitioner to vacate the shop in dispute within a period of two months. The defendant-petitioner assailed the aforesaid decree by filing a revision under

Section 25 of the Provincial Small Cause Courts Act, 1887 (hereinafter referred to as 'the Act, 1887'), however, the challenge has been turned down by the District Judge, Aligarh by dismissing the revision by order impugned dated 01.04.2023.

7. I have heard Ms. Utkarshni Singh, learned counsel for the petitioner and perused the record. Shri Ankit Kumar Rai represents the respondents through caveat.

8. Learned counsel for the petitioner has mainly argued that Vishal Sharma, alleging himself to be Manager of the plaintiff No.1 was not a duly elected Manager and as the Society was not duly recognized by Deputy Registrar, Firms, Societies and Chits, Aligarh, the suit instituted on behalf of the Society through the said Manager was not maintainable. It has further been argued that though the landlord-tenant relationship was not denied by the defendant-petitioner, the courts below, while considering the admission to this effect, have erred in holding the suit as maintainable. It has further been argued that the petitioner had moved an application 29-C before the trial court under Order XI Rules 12 and 14 read with Section 151 of the Civil Procedure Code, 1908 (hereinafter referred to as 'the Code, 1908') seeking a direction for the plaintiffs to file documents of registration and Constitution of Society and also recognition letter of the plaintiff No.3 under the provisions of U.P. State Universities Act, 1973 and though the said application was allowed by the Judge Small Causes Court by order dated 03.10.2015, the documents were not filed by the plaintiff-respondents and, hence, adverse inference should have been drawn by the courts but has not been drawn. It has further been argued that the courts below

have failed to take into consideration the amended paragraphs of the written statement, by which, the locus and right to sue of the plaintiffs was specifically objected to by the defendant-petitioner.

9. I have considered the submissions advanced by the learned counsel for the petitioner and I would like to deal with the same in the light of statutory provisions which are applicable in the proceedings instituted by a Society registered under the Act, 1860 and other laws.

10. There is no dispute about the fact that since the shop in dispute forms part and parcel of the building vested in a recognized educational institution, the provisions of U.P. Act No.13 of 1972 would not be applicable by virtue of Section 2(1)(b) of the said Act. There is also no dispute about the landlord-tenant relationship in between the parties to the litigation, atleast in between the plaintiff Nos.1 and 2 and the defendant-petitioner. There is also no dispute that the notice determining the tenancy of the defendant-petitioner was duly served upon him. The dispute in the present case is as to whether, in the light of the material placed before the courts below, it could be said that the plaintiffs had no right to sue or that the suit instituted by them was not maintainable.

11. I find that there was sufficient material on record in the form of Scheme of Administration of the Institution, list of office bearers approved by the University pertaining to the year 2014-2015; certain letters issued by the authorities in this regard; the Bye-laws and also Certificate of renewal of registration of the Society, Paper No.27-Ga/14 (list of office bearership of 2014-15) and paper No.27-Ga/15 (certificate issued by the Registrar of

Societies, U.P. renewing the registration of the Society for a period of five years w.e.f. 28.01.2015) to establish that the Society was duly registered under the provisions of Act, 1860. Even if, by any stretch of imagination, it is assumed that the Society was not registered on the date of institution of the suit (though I do not find any such material to this effect), the question would arise as to whether office bearers of the Society, having actual and effective control over the affairs of the Society, are competent to institute and press a suit for ejectment of a tenant from immovable property forming part of the building vested in a recognized educational institution run by the Society.

12. Sections 5 and 6 of the Act, 1860 are required to be referred in this regard and are quoted hereinbelow:-

“5. Property of society how vested.—The property, movable and immovable, belonging to a Society registered under this Act, if not vested in trustees, shall be deemed to be vested, for the time being, in the governing body of such Society, and in all proceedings, civil and criminal, may be described as the property of the governing body of such society for their proper title.

6. Suits by and against societies.—Every society registered under this Act may sue or be sued in the name of the President, Chairman, or Principal Secretary, or trustees, as shall be determined by the rules and regulations of the society, and, in default of such determination, in the name of such persons as shall be appointed by the governing body for the occasion :

Provided that it shall be competent for any person having a claim or demand against the Society, to sue the president or chairman, or principal

secretary or the trustees thereof, if on application to the governing body some other officer or person be not nominated to be the defendant.”

13. From the aforesaid, it is clear that any immovable property belonging to a Society shall be deemed to be vested for the time being in the Governing Body of such Society and in all proceedings, the property, movable and immovable, belonging to a Society registered under this Act, if not vested in trustees, shall be deemed to be vested, for the time being, in the governing body of such Society, and in all proceedings, civil and criminal, may be described as the property of the governing body of such society for their proper title. It is also clear that such a Society may sue or be sued in the name of the President, Chairman or Principal Secretary or Trustees and, in case, anybody has claim or demand against the Society, he may sue the office bearers of the Society by launching appropriate proceedings.

14. Insofar as the requirement of a suit instituted by such plaintiff is concerned, Order VII Rule 1(b) and Rule 4 of the Civil Procedure Code, 1908 need to be referred and are quoted hereinbelow:-

“Order VII Rule 1(b)- the name, description and place of residence of the plaintiff;

Rule 4- When plaintiff sues as representative.- Where the plaintiff sues in a representative character the plaint show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it.”

15. From a perusal of the aforesaid provisions read with the array of the

parties, I find that the description of plaintiffs was in consonance with Order VII Rule 1 (b) of the Code, 1908 and the office bearers of the Societies had, by leading cogent documentary and oral evidence, established that they were having **actual existing interest in the subject matter (i.e. the shop in dispute)** and, hence, since the office bearers were representing the Society, the requirement of Order VII Rule 4 of the Code, 1908 also stood fulfilled.

16. Admittedly, the suit was filed under Sections 15 and 16 of the Act, 1887 and Section 15, as amended in the State of U.P., as per the Second Schedule contained in the Act clearly provides institution of a suit by lessor for eviction of lessee from the building after determination of his lease. Since the provisions of U.P. Act No.13 of 1972 are not applicable, as already observed, the definition of “lessor” and “lessee” shall have to be read in the light of Section 105 of the Transfer of Property Act, 1882 which reads as follows:-

***“105. Lease defined.*—A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.**

***Lessor, lessee, premium and rent defined.*—The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.”**

17. In view of the above discussion, I find that there is no flaw in institution of

suit by a Society represented by its office bearers. The emphasis of learned counsel for the petitioner that the Society was not duly registered under the provisions of Act, 1860 is contrary to the record of proceedings.

18. Now coming to the order dated 03.10.2015 passed by the Judge Small Causes Court on application 29-C, I find that even the Judge Small Causes Court did not mention in his order dated 03.10.2015 as to what documents were not filed by the plaintiffs and what were required to be filed. A perusal of the said order shows that specific objections were filed by the plaintiffs that the documents sought to be brought on record as per the defendant-petitioner, were already filed by the plaintiffs and there was no other document with the plaintiffs. The Judge Small Causes Court observed that whatever documents are available with the plaintiffs may be filed by them and whatever documents are not available, the plaintiffs are not bound to file the same. I have already observed in the judgment that sufficient documents were there to establish that Society was renewed under the provisions of law and list of office bearers was also duly approved.

19. In this regard, analysis of oral evidence is also of quite significance. PW-1 Vishal Sharma, who appeared in the capacity of Manager/Secretary of the plaintiff No.1, had clearly stated in his cross-examination that list of office bearers and other documents pertaining to the Society had been filed by the plaintiffs and that it was wrong to allege that he was not office bearer or Secretary of the Society. The petitioner who had appeared as DW-1, in his cross-examination, stated as follows:-

“मुझे नहीं मालूम कि राष्ट्रीय सभा खैर क्या है, मैं राष्ट्रीय सभा का संविधान नहीं पढ़ा मैं डा० निशान शर्मा को नहीं जानता, सोसाइटी का रजिस्ट्रेशन कब तक वैधानिक है, हमें नहीं मालूम है, मैं डिप्टी रजिस्ट्रार सोसाइटी आगरा नहीं गया हूँ, सोसाइटी की तरफ से दावा दायर करने का किसे अधिकार है मुझे नहीं मालूम है। मैं किरायेदारी कानून को नहीं पढ़ा, सोसाइटी का नवीनीकरण कब हुआ मुझे नहीं मालूम है। सोसाइटी का कार्यालय कहाँ है नहीं मालूम है।”

20. The Judge Small Causes Courts, in the final judgment, has also referred to the cross-examination of petitioner DW-1 and has also held that the plaintiff-petitioner No.1, being a juristic person, and there being sufficient material placed by the plaintiffs, the suit was clearly maintainable. It was also held that the educational institution is being run by the plaintiff No.1-Society and also that nobody has raised any objection with regard to office bearership or any other aspect of the Society. The Judge Small Causes Court also held that the dispute was neither a dispute of title nor a dispute relating to the office bearership of the Society and, therefore, the defendant had no right to raise any objection in this regard.

21. Even if, for the sake of argument, it is assumed to the extreme extent that on the date of institution of suit, there was some defect in the Society or its office bearership (though I do not find any such defect after perusing the entire record), the question of **effective and actual control** over and *de facto* management *qua* the affairs of the Society and educational institution needs to be elaborated.

22. Coming to the *de facto doctrine*, the literal meaning of this would be 'in fact'. The doctrine of *de facto* is based on sound principle of public policy and is aimed at removing any kind of insecurity

and confusion amongst the people whose rights would get prejudiced in the event the orders passed or actions taken by a person, who in fact occupied the office, is held to be void on account of his occupation of office subsequently being held to be illegal. It is rightly said that doctrine is borne of necessity and to arrest mischief if there exists office in law and an authority occupies it by virtue of its appointment or election or nomination. Such a person or body is clothed with insignia of the office and exercises powers and functions as such and the authority to exercise such power is upheld by virtue of *de facto doctrine*.

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

24. Following the above judgment, a Division Bench of this Court in the case of *Mehandi Hasan and others v. State of U.P. and others reported in 2014 (3) ADJ 437 (DB)*, had an occasion to deal with the situation where Committee of Management continued to enjoy office by virtue of stay order passed by this Court even though subsequently the election was held to be invalid. In that case, the Committee of Management which was continued by virtue of an interim order, issued an advertisement. The petitioners, who had applied against the advertisement and their

selection was held but the same was questioned on the ground that their appointment was *void ab initio* as at that time the Committee was only on the strength of interim order. The similar view was taken by a Division Bench of this Court in the case of **Committee of Management Gangadin Ram Kumar Inter College, Ramgarh Barwan, District Jaunpur v. Deputy Director of Education, Vth Region, Varanasi and others, 2006(4) ADJ 381 (DB)**. The question of effective control over the managerial affairs of an educational institution has also been emphasized by the Five Judges Full Bench of this Court in the case of **Committee of Management, Pandit Jawaharlal Nehru Inter College, Bansgaon and Anr. v. Deputy Director of Education, Gorakhpur & Ors.** reported in **AIR 2005 Allahabad 101 (FB)**.

25. In view of the aforesaid position of law, I find that there being no rival Committee or Society raising objection with regard to the office bearership of the plaintiffs, there being no suit or proceedings under the proviso attached to Section 6 of the Act, 1860, there being sufficient material to establish that plaintiffs were under effective and actual control over the affairs of the Society, and their control being saved by doctrine of both *de facto* and *de jure* management, I find that suit for eviction of the tenant-petitioner from the immovable property was very much maintainable in the light of the provisions of Sections 5 and 6 of the Societies Registration Act 1860, Order VII Rules 1(b) and 4 of the Civil Procedure Code, 1908, Section 105 of the Transfer of Property Act read with Second Schedule of U.P. (Amendment) contained in Section 15 of the Provincial Small Causes Court Act, 1887.

26. No other point was argued.

27. The findings recorded by the Judge Small Causes Court as affirmed by the revisional court are pure findings of fact which do not require any interference in exercise of powers under Article 227 of the Constitution of India, and the present petition alongwith nine other petitions (as noted hereinabove) fail and are, accordingly, **dismissed**.

28. The petitioners are granted time to vacate the shop(s) in dispute **on or before 30.04.2024** provided they continue to deposit admitted rent before the Judge Small Causes Court, month-to-month, which shall be released in favour of the plaintiff-respondents without furnishing any security. It is also provided that, in case, the petitioners fail to vacate the shops in dispute as directed hereinabove, the Executing Court shall execute the decree of eviction forthwith by using force **on or before 31.05.2024** i.e. within a month of the last date fixed by this Court saving possession of the petitioners.

(2023) 8 ILRA 225

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 04.08.2023

BEFORE

**THE HON'BLE SAUMITRA DAYAL SINGH, J
THE HON'BLE VINOD DIWAKAR, J.**

Special Appeal No. 309 of 2019

**Oriental Insurance Co. Ltd., Moradabad
...Appellant**

Versus

Smt. Priyanka Agarwal ...Respondent

Counsel for the Appellant:

Sri Amaresh Sinha, Sri Anubhav Sinha

Counsel for the Respondent:

Sri Vijay Prakash Jaiswal

The claim for compassionate appointment must be considered in accordance with the scheme prevailing on the date of death of the employee, not based on any subsequent or retrospective change in policy. In the present case, the deceased employee died on 06.09.2014, before the reintroduction of the compassionate appointment scheme, which came into effect prospectively from 01.11.2014, as per Clause 8 of the Scheme notified on 07.08.2014. The learned single judge's direction to consider the respondent's application ignoring the cut-off date was set aside, as no challenge was made to the validity of the cut-off date (Clause 8) in the writ petition. Compassionate appointment is not a fundamental right but an exception to Article 14 and 16; it must be interpreted strictly per the scheme. Doctrine of equality in public employment overrides any claim of retrospective entitlement in absence of legal provision or constitutional challenge. Appeal Allowed. Order of the single judge set aside.

Appeal allowed.**Reference:**

1. Gazula Dasaratha Rama Rao Vs St. of A.P., AIR 1961 SC 5377
2. Umesh Kumar Nagpal Vs St. of Har., (1994) 4 SCC 138
3. Ajay Hasia Vs Khalid Mujib Sehravardi, (1981) 1 SCC 722 –
4. R.K. Garg Vs U.O.I., (1981) 4 SCC 675 –
5. S. B.I. Vs Jaspal Kaur, (2007) 9 SCC 571
6. Bhawani Prasad Sonkar Vs U.O.I., (2011) 4 SCC 209
7. S.B.I. Vs Raj Kumar, (2010) 11 SCC 661 –

8. MGB Gramin Bank Vs Chakrawarti Singh, (2014) 13 SCC 583

9. Canara Bank Vs M. Mahesh Kumar, (2015) 7 SCC 412 –

10. Indian Bank Vs Promila, (2020) 2 SCC 729 –

11. N.C. Santosh Vs St. of Karn., (2020) 7 SCC 617

12. St. of M.P. Vs Amit Shrivastava, (2020) 10 SCC 496

13. St. of M.P. Vs Ashish Awasthi, (2022) 2 SCC 157

14. Secretary to Government Department of Education (Primary) Vs Bhmesh @ Bheemappa, 2021 SCC OnLine 1264

15. St. of U.P. Vs Himanshu Yadav, Special Appeal No. 126 of 2023

(Delivered by Hon'ble Saumitra Dayal
Singh, J.
&
Hon'ble Vinod Diwakar, J.)

1. Heard Sri Anubhav Sinha, Advocate, holding brief of Sri Amaresh Sinha, learned counsel for the respondent-appellant and Sri Vijay Prakash Jaiswal, learned counsel for the petitioner-respondent.

2. The present intra-court appeal has been filed against the order of the learned single-judge dated 22.2.2019 passed in *Priyanka Agarwal Vs. Union of India and 2 Ors. (Writ-A No. 51712 of 2017)*. By that order, the learned single-judge has allowed the writ petition and directed the appellant-respondent to consider the claim of the respondent-petitioner for grant of compassionate appointment, ignoring the cut-off date i.e. 1.11.2014 arising under the Scheme for Compassionate Appointment in

Public Sector and General Insurance Companies, introduced vide communication dated 7th August, 2014, issued by the Director, Department of Financial Services, Ministry of Finance, Government of India.

3. The petitioner's husband Sri Surendra Kumar Agarwal died-in-harness on 6.9.2014, while working on the post of Assistant, with the Oriental Insurance Company Ltd., Moradabad. Undisputedly, on the date of occurrence of his death, there did not exist a scheme for grant of compassionate appointment, to his family members. In fact, there existed and was enforced a scheme for grant of *Ex-gratia* payment, to the family of the deceased-employees of the Oriental Insurance Company Ltd.

4. Later, on 7.8.2014, vide communication issued by the Director, Department of Financial Services, Ministry of Finance, Government of India, the Scheme for Grant of Compassionate Appointment, was published. For ready reference, Clause 8 of the Scheme for Grant of Compassionate Appointment, reads as below:

"8. The scheme comes into force prospectively from 01st November 2014. Application for employment under the Scheme from eligible dependent should normally be considered up to five years from the date of death or retirement on medical grounds taking place on or after 01st November, 2014 and decision to be taken on merit in each case."

5. On 12.12.2014, the present petitioner-respondent filed her application for grant of compassionate appointment. It was rejected by communication dated

5.3.2015 for the reason that the death had occurred prior to the cut-off date. Here, it may also be noted, much earlier there existed a scheme for grant of compassionate appointment. However, it was discontinued with effect from 1.6.2002 and replaced with the scheme providing for *Ex-gratia* payment.

6. In the writ petition, the only prayer made reads as below:

"(a) Issue a writ, order or direction in the nature of mandamus directing the respondent nos. 1 and 2 to appoint the petitioner on compassionate ground as soon as possible and in this regard efforts may be done by the respondents.

(b) Issue a writ, order or direction in the nature of mandamus directing the respondent no.2 to decide the representations of the petitioner pending before him.

(c) Issue any other writ, order or direction which this Hon'ble Court may deem fit and proper in the circumstance of the case."

7. While allowing the writ petition, the learned Single Judge has observed as below:

"I have considered the submissions of the parties.

An employee or the dependent cannot decide his/her date of death. It is not in the hands of dependent of an employee or the employee himself/herself when he/she would die. Even before 1.11.2014 there was old scheme of 2002 and there is no dispute that under the old scheme, the petitioner was entitled for being given compassionate appointment. The petitioner's claim for appointment on

compassionate ground is being denied on the ground of new scheme in which an artificial date of death of an employee i.e. 1.11.2014 is fixed, which has no basis. Even otherwise, the petitioner was entitled for consideration of appointment on compassionate ground under the old scheme when the death of the husband of the petitioner was occurred on 6.9.2014

Considering the fact that the date of death of an employee has been fixed in an artificial manner, the same cannot be made basis for denying the legitimate claim of the petitioner for appointment on compassionate ground.

Accordingly, the present writ petition is allowed and the respondents are directed to consider the claim of the petitioner for compassionate appointment ignoring the cut off date i.e. 1.11.2014 and take a decision in accordance with law and appoint the petitioner on compassionate ground, if she is otherwise found eligible and qualified, within a period of one month from today.”

8. Having heard counsel for the parties and having perused the record, we find, on the date of occurrence of the death of Sri Surendra Kumar Agarwal, there did not exist any scheme for grant of compassionate appointment. On that date, there existed a scheme to provide *Ex-gratia* payment to the family of the deceased-employee. The scheme for compassionate appointment that was earlier discontinued with effect from 1.6.2002, was first re-introduced by communication dated 7th August, 2014 written by the Director, Department of Financial Services, Ministry of Finance, Government of India. As noted above, that scheme was made effective prospectively from 1.11.2014 with further clarification, it would apply only to cases

where the death may occur on or after 1.11.2014.

9. In absence of any challenge raised to Clause 8 of that Scheme, it remains well settled in law that grant of compassionate appointment is not a fundamental right. In fact, that concession exists by way of an exception to the fundamental right to equality in employment. Being an exception, it has to be construed strictly in terms of the scheme under which that exception has been created. Here, it may be noted, from the earliest time, under our Constitutional scheme, claims for appointment on public posts on descent only, were looked down upon being in violation of the fundamental right to equality in public employment as was observed in a five judge Bench decision of the Supreme Court in ***Gazula Dasaratha Rama Rao Vs. State of Andhra Pradesh & Ors.***, AIR 1961 SC 5377, at the same time grant of compassionate appointment to a family member of an employee who may have suffered death-in-harness, thereby suddenly visiting the circumstances of destitution on his hapless family, was recognized as a permissible exception to the general rule of equality arising under Articles 14 and 16 of the Constitution of India. Thus, in ***Umesh Kumar Nagpal Vs. State of Haryana***, (1994) 4 SCC 138, it was held:

“2. The question relates to the considerations which should guide while giving appointment in public services on compassionate ground. It appears that there has been a good deal of obfuscation on the issue. As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and met-it. No other mode of appointment nor any other consideration is 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 dependent 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.”

10. In the present facts, the Scheme for Compassionate Appointment clearly provides that that exception to the rule of equality in employment may be granted only in deserving cases, where death may occur on or after 1.11.2014. Therefore, in the first place, it never became open to the learned single-judge to confer any right to claim compassionate appointment on any person who may not have been eligible owing to that stipulation of the cut-off date.

11. Then, in the absence of any challenge raised to the validity of Clause-8 of the Scheme for Grant of Compassionate Appointment, first introduced with effect from 1.11.2014, it further never became open to the learned single-judge, either to consider or to read that cut-off date was arbitrary. Before such conclusion may have been drawn, there must have existed a direct challenge raised to the cut-off date prescribed by the Scheme for Grant of Compassionate Appointment. Since, the petitioner chose to only seek a direction to decide her application without challenging

the cut-off date prescribed under the scheme for grant of compassionate appointment, that observation of the learned single-judge that Clause 8 is arbitrary, is not founded, either on facts or in law, as neither any fact was pleaded to base that premise nor any relief was sought, of that nature.

12. In that light, the submission of learned counsel for the respondent-petitioner, on the strength of five-judge bench decisions of the Supreme Court in *Ajay Hasia Vs. Khauid Mujib Sehravardi (1981) 1 SCC 722* and *R.K. Garg Vs. Union of India and others (1981) 4 SCC 675*, cannot be entertained with any seriousness.

13. Matters of constitutional validity are to be considered only in deserving cases, where necessary facts are first pleaded and specific challenge is raised on such pleadings. The Writ Court may never entertain such a challenge or enter into that exercise in a cavalier manner. A presumption as to validity of the law pre-exists under our jurisprudence. In absence of specific challenge raised, the submission advanced could not have been taken up less so decided in favour of the petitioner-respondent.

14. The further submission attempted to be advanced on the strength of Section 17(A) of the General Insurance Business (Nationalisation) Act, 1972 also does not merit any acceptance, as Clause 1 thereto applies to terms and conditions of service of officers and employees of the Corporation. It has nothing to do with the claim for grant of compassionate appointment to a family member of a deceased-employee. Therefore, no benefit

may be drawn from the language of Section 17(A) (6) of the Act.

15. Though, parties are at variance as to the law to be applied with respect to the date of death or with respect to the date of claim being filed or with respect to the date of being considered, we may only note that in **State Bank of India and Others Vs. Jaspal Kaur (2007) 9 SCC 571**, the employee died in harness on 01.8.1999. The application for grant of compassionate appointment, made by his wife on 05.2.2000 came to be rejected on 07.1.2002. Later a scheme for grant of compassionate appointment was introduced on 04.8.2005. The High Court issued a direction to the bank to consider the application filed earlier, under the new scheme. That decision of the High Court was reversed by the Supreme Court. The same principle was reiterated in **Bhawani Prasad Sonkar Vs. Union of India and Others (2011) 4 SCC 209**. In **State Bank of India Vs. Raj Kumar (2010) 11 SCC 661**, it was opined, the Scheme for Grant of Compassionate Appointment existing on the date of decision will govern the fate of all pending applications. That view was reiterated in **MGB Gramin Bank Vs. Chakrawarti Singh (2014) 13 SCC 583**.

16. Again in **Canara Bank and Another Vs. M. Mahesh Kumar (2015) 7 SCC 412**, the death occurred on 10.10.1998 whereas the application for grant of compassionate appointment was filed on 30.11.1998. While that application remained pending, the Scheme for Grant of Compassionate Appointment was withdrawn and replaced with another scheme providing for *Ex-gratia* payment, in the year 2005. After considering the earlier law laid down by it, a two judge bench of the Supreme Court reached the

conclusion that the case of the claimant (in that case) could not be dealt with in terms of the subsequent scheme. It required that claim to be reconsidered in accordance with the scheme that was in existence on the date of occurrence of death and also on the date of claim being made.

17. Then, in **Indian Bank and Others Vs. Promila and Another (2020) 2 SCC 729**, the death occurred on 15.1.2004 whereas the application for grant of compassionate appointment was made on 24.1.2004. The scheme for grant of compassionate appointment was introduced on 27.4.2004 i.e., after the occurrence of death and filing of the claim petition. Following **Canara Bank** (supra), a two judge bench of the Supreme Court held, the claim would be determined in accordance with the scheme that was existing on the date of occurrence of death and filing of the claim petition.

18. Later, in **N.C. Santosh Vs. State of Karnataka and Others (2020) 7 SCC 617**, a three judge bench of the Supreme Court considered, amongst others, the earlier decisions of that Court in **State Bank of India Vs. Raj Kumar** (supra), **MGB Gramin Bank Vs. Chakrawarti Singh** (supra) as also **Canara Bank and Another Vs. M. Mahesh Kumar** (supra). In that case, death had occurred on 25.1.1998, application for grant of compassionate appointment was made on 29.6.2000 whereas the rule providing for compassionate appointment stood amended w.e.f. 01.4.1999 thereby taking away the enabling provision to grant compassionate appointment. Nevertheless, appointment was granted on 25.8.2000. It was later withdrawn on 04.11.2003. It was observed as below:

“19. Applying the law governing compassionate appointment culled out from

the above cited judgments, our opinion on the point at issue is that the norms, prevailing on the date of consideration of the application, should be the basis for consideration of claim for compassionate appointment. A dependent of a government employee, in the absence of any vested right accruing on the death of the government employee, can only demand consideration of his/her application. He is however disentitled to seek consideration in accordance with the norms as applicable, on the day of death of the government employee.”

19. Later in State of **Madhya Pradesh Vs. Amit Shrivastava (2020) 10 SCC 496**, another three judge bench of the Supreme Court again had the occasion to consider the claim for compassionate appointment. In that case, the death occurred on 11.12.2009 whereas the scheme for grant of compassionate appointment was made under policy dated 18.8.2008. It was rejected on 19.8.2010. It was found that the policy did not provide for grant of compassionate appointment to a work charge/contingency fund daily wage employee. Following **Indian Bank and Others Vs. Promila and Another** (supra), it was observed that the scheme in force, on the date of occurrence of death would be decisive to the claim. Later, in State of **Madhya Pradesh and Others Vs. Ashish Awasthi and connected matters (2022) 2 SCC 157**, that view was reiterated by a two judge bench decision of the Supreme Court.

20. Still later in **Secretary to Government Department of Education (Primary) and Others Vs. Bhemesh alias Bhemappa 2021 SCC OnLine 1264**, a two judge bench of the Supreme Court chose to consider the entire gamut of law laid down by the Supreme Court and

thereafter interpreted its earlier three judge bench decision in **N.C. Santosh Vs. State of Karnataka** (supra) and the other existing law to only mean that compassionate appointment would remain an exception to the rule of equality in employment and that wherever, either under the unamended scheme or an amended law that equality was sought to be restored by taking away the right to grant of compassionate appointment, the Courts would enforce the law in favour of equality and against the exception made to it, whether prior or after the death of the employee. Paragraph-17 of the report reads as below:

“17. Keeping the above in mind, if we critically analyse the way in which this Court has proceeded to interpret the applicability of a new or modified Scheme that comes into force after the death of the employee, we may notice an interesting feature. In cases where the benefit under the existing Scheme was taken away or substituted with a lesser benefit, this Court directed the application of the new Scheme. But in cases where the benefits under an existing Scheme were enlarged by a modified Scheme after the death of the employee, this Court applied only the Scheme that was in force on the date of death of the employee. This is fundamentally due to the fact that compassionate appointment was always considered to be an exception to the normal method of recruitment and perhaps looked down upon with lesser compassion for the individual and greater concern for the rule of law.”

21. Once, the Supreme Court itself clarifies the law laid down by it, whether by speaking through a bench of two judges of that Court or three judges, it leaves very

little or no space to reason to the High Court to itself explore the correct law. Any reasoning that the High Court may express as to the correct/true law laid down by the Supreme Court, it would remain academic as in the scheme of the Constitution it would not cross swords with the further opinion of the Supreme Court, as to the law to be applied, pending the reference made to a larger bench of the Supreme Court in **Ajay Hasia Vs. Khauid Mujib Sehravardi (1981) 1 SCC 722 and R.K. Garg Vs. Union of India and others (1981) 4 SCC 675**. That is the effect caused by a two-judge bench of the Supreme Court in **Bhemesh alias Bheemappa (supra)**.

22. Recently a coordinate bench of this Court was faced with a similar dilemma in **State of U.P. and 3 Others Vs. Himanshu Yadav (Special Appeal No. 126 of 2023, decided on 07.7.2023)**, followed the dictum of the Supreme Court in **Secretary to Government Department of Education (Primary) and Others Vs. Bhemesh alias Bheemappa (supra)**. Paragraph-43 of the said judgment reads as below:

*“43. Considering the principles laid down in **N.C. Santhosh (supra)** and the discussion made in **Bhemesh Alias Bheemappa (supra)** as noted above, it is more than evident that existing benefits in a scheme for compassionate appointment, if diluted or taken away by the amended scheme, cannot be applied on any pending application after modification of the scheme. However, in case the benefits under the modified scheme are larger than the existing scheme prevailing on the date of death of the employee or on the date of moving of the application, such benefits cannot be granted to the dependent of a deceased employee, inasmuch as, the*

scheme of compassionate appointment is applied in perspective manner and no retrospective effect can be given for the purposes of consideration of even pending claim of a dependent of a deceased.”

23. We are also aware that the reference made to Larger Bench of the Supreme Court in ***State Bank of India Vs. Sheo Shankar Tewari*** is still pending before that Court. However, in view of the discussion made above as to the law laid down by the Supreme Court, since the occurrence of that reference vide order dated 08.02.2012 we do not find any doubt exists as to the law to be applied in matters of compassionate appointments, in the meanwhile. For that reason as well, since on the date of occurrence of death of Sri Surendra Kumar Agrawal, on 06.9.2014, there did not exist any scheme for grant of compassionate appointment, the claim made by the petitioner would fail.

24. The order of the learned single judge is set aside. Consequentially the appeal is **allowed**.

25. Since there is no other dispute surviving, the **writ petition itself shall stand disposed of** with the observation that the appellant-respondent shall pay out the amount of *Ex-gratia* payment to the respondent-petitioner within 30 days from today.

(2023) 8 ILRA 233

**APPELLATE JURISDICTION
CIVIL SIDE**

DATED: LUCKNOW 30.08.2023

BEFORE

THE HON'BLE OM PRAKASH SHUKLA, J

Special Appeal Defective No. 589 of 2018
with other connected cases

Khushnuda Parveen **...Appellant**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Appellant:
Virendra Singh

Counsel for the Respondents:
C.S.C., Meenakshi Parihar Singh, Prashant Kumar Singh, Raj Kr Singh Suryavanshi

Appointment–Claim under Scheduled Caste Category–Marriage with SC Male–Whether sufficient to claim SC status–Held–No.

Appointment of appellant on the post of Lecturer (Urdu) challenged as obtained on the basis of Scheduled Caste certificate. Appellant, originally belonging to General Category, obtained SC status through marriage with a Scheduled Caste male. Held, such voluntary mobility into a reserved category by marriage is not permissible under law. Once appointment is held to be void ab initio, no question of seniority or consequential relief arises. The appellant cannot claim Scheduled Caste status solely on the basis of her marriage. Her appointment as Lecturer under SC quota is void, having been secured through misrepresentation. Consequently, her claim to seniority and post of ad hoc Principal rightly denied.

List of Cases cited:

1. Valsamma Paul Vs Cochin University, (1996) 3 SCC 545
2. Sobha Hymavathi Devi Vs Setti Gangadhara Swamy, (2005) 2 SCC 244
3. N.E. Horo Vs Jahan Ara Jaipal Singh, AIR 1972 SC 1840
4. Dr. Asha Saxena Vs Smt. S.K. Chaudhary, (1991) 17 ALR 267
5. M.A. Murthy Vs St. of Karn., (2003) 7 SCC 517

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

Application for Condonation of Delay

(1) Heard Ms. Pushpila Bisht, *Amicus Curiae*, appearing on behalf of appellant, Shri V.P. Nag, learned Standing Counsel representing the State/respondents no. 1, 2, 3 and 5, Shri R.K. Singh Suryavanshi, learned Counsel representing respondent no.4/U.P. Secondary Education Service Selection Board, Shri Prashant Kumar Singh, learned Counsel representing the respondent no.6/Committee of Management, Smt. Meenakshi Parihar, learned Counsel representing the respondent no.7/writ petitioner,

(2) Having gone through the averments made in the affidavit filed in support of the application seeking condonation of delay and in absence of any objection by the respondents, this Court is satisfied that delay has sufficiently been explained.

(3) The application for condonation of delay filed in the above-captioned appeals is, accordingly, allowed and delay in filing the above-captioned special appeals is hereby condoned.

(Order on Appeals)

A. INTRODUCTION

(4) The legality and correctness of common judgment and order dated 19.07.2018 passed by the learned Single Judge in (i) Writ Petition No. 23409 (S/S) of 2016 : *Ram Ujagar Mishra Vs. State of U.P. and others*, (ii) Writ Petition No. 13 (S/S) of 2014 : *Ram Ujagar Mishra Vs.*

State of U.P. and others, (iii) Writ Petition No. 7415 (S/S) of 2014 : *Ram Ujagar Mishra Vs. State of U.P. and others*, (iv) Writ Petition No. 4016 (S/S) of 2011 : *Smt. Khushnuda Parveen Vs. State of U.P. and others* and (v) Writ Petition No. 3969 (S/S) of 2013 : *Smt. Khushnuda Parveen Vs. State of U.P. and others*, are called in question by the appellant, **Smt. Khushnuda Praveen**, in the above-captioned *intra Court* appeals under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952.

B. FACTS

(5) Succinctly, the facts of the case are that Saadat Inter College, Nanpara, District Bahraich (hereinafter referred to as '**Institution**'), is being run under the aegis of a society registered under the provisions of Societies Registration Act, 1860. The said Institution is recognized under the provisions of U.P. Intermediate Education, 1921 and is also receiving grant-in-aid from the State Government. Therefore, the provisions of U.P. High School and Intermediate Colleges (Payment of Salary to the Teachers and other Employees) Act, 1971 and the provisions of U.P. Secondary Education Service Selection Board Act, 1982 and rules framed thereunder are also applicable to the said institution.

(6) The appellant, Smt. Kushnuda Parveen, was selected by U.P. Secondary Education Services Selection Board through direct recruitment and was appointed on the post of Lecturer (Urdu) on 07.06.1996 in the Institution. Her selection was made under reserved quota i.e. Scheduled Caste on the basis of Caste Certificate submitted by her.

(7) Sri Ram Ujagar Mishra (respondent no.7 herein) was initially appointed in the Institution on the post of Assistant Teacher (L.T. Grade) in the year 1981 on *ad hoc* basis, however, his services were regularized w.e.f. 06.04.1991 in the Institution vide order dated 02.08.1992.

(8) Shri Bismillah Khan, who was the Lecturer in Mathematics in the Institution, retired on 30.06.1991 on attaining the age of superannuation and as such, vide resolution dated 02.08.1992, the Committee of Management resolved to grant promotion to Shri Ram Ujagar Mishra (respondent no.7 herein) on the vacant post of Lecturer in Mathematics in the Institution on *ad hoc* basis under 50% promotion quota. The District Inspector of Schools (hereinafter referred to as 'D.I.O.S.'), vide order dated 15.12.1992, had accorded approval to the aforesaid resolution of the Committee of Management to grant *ad hoc* promotion to Shri Ram Ujagar Mishra (respondent no.7 herein). Subsequently, vide letter dated 20.04.1998, the U.P. Secondary Education Service Selection Board (hereinafter referred to as 'Board') intimated the decision of the Board to the D.I.O.S. in regard to the regular promotion of Shri Ram Ujagar Mishra (respondent no.7 herein) on the post of Lecturer in Mathematics in the Institute.

(9) Apparently, a dispute in regard to the seniority arose in the Institution between the appellant and the respondent No.7 as apparently the said seniority would lead to appointment as Principal to the said Institution. The appellant preferred a representation dated 13.09.2010 claiming seniority and sought for handing over the officiating charge on the post of Principal to her by reverting Shri Ram Ujagar Mishra

on the post of Assistant Teacher (L.T. Grade). The Regional Joint Director of Education, Devipatan Mandal, Faizabad, vide order dated 02.06.2011, had considered the aforesaid representation of the appellant and rejected the same vide order dated 02.06.2011 (hereinafter referred to as "**First Order**").

(10) Subsequently, Shri Shyam Das Maurya, who was the Principal of the Institution, retired on attaining the age of superannuation on 30.06.2011 and before his retirement, the Committee of Management passed a resolution on 29.06.2011, resolving to appoint Shri Ram Ujagar Mishra (respondent no.7 herein) as *ad hoc*/officiating Principal of the Institution. The said resolution dated 29.06.2011 (hereinafter referred to as "**Second Order**") was sent to D.I.O.S. for attestation of the signature of Shri Ram Ujagar Mishra as Principal and payment of salary.

(11) Meanwhile, the appellant preferred Writ Petition No. 4016 (S/S) of 2011 before this Court, challenging the order dated 02.06.2011 ("First Order") by which her representation claiming seniority was rejected. The learned Single Judge, while entertaining the said writ petition, kept in abeyance the order dated 02.06.2011 passed by the Regional Joint Director of Education, Devipatan Mandal, Faizabad till further order of the Court vide order dated 14.07.2011. Thereafter, on the strength of this interim order dated 14.07.2011, the appellant had claimed for joining on the post of Principal on *ad hoc*/officiating basis, but the same was not allowed and as such, she preferred Contempt Petition No. 3144 of 2011, which was disposed of vide order dated 14.02.2013 with a liberty to the appellant to raise the issue in her writ petition.

(12) Pursuant to the aforesaid liberty, the appellant preferred another writ petition, bearing writ petition No. 41 (S/S) of 2013, before this Court. The learned Single Judge, vide order dated 27.05.2013, disposed of the said writ petition finally with a direction to dispose of the representation of the appellant.

(13) In compliance of the aforesaid order dated 27.05.2013, the D.I.O.S. considered the claim set-up by the appellant and rejected the same vide order dated 28.06.2013 (hereinafter referred to as **“Third Order”**), stating that since the matter regarding seniority is pending before the Hon’ble High Court, thus, there is no requirement for any action at this stage. Aggrieved by this order dated 28.06.2013, the appellant preferred Writ Petition No. 3969 (S/S) of 2013.

(14) It seems that during pendency of the aforesaid two writ petitions, i.e., Writ Petition No. 4016 (S/S) of 2011 against “First order” and Writ Petition No. 3969 of 2013 preferred by the appellant against “Third Order”, the Joint Director of Education, Devipatan Mandal, Faizabad, in compliance of the order dated 27.05.2013 passed in Writ Petition No. 41 (S/S) of 2013, had also considered the representation dated 01.11.2012 preferred by the appellant and decided the same vide order dated 17.12.2013 (hereinafter referred to as **“Fourth Order”**), stating that appellant was senior to the respondent no.7 (Ram Ujagar Mishra) w.e.f. 07.06.1996 and as such, it would be appropriate to grant promotion to the appellant on the post of *ad hoc*/officiating Principal of the Institution. Aggrieved by this order dated 17.12.2013 (**“Fourth Order”**), the respondent no.7 (Ram Ujagar Mishra)

preferred Writ Petition No. 13 (S/S) of 2014.

(15) During pendency of the aforesaid writ petitions i.e. writ petition Nos. 4016 (S/S) of 2011, 3969 (S/S) of 2011 and writ petition No. 13 (S/S) of 2014, the respondent no.7 (Ram Ujagar Mishra) also preferred another writ petition, bearing Writ Petition No. 7415 (S/S) of 2014, challenging the validity of the orders dated 05.04.1996 and 30.05.1996 (together referred to as “Fifth Order”), by which appellant was selected and appointed as Lecturer in Urdu.

(16) Thereafter, the Director of Education (Secondary), on the basis of the letter sent by D.I.O.S. dated 17.08.2016, had passed the order dated 19.09.2016 (hereinafter referred to as **“Sixth Order”**), by which the D.I.O.S. was directed to ensure the joining of the appellant on the post of *ad hoc*/officiating Principal of the Institution by exercising power under Section 18 (2) of the U.P. Secondary Education Services Selection Board Act, 1982. Pursuant to the aforesaid order of the Director of Education (Secondary) dated 19.09.2016, the D.I.O.S. had passed an order dated 20.09.2016 (hereinafter referred to as **“Seventh Order”**), whereby he had directed for handing over the charge of *ad hoc*/officiating Principal to the appellant.

(17) Aggrieved by the aforesaid orders dated 19.09.2016 and 20.09.2016, the respondent no.7 herein (Sri Ram Ujagar Mishra) preferred Writ Petition No. 23409 (S/S) of 2016 before this Court. The learned Single Judge, vide order dated 28.12.2016, while entertaining the said writ petition, stayed the operation of aforesaid orders dated 19.09.2016 and 20.09.2016.

(18) Ultimately, the learned Single Judge had clubbed all five writ petitions i.e. Writ Petition Nos. 23409 (S/S) of 2016, 13 (S/S) of 2014, 7415 (S/S) of 2014, 4016 (S/S) of 2011 and 3969 (S/S) of 2013 and heard together and the same were disposed of vide common judgment and order dated 19.07.2018 (hereinafter referred to as **“Impugned Order”**). The learned Single Judge has decided the aforesaid writ petitions as under :-

Sl. No.	Writ Petition Number	Decision	Challenge in Special Appeal
01	23409 (S/S) of 2016 : Ram Ujagar Mishra Vs. State of U.P. and others	Writ Petition is allowed. The impugned orders dated 19.09.2016 and 20.09.2016 are set-aside.	Special Appeal Defective No. 590 of 2018 : Smt. Khushnuda Parveen Vs. State of U.P. and others
02	13 (S/S) of 2014 : Ram Ujagar Mishra Vs. State of U.P. and others	Writ Petition is allowed. The impugned order dated 17.12.2013 is set-aside	Special Appeal Defective No. 592 of 2018 : Smt. Khushnuda Parveen Vs. State of U.P. and others.
03	Writ Petition No. 7415 (S/S) of 2014.: Ram Ujagar Mishra Vs. State of U.P. and others	The writ petition is allowed and the impugned orders dated 05.04.1996 and 30.05.1996	Special Appeal Defective No. 589 of 2018 : Smt. Khushnuda Parveen Vs. State of U.P. and others
04	Writ Petition No. 4016 (S/S) of 2011 : Smt. Khushnuda Parveen Vs. State of U.P.	The writ petition is	Special Appeal Defective

	and others	dismissed.	No. 591 of 2018: Smt. Khushnuda Parveen Vs. State of U.P. and others
05	Writ Petition No. 3969 (S/S) of 2013 :Smt. Khushnuda Parveen Vs. State of U.P. and others	The writ petition is dismissed.	Special Appeal Defective No. 593 of 2018: Smt. Khushnuda Parveen Vs. State of U.P. and others

(19) The learned Single Judge, while deciding the aforesaid writ petitions vide impugned order, has also directed the respondents in the writ petitions to permit Sri Ram Ujagar Mishra (respondent no.7 herein) to continue on the post of *ad hoc* Principal of the Institution till regularly selected candidates comes and joins and to pay him regular monthly salary month by month accordingly, in as much as, the arrears of salary, if found due, be paid within three months from the date of production of a certified copy of the order.

(20) The appellant being aggrieved have preferred the above-captioned special appeals before this Court.

(21) Since the above-captioned special appeals arise out of a common factual matrix and impugned judgment, we are disposing them of vide this common judgment.

C. SUBMISSIONS

(22) Ms. Pushpila Bisht, *Amicus Curiae*, appearing on behalf of appellant has submitted that by means of the

impugned common judgment/order dated 19.07.2018, the learned Single Judge had decided different issues agitated by the appellant and respondent no.7 in their respective writ petitions. In Writ Petition No. 4016 (S/S) of 2011 filed by the appellant herein, she challenged the order dated 02.06.2011 ("First Order"), whereby her representation claiming seniority and prayer for handing over the charge on the post of Principal to her by reverting Sri Ram Ujagar Mishra on the post of Assistant Teacher (L.T. Grade) was rejected and seniority determined earlier was held to be valid; in Writ Petition No. 3969 (S/S) of 2013 filed by the appellant, she challenged the order of the D.I.O.S. dated 28.06.2013 ("**Third Order**") by which her representation claiming seniority was rejected *inter alia* on the ground that since the matter regarding seniority is pending before the Hon'ble High Court, hence there is no requirement for any action at this stage; in Writ Petition 13 (S/S) of 2014 filed by the respondent no.7 herein (Ram Ujagar Mishra), he challenged the order of Regional Joint Director of Education dated 17.12.2013 ("**Fourth Order**") by which seniority was re-determined; in Writ Petition No. 7415 (S/S) of 2014 filed by the respondent no.7 herein, he challenged the validity of the orders dated 05.04.1996 and 30.05.1996 ("**Fifth Order**"), whereby the appellant herein was selected and appointed as Lecturer in Urdu; and in Writ Petition No. 23409 of 2016 filed by the respondent no.7, he challenged the order dated 19.09.2016 ("**Sixth Order**") by which D.I.O.S. was directed to ensure the joining of the appellant on the post of *ad hoc*/officiating Principal of the Institution by exercising power under Section 18 (2) of the U.P. Secondary Education Service Selection Board Act, 1982, as well as the consequential order dated 20.09.2016 (

"**Seventh Order**") passed by the D.I.O.S., by which he had directed for handing over the charge of *ad hoc* Principal to the appellant. Thus, her submission is that in all the writ petitions, more or less the issue between the appellant herein and respondent no.7 herein was in respect of their seniority, appointment of respondent no.7 herein on the post of *ad hoc*/officiating Principal and appointment of the appellant.

(23) So far as issue of seniority between the appellant and respondent no.7, learned *Amicus Curiae* has argued that appellant was appointed on the post of Lecturer (Urdu) through direct recruitment on 07.06.1996 by the U.P. Secondary Education Services Board, whereas respondent no.7 was appointed as Assistant Teacher (L.T. Grade) in *ad hoc*/temporary basis by the Manager of the Institution on 20.10.1981 on short term vacancy and thereafter his services on the post of Assistant Teacher (L.T. Grade) were regularized w.e.f. 06.04.1991 vide order dated 02.08.1992. Subsequently, respondent no.7 was granted *ad hoc*/temporary promotion on the post of Lecturer (Mathematics) on 16.12.1992 under 50% quota and his services on the post of Lecturer (Mathematics) were regularized on 20.04.1997 on the recommendation of Uttar Pradesh Secondary Education Services Selection Board. Thus, in any view of the matter, the appellant is senior to the respondent no.7 as also evident from the final seniority list dated 05.08.2007 issued by the Committee of Management of the Institution contained in Annexure No.1 to the affidavit filed in support of application for disposal of interim relief application in Special Appeal Defective No. 589 of 2018, wherein the name of the appellant was shown at serial No. 3, whereas the name of the respondent

no.7 was shown at serial No. 5, meaning thereby i.e. on 05.08.2007, the Committee of Management of the Institution had declared the appellant senior to the respondent no.7. However, the learned Single Judge, while adjudicating the issue of re-determination of seniority, has lost sight of not considering the aforesaid aspect of the matter and has erred in recording the finding that the respondent no.7 is continuing to be senior in the Institution since 1996, which has not been challenged by the teachers working in the Institution including Smt. Khusnuda Parveen (appellant herein), therefore, the ratio of the judgment of the Full Bench in the case of **Dr. Asha Saxena Vs. Smt. S.K. Chaudhary** : (1991) 17 ALR 267 relied upon by the learned Counsel for the writ petitioner (respondent no.7 herein) is fully applicable to the facts and circumstances of the case and as such respondent no.6 (appellant herein) cannot be allowed to challenge the seniority of the writ petitioner (respondent no.7 herein) after lapse of almost 15 years.

(24) So far as the issue of appointment of the appellant on the basis of the alleged forged caste certificate is concerned, learned *Amicus Curiae* representing appellant has argued that the appellant, who did not belong to a Scheduled Caste community by birth but belong to General Category by birth, got married with Sri Harish Chandra Sundaram, who belonged to the Scheduled Caste community and as such, the appellant was entitled to caste certificate on the basis of the law prevailing at the relevant point of time. Learned *Amicus Curiae* has placed reliance upon the judgment of the Apex Court in **N.E. Horo Vs. Smt. Jahan Ara Jaipal Singh** : AIR 1972 SC 1840 and argued that in view of **N.E. Horo (supra)**,

the appellant belonged to the Scheduled Caste community. On that basis, she was appointed as a Lecturer (Urdu) in the Institution through direct recruitment by the U.P. Secondary Education Selection Board on 07.06.1996. Her submission, thus, is that this is not a case where appellant, on the basis of false averments or by playing fraud, had sought and was granted a false Caste Certificate. However, the learned Single Judge, while adjudicating the issue, has lost sight of not considering the aforesaid aspect of the matter and erred in declaring that the appellant got appointment on the post in question by playing fraud.

(25) Learned *Amicus Curiae* representing the appellant has further submitted that the respondent no.7-Ram Ujagar Mishra had no reason to file writ petition No. 7415 (S/S) of 2014 against the appellant that too in the year 2014 i.e. approx ten years prior to the retirement of the appellant. She submits that the respondent no.7 is working as a Lecturer (Mathematics) in the Institution and apparently he is junior to the appellant, therefore, the respondent no.7 had no *locus standi* to file such a petition against the appellant herein. On this count also, the impugned judgment/order passed by the learned Single Judge is liable to be quashed.

(26) *Per contra*, learned Counsel for the respondents supported the judgment/order of the learned Single Judge and submitted that the appellant belonged to General Category and did not belong to Scheduled Cast community by birth. Therefore, she could not have obtained a Caste Certificate to the effect that she belonged to the Scheduled Caste community. They submits that the appellant

was appointed on the post of Lecturer (Urdu) by the U.P. Secondary Education Service Board under Scheduled Caste category, whereas she actually belongs to General Category. In the service book of the appellant also, the caste of the appellant was shown '*Chamar*', which comes under the category of Scheduled Caste. They pointed out that at the time of selection of appellant, the U.P. Secondary Education Selection Board had prepared the merit list category-wise like General, O.B.C. and SC/ST, in which the name of the appellant finds place in the category of Scheduled Caste and the appellant scored only 19 marks and got selected on the post of Lecturer (Urdu) in Varg-I, while the last candidate of General Category, namely, Zeenat Zahara Rizwi, obtained 58 marks, but could not be selected, meaning thereby the appellant was selected under the Scheduled Caste Certificate not in the General Category.

(27) Learned Counsel for the respondents has further argued that as the appellant obtained appointment of Lecturer (Urdu) by showing her belonging to Scheduled Caste community, even knowing the fact that she belong to General Category by birth, therefore, the learned Single Judge has rightly observed that the appointment was obtained by the appellant by playing fraud. Thus, the finding recorded by the learned Single Judge in this regard is just and proper and there is no illegality of infirmity in the impugned order.

(28) Learned Counsel for the respondents has further argued that as the appointment of the appellant was itself void, hence issue of seniority or other service benefit agitated by the appellant cannot be looked into at this stage. Moreso,

the declaration of law by the Hon'ble Supreme Court of India under Article 141 of the Constitution of India is always retrospective unless made specifically prospective and that as there is nothing indicated to that effect in the subsequent ruling, it would necessarily follow that the appellant cannot claim any benefit to continue in employment on the basis of the overruled decision.

D. ANALYSIS & FINDINGS

(29) Having heard learned Counsel representing the parties and going through the record available before this Court, it is required to be noted that learned Counsel for the appellant has assailed the impugned judgment/order passed by the learned Single Judge on various grounds, however, we deem it apt to first deal with the issue of appointment of the appellant on the post of Lecturer (Urdu) obtained by her on the basis of Scheduled Caste Community Certificate. This issue gains significance as in case the appellant is not able to cross the bridge of her appointment, the consequential benefits of seniority, would obviously not accrue in her favour.

(30) Apparently, it has been argued by the learned *Amicus Curiae* that there has not been any misrepresentation on the part of the appellant in obtaining the Scheduled Caste Community certificate, as she has obtained the said certificate after disclosing the specific fact that she claimed Scheduled Caste status only on the basis of her marriage with Shri Harish Chandra Sundaram, who belongs to '*Chamar*' community, which has been notified as Scheduled Caste Community.

(31) In order to buttress the claim that though the appellant did not belong to

Scheduled Caste Community by birth, she was entitled to be treated as Scheduled Caste Community on her marriage with a Scheduled Caste person, the learned Counsel for the appellant cited the decision of the Hon'ble Supreme Court in **N.E. Horo (supra)**, in which it has been held as follows :-

"23. We may also refer to Article 330 of the Constitution according to which the seats reserved for the Scheduled Tribes are to be reserved in the House of the People, inter alia, for members of these Tribes. Under S.33(2) of the Act a candidate for a reserved seat has to file a declaration specifying a particular caste or tribe of which he is a member. Article 342(1) empowers the President to specify 'the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall, for the purposes of the Constitution, be deemed to be Scheduled Tribes in relation to the State or Union territory as the case may be. In Parts 1 to 12 of the Schedule to the Constitution (Scheduled Tribes) Order 1952 are specified the tribes or tribal communities or parts of or groups within the tribes or tribal communities who are to be deemed to be Scheduled tribes. Munda is one of such specified tribes or tribal communities. It can well be said that the term "tribal community" has a wider connotation than the expression "tribe". A person who, according to the strict custom of a tribe cannot be regarded as a member of that tribe may well be regarded as a member of that tribal community. Where a non-Munda woman is married to a Munda male and the marriage is approved and sanctioned by the Parha Panchayat of that tribe and the marriage is valid she may not, on the assumption that the rule of endogamy prevails, become a member of

the Munda tribe in the strict sense as not having been born in the tribe. She cannot, however, be excluded from the larger group, namely, the tribal community. The High Court has taken the view that the use of the term "tribal communities" in addition to the term "tribes" in Article 342 shows that a wide import and meaning should be given to these words and even if the respondent is not a member of the Munda tribe by virtue of birth she having been married to a Munda after due observance of all formalities and after obtaining the approval of the elders of the tribes would belong to the tribal community to which her husband belongs on the analogy of the wife taking the husband's domicile. Even without invoking the doctrine of domicile the respondent's marriage with late Shri Jaipal Singh who was a Munda having been approved and sanctioned by the Parha Panchayat of the Munda tribe it can be said that she became a member of the Munda tribal community. We have not been shown any infirmity in the reasoning of the High Court on this point. When a person, in the course of time, has been assimilated in the community it is somewhat difficult to comprehend how that person can be denied the rights and privileges which may be conferred on that community even though tribal by constitutional provisions."

(32) However, the learned *Amicus Curiae* appearing on behalf of the appellant missed the point that although the appellant was appointed on 07.06.1996, the Judgment, which held the field, was not in fact **N.E. Horo (supra)**, but another Judgment passed by the Hon'ble Supreme Court subsequently on 04.01.1996. The dates are of great significance as the argument that the Judgment of N.E Horo (Supra) would apply falls flat on its own weight as by the time the appointment of

the appellant was being made, the judgment in **Valasamma Paul v. Cochin University and others** : [(1996) 3 SCC 545] had been governing the field. It is important to note that the Hon'ble Supreme court, after considering the aforesaid decision in N.E. Hora's case and other subsequent judgments, had held in Valasamma (Supra) as follows:-

"34. when a member is transplanted into the Dalits, Tribes and OBCs. he/she must of necessity also undergo have had same the handicaps, and must have been subject to the same disabilities, disadvantages, indignities or sufferings so as to entitle the candidate to avail the facility of reservation. A candidate who had the advantageous start in life being born in forward caste and had march of advantageous life but is transplanted in backward caste by adoption or marriage or conversion, does not become eligible to the benefit of reservation either under Article 15(4) or 16(4), as the case may be. Acquisition of the Status of Scheduled Caste etc. by voluntary mobility into these categories would play fraud on the Constitution, and would frustrate the benign constitutional policy under Articles 15(4) and 16(4) of the Constitution."

(33) Submission of the learned *Amicus Curiae* representing the appellant is that as the Scheduled Caste Community Certificate of the appellant had been issued on the basis of a ruling of the Apex Court in N.E. Hora's Case which was then holding the field and had enabled the appellant to secure an employment on 07.06.1996 is not correct and as such the argument of the learned *Amicus Curiae* that the appointment of the appellant would not be equitable to deprive her of that Scheduled Caste Community status on the

basis of the subsequent ruling of the Apex Court of the year 1996 is also not correct.

(34) It would be apt to mention here that a Bench of Three-Judges of the Hon'ble Supreme Court in **Sobha Hymavathi Devi v. Setti Gangadhara Swamy and others** : (2005) 2 SCC 244, on noticing the contradictions in the decisions of the two Division Benches of the Hon'ble Supreme Court in **N.E. Hora v. Smt. Jahan Ara Jaipal Singh (supra)** and **Valasamma Paul v. Cochin University and others (supra)**, held that the constitutional reservations intend to benefit the really underprivileged and not those who come to the caste by way of a marriage, and to that extent, the decision in N.E. Hora's case, which runs counter to that view, cannot be accepted as correct, and categorically laid out that the recognition of a lady as a member of a Backward Class Community in view of her marriage would not be relevant for the purpose of entitlement to reservation under Article 16(4) of the Constitution of India for the reason that she as a member of the forward caste, had an advantageous start in life and a marriage with a male belonging to a backward class, would not entitle her to the facility of the reservation given to a Backward Class Community. There is nothing indicated in that binding ruling that it would be only prospective in operation. The relevant part of **Sobha Hymavathi Devi (supra)** is reproduced as under :-

"What then remains is the fact that the appellant though assigned the caste of her father Murahari Rao, namely, the Sistu Karnam community, had married a tribal belonging to the Bhagatha Community. On the basis of this marriage, it is argued that she must be taken to have acquired membership in the community of

her husband and consequently treated as a member of that community. It is in that context that the decision in *Horo (supra)* was relied on. It is also contended that the decision in *Horo (supra)* related to an election dispute and consequently, the ratio of that decision should govern the present case. We have already indicated that there is nothing to show that the marriage of the appellant with Appala Raju was sanctioned or approved by the elders of the Bhagatha Community or the concerned Panchayat or was in tribal form or that the formalities attending such a tribal marriage were observed and the marriage was performed after obtaining the approval of the elders of the tribe. Even otherwise, we have difficulty in accepting the position that a non-tribal who marries a tribal could claim to contest a seat reserved for tribals. **Article 332 of the Constitution speaks of reservation of seats for Scheduled Tribes in Legislative Assemblies. The object is clearly to give representation in the legislature to Scheduled Tribe candidates, considered to be deserving of such special protection. To permit a non-tribal under cover of a marriage to contest such a seat would tend to defeat the very object of such a reservation. The decision of this Court in Valsamma Paul (Mrs.) vs. Cochin University and others (supra), supports this view.** Neither the fact that a non-backward female married a backward male nor the fact that she was recognized by the community thereafter as a member of the backward community, was held to enable a non-backward to claim reservation in terms of Articles 15(4) or 16(4) of the Constitution. Their Lordships after noticing *Bhoobun Moyee v. Ram Kishore*, (1865) 10 MIA 279, and *Lulloobhoy Bappoobhoy Cassidass Moolchund v. Cassibai*, (1879-80) 7 IA 212, held that a woman on marriage becomes a member of the family

of her husband and thereby she becomes a member of the caste to which she has moved. The caste rigidity breaks down and would stand as no impediment to her becoming a member of the family to which the husband belongs and to which she gets herself transplanted. Thereafter, this Court noticed that recognition by the community was also important. Even then, this Court categorically laid down that the recognition of a lady as a member of a backward community in view of her marriage would not be relevant for the purpose of entitlement to reservation under Article 16(4) of the Constitution for the reason that she as a member of the forward caste, had an advantageous start in life and a marriage with a male belonging to a backward class would not entitle her to the facility of reservation given to a backward community. The High Court has applied this decision to a seat reserved in an election in terms of Article 332 of the Constitution. We see no reason why the principle relating to reservation under Articles 15(4) and 16(4) laid down by this Court should not be extended to the constitutional reservation of a seat for a Scheduled Tribe in the House of the People or under Article 332 in the Legislative Assembly. The said reservations are also constitutional reservations intending to benefit the really underprivileged and not those who come to the class by way of marriage. **To the extent the decision in Horo (supra) can be said to run counter to the above view, it cannot be accepted as correct. Even otherwise, in the absence of evidence on the relevant aspects regarding marriage in tribal form and acceptance by the community, the decision in Horo (supra) cannot come to the rescue of the appellant.** On a consideration of the relevant aspects, we are of the view that whether it be a reservation under Articles

15(4) or 16(4) or 330 and 332, the said reservation would benefit only those who belong to a Scheduled Caste or Scheduled Tribe and not those who claim to acquire the status by marriage, like the appellant in this case. Thus, in our view, the High Court was fully justified in coming to the conclusion that the appellant could not claim the right to contest a seat reserved for a Scheduled Tribe in terms of Article 332 of the Constitution of India merely by virtue of her marriage to a person belonging to a Scheduled Tribe."

(emphasis supplied)

(35) To the aforesaid context, it would be necessary to recapitulate the unassailable legal position regarding retrospectively of declaration of law by a binding ruling of the Hon'ble Supreme Court under Article 141 of the Constitution of India as held in **M.A.Murthy v. State of Karnataka** : (2003) 7 SCC 517, which reads as under :-

"8. ... the law declared by this Court is presumed to be the law at all times. Normally, the decision of this Court enunciating a principle of law is applicable to all cases irrespective of its stage of pendency because it is assumed that what is enunciated by the Supreme Court is, in fact, the law from inception. The doctrine of prospective overruling which is a feature of American jurisprudence is an exception to the normal principle of law, was imported and applied for the first time in *L.C. Golak Nath v. State of Punjab* [AIR 1967 SC 1643]. In *Managing Director, ECIL v. B. Karunakar* [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] the view was adopted. Prospective overruling is a part of the principles of constitutional canon of interpretation and can be resorted to by this Court while superseding the law

declared by it earlier. It is a device innovated to avoid reopening of settled issues, to prevent multiplicity of proceedings, and to avoid uncertainty and avoidable litigation. In other words, actions taken contrary to the law declared prior to the date of declaration are validated in larger public interest. The law as declared applies to future cases. (See *Ashok Kumar Gupta v. State of U.P.* [(1997) 5 SCC 201 : 1997 SCC (L&S) 1299] and *Baburam v. C.C. Jacob* [(1999) 3 SCC 362 : 1999 SCC (L&S) 682 : 1999 SCC (Cri) 433] .) It is for this Court to indicate as to whether the decision in question will operate prospectively. In other words, there shall be no prospective overruling, unless it is so indicated in the particular decision. It is not open to be held that the decision in a particular case will be prospective in its application by application of the doctrine of prospective overruling. The doctrine of binding precedent helps in promoting certainty and consistency in judicial decisions and enables an organic development of the law besides providing assurance to the individual as to the consequences of transactions forming part of the daily affairs. ..."

(emphasis supplied)

(36) Keeping in mind the aforesaid legal proposition of law, it would not be possible to adopt equitable considerations to sustain the Scheduled Caste Community Certificate that had been obtained by the appellant, who admittedly does not belong to Scheduled Caste Community by birth and had claimed such status only on account of her marriage with a person belonging to Scheduled Caste.

(37) Even otherwise, a Three Judge Bench of the Hon'ble Supreme Court in **R.**

Viswanatha Pillai Vs. State of Kerala : (2004) 2 SCC 105 has ruled that the invalidation of the caste or tribe claimed, upon verification, would result in the appointment or admission, as the case may be, being rendered *non est* or *void ab initio*.

(38) Reiterating the same legal position in **Chairman and Managing Director, Food Corporation of India v Jagdish Balaram Bahira :** (2017) 8 SCC 670, another Bench of Three-Judges of the Hon'ble Supreme Court has held that the exception to the above doctrine was in those cases where that Court exercised its power under Article 142 of the Constitution to render complete justice. The relevant part of **Jagdish Balaram Bahira (supra)** is reproduced as under :-

“48...Where a candidate had been appointed to a reserved post on the basis of the claim that he or she was a member of the group for which the reservation is intended, the invalidation of the claim to belong to that group would, as a necessary consequence, render the appointment void ab initio. The rationale for this is that a candidate who would otherwise have to compete for a post in the general pool of unreserved seats had secured appointment in a more restricted competition confined to the reserved category and usurped a benefit meant for a designated caste, tribe or class. Once it was found that the candidate had obtained admission upon a false representation to belong to the reserved category, the appointment would be vitiated by fraud and would be void ab initio. The falsity of the claim lies in a representation that the candidate belongs to a category of persons for whom the reservation is intended whereas in fact the candidate does not so belong. The reason for depriving the

candidate of the benefit which she or he has obtained on the strength of such a claim, is that a person cannot retain the fruits of a false claim on the basis of which a scarce public resource is obtained... A candidate who does so causes detriment to a genuine candidate who actually belongs to the reserved category who is deprived of the seat. For that matter, a detriment is caused to the entire class of persons for whom reservations are intended, the members of which are excluded as a result of an admission granted to an imposter who does not belong to the class. The withdrawal of benefits, either in terms of the revocation of employment or the termination of an admission was hence a necessary corollary of the invalidation of the claim on the basis of which the appointment or admission was obtained. The withdrawal of the benefit was not based on mens rea or the intent underlying the assertion of a false claim. In the case of a criminal prosecution, intent would be necessary. On the other hand, the withdrawal of civil benefits flowed as a logical result of the invalidation of a claim to belong to a group or category for whom the reservation is intended.”

“59. The Full Bench judgment of the Bombay High Court in Arun [Arun v. State of Maharashtra, 2014 SCC OnLine Bom 4595 : (2015) 1 Mah LJ 457] has essentially construed the judgments in Kavita Solunke [Kavita Solunke v. State of Maharashtra, (2012) 8 SCC 430 : (2012) 2 SCC (L&S) 609] and in Shalini [Shalini v. New English High School Assn., (2013) 16 SCC 526 : (2014) 3 SCC (L&S) 265] as having impliedly overruled the earlier Full Bench judgments in Ganesh Rambhau Khalale [Ganesh Rambhau Khalale v. State of Maharashtra, 2009 SCC OnLine Bom 20 : (2009) 2 Mah LJ 788] and Ramesh Suresh Kamble [Ramesh Suresh Kamble v. State of

Maharashtra, 2006 SCC OnLine Bom 1078 : (2007) 1 Mah LJ 423] . In view of the conclusion which we have arrived at in regard to the earlier decisions rendered by the two-Judge Benches in Kavita Solunke [Kavita Solunke v. State of Maharashtra, (2012) 8 SCC 430 : (2012) 2 SCC (L&S) 609] and Shalini [Shalini v. New English High School Assn., (2013) 16 SCC 526 : (2014) 3 SCC (L&S) 265] , we are unable to subscribe to the view expressed by the Full Bench in Arun [Arun v. State of Maharashtra, 2014 SCC OnLine Bom 4595 : (2015) 1 Mah LJ 457] . The judgment of the Full Bench of the Bombay High Court in Arun [Arun v. State of Maharashtra, 2014 SCC OnLine Bom 4595 : (2015) 1 Mah LJ 457] holds that: (SCC OnLine Bom para 75)

(i) mere invalidation of the caste claim by the Scrutiny Committee would not entail the consequences of withdrawal of benefits or discharge from employment or cancellation of appointments that have become final prior to the decision in Milind [State of Maharashtra v. Milind, (2001) 1 SCC 4 : 2001 SCC (L&S) 117] on 28-11-2000;

(ii) the benefit of protection in service upon invalidation of the caste claim is available not only to persons belonging to Koshti and Halba Koshti but is also available to persons belonging to the special backward category on the same terms.

The High Court has even gone to the extent of holding that the decision in Milind [State of Maharashtra v. Milind, (2001) 1 SCC 4 : 2001 SCC (L&S) 117] was in the nature of prospective overruling of the law which was laid down by the Bombay High Court. The above view of the Bombay High Court is clearly unsustainable. Neither the judgment in Milind [State of Maharashtra v. Milind,

(2001) 1 SCC 4 : 2001 SCC (L&S) 117] nor any of the judgments of this Court which have construed it have held that Milind [State of Maharashtra v. Milind, (2001) 1 SCC 4 : 2001 SCC (L&S) 117] was an exercise in prospective overruling. The High Court was in error in holding so. The decision of the Full Bench in Arun [Arun v. State of Maharashtra, 2014 SCC OnLine Bom 4595 : (2015) 1 Mah LJ 457] is unsustainable. The Full Bench had evidently failed to notice that cases where the protection was granted by this Court following the invalidation of a caste claim was in exercise of the power conferred by Article 142 of the Constitution, depending upon the facts and circumstances of each case. The jurisdiction under Article 142 is clearly not available to the High Court in the exercise of its jurisdiction under Article 226. The High Court erred in arrogating that jurisdiction to itself.”

(39) In State of Punjab Vs. Rafiq Masih (Whitewasher) : (2014) 8 SCC 883, another Three Judge Bench of the Hon'ble Supreme Court has held that the directions of that Court under Article 142 of the Constitution, while moulding the relief, that relax the application of law or exempt the case from the rigour of the law in view of the peculiar facts and circumstances do not comprise the ratio decidendi and therefore lose its basic premise of making it a binding precedent. In such circumstances, the reliance placed by the learned counsel for the appellant, cannot be of any avail.

E. Conclusion

(40) In the light of the aforesaid incontrovertible legal position coupled with the fact of the present case, we are in full agreement with the view expressed by the learned Single Judge on the issue of

appointment of the appellant by means of the impugned judgment/order. The learned Single Judge has taken great pain in deciding all the issues which were agitated by the parties. No new ground has been pressed, which would enable this Court to take a contrary view as has been expressed by the learned Single Judge.

(41) For the aforesaid reasons, since the appellant obtained appointment upon a false representation to belong to the reserved category and her very appointment to the post of Lecturer (Urdu) stands vitiated, we deem it not to deal with other issues raised by the appellant in the above-captioned special appeals and allow the *lis* to set at rest without any further action or counter claim.

(42) The above-captioned *intra Court* appeals being bereft of merits are, accordingly, **dismissed**. However, there shall be no order as to costs for the facts and circumstances of the case.

(43) Before parting with the case, this Court must candidly express unreserved and uninhibited appreciation for the assistance rendered by Ms. Pushpila Bisht, *Amicus Curiae* representing the appellant in the above-captioned appeals, therefore, she shall be paid a sum of Rs.5,000/- towards her remuneration by the High Court Legal Service Committee.

(2023) 8 ILRA 247
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2023

BEFORE

THE HON'BLE AJIT KUMAR, J

Writ A No. 779 of 2023

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

Counsel for the Petitioner:
Sri Yashpal Yadav, Sri Lalji Yadav

Counsel for the Respondents:
C.S.C.

Service Law – Recruitment – OBC Reservation – Caste Certificate Format – Affirmative Action – An OBC candidate, applied for the post of Sub Inspector in Civil Police He was denied OBC reservation due to submitting a caste certificate in the format meant for Central Government posts instead of the St. Government format for the required period The respondents treated him as a general category candidate, and he did not qualify due to higher cut-off marks. The petitioner argued that both certificates, issued by the same St. authority, confirmed his OBC status, and the format difference should not disqualify him. The sole issue is whether a candidate can be denied OBC reservation benefit merely for not furnishing the caste certificate in the prescribed "St. Government" format during the relevant period, despite producing a valid certificate (on Central format) issued by the same St. authority. Respondents directed to consider the petitioner under OBC category and include him in the OBC merit list. If his marks are above the last OBC cut-off, he shall be offered appointment.

Writ petition allowed.

Citations:

1. St. of U.P. Through Addl. Chief Secretary (Home) Vs Rinki Yadav Special Appeal (Def.) No. 274 of 2022, decided on 11.02.2022
2. Gaurav Sharma Vs St. of U.P. & ors.– 2017 (2) ESC 877 (All) (FB)
3. St. of U.P. & ors. Vs Arvind Kumar Srivastava & ors.– (2015) 1 SCC 347

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

1. Heard Sri Yashpal Yadav, learned counsel for the petitioner and learned Additional Chief Standing Counsel appearing for the State respondents.

2. Petitioner was applicant in the category of other backward class (OBC) for the post of Sub Inspector in Civil Police pursuant to the advertisement no. PRPB-nsk-2 (3 fo /2020) dated 25.2.2021, however at the time of submission of his online application form, he furnished the certificate issued by the competent authority of the State, of the backward caste meant for the post under the Central Government. He was permitted to appear in the written examination and having been successful as such and also qualifying the other physical standard and efficiency test, deserved to be considered in the merit list of the OBC category. At the time of document verification on 17th May, 2022, he furnished a notary affidavit alongwith certificate issued by the competent authority of the OBC caste but this time issued on the format meant for the post under the State Government. The certificate that was furnished by the petitioner was issued on 26.11.2018, which was available to him at the time of filling up the form but was not issued during the period required for i.e. between 01.4.2021 and 30th April, 2021.

3. In view of the fact that petitioner did not furnish requisite certificate issued on the format meant for the posts under the State Government of the relevant period and had submitted certificate on the format meant for the posts under the Central Government, the respondent seems to have considered the petitioner in open category instead of OBC and that is how petitioner having not qualified the merit in the open category, could not make it successful to

find place in merit list. It is submitted that last cut-off marks for the selected candidate in OBC is 305.54 for the post of Sub Inspector, whereas petitioner's marks are 305.84.

4. Two fold arguments have been advanced by learned counsel for the petitioner:

(a). *The controversy regarding irreconcilable the difference of repugnancy between norms fixed for issuing caste certificate for the posts under the Central Government and that for the posts under the State Government is no more res integra as format has been issued for the both the purposes by the same State Government for the Court which recognized as OBC in the state and both the certificates are issued by the competent authority assigned for such purpose by the State Government; and*

(b) *The purpose of the cast certificate being to make an acknowledgement that a person (candidate) is belonging to a particular caste and such an evidence of this fact and unless and until there is dispute with respect to a candidates falling under the non creamy layer a certificate issued and recognized by the State Government cannot be denied by the selecting body merely being on a different format.*

5. *Per contra*, the argument advanced by learned Additional Chief Standing Counsel is to the effect that requisite document is required to be filed alongwith application form filled up online upto the last date and if one is not possessed of the requisite document as required for, till the last date of the submission of form, a candidate cannot be permitted to rectify shortcomings subsequently.

6. The other argument advanced by learned Additional Chief Standing Counsel is that a caste certificate was required to be issued on a format prescribed for the posts under the State Government vide Clause 5.4(4) of the advertisement and there was specific rider to the effect that in the event the cast certificate issued on a required format is not filed or cast certificate meant for the posts under the Central Government is filed then candidature of such candidate in the reserved category shall be cancelled.

7. Learned Additional Chief Standing Counsel has also sought to urge that in view of the answer given to third issue framed by the full bench of this Court in the case of **Gaurav Sharma v. State of U.P. and Other, 2017 (2) ESC 877 (All) (FB)**, vide Paragraph 28, despite there being no repugnancy in the norms fixed by the Union and State Government, it would not absolve a candidate of liability to furnish a requisite document evidencing his cast status of to a particular reserved category as recognized and identified by the State,

8. In rejoinder to the counter submissions advanced by learned Additional Chief Standing Counsel, learned counsel appearing for the petitioner reiterated his argument and further added that even previously petitioner had been selected as constable by the police department on the basis of certificate issued in the year 2018, and therefore, there could be no doubt that petitioner did belong to OBC category and fell under non creamy layer.

9. It is also argued by learned counsel appearing for the petitioner that in the **State Of U.P. Thru. Addl. Chief Secy. Home (Police) Civil Sectr. Lko. And Others v.**

Rinki Yadav passed in Special Appeal (Def.) No. 274 of 2022 on 11.02.2009, a division bench has addressed all these issues and also referred to the judgment of the full bench in the case of Gaurav Sharma (*supra*) and has thus dismissed the appeal of the State Government against the order passed by the learned Single Judge who had permitted for consideration of candidature of that petitioner against the same recruitment examination conducted despite the fact that in that case also the caste certificate issued on the format meant for the posts under the Central Government, issued by the competent authority of the State, was filed initially.

10. Having heard learned counsel for the respective parties and their arguments raised across the bar, I find there to be the only issue that requires consideration as to whether merely because the petitioner did not get the requisite document in the form of certificate on the format of the State Government of the relevant period, would make any difference even if he had furnished caste certificate on the format meant for the post under the Central Government issued by the competent authority during period prescribed for under the advertisement.

11. In view of findings returned by the division bench of this Court in the case of State of U.P. v. Rinki Yadav (*supra*) vide paragraph 15 and 16, I do not consider it appropriate to go again into the controversy as to whether a candidate filing a certificate on the format meant for the post under the Central Government of the required period issued by the competent authority, would be considerable or not .

12. Paragraphs 15 and 16 of the judgment of the division bench are reproduced hereunder:

15. One of the issues which was considered by the Full Bench in the case of *Gaurav Sharma (Supra)* was as to whether there exists any irreconcilable difference or repugnancy between the norms fixed by the Union and State Governments with regard to certification of creamy layer? If not, its effect. It is also relevant to point out that petitioner in the *Gaurav Sharma* case had also submitted the certificate certifying that he belonged to the O.B.C. category in the same format in which the respondent-petitioner obtained the caste certificate and submitted the same for seeking benefit of the reservation available to O.B.C category candidates. The format in which the respondent-petitioner obtained the certificate is prescribed by the State of Uttar Pradesh. This fact is not in dispute, however, as stated by the learned counsel for the appellant-State authorities, the said format is for claiming benefit of reservation available to O.B.C. category candidates in relation to employment under the Government of India and not in relation to employment under the State of Uttar Pradesh. The caste certificate relied upon by the candidate in the case of *Gaurav Sharma* has been extracted in para-5 of the said judgement which is the same in which the respondent-petitioner was issued the certificate by the Tehsildar. The Full Bench in the case of *Gaurav Sharma (Supra)* has opined that, "while it is true that a caste certificate is only a recognition of an existing status, an O.B.C. candidate necessarily must establish the twin conditions of belonging to an O.B.C. group recognized by the State and also that he does not fall within the creamy layer. In paragraph-26 of the judgment in the case of *Gaurav Sharma*, the Full Bench has further observed that, "while it is true that an O.B.C. candidate even he produces a certificate which evidences that he does not

stand excluded from the benefits of reservation in terms of office memorandum dated 14th October, 2008, that issue still remain as to whether he is an O.B.C, as specified and identified by the State of Uttar Pradesh. The Full Bench further observes that, "although the certificate initially submitted by the O.B.C, candidates before the court did not stand excluded by virtue of standards fixed by the office memorandum dated 14th October, 2008, the certificate did not evidence them belonging to an O.B.C, as identified in the State of Uttar Pradesh". The court further goes on to observe that, "for the purposes of seeking the benefit of reservation it is imperative for a candidate to establish that he belongs to O.B.C, as recognized and identified by the State concerned and further that he/she does not fall within the field of exclusion".

16. Finally answering the issue (C), it has been said by the Full Bench in para-27 of the report that:

"27. We accordingly answer Question No. 1 in the negative and hold that an OBC candidate is not exempt from the rigours of a cut off or last date prescribed in an advertisement or recruitment notice. We further declare that Arvind Kumar Yadav correctly articulates the law on the issue and overrule Pravesh Kumar and Shubham Gupta. Insofar as Question No. 3 is concerned, we hold that although there is no repugnancy in the norms fixed by the Union and State Government, the same would have no favourable impact upon the eligibility of a candidate unless he also furnishes a certificate evidencing him as belonging to the OBC category as recognised and identified by the State."

(emphasis added)

13. The Court vide paragraph 20 discussed the OBC caste Ahir belonging to OBC category which is given in the

scheduled-1 as appended to the Reservation Act of 1994 and in that regard has also discussed and has also referred to notification issued in the Gazette of India, extraordinary dated 13th September, 1993. Paragraph 20, 21 and 22 of the judgment are reproduced hereunder:

“20. The Schedule-1 appended to Reservation Act 1994 is referable to Section-2 (b) of the said Act. Section 2(b) of the Reservation Act defines other backward classes of citizens to mean the backward classes of citizens specified in Schedule-1. Schedule-1 appended to the Reservation Act 1994 is extracted herein below:-

[SCHEDULE-I]

[See Section 2(b)]

1. Ahir, Yadav, Gwala, Yaduvanshiya

41. Bhurji, Bharbhunja, Bhooj, Kandu, Kashaughan

2. Sonar, Sunar, Swarnkar

42. Bhathiara

3. Jat

43. Mali, Saini

4. Kurmi, Chanau, Patel, Patanwar, Kurmi-Mall, Kurmi-Seinthwar

44. Sweeper (Those not included in

Scheduled Caste Category), Halalkhor

5. Giri

45. Lohar, Lohar-Saifi

6. Gujar

46. Lonia, Nonia, Gole-Thakur, Lonia- Chauhan

7. Gosain

47. Rangrez, Rangwa

8. Lodh, Lodha, Lodhi, Lot, Lodhi-Rajput

48. Marchcha

9. Kamboj

49. Halwai, Modanwal

10. Arakh, Arakvanshiya

50. Hajjam, nai, Salmani, Savita,

Sriwas

11. Kachchi, Kachchi-Kushwaha,

Shakya

51. Rai Sikh

12. [xxx]

52. Sakka-Bhisti, Bhisti- Abbasi

13. [xxx]

53. Dhobi (Those not included in the scheduled castes or scheduled tribes category

14. Kisan

54. Kasera, Thathera, Tamrakar

15. Koeri

55. Nanbai

16. [xxx]

56. Mirshikar

17. Kasgar

57. Shekh Sarwari (Pirai),

Peerahi

18. Kunjra or Raeen

58. Mev, Mewati

19. Gareria, Pal, Vaghel

59. Koshta/Koshti

20. Gaddi, Ghoshi

60. Ror

21. Chikwa, Qassab Qureshi,

Chak

61. Khumra, Sangatarash,

Hanseri

22. Chhippi, Chipa

62. Mochi

23. Jogi

63. Khagi

24. Jhoja

64. Tanwar Singharia

25. Dhafali

65. Katuwa

26. Taraoli, Barai, Chaurasia

66. Maheegeer

27. Teli, Samani, Rogangar, Sahu, Rauniar, Guandhi, Arrak

67. Dangi

28. Darji, Idrisi, Kakutsstha

- 68. Dhakar
- 29. [x x x]
- 69. Gada
- 30. Naqqal
- 70. Tantawa
- 31. Nat (Those not included in Scheduled Castes category)
- 71. Joria
- 32. Naik
- 72. Patwa, Patahra, Patehara, Deovanshi
- 33. Faqir
- 73. Kalal, Kalwar, Kalar
- 34. Banjara, Ranki, Mukeri, Mukerani
- 74. Manihar, Kacher Lakhara
- 35. Barhai, Saifi, Vishwakarma
- Panchal, Ramgadhiya, Jangir, Dhiman
- 75. Murao, Murai, Maurya
- 36. Bari
- 76. Momin (Ansar)
- 37. Beragi
- 77. Muslim Kayastha
- 38. [x x x]
- 78. Mirasi
- 39. Biyar
- 79. Naddaf (Dhuniya), Mansoori, Kandere, Kadera, Karan (Karn)].
- 40. [x x x]

21. A perusal of afore quoted Schedule-1 appended to 1994 Reservation Act clearly reveals that entry-1 therein mentions the community "Ahir". Accordingly as per the identification and recognition made by the State of Uttar Pradesh for a particular community belonging to other backward class, the entries in Schedule-1 is the only source for determination of such an issue. Admittedly "Ahir" community is included in the Schedule-1 at entry-1 and hence in terms of the identification made by the State of Uttar Pradesh for providing reservation available to O.B.C category candidates, persons belonging to "Ahir" community are

identified and recognized for the said purpose.

22. If we examine the notification published in the Gazette of India, extraordinary dated 13th September, 1993 which publishes the resolution of the Government of India dated 10th September, 1993 what we find is that in the State of Uttar Pradesh Ahir community is listed at Serial No.1. Accordingly, on examination of the identification made by the Government of India as also by the State of Uttar Pradesh for the purposes of inclusion of a particular group or community amongst the Other Backward Classes or citizens entitle to seek benefit of reservation available to them, we find that there does not exist any repugnancy as far as "Ahir" community is concerned. The reason for us to observe that there is no such repugnancy is that "Ahir" community finds mentioned in the notification of the Government of India dated 13th September 1993 which published the resolution of the Government of India dated 10th September 1993 and it is also included at Entry-1 of Schedule-1 appended to 1994 Reservation Act passed by the Legislature of State of Uttar Pradesh. “

14. The Court also referred to both the formats framed by the State Government vide paragraphs 7 and 8 of the judgment, which run as under:

“7. Learned counsel for the appellant- State Authorities has vehemently argued that as per the Notes appended to Clause 5.4 of the advertisement, the benefit of reservation to those candidates who belong to Other Backward Classes but fall in the creamy layer will not be available. Drawing out attention to Note 3 appended to clause 5.4 of the advertisement, it has been argued by learned State Counsel that

the said provision in the advertisement clearly provides that the candidates belonging to Other Backward Classes as mentioned in Schedule-I of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act 1994 (hereinafter referred to as the Reservation Act 1994) will not be entitled to the benefit of reservation if they fall in the creamy layer category. He has also stated that as per the stipulation made in Note 3, the caste certificate to be submitted by the candidates claiming the benefit of reservation available to Other Backward Classes shall be in a format (Praroop -1) and should have been issued on or after 01st April, 2020 but till the last date of making the application. That is to say, the caste certificate to be submitted by the candidate concerned should have been issued between 01st April, 2020 and 30th April, 2021 for the reason that 30th April, 2021 was the last date as per the advertisement to make the application. Note 3 appended to Clause 5.4 to the advertisement is extracted hereunder :-

(3) उत्तर प्रदेश लोक सेवा (अनुसूचित जातियों, अनुसूचित जन जातियों और अन्य पिछड़े वर्गों के लिए आरक्षण) अधिनियम-1994 (समय-समय पर यथा संशोधित) की अनुसूची-दो के अनुसार क्रीमीलेयर के अन्तर्गत आने वाले उत्तर प्रदेश के अन्य पिछड़े वर्ग के अभ्यर्थियों को आरक्षण का लाभ अनुमन्य नहीं है। अन्य पिछड़े वर्ग के लिए जाति प्रमाण-पत्र (प्रारूप-1) 01 अप्रैल, 2020 या उसके बाद का हो परन्तु अभ्यर्थी द्वारा इस भर्ती हेतु आवेदन करने की तिथि तक निर्गत होना चाहिए (अभ्यर्थी द्वारा आवेदन करने की अन्तिम तिथि 30-04-2021 को आवेदन करने की स्थिति में जाति प्रमाण- पत्र दिनांक: 30- 04-2021 तक निर्गत होना चाहिये)

8. Praroop-1 as per the advertisement is also extracted hereunder:-

प्रारूप-1

उत्तर प्रदेश के अन्य पिछड़े वर्ग के लिए जाति प्रमाण-पत्र

शासनादेश संख्या-13/22/16/92/टीसी-iii-का-2/2014 दिनांक 17 दिसम्बर, 2014

प्रमाणित	किया	जाता	कि
श्री/श्रीमती/कुमारी.....	सुपुत्र/	सुपुत्री	
/श्री.....	निवासी	ग्राम.....	
तहसील.....	नगर.....	जिला.....	उत्तर प्रदेश

राज्य की पिछड़ी जाति के व्यक्ति हैं। यह जाति उत्तर प्रदेश लोक सेवा (अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्गों के लिये आरक्षण अधिनियम, 1994 (यथासंशोधित) की अनुसूची- एक के अन्तर्गत मान्यता प्राप्त हैं। यह भी प्रमाणित किया जाता है कि श्री/श्रीमती/कुमारी पूर्वोक्त अधिनियम 1994 (यथासंशोधित) की अनुसूची-दो (जैसा कि उत्तर प्रदेश लोक सेवा) (अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्गों के लिये आरक्षण) (संशोधन) अधिनियम 2001 द्वारा प्रतिस्थापित किया गया है एवं जो उ०प्र० लोक सेवा (अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्गों के लिये आरक्षण) (संशोधन) अधिनियम 2002 द्वारा संशोधित की गयी है, से आच्छादित नहीं हैं। इनके माता पिता की निरन्तर तीन वर्ष की अवधि के लिये सकल वार्षिक आय आठ लाख रुपये या इससे अधिक नहीं है तथा इनके पास धनकर अधिनियम 1957 में यथा विहित छूट सीमा से अधिक सम्पत्ति भी नहीं है। श्री/श्रीमती/कुमारी..... तथा/अथवा उनका परिवार उत्तर प्रदेश के ग्राम.....तहसील.....नगर.. जिला.....में सामान्यतः रहता है।

स्थान.....

दिनांक.....

मुहर.....

हस्ताक्षर..

पूरा

नाम.

पदनाम...

जिलाधिकारी/अतिरिक्त जिलाधिकारी/

सिटी मजिस्ट्रेट/परगना मजिस्ट्रेट/ तहसीलदार "

15. I have perused the caste certificate of the petitioner issued on format meant for the post of Central Government filed as Annexure 1 at page 25-b and find that petitioner has been certified to be belonging to 'Ahir' community and also not falling in category and persons belonging to 'creamy layer' and the certificate which was earlier issued to the petitioner on 26.11.2018, the petitioner has been declared certified to be belonging to 'Ahir' community and also within the financial status, which would fall out of 'creamy layer'.

16. In view of above, therefore, in my considered view as petitioner belongs to the same selection and recruitment in respect of which judgment was passed in the case of State of U.P. and Rinki Yadav (*supra*) the petitioner is entitled to the same relief.

17. In the case of **State of Uttar Pradesh and Others v. Arvind Kumar Srivastava and Others (2015) 1 SCC 347**, vide paragraph 22.1, Supreme Court has held thus:

“ The normal rule is that when a particular set of employees is given relief by the Court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently ”

18. Now, there could be a question here, as has been argued by learned Additional Chief Standing Counsel, regarding distinguishing facts between the two cases. In the case of State of U.P. v. Rinki Yadav (*supra*), the certificate on the format meant for the posts under State Government was furnished of the requisite period later on whereas in the present case, petitioner has never furnished the certificate on the format meant for the posts under the State Government. This argument though appears to be quite impressive looking to the conditions laid down under the advertisement but one must not forget that in the event two certificates are being issued by same Government authority, and purpose/object in two different formats is the same, furnishing requisite information, the State selecting body under the circumstances cannot just reject the candidature on the ground that certificate has not been furnished on a particular format required for under the advertisement of the requisite period even though certificate of requisite period was submitted.

19. It is necessary here at this stage also to go through the clause 5.4(4) of the advertisement dated 25.2.2021 is reproduced hereunder:

“ अन्य पिछड़ा वर्ग श्रेणी के अभ्यर्थियों द्वारा निर्धारित प्रारूप-1 निर्धारित अवधि का प्रमाण पत्र प्रस्तुत न किये जाने अथवा भारत सरकार की सेवाओं हेतु मान्य अन्य पिछड़ा वर्ग श्रेणी को प्रमाण-पत्र प्रस्तुत किये जाने पर उसको अनारक्षित श्रेणी के अभ्यर्थी के रूप में व्यवहृत किया जायेगा । ”

20. The language of clause 5.4(4) though in so many words prescribes that certificate should not be on the format meant for the posts under the Government

of India but looking to the object with which the clause has been framed that the candidate must furnish a certificate evidencing the caste meant to make him eligible for the particular category under reservation in the State of Uttar Pradesh.

21. There could be cases where a caste recognized as falling in particular reserved category as per notification of Central Government but not in the State and vice versa, in as much as since posts under Central Government are applied at the country land from different states and so Union of India/ Central Government has prescribed a common format for all states. Hence, therefore, we should have a pragmatic approach. The format whether of Central Government or State Government, if has all the requisites to identify a person belonging to a particular caste so as to ascertain his/her eligibility for reservation, it should be acceptable provided, of course both the certificates are issued by the same authority and of the same State where posts are under State Government and are subject to selection and recruitment.

22. Here, I would like to refer to paragraph 29 of the judgment of the division bench, in which reservation has been taken to be an affirmative action on the part of the State Government to reach out to most defined section of the society in giving proper representation in government service with an object to bringing them in the main stream of the country. Paragraph 29 of the judgment in the division bench of State of U.P. v. Rinki Yadav (*supra*) is reproduced hereunder:

“29. Before parting with this case, we may observe that benefit of reservation in public employment to different disadvantaged sections of Society

is permissible under the Constitution of India as an affirmative action. It is not in dispute that the respondent-petitioner was given appointment while she claimed the benefit of reservation available to O.B.C. candidates in her selection to the post of Constable (Civil Police). Merely because the certificate produced by her was not in Praroop-I, though the certificate produced by her clearly evidences that she belongs to an O.B.C. group as identified by the State of Uttar Pradesh and also that she does not get excluded as a person belonging to creamy layer in terms of the criteria laid down by the State of Uttar Pradesh for the said purpose, it should not be taken aid of by the State authorities for denying her otherwise constitutionally guaranteed right of affirmative action. “

23. It is also necessary here to refer to last paragraph 5 of the judgment of the full bench in the case of Gaurav Sharma (*supra*) wherein question no. 3 has been answered and which was heavily relied upon by the Additional Chief Standing Counsel in support of his argument. The answer given by the full bench in question no. 3 in paragraph 28 is reproduced hereunder:

“28. Applying the reasoning as given by the Full Bench in the case of Gaurav Sharma (supra), we, accordingly, are of the opinion that the certificate relied upon and submitted by the respondent-petitioner; dated 15th April 2021 which was issued by Tehsildar, Unnao sufficiently certifies and evidences that the respondent-petitioner belongs to an O.B.C. group identified and recognized by the State of Uttar Pradesh and further that she as per the criteria prescribed by the State of Uttar Pradesh for exclusion under creamy layer does not fall in the creamy layer and hence

she is eligible and entitle to claim reservation available to O.B.C. category candidate. “

24. Upon reading of the aforesaid paragraph of the judgment, it is clear that a candidate is required to furnish certificate evidencing him to be belonging to OBC category as recognized and identified by the State so the *ratio* behind the answer by the full bench appears to be very clear that a candidate is required to furnish certificate which certifies him belonging to the caste of particular category under which he/ she claims reservation benefit.

25. I would also observe here that the object behind reservation being to bring into mainstream of the nation the most oppressed class both socially and financially and castes in the state and at the nation level are identified and notified of such category to offer them reservation in government service, so if there is no quarrel about the cast of a person as notified by the state deserving benefit of regularization in that state, it should not matter on which format certificate has been issued. Both the posts under Union of India and the State if are reserved for such category and the state is issuing certificates one meant for posts under Central Government and other for post under State Government, if requisite information is available, it would be hypothetical approach to reject a certificate just for it being on a format prescribed for the posts under Central Government. To this extent the relevant clause in the advertisement should be construed liberally.

26. In the present case whether it is upon format meant for the posts under Government of India or upon format meant for posts the State Government both the

certificates having been issued by the State Government certifying the petitioner to be belonging to Ahir cast, the OBC caste and also not belong to creamy layer, respondents are not justified in rejecting candidature of the petitioner as far as his eligibility for OBC category is concerned.

27. In view of above, writ petition succeeds and is allowed. The respondents are directed to consider the candidature of the petitioner as candidate of other backward caste, in the selection held for the recruitment against the post of Sub Inspector under the advertisement PRPB-nsk-2 (3 fo /2020) dated 25.2.2021. The petitioner shall be placed in the merit list of OBC category as per marks obtained and if is at par or above the last cut off, shall be offered appointment.

(2023) 8 ILRA 256
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2023

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J
THE HON'BLE VINOD DIWAKAR, J.

Special Appeal No. 1013 of 2018
 with other connected cases

State of U.P. & Ors. ...Appellants
Versus
Shiv Jag Sharma & Ors. ...Respondents

Counsel for the Appellants:
 Sri Yogendra Kumar Singh

Counsel for the Respondents:
 A.A.G., A.S.G.I., Sri Yogesh Kumar Saxena,
 Sri Yogesh Kumar Saxena

**Civil Law - Civil Service Regulations, 1986 -
 Regulation 361 - Industrial Employment
 (Standing Orders) Act, 1946 - U.P.**

Absorption of Retrenched Employees Rules, 1991 - Constitution of India, 1950 - Article 14 - Article 226 - Governed absorption of UPCL employees into other government departments post-liquidation

The St. appealed against a Single Judge's order (12.03.2018) granting pensionary benefits to workmen of the Churk and Dala Cement Factories, owned by the St., under Regulation 361 of the Civil Service Regulations, for service rendered up to 31.03.1981. The core question was whether these workmen, governed by the Industrial Employment (Standing Orders) Act, 1946, could be treated as civil servants eligible for pension, given their status as industrial employees and subsequent absorption into the U.P. Cement Corporation Limited from 01.04.1981. The court affirmed the respondents' entitlement to pensionary benefits, rejecting the St.'s argument that workmen were not civil servants. The decision rested on the St.'s own policy (02.08.2005 Order), the equitable principle of equal treatment under Article 14, and the factual identity with Gorakh Nath Pandey.

The appeal was dismissed.

List of Cases cited:

1. Ajit Kumar Nag Vs General Manager (PJ), Indian Oil Corp. Ltd. (2005) 7 SCC 764:
2. Gorakh Nath Pandey Vs St. of U.P. (Special Appeal (Defective) No. 773 of 2016)
3. St. of U.P. Vs Gorakh Nath Pandey (SLP (Civil) Diary No. 11199 of 2018, 01.05.2018)
4. Kamla Neti Vs Special Land Acquisition Officer (2023) 3 SCC 528; B. Premanand Vs Mohan Koikal (2011) 4 SCC 266; P.M. Latha Vs St. of Kerala (2003) 3 SCC 541:
5. St. of U.P. Vs Arvind Kumar Srivastava (2015) 1 SCC 347:
6. Azam Jahi Mill Workers Association Vs National Textile Corp. Ltd. [2021 (4) ESC 880 (SC)]:

7. VSM. Salgaocar & Bros. Vs CIT (2000) 5 SCC 373;

8. Kunhayammed Vs St. of Ker. (2000) 6 SCC 359:

9. Wander Ltd. Vs Antox India Pvt. Ltd. (1990 (Supp) SCC 727);

10. Roma Sonkar Vs M.P. St. Public Service Commission (2018) 17 SCC 106

(Delivered by Hon'ble Saumitra Dayal
Singh, J.
&
Hon'ble Vinod Diwakar, J.)

1. Heard Sri Ajeet Kumar Singh, learned Additional Advocate General assisted by Sri Pankaj Kumar Rai, learned Additional Chief Standing Counsel and Sri Amit Verma, learned Standing Counsel for the respondents-appellants and Sri Yogesh Kumar Saxena, learned counsel for the respondents-petitioners.

2. Present intra-court appeal has been filed against the order of the learned single judge dated **12.03.2018** passed in **Writ-A No. 33526 of 2016 (Shiv Jag Sharma and 9 others Vs. State of U.P. and others).**

3. By that order, the learned single judge has allowed the writ petition, following the earlier decision of a Division Bench of this Court in **Special Appeal (Defective) No. 773 of 2016 (State of U.P. and 4 others Vs. Gorakh Nath Pandey and 15 others)**, arising from an order of the another learned single judge dated **12.04.2016** in **Writ-A No. 61107 of 2013 (Gorakh Nath Pandey and 15 others Vs. State of U.P. and 4 others).**

4. In short, petitioners-respondents who had been engaged as workmen at the

Churk and Dala Cement Factories established by the Government of U.P., have been directed to be paid pension, commensurate to the years of service rendered at those cement factories of the State Government, up to the cut off date i.e. 31.03.1981. They having rendered 10 years qualifying service on that date, were found eligible to that benefit, under Regulation 361 of the Civil Service Regulation.

5. Submissions of the learned Additional Advocate General are, all the petitioners-respondents were appointed as workmen at the Churk and Dala Cement Factories established by the State Government. Though, they may have served continuously for a period of 10 years in that capacity, they could never claim to be Civil Servants within the meaning of Regulation 361 of the Civil Service Regulation. The petitioners-respondents had only been appointed as workmen under the Industrial Employment (Standing Orders) Act, 1946 (hereinafter referred to as the "Act, 1946") and the Standing Order issued thereunder. Referring to the Government Order No. 1355, dated 18.04.1972, it has been submitted, the distinction between the workmen who may have worked at the above described cement factories and the other employees and officers of the State Government, who may have worked at those establishment of the government and who were governed by the Industrial Standing Orders, may never have been equalised.

6. Reference has also been made to another Government Order dated 01.07.1989, to submit that the same was applicable only to Temporary Government Servants but not to workmen, who may have been engaged by the State Government.

7. Referring to another Office Order No. 3047-51, dated 02.08.2005, it has been submitted, the benefit of the pension scheme was applicable only to Officers and Temporary Government Servants of the above described cement factories, who were not governed by the Industrial Standing Orders, excluding the workmen who remained governed by the terms of the extant Industrial Standing Orders.

8. Relying on a decision of the Supreme Court in **Ajit Kumar Nag Vs. General Manager (PJ), Indian Oil Corporation Limited; (2005) 7 SCC 764**, it has been strenuously urged, workmen engaged at an industrial establishment owned by the State Government may never acquire the status of a government servant. Since the petitioners-respondents continued to be workmen of the State Government, up to the date of their absorption in the U.P. Cement Corporation incorporated by the State Government w.e.f. 1.4.1981, they never acquired the status of a government/civil servant, either while working as a workman at a factory establishment owned by the State Government or at the factory of the corporation owned by the State Government.

9. That status of government servant may have been acquired by some of the petitioners-respondents who later came to be absorbed in other government departments under the U.P. Absorption of Retrenched Employees Rules, 1991, occasioned by the winding of the U.P. Cement Corporation Limited, vide order of the learned Company Judge, dated 8.12.1989. None of the petitioners-respondents have set up their claim of having completed qualifying service after

the date of such absorption, as government servants.

10. In that factual premise, it has been submitted, the earlier order of the learned single judge in **Gorakh Nath Pandey (supra)** was based on a wrong assumption in law. It did not take note of the correct status of the petitioners in that case and proceeded to treat the workmen of the State Government to be government employees/civil servants. That mistake committed by the learned single judge was not corrected in the intra court appeal being **Special Appeal (Defective) No. 773 of 2016 (State of U.P. and 4 others Vs. Gorakh Nath Pandey and 15 others)** (hereinafter referred to as the "**Gorakh Nath Pandey (supra)**").

11. Upon further challenge raised by the State before the Supreme Court, that view of the co-ordinate bench of this Court was not affirmed. Thus, the **Special Leave Petition (Civil) Diary No. 11199 of 2018 (State of Uttar Pradesh & Ors. Vs. Gorakh Nath Pandey & Ors.)** came to be decided by the following order dated 01.05.2018 :

"Delay condoned.

Application for exemption from filing official translation is allowed.

In the peculiar facts of this case, we are not inclined to exercise our jurisdiction under Article 136 of the Constitution of India. Hence, this special leave petition is dismissed, leaving the question of law open.

Needless to say that the impugned judgment may not be treated as precedent."

12. Thus, it was only in the peculiar facts of that case found by the Supreme Court that SLP came to be dismissed. At

the same time, the question of law raised in that appeal, whether a workman at a government factory could be equated as a government servant and be eligible to pension, was specifically left open. Any doubt in that regard was clarified further by the Supreme Court by observing that the said decision of the division bench of this Court would not be treated as a precedent.

13. In view of that order passed by the Supreme Court, the learned Additional Advocate General would further contend, the issue has to be examined de novo and, in any case, referred to a larger bench of the Court.

14. Since the equities are pitted directly against the law, it is not for this Court to rule in favour of equities. Here, reliance has been placed on decisions of the Supreme Court in **Kamla Neti Vs. The Special Land Acquisition Officer and others; (2023) 3 SCC 528, B. Premanand and others Vs. Mohan Koikal and others; (2011) 4 SCC 266 and P.M. Latha and another Vs. State of Kerala and others; (2003) 3 SCC 541.**

15. Last, it has been submitted, the petitioners did not approach this Court within time and therefore they are entitled to get any relief. The learned single judge has erred in allowing their writ petitions. Here, reliance has been placed on three co-ordinate bench decisions of this Court, in **State of U.P. and 3 others Vs. Mohd. Israr Khan and 40 others; Neutral Citation No. 2023:AHC:105865-DB, State of U.P. and 2 others Vs. Gautam Das and 46 others; Neutral Citation No. 2023:AHC:105868-DB and State of U.P. and 2 others Vs. Sant Lal Vishwakarma and 50 others; Neutral Citation No. 2023:AHC:116438-DB.**

16. On the other hand, Sri Yogesh Kumar Saxena would submit, the petitioners-respondents have not been given any benefit of service rendered by them to the U.P. Cement Corporation Limited w.e.f. 1.4.1981. Undoubtedly, those services have to be treated to have been rendered to a corporation established by the State Government. That corporation was a distinct and different entity from that of the State Government. Therefore, the dictum of the Supreme Court in **Ajit Kumar Nag (supra)** is wholly inapplicable to the present facts, inasmuch as that ratio had arisen in the context of employees of a State owned corporation only. In that case, it was never in dispute, if a workman under the industrial establishment owned by the State Government may stand on the same footing as a government servant or a civil servant.

17. The precise issue that had arisen in the present case was dealt with by the State Government by first issuing Government Order No. 1355, dated 18.04.1972 dealing with the nomenclature of employees of the State Government. Then, vide further Government Order dated 01.07.1989, it was specifically provided that the retiral benefits due to Government Servants would extend to Temporary Government Servants as well. In any case, on 02.08.2005, the State Government being cognizant of the fact situation applicable to the present case namely workmen of the industrial establishment owned by it had been permanently absorbed by a corporation established by it, w.e.f. 1.4.1981. In that context, the workmen of the State Government were described as employees with reference to whom provision was being made by means of the said Office Order. Paragraph-3 of the said order clearly refers to the workmen of the

Cement Factories, Churk and Dala of the State Government. The State Government then announced its decision to extend the pensionary benefits to such workmen treating/equating them to be Temporary Government Servants to whom such benefit had been extended by the earlier Government Order dated 01.07.1989.

18. That decision having been made by the State Government itself and implemented, the petitioners were clearly entitled to its benefits. The distinction, if any that was being drawn, was dealt with by the learned single judge in **Gorakh Nath Pandey (supra)**. Thereupon, it was found, having worked for more than 10 years in the cement factory established by the State Government, those workmen were entitled to pensionary benefits under the self-same Government Order (discussed above).

19. Upon challenge laid to the said order of the learned single judge, a division bench of this Court dealt with the self-same issue and repelled the submission as is now being advanced on behalf of the State Government. After a detailed discussion of the provisions of the Civil Service Regulation, the co-ordinate Bench reached a conclusion that the workmen of the industrial establishment owned by the State Government would remain entitled to pensionary benefits as government servants.

20. While the Supreme Court may not have fully approved and thus affirmed the order of the co-ordinate Bench, it did not reverse the same and in any case, it did not lay down any contrary law. The later observation made in that order leaving the question of law open and not for that reason allowing that decision of the co-

ordinate bench to be made precedent, only indicates that the same is not to be applied by way of reasoning if facts are different.

21. Insofar as the same facts are shown to exist in the present case as existed in **Gorakh Nath Pandey (supra)**, peculiarity of facts noted by the Supreme Court in the third paragraph of its order dated 1.5.2018 obtains in the present case, as well. It is not the case of the State-respondents that the present set of respondents stand on a different footing than the petitioners in **Gorakh Nath Pandey (supra)**. Therefore, while no law may have arisen as may bind the Court in future decisions, at the same time, the rule of consistency and principles of equity would dictate, the Court may not draw any distinction as may itself lead to equals being treated unequally. Relying on a decision of the Supreme Court in **Modified Voluntary Retirement Scheme of 2002 of Azam Jahi Mill Workers Association Vs. National Textile Corporation Limited and others; [2021 (4) ESC 880 (SC)]**, it has been strenuously urged that the Court itself may not pass any order as may result in equals being treated unequally. As to delay, it has been submitted, neither such ground was raised before the learned single judge nor there is any inordinate delay on the part of the petitioner in the present case. These petitions were filed immediately after pronouncement by the learned single judge in **Gorakh Nath Pandey (supra)**.

22. Having heard learned counsel for the parties and having perused the record, we find the coordinate Bench in **Gorakh Nath Pandey (supra)** had the occasion to deal with the exact same submissions being advanced in the present appeal. There also, an issue had been raised that exactly similarly situated workmen of a cement

factory established by the State Government may not have been equated to civil servants and, therefore, they may not be found entitled to pensionary benefits under Regulation 361 of the Civil Service Regulations. Pertinent to the dispute before us, the co-ordinate bench had observed as under:

"Crux of the submission of the learned Advocate General therefore, is what once the petitioners are found to answer the description of workmen/industrial employees within the meaning of to be assigned under the Standing Orders Act, they stand excluded from the definition of a person appointed to a civil post or in civil service within the meaning of U.P. Fundamental Rules/Civil Service Regulations and therefore they are not entitled to pension.

We specifically inquired from the learned Advocate General as to under which provision of the U.P. Fundamental Rules/Civil Service Regulations/Standing Orders Act, any such exclusion in respect of the persons who are workmen are not being a person appointed to a civil post. No response could be given. It is more or less an admitted position that there is no specific provision for excluding the workmen/industrial employees in the matter of payment of pension/retiral dues, who otherwise satisfy all the conditions as contemplates by Regulation 361 of the Civil Service Regulations.

The Standing Orders Act has been enforced with an object to law down the condition of service like disciplinary action, leave, allowances etc. so as to minimize the friction between the workmen and employer in Industrial Undertaking. Such Industrial Undertaking can be private undertaking or Government Undertaking or Public Private Undertaking. It is useful

to refer to the definition of employer contained in Section 2 (d) (ii) of the Act, 1946, which reads as follows:

"2. Interpretation.

(d) "employer".....

(ii) in any industrial establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf, or where no authority is so appointed, the head of the department;"

Thus, it will be seen that a Government may own industrial undertaking and in that circumstance, a employee working in such an industrial undertaking has to be held to be in service of Government and if the appointment is substantive and his service is to be paid by the Government, he stands covered by the provisions of Regulation 361 of the Civil Service Regulations, which entitles him to pension.

For ready reference, Regulation 361 of the Civil Service Regulations reads as under:

"361. The service of an officer does not qualify for pension unless it conforms to the following three conditions:---

First-The service must be under Government.

Second-The employment must be substantive and permanent.

Third-The service must be paid by Government."

We may explain that use of the word "civil service" under Civil Service Regulations has to be read to include all nature of employment in the Government, except those which are in relation to defence service or service connected with defence.

Civil Service as defined in The New Dictionary of Cultural Literacy, Third

Edition by Houghton Mifflin Company reads as under:

"The nonmilitary personnel who work for a government, applying its laws and regulations."

In our opinion the service conditions laid down as per the Certified Standing Orders, the Act, 1946 do not in any way impinge upon the right of a employee working in a Government Industrial Undertaking to be entitled to pension and other retiral dues under Regulation 361 of Civil Service Regulations. Provisions of Regulation 361 of the Civil Service Regulations are a beneficial piece of legislation and we do not find any reason for the persons who are covered by the Certified Standing Orders to be excluded from the benefits of Regulation 361 of the Civil Service Regulations, if they satisfy the other requirements of Regulation 361 of the Civil Service Regulations.

In our opinion even a workman/industrial employee of Government Industrial Undertaking has to be held to be a civil servant/holder of a civil post under the Government so as to be covered within the meaning of Regulation 361 of the Civil Service Regulations.

There is no issue with regard to other employees appointed in Factory at Churk and subsequently absorbed in the Corporation being paid pension in terms of the Government Order dated 2nd August, 2005.

We for the reasons recorded above see no reason as to why the workmen/industrial employees similarly appointed and absorbed be denied the same benefit. It is held that petitioners who answer the description of industrial employees/workmen shall also be covered by the Government Order dated 2nd August, 2005 and would be entitled to all benefits following therefrom.

In the totality of the circumstances on record we do not find any substance in the contentions raised by the learned Advocate General for the State to interfere with the judgment and order of the learned Single Judge dated 12th April, 2016.

All these appeals lack merit and are accordingly dismissed."

23. Thus, we find, exact same submission had been raised before the coordinate Bench. It had been dealt with and repelled on the reasoning that the petitioners (in that case), were specifically included for the purpose of grant of pensionary benefit upon the decision made by the State Government dated 02.08.2005. Even today, it is no one's case that the above Office Order issued by the Commissioner and Director, Industries, Government of U.P., was later withdrawn or amended, at any subsequent date. That decision of the State Government has not only remained in existence, but it was also enforced against the State Government in **Gorakh Nath Pandey (supra)**.

24. Therefore, the mere reference to the Standing Order containing the terms and conditions of engagement of the petitioners-respondents as workmen establishes that technically it is true that the workmen of the industrial establishment may stand on a different footing than an employee of the State Government enjoying status of an employee engaged under separate Rules. That technical deficiency of status though may always be recognized by the Courts, yet, it is always open to the State-government/employer to still treat its workmen equal to its other employees, for grant of pensionary benefit. In the context of a welfare State, that exact decision does appear to have been made by

the State Government in favour of the present petitioners-respondents on 02.08.2005 when it decided, despite being conscious of the above distinction of the status of the petitioners-respondents, to grant them pensionary benefits by equating them with other government employees. Relevant extract of the Office Order dated 02.08.2005 reads as below:

"कार्यालय आदेश

उत्तर प्रदेश राज्य सीमेण्ट निगम लिमिटेड की चुर्क/चुनाव एवं अन्य ईकाईयों से सेवानिवृत्त कुछ कर्मचारियों द्वारा माननीय उच्च न्यायालय में पेन्शन एवं अन्य परिणामी लाभ दिये जाने हेतु याचिकाये योजित की गई। इन याचिकाओं में मा० उच्च न्यायालय द्वारा पारित निर्णय के परिप्रेष्य में समय समय पर शासन द्वारा याचीगणों को पेन्शन उच्चीकृत किये जाने हेतु कतिपय शर्तों के अंतर्गत अनुमन्यता प्रदान की गई। याचीगणों को पेन्शन अनुमन्य किये जाने पर अन्य अधिकारियों / कर्मचारियों द्वारा भी पेन्शन स्वीकृत किये जाने हेतु शासन से मांग की गई। अधिकारियों / कर्मचारियों की मांगों पर सम्यक रूप से विचारोपरान्त शासन स्तर पर दिनांक 24-7-2003 को विशेष सचिव, औद्योगिक विकास अनुभाग- 1 की अध्यक्षता में हुई बैठक में निर्णय लिया गया कि मा० उच्च न्यायालय के आदेशों के अनुश्रवण में याचीगण अथवा अन्य पूर्व कर्मचारियों के पेन्शन की स्वीकृति संबंधी जो आवेदन पत्र प्राप्त हुए उकने संबंध में उद्योग निदेशालय द्वारा कार्यवाही की जायेगी, पेन्शनरी लाभ दिये जाने हेतु निगम के पूर्व कर्मचारियों के सेल अभिलेख शासकीय समापक इलाहाबाद से व्यक्तिगत प्रयास करके प्राप्त कर लिये जाये इसके लिये उद्योग निदेशालय के स्थानीय अधिकारियों का सहायोग लिया जाये एवं जो अभिलेख पर्याप्त प्रयासों के बावजूद उपलब्ध नहीं हो पते है उनके संबंध में नियमानुसार शपथपत्र प्राप्त करके कार्यवाही की जाये।

शासन के उपरोक्त आदेशानुसार उक्त अधिकारियों / कर्मचारियों से प्राप्त पेन्शन प्रपत्रों पर कार्यवाही करते हुए महालेखाकार के माध्यम से पेन्शन अनुमन्य कराई जाती है उक्त सीमेण्ट फैक्ट्रिया उद्योग विभाग के अन्तर्गत संचालित थी एवं इन फैक्ट्रियों में जो कर्मचारी थे वे राजकीय सेवक थे कालान्तर में उ० प्र० राज्य सीमेण्ट निगम लि० की स्थापना होने पर उक्त फैक्ट्रियां निगम के नियंत्रणाधीन चली गई

एवं उनमें कार्यरत कर्मचारियों की सेवायें 1.4.1972 से सीमेण्ट निगम में स्थानान्तरित हो गई। इन कर्मचारियों की यह सेवायें निगम में 1.4.1972 से प्रतिनियुक्ति पर मानी गई एवं यह प्रतिनियुक्ति अवधि दिनांक 31.3.1981 तक बढ़ाई गई एवं 1.4.1981 से इन अधिकारियों / कर्मचारियों की सेवायें उ० प्र० राज्य सीमेण्ट निगम लि० में संविहीन हो गई इस प्रकार उ० प्र० राज्य सीमेण्ट निगम लि० की सेवाओं में आमेसन की तिथि (1.4.1981) से ठीक पूर्व इन कर्मचारियों द्वारा की गई सेवायें राजकीय सेवायें हैं।

उक्त कर्मचारियों के अस्थाई होने के कारण उन्हें सेवा नैवृत्तिक लाभो की स्वीकृति प्रदान नहीं की जा सकी थी चूंकि तत्समय राज्य सरकार के अस्थाई कर्मचारियों को पेन्शन सुविधा अनुमन्य नहीं थी। कालान्तर में वित्त विभाग (सामान्य अनुभाग-3) के कार्यालय ज्ञाप संख्या सा०-3-1152 / दस-915 - 89 दिनांक 1.7.1989 द्वारा अस्थाई कर्मचारियों को भी सेवा नैवृत्तिक लाभों की सुविधा अनुमन्य कर दी गई। तदनुसर सीमेण्ट निगम के उक्त कर्मचारी निगम की सेवा में आमेसन की तिथि से पूर्व की राजकीय सूचनाओं के लिये पेन्शनरी सुविधा हेतु अर्ह हो गये।

चूंकि उ० प्र० राज्य सीमेण्ट निगम लि० के लिक्वीडेशन की प्रक्रिया चल रही है यहां पर कोई भी अधिकारी शेष नहीं बचा है जो इन अधिकारियों / कर्मचारियों के पेन्शन प्रपत्रों का परीक्षा करके पेन्शन स्वीकृति हेतु उद्योग निदेशालय अग्रसारित कर सकें अतः इस संबंध में शासन स्तर पर सम्यक विचारोपरान्त लिये गये निर्णय के अनुसार उपरोक्त तीनों ईकाईयां जिकने अधिकारियों 2 कर्मचारियों के व्यक्तिगत अभिलेख सीमेण्ट निगम के चुर्क स्थिति कार्यालय में शासकीय सहायक की अभिरक्षा में उपलब्ध है को प्राप्त करके तदुसार पेन्शन प्रपत्रों व जांच करके उन्हें उद्योग निदेशालय अग्रसारित किये जाने हेतु महा प्रबन्धक जिला उद्योग केन्द्र सोनभद्र को अधिकृत किया जाता है। महाप्रबन्धक, जिला उद्योग केन्द्र सोनभद्र शासकीय समापक से प्राप्त कर्मचारियों के अभिलेखों के आधार पर उकने पेन्शन प्रपत्रों की जांच करके पेन्शन स्वीकृति हेतु निदेशालय को अग्रसारित करें ताकि तदुसार पेन्शन स्वीकृति हेतु निदेशालय स्तर पर वांछित औपचारिकतायें पूर्ण कराने के उपरान्त उन्हें महा लेखाकार कार्यालय को भेजा जा सके। महा प्रबन्धक जिला उद्योग केन्द्र तत्काल कार्यवाही सुनिश्चित करेंगे।"

25. It was never for this Court to question the wisdom of the State Government in taking that administrative decision. Insofar as that decision was permissible to be taken by the State Government, apparently while pursuing the welfarist objectives under the Constitution of India, we do not find that decision to be per se illegal or contrary to law. Having failed to specifically exclude the workmen from the scope of application of that order, it was not fair for the respondent-appellant/State, to now set up this plea.

26. As to reason, we find the learned single judge did not find any occasion to take a different view to that taken by the coordinate bench, in **Gorakh Nath Pandey (supra)**. The learned single judge felt inclined to follow the decision of the coordinate bench in **Gorakh Nath Pandey (supra)**. In the peculiar facts of the present case namely, the State Government having itself chosen to treat the industrial workmen appointed by it at its erstwhile cement factories at Churk and Dala, to be entitled to pensionary benefits and in view of the exact identity of facts between present petitioners-respondents and in **Gorakh Nath Pandey (supra)**, and further, in absence of any dispute to the continued applicability of the Office Order dated 02.08.2005 issued by the State Government, read in conjunction with the Government Orders dated 18.04.1972 and 01.07.1989, to such industrial workmen, they having fulfilled the requirement of qualifying service of 10 years on the cutoff date i.e. 31.3.1981, we do not see any wrong principle had been applied by the learned single judge, in this case.

27. In **Wander Ltd. Vs Antox India P. Ltd. 1990 (Supp) SCC 727**, in an appeal arising from an interlocutory injunction, the

Supreme Court disapproved the approach of the division bench of the High Court, in interfering with the interlocutory order of the learned single judge. In that, it was laid down:

“14.The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd.v.Pothan Joseph[(1960) 3 SCR 713 : AIR 1960 SC 1156] : (SCR 721)

“... These principles are well established, but as has been observed by Viscount Simon in Charles Osenton & Co.v.Jhanaton[1942 AC 130] ‘...the law as to the reversal by a court of appeal of an

order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case’.”

The appellate judgment does not seem to defer to this principle”.

28. That principle was then applied by the Supreme Court to intra court appeals arising in writ jurisdiction, in **Roma Sonkar v. M.P. State Public Service Commission, (2018) 17 SCC 106**. It was observed:

“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”.

29. We thus prefer to look through the filter of principle to be applied to the undisputed rather, admitted facts. To the extent, we find no fault in exactly similar

citizens being treated similarly (on the force of an earlier division bench decision of this Court, that was not upturned in the challenge raised to it before the Supreme Court), at the cost of the respondent-State, that is otherwise sworn to pursue the constitutional ideology of a welfarism. The beneficiaries of that equality being affirmed through the agency of equitable relief granted, being individual workmen who had been engaged by the State Government, we find no error of principle applied by the learned single judge, in granting them the relief, following the earlier decision of the coordinate bench in **Gorakh Nath Pandey (supra)**.

30. Thus, in the present facts, we decline to examine if an industrial workman (appointed with that status by the State Government), would hold the status equivalent to that of a Government Servant or a Civil Servant. We are inclined to affirm the decision of the learned single judge that is found based on the decision of the coordinate Bench in **Gorakh Nath Pandey (supra)**. In the peculiar facts of the present case namely noted above we find no error of principle applied by the learned single judge, in allowing the writ petition in terms of **Gorakh Nath Pandey (supra)**.

31. As noted above, that conscious and beneficial decision was taken by the State Government. It is not the case of the State Government that the said Executive Order was in conflict with any statutory or other law, that Executive Order created the force of law, to the extent the State Government may not be permitted to either ignore it or to exercise whims or to pick and choose between exactly similarly situated persons – to grant its benefit to some to deny it to others. To that extent the Executive Order remains enforceable, and

in any case lays down an administrative principle that may be applied universally, to all persons falling within its ambit, without any element of arbitrariness.

32. Coming to the order of the Supreme Court, we find, no exaggerated intent may be drawn from the use of the phraseology in that order, either to the words "peculiar facts in this case" or "leaving the question of law open" or "impugned judgement may not be treated as precedent". It is settled law that an order of the Supreme Court dismissing Special Leave Petition does not itself lay down any law as was observed by the Supreme Court in **V.M. Salgaocar & Bros. (P) Ltd. v. CIT, (2000) 5 SCC 373**, observed as under:

“8. Different considerations apply when a special leave petition under Article 136 of the Constitution is simply dismissed by saying “dismissed” and an appeal provided under Article 133 is dismissed also with the words “the appeal is dismissed”. In the former case it has been laid by this Court that when a special leave petition is dismissed this Court does not comment on the correctness or otherwise of the order from which leave to appeal is sought. But what the Court means is that it does not consider it to be a fit case for exercise of its jurisdiction under Article 136 of the Constitution. That certainly could not be so when an appeal is dismissed though by a non-speaking order. Here the doctrine of merger applies. In that case, the Supreme Court upholds the decision of the High Court or of the Tribunal from which the appeal is provided under clause (3) of Article 133. This doctrine of merger does not apply in the case of dismissal of a special leave petition under Article 136. When an appeal is

dismissed the order of the High Court is merged with that of the Supreme Court. We quote the following paragraph from the judgment of this Court in the case of Supreme Court Employees' Welfare Assn.v.Union of India[(1989) 4 SCC 187 : 1989 SCC (L&S) 569] : (SCC pp. 206-07, para 22)

“22. It has been already noticed that the special leave petitions filed on behalf of the Union of India against the said judgments of the Delhi High Court were summarily dismissed by this Court. It is now a well-settled principle of law that when a special leave petition is summarily dismissed under Article 136 of the Constitution, by such dismissal this Court does not lay down any law, as envisaged by Article 141 of the Constitution, as contended by the learned Attorney General. In Indian Oil Corpn. Ltd.v.State of Bihar[(1986) 4 SCC 146 : 1986 SCC (L&S) 740] it has been held by this Court that the dismissal of a special leave petition in limine by a non-speaking order does not justify any inference that, by necessary implication, the contentions raised in the special leave petition on the merits of the case have been rejected by the Supreme Court. It has been further held that the effect of a non-speaking order of dismissal of a special leave petition without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to be that the Supreme Court had decided only that it was not a fit case where special leave petition should be granted. In Union of India v. All India Services Pensioners' Assn. [(1988) 2 SCC 580 : 1988 SCC (L&S) 651 : (1988) 7 ATC 449] this Court has given reasons for dismissing the special leave petition. When such reasons are given, the decision becomes one which attracts Article 141 of the Constitution which provides that the

law declared by the Supreme Court shall be binding on all the courts within the territory of India. It, therefore, follows that when no reason is given, but a special leave petition is dismissed simpliciter, it cannot be said that there has been a declaration of law by this Court under Article 141 of the Constitution.”

33. Then, in **Kunhayammed v. State of Kerala, (2000) 6 SCC 359**, the Supreme Court further explained the effect of dismissal of a Special Leave to Appeal petition, thus:

“27. A petition for leave to appeal to this Court may be dismissed by a non-speaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, if it is a non-speaking order, i.e., it does not assign reasons for dismissing the special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared. If the order of dismissal be supported by reasons then also the doctrine of merger would not be attracted because the jurisdiction exercised was not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to appeal. We have already dealt with this aspect earlier. Still the reasons stated by the Court would attract applicability of Article 141 of the Constitution if there is a law declared by the Supreme Court which obviously would be binding on all the courts and tribunals in India and certainly the parties thereto. The statement contained in the order other than on points of law would be binding on the parties and the court or tribunal, whose

order was under challenge on the principle of judicial discipline, this Court being the Apex Court of the country. No court or tribunal or parties would have the liberty of taking or canvassing any view contrary to the one expressed by this Court. The order of Supreme Court would mean that it has declared the law and in that light the case was considered not fit for grant of leave. The declaration of law will be governed by Article 141 but still, the case not being one where leave was granted, the doctrine of merger does not apply. The Court sometimes leaves the question of law open. Or it sometimes briefly lays down the principle, may be, contrary to the one laid down by the High Court and yet would dismiss the special leave petition. The reasons given are intended for purposes of Article 141. This is so done because in the event of merely dismissing the special leave petition, it is likely that an argument could be advanced in the High Court that the Supreme Court has to be understood as not to have differed in law with the High Court.

40. A petition seeking grant of special leave to appeal may be rejected for several reasons. For example, it may be rejected (i) as barred by time, or (ii) being a defective presentation, (iii) the petitioner having no locus standi to file the petition, (iv) the conduct of the petitioner disentitling him to any indulgence by the court, (iv) the question raised by the petitioner for consideration by this Court being not fit for consideration or deserving being dealt with by the Apex Court of the country and so on. The expression often employed by this Court while disposing of such petitions are — “heard and dismissed”, “dismissed”, “dismissed as barred by time” and so on. May be that at the admission stage itself the opposite party appears on caveat or on notice and offers contest to the maintainability of the

petition. The Court may apply its mind to the meritworthiness of the petitioner's prayer seeking leave to file an appeal and having formed an opinion may say “dismissed on merits”. Such an order may be passed even ex parte, that is, in the absence of the opposite party. In any case, the dismissal would remain a dismissal by a non-speaking order where no reasons have been assigned and no law has been declared by the Supreme Court. The dismissal is not of the appeal but of the special leave petition. Even if the merits have been gone into, they are the merits of the special leave petition only. In our opinion neither doctrine of merger nor Article 141 of the Constitution is attracted to such an order. Grounds entitling exercise of review jurisdiction conferred by Order 47 Rule 1 CPC or any other statutory provision or allowing review of an order passed in exercise of writ or supervisory jurisdiction of the High Court (where also the principles underlying or emerging from Order 47 Rule 1 CPC act as guidelines) are not necessarily the same on which this Court exercises discretion to grant or not to grant special leave to appeal while disposing of a petition for the purpose. Mere rejection of a special leave petition does not take away the jurisdiction of the court, tribunal or forum whose order forms the subject-matter of petition for special leave to review its own order if grounds for exercise of review jurisdiction are shown to exist. Where the order rejecting an SLP is a speaking order, that is, where reasons have been assigned by this Court for rejecting the petition for special leave and are stated in the order still the order remains the one rejecting prayer for the grant of leave to appeal. The petitioner has been turned away at the threshold without having been allowed to enter in the appellate jurisdiction of this Court. Here also the

doctrine of merger would not apply. But the law stated or declared by this Court in its order shall attract applicability of Article 141 of the Constitution. The reasons assigned by this Court in its order expressing its adjudication (expressly or by necessary implication) on point of fact or law shall take away the jurisdiction of any other court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by this Court because permitting to do so would be subversive of judicial discipline and an affront to the order of this Court. However this would be so not by reference to the doctrine of merger.

44. To sum up, our conclusions are:

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or

authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(emphasis supplied)

34. Insofar as no reason has been ascribed in the order of the Supreme Court dated 1.5.2018, there is no merger and no law declared under Article 141 of the Constitution of India. Then, the further observation of the Supreme Court, that the law declared by the coordinate bench of this Court, would not have precedential value, only amounts to leaving this Court completely free to take a contrary view, in any other case, if facts so justify. At the same time, in absence of any reason whatsoever, given by the Supreme Court, while deciding that Special Leave to Appeal, it did not lay down any principle of law to be applied to such other case. Therefore, the learned single judge may not have erred in principle, in following the earlier coordinate bench decision of this Court, in **Gorakh Nath Pandey (supra)**.

35. Therefore, to us, the order of the Supreme Court maintained the fact conclusions reached by the coordinate bench leading to the relief granted by it, in those facts. To that extent, the order of the Supreme Court is not an order negating or disapproving the fact reasoning given by the coordinate bench. Rather, it grants finality to that decision. There is no doubt that the said decision of the coordinate bench has attained finality. No review application or other proceedings was instituted by the State before the Supreme Court, or this Court, in that matter.

36. As to the peculiar facts in which the Supreme Court passed the above order, we are inclined to accept the submission of the learned counsel for the petitioners-respondents that that exact peculiarity of facts exists and obtains in the present set of proceedings, as well. It is not in dispute that the petitioners-respondents were initially engaged as workmen by the State Government to work at its industrial establishment namely - Churk and Dala Cement Factories. It is also not in dispute that the petitioners-respondents continued to work in that capacity for a period of 10 years or more, allowing them to describe themselves as persons who had rendered qualifying service for the purposes of eligibility to claim pension. It is also not in dispute that the petitioners-respondents have not claimed any pension for any length of service rendered by them as employees of the U.P. Cement Corporation. Those exact facts existed in the case of **Gorakh Nath Pandey (supra)**. There is not the slightest difference in essential facts in these two sets of proceedings.

37. It is on those facts that the decision of the learned single judge arose in the first set of cases, namely, **Gorakh Nath Pandey (supra)**, that was confirmed by the coordinate bench of this Court. Unless some distinct fact feature was shown to exist, the writ Court which remains a Court of equity may not reach a different fact conclusion and thus lead itself to treat equals, unequally. In **Azam Jahi Mill Workers Association (supra)**, a group of workers of the said mill were granted voluntary retirement. Of that group, one set of workers vacated their official quarters earlier, voluntarily. Another set of workers continued in occupation. Later, to secure the possession of the premises thus illegally occupied by its retired employees, the

management floated a scheme to provide for allotment of alternative land, to secure the vacant possession of its premises. The first set of retired employees who had voluntarily vacated the premises were denied that benefit. In that context, proceedings arose, and the Supreme Court made the following pertinent observations in that regard:

"9.3 The concept of equality before the law and equal protection of the laws emerges from the fundamental right expressed in Article 14 of the Constitution. Equality is a definite concept.

The concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Those who are similarly circumstanced are entitled to an equal treatment. Equality is amongst equals. Classification is therefore to be founded on substantial differences which distinguish persons grouped together from those left out of the groups and such differential attributes must bear in just and rational relation to the object sought to be achieved.

In a given case Article 14 of the Constitution may permit a valid classification. However, a classification to be followed must necessarily satisfy two tests. Firstly, the distinguishing rationale has to be based on a just objective and secondly, the choice of differentiating one set of persons from another must have a reasonable nexus to the objects sought to be achieved. In the present case allotment of 200 Sq.Yards free of cost to 134 employees was to avoid undue hardship to the ex-employees and as a welfare measure. As observed hereinabove those 318 ex-employees who are denied the benefit of allotment of 200 Sq.Yards of plots free of cost are similarly placed persons with that of 134 employees who are allotted 200

Sq. Yards plots free of cost. There is no rationale justification in providing differential treatment to one class of ex-employees similarly placed with another class of ex-employees who are allotted the plots."

38. The decisions referred to and relied upon by the learned Additional Advocate General ruling in favour of principle, law would prevail over simple equity, are not apposite to the present facts. That principle may have been applied, if there did not exist any Government Order dated 18.04.1972 and 01.07.1989 and further, if conscious decision had not been made by the State Government itself on 02.08.1985, to grant pensionary benefits to all its erstwhile employees who had been appointed at the Cement Factories, Dala and Churk, without specifically excluding the workmen. More critically, that principle in law may have been applied if this Court had not found **Gorakh Nath Pandey** and other exactly similarly situated persons entitled to the relief of pensionary benefits. That equalization with civil/government servants, granted to industrial workmen of the cement factories of the State Government at Dala and Churk, even if granted on the peculiar facts found in that case, strongly commends that the learned single judge did not err in granting that relief to the petitioners-respondents, on the own strength and force of equity.

39. Having failed to establish any distinction before the co-ordinate bench, in **Gorakh Nath Pandey (surpa)**, and that decision having not been upturned by the Supreme Court, we do not find this a fit case to interfere on the submission advanced by the learned Additional Advocate General that the basic difference in status between a civil servant and an

industrial workman, must always maintain. The respondent-appellant/State may not be permitted to re-agitate that issue, in these proceedings. That exercise, if permitted, may only lead to absolute equals being treated unequally by the writ Court. Thus, we do not find the equities being pitted against the law; rather, we find, in the present facts, the equities are running parallel to the result that arose in law i.e., upon dismissal of the Special Leave Petition in **Gorakh Nath Pandey (supra)**.

40. Since the equality claimed was to a final order of a coordinate bench that has attained finality, it is that 'law' that the present set of petitioners-appellants sought benefit of, on an equitable principle. It has been granted by the learned single judge in exercise of the extraordinary discretionary jurisdiction of the Court under Article 226 of the Constitution of India.

41. In the context of service jurisprudence, the normal rule remains i.e. when a particular set of employees is given relief by the Court, all other identically situated persons are to be treated alike by extending that benefit. Not extending that benefit would itself amount to discrimination in violation of Article 14 of the Constitution of India. That principle was recognized in **State of U.P. and others Vs. Arvind Kumar Srivastava and others (2015) 1 SCC 347**. However, the exception to that rule arising from gross delay and laches was also recognized and applied in that decision. Since there were unexplained delay and laches, such relief granted by the Tribunal as was confirmed by the High Court, was reversed by the High Court. However, the discussion as to the rule and its exception insofar as it is relevant case, contained in paragraph-22, is quoted hereinbelow :

“22.1. The normal rule is that when a particular set of employees is given relief by the Court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently.

22.2. However, this principle is subject to well recognized exceptions in the form of laches and delays as well as acquiescence. Those persons who did not challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay only because of the reason that their counterparts who had approached the Court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons be extended to them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim.

22.3. However, this exception may not apply in those cases where the judgment pronounced by the Court was judgment in rem with intention to give benefit to all similarly situated persons, whether they approached the Court or not. With such a pronouncement the obligation is cast upon the authorities to itself extend the benefit thereof to all similarly situated person. Such a situation can occur when the subject matter of the decision touches upon the policy matters, like scheme of regularisation and the like (see **K.C.**

Sharma & Ors. v. Union of India (1997) 6 SCC 721 : 1998 SCC (L&S) 226. On the other hand, if the judgment of the Court was in personam holding that benefit of the said judgment shall accrue to the parties before the Court and such an intention is stated expressly in the judgment or it can be impliedly found out from the tenor and language of 27 the judgment, those who want to get the benefit of the said judgment extended to them shall have to satisfy that their petition does not suffer from either laches and delays or acquiescence.”

42. In the present case, there are no gross or unexplained delay and laches. The decision in **Gorakh Nath Pandey (supra)**, is dated **12.04.2016** arising on writ petition filed in year 2013, whereas the petitions giving rise to the present batch of appeal were filed soon thereafter, in the year 2016 itself. The petition giving rise to the present appeal having filed immediately after declaration of the law in **Gorakh Nath Pandey (supra)**, we do not find the writ petition to have been filed with gross or unexplained delay and laches.

43. As discussed above, while exercising intra-court appeal jurisdiction, we remain within the confines of the same jurisdiction. Discretion vested in the Court having been exercised by the learned single judge, in favour of the petitioners-respondents, may not be interfered with in absence of any wrong application of principle by the learned single judge. Thus, we remain disinclined to take a contrary view as may seek to negate the discretion exercised, since we are unable to see material difference of facts existing, as may require or compel us to entertain any different view in law or on equity as may further compel us to make a reference to a larger bench.

44. Thus, we restrain the State Government from picking and choosing or differentiating between exactly similarly situated persons, for the purpose of grant of benefit of the Office Order dated 02.08.2005. To that extent we apply the principle laid down in **Azam Jahi Mill Workers Association (supra)**.

45. In view of the above, we find no good ground to treat the petitioners differently from the petitioners in **Gorakh Nath Pandey (supra)**.

46. Accordingly, the appeal fails and is **dismissed**.

47. No order as to costs.

(2023) 8 ILRA 273
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.08.2023

BEFORE

THE HON'BLE IRSHAD ALI, J

Writ A No. 1330 of 2010
connected with
Writ A No. 5897 of 2010
connected with
Writ A No. 1413 of 2010

Jitendra Kumar Tiwari **...Petitioner**
Versus
State of U.P. & Anr. **...Respondents**

Counsel for the Petitioner:
Dr. L.P. Mishra

Counsel for the Respondents:
C.S.C., Mahendra Pratap

Service Law – Appointment – Cancellation of appointments during Model Code of Conduct – Discrimination – Similarly situated candidates allowed to join –

Right to equal treatment – Mandamus issued to permit joining.

Where petitioners were duly selected and issued appointment letters to various posts (Pharmacist, Stenographer, Clerk, Store Keeper) in Government Medical Colleges under a common selection process and advertisement, and though they reported for duty, they were denied joining solely due to enforcement of the Model Code of Conduct. Later, their appointments were cancelled without notice. However, similarly placed candidates from the same select list were permitted to join following court orders revoking the cancellation. The denial of joining to the petitioners amounted to discrimination, especially when no allegations of misconduct or fraud were raised against them, and others similarly placed were reinSt.d. The Court held that the St. could not take a U-turn after appointing candidates to fulfil Medical Council of India (MCI) inspection requirements, and technical lapses by the respondents could not prejudice the petitioners. **Mandamus issued** directing the respondents to permit petitioners to join their respective posts within six weeks.

The writ is allowed.

Citations:

1. Committee of Management, Vaidik Kanya Inter College & anr.Vs St. of U.P. & ors. (2023) 7 ILRA
2. Kul Bhushan Mishra & anr.Vs St. of U.P. & ors. (2023) 7 ILRA
3. Dinesh Chandra Verma Vs St. of U.P. & ors. (2023) 7 ILRA
4. Rajat Yadav Vs St. of U.P. & ors. (2023) 8 ILRA
5. St. of U.P. & ors. Vs Shiv Jag Sharma & ors. (2023) 8 ILRA
6. Jitendra Kumar Tiwari Vs St. of U.P. & anr. & Connected Cases (2023) 8 ILRA

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Dr. L.P Misra, learned Senior Counsel assisted by Ms. Arti Bali, learned counsel for the petitioners and Sri Pankaj Patel, learned Additional CSC for respondent - State.

2. At the very outset, learned Senior Counsel for the petitioners requested for withdrawal of prayer (a) to the writ petitions, which is being quoted as under:

(a) To issue a writ, order or direction in the nature of Certiorari quashing the orders dated 02.05.2009, 07.05.2009 and 22.05.2009, the true copies of which are contained as Annexure Nos.8, 9 and 10 respectively to the writ petition, if there arises any legal necessity for the same as the orders canceling the appointment have already been recalled by the State Government."

3. Accordingly, prayer (a) to the writ petitions is dismissed as withdrawn.

4. By means of **Writ-A No.1330 of 2010**, the petitioners have prayed for issuance of a writ, order or direction in the nature of mandamus commanding the respondents to allow the petitioner Nos.1 to 4 to join on the post of Pharmacist, petitioner No.5 to join on the post of Stenographer, petitioner No.6 to join on the post of Clerk and petitioner No.7 to join on the post of Store Keeper in Manyawar Kanshiramji Rajkiya Allopathic Medical College, Jalaun on which posts they were appointed in the same manner as other similarly situated persons, including the persons placed below them in the select list, who are being allowed to continue.

In **Writ -A No.5897 of 2010**, the petitioner has prayed for issuance of a writ, order or direction in the nature of

mandamus commanding the respondents to allow the petitioner to join on the post of Pharmacist in Government Medical College, Azamgarh on which posts he was appointed in the same manner as other similarly situated persons, including the persons placed below him in the select list, who are being allowed to continue.

In **Writ-A No.1413 of 2010**, the petitioner has prayed for issuance of a writ, order or direction in the nature of mandamus commanding the respondents to allow the petitioner to join on the post of Store Keeper in Manyawar Kanshiramji Rajkiya Allopathic Medical College, Jalaun on which posts he was appointed in the same manner as other similarly situated persons, including the persons placed below him in the select list, who are being allowed to continue.

5. Since all the writ petitions give rise to a similar controversy, the same are being decided by means of a common judgment and order treating Writ-A No.1330 of 2010 to be leading writ petition and the judgment and the judgment and order passed thereon shall be equally applicable to the connected matters.

5. Brief facts giving rise to the present writ petition are as under:

Sr. No.	Relevant Facts of the Case
a.	The State Government established a number of Medical Colleges in the State of Uttar Pradesh including Government Medical College, Kannauj, Government Medical College, Jalaun and Government Medical College, Azamgarh.
b.	An advertisement was issued on 29.08.2008 by the Director General of Medical Education and Training (for short, "DGME"), Lucknow - - respondent No.2 for the posts of Lab Attendants, Pharmacists, Drivers, Store Keepers, Stenographers, Typists and Clerk for Government Medical College, Kannauj. In response to the aforesaid advertisement, the petitioners submitted their candidature for

	appointment on the posts of Pharmacist, Stenographer, Clerk and Store Keeper.
c.	Said Medical Colleges were to start from Educational Session, 2009 and before that recognition from Medical Council of India (MCI) was sought for and a panel of MCI was likely to inspect for the purpose of grant of recognition, shortly, for Government Medical College, Jalaun.
d.	The appointment of teaching staff, para medical staff and other staffs are a condition precedent for making a satisfactory inspection report by MCI, which was basis for grant of recognition and, therefore, respondent No.4 issued a letter on 20.02.2009 addressed to respondent No.2 requesting that as the educational session was to start and the inspection by MCI was proposed, it will be appropriate that candidates from select list prepared in pursuance to advertisement dated 29.08.2008 be made available for appointment in Government Medical College, Jalaun, wherein posts of Pharmacists, Stenographers, Clerks and Store Keepers were also indicated.
e.	On the basis of instructions issued by respondent No.2, respondent No.3 issued appointment letters dated 24.02.2009 earmarking the petitioners to Government Medical College, Jalaun.
f.	Vide letter dated 26.02.2009, respondent No.4 intimated to respondent No.2 that persons mentioned in the appointment letter have been taken over.
g.	On 26.02.2009, the petitioners approached respondent No.4 and requested to give joining on their respective posts but as they were not carrying their physical fitness certificates and affidavits, they were asked about their credentials and to get medically examined by concerned Chief Medical Officer.
h.	On 04.03.2009, the petitioners approached the respondent No.4 along with physical fitness certificates and affidavits and requested for giving them joining on their respective posts but respondent No.4 apprised the petitioners that as the election code of conduct has been implemented, they cannot be allowed to join on their respective posts.
i.	On 02.05.2009, without giving any notice to the petitioners including other persons, the Minister, Parliamentary Affairs, Finance and Medical Education, U.P. issued an order requiring respondent No.1 to cancel the appointments on persons mentioned in the list annexed therewith.
j.	On 07.05.2009, Special Secretary, Medical Education and Training, Government of U.P. issued an order requiring the respondent No.2 to cancel the appointments and submit a report to the Government in this regard.

k.	On 22.05.2009, respondent No.2 passed an order canceling the appointments made in Government Medical College, Jalaun.
l.	On 25.05.2009, the petitioners approached to respondent No.4 for joining on their respective posts but they were apprised that all the appointments made in Medical College, Jalaun have been cancelled, therefore, the petitioners cannot be allowed to join on their respective posts.
m.	A number of persons approached to this Court by means of various writ petitions challenging the order of cancellation of appointments and this Court was pleased to pass interim orders staying the cancellation of their appointments.
n.	On 13.09.2009, the State Government filed a number of special leave to appeal petitions before Hon'ble Apex Court against interim orders granted by this Court, which was dismissed vide order dated 18.09.2009 with a liberty to the State Government to file special appeals before the High Court.
o.	The State Government filed two special appeals including Special Appeal No.743 of 2009, which were dismissed by the Division Bench of this Court vide order dated 28.10.2009.
p.	The State Government issued an order on 07.11.2009 revoking the cancellation of order dated 22.05.2009 by means of which appointments were made.
q.	When the respondents did not comply with orders passed by this Court, contempt petitions were filed before this Court, wherein orders dated 11.02.2010 and 22.02.2010 were passed in Criminal Misc. Case No.2906 (C) of 2009 - Ajay Kumar Yadav and others Vs. Har Bhajan Singh and others
r.	Vide order dated 26.02.2010, respondents allowed the persons, who filed writ petitions to join on their respective posts.
s.	The petitioners made a representation on 20.02.2010 to respondent No.2 claiming joining on their respective posts, which is lying pending consideration and no order whatsoever has been passed till date.
t.	Hence, the present writ petition has been preferred before this Court.

4. Submission of learned Senior Counsel for the petitioners is that appointment of the petitioners were made after following due procedure and the

petitioners have faced selection committee and appointment letter has been issued to them and on the ground of any lapse / technical objection on the part of the respondents, they should not be deprived.

5. He further submitted that there was no allegation against the petitioners for concealment or fraud, therefore, they should not be paralyzed by not allowing them to join the post.

6. He next submitted that the persons pursuant to same appointment order under which the petitioners were appointed with same conditions have been allowed to join, however, the petitioners have not been allowed to join due to implementation of election code of conduct and subsequently, the order of appointment has been cancelled by the State Government, which was stayed by this Court in various writ petitions. He submitted that persons having been placed below the petitioners in the same select list have also been appointed, however, the claim of the petitioners has been ignored.

7. He lastly submitted that the petitioners are not strangers nor they are outsiders. They are the persons, who were subjected to the process of regular selection. The respondents under compelling circumstances for grant of recognition from MCI, appointed the petitioners as regular incumbents to meet out the norms for grant of recognition during visit of MCI and subsequently they cannot be permitted to take a U-turn declining the claim of the petitioners.

8. On the other hand, learned Additional C.S.C. placed before this Court an order dated 04.07.2023 passed by this Court in Writ-A No.5435 of 2010; Shivendra

Vashishtha Vs. State of U.P. and others and submitted that case of the petitioners is akin to petitioner of aforesaid writ petition and they are also entitled to get the same relief.

9. I have considered the submissions advanced by learned counsel for the parties and perused the material on record as well as order placed by learned Additional C.S.C.

10. Vide order dated 04.07.2023, following observation and directions were issued in Writ-A No.5435 of 2010:

"13. On perusal, it is evident that an advertisement was published and on the basis of appointment letter issued to the petitioner along with six other persons, four persons named above were given joining in Medical College, Azamgarh. Later on, their appointment has been cancelled vide order dated 22.05.2009. Subsequently, as a result of order of this Court in several writ petitions, the order dated 22.05.2009 was recalled by the respondents and the aforementioned four persons were permitted to re-join their respective post. However, the petitioner, whose name finds place at serial No.4 in the aforesaid list, has not been permitted to join on the ground of technicalities. This fact itself has been admitted in the counter affidavit that four persons were initially permitted to join on the instructions of higher authorities. Therefore, such kind of discrimination cannot be permitted to go on.

14. If the aforementioned four persons were the part of same selection under same advertisement and were permitted to join the post under same appointment letter, there is no occasion to not permit the petitioner to join his respective post.

*15. In view of reasons recorded above, the writ petition deserved to be allowed and is hereby **allowed**.*

16. A writ in the nature of mandamus is issued commanding the respondent No.2 to look into the matter and if case of the petitioner is akin to aforementioned persons, namely, Santosh Kumar Upadhyaya, Neeraj Gupta, Sandeep Kumar Singh and Sushri Seema Verma, he shall also be given joining within a period of four weeks from the date of production of a certified copy of this order.

17. No order as to costs."

11. On perusal of aforesaid judgment and order, it is evident that petitioners of aforesaid writ petition were selectees of same advertisement and were appointed vide same appointment letter. However, four persons, who were part of same selection proceeding, were permitted to join but the petitioner of that writ petition was not allowed to join his respective post. The writ petition was allowed and direction was issued to respondent No.2 to give joining to him within a period of four weeks from the date of production of a certified copy of the order, if his case is found akin to similarly situated persons, who were already granted appointment.

12. Here, in the present case, the claim of the petitioners for facing due selection procedure and issuance of appointment letter has not been denied by the respondents. It has also not been denied by the respondents that in pursuance to appointment letter issued to them, they have not submitted their joining.

13. It is crystal clear from record that the petitioners tendered their joining before the respondent No.4 on 26.02.2009 but as they were not carrying their physical fitness certificates and affidavits, they were asked about their credentials and to get medically examined by the Chief Medical Officer.

Subsequently, the petitioners approached to respondent No.4 on 04.03.2009, along with physical fitness certificates and affidavits and requested for joining on their respective posts but respondent No.4 apprised the petitioners that as the election code of conduct has been implemented, they cannot be allowed to join on their respective posts.

14. Later on, vide order dated 22.05.2009, respondent No.2 cancelled the appointments made in Government Medical College, Jalaun against which, several writ petitions were filed before this Court and the order of cancellation of appointment was stayed. The State Government filed special leave to appeal petition before Hon'ble Supreme Court, which has been dismissed with liberty to file special appeal before the High Court. In pursuance thereof, the State Government filed two special appeals before this Court including Special Appeal No.743 of 2009, which have also been dismissed by Division Bench of this Court vide order dated 28.10.2009.

15. Subsequently, the State Government passed an order on 07.11.2009 revoking the cancellation of order dated 22.05.2009 by means of which appointments were made. When the order of writ court was not complied with, several contempt petitions were also filed and vide order dated 26.02.2010, the respondents allowed the persons, who filed writ petitions to join on their respective posts.

16. In this background of the case, the petitioners, who are also selectees of same selection process, cannot be ruled out and their claim for joining on their respective posts cannot be ignored on technicalities.

17. In view of reasons recorded above, the writ petition succeeds to be allowed and is hereby allowed.

18. A writ in the nature of mandamus is issued commanding the respondents to allow the petitioners to join on their respective posts within a period of six weeks from the date of production of a certified copy of this order.

19. No order as to costs.

(2023) 8 ILRA 278
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J

Writ A No. 7428 of 2023

Jag Mohan Agarwal **...Petitioner**
Versus
Smt. Kanchan Kumari Jain **...Respondent**

Counsel for the Petitioner:

Sri Pankaj Agarwal

Counsel for the Respondent:

Sri Sudeep Harkauli

Applicability of Act No. 16 of 2021 - Tenancy Dispute, Non-Registration of Tenancy Agreement, Interim Rent Fixation, Maintainability of Recall Application, Tenancy Succession: For non-residential tenancies (Section 6(3)), the tenant's successor must prove they inherited the business, failing which the existing tenant remains liable. Tenancy Agreement Registration: Non-registration by the tenant does not invalidate proceedings if the landlord complies with Section 4(3) by filing particulars. Interim Rent Fixation: The Rent Authority can fix provisional rent under Section 10(4) based on market rates, and such decisions must be supported by evidence (e.g.,

comparable rents). Recall Limitations: Section 34 (8) restricts recall applications to procedural issues like non-service or inability to appear, not new substantive objections. The proceedings under Act No. 16 of 2021 were held maintainable, and the petitioner was confirmed as the tenant. The interim rent fixation was deemed lawful and based on market rates. The court upheld the rejection of the recall application under Section 34(8), as it only allows recalls for non-service of notice or inability to appear, neither of which applied. New objections raised in the recall application were not permissible.

Citations:

1. Sana Ullah Vs Ashok Kapil, 1979 ARC 138

2. Neena Jain & ors. Vs St. of U.P. & anr., Civil Appeal Nos. 1082-2083 of 2017

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Pankaj Agarwal, learned counsel for petitioner and Sri Sudeep Harkauli, learned counsel for respondent.

2. Present petition has been filed seeking following reliefs:-

"i) to issue a writ, order or direction in the nature of certiorari quashing the order dated 05.04.2023 passed by Additional District Magistrate (Civil Supply)/Rent Authority, Agra as well as impugned order dated 06.07.2022 passed by Additional District Magistrate (Civil Supply)/Rent Authority, Agra.

ii) to issue a writ, order or direction in the nature of certiorari quashing the entire proceedings of Case No. 696/2022, Smt. Kanchan Kumar Jain vs. Jagmohan Agrawal under section 10(1) of U.P. Regulation of Urban Premises Tenancy Act, 2021."

3. Learned counsel for petitioner-defendant submitted that premises in

question is a Nazul/Lease land given by the State Government/Nagar Nigam, therefore, under the exception of Section 3 of the Uttar Pradesh Regulation of Urban Premises Tenancy Act, 2021 (hereinafter referred to as 'Act No. 16 of 2021'), Act No. 16 of 2021 would not be applicable in this case. Though this objection was not taken against the application filed by respondent-plaintiff for fixation of interim rent, but petitioner-defendant has raised the same while filing recall application and without considering the same, recall application has been rejected under the provisions of Section 34(8) of Act No. 16 of 2021. He firmly submitted that once Act No. 16 of 2021 is not applicable, all proceedings under the provision of Act No. 16 of 2021 are void ab-initio. In the present case, remedy before the landlord is to file SCC Suit under the Provisions of Provincial Small Causes Court Act, 1887(hereinafter, referred to as, 'Act of 1887').

4. It is next submitted that from the day one, the case of petitioner is that he is never a tenant of the shop in question and in fact his father was the tenant. After his death, he has not succeeded his father's business and as per Section 6(3) of Act No. 16 of 2021, he is not the tenant and tenancy devolves for remaining period to the person/family member, who had succeeded the business of deceased-tenant. Petitioner-defendant has taken this specific ground in his objection, but rejecting the same, rent application was decided vide impugned order dated 06.07.2022 in terms of Section 6(2) of Act No. 16 of 2021, which is for the purpose of residential tenancy, where the right of tenancy shall devolve for the remaining period to his successors, therefore, treating the petitioner-defendant as tenant, order is bad in light of Section 6(3) of Act No. 16 of 2021.

5. He further submitted that Section 4 of Act No. 16 of 2021 provides for tenancy agreement and in case of only tenancy agreement, any proceeding may be initiated under Section 4 of Act No. 16 of 2021. Tenancy is required to be registered by submitting joint application or individual application by the landlord or the tenant and after that, Rent Authority shall provide a Unique Identification Number. In the present case, tenancy agreement has never been registered either jointly or separately and no Unique Identification Number has been allotted, therefore, no proceeding can be initiated under Section 4 of Act No. 16 of 2021.

6. It is further submitted that Section 10 of Act No. 16 of 2021 provides for Rent Authority to determine the revised rent in case of any dispute between the landlord and the tenant and for that purpose, it is required on the part of Rent Authority to determine the rent after application of mind, but in present case, after deducting certain amount, rent as proposed has been approved without application of mind and any exercise to determine the rent.

7. Lastly, it is submitted that in light of facts so argued here, neither, proceeding is maintainable under the law nor on the facts. Even in case assuming that the Act No. 16 of 2021 is applicable, even though, order is bad in light of facts that it has also not been considered that petitioner is not a tenant and no rent may be revised under Section 10 of the Act No. 16 of 2021.

8. Sri Sudeep Harkauli, learned counsel for respondent-plaintiff raised preliminary objection and submitted that it is a factual issue, therefore, it is required on the part of the petitioner-defendant to file appeal before the Rent Tribunal under

Section 35 of the Act No. 16 of 2021 against the order of the Rent Authority within 30 days from the passing of such order after depositing 50 per cent of the entire payable amount determined under the order of Rent Authority.

9. He also pointed out that in the writ petition, it is mentioned that lease in question has expired, which is incorrect, but in fact, the lease was last renewed on 06.04.2010 and the same is valid up to the year 2037. Therefore, this ground alone is sufficient to dismiss the writ petition.

10. It is next submitted that Section 3 of Act No. 16 of 2021 provides that nothing in this Act shall apply to any premises owned by Central Government or State Government or Union territory Administration or a Government undertaking or enterprises or a statutory body or Cantonment Board. He further submitted that definition of premises is given in Section 2(c) of Act No. 16 of 2021 which means building and the land around it for the purpose of business or residence use. In the present case, there is no dispute on this point that only land was given on lease and so far as building on land is concerned, which constitutes premises, is undisputedly constructed and owned by the plaintiff-respondent. In present petition it has not been disputed that building is not owned by the petitioner, but owned by the State Government or State Authorities as defined under Section 3 of Act No. 16 of 2021. He also pointed out renewal of lease deed on 06.04.2010 and invited attention of this Court to paragraph Nos. 5 & 6 of the lease deed, which clearly shows that in case of expiry of lease deed, an evaluation has to be made on a building constructed over the leased land and be given to building owner. There is also certain provisions with regard

to dispute of evaluation, which is not relevant in the present case. He further submitted that definition of premises is exhaustive, therefore, nothing beyond that may be travelled by any Court of law. In the present case, only land is given on lease and that doesn't come within the definition of 'premises' as provided under Section 2(c) of the Act No. 16 of 2021. Therefore, provisions of Act No. 16 of 2021 would be very well applicable in the present case. In support of his contention, he has placed reliance upon the judgement of this Court in the matter of *Sana Ullah Vs. Ashok Kapil:1979 ARC 138*.

11. Learned counsel for the respondent-plaintiff next submitted that so far as denial of tenancy is concerned, this fact is also absolutely incorrect. He further submitted that as per written statement filed by the petitioner-defendant, tenancy was not denied and even it is mentioned in the written statement that he is not in possession of the premises in question for a period of more than 10 years, meaning thereby that prior to that, he was having possession over the premises in question. He further submitted that up to 2014, rent receipt was duly signed by the petitioner-defendant, which is annexed alongwith the counter affidavit. Not only this, a court agreement had also taken place on 23.8.2012 upon which, petitioner-defendant has put his signature in the capacity of tenant. Thus, denial of tenancy is vague, not supported by any document in light of facts mentioned hereinabove. In case of any family settlement or any other reason about shifting of tenancy, the same must have been brought on record by the tenant before the Rent Authority, which is missing in the present case. Therefore, under such facts of the case, petitioner has rightly been treated as tenant.

12. He also pointed out that many documents have been brought on record while filing recall application. There is provision under Section 34(8) of the Act No. 16 of 2021 about the recall of order and according to that, recall application is not maintainable. Therefore, any new document brought on record through recall application cannot be seen at this stage and only at the most, it may be seen while deciding the rent application finally as it is only interim determination of rent and not final. Therefore, he reiterated that any document so filed with recall application cannot be read in light of fact that the recall application is not maintainable other than an ex-parte order as provided under Section 34(8) of the Act No. 16 of 2021, which is not the case of petitioner-defendant.

13. He next submitted that so far as registration of rent agreement under Section 4 of the Act No. 16 of 2021 is concerned, respondent-plaintiff has submitted the information as per First Schedule as provided under Section 4(1) of the Act No. 16 of 2021 before the Rent Authority and registration had not taken place because petitioner-defendant refused/failed to furnish any relevant information. He next submitted that petitioner-defendant has made this specific averment about First Schedule of Section 4(1) of the Act No. 16 of 2021 which is mentioned in Para 18 of the counter affidavit. First Schedule has also been annexed alongwith particulars of the building and as well name of the tenant, i.e. Jagmohan Agarwal, who is petitioner-herein. Therefore, conditions so mentioned in Section 4 of the Act No. 16 of 2021 has been very well complied by the respondent-plaintiff. Hence proceeding of arrears of rent is very well maintainable.

14. He further invited attention of this Court to Section 4(3) of the Act No. 16 of

2021. He submitted that first proviso to Section 4(3) of the Act No. 16 of 2021, i.e. 4(3)(a) is applicable in the present case, which provides for tenancy created before the commencement of this Act and further provides that in case landlord and tenant jointly fail to present a copy of the agreement or fail to reach an agreement within specified period, such landlord and tenant shall separately file particulars about such tenancy before the Rent Authority within one month from the date of expiry of the period mentioned in Clause 4(2). If the landlord has submitted its particulars within the specified period, but tenant failed to submit the same, then landlord may file an application for eviction on this ground alone. He also pointed out that next proviso provides that during such eviction proceeding, Rent Authority shall also decide the interim rent payable by the tenant during such adjudication. In the present case, it is admitted that petitioner-defendant has not complied with Section 4 of the Act No. 16 of 2021, therefore, this cannot be a ground favourable for the petitioner-defendant. There is no such exception that in case of failure on the part of landlord or the tenant, proceeding cannot be initiated rather he submitted that in case petitioner-defendant fails to comply with Section 4(2) & 4(3) of the Act No. 16 of 2021 and after submission of agreement by landlord, he may proceed for eviction. Therefore, in light of Section 4 of the Act No. 16 of 2021, the present proceeding is very well maintainable.

15. He next submitted that so far as maintainability of proceeding is concerned, a bunch of civil appeals were pending before the Apex Court for the same market in question, i.e. Labh Chand Market, Rajaki Mandi, Agra. The market is owned by joint family of respondent-plaintiff and while

deciding the civil appeals, Apex Court had made an observation that provision of new Act, i.e Act No. 16 of 2021 would apply to principle of revision of rent to existing holders of tenancy also and thus, there remains no doubt about it. So far as the claim of arrears as submitted by learned counsel for the respondent-plaintiff is concerned, that also have to be dealt with under the provisions of Act No. 16 of 2021.

16. He next submitted that Apex Court has separately dealt with the civil appeals filed by the family members of the respondent-plaintiff in relation to similarly situated shop in the same market and set aside the orders passed by the Revisional Court and the trial Court rejecting the suits under Order VII Rule 11 CPC and restored suit for reconsideration on the basis of Act No. 16 of 2021.

17. He firmly submitted that Supreme Court itself has held that Act No. 16 of 2021 would be applicable to the shop in question that is situated in the same market. Therefore issue of applicability of Act No. 16 of 2021 cannot be raised, once it is upheld by the Supreme Court.

18. He further submitted that he has taken specific averment in paras 4, 5, 6 and 7 of the rent application mentioning the rent of four shops in the same area in the same market, i.e. Labh Chand Market, Rajaki Mandi, Agra alongwith assessment of area made by ADM (FR) for a period between 2004 to 2012 and according to that, annual rental value comes to Rs. 10,000/-. He also submitted that in para 6, he has given the name of tenant, namely Virendra Kumar Sharma with shop No. 29/296/24, who is paying Rs. 22,000/- per month for shop in the same market. Not only this, in para 7, there is specific

averment that Rent Authority vide its order dated 22.12.2021 has revised the rent of shop No. 29/296A/29(New No. 29/296/A/5), Labh Chand Market, Rajaki Mandi, Agra as 750 per sq. feet and the same has been fixed by the Rent Authority in the present case considering the fact that this shop is also situated in the same area and same market, i.e. Labh Chand Market, Rajaki Mandi, Agra.

19. He also submitted that in the objection filed by the petitioner-defendant before the Rent Authority, there is no denial of the facts so mentioned in paras 4, 5, 6 and 7 of the rent application filed by the respondent-plaintiff. Therefore, contention of the petitioner-defendant that there is no determination of rent is absolutely incorrect as in the same market, there is determination of rent by the Rent Authority coupled with the other facts so mentioned in paras 4, 5, 6 and 7 of the rent application. Therefore this argument is also not sustainable.

20. In the rejoinder argument, learned counsel for the petitioner-defendant submitted that while using the word 'premises', intention of legislation is something different. It does not mean that only land is to be occupied or owned by the State Government, whereas, the building is to be owned by the lessee. In fact, meaning of word 'premises' includes land in question as well as building raised upon that, though it is constructed by lessee.

21. He also reiterated that while deciding the interim rent, there is no discussion made by the Rent Authority even with regard to facts so mentioned in paras 4, 5, 6 and 7 of the rent application, but Rent Authority straight away has fixed the rent, which is bad.

22. I have considered the rival submissions made by learned counsel for the parties, perused the record, relevant provisions of Act No. 16 of 2021 as well as judgments relied upon.

23. There is provision of appeal under Section 35 of the Act No. 16 of 2021 and it is required on the part of the petitioner-defendant to first exhaust the alternative remedy so available, but in the present petition, issue of applicability of Act No. 16 of 2021 is involved, which is absolutely a legal question, therefore, present petition is entertained and Court proceeded to decide the petition.

24. The very first issue argued before this Court is about the applicability of new Act, i.e. Act No. 16 of 2021. Learned counsel for the petitioner-defendant has placed reliance upon Section 3 of the Act No. 16 of 2021, which is relevant in the present dispute. The same is being quoted hereinbelow:

“3. Act not to apply to certain premises.-(1) *Nothing in this Act shall apply to any-*

(i) premises owned by the Central Government or State Government or Union Territory Administration or a Government undertaking or enterprises or a statutory body or Cantonment Board;

(ii) premises owned by a company, University or organisation given on rent to its employees as part of service contract;

(iii) premises owned by religious or charitable institution as may be specified, by notification by State Government;

(iv) premises owned by Auqaf registered under the Waqf Act, 1995 (Act

No. 43 of 1995) or by any public trust registered under applicable law;

(v) other building or category of building specifically exempted in public interest by notification by the State Government.

(2) Notwithstanding anything contained in sub-section(1), if the owner and tenant of the premises referred to in clause (i) to clause (v) of the said sub-section agrees that the tenancy agreement entered into between such landlord and tenant be regulated under the provisions of this Act, such landlord may inform the Rent Authority of the agreement to do so at the time of information of the tenancy agreement under Section 4.”

25. From the perusal of the above quoted provision, it is apparently clear that this Act would not apply in case premises is owned by Central Govt. or State Govt. or Union Territory Administration or a Government undertaking or enterprises or a statutory body or Cantonment Board.

26. Now, learned counsel for the respondent-plaintiff while opposing the submission made by learned counsel for the petitioner-defendant has placed reliance upon Section 2(c) of the Act No. 16 of 2021, which is being quoted hereinbelow:

“2. Definition.- *In this Act, unless the context otherwise requires,-*

(c) “premises” means any building or part of a building which is, or is intended to be, let on rent for the purpose of residence or for commercial or for educational use, except for industrial use and includes-

(i) garden, garage or closed parking area, vacant land, grounds and out-houses, if any appertaining to such building or part of the building; and

(ii) *any fitting to such building or part of the building for the more beneficial enjoyment thereof, but does not include premises such as hotel, lodging house, dharamshala or inn;*”

27. Section 2(c) defines the premises. The word ‘premises’ means building alongwith land around it for the purpose of business or residential use. So far as present dispute is concerned, as to whether the premises or only the land was leased out by the State authorities or any other municipal authority. In the present case, there is no dispute that only the land was on lease having no building upon that and undisputedly the building was constructed by the respondent-plaintiff. Therefore, the word premises cannot be read as only land, but it includes building also, which has never been leased out in the present case. The definition of word ‘premises’ is very exhaustive and no interpretation can be made beyond that and certainly in the present case, only the land is owned and leased out by the State authorities as mentioned in Section 3(i) of the Act No. 16 of 2021 and not the building, therefore, the property in dispute includes land and building both and it is not covered with the exception of Section 3(i) read with Section 2(c) of the Act No. 16 of 2021. The very same ratio of law has also been followed by the Court in the matter of **Sana Ullah(Supra)**.

28. The definition of premises under Section 2(c) of the Act No. 16 of 2021 is also parimateria to the definition of building given in Section 3(i) of the U.P. Act No. 13 of 1972 and this was the subject matter of judgment of this Court in **Sana Ullah(Supra)** and the Court in the said judgment is of the view that if the definition is very exhaustive, it is not

possible to read it as something else, which is not stated therein. Relevant paragraphs of aforesaid judgment are being quoted hereinbelow:-

“14. The expression “building” has been defined in Section 3(1) as follows:--

‘Building’, means residential or non-residential roofed structure and includes--

(1) *any land (including any garden), garages and out-houses,*

appurtenant to such building;

(ii) *any furniture supplied by the landlord for use in such building;*

(iii) *any fittings and fixtures affixed to such building for the more beneficial enjoyment thereof.*

15. Since the definition above uses the word “means”, it is clear that the definition is exhaustive, and that it is not possible to read in it something which is not stated therein. The definition clearly shows that in order to fall within it, there must be a roofed structure. If, therefore, there is no roofed structure, the premises cannot be a building. Apart from the meaning given in the Act, what is a ‘building’ must always be a block of brick or stone work, covered in by a roof. The roof need not be laid with lintel or other similar constructions. The ordinary and natural meaning of the word “building” includes the fabric and the ground on which it stands. It is a structure roofed in and capable of upholding protection and shelter. Therefore, similar roofless Ahata which merely surrounds a piece of land, though stayed and tied together, is not a building within the definition given above. The next question that arises for decision in this case is whether a construction should be a building on the date of allotment as well or that if it is found to be a building on

the date when it is vacated, that alone should be sufficient for passing an allotment order.

29. From the perusal, it is apparently clear that definition of ‘building’ in Section 3(i) of the Act No. 16 of 2021 and definition of premises in Section 2(c) of the Act No. 16 of 2021 are similar and very exhaustive, which includes land also. Therefore only land cannot be said to be ‘premises’. In the present case, only land was leased out by the State authorities and that cannot be said to be a premises. Therefore, exception of Section 3(i) of the Act No. 13 of 1973 would not be applicable in the present case.

30. Plaintiff-respondent has moved rent application for enhancement of rent under Section 10 of the Act No. 16 of 2021. Section 10 of the Act No. 16 of 2021 is being quoted hereinbelow:

“10. Rent Authority to determine the revised rent in case of dispute-(1) *In case of any dispute between the landlord and the tenant regarding revision of rent, the Rent Authority may, on an application made by the landlord or tenant determine the revised rent and other charges payable by the tenant and also fix the date from which such revised rent becomes payable.*

(2) In determining the rent to be revised, the rent Authority may be guided by the prevailing market rent in the surrounding areas let out on rent.

(3) Once a determination under this section has been made, no application for fresh determination shall lie for a period of one year after the said determination.

(4) The Rent Authority may determine provisional rent during the

proceedings for revision of rent which shall be subject to final determination.”

31. Under Section 10(4) of the Act No. 16 of 2021, there is provision for Rent Authority to fix provisional rent during the proceeding of revision of rent, therefore, order of Rent Authority is well within its authority conferred upon it under the provision of 10(4) of the Act No. 16 of 2021.

32. The next argument of learned counsel for the petitioner-defendant is that under Section 6(3) of the Act No. 16 of 2021, which says that tenancy devolves for remaining period on the person who has succeeded the business of the deceased tenant and in the present case, petitioner-defendant had not succeeded any business, therefore, he is not a tenant as provided under Section 6(3) of the Act No. 16 of 2021.

33. This argument of the learned counsel for the petitioner-defendant arises from the interpretation of Section 6 of the Act No. 16 of 2021 and relevant part of the same is being quoted hereinbelow:

“6. Rights and obligations of successor in case of death-(1) *The terms of agreement executed between landlord and tenant, shall be binding upon their successors in the event of the death of the landlord or tenant, as they case may be, and in such case, the successor of the deceased landlord or tenant shall have the same rights and obligations as agreed to in the tenancy agreement for the remaining period of such tenancy.*

(2) In the event of death of a tenant, of residential tenancy, the right of tenancy shall devolve for the period of tenancy on his successor; namely:

Spouse; son or daughter or where there are both son and daughter, both of them; parents; daughter-in-law, being the widow of his pre-deceased son widowed or divorced sister:

Provided that the successor has ordinarily been living in the premises with the deceased tenant up to the date of his death.

(3) In the event of death of a tenant of a non-residential tenancy, the right of tenancy shall devolve for the remaining period of tenancy on the person who has succeeded the business of deceased tenant.”

34. Learned counsel for the respondent-plaintiff has argued that in the written statement, it is mentioned that petitioner-defendant was in possession of the premises in question for a period of more than 10 years up to 2014. Rent receipt was duly signed by the petitioner-defendant, which is part of counter affidavit and the court agreement dated 23.08.2012 is also signed by the petitioner-defendant in the capacity of tenant. **These facts are undisputed.**

35. Once it is admitted that petitioner-defendant was in possession of shop in question for more than 10 years, signed the rent receipt up to 2014 and also put his signature in the capacity of tenant in a court agreement, he cannot deny the tenancy.

36. Learned counsel for the petitioner-defendant could not bring any document on record to show that at any stage of time, due to family settlement or any other reason, tenancy was shifted to other family members, who succeeded in the business. Therefore denial of tenancy by the petitioner-defendant cannot be accepted. He has to be treated as tenant.

37. It is also the case of the petitioner-defendant that though he has not taken objection against the rent application filed by the respondent-plaintiff for fixation of rent, but he has raised the same objection by filing recall application, which was rejected in light of Section 34(8) of the Act No. 16 of 2021. It is his case that once the Act No. 16 of 2021 is not applicable in his case, all proceedings are bad and therefore in recall application, issue of applicability of Act No. 16 of 2021 has to be considered.

38. This argument of learned counsel for the petitioner-defendant is based upon interpretation of Section 34(8) of the Act No. 16 of 2021, which is being quoted hereinbelow:

“34. Powers of Rent Authority and Rent Tribunal.- (1) *The Rent Authority and the Rent Tribunal shall, for discharging their functions under this Act, have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908(Act No. 5 of 1908) for the purpose of:*

(8) The Rent Authority may set aside or recall any order passed ex-parte if the aggrieved party files an application and satisfies it that the notice was not duly served or that he was prevented by any sufficient cause from appearing when the case was taken up for hearing.”

39. From the perusal of aforesaid provision, it is apparently clear that Section 34(8) of the Act No. 16 of 2021 clearly provides that Rent Authority may set aside the recall application on the ground that notice has not been served or he was prevented from appearing when the case was taken up. It is not the case of the petitioner-defendant. He has duly received the notice, filed objection, therefore in light

of Section 34(8) of the Act No. 16 of 2021, Rent Authority cannot travel beyond that and any new fact or objection or paper except the service of notice for non appearance as referred in Section 34(8) of the Act No. 16 of 2021 cannot be accepted. Rent Authority has rightly rejected recall application filed by the petitioner-defendant.

40. There was another argument of learned counsel for the petitioner-defendant about the interpretation of provision of Section 4 of the Act No. 16 of 2021. Relevant paragraph, i.e. 4(1), 4(2) & 4(3) are being quoted hereinbelow:

“4, Tenancy Agreement.- (1) *Notwithstanding anything contained in this Act or any other law for the time being in force, no person shall, after the commencement of this Act, let or take on rent any premises except by an agreement in writing, which shall be informed to the Rent Authority by the landlord and tenant jointly, in the form specified in the First Schedule within a period of two months from the date of tenancy agreement.*

Provided that in cases or residential tenancies for a period of less than twelve months, the landlord and tenant shall not be required to inform the Rent Authority about such tenancy.

(2) *Where the landlord and the tenant fail to jointly inform the execution of the tenancy agreement referred to in sub-section(1), the landlord and tenant shall separately inform the execution of tenancy agreement to the Rent Authority within a period of one month from the date of expiry of the period specified in sub-section(1)*

(3) *Where, in relation to a tenancy created before he commencement of this Act,-*

(a) if an agreement in writing was entered into between the landlord and the tenant, they shall jointly present a copy thereof to the Rent Authority within three months of the commencement of this Act.

(b) if no agreement in writing was entered into, the landlord and the tenant shall enter into an agreement in writing with regard to that tenancy and present the same to the Rent Authority within three months of the commencement of this Act:

Provided that where the landlord or the tenant fail to present jointly a copy of the tenancy agreement or fail to reach an agreement within specified period, such landlord and tenant shall separately file the particulars about such tenancy with the rent Authority within one month from the date of expiry of period mentioned in clause (b) above, in the form specified in First Schedule. If the landlord has submitted his particulars within the specified period but tenant fails to submit such particulars, the landlord may file an application for eviction on this ground alone;

Provided further that during such eviction proceedings, the Rent Authority shall, notwithstanding anything contained in this Act, decide interim rent payable by the tenant during such adjudication.”

41. From the perusal of Section 4(2) and 4(3) of the Act No 16 of 2021 it is apparently clear that in case a joint tenancy agreement has not been filed by the landlord and the tenant, it is open for the landlord and the tenant to file separate particulars of such tenancy within one month before the Rent Authority in the form prescribed in the First Schedule. In the present case, the respondent-plaintiff herein has submitted particulars of tenancy in the form prescribed in the First Schedule and there is no denial of this fact either

before the Rent Authority or before this Court. Therefore, in light of Section 4(2) and 4(3) of the Act No. 16 of 2021, proceeding under the Act No. 16 of 2021 is very well maintainable.

42. Not only this, arising out of same dispute of same market duly owned by the family members of the respondent-plaintiff, the matter went up to Apex Court in Civil Appeal Nos. 1082-2083 of 2017 (**Neena Jain & Ors. Vs. State of U.P. & Anr.**) and during the pendency the said case, new Act No. 16 of 2021 was framed and implemented. Hence, Apex court has closed the proceedings of the said case with the observation that new Act, i.e. Act No. 16 of 2021 shall govern the revision of rent to existing tenancies. Relevant paragraphs of the said judgment is quoted hereinbelow:

“The provisions of the Act aforesaid apply the principle of revision of rent to existing holder tenancies also and thus, there is no doubt about it. Insofar as the claim of any arrears as submitted by learned counsel for the appellants is concerned, that will also have to be dealt with under the provisions of the new Act and thus, even on that aspect there appears to be no apprehension.

We may notice that in these batch of appeals there are some cases where the suit filed by the landlords were dismissed under Order VII Rule 11 of the Code of Civil Procedure, 1908. The revision filed against the same were also dismissed by the High Court predicated on the rationale of the impugned order. It is thus, the submission of learned counsels in these matters that these orders rejecting the plaint would have to be recalled and the suit remitted for fresh consideration in view of the new law as discussed aforesaid.

We accordingly set aside the order(s) passed in revision and by the trial Court rejecting the suits under Order VII Rule 11, CPC and restore the suits for re-consideration on the basis of the new law and the order passed by us today.”

43. Apex Court while passing the order dated 23.08.2021 dealing with many civil appeals, out of which one Civil Appeal bearing no. 1089/2017 was filed by the family members of the respondent-plaintiff in relation to similarly situated shop in the same market. In those matters, suit filed by the landlords were dismissed under Order VII Rule 11 CPC by the trial Court and revision was also dismissed by the High Court. Ultimately, the Apex Court allowed the Civil Appeals setting aside the order of trial Court as well as of the High Court and remanded the matter to trial Court to decide the same on the basis of new Act, i.e. Act No. 16 of 2021.

44. Therefore, from the perusal of Section 4(2) and 4(3) of Act No. 16 of 2021 as well as finding given by the Apex Court in the matter of **Neena Jain & Ors(Supra)**, there is no dispute that proceedings under the new Act is maintainable.

45. This is also case of petitioner-defendant is that without any exercise and application of mind the rent proposed by the respondent-plaintiff is accepted.

46. It is argued by learned counsel for the respondent-plaintiff that in paragraphs 4, 5, 6 and 7 of the rent application, there is averment about the fixation of rent about the shops in the same market, i.e. Labhchand Market, Rajaki Mandi, Agra, which is not denied in the objection filed by the petitioner-defendant.

47. I have perused the rent application and also objection of petitioner-defendant. Certainly the facts so mentioned in paragraphs 4, 5, 6 and 7 of the rent application dated 20.01.2022 it has not been denied that it is not in the same market, i.e. Labhchand Market, Rajaki Mandi, Agra. Paragraphs 4, 5, 6 and 7 of the rent application are being quoted hereinbelow:-

“4. That the shop in question is situated in most prominent important market of City of Agra. The valuation of 4 shops in the area in question (in the same Labh Chand Market) were assessed by ADM(FR), Agra in respect of Shops No. 29/296A/31, 29/296A/37, 29/296/11 and 29/296/14 on various dates.

The copies of all orders are also being filed as Annexure B, C, D & E to Affidavit.

5. That as per above aluation done by ADM(FR), Agra for four shops between 2004 and 2012 the current value of the shops in Labh Chand Market in 2021 comes to approx. Rs. 1,00,000/- per sqr. Feet Annual rent Value(At 10% of Market Value) comes to Rs. 10,000/- per Sqr. Feet and the monthly rental at Rs. 833/- per Sqr. Feet as per table below:-

Shop No. Old	Shop No. New	Area in Sqr. Feet (Approx)	Date of Valuation	Valued at Rs. (in Lakh)	Value (in Rs. Lak h) in 2021 @ 7% Annual increment	Value in Rs. Per sqr. Feet in 2021
29/296 A/31	29/296/ A/7	134 in GF and 268 in	17/05/ 2012	165	309. 23	1,15 ,384 /-

		Basement= 134+134= 268				
29/296 A/37	26/296/ B/5-6	340 GF+310 basement=340+155=495	05/12/ 2007	184	488	98,586/-
29/296/ 11		71.22	14/05/ 2004	19.50	63.87	89,958/-
29/296/ 14		79.50	30/04/ 2005	21.45	65.54	82,440/-

*6. That even in the market one tenant namely **Shri Virendra Kumar Sharma, with Shop No. 29/296/24** having area of 20 Sq. feet is paying rent to his Landlord Shrimati Kanchan Kumari Jain Wife of Late Shri Milap Chandra Jain at the rat of Rs. 22,000/- per month. **The copy of lease agreement and his payment receipts are being filed as Annexure F, G & H to the Affidavit.***

*7. That recently the Rent Authority by its order dated 22/12/2021 has revised the rent of the Shop No. 29/296A/29 (New No. 29/296A/5) Labh Chand Market, Raja Ki Mandi, Agra as Rs. 750/- per Sq. Feet. **The Copy of order dated 22/12/2021 is being filed as Annexure I to the Affidavit.***

48. Petitioner-defendant has replied paragraph 4, 5, 6 and 7 of the rent application dated 20.01.2022 filed by respondent-plaintiff by filing objection dated 18.05.2022. Relevant paragraphs of objection filed by petitioner-defendant are being quoted hereinbelow:-

“3. That para No. 3 and 4 of the application are legal hence needs no offer.

More so ever because the opposite party is not a tenant of the demised premises.

4. That para No. 5, since does not in any way relate to the opposite party, hence needs no offer. However, it is submitted that any landlord legally cannot shift the fruits to be obtained from a tenant on the shoulders of his brothers or a person who is blood related except her legal heirs/successors.

5. That para No. 6 of the application is a matter of regard and being legal in nature needs no offer.

6. That since para No. 7 of the application does not relate to the opposite party, hence needs no offer.

49. In paragraphs 3, 4, 5 and 6 of the objection, there is no denial of fact so mentioned in paragraphs 4, 5, 6 and 7 of the rent application filed by plaintiff-respondent.

50. It is mentioned in para 4 of the rent application that shop in question is also situate in the same market, i.e. Labh Chand Market, Rajaki Mandi, Agra. In para 4, there is reference of assessment order of ADM (FR) and as per that monthly rent is fixed at the rate of Rs. 833/- per sq. ft for other shops situated in the very same market.

51. Not only this, Rent Authority vide its order dated 22.12.2021 has revised the rent of Shop No. 29/296A/29(New No. 29/296/A/5), Labh Chand Market, Rajaki Mandi, Agra at the rate of Rs. 750/-. In the present case, Shop No. 29/296/20 in the same market, impugned interim rent order dated 06.07.2022 has been passed relying upon the order dated 22.12.2021 fixing the rent as Rs. 750/- per sq. ft. Therefore in want of specific denial in objection, it cannot be said that Rent Authority has fixed

the interim rent without application of mind. In fact, Rent Authority while deciding the interim rent has relied upon the order dated 22.12.2021 fixing the rent as Rs. 750/- per sq. ft. for the same market. Impugned interim rent order has been passed on 06.07.2022 almost after 8 months from the earlier order dated 22.12.2021. Therefore in all eventuality interim rent cannot be fixed lessor than the amount of Rs. 750/- per sq. ft. for the reason that shops are situated in the same market, i.e. Labh Chand Market, Rajaki Mandi, Agra. Under such facts of the case, it cannot be said that the impugned order dated 06.07.2022 has been passed without any exercise or application of mind. Rent Authority has taken a lenient view while fixing the interim rent at the rate of 750/- per sq. feet even after 8 months from the earlier order dated 22.12.2021, otherwise, it may have been fixed to some higher side.

52. Therefore, in light of facts, provision of law and judgments discussed hereinabove, I find no illegality in the impugned order dated 06.07.2022. Petition lacks merit and is accordingly dismissed.

53. No order as to costs.

(2023) 8 ILRA 290

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 26.04.2023

BEFORE

THE HON'BLE AJIT KUMAR, J

Writ A No. 7471 of 2016

Ram Kesh Yadav

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Sri Amit Kumar Srivastava, Sri Arpan Srivastava, Sri Anil Bhushan (Sr. Advocate)

Counsel for the Respondents:
C.S.C.

Service Law – U.P. Secondary Education Services Commission Act, 1982 – Section 33-C - Regularization – Appointment prior to Radha Raizada judgment – Validity of appointment and entitlement to regularization – Substantive vacancy existed due to promotion of Assistant Teacher to Principal – District Inspector of Schools granted financial approval – Committee’s finding rejecting vacancy report held perverse – Writ allowed – Direction for regularization with consequential benefits. The petitioner was appointed as an Assistant Teacher against a substantive vacancy. Although salary was initially paid till 1998, further salary was stopped without justification, leading to multiple rounds of litigation. The District Inspector of Schools had granted financial approval in 1997, confirming the existence of a substantive vacancy and due process followed by the management. A regional committee later rejected the petitioner’s claim for regularization, citing lack of clarity in vacancy and selection process. The High Court held that the findings of the committee were perverse and ignored prior binding judicial findings and official reports confirming the vacancy and appointment process. The petitioner’s appointment was made prior to the Radha Raizada judgment (1994), thus the requirement of advertisement and prior permission was not applicable. The Court further clarified that lapse of vacancy under Regulation 20 was not attracted due to the applicability of the U.P. Secondary Education Services Commission Act, 1982. writ allowed. The High Court quashed the impugned order dated 18.11.2015, held the petitioner to have been lawfully appointed against a substantive vacancy, and directed the authorities to regularize his service under Section 33-C of the 1982 Act, along with all consequential benefits including pay fixation, increment, and pensionary benefits. Direction was also issued for compliance within one month.

Writ allowed.

Key Citations:

1. Radha Raizada Vs Committee of Management, 1994 (3) UPLBEC 1551
2. Ashika Prasad Shukla Vs DIOS, 1998 (3) UPLBEC 1722
3. Yogendra Nath Singh Vs DIOS, 1991 (1) AWC 562

(Delivered by Hon’ble Ajit Kumar, J.)

1. Heard Sri Anil Bhushan, learned Senior Advocate assisted by Sri Amit Kumar Srivastava, learned counsel for the petitioner and learned Standing Counsel for the State respondents.

2. As per the office report dated 9th April, 2016 neither registered envelop nor, acknowledgement sent by the registered post to the respondent No.-5 has been received back.

3. In the circumstances, therefore, service of notice upon respondent No.- 5 is deemed sufficient and the Court now proceeds to decide the matter.

4. The petitioner before this Court was selected and appointed on the post of Assistant Teacher in LT grade on 26th April, 1992 by the Committee of Management against a substantive vacancy which had fallen vacant on account of selection and appointment of the then Principal of the institution, namely, Jagat Pal Singh in the year 1986. The papers after selection was forwarded to the District Inspector of Schools, however he did not accord any financial approval forcing to the petitioner to file writ petition before this Court bearing Writ Petition No.- 6623 of

1993 in which certain directions were issued on 15th April, 1993. While the matter remained pending before this Court, the District Inspector of Schools accorded financial approval to the petitioner's appointment vide order dated 5th July, 1995 and so according to the petitioner, the writ petition had got rendered infructuous and so was dismissed on 20th July, 2010.

5. It transpires from the pleadings that the petitioner's salary was paid till 1998 only and so consequently another writ petition being Writ Petition No.- 50664 of 2000 was filed in which direction was issued on 24th November, 2000 commanding the authorities to consider the representation of the petitioner and pass appropriate order thereupon. The Finance and Accounts Officer passed an order on 18th June, 2003 rejecting the representation of the petitioner filed for the purposes of payment of salary virtually questioning the appointment of the petitioner more especially on the ground of ban on the appointments in such institution. The petitioner again approached this Court vide writ petition No. - 3657 of 2003 which was allowed and the order passed by the Finance and Accounts Officer dated 8th June, 2003 was set aside and the matter was remitted to the respondent No.- 2, namely, the Director of Education (Secondary) U.P. Lucknow to pass appropriate detailed order in accordance with law after giving opportunity of hearing to the petitioner.

6. The Director of Education again rejected the claim of the petitioner vide detailed order dated 31st December, 2008 taking a ground that prior permission was not taken from the competent authority in the light of the judgment of this Court in the case of **Radha Raizada and another v. Committee of Management, Vidyawati**

Darbari Girls Inter College and others: 1994 (3) UPLBEC 1551 and that the post was fraudulently taken to be vacant.

7. The basic ground, therefore was taken that there was no post in existence upon which the petitioner could have been appointed. This order dated 31st December, 2008 came to be challenged again vide writ petition being Writ – A No.- 22809 of 2009, in which both these grounds were held to be untenable, firstly for the reason that in the Full Bench judgment in **Radha Raizada** it was made only prospective in its application and hence Committee of Management was fully empowered to make appointment; and secondly no prior permission to fill up the vacancy was required. The judgment had been delivered on 15th July, 1994 and the appointment of the petitioner had taken place way back in the year 1992, and so it was held not applicable in the light of the directions issued by the Full Bench itself. Further more relying upon the judgment of **Ashika Prasad Shukla v. District Inspector of Schools, Allahabad and others: 1998 1998 (3) UPLBEC 1722**, the point canvassed by learned counsel for the petitioner was that even notice board notification of vacancy was sufficient, was upheld by the Court. The Court also observed that the view taken in the judgment of this Court dated 28th July, 2006 was not accorded consideration by the authority while passing the order. Thus, the Court was of the final view that the validity of appointment could not have been gone into. As far as the procedural aspect of the matter was concerned, all that was required to be seen was as to whether there existed vacancy or not upon which the appointment of the petitioner could have been facilitated.

8. The Court in its ultimate analysis reproduced the operative portion of the order which was passed in Writ Petition

No.- 44818 of 2002 filed by one Satyawar Yadav, who also set up a claim of the post in question and the Court recorded that Ram Kesh Yadav, namely the present petitioner, who was respondent No.- 4 in the said petition, was appointed on the vacancy and was discharging duties as such.

9. In the circumstances, therefore, the Court directed that "only question is to be considered by the Committee to scrutinize the aspect of the petitioner's appointment against the then subsisting substantive vacancy only". The finding part of the operative portion of the order of this Court dated 19th February, 2015 is reproduced hereunder:

"He submits that all requisite papers including the proposal of the Management, resolutions passed etc., were produced for consideration of respondent No.2 but unfortunately has not found favour with him. He has submitted that on an earlier occasion also a dispute had been raised by the respondents when it was contended that two persons viz., the petitioner and one Sri Satyawar Yadav were appointed against the vacancy caused by the promotion of Sri Jagatpal Singh. Addressing the same, Sri Satyawar Yadav appears to have filed a Writ Petition in this Court being Writ Petition No. 44818 of 2002 (Satyawar Yadav Vs. Director of Education and others) which came to be dismissed on 20.04.2004. While dismissing the Writ Petition, this Court was pleased to record as follows:-

"The Director has found that in the meantime Sri Ram Kesh Yadav respondent No.4 was appointed on the vacancy caused on account of appointment of Sri Jagatpal Singh, Assistant Teacher as

Principal of the college and that Sri Ram Kesh Yadav is working since April, 1992 and had drawn salary from May 1997 to October 1998. Sri Ram Kesh Yadav also filed Writ Petition No. 50664/2000 which was disposed of with direction to the Director of Education (Secondary) to decide the representation."

The Court is informed that the above judgment has attained finality. If that be the above position, it is not known on what basis, the respondent No.2 could take a contrary decision or record conflicting statements while passing the impugned order.

In light of the above discussion, it is apparent that the impugned order cannot be sustained. The Writ Petition is accordingly allowed and the order dated 31.12.2008 is quashed. However, considering the over all circumstances of the case, this Court deems it appropriate to direct the Regional Level Committee to scrutinize the aspect of the petitioner's appointment against a then subsisting substantive vacancy only and to consider the case of the petitioner for regularization under the provisions of Section 33-B of the U.P. Secondary Education Selection and Service Board Act 1982. This exercise be completed by the Committee within a period of one month from the date of production of a certified copy of this order. The consequential relief sought by the petitioner would abide by the decision taken by the Committee aforesaid.

The Writ Petition is allowed in the above terms."

10. Now after the matter got remitted to consider the factum of the existence of the vacancies which was claimed to be substantive in nature and if so found the consequential action for regularization of the petitioner in service, Regional

Committee asked for a report from the District Inspector of Schools which came to furnished by him on 20th June, 2015. In the report the District Inspector of Schools very categorically recorded a fact that on account of selection and appointment of Jagat Pal Singh, the then Assistant Teacher in the institution on the post of Principal, LT grade post in question had consequently fallen vacant and that the Manager took appropriate steps to fill up the vacancy by appointing Ram Kesh Yadav, namely, the petitioner on 26th June, 1992 and that Ram Kesh Yadav was given joining by Committee on 28th April, 1992. Thereafter the detailed narrative that is contained in the report relating to the various petitions that were filed before this Court and directions issued from time to time including the direction for payment of salary etc. But the relevant part of the report that has been referred to hereinabove with regard to the appointment of the petitioner and his joining is reproduced hereunder:

"बहुधन्धी इण्टर कालेज, सोनहिता जौनपुर एक मान्यता प्राप्त एवं हाईस्कूल स्तर पर सहायता प्राप्त शिक्षण संस्था है। संस्था पर वेतन अधिनियम 1971 एवं माध्यमिक शिक्षा सेवा चयन बोर्ड नियमावली 1982 प्रभावी है। विद्यालय के सहायक अध्यापक श्री जगतपाल सिंह की पदोन्नति प्रधानाचार्य पद पर हो जाने के फलस्वरूप एल०टी० ग्रेड का एक पद मौलिक रूप से रिक्त हो गया। प्रबंधक द्वारा रिक्त पद पर नियुक्ति सम्बन्धी कार्यवाही करते हुए श्री रामकेश यादव की नियुक्ति स०अ० के पद पर दिनांक 26.04.1992 को की गई थी। श्री रामकेश यादव को विद्यालय में दिनांक 28.04.1992 को कार्यभार ग्रहण करा दिया गया। वेतन भुगतान न होने के कारण श्री यादव द्वारा माननीय उच्च न्यायालय ने याचिका संख्या-6623/1993 योजित की गयी। माननीय उच्च न्यायालय द्वारा पारित आदेश दिनांक 15.04.1993 के अनुपालन में श्री रामकेश यादव की नियुक्ति का अनुमोदन इस कार्यालय के पत्रांक/1915-16/1997-98 दिनांक 03.06.1997 द्वारा किया गया।"

"Bahudhandhi Inter College, Sonhita Jaunpur is a recognized educational institution that receives aid up to the High School. The payment of Salary Act, 1971 and U.P. Secondary Education Service Selection Board Rules, 1982 are applicable to the institution. In view of promotion of Assistant Teacher Sri Jagat Pal Singh on the post of Principal, the post of L.T. grade had fallen vacant substantively. Sri Rakesh Yadav was appointed on the post of Assistant Teacher on 26th April, 1992 by the Manager after conducting proceedings qua selection and appointment. Sri Ram Kesh Yadav has joined the institution on 28th April, 1992. In view of the payment not being made, Sri Ram Kesh Yadav filed writ petition before this Court being Writ Petition No.- 6623 of 1993. In compliance of the order passed by the High Court dated 15th April, 1993, the approval order of appointment of Sri Ram Kesh Yadav was issued by this office vide letter No.1915-16/1997-98 dated 3rd June, 1997."

(English Translation by the Court)

11. After the report was received the Committee constituted for the said purpose under Section 33-C(2) proceeded to examine the matter of the petitioner from both angle: (i). Existence of the substantive vacancy; and (ii). Claim for regularization under Section 33-C of the Act No.- 5 of 1992.

12. The Committee concerned has considered the report of the District Inspector of Schools and also the statement and submission advanced before it by the petitioner. The Committee of Management was also heard and in its analysis and finding part it has recorded that there was no proof available as to upon which vacancy the petitioner was given appointment and then no explanation has

been offered by the Committee of Management as to under which circumstances it proceeded to fill up the vacancy in 1992 which had fallen vacant as back as in the year 1996 and then the Committee has proceeded to hold that the vacancy stood lapsed virtually in the light of the provisions as contained under Regulation 22 of Chapter II of Intermediate Education Act, 1921.

13. Learned Senior Advocate has questioned the findings returned by the Committee as perverse. Firstly, he argues that the sufficient document were available on records inasmuch as the report of the District Inspector of Schools itself acknowledged that the vacancy that had fallen vacant on account of selection and appointment of Jagat Pal Singh as Principal by the Board, was sought to be filled up by making appointment of the petitioner resorting to the procedure prescribed for, by the Committee of Management. He submits that the District Inspector of Schools has also proceeded to record that the approval was granted by the District Inspector of Schools. He has also taken to the Court to a document which had been filed as Annexure – 1 to the papers forwarded to the District Inspector of Schools on 23rd January, 1992. This document regarding existence of vacancy absolutely demonstrates that vacancy had fallen vacant on account of the then Assistant Teacher, namely, Jagat Pal Singh, being selected as Principal by the U.P. Secondary Regulation Service Selection Board.

14. He submits that the financial approval had been accorded by the District Inspector of Schools upon those very documents which were duly got verified by the then District Inspector of Schools and those documents were very much available

on record upon which the report has been submitted by the District Inspector of Schools. He submits that those very documents have been referred to in paragraph 7, 8 and 9 of the writ petition and the paragraphs which have been very vaguely replied to, inasmuch as the contents thereof have not at all been denied. He further submits that regarding existence of vacancies, specific averments have also been made in paragraph 37 of the writ petition which too have not been denied and only the order of the Committee has been referred to, which is impugned herein this petition. Regarding the other point that has been taken in a disguised way or in a language which can be said to be camouflaged one, so as to be referable to Regulation 20 of Chapter II of the Intermediate Education Act, 1921. The petitioner's counsel has relied upon the authority in the case of **Yogendra Nath Singh v. District Inspector of Schools and another: 1991 (1) AWC 562.**

15. Meeting to above two arguments, learned Standing Counsel has submitted that two persons, namely, Satyawar Singh and the petitioner had come to join on the post in question and, therefore, there was an issue with regard to the legality of appointment. However, he could not deny the report submitted by the District Inspector of Schools and also the papers filed along with writ petition which are also available with the office of the District Inspector of Schools in the original file upon which the approval had been granted. He has sought to justify the order passed by the Committee for the reasons assigned therein.

16. On the question of continuance of the petitioner, he has filed certain certificates of the Principal of the

institution which record that he has been working in the institution. The certificates are of the year 2015 just prior to filing of the writ petition, more especially the last one dated 5th May, 2015 written by the Manager of the institution and 12th February, 2014 by the Principal of the institution. The management has not represented itself despite service of notice from this Court and therefore, it would be taken that it has admitted the case of the petitioner.

17. Having heard learned counsel for the respective parties and having perused the records and having discussed the facts and previous order passed by this Court in earlier round of litigation, I proceed to examine the facts returned by the regularization/ regional level committee dated 18th November, 2015. Upon perusal of the decision I find that after referring to the earlier order of this Court dated 19th February, 2015 passed in writ petition No.- 22809 of 2009 and the submissions of petitioner, Manager of Committee of Management and that of District Inspector of Schools, the following findings have been returned:

(i). Jagat Pal Singh, an Assistant Teacher having been selected as Principal of the institution took charge of Principal on 26th December, 1986 and thus consequently post of Assistant Teacher fell substantively vacant on 26th December, 1986.

(ii). From the documents filed by petitioner it was clear that there was a resolution adopted by the Committee of Management on 26th April, 1992 and vide resolution No.- 2 thereof petitioner's appointment proposal was passed against a vacancy.

(iii). It was not clear from the documents against which vacancy petitioner was appointed and no document was available to demonstrate that Management proposed to fill up vacancy after six years of it falling substantively vacant.

(iv). No documents were available regarding creation of post, substantive vacancy, prior permission of District Inspector of Schools, advertisement details of other candidates if appeared before selection Committee.

18. First two findings (i) & (ii) fully support the claim of petitioner regarding vacancy in the institution and resolution of Committee of Management in favour of petitioner. The report of District Inspector of Schools concerned, also records very categorically: विद्यालय के सहायक अध्यापक श्री जगतपाल सिंह की पदोन्नति प्रधानाचार्य पद पर हो जाने के फलस्वरूप एल०टी० ग्रेड का पद मौलिक रूप से रिक्त हो गया। प्रबन्धक द्वारा रिक्त पद पर नियुक्ति सम्बन्धी कार्यवाही करते हुए श्री रामकेश यादव की नियुक्ति स०अ० के पद पर दिनांक 26.4.1992 को कार्यभार ग्रहण करा दिया गया। (An Assistant Teacher of the institution, Sri Jagat Pal Singh having been promoted as a Principal, the post of Assistant Teacher in L.T. Grade fell substantively vacant. The Manager initiated proceeding for making appointment against the substantive vacancy and accordingly, appointed Sri Ramkesh Yadav as Assistant Teacher who joined duties as such on 26th April, 1992.)

(English Translation by the Court)

19. The documents relating to the resolution were also available and has so recorded at the bottom of internal page 3 of the order/ decision of the Committee. Here it is worth mentioning that the order of promotion has been passed in respect of the Assistant Teacher Jagat Pal Singh as

Principal but as a matter of fact he was selected and appointed as such against the vacancy but whether the promotion or selection it will hardly make any difference as the vacancy had fallen vacant for Jagat Pal Singh's appointment as regular Principal of the institution in substantive capacity.

20. This above being the fact position, the finding No. (iii) reached by the Committee does not appeal to reason. The Committee utterly failed to record reasons as to why it was disputing the report of the District Inspector of Schools (*supra*). The records that were placed by the petitioner and were also placed by District Inspector of Schools and very explicitly revealed that proposal of Committee of Management to make appointment was in respect of the vacancy caused by substantive and permanent selection and appointment of Jagat Pal Singh, an Assistant Teacher as Principal by the selection Board.

21. Still further, the Committee failed to appreciate the findings returned by the High Court in its decision dated 20th April, 2004 while dismissing writ petition of Satyawar Yadav being Writ Petition No.-44818 of 2002.

22. It is to my utter astonishment that even though this above finding was referred to with approval by this Court while allowing writ petition No. 50664 of 2000 questioning the order dated 31st December, 2008 vide order dated 19th February, 2015 pursuant to which the impugned decision has been taken and yet the Committee held that it was not clear as to whether petitioner was appointed against the vacancy of Jagat Pal Singh. Thus, the findings No. (iii) returned by the

Committee is held perverse and hence unsustainable.

23. Coming to the (iv) finding of Committee, the Court finds that it was not in issue at all. No body had questioned appointment of petitioner for procedural defects or irregularities to the extent of impunity. Satyawar Yadav could have been the only rival candidate but his writ petition was discussed in the order dated 20th April, 2004 while returning finding in favour of petitioner. Satyawar Yadav's claim ended there itself and findings returned in favour of the petitioner remained intact. The only issue was to reconsider the claim of petitioner in the light of the findings returned in the order dated 20th April, 2004 upon which basis order dated 31st December, 2008 was quashed by this Court. The Committee, therefore, was not justified to go behind the orders dated 20th April, 2004 and 19th December, 2015. It is unfortunate only that instead of appreciating the documents placed by the District Inspector of Schools, his report and the orders of this Court, the Committee proceeded to nonsuit the petitioner *qua* his claim for regularization by demanding details of selection process. The finding No. (iv) is, therefore, held to be totally uncalled for, inasmuch as, petitioner's appointment and continuance in the institution cannot now be questioned for alleged absence of old documents as to selection *moreso* when there was no rival challenge. Still further, when appointment had been made as per prerequisite even prevalent before the Full Bench in Radha Raizada's case laid down the law of advertisement etc., petitioner's selection and appointment procedure that remained prevalent as per judgment in Ashika Prasad's case.

24. I would like here to refer the earlier findings returned by the Regional Joint Director of Education in his order dated 31st December, 2008 regarding advertisement etc. questioning the selection process:

"उपर्युक्त सभी नियुक्तियां वर्ष 1989से 1993 के मध्य की गयी है। ज्ञातव्य है कि श्री रामकेश यादव द्वारा पूर्व में योजित याचिका संख्या- 6623/93 में जिस पद पर उनकी नियुक्ति किये जाने का उल्लेख है वह पद 19-1-92 को दिखाया गया है किन्तु वह पद किस प्रकार रिक्त हुआ तथा पूर्व पदधारी कौन था, स्पष्ट नहीं है। बाद में उनकी नियुक्ति प्रबन्धतंत्र द्वारा श्री जगतपाल सिंह, सहायक अध्यापक के प्रधानाध्यापक पद पर नियुक्त होने से रिक्त पद पर दर्शायी जा रही है जबकि उक्त पद दिनांक 26.12.86 से रिक्त हुआ। उक्त पद पर अध्याचन जिला विद्यालय निरीक्षक जौनपुर या माध्यमिक शिक्षा सेवा चयन बोर्ड इलाहाबाद को नहीं भेजा गया और न ही उसका विज्ञापन व्यापक प्रसार वाले समाचार-पत्र में कराया गया, मात्र नोटिस बोर्ड पर विज्ञापन किया जाना दर्शाया गया है।....."

"All the aforesaid appointments were made between 1989 and 1993. It is noticeable that in the earlier writ petition No.- 6623 of 1993 that was filed by Sri Ramkesh Yadav, he had been shown to have been appointed on 9th January, 1992 but it would not made clear as to how that post had fallen vacant and who had lien against the said post. Later on it shows appointment of the petitioner against the post that had fallen vacant on account of the then Assistant Teacher Jagat Pal Singh being appointed as Headmaster whereas the said post was vacant since 26th December, 1986. No requisition was made in respect of the said vacancy either to District Inspector of Schools for U.P. Secondary Education Service Selection Board, Allahabad nor, the said post ever came to be advertised in newspaper and only advertisement on notice board has been shown"

(English Translation by the Court)

25. I the penultimate paragraph of the order of the Director of Education dated 31st December, 2008 following findings came to be returned:

"जहां तक श्रीमती रामदुलारी देवी व अन्य बनाम संयुक्त शिक्षा निदेशक, वाराणसी व अन्य तथा श्री आशिक प्रसाद शुक्ला बनाम जिला विद्यालय निरीक्षक, इलाहाबाद में पारित आदेश का प्रश्न है याची का प्रकरण उक्त आदेश से आच्छादित नहीं है क्योंकि मा० सर्वोच्च न्यायालय द्वारा राधा रायजादा (1994) 3 यू०पी०एल०बी०ई०सी० में दिये गये निर्णय के पूर्व याची का अनुमोदन सक्षम अधिकारी द्वारा नहीं दिया गया था। संदर्भित प्रकरण में नियुक्त प्रबन्धक द्वारा कूटरचित ढंग से दिनांक 19.1.92 को पद रिक्त दिखाकर की गयी है जबकि वास्तव में उस दिनांक को कोई पद रिक्त हुआ ही नहीं है। मांग किये जाने पर भी प्रबन्धक द्वारा प्रबन्ध समिति की कार्यवाही पंजिका आदि पत्रजात प्रस्तुत नहीं किया गया। इस प्रकार याची की नियुक्ति बिना पद व विहित प्रक्रिया का पालन किये होने के कारण अवैधानिक है। जिला विद्यालय निरीक्षक जौनपुर द्वारा दिनांक 3.6.97 को माननीय उच्च न्यायालय के आदेश के अनुपालन में वेतन भुगतान का आदेश पारित किया गया है जबकि इस प्रकार का कोई आदेश माननीय उच्च न्यायालय द्वारा पारित ही नहीं है। माननीय सर्वोच्च द्वारा राधा रायजादा प्रकरण में दिये गये निर्णय में उल्लिखित मार्गदर्शी सिद्धान्तों के आधार पर परीक्षण किये बिना पद के होने के कारण तथा अध्याचन व समाचार पत्रों में विज्ञापन ने होने के कारण तथा जिला विद्यालय निरीक्षक द्वारा नियुक्ति हेतु पूर्वानुमति न दिये जाने के कारण अवैध है। जिनके वेतन भुगतान का दायित्व विभाग/ शासन का नहीं है।"

"Insofar as the judgment in the case of Smt. Ramdulari Devi and others v. Joint Director of Education, Varanasi and others and the judgment of Aashik Prasad Shukla v. District Inspector of Schools, Allahabad are concerned, the case of the petitioner is not covered by the said judgments because the appointment of the petitioner was not approved by the competent authority prior to the judgment in the case of Radha Raizada (1994) 3 UPLBEC. In this matter Manager had made appointment in fraudulent manner on 19th

January, 1992 showing the post to be vacant whereas on that date no such post had fallen vacant. Despite being asked, the Manager did not submit the minutes register and other papers of the Committee of Management. Thus, petitioner having been appointed without their being any post and without following the procedure prescribed for, his appointment is illegal. District Inspector of Schools vide his order dated 3rd June, 1997 had passed the order for payment of salary in compliance of the order of High Court whereas there was no such order passed by the High Court. The appointment of the petitioner having been made without following the guidelines and principles laid down in the case of Radha Raizada and without there being any post as such and also in the absence of any advertisement in the newspaper and requisition being not sent, the approval of the selection and appointment by the District Inspector of Schools was illegal and for that reason the department/Government cannot be held liable to make payment of salary to the petitioner.”

(English Translation by the Court)

26. These above findings and consequential order was set aside by this Court under its order dated 19th February, 2015 by allowing his Writ Petition No.-22809 of 2009 holding thus:

“It appears from the record that this submission and particular aspect was urged before this Court in the earlier round of litigation also. The judgment of this Court rendered on 28.07.2006 specifically refers to the submission in this regard made before the Court. Surprisingly, however, the same has received no consideration or notice by the respondent No.2, while passing the impugned order.

Following the law laid down in Ashika Prasad Shukla (Supra), this Court is of the opinion, that the appointment of the petitioner cannot be annulled on the ground that the vacancy against which the appointment was effected had not been advertised or that the appointment did not enjoy the prior approval of the District Inspector of Schools. This so because the appointment was admittedly made prior to the judgment pronounced by this Court in Radha Raizada (supra) on 15.07.1994.

That leaves only one other issue, which is whether the appointment of the petitioner was made against a substantive vacancy existing at the relevant time.”

27. Thus having held as above the Court remitted the matter as to ascertain whether ‘petitioner was appointed against a then subsisting substantive vacancy’. In the circumstances, the Committee was only required to ascertain availability of vacancy and so the Committee has done vide findings No. (i). Resultantly, findings No. (iv) arrived by the Committee, is hereby held perverse and accordingly unsustainable.

28. One more issue needed to be addressed to do complete justice in the matter and the issue is of Management’s right to make appointment after six years of occurrence of vacancy. It is settled law that with enforcement of U.P. Secondary Regulation Services Selection Board Act 1982, all such vacancies fall within the domain of Board constituted under the Act and requisition has to be made. In the present case requisition was made by Committee of Management on 23rd January, 1992 and so Management in April, 1992 was fully competent to make appointment on ad-hoc basis, and post would not be taken to have lapsed. In the

case of **Yogendra Nath Singh** (*supra*) vide paragraph 8 this Court held thus:

“8. Another objection is that this vacancy lapsed within the meaning of Regulation 20 of Chapter II of the Regulations framed under the U.P. Intermediate Education Act, 1921. Regulation 20 states that where the Committee of Management has failed to advertise any sanctioned post, which has fallen vacant, in accordance with the Regulations within a period of three months from the date of occurrence of the vacancy, such posts shall be deemed to have been surrendered and shall not be filled up, unless its creation is sanctioned afresh by the Director. No sanction having been obtained from the Director, the Respondent No. 1 stated in the impugned order that the post would be deemed to have been surrendered. This was the position before the Act, 1982, became operative. But after the enforcement of the Act, 1982, every vacancy has to be filled in only by the commission and ad hoc appointment can be made by the Management Committee only in the circumstances as contained in Section 18(1)(b). Petitioner's appointment cannot be impugned on that ground.”

29. I may observe here that whenever a matter is remanded on a question upon which the Court wants a certain finding of fact, the authority has to address that issue only and no other considerations extraneous to issue should be taken into account to reject a claim which otherwise would be valid but for a definite finding on issue under remand. In my considered view the authority having held issue No. 2 in favour of the petitioner, was required to just look into the documents and findings of the High Court in earlier round of litigation and nothing beyond that.

30. In view of the above, writ petition succeeds and is allowed. The decision taken by the Committee dated 18th November, 2015 impugned in the writ petition questioning the appointment against the vacancy of Jagat Pal Singh is set aside. Petitioner is held to be lawfully appoint against a substantive vacancy of Assistant Teacher then lying vacant. He is held entitled to regularisation vide relevant provisions and clause under Section 33-C of Act No.- 5 of 1982 and so also all other consequential benefits both in terms of salary increment in pay etc. including service period to be counted towards qualify service for pension.

31. Competent authority is directed to pass consequential order within a month from the date of production of certified copy of this order.

(2023) 8 ILRA 300
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.08.2023

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ A No. 8770 of 2022

Ashok Kumar Singh ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
 Sameer Kalia

Counsel for the Respondents:
 C.S.C.

Held: The writ petition under Article 226 challenging the St. Public Service Tribunal's order dated 22.09.2022, dismissing the claim petition against the punishment order dated

22.12.2021 (imposing censure and stoppage of one increment for one year), is allowed. The Tribunal's order and the punishment order are set aside due to procedural irregularities in the disciplinary proceedings, including non-supply of relied-upon documents (report/tehrir of Shri Shiv Avatar Singh and NCRB dated 05.05.2021) not part of the charge-sheet, violating Rule 7 of the U.P. Government Servants (Discipline & Appeal) Rules, 1999, and failure to provide the enquiry report to the petitioner before imposing punishment, contravening Rule 9(4). The Tribunal failed to address these grounds, and the disciplinary enquiry exceeded the three-month time limit stipulated by the court without seeking an extension, rendering the proceedings unsustainable. The petitioner is entitled to all consequential reliefs as per rules. The order is not to be treated as precedent due to the peculiar facts of the case. No order as to costs.

List of Cases cited:

1. Abhishek Prabhakar Awasthi Vs The New India Assurance Company Limited & ors., 2013 SCC OnLine All 14267
2. Ministry of Finance & anr.Vs S.B. Ramesh, AIR 1998 SC 853
3. Surya Dev Rai Vs Ram Chander Rai & ors., (2003) 6 SCC 675

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

A. INTRODUCTION

(1) Heard Shri Sameer Kalia, learned Counsel representing the appellant and Shri Anil Kumar Singh 'Visen', learned Standing Counsel for the State/respondents.

(2) The present writ petition under Article 226 has been filed assailing the judgment and order dated 22.09.2022 passed by the State Public Service Tribunal, Lucknow (hereinafter referred to as "Tribunal"), whereby Claim Petition No.370 of 2022 filed by the claimant/petitioner against the order of

punishment dated 22.12.2021, by which he was awarded two minor penalties i.e. (1) Censure; and (2) stoppage of one increment for one year, has been dismissed.

B. FACTUAL MATRIX

(3) As per the records available on the file of the present case, the petitioner was initially appointed on the post of Assistant Commissioner Sales Tax under the Commissioner, Commercial Tax (respondent no.2) on 29.9.1998 after having been selected for the said post by the U.P. Public Service Commission. Subsequently, on account of his excellent services, the petitioner was promoted to the post of Deputy Commissioner in the year 2009 and thereafter again in the year 2015, he was promoted to the post of Joint Commissioner Commercial Tax. Thereafter, in the month of July 2019, the petitioner was transferred from the Headquarters at Lucknow to District - Bulandshahr where he joined and started functioning as Joint Commissioner, Commercial Tax (SIB), Bulandshahr.

(4) On 26.3.2021, the State Election Commission notified the Three Tier Panchayat Elections - 2021 held in the State of Uttar Pradesh. Apparently, prior to the aforesaid notification i.e. on 25.3.2021, the District Election Officer (Panchayat)/District Magistrate, Bulandshahr appointed the petitioner as Returning Officer for Development Block-Sikandrabad, District- Bulandshahr. However, subsequently, the District Election Officer (Panchayat)/District Magistrate Bulandshahr, vide order dated 03.04.2021, amended its earlier order dated 25.3.2021 and appointed the petitioner as Returning Officer for Development Block - Khurja in place of Development Block - Sikandarabad.

(5) Pursuant to the aforesaid order of the District Magistrate Bulandshahr dated 03.04.2021, the petitioner took charge of the post of Returning Officer, Development Block - Khurja and conducted the entire election process starting from the submission of nomination papers till the counting of votes and declaration of results (except for the Member Zila Panchayat), as per the notified election schedule, with sincerity and transparency. The polling of votes took place on 29.4.2021 at all the polling booths of Development Block - Khurja and during which reportedly no untoward incident took place and the polling was conducted in a peaceful and organized manner.

(6) According to the petitioner, on 02.5.2021, at 08:00 a.m., the counting of votes commenced under his direction and supervision at Jatiya Bal Vihar Inter College, Khurja which is situated in the said Development Block Khurja. At around 05:00 p.m., on the following date i.e. 03.5.2021, the counting of votes got concluded and subsequently, the petitioner declared the result of the concerned posts of Gram Pradhan, Member Gram Panchayat and Member Kshetra Panchayat and also handed over the prescribed certificate to the returned/elected candidates.

(7) After conclusion of counting of votes at 05:00 p.m. and declaration of result of the aforesaid three posts, the petitioner and the polling team secured all the necessary documents and completed all the formalities, which took some time and as such it was only at around 06:30 p.m., the petitioner along with his team were able to proceed to District Headquarters. Apparently, before the petitioner could reach the District Headquarters with his

team, the Additional District Magistrate (Administration)/Deputy Election Officer Panchayat, Bulandshahr contacted the petitioner on his mobile no.7235001008 and directed the petitioner to return to the place where the counting took place as allegedly some dispute had to be resolved. As per the directions of the Deputy Election Officer Panchayat/ Additional District Magistrate (Administration), the petitioner reached the place of counting, where the Deputy District Election Officer, Panchayat also reached, whereafter the aforesaid officer apprised the petitioner about the complaint of one candidate for the post of Member Zila Panchayat (Ward No.25) who had made a request for re-counting. On the request having been made by the alleged complainant/candidate, the petitioner required the other counting staff to be present at the place of counting and further directed the support staff to call the other candidates of Ward No.25 also till such time the support staff and the other candidates were reaching the place of counting. The petitioner along with his team in the presence of the Deputy Election Officer Panchayat/ Additional District Magistrate (Administration) tried to sort out the objections of the aforesaid candidate and due to the efforts of the petitioner and Deputy Election Officer Panchayat/ Additional District Magistrate (Administration) and other district level officer, the objections of the candidate were sorted out and upon which the said candidate requested for declaration of the result without insisting for re-counting of votes.

(8) It was only thereafter that the District Level Election Officers left with the required counting sheet to enable them to declare the result. In all this process of consideration/ resolution of complaint /

objection of the candidate (ward no.25) it took considerable time, which eventually led to some delay. It is the case of the petitioner that the delay caused was neither deliberate nor intentional and in any case the entire process and the delay therewith was well within the knowledge of the District Level Election authorities.

(9) Apparently, the Deputy Election Officer (Panchayat)/ Additional District Magistrate (Administration) on 04.5.2021 submitted a letter to the District Election Officer Panchayat/ District Magistrate narrating that the petitioner had not submitted the counting sheet to the Election Officer till 12:00 PM despite of the fact that the counting had concluded about 05:00 PM and allegedly due to which certain candidates of Ward Nos. 24, 25 and 26 created a ruckus at the Collectorate premises as well as at the place of counting in Khurja citing that the result is being allegedly manipulated and due to which there was unrest at the said places. This letter dated 04.05.2021 was forwarded to the State Election Commission by the District Election Officer Panchayat/District Magistrate vide his letter dated 04.5.2021.

(10) Thereafter, the State Election Commission, on the basis of the aforesaid letter of the District Magistrate dated 04.5.2021 forwarded a recommendation to the respondent no.2-Commissioner, Commercial Tax, Lucknow for suspension and initiation of disciplinary inquiry against the petitioner stating that the petitioner had shown indifference and had been negligent towards his duties while functioning as Returning Officer of Development Block-Khurja.

(11) Subsequently, on 13.05.2021, the Commissioner, Commercial Tax, Lucknow

(respondent no.2), on the basis of the aforesaid letter dated 12.5.2021 of the State Election Commission, forwarded a recommendation to the State Government (respondent no.1) for suspension and initiation of disciplinary inquiry against the petitioner. Thereafter, the State Government (respondent no.1) issued the order of suspension dated 21.05.2021 to the petitioner and it was also directed to initiate disciplinary enquiry with respect to the role of the petitioner as Returning Officer, Development Block – Khurja.

(12) Feeling aggrieved by the order of suspension dated 21.05.2021, the petitioner in the first round of litigation had preferred Writ Petition No. 12120 of 2021 before this Court. The learned Single Judge, on appreciating the rival submissions of the parties, arrived at a conclusion that the respondents while passing the order of suspension has failed to record reasons to arrive at a conclusion of satisfaction that the charges are serious enough to impose major penalty. In this background, the learned Single Judge, vide judgment and order dated 19.07.2021, while setting aside the order of suspension dated 21.05.2021, directed the respondents to permit the petitioner to function on the post of Joint Commissioner (SIB), Bulandshahar and pay him regular salary month by month as and when they became due, however, disciplinary proceedings pending against the petitioner was directed to be continued and the same was to be completed within three months from the date of production of certified copy of the said order. The concluding remark by the learned Single Judge vide order dated 09.07.2021 has been pressed by the petitioner, which is being extracted herein below:

“.....Respondents are directed to permit the petitioner to allow to work on

the post of Joint Commissioner (SIB), Bulandshahar and pay him regular salary month by month as and when became due.

It is, however, made clear that the disciplinary proceedings pending against the petitioner shall go on and shall be completed within three months from the date of production of certified copy of this order.”

(13) According to the petitioner, he served a certified copy of the aforesaid judgment and order dated 19.07.2021 to the State Government on 06.08.2021. However, prior to it, vide letter dated 20.07.2021, the Enquiry Officer so appointed on 07.06.2021 by the State Government served a charge-sheet dated 13.07.2021 to the petitioner levelling two charges against him. In support of both the charges, two reports i.e. one of Additional District Magistrate (Administration) and the other of the District Magistrate, Bulandshahr dated 04.05.2021 were cited as evidence. On receipt of the aforesaid charge-sheet dated 29.07.2021, the petitioner, vide application/representation dated 29.07.2021, sought certain documents from the Enquiry Officer related to the charges in question, so as to enable him to give a proper reply. Although, the Enquiry Officer, on receipt of the application of the petitioner dated 29.07.2021, wrote a letter to the Additional District Magistrate (Administration)/Deputy Election Officer (Panchayat), requesting to supply the documents demanded by the petitioner vide letter dated 29.07.2021 within a week, however, allegedly no heed was paid by the aforesaid authorities and the documents demanded by the petitioner vide letter dated 29.07.2021 was never supplied to him. Thereafter, in absence of the demanded documents, the petitioner submitted his reply to the charge-

sheet on 08.10.2021, denying the charges levelled against him.

(14) On receipt of the aforesaid reply of the petitioner, on 11.01.2021, the Enquiry Officer again requested the Additional District Magistrate (Administration)/Deputy Election Officer (Panchayat) to supply the required documents to the petitioner. Although, on 20.10.2021, the Additional District Magistrate (Administration)/Deputy Election Officer (Panchayat) supplied certain documents to the petitioner, however, according to the petitioner, these documents were not those documents, which were demanded by the petitioner. In any case, the petitioner, in continuation of his earlier reply, again submitted a supplementary reply to the charge-sheet on 29.10.2021, denying the charges and requested that he may be exonerated from the charges so levelled against him.

(15) Apparently, the Enquiry Officer had submitted its report on 17.12.2021, holding both the charges to be proved against the petitioner.

(16) The Disciplinary Authority i.e. State Government (respondent no.1), on receipt of the enquiry report dated 17.12.2021, passed the impugned punishment order dated 22.12.2021, thereby imposing two minor penalties upon the petitioner, namely, (1) censure; and (2) stoppage of one increment for one year.

(17) Feeling aggrieved by the impugned punishment order dated 22.12.2021, the petitioner preferred Claim Petition No. 370 of 2022 before the State Public Service Tribunal, Lucknow. The learned Tribunal, vide judgment and order dated 22.09.2022, dismissed the claim

petition, by upholding the punishments inflicted/imposed on the petitioner by the disciplinary authorities. It is this judgment and order passed by the learned Tribunal dated 22.09.2022, which has been assailed in the instant writ petition.

C. SUBMISSIONS

(18) The learned Counsel for the petitioner has submitted manifold grounds to impinge the impugned order and has heavily relied on a judgment of Full Bench of this Court rendered in **Abhishek Prabhakar Awasthi Vs. The New India Assurance Company Limited and others**: 2013 SCC OnLine All 14267 and has submitted that the learned Single Judge of this Court, while allowing the writ petition No. 12120 (S/S) of 2021 filed by the petitioner against the order of his suspension dated 21.05.2021 vide judgment and order dated 19.07.2021, in addition to other direction, had also directed that the disciplinary proceedings should be completed within three months from the date of receipt of a certified copy of the order. It is the submission of the learned Counsel for the petitioner that since the petitioner had served a certified copy of the aforesaid judgment and order dated 19.07.2021 to the State Government on 06.08.2021, the period of three months came to be expired on 05.12.2021. Thus, according to him, since the charge-sheet was prepared on 13.07.2021 and served on the petitioner vide letter of Enquiry Officer dated 20.07.2021 only, therefore, construing the date of initiation of departmental enquiry to be when the charge-sheet is prepared/ served on the petitioner, the departmental enquiry ought to have been concluded within a period of three month w.e.f. 13.07.2021 or 20.07.2021. However, the enquiry came to

be concluded only on 19.12.2021. Therefore, according to him, for all practical purposes the authority concerned as having not concluded the departmental enquiry against the petitioner within three months' time as stipulated by the learned Single Judge vide order dated 19.07.2021 nor had sought for any extension of time from this Hon'ble Court, the same is bad in law. Thus, it has been argued that in view of the decision of Full Bench of this Court in the case of **Abhishek Prabhakar Awasthi vs. New India Assurance Company Ltd.** (Supra), after expiry of stipulated period, the departmental enquiry ought to have not been conducted and concluded against the employee. Therefore, it is submitted by him that on this ground alone, the impugned punishment order falls and is not sustainable.

(19) Elaborating his submissions, the learned Counsel has drawn our attention to para-4.10 of the claim petition to submit that though specific plea to the aforesaid aspect of the matter has been taken by the petitioner in para-4.10 of the claim petition, but the learned Tribunal has not considered the aforesaid plea of the petitioner nor has even discussed while passing the impugned judgment and order dated 22.09.2022.

(20) Learned Counsel representing the petitioner has next submitted that impugned punishment order dated 22.11.2021 has been passed in utter violation of Rule 9 (4) of the U.P. Government Servants (Discipline & Appeal) Rules, 1999 for the reason that (a) the documents as demanded by the petitioner during the course of enquiry were never supplied to him; (b) the enquiry report dated 17.12.2021 was never supplied to the petitioner; and (c) while preparing enquiry report dated 17.12.2021, though report/tehrir of Shri Shiv Avatar

Singh, Tehsildar/Counting Magistrate, Tehsil Khurja and NCRB dated 05.05.2021 were not the part of the charge-sheet, but even then the same were placed reliance by the Enquiry Officer to prove the charges, therefore, the enquiry report as well as the impugned punishment order are per se illegal. According to him, the aforesaid plea has been taken by him in para-4.5 of the claim petition, but while passing the impugned judgment/order, the Tribunal had not considered the aforesaid aspect of the matter and erred in dismissing the claim petition by means of the impugned order. Thus, the impugned order passed by the Tribunal as well as the impugned punishment order were liable to be set-aside.

(21) *Per contra*, learned Standing Counsel representing the State/ respondents has supported the impugned judgment/order passed by the learned Tribunal and has submitted that though in the earlier proceedings when suspension order was set-aside by the learned Single Judge of this Court vide order dated 19.07.2021 (*supra*), time period was given within which the disciplinary proceedings so initiated against the petitioner was supposed to be completed, which could not be done, but that by itself would not be a ground for setting aside punishment order in view of the dictum of the Full Bench of this Court rendered in **Abhishek Prabhakar Awasthi Vs. New India Assurance Company Limited and others** (*supra*). Thus, according to the learned Counsel for the respondent, the plea of the petitioner in this regard was not substantiated.

(22) Learned Standing Counsel has next submitted that the charges levelled against the petitioner is serious in nature,

for which disciplinary proceedings have been initiated against the petitioner. The Enquiry Officer, after appreciating the relevant material on record and also considering the reply of the petitioner to the charge-sheet, has come to the conclusion that the petitioner is guilty for the charges levelled against him. The Departmental Authority i.e. State Government, on examining the relevant record as well as the enquiry report, has passed the impugned order of punishment against the petitioner, which is in consonance to the gravity of the charges levelled against the petitioner. The learned Tribunal, after considering the gravity of the charges and also material brought on record before him, has rightly dismissed the claim petition by means of the impugned order. Thus, according to the learned Standing Counsel, the impugned order of punishment as well as impugned judgment/order passed by the learned Tribunal do not suffer from any infirmity or illegality. Therefore, the writ petition is liable to be dismissed.

D. ANALYSIS & FINDINGS

(23) Having regard to the submissions advanced by the learned Counsels for the parties and after perusing the records available, this Court has given an anxious thought to the entire gamut of facts and the law referred by both the rival parties.

(24) Apparently, the procedure with regard to holding of disciplinary proceedings against Government servants in State of U.P. is governed as per the provisions of the Uttar Pradesh Government Servant (Discipline and Appeal), Rules 1999 (hereinafter referred to as '**Rules, 1999**'). The procedure for imposing penalties, the manner in which charge-sheet is required to be given, the

holding of an enquiry by the inquiry officer designated for the said purpose, the grant of opportunity to call witnesses and record their oral evidence are also provided under Rules, 1999.

(25) While assailing the impugned punishment order passed by the disciplinary authority as well as impugned judgment/order passed by the Tribunal, the learned Counsel representing the petitioner has laid much emphasis upon Rule 7 and Rule 9 (iv) of Rules, 1999, therefore, we deem it apt to reproduce Rule 7 and 9 of Rules, 1999, which are as under :-

“7. Procedure for imposing major penalties.- Before imposing any major penalty on a Government servant, an inquiry shall be held in the following manner-

(i) The Disciplinary Authority may himself inquire into the charges or appoint an Authority subordinate to him as Inquiry Officer to inquire into the charges.

(ii) The facts constituting the misconduct on which it is proposed to take action shall be reduced in the form of definite charge or charges to be called charge-sheet. The charge-sheet shall be approved by the Disciplinary Authority:

Provided that where the Appointing Authority is Governor, the charge-sheet may be approved by the Principal Secretary or the secretary, as the case may be, of the concerned department.

(iii) The charges framed shall be so precise and clear as to give sufficient indication to the charged Government servant of the facts and circumstances against him. **The proposed documentary evidences and the name of witnesses proposed to prove the same along with oral evidences, if any, shall be mentioned in the charge-sheet.**

(iv) The charged Government servant shall be required to put in a written statement of his defence in person on a specified date which shall not be less than 15 days from the date of issue of charge-sheet and to state whether he desires to cross-examine any witness mentioned in the charge-sheet and whether desires to give or produce evidence in his defence. He shall also be informed that in case he does not appear or file the written statement on the specified date, it will be presumed that he has none to furnish and Inquiry Officer shall proceed to complete the inquiry ex parte.

(v) **The charge-sheet, along with the copy of documentary evidences mentioned therein and list of witnesses and their statements, if any shall be served on the charged Government servant** personally or by registered post at the address mentioned in the official records in case the charge-sheet could not be served in aforesaid manner the charge-sheet shall be served by publication in a daily newspaper having wide circulation:

Provided that where the documentary evidence is voluminous, instead of furnishing its copy with charge-sheet, the charged Government servant shall be permitted to inspect the same before the Inquiry Officer.

(vi) Where the charged Government servant appears and admits the charges, the Inquiry Officer shall submit his report to the Disciplinary Authority on the basis of such admission.

(vii) Where the charged Government servant denies the charges the Inquiry Officer shall proceed to call the witnesses proposed in the charge-sheet and record their oral evidence in presence of the charged Government servant who shall be given opportunity to cross-examine such witnesses. After recording the aforesaid

evidences, the Inquiry Officer shall call and record the oral evidence which the charged Government servant desired in his written statement to be produced in his defence;

Provided that the Inquiry Officer may for reasons to be recorded in writing refuse to call a witness.

(viii) The Inquiry Officer may summon any witness to give evidence or require any person to produce documents before him in accordance with the provisions of the Uttar Pradesh Departmental Inquiries (Enforcement of Attendance of Witness and Production of Documents) Act 1976.

(ix) The Inquiry Officer may ask any question he pleases, at any time of any witness or from person charged with a view to discover the truth or to obtain proper proof of facts relevant to charges.

(x) Where the charged Government servant does not appear on the date fixed in the inquiry or at any stage of the proceeding in spite of the service of the notice on him or having knowledge of the date, the Inquiry Officer shall proceed with the inquiry ex parte. In such a case the Inquiry Officer shall record the statement of witnesses mentioned in the charge-sheet in absence of the charged Government servant.

(xi) The Disciplinary Authority, if it considers it necessary to do so, may, by an order appoint a Government servant or a legal practitioner, to be known as "Presenting Officer" to present on its behalf the case in support of the charge.

(xii) The Government servant may take the assistance of any other Government servant to present the case on his behalf but not engage a legal practitioner for the purpose unless the presenting officer appointed by the Disciplinary Authority is a legal practitioner or the Disciplinary Authority

having regard to the circumstances of the case so permits

Provided that this rule shall not apply in following cases:

(i) Where any major penalty is imposed on a person on the ground of conduct which has led to his conviction on a criminal charge; or

(ii) Where the Disciplinary Authority is satisfied, that for reason to be recorded by it in writing, that it is not reasonably impracticable to hold an inquiry in the manner provided in these rules; or

(iii) Where the Governor is satisfied that, in the interest of the security of the State, it is not expedient to hold an inquiry in the manner provided in these rules."

8. xxxxxxxxxx

"9. Action on Inquiry Report-

(1) The disciplinary authority may, for reasons to be recorded in writing, remit the case for re-enquiry to the same or any other inquiry officer under intimation to the charged Government Servant. The inquiry officer shall thereupon proceed to hold the inquiry from such stage as directed by the Disciplinary Authority, according to the provisions of Rule 7.

(2) The disciplinary authority shall, if it disagrees with the findings of the inquiry officer on any charge, record its own findings thereon for reasons to be recorded.

(3) In case the charges are not proved, the charged Government Servant shall be exonerated by the Disciplinary Authority of the charges and inform him accordingly.

(4) **If the Disciplinary Authority, having regard to its findings on all or any or charges is of the opinion that any penalty specified in Rule 3 should be imposed on the charge Government Servant, he shall give a**

copy of the inquiry report and his findings recorded under sub-rule (2) to the charged Government Servant and require him to submit his representation if he so desires, within a reasonable specified time.

The disciplinary authority shall, having regard to all the relevant records relating to the inquiry and representation of the charged Government servant, if any, and subject to the provisions of Rule 16 of these rules, pass a reasoned order imposing one or more penalties mentioned in Rule 3 of these rules and communicate the same to the charged Government Servant."

(Emphasis supplied)

(26) A bare perusal of the aforesaid provisions of Rules, 1999 would go to show that the aforesaid rules are a self-contained rules and an exhaustive procedure has been laid down for conducting a departmental inquiry. It has been the consistent stand of the petitioner that the procedure adopted by the disciplinary is vitiated due to various reasons including he was not provided with the relevant documents during the said proceedings. Although, the learned Counsel for the petitioner has asserted that relevant documents were not provided to the petitioner, however he was unable to point out from the pleading or otherwise as to what documents could not be supplied to him nor it has been argued as to how those documents could be relevant to the disciplinary proceedings. Thus, the said issue appears to be irrelevant.

(27) The next point raised by the learned Counsel for the petitioner is that while preparing enquiry report dated 17.12.2021, though report/tehrir of Shri Shiv Avatar Singh, Tehsildar/Counting Magistrate, Tehsil Khurja and NCRB dated

05.05.2021 were not the part of the charge-sheet, but even then the same were placed reliance by the Enquiry Officer to substantiate the charges against the petitioner and therefore, according to him, the enquiry report as well as the impugned punishment order are per se illegal.

(28) This Court finds substantial force in the said argument of the petitioner, even the learned Tribunal did not deal with the said aspect, although the said ground had been agitated by the petitioner in the claim petition. Since, the learned Tribunal did not deal with the said aspect of the matter, this Court is obliged to examine the said ground enunciated by the petitioner in the present writ petition.

(29) A con-joint reading of Rule 7(iii) and (v) of the Rules 1999 makes it clear that not only the proposed documentary evidences shall be mentioned in the charge-sheet, but the same shall be served upon the charged officer. The said procedure is an essential facet of the departmental proceeding as it not only gives a certainty to the allegation levelled against the erring public servant but also prevents the department from a roving enquiry. The said procedure is to serve the rule of fairness and flows in the true spirit of Article 14 and public policy. Most importantly, the said procedure prevents from pulling up a surprise at the time of departmental enquiry and also enables the delinquent public servant to prepare for his defense well in advance. In any case, supply of documents relied upon by the department in an enquiry is an inalienable right of the charged officer and is an extension of the right to equality as free and fair procedure are a part and parcel of Article 14 of the Constitution of India, which in turn serves the purpose to live with dignity.

(30) This Court is clear in its mind that the applicability of the provisions of Rule 7 of the Rules, 1999 relating to supply of documents to the charged officer is mandatory and forms essential cannons of principle of natural justice viz “*audi alteram partem*” i.e no person shall be condemned unheard. Apparently, the impugned judgment of the learend Tribunal has fallen short of returning any findings on the said aspect of non-supply of the report/tehrir of Shri Shiv Avatar Singh, Tehsildar/Counting Magistrate, Tehsil Khurja and NCRB dated 05.05.2021 to the petitioner, which admittedly were not the part of the charge-sheet, but were relied upon by the Enquiry Officer to substantiate the charges against the petitioner. The very non-supply of these documents vitiates the enquiry and the consequent report filed with the disciplinary authority and as such cannot be allowed to be sustained in the eyes of law.

(31) This Court finds that even at the second stage, wherein as per Rule 9 (4) of the Rules 1999, the petitioner was to be supplied with the enquiry report and called for a representation against the said representation, adequate opportunity for explanation was not given to the petitioner in that regard. Apparently, Rule 9(4) of the Rules, 1999 provides for sufficient self-guard to a delinquent officer, in case the disciplinary authority is of the view that the enquiry report submitted is against the said delinquent officer, inasmuch as it provides that the Disciplinary Authority, shall give a copy of the inquiry report and his findings to the charged Government Servant and require him to submit his representation within a reasonable specified time. Apparently the giving of such a representation is a last chance afforded to a delinquent officer to justify his misdeeds to

the disciplinary authority and is again an essential facet of the disciplinary proceedings and in terms of the public policy. Further, it is only after a representation is received from the charged officer that the disciplinary authority having regard to all the relevant records relating to the inquiry and representation of the charged Government servant pass a reasoned order imposing one or more penalties.

(32) In the present case, the enquiry report was submitted by the enquiry officer on 17.12.2021 and without supplying a copy of the said report and awaiting the representation thereof, the petitioner was imposed the punishment order on 22.12.2021. Again, although these grounds had been made good by the petitioner before the learned Tribunal, however, unfortunately the same has been dealt in a very cursory manner and as such this Court has been burdened to deal with such a fundamental aspect of a departmental enquiry.

(33) The Hon’ble Supreme Court in the case of **Ministry of Finance and another v. S.B. Ramesh** reported in AIR 1998 SC 853 has emphasized that in case of disciplinary proceedings if Enquiry Officer relies on the documents, then, those documents should be proved in accordance with law and any inference drawn from the documents which were not proved in accordance with law, would be illegal and opposed to law.

(34) Further, there is another aspect of the matter, which has been agitated by the learned Counsel for the petitioner. This Court finds that the said issue relating to conclusion of departmental enquiry within three months of the order dated 21.07.2021

passed in the case of the petitioner by this Hon'ble Court in the earlier round of litigation has been conveniently again not dealt with the learned Tribunal. Although an effort has been made by the learned Standing Counsel before this Court in the present writ petition, by submitting that the judgment of the Hon'ble Full Bench of this Court in **Abhishek Prabhakar Awasthi vs. The New India Assurance Company Limited and others (supra)** by itself cannot be a ground for setting aside the punishment imposed on the petitioner. Although, the argument appears to be very attractive, however, this Court finds that the Full Bench of this Court has answered the questions in reference vide paragraph-2 of the aforesaid referred judgment by formulating the following question :-

“(a) Whether if an inquiry proceeding is not concluded within a time frame fixed by a court and concluded thereafter, without seeking extension from the Court then on the said ground the entire inquiry proceeding as well as punishment order passed, is vitiated in view of the judgment in the case of P.N. Srivastava; and

(b) Whether the law as laid down by a Division Bench of this Court in the case of P.N. Srivastava that if an inquiry proceeding is not concluded within a time frame as fixed by a Court, it stands vitiated is still a good law in view of the judgment rendered by the Supreme Court in the case of Suresh Chandra as well as a judgment dated 27.07.2009 of a Division Bench of this Court in Writ Petition No. 1056 (SB) of 2009 (Union of India and others Vs. Satendra Kumar Sahai and another).”

(35) Although, the answer to the aforesaid reference was made by the Full bench at paragraph-19 of the judgment,

however, it would be significant to note that the Full Bench in that very judgment also recorded the prelude to the said judgment at paragraph-6, which makes for an enlightenment reading. Suffice to mention that the Full Bench in that paragraph observed as follows :-

“6. In the context of disciplinary proceedings, the High Court in the exercise of its writ jurisdiction under Article 226 of the Constitution may in appropriate cases fix a stipulation in regard to the conclusion of an enquiry within a stipulated period. Such an order may be passed in several situations, such as when an employee moves a petition challenging an order of suspension and the Court considers it appropriate, in the interests of justice, to direct that the disciplinary proceeding should be expeditiously disposed of. Such directions are issued in other appropriate instances to obviate a delay in disposing of disciplinary proceedings. The basis and rationale for these orders is to ensure that an employee is not prejudiced by an undue delay in the conclusion of a disciplinary proceeding. Where the Court stipulates a period of time during which an enquiry must be completed, such a stipulation has to be observed. Clearly, it is not open to the employer to act in disregard of the orders of the Court and it cannot possibly be asserted that notwithstanding the time fixed by the Court, the employer is at liberty to conclude the enquiry at its own whims and fancy disregarding the stipulation of time.

(Emphasis supplied)

(36) The Full Bench in the background of the aforesaid observation made at paragraph-6 of the judgment, went to answer the aforesaid question framed,

vide para-19 of the judgment, which is being reproduced here-in-below :-

"19. In view of the above discussion, we now proceed to answer the questions which have been referred to the Full Bench.

(A) Question No. (a): We hold that if an enquiry is not concluded within the time which has been fixed by the Court, it is open to the employer to seek an extension of time by making an appropriate application to the court setting out the reasons for the delay in the conclusion of the enquiry. In such an event, it is for the court to consider whether time should be extended, based on the facts and circumstances of the case. **However, where there is a stipulation of time by the Court, it will not be open to the employer to disregard that stipulation and an extension of time must be sought;**

(B) Question No. (b): The judgment of the Supreme Court in the case of Suresh Chandra (supra) as well as the judgment of the Division Bench of this Court in the case of Satyendra Kumar Sahai (supra) clearly indicate that a mere delay on the part of the employer in concluding a disciplinary enquiry will not ipso facto nullify the entire proceedings in every case. The court which has fixed a stipulation of time has jurisdiction to extend the time and it is open to the court, while exercising that jurisdiction, to consider whether the delay has been satisfactorily explained. The court can suitably extend time for conclusion of the enquiry either in a proceeding instituted by the employee challenging the enquiry on the ground that it was not completed within the stipulated period or even upon an independent application moved by the employer. The court has the inherent jurisdiction to grant an extension of time,

the original stipulation of time having been fixed by the court itself. Such an extension of time has to be considered in the interests of justice balancing both the need for expeditious conclusion of the enquiry in the interests of fairness and an honest administration. In an appropriate case, it would be open to the Court to extend time suo motto in order to ensure that a serious charge of misconduct does not go unpunished leading to a serious detriment to the public interest. The court has sufficient powers to grant an extension of time both before and after the period stipulated by the court has come to an end."

(Emphasis Supplied)

(32) Having said so, this Court is of the view that in all fairness and as per the judgment of the Full Bench, there is no escape for the employer/disciplinary authority to disregard the stipulation of time as provided for completion of disciplinary proceedings. However, a way out as has been prescribed by the Full Bench, inasmuch as, it is always open for the disciplinary authority to seek extension of time from this court giving reasons for delay in conclusion of the enquiry. Further, suo-moto power has also been given to this Court to grant an extension of time both before or after the period stipulated by the Court.

(33) This Court finds that there is no request nor any application by the disciplinary authority seeking any extension of time for concluding the enquiry. Even during the present proceeding before this Court, there had been no such request by the disciplinary authority. Further, this Court finds that the disciplinary authority was granted three months' time to conclude the enquiry vide

order dated 19.07.2021, however, apparently the punishment order came to be passed vide order dated 22.12.2021, which was well beyond the time granted by this Court. Although, in answer to issue 'B' of the reference, the Full Bench of this Court was of the view that this Court may grant *suo-moto* extension, if the charges are so serious, but in the peculiar facts and circumstances of the issue in question, such *suo-motu* extension of time cannot be granted for various reason including (i) that the charges against the petitioner is essentially for delayed declaration of result of the members of the Zila Panchayat, (ii) Although the petitioner was immediately put on suspension, however learned Single Judge of this Court has quashed the said order of suspension and allowed the petitioner to work and the said order of the learned Single Judge has attained finality as the same was never challenged by the department, (iii) the penalty imposed are minor in nature and (iv) most significantly this court has found several procedural infirmities in the conduct of enquiry as formulated under Rule 4 and 9 of the Rules 1999.

(34) This Court cannot be oblivious to the fact that the enquiry report pursuant to which the disciplinary authority has passed the punishment order was never put to the petitioner, so as to enable him to file representation. Thus, in view of the said mandatory procedure prescribed under the Rules, 1999 and several other procedural infirmities in the conduct of enquiry, the order of punishment cannot be held to be legally unsustainable, especially when there is a consistent series of authority on the point that a departmental inquiry against government servant is not to be treated as a casual exercise and the principles of natural justice are required to be observed so as to

ensure not only that justice is done but is manifestly seen to be done; the object being to ensure that the delinquent is treated fairly in proceedings which may culminate in imposition of a penalty against him.

(35). The next question which comes for consideration as to what kind of relief can be granted to the petitioner under the present petition filed under Article 227 of the Constitution of India, which essentially is in the nature of Judicial review. In a series of judgments, the Apex Court has culled out the principles governing difference between Writ of Certiorari under Article 226 of the Constitution of India and supervisory jurisdiction under Article 227 of the Constitution of India. Without burdening this judgment by referring to various judgments of the Apex Court, suffice it would be to refer to the judgment of **Surya Dev Rai v. Ram Chander Rai and other** (2003) 6 SCC 675, wherein the Apex Court observed in paragraphs 24 and 25 as herein below:

“24. The difference between Articles 226 and 227 of the Constitution was well brought out in Umaji Keshao Meshram v. Radhikabai [1986 Supp SCC 401]. Proceedings under Article 226 are in exercise of the original jurisdiction of the High Court while proceedings under Article 227 of the Constitution are not original but only supervisory. Article 227 substantially reproduces the provisions of Section 107 of the Government of India Act, 1915 excepting that the power of superintendence has been extended by this article to tribunals as well. Though the power is akin to that of an ordinary court of appeal, yet the power under Article 227 is intended to be used sparingly and only in appropriate cases for the purpose of keeping the subordinate courts and

tribunals within the bounds of their authority and not for correcting mere errors. The power may be exercised in cases occasioning grave injustice or failure of justice such as when (i) the court or tribunal has assumed a jurisdiction which it does not have, (ii) has failed to exercise a jurisdiction which it does have, such failure occasioning a failure of justice, and (iii) the jurisdiction though available is being exercised in a manner which tantamounts to overstepping the limits of jurisdiction"

25. Upon a review of decided cases and a survey of the occasions, wherein the High Courts have exercised jurisdiction to command a writ of certiorari or to exercise supervisory jurisdiction under Article 227 in the given facts and circumstances in a variety of cases, it seems that the distinction between the two jurisdictions stands almost obliterated in practice. Probably, this is the reason why it has become customary with the lawyers labelling their petitions as one common under Articles 226 and 227 of the Constitution, though such practice has been deprecated in some judicial pronouncement. Without entering into niceties and technicality of the subject, we venture to state the broad general difference between the two jurisdictions. Firstly, the writ of certiorari is an exercise of its original jurisdiction by the High Court; exercise of supervisory jurisdiction is not an original jurisdiction and in this sense it is akin to appellate, revisional or corrective jurisdiction. Secondly, in a writ of certiorari, the record of the proceedings having been certified and sent up by the inferior court or tribunal to the High Court, the High Court if inclined to exercise its jurisdiction, may simply annul or quash the proceedings and then do no more. In exercise of supervisory

jurisdiction, the High Court may not only quash or set aside the impugned proceedings, judgment or order but it may also make such directions as the facts and circumstances of the case may warrant, maybe, by way of guiding the inferior court or tribunal as to the manner in which it would now proceed further or afresh as commended to or guided by the High Court. In appropriate cases the High Court, while exercising supervisory jurisdiction, may substitute such a decision of its own in place of the impugned decision, as the inferior court or tribunal should have made. Lastly, the jurisdiction under Article 226 of the Constitution is capable of being exercised on a prayer made by or on behalf of the party aggrieved; the supervisory jurisdiction is capable of being exercised suo motu as well."

(Emphasis Supplied)

E. CONCLUSION

(36) Keeping the aforesaid dictum in mind and in view of the various reasons as enumerated herein above, we are inclined to allow the present petition and set-aside the impugned order of the learned Tribunal. Since the learned Tribunal having called upon to adjudicate the matter in its right perspective has failed to determine and return any findings on the various grounds and issue raised by the petitioner as can be borne out from the claim petition itself filed before the Tribunal, this Court accedes to the request of the petitioner that grave injustice would incur, in case the present case is remanded to the Tribunal for re-hearing.

(37) We, accordingly, **allow** this writ petition by setting aside the impugned judgment and order dated 22.09.2022 passed by the Tribunal in Claim Petition

No. 370 of 2022 and consequent order of punishment dated 22.12.2021 imposed by the disciplinary authority. The petitioner shall be entitled for all consequential reliefs as per the rules.

(38) It is clarified that the present order shall not be treated as precedent as the same has been rendered in the peculiar facts of the present case.

(39) There shall be no orders as to cost.

(2023) 8 ILRA 315
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.07.2023

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J
THE HON'BLE VINOD DIWAKAR, J.

Writ A No. 8882 of 2023

Pankhudi Agarwal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Prabhav Srivastava

Counsel for the Respondents:

C.S.C., Sri M.N. Singh, Sri G.K. Singh
(Senior Adv.)

Recruitment Law – Change of Reservation Category After Application Deadline – Interpretation of ‘False or Misleading Information’ – Mid-Process Amendment in Selection Criteria – Vested Right of Consideration

The petitioner, who initially applied for the post of Civil Judge (Junior Division) under the DFF (Dependent of Freedom Fighter) and EWS (Economically Weaker Section) categories in response to Advertisement No. A-5/E-1/2022

issued by UPPSC, later sought to withdraw her DFF claim upon realizing her ineligibility. She requested correction to be treated under EWS category alone after the declaration of Preliminary Exam result. UPPSC rejected this request, citing Clauses 2 and 11(18) of the 'Necessary Information' as prohibiting any post-deadline changes to category claims. The High Court held that although the petitioner could not amend her reservation category post-deadline under Clause 11(18), the failure to substantiate her DFF claim did not constitute a 'false' or 'misleading' claim under the said clause. Relying on dictionary and judicial interpretation of the terms "false" and "misleading," the Court distinguished between incomplete/incorrect claims and deceitful submissions. As the petitioner had not filed any document to support the DFF category, and had qualified under EWS cut-off, her candidature could not be cancelled outright. Incomplete or unsubstantiated claims are not automatically 'false' or 'misleading.' Reservation claims not supported by certificates can be denied, but candidature cannot be cancelled.

Case Law Citations:

1. Union Public Service Commission Vs Bibhu Prasad Sarangi & anr. – (2021) 4 SCC 516
2. N.T. Devin Katti & ors. Vs Karnataka Public Service Commission & ors.– (1990) 3 SCC 15
3. K. Manjusree Vs St. of Andhra Pradesh & anr.– (2008) 3 SCC 512
4. Rajendra Bhimrao Mandve Vs St. of Mah. & ors.– (2001) 10 SCC 111
5. Kumari Shraddha Vs St. of U.P. & ors.– Writ A No. 8825 of 2023

(Delivered by Hon'ble Saumitra Dayal
Singh, J.
&
Hon'ble Vinod Diwakar, J.)

1. Heard Shri Prabhav Srivastava, learned counsel for the petitioner, Shri G.K. Singh, Senior Advocate, assisted by Shri

M.N. Singh, learned counsel for respondent nos. 2 & 3 and Shri Mukul Tripathi, learned Standing Counsel.

2. Present petition has been filed against the communication dated 29.4.2023 issued by Under Secretary, Uttar Pradesh Public Service Commission ('UPPSC' in short) and the further communication dated 10.5.2023 issued on behalf of the Appeal Authority of the UPPSC rejecting the request of the petitioner to be treated as a candidate belonging to Economically Weaker Section ('EWS' in short) category, while giving up her claim, Dependent of Freedom Fighter ('DFF' in short).

3. Facts relevant to decide the present controversy are, the UPPSC came out with the Advertisement No. A-5/E-1/2022 (hereinafter referred to as the 'Advertisement'), dated 10.12.2022, inviting applications to participate at an Open Examination to be conducted by the UPPSC, for selection on the post of Civil Judge (Junior Division). In all, 303 vacancies were advertised. Of that, 123 vacancies fell under the Unreserved (General) category, while by way of vertical reservation provided, 81 vacancies were reserved for Other Backward Classes (OBC) category, 63 vacancies were reserved for Scheduled Castes (SC) category, 6 vacancies were reserved for Scheduled Tribes (ST) category. Further, by way of horizontal reservation provided, 30 vacancies were reserved for EWS category, 15 vacancies were reserved for Ex-Servicemen category, 6 vacancies were reserved for DFF category, 60 vacancies were reserved for Women category and 12 vacancies were reserved for Persons with Disabilities category. Petitioner filled up the said form disclosing, she belonged to DFF & EWS categories.

4. Consequently, she was issued an admit card and she appeared at the Preliminary Examination on 12.2.2023. Upon declaration of the result of that examination, on 16.3.2023, she was included in the list of candidates declared successful. She was then required to fill up another form (to appear at the Mains (Written) Examination), and to submit documentary proof as to her eligibility and reservation claimed.

5. At that stage, the petitioner appears to have realized, she was not eligible to claim reservation under the DFF category. Thus, she wrote to the UPPSC on 29.3.2023, to be treated, non-DFF category candidate. It is that application moved by the petitioner that came to be rejected, by communication dated 29.4.2023, issued by the Under Secretary, UPPSC as was confirmed in appeal vide further communication dated 10.5.2023. At that stage and before the written examination could be held, the petitioner approached this Court by means of the present petition. Upon hearing, on 22.5.2023, the following order was passed:

"1. Heard Sri Prabhav Srivastava, learned counsel for the petitioner; Sri M.N. Singh, learned counsel for the Commission and learned Standing Counsel for the State-respondent.

2. Submission is that the petitioner while filling up the form for preliminary examination by mistake applied as 'Dependent of Freedom Fighter' (for short "DFF") though she belongs to Economically Weaker Section (for short "EWS") category. Upon qualifying the preliminary examination, she realised her mistake and tried to fill up the form as a EWS category candidate. As far as the

DFF, she sought correction in the application, which has been rejected.

3. Relying on Note 6 of Clause 7 pertaining to reservation under Advertisement No.A-5/E-1/2022, dated 10.12.2022, the Commission may not have cancelled the petitioner's candidature as she did not make any false or misleading claim as may invite action under sub Clause 18 of Clause 11 of the above advertisement.

4. Prima-facie the matter requires serious consideration.

5. Upon the matter being heard in the pre-lunch session, Sri M.N. Singh was required to produce the result of the preliminary examination concerning the present petitioner, in sealed cover. After lunch that result has been produced. The petitioner has obtained more than the cut off marks under EWS category.

6. Since the examination is to be held from tomorrow onwards, as an interim measure, it is provided that the Commission would allow the petitioner to appear in the examination provisionally subject to the final out come of the present writ petition. However final result of the petitioner may not be declared except with leave of the Court.

7. Since the issue involved is purely legal, learned counsel for the Commission prays for and is granted two weeks time to file counter affidavit. Petitioner may file rejoinder affidavit within one week thereafter. Thus we expect, the pleadings would be completed in the first week of July 2023.

8. Put up on 10.07.2023, in top ten cases.

9. The result has been returned to Sri M.N. Singh in sealed cover.

10. Copy of the order be provided to learned counsel for the petitioner today itself."

6. Consequent to the above order, the petitioner appeared at the Mains (Written) Examination. Its result is awaited. Meanwhile, pleadings are complete and accordingly the matter has been heard.

7. Submission of learned counsel for the petitioner are two fold. First, relying on Clause 2 of the Advertisement read with Clause 11(14) of the 'Necessary Information to Applicants for Filling Their Applications Through On-Line', it has been submitted, the information filled by the petitioner while applying through on-line mode, was not sacrosanct. It could be edited, and any inaccuracy therein, could be corrected by the candidate through on-line mode, without inviting any adverse consequence. Since, the last date for making the online correction had expired on 10.1.2023, by virtue of Clause 11(14), the petitioner was permitted to communicate such change through off-line mode i.e., through postal communication. UPPSC has erred in not entertaining such application for correction made by the petitioner on 29.3.2023 i.e., immediately after declaration of the result of the Preliminary Examination.

8. Second, relying on Clause 7(6) pertaining to 'Reservation' read with Clause 11(30) of the 'Necessary Information to Applicants for Filling Their Applications Through On-Line', it has been submitted, as to reservation, incomplete disclosure of facts made by the petitioner (for the purpose of claiming reservation), did not invite the harsh consequence of cancellation of her candidature, rather, it invited the consequence of ineligibility to claim that (DFF) reservation, only. Thus, by way of example, it has been submitted, if a candidate claimed to be one belonging to a reserved category at the stage of

preliminary examination and he failed to establish his credential as to that reservation, at the stage of filling up the form for Written (Mains) Examination, without making any 'false' or 'misleading' statement, he would remain entitled to be considered as an Unreserved (General) category candidate, but he may not lose his candidature, in entirety.

9. To bolster his submission, learned counsel for the petitioner has then referred to Clauses 7(7) and 7(23) to submit, different consequences would arise including rejection of reservation and even candidature, in different specified circumstances. Thus, a candidate who may not have annexed his eligibility certificates, to establish his 'Educational Qualifications', or a candidate who may have failed to submit his application on the prescribed form or failed to disclose his date of birth or to have not mentioned or to have disclosed wrong date of birth etc., would suffer the harsh consequence of cancellation of candidature, in entirety.

10. Last, it has been submitted, under the General Instruction no.3, that is also a part of the Advertisement, it was open to a candidate to seek reservation under more than one category. However, even in a case of proper documentation made - to claim all such reservations, such candidate would be entitled to only one reservation - which may be more beneficial, in his facts.

11. Referring to the facts of the present case, it has been submitted, the petitioner may, at most, have failed to establish her claim for reservation as a DFF candidate. Insofar as she had not filed any document in support of such claim, her claim may never be described as a 'false' and/or a 'misleading' claim. For that

conclusion to arise, there must have pre-existed, a case of positive action or concealment practiced by the petitioner, in making a 'false' or 'misleading' claim. A simple case of incorrect disclosure or incomplete disclosure may never be equated to a false or misleading claim as may lead to such a harsh consequence, in law. Insofar as the petitioner is seen to have obtained more than the cut-off marks for an EWS category candidate, she did not lose her right to compete at the written examination as an EWS candidate.

12. As to the Notification dated 24.3.2023 issued after the declaration of the result of the Preliminary Examination (Clause 4 thereof), it has been submitted, that change in the eligibility for the Mains (Written) Examination was first sought to be enforced by the UPPSC vide that notification issued during the ongoing selection process. That has been resisted on the fundamental principle, UPPSC may not change its procedure (to make selections), during an ongoing selection process. The change, if at all, would apply prospectively, to fresh selections, only.

13. In support of his submissions learned counsel for the petitioner has relied on the full bench decision of this Court in **Special Appeal No. 156 of 2017 (Gaurav Sharma vs State of U.P. & 3 Ors.) and connected matters**, decided on 4.5.2017. He has also relied on the decisions of the Supreme Court in **T. Nadu Computer SC B.Ed. G.T. Welf. Society vs Higher Sec. Sci. Computer Tech. Assn. & Ors., (2009) 14 SCC 517** and **Sureshkumar Lalitkumar Patel & Ors. vs State of Gujarat & Ors., 2023 SCC OnLine SC 167**.

14. On the other hand, Shri G.K. Singh, learned senior counsel for the

UPPSC submits, the terms and conditions of the Advertisement are sacrosanct. Besides the Clause 4 of the Notification dated 24.3.2023, even under the original Advertisement, all candidates were mandatorily required to submit their online form, by the cut-off date 10.1.2023, clearly disclosing the category under which they were claiming their eligibility. The petitioner having claimed to be a person belonging to DFF category, she may never have changed her category, later. Therefore, the UPPSC has rightly rejected the candidature of the petitioner arising from her application dated 29.3.2023, seeking change of category.

15. Second, it has been submitted, the only provision to allow for change of category, existed under Clause 2 of the 'Necessary Information to Applicants for Filling Their Applications Through On-Line'. The date for the same expired on 10.1.2023. The petitioner failed to take benefit of the same. Then, it has been submitted, at the stage of filling the form for the Mains (Written) Examination, further requirement arose to the petitioner to file documents in support of the information furnished by her in her original application (submitted through online mode). At that stage, the petitioner could not have chosen - to not file the necessary certificates. Referring to Clause 11(7) of the 'Necessary Information to Applicants for Filling Their Applications Through On-Line', it has been submitted, the consequence of non-filing of such documents is provided by way of cancellation of the candidature, in entirety. Since the petitioner did not file the certificates/documents to establish that she belonged to DFF category, she cannot escape the consequence of cancellation of her candidature.

16. In support of above, reference has also been made to the provision of Clause 7(18) of the 'Necessary Information to Applicants for Filling Their Applications Through On-Line', to submit, change of category or sub-category was not permissible to the petitioner after 10.1.2023 i.e., after the cut-off date. Since it is the own case of the petitioner that she did not belong to DFF category, she had given 'false' and/or 'misleading' information. Therefore, her candidature was rightly rejected.

17. In support of his submission, learned senior counsel for the UPPSC has relied on two decisions of learned single Judge of this Court in **Vaishali Dwivedi vs State of U.P. & 2 Ors., Writ - A No. 15413 of 2022 decided on 27.9.2022** and **Satyendra Kumar Mishra vs State of U.P. & 2 Ors., Writ - A No. 3841 of 2023, decided on 17.3.2023**. He has also relied on the full bench decision of this Court in **Rajendra Patel vs State of U.P. & Anr., (2015) 8 ADJ 219 (FB)**.

18. Having heard learned counsel for the parties and having perused the record, besides the undisputed facts as noted above, it would be relevant to extract the Clauses 2, 7(6), 11(7), 11(14), 11(18), 11(23), 11(30) of the 'Necessary Information to Applicants for Filling Their Applications Through On-Line'. These clauses read as below:

"2. *Modify Submitted Application: If a candidate comes to know about any error/errors in the submitted application form except in the name of exam and type of recruitment. Registered Mobile Number, E-mail ID, Aadhar 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.

7(6): It is mandatory for the candidates to enclose self attested copies of all marksheets and certificates alongwith the application forms of Main (Written) Examination in support of the claims made by them in their application forms of Preliminary Examination regarding eligibility and category/sub-category for the benefit of reservation failing which their claim as a reserve category candidate shall not be entertained.

11(7): The candidates will have to enclose self attested copies of marksheets, certificates and degree alongwith the application form of main examination in support of their claims of Educational Qualifications. If they do not enclose self attested certificates/documents in support of their claims, the applications shall be rejected.

11(14): In every correspondence with the Commission, the name of Examination, Advertisement No. Registration No. Name of Candidate, Date of Birth & Roll No. (if communicated) Should be mentioned.

11(18): The claim of category, subcategory, domicile, gender, date of birth, name and address will be valid only till the last date of applying on line application. No change will be admissible after this. On submission of false/misleading information, the candidature will be cancelled. In this regard no application for error correction/modification shall be acceptable. Incomplete Application form

shall be summarily rejected and no correspondence shall be entertained in this regard.

11(23): The application/candidature will be rejected/cancelled if the application is not submitted on prescribed form, date of birth is not mentioned or wrong date of birth is mentioned, overage, under age, not fulfilling the minimum educational qualifications, applications received after last date and no signature under declaration in the format.

11(30): The candidates of reserved categories will be adjusted against the Unreserved Category in the final selection only if he/she will not avail any benefit/concession in qualifying standard at the state of Preliminary/Main/Screening Examination."

19. Also, relevant to the controversy at hand, the provision of General Instructions no.3 may also be taken note of, as below:

"3. Those candidates, willing to take the benefit of the reservation/age relaxation must obtain a certificate, issued by the competent authority, in support of the reserved category, in the prescribed format printed in this detailed advertisement (Appendix-3) and submit the same to the Commission whenever required to do so. Those claiming more than one reservation/age relaxation will be given only one such concession, which will be more beneficial. The Candidates who are not originally domicile of U.P. belonging to SC, ST, O.B.C. dependants of freedom fighters, Ex-Servicemen, Skilled Players, and Persons with Disabilities (Pwds) are not entitled to benefit of reservation/age relaxation. Such candidates will be treated as unreserved (General) candidates. In

case of the women candidates, the caste certificate issued from father side will be treated valid."

20. Having given our anxious consideration to the submissions advanced at the bar, we find, under the terms and conditions of the Advertisement, there was no option to the petitioner, but to submit her original/first application through the online mode, to appear at the Preliminary Examination. In view of the language of Clause 2 of 'Necessary Information to Applicants for Filling Their Applications Through On-Line', the petitioner was effectively prevented from seeking any change in her application form, after 10.1.2023. That being the last date to fill her application form, the submission of the learned counsel for the petitioner - based on Clause 11(14) does not impress us. While the UPPSC may have allowed for physical correspondence to arise through offline mode, it may never be inferred therefrom, that the mandatory condition and the timeline with respect to amendment and correction in the original application form stood extended, by necessary implication.

21. Allowing a postal correspondence to arise, in no way granted or created any right to the applicant, to correct/change the details submitted on her original/first application, submitted earlier, electronically. In absence of any inherent or recognized right existing (as to that) after the cut-off date, the first submission advanced by learned counsel for the petitioner does not merit our acceptance. It is rejected.

22. Insofar as the second submission advanced by learned counsel for the petitioner is concerned, the scheme of the selection, as contained in the

Advertisement, appears to be that the petitioner and the other candidates were allowed to appear at the Preliminary Examination on the strength of the self-disclosure made by them (in their applications submitted online), without verification made by the UPPSC, at that stage. That also appears to be the widely accepted mode at public examinations. These days, large number of candidates appear at public examinations, for a very few posts. Therefore, it does appear highly improbable and time consuming for the selection bodies to carry out due verification of all candidates, at the first stage of the selection process. It also allows the selection bodies access to higher fee collections. Thus, only after most of the candidates get screened out during the process of the Preliminary Examination, the more serious phase of the selection and verification is undertaken by UPPSC, through the Mains (Written) Examination and Interview/Viva Voce. Upon query made, the learned senior counsel for the UPPSC does not dispute this assumption.

23. Looked in that light, we first take note of Clause 7(6) of 'Necessary Information to Applicants for Filling Their Applications Through On-Line'. It appears to suggest that the benefit of reservation under any category/sub-category would fail if the self-attested certificate forming the basis of such claim were not enclosed with the offline/second application form - to be submitted before the Mains (Written) Examination. Here, it is undisputed, the offline application was to be submitted only after qualifying at the Preliminary Examination i.e., at the stage of Mains (Written) Examination.

24. Thus, in the first place, a candidate who may have first claimed

reservation under any category (in the form submitted online) and failed to enclose his self-attested category certificate (with his offline application), would lose his entitlement to his claim, as a reserved category candidate. There is no quarrel between the parties, the petitioner lost her claim as a DFF category candidate, for reason of having not enclosed her self-attested certificate to claim that benefit under that category of reservation, along with her offline application form.

25. Insofar as Clause 11(7) of 'Necessary Information to Applicants for Filling Their Applications Through On-Line' is concerned, the same appears to apply solely to 'Educational Qualifications'. Though the said clause also uses the word 'certificate' in conjunction with the words 'marksheet and degree', at the same time, it qualifies the applicability of that Clause itself to 'Educational Qualifications'. Therefore, it is plain - under that Clause, failure to enclose 'such' self-attested certificates/documents would result in the application itself being rejected. Though mandatory without an exception, the said Clause applies qua 'Educational Qualifications', only. By no process of reasoning, it may ever be inferred, it would apply or be extended to reservation, also.

26. Then, coming to Clause 11(18), first, it clearly provides, no change of category/sub-category may be made by a candidate after the last date to file the original (first) application, submitted through online mode. To that also, there is no dispute or quarrel between the parties. Therefore, as noted above, the petitioner lost her right to change her category, after the last date to submit the application to appear at the Preliminary Examination. However, as to consequence, only in the event of

'false/misleading information' being provided, the candidature of such candidate may be cancelled. Therefore, meaning would have to be attributed to the words 'false' and 'misleading'.

27. Blacks Law Dictionary, Ninth Edition defines the words 'False' & 'Misleading' as below:

"false, *adj.* (12c) 1. *Untrue* 2. *Deceit-ful; lying* 3. *Not genuine; inauthentic*. *What is false can be so by intent, by accident, or by mistake."*

misleading, *adj.* (16c) (*Of an instruction, direction, etc.*) *delusive; calculated to be misunderstood*. [*Cases: Fraud-13(1).*]"

28. Clearly, used in conjunction - to cause the legal effect of disqualification at an open/public competitive examination, to a person otherwise qualified to participate at such examination. Since 'false/misleading information' must itself cause that disqualification, it must be such as may be intended to obtain a result/benefit that the informant i.e., the candidate must know from before, he was not entitled to. Unless that falsity is ascertained by the UPPSC and, unless that is the test applied, it would include within its sweep incomplete disclosures and innocent errors of perception as to one's status, without ever having the intent to take any benefit, of the same. In the context of the disqualification being set up against an aspirant/candidate i.e., the petitioner, since she did not file any certificate or document to claim DFF reservation, we are disinclined to give that wider meaning to the words 'false' and 'misleading' to include therein unproven or incomplete or wrong disclosures.

29. As to what may be construed as 'false', came to be considered, though in a

different context arising under criminal jurisdiction, in **Ravinder Singh vs Sukhbir Singh & Ors., (2013) 9 SCC 245**. Yet, the same is relevant to our purpose since we are only looking to ascertain the dictionary meaning of word 'false'. That exercise has been undertaken by the Supreme Court in the above noted decision. Considering the meaning of word 'false', it was observed as below:

"18. The dictionary meaning of word "false" means that, which is in essence incorrect, or purposefully untrue, deceitful, etc. Thus, the word "false" is used to cover only unlawful falsehood. It means something that is dishonest, untrue and deceitful, and implies an intention to perpetrate some treachery or fraud. In jurisprudence, the word "false" is used to characterise a wrongful or criminal act, done intentionally and knowingly, with knowledge, actual or constructive. The word "false" may also be used in a wide or narrower sense. When used in its wider sense, it means something that is untrue whether or not stated intentionally or knowingly, but when used in its narrower sense, it may cover only such falsehoods, which are intentional. The question whether in a particular enactment, the word "false" is used in a restricted sense or a wider sense, depends upon the context in which it is used.

19. In CST v. Sanjiv Fabrics [(2010) 9 SCC 630 : (2010) 3 SCC (Cri) 1439] , this Court, after relying upon certain legal dictionaries, explained that the word false describes an untruth, coupled with wrong intention or an intention to deceive. The Court further held that in case of criminal prosecution, where consequences are serious, findings of fact must be recorded with respect to mens rea

in case of falsehood as a condition precedent for imposing any punishment."
(emphasis supplied)

30. Again as to the word 'mislead', in another case arising under the criminal jurisdiction, in **Ram Chandra Bhagat vs State of Jharkhand, (2013) 1 SCC 562**, the Supreme Court had the occasion to consider the meaning to be given to the word 'deceit'. In its concurring judgement, Justice R.M. Lodha (as he then was) reached a conclusion that any device or false representation by which one man may mislead another to his injury and fraudulent misrepresentations would have practiced deceit. Paragraphs 17 & 18 of the report read as under:

"17. Stroud's Judicial Dictionary (5th Edn.) explains "deceit" as follows:

"Deceit." "Deceit", deceptio, fraus, dolus, is a subtle, wily shift or device, having no other name; hereto may be drawn all manner of craft, subtilly, guile, fraud, wiliness, slight, cunning, covin, collusion, practice, and offence used to deceive another man by any means, which hath none other proper or particular name but offence'."

Black's Law Dictionary (8th Edn.) explains "deceit" thus:

"Deceit, n.?(1) The act of intentionally giving a false impression

In The Law Lexicon by P. Ramanatha Aiyar (2nd Edn., Reprint 2000), "deceit" is described as follows:

"Deceit.?Fraud; false representation made with intent to deceive; 'Deceit, "deception of fraud" is a subtle, wily shift or device, having no other name. In this may be included all manner of craft, subtilty, guile, fraud, wiliness, slight, cunning, covin, collusion, practice and offence used to deceive another may be by

any means, which hath none other proper or particular name but offence'."

18. *"Deceit", in the law, has a broad significance. Any device or false representation by which one man misleads another to his injury and fraudulent misrepresentations by which one man deceives another to the injury of the latter, are deceit. Deceit is a false statement of fact made by a person knowingly or recklessly with intent that it shall be acted upon by another who does act upon it and thereby suffers an injury. It is always a personal act and is intermediate when compared with fraud. Deceit is sort of a trick or contrivance to defraud another. It is an attempt to deceive and includes any declaration that misleads another or causes him to believe what is false."*

31. Clearly, and without any doubt, in our context, 'false' and/or 'misleading' information would imply a deliberate, wrong statement made by the petitioner to claim benefit as a DFF candidate knowingly yet wrongly. By merely claiming that benefit without filling any certificate or basis, left the claim made incomplete or unsubstantiated. Such claim may, at most, be described as wrong, yet not false or misleading.

32. By not supplying or substantiating the basis for her claim to DFF reservation (in the first/original application), the petitioner did not commit any positive and/or complete act as may ever allow any prudent person to reach a conclusion that that incomplete information was itself patently 'false/misleading', upon evaluating the inherent or intrinsic worth of that unsubstantiated claim. Per se, an incomplete or unsubstantiated claim may not involve element of 'false/misleading information'. It would not render the

declaration made - 'false' and/or 'misleading', on the face of it.

33. Then, the UPPSC did not conduct any enquiry or verification exercise, to adjudge the otherwise incomplete and/or inaccurate claim made by the petitioner, false or misleading. Unless any false/misleading information was found to have been furnished by the petitioner (to claim reservation under the DFF category), and unless that satisfaction were reached by the UPPSC, on its own enquiry, it is not possible and/or permissible to reach any further conclusion that that declaration made by the petitioner was either 'false' and/or 'misleading', merely because the petitioner chose not to substantiate it at the stage of submitting her second application (through offline mode).

34. Thus, the UPPSC has neither discovered any inherent falsehood nor dishonest nor deceitful nor misleading conduct on part of the petitioner as may have exposed her to the harsh consequence of cancellation of her candidate under Clause 11(18) of 'Necessary Information to Applicants for Filling Their Applications Through On-Line'.

35. Then, Clause 11(23) of 'Necessary Information to Applicants for Filling Their Applications Through On-Line' also specifies certain conditions on which a candidature may be rejected/cancelled. Those are:

- "(i) submission of application on form other than prescribed form;*
- (ii) date of birth being not mentioned in the application;*
- (iii) mention of wrong date of birth;*
- (iv) candidate being overage;*

- (v) *candidate being underage;*
- (vi) *not fulfilling the minimum educational qualifications;*
- (viii) *applications received after last date and;*
- (ix) *no signature on the advertisement form."*

36. Thus, besides Clause 11(18) of 'Necessary Information to Applicants for Filling Their Applications Through On-Line', the UPPSC had thus chosen to specify other contingencies and circumstances in which the candidature of the candidate may be cancelled/rejected, out-rightly. A circumstance of incompleteness in the form with respect to reservation sought not being one of those conditions, it was not open to the UPPSC to contend, such condition was a part of the original Advertisement. The terms of the Advertisement had to be seen upon the plain language used therein. The terms of the Advertisement being elaborate - covering various contingencies providing for different consequences, it cannot be accepted that the candidature of the petitioner may have been cancelled for the event not specified or stipulated as one that may result in its cancellation. The language of the Advertisement that is the law between the parties, clearly works the other way, i.e., to infer, different consequences for different eventualities, with the harsh consequence of cancellation of the candidature being confined to pre-specified contingencies only.

37. In that light, it may also be noted, under Clause 11(30) of 'Necessary Information to Applicants for Filling Their Applications Through On-Line' and General Instruction no.3, UPPSC itself contemplates, a candidate who may have claimed reservation may be adjusted

against Unreserved (General) category at the final selection only if such candidate may not have availed reservation at the stage of Preliminary/Mains (Written) Examination/Screening Examination. Thus, though the petitioner had lost her self-right to seek a change of category, yet, the UPPSC retained to itself a right, to consider her candidature, under the appropriate category. In the present case, the petitioner has not availed the DFF category at the stage of Preliminary Examination. As noted in the interim order itself, she qualified for the Mains (Written) Examination as an EWS category candidate but not as a DFF candidate. Therefore, the UPPSC may allow her to compete further, as an EWS candidate.

38. As to the decisions relied upon by respective learned counsel for the parties, in the full Bench decision of this Court - **Gaurav Sharma vs State of U.P. & 2 Ors. (supra)**, a question had been framed:

"A. Whether the candidature of an OBC candidate is liable to be rejected on the ground of the caste certificate having been submitted after the last date for submission of applications?"

39. While answering that question, full Bench observed as under:

"Judging whether a particular candidate is entitled to the benefits of reservation or has rightly claimed as falling in the said category is an essential exercise liable to be undertaken. For the purposes of undertaking this exercise the selecting body must be in a position to adjudge for itself whether a particular candidate is entitled to the benefits and exemptions as claimed. If this were not read as being an inherent power in the selecting

body, the process of selection itself may be completely derailed. While it is a true that a caste certificate is only a recognition of an existing status, as noted above, an OBC candidate necessarily must establish the twin conditions of belonging to a OBC group recognised by the State and also that he does not fall within the creamy layer. This requirement is liable to be judged with reference to a date prescribed in an advertisement. The certificate of OBC (non creamy layer) is issued with reference to the financial condition of the holder or his parents assessed over a period of three years. The financial condition of a holder is liable to change or fluctuate over a period of time. Viewed in this light it cannot be said that the requirement of submission of such a certificate by a particular date is not attracted to the case of an OBC candidate."

40. We do not find the dictum of the full Bench to be offering the answer to the question involved in the present case.

41. Insofar as the decisions of the learned single-Judge relied upon by learned senior counsel for UPSSC are concerned, clearly, they do not appear to take note of the second submission advanced by learned counsel for petitioner, in the present case. That we have considered above. Though terms and conditions of the Advertisement and even facts may have been similar, it would be dangerous to adopt that reasoning in the present case. Submissions advanced in the present petition have remained untested before the learned single Judge. Thus, those decisions of the learned single Judge may not persuade us.

42. Without making any observation as to the correctness or otherwise of those decisions of the learned single Judge, for reason of different arguments advanced

and, upon consideration of those advanced in the present case, we find, the petitioner did not lose her eligibility to participate further, pursuant to the Advertisement, consequent to her not filing prescribed certificate to claim DFF reservation.

43. The stipulation allowing for rejection of the candidature in the event of an incomplete claim of reservation was first introduced vide Notification dated 24.3.2023. It reads as below:

"अभ्यर्थी द्वारा प्रश्नगत चयन हेतु प्रारंभिक परीक्षा के ऑनलाइन आवेदन में श्रेणी/उपश्रेणी/अहर्ता आदि के सम्बन्ध में किये गए दावे के समर्थन में अपने समस्त अभिलेख मुख्या परीक्षा के आवेदन के साथ अवश्य संलग्न करें अन्यथा उनका अभ्यर्थन स्वतः निरस्त मन जयगा "

44. Undisputedly, that condition was changed not only mid-way but after declaration of the result of the Preliminary Examination.

45. We are unable to accept the objection being raised by the learned senior counsel for the UPPSC on the strength of Notification dated 24.3.2023. The effect of Notification is not to improve the standard of the selection. It is not to pick the best over the lesser in order of merit. It seeks to completely exclude the petitioner from the zone of consideration, midway through the selection process.

46. In **N.T. Devin Katti v. Karnataka Public Service Commission, (1990) 3 SCC 157**, the Supreme Court had laid down a rule against change to the rules of selection, while that selection was underway. It held:

"11. There is yet another aspect of the question. Where advertisement is issued

inviting applications for direct recruitment to a category of posts, and the advertisement expressly states that selection shall be made in accordance with the existing rules or government orders, and if it further indicates the extent of reservations in favour of various categories, the selection of candidates in such a case must be made in accordance with the then existing rules and government orders. Candidates who apply, and undergo written or viva voce test acquire vested right for being considered for selection in accordance with the terms and conditions contained in the advertisement, unless the advertisement itself indicates a contrary intention. Generally, a candidate has right to be considered in accordance with the terms and conditions set out in the advertisement as his right crystallises on the date of publication of advertisement, however he has no absolute right in the matter. If the recruitment Rules are amended retrospectively during the pendency of selection, in that event selection must be held in accordance with the amended Rules. Whether the Rules have retrospective effect or not, primarily depends upon the language of the Rules and its construction to ascertain the legislative intent. The legislative intent is ascertained either by express provision or by necessary implication; if the amended Rules are not retrospective in nature the selection must be regulated in accordance with the rules and orders which were in force on the date of advertisement. Determination of this question largely depends on the facts of each case having regard to the terms and conditions set out in the advertisement and the relevant rules and orders. Lest there be any confusion, we would like to make it clear that a candidate on making application for a post pursuant to an advertisement does not acquire any

vested right of selection, but if he is eligible and is otherwise qualified in accordance with the relevant rules and the terms contained in the advertisement, he does acquire a vested right of being considered for selection in accordance with the rules as they existed on the date of advertisement. He cannot be deprived of that limited right on the amendment of rules during the pendency of selection unless the amended rules are retrospective in nature".
(emphasis supplied)

47. Then, in **Maharashtra State Regional Transport Corpn. & Ors. vs Rajendra Bhimrao Mandve & Ors., (2001) 10 SCC 51**, the Supreme Court further observed:

"the rules of the game, meaning thereby, that the criteria for selection cannot be altered by the authorities concerned in the middle or after the process of selection has commenced."

48. That ratio was applied by a three-Judge bench decision of the Supreme Court in **K. Manjusree vs State of Andhra Pradesh & Anr. (2008) 3 SCC 512**. Paragraphs nos. 32 and 33 of that report read as below:

"32. In Maharashtra SRTC v. Rajendra Bhimrao Mandve [(2001) 10 SCC 51 : 2002 SCC (L&S) 720] this Court observed that "the rules of the game, meaning thereby, that the criteria for selection cannot be altered by the authorities concerned in the middle or after the process of selection has commenced". In this case the position is much more serious. Here, not only the rules of the game were changed, but they were changed after the game had been played and the

results of the game were being awaited. That is unacceptable and impermissible.

33. *The Resolution dated 30-11-2004 merely adopted the procedure prescribed earlier. The previous procedure was not to have any minimum marks for interview. Therefore, extending the minimum marks prescribed for written examination, to interviews, in the selection process is impermissible. We may clarify that prescription of minimum marks for any interview is not illegal. We have no doubt that the authority making rules regulating the selection, can prescribe by rules, the minimum marks both for written examination and interviews, or prescribe minimum marks for written examination but not for interview, or may not prescribe any minimum marks for either written examination or interview. Where the rules do not prescribe any procedure, the Selection Committee may also prescribe the minimum marks, as stated above. But if the Selection Committee wants to prescribe minimum marks for interview, it should do so before the commencement of selection process. If the Selection Committee prescribed minimum marks only for the written examination, before the commencement of selection process, it cannot either during the selection process or after the selection process, add an additional requirement that the candidates should also secure minimum marks in the interview. What we have found to be illegal, is changing the criteria after completion of the selection process, when the entire selection proceeded on the basis that there will be no minimum marks for the interview."*

49. Later, in **T.N. Computer SC B.Ed. Govt. Welfare Society (1) Vs Higher Secondary School Computer Teachers Assn., (2009) 14 SCC 517,**

another three-judge bench of the Supreme Court again had the occasion to consider that issue. It was then observed:

"33. We, however, cannot hold that the subsequent decision of the Government thereby changing qualifying norms by reducing the minimum qualifying marks from 50% to 35% after the holding of the examination and at the time when the result of the examination was to be announced and thereby changing the said criteria at the verge of and towards the end of the game as justified, for we find the same as arbitrary and unjustified. This Court in Hemani Malhotra v. High Court of Delhi [(2008) 7 SCC 11 : (2008) 2 SCC (L&S) 203] has held that in recruitment process changing rules of the game during selection process or when it is over are not permissible".

50. Later, a doubt arose before another three-judge bench of the Supreme Court in **Tej Prakash Pathak & Ors. vs Rajasthan High Court & Ors., (2013) 4 SCC 540,** as to whether the above principle prohibiting any change to the "rules of game" could be applied to a change to the procedure to be followed at an ongoing selection. In that case, the requirement to achieve 75% marks in the competitive examination was introduced after the advertisement and that procedural requirement was not known to the candidates, under the original advertisement. That reference appears to be still pending before a larger bench of the Supreme Court.

51. Pending that reference, recently, in **Ramjit Singh Kardam v. Sanjeev Kumar, (2020) 20 SCC 209,** a two-judge bench of the Supreme Court again had the occasion to consider the enforceability of

an amendment to the selection process, made midway through the selection. After considering the scope and pendency of the reference in **Tej Prakash Pathak (supra)**, the Supreme Court observed:

"53. The learned counsel for the appellant has submitted that judgments of this Court laying down the criteria for selection cannot be changed during the course of selection has been referred to a larger Bench by a judgment of this Court in Tej Prakash Pathak v. High Court of Rajasthan [Tej Prakash Pathak v. High Court of Rajasthan, (2013) 4 SCC 540 : (2013) 2 SCC (L&S) 353] , hence the judgment of this Court laying down the criteria cannot be changed during the course of the selection is yet to be tested. For the purposes of the present case we proceed on the assumption that even if the criteria can be changed by selecting body from time to time, the said change cannot be affected arbitrarily. The present is a case where change in criteria has been affected and altered arbitrarily with the object of downgrading and not upgrading the standards of selection. The High Court did not commit any error in not upholding the change of criteria effected after start of selection process with which finding we fully concur".

52. It is that line of reasoning and distinction that has again been adopted and applied in the most recent decision of the Supreme Court, cited by learned counsel for the petitioner, in **Sureshkumar Lalitkumar Patel (supra)**.

53. Here as well, the change of procedure to select has been changed not only abruptly but arbitrarily. Having first given out to the candidates (through the Advertisement), that their candidature would not be cancelled occasioned by incomplete claim as to reservation, the UPPSC could not have turned

around to reject such candidature of the petitioner, after she had acted in accordance with the terms of the Advertisement. Plainly, the change made serves no purpose. The petitioner being qualified as an EWS candidate, she continues to be eligible to participate further, in the selection process. The change made to the selection process has not been shown to have any intrinsic purpose or nexus to the object of selecting the best amongst the eligible.

54. Moreover, since the present is not a case of change of procedural requirements but one of change to the substantive requirements of selection, introduced mid-way through the selection process, we find no impediment existing by virtue of the pending reference (to the larger bench), at the Supreme Court.

55. Accordingly, the present petition is **allowed**. The impugned communications dated 29.04.2023 and 10.05.2023 are found to have been issued contrary to the law. They are quashed. The petitioner is entitled to participate in the ongoing selection process as an EWS candidate. Let result of the petitioner for the Mains (Written) Examination be declared, along with the other candidates. No order as to costs.

(2023) 8 ILRA 329
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.08.2023

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ A No. 17237 of 2016

Jagdamba Prasad Dubey **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:

Jagdish Prasad Pandey, Lalit Shukla

Counsel for the Respondents:

C.S.C.

Civil Law - Constitution of India, 1950 - Article 226 - U.P. Government Servant (Discipline & Appeal) Rules, 1999 - Rule 9(4) - U.P. Jail Manual - Paras 1033, 1105, 1111, 1114 & 1118(10) - U.P. Government Servants Conduct Rules, 1956 - Rule 3(1) & (2) - Unauthorized absence - Disciplinary proceedings - Principles of natural justice - Proportionality of punishment - Post facto sanction of medical leave - Petitioner, a Deputy Jailor, challenged Tribunal's order dismissing his claim against punishment of reversion in pay scale for unauthorized absence - Absence due to medical reasons (diarrhea), medical leave later sanctioned - Enquiry flawed due to lack of hearing, non-supply of documents, and failure to establish willful absence - Tribunal failed to consider sanctioned leave and non-willful nature of absence - Punishment disproportionate - Orders of Tribunal, disciplinary, and appellate authorities set aside - Petitioner entitled to consequential reliefs - Writ petition allowed - No costs - Not a precedent.

Writ petition allowed.**Cases referred:**

St. of Pun. Vs Dr. P.L. Singla, (2008) 8 SCC 469 - Para 24 B.C. Chaturvedi Vs U.O.I., (1995) 6 SCC 749 - Para 26

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

(1) Heard Shri Lalit Shukla, learned Counsel representing the petitioner and learned Standing Counsel representing the respondents.

(2) This writ petition under Article 226 of the Constitution of India has been filed by the petitioner, **Jagdamba Prasad Dubey**, challenging the judgment and order

dated 09.10.2015 passed by the U.P. State Public Services Tribunal, (hereinafter referred to as the 'Tribunal') Lucknow, whereby Claim Petition No. 754 of 2014 filed by the petitioner has been dismissed.

The petitioner is also challenging the validity of order of punishment dated 27.06.2008, by which he was reverted to two stage below in the present pay-scale as well as the appellate order dated 28.06.2013, by which his appeal preferred against the aforesaid punishment order was dismissed.

(3) Briefly stating, the facts of the case are that the petitioner was appointed as a Deputy Jailor in the pay-scale of Rs.9300-Rs.34500/- (Grade Pay-Rs.5400/-) and was posted in the same capacity at Central Jail, Naini, Allahabad on 14.07.1997. He remained posted at different places and worked with full devotion and satisfaction of the higher authorities during his employment.

(4) Apparently, while the petitioner was posted as Deputy Jailor in District Jail, Lucknow in the year 2007, he submitted an application dated 04.04.2007 seeking to grant two days' Casual Leave on account of the fact that he was suffering from diarrhea, however, without getting the said Casual Leave sanctioned, he left the station and also he was unauthorizedly absent from duty thereafter and as such, vide order dated 26.04.2007, he was placed under suspension in contemplation of departmental enquiry.

(5) During pendency of the departmental enquiry, the petitioner joined his services on 01.05.2007 at his place of posting and has sought retrospective medical leave w.e.f. 06.04.2007 to

30.04.2007 by moving an application in this regard. Thereafter, vide order dated 20.06.2007, the services of the petitioner were reinstated and he was posted in Central Jail, Agra, however, it was directed that enquiry instituted against him would be continued as usual.

(6) Pursuant to the order dated 20.06.2007, the Enquiry Officer had served a charge-sheet dated 20.06.2007 to the petitioner, containing three charges viz. (1) the petitioner had proceeded on casual leave without getting it sanctioned from the competent authority; (2) though the District Magistrate, Lucknow, keeping in mind the Assembly Election, 2007, issued direction to officer/employee not to proceed on leave or leave the headquarter, but even then the petitioner left the station without getting his leave sanctioned; and (3) the petitioner had not given any information immediately to the Jailor about his ailment along with medical certificate.

(7) It seems that on receipt of the aforesaid charge-sheet, the petitioner had made an application/representation dated 23.07.2007, seeking supply of certain documents to him, but vide letter dated 12.08.2007, the Enquiry Officer refused to provide the demanded documents to the petitioner, however, opportunity was granted to the petitioner to visit the office of the Superintendent, District Jail, Lucknow in any working day and go through the demanded documents and then submit his reply within ten days. However, instead of availing the said opportunity, the petitioner moved another application/letter dated 22.08.2007, seeking again to supply him the documents as demanded vide letter dated 12.08.2007 and this time again his request was turned down. Thereafter, the petitioner had requested vide

letter/representation dated 20.09.2007 to change the Enquiry Officer, which was also rejected vide order dated 08.10.2007. Ultimately, the petitioner had filed his reply to the charge-sheet on 01.11.2007, denying all the charges so levelled against him.

(8) According to the petitioner, after giving reply to the charge-sheet on 01.11.2007, the Enquiry Officer had neither conducted enquiry by fixing date, time and place nor charges were proved in his presence nor any Presenting Officer was appointed for proving the charges on behalf of the department nor the authenticity of the document supplied along with the charge-sheet as evidence was ever tested during the course of enquiry by associating him or any witnesses for proving the charges against him and the Enquiry Officer had straightaway submitted enquiry report dated 29.11.2007, holding that the charges stood proved against him.

(9) The Disciplinary Authority, on receipt of the enquiry report dated 29.11.2007, issued a show cause notice dated 14.02.2008 along with the enquiry report to the petitioner under the provisions of Rule 9 (4) of the U.P. Government Servant (Discipline & Appeal) Rule, 1999, calling upon his explanation within fifteen days. In response thereof, the petitioner submitted his reply on 03.03.2008. Thereafter, the Disciplinary Authority had passed the order of punishment dated 27.06.2008, by which the petitioner was reverted to two stages below in the present pay-scale.

(10) Aggrieved by the aforesaid order of punishment dated 27.06.2008, the petitioner preferred an appeal on 03.10.2008, which was dismissed by the Appellate Authority vide order dated

28.06.2013. Significantly, in the interregnum vide order dated 03.09.2008, medical leave w.e.f. 06.04.2007 to 30.04.2007 sought by the petitioner was sanctioned by the competent authority.

(11) Consequently, the petitioner dissatisfied with the aforesaid order of punishment dated 27.06.2008 as well as appellate order dated 28.06.2013, preferred Claim Petition No. 754 of 2014 before the Tribunal. The learned Tribunal, after hearing the parties, dismissed the claim petition vide order dated 09.10.2015. It is this order dated 09.10.2015, which has been challenged in the instant writ petition.

(12) Assailing the impugned judgment/order passed by the learned Tribunal, the learned Counsel representing the petitioner has contended that on 04.04.2007, while the petitioner was on duty as Deputy Jailor in District Jail, Lucknow, he became seriously ill on account of diarrhea and as such, he immediately moved an application seeking to grant him two days' Casual Leave. As his health was deteriorating and he felt acute sickness, he took treatment from the Medical Officer posted in District Jail, Lucknow, but despite that his health was not improving, hence in that peculiar situation and assuming that his Casual Leave might have been sanctioned by the department, he firstly went to Primary Health Centre, Sarojini Nagar, Lucknow for his better treatment, but when his health was not improving there, then, he went to his home town i.e. district Pratapgarh, from where he took his treatment at Primary Health Centre, Ramganj, Sultanpur. Subsequently, after becoming fit, he immediately reported for duty on 01.05.2007 along with application for grant of medical leave i.e. w.e.f. 06.04.2007 to

30.07.2007, however in the intermittent period, he was placed under suspension vide order dated 26.04.2007 in contemplation of inquiry.

(13) It has been contended by the learned Counsel for the petitioner that the absence from duty w.e.f. 06.04.2007 to 30.04.2007 was not willful or deliberate but his absence from duty for the aforesaid period was on account of medical issue faced by the petitioner and that too the department was fully aware about his serious ailment. The said medical leave w.e.f. 06.04.2007 to 30.04.2007 was later sanctioned by the competent authority vide order dated 03.09.2008. Thus, according to him, if medical leave of 24 days was sanctioned by the competent authority itself, the very imposition of the impugned punishment was unwarranted and illegal. The learned Counsel has also submitted that in any case, the said punishment has been awarded without giving a proper opportunity of hearing to the petitioner. The disciplinary authority did not consider the reply submitted by the petitioner against the show cause notice wherein it had specifically been submitted that opportunity of hearing was not afforded to the petitioner during the enquiry proceedings as no date, time and place was fixed nor any documents demanded by him were supplied to him, hence the enquiry itself stood vitiated, and it was merely in a mechanical manner, the disciplinary authority had passed the impugned punishment order, which remained disproportionate to the proved delinquency.

(14) The learned Counsel has further submitted that Appellate Authority, while confirming the order of punishment, also did not consider the plea of the petitioner that the impugned punishment order has

been awarded to the petitioner in utter violation of principle of natural justice. According to him, though the learned Tribunal, while passing the impugned judgment/order, appreciated the facts that the medical leave w.e.f. 06.04.2007 to 30.04.2007 was sanctioned by the competent authority vide order dated 03.09.2008, but the Tribunal has failed to give any finding on this aspect of the matter. The learned Tribunal has also erred in not considering the Circular dated 19.04.1996, which says that the staff of the Jail were exempted from election duty, a fact which has not been denied by the respondent. Thus, it has been argued that the Tribunal has erred in dismissing the claim petition and as such the writ petition deserved to be allowed.

(15) *Per contra*, learned Standing Counsel representing the State of U.P. has opposed the writ petition contending that the petitioner had been the member of a disciplined force. Indiscipline therein, amounts to a very serious misconduct. Therefore, it is intolerable. Once the charge of absence stood proved, the matter does not deserve to be considered by this Court. The writ petition lacks merit and is liable to be dismissed.

(16) Having regard to the rival submissions advanced by learned counsel for the parties and gone through the record available before this Court in the instant writ petition, it is required to be noted that while the petitioner was posted as Deputy Jailor in District Jail, Lucknow, he was placed under suspension in contemplation of disciplinary proceedings vide order dated 26.04.2007 on the charge of unauthorized absence from duty. However, during pendency of the enquiry, the petitioner joined the services on 01.05.2007

and thereafter, he was reinstated in service and posted in District Jail, Agra vide order dated 20.06.2007 but enquiry was ordered to be continued as usual. Pursuant to the aforesaid order dated 20.06.2007, the petitioner submitted his joining in District Jail, Agra and an enquiry was conducted against the petitioner by serving a charge-sheet dated 20.06.2007 to the petitioner containing three charges, which are reproduced hereinbelow :-

“आरोप संख्या - 1

उ०प्र० जेल मैनुअल के प्रस्तर-1111 में प्राविधान है कि जेल अधिकारी अपनी अनुपस्थिति की सूचना कारापाल को तुरन्त देंगे। जिला कारागार, लखनऊ की तैनाती के दौरान आप द्वारा दिनांक 04.04.2007 को एक प्रार्थना-पत्र कारापाल को दिया गया, जिसमें डायरिया होने के कारण दो दिन का आकस्मिक अवकाश दिए जाने का अनुरोध किया गया था। जेल मैनुअल के प्रस्तर-1033 के अनुसार उस पर कारागार चिकित्सक द्वारा चिकित्सा परीक्षण रिपोर्ट एवं विश्राम की संस्तुति अंकित नहीं थी। आप द्वारा किसी अन्य सक्षम प्राधिकारी का चिकित्सा प्रमाण-पत्र भी उपलब्ध नहीं कराया गया जबकि जेल लाइन में रहने की दशा में कारागार चिकित्सक से परीक्षण कराना एवं उनकी रिपोर्ट प्राप्त करना आवश्यक था और जेल मैनुअल प्रस्तर - 1114 के अनुसार अवकाश स्वीकार कराकर तथा स्टेशन छोड़ने की अनुमति प्राप्त कर ही कारागार परिसर छोड़ना चाहिए था। आप जेल लाइन से बाहर चले गए, जो गम्भीर अनियमितता है। अतः आप बिना कारागार चिकित्सक से परीक्षण कराए और उनकी संस्तुति प्राप्त किए बिना तथा अवकाश स्वीकृत किए जाने से पूर्व ही जेल लाइन छोड़कर अनाधिकृत रूप से प्रस्थान कर गए, जो गम्भीर अनुशासनहीनता है। इस प्रकार आप उ०प्र० जेल मैनुअल के प्रस्तर-1111, 1114, 1033 व उ०प्र० सरकारी कर्मचारियों की आचरण नियमावली, 1956 के नियम-3(1) व (2) के उल्लंघन, कर्तव्यविमुखता, बीमारी का फर्जी बहाना कर जेल लाइन छोड़कर अनुशासनहीनता का परिचय देने के दोषी ठहराते हैं।

साक्ष्य जो उपरोक्त आरोप के समर्थन में प्रस्तुत किए जायेंगे:-

1- आपके स्वयं के प्रार्थना-पत्र दिनांक 04.04.07 की प्रति

2- जेलर रिपोर्ट बुक दिनांक 06.04.07 के क्रमांक-130 की प्रति

3- अधीक्षक, जिला कारागार, लखनऊ के पत्र संख्या-1534/अधि०अनु० (व्यय०पत्रा०)/07 दिनांक 26.04.07 की प्रति

4- उ०प्र० सरकारी कर्मचारियों की आचरण नियमावली, 1956 के नियम-3(1) व (2) की प्रति

आरोप संख्या-2

जिला मजिस्ट्रेट, लखनऊ द्वारा विधान सभा निर्वाचन, 2007 के दृष्टिगत किसी भी अधिकारी/कर्मचारी को अवकाश/मुख्यालय न छोड़ने के आदेश दिए गए थे। इन सबके बावजूद आचार संहिता लागू होने पर भी आप द्वारा बिना अवकाश स्वीकृत कराए स्टेशन छोड़कर बाहर चले जाना बंध आदेशों की अवहेलना व अनुशासनहीनता है। इस प्रकार आप उ०प्र० जेल मैनुअल के प्रस्तर-1105 व 1118 (10) व उ०प्र० सरकारी कर्मचारियों के आचरण नियमावली 1956 के नियम-3(1) व 2 के उल्लंघन कर्तव्यविमुखता एवं उच्चाधिकारी के वैध आदेशों की अवहेलना करने के दोषी ठहरते हैं।

साक्ष्य जो उपरोक्त आरोप के समर्थन में प्रस्तुत किए जायेंगे:-

(1) जिलाधिकारी, लखनऊ के पत्र 681/निर्वाचन, दिनांक 08.03.07 की प्रति

आरोप संख्या-3

आपने अपनी बीमारी की सूचना तत्काल कारागार पर चिकित्सा प्रमाण-पत्र सहित नहीं उपलब्ध कराई। आपका यह कहना है कि बीमारी की दशा में कोई देखभाल करने वाला नहीं है जबकि दिनांक 10.4.2007 को आपकी पत्नी कारागार लाइन स्थित आवास पर उपलब्ध थी। इससे यह स्पष्ट होता है कि आप गम्भीर रूप से बीमार नहीं थे वरन् अनाधिकृत रूप से कारागार लाइन छोड़कर अनुपस्थित हो गए तथा लखनऊ शहर में, जहां पर्याप्त चिकित्सा सुविधा करता है कि आप वास्तव में बीमार नहं थे वरन् अनाधिकृत रूप से जेल लाइन छोड़कर बाहर चले गए। इस प्रकार आप उ०प्र० सरकारी

कर्मचारियों के आचरण नियमावली 1956 के नियम-3(1) व (2) के उल्लंघन व असत्य बयान देने के दोषी ठहरते हैं।

साक्ष्य जो उपरोक्त आरोप के समर्थन में प्रस्तुत किए जायेंगे:-

1. अधीक्षक, जिला कारागार, लखनऊ के पत्र संख्या - 1299/अधि०अनु० (अवकाश)/07 दिनांक 10.4.07 की प्रति"

(17) The record available before this Court would reveal that the petitioner, after submitting an application dated 04.04.2007 for grant of two days' Casual Leave on the ground of sickness, proceeded on leave without getting it sanctioned from the competent authority. Thereafter, he was unauthorizedly absent from duty w.e.f. 06.04.2007 to 30.04.2007. However, it transpires that medical leave of the petitioner w.e.f. 06.04.2007 to 30.04.2007 came to be sanctioned by the competent authority vide order dated 03.09.2008 only.

(18) It is settled principle of law that mere absence from duty does not *per se* amount to a serious misconduct unless it is held as deliberate and willful absenteeism, more particularly for a long period or frequent absenteeism. Therefore, the disciplinary authority requires to go into the aspects as to why and in what circumstances employee was absent, whether explanation offered by the delinquent employee was satisfactory or not or as to whether the delinquent employee is in the habit of frequently absenting from duty or as to whether the absence is for a shorter period or a longer period. Depending on the finding recorded in the departmental proceedings on the nature and period of absence, it is for the disciplinary authority to impose appropriate punishment ranging from censure to that of dismissal from service. There is no strait-

jacket formulae for inflicting of punishment in a departmental proceedings and the imposition of punishment would naturally depend on the facts and circumstances of that particular case. Therefore, the basic requirement for the disciplinary authority to take a final decision to impose appropriate punishment is finding of fact on the allegation of unauthorized absence.

(19) In the instant case, in response to the charge-sheet issued by the enquiry officer, the petitioner initially requested to supply documents and also requested to provide some more time to file a detailed explanation and when his request was turned down twice, then the petitioner submitted his explanation briefly explaining the reasons for absence. He has also pointed out that his absence after 04.04.2007 was on health grounds, that he applied for leave and his application for grant of two days' casual leave were not rejected. Therefore, this particular piece of explanation offered by him was crucial to assess whether the absence of employee after 04.04.2007 was deliberate and willful.

(20) It is also apparent from the record that absence of petitioner whether deliberate and willful was not established. Petitioner's absence could have been termed as deliberate and willful if the case of the department was that any of the medical prescription produced by the petitioner while joining the duty was forged, however, it is not the case of the department that they had examined these medical records during the course of enquiry and during such examination had found that the medical prescription produced by the petitioner was forged. It is also not a case of the department that the ailment complained of by the petitioner was false or that he was never suffering from any serious ailment. It is interesting to note that in the order of

punishment, there is discussion on applications made by petitioner for casual leave.

(21) It is borne out from the order of appellate authority that though the petitioner raised several grounds in his appeal, the appellate authority failed to consider any of the grounds and simply affirmed the decision of the disciplinary authority. Apparently, the appellate authority acted teeth less and without any application of mind.

(22) It is apt to mention that no employee can remain absent from duty without permission. He can be absent from duty only by submitting leave application and only after leave is sanctioned. Without prior intimation and sanction of leave, if employee does not attend to duties, such absence may be treated as unauthorised, which may amount to misconduct and warrant disciplinary action. However, gravity of misconduct depends on period of absence and conduct of employee. Different yardsticks may apply if absence was in continuation to sanctioned leave. Thus, mere absence from duty does not automatically amount to grave misconduct. Only if absence is wilful, deliberate and without any justification, it would be a grave misconduct. Thus, it is necessary for the disciplinary authority to find out first whether the absence was deliberate and wilful. For this, enquiry is necessary. If the absence was proved to be deliberate and wilful, the next question is what punishment can be imposed. On a proved allegation of unauthorized absence punishment may vary from case to case and depending on various aspects.

(23) In the instant case, there is no discussion in the order of punishment as to the conduct of petitioner prior to initiation of disciplinary proceedings resulting in

imposing the impugned punishment, nor there is any discussion on endeavour made to secure the presence of employee nor it is the case of the department that despite repeated instructions to attend to duty, the employee refused to resume his work. It is not alleged that petitioner was in the habit of absenting from duty. It is also not placed on record that he was indulging in misconduct earlier and was imposed punishments. Perforce, application of mind to the issue and taking conscious decision is paramount. The same is palpably missing. The whole exercise appears to be vindictive.

(24) Having noticed the aforesaid, what we find from the impugned judgment/order passed by the Tribunal that the Tribunal has not recorded any finding with regard to sanctioned medical leave of the petitioner w.e.f. 06.04.2007 to 30.04.2007 by the competent authority nor any discussion has been made whether the absence of the petitioner from duty was willful or deliberate. This court would find profitable to quote the observation of the Apex court in the given facts and circumstances of the present case as was made in the case of **State of Punjab Vs Dr. P.L. Singla**: (2008) 8 SCC 469, wherein the Apex Court observed:

“8. Unauthorized absence (or overstaying leave), is an act of indiscipline. Whenever there is an unauthorised absence by an employee, two courses are open to the employer. The first is to condone the unauthorized absence by accepting the explanation and sanctioning leave for the period of the unauthorized absence in which event the misconduct stood condoned. The second is to treat the unauthorized absence as a misconduct, hold an enquiry and impose a punishment for the misconduct.

9. An employee who remains unauthorisedly absent for some period (or who overstays the period of leave), on reporting back to duty, may apply for condonation of the absence by offering an explanation for such unauthorized absence and seek grant of leave for that period. If the employer is satisfied that there was sufficient cause or justification for the unauthorized absence (or the overstay after expiry of leave), the employer may condone the act of indiscipline and sanction leave post facto. If leave is so sanctioned and the unauthorized absence is condoned, it will not be open to the employer to thereafter initiate disciplinary proceedings in regard to the said misconduct unless it had, while sanctioning leave, reserved the right to take disciplinary action in regard to the act of indiscipline. We may note here that a request for condoning the absence may be favourably considered where the unauthorized absence is of a few days or a few months and the reason for absence is stated to be the sudden, serious illness or unexpected bereavement in the family. But long unauthorized absences are not usually condoned. In fact in Security services where discipline is of utmost importance, even a few of days overstay is viewed very seriously. Be that as it may”

(25) Apparently, in the present case, the department had condoned the act of absence by granting the sanction of leave post facto. No doubt, the department, even thereafter can take action against the petitioner, subject to reservation of its rights, however, the point to be noted is that the Apex Court has also observed in the said case, that in case the unauthorized absence is for a few days or few months and the reasons for absence is stated to be serious illness, the said request can be considered favorably by the department. This court finds that although the petitioner had given an adequate explanation for his

absence of 26 days, however the same was not considered favorably by the department in a very pedantic manner. As seen from the record, the explanation of the petitioner for his absence from duty for 26 days justifies his case. Hence, in the light of the explanation submitted by the petitioner, the punishment imposed on him appears to be disproportionate to the charges leveled against him.

(26) As to what kind of relief can be granted by this Court in the present matter, the Apex court at paragraph No. 18 of the judgment in **B.C. Chaturvedi V/s Union of India**: (1995) 6 SCC 749 has held that

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

(27) Having regard to the aforesaid judgment passed by the Apex Court and in the peculiar facts of the present case, this Court cannot be oblivious of the fact that the present litigation is more than 15 years old and as such any direction to the disciplinary/appellate

authority to reconsider the punishment imposed to the petitioner would be a travesty of justice. Thus, for the cogent reasons as explained herein above, we are of the view that the punishment imposed is wholly unfounded and is a serious error of law, therefore, the restitution of financial benefit of which the petitioner was deprived, deserved to be restored. The learned Tribunal having been approached to adjudicate the matter in its right perspective has failed to provide any solace to the petitioner. Therefore, the judgment of the Tribunal confirming the orders of the disciplinary and appellate authority calls for interference.

(28) We, accordingly, **allow** this writ petition by setting aside the judgment and order passed by the learned Tribunal dated 09.10.2015 in Claim Petition No. 754 of 2014 and consequent punishment order passed by the disciplinary authority dated 27.06.2008 as well as appellate authority dated 28.06.2013. The petitioner shall be entitled for all consequential reliefs as per the rules.

(29) It is clarified that the present order shall not be treated as precedent as the same has been rendered in the peculiar facts of the present case.

(30) There shall be no orders as to cost.

(2023) 8 ILRA 337
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.07.2023

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J

Writ A No. 21430 of 2022

Renu		...Petitioner
	Versus	
State of U.P. & Ors.		...Respondents

Counsel for the Petitioner:

Sri Shantanu Khare, Sri Siddharth Khare,
Sri Ashok Khare (Sr. Advocate)

Counsel for the Respondents:

C.S.C., Sri M.N. Singh, Sri Nisheeth Yadav,
Sri G.K. Singh (Sr. Advocate)

Held:

The petitioner challenged the revised result dated 23.08.2022 excluding her from selection for the post of Staff Nurse/Sister Grade-II and the order dated 16.11.2022 rejecting her representation, on the ground that the experience certificate submitted incorrectly mentioned 'Nurse Mentor' instead of 'Staff Nurse' due to an error by the issuing authority.

Possession of essential qualifications by the last date of application is mandatory, but submission of proof is procedural and ancillary. Relying on *Food Corporation of India Vs Rimjhim* (2019) 5 SCC 793, *Dolly Chhanda Vs Chairman JEE* (2005) 9 SCC 779, and *Charles K. Skaria Vs Dr. C. Mathew* (1980) 2 SCC 752, the Court held that technicalities should not override equity where justice is at stake.

The error in the experience certificate dated 09.11.2021, issued by the Chief Medical Officer, Rampur, was corrected by certificates dated 24.08.2022 and 30.08.2022, confirming the petitioner's contractual service as Staff Nurse from 01.04.2015 to 18.10.2019. The Commission's rejection of candidature for late submission of the corrected certificate was arbitrary.

Clause 10 of the advertisement, empowering the Commission to cancel candidature, must be exercised judicially. The absence of a negative stipulation, unlike *Gaurav Sharma Vs St. of U.P.* (2017 SCC Online All. 1286), distinguished the case.

The impugned order dated 16.11.2022 was quashed, and the Commission was directed to grant the benefit of the experience certificate and consider the petitioner's candidature for appointment on merit, subject to other conditions.

Case Law Discussed:

1. F.C.I. Vs Rimjhim (2019) 5 SCC 793
2. Dolly Chhanda Vs Chairman JEE (2005) 9 SCC 779
3. Charles K. Skaria Vs Dr. C. Mathew (1980) 2 SCC 752
4. Gaurav Sharma Vs St. of U.P. (2017 SCC Online All. 1286)
5. Rajendra Patel Vs St. of U.P. (2015) 8 ADJ 219 (FB)
6. Ram Kumar Gijroya Vs Delhi Subordinate Services Selection Board (2016) 4 SCC 754
7. Karan Singh Yadav Vs Government of NCT of Delhi (2022 SCC Online SC 1341)

Result: Writ petition allowed. No order as to costs.

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

1. Heard Sri Ashok Khare, learned Senior Counsel assisted by Sri Siddharth Khare, learned counsel for the petitioner and Sri G.K. Singh, learned Senior Counsel assisted by Sri Nisheeth Yadav, learned counsel for the respondents and learned Standing Counsel for the State.

2. The petitioner through the present writ petition has prayed for a writ of certiorari quashing the revised result dated 23.08.2022 for the post of Staff Nurse/Sister Grade-II in so far as it excludes the petitioner therefrom, and order dated 16.11.2022 passed by the Secretary, Public Service Commission, U.P. Pryagaraj (hereinafter referred to as 'Commission') rejecting the representation of the petitioner dated 27.08.2022. The petitioner has further

prayed for a writ of mandamus directing the respondents to grant appointment to the petitioner as Staff Nurse/Sister Grade-II and pay regular monthly salary on the said post.

3. The facts, in brief, are that under Advertisement No.A-4/E-1/2021 issued by the Commission notifying the selection for the post of Staff Nurse/Sister Grade-II (Male/Female), the petitioner applied for consideration in the aforesaid selection. The aforesaid selection consisted of total 100 marks, out of which 85 marks stood allocated for the written examination and 15 marks for the experience of working as a Staff Nurse on a contractual basis. Marks for the experience to be awarded in a manner that three marks were to be allocated for the first completed year of service on a contract basis followed by three additional marks for each succeeding year subject to a maximum of 15 marks. The petitioner in support of experience filed an experience certificate dated 09.11.2021 issued by the Chief Medical Officer, Rampur.

4. The petitioner appeared in the written examination held on 01.10.2021. The result thereof was published on 04.01.2022. In the result so published, the petitioner was shown to be selected in the aforesaid examination. The petitioner got the marks sheet downloaded from the official website of the Commission in which the petitioner was shown to have secured 28.50 marks in the written examination, 12 marks based on experience. Thus, the petitioner secured 40.50 marks in aggregate.

5. It appears that after the declaration of the result, Writ-A No.1815 of 2022 (Preeti Patel & Another Vs. State of U.P. and Others)

was filed challenging the result on the ground that there were certain discrepancies in scrutinizing the experience certificates of the candidates. In the said petition, counsel for the Commission made a statement that the Commission had decided to re-scrutinize the experience certificate of 814 selected candidates whose recommendations were not sent till date to the State Government as well as other candidates.

6. Thereafter, Commission proceeded to re-scrutinize the experience certificate and issued a notification dated 23.08.2022 declaring a revised result in which the name of the petitioner did not appear.

7. Aggrieved by her non-selection, the petitioner submitted a representation to the Commission on 05.09.2022 enclosing therewith a certificate dated 24.08.2022 issued by the Chief Medical Officer certifying that the petitioner had worked as 'Staff Nurse' from 01.04.2015 to 18.10.2019 on contract basis. The petitioner also enclosed another certificate dated 30.08.2022 issued by the Chief Medical Officer certifying that inadvertently 'Nurse Mentor' has been mentioned in the certificate dated 09.11.2021 whereas the petitioner has worked as 'Staff Nurse (contractual) in Community Health Centre, Tanda, Rampur from 01.04.2015 to 18.10.2019.

8. The Commission did not pay any heed to the representation of the petitioner which led the petitioner to file Writ-A No.15147 of 2022 which was disposed off by this Court by order dated 18.10.2022 directing the Commission to consider and decide the representation of the petitioner.

9. Pursuant to the direction of this Court dated 18.10.2022 in Writ-A No.15147 of 2022, Commission vide order

dated 16.11.2022 rejected the candidature of the petitioner on the ground that the petitioner submitted a working experience certificate of 'Staff Mentor' and not of 'Staff Nurse', therefore, she was not selected.

10. The respondent-Commission has placed an instruction on record. According to instructions, a complete procedure for selection was specified in the advertisement. The instruction further states that Rule 15(3) (appears to have been wrongly typed as 'Rule 10(3)' in the instruction) of Uttar Pradesh State Subordinate Nursing (Non-Gazetted) Service (Fourth Amendment), Rules, 2016 (hereinafter referred to as 'Rules, 2016') provides the procedure for selection. Rule 15(3) is reproduced below:-

“चयन एक सौ अंकों का होगा। अभ्यर्थियों की योग्यता सूची निम्नलिखित रीति में तैयार की जायेगी:-

(क) लिखित परीक्षा पच्चीस अंकों की होगी।

(ख) चिकित्सा एवं स्वास्थ्य सेवाएं विभाग उत्तर प्रदेश में संविदा के आधार पर कार्यरत किसी व्यक्ति को अधिकतम पन्द्रह अंकों के अध्याधीन निम्नलिखित रीति में अंक प्रदान किये जायेगे:-

(एक) संविदा के आधार पर सेवा में प्रथम पूर्ण वर्ष के लिए ... तीन अंक।

(दो) संविदा के आधार पर सेवा के अगले एवं प्रत्येक पूर्ण वर्ष के लिए तीन अंक प्रति वर्ष के लिए।

(ग) खण्ड (क) के अधीन प्रत्येक अभ्यर्थी द्वारा प्राप्त अंकों को, जहाँ लागू हो, खण्ड (ख) के अधीन प्राप्त अंकों के साथ जोड़ दिया जायेगा।

तदुसार उपरोक्त संगत सेवा नियमावली के अधीन संविदा के अनुभव के लिए अधिकतम 15 अंक निर्धारित हैं।”

11. The instruction further states that after the written examination, a notification dated 03.11.2021 was published inviting online applications in respect of preference of the candidate from 20,181 candidates. The cut-off marks for the General, E.W.S.

& O.B.C. category was 25 marks out of 85 marks whereas the cut-off marks for Scheduled Caste and Scheduled Tribes was 20 marks out of 85 marks. The said application was to be uploaded by a candidate along with the photocopy of all relevant documents on the website of the Commission by 18.11.2021.

12. The Commission further stated that the last date of submitting online application mentioned in the advertisement no.807/07/एस-6/2019-20 टी०सी०, dated 03.11.2021 was 18.11.2021 which was further extended till 22.11.2021 by amended notification no.815/एस-6/2019-20 टी०सी० dated 15.11.2021.

13. In response to the said notification, 18693 candidates logged in to the website of the Commission for uploading online applications, out of which only 15830 candidates completed all stages of uploading with educational certificates and experience certificates within the time prescribed in the notification.

14. The instructions further stated that the petitioner submitted a hard copy of the experience certificate (परिशिष्ट-6) of 'Nurse Mentor' as a contractual employee due to which the benefit of experience was not extended to the petitioner. However, the petitioner after the declaration of result dated 23.08.2022, submitted representation dated 27.08.2022 informing that the Chief Medical Officer, Rampur inadvertently mentioned 'Nurse Mentor' in place of 'Staff Nurse' in the experience certificate, but since the said representation was submitted by the petitioner after declaration of result dated 23.08.2022, therefore, representation of the petitioner dated 27.08.2022 being not maintainable was rejected.

15. It is stated that since the petitioner has not submitted the experience certificate within the time prescribed in the notification dated 03.11.2021 and amended notification dated 15.11.2021, therefore, she could not be extended the benefit of the experience certificate.

16. Challenging the aforesaid order, Sri Ashok Khare, learned Senior Counsel for the petitioner has invited the attention of this Court to Clause 4 of the General Instruction of advertisement which states that the candidate must possess all the requisite qualifications till the last date of submission of application. It is submitted that the respondent Commission is not denying the fact that the petitioner possessed essential qualifications on the last date of submission of application, but has refused to grant the benefit of working experience to the petitioner as 'Staff Nurse' on a contractual basis on the ground that said experience certificate was not presented within the time prescribed in the notification dated 03.11.2021 and amended notification dated 15.11.2021.

17. He submits that possession of essential qualification before the last date of submitting the application form and proof/mode of proof thereof is two separate things. Accordingly, he submits that if it is not disputed that the petitioner possessed essential qualifications before the last date of submission of the application form, the petitioner's candidature cannot be cancelled on the ground of non-production of requisite experience certificate which can be said to be a mere irregularity. He submits that possession of essential qualification before the last date/cut-off date as mentioned in the notification dated 03.11.2021 and amended notification dated 15.11.2021 is a mandatory requirement,

whereas the submission of proof in support thereof cannot be treated to be mandatory for invalidating the candidature of the petitioner. Accordingly, it is submitted that the action of the respondent Commission in rejecting the candidature of the petitioner is arbitrary and cannot be sustained in law.

18. In support of the aforesaid contention, learned Senior Counsel has placed reliance upon the judgments of Apex Court in the case of ***Food Corporation of India Vs. Rimjhim (2019) 5 SCC 793; Dolly Chhanda Vs. Chairman JEE and Others (2005) 9 SCC 779 and Charles K. Skaria and Others Vs. Dr. C. Mathew and Others (1980) 2 SCC 752.***

19. Countering the aforesaid submission, learned counsel for the respondent-Commission has submitted that the last date for submitting the application form along with all requisite documents was 22.11.2021 as per amended notification dated 15.11.2021, and if the application of the candidate was not complete in all respect, the Commission reserved its right to cancel the candidature of a candidate. He has placed Clause 10 of the important instructions of the advertisement and contended that the right of the Commission to cancel the candidature emanates from the said clause which stipulates that the Commission may admit the candidates provisionally after summarily checking the applications, but if it is found at any stage that candidate was not eligible or that his/her application should have been rejected or was not entertainable initially, his/her candidature will be rejected, and if the candidate is selected, the recommendation of the Commission for the appointment shall be withdrawn. Accordingly, it is submitted that admittedly, the petitioner has not submitted the

experience certificate before the last date of submission of the application form, therefore, she could not be granted the benefit of experience as a 'Staff Nurse'. It is submitted that since the petitioner could not secure minimum cut-off marks, therefore, her candidature has rightly been rejected by the Commission.

20. In support of his aforesaid submission, he has placed reliance upon the Full Bench judgment of this Court in the case of *Gaurav Sharma Vs. State of U.P. and Others 2017 SCC Online All. 1286 and Rajendra Patel Vs. State of U.P. and Another 2015(8) ADJ 219 (Full Bench)*.

21. I have considered the rival submissions of the parties and perused the record.

22. The undisputed facts which emanate from the record are that the petitioner under an advertisement dated 16.07.2021 submitted an application for consideration for appointment on the post of 'Staff Nurse/Sister Grade II. The petitioner uploaded her application form along with all required documents within the time prescribed in the notification dated 03.11.2021 and amended notification dated 15.11.2021. The petitioner appeared in the written examination held on 01.10.2021 and was declared successful in the result published on 04.01.2022. However, the name of the petitioner stood excluded in the revised result dated 23.08.2022 which was published after re-scrutiny of the experience certificate of the candidates in compliance with the order of this Court dated 26.04.2022 passed in Writ-A No.1815 of 2022.

23. The petitioner claims that the exclusion of her name from the select list is

arbitrary inasmuch as she possessed essential qualifications for the post of 'Staff Nurse' on the last date of submission of the application form and is entitled to award of marks for experience as 'Staff Nurse', as discrepancy occurred in the experience certificate dated 09.11.2021 issued by the Chief Medical Officer, Rampur was an inadvertent error on the part of the Chief Medical Officer, Rampur which had been corrected by him by issuing another certificate dated 24.08.2022 and 30.08.2022, and petitioner cannot be penalised for the fault of Chief Medical Officer, Rampur.

24. According to the petitioner, the mistake which had crept in issuing the experience certificate dated 09.11.2021 by the Chief Medical Officer, Rampur is only an irregularity, and therefore, cancellation of the candidature of the petitioner in the instant case is an arbitrary exercise of power by the Commission.

25. Now, this Court proceeds to analyse whether the action of the Commission in excluding the name of the petitioner from the select list is arbitrary and whether the petitioner is entitled to marks for experience certificate as 'Staff Nurse' on a contractual basis.

26. In the case of *Food Corporation of India (supra)*, the Apex Court considered a case where the respondent (Rimjhim) was not selected as she did not produce any experience certificate to show that she had one year of experience in translation from English to Hindi and vice versa. The facts as stated in the said case reveal that the original writ petitioner (respondent before Apex Court) produced her experience certificate issued by her erstwhile employer certifying that she had

one year of experience in translation from English to Hindi and vice versa before the learned Single Judge. However, the learned Single Judge dismissed the writ petition holding that as the original writ petitioner did not have the requisite experience certificate of one year of translation from English to Hindi and vice versa, the Food Corporation of India was justified in denying the employment to her. The letters patent appeal preferred by the original writ petitioner was allowed by the Division Bench on the basis of certificates produced by the original writ petitioner dated 14.01.2015 and 18.07.2016 before the learned Single Judge holding that since the original writ petitioner possessed requisite experience before the last date prescribed in the advertisement, therefore, she possessed essential qualification as prescribed in the advertisement. Consequently, Division Bench held that the Food Corporation of India was not justified in denying appointment to the original writ petitioner.

27. In the Special Leave Petition preferred by the Food Corporation of India against the judgment of the Division Bench, it was argued that as per the advertisement, one of the essential qualifications was that a candidate must have one year experience in translation from English to Hindi and vice versa which the candidate was required to submit at the time of submitting the application form. It was argued that admittedly, the original writ petitioner did not produce any experience certificate, and therefore, the candidature of the original writ petitioner has rightly been rejected. The said contention has been dealt with by the Apex Court in paragraph 13 of the judgment which reads as under:-

“13. Now so far as the submission on behalf of the FCI that a candidate must and/or ought to have produced the experience certificate along with the application is concerned, at this stage, a decision of this Court in Charles K. Skaria Vs. Dr. C. Mathew (1980) 2 SCC 752 and the subsequent decision of this Court in Dolly Chhanda v. Chairman, Jee and others (2005) 9 SCC 779 are required to be referred to. In Charles K. Skaria, this Court had an occasion to consider the distinction between the essential requirements and the proof/mode of proof. In the aforesaid case, this Court had an occasion to consider the distinction between a fact and its proof. In the aforesaid case before this Court, a candidate/student was entitled to extra 10% marks for holders of a diploma and the diploma must be obtained on or before the last date of the application, not later. In the aforesaid case, a candidate secured diploma before the final date of application, but did not produce the evidence of diploma along with the application. Therefore, he was not allowed extra 10% marks and therefore denied the admission. Dealing with such a situation, this Court observed and held that what was essential requirement was that a candidate must have obtained the diploma on or before the last date of application but not later, and that is the primary requirement and to submit the proof that the diploma is obtained on or before a particular date as per the essential requirement is secondary. This Court specifically observed and held that “What is essential is the possession of a diploma before the given date; what is ancillary is the safe mode of proof of the qualification”. This Court specifically observed and held that “To confuse between a fact and its proof is blurred

perspicacity". This Court further observed..."

28. In the said judgment, the Apex Court followed the ratio laid down in the two earlier judgments namely, **Charles K. Skaria (supra) and Dolly Chhanda (supra)**, and held that the original writ petitioner had acquired one year experience in translation from English to Hindi and vice versa before the cut-off date prescribed in the advertisement, therefore, Division Bench rightly set aside the action of the Food Corporation of India in rejecting the candidature of the original writ petitioner and directing the Food Corporation of India to consider the case of the original writ petitioner for appointment on merit, if other conditions are satisfied.

29. In the case of **Dolly Chhanda (supra)**, the appellant-Dolly Chhanda submitted the application for appearing in the Joint Entrance Examination-2003 (hereinafter referred to as 'J.E.E-2003') under the reservation of M.I. category being the daughter of Ex-Service Man, who was discharged from Armed Forces on the ground of permanent disability. A certain percentage of seats were reserved for children or widows of personnel of armed/paramilitary forces of Orissa killed/disabled in action during war or peacetime operation under clause 2.1.4 of the information brochure of J.E.E-2003. The appellant's rank in the reserved M.I. category in the medical stream was 20, and she was called for counselling for admission to a medical college. During scrutiny, it was found that in column no.3 in the certificate given to her father by Zilla Sainik Board which pertained to "disabled/killed in war/hostilities", the words "not eligible" were written. Since the said certificate did not satisfy the

requirement of the M.I. category, the appellant's candidature was rejected. Subsequently, on the request of the appellant's father, a fresh certificate dated 16.07.2003 was issued by the Zila Sainik Board rectifying the mistake in the certificate dated 29.06.2003. The appellant on coming to know that another round of counselling was fixed due to an increase in the seat approached the concerned center and requested for grant of admission on the basis of the fresh certificate issued by the Zilla Sainik Board. However, she was denied admission. The appellant's case as noted by the Apex Court in paragraph 3 of the judgment was that it was the mistake of Zila Sainik Board in not issuing the correct certificate and said mistake having been rectified in the second certificate issued on 16.07.2003, she was entitled to admission in a medical college. The Apex Court in paragraph 7 of the judgement has observed as under:-

"7. The general rule is that while applying for any course of study or a post, a person must possess the eligibility qualification on the last date fixed for such purpose either in the admission brochure or in application form, as the case may be, unless there is an express provision to the contrary. There can be no relaxation in this regard i.e. in the matter of holding the requisite eligibility qualification by the date fixed. This has to be established by producing the necessary certificates, degrees or marksheets. Similarly, in order to avail of the benefit of reservation or weightage etc. necessary certificates have to be produced. These are documents in the nature of proof of holding of particular qualification or percentage of marks secured or entitlement to benefit of reservation. Depending upon the facts of a case, there can be some relaxation in the

matter of submission of proof and it will not be proper to apply any rigid principle as it pertains in the domain of procedure. Every infraction of the rule relating to submission of proof need not necessarily result in rejection of candidature.”

30. The Apex Court in the aforesaid case noted in paragraph 9 of the judgment that as the appellant came from a very humble background as her father was only a Naik in the armed forces, he might not have noticed the mistake committed by the Zila Sainik Board while issuing the first certificate dated 29.06.2003. Accordingly, it held that it cannot be a ground to deny admission to the appellant, more so when the candidates, who have secured less marks than the appellant have been given admission.

31. In the case of Charles K. Skaria (supra), a notification inviting the application for admission to postgraduate in various streams including ophthalmology was published. Under the advertisement, a weightage of 10% marks was to be given to the candidates who possessed a 'Diploma' in the relevant stream in the selection of candidates in M.S. and M.D. courses. The appellants possessed a diploma in ophthalmology but were denied the benefit of 10% marks on the ground that they did not produce diploma certificate along with the application form. The High Court refused to grant relief to the appellant. The Apex Court did not agree with the opinion of the High Court and held that possession of essential qualification on or before the last date of submission of the application form is mandatory, but proof thereof is secondary, as the purpose of production of such certificate is to have instant proof of qualification. Paragraphs 20 to 23 are reproduced herein below:-

“20. There is nothing unreasonable or arbitrary in adding 10 marks for holders of a diploma. But to earn these extra 10 marks, the diploma must be obtained at least on or before the last date for application, not later. Proof of having obtained a diploma is different from the factum of having got it. Has the candidate, in fact, secured a diploma before the final date of application for admission to the degree course? That is the primary question. It is prudent to produce evidence of the diploma alongwith the application, but that is secondary. Relaxation of the date on the first is illegal, not so on the second. Academic excellence, through a diploma for which extra marks is granted, cannot be denuded because proof is produced only later, yet before the date of actual selection. The emphasis is on the diploma; the proof thereof subserves the factum of possession of the diploma and is not an independent factor. The prospectus does say:

(4)(b) 10% to diploma holders in the selection of candidates to M.S., and M.D. courses in the respective subjects or sub-specialties.

13. Certificate to be produced :- In all cases true copies of the following documents have to be produced:-

(k). Any other certificates required alongwith the application.

This composite statement cannot be read formalistic fashion. Mode of proof is geared to the goal of the qualification in question. It is subversive of sound interpretation and realistic decoding of the prescription to telescope the two and make both mandatory in point of time. What is essential is the possession of a diploma before the given date; what is ancillary is the safe mode of proof of the qualification. To confuse between a fact and its proof is blurred perspicacity. To make mandatory

the date of acquiring the additional qualification before the last date for application makes sense. But if it is unshakeably shown that the qualification has been acquired before the relevant date, as is the case here, to invalidate this merit factor because proof, though indubitable, was adduced a few days later but before the selection or in a manner not mentioned in the prospectus, but still above board, is to make procedure not the handmaid but the mistress and form not as subservient to substance but as superior to the essence.

21. Before the selection committee adds special marks to a candidate based on a prescribed ground it asks itself the primary question: has he the requisite qualification? If he has, the marks must be added. The manner of proving the qualification is indicated and should ordinarily be adopted. But, if the candidate convincingly establishes the ground, though through a method different from the specified one, he cannot be denied the benefit. The end cannot be undermined by the means. Actual excellence cannot be obliterated by the choice of an incontestable but unorthodox probative process. Equity shall overpower technicality where human justice is at stake.

22. The present case is a capital illustration of nominalism battling with realism for judicial success. Both sides admit that the appellants before us had secured diplomas. They further admit (ignoring for a moment the submission on 2% for outsiders) that if the diploma scores were added, the applicants, by the measure of marks, deserve to be selected, provided the diploma obtained in the examination held in 1979 is within time. Then, why did the High Court upset their selection? Because the certificates of diploma were not attached to the applications and

communication by the Registrar of the University to the selection committee was an unauthorised mode of proof, deviating from the prospectus, though authentic in fact. Two flaws vitiate this verbally virtuous approach. True, the prospectus directs that certificates shall be produced along with the applications for admission. The purpose obviously is to have instant proof of the qualification.

23. We are aware that when a statute vests a public power and conditions the manner of exercise of that power than the law insists on that mode of exercise alone. We are here unconcerned with that rule. A method of convenience for proving possession of a qualification is merely directory. Moreover, the prospectus itself permits government to modify the method, as the learned Single Judge has pointed out. In this view, we see nothing objectionable with the government directive to the selection committee, nor in the communication to the selection committee by the university, nor even in their taking into consideration and giving credit for diplomas although the authentic copies of the diplomas were not attached to the application for admission. A hundred examples of absurd consequences can be given if the substance of the matter were to be sacrificed for mere form and prescriptions regarding procedures."

32. In the aforesaid cases, the Apex Court held that possession of essential qualification by a candidate on or before the last date of submission of the application form or cut-off date provided in the brochure or the advertisement is a must, and there cannot be any deviation from the same. However, for the ends of justice, it would not be apposite to apply rigid principles in the matter of submission of proof of possession of qualification before

the cut-off date in the advertisement as it pertains in the domain of procedure and equity shall overpower technicalities where human justice is at stake.

33. Now in the instant case, the Commission does not dispute the fact that the petitioner possessed requisite experience for receiving additional marks for experience, however, the said benefit has been denied to her only on the ground that she did not produce correct experience certificate along with application form before the last date of submission of the application form. The experience certificate dated 09.11.2021 was issued by the Chief Medical Officer, Rampur. The mistake which had crept in the certificate dated 09.11.2021 was solely due to the fault of the Chief Medical Officer, Rampur which was later on corrected by him by issuing a fresh certificate dated 30.08.2022.

34. The Commission also did not notice the said mistake while declaring the first select list on 04.01.2022 in which the petitioner was shown selected. It is only on re-scrutiny of the experience certificate in compliance with the order of this Court dated 26.04.2022 passed in Writ-A No.1815 of 2022, the experience certificate of the petitioner was found defective resulting in the exclusion of the petitioner from the select list published on 23.08.2022. The petitioner, thereafter, submitted the correct experience certificate issued by the Chief Medical Officer, Rampur along with the representation, but her representation was rejected on the ground of non-production of the experience certificate in time.

35. At this stage, it would also be apt to refer to the condition no.4 of the general instructions which reads as under:-

“4. The Commission do not advise to candidates about their eligibility. Therefore, they should carefully read the advertisement and when satisfied about their eligibility as per conditions of the advertisement, only then apply. The candidates must possess all the requisite qualifications till the last date for submitting the applications.”

36. Thus, as per condition no.4 of general instructions, a candidate must possess essential qualifications till the last date for submitting the application form. In the present case, it is not disputed that the petitioner possessed the required essential qualification before the last date of submitting the application form.

37. It is submitted by the learned Senior Counsel for the Commission that the Commission under clause 10 of the important instructions of the advertisement reserved its right to cancel the candidature of a candidate at any stage of selection in case it is found that the candidate is not eligible. Clause 10 of the important instructions of the advertisement reads as under:-

“10. The Commission may admit the candidates provisionally after summarily checking of the applications but if it is found at any stage that applicant was not eligible or that his/her application should have been rejected or was entertainable initially, his/her candidature will be rejected and if the candidate is selected, the recommendation of the Commission for the appointment shall be withdrawn.”

38. Thus, it is contended that there is no illegality in cancelling the selection of the petitioner.

39. It is no doubt true that under clause 10 of the important instructions of the advertisement, the Commission has the power to cancel or reject the candidature or selection of a candidate at any stage of selection and if the candidate has been selected and appointed, the Commission can withdraw the recommendation, but such power should be exercised by the Commission judicially, reasonably and on sound principles of law and not in arbitrary manner.

40. Now, coming to the Full Bench judgment of this Court in the case of **Gaurav Sharma (supra)** on which reliance has been placed by the learned counsel for the *respondents*, **this Court was considering a case where the petitioner (Gaurav Sharma)** submitted altogether different caste certificate than what was required under the advertisement. Subsequently, he submitted a certificate as per the requirement under the advertisement. His candidature was rejected on the ground that he had submitted a caste certificate after the last date of submission of the application form. The Full Bench of this Court noticed paragraph 5.4(10) of the advertisement and found that there is a negative stipulation in the advertisement which in unequivocal terms placed all candidates seeking the benefit of reservation to notice that in case the original caste certificate is not produced, it would be presumed that they do not claim the benefit of reservation and their claim for reservation shall consequently be rejected. The said clause also provided that no further opportunity will be provided to any candidate to seek any amendment or modification. The Full Bench further noticed that the date of issuance of such a certificate is crucial in case a candidate is claiming the benefit of

reservation under the O.B.C. quota because an O.B.C. candidate necessarily must establish twin conditions; that he belongs to the O.B.C. group recognised by the State, and also that he does not fall within the creamy layer. These requirements are liable to be judged with reference to the date prescribed in the advertisement.

41. Apart from the aforesaid, the Full Bench further proceeded to distinguish the Apex Court judgment in the case of **Ram Kumar Gijroya Vs. Delhi Subordinate Services Selection Board & Another 2016 (4) SCC 754** on the ground that in the said case, the advertisement did not prescribe the cut-off date at all. In such factual backdrop and after interpreting a negative stipulation contained in clause 5.4(10) in the advertisement, this Court laid down that the caste certificate submitted after the date prescribed in the advertisement cannot be accepted, and the candidature of a candidate is liable to be rejected.

42. The facts of the case of **Gaurav Sharma (supra)** are not akin to the facts of the present case. One further fact that distinguishes the case of **Gaurav Sharma (supra)** from the present case is that in the instant case, a notification dated 03.11.2021 was published asking the candidates belonging to General, E.W.S., O.B.C. quota, who have secured 25 marks in written examination and the candidates belonging to Scheduled Castes and Scheduled Tribes, who have secured 20 marks in written examination, to submit their complete application form by 5:00 P.M. on 18.11.2021. The notification dated 03.11.2021 reads as under:-

“कार्यालय उ०प्र० लोक सेवा आयोग
संख्या-807(I)/ 07/एस-6/ 2019-20टी०सी०

प्रयागराज, दिनांक-03 नवम्बर, 2021

विज्ञप्ति

उ०प्र० लोक सेवा आयोग, प्रयागराज द्वारा विज्ञापन संख्या-ए-4/ई-1/2021 के अन्तर्गत दिनांक-03.10.2021 को आयोजित स्टाफ नर्स/ सिस्टर ग्रेड-2 (पुरुष / महिला) परीक्षा-2021 में सम्मिलित सामान्य, ई०डब्ल्यू०एस० व अन्य पिछड़ा वर्ग के ऐसे अभ्यर्थी जिन्होंने उक्त लिखित परीक्षा (कुल-85 अंक) में 25 अंक व उससे अधिक एवं अनुसूचित जाति व अनुसूचित जनजाति श्रेणी के ऐसे अभ्यर्थी जिन्होंने 20 अंक व उससे अधिक अंक प्राप्त किए हैं की सूची आयोग के वेबसाइट- <https://uppsc.up.nic.in> पर उपलब्ध है।

2-सूची में सम्मिलित समस्त अभ्यर्थियों को निर्देशित किया जाता है कि वे आवेदन पत्र पूर्णरूप से भरकर समस्त अभिलेखों सहित अंतिम तिथि दिनांक 18 नवम्बर, 2021 अपराह्न 5.00 वजे तक आयोग कार्यालय में जमा करना सुनिश्चित करें। अंतिम तिथि के बाद प्राप्त आवेदन पत्र किसी भी दशा में स्वीकार नहीं किये जायेंगे। इस संबंध में कोई प्रत्यावेदन विचारणीय नहीं होगा।”

43. Later on, an amended notification dated 15.11.2021 was issued extending the period of submission of the application form till 22.11.2021. The relevant extract of the notification dated 15.11.2021 as noted in the instruction is reproduced herein below:-

“ऐसे अभ्यर्थी जिन्होंने प्रथम चरण (ऑनलाइन प्रक्रिया) पूर्ण किये बिना केवल समस्त अभिलेख आयोग कार्यालय में प्रेषित किये हैं, ऐसे प्रकरणों पर कोई भी कार्यवाही नहीं की जायेगी। उपरोक्त वर्णित संशोधित तिथियां अन्तिम रूप से बढ़ाई जा रही हैं। संशोधित अन्तिम तिथि के पश्चात प्राप्त किसी भी आवेदन पर कोई भी कार्यवाही नहीं की जाएगी।”

44. Reading of aforesaid two notifications suggests that a candidate has to submit his/her complete application form within the time prescribed in the aforesaid notifications dated 03.11.2021 and 15.11.2021. Learned counsel for the Commission could not place any negative stipulation in the advertisement as was in

the case of **Gaurav Sharma** to justify the rejection of candidature of the petitioner. Thus, the said judgment is of no help to the respondent-Commission.

45. It is also pertinent to note that the principle of law elucidated in the judgment of Apex Court in the case of **Ram Kumar Gijroya (supra)**, which was distinguished by the Full Bench in the case of **Gaurav Sharma (supra)**, has again been reiterated by the three Judges of Apex Court in the case of **Karan Singh Yadav Vs. Government of NCT of Delhi and Others 2022 SCC Online SC 1341**.

46. Similarly, the case of **Rajendra Patel (supra)** is also of no help to the respondents since it was a case where the controversy was whether the submission of a hard copy of the online application form was mandatory or not. The Full Bench after noticing the stipulations in the advertisement and further noticing the fact that if a candidate is allowed to submit a hard copy at any time, that would dislocate the selection process and would render the process conducted by the Commission in a peripheral stage of uncertainty. Consequently, it was held that such a requirement is mandatory.

47. Applying the principles of law enunciated by the Apex Court in the judgment referred above, that possession of essential qualification before the last date prescribed in the advertisement is a must, and proof of qualification is ancillary, and that the facts of the present case are almost akin to the facts in the case of **Food Corporation of India (supra)** where original writ petitioner did not file experience certificate along with the application, but presented before the High Court, and the Division Bench having

found that original writ petitioner possessed essential qualification before the last date of submission of the application form set aside the action of the Food Corporation of India in rejecting the candidature of the original writ petitioner, this Court for the reasons given above is of the view that rejection of the candidature of the petitioner is arbitrary exercise of power by the respondent in the facts of the present case. Consequently, the argument of learned counsel for the Commission based on clause 10 of the important instructions of the advertisement which gives power to the Commission to cancel the candidature of a candidate or withdraw the recommendation for appointment in the facts of the present case is not sustainable since this Court has held that action of the Commission in rejecting the representation of the petitioner is an arbitrary exercise of power.

48. Thus, for the reasons given above, this Court is of the view that the impugned order dated 16.11.2022 passed by the Secretary, Public Service Commission, Prayagraj cannot be sustained in law and is hereby set aside. Further, a direction is issued to respondent no.4 to grant the benefit of experience certificate and consider the candidature of the petitioner for appointment on merit, if all other conditions stand satisfied.

49. Consequently, the writ petition is *allowed*. There shall be no order as to costs.

(2023) 8 ILRA 350
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.05.2023

BEFORE

THE HON'BLE AJIT KUMAR, J

Writ A No. 44003 of 2016

Shri Krishna Mishra ...Petitioner
Versus
L.I.C. of India, Central Office, Mumbai & Ors. ...Respondents

Counsel for the Petitioner:

Sri P.K. Singhal, Sri Vinay Kumar Mishra, Sri Vishesh Rajvanshi

Counsel for the Respondents:

Sri Manish Goyal, Sri Pramod Kumar Dubey, Sri Sanjit Singh, Sri Sanjeev Singh (Senior Adv.)

Civil Law - Life Insurance Corporation of India (Staff) Regulations, 1960 - Constitution of India, 1950 - Articles 14 & 226 - The petitioner, a Class I officer with LIC, faced disciplinary proceedings for approving maturity claims under two policies allegedly without proper verification. Charges included improper execution of surety and indemnity bonds by agents from different branches, differences in policyholder signatures, and premature claim disbursement, allegedly causing financial loss to LIC. The enquiry officer exonerated the petitioner on most charges, finding no evidence of fraud or loss, but held charge 1-A partially valid due to the absence of the original policy bond. The disciplinary authority disagreed, imposed penalties (reduction in pay scale and recovery of Rs. 50,508), and the appellate authority upheld this. The petitioner challenged these orders under Article 226.

Held: No evidence of fraud or financial loss to LIC. No rule requiring sureties or witnesses to be from the same branch. Lack of complaints from policyholders. Disciplinary authority's failure to provide cogent reasons or evidence to contradict the enquiry officer's findings. The charge regarding the absence of the original policy bond was irrelevant as it was not part of the chargesheet. Since the petitioner had retired, remand was deemed unnecessary. The petitioner was entitled to reinstatement in the same pay grade, arrears, and refund of

recovered amounts. Writ petition allowed; orders quashed; consequential benefits granted.

Writ petition allowed.

Case Law Discussed:

1. B.C. Chaturvedi Vs U.O.I., (1995) 6 SCC 749
2. U.O.I.Vs H.C. Goel, AIR 1964 SC 364
3. Managing Director, ECIL, Hyderabad Vs B. Karunakar, (1993) 4 SCC 727
4. U.O.I.Vs Subrata Nath, Special Leave to Appeal Nos. 3524-25 of 2022 (decided on 23.11.2022)
5. Ram Krishna @ Ram Krishna Yadav Vs Indian Oil Corporation & ors. (2023) 8 ILRA 61055

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

1. Heard Sri Vishesh Rajvanshi, learned counsel for the petitioner and Sri P.K.Dubey, learned counsel for respondent nos. 1,2 and 3.

2. The petitioner who was working with respondent Life Insurance Corporation (hereinafter referred to as "Corporation") as class I officer and was posted at the District Branch Office, Kanpur in the capacity of Senior Branch Manager was subjected to disciplinary proceedings in the matter of disbursement of maturity claim under police no. 058472150 in favour of Jagdip Kumar Anand and also payment of maturity claim under policy no. 058472329 in favour of one Pradeep Kumar Agarwal.

3. The chargesheet issued to the petitioner in connection with payment made to Jagdip Kumar Anand was to the effect that surety form subject to which payment settlement was made, was signed by one Sri P.K.Gautam an agent of another branch and the indemnity bond and

discharge voucher were signed by one Mr. S.C. Tiwari an agent also of another branch. Further these two documents were witnessed by one Dr. R.K.Gupta, Veterinary Officer of Kanpur. Since payment was issued by C.B.O. 4 (Kanpur Branch Office of Corporation), the issue was raised that beneficiary of the maturity stood impersonated.

4. Yet another offshoot of the charge was that signatures of Jagdip Kumar Anand upon receipt were different from those made on the proposal form.

5. The second charge was that petitioner while working as Senior Branch Manager failed to verify the authenticity of the claim of policy holder before approving payment of Rs. 64,975/- maturity amount vide cheque dated 6.3.2006 drawn in favour of Sri Jagdip Kumar Anand and so with the encashment of the said amount, Corporation suffered with financial loss.

6. The third charge was also similar in nature in respect of payment of maturity claim of Rs. 57,700/- by issuing a cheque dated 1.6.2006 in favour of Sri P.K.Agarwal. Here in this charge, the issue was that policy bond and discharge vouchers were submitted by policy holder only on 16.06.2006 whereas claim voucher was issued on 28th March, 2006 stood encashed. The cheque was issued on 31st March, 2006 which would encashed on 2nd May, 2006. Thus in substance, the charge got impersonated and Corporation stood defrauded and suffered financial loss of Rs. 57,700/-.

7. The petitioner submitted his reply to the chargesheet. In respect of charge no. 1, he stated that surety was signed by Sri P.K.Gautam who was a CM Club member

with an authorized agency code bearing no. 67/23S registered at CBO 9 and had sound financial backing of 30,000/- monthly income as an agent, he owned independent house and car worth valuation of Rs. 20,00,00/- for just a claim of Rs. 64,975/-. The sureties were witness by a respectable citizen R.K. Gupta, a Veterinary Officer in Kanpur. Officer admitted that indemnity bond and discharge vouchers were witnessed by one Sri S.C.Tiwari, an another CM Club member with an authorized agency code being no. 05901/232 registered at CBO 1, and the charge was that these two agents did not belong to CBO-4 was not maintainable because there was no such requirement that such surety be filed and so also indemnity bond and discharge voucher be witnessed by an agent of the same branch. He referred to the claim manual and other instructions of the Corporation in that regard, and therefore, pleaded that charge was absolutely ill founded. He claimed to have taken protection while approving security regarding difference in signatures of Jagdip Kumar Anand on the claim document and that on the proposal form. He claimed that signatures as per his own eyes appeared to be identical and would be so visible from the naked eyes. He pleaded that in the month of 2006, he had settled more than 800 maturity as he claims, and therefore, involvement of the two CM Club members not belonging to the branch did not give him any reason to doubt about correctness of the claim.

8. He repelled the second charge for the same reason as second charge was sequel to the first charge and thus submitted that there was as a no question of any financial loss being caused to the Corporation. He asserted in his reply that documents were carrying correct address of the policy holder as both on the bond and the claim form were same

and the cheque of claim was dispatched also at the same address. He also disclosed that later on he came to know that the cheque was received by one Sri V.K.Pandey a sub staff of CBO-4 itself, and therefore, any responsibility of misuse or abuse of cheque would be of V.K.Pandey and not of the petitioner.

9. Regarding charge no. 3, the petitioner claimed that entire papers were first verified by the officer and then were placed before him in respect of claim of one Sri P.K.Agarwal, he submitted that it was primary duty of the claim department to have checked all those papers and then to forward to the Senior Branch Manager for passing the same. He submitted that papers were placed before him with all documents in fact and it was upon that he had approved payment. The cheque of Rs. 57,700/- after approval was prepared by accounts department and sent for dispatch. This cheque, he claimed was also received by Sri Uday Narayan Singh Chauhan, the Development Officer with Code 9025 of CBO-4, a third party and he put his signatures in endorsement of receipt upon dispatch register. Any use of misuse of cheque for payment if was by a third party then that real claimant would be a question of enquiry from Sri Uday Narayan Singh Chauhan only and not the petitioner. The enquiry officer Sri Anup Kumar Agarwal conducted an enquiry and in the enquiry report that he submitted, he had exonerated the petitioner from charge nos. 1-B, 2 and 3 having found them not proved so the charge regarding payment of person other than the real claimant Sri Jagdip Kumar Anand and Sri Pradeep Kumar Agarwal were found not proved and hence there was no financial loss caused to the Corporation.

10. Regarding charge no. 1-A, which was regarding the fact that surety was not

of the same branch and so also witness being not agent of the same branch from where policy claim was to be disbursed, the enquiry officer while did not agree with the stand of the department that agent should be of the same branch from where payment was released, but he concluded that, had the original policy bond been there, the surety papers would not have been required to be submitted at all, and therefore, he claimed that payment was made upon maturity claim without original policy bond being there. The findings to certain extent virtually questioned of disbursement of claim even in the absence of policies bond.

11. The disciplinary authority while concurred with enquiry officer's report in respect of charge no. 1-A, it disagreed with the findings of enquiry officer in respect of charge no. 1-B, 2 and 3 and held that from the perusal of the documents and other evidence on record, the charges stood established and accordingly a show cause notice was issued to the petitioner of the proposed penalty of lowering by a stage in time scale of pay applicable to his cadre and recovery of Rs. 50,508/- in terms of Regulation 39 (1)(d) Regulation 39(1) (c) of the Life Insurance Corporation of India Staff Regulation, 1960. The petitioner did submit his reply to the show cause notice and reiterated stand already taken in reply to the chargesheet. The disciplinary authority having found itself not satisfied with the reply submitted by the petitioner imposed penalty, as proposed, vide order dated 25th January, 2016. The petitioner unsuccessfully appealed against the said order before the appellate authority as his appeal also came to be dismissed vide order dated 2nd August, 2016 and hence this petition.

12. The argument advanced by learned counsel for the petitioner is that

once enquiry officer had returned a finding that charges 1-B, 2 and 3 were not proved, but it was necessary to have placed reliance and discussed those material and documents which compelled the disciplinary authority to disagree with the findings of the enquiry officer but disciplinary authority did not do so and merely by referring facts has established the charge holding petitioner guilty of those charges, which finding is, therefore, liable to be rendered perverse.

13. In support of his above argument, learned counsel for the petitioner submits that all those documents that have been referred to in the chargesheet were very much before the enquiry officer and the departmental agents/ officers who deposed before the enquiry officer in support of the charge could not establish firstly that surety and indemnity bond were fake surety and notarized indemnity bond were fake or that authorized agents may be of a different branch signing those documents as surety witnesses were not authorized agents, nor it could cite any rule or manual providing for a particular category of person to be surety and witness to the indemnity bond and were also required to belong to the same branch. He argued that CM Club membership is common to all and only registered and authorized agents are members. He further submitted that the enquiry officer while holding the petitioner guilty of charge no. 1-A only assigned a reason that policy bond in original was not available and had that been there, indemnity bond would have not been required.

14. He argued that the charge was not that the original policy bond was not available but the charge was that indemnity bond was signed by witnesses who

belonged to another branch. He submitted, therefore, that when a document of policy was not in issue, the enquiry officer could not have returned a finding against him, and on the question of surety, indemnity bond, no such rule was cited that such agent must belong to the same branch and this has been carefully noticed by enquiry officer in his report, and so, he could not have taken view in favour of the department.

15. Regarding charge no. 1-B , learned counsel argued that enquiry officer had tallied the signatures and admission of the own departmental witnesses and returned finding to the effect that style and flow of signature of two signatures was the same . The enquiry officer also returned a finding that there was gap of 21 years between execution of the policy bond and the indemnity bond, therefore, a little variance would not render the subsequent signature to be doubtful. He further argued that as far as charge no. 2 was concerned, verification regarding authenticity of the policy holder was not to be doubted because it was the claim department that was to forward papers. Had this formalities of verification etc. had not been done by the claim department, it would certainly not have processed file for approval before the petitioner. It is argued regarding third charge that enquiry officer returned a finding that payment of maturity claim was made on document P-16 which bore maturity paid stamp and the officer of the department failed to provide dispatch form which according to the banks' case had been received on 16.06.2006. He, therefore, submitted, when the crucial evidence relied upon by the bank was not produced before the enquiry officer, the enquiry officer could not have relied upon any such document not produced to hold the petitioner guilty of the charge.

16. Learned counsel for the petitioner submitted that all these aspects were required to be dealt with by the disciplinary authority in the first instance, *prima facie*, while disagreeing with enquiry officer's report and requiring the petitioner to submit reply to the *prima facie* findings of the disciplinary authority, afresh. He submitted that in the entire show cause notice all that was stated in the charge sheet had been reiterated and petitioner had been held to be guilty of negligence as well, but no document had been discussed, which could be said to have escaped the scanning eyes of the enquiry officer. He submitted that in order to defer from the findings of the enquiry officer, the disciplinary authority was not required to merely refer to the minutes of the proceedings but to take a *prima facie* view with reasons as to why it was deferring from the findings.

17. Learned counsel for the petitioner, therefore, summed up his arguments by submitting that disciplinary authority did not rely upon any departmental Life Insurance Corporation Manual or Rules, which would have held the surety signed by an agent of different branch or an indemnity bond by an agent of different branch would not be admissible so as to clear the maturity claims. Even on the question of difference in signatures, the disciplinary authority could not give a sound reasoning to disagree with the findings of the enquiry officer, more especially relating to the style and flow already admitted by its own witnesses to be the same in respect of both the signatures. The disciplinary authority according to learned counsel could not refer to any such document available with the department so as to create doubt about signatures and if any, it failed to supply copy thereof to the petitioner alongwith show cause notice so

as to enable him to defend the findings as far as charge no. 3 is concerned.

18. Assailing the order of the appellate authority, counsel for the petitioner has argued that appellate authority has simply affirmed the decision taken by the disciplinary authority without recording any independent finding as to the documents and report that could be said to be sufficient enough to bring the charges home so as to punish the petitioner. One more argument has been advanced by learned counsel for the petitioner is that, had it been a case of complaint at the end of the policy holders or their heirs or successors that maturity amount had been got encashed fraudulently by a third party, there would have arisen an occasion for the Corporation to take a *suo motu* notice of the disbursal of the claim styling it to be a fraudulent act on the part of the petitioner but it was not so.

19. He further argued that the loss would have been caused to the Corporation, had the maturity claim gone in favour of the petitioner who might not have been entitled to the same or in the event of any excess amount than due amount had been got paid. Neither of the situation being there, the department failed to make out a case of fraudulent payment by the petitioner. He, therefore, submitted that besides the fact that the charges could not be proved, even punishment was disproportionate to the charges made, there being no loss caused to the Corporation as there was not complaint as such. So the Corporation was not justified to assume loss and accordingly penalize the petitioner with recovery. He further submitted that in the entire service career of the petitioner he had cleared hundreds of maturity claims and never any finger was raised. Here also

the maturity claim had been released, but the finger was raised for technical reason that surety bond was signed by an agent not belonging to the branch and so witness agent of indemnity bond was not belonging to the branch. He, therefore, argued that at the most, petitioner could have been visited with penalty of censure and caution and to be more responsible and careful in future. The punishment of reduction of one stage in the time scale was too excessive. He submitted that negligence if at all was there, it was not deliberate one and if, in the event Corporation could have proved that agent of different branch could not have executed surety, nor could have signed indemnity bond as witness, it would have been at the most on irregularity and illegality not to the extent of impunity because the persons who signed it both as executant of surety and then as a witness to the indemnity bond were not denied to be authorized agents of the Corporation though belonging to another branch in the same city.

20. It is also submitted by learned counsel for the petitioner that petitioner has attained the age of superannuation and recovery has already been made pursuant to the order impugned.

21. Sri Sanjeev Singh, learned Senior Counsel appearing for the respondent in the first instance submits that the disciplinary authority had every right to disagree with the findings returned in enquiry report of enquiry officer and accordingly issued a show cause notice. He submits that the findings of the enquiry officer on charge no. 1-A, 2 and 3 were even not correct for the sufficient material available on record. He argued that disciplinary authority in its final order imposing penalty has discussed all those documents and then assigned

reasons why it disagreed with the findings of the enquiry officer and held the petitioner guilty of the charges. He submitted that no procedural flaw has been claimed by the petitioner in the entire disciplinary proceedings and merely because this Court may come to a different conclusion from what has been arrived at by the disciplinary authority on the basis of documents available before it, this Court would not sit in appeal over and above findings returned. He argued that both the disciplinary authority well as appellate authority have dealt in detail with every aspect of the matter and have correctly held petitioner to be guilty of the charges.

22. On the question of penalty imposed upon the petitioner, learned Senior Advocate argued that the penalty has been imposed as per relevant rules which authorized the authority to impose penalty and the nature of negligence that has been committed by the petitioner which can be taken to be quite serious lapse in nature because it involved disbursement of the maturity claim against a policy. It is always duty of officer in the rank which petitioner was to be doubly sure that in the absence of policy bond, indemnity bond was being signed alongwith maturity claim form by the same person who had signed the policy bond and that surety filed by an agent should have been very carefully examined and verified. Thus, he submitted that penalty imposed is commensurate to the charge levelled and findings returned upon the charges by the disciplinary authority. He further argued, alternatively, if the court is of the view that penalty imposed is not proportionate to the charges proved, it may remand the matter to the disciplinary authority to take decision afresh as far as penalty part is concerned.

23. Having heard learned counsel for the parties and having perused the records relating to disciplinary proceedings brought

on record and also the order passed by the disciplinary authority as well as appellate authority and the respective arguments raised across the bar, I am of the view that this Court would certainly be interfering in a case where findings returned by enquiry officer or disciplinary authority are found to be perverse for there being documents speaking otherwise or for there being no document at all to support the findings.

24. Normally the rule is that the matter is remitted to be decided afresh from the stage, it is found that procedural steps have gone wrong requiring interference by this Court or even in matters where the Court concludes that the matter required to be examined afresh by the disciplinary authority or by the appellate authority and also in matters of proportionality as to the penalty imposed considering the charge levelled and proved.

25. I have no reason to disagree with the argument advanced by learned Senior Advocate appearing for the Corporation that in matters of disciplinary authority, the Court would not be interfering as a rule but there is no thumb rule either. If the findings of the enquiry officer is found to be perverse and disciplinary authority has agreed or concurred with the same, and resultant punishment/penalty such a situation would certainly require interference by this Court to arrest any miscarriage of justice.

26. In service jurisprudence there is no scope for an order by administrative authority to be sustained even if not well informed one. An employee is never in a bargaining position with the employer for the simple reason that its employer who offers appointment, it is he who lays down conditions, it is he who frames the rules

and it is he who also controls the game, period of service. The employee once appointed stands virtually caged in, and therefore, every action of the employer is not only to be within the four corners of the rules but within the parameters laid in administrative law to test an action of administrative authority. When it comes to the state, its instrumentality, its agency, then an order has to pass testing anvil of Article 14 of the Constitution, and if it fails, it would be arbitrary action, which would be required to be arrested to avoid any miscarriage of justice.

27. In the present case since petitioner has already attained the age of superannuation, I proceed to decide the matter taking it not to be a case which should be remanded at this stage.

28. From the entire facts of the disciplinary proceedings, the charges that have been levelled against the petitioner can be reproduced as under:

a). One Jagish Kumar Anand ensured with Life Corporation of India, was paid the maturity claim under policy, on the basis of surety form signed by LIC agent of a different branch and witnessed by veterinary doctor and then on the basis of indemnity bond and discharge voucher witnessed by another agent of a different branch and so also witnessed by veterinary doctor . The payment was questioned on three grounds:

a). that surety and indemnity bonds were not properly executed and signatures of the ensured on the original policy proposal form were different from that of indemnity bond and discharge voucher;

b). as a consequence of the above, it was claimed that there was lack of

verification on the part of the petitioner regarding due verification of the authenticity of the policy holder who got paid the amount and resultantly Corporation suffered a loss of Rs. 64,965/- the maturity amount; and

c).The claim of maturity amount in favour of P.K.Agarwal got cleared and encashed on 2.5.2006 whereas the policy bond and discharge voucher claim to have been submitted by policy holder subsequently on 16.06.2006 and so it was a case where Life Insurance Corporation is claimed again to have suffered loss of Rs. 57,700/- the claim amount.

29. In order to establish this above charges, the Corporation had no other document except those mentioned in the charges but a crucial document relating to the third charge, the discharge voucher dated 16.06.2006 was not produced.

30. Yet another aspect is equally important here to be noticed that Corporation did not turn up to show that any such claim made before it was complained of by either insured persons or their successors that maturity claim got encashed by a third party and they had been defrauded. It is equally worth noticing that during disciplinary enquiry, presenting officer of the Corporation did not produce any manual or rules which would have supported the charge that an agent to sign surety or to sign the indemnity bond and discharge voucher as witness must belong to the same branch from where maturity claim was to be issued. Learned Senior Advocate appearing for the Corporation, on a pointed query could not produce any such manual or the rules.

31. Now it is in the backdrop of the above, I proceed to examine the case, more

especially relating to the findings returned by the Enquiry officer and disagreement expressed by the disciplinary authority so as to justify its stand in passing the order of punishment.

32. In order to establish that surety bond could not have been signed by the agent not belonging to the branch from where maturity claim was to be disbursed and /or an indemnity bond and discharge voucher could not have been witnessed by an agent who did not belong to the said branch, it was primarily a duty of the Corporation to have presented the relevant provisions of the manual/ or the rules of the Corporation and in the absence thereof or if there was no rule and manual, the Corporation was required to prove that these agents were fraudulent persons. In the enquiry report regarding this aspect of the matter, a finding returned is that “*P.O.’ has also confirmed that there is no circular that states that the agent should be of the same branch*”. In other words, no guidelines / circular that may have prohibited the agent of other branch to be of surety was produced. The enquiry officer recorded that P.O. (Presenting Officer) sought to frame a new charge of indemnity bond by the surety. The enquiry officer refused to give any acknowledgement to such new charge, it not being part of the charge-sheet.

33. On the question of indemnity bond, the reply by the petitioner was “*in view of document P-1 (i.e. copy of the original policy bond already available with the Corporation) submitted by P.O. itself, the lapse in execution of indemnity bond has no meaning at all.*” The enquiry officer held “*if policy bond was there, the surety papers would not have been submitted at all*” but he found it to be not clear as to when policy bond was submitted and so

observed “*I am constrained to accept when policy bond was available at the time of settling maturity claim*”.

34. This above finding does not hold the document of policy bond bearing insurance stamp to be bad. This rather strengthens petitioner’s case that maturity was claimed in respect of genuine bond. Still further, enquiry officer has not held indemnity bond and the surety to be forged or fake document and so charge 1-A cannot be said to have been proved at all. The only conclusion in regard to this charge by enquiry officer is that it was not acceptable that policy bond was available at the time of settling maturity claim .

35. Regarding charge 1-B, the enquiry officer held that “*presenting officer (of the bank) could not find out any difference particularly in the letter ‘K’ in its style and flow from one signature to the other signature*”. Moreover, he held that “*here is important to mention that P.O. himself has admitted that style of signature appears to be same*” Moreover a period of 21 years has elapsed from the date of first signature (on the proposal form) and second signature and naturally both the signatures cannot match in to to, may be similar (similarity on style) has been acknowledged by P.O. but exact match of signature was not possible. Thus, charge 1-B was also held as not proved.

36. Regarding charge no. 2, the enquiry officer held that “*cheque was prepared by accounts department favouring policy holder and forwarding letter carries address given in the policy bond/discharge cheque and then sent the dispatch through moment register.*” It was Sri V.K.Pandey (sub staff) who received this cheque (referred the document as D-5) without any

authority or any approval from the competent authority that can at the most be said to have led fraudulent misappropriation for which petitioner could not be blamed. Thus, charge 2 was also held as not proved.

37. Regarding charge no. 3, the enquiry officer held that in March, 2006, the claim was processed whereas discharge form no. 3825, and the policy bond was received only on 16.06.2016 but the presenting officer of the Corporation failed to produce any such discharge form which was claimed to have been presented on 16.06.2006. The enquiry officer further held that as per presenting officer's own document, P-16, it bore maturity paid stamp. Thus, charge no. 3 was also held as 'not proved'.

38. The disciplinary authority while agreed with the findings of enquiry officer on charge 1-A disagreed with the findings on other charges and observed that there was some difference in signatures which was noticeable to prove the charge 1-B and then proceeded to prove charge 2 merely on the basis that surety form no. 3507 was approved by the petitioner and indemnity bond also without verifying credentials of the policy holder. Thus petitioner was held to be guilty of facilitating perpetration of fraud and resultant fraudulent acknowledgement of cheque.

39. Regarding charge no. 3, disciplinary authority has expressed its view that policy bond and discharge voucher having been received on 16.6.2006 the maturity claim could not have been released in March, 2006 and again negligence was cited on the part of the petitioner.

40. These above are bare statements made in the show cause notice to defer with

the findings. The reply of the petitioner has been noticed in the show cause notice and then a reference has been made to the findings on charge no. 1-A of the enquiry officer to the following effect:

"1. There is no documentary evidence of the financial status of the surety, in this case, agent Shri P.K. Gautam.

2. Indemnity Bond though notarized, has not been executed by the surety."

41. Regarding charge nos. 2 and 3, no further documents have been referred to so as to justify that findings returned by the enquiry officer were not worth to be reckoned with. The petitioner's reply as usual has not been held to be satisfactory to the show cause notice. Despite statement made by the petitioner in his reply that both the cheques were received by the persons of Corporation whose identity was well established and yet they were not questioned.

42. Regarding execution of the surety and signing of the indemnity bond and discharge voucher, same legal plea was taken by the petitioner. The disciplinary authority in its ultimate final order has though referred to the reply of the petitioner to the chargesheet but has failed to reverse the findings of enquiry officer on the issue of execution of surety and signing of indemnity bond and discharge voucher by witnesses who were authorized agents of the Corporation though belonging to the other branch, whereas it was fair admission on the part of presenting officer that there was no such rule or manual available that such agent should of the same branch.

43. The disciplinary authority could not refer to any document by which it could

be said that the surety was not duly executed and signed by the authorized person or that indemnity bond and discharge vouchers were not signed by the policy holder and not witnessed by the authorized persons. Thus reply of petitioner has been repelled for no justifiable reason. A mere statement that the officer should shoulder his share of responsibility very consciously would not bring home the charge. The disciplinary authority, instead, was required to rely upon the rule that such surety and indemnity bond could not have been signed by a agent of another branch and should have held that such surety and indemnity bond and discharge voucher were forged documents. The disciplinary authority was also required to test finding addressing the question, whether merely for indemnity bond that was filed, it would have dis-entitled the policy holder of the maturity claim. Having not held so, neither findings of enquiry officer on charge no. 1-A nor, of the disciplinary authority on such charge would be said to have been well informed with the reasons and supported by documents and rules.

44. Regarding charge nos. 2 and 3, the disciplinary authority has not been able to assign any reason for disagreeing with the findings of the enquiry officer as to difference in signatures. The disciplinary authority has not been able to establish as to how it finds that the signatures upon the discharge voucher of the policy claimants Mr. J.K.Anand were forged. Similarly, therefore, the question of verification of indemnity bond and surety would arrive provided the insured/ policy holder or his legal heirs and successors come to lodge complaint that they have not received payments and that they had not executed such bond and that agents have virtually committed fraud. In the absence of any

such finding, petitioner has rightly replied that the entire papers processed through a different department, namely claim department were placed before him for final approval. He would see the documents placed and would believe the noting done by the claim department to approve the same. Once the approval is accorded, the duty of payment is of accounts department and if the cheque had been received by a third party, petitioner could not have been held liable for the same.

45. Similarly, again in respect of charge no. 3 the disciplinary authority failed to record a findings that report of the enquiry officer was perverse and that discharge voucher and policy bond were received on 16.6.2006 and he had perused the same and that enquiry officer failed to notice this document. On this aspect, regarding charge no. 3, there is no finding by disciplinary authority. Thus, in my considered view the disciplinary authority had disagreed with the findings returned by the enquiry officer without recording any independent finding of fact relying upon any material which may be said to have gone unnoticed by the enquiry officer or noticed but was ignored by the enquiry officer. There being no such finding, the disciplinary authority was not justified in taking a different view from that of the enquiry officer.

46. Coming to the order of the appellate authority, I find that the appellate authority has proceeded to hold that the enquiry officer had held that policy bond was not available, therefore, in the absence of policy bond, the correctness of the indemnity bond was to be verified. The appellate authority has failed to record any reason as to what compelled him to hold that surety and indemnity bonds were

forged documents and were not duly executed. It is worth noticing that neither disciplinary authority, nor the appellate authority has held that those documents to be forged documents. Regarding difference in signatures also the appellate authority came to conclusion that it had come to observe that there was difference in signatures and whether there was slight or major difference, it was quite noticeable which should not have been ignored by the petitioner and had he been vigilant, he would have arrested the fraud.

47. In my considered view, this above finding is not tenable for the simple reason that the bank's presenting officer himself has found style and flow of the signatures to be same. What difference it found/noticed to record finding to the contrary has not been mentioned either in the order of disciplinary authority or the decision of the appellate authority that has affirmed the findings of disciplinary authority.

44. Supporting the plea of differences in signatures vide paragraph 45 of the counter affidavit, it has been averred as under:

"That the contents of paragraph no. 51 of the writ petition are vehemently denied. It is further stated that the charges were levelled against the petitioner for having checked the claim payment Vr. No. 998 dated 06.03.2006 for Rs. 64,975 under Policy No. 058472150 where signatures of Shri Jagdip Kumar Anand the policy holder in the Indemnity Bond and Discharge Voucher was different from the one on the proposal form. On the basis of the documents adduced during the enquiry proceedings it has been observed that there was difference in the questioned signatures.

Difference being slight or major, the fact is that difference in signature was noticeable, which was ignored by the petitioner at the time of checking of the voucher. The entire allegations contrary to the facts stated above are vehemently denied."

48. The stand of the authority is that difference between two signatures slight or major would not weigh much if difference is apparent to naked eyes. In my view once the presenting officer of Corporation himself noticed flow and style of this signatures to be same before enquiry officer and finding has been returned accordingly, the disciplinary authority could not have deferred merely because it appeared to him so without calling for an expert opinion. Even if the authority had its conviction, it must have penned down the difference in the backdrop of the fact that two signatures were with the gap of 21 years and there was no complaint by the insured. Thus vide paragraph 23, this has been reiterated in rejoinder affidavit as under:

"That the contents of paragraph 45 of the counter affidavit are wholly wrong and are denied and the contents of paragraph 51 of the writ petition are reiterated and reaffirmed. The signature of Jagdip Kumar Anand was strikingly similar. The flow and style of signature was the same to the naked eyes. The difference, if any, was due to a gap of 21 years and all these aspects were considered by the enquiry officer who has held the charge no. 1 (b) as not proved."

49. Regarding other charges, I find that the appellate authority has concurred with the findings of the disciplinary authority, holding petitioner to be guilty of negligence in discharge of his official duty but failed to give one independent reason to

justify such a reasoning despite good grounds taken by the appellant-petitioner to assail the findings of disciplinary authority.

50. Regarding payment made in respect of Mr. Agarwal of the maturity claim, the appellate authority could also not disclose as to where the discharge voucher and policy bond alleged to have been received on 16.6.2006, had gone. This would have been the only statement of fact without there being any evidence on record that such a bond was received on 16.06.2006 subsequent to the disbursement of the maturity claim. Besides above, the appellate authority has also not discussed anywhere as to why those two employees, namely, V.K.Pandey and Uday Narayan Singh Chauhan who were employees of the Corporation and their identity was known, were not enquired by the Corporation for receiving cheques and no enquiry was held against them.

51. In view of above, therefore, I find that the orders passed by the appellate authority as well disciplinary authority cannot be sustained in law. As far as enquiry officer is concerned, though, I am not satisfied with the findings returned by the enquiry officer that, had the original policy bond been filed, there would have been no occasion to file indemnity bond as this by itself would not be sufficient enough to question the disbursement of maturity claim. It was never an issue as far as charge nos. 1 and 2 are concerned that payment was made without there being original policy bond. The payment was made on indemnity bond because original policy bond was not presented and charge was only that surety and indemnity bond was not properly executed as the agents were from a different branch. Since the Corporation failed to place any rule or

provision under manual either before enquiry officer or even before this Court, which would have disclosed an act of fraud in execution of surety and indemnity bond and resultant discharge voucher to be illegal, I hold that that there was no finding of the enquiry officer that indemnity bond and surety were not properly executed. There is a finding in favour of the petitioner and not against the petitioner in enquiry report. In such circumstances, therefore, the disciplinary authority was required to record a cogent and convincing finding to bring the charge home. Now, in this case, I find therefore, that the charges could not be established by the Corporation and findings returned by the appellate authority as well disciplinary authority are perverse for want of substantive piece of evidence. In the counter affidavit, nothing has been disclosed additionally in support of the findings returned so as to compel this Court to remand the matter. The most relevant paragraph of the counter affidavit is paragraph no. 44 that runs as under:

“ That the contents of paragraph no. 49 and 50 of the writ petition are vehemently denied. It is further stated that the charge I was levelled against the petitioner that without proper verification and identification he allowed and approved the Surety Form 3807 and Indemnity Bond filled in the name of Shrie Jagdip Kumar Anad for payment of Maturity Claim under Policy No. 058472150. While allowing and approving the Surety Form No. 3807 and Indemnity Bond petitioner had veerified the witness who did not belong to the Branch concerned. He should have been vigilant and raised doubt. The contentions raised by him do not alter the fact that based on his approval the maturity claim was passed and fraudulently encashed by person other than the policy holder.

Further as per the documents adduced during the enquiry proceeding P-15 (Guidelines for Maturity Claim payment in case of lost Policy) Indemnity bond was also not executed by Surety. The entire allegations contrary to the facts stated above are vehemently denied.”

52. This paragraph has been sworn on the basis of perusal of record but no record has been annexed. Upon repeated query being made, learned Senior Advocate appearing for the Corporation could not place any rule/regulation or manual for executing indemnity/surety bonds, in support of the allegations made. In so far as allegations regarding fact of Policy not being placed, in my considered view when this was not the charge, this aspect was not open to be enquired into. Even otherwise, the Corporation failed to make out a case that even while original policy bond was available, there was no need to furnish surety bond and indemnity bond. So even this ground was not available to the disciplinary authority. There was no such charge that persons executing surety and indemnity bond were fraudulent persons. A very correct reply has been submitted in the rejoinder affidavit vide paragraph 25 that runs as under:

“25- That the contents of paragraph 47 of the counter affidavit are wholly wrong and are denied and the contents of paragraph 53 of the writ petition are reiterated and reaffirmed. The verification and identification was proper and there was nothing wrong in it. Further, when the original policy bond was itself submitted on 6.3.2006, there was no necessity of submitting the Surety Form and Indemnity Bond. After due process of the maturity claim the cheque was prepared and subsequently if cheque is fraudulently

encashed the petitioner cannot be punished by searching fault in the approval of Surety Form and Indemnity Bond.”

53. Thus the case in hand is one such case where I find that the enquiry officer having found no evidence to support the charges exonerated the petitioner from all the charges except one charge being no. 1-A. Even though, this charge was also not proved by evidence but the enquiry officer expressed his view, had original insurance policy been there, indemnity and surety bonds would not have been required. This in my view there is no finding to bring home the charge as even a man of ordinary prudence would not come to conclude that charge no. 1-A stood proved upon the available evidence. Regarding other charge, if the disciplinary authority was taking the view contrary to the findings of enquiry officer, it was required to appreciate the same evidence as substantial piece of evidence but there has been no appreciation worth calling it as such. I have discussed the findings in detail for not appreciate or re-appreciate but to find out as to whether there was any evidence to support findings or legal provision in support of the charge as to witnesses to indemnity/surety bonds were required to belong to same branch that had issued the Insurance Policy and I found there to none. Under the circumstances findings if sustained would only lead to miscarriage of justice.

54. Constraints and self discipline in exercise of power of the High Court under Article 226 of the Constitution are sine qua non as principle to be followed when it comes to judicial review of an administrative or executive action. One must remember that judicial review is a legal process through which the Courts examine the action or decision to ensure

that they are lawful and constitutional. This process allows judiciary to assess the legality of actions taken by the Government and its instrumentalities and determine if they complied with constitution or other laws. So judicial review is a fundamental principle that provides a system of cheques and balances. It enables judiciary to safeguard individual rights uphold the rule of law and prevent abuse of power by execute/government or its instrumentalities. When a person or organization challenges an action through judicial review, to be specific under Article 226 of the Constitution, the Court is under obligation to evaluate whether action is consistent with law and constitution. If the Court finds that action is unconstitutional or unlawful, it may declare action null and void or may pass appropriate order to rectify situation.

55. It is true that power of judicial is not akin to the power of appeal and in exercise of power High Court cannot appreciate evidence to arrive at its own findings to substitute findings of the enquiry officer in a disciplinary proceeding. The disciplinary authority is the sole judge of fact but in the event conclusion of finding by the disciplinary authority is barred as no evidence or conclusion of finding is such that a reasonable person would have reached, this Court may interfere with the conclusion or finding (**B.C.Chaturvedi v. Union of India and Others (1995) 6 SCC 749**).

56. Supreme Court in its recent judgment in the case of **Union of India and Others v. Subrata Nath (Special Leave to Appeal Nos. 3524- 25 of 2022 decided on 23.11.2022)** referred to the judgment of **Union of India v. H.C. Goel AIR 1964 SC 364**, wherein it was held that “*if conclusion drawn by the disciplinary authority is*

perverse or suffers from error on the face of record or barred as no evidence at all, a writ of certiorari will be issued.”

57. In view of above, I am not able to sustain the action of disciplinary authority. Accordingly, since I am not able to uphold the findings of disciplinary authority and consequential orders of punishment. The Court would have in ordinary circumstances remitted the matter to the stage of enquiry officers or at disciplinary authority as held by the Constitution bench that “*where after following the above procedure the Courts/Tribunals sets aside the order of punishment, the proper relief that should be granted is to direct reinstatement of the employee with liberty to the authority, management to proceed with the inquiry, by placing the employee under suspension and continuing the inquiry from the stage of furnishing him with the report. The question whether the employee would be entitled to the back-wages and other benefits from the date of his dismissal to the date of his reinstatement if ultimately ordered should invariably be left to be decided by the authority concerned according to law, after the culmination of the proceedings and depending on the final outcome* (**Managing Director, ECIL, Hyderabad and Others v. B.Karunakar and Others (1993) 4 SCC 727**),” but since petitioner has already retired from service so no useful purpose now would be served to remand the matter to be examined afresh.

58. In my considered view, there was no material available which would have established the charge, nor was there any complaint by ensured persons that claim had been got disbursed to a third party to their disadvantage and that they had been defrauded.

59. In view of above, writ petition succeeds and is allowed. The order passed

by the disciplinary authority as well as appellate authority dated 25th January, 2016 and 2nd August, 2016 are hereby quashed. The petitioner is held entitled to all consequential benefits treating him to in service in the same pay grade and pay scale in which he was at the time of passing of the order dated 25th January, 2016 and all consequential benefits in terms of pay fixation etc. and arrears of pay. Further the amount already recovered from the petitioner under the order dated 25th January, 2016 shall also be refunded to him.

(2023) 8 ILRA 365
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2023

BEFORE
THE HON'BLE ALOK MATHUR, J

Writ A No. 1000017 of 2012

Champi @ Sundar Lal **...Petitioner**
Versus
Addl. District Judge 9 Court Room No. 13
Lko. & Ors. **...Respondents**

Counsel for the Petitioner:

Brijesh Kumar Saxena, Ankit Srivastava,
 Shafiz Mirza

Counsel for the Respondents:

Sujata Srivastava, Appoli Srivastava,
 Deepika Srivastava, Mamta Singh, Prashant
 Jaiswal, Sujata Srivastava

**A. Civil Law - Indian Trusts Act, 1882 –
 Section – 73 - Private Trust Vs Public
 Charitable Trust – Determination**

Held: The nature of a trust is determined by the trust deed and tests laid down in *Radhakant Deb Vs Commissioner of Hindu Religious Endowments, Orissa, (1981) 2 SCC 226*. Where the trust deed retains control with the founder,

his family, or nominated trustees, excludes public management, and lacks provision for public contributions, it is a private trust. The respondent trust's deed vested control in the founder, his wife, and named trustees, with no public participation. An application under Section 73 of the Indian Trusts Act, 1882, for trustee appointment further confirmed its private nature. The courts below erroneously held it a public charitable trust based solely on its charitable hospital activities, rendering their findings perverse. [Paras 9-14, 19-27]

**B. Landlord and Tenant – Eviction –
 Jurisdiction under U.P. Urban Buildings
 (Regulation of Letting, Rent and Eviction)
 Act, 1972**

Held: As the respondent trust is a private trust, the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, applies. The ejectment suit filed before the Small Causes Court was not maintainable, as eviction proceedings should have been initiated under the Act before the prescribed authority. The courts below erred in assuming jurisdiction, and their orders were unsustainable. [Paras 5, 38, 40]

**C. Landlord and Tenant – House Tax
 Payment by Tenant – Adjustment Against
 Rent**

Held: Under Section 108(g) of the Transfer of Property Act, 1882, read with Sections 149 and 177 of the U.P. Municipalities Act, a tenant paying house tax, primarily the landlord's liability, may deduct it from rent if recoverable against the leased property. The petitioner paid Rs. 1500/- towards house tax demanded by Lucknow Nagar Nigam, exceeding the alleged rent arrears of Rs. 1260/-. The courts below wrongly held that this payment could not be adjusted, and the petitioner was not a defaulter. [Paras 4, 28-37]

Result: Writ petition allowed. Orders dated 09.02.2012 (Additional District Judge, Court Room No. 13, Lucknow in SCC Revision No. 39 of 2011) and 05.05.2011 (2nd Additional Judge, Small Causes, Lucknow in SCC Suit No. 222 of 2001) set aside. [Para 41]

Writ petition allowed.**Cases Referred:**

1. Radhakant Deb Vs Commissioner of Hindu Religious Endowments, Orissa, (1981) 2 SCC 226 [Paras 10, 22-27]
2. Kuldip Chand Vs Advocate General to Govt. of H.P., (2003) 5 SCC 46 [Para 11]
3. Deoki Nandan Vs Murlidhar, AIR 1957 SC 133 [Paras 21, 38]

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Sri Brijesh Kumar Saxena, learned counsel for the petitioner; Sri Prashant Jaiswal, learned Advocate for the opposite party nos. 2 and 3, and perused the record.

2. By means of the present writ petition the petitioner has assailed the order dated 05.05.2011 passed by the IIInd Addl. Judge, Small Causes Court, Lucknow, thereby decreeing the suit of ejectment filed by the respondents.

3. The facts in brief are that the petitioner was a tenant in respect of premises situated at 253/103 Nandan Mahal Road, Yahiaganj, Lucknow at the rent of Rs. 45.00 per month. The said premises are owned by Sriman Thakurji Maharaj Virajman Thakurdwara Lal Shanker Lala Dosar Vaish Trust. The petitioner did not pay rent from July 1999 to October 2001 amounting to Rs. 1260.00 and consequently notice in this regard was also given by the respondents on 24.09.2001, but despite the notice the rent was not paid and, hence, the said suit for ejectment was filed.

4. The petitioner put in appearance before the Trial Court. It was submitted that he had in fact deposited an amount of Rs.

1500.00 towards House Tax on the aforesaid property for the benefit of the landlord in pursuance to recovery notice issued by the Lucknow Nagar Nigam. It was further stated that as per Section 108(g) of the Transfer of Property Act the said amount, which was paid towards the House-Tax, could have been appropriated by the tenant towards the outstanding amount of rent and accordingly the entire rent was paid and, hence, he was not a defaulter.

5. Learned counsel for the petitioner has further submitted that the said suit itself was not maintainable before the Judge, Small Causes, in as much as the plaintiff/respondent is a Private Trust and according to the provisions of Uttar Pradesh Urban Building (Regulation of Letting Rent and Eviction) Act 1972 (hereinafter referred as 'Act no.13 of 1972'), Section 2(bb), the operation of the said Act does not bar any dispute pertaining to any building belonging to/vested in a Private Charitable Trust. The findings of both the courts below holding that the respondent is a of 'Public Charitable Trust' is perverse and contrary to record and therefore requires interference. It has been accordingly submitted that the proper remedy for the respondent was by filing an application for eviction under the Act no. 13 of 1972 before the prescribed authority, and the proceedings not having been initiated under the Act no. 13 of 1972 were without jurisdiction.

6. The Trial Court while deciding the said suit had framed seven issues. Amongst others, Issue Nos. 3 and 4 related to the nature of Trust and as to whether the provisions of the Act of 13 of 1972 would be applicable in the present case. It was considered that the said Trust was involved

in working for the benefit of poor children, providing education and scholarships to such students, providing for wedding of poor persons and other welfare related activities and it also does not take any donations from the State Government. It was further stated that the said Trust is running a Homeopathic Hospital and no money is charged from the patients, except Rs. 1/-, that is charged towards registration and accordingly the Court was of the considered view that the respondent was a Public Charitable Trust. Issue No. 5 was in relation to the amount paid by the petitioner towards House Tax, which was due on the respondents and the Trial Court was of the considered view that the payment of the said amount could not be appropriated towards the outstanding amount of rent and decided the issue in favour of the respondents.

7. The petitioner has confined his arguments to Issue Nos. 3, 4 and 5, which have been dealt with by the Trial Court.

8. Sri B.K. Saxena, Learned Advocate, has vehemently submitted that a perusal of the Trust Deed would indicate that the nature of the said Trust is a Private Trust, rather than a Public Trust.

9. A perusal of the Trust-Deed, which has been annexed alongwith the Short Counter Affidavit, and a Hindi Translation of the original Urdu Version, indicates that the creator of the Trust was one Shankar Lal S/o Narayan Das, who had created the said Trust, with the following objects-

(1) Shankar Lal would continue to be absolute owner and in control of the entire Trust and its properties.

(2) After his death, the entire properties of Trust would vest in his wife,

who will own the same on the same terms and conditions, as the original Trustee.

(3) Instructions were given to the wife that whatever amount is received, she should spend first on herself. Whatever money is left, the Thakurdwara will be maintained, and if anything is left thereafter, the same would be deposited in the name of Thakurdwara;

(4) It was indicated that after his death, it will be duty of his wife to maintain Thakurdwara for its development,;

(5) His wife would be entitled to run the trust according to her wishes. She can use a part of the rental income for daan-punya, i.e. charity, and nobody will have any objection;

(6) After his death, his cremation shall be carried out from the income earned from Thakurdwara;

(7) After the death of his wife, the entire property shall be owned and possessed by Thakur Ji Maharaj and he gave instructions to the Trustees from No. 3 to 7 to look after the properties in the manner he wished and keep the account of income and expenditure; and

(8) It was also provided that in case his wife, after his death, does not implement the terms of this Trust-Deed, then in that condition the Trustees No. 3 to 7 shall be entitled to keep possession, use income for purposes indicated by him, i.e., in case his wife do not implement the terms of this Trust Deed, which he has provided and does not agree with his wishes, then Trustees No. 3 to 7 shall be entitled to take-over the control.

10. It was submitted that a bare perusal of the Trust-Deed would indicate that the intention of Creator of the Trust was to create the same for benefit of Thakur Ji Maharaj Virajman and during his lifetime he was to retain the entire control

of the said Trust. After his death, his wife would have the similar control and after her death he had nominated certain persons, who were to have full control over the said Trust. In case any of the Trustees dies, then the other Trustees would have a right to nominate a Trustee in his place. It was urged that in the aforesaid circumstances the Trust-Deed would be determinative of the fact that the said Trust was a Private Trust, rather than a Public Trust. In support of his contentions, he relied upon a judgment of the Supreme Court in the case of *Radhakant Deb & anr. v. The Commissioner of Hindu Religious Endowments, Orissa*, (1981) 2 SCC 226. He submitted that guidelines have been framed by the Supreme Court in para-14 of the said judgment, from which it would be determined as to whether any Trust would be classified as a Public Trust or a Private Trust.

11. It was further submitted that Clauses 2 & 3 of paragraph-14 of the aforesaid judgment are applicable in the facts of the present case. It was stated that neither the Management vests with a large body of persons and the Founder and Trustees retained control over the Management and, therefore, as held by the Supreme Court, the aforesaid facts would be conclusive proof to show that the endowment was of a private nature. He further argued that to answer the question as to whether the said Trust would be a Public Trust or a Private Trust, it has to be demonstrated that the Founder has totally ceased control over the said Trust, and only then such a Trust can be called a Public Trust. He further relied upon the judgment of the Supreme Court in the case of *Kuldip Chand & anr. v. Advocate General to Govt. of H.P. & ors.*, (2003) 5 SCC 46, relevant

paragraphs 37 and 38 of which read as under-

“37. From the materials brought on record by the parties, as noticed hereinbefore, the following facts emerge: (1) That the shops were let out to other people. (2) People could come and stay in the Dharamshala but for stay of more than three days, only upon seeking permission therefor. (3) Rent received from the shops was being used by the owners for their own purpose. (4) The Dharamshala was being managed/maintained from the personal funds of the owner. (5) The management and control of the Dharamshala was all along with the owners. (6) A school was opened in the Dharamshala. (7) A chowkidar was appointed by Ranzor Singh to look after the Dharamshala and his salary used to be paid by the owner from his own pocket. (8) The Dharamshala could be used for marriage purpose but only with the permission of the owners. (9) The first-floor rooms could be used only by the officers or by others with the permission of the owner. (10) The Dharamshala was ordinarily being used by the pilgrims only during fair. (11) The public never contributed anything for maintenance of the Dharamshala. (12) No member of the public had any say as regards management of the Dharamshala and had no legal right to use the same. (13) No member of public the ever participated in the management of the Dharamshala. (14) No manager had ever been appointed to look after and manage the property. (15) The Dharamshala was not registered under the Sarais Act. (16) There is no evidence to show that the owners acted as shebaites or trustees.

38. A dedication for public purposes and for the benefit of the general

public would involve complete cessation of ownership on the part of the founder and vesting of the property for the religious object. In absence of a formal and express endowment, the character of the dedication may have to be determined on the basis of the history of the institution and the conduct of the founder and his heirs. Such dedication may either be complete or partial. A right of easement in favour of a community or a part of the community would not constitute such dedication where the owner retained the property for himself. It may be that right of the owner of the property is qualified by public right of user but such right in the instant case, as noticed hereinbefore, is not wholly unrestricted. Apart from the fact that the public in general and/or any particular community did not have any right of participation in the management of the property nor for the maintenance thereof any contribution was made is a matter of much significance. A dedication, it may bear repetition to state, would mean complete relinquishment of his right of ownership and proprietary. A benevolent act on the part of a ruler of the State for the benefit of the general public may or may not amount to dedication for charitable purpose.”

12. It is in the aforesaid circumstances that the learned counsel for the petitioner has vehemently submitted that a perusal of the Trust-Deed indicates that the said Trust was of a Private Nature as the Creator of the said Trust had retained control with themselves at all stages and subsequently, the trustees were mere successors of the Original Trustee and, hence, there is no doubt that the said Trust Deed pertain to a Private Trust.

13. The nature of the Trust being a Private Trust is also demonstrated by the

fact that for the appointment of the Trustee Hori Lal, an application was made by the respondent-Trust invoking the provisions of Section 73 of the Indian Trust Act 1882. He stated that had the respondent been a Public Trust, they would have filed an application under Section 92 of the Code of Civil Procedure (C.P.C.) and the aforesaid application could have been filed by the Advocate General, or two or more persons having interest in the Trust, having obtained the leave of the Court. He submits that the Indian Trust Act applies only to private trust and an application for appointment of a trustee was moved under Section 73 of the Indian Trust Act which clearly shows that the respondent themselves have held themselves to be a private trust and cannot be permitted to resile from the said stand. The said application was filed by the Trustees seeking to fillup the vacancy arising amongst themselves and the present application was filed by one Gaya Prasad Gupta, one of the Trustees of the Trust. He submits that the respondents have all along considered themselves to be a Private Trust and, accordingly, had invoked the provisions of Section 73 of the Trust Act for appointment of a Trustees.

14. It was further submitted that though a perusal of the said Trust-Deed may indicate to be a Private Trust, but now the Trust is being run by the Trustees, who are involved in Public related activities and, hence, now the said Trust can be said to be a Public Trust rather than a Private Trust.

15. The writ petition has been opposed by Mr. Jaiswal, learned Counsel appearing for the respondents. He has submitted that the respondent Trust is a Public Trust and is working for the welfare of the Public at large. He has submitted that

the Trust is running a Hospital and no money is charged from the patients and the Trial Court has adequately considered the material before it and correctly come to the conclusion that the Trust is a Public Trust. He further submitted that the nature of the respondent cannot be considered in such proceedings. Lastly with regard to the question as to whether the petitioner had paid rent, when they deposited outstanding amount of dues towards the house-tax recovery by Lucknow Nagar Nigam, he submitted that the payment of the said amount cannot be appropriated towards the rent. He submitted that it was the duty of the landlord to pay the House Tax and if the tenant has voluntarily paid the said amount, the same cannot be adjusted towards his rent, and prayed for dismissal of writ petition.

16. In this writ petition, the first important question that falls for consideration is whether the respondent is a private charitable trust as alleged by the petitioner or a Public Trust as alleged by the respondents.

17. In pith and substance, the argument of the learned counsel for the respondent is that the Trust in question is maintained by the trust money which put therein "Thakur ji Maharaj Virajman" and that money is used to maintain "Hospital" which is meant for public. Only Rs.1/- is charged from the patients towards registration and it is actively working for the welfare of general public and, hence, the said trust would qualify as "Public Charitable Trust".

18. Needless to mention that concept of a private endowment or a private trust is unknown to English law where all trusts are public trusts of a purely charitable and

religious nature but in India, the Trusts are divided into private Trust or Public Trust, as observed by Dr. Mukherjee in his Tagore Law Lectures on the Hindu Law of Religious and Charitable Trusts (1952 Edition) p.12 that-

"The question as to whether the religious endowment is of a private nature or of a public nature has to be decided with reference to the facts proved in each case and it is difficult to lay down any test or tests which may be of universal application. It is manifest that where the endowment is lost in antiquity or shrouded in mystery, there being no document or revenue entry to prove its origin, the task of the court becomes difficult and it has to rely merely on circumstantial evidence regarding the nature of the user of the temple.

19. Accordingly, the essential distinction between a private and a public endowment is that whereas in the former, the beneficiaries are specified individuals, in the latter, they are the general public or class of unascertained people. This being the essential distinction between the nature of a public or a private endowment, it follows that one of the crucial tests to determine the nature of the endowment would be to find out if the management of the property dedicated is in the hands of the strangers or members of the public or in the hands of the founders or their descendants.

20. After all, an idol is a juristic person capable of holding property and the property dedicated to the temple vests in the deity. If the main worshippers are the members of the public who worship as a matter of right then the real purpose is to confer benefit on God. Some of the circumstances from which a public endowment can be inferred may be whether

an endowment is made by a person who has no issue and who after installing the deity entrusts the management to members of the public or strangers which is a clear proof of the intention to dedicate the temple to public and not to the members of the family. Where, however, it is proved that the intention of the testator or the founder was to dedicate the temple merely for the benefit of the members of the family or their descendants, the endowment would be of a private nature.

21. The mere fact that members of the public are allowed to worship by itself would not make an endowment public unless it is proved that the members of the public had a right to worship in the temple. In **Deoki Nandan vs. Murlidhar, AIR 1957 SC 133**, Hon'ble Apex Court observed as follow:

"The distinction between a private and a public trust is that whereas in the former the beneficiaries are specific individuals, in the latter they are the general public or a class thereof. While in the former the beneficiaries are persons who are ascertained or capable of being ascertained, in the latter they constitute a body which is incapable of ascertainment."

22. The counsel for petitioner relied on the judgment of the Hon'ble Supreme Court in the case of **Radhakant Deb & anr (Supra)** where the test has been laid down as providing sufficient guidelines to determine on the facts of case whether an endowment is of a private or of a public nature. The test can be summarized in the context of present case.

The guidelines framed in the said judgment in para-14 are quoted hereunder:

"(1) Where the origin of endowment cannot be ascertained, the question whether the user of the temple by members of the public is as of right.

(2) The fact that the control and management vests either in a large body of persons or in the members of the public and the founder does not retain any control over the management. Allied to this may be a circumstance where the evidence shows that there is provision for scheme to be framed by associating the members of the public at large.

(3) Where, however, a document is available to prove the nature and origin of the endowment and the recitals of the document show that the control and management of the temple is retained with the founder or his descendants, and that extensive properties are dedicated for the purpose of the maintenance of the temple belonging to the founder himself, this will be a conclusive proof to show that the endowment was of a private nature.

(4) Where the evidence shows that the founder of the endowment did not make any stipulation for offerings or contributions to be made by members of the public to the temple, this would be an important intrinsic circumstance to indicate the private nature of the endowment."

23. In the first test in order to determine the nature of the trust, it is to be ascertained as to whether the user of the temple by members of public is as of rights. The Trust deed by which the trust in question came into existence nowhere provides that user of temple by the members of the public will be as of right. Even otherwise the public has no say in the user of temple in question as of right.

24. In the second test, it has to be ascertained as to whether the control and

management vests in large body of persons are members of the public or the founder did not retain any control over the management. A perusal of the Trust deed would show that the control and management was retained by the founder in himself and his own family and subsequently the named trustees. Thus in view of the second test the trust in question is only a private trust.

25. The third test as laid down is to see from the document, the nature and origin of the trust and if the control and management of the temple is retained with the founder and his descendants, and that extensive properties are dedicated for the maintenance of the temple belonging to the founder himself. It will be a conclusive proof to determine that the trust is a private trust. In the present case, a perusal of the Trust deed shows that the control and management of the temple was retained by the founder in himself and after his death his wife and subsequently with the named trustees.

26. The fourth test is where the founder of the trust did not make any stipulation for contribution to be made by members of the public. It will be an important circumstance to indicate the private nature of the trust. A perusal of the trust deed by means of which the trust in question came into existence reflects that no stipulation for offering or contributions to be made by the members of the public was made by the founder in the deed.

27. Thus on examining the nature of the trust by applying the aforementioned tests it would be crystal clear that the trust in question is a private trust. As per the trust deed the control of the trust at all times vested initially with the creator / founder of the trust,

and subsequent to his death his wife and thereafter the trustees. The management of the trust accordingly vested with the founder and subsequently with the trustees. No member of the public could be associated or appointed as a trustee, and coupled with the fact that the members of the trust have all along been running the same is a private trust, due to which for appointment of the trustees they had approached the court of District Judge under Section 73 of the Indian Trust Act and of themselves treated to be a private trust and accordingly this Court is of the considered view that due to the aforesaid reasons the trust would fulfill all the qualifications to be recognized as a private trust. Both the courts below have failed to examine the nature of the trust in light of the law propounded by Hon'ble Supreme Court and, therefore, have not dealt with the said issue correctly and merely on the basis that the said trust was running a charitable hospital, have held the trust to be a public trust. As discussed above elaborately, the said finding is perverse and is accordingly set aside.

28. The other question with which we are concerned in this writ petition is whether the defendant appellant was entitled to claim deduction of the amounts paid by him to the Municipal Board in pursuance of the demands made by the Municipal Board upon the defendant for taxes. The Courts below took the view that the defendant appellant was not entitled to deduct those amounts with the result that the plaintiffs' suit for possession by ejectment of the defendant stands decreed on the finding that the defendant appellant had failed to comply with the notice of demand served upon him by the plaintiff.

29. Learned counsel for the appellant has urged that according to the findings

recorded by the court below, the defendant-appellant's claim that he was entitled to deduct the amounts paid by him to the Municipal Board was not liable to be adjusted towards the outstanding amount of rent, but the court below erred in taking the contrary view.

30. There is no controversy that the defendant-appellant is a tenant of a portion only of a large building. The finding of the court below is that a total sum of Rs. 1500/- was paid by the defendant-appellant to the Municipal Board and that the receipt as proof of payment made by the appellant to the Municipal Board pursuant to the notices of demand. It is also clear from the findings that the Municipal Board had served upon the appellant demands for payment of taxes in relation to the portion of which the appellant was a tenant.

31. Learned counsel has founded his contention in trial the appellant/defendant was entitled to deduct the amounts covered by the receipts from the rent due from him to the plaintiff-respondents as per provisions of clause (g) of Section 108 of the Transfer of Property Act, read with the provision contained in Section 177 of the U.P. Municipalities Act. Section 108 of the Transfer of Property Act is in two parts viz. rights and liabilities of the lessor, and rights and liabilities of the lessee. Clause (g) falls within the latter portion embodying the rights and liabilities of the lessee, and runs as follows:--

"If the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest

from the rent, or otherwise recover it from the lessor."

Section 177 of the U.P. Municipalities Act runs as follows:--

"All sums due on account of a tax imposed on the annual value of building or lands or of both shall, subject to the prior payment of the land revenue (if any) due to Government thereupon be a first charge upon such building or lands."

32. Learned counsel for the petitioner has urged that, under the provision contained in Section 177 of the U. P. Municipalities Act, the Municipal Board has been invested with the authority to treat arrears of taxes as constituting a charge upon the entire property, including the portion which was in the possession of the defendant-appellant as a tenant, with the result that those arrears of taxes were recoverable against the property in the possession of the defendant-appellant as a lessee, as contemplated by Clause (g) of Section 108 of the Transfer of Property Act. His contention is, that in these circumstances, the defendant-appellant having made the payment himself, was entitled to deduct the same from the rent.

33. Learned counsel for the petitioner has also relied upon the provision contained in Section 149 of the U.P. Municipalities Act whereunder an occupier who makes payment of tax for which the lessor is primarily liable, is entitled, in the absence of any contract to the contrary, to be reimbursed by the lessor who, according to the provisions contained in Section 149 aforesaid, is the person primarily liable to pay the taxes. I have heard learned counsel for the parties. In my opinion the contention of the learned counsel for the appellant is sustainable on both the grounds.

34. The provisions contained in Section 177 of the U. P. Municipalities Act make it clear that the powers with which the Municipal Board is invested for the purpose of recovering Municipal dues includes the power to sell the property in respect of which taxes may be due, and for that purpose the tax due constitutes a first charge upon the building. It is, therefore, clear that the Municipal Board could, if it so liked, recover the tax due by sale of the property which included the property in the possession of the defendant-appellant. That being so, and there being no controversy that the lessor had neglected to make payment of the total amount of Rs. 1500/- paid by the petitioner to the Municipal Board, that amount was recoverable against the property in the possession of the defendant-appellant. The defendant-appellant was, therefore, entitled to make the payments himself and deduct the same from the rent, in exercise of his rights under Clause (g) of Section 108 of the Transfer of Property Act.

35. Section 149 of the U. P. Municipalities Act runs as follows :--

(1) Except when otherwise provided by rule, every tax other than a scavenging tax or tax for the cleansing of latrines and privies on the annual value of buildings or lands or of both shall be leviable primarily from the actual occupier of the property upon which the said taxes are assessed, if he is the owner of the buildings or lands or holds them on a building or other lease from the Government or from the board, or on a building lease from any person.

(2) In any other case the tax shall be primarily leviable as follows, namely:--

(a) if the property is let, from the lessor;

(b) if the property is sub-let, from the superior lessor

(c) if the property is unlet, from the person in whom the right to let the same vests.

(3) On failure to recover any sum due on account of such tax from the person primarily liable, the board may recover from the occupier of any part of the buildings or lands in respect of which it is due that portion thereof which bears to the whole amount due the same ratio as the rent annually payable by such occupier bears to the aggregate amount of rent payable in respect of the whole of the said buildings or lands, or to the aggregate amount of the letting value thereof in the authenticated assessment list (4) An occupier who makes any payment for which he is not primarily liable under the foregoing provisions shall in the absence of any contract to the contrary, be entitled to be reimbursed by the person primarily liable."

36. There is no controversy that the taxes demanded did not include scavenging tax or tax for the cleansing of latrines and privies. From the above provision it is clear that, so far as the personal liability of the petitioner was concerned, it was confined, under Clause (3) of Section 149, to the proportionate amount of tax due in respect only of the portion which was in the occupation of the petitioner as a tenant. Under Clause (4), however, the right of reimbursement embodied therein is not confined to the extent of the personal liability of the occupier, but extends to any payment made by him so long as it is payment of an amount for which the plaintiff respondents were primarily liable. The substance of a right to be reimbursed a sum of money implies, to my mind, a right to deduct that sum from monies which the

person entitled to reimbursement may owe to the person liable to reimburse. The view that the expression 'any payment' in Clause (4) should be interpreted to include payment of any tax for which the lessor was primarily liable, even though under Clause (3) the Board may have been entitled to recover only part thereof from the occupier, seems also to be in accord with the rule of equitable construction, for, if it were held that the occupier is entitled to pay and be reimbursed only to the extent of the proportionate liability in respect of the portion in his occupation, it would lead to anomalies and hardship on the occupier. The Municipal Board may refuse to accept part payment and deprive the occupier of municipal amenities enjoyed by him in common with other occupiers.

37. Therefore, keeping in view the provisions of Section 149 of the Municipalities Act, the petitioner cannot be held to have defaulted in payment of any arrears of rent when the appellant has established that he had paid an amount of Rs.1500/- which exceeded Rs.1260/- in respect of which he was alleged to have defaulted had been paid by him to the Municipal Board under notices of demand served upon him in respect of taxes due against property including the portion of which he was the tenant.

38. The Hon'ble Apex Court has already observed in the case of *Deoki Nandan* (supra) that the mere fact that members of the public are allowed to worship by itself would not make an endowment as public. Thus, it appears that the present Trust is a Private Trust and the concurrent finding recorded by the lower courts are erroneous and liable to be interfered. Consequently, the trust in question is not exempted from and the

provisions of Sec 13 of Act, 1972 and the same are applicable to it.

39. Moreover, the petitioner himself has admitted that there is relationship of tenant and landlord between him and the opposite-party no.3. The petitioner is regularly paying the rent. Thus, there is undisputed relationship of the landlord and tenant between them.

40. In view of the above the concurrent findings of the courts below are erroneous and the provisions Section 13 of the Act of 1972 are applicable in the instant case. Hence, in this regard, the orders of the lower courts are hereby set aside.

41. In these circumstances, the writ petition is **allowed** and the impugned order dated 9.2.2012 passed by Additional District Judge, Court Room No.13, Lucknow in SCC Revision No.39 of 2011 as well as the judgment dated 5.5.2011 passed by 2nd Additional Judge, Small Causes, Lucknow in SCC Suit No.222 of 2001 are set aside.

(2023) 8 ILRA 375

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 07.08.2023

BEFORE

THE HON'BLE IRSHAD ALI, J

Writ A No. 2000700 of 2003

And

Writ A No. 2000699 of 2003

Reeta Gupta

...Petitioner

Versus

Astt. General Manager Personal Oriental Bank of Commerce

...Respondent

Counsel for the Petitioner:

Rajiv Srivastava, Smt. Nalini Jain

Counsel for the Respondent:

B.B. Saxena, Ghaus Beg, Vinay Shanker

Civil Law - Oriental Bank of Commerce - Regulation 4(i) - Articles 14, 16 & 21 -

Removal from service, Disciplinary Authority, Natural Justice, Non-speaking order, Appellate Authority, Proportionality of punishment.

Reta Gupta was appointed/promoted as Manager (MMG Scale-II) on 12.07.1995 by the Deputy General Manager, Oriental Bank of Commerce (OBC). On 25.09.2000, she received a letter from the Deputy General Manager, Lucknow, regarding a complaint by Shri Dushyant Singh alleging financial irregularities. The petitioner responded on 09.10.2000. The petitioner was appointed as an Officer (JMGS-I) by the Deputy General Manager, Lucknow, and confirmed on 15.04.1999. On 10.10.2000, she was issued a letter alleging irregularities during her posting at Gorakhnath, Gorakhpur, to which she admitted lapses and complied by depositing the amount as advised. In both cases, the Assistant General Manager (Personnel), Head Office, New Delhi, issued a show cause notice and a charge-sheet. The Assistant General Manager imposed a major penalty of "Removal from service which shall not be a disqualification for future employment" under Regulation 4(i) of the OBC (Discipline & Appeal) Regulations, 1982, in both cases, without providing reasons (non-speaking order).

- The Assistant General Manager lacked jurisdiction to impose the penalty, as only an authority not below the rank of the appointing authority (Deputy General Manager) could impose a major penalty like removal.
- The Disciplinary Authority's orders were non-speaking and failed to provide reasons for disagreeing with the Enquiry Officer's findings, violating natural justice.
- The Appellate Authority's orders were arbitrary, lacking reasoned analysis and

opportunity for the petitioner to rebut adverse findings.

- The penalty was disproportionate, and the process violated constitutional protections under Articles 14, 16, and 21.

Reliefs Granted:

- The orders of removal in both writ petitions were quashed.
- The court directed respondent no. 4 to treat the petitioner as continuing in service with all consequential benefits.

The orders dated 21.09.2002 passed by the Assistant General Manager (Personnel), imposing the penalty of "Removal from service which shall not be a disqualification for future employment" under Regulation 4(i) of the Oriental Bank of Commerce (Discipline & Appeal) Regulations, 1982, in both Writ-A No. 2000700 of 2003 and Writ-A No. 2000699 of 2003, were quashed as they were non-speaking orders and failed to provide reasons for disagreeing with the Enquiry Officer's findings, violating principles of natural justice.

The Disciplinary Authority, being lower in rank than the Appointing Authority (Deputy General Manager), lacked competence to impose a major penalty like removal from service, as per the analogy with Regulation 68(II) of the S.B.I. Officers Service Rules, rendering the orders void ab initio.

The Appellate Authority's orders dated 03/04.02.2003, dismissing the petitioner's appeals without reasoned findings or opportunity to rebut adverse observations, were held to be arbitrary and passed without application of mind.

The penalty of removal was found to be disproportionate and violative of Articles 14, 16, and 21 of the Constitution of India, as the petitioner was not placed under suspension despite alleged irregularities, and the Disciplinary Authority failed to adhere to procedural fairness.

The petitioner was entitled to be treated as continuing in service with all consequential benefits.

Case Law Discussed:

1. S.B.I. Vs S. Vijay Kumar (1990)
2. Sirsil Ltd. Vs Textile Committee (1989)
3. Krishna Kumar Vs Divisional Assistant, Electrical Engineer (1979)
4. P.N.B. Vs Kunj Behari Mishra (1998)
5. Dr. Har Kishan Singh Vs St. of Pun. (1971)
6. U.O.I.Vs J.A. Munaff (1967) –

Reliefs Granted:

Writs of certiorari issued quashing the orders of removal dated 21.09.2002 and appellate orders dated 03/04.02.2003.

Writ of mandamus issued directing respondent no. 4 to treat the petitioner as continuing in service with all consequential benefits.

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Shri Rajiv Srivastava, learned counsel for the petitioner and Shri Vinay Shankar, learned counsel for the respondent.

2. Since both the writ petitions involves similar controversy, they are being decided collectively by this common judgement and Writ-A No. 2000700 of 2003 is being treated as leading case.

3. By means of the present writ petition, the petitioner has prayed for the following reliefs:

(i) a writ of certiorari or a writ or direction in the nature of certiorari quashing the order of "Removal from

service which shall not be a disqualification for future employment", as contained in Letter No.H.O.:PER(DAD): 2291 (Annexure-1) passed by A.G.M. (Personal), Head Office, New Delhi, dated September 21, 2002.

(ii) Issue a writ of certiorari or a writ, order or direction in the nature of certiorari quashing the order of Appellate Authority opposite party no.3 as contained in letter no. H.O.:PER (DAD) 620 dated February 3/4 2003 (Annexure 2), upholding the punishment imposed by opposite party no.1 vide his letter dated 21/9/2002.

(iii) Issue a writ of mandamus or a writ, order or direction in the nature of mandamus commanding the opposite party no.4 to continue to treat the petitioner in service with consequential benefits treating the order passed by opposite party no.1 removing the petitioner from service vide (Annexure-1) and the order of the Appellate Authority, opposite party no.3 upholding vide letter H.O.: PER(DAD) 620, (Annexure-2) the order of removal against the petitioner passed by opposite party no.1 as void abinitio.

(iv) Issue a writ of mandamus or a writ, order or direction in the nature of mandamus commanding the opposite party no.5 to deem the mandatory statutory provision of consultation provided under Section 19 of the Banking companies (Acquisition and Transfer of undertakings) Act, 1980 as not having taken place to the extent there is no express provision as to an Officer (petitioner) not to be subjected to the imposition of a major penalty like removal from service by an authority lower in rank and grade than the appointing authority in regulation 3(g) of Oriental Bank of commerce Discipline & Appeal Regulations, 1982 as provided in 68 (II) of the State Bank of India Officers service regulation.

(v) *A writ of mandamus or a writ, order or direction in the nature of mandamus commanding the opposite party no.6 to deem the mandatory provision of previous sanction as not having been accorded in framing the Discipline & Appeal Regulations of Oriental Bank of Commerce to the extent regulation 3(g) of the said regulations does not expressly provide that a major penalty like removal from service imposed upon the petitioner cannot be inflicted by an officer not below the rank of appointing authority of the petitioner; as it is provided in regulation 68(II) of service regulation applicable to officers of State Bank of India.*

(vi) *Any other appropriate writ, order or direction which this Hon'ble Court may deem just and proper in the facts and circumstances of the case.*

(vii) *Allow the writ petition with costs in favour of the petitioner.*

4. By means of Writ-A No.2000699 of 2003, the petitioner has prayed for the following reliefs:

(i) *a writ of certiorari or a writ, order or direction in the nature of certiorari quashing the order of "Removal from service which shall not be a disqualification for future employment", as contained in Letter No.H.O.: PER (DAD): 2292 (Annexure-1) passed by A.G.M. (Personnel), Head Office, New Delhi, dated September 21, 2002.*

(ii) *Issue a writ of certiorari or a writ, order or direction in the nature of certiorari quashing the order of Appellate Authority opposite party no.3 as contained in letter no. H.O.: PER (DAD): 620 dated February 3/4, 2003 (Annexure-2) upholding the punishment imposed by opposite party no.1 vide his letter dated 21.9.2002.*

(iii) *Issue a writ of mandamus or a writ, order or direction in the nature of mandamus commanding the opposite party no.4 to continue to treat the petitioner in service with consequential benefits treating the order passed by opposite party no.1 removing the petitioner from service vide (Annexure-1) and the order of the Appellate Authority, opposite party no.3 upholding vide letter H.O.: PER(DAD) 620, Annexure-2 the order of removal against the petitioner passed by opposite party no.1 as void abinitio.*

(iv) *Issue a writ of mandamus or a writ, order or direction in the nature of mandamus commanding the opposite party no.5 to deem the mandatory statutory provision of consultation provided under Section 19 of the Banking Companies (Acquisition and Transfer of undertaking) Act, 1980 as not having taken place to the extent Regulation 3(g) does not expressly provide for imposing a major penalty like removal from service by an authority not lower in rank and graded than the Appointing Authority as it is provided in the proviso to Regulation 68(II) of State Bank of India, Officers Service Rules.*

(v) *A writ of mandamus or a writ, order or direction in the nature of mandamus commanding the opposite party no.6 to deem as if the previous sanction to the making of Oriental Bank of Commerce, Officer Employees Discipline and Appeal Regulations, 1982 has not been accorded to the extent Regulation 3(g) of the said Regulations does not expressly contain the provision to Regulation 68(II) of State Bank of India Officers Service Rules, which provides, "Where the Disciplinary Authority is lower in rank than the Appointing Authority in respect of the category of officers to which the petitioner belongs, no order for imposing any of the major penalties specified in clauses*

(e),(f),(g) and (h) of rule 67 shall be made except by the Appointing Authority or any authority higher than it on the recommendations of the Disciplinary Authority."

(vi) Any other appropriate writ, order or direction which this Hon'ble Court may deem just, and proper in the facts and circumstances of the case.

(vii) Allow the writ petition with costs in favour of the petitioner."

5. Facts of Writ-A No.2000700 of 2013 are that the petitioner was appointed/promoted on 12.7.1995 as Manager in MMG II by Deputy General Manager in terms of "Competent Authority" designed by the Board of Directors of the Bank for the purpose of an appointment of an officer in the rank and grade of the petitioner. On 25.9.2000, the petitioner was served upon a letter by Deputy General Manager, Lucknow with reference to a complaint made by one Shri Dushyant Singh alleging therein certain financial irregularities against the petitioner.

On 9.10.2000, the petitioner submitted her reply to the Deputy General Manager, Regional Office, Lucknow. On 27.1.2001, opposite party no.1- Assistant General Manager (Personnel), Head Office, New Delhi served a show cause notice upon the petitioner on the subject matter of the complaint already having been taken cognizance of by the Deputy General Manager, Regional Office, Lucknow.

On 27.6.2001, the petitioner was served upon a charge-sheet by opposite party no.1, Assistant General Manager (Personnel), Head Office, New Delhi to which the petitioner submitted her reply on 11.7.2001. On 8.8.2001, the opposite party no.1 instituted the enquiry against the petitioner. On 6.5.2002, the complainant

(Shri Dushyant Singh) confirmed having written to the petitioner his letter dated 25.1.2000 absolving her of any responsibility in respect of any of the accounts held in the name of his mother or in his own name jointly with his mother in Oriental Bank of Commerce as well as in banks mentioned in the aforesaid letter.

On 1.7.2002, the opposite party no.1, Assistant General Manager (Personnel), Head Office, New Delhi asked from the petitioner to make his representation to the report of the inquiry officer received by the petitioner enclosed with the letter of the opposite party no.1. On 23.7.2002, the petitioner submitted her representation with opposite party no.1 on the report of Inquiring Authority.

On 21.9.2002, opposite party no.1 imposed a major penalty of "Removal from service which shall not be a disqualification for future employment" on the petitioner in terms of Regulation 4(i) of the (Discipline and Appeal) Regulations, 1982 by a non-speaking order.

The opposite party no.1, at no point of time, neither when he served upon the petitioner the charge sheet nor when he imposed upon the petitioner the punishment of removal was the competent Disciplinary Authority in respect of the petitioner much less competent was he to impose the major penalty of removal from service.

In terms of schedule as providing for Disciplinary Authority in respect of the petitioner appended to the Discipline and Appeal Regulations, 1982 as amended upto 30.06.2002, Disciplinary Authority specified in the schedule which is competent to impose any of the penalties in Regulation 4 is Deputy General Manager, Regional Office, Lucknow. But, as on the date of imposition of the penalty by opposite party no.1 the amended schedule dated 8.2.2002 had come into force.

Again, Deputy General Manager, Regional Office, Lucknow is the authority specified in the schedule competent to impose any of the penalties upon the petitioner in terms of Regulation 4 as read with Regulation 5(3). Also Regulation 3(g) of Oriental Bank of Commerce Discipline and Appeal Regulations, 1982 is in *pari materia* with Regulation 68 of State Bank of India Officers Service Rules. Therefore, the protection of not being subjected to the infliction of a major penalty like removal from service by an authority lower than the Appointing Authority as available to Officers in State Bank of India is available to the petitioner also.

The order under challenge passed by opposite party no.1 of removal from service which shall not be disqualification for future employment and rejection of the appeal is violative of Articles 14, 16, 19 and 21 of the Constitution of India.

On 7.1.2003, the writ petition no.1/2003 (SB) filed by the petitioner against the order of removal from service was relegated to statutory Appellate Authority by this Hon'ble Court with the direction to the Appellate Authority to decide the appeal on merits and in accordance with law.

On 15.1.2003, the petitioner filed her comprehensive appeal to the Appellate Authority, opposite party no.3, General Manager (Personnel) Head Office, New Delhi which has been dismissed upholding the order of the Disciplinary Authority.

6. Facts in Writ-A No.2000699 of 2003 are that the petitioner was appointed/promoted as Officer in JMGS I by Deputy General Manager, Regional Lucknow. On 15.4.1999, the petitioner was confirmed as Officer in JMGS I by Deputy General Manager, Regional Lucknow with effect from 20.3.1999.

On 10.10.2000, the Deputy General Manager, Regional Lucknow, opposite party no.2 issued a letter No.ROL/I&C/4163 dated 10.10.2000 captioned "Irregularities committed by you during your posting at Gorakhnath, Gorakhpur" and advised the petitioner to deposit the amount fraudulently withdrawn by him.

On 23.10.2000, the petitioner's letter of compliance dated 23.10.2000 addressed to opposite party no.2, Deputy General Manager, Regional Lucknow admitting his lapses therein. The Deputy General Manager, Regional Lucknow, the competent Disciplinary Authority in terms of Regulation 3(g) of Oriental Bank of Commerce Discipline and Appeal Regulations, 1982 took his decision as to the alleged lapses and admission of guilt in respect of those lapses by advising to deposit the amount and to certify that no such lapses have been committed by the petitioner in any office he has worked at.

On 27.6.2001, the petitioner was served with a charge sheet by opposite party no.1, Assistant General (Personnel) Head Office, New Delhi. On 8.8.2001, the opposite party no.1, Assistant General Manager (Personnel), Head Office, New Delhi instituted the inquiry proceedings. On 1.7.2002, the opposite party no.1, Assistant General Manager (Personnel) Head Office, New Delhi asked from the petitioner to make his representation to the report of the inquiry officer received by the petitioner enclosed with the letter of the opposite party no.1.

On 23.7.2002, the petitioner submitted his representation with opposite party no.1 on the report of Inquiring Authority. On 21.9.2002, the opposite party no.1 imposed a major penalty of "Removal from service which shall not be a disqualification for future employment" on

the petitioner in terms of Regulation 4(i) of the (Discipline and Appeal) Regulations, 1982 by a non-speaking order.

The opposite party no.1, at no point of time, neither when he served upon the petitioner the charge-sheet nor when he imposed upon the petitioner the punishment of removal, was the competent Disciplinary Authority in respect of the petitioner, much less competent was he to impose the major penalty of removal from service.

7. Learned counsel for the petitioner submitted that the order dated 21.9.2002 passed by Assistant General Manager (Personnel), Head Office, New Delhi imposing a major penalty of "Removal from service which shall not be a disqualification for future employment", passed under Regulation 4(i) of Discipline and Appeal Regulations, 1982 is not an order supported by reasons and is thus not a speaking order. Against the finding of the Inquiring Authority in respect of charge no.1 as unauthorized and highly irregular act the opposite party no.1 has treated the petitioner as having fraudulently got credited the proceeds of Transfer Payment Order to her own account. To the extent the opposite party no.1 has differed with the finding of the Inquiring Authority, he is liable to afford an opportunity to the petitioner to explain her conduct in respect to charge no.1.

8. Learned counsel for the petitioner next submitted that the finding of the Inquiring Authority in respect of charge-2 is perverse inasmuch as the said finding is based on disregard of the evidence given in the proceedings in respect of the said charge. The charge has been proved in complete disregard and violation of the provision to Regulation 15 of the Discipline and Appeal Regulations, 1982.

The opposite party no.1 vide his order dated 21.9.2002 passed his order in respect of charge no.2 in spite of the proviso to Regulation 15 without assigning any reason. Thus, opposite party no.1 has passed a non-speaking order in respect of charge no.2 also.

9. Learned counsel for the petitioner next submitted that the Appellate Authority (opposite party no.3) has not passed a reasoned order and has summarily rejected the appeal filed by the petitioner in pursuance of the orders passed by this Hon'ble Court in Writ Petition No.1(SB) of 2003 in spite of the direction of this Hon'ble court to decide the appeal filed by the petitioner on merits, the opposite party no.3 has failed to do so.

10. Learned counsel for the petitioner next submitted that the order of the opposite party no.1 in imposing a major penalty of removal from service which shall not be a disqualification for future employment, in terms of Regulation 4(i) was wholly without jurisdiction as an Officer below the rank of a Deputy General Manager, in the Bank was never the competent Disciplinary Authority to impose the major penalty of removal from service which shall be a disqualification for future employment in terms of Regulation 4(i).

11. Learned counsel for the petitioner next submitted that the penalty of removal from service in terms of Regulation 4(i) imposed on the petitioner is disproportionately excessive as even after it was prima facie established that the petitioner could be responsible for an irregular act, she was not placed under suspension as contemplated under

Regulation 12(1) a by the competent Disciplinary Authority.

12. Learned counsel for the petitioner next submitted that the Discipline & Appeal Regulations framed for State Bank of India and Oriental Bank of Commerce by their respective Boards are in *Pari Materia*, the words “Competent to impose” occurring in the definition of Disciplinary Authority in terms of Regulation 3(g) of Discipline & Appeal regulations of Oriental Bank of Commerce has to be read with the proviso to Regulation 68(ii) of the State Bank of India Officers’ Service Rules.

13. Learned counsel for the petitioner next submitted that the definition of competent authority in terms of Regulation 3(g) does not merely provide for an authority specified in the schedule as the Disciplinary Authority. It also clearly mandates that the Disciplinary Authority has to have the competence to impose any of the penalties specified in Regulation 4 of the Discipline & Appeal Regulations. The competence to impose a major penalty like removal from service upon the petitioner is conferred only when such authority is not below the rank of the appointing authority as is the case applicable to the officers of State Bank of India.

14. Learned counsel for the petitioner next submitted that the petitioner has got the vested right to be judged in respect of the security of tenure in the service of the Bank which is an instrumentality of the State by an Authority/ Officer not below the rank of her Appointing Authority.

15. Learned counsel for the petitioner next submitted that the State Bank of India being a public sector bank as per Regulation 3(1)(iii) for the purpose of Discipline &

Appeal Regulations of Oriental Bank of Commerce, the words ‘competent to impose’ as given in the definition of Disciplinary Authority in terms of regulation 3(g) have to be construed so as not to render them redundant. By reading the proviso to Regulation 68 (II) of State Bank of India Officers Service Rules which provides that a major penalty can be imposed only by an authority not lower in rank and grade than the Appointing Authority in Regulation 3(g) of Oriental Bank of Commerce, the words ‘competent to impose’ can be given meaning and substance.

16. Learned counsel for the petitioner next submitted that the Discipline & Appeal Regulations in State Bank of India and Oriental Bank of Commerce have been framed in consultation with Reserve Bank of India and with previous sanction of Central Government, the protection of not, being subjected to the imposition of a major penalty applicable to Officers in State Bank of India in terms of the proviso to Regulation 68(II) of State Bank of India Officers Service Rules by an authority not lower in rank than the Appointing Authority has to be read in the definition of Disciplinary Authority provided in regulation 3(g) of Oriental Bank of Commerce Officer Employees (Discipline & Appeal) Regulation, 1982 in order to safeguard the rights of the petitioner as contained in Articles 14, 16, 19 and 21 of the Constitution of India.

17. Learned counsel for the petitioner next submitted that the punishment imposed upon the petitioner of removal from service is grossly unfair and disproportionate to the finding of the Inquiring Authority.

18. Learned counsel for the petitioner next submitted that the impugned order of

removal which shall not be a disqualification for future employment imposed upon the petitioner in terms of Regulation 4 (i) by opposite party no.1 is void abinitio and cannot be cured by rejection of her appeal vide order dated 3/4 February, 2003 of the Appellate Authority.

19. Learned counsel for the petitioner next submitted that the removal of the petitioner from the service of the Bank by an authority lower than her appointing authority is clearly violative of Article 14, 16 and 21 of the Constitution of India.

20. Learned counsel for the petitioner next submitted that the order of the Appellate Authority, opposite party no.3, contained in Annexure CA-9 to the counter affidavit filed on behalf of the opposite parties has been passed in complete disregard of the change in jurisdiction of the competent disciplinary authority in respect of the petitioner vide Circular No.PER/12/02/347 dated 8.2.2002 (page 95 of the writ petition), which rendered the impugned order passed by the opposite party no.1 wholly without jurisdiction thereby rendering the said impugned order void ab initio.

21. Learned counsel for the petitioner next submitted that the order of the Appellate Authority, opposite party no.3 contained in Annexure CA-9 to the counter affidavit filed on behalf of the opposite parties has been passed without any application of mind on the most material grounds taken in the appeal of the petitioner, thereby rendering the aforesaid order as patently illegal, being arbitrary and discriminatory.

22. In support of his submissions, learned counsel for the petitioner has

placed reliance upon the following judgments:

(i) State Bank of India v. S. Vijay Kumar, decided on 18.7.1990 passed in Civil Appeal Nos.3392-3394 of 1990

(ii) Sirsilk Ltd. v. Textile Committee and Ors. reported 1989 Supp (1) SCC 168

(iii) Kirshna Kumar v. Divisional Assistant, Electrical Engineer, Central Railway and others reported in (1979) 4 SCC 289

(iv) Punjab National Bank and others v. Kunj Behari Mishra reported in (1998) 7 SCC 84

(v) Dr. Har Kishan Singh v. State of Punjab and others, decided on 25.3.1971 passed in Civil Appeal No.430 of 1970

(vi) Union of India and others and J.A. Munaff, decided on 7.12.1967 passed in Civil Appeal No.995 of 1967

23. Per contra, Shri Vinay Shanker, learned counsel for the respondents submitted that the petitioner was promoted by the Interview committee and not by the Deputy General Manager as per provisions of Promotion Policy of the respondent Bank and promotion letter dated 17.7.1995 was issued by the Assistant General manager (Per.) Competent Authority for Scale-II officers is Regional Head/ Chief Manager. Thus, Scale-IV officer is appointing authority for Scale-II officers.

24. Learned counsel for the respondents next submitted that actually the petitioner was not appointed in MMGS-II instead she was appointed as Clerk/ Typist and her Appointing Authority for the said post is Assistant Regional Manager i.e. an officer in MMGS-III. She was promoted to

the post of Manager as per promotion policy of the respondent Bank.

25. Learned counsel for the respondent next submitted that at the relevant point of time, the Deputy General Manager, Regional Office, Lucknow was controlling the Lucknow Region administratively but the Disciplinary Authorities for all employees of the respondent-Bank were at Head Office and Assistant General Manager (Per.) was the Disciplinary Authority for the Officers in JMG Scale-I and MMG Scale-II. Since the petitioner was an officer in MMG Scale-II, the Asstt. General Manager (Per.) at Head Office was his Disciplinary Authority under OBC Officer employees (Discipline & Appeal) Regulations, 1982.

26. Learned counsel for the respondents next submitted that even in circular dated 8.2.2002, it is clarified that in the cases where Award Staff/ Officers in JMG Scale-I and MMG Scale-II have been placed under suspension/ charge-sheeted prior to 8.2.2002 the competent authority in all such cases will be the Head Office. Since the petitioner was charge sheeted on 27.6.2002 her Disciplinary Authority was the Assistant General manager (Per) at Head Office.

27. Learned counsel for the respondent next submitted that the Asstt. General Manager (Per.) was/ is the competent Disciplinary Authority for the petitioner and the same is as per schedule to the OBC Officer Employees (Discipline & Appeal) Regulations, 1982 at the relevant time. The schedule to the above said regulations amended upto 30.06.2002 was inserted vide circular dated 8.2.2002 whereas the petitioner was charge sheeted on 27.6.2001 and as per the schedule to the

said Regulations existing as on 27.06.2001, the opposite party no.1 Asstt. General Manager (Per.) was the competent Disciplinary Authority for the petitioner..

28. I have considered the submissions advanced by learned counsel for the parties and law-reports cited by learned counsel for the petitioner.

29. Perusal of the material on record reveals that the petitioner was appointed/ promoted on 12.7.1995 as Manager in MMG II by Deputy General Manager. On 25.9.2000, the petitioner was served upon a letter by the Deputy General Manager with reference to a complaint made by Shri Dushyant Singh alleging certain allegation, to which petitioner submitted reply on 9.10.2000. Respondent no.1 (Assistant General Manager (Personnel), Head Office, New Delhi served a show cause notice upon the petitioner on 27.1.2001 of the complaint already having been taken cognizance of by the Deputy General Manager, Regional Office, Lucknow.

It also reveals that on 27.6.2001, the petitioner chargesheeted by respondent no.1, to which the petitioner submitted her reply on 11.7.2001. On 8.8.2001, the respondent no.1 instituted enquiry against the petitioner. On 1.7.2002, respondent no.1 asked from the petitioner to make his representation to the report of the inquiry officer received by the petitioner, to which petitioner submitted her representation on 23.7.2002. On 21.9.2002, respondent no.1 imposed a major penalty of "Removal from service which shall not be a disqualification for future employment. Against which, the petitioner filed a writ petition bearing Writ Petition No.1/2003 (SB) which has been disposed of with the direction to the Appellate Authority to decide the appeal on

merits and in accordance with law. On 15.1.2003 the petitioner filed comprehensive appeal before respondent no.3 i.e. General Manager (Personnel) Head Office, New Delhi which has been dismissed while upholding the order of the Disciplinary Authority.

30. Learned counsel for the petitioner relied upon the several judgments in support of his submissions, relevant portions of which are being quoted below:

(i) State Bank of India (supra):-

20. *All the employees of the bank in the cases before us were appointed by the Executive Committee. Order of dismissal in their cases has been passed by the Chief General Manager. It is an admitted position that on the date of passing the order of dismissal the Chief General Manager was the appointing authority. According to the Bank though the employees were appointed by the Executive Committee, but at the time when inquiry was held and the order of dismissal passed, the Chief General Manager had become the appointing authority. On the other hand the contention on behalf of the employees is that the Executive Committee being the appointing authority, no authority lower than the Executive Committee can pass the order of dismissal in their cases. According to their contention the Chief General Manager, being a lower authority than the Executive Committee, he had no competence to pass the order of dismissal. Learned counsel for the employees in this regard referred to Article 311 of the Constitution of India and placed reliance on a plethora of cases decided on the basis of guarantee enshrined under Article 311 of the Constitution.*

22. *Now so far as the right which has been conferred on the employees of the*

State Bank contained in Regulation 55(2)(a) is that such officers or employees shall not be dismissed from service of the State Bank by an authority lower than the appointing authority. Thus a comparison of the provisions contained in Article 311(1) of the Constitution and the right guaranteed to the employees of the State Bank under Regulation 55(2)(a) shows that there is a material difference between the language used in the two provisions. Under Article 311(1) the words used are "by which he was appointed" In Regulation 55(2)(a) there are no such words "By which he was appointed" and in its place the only right guaranteed is that the employee shall not be dismissed by an authority lower than the appointing authority. Thus the right guaranteed in case of the officers or employees of the State Bank is that the order of dismissal cannot be passed by an authority lower than the appointing authority. A perusal of the relevant Regulations and Rules mentioned above clearly go to show that the Chief General Manager had become the appointing authority of the employees in question under Regulation 55(2)(a) with effect from 1.7.24. Admittedly the orders of dismissal have been passed long after these amendments when the Chief General Manager had already become their appointing authority under the Regulations and the Rules. The right that an officer or employee of the State Bank of India cannot be dismissed from service by an authority lower than the appointing authority is a creation of statutory rules and regulations. So far as the right or protection guaranteed under Article 311 of the Constitution is concerned, it applies to members of the Civil Service of the Union or an All India service or a Civil Service of the Union or an All India service or a Civil Service of a State of who holds a Civil Post under the Union or a State. Admittedly the employees

of the State Bank do not fall under any one of these categories and they cannot seek any protection under Article 311(1) of the Constitution. The employees of the State Bank can only claim such rights which have been conferred under Regulation 55(2)(a) of the General Regulations. The only right conferred under the said provision is that the officers or employees of the State Bank cannot be dismissed by an authority lower than the appointing authority. With the risk of repetition it may be stated that on the date when the order of dismissal has been passed, Chief General Manager had already become the appointing authority and as such the order of dismissal has not been passed by an authority lower than the appointing authority.

(ii) Sirsilk Ltd. (supra):-

28. *The Industries (Development and Regulation) Act, 1951 and the Textiles Committee Act*, with which we are concerned, may properly be considered to be statutes in *pari materia*. According to Sutherland:

“Statutes are considered to be in *pari materia* to pertain to the same subject-matter when they relate to the same person or things, or to the same class of persons or thing, or have the same purpose or object. (*Statutes and Statutory Construction*, Vol. 2, p. 535, 3rd Edn.)”

The object of either of these two Acts is to protect and to assist in the development of Textile Industry *inter alia*. “Assistance in ascertaining the meaning of an enactment may be obtained by comparing its language with that used in earlier statutes relating to the same subject” (*Craies on Statute Law*, p. 140, 1971 Edn.). Maxwell also in *The Interpretation of Statutes* (1976 Edn. p. 66) states that:

“light may be thrown on the meaning of a phrase in a statute by reference to a specific phrase in an earlier statute dealing with the same subject-matter.”

The Industries (Development and Regulation) Act, 1951 is an Act earlier in point of time and we see no reason why if a subsequent statute by the same legislature can be pressed in aid for the purpose of interpreting in the event of any doubt, the provisions of an earlier statute, the earlier statute cannot be made use of for the purpose of construing, in the event of ambiguity, the provisions of a later statute.

(iii) Krishna Kumar (supra):-

4. Article 311(1) of the Constitution provides that no person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed. The simple question for determination is whether, as alleged by the appellant, he was removed from service by an authority subordinate to that which had appointed him. The relevant facts are but these and these only: The appellant was appointed as a Train Lighting Inspector under an order issued by the Chief Electrical Engineer and was removed from service under an order passed by the Divisional Assistant Electrical Engineer, Central Railway, Nagpur. The narrow question, therefore, for consideration is whether the Divisional Assistant Electrical Engineer is subordinate in rank to the Chief Electrical Engineer. None of the affidavits filed by Shri Sarathy, who passed the order of removal says that the post of Divisional Assistant Electrical Engineer is equivalent to that of the Chief Electrical Engineer in the official hierarchy. That the former is not higher in rank than the latter

is self-evident. In the circumstances, it seems clear that the appellant was removed from service by an authority which is subordinate in rank to that by which he was appointed.

(iv) Punjab National Bank (supra) :-

18. Under Regulation 6, the enquiry proceedings can be conducted either by an enquiry officer or by the disciplinary authority itself. When the enquiry is conducted by the enquiry officer, his report is not final or conclusive and the disciplinary proceedings do not stand concluded. The disciplinary proceedings stand concluded with the decision of the disciplinary authority. It is the disciplinary authority which can impose the penalty and not the enquiry officer. Where the disciplinary authority itself holds an enquiry, an opportunity of hearing has to be granted by him. When the disciplinary authority differs with the view of the enquiry officer and proposes to come to a different conclusion, there is no reason as to why an opportunity of hearing should not be granted. It will be most unfair and iniquitous that where the charged officers succeed before the enquiry officer, they are deprived of representing to the disciplinary authority before that authority differs with the enquiry officer's report and, while recording a finding of guilt, imposes punishment on the officer. In our opinion, in any such situation, the charged officer must have an opportunity to represent before the disciplinary authority before final findings on the charges are recorded and punishment imposed. This is required to be done as a part of the first stage of enquiry as explained in Karunakar case [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704].

19. The result of the aforesaid discussion would be that the principles of natural justice have to be read into

Regulation 7(2). As a result thereof, whenever the disciplinary authority disagrees with the enquiry authority on any article of charge, then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings. The report of the enquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favourable conclusion of the enquiry officer. The principles of natural justice, as we have already observed, require the authority which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file a representation before the disciplinary authority records its findings on the charges framed against the officer.

(v) Dr. Harkishan Singh (supra):-

11. Rule 9(2) does not contain any restrictive word that only members of the service shall be eligible to promotion to a selection grade. The proviso to rule 9(2) contains a word of limitation and it is that no member of the service shall be entitled to such promotion. To exclude appointment to selection grade would be to rule 5 as well as rules 9(2) and 9(3) of their contents because rule 5 speaks of appointment to the service to be either by promotion or by direct recruitment. Rule 9(2) speaks of eligibility of members of the service for promotion to the selection grade and rule 9(3) speaks of number of appointments in the selection grade and rule 9(3) speaks of number of appointments in the selection grade not to exceed 25 per cent of appointments in the service; The service as defined in rule 2(c) means the Punjab Civil Medical Service Class I Selection grade in

the Punjab Civil Medical Service Class I. That is not disputed. Therefore, rule 5 which specifically speaks of appointment to the service by direct recruitment embraces Class I and the Selection grade which is a part and parcel of Class I. The word 'Appointment' in rule 9(3) in regard to selection grade as not exceeding 25 per cent of the total number of appointments in the service contemplates both promotion and direct appointment in that service contemplates both promotion and direct appointments in the service to the selection grade. The word 'appointment' cannot mean only promotion. It means appointment both by promotion and by direct recruitment; That is why the word 'appointment' is used in the sense once in relation to selection grade and again in relation to the total number of appointments to the service. Direct appointment to selection grade is not only contemplated in the rules particularly rules 5, 9(2) and 9(3) but is also the implicit idea inherent in the word direct recruitment and direct appointment' in Rule 5 for purpose of attracting able and meritorious persons to the service including the selection grade. The fallacy in the appellant's contention is that though selection grade will be within the definition of the service in rule 2(c) wherever the word 'service' occurs in rules 5 and 9 the construction put upon the word 'service' is members of the service who are in class I on time scale appointment and who alone can be promoted to the selection grade and that there cannot be any direct appointment to selection grade.

(vi) Union of India (supra):-

10. The situation here seems to be different. The expression 'Disciplinary Authority' has a two-fold meaning. For the purpose of imposing penalties of compulsory retirement, removal or

dismissal, it can only be the appointing authority, whereas in relation to the is sue of charge-sheets etc., under rules 1709 to 1712 and 1716 it can be any authority competent to impose any of the penalties specified in rule 1707. Rule 1707, as already noted, enumerates the various penalties which can be imposed on a railway servant including those mentioned above. Rule 1705 read with Schedule II (for the purpose of this case) shows that the Head of the Department is competent to impose some of the penalties on class IV artisans and class III staff. If, therefore, the charge-sheet issued to the respondent in this case was in conformity with rule 1705 read with Schedule II, there was nothing irregular in the enquiry and it was open to the appointing authority, namely, the General Manager, to impose on the respondent the penalty of dismissal from service. In the absence of all the available material, we find ourselves unable to accept the judgment of the High Court in this case. We therefore set aside the judgment appealed from and remand the matter to the High Court for consideration of the point canvassed before us afresh, if necessary by giving the parties opportunity of adducing evidence by affidavit as to whether the respondent belonged to class IV or class III staff or was an artisan and whether the charge-sheet was issued by the Head of the Department to which the respondent belongs.

31. On perusal of the above-extracted judgments, it is crystal clear that the right guaranteed in case of the officers or employees of the State Bank is that the order of dismissal cannot be passed by an authority lower than the appointing authority. Article 311 (1) of the Constitution provides that no person who is a member of a civil services of the Union

or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

It is also crystal clear that when the disciplinary authority disagrees with the findings of the inquiry Authority and is required to record its own reasons for such disagreement and also to record its own finding on such charges, it is required to give a hearing to the delinquent officer.

32. I have carefully examined the material on record in the light of the law-reports cited by learned counsel for the petitioner.

33. While passing the order dated 21.9.2002 imposing the major penalty of "Removal from Service which shall not be a disqualification for future employment", the respondent no.1 [Assistant General Manager (Personnel), Head Office, New Delhi] has differed with the finding of the Inquiry Officer with respect of charge no.1 that the petitioner has been found to have committed an unauthorized and highly irregular Act, and has recorded finding that the petitioner has been found guilty of committing a fraud. In the order, the Disciplinary Authority has not given any reason as to why he did not accept the finding of the enquiry officer. In this view of the matter, this Court is of the opinion that in case the Disciplinary Authority has disagreed with the finding of the enquiry officer, the Disciplinary Authority would have given opportunity to the petitioner to submit her representation as to why her act was not a fraud and only a irregularity, and to explain her conduct in respect to charge no.1 which has not been done.

34. In the order passed by the respondent no.3 i.e. Appellate Authority rejecting the appeal, the Appellate Authority without assigning any reason in regard to disagreement of the Disciplinary Authority with the finding of the enquiry officer, passed the order upholding the order of the Disciplinary Authority without application of mind. The Appellate Authority has also not given opportunity to the petitioner to rebut the adverse observations. In this view of the matter, this Court is of the opinion that the order has been passed by the Appellate Authority without any application of mind.

35. It has been well settled law that when the disciplinary authority disagrees with the finding of the enquiry authority, and is required to record its own reasons, for such disagreement and to record its own finding on such charge, it is required to give a hearing to the delinquent officer.

36. It may be remembered that the Enquiry Officer's report is not binding upon the Disciplinary Authority to come to its conclusion on the charges. It is not in the nature of an appeal from the inquiry officer to the Disciplinary Authority. It is one and the same proceedings. It is open to a disciplinary authority to hold the inquiry himself. It is equally open to him to appoint an inquiry officer to conduct the inquiry and place the entire record before him with or without his findings.

37. The Hon'ble Supreme Court as well as this Court in catena of judgments repeatedly observed that whenever the disciplinary authority disagrees with the enquiry authority on any article of charge then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to

the delinquent officer an opportunity to represent before it records its finding. The report of the inquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favourable conclusion of the inquiry officer. The principles of natural justice require the authority which has to take a final decision and can impose a penalty, to give an opportunity to the charged officer to file a representation before the disciplinary authority records its finding on the charges framed against the officer.

38. Considering in totalities of facts and circumstances of the case, both the writ petition are **allowed**. Order of “Removal from service which shall not be a disqualification for future employment”, as contained in Letter No.H.O.: PER(DAD): 22991 (Annexure-1) passed by A.G.M. (Personnel), Head Officer, New Delhi dated September 21, 2002 as well as order of the Appellate Authority (Opposite Party No.3) as contained in letter no.H.O.: PER(DAD) 620 dated February 3/4, 2003 (Annexure no.2) [both the orders have been challenged in Writ-A No.2000700 of 2003] and order of “Removal from service which shall not be a disqualification for future employment” as contained in Letter No.H.O.: PER (DAD): 2292 (Annexure-1) passed by the A.G.M. (Personnel), Head Office, New Delhi, dated September 21, 2002 as well as order of the Appellate Authority (Opposite Party no.3) contained in letter no. H.O.: PER(DAD) 620 dated February 3/4, 2003 (Annexure-2) [both the orders have been challenged in Writ-A No.2000699 of 2003] are hereby quashed. However, the respondent no.4 is directed to continue to treat the petitioner in service with all consequential benefits.

(2023) 8 ILRA 390
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.08.2023

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Writ B No. 613 of 2023

Mirza Rashid Beg & Ors. ...Petitioners
Versus
Board of Revenue, U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Pradeep Kumar Tiwari

Counsel for the Respondents:

C.S.C., Mohan Singh, Pankaj Kumar Pandey

Civil Law-U.P. Zamindari Abolition and Land Reforms Act, 1950-Section 331 - The Code of Civil Procedure-1908-Section 100

- Order 41 & 42- According to law settled as also mode and manner prescribed for deciding the appeal from appellate decree under Order 42 CPC, as applicable in St. of U.P., which says that Rules of Order 41 and 41-A shall apply, so far as may be, to appeals from appellate decree and accordingly the second appeal, if not dismissed in limine in terms of under Rule 11 of Order 41, should be decided after formulating/framing substantial question of law and thereafter fixing a day for hearing on the same, as would appear from a conjoint reading of Section 100, Rule 11 and 12 of Order 41 and Rule 2 of Order 42 CPC- Board of Revenue failed to follow the mandatory procedure prescribed for deciding a second appeal-Impugned Order quashed.

Petition allowed. (E-15)

List of Cases cited:

1. St. of Uttarakhand (previously St. of Uttar Pradesh) v. Mohan Singh & ors., (2012) 13 SCC 281

2. Surat Singh (dead) Vs Siri Bhagwan & ors. [2018 (141) RD 300]

3. Arulmighu Nellukadai Mariamman Tirukkcoil Vs Tamarasari (Dead) AIR 2019 SC 3027

4. Chandrabhan (Deceased) through LRs. & ors. Vs Saraswati & ors. AIR 2022 SC 4601

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Sri Pradeep Kumar Tiwari, learned counsel for the petitioners, Sri Hemant Kumar Pandey, learned State counsel appearing for the respondent Nos. 1 to 3 & 13, Sri Mohan Singh, Advocate, who has received notice on behalf of respondent No. 12/Gaon Sabha concerned and Sri Pankaj Kumar Pandey, Advocate, appearing for the respondent No. 4, who has also filed his Valakathnama on behalf of respondent Nos. 5 to 11 in the Court today, which is taken on record.

2. By means of this petition, the petitioners have assailed the order dated 15.05.2023 passed by the respondent No. 1/Board of Revenue, U.P., at Lucknow in Second Appeal registered as Case No. SA/205/2022/Ayodhya, Computerized Case No. R2022042300205 (Mirza Khalid Beg and others vs. Mirza Shahid Beg) filed by the private respondents Nos. 4 to 11 under Section 331 of U.P. Zamindari Abolition and Land Reforms Act, 1950 (in short "Act of 1950").

3. By order dated 15.05.2023, the second appeal has been allowed at the admission stage and the matter has been remanded back to the trial Court concerned for deciding the case afresh on merits after framing the relevant issues.

4. The brief facts of the case, which are required for disposal of this petition, are

to the effect that a suit for declaration of rights over certain plots/gatas was instituted by Khursida Begum registered as Case No. 68/192/22/44/61 (Khurshida Begum and others vs. Mirza Zulfikar Beg and others), which was dismissed vide order dated 05.09.2007 based on the plea related to Section 49 of U.P. Consolidation of Holdings Act, 1953 (in short "Act of 1953"), which creates bar *in* relation to suit filed subsequent to notification published under Section 52 of the Act of 1953.

5. The order dated 05.09.2007 was assailed by the original plaintiffs namely Khurshida Begum and Sayeeda Begum, who expired during pendency of appeal and in their place, the legal heirs were substituted, who are the private respondent Nos. 4 to 11 in this petition. This first appeal was registered as Case No. 1248/2007-2008, Computerized Case No. C2007040000615 (Khurshida Begum vs. Mirza Zulfikar Beg) under Section 331(3) of the Act of 1950. The First Appellate Court affirmed the order dated 05.09.2007 vide its order dated 18.12.2021.

6. Challenging the orders dated 05.09.2007 and 18.12.2021, the Second Appeal registered as Case No. SA/205/2022/Ayodhya, Computerized Case No. R2022042300205 (Mirza Khalid Beg and others vs. Mirza Shahid Beg) was preferred by the private respondents No. 4 to 11, which has been allowed vide impugned order dated 15.05.2023 and matter has been remanded back by the second Appellate Court/respondent No. 1 with a direction to the trial Court to decide the case on merits after framing the issues.

7. The order impugned dated 15.05.2023 has been challenged on several grounds. The main ground is to the effect

that the Second Appellate Court has not proceeded in the matter as required under the law.

8. Elaborating this aspect of the case, learned counsel for the petitioners stated that a second appeal under Section 331 of the Act of 1950 has to be decided strictly in terms of mode and manner prescribed under Section 100 CPC read with Order 41 and Order 42 CPC. According to these provisions, a second appeal under Section 331 of the Act of 1950 can be allowed after formulating/framing substantial question law(s) and thereafter fixing a day for hearing on the same.

9. In the instant case, without formulating/framing substantial question of law(s), the second appeal was heard on 17.04.2023 and judgment was reserved on the same day and thereafter, the judgment was pronounced. As such, the second Appellate Court failed to exercise the jurisdiction vested in it in accordance with the mode and manner prescribed. In these circumstances, interference of this Court is required in the matter.

10. He further stated that there is concurrent finding of fact against the private respondents on the issue related to Section 49 of the Act of 1953 and the manner in which the appeal has been decided would prejudice the rights of the petitioners.

11. In support of his submissions, learned counsel for the petitioners has placed reliance on the judgment passed by this Court in the case of *Matashiromani vs. State of U.P. and another* reported in *AIR Online 2022 ALL 543* as also the judgments passed by the Hon'ble Apex Court in the cases of *Surat Singh (dead) vs.*

Siri Bhagwan and others reported in *[2018 (141) RD 300]*, *Arulmighu Nellukadai Mariamman Tirukkoil vs. Tamilarasi (Dead)* reported in *AIR 2019 SC 3027* and *Chandrabhan (Deceased) through LRs. and others vs. Saraswati and others* reported in *AIR 2022 SC 4601*.

12. Opposing the present petition, learned counsel for the private opposite parties stated that a perusal of impugned order dated 15.05.2023 reflects that the second appeal was heard on 17.04.2023 on the issue involved i.e. the issue related to Section 49 of the Act of 1953 and after considering the law settled on the same, the second appeal has been allowed and being so, the order dated 15.05.2023 is not liable to be interfered with by this Court.

13. Considered the submissions made by the learned counsel for the parties and perused the record.

14. In order to consider the issue involved in the present petition which is to the effect that as to 'whether the second appeal under Section 331 of the Act of 1950 can be allowed without formulating/framing the substantial question of law and without fixing a date of hearing on the same', it would be appropriate to refer the judgment dated 12.09.2012 passed by the Hon'ble Apex Court in the case of *State of Uttarakhand (previously State of Uttar Pradesh) v. Mohan Singh and others*, reported in *(2012) 13 SCC 281*, wherein, the Hon'ble Apex Court observed as under:-

"11. In order to examine the contentions raised by the counsel on either side, it is necessary to first examine the scope of Sections 331(3) and 331(4) of the

U.P. Act and those provisions are extracted below for our easy reference:

“331. Cognizance of suits, etc. under this Act.—(1)-(2)***

(3) An appeal shall lie from any decree or from an order passed under Section 47 or an order of the nature mentioned in Section 104 of the Code of Civil Procedure, 1908 (5 of 1908) or in Order 43 Rule 1 of the First Schedule to that Code passed by a court mentioned in Column 4 of Schedule II to this Act in proceedings mentioned in Column 3 thereof to the court or authority mentioned in Column 5 thereof.

(4) A second appeal shall lie on any of the grounds specified in Section 100 of the Code of Civil Procedure, 1908 (5 of 1908) from the final order or decree, passed in an appeal under sub-section (3), to the authority, if any, mentioned against it in Column 6 of the Scheduled aforesaid.”

12. Sub-section (4) of Section 331 of the U.P. Act also refers to Column 6 of Schedule II. Hence, the relevant portion of the Schedule is also extracted hereunder:

“schedule ii
(section 331)

Sl. No.	Section	Description of proceedings	Court of original jurisdiction	Court of	
				First Appeal	Second Appeal
(1)	(2)	(3)	(4)	(5)	(6)
	*	*	*		
34.	229, 229-B, 229-C	Suit for declaration of rights	Assistant Collector 1st Class		Commissioner Board

13. Sub-section (4) of Section 331 of the U.P. Act states that a second appeal shall lie on “any of the grounds” specified in Section 100 CPC, 1908. Section 100 CPC, as it stood prior to 1-2-1977, reads as follows:

“100. (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to a High Court on any of the following grounds, namely—(a) the decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

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

14. After Section 100 was substituted by Act 104 of 1976 with effect from 1-2-1977, it reads as follows:

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

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

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

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

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

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

15. The U.P. Act received the assent of the President on 24-1-1951. It was published in the U.P. Gazette (Extraordinary) dated 26-1-1951. Sub-section (4) of Section 331 has incorporated the unamended Section 100 CPC.

16. The question that calls for consideration is: whether sub-section (4) of Section 331 carries with it the amended Section 100 CPC as well, consequently, making it obligatory for the Board of Revenue to frame substantial questions of law? The question, therefore, calls for consideration is: whether reference to Section 100 in sub-section (4) of Section 331 is by way of referential legislation or legislation by incorporation?

17. A subsequent legislation often makes a reference to earlier legislation so as to make the provisions of the earlier legislation applicable to matters covered by later legislation. Such a legislation may either be (i) a referential legislation which merely contains a reference to or the citation of the provisions of the earlier statute; or (ii) a legislation by incorporation whereunder the provisions of the earlier legislation to which reference is made are

incorporated into the later legislation by reference.

18. The question how the above two principles operate came up for consideration in *U.P. Avas Evam Vikas Parishad v. Jainul Islam* [(1998) 2 SCC 467] before a three-Judge Bench of this Court and it was held as follows: (SCC pp. 480-81, para 17)

"17. A subsequent legislation often makes a reference to the earlier legislation so as to make the provisions of the earlier legislation applicable to matters covered by the later legislation. Such a legislation may either be (i) a referential legislation which merely contains a reference to or the citation of the provisions of the earlier statute; or (ii) a legislation by incorporation whereunder the provisions of the earlier legislation to which reference is made are incorporated into the later legislation by reference. If it is a referential legislation the provisions of the earlier legislation to which reference is made in the subsequent legislation would be applicable as it stands on the date of application of such earlier legislation to matters referred to in the subsequent legislation. In other words, any amendment made in the earlier legislation after the date of enactment of the subsequent legislation would also be applicable. But if it is a legislation by incorporation the rule of construction is that repeal of the earlier statute which is incorporated does not affect operation of the subsequent statute in which it has been incorporated. So also any amendment in the statute which has been so incorporated that is made after the date of incorporation of such statute does not affect the subsequent statute in which it is incorporated and the provisions of the statute which have been incorporated would remain the same as they were at the

time of incorporation and the subsequent amendments are not to be read in the subsequent legislation. In the words of Lord Esher, M.R., the legal effect of such incorporation by reference 'is to write those sections into the new Act just as if they had been actually written in it with the pen or printed in it, and, the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all'. (See *Wood's Estate, In re* [(1886) 31 Ch D 607 (CA)] , Ch D at 615.) As to whether a particular legislation falls in the category of referential legislation or legislation by incorporation depends upon the language used in the statute in which reference is made to the earlier legislation and other relevant circumstances. The legal position has been thus summed up by this Court in *State of M.P. v. M.V. Narasimhan* [(1975) 2 SCC 377 : 1975 SCC (Cri) 589] : (SCC p. 385, para 15 : SCR p. 14)

'15. ... Where a subsequent Act incorporates provisions of a previous Act then the borrowed provisions become an integral and independent part of the subsequent Act and are totally unaffected by any repeal or amendment in the previous Act. This principle, however, will not apply in the following cases:

(a) where the subsequent Act and the previous Act are supplemental to each other;

(b) where the two Acts are in *pari materia*;

(c) where the amendment in the previous Act, if not imported into the subsequent Act also, would render the subsequent Act wholly unworkable and ineffectual; and

(d) where the amendment of the previous Act, either expressly or by necessary intendment, applies the said provisions to the subsequent Act."

19. The law is, therefore, clear that a distinction has to be drawn between a mere reference or citation of one statute into another and incorporation. In the case of mere reference or citation, a modification, repeal or re-enactment of the statute that is referred will also have effect for the statute in which it is referred; but in the latter case any change in the incorporated statute by way of amendment or repeal has no repercussion on the incorporating statute.

20. We need not further elaborate this point, since almost identical question came up for consideration before a three-Judge Bench of this Court in *Mahindra and Mahindra Ltd. v. Union of India* [(1979) 2 SCC 529] wherein this Court dealt with the scope of Section 55 of the Monopolies and Restrictive Trade Practices Act, 1969 read with Section 100 CPC, which reads as follows:

"55. Appeals.—Any person aggrieved by any decision on any question referred to in clause (a), clause (b) or clause (c) of Section 2-A, or any order made by the Central Government under Chapter III or Chapter IV, or, as the case may be, or the Commission under Section 12-A or Section 13 or Section 36-D or Section 37, may, within sixty days from the date of the order, prefer an appeal to the Supreme Court on one or more of the grounds specified in Section 100 of the Code of Civil Procedure, 1908 (5 of 1908)."

21. This Court in the abovementioned case examined the scope of Section 55 read with Section 100 CPC, both amended and unamended. Section 55 provides *inter alia* that any person aggrieved by an order made by the Commissioner under Section 13 may prefer an appeal to this Court on "one or more of the grounds" specified in Section 100 CPC, 1908. When Section 55 was enacted,

namely, 27-12-1969, being the day of coming into force of the Act, Section 100 CPC specified three grounds on which a second appeal could be brought to the High Court on one of those grounds was that the decision appealed against was contrary to law. Therefore, if the reference in Section 55 was to the grounds set out in the then existing Section 100, there can be no doubt that an appeal would lie to this Court under Section 55 on a question of law. The above aspects have been elaborately dealt with in *Mahindra and Mahindra Ltd.* [(1979) 2 SCC 529] The relevant portion of the judgment is as follows: (SCC pp. 547-48, para 8)

“8. ... It was sufficient under Section 100 as it stood then that there should be a question of law in order to attract the jurisdiction of the High Court in second appeal and, therefore, if the reference in Section 55 were to the grounds set out in the then existing Section 100, there can be no doubt that an appeal would lie to this Court under Section 55 on a question of law. But subsequent to the enactment of Section 55, Section 100 of the Code of Civil Procedure was substituted by a new section by Section 37 of the Code of Civil Procedure (Amendment) Act, 1976 with effect from 1-2-1977 and the new Section 100 provided that a second appeal shall lie to the High Court only if the High Court is satisfied that the case involves a substantial question of law. The three grounds on which a second appeal could lie under the former Section 100 were abrogated and in their place only one ground was substituted which was a highly stringent ground, namely, that there should be a substantial question of law. This was the new Section 100 which was in force on the date when the present appeal was preferred by the appellant and the argument of the respondents was that the

maintainability of the appeal was, therefore, required to be judged by reference to the ground specified in the new Section 100 and the appeal could be entertained only if there was a substantial question of law. The respondents leaned heavily on Section 8(1) of the General Clauses Act, 1897 which provides:

‘8. Construction of references to repealed enactments.—(1) Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.’

and contended that the substitution of the new Section 100 amounted to repeal and re-enactment of the former Section 100 and, therefore, on an application of the rule of interpretation enacted in Section 8(1), the reference in Section 55 to Section 100 must be construed as reference to the new Section 100 and the appeal could be maintained only on ground specified in the new Section 100, that is, on a substantial question of law. We do not think this contention is well founded. It ignores the distinction between a mere reference to or citation of one statute in another and an incorporation which in effect means bodily lifting a provision of one enactment and making it a part of another. Where there is mere reference to or citation of one enactment in another without incorporation, Section 8(1) applies and the repeal and re-enactment of the provision referred to or cited has the effect set out in that section and the reference to the provision repealed is required to be construed as reference to the provision as re-enacted. Such was the

case in *Collector of Customs v. Nathella Sampathu Chetty* [AIR 1962 SC 316 : (1962) 1 Cri LJ 364 : (1962) 3 SCR 786] and *New Central Jute Mills Co. Ltd. v. CCE* [(1970) 2 SCC 820]. But where a provision of one statute is incorporated in another, the repeal or amendment of the former does not affect the latter. The effect of incorporation is as if the provision incorporated were written out in the incorporating statute and were a part of it. Legislation by incorporation is a common legislative device employed by the legislature, where the legislature for convenience of drafting incorporates provisions from an existing statute by reference to that statute instead of setting out for itself at length the provisions which it desires to adopt. Once the incorporation is made, the provision incorporated becomes an integral part of the statute in which it is transposed and thereafter there is no need to refer to the statute from which the incorporation is made and any subsequent amendment made in it has no effect on the incorporating statute. Lord Esher, M.R., while dealing with legislation by incorporation in *Wood's Estate, In re* [(1886) 31 Ch D 607 (CA)] pointed out at p. 615:

‘... If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and, the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all.’

Lord Justice Brett, also observed to the same effect in *Clarke v. Bradlaugh* [(1881) 8 QBD 63 : (1881-85) All ER Rep 1002 (CA)] : (QBD p. 69)

‘... there is a rule of construction that, where a statute is incorporated by reference into a second statute, the repeal

of the first statute by a third [statute] does not affect the second.’”

22. The Judicial Committee of the Privy Council in *Secy. of State for India in Council v. Hindustan Coop. Insurance Society Ltd.* [(1930-31) 58 IA 259] also applied the same rule. The Judicial Committee pointed out that the provisions of the Land Acquisition Act, 1894 having been incorporated in the Calcutta Improvement Trust Act, 1911 had become an integral part of it, the subsequent amendment of the Land Acquisition Act, 1894 by the addition of sub-section (2) in Section 26 had no effect on the Calcutta Land Improvement Trust Act, 1911 and could not be read into it. Sir George Lowndes delivering the opinion of the Judicial Committee observed: (IA p. 267)

“... In this country it is accepted that where a statute is incorporated by reference into a second statute, the repeal of the first statute does not affect the second: see the cases collected in Craies on Statute Law, 3rd Edn., pp. 349 and 350. ... The independent existence of the two Acts is therefore recognised; despite the death of the parent Act, its offspring survives in the incorporating Act. ...

It seems to be no less logical to hold that where certain provisions from an existing Act have been incorporated into a subsequent Act, no addition to the former Act, which is not expressly made applicable to the subsequent Act, can be deemed to be incorporated in it, at all events if it is possible for the subsequent Act to function effectually without the addition.”

23. This Court in *Ram Sarup v. Munshi* [AIR 1963 SC 553 : (1963) 3 SCR 858] held that since the definition of “agricultural land” in the Punjab Alienation of Land Act, 1900 was bodily incorporated in the Punjab Pre-emption Act, 1913, the

repeal of the former Act had no effect on the continued operation of the later. Rajagopala Ayyangar, J., speaking for the Court observed at pp. 868-69 of the Report: (AIR p. 558, para 11)

“11. ... Where the provisions of an Act are incorporated by reference in a later Act the repeal of the earlier Act has, in general, no effect upon the construction or effect of the Act in which its provisions have been incorporated. ...

In the circumstances, therefore, the repeal of the Punjab Alienation of Land Act of 1900 has no effect on the continued operation of the Pre-emption Act and the expression ‘agricultural land’ in the later Act has to be read as if the definition in the Alienation of Land Act had been bodily transposed into it.”

24. In *Bolani Ores Ltd. v. State of Orissa* [(1974) 2 SCC 777], this Court proceeded on the same principle. There the question arose *in regard* to the interpretation of Section 2(c) of the Bihar and Orissa Motor Vehicles Taxation Act, 1930 (hereinafter referred to as “the Taxation Act”). This section when enacted adopted the definition of “motor vehicle” contained in Section 2(18) of the Motor Vehicles Act, 1939. Subsequently, Section 2(18) was amended by Act 100 of 1956 but no corresponding amendment was made in the definition contained in Section 2(c) of the Taxation Act. The argument advanced before the Court was that the definition in Section 2(c) of the Taxation Act was not a definition by incorporation but only a definition by reference and the meaning of “motor vehicle” in Section 2(c) must, therefore, be taken to be the same as defined from time to time in Section 2(18) of the Motor Vehicles Act, 1939. This argument was negatived by the Court and it was held that this was a case of

incorporation and not reference and the definition in Section 2(18) of the Motor Vehicles Act, 1939 as then existing was incorporated in Section 2(c) of the Taxation Act and neither repeal of the Motor Vehicles Act, 1939 nor any amendment in it would affect the definition of “motor vehicle” in Section 2(c) of the Taxation Act. It is, therefore, clear that if there is mere reference to a provision of one statute in another without incorporation, then, unless a different intention clearly appears, Section 8(1) would apply and the reference would be construed as a reference to the provision as may be in force from time to time in the former statute. But if a provision of one statute is incorporated in another, any subsequent amendment in the former statute or even its total repeal would not effect the provision as incorporated in the latter statute. The question is as to which category the present case belongs.

25. In *Mahindra and Mahindra Ltd.* [(1979) 2 SCC 529] after referring to the abovementioned judgment, this Court held as follows: (SCC pp. 550-51, para 9)

“9. We have no doubt that Section 55 is an instance of legislation by incorporation and not legislation by reference. Section 55 provides for an appeal to this Court on ‘one or more of the grounds specified in Section 100’. It is obvious that the legislature did not want to confer an unlimited right of appeal, but wanted to restrict it and turning to Section 100, it found that the grounds there set out were appropriate for restricting the right of appeal and hence it incorporated them in Section 55. The right of appeal was clearly intended to be limited to the grounds set out in the then existing Section 100. Those were the grounds which were before the legislature and to which the legislature could have applied its mind and it is reasonable to assume that it was with

reference to those specific and known grounds that the legislature intended to restrict the right of appeal. The legislature could never have intended to limit the right of appeal to any ground or grounds which might from time to time find place in Section 100 without knowing what those grounds were. The grounds specified in Section 100 might be changed from time to time having regard to the legislative policy relating to second appeals and it is difficult to see any valid reason why the legislature should have thought it necessary that these changes should also be reflected in Section 55 which deals with the right of appeal in a totally different context. We fail to appreciate what relevance the legislative policy *in regard* to second appeals has to the right of appeal under Section 55 so that Section 55 should be inseparably linked or yoked to Section 100 and whatever changes take place in Section 100 must be automatically read into Section 55. It must be remembered that the Act is a self-contained code dealing with monopolies and restrictive trade practices and it is not possible to believe that the legislature could have made the right of appeal under such a code dependent on the vicissitudes through which a section in another statute might pass from time to time. The scope and ambit of the appeal could not have been intended to fluctuate or vary with every change in the grounds set out in Section 100. Apart from the absence of any rational justification for doing so, such an indissoluble linking of Section 55 with Section 100 could conceivably lead to a rather absurd and startling result. Take for example a situation where Section 100 might be repealed altogether by the legislature—a situation which cannot be regarded as wholly unthinkable. If the construction contended for on behalf of the respondents were accepted, Section 55

would in such a case be reduced to futility and the right of appeal would be wholly gone, because then there would be no grounds on which an appeal could lie. Could such a consequence ever have been contemplated by the legislature? The legislature clearly intended that there should be a right of appeal, though on limited grounds, and it would be absurd to place on the language of Section 55 an interpretation which might, in a given situation, result in denial of the right of appeal altogether and thus defeat the plain object and purpose of the section. We must, therefore, hold that on a proper interpretation the grounds specified in the then existing Section 100 were incorporated in Section 55 and the substitution of the new Section 100 did not affect or restrict the grounds as incorporated and since the present appeal admittedly raises questions of law, it is clearly maintainable under Section 55. We may point out that even if the right of appeal under Section 55 were restricted to the ground specified in the new Section 100, the present appeal would still be maintainable, since it involves a substantial question of law relating to the interpretation of Section 13(2)."

26. We are of the view that the principle laid down in *Mahindra and Mahindra Ltd.* [(1979) 2 SCC 529] and the judgments referred to earlier clearly apply when we interpret sub-section (4) of Section 331 of the U.P. Act. Sub-section (4), as we have already indicated, has used the expression "on any of the grounds" specified in Section 100 CPC. Consequently, the then existing Section 100 (i.e. Section 100, as it existed in 1908 unamended) was incorporated in sub-section (4) of Section 331 and substitution of the new Section 100 does not affect or restrict the grounds as incorporated. The

right of appeal to the Board of Revenue under sub-section (4) of Section 331 clearly intended to be limited to the grounds set out in the then existing Section 100, since those were the grounds which were before the legislature and to which the legislature could have applied its mind and it is reasonable to assume that it was with reference to those specific and known grounds that the legislature intended to limit the right of appeal.

27. The appeal before the Board of Revenue would, therefore, lie on a question of law. This legal aspect was not considered properly either by the Board of Revenue or by the High Court. Further, we also notice that the Board of Revenue has not examined the provisions of the land record and Lekhpal diary number, date and P.A. 10. The Additional Commissioner had specifically noticed that P.A. 10 which had been filed pertaining to year 1976 did not bear any signature and the same was found to be doubtful, as to whether the original "Kashtkar" (tillers) of the land in dispute belonged to Tharu tribe, was also not properly examined. Further, the Board of Revenue also should have examined whether the land belonged to Tharu tribe and the plaintiff could claim the benefit of Section 210 of the U.P. Act. All these aspects are very vital for a proper and just adjudication of the dispute, which has not been done.

28. In such circumstances, we are inclined to allow the appeals and set aside the order passed by the High Court as well as that of the Board of Revenue and the matter is remanded to the Board of Revenue for fresh consideration, in accordance with law. However, we are not expressing any opinion on the merits of the case, since we are remitting the matter to the Board of Revenue. The Board of Revenue will pass the final orders within a

period of three months from the date of receipt of this order."

15. From the aforesaid, it is apparent that the second appeal before the Board of Revenue would lie on a substantial question of law. Requirement of formulating/framing of substantial question of law(s) has been held to be mandatory for deciding the appeal, as would appear from the judgment passed in the case of *Surat Singh* (supra), followed in the judgment passed in the case of *Arulmighu Nellukadai Mariamman Tirukkoil* (supra), wherein, the Hon'ble Apex Court has observed as under:-

"19. In our considered opinion, the manner and the procedure adopted by the High Court while allowing the second appeal are against the procedure laid down in Section 100. Section 100 of the Code reads as under:

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

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

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

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

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the

appeal, be allowed to argue that the case does not involve such question:

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

20. Sub-section (1) of Section 100 says that the second appeal would be entertained by the High Court only if the High Court is “satisfied” that the case involves a “substantial question of law”. Sub-section (3) makes it obligatory upon the appellant to precisely state in memo of appeal the “substantial question of law” involved in the appeal. Sub-section (4) provides that where the High Court is satisfied that any substantial question of law is involved in the case, it shall formulate that question. In other words, once the High Court is satisfied after hearing the appellant or his counsel, as the case may be, that the appeal involves a substantial question of law, it has to formulate that question and then direct issuance of notice to the respondent of the memo of appeal along with the question of law framed by the High Court.

21. Sub-section (5) provides that the appeal shall be heard only on the question formulated by the High Court under sub-section (4). In other words, the jurisdiction of the High Court to decide the second appeal is confined only to the question framed by the High Court under sub-section (4). The respondent, however, at the time of hearing of the appeal is given a right under sub-section (5) to raise an objection that the question framed by the High Court under sub-section (4) does not involve in the appeal. The reason for giving this right to the respondent for raising such objection at the time of hearing is because

the High Court frames the question at the admission stage which is prior to issuance of the notice of appeal to the respondent. In other words, the question is framed behind the back of the respondent and, therefore, sub-section (5) enables him to raise such objection at the time of hearing that the question framed does not arise in the appeal. The proviso to sub-section (5), however, also recognises the power of the High Court to hear the appeal on any other substantial question of law which was not initially framed by the High Court under sub-section (4). However, this power can be exercised by the High Court only after assigning the reasons for framing such additional question of law at the time of hearing of the appeal.

22. Adverting to the facts of this case at hand, we are at a loss to understand as to how the High Court while passing a final judgment in its concluding para could frame the substantial question of law for the first time and simultaneously answered the said question in the appellant's favour. Obviously, the learned Judge must have done it by taking recourse to sub-section (4) of Section 100 of the Code.

23. Here is the case where the High Court was under a legal obligation to frame the substantial question at the time of admission of the appeal after hearing the appellant or/and his counsel under sub-section (4) of Section 100 of the Code, but the High Court did it while passing the final judgment in its concluding para.

24. Such novel procedure adopted by the High Court, in our considered opinion, is wholly contrary to the scheme of Section 100 of the Code and renders the impugned judgment legally unsustainable.

25. In our considered opinion, the High Court had no jurisdiction to frame the substantial question at the time of writing of its final judgment in the appeal except to

the extent permitted under sub-section (5). The procedure adopted by the High Court, apart from it being against the scheme of Section 100 of the Code, also resulted in causing prejudice to the respondents because the respondents could not object to the framing of substantial question of law. Indeed, the respondents could not come to know on which question of law, the appeal was admitted for final hearing.

26. In other words, since the High Court failed to frame any substantial question of law under sub-section (4) of Section 100 at the time of admission of the appeal, the respondents could not come to know on which question of law, the appeal was admitted for hearing.

27. It cannot be disputed that sub-section (5) gives the respondents a right to know on which substantial question of law, the appeal was admitted for final hearing. Sub-section (5) enables the respondents to raise an objection at the time of final hearing that the question of law framed at the instance of the appellant does not really arise in the case.

28. Yet, the other reason is that the respondents are only required to reply while opposing the second appeal to the question formulated by the High Court under sub-section (4) and not beyond that. If the question of law is not framed under sub-section (4) at the time of admission or before the final hearing of the appeal, there remains nothing for the respondent to oppose the second appeal at the time of hearing. In this situation, the High Court will have no jurisdiction to decide such second appeal finally for want of any substantial question(s) of law.

29. The scheme of Section 100 is that once the High Court is satisfied that the appeal involves a substantial question of law, such question shall have to be framed under sub-section (4) of Section

100. It is the framing of the question which empowers the High Court to finally decide the appeal in accordance with the procedure prescribed under sub-section (5). Both the requirements prescribed in sub-sections (4) and (5) are, therefore, mandatory and have to be followed in the manner prescribed therein. Indeed, as mentioned supra, the jurisdiction to decide the second appeal finally arises only after the substantial question of law is framed under sub-section (4). There may be a case and indeed there are cases where even after framing a substantial question of law, the same can be answered against the appellant. It is, however, done only after hearing the respondents under sub-section (5).

30. If, however, the High Court is satisfied after hearing the appellant at the time of admission that the appeal does not involve any substantial question of law, then such appeal is liable to be dismissed in limine without any notice to the respondents after recording a finding in the dismissal order that the appeal does not involve any substantial question of law within the meaning of sub-section (4). It is needless to say that for passing such order in limine, the High Court is required to assign the reasons in support of its conclusion.

31. It is, however, of no significance, whether the respondent has appeared at the time of final hearing of the appeal or not. The High Court, in any case, has to proceed in accordance with the procedure prescribed under Section 100 while disposing of the appeal, whether in limine or at the final hearing stage.

32. It is a settled principle of rule of interpretation that whenever a statute requires a particular act to be done in a particular manner then such act has to be done in that manner only and in no other

manner. (See *Interpretation of Statutes* by G.P. Singh, 9th Edn., p. 347 and *Baru Ram v. Prasanni* [Baru Ram v. Prasanni, AIR 1959 SC 93].)

33. The aforesaid principle applies to the case at hand because, as discussed above, the High Court failed to follow the procedure prescribed under Section 100 of the Code while allowing the second appeal and thus committed a jurisdictional error calling for interference by this Court in the impugned judgment.

34 [Ed. : Para 34 corrected vide Official Corrigendum No. F-3/Ed.B.J./14/2018 dated 8-5-2018.]

While construing Section 100, this Court in *Santosh Hazari v. Purushottam Tiwari* [*Santosh Hazari v. Purushottam Tiwari*, (2001) 3 SCC 179] succinctly explained the scope, the jurisdiction and what constitutes a substantial questions of law under Section 100 of the Code.

35. It is, therefore, the duty of the High Court to always keep in mind the law laid down in *Santosh Hazari* [*Santosh Hazari v. Purushottam Tiwari*, (2001) 3 SCC 179] while formulating the question and deciding the second appeal."

16. Mode and manner to be adopted for deciding a second appeal has also been explained by the Hon'ble Apex Court in the case of ***Chandrabhan (Deceased) through LRs. and Ors. vs. Saraswati and Ors.*** reported in **2022 SCC OnLine SC 1273**. Relevant paras are as under:-

"23. It is well settled that a Second Appeal under Section 100 of the Civil Procedure Code, 1908 (CPC) can only be entertained on a substantial question of law. In *H.P. Pyarejan v. Dasappa (Dead)* by LRs. (2006) 2 SCC 496, this Court held:—

"16. In our opinion, therefore, the judgment of the High Court suffers from serious infirmities. It suffers from the vice of exercise of jurisdiction which did not vest in the High Court under the law. Under Section 100 of the Code (as amended in 1976) the jurisdiction of the High Court to interfere with the judgments of the courts below is confined to hearing on substantial questions of law. Interference with finding of fact by the High Court is not warranted if it involves reappreciation of evidence (see Panchugopal Barua v. Umesh Chandra Goswami [(1997) 4 SCC 713] and Kshitish Chandra Purkait v. Santosh Kumar Purkait [(1997) 5 SCC 438]). The High Court has not even discussed any evidence. No basic finding of fact recorded by the courts below has been reversed much less any reason assigned for taking a view contrary to that taken by the courts below. The finding on the question of readiness and willingness to perform the contract which is a mixed question of law and fact has been upset. It is statutorily provided by Section 16(1)(c) of the Act that to succeed in a suit for specific performance of a contract the plaintiff shall aver and prove that he has performed and has always been ready and willing to perform the essential terms of the contract which were to be performed by him other than the terms the performance of which has been prevented or waived by the defendant."

24. In *Ram Prasad Rajak v. Nand Kumar & Bros.* (1998) 6 SCC 748, this Court held that, "Once the proceeding in the High Court is treated as a Second Appeal under Section 100 CPC, the restrictions prescribed in the said Section would come into play. The High Court could and ought to have dealt with the matter as a Second Appeal and found out whether a substantial question of law arose

for consideration. Unless there was a substantial question of law, the High Court had no jurisdiction to entertain the Second Appeal and consider the merits.”

25. In *Kshitish Chandra Purkait v. Santosh Kumar Purkait* (1997) 5 SCC 438, this Court held that existence of substantial question of law was the sine qua non for the exercise of jurisdiction under Section 100 of the CPC.

26. In *Kshitish Chandra Purkait* (supra), this Court held:—

“10. We would only add that (a) it is the duty cast upon the High Court to formulate the substantial question of law involved in the case even at the initial stage; and (b) that in (exceptional) cases, at a later point of time, when the Court exercises its jurisdiction under the proviso to sub-section (5) of Section 100 CPC in formulating the substantial question of law, the opposite party should be put on notice thereon and should be given a fair or proper opportunity to meet the point. Proceeding to hear the appeal without formulating the substantial question of law involved in the appeal is illegal and is an abnegation or abdication of the duty cast on court; and even after the formulation of the substantial question of law, if a fair or proper opportunity is not afforded to the opposite side, it will amount to denial of natural justice. The above parameters within which the High Court has to exercise its jurisdiction under Section 100 CPC should always be borne in mind. We are sorry to state that the above aspects are seldom borne in mind in many cases and second appeals are entertained and/or disposed of, without conforming to the above discipline.”

27. The guidelines to determine what is a substantial question of law within the meaning of Section 100 CPC has been laid down by this Court in *Sir Chunnilal V.*

Lal Mehta & Sons v. Century Spinning and Manufacturing Co. Ltd. AIR 1962 SC 1314.

28. In *Sir Chunilal V. Mehta and Sons* (supra), this Court agreed with and approved a Full Bench judgment of the Madras High Court in *Rimmalapudi Subba Rao v. Noony Veeraju* AIR 1951 Mad 969 which laid down the principles for deciding when a question of law becomes a substantial question of law.

29. In *Hero Vinoth v. Seshammal* (2006) 5 SCC 545, this Court followed *Sir Chunilal v. Mehta & Sons* (supra) and other judgments and summarized the tests to find out whether a given set of questions of law were mere questions of law or substantial questions of law.

30. The relevant paragraphs of the judgment of this Court in *Hero Vinoth* (supra) are set out herein below:

“21. The phrase “substantial question of law”, as occurring in the amended Section 100 CPC is not defined in the Code. The word substantial, as qualifying “question of law”, means of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of “substantial question of law” by suffixing the words “of general importance” as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In *Guran Ditta v. Ram Ditta* (1927-28) 55 IA

235 : AIR 1928 PC 172] the phrase “substantial question of law” as it was employed in the last clause of the then existing Section 100 CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case. In *Sir Chunilal case* [1962 Supp (3) SCR 549 : AIR 1962 SC 1314] the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in *Rimmalapudi Subba Rao v. Noony Veeraju* [AIR 1951 Mad 969 : (1951) 2 Mad LJ 222 (FB)] : (*Sir Chunilal case* [1962 Supp (3) SCR 549 : AIR 1962 SC 1314], SCR p. 557) “[W]hen a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular fact of the case it would not be a substantial question of law.”

31. The proper test for determining whether a question of law raised in the case is substantial would be, whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so, whether it is either an open question in the sense that it is not finally settled by this Court. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of

applying those principles or the question raised is palpably absurd, the question would not be a substantial question of law.

32. To be ‘substantial’, a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law “involving in the case” there must be first, a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case or not, the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis. (See *Santosh Hazari v. Purushottam Tiwari* (2001) 3 SCC 179).

33. The principles relating to Section 100 of the CPC relevant for this case may be summarised thus:

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

construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents and involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

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

34. In this case, it cannot be said that the First Appellate Court acted on no evidence. The Respondents in their Second

Appeal before the High Court did not advert to any material evidence that had been ignored by the First Appellate Court. The Respondents also could not show that any wrong inference had been drawn by the First Appellate Court from proved facts by applying the law erroneously.

35. In this case, as observed above, evidence had been adduced on behalf of the Original Plaintiff as well as the Defendants. The First Appellate Court analysed the evidence carefully and in effect found that the Trial Court had erred in its analysis of evidence and given undue importance to discrepancies and inconsistencies, which were not really material, overlooking the time gap of 34 years that had elapsed since the date of the adoption. There was no such infirmity in the reasoning of the First Appellate Court which called for interference.

36. Right of appeal is not automatic. Right of appeal is conferred by statute. When statute confers a limited right of appeal restricted only to cases which involve substantial questions of law, it is not open to this Court to sit in appeal over the factual findings arrived at by the First Appellate Court."

17. Now coming to the impugned order dated 15.05.2023. In order to examine as to whether the impugned order passed by the Board of Revenue in the second appeal preferred by the opposite party is sustainable, it would be appropriate to extract the relevant portion of the same, which reads as under:-

"2. सुनवाई तिथि 17.04.2023 को अपीलकर्ता एवं प्रतिपक्षी के विद्वान अधिवक्तागण को सुनकर निम्नलिखित रूप से अन्तरिम आदेश पारित किया गया था-

"1. पुकार करायी गयी। पत्रावली प्रस्तुत हुई। उभयपक्ष के विद्वान अधिवक्ता उपस्थित हुए। मा० उच्च न्यायालय के

द्वारा याचिका संख्या एमयूए- 141/2023 में पारित आदेश दिनांक 13.01.2023 के अनुपालन में विपक्षी के स्थगन खारिज किये जाने विषयक प्रार्थना पत्र पर सुना।

2. अपीलकर्ता का तर्क है कि उसके द्वारा निर्मित किये गये बिन्दुओं को स्वीकार किया जाये। विपक्षी का तर्क है कि अपीलकर्ता द्वारा निर्मित किये गये विधि के सारवान बिन्दु के स्थान पर मुकदमे के तथ्य को लिखा गया है।

3. उभयपक्ष द्वारा की गयी बहस के परिप्रेक्ष्य में पत्रावली पर उपलब्ध कागजातों के अवलोकन से यह विदित है कि प्रकरण में धारा-49 उ०प्र० जोत चकबन्दी अधिनियम का बिन्दु विधिक रूप से इस द्वितीय अपील में विचारणीय है।

4. परिषद न्यायालय के पूर्व पारित अन्तरिम अनुतोष विषयक आदेश दिनांक 18.04.2022 परिषद न्यायालय द्वारा सारवान विधिक बिन्दु का विनिश्चय किये जाने से पूर्व पारित किया गया था। अतएव विपक्षी का यह तर्क कि विधि के सारवान बिन्दु के विनिश्चय से पूर्व अन्तरिम अनुतोष विषयक आदेश दिनांक 18.04.2022 प्रथमदृष्ट्या त्रुटिपूर्ण होने के कारण निरस्त किया जाता है।

5. उ०प्र० जोत चकबन्दी अधिनियम की धारा-49 का बिन्दु इस द्वितीय अपील में विचारणीय होने के दृष्टिगत उभयपक्ष को सुनकर पत्रावली दिनांक 15.05.2023 को आदेश हेतु सुरक्षित की जाती है।"

18. A perusal of impugned order dated 15.05.2023 including the above quoted portion of the same reflects that without formulating/framing substantial question of law, the second appeal was heard on 17.04.2023 on the issue related to Section 49 of the Act of 1953 and thereafter, on the same day, the judgment was reserved and subsequently, the second appeal was allowed.

19. Whereas, according to law settled as also mode and manner prescribed for deciding the appeal from appellate decree under Order 42 CPC, as applicable in State of U.P., which says that Rules of Order 41 and 41-A shall apply, so far as may be, to appeals from appellate decree and accordingly the second appeal, if not dismissed in limine in terms of under Rule 11 of Order 41, should

be decided after formulating/framing substantial question of law and thereafter fixing a day for hearing on the same, as would appear from a conjoint reading of Section 100, Rule 11 and 12 of Order 41 and Rule 2 of Order 42 CPC.

20. Thus, the Board of Revenue/respondent No. 1 ought to have first formulated/framed the substantial question of law(s) and thereafter, ought to have fixed a day/date for hearing on the same. Accordingly, in the instant case, the Board of Revenue/respondent No. 1 failed to follow the mandatory procedure prescribed for deciding a second appeal.

21. For the reasons aforesaid, this Court is of the view that interference in the matter is required. Accordingly, the writ petition is allowed. The order impugned dated 15.05.2023 is hereby quashed. The matter is remanded back to the respondent No. 1/Board of Revenue, U.P. at Lucknow to decide the second appeal afresh strictly in accordance with the mode and manner prescribed under Section 100 CPC read with Order 41 and Order 42 CPC, as the same has to be followed in view of the provisions of the Act of 1950 while dealing with second appeal, after affording proper opportunity of hearing to the parties to the litigation preferably within a period of four months from 28.08.2023, if possible and if there is no other legal impediment in this regard. While conducting the proceedings, the Authority concerned is directed to avoid unnecessary adjournments to either party. It is in order to decide the appeal within the time specified in this order. The parties present before this Court are directed to appear before the Board of Revenue on 28.08.2023.

22. It is open for the appellants, who are private respondents in this petition, to

prefer an application for interim protection within a week w.e.f. 28.08.2023, which shall be considered and decided expeditiously.

23. It is provided that till disposal of the application seeking interim protection, the parties are directed to maintain status-quo regarding the property in issue. It is in view of substantial justice between the parties. However, this protection would be available if the application seeking interim protection is filed in terms of this order.

The petition is *allowed* in above terms.

(2023) 8 ILRA 408

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 08.08.2023

BEFORE

**THE HON'BLE SAURABH SHYAM
SHAMSHERY, J.**

Writ B No. 2067 of 1983

Mata Din Singh **...Petitioner**
Versus
D.D.C. Basti & Ors. **...Respondents**

Counsel for the Petitioner:

Sri V.K. Singh(Sr. Advocate), Sri Santosh Kumar, Sri Krishan Mohan, Sri M.N. Singh

Counsel for the Respondents:

Sri A.C. Nishad (Standing Counsel), Sri Anil Sharma (Sr. Advocate), Sri P.K. Singh, Sri S.L. Yadav, Sri B.K. Srivastava, Dr. Vinod Kr. Rai, Sri Gulab Shanker Singh, Sri Rajesh Ji Verma, S.C.

Civil Law-U.P. Consolidation of Holdings Act,1953 - U.P. Land Records Manual-Clause (9) of Part-II of Para A-124 - Code of Civil Procedure-1908-Order 3 Rule 1 & 2- Power of attorney holder can only appear in

his personal capacity and could depose only whatever knowledge he has about the case but, cannot depose as a witness on behalf of the party and cannot depose for the acts done by the principal-No finding was returned that PA-10 was served upon the recorded tenure holders and contesting respondents have failed to prove that fact and have also not able to show that there was a reference of PA-10 in the revenue entries and all Courts under Consolidation Act have not returned any finding in regard to preparation of PA-10 and whether entries of possession were made in terms of and observing procedure prescribed in 'the Manual' and for reference-Authorities

Petition allowed. (E-15)

List of Cases cited:

1. Janki Vashdeo Bhojwani & anr.Vs IndusInd Bank Ltd. & ors., AIR 2005 SC 439
2. Gurmukh Singh & anr.Vs DDC/ADM (F&R), 1996 SCC Online All 823 : (1997) 88 RD 276
3. Bhagwati Deen Vs Sheetladin & ors., (2022) 156 RD 602 : 2022 SCC Online All 349
4. Hemaji Waghaji Jat Vs Bhikhabhai Khengarbhai Harijan & ors., AIR 2009 SC 103
5. P.T. Munichikkanna Reddy & ors. Vs Revamma & ors., 2007 (6) SCC 59
6. Uttam Chand (Dead) through LRs Vs Nath Ram (Dead) through LRs & ors., 2020 (11) SCC 263

(Delivered by Hon'ble Saurabh Shyam Shamschery J.)

1. This case is arising out of consolidation proceedings of village Ratanpur Rai, Tappa Puraina, Tehsil Haraiya, District Basti.

2. The case of original petitioner (Mata Din Singh (since deceased)) was that in the basic year, name of Jairaj Singh (his

father) and Ram Nihal Singh were recorded as tenure holders, whereas name of Rambadan Singh (since deceased and predecessors of original respondent nos. 4 to 7) was recorded in Clause (9) of revenue records.

3. Predecessors of contesting respondents have claimed sirdar rights on basis of their alleged continuous possession of more than 25 years.

4. During proceedings, witnesses were examined from both sides. From the side of petitioner, objector has examined himself whereas contesting respondent did not appeared before Authority and one Ramjanam Singh appeared being a mukhtar-e-khas of respondent Rambadan Singh and another witness Anshuman Singh also appeared for respondent. Certain revenue records were also placed by both the parties.

5. The Consolidation Officer vide order dated 24.01.1978 has rejected the objections of petitioner and allowed the objections filed on behalf of contesting respondents and their names were directed to be entered into revenue records as sirdar. The relevant findings of the Consolidation Officer are as follows :-

“प्रतिवादी गण की ओर से जो भी कागजी प्रमाण दाखिल है वे दौरान चक्रबन्दी के है अतः वे प्रतिवादी गण के पक्ष में अधिक सहायक नहीं हो सकता और चक्रबन्दी के पूर्व का कोई ऐसा प्रमाण कागजी या कोई निष्पक्ष गवाह नहीं प्रस्तुत किया गया है जिससे वादी के बयान पर अविश्वास किया जाय यद्यपि कि वादी का कब्जा प्रमाणों के आधार पर केवल 10 साल का ही साबित होता है किंतु निष्पक्ष गवाह के बयान से यह साबित है कि कब्जा 12 साल से अधिक का है और किसी निष्पक्ष गवाह द्वारा उसमें विरुद्ध बयान नहीं हुआ है और जैराम सिंह के विरुद्ध दिनांक 29.1.76 प्रभावी है अतः वादी के कागजी प्रमाणों व साक्ष्यों के आधार पर वादी को सीरदार घोषित करने का अवचित्य प्रमाणित है तदनुसार

वाद विन्दु सकारात्मक निर्णीत किया जाता है वादी मृतक है उसके वारिश विश्वनाथ सिंह दर्शन नाथ सिंह, अजय कुमार आयु 13 वर्ष विजय कुमार सिंह अवस्था आयु 8 वर्ष संरक्षिका सोमारी माता है जो निर्विवाद है”

6. The petitioner and others filed an appeal before Settlement Officer of Consolidation, however, same was dismissed by an order dated 18.02.1982. Relevant part of order is mentioned hereinafter :-

“जहाँ तक अपील कर्ता के विद्वान अभिभाषक के इस तर्क का प्रश्न है कि 1369फ० के एस०के० के आदेश का अमल दरामद है। एस०के० ने स्वयं आदेश खतौनी में अंकित नहीं किया है। इसलिये यह आदेश सही नहीं है। मैं उनके इस तर्क में (अस्पष्ट) एस०के० के आदेश प०क० 10 पर पारित होता है तथा अमल दरामद भी उस समय खतौनी पर किया जाता था। इसलिये इस अमल दरामद में कोई संदिग्ध होने की बात नहीं है। अपीलकर्ता के विद्वान अभिभाषक ने यह तर्क रखा कि ए०आर०के० के बयान में यह बात आई है कि खसरे के इन्द्राजों में भिन्नता है परन्तु उन्होंने अपने मूल बयान तथा जिरह दोनों में यह बात कही है कि भिन्नता स्याही के कारण है इसलिये केवल इस आधार पर इतने लम्बे इन्द्राजों को संदिग्ध या गलत नहीं माना जा सकता।”

“जहाँ तक रामबदन सिंह के अदालत में हाजिर होकर स्वयं बयान न देने का सवाल है, रामबदन सिंह उस समय पुलिस विभाग में नौकरी करते थे तथा उन्हें छुट्टी न मिलने के कारण यह बयान देने नहीं आ सके। उनके स्थान पर उनके मुख्तार तथा भाई राम जन्म सिंह बयान देने के लिये अदालत में हाजिर हुये, इसलिये रामबदन सिंह के अदालत में हाजिर न आने के कारण उनके अधिकारों पर कोई अन्तर नहीं पड़ता। उत्तर वादी की ओर से यह बहस की गयी कि यह मोकदमा 26.9.78 को एक तरफ हुआ था तथा 18.3.81 के बाद यह आदेश 10/- रुपये हरजा अदा करने पर रेस्टोर हुआ था और यह हरजा अभी तक अदा नहीं किया गया है उनका यह तर्क भी सही है कि इस आधार पर यह अपील खारिज होने योग्य है।

उपरोक्त विवेचन के आधार पर मैं इस निष्कर्ष पर पहुँचता हूँ कि विवादित भूमि 1369 फ० से लगातार राम बदन सिंह का आधार वर्ष तक विरोधात्मक अध्यासन व और अपने इस कब्जे के आधार उन्होंने विवादित भूमि पर सीरदारी अधिकारी अर्जित कर लिये थे और उने लड़के व वारिस इन गाटों पर बतौर सीरदार दर्ज होने के अधिकारी थे। चक्रबन्दी अधिकारी ने विवादित गाटों पर लिखित खातेदारों का नाम खारिज करके उत्तर वादीगण का

नाम बतौर सीरदार दर्ज करने में कोई भूल नहीं की है। अपील में कोई बल नहीं है।”

7. Both the above referred orders were challenged by petitioner before Deputy Director of Consolidation by way of filing a revision petition, however, same was also dismissed by an order dated 09.02.1983 and relevant part of order is mentioned hereinafter :-

“इसके अतिरिक्त निगरानी कर्ता के विद्वान अधिवक्ता की तरफ से यह तर्क किया गया कि खाता नं० 48 के नम्बरान 236, 244 पर कोई हक नहीं मांगा गया है जिस पर उन्हें कोई अधिकार बिना उज्रदारी नहीं दिया जाना चाहिये तथा 236,244 नम्बरान विवादित खाते के नहीं है और न ही विवादित खातेदारों का पारीक मुकदमा ही बनाया गया है अतः उस पर अधिकार नहीं मिलना चाहिये। पत्रावली के अवलोकन से स्पष्ट है कि गाटा सं० 236,244 पर हक नहीं मांगा गया है किन्तु कार्यवाही चक्रबन्दी प्रक्रियाओं में धारा 9 के प्रकाशन के बाद की गयी है। अतः निगरानीकर्ता को इससे कोई लाभ नहीं मिल सकता। यह भी तर्क किया गया कि कब्जा गासवाना बिना किसी आधार के है किन्तु निगरानी कर्ता द्वारा स्वयं रंजिश की बात स्वीकार की गयी है। निगरानीकर्ता के विद्वान अधिवक्ता ने यह भी तर्क किया कि कोई पं०क० 24 नहीं बना है आरन जारी हुआ है किन्तु पं०क० 24 जारी करने का प्राविधान 1965 के संशोधन से लागू हुआ है अतः 1373 पं० में जारी होने का कोई औचित्य नहीं था तथा उस समय नियमानुसार पं०क० 10 जारी होता था जो 1369 पं० में जारी है इसके अतिरिक्त यह भी तर्क किया गया कि निगरानीकर्ता पर अधीनस्थ न्यायालय द्वारा जो हर्जाना लगाया गया था उसे अदा भी नहीं किया गया। निगरानीकर्ता द्वारा हर्जाना न अदा करने का कोई कारण नहीं दर्शाया गया और न हर्जाना अदा करने का प्रयास किया गया इस प्रकार सम्पूर्ण वाद पर गौर करने से यह स्पष्ट है कि विवादित आराजी पर विपक्षीगण का अनाधिकार कब्जा सबित है जो काफी लम्बे अरसे से तथा अधिकार पाने के मियाद से भी अधिक समय से है। निगरानीकर्ता की तरफ से केवल जैराज सिंह के वारिसों द्वारा आपत्ति की गयी है। आधार वर्ष में दर्ज राम निहाल की तरफ से कोई आपत्ति नहीं दाखिल की गयी है। जो इन्द्राज है वह नियमानुकूल है जिसके आधार पर विद्वान चक्रबन्दी अधिकारी एवं विद्वान सहायक बन्दोबस्त अधिकारी चक्रबन्दी ने विपक्षी गण का नाम विवादित आराजी में बतौर सीरदार अंकित होने के आदेश किये हैं जो न्यायोचित है अतः निगरानी में कोई बल नहीं है। निगरानी निरस्त होने योग्य है।”

8. Above referred orders dated 24.01.1978, 18.02.1982 and 09.02.1983 are impugned in this writ petition.

9. Sri V.K. Singh, learned Senior Advocate assisted by Sri Santosh Kumar, Advocate appearing for petitioners has submitted that undisputedly original petitioner was tenure holder and contesting respondents were in unauthorized possession of land in dispute and their names being mutated on basis of such nature of possession which would not create any substantive right in their favour. There was a finding of Consolidation Officer that according to revenue records, even in some of years, respondents were not in possession over the land in dispute as well as the Consolidation Officer has recorded a finding that respondents' possession was proved upto 10 years only and only on surmises, it was held that they were in possession for 12 years, therefore, all three Authorities have erroneously accepted the argument of respondents that they have perfected their rights on basis of alleged unopposed possession of twelve years over the land in dispute.

10. Learned Senior Advocate also submitted that evidence given by *mukhtar-khas* was not acceptable and that entries were not made in terms of provisions of U.P. Land Records Manual (for short “**the Manual**”).

11. In order to buttress the arguments, he has placed reliance upon judgments of Supreme Court and this Court in **Hemaji Waghaji Jat vs. Bhikhabhai Khengarbhai Harijan and others**, AIR 2009 SC 103; **Vidhyadhar vs. Manik Rao and others**, (1999) 3 SCC 573; **Smt. Bitiya Bano vs. DDC**, 1979 SCC Online All 502, 1980 RD 190; **Janki Vashdeo**

Bhojwani and another vs. IndusInd Bank Ltd. And others, AIR 2005 SC 439 : (2005) 2 SCC 217; Gaya Prasad vs. Nathu Singh and others, 2019 (4) AWC 3600; Sunehri Lal vs. Smt. Premwati, 2015 All. C.J. 738 and Ganga Ram and others vs. DDC and another, 1982 RD Page 1.

12. Per contra, Sri Anil Sharma, learned Senior Advocate assisted by Sri P.K. Singh, Advocate appearing for respondents has referred provisions of Clause (9) of Part-II of Para A-124 of the Manual, which states that :-

“Occupiers of land without the consent of the person entered in column 4 of the khasra.”

13. Learned Senior Advocate has further submitted that contesting respondents were in possession of land and it was in the knowledge of petitioners but no proceedings were initiated against them, therefore, they have perfected their title on the strength of their uninterrupted possession for twelve years.

14. Learned Senior Advocate further urged that claim of rival parties was decided on the basis of revenue records placed by Ramjanam Singh being *mukhtar-khas* of respondent Rambadan Singh, being legally permissible. It was not the case that *mukhtar-khas* had given some evidence of a fact which was exclusive in the knowledge of respondent Rambadan Singh. According to revenue records, contesting respondents were shown under the category of Clause 9, a substantive piece of evidence that they were in possession of land without consent of persons whose name was entered in column 4 of the khasra. Learned Senior Advocate has placed reliance upon a

judgment of Supreme Court passed in the case of **Ramdular vs. Deputy Director of Consolidation, Jaunpur, 1994 Supp 2 SCC 198: 1994 1 SCR 735.**

15. Learned Senior Advocate appearing for respondents has further submitted that petitioners have created absolutely a new case for the first time before this Court.

16. In rejoinder, learned Senior Advocate appearing for petitioner has submitted that respondents are outsiders and normally lived in other village and they have never been in possession over the land in dispute as well as their cultivatory possession over the land in dispute was not proved.

17. Heard learned Senior Advocates appearing for rival parties, perused record and written submissions.

18. On basis of above referred facts, rival submissions and judgments relied upon, issues for consideration before this Court are as follows :-

(a) Whether statement made by *mukhtar-khas* as a witness is admissible or not, if yes, to what extent?

(b) Whether entry under Clause-9 of Part-II of Para A-124 of ‘the Manual’ and khasra of relevant period would itself be sufficient to prove adverse possession, and, if no?

(c) Whether contesting respondents have perfected their rights on basis of their possession of twelve years on land in dispute i.e. whether their possession was *nec vi, nec clam, nec precario*, i.e. adequate in continuity, adequate in publicity and adverse to a competitor in denial of title and his knowledge?

19. In reference to above referred **issue (a)**, i.e. nature of evidence of a *mukhtar-khas*, it would be relevant to refer few paragraphs of a judgement passed by Supreme Court in the case of **Janki Vashdeo Bhojwani (supra)** :-

“13. Order 3 Rules 1 and 2 CPC empower the holder of power of attorney to “act” on behalf of the principal. In our view the word “acts” employed in Order 3 Rules 1 and 2 CPC confines only to in respect of “acts” done by the power-of-attorney holder in exercise of power granted by the instrument. The term “acts” would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder has rendered some “acts” in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

14. xxxxxx

15. xxxxxx

16. xxxxxx

17. On the question of power of attorney, the High Courts have divergent views. In the case of *Shambhu Dutt Shastri v. State of Rajasthan* [(1986) 2 WLN 713 (Raj)] it was held that a general power-of-attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in the witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power-of-attorney holder cannot be allowed to appear as a witness on

behalf of the plaintiff in the capacity of the plaintiff.

18. The aforesaid judgment was quoted with approval in the case of *Ram Prasad v. Hari Narain* [AIR 1998 Raj 185 : (1998) 3 Cur CC 183] . It was held that the word “acts” used in Rule 2 of Order 3 CPC does not include the act of power-of-attorney holder to appear as a witness on behalf of a party. Power-of-attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but he cannot appear as a witness on behalf of the party in the capacity of that party. If the plaintiff is unable to appear in the court, a commission for recording his evidence may be issued under the relevant provisions of CPC.

19. In the case of *Pradeep Mohanbay (Dr.) v. Minguel Carlos Dias* [(2000) 1 Bom LR 908] the Goa Bench of the Bombay High Court held that a power of attorney can file a complaint under Section 138 but cannot depose on behalf of the complainant. He can only appear as a witness.

20. However, in the case of *Humberto Luis v. Floriano Armando Luis* [(2002) 2 Bom CR 754] on which reliance has been placed by the Tribunal in the present case, the High Court took a dissenting view and held that the provisions contained in Order 3 Rule 2 CPC cannot be construed to disentitle the power-of-attorney holder to depose on behalf of his principal. The High Court further held that the word “act” appearing in Order 3 Rule 2 CPC takes within its sweep “depose”. We are unable to agree with this view taken by the Bombay High Court in *Floriano Armando* [(2002) 2 Bom CR 754].

21. We hold that the view taken by the Rajasthan High Court in the case of *Shambhu Dutt Shastri* [(1986) 2 WLN 713

(Raj)] followed and reiterated in the case of Ram Prasad [AIR 1998 Raj 185 : (1998) 3 Cur CC 183] is the correct view. The view taken in the case of *Floriano Armando Luis* [(2002) 2 Bom CR 754] cannot be said to have laid down a correct law and is accordingly overruled.”.

(emphasis supplied)

20. In present case, Rambadan Singh, original contesting respondent has not appeared to depose before the Consolidation Officer and on his behalf his *mukhtar-khas*, Ramjanam Singh has appeared and got recorded his statement and also produced relevant revenue records.

21. As referred in **Janki Vashdeo Bhojwani** (*supra*), power of attorney holder (*mukhtar-khas*) can only appear in his personal capacity and could depose only whatever knowledge he has about the case but, cannot depose as a witness on behalf of the party and cannot depose for the acts done by the principal. Therefore, evidence of *mukhtar-khas* would be admissible only to the extent to which he has personal knowledge. However, since only the original respondent had personal knowledge about his cultivatory possession, therefore, any evidence in that regard as deposed by his *mukhtar-khas* would not be admissible and further that documents placed on record by *mukhtar-khas* are the documents from the revenue records, therefore they would be admissible according to law and consequence thereof only would fall.

22. In reference to *issue (b)* i.e. about entries in the revenue records, it would be relevant to refer a judgment passed by the co-ordinate Bench in **Gurmukh Singh and Another vs. DDC/ADM (F&R), 1996**

SCC Online All 823 : (1997) 88 RD 276 and relevant paragraphs 7, 8 and 9 thereof are reproduced below:-

“7. Similar view was expressed by this Court in *Ganga Ram v. D.D.C.*, 1982 RD 1, wherein it was observed that the person who alleges that P.A. 10 was prepared and served upon the recorded tenure holder has to prove that fact. Learned counsel for the petitioner has referred to the decision of the Board of Revenue in *Ranvir Singh v. (Smt.) Satyawati*, 1990 RD 435, wherein the Board of Revenue distinguished the case of this Court in the case of *Jamuna Prasad (supra)*. It was held therein that there was presumption with regard to the correctness of public document and correctness of the entries made in the annual register when the papers relating to compliance of Para 80-A and A-81 of the Land Records Manual is proved on evidence available on the record and it is proved that P.A. 10 was issued, its service is to be presumed on the recorded tenure-holder. It was, on the facts of that case, it was found that adverse possession was proved. The Board of Revenue could not have taken a contrary view already expressed by the Court in the case of *Jamuna Prasad (supra)*.

8. Learned counsel for the petitioner has further placed reliance upon a decision of *Board of Revenue in Hazari v. Mathura*, 1992 RD 79, wherein it was held that where a person being not a rank trespasser is in continuous possession to the full knowledge of the recorded tenure holder, issuance of P.A. 10 is not necessary. This decision is not an authority on the question that where the person is claiming adverse possession and relies upon the recorded entries, he is not to establish that the entries were made in accordance with law.

9. The petitioners led evidence to prove adverse possession. They relied upon the Khatauni 1375-1377 F and also twelve year Khasra, 1386-1397 F. Surjan Singh, father of the petitioners also tendered oral evidence. Khatauni 1375 F indicated that respondent No. 3 Mangal Singh, father of respondent No. 4 was recorded as sirdar of the land in dispute. In column No. 9 there is entry that Jagtar Singh is in possession and has been shown in column No. 9 in respect of plot No. 150. This entry is alleged to have been made by the Supervisor Qanungo. The petitioners did not lead any evidence to show that before making such entry the Supervisor Qanungo had issued any notice to the recorded tenure-holder. The petitioner did not file any copy of Khasra which could show that in the remarks column the date of the *Partial* and the date of issuance of P.A. 10 was made. The diary of the Lekhpal was also not summoned. The petitioner was relying upon these entries to prove his adverse possession. The person who is recorded as tenure-holder is otherwise entitled to notice when an authority makes an entry regarding possession against him, which in effect creates a right in favour of another person in respect of the and for which the entry is made in the Khasra. Secondly, respondent No. 2 has believed the oral evidence adduced on behalf of the respondents 3 and 4 that Jagtar Singh was related to them. Respondent No. 3 is brother in law of Jagtar Singh and respondent No. 4 is his nephew. The findings recorded by the respondents are not illegal.”

(emphasis supplied)

23. In a recent judgment passed by a coordinate Bench in **Bhagwati Deen vs. Sheetladi and others, (2022) 156 RD 602 : 2022 SCC Online All 349**, the issue

in hand was considered and it was observed in paragraph 28 of aforesaid judgment that -:

“28. Lately, this Court also had the occasion to consider the aforesaid issue of adverse possession in the case of *Chit Bahal Singh v. Joint Director of Consolidation*, decided on 29.04.2022 and by relying upon the decision of *Babu Ali v. D.D.C. (Supra)* the plea of adverse possession was rejected. The relevant paras explaining the law and the preparation of entries and what ingredients have to be met are being extracted hereinafter:—

“11. The para-89-A, 89-B and 102-B of the Land Records Manual (herein-after referred as “the manual”), relevant for the purpose, are extracted below:—

“89-A. List of changes.-After each Kharif and rabi portal of a village the Lekhpal shall prepare in triplicate a consolidated list of new and modified entries in the Khasra in the following form:

Form No. P-10
Khasra No. of Plot Area
Details of entry in the last year
Details of entry made in the current year

Verification report by the Revenue Inspector

Remarks

1

2

3

4

5

6

(ii) The Lekhpal shall fill in the first four Columns and hand over a copy of the list to the Chairman of the Land Management Committee. He shall also prepare extract from the list and issue to the person or persons concerned recorded in Columns 3 and 4 to their heirs, if the

person or persons concerned have died, obtaining their signature in the copy of the list retained by him. Another copy shall be sent to the Revenue Inspector.

(iii) The Revenue Inspector shall ensure at the time of his partial of the village the extract have been issued in all the cases and signatures obtained of the recipients.

89-B. Report of changes.- The copy of the list with the Lekhpal containing the signatures of the recipients of the extracts shall be attached to the Khasra concerned and filed with the Registrar (Revenue Inspector) alongwith it on or before 31st July, of the following year (sub-paragraph (iv) of the paragraph 60).

102-B. Entry of possession (Column 22) (Remarks column).- (1) The Lekhpal shall while recording the fact of possession in the remarks Column of the Khasra, write on the same day the fact of possession with the name of the person in possession in his diary also, and the date and the serial number of the dairy in the remarks Column of the Khasra against the entry concerned.

(2) As the list of changes in Form p-10 is prepared after the completion of the patal of village, the serial number of the list of changes shall be noted in red ink below the entry concerned in the remarks column of the Khasra in order to ensure that all such entries have been brought on the list.

(3) If the Lekhpal fails to comply with any of the provisions contained in paragraph 89-A, the entry in the remarks Column of the Khasra will not be deemed to have been made in the discharge of his official duty.”

12. Reading of the aforesaid provisions makes it clear that if any entry is made in PA-10, the same shall be communicated to the person or persons concerned recorded in columns 3 and 4 or

their heirs and obtain their signatures. Records on being submitted to the Revenue Inspector, he shall ensure at the time of Patal i.e. verification of the village that it has been issued in all the cases and the signatures obtained by the recipients. Therefore, in case, any entry made on the basis of adverse possession the same was to be communicated to the person concerned and the person claiming is required to prove that it was in accordance with the manual and as to what was nature of possession and when it started in the knowledge of the tenant and the possession was continuous and how long it continued.

13. This Court considered this issue in the case of *Mohd. Raza v. Deputy Director of Consolidation*, 1997 RD 276 and held that the entries in the revenue papers not prepared by following the procedure prescribed under the Uttar Pradesh Land Records Manual and PA-10 notice was not served on the main tenant, such entries are of no evidentiary value and would not confer any right.

14. This court, in the case of *Gurumukh Singh v. Deputy Director of Consolidation, Nainital*, (1997) 80 RD 276, has also held that the entries will have no evidentiary value if they are not in accordance with the provisions of Land Records Manual and the burden to prove is on the person who is asserting the possession on the basis of adverse possession. Relevant paragraphs 6 and 7 are extracted below:—

“6. It is clear from Para A-102C of the Land Records Manual that the entries will have no evidentiary value if they are not made in accordance with the provisions of Land Records Manual. There is presumption of correctness of the entries provided it is made in accordance with the relevant provision of Land Records Manual and secondly, in case where a person is

claiming adverse possession against the recorded tenure-holder and he denies that he had not received any P.A. 10 or he had no knowledge of the entries made in the revenue records, the burden of proof is further upon the person claiming adverse possession to prove that the tenure-holder was duly given notice in prescribed Form P.A. 10. Para A-81 itself provides that the notice will be given by the Lekhpal and he will obtain the signature of the Chairman, Land Management Committee as well as from the recorded tenure-holder. It is also otherwise necessary to be provided by the person claiming adverse possession. The law of adverse possession contemplates that there is not only continuity of possession as against the true owner but also that such person had full knowledge that the person in possession was claiming a title and possession hostile to the true owner. If a person comes in possession of the land of another person, he cannot establish his title by adverse possession unless it is further proved by him that the tenure-holder had knowledge of such adverse possession.

7. In *Jamuna Prasad v. Deputy Director of Consolidation, Agra*, this Court repelled the contention that the burden of proof was upon the person who challenges the correctness of the entries. It was observed:

“Learned counsel for the Petitioner argued that there was a presumption of correctness about the entries in the revenue records and the onus lay upon the Respondent to prove that the entries showing the Petitioner's possession had not been in accordance with law. This contention is untenable. Firstly, it is not possible for a party to prove a negative fact. Secondly, the question as to whether the notice in Form P.A. 10 was issued and served upon the Petitioner also is a fact

which was within his exclusive knowledge.”

“Petitioner's contention that the burden lay on the Respondents to disprove the authenticity and destroy the probative value of the entry of possession cannot be accepted. In my opinion, where possession is asserted by a party who relies mainly on the entry of adverse possession in his favour and such possession is denied by the recorded tenure-holder, the burden is on the former to establish that the entries in regard to his possession was made in accordance with law.”

15. This Court, in the case of *Sadhu Saran v. Assistant Director of Consolidation, Gorakhpur*, (2003) 94 RD 535, has held that it is well settled in law that the illegal entry does not confer title. Therefore even if the entry has been made, it does not confer right title or interest if it is not in accordance with law and the prescribed procedure. This Court and the counsel for the parties also could not get the same in the Lekhpal diary. The provision of PA-24 has come vide notification dated 03.07.1965, therefore it is also of no assistance because entry could not have been made on the basis of PA-24 in Khatauni of 1373 fasli and it is also without number and year.”

(emphasis supplied)

24. In the present case, no finding was returned that PA-10 was served upon the recorded tenure holders and contesting respondents have failed to prove that fact and have also not able to show that there was a reference of PA-10 in the revenue entries and all Courts under Consolidation Act have not returned any finding in regard to preparation of PA-10 and whether entries of possession were made in terms of and observing procedure prescribed in ‘the Manual’ and for reference, relevant

procedure and paragraphs of 'the Manual' are quoted below:-

"A80. List of Changes :- After each *kharif* and *rabi partal* of a village, the Lekhpal shall prepare in triplicate a consolidated list of the entries mentioned in paragraphs A71 to A73 and A84 in following form

A81. List how to be utilized :-

(1) The lekhpal shall fill in first five columns and handover a copy of the list to the Chairman of Land Management Committee. He shall also prepare extracts from the list and issue to the person or persons recorded in column 3, 4 and 5 thereof or to their heirs, if the person or persons concerned have died, obtaining their signatures in the copy of list retained by him. Another copy shall be sent to the supervisor kanungo.

(2) The supervisor kanungo shall deal with the list in the manner prescribed in sub paragraph (iv) of paragraph 423. He shall also ensure that extracts have been issued in all the cases, and signature of recipients obtained. If he finds that an extract has not been issued in any case, he shall get it issued in his presence. This is important so that the person affected, if he is aggrieved, may apply for correction of papers to the tehsildar or the Sub Divisional Officer, as the case may be.

A82. Report of Changes :- The copy of the list with the lekhpal containing the signatures of the recipients of the extract shall be attached to the khasra concerned and filed with the registrar kanungo along with it on or before 31 July, of the following year [sub-paragraph (iv) of paragraph A60].

A83. Immediately after the *kharif partal* the lekhpal shall submit to the supervisor kanungo a statement in duplicate showing all holdings in his halka of a

bhumidhar, *sirdar* or *asaami* of Gaon Samaj whose cultivable area has decreased or increased by diluvion of alluvian. The supervisor kanungo shall by personal inspection check all the entries in the statement and after making such corrections, as may be necessary, submit the statement in duplicate to the tehsildar for taking action under rule 205-B of the U.P. Zamindari Abolition and Land Reforms Rules, 1952.

102C. Entry of possession column 21 (Remarks column) :-

(1) The lekhpal shall, while recording the fact of possession in the remarks column of the khasra write on the same day the fact of possession with the name of the person in possession in his diary also, and note the date and serial number of the diary in the remarks column of the khasra against the entry concerned.

(2) As the list of changes in form PA-10 is prepared after the completion of the *partal* of a village, the serial number of the list of changes shall be noted in red ink below the entry concerned in the remarks column of the khasra in order to ensure that all such entries have been brought on the list.

(3) If the lekhpal fails to comply with any of the provisions contained in paragraphs A80 and A81, the entry in the remarks column of the khasra will not be deemed to have been made in the discharge of his official duty."

25. In this regard, it would be relevant to reiterate the observations made in **Gurmukh Singh (*supra*)** that the entries will have no evidentiary value, if are not entered, in accordance with the provisions of 'the Manual'. As referred above, in the present case, no finding was returned by Courts below that the procedure prescribed in 'the Manual' was duly followed. Even

there is no material before this Court to hold that while making the entries, procedure prescribed under 'the Manual', such as whether the lekhpal has prepared the changes in triplicate, a copy thereof was handed over to the Chairman, Land Management Committee, changes were reported, statement was submitted to the supervisor kanungo, *partial* of the village was conducted, procedure prescribed under Para 102-C, etc. were duly followed. Therefore, only on basis of entries being under clause (9) of Part II of Para A-124 of 'the Manual', it could not be held that c *JurisprudenceJurisprudenceJurisprudence* ontesting respondents were in continuous possession on the land in dispute for a period of 12 years and thus perfected their right on the strength of adverse possession.

26. In view of above discussion and conclusion, there is no necessity for this Court to consider the third issue. However, since certain arguments were raised in this regard, therefore, now this Court proceeds further to consider issue (c) i.e. nature of possession also.

27. In this regard, it would be apposite to refer a judgment of Supreme Court in Hemaji Waghaji Jat (*supra*) wherein following relevant paragraphs of P.T. Munichikkanna Reddy and others Vs. Revamma and others, 2007 (6) SCC 59 were reiterated with approval that -:

“24. In a relatively recent case in *P.T. Munichikkanna Reddy v. Revamma* [(2007) 6 SCC 59] this Court again had an occasion to deal with the concept of adverse possession in detail. The Court also examined the legal position in various countries particularly in English and American systems. We deem it appropriate to reproduce relevant passages in extenso.

The Court dealing with adverse possession in paras 5 and 6 observed as under : (SCC pp. 66-67)

“5. Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile. (See *Downing v. Bird* [100 So 2d 57 (Fla 1958)] ; *Arkansas Commemorative Commission v. City of Little Rock* [227 Ark 1085 : 303 SW 2d 569 (1957)] ; *Monnot v. Murphy* [207 NY 240 : 100 NE 742 (1913)] ; *City of Rock Springs v. Sturm* [39 Wyo 494 : 273 P 908 : 97 ALR 1 (1929)] .)

6. Efficacy of adverse possession law in most jurisdictions depends on strong limitation statutes by operation of which right to access the court expires through efflux of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time, but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or colour of title. (See *American Jurisprudence, Vol. 3, 2d, p. 81.*) *It is important to keep in mind while studying the American notion of adverse*

possession, especially in the backdrop of limitation statutes, that the intention to dispossess cannot be given a complete go-by. Simple application of limitation shall not be enough by itself for the success of an adverse possession claim.”

(Italic part is emphasised in original and underline part is emphasised by this Court)

28. Recently the Supreme Court in **Uttam Chand (Dead) through LRs vs. Nath Ram (Dead) through LRs and others, 2020 (11) SCC 263** has reiterated earlier judgments and observed that -:

“15. The matter has been examined by a Constitution Bench in *M. Siddiq (Ram Janmabhumi Temple-5 J.) v. Suresh Das [M. Siddiq (Ram Janmabhumi Temple-5 J.) v. Suresh Das, (2020) 1 SCC 1]* wherein, it has been held that a plea of adverse possession is founded on the acceptance that ownership of the property vests in another, against whom the claimant asserts possession adverse to the title of the other. The Court held as under: (SCC pp. 703-706, paras 1142-1143 & 1147-1150)

“1142. A plea of adverse possession is founded on the acceptance that ownership of the property vests in another against whom the claimant asserts a possession adverse to the title of the other. Possession is adverse in the sense that it is contrary to the acknowledged title in the other person against whom it is claimed.

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1143. A person who sets up a plea of adverse possession must establish both possession which is peaceful, open and continuous possession which meets the requirement of being *nec vi nec claim and nec precario*. To substantiate a plea of adverse possession, the character of the possession must be adequate in continuity

and in the public because the possession has to be to the knowledge of the true owner in order for it to be adverse. These requirements have to be duly established first by adequate pleadings and second by leading sufficient evidence. Evidence, it is well settled, can only be adduced with reference to matters which are pleaded in a civil suit and in the absence of an adequate pleading, evidence by itself cannot supply the deficiency of a pleaded case. Reading Para 11(a), it becomes evident that beyond stating that the Muslims have been in long, exclusive and continuous possession beginning from the time when the Mosque was built and until it was desecrated, no factual basis has been furnished. This is not merely a matter of details or evidence. A plea of adverse possession seeks to defeat the rights of the true owner and the law is not readily accepting of such a case unless a clear and cogent basis has been made out in the pleadings and established in the evidence.

1147. In *Supt. & Remembrancer of Legal Affairs v. Anil Kumar Bhunja [Supt. & Remembrancer of Legal Affairs v. Anil Kumar Bhunja, (1979) 4 SCC 274 : 1979 SCC (Cri) 1038]*, R.S. Sarkaria, J. speaking for a three-Judge Bench of this Court noted that the concept of possession is “polymorphous” embodying both a right (the right to enjoy) and a fact (the real intention). The learned Judge held: (SCC p. 278, para 13)

‘13. ... It is impossible to work out a completely logical and precise definition of “possession” uniformly applicable to all situations in the contexts of all statutes. Dias and Hughes in their book on *Jurisprudence* say that if a topic ever suffered from too much theorising it is that of “possession”. Much of this difficulty and confusion is (as pointed out in

Salmond's Jurisprudence, 12th Edn., 1966) caused by the fact that possession is not purely a legal concept. "Possession", implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real intention. It involves power of control and intent to control. (See Dias and Hughes, *ibid.*)'

These observations were made in the context of possession in Section 29(b) of the Arms Act, 1959.

1148. In *P. Lakshmi Reddy v. L. Lakshmi Reddy* [*P. Lakshmi Reddy v. L. Lakshmi Reddy*, 1957 SCR 195 : AIR 1957 SC 314] , Jagannadhadas, J. speaking for a three-Judge Bench of this Court dwelt on the "classical requirement" of adverse possession: (AIR pp. 317-18, para 4)

'4. Now, the ordinary classical requirement of adverse possession is that it should be *nec vi nec clam nec precario*. (See *Secy. of State for India in Council v. Debendra Lal Khan* [*Secy. of State for India in Council v. Debendra Lal Khan*, 1933 SCC OnLine PC 65 : (1933-34) 61 IA 78] IA at p. 82.) The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor.'

The Court cited the following extract from U.N. Mitra's *Tagore Law Lectures on the Law of Limitation and Prescription*: (AIR p. 319, para 7)

'7. ... "An adverse holding is an actual and exclusive appropriation of land commenced and continued under a claim of right, either under an openly avowed claim, or under a constructive claim (arising from the acts and circumstances attending the appropriation), to hold the land against him (sic) who was in possession. (Angell, Sections 390 and 398). It is the intention to claim adversely accompanied by such an invasion of the rights of the opposite party as gives him a cause of action which

constitutes adverse possession." ' [6th Edn., Vol. I, Lecture VI, at p. 159]

This Court held: (AIR p. 319, para 7)

'7. ... Consonant with this principle the commencement of adverse possession, in favour of a person implies that the person is in actual possession, at the time, with a notorious hostile claim of exclusive title, to repel which, the true owner would then be in a position to maintain an action. It would follow that whatever may be the animus or intention of a person wanting to acquire title by adverse possession his adverse possession cannot commence until he obtains actual possession with the requisite animus.'

1149. In *Karnataka Board of Wakf v. Union of India* [*Karnataka Board of Wakf v. Union of India*, (2004) 10 SCC 779] , S. Rajendra Babu, J. speaking for a two-Judge Bench held that: (SCC p. 785, para 11)

'11. ... Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed.'

The ingredients must be set up in the pleadings and proved in evidence. There can be no proof sans pleadings and pleadings without evidence will not establish a case in law.

1150. In *Annakili v. A. Vedanayagam* [*Annakili v. A.*

Vedanayagam, (2007) 14 SCC 308] , this Court emphasised that mere possession of land would not ripen into a possessory title. The possessor must have *animus possidendi* and hold the land adverse to the title of the true owner. Moreover, he must continue in that capacity for the period prescribed under the Limitation Act.”

(Italic part is emphasised in original and underline part is emphasised by this Court)

29. In the present case, Consolidation Officer has returned a finding on the issue of adverse possession that name of respondents were recorded under Clause 9 in khasra no. 1366F-1377F and that on the basis of such revenue records, it was held that they were in possession for at least 10 years. However, Consolidation Officer accepted the oral evidence and returned a finding that they were in possession over land for more than 12 years.

30. On the face of it, the above approach of Consolidation Officer appears to be contrary to the settled position of law. As referred above, there must be a finding on the basis of clear and unequivocal evidence that possession was hostile to real owner and to denial of his title and knowledge, to the property claimed. There must be animus of the person doing those acts which must be ascertained from the facts and circumstances of the case. However, the Consolidation Officer has in very cursory manner has decided the issue of adverse possession, without reference of above referred essential pleadings and nature of evidence being on record.

31. The Settlement Officer of Consolidation, while deciding appeals, has also placed reliance on entries in revenue records, for that it has already been referred above that those entries were not prepared

in terms of the procedure prescribed in ‘the Manual’. The Appellate Court has also not returned any finding in regard to above referred essential and necessary factors of adverse possession. Therefore, error as committed by the Consolidation Officer continued in the order passed by the Settlement Officer of Consolidation.

32. The Deputy Director of Consolidation has placed heavy reliance again only on the entries made in revenue records and has not considered factors relevant for taking decision in regard to adverse possession that the possession was adequate in continuity, publicity and adverse to competitor. Adverse possession requires that all three essential requirements to co-exist at the same time, viz., it should be adequate in continuity, adequate in publicity and adverse to competitors in denial of the title and his knowledge. There must be physical fact of exclusive possession and the *animus possidendi* to hold as owner in exclusion to the actual owner. However, these important factors also skipped from consideration of Deputy Director of Consolidation as well as two Courts below.

33. I have carefully perused the contents of memo of counter affidavit filed by the respondents, however, they have not stated any averment in regard to any of the factors referred above. Even during the course of argument, learned Senior Advocate appearing for respondents has not pointed out any relevant detail or factor on record that claim of adverse possession was positively proved in terms of the above referred factors. The Ramdular (*supra*) relied upon by learned Senior Advocate for respondent would not be helpful since it is on the issue of power under Section 48 of U.P. Consolidation of Holdings Act, 1953,

34. In view of discussion and findings on above referred issues, I am of the considered opinion that all the Authorities under the Consolidation Act have erred and miserably failed to return a finding whether mandatory procedure for recording revenue entries under 'the Manual' was followed and have also erred in returning a finding about adverse possession only on the basis of revenue entries which only indicates the possession of the respondents for less than 12 years as well as that PA-10 was not prepared in terms of the procedure prescribed under 'the Manual' and further erred in placing reliance on the evidence of *mukhtar-khas* who was not competent to give evidence in regard to facts which were in exclusive knowledge of the original respondent qua to adverse possession. Lastly, the Authorities have also failed to give finding that possession of respondent was *nec vi, nec clam, nec precario*.

36. Accordingly, all impugned orders referred above are set aside and the writ petition is **allowed**, with no order as to costs.

38. By this judgment, this Court has decided a writ after forty years.

ORIGINAL JURISDICTION

DATED: ALLAHABAD 03.04.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ C No. 3149 of 2016

Smt. Parul Agarwal ...Petitioner
Versus
L.I.C. of India, Sonakpur, Moradabad &
Ors. ...Respondents

Counsel for the Petitioner:

Sri Neeraj Tripathi, Sri Abhinav Ojha, Sri
Ashutosh Srivastava, Sri Rajendra Pratap
Singh, Sri Rakesh Chandra Pathak, Ms.
Ritwika Tripathi

Counsel for the Respondents:

Sri Manish Goyal, Sri P. Mishra, Sri Udai
Shanker Mishra

Held:

Repudiation of life insurance claim by L.I.C. on ground of non - disclosure of previous policy upheld - Disclosure regarding earlier policy no. 224492798 was deliberately omitted in one proposal form and inaccurately denied in another by mentioning "कोई नहीं" - Insurance contract is based on utmost good faith - Insured is duty - bound to disclose all material facts within his knowledge - Insurance company rightly repudiated claim as per law and guidelines - Judgment in *Manmohan Nanda Vs United India Assurance Co.* (2022) 4 SCC 582 not applicable in absence of factual foundation that agent failed in duty - Mere payment of premium does not create estoppel against Corporation where material concealment is proved - Court drew adverse inference under Section 114(g) Evidence Act and applied principle of estoppel under Section 115.

Writ petition dismissed.**Case Law Discussed:**

1. Manmohan Nanda Vs United India Assurance Co. Ltd. (2022) 4 SCC 582
2. Satwant Kaur Sandhu Vs New India Assurance Co. Ltd. (2009) 8 SCC 316
3. United India Insurance Co. Ltd. Vs M.K.J. Corp. (1996) 6 SCC 428
4. Modern Insulators Ltd. Vs Oriental Insurance Co. Ltd. (2002) 2 SCC 734
5. Carter Vs Boehm (1766) 3 Burr 1905

Statutes and Provisions Referred:

1. Section 106, 114(g), 115 – Indian Evidence Act, 1872
2. Section 37 – Indian Contract Act, 1872
3. IRDA (Protection of Policyholders' Interests) Regulations, 2002

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Shri Rajendra Pratap Singh, learned counsel for the petitioner and Shri Udai Shankar Mishra, learned counsel for the respondent-Life Insurance Corporation.

2. The instant writ petition has been filed by one Smt. Parul Agarwal, wife of late Vishal Agarwal challenging the impugned order dated 10.09.2015 (annexed as "Annexure No.6" to the writ petition) whereby the Insurance Ombudsman, (Western U.P. and Uttarakhand), has dismissed the complaint filed by the petitioner against rejection of her claim by the Senior Divisional Manager of the Life Insurance Corporation (hereinafter referred to as "the Corporation") concerning the insurance policy Nos.256487214 and 256487400 vide order dated 14.03.2014

which has also been challenged. Further prayer is to issue a direction to the respondent no.1 to pay to the petitioner the amount payable under policy Nos.256487214 and 256487400.

Facts of the Case

3. The facts culled out from the pleadings contained in the writ petition are that Vishal Agarwal, i.e. husband of the petitioner, was holder of three insurance policies bearing nos.224492798, 256487214 and 256487400 issued by the Corporation and he died on 11.11.2013, whereafter, the petitioner, as his widow, preferred a claim against the aforesaid three policies. It is pleaded that the claim of the petitioner in respect of policy Nos.256487214 and 256487400 was rejected by the Corporation vide impugned order dated 14.03.2014 on the ground that the husband of the petitioner did not disclose the previous policy No.224492798 in the proposal form. After rejection of her claim concerning the aforesaid two insurance policies, the petitioner filed a review application before the Zonal Manager of the respondent-Corporation and, thereafter, filed an application before the respondent no.4 i.e. Insurance Ombudsman on 01.11.2014, however, the application/complaint of the petitioner was rejected by the impugned order dated 10.09.2015.

4. The writ petition is founded on the premise that the impugned order dated 14.03.2014 was passed with a pre-determined mind and smells of deep-rooted prejudice against the petitioner; that the Corporation, accepting the personal statement of the deceased to be correct, issued the policies without any protest and that there is nothing on record from which

it can be inferred that the insured ever made any concealment or misrepresentation at the time of commencement of insurance policy and, therefore, the impugned orders of the Corporation as well as the Insurance Ombudsman are unsustainable.

5. A counter affidavit dated 18.04.2016 has been filed on behalf of the Insurance Company stating that claim under policy nos.256487214 and 256487400 was repudiated on account of non-disclosure of previous policy No.224492798. It is further pleaded in the counter affidavit that as the Corporation works on the basis of utmost good faith by relying on the statement of insured in the proposal form, repudiation of claim was done as per rules on account of non-disclosure of previous policy in the proposal form.

6. The petitioner has filed rejoinder affidavit reiterating her stand taken in the writ petition.

7. A Supplementary affidavit dated 17.04.2022 has also been filed by the petitioner substantially relying upon the judgement of the Apex Court in *Civil Appeal No.8386 of 2015 (Manmohan Nanda v. United India Assurance Co. Ltd. & Anr.)* reported in *(2022) 4 SCC 582* and referring to the provisions of the Insurance Regulatory and Development Authority (Protection of Policyholders' Interests) Regulations-2002 (in short "the Regulations-2002"), it has been pleaded that the proposal form was rightly filled up by the insured with full satisfaction of the respondent-Corporation.

8. As against the supplementary affidavit, supplementary counter affidavit

has been filed on behalf of the Corporation taking the same stand as was taken in the main counter affidavit. Another rejoinder affidavit has been filed by the petitioner reiterating the ratio of Supreme Court in the case of *Manmohan Nanda* (Supra).

9. Perusal of order sheet indicates that this Court, on 16.11.2022, passed the following order:-

"Supplementary counter affidavit and rejoinder affidavit filed today are taken on record.

Sri U.S. Mishra, learned counsel appearing for the Life Insurance Corporation states that original insurance application form duly filled in and signed by the petitioner is required to be examined along with original insurance policy cover for deciding this case.

Accordingly, he is granted two weeks' time to produce the original insurance application form and insurance policy cover.

List this matter again on 7th December, 2022 amongst top 10 cases. "

10. Pursuant to the aforesaid order, original file concerning the claim of the petitioner was produced on 14.03.2023, during the course of arguments, by Shri Udai Shankar Mishra, learned counsel for the respondent-Corporation which was retained on record for the purposes of pronouncing the final judgement which was reserved on the said date.

11. I have heard the learned counsel for the parties and perused the record on the file as well as original record produced by Shri Mishra.

Contention of Petitioner

12. The contention of learned counsel for the petitioner is to the effect that while claim concerning one policy was allowed by the Corporation, rejection of claim in respect of two policies bearing nos.256487214 and 256487400 was wholly unsustainable and the impugned order dated 14.03.2014 has been passed taking a wrong and unsustainable ground. He further contends that no fraud/misrepresentation/concealment was made by the insured and, moreover, the proposal form is filled up by the agents of the insurance company themselves and, in case, there was something left blank in "Column No.9", the petitioner cannot be non-suited on such ground, rather, the same would be attributable to the insurance company whose agent had filled up the form and left something blank. It has further been argued that as per the decision of the Hon'ble Apex Court in the case of **Manmohan Nanda** (Supra), it was the duty of the agent of the Corporation to make specific queries from the insured while filling up the form and, if no such query was made and something was left blank in the form, whatever omission took place while filling up the proposal form, the same would not constitute a ground for repudiation of claim of the petitioner.

13. Learned counsel for the petitioner has placed strong reliance upon paragraph Nos.34, 35, 36, 40 and 55 of the aforesaid judgement that are reproduced hereinbelow:-

"34. Under the provisions of Insurance Regulatory and Development Authority (Protection of Policyholders' Interests) Regulations, 2002 the explanation to Section 2(d) defining "proposal form" throws light on what is the meaning and content of "material." For an

easy reference the definition of "proposal form" along with the explanation under the aforesaid Regulations has been extracted as under:

"2. Definitions:-In these regulations, unless the context otherwise requires:

(d) "Proposal Form" means a form to be filled in by the proposer for insurance, for furnishing all material information required by the insurer in respect of a risk, in order to enable the insurer to decide whether to accept or decline, to undertake the risk, and in the event of acceptance of the risk, to determine the rates, terms and conditions of a cover to be granted.

Explanation:- "Material" for the purpose of these Regulations shall mean and include all important, essential and relevant information in the context of underwriting the risk to be covered by the insurer."

Thus, the Regulation also defines the word "material" to mean and include all "important", "essential" and "relevant" information in the context of guiding the insurer in deciding whether to undertake the risk or not.

35. Just as the insured has a duty to disclose all material facts, the insurer must also inform the insured about the terms and conditions of the policy that is going to be issued to him and must strictly conform to the statements in the proposal form or prospectus, or those made through his agents. Thus, the principle of utmost good faith imposes meaningful reciprocal duties owed by the insured to the insurer and vice versa. This inherent duty of disclosure was a common law duty of good faith originally founded in equity but has later been statutorily recognised as noted above. It is also open to the parties

entering into a contract to extend the duty or restrict it by the terms of the contract.

36. *The duty of the insured to observe utmost good faith is enforced by requiring him to respond to a proposal form which is so framed to seek all relevant information to be incorporated in the policy and to make it the basis of a contract. The contractual duty so imposed is that any suppression or falsity in the statements in the proposal form would result in a breach of duty of good faith and would render the policy voidable and consequently repudiate it at the instance of the insurer.*

40. *If a fact, although material, is one which the proposer did not and could not in the particular circumstances have been expected to know, or if its materiality would not have been apparent to a reasonable man, his failure to disclose it is not a breach of his duty.*

55. *On a consideration of the aforesaid judgments, the following principles would emerge:*

55.1. *There is a duty or obligation of disclosure by the insured regarding any material fact at the time of making the proposal. What constitutes a material fact would depend upon the nature of the insurance policy to be taken, the risk to be covered, as well as the queries that are raised in the proposal form.*

55.2 *What may be a material fact in a case would also depend upon the health and medical condition of the proposer.*

55. 3. *If specific queries are made in a proposal form then it is expected that specific answers are given by the insured who is bound by the duty to disclose all material facts.*

55.4. *If any query or column in a proposal form is left blank then the Insurance Company must ask the insured to*

fill it up. If in spite of any column being left blank, the Insurance Company accepts the premium and issues a policy, it cannot at a later stage, when a claim is made under the policy, say that there was a suppression or non-disclosure of a material fact, and seek to repudiate the claim.

55.5 *The Insurance Company has the right to seek details regarding medical condition, if any, of the proposer by getting the proposer examined by one of its empanelled doctors. If, on the consideration of the medical report, the Insurance Company is satisfied about the medical condition of the proposer and that there is no risk of pre-existing illness, and on such satisfaction it has issued the policy, it cannot thereafter, contend that there was a possible pre-existing illness or sickness which has led to the claim being made by the insured and for that reason repudiate the claim.*

55.6 *The insurer must be able to assess the likely risks that may arise from the status of health and existing disease, if any, disclosed by the insured in the proposal form before issuing the insurance policy. Once the policy has been issued after assessing the medical condition of the insured, the insurer cannot repudiate the claim by citing an existing medical condition which was disclosed by the insured in the proposal form, which condition has led to a particular risk in respect of which the claim has been made by the insured.*

55.7. *In other words, a prudent insurer has to gauge the possible risk that the policy would have to cover and accordingly decide to either accept the proposal form and issue a policy or decline to do so. Such an exercise is dependant on the queries made in the proposal form and the answer to the said queries given by the proposer. "*

14. *The contention of learned counsel for the petitioner is to the effect that while*

claim concerning one policy was allowed by the Corporation, rejection of claim in respect of policy nos.256487214 and 256487400 was wholly unsustainable on the ground that as the insured had not made disclosure of policy No. 224492798 in "Columns No.9' of the proposal form, therefore, the claim was rejected "on the ground of concealment'.

Contention of Respondent-L.I.C.

15. On the other hand, Shri Uday Shankar Mishra, learned counsel for the respondent-Corporation, apart from the defence taken in the counter affidavit in support of the orders impugned, has specifically referred to the proposal forms of the two disputed policies, i.e. policy nos.256487214 and 256487400 with specific reference to the "Column 9' of the proposal forms. For a ready reference, "Columns No.9' of the both the policies are quoted hereinbelow:-

Column 9

अपनी सभी पॉलिसियों का विवरण नीचे दीजिए। (पिछले तीन वर्षों में अग्रपक्षित एवं वास्तविक पॉलिसियों को शामिल किए जायेंगे) Please give details of your previous insurance including policies surrendered/terminated during last 3 years.												
पॉलिसी संख्या Policy No.	बीमा कंपनी का नाम एवं पता जहां से पॉलिसी का पॉलिसिस्ट की गई है यदि वह अलग-अलग है तो पता/अकाउंट नाम दें। Insurance Companies from where the previous policies have been purchased with address (if previous policies are from LIC of India give name of the Branch/DO)	बीमा योजना Table & Terms	बीमा राशि Sum assured of main plan	अन्य बीमा राशि Sum Assured of Main Plan	अन्य बीमा राशि Sum Assured of Main Plan	अन्य बीमा राशि Sum Assured of Main Plan	अन्य बीमा राशि Sum Assured of Main Plan	अन्य बीमा राशि Sum Assured of Main Plan	अन्य बीमा राशि Sum Assured of Main Plan	अन्य बीमा राशि Sum Assured of Main Plan	अन्य बीमा राशि Sum Assured of Main Plan	अन्य बीमा राशि Sum Assured of Main Plan
256487214	MBD-2	14-16	55000	NIL	NIL	55000	28	07	12	YES	N.M	YES
अपनी सभी पॉलिसियों का विवरण नीचे दीजिए। (पिछले तीन वर्षों में अग्रपक्षित एवं वास्तविक पॉलिसियों को शामिल किए जायेंगे) Please give details of your previous insurance including policies surrendered/terminated during last 3 years.												
पॉलिसी संख्या Policy No.	बीमा कंपनी का नाम एवं पता जहां से पॉलिसी का पॉलिसिस्ट की गई है यदि वह अलग-अलग है तो पता/अकाउंट नाम दें। Insurance Companies from where the previous policies have been purchased with address (if previous policies are from LIC of India give name of the Branch/DO)	बीमा योजना Table & Terms	बीमा राशि Sum assured of main plan	अन्य बीमा राशि Sum Assured of Main Plan	अन्य बीमा राशि Sum Assured of Main Plan	अन्य बीमा राशि Sum Assured of Main Plan	अन्य बीमा राशि Sum Assured of Main Plan	अन्य बीमा राशि Sum Assured of Main Plan	अन्य बीमा राशि Sum Assured of Main Plan	अन्य बीमा राशि Sum Assured of Main Plan	अन्य बीमा राशि Sum Assured of Main Plan	अन्य बीमा राशि Sum Assured of Main Plan

16. The submission of learned counsel for the respondent-Corporation is that the existence of the aforementioned two policies was well within the knowledge of insured but in one of the forms, disclosure of only one policy bearing no. 256487214 was made whereas in another form, the words "कोई नहीं" were mentioned. It is, therefore, contended that the Insurance Ombudsman has rightly taken a view that the policy holder did not want to undergo special medical examinations at the time of taking insurance policy. Such non-disclosure prevented the Corporation from conducting certain additional checks and precautions specially with respect to the medical condition of the insured such as ECG, FBS, RUA, Hb% & Elisa etc.

17. Learned counsel for the respondent-Corporation has placed reliance upon the judgement of Supreme Court in *Satwant Kaur Sandhu v. New India Assurance Company Limited reported in (2009) 8 Supreme Court Cases 316* and has argued that in the matter of insurance, parties must act in utmost good faith and the insured is under a solemn obligation to make a true and full disclosure of the information on the subject which is within his knowledge.

Analysis of rival contentions

18. There is no dispute about the fact that there were three insurance policies issued in favour of Late Vishal Agarwal (husband of the petitioner) bearing nos.224492798, 256487214 and 256487400. The parties are not at dispute about the fact that claim for policy no.224492798 was allowed, whereas the claim for remaining policies was rejected under the orders impugned.

19. The dispute between the parties is as to whether non-disclosure of two policies in "Columns 9" of the two proposal forms was fatal to the claim made by the petitioner.

20. The decision of Apex Court relied upon by the learned counsel for the petitioner in *Manmohan Nanda* (supra) deals with the definition of proposal form under the aforesaid Regulations-2002 and the definition in "paragraph 34" is clear to the effect that "Proposal Form" means a form to be filled in by the proposer for insurance, for furnishing all material information required by the insurer in respect of a risk, in order to enable the insurer to decide whether to accept or decline, to undertake the risk, and in the event of acceptance of the risk, to determine the rates, terms and conditions of a cover to be granted.

21. Insofar as, the contention of learned counsel for the petitioner to the effect that the insurance agent sent by the Corporation, who had allegedly filled up the proposal form, must have informed the insured about the terms and conditions of the policy and also must have raised specific query from the insured regarding entries in the relevant Columns (in the present case Columns No.9), this Court finds that there is no pleading in the entire writ petition or in the supplementary affidavit that the insurance agent or officer of respondent-Corporation did not raise any query from the insured regarding policy numbers to be filled up in Column 9. Further, there is no pleading to the effect that the insured had, in fact, informed the agent/officer of the Corporation about existence of policy no.224492798, rather, it is the plea of the petitioner that it was agent/officer who did not fill up the same in

the proposal form. The Court finds that mere principle of law laid down in the decision of Supreme Court in the case of *Manmohan Nanda* (Supra) has been argued on behalf of the petitioner without any factual background. Moreover, even from the perusal of "paragraph 55" of the judgment of the Supreme Court in *Manmohan Nanda* (supra), it is clear that Supreme Court has clearly laid down the principle regarding what may constitute a "material fact".

22. The present case is not the one where "Column No.9" was left blank. Rather, it is a case where, as aforesaid, in one of the forms, disclosure of one policy No.256487214 was made without disclosing anything about policy No.224492798 and in, another form, words "कोई नहीं" were mentioned. "Columns 9" as such, in both the proposal forms were not left blank.

23. The case can be viewed from another angle. This Court, from perusal of the proposal form, finds a clear declaration by the insured Vishal Agarwal at the end of the form in the following words:-

**प्रस्तावक द्वारा घोषणा/ DECLARATION
BY THE PROPOSER**

"मैं विशाल अग्रवाल जिसे इसमें जीवन बीमा के लिये प्रस्तावित किया गया है एतद् द्वारा घोषणा करता हूँ कि उपरोक्त प्रकथन एवं उत्तर मेरे द्वारा प्रश्नों को पूरी तरह समझ लेने के बाद दिये गये हैं और वह सही है तथा प्रत्येक विवरण पूर्ण है और मैंने कोई सूचना छिपाई नहीं है। मैं एतद् द्वारा इस बात से सहमत हूँ और घोषित करता/ करती हूँ कि ये प्रकथन और घोषण मेरे एवं भारतीय जीवन बीमा निगम के अनुबन्ध के आधार पर होंगे और यदि कोई इसमें असत्य कथन पाया जायेगा तो वह अनुबन्ध पूर्ण रूप से रद्द हो जायेगा तथा इस सम्बन्ध में चुकाई गई समस्त धनराशि निगम द्वारा जब्त कर ली जायेगी।

I..... the person whose life Insurance is herein being proposed to be

*assured, do hereby declare that the fore going statement and answers have been given by me after fully understanding the questions and the same are true and complete in every particular and that **I have not withheld any information** and I do hereby agree and declare that these statements and this declaration shall be the basis of the contract of assurance between me and the Life Insurance Corporation of India and that **if any untrue averment be contained therein the said contract shall be absolutely null and void** and moneys which shall have been paid in respect thereof shall stand forfeited to the corporation."*

24. The aforesaid declaration has been signed by the insured-Vishal Agarwal. Therefore, this Court has no reason to repel the contention of the Insurance Corporation that existence of policy bearing no.224492798 was deliberately concealed in one of the forms, whereas in other form, by mentioning words "कोई नहीं ", both the policies were concealed.

25. In the facts and circumstances of the present case, I find it appropriate to refer three important provisions of the Indian Evidence Act-1872 which would be useful for deciding the present controversy.

26. Section 106 of the Evidence Act-1872 deals with provision for burden of proving a fact especially within knowledge. It is quoted hereinbelow:-

"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."

27. Section 114 of the Evidence Act-1872 is a provision wherein the Court may draw inferences in any proceedings which include inferences favourable or unfavourable (adverse) to any party. Section 114 alongwith relevant illustration (g) is quoted hereinbelow:-

"114 Court may presume existence of certain facts. --The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

Illustrations

The Court may presume-

(a)....

(b)....

(c)...

(d)..
(e)....

(f)...

(g). That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;"

(h).....

(i).....

28. Section 115 of the Evidence Act contains principle of "Estoppel" which reads as follows:-

"115 Estoppel. --When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing. "

29. Apart from the aforesaid, reference to Section 37 of the Indian Contract Act-1872, contained in Chapter IV, may also be made. This Chapter relates to performance of contracts and Section 37 provides for obligation of parties to contract and reads as follows:-

"37. Obligation of parties to contracts.--The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract. "

30. In the present case, the contract of insurance between Vishal Agarwal and Corporation would certainly bind legal representative of late Vishal Agarwal, i.e. the petitioner herein, and proposal forms described hereinabove would certainly fall within the category of **"contract of insurance"** and, therefore, if, on account of any false declaration or concealment made by the deceased, the claim has been rejected, the petitioner, being a successor/representative of her husband, would not get any relief in the totality of the facts and circumstances of the present case.

Conclusion-I

31. Considering the aforesaid provisions in the light of the material available on record, particularly the proposal form, I find that existence of two policies bearing nos.256487214 and 224492798 was in special knowledge of the

insured Vishal Agarwal but only existence of policy No.256487214 was disclosed in one form and the policy bearing No.224492798 was not disclosed in either of the proposal forms and, therefore, by invoking the principle of adverse inference and estoppel, respectively contained in **Section 114(g) and Section 115 of the Act-1872**, which would apply to the representative of the deceased Vishal Agarwal, i.e. the petitioner herein, no advantage of non-disclosure can be given to the petitioner so as to claim any relief regarding the two policies repudiated under the impugned orders.

32. The contention of the learned counsel for the petitioner to the effect that insurance company accepted the premium and, therefore, it was unjustified in dislodging the claim, is of no consequence in view of the fact that the proposal forms were filled in the year 2012 and Vishal Agarwal died in the year 2013 due to cardio-respiratory failure and payment might have been made only once during this period. Even otherwise, mere payment of premium would not estop the insurance company from repudiating the claim as it is well within its rights to repudiate or reject the claim on the ground of non-disclosure of existence of previous policies at the time of taking any fresh policy as there are various factors, administrative, medical as well as financial which need to be analyzed by the Corporation, while issuing any fresh insurance policy to a person who was already insured.

33. Regarding the principles of insurance law with respect to action in good faith, the Apex Court in the Case of **Satwant Kaur Sandhu** (supra), relied upon by learned counsel for the Corporation, has held that insurance policy is a contract of

insurance falling in the category of contract *uberrimae fidei*, meaning a contract of utmost good faith on the part of the assured. Thus, it needs little emphasis that when an information on a specific aspect is asked for in the proposal form, an assured is under a solemn obligation to make a true and full disclosure of the information on the subject which is within his knowledge. It is not for the proposer to determine whether the information sought for is material for the purpose of the policy or not. Of course, the obligation to disclose extends only to facts which are known to the applicant and not to what he ought to have known. The obligation to disclose necessarily depends upon the knowledge one possesses. His opinion of the materiality of that knowledge is of no moment. {See: *Joel Vs. Law Union & Crown Ins. Co. (1908) 2KB 863 (CA)*}.

34. In *United India Insurance Co. Ltd. Vs. M.K.J. Corporation, (1996) 6 SCC 428*, the Supreme Court has observed that it is a fundamental principle of insurance law that utmost faith must be observed by the contracting parties. Good faith forbids either party from non-disclosure of the facts which the party privately knows, to draw the other into a bargain, from his ignorance of that fact and his believing the contrary. (Also see: *Modern Insulators Ltd. Vs. Oriental Insurance Co. Ltd. (2002) 2 SCC 734*).

35. **MacGillivray on Insurance Law (10th Edition)** has summarised the assured's duty to disclose stating that the assured must disclose to the insurer all facts material to an insurer's appraisal of the risk which are known or deemed to be known by the assured but neither known nor deemed to be known by the insurer. Breach of this duty by the assured entitles the

insurer to avoid the contract of insurance so long as he can show that the non-disclosure induced the making of the contract on the relevant terms.

36. In *Carter Vs. Boehm (1558-1774) ALL ER Rep 183: (1766) 3 Burr 1905*, Lord Mansfield had succinctly summarised the principles necessitating a duty of disclosure by the assured by stating that insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist. The keeping back of such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void; because the *risque* run is really different from the *risque* understood and intended to be run at the time of the agreement...The policy would be equally void against the underwriter if he concealed...Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of the fact, and his believing the contrary.

37. The term "material fact" is not defined in the Act and, therefore, it has been understood and explained by the courts in general terms to mean as any fact which would influence the judgment of a prudent insurer in fixing the premium or determining whether he would like to accept the risk. Any fact which goes to the root of the Contract of Insurance and has a

to be returned to him by the office immediately.

Writ C No. 3818 of 2023

40. The original record produced by Shri Udai Shankar Mishra, learned counsel for the respondent-Corporation, is directed

3. The Collector's rejection of the petitioner's application for correction of the revenue map, despite reports from Naib Tehsildar and

Tehsildar confirming the need for correction, was a failure to discharge statutory duty.

4. The Revisional Authority erred in law by failing to consider the statutory provisions of the U.P. Revenue Code, 2006, and Rules, 2016, while dismissing the petitioner's revision.

5. The impugned orders dated 05.12.2022 and 06.03.2023 were set aside, and the matter was remanded to the Collector, Ambedkar Nagar, for a fresh decision with a reasoned and speaking order, considering the statutory duty to correct errors in revenue records.

Case Laws Discussed:

1. Ghafoor Vs Additional Commissioner, MANU/UP/0670/1978

2. Ali Khan Vs Ram Prasad, MANU/UP/0589/1980

3. Surji Devi Vs Additional Commissioner, MANU/UP/1594/2012

4. Gaya Prasad Vs Yadunath, MANU/UP/1457/2017

5. Smt. Shyam Raji Vs Board of Revenue, Misc. Single No. 7638 of 2015

Writ petition allowed; impugned orders set aside; matter remanded to Collector, Ambedkar Nagar, for fresh decision.

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Shri Sanjay Kumar Srivastava, learned counsel for the petitioner assisted by Shri Akshat Kumar, Advocate and Shri Hemant Kumar Pandey, learned Standing Counsel for State-respondents.

2. By means of this petition, the petitioner has assailed the order dated 05.12.2022 passed in the case instituted under Section 30 of U.P. Revenue Code, 2006 (hereinafter referred to as 'Code,

2006') for correction of *map* registered as Case No. 189 of 2022, Computerized Case No.D202204040000189 (Ravindra Kumar Vs. Krishna Murari), whereby the application preferred by the petitioner for correction of *map* was rejected by the respondent no. 3 i.e. Collector/District Magistrate, Ambedkar Nagar.

3. The petitioner has also assailed the order dated 06.03.2023 passed by the respondent no. 2 i.e. Additional Commissioner (Administration), Ayodhya Division, Ayodhya, whereby the respondent no. 2 has rejected the Case No. 2544 of 2022, Computerized No. C202204000002544 (Ravindra Kumar Vs. Krishna Murari And Others) preferred by the petitioner under Section 210 of Code, 2006, being aggrieved by the order dated 05.12.2022 passed by the respondent no. 3.

4. Considering the dispute pertaining to difference between the area of Gata No. 408 recorded as pond in revenue records situated at Village-Jainuddinpur, Perghana-Bidahar, Tehsil- Tanda, District – Ambedkar Nagar and in the *map* and *khatauni* i.e. 0.477 hectares and 0.455 hectares respectively, this Court, vide order dated 12.05.2023, protected the interest of the petitioner and directed the learned Standing Counsel to seek instructions in the matter.

5. It would be apt to clarify that area indicated in *khatauni* of Gata No. 408 is 0.455 hectares and in the revenue *map*, the same has been indicated as 0.477 hectares and in view of same, the area inadvertently transcribed in the order dated 12.05.2023 passed by this Court be accordingly read.

6. Today, when the case was called out, Shri Hemant Kumar Pandey, learned

Standing Counsel, based upon instructions, stated that there is a difference between area mentioned in *khatauni* i.e. 0.455 hectares and the revenue *map* i.e. 0.477 hectares.

7. It is also not in dispute that on an application for correction of *map*, the report(s) were called from the concerned revenue official(s) and in response, the report(s) were submitted by Naib Tehsildar, Tanda and Tehsildar, Tanda and as per these reports, the revenue *map* pertaining to Gata No. 408 area 0.455 hectares mentioned in the *khatauni* requires correction. The reports are annexed with the present petition as Annexure Nos. 5 & 4, respectively and the contents of these reports were taken note of by the respondent no. 3, as appears from the impugned order dated 05.12.2022. However, it appears from the impugned order dated 05.12.2022 that the respondent no. 3 rejected the application after observing that no correction is required on account of the difference of area, in issue, between *khatauni* and revenue *map*.

8. The Revisional Authority also, taking note of the area, in issue, rejected the revision of the petitioner. The impugned order dated 06.03.2023 of the Revisional Authority also shows that Revisional Authority failed to take note of the facts mentioned in the report(s) submitted by Naib Tehsildar, Tanda and Tehsildar, Tanda.

9. In the aforesaid background of the case assailing the orders impugned, Shri Sanjay Kumar Srivastava, Advocate and Shri Akshat Kumar, Advocate stated that impugned orders are liable to be interfered by this Court as Section 30 of the Code, 2006 read with U.P. Revenue Rules, 2016 (hereinafter referred to as 'Rules, 2016')

ought to have been taken note of by the respondent no. 3 while considering the application for correction of *map* and in the instant case, the respondent no. 3 has considered the provisions of '*Chakbandi Manual*', which would not apply after promulgation of Code, 2006 and Rules made thereunder.

10. He further submitted the provisions of Code, 2006 and Rules, 2016 have also not been considered by respondent no. 2 while dealing with the revision preferred by the petitioner challenging the order dated 05.12.2022.

11. Further submitted that the admitted position is that there is a difference between area indicated in the *khatauni* and the revenue *map* as such District Magistrate/Collector, being the revenue head of the district, is under obligation to correct the revenue *map* so as to resolve dispute related to area in revenue record and *map*.

12. He further submitted that it is the duty of the District Magistrate/Collector to correct the revenue entries and no application for this purpose is required. In the instant case, application for correction of *map* was preferred by the petitioner on account of the proceedings initiated under Section 67 of Code, 2006, against the petitioner for eviction alleging that the petitioner is an encroacher of the land recorded as *pond* though the house of the petitioner is situated, as indicated in the revenue *map*, over abadi land. As such, the petitioner was compelled to prefer the application for correction of *map*.

13. It is also stated that in case under Section 67 of Code, 2006, during the pendency of the application for correction

of *map*, an order has already been passed as per which execution, if any, would be carried out against the petitioner only after order passed on the application for correction of *map* and as per the report(s) of Naib Tehsildar, Tanda and Tehildar, Tanda, the correction of *map* is required in revenue records and the same has been declined by the authorities under the Code, 2006.

14. Shri Hemant Kumar Pandey, learned Standing Counsel for State-respondents stated that impugned order dated 05.12.2022 and also the order dated 06.03.2023 are basically based upon the provisions of '*Chakbandi Manual*' particularly para 101 as also that the petitioner was not having any locus to prefer an application for correction of *map* with regard to land recorded as pond. The difference of area is negligible i.e. less than three biswa accordingly, no correction in *map* is required as per para 101 of '*Chakbandi Manual*'.

15. But he could not dispute that revenue authorities are under obligation to correct the revenue entries including the entries related to *map* and in the instant case, there is a difference between area indicated in the '*khatauni*' and also in the revenue *map*.

16. Considered the submissions made by learned counsel for the contesting parties and having perused the record including the orders impugned, as also the instructions dated 15.05.2023, provided by the District Magistrate, Ambedkar Nagar, placed before this Court, a copy of which is taken on record.

17. The difference between area of Gata No. 408, detailed above, indicated in

the revenue *map* and in the *khatauni* is undisputed which as per *map* is 0.477 hectares and as per *khatauni* is 0.455 hectares. Thus, the issue is that as to whether the Collector concerned has failed to discharge his statutory duties by declining to correct the error or omission in revenue *map*.

18. From the impugned order dated 05.12.2022, it is apparent that the respondent no. 3 i.e. Collector/District Magistrate, Ambedkar Nagar has not recorded reasons/findings for rejecting the reports of Naib Tehsildar, Tanda and Tehsildar, Tanda, whereas according to these reports, the correction of *map* is required. These reports have not been dealt with by recording reasons.

19. The Collector/District Magistrate, Ambedkar Nagar, only taking note of difference in area, in issue, i.e. 0.022 (1.73 biswa) and Para 101 of '*Chakbandi Manual*' has rejected the report of Naib Tehsildar, Tanda dated 18.01.2022 and also of Tehsildar, Tanda dated 01.12.2021 by saying that reports are not based upon evidence though the facts are otherwise,

20. Para 101 of '*Chakbandi Manual*' based upon which impugned order has been passed does not say in specific terms that if the area is less than three *biswas* then the revenue *map* would not be corrected and this aspect is evident from the language couched in the same and being relevant, the same reads as under:

“101. भुजाओं की नाप से निकाला हुआ क्षेत्रफल आधार.....खसरे में दिए गए क्षेत्रफल से मिलाया जाए। इन दोनों क्षेत्रफलों में अन्तर का प्रतिशत हर गाटे के लिए निकालकर 'गट्टा बुक' के स्तम्भ 14 में दर्ज किया जाये। आधे एकड़ या उसे कम के खेतों में दस प्रतिशत तक का अन्तर नगण्य होगा।

आधे एकड़ से अधिक वाले खेतों में पाँच प्रतिशत तक का अन्तर नहीं माना जायेगा। परन्तु कोई भी अन्तर जिसे नगण्य माना जाये, तीन बिस्वा से अधिक न होना चाहिए। जिन खेतों में अन्तर ऊपर दी गई सीमाओं से कम है, उनका आधार-वर्ष के खसरे में दिया गया क्षेत्रफल सही माना जायेगा और उसे गट्टाबुक के स्तम्भ 15 में अंकित किया जायेगा। अन्य दशाओं में, मौके पर भुजाओं की नाप में पाया गया क्षेत्रफल सही माना जायेगा और उसे गट्टा-बुक के स्तम्भ 15 में लाल स्याही से लिखा जायेगा। चकबन्दी कर्ता मौके पर शत प्रतिशत गाटों की जांच करेंगे। चकबन्दी का की जांच के बाद, गट्टा-बुक के स्तम्भ 15 का क्षेत्रफल, खसरा-चकबन्दी (जी-च-आकार-पत्र 2-क स्तम्भ 4 में हर गाटे के सामने, लिखा जायेगा जो क्षेत्रफल जोत चकबन्दी आकार-पत्र के स्तम्भ 2 में दिए गए क्षेत्रफल से भिन्न हों, उन्हें लाल स्याही से दिखाया जायेगा। ऐसे गाटों के पुराने और नये क्षेत्रफल का अन्तर गलती माना जायेगा और उसे जोत चकबन्दी आकार-पत्र 4 में गलती मानकर लिखा जायेगा। पड़ताल की जांच के समय, चकबन्दी अधिकारी ऐसे सभी गाटों की मौके पर जांच आवश्यक करें। चकबन्दी अधिकारी भी अपने क्षेत्र के गांवों में इनमें से कुछ गाटों की मौके पर पैमाइश कर लें।"

21. The relevant provision in the Code, 2006 is Section 30 which casts a duty upon the Collector. It provides that the Collector shall maintain a *map* and a field book (*khasra*) for each such village and shall cause to be recorded therein, all changes in the boundaries of the village or survey numbers, and shall also cause to be corrected any errors or omissions which are, from time to time, detected in such *map* or field book (*khasra*). This Section reads as under:

“Section 30 - Maintenance of map and Field Book : (1) *The Collector shall maintain, in the manner prescribed, a map and a field book (khasra) for each such village and shall cause to be recorded therein, annually, or at such longer intervals as may be prescribed, all changes in the boundaries of the village or survey numbers, and shall also cause to be corrected, any errors or omissions which*

are, from time to time, detected in such map or field book (khasra).

(2) *The minimum number shall be divided physically in the manner prescribed and revenue records including map and khasra shall be corrected accordingly.”*

22. Other relevant provisions are Section 32 & 38, both these sections also as per language couched relate to correction of revenue record including a *map* and a field book (*khasra*). The same are as under:

“Section 32 : (1) *Subject to the control of the Collector, the Sub-Divisional Officer, the Tahsildar, or the Revenue Inspector shall record, in the manner hereinafter provided in this Chapter, all changes in the record of rights (khatauni), the field book (Khasra) and the map that may take place, and all transactions that may affect any of the rights or interests recorded, and correct therein any errors proved to have been made in the records previously prepared: Provided that order for correction in map shall be passed by the Collector.*

(2) *No application for correction of error under sub-section (1) where the claim is based solely on possession as well as involving intricate question of title shall be maintainable.”*

“Section 38 : (1) *An application for correction of any error or omission in the map, filed-book (khasra) or record of rights (khatauni) shall be made to the Tahsildar in the manner prescribed.*

(2) *On receiving an application under sub-section (1) or on any error or omission otherwise coming to his knowledge, the Tahsildar shall make such inquiry as may appear to him to be necessary, and refer the case along with his report to the Collector in the case of map*

correction and the Sub-Divisional Officer in matter of other correction.

(3) The case shall be decided by the Collector or the Sub-Divisional Officer, as the case may be, after considering any objection filed and evidence produced before him or before the Tahsildar.

(4) Any person aggrieved by an order of the Collector or the Sub-Divisional Officer, as the case may be, under sub-section (3), may prefer an appeal to the Commissioner within a period of thirty days from the date of such order, and the decision of the Commissioner shall, 1 [subject to the provisions of section 210], be final.

(5) Any forged or manipulated entry in the map, the khasra or the record of rights (khatauni) may be expunged under this section.

(6) Notwithstanding anything contained in other provisions of this Code, the Revenue Inspector may correct any undisputed error or omission in the record of rights (khatauni) or khasra in such manner and after making such inquiry, as may be prescribed. Explanation. - The power to correct any error or omission under this section shall not be construed to include the power to decide a dispute involving question of title.”

23. The procedure for correction of map has been provided in Rules, 2016. Rule 25 and Rule 36, being relevant, the same are being extracted herein-under:

“Rule 25 - map and Field Book [Section 30(1)]. - For every village, the Collector shall cause to be prepared and maintained a Field Book (khasra) in R.C. Form-4 and also a map (showing the boundaries of survey number) wherein the changes referred to in section 30 shall be recorded.

[(1) The Collector will get prepared and maintained a Field Book (khasra) in R.C. Form 4 for each village, and keep a map (showing boundaries of khasra numbers or gata number) wherein the changes referred to in Section 30 shall be recorded.

(2) The Field Book (khasra) for the years before Fasli year 1428 shall be kept in R.C. Form 4 and it shall be maintained and preserved according to Governments Orders and Board Orders issued from time to time.

(3) In the areas where U.R Zamindari Abolition and Land Management Act, 1950 was in force, the Field Books (khasra) of Fasli year 1428 and thereafter shall be kept in R.C. Form 4-A in Computerized(digital) form.

(4) At the end of Fasli Year, Khasra entries will be made unchangeable (be frozen) and the copy of Field Book (khasra) in PDF or any other unchangeable format shall be eternally preserved at State Data Centre at Board level, or at Government Electronic Cloud, like Meghraj etc. one printed copy of the same will be preserved at Tehsil level as record till 12 years.(5) Entries in R.C. Form 4-A will be recorded in computerized (digital) form as per Governments Orders and Board Orders issued from time to time.]”

“Rule 36. Correction of error or omission (Section 38). - (1) Every application for correction of any error or omission in the map, field-book (khasra) or record-of-rights (khatauni) referred to in section 38(1) shall contain the following particulars:-

(a) Name, parentage and address of the applicant.

(b) The document for the correction whereof the application is being made.

(c) Particulars of the land to which the error or omission relates.

(d) The precise nature of the error or omission.

(e) The application shall be accompanied by a certified copy of the map, khasra or khatauni to which the alleged error or omission relates.

(2) Proceedings for correction of the map, field book or record-of-rights may be initiated even without any application under sub-rule (1), if the error or omission otherwise comes to the knowledge of the Tahsildar.

(3) If during the preparation of new khatauni, partial, spot verification and local visit or inquiry, the Lekhpal, Naib Tahsildar, Revenue Inspector or any other revenue officer has reasons to believe that any error or omission (including any fake or fraudulent entry but excluding the errors or omissions referred to in the explanation to section 38) has crept in the map, field book or the record of rights, he shall refer the matter to the Tahsildar who shall initiate necessary proceedings under this rule.

(4) In proceedings for correction of errors and omission under this rule, the Tahsildar shall call for a report from the Revenue Inspector or the Lekhpal and after affording reasonable opportunity of hearing to the parties concerned and making summary inquiry, refer the case to the Collector in the case of map correction and to the Sub-Divisional Officer in the case of other correction along with his report within a period of thirty days from the date of registration of the application.

(5) The Collector or the Sub-Divisional Officer, as the case may be, shall allow the parties to file objection, if any, against the report of the Tahsildar submitted under sub-rule (4), and then decide the dispute. If the Collector or the

Sub-Divisional Officer, as the case may be, is of the opinion that the map, field book or record of rights contains any error or omission, he shall direct for the correction thereof.

(6) An endeavor shall be made to conclude the proceeding for correction under section 38 within the period of 45 days from the date of receiving the application with the report and if the proceeding is not concluded within such period the reasons for the same shall be recorded.

(7) The Revenue Inspector may correct any undisputed error or omission in the Record of Rights (khatauni) or khasra after making such inquiry in the manner contained in the Land Record Manual."

24. Similar provision i.e. Section 28 of the U.P. Land Revenue Act, 1901 (now repealed), being relevant to the view of this Court is also extracted herein-under:

"Section 28. Maintenance of map and field-book. - The Collector shall in accordance with rules made under Section 234, maintain a map and field-book of each village in his district and shall cause annually, or at such longer intervals as the [State Government] may prescribe, to be recorded therein all changes in the boundaries of each village or field and shall correct any errors which are shown to have been made in such map or field-book".

25. This Court, after considering Section 28, quoted above, as also Section 52 of U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as "Act, 1953"), in the following judgments specifically observed that it is the duty of the Collector to correct any error in the

revenue map, field book or the record of rights:

A. In the the judgment passed in the case of **Ghafoor Vs. Adl. Commissioner and Ors.**, reported in **MANU/UP/0670/1978**, this Court observed as under:

“2. Thus after consolidation operations are over and the notification under Section 52 of the U.P. Consolidation of Holdings Act is published it is the Collector who is to maintain the map, field-book etc., and such a map and field-book can be corrected under the Land Revenue Act and under such circumstances the U.P. Consolidation of Holdings Act does not go to the extent of rendering the provisions of the U.P. Land Revenue Act nugatory, so far as correction of map prepared during consolidation operations is concerned.

3. Our attention has been drawn to another case *Mohammad Raza v. Board of Revenue* 1973 AWR 621 in which it was held that a map prepared by the consolidation authorities is not necessarily final and conclusive and a map incorrectly drawn up cannot be treated as final and conclusive and can be corrected under Section 28 of the Land Revenue Act.

4. Looking to the provisions of the U.P. Consolidation of Holdings Act and the Land Revenue Act, we are in agreement with the view expressed in *Mohammad Raza v. Board of Revenue* (supra) and we hold that if a map is subsequently found incorrect and it is not in conformity with the document prepared by the consolidation authorities, the same can in suitable cases be corrected subsequent to the publication of the notification under Section 52 of the U.P. Consolidation of Holdings Act by the Collector in exercise of power under Section 28 of the Land Revenue Act. Thus we are of the view that the law laid down in

Ganga Glass Works (Private) Ltd., Balawali v. State of U.P. (supra) is not a good law.

5. Thus the powers of the Collector under Section 28 of the U.P. Land Revenue Act for correcting the map in suitable cases are intact notwithstanding the map has been prepared by the consolidation authorities who have adjudicated the rights and title of the parties. In case there is any discrepancy in the map and final document has been prepared by the consolidation authorities, the same can be corrected in proceedings under Section 28 of the Land Revenue Act provided the right, interest and title of the party which have been finally adjudicated or have become final are not involved.

6. In the present case after notification under Section 52 of the U.P. Consolidation of Holdings Act was published, an application was moved by the Petitioner for correction of the map and the Petitioner tendered evidence that the map was not in conformity with the entries which were made in C.H. Form 45. It was obligatory on the authorities to correct the map in case they were satisfied that there was some discrepancy between the map and the entries in C.H. Form 45 and it is on a mistaken view of law that they have refused to grant this relief to the Petitioner.”

B. In the judgment passed in the case of **Ali Khan Vs. Ram Prasad and Ors.**, reported in **MANU/UP/0589/1980**, this Court observed as under:

“6. The only point for consideration in this appeal is whether the Civil Court has the jurisdiction to make corrections in the map prepared by the consolidation authorities.

7. If the village had not been denotified under Section 52 of the U.P. Consolidation of Holdings Act, the obvious

mistake in the map could have been rectified by moving an application under Section 42A of the U.P. Consolidation of Holdings Act. It is, however, admitted on all hands that the village had already been denotified under Section 52 of the U.P. Consolidation of Holdings Act. In this situation, there was no remedy open to the Appellant for getting the needful correction done. Section 27 of the U.P. Consolidation of Holdings Act provides for the preparation of the revenue records after the enforcement of the final consolidation scheme. Section 27 reads:

27. As soon as may be after the final Consolidation Scheme has come into force, the District Deputy Director of Consolidation shall cause to be prepared for each village a new map, field book and record of rights in respect of the consolidation area, on the basis of the entries in the map as corrected under Section 7, the khasra chakbandi, the annual register prepared under Section 10 and the allotment orders as finally made and issued in accordance with the provisions of this Act. The provisions of the Uttar Pradesh Land Revenue Act, 1901, shall subject to such modifications and alterations as may be prescribed be followed in the preparation of the said map and records.

(2) All entries in the record of rights prepared in accordance with the provisions of Sub-section (1) shall be presumed to be true until the contrary is proved.

(3) After the issue of notification under Section 52, the Collector shall, instead of the map, field-book and record of rights previously maintained by him, maintain the map, field-book and record of rights prepared in accordance with the provisions of Sub-section (1) and the provisions of Sections 28 and 33 of the U.P.

Land Revenue Act, 1901 shall apply to the maintenance of such map, field book and record of rights, as the case may be.

8. In view of Sub-section (3) of Section 27 of the U.P. Consolidation of Holdings Act, after the denotification of the village under Section 52, the Collector has been enjoined to maintain the map, field-book and record of rights prepared in accordance with the provisions of Sub-section (1) of Section 27. The provisions of Sections 28 and 33 of the U.P. Land Revenue Act have been made applicable for the maintenance of such map, field book and record of rights.

9. Consequently, the Appellant moved an application under Section 28 of the U.P. Land Revenue Act for making a correction in the map to bring it in line with the record of rights. The revenue Court, however, took the view that it had no jurisdiction. The same was confirmed even by the appellate authority. The Appellant was, under the circumstances, compelled to file a regular suit in the Civil Court for injunction restraining the Respondent from interfering with his possession over the disputed area of plot No. 320 and also for the correction of the map. As stated earlier the trial Court decreed the suit, but the appellate Court took the view that the Civil Court had no jurisdiction to entertain the suit.

10. It may be pointed out that if the Appellant had remedy under the U.P. Consolidation of Holdings Act, Section 49 would bar the suit. But the Appellant had no remedy before the consolidation authorities on account of the denotification of the village under Section 52 of the U.P. Consolidation of Holdings Act. Besides, the title of the parties had already been determined by the consolidation authorities. But while preparing the record, the area shown in the map was not in

conformity with the area shown in the annual register. This was an obvious mistake to be rectified. The Appellant tried to get the same rectified by the revenue Court, further failed. He next attempted to get the same relief in the Civil Court, but there also he failed. Thus, he has been running from pillar to post to get an obvious mistake rectified, but of no avail.

11. The learned Counsel for the appellants cited *Smt. Rekha Singh v. The State of U.P.* (supra). In that case, Justice O.P. Trivedi (as he then was) took the view :

Under Section 28, the Collector is empowered to cause to be recorded annually or of such intervals as may be prescribed by Government all changes in the map regarding boundaries of each village and field. He has also been empowered to correct any errors which are shown to have been made in such map or field book. It is clear that Section 28 does not empower the Collector to make any changes or alterations in the entries of 'khatauni'. He can make changes in the field book or khasra and the map only under specified conditions.

He also found that the power exercised under Section 28 by the Collector is a non-judicial power, which is well settled by a Full Bench of this Court (? Board of Revenue) in *Raj Kumar v. Bhagwat Singh*, 1956 AWR 202. He further found:

This implies that the power which may be exercised under Section 28 administratively should not adversely affect the rights of any one. The moment a certain error is a disputed one, the Collector cannot obviously decide it u/S. 28 without affecting the rights of the disputants. In conferring power of correcting errors in the field-book and the map under Section 28 in a unilateral manner by a executive order

the Legislature clearly did not intend to confer on the Collector power to make correction in the field book and the map in respect of disputed entries. Where there is a disputed error in the map or khasra it is the Civil Court only which is competent to adjudicate upon it. under Section 57 of the Act, all entries in the record of rights prepared in accordance with the provisions of Chapter IV of the Act are presumed to be true until the contrary is proved and the entries which are binding on all Revenue Courts can be challenged only before the Civil Court. The presumption of correctness about these entries must hold until the contrary is proved before the Civil Court. It is, therefore, clear from Section 57 of the Act that in the case of a disputed error in the field book and the map or the record of rights prepared in accordance with Chapter IV of the Act the Collector has no power to decide whether there is an error or there is no error and it is the Civil Court alone which can adjudicate upon a disputed error.....All disputes regarding the annual registers and records of rights must have been disposed of and decided by the Record Officer under Section 51 of the Act in accordance with the procedure laid down in Section 41 and after the close of these operations the khasras, khataunis and the maps of these villages became final." In the instant case, in the first instance, the error has crept in only in the map which was not in conformity with the annual register. Therefore, the case is fully covered by Section 28 of the U.P. Land Revenue Act and the mistake could have been rectified. Section 49 of the U.P. Consolidation of Holdings Act would also not stand as a bar inasmuch as the rights and title of the parties had already been decided by the consolidation authorities in respect of the disputed plot. The only dispute was that the map prepared by the consolidation

authorities at the close of the consolidation scheme was not in accordance with the record of rights.

12. In *Ganga Glass Works (Private) Ltd. Balwali v. The State of U.P.*, MANU/UP/0040/1972MANU/UP/0040/1972 : AIR 1972 All. 158 Justice B. N. Lokur (as he then was) took the view that a map prepared by the consolidation authorities can be corrected by those authorities alone and the revenue authorities cannot resort to Section 28 of the U.P. Land Revenue Act to make corrections in that map. Section 42A of the U.P. Consolidation of Holdings Act does enable the authorities concerned to correct the size and shape of the plots in the map prepared with the size recorded in the record of rights. Similarly, the shape also would be an error which would come within the purview of Section 42A of the Act and can be corrected by the consolidation authorities.

13. The case is also distinguishable inasmuch as, in the instant case, there had already been a denotification under Section 52 of the U.P. Consolidation of Holdings Act and, therefore, there was no question of making an application under Section 42A for the correction of the map and, in this situation, it was open to the Appellant to have got the map corrected by moving an application under Section 28 of the U.P. Land Revenue Act.

14. In *Jaggu v. Patan Din* 1960 RD 63 the boundaries of chak Nos. 287 and 272 shown by the consolidation authorities in the map prepared by them did not accord with the record of rights prepared by them. Taking advantage of this mistake, the Defendants interfered with the Plaintiff's possession. The Plaintiff, therefore, applied to the Collector concerned for correction of the map after the close of the consolidation operation. The Additional Collector

dismissed the Plaintiff's application on the ground that the map had become final and conclusive under Section 28 of the U.P. Consolidation of Holdings Act and he had no jurisdiction to correct it. The Plaintiff then filed the suit giving rise to the present second appeal. The Defendant raised the plea that the suit was barred by Section 49 of the U.P. Consolidation of Holdings Act. The argument was repelled. Reference was made to Section 27 of the U.P. Consolidation of Holdings Act. It contemplates that the entries in the record of rights prepared in accordance with the provisions of Sub-section (1) shall be presumed to be true until the contrary is proved. Thus, presumption of correctness is only rebuttable. There is no such presumption of correctness with regard to the map. Section 49 of the U.P. Tenancy Act also speaks of the rights of tenure holders to land. If the map does not accord with the record of rights, the error could certainly be corrected by the revenue authorities after the close of the consolidation operations.

15. On an analysis of the relevant provisions of the Act and the cases cited before us, we are satisfied that the mistake could have been rectified by the Revenue Court and the cases cited on behalf of the Appellant in support of the contention that the Civil Court has the jurisdiction are distinguishable.

16. There is, however, another aspect of the matter which cannot be lost sight of. The Revenue Court, which was competent to entertain the application under Section 28, however, erroneously held that it had no jurisdiction to entertain the application under Section 28. The order was confirmed even in revision by the Additional Commissioner, Bareilly, by his order dated 2nd March, 1977.

17. It is now well settled that even an erroneous judgment by a competent Court between the parties can operate res-judicata. In *Avtar Singh v. Jagjit Singh* 1979 AWC 635 (SC), the Appellant filed a civil suit claiming one fourth share on the ground that he was the fourth son of his father. An objection was raised by the Respondents that the Civil Court had no jurisdiction. A preliminary issue was framed and it was held by the Subordinate Judge that the Civil Court had no jurisdiction to try the suit and directed the return of plaint for presentation to the proper revenue Court. When the Appellant filed the suit in the revenue Court, the petition was returned holding that the revenue Court had no jurisdiction to try the suit. Thereupon, the Appellant again instituted Suit No. 13 of 1960 in the Court of the Civil Judge. That suit failed throughout on the ground of res-judicata. It was contended before the Supreme Court that the appellants were driven from pillar to post for the redress of their grievances. When they instituted the suit in the Civil Court, the Court held that it had no jurisdiction to try. When the suit was filed in the revenue Court, the said Court took a contrary view. Where could the Appellant go then ? The Supreme Court repelled the argument and observed as under :

We do sympathise with the appellant's dilemma but they were wrongly advised to do as they did. Either they ought to have followed the matter in the First Civil suit and insisted upto the end that the suit was triable by a Civil Court, or they would have taken the matter further before the higher authorities and Court from the order of the Revenue Court and persisted that the matter whether the Civil Court had jurisdiction to decide the dispute between the parties or not was res-judicata, the Revenue Court had no jurisdiction to go

behind the decision of the Civil Court. The appellants did neither. It is unfortunate that due to the wrong paths which they followed under wrong advice they have ultimately to fall on the technical ground of res-judicata but there is no way out.

Again, in *Upendra Nath Bose v. Lall* 1940 AWR (PC) 147 the Privy Council laid down that there would be res-judicata in regard to the question of lack of jurisdiction of the Civil Court to try the matter. If the Defendant appears and an issue is raised and decided then the decision on the question of jurisdiction will operate as res-judicata.

18. In this view of the law enunciated by the Supreme Court, the judgment of the Revenue Court that it had no jurisdiction would operate as res-judicata between the parties and it was not open to the Civil Court to take a contrary view and hold that the Civil Court had no jurisdiction. After all the error in the map prepared by the consolidation authorities is obvious. The area of plot No. 320 shown in the map is not in conformity with the area shown in the record of rights prepared by the consolidation authorities. Such an obvious error has got to be rectified and it will be a sad commentary in judicial proceeding that despite the fact that the obvious mistake is there in the map but the Court is helpless to rectify the same. We, therefore, hold that in view of the finality of the decision of the Revenue Court on the question of jurisdiction, the Civil Court had no jurisdiction to hold to the contrary and should have decided the appeal on merits”.

C. In the judgment passed in the case of **Surji Devi Vs. Additional Commissioner (1st) and Ors.**, reported in **MANU/UP/1594/2012**, this Court observed as under:

"10. After having heard learned counsel for the parties and perusal of the record, it is clear that the application moved by the petitioner under Section 28 of LR Act read with Section 27(3) of CH Act was for correction of map prepared after the consolidation operation. Provisions of Section 28 of the LR Act and Section 27(3) of the CH Act art as under:

28. Maintenance of map and field-book.-- The Collector shall in accordance with rules made under Section 234, maintain a map and field-book of each village in his district and shall cause annually, or at such longer intervals as the State Government may prescribe, to be recorded therein all changes in the boundaries of each village or field and shall correct any errors which are shown to have been made in such map or field-book.

27(3) After the issue of notification under Section 52, the Collector shall, instead of the map, field-book and record-of-rights previously maintained by him, maintain the map, field-book and record of rights prepared in accordance with the provisions of sub-section (1)(and the provisions of the U.P. Land Revenue Act, 1901, relating to the maintenance and correction of such map, field-book and record-of-rights shall mutatis mutandis apply).

11. A combined reading of aforesaid provisions shows that the Collector is under obligation to maintain the map, field book and record of rights of each village in his district in accordance with the rules made under Section 234. Section 27(3) states that in maintenance of map and field book, the provision as contained in LR Act relating to maintenance and correction of such map, field book and record of rights shall mutatis mutandis apply. Section 28 of the LR Act states that the Collector shall correct any

errors which are shown to have been made in such map or field book maintained by him.

12. It is well-settled that the correction of map cannot be refused on the ground that consolidation operation had already been over. The Collector has power under Section 28 of the LR Act to correct clerical error or omission of the clerical error in the existing map. The proceedings under Section 28 of the LR Act are judicial in nature. The intention of the legislature appears to have prescribed the maintenance of map and its indexes, the field book by observation on the spot. The word used under Section 28 is "shown" and not "proved". Thus, in view of the said legal position, only the previous error shown on the spot are to be corrected in the summary proceeding. In view thereof, it is bounden duty of the Collector to correct any defect in the map, if it is found by him.

13. In the present case, the application was moved by the petitioner on 3.2.1999 for correction of map on the ground that the position of plot i.e. 240 (E) area 12 Decimal has incorrectly been shown in the map prepared after the consolidation operation. The application of the petitioner was rejected by the Additional District Magistrate only on the ground that in absence of the chak map, no correction can be made in the map prepared on the basis of documents produced by the petitioner. The said application has been rejected by the Additional District Magistrate on the ground that the petitioner has failed to produce the copy of the chak map. The view taken by the Additional District Magistrate in rejection of the application moved by the petitioner for correction of map is incorrect in as much as the chak map is the part of the revenue record maintained by the authorities. In the event, the chak map was

not filed by the petitioner, it is incumbent upon the Additional District Magistrate to call for the record i.e. chak map and pass an appropriate order after looking to the merits of the application moved by the petitioner. The Additional District Magistrate in its order recorded that the basis of correction of final map prepared after the consolidation operation is the Chak map and the same has not been mentioned in the report submitted by the Tehsildar. It further recorded the finding that an effort has been made by the petitioner to get the corrections done by the concealment of the relevant document i.e. chak map. The said findings of Additional District Magistrate are totally perverse and cannot be sustained. In so far as the ground for rejection of application for correction of final map in absence of chak map is concerned, suffice is to say that ground taken by the Additional District Magistrate is technical in nature and the Additional District Magistrate has failed to discharge his duty in not calling for the record himself and pass an appropriate order on the merits of the application moved by the petitioner. In view thereof, the order of Additional District Magistrate dated 15.6.2002 cannot be sustained.

.....

21. As far as the question raised by the petitioner with regard to maintainability of the application moved under Section 28 of the Act by the petitioner for correction of the map after the consolidation operations were over in the village and its notification under Section 52 issued on 10.8.1985 is concerned, it is well-settled that the power and scope of the Collector under Section 28 of the Act to make corrections in the map is confined to the clerical errors in the existing map after observation on the spot. The combined reading of provisions of

Section 28 of the LR Act and Section 27(3) of CH Act clearly shows that after the map is prepared and maintained by the Collector. In case, any error is pointed out which is an error shown on the spot, the same can be corrected and the Collector is bound to make necessary corrections in the summary proceedings under section 28 of the Act. The rectification of mistake/corrections can be done at any stage, and in view thereof, the objection of the respondents that the application under Section 28 of LR Act read with Section 27(3) of CH Act for correction of map moved by the petitioner is not maintainable after the consolidation operations are over, is unsustainable.”

D. In the judgment passed in the case of **Gaya Prasad and Ors. Vs. Yadunath and Ors.** reported in **MANU/UP/1457/2017**, the Court observed as under:

“13. The counsel for petitioners has stated that since the map had been prepared after the consolidation proceedings, it could not be corrected at all by exercising the powers under Section 28 of the U.P. Land Revenue Act. In the case of Mohd. Raza and others v. Board of Revenue, U.P. at Allahabad and others, MANU/UP/0414/1971MANU/UP/0414/1971 : 1973 (8) AWR 621 it has been observed that it is wrong to assume that the map prepared under Section 27 of the U.P. Consolidation of Holdings Act must necessarily be treated as final and conclusive. Later on, relying upon the same judgment in Nanbudda v. Latif Ahmad, 1982 RD 170 it has been further observed in paragraph - 6 thus :-

"It may further be added that even Section 27(2) of the U.P. C.H. Act states about the presumption of correctness

subject to contrary being proved. The right of rebuttal must be admissible. Secondly, this presumption applied to 'all entries in the record of rights' only and not for the Shajra. Admittedly, the Shajra is not a record of rights. Section 27(3) of the U.P. C.H. Act itself provides that the provisions of Sections 28 and 33 of the U.P. Land Revenue Act shall apply to the maintenance of such map, field-book etc. Under these provisions, any errors which are shown to have been made in such map or field-book, shall be corrected. Thus there is no scope left for the application of bar under Section 49 of U.P. C.H. Act."

14. This view expressed by the Board of Revenue is in line with the judgment rendered by this Court by a Division Bench in the case of *Ali Khan v. Ram Prasad and another*, MANU/UP/0589/1980MANU/UP/0589/1980 : 1981(1) Alld. Law Journal 271 wherein this Court has considered a similar question raised as to whether after denotification of the village under Section 52 of the U.P. Consolidation of Holdings Act, correction of errors can be made by moving an application under Section 28 of the U.P. Land Revenue Act. This Court has observed that the Revenue Court was competent to entertain the application under Section 28 and it had erroneously held that it had no jurisdiction to entertain the same. It further observed that if error in the map prepared by the Consolidation Authorities is obvious and the area of the plot in question shown in the map is not in conformity with the area shown in the Record of Rights prepared by the Consolidation Authorities, "Such an obvious error has got to be rectified" and it will be a sad commentary in judicial proceeding that despite the fact that the obvious mistake is there in the map but the Court is helpless to rectify the same..... "

15. A similar view has been taken by another Division Bench of this Court in *Ghafoor v. Additional Commissioner, Lucknow*, MANU/UP/0670/1978MANU/UP/0670/1978 : 1978 AWC, 836 (by Hon'ble U.C. Srivastava and Hon'ble K.N. Goyal, JJ.) wherein the Hon'ble Division Bench has observed in paragraphs - 3, 4, 5 and 6 as thus:-

"3. Our attention has been drawn to another case *Mohammad Raza V. Board of Revenue*, MANU/UP/0414/1971MANU/UP/0414/1971 : 1973 AWR 621 in which it was held that a map prepared by the consolidation authorities is not necessarily final and conclusive and a map incorrectly drawn up cannot be treated as final and conclusive and can be corrected under Section 28 of the Land Revenue Act.

4. Looking to the provisions of the U.P. Consolidation of Holdings Act and the Land Revenue Act, we are in agreement with the view expressed in *Mohammad Raza v. Board of Revenue* (supra) and we hold that if a map is subsequently found incorrect and it is not in conformity with the document prepared by the consolidation authorities, the same can in suitable cases be corrected subsequent to the publication of the notification under Sec. 52 of the U.P. Consolidation of Holdings Act by the Collector in exercise of power under Section 28 of the Land Revenue Act. Thus we are of the view that the law laid down in *Ganga Glass Works (Private) Ltd., Balawali v. State of U.P.* (supra) is not a good law.

5. Thus the powers of the Collector under Section 28 of the U.P. Land Revenue Act for correcting the map in suitable cases are intact notwithstanding the map has been prepared by the consolidation authorities who have

adjudicated the rights and title of the parties. In case there is any discrepancy in the map and final document has been prepared by the consolidation authorities, the same can be corrected in proceedings under Section 28 of the Land Revenue Act provided the right, interest and title of the party which have been final are not involved.

6. In the present case after notification under Section 52 of the U.P. Consolidation of Holdings Act was published, an application was moved by the petitioner for correction of the map and the petitioner tendered evidence that the map was not in conformity with the entries which were made in C.H. Form 45. It was obligatory on the authorities to correct the map in case they were satisfied that there was some discrepancy between the map and the entries in C.H. Form 45 and it is on a mistaken view of law that they have refused to grant this relief to the petitioner."

16. A Full Bench of Board of Revenue (Five Members) has also held in *Suraj Narain and others v. Bhawani Prasad and others*, 1977 RD 234 after noticing the amendments made in the U.P. Consolidation of Holdings Act by U.P. Act No. 24 of 1956 and U.P. Act No. 38 of 1958 and the amendment made by the U.P. Act No. 12 of 1965 that in the case of *Ganga Glass Works Pvt. Limited Baliwali v. State of U.P.* MANU/UP/0040/1972 MANU/UP/0040/1972 : 1972 (All.) AIR 158 the impact of Section 27(3) of the U.P. Consolidation of Holdings Act was not considered and hence, this judgment cannot help in arriving at a correct conclusion in respect to the questions referred to it. The questions referred to the Full Bench aforesaid were as follows :

• Whether the provisions of Sub-section (3) of Section 27 of the U.P.

Consolidation of Holdings Act empower the Collector to rectify such mistakes occurring during the consolidation operation and noticed after the denotification under Section 52 of the Act?.

• Whether the word 'Collector' mentioned in Section 27(3) of the U.P. Consolidation of Holdings Act read with Section 28 of the U.P. Land Revenue Act includes 'Assistant Collector First Class' also?, and

• Whether the proceedings in such cases are barred by the provisions of Section 49 of the U.P. Consolidation of Holdings Act?"

17. The Board of Revenue held that after the amendments made in the U.P. Consolidation of Holdings Act, Section 27 of itself now empowers the Collector to correct under Section 28 of the U.P. Land Revenue Act any errors found subsequently in the map and Field Book preferred during the consolidation operation. The proceedings for correction of map under Section 27 (3) of the U.P. Consolidation of Holdings Act read with Section 28 of the U.P. Land Revenue Act are not barred by the provisions of Section 49 of the U.P. Consolidation of Holdings Act.

18. It is, thus, clear from the law as settled by a Full Bench of the Board of Revenue and by Division Benches of this Court, correction of mistakes apparent in the village map can be made under Section 28 of the U.P. Land Revenue Act even after the consolidation operations are over and final notification has been issued under Section 52 of the U.P. Consolidation of Holdings Act.

19. From a perusal of the orders impugned it is evident that the amendment proposed in the map by the Assistant Consolidation Officer by adjustment of lands of three plots in question to bring them in consonance with the verified map

and the orders passed by the Collector and the Additional Commissioner cannot be said to be erroneous either on facts or on law."

E. In the judgment pronounced in the case of **Smt. Shyam Raji & Ors. Vs. Board of Revenue Lko Thru Chairman & Ors.**, passed on **20.2.2019** in **Misc. Single No. 7638 of 2015**, the Court observed as under:

"Section 28 of U.P. Land Revenue Act is extracted herein under:-

"28. Maintenance of map and field-book. - The Collector shall in accordance with rules made under Section 234, maintain a map and field-book of each village in his district and shall cause annually, or at such longer intervals as the [State Government] may prescribe, to be recorded therein all changes in the boundaries of each village or field and shall correct any errors which are shown to have been made in such map or field-book".

A perusal of the aforesaid quoted provision of Section 28 of U.P. Land Revenue Act shows that Collector has been cast with the statutory duty to maintain the map and filed book of the villages in his District. He is also cast with another statutory duty of causing annually or at such longer intervals as may be prescribed, recording of all changes in the boundaries of each village or filed and correcting any errors which are shown to have been made in such map or field book.

As a matter of fact, for making any correction in the map or in the field-book, no application is mandatorily required to be moved. Such correction has to be necessarily made by the Collector where any mistake or discrepancy is noticed by him on an application preferred

by a person or if any mistake comes to his knowledge by any other mode or means. If a mistake comes to the notice of the Collector either on any application or even otherwise, he is duty bound to make correction in the map. Tenure holder is not even bound to make any application for effecting corrections in the map, if the same exists.

It is further noticeable that the applicability of the principles of res-judicata as enunciated in Section 11 of Code of Civil Procedure in respect of the duty discharged by the Collector under Section 28 of U.P. Land Revenue Act is very doubtful. While exercising the authority/jurisdiction under Section 28 of U.P. Land Revenue Act, the Collector does not decide any issue between the parties. To term the provision of Section 28 of U.P. Land Revenue Act as some power or authority or jurisdiction would be a misnomer. In fact, it casts a duty to incorporate correction in the map or the field book, if any such mistake or discrepancy comes to his notice. The provision of Section 28 of U.P. Land Revenue Act cannot be described to be a remedy available to a person in the traditional sense of the word. As observed above, it is rather a duty to be performed by the Collector mandatorily in terms of the mandate given to him by the Legislature by enacting Section 28 of U.P. Land Revenue Act.

The submissions of the learned counsel for the petitioners thus carries weight. The grounds taken by learned counsel representing the respondent nos. 3 and 4 for suggesting that the second application dated 6th March, 2013 was barred to principles of res-judicata, are hereby rejected.

Additional Commissioner has thus failed to properly understand the actual purpose of Section 28 of U.P. Land

Revenue Act and mandate given to the Collector by the State Legislature.”

26. Thus, from the above quoted provisions particularly the expression ‘any error or omission’ used in Section 30 of Code, 2006 and Rule 36(5) of Rules, 2016 as also the expression ‘any error proved to have been made in the records previously prepared’ indicated in Section 32 of Code, 2006 and the judgments referred above, it is crystal clear that if the Collector or Sub-Divisional Officer, as the case may be, is of the opinion that the *map*, field book (*khasra*) or record of rights (*khatauni*) contains ‘any error or omission’, he shall direct for the correction thereof. The Collector or Sub-Divisional Officer, as the case may be, is under obligation to correct ‘any error or omission’ in relation to *map*, field book (*khasra*) or record of rights (*khatauni*). As per provisions quoted above, the order of correction of *map* shall be passed by Collector and in the matter of other correction by Sub-Divisional Officer. Statutory provisions above referred do not say that any error or omission in the *map* if is of three *biswas* or less then the Collector can refuse to correct the *map*.

27. Under Section 30 of Code, 2006, the Collector is required to maintain a *map* of each village in his district. The importance of the correct maintenance of village *maps* cannot be over-emphasized as the *map* is the starting point of the land records of a village and an error in it is likely to render all the records of the village erroneous. It defines the boundaries of the village and also of each field in the village.

28. It also reflects from the aforesaid that revenue records viz. *map*, field book (*khasra*) or record of rights (*khatauni*) can be corrected even after publication of

notification under Section 52 of the Act, 1953 by the Collector or Sub-Divisional Officer, as the case may be.

29. In the light of the aforesaid, this Court is of the view that it is the duty of the Collector to correct the *map* if ‘any error or omission’ is apparent and Code, 2006 or Rules, 2016 do not provide any discretion to the Collector to refuse the said correction based upon the Para 101 of ‘*Chakbandi Manual*’.

30. As per statutory provisions indicated above particularly in view of Section 38 of Code, 2006, the proceedings regarding the correction of revenue records including the *map* should be initiated on an application preferred in this regard or on ‘any error or omission’ is otherwise come to the knowledge of Tehsildar concerned. Further, in the statutory provisions, it has not been indicated that who can prefer an application for correction of revenue records including the application for correction of *map*. Thus, a person having knowledge of discrepancy in revenue records can provide the information in this regard to Tehsildar concerned who shall thereafter make such inquiry as may appear to him to be necessary, and refer the case along with his report to the Collector in the case of *map* correction and the Sub-Divisional Officer in matter of other correction.

31. For aforesaid reasons as also taking note of the observations made by this Court in the judgments referred above, this Court is of the view that the application preferred by the petitioner for correction of *map* was maintainable as he, being a resident of the vicinity, pointed out the error in the revenue *map*.

32. Thus, for the reasons aforesaid, this Court is of the view that the Collector,

Ambedkar Nagar/respondent no. 3, by rejecting the application for correction of *map* vide order dated 05.12.2022, failed to discharge his statutory duty, which in the present case relates to correction of *map* in regard to error therein was indicated in the reports submitted by Naib Tehsildar, Tanda and Tehsildar, Tanda and the respondent no. 2, while dismissing the revision filed by the petitioner vide order dated 06.03.2023, failed to take note of relevant statutory provisions and being so committed error in law.

33. Accordingly, the impugned orders dated 06.03.2023 and 05.12.2022 (Annexure Nos. 1 & 2 to the petition) are set aside. The matter is remanded back to Collector/District Magistrate, Ambedkar Nagar to decide the matter afresh by passing reasoned and speaking order.

34. While deciding the case, the Collector/District Magistrate, Ambedkar Nagar is expected to take note of statutory provisions according to which it is the duty of the Collector to maintain the revenue records including the *map* and to correct 'any error or omission' therein and proceedings of correction of revenue records including the *map* may be initiated even without any application if 'any error or omission' therein comes to the notice of Tehsildar, the Sub-Divisional Magistrate or the Collector.

35. Accordingly, the writ petition is allowed.

(2023) 8 ILRA 450
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2023

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ C No. 12362 of 2023

**Nehru Junior High School Taryasujan,
Kushinagar ...Petitioner**

Versus

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

Counsel for the Petitioner:

Sri Ashok Kumar Pandey, Sri Rituvendra Singh Nagvanshi, Sri R.C. Singh (Sr. Advocate)

Counsel for the Respondents:

C.S.C., Sri Anurag Tripathi, Sri Sudhir Bharti, Sri Anoop Trivedi (Sr. Advocate)

Civil Law - Civil Procedure Code, 1908 - Order VII Rule 11 CPC - U.P. Revenue Code, 2006 - Section 144 - Section 49 U.P. Consolidation of Holdings Act - Declaratory Suit - Maintainability - Trial Stage - Cause of Action - Educational Institution - Revenue Court Jurisdiction

Held:

Rejection of application under Order VII Rule 11 CPC in pending suit under Section 144 of the U.P. Revenue Code, 2006 - challenged - suit filed by respondent no.5 claiming declaration of rights over disputed land - petitioner, an educational institution, asserted bar under Section 49 of U.P. Consolidation of Holdings Act - Trial Court rejected application; revision dismissed - Held, plaint allegations disclose cause of action - declaratory suits under Section 144 of U.P. Revenue Code are of special character - issue of bar under Section 49 U.P.C.H. Act to be examined during trial - not a case fit for rejection at threshold - petition dismissed.

Cases Referred:

1. Church of Christ Charitable Trust Vs Ponniamman Educational Trust, Civil Appeal No. 4841 of 2012

2. Madanuri Sri Rama Chandra Murthy Vs Syed Jalal, Civil Appeal No. 5368 of 2017

3. K. Akbar Ali Vs K. Umar Khan & ors., AIR 2021 SC 1114

4. Charu Kishor Mehta Vs Prakash Patel & ors., SLP (C) No. 11030 of 2022

5. Pan Kumari Vs Board of Revenue, U.P., 2005 (99) RD 529

6. Roshan Singh @ Bunti Vs Board of Revenue & ors., 2019 (145) RD 411

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

1. Heard Sri R.C. Singh, learned Senior Counsel assisted by Sri R.S. Nagvanshi, learned counsel for petitioner, Sri Anoop Trivedi, learned Senior Counsel assisted by Sri Anurag Tripathi, learned counsel for respondent no.5, Sri Abhishek Shukla, learned Additional Chief Standing Counsel for state-respondents and Sri Sudhir Bharti, learned counsel for Gaon Sabha.

2. Brief facts of the case are that one Naipal and Raghunath sons of Dev Narayan were bhumidhar in possession of old plot nos. 43/1.93, 44/1.64, 54/50, 55/48, and 56/48 New No. 514, 515, 529. The recorded tenure holders as mentioned above transferred the aforesaid plots to the Junior High School Tarya Sujan, District Deoria (now district Kushinagar) vide registered sale deed dated 09-08-1965.

3. On the basis of the aforementioned sale deed dated 09-08-1965 name of the college was accordingly recorded in the revenue records. The village in question where the aforementioned plots were situated was brought under consolidation operation by means of notification issued under Section 4 of U.P. Consolidation of Holdings Act (hereinafter referred as U.P.

C.H. Act). Basic year entry according to petitioner was in the name of petitioner and no objection under Section -9A (2) of U.P. C.H. Act was filed by anybody but according to respondent no.5 her husband was recorded in the basic year of consolidation but petitioner got his name recorded fraudulently subsequent to C.H. form 23 stage without any basis..

4. According to petitioner the name of the contesting respondent no.5 or her predecessor-in-interest was not recorded in the revenue records at any point of time over the plots in dispute.

5. Respondent no.5 filed a suit under Section 144 of the U.P. Revenue Code, 2006 for declaration in respect of the plots in dispute which was numbered as Case No. T201905440303976, stating that plots in dispute was self-acquired property of her husband (Raj Kishore) and after the death of her husband in the year 2011, she came in possession of the plots in dispute.

6. The Trial Court vide ex-parte judgment dated 26-07-2019 decreed the plaintiff's suit under Section 144 of the U.P. Revenue Code 2006.

7. Petitioner filed an application under Order IX Rule 13 of the Civil Procedure Code (hereinafter referred as CPC) against the ex-parte judgment and decree dated 26-07-2019, which was allowed vide order dated 16-12-2019 and the suit was again restored to its original number for decision afresh.

8. Against the order dated 16-12-2019, respondent no.5 filed an appeal before the Appellate Court, which was dismissed vide judgment and dated 05-04-2021.

9. Petitioner filed an application dated 01-07-2022 before the Trial Court to dismiss the suit as not maintainable as no proceeding has been taken during consolidation operation as such the suit under Section 144 of the U.P. Revenue Code, 2006 is barred by Section 49 of the U.P. C.H. Act.

10. The Sub Divisional Officer, Tamkuhiraj, Kushinagar vide order dated 26-08-2022 rejected the application filed by the petitioner.

11. Against the order dated 26-08-2022 passed by the Trial Court, petitioner filed a revision being Revision No. C202205000001466 before the Commissioner Gorakhpur Division, Gorakhpur.

12. The aforementioned revision was dismissed by Commissioner/respondent no.2 vide order dated 24-03-2023, hence, this writ petition.

13. Learned Senior Counsel appearing for petitioner submitted that application under Order VII Rule 11 of the CPC filed by petitioner in the pending suit has been rejected in an arbitrary manner. He further submitted that for deciding an application under Order VII Rule 11 of the CPC filing of the written statement and framing of the issue is not a condition precedence rather plaintiff allegation is relevant. He further submitted that if the suit is frivolous and is barred by provisions of law, the same can be considered at the very initial stage. He further submitted that no objection under Section 9 of the U.P. C.H. Act was filed by respondent no.5, as such the suit under Section 144 of the U.P. Revenue Code, 2006 is barred under Section 49 of the U.P. C.H. Act. He further submitted that

petitioner who is an educational institution has been unnecessarily dragged into litigation, as such the application under Order VII Rule 11 of the CPC filed by petitioner should be allowed in view of the provisions contained under Order VII Rule 11 of the CPC .

14. Learned Senior Counsel for petitioner has placed reliance upon the judgments in *Church of Christ Charitable Trust & Educational Charitable Society, represented by its Chairman Vs. M/S Ponniamman Educational Trust represented by its Chairperson/Managing Trustee in Civil Appeal No. 4841 of 2012 (Arising out of SLP (c) NO. 30632 of 2011) dated 03-07-2012 ; Madanuri Sri Rama Chandra Murthy Vs. Syed Jalal in Civil Appeal No. 5368 of 2017 (Arising out of S.L.P. (Civil) No. 35352 dated 19-04-2017; K. Akbar Ali Vs. K. Umar Khan and Others, AIR 2021 SC 1114 and Charu Kishor Mehta Vs. Prakash Patel and Others in Special Leave Petition © No. 11030 of 2022 dated 22-06-2022* on the scope of Order VII Rule 11 of the CPC .

15. On the other hand Sri Anoop Trivedi, learned Senior Counsel appearing for respondent no.5 submitted that suit under Section 144 of the U.P. Revenue Code, 2006 filed by respondent no.5 is not barred under Section 49 of the U.P. C.H. Act. He further submitted that suit under Section 144 of the U.P. Revenue Code, 2006 are suit of special character, as such the same cannot be dismissed without framing issue and giving opportunity to the parties to lead evidence. He further submitted that the name of respondent no.5 was recorded in the revenue records up to the preparation of CH- Form 23, but the name of petitioner came in CH- Form 45 in the fraudulent manner. He further

submitted that petitioner is claiming the rights on the basis of sale deed, however, the vendor of petitioner has died before the alleged execution of sale deed in favour of the petitioner. He submitted that petitioner is not the rightful owner of the plots in dispute as such the suit for declaration filed by respondent no.5 cannot be dismissed as not maintainable. He further submitted that the claim of the petitioner can be very well examined on merit as to whether the suit is barred under Section 49 of U.P. C.H.Act or not after framing issues in the suit. He further submitted that after framing issues in the suit the matter will be decided in accordance with law including the issue relating to Section 49 of U.P. C.H.Act. He further submitted that argument advanced by the counsel for petitioner on the point of under Order VII Rule 11 of the CPC is misconceived as the allegation made in the plaint discloses the cause of action for filing the suit under Section 144 of the U.P. Revenue Code, 2006. He further submitted that no interference is required in the matter and the writ petition is liable to be dismissed.

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

17. There is no dispute about the fact that the suit under Section 144 of the U.P. Revenue Code, 2006 filed by respondent no.5 is pending before the Trial Court/respondent no.3.. There is also no dispute about the fact that application filed by petitioner for dismissing the suit as not maintainable being barred by Section 49 of U.P. C.H. Act has been rejected by the Trial Court and the order has been maintained in revision.

18. In order to appreciate the controversy a perusal of Section 144 of the

U.P. Revenue Code, 2006 is necessary, which is as under:

144. Declaratory suits by tenure holders.—(1) Any person claiming to be a bhumidhar or asami of any holding or part thereof, whether exclusively or jointly with any other person, may sue for a declaration of his rights in such holding or part.

(2) In every suit under sub-section (1) instituted by or on behalf of—

(a) a bhumidhar, the State and the [Gram Panchayat] shall be necessary parties;

(b) an asami, the landholder shall be a necessary party.

19. On the scope of Section 144 of the U.P. Revenue Code, 2006/Section 229-B of U.P. Z.A & L.R. Act, this Court in the case of **Pan Kumari Vs. Board of Revenue, U.P. at Allahabad and Others, reported in [2005 (99) RD 529]** has held that suit under Section 229-B of U.P. Z.A. & L.R. Act are the suit of special character and even no limitation is provided for filing a declaratory suit before the Revenue Court. The paragraph no.6 of the judgment is relevant, which is as under:-

“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 Limitation 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 remain stayed. ply 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 Limitation Act 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 Limitation Act. 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 Section 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."

20. The exercise of jurisdiction under Order VII Rule 11 C.P.C. in respect to the suit under Section 229-B of U.P. Z.A. & L.R. Act, this Court in the case reported in

2019(145) RD 411 **Roshan Singh @ Bunti Vs. Board of Revenue and Others** has held that jurisdiction under Order VII Rule 11 C.P.C. is not to be utilised as a trial before the trial. Paragraph No.6 of the judgment is relevant for perusal which is as under:-

“6.This Court has perused the plaint, a copy of which is annexed as Annexure-3 to the writ petition. A perusal of paragraphs 5, 6, 7 and 8 of the plaint shows that the plaintiff has come forward seeking declaration of his rights to Khasra No.213, admeasuring 1 Bigha, 9 Biswa and 6 biswansi situate at Village Kheda, Pargana Dasna, District Hapur, (then Ghaziabad) and to hold the Will dated 06.06.1977 void. The cause of action clearly indicates that the petitioner alleges fraud played upon him by the defendants. It has been averred in paragraph-6 of the plaint that the fact that the name of the defendants had been recorded over the property in dispute, was kept back from the plaintiff until the month of May, 2006. It is claimed that the plaintiff Charan Singh, never knew it before the said date. It is claimed by the plaintiff that he is a co-sharer along with deceased, Balbeer Singh through whom the defendants claim, on the basis of a Will. It is also averred in paragraph-8 that the entire mutation proceedings, wherein the order dated 18.11.1998 has been passed in favour of the defendant, were all taken behind his back. These are pleadings which prima facie require to be examined on the basis of evidence, even if the cause of action is ultimately held to be barred by limitation. It is not a case where on a reading of the plaint, the cause of action is ex facie barred by limitation. The law about exercise of jurisdiction under Order VII Rule 11 CPC is settled beyond the slightest doubt. It is that, that allegations

in the plaint alone are to be seen, in order to determine whether the plaint is to be rejected, on any of the grounds mentioned in Order VII Rule 11 CPC. The defence put forward by the defendant or the evidence is not at all to be considered. The jurisdiction under Order VII Rule 11 CPC is not to be utilized as a trial before the trial.

21. In the instant case paragraph nos. 3 to 7 of the plaint of the suit under Section 144 of U.P. Revenue Code, 2006 are relevant for perusal which are as under:-

“न्यायालय श्रीमान उपजिलाधिकारी महोदय, तमकुहीराज,
जनपद- कुशीनगर।

वाद

संख्या-

T201905440303976

श्रीमती ज्ञान्ती देवी पत्नी स्व० राजकिशोर निवासिनी मौजा- गड़हिया
पाठक, तप्पा हवेली, परगना सि० जो० तहसील-
तमकुहीराज जनपद- कुशीनगर।

..... (वादिनी)

3- यह कि वास्तविक तथ्य यह है कि विवादित भूखया मूलरूप से हम वादिनी के पति राज किशोर पुने राधाकिशुन की तनहा पैदाकरदगी भूमि है। जिस पर वे अपने जीवनकाल तक बहैसियत तनहा भूमि धर काबिज दाखिल एवं अध्यासित थे तथा उनके मृत्युपरान्त उनका तनहा वारिस होने के नाते वादिनी बहैसियत वारिस पत्नी वरासतन काबिज दाखिल एवं अध्यासित चली आ रही है, जो कभी भी खण्डित नहीं हुआ।

4- यह कि पूर्व चकबन्दी विवादित भूखण्ड की पुरानी भूखण्ड सं० 43/1.93 एकड़, 44/1.64 एकड़, 54/0.59 एकड़, 55/0.48 एकड़, अराजी सं० 56/0.48 एकड़ व 611/0.62 एकड़ था जो दौरान चकबन्दी जोत चकबन्दी आकार पत्र 11 व जोत चकबन्दी आकार पत्र 23 भाग (I) में भूखण्ड सं० 43/1/1.20 एकड़, 43/2/0.02 एकड़, 43/3/0.01 एकड़, 44/1/0.31 एकड़, 44/2/0.47, 54/1/0.38 एकड़, 44/3/0.33, 54/3/0.08 एकड़, 55/1/0.25 एकड़, 55/3/0.05 एकड़, 56/1/0.5 एकड़, 56/3/0.25 एकड़,

व 56/4/0.02 एकड़ बना है। जिसकी नई वर्तमान भूखण्ड सं० 514/0.190 हे०. 515/0.942 हे० व 529/0.174 हे० बना है, जिसे विवादित भूखण्ड कहा जा रहा है।

5- यह कि उक्त ग्राम की चकबन्दी की कार्यवाही बीत जाने के काफी दिनों बाद वर्ष 2011 में हम वादिनी के पति राजकिशोर की मृत्यु हो गई तथा उनके मृत्युपरान्त वादिनी विवादित भूखण्ड पर बहैसियत तनहा भूमिधर सुतवारित वरासतन काबिज दाखिल एवं अध्यासित चली आ रही है।

6- यह कि विवादित भूखण्ड पर चकबन्दी पूर्व के खतौनी में तथा दौरान चकबन्दी आधार वर्ष की खतौनी, जोत चकबन्दी आकार पत्र-1, जोत चकबन्दी आकार पत्र-23 भाग (प) एवं उसके बाद के अन्य अभिलेखों में वादिनी के पति राजकिशोर का नाम बहैसियत तनहा भूमिधर अंकित चला आया तथा अपने जीवनकाल तक काबिज दाखिल एवं अध्यासित रहें।

7- यह कि चूंकि प्रतिवादी प्रथम पक्ष काफी चालाक एवं मुकदमेबाज किस्म के व्यक्ति है, जिन्होंने विवादित भूखण्ड को हड़पने की नियत से चकबन्दी अहलकारान को अपने साजिश में करके जोत चकबन्दी आकार अधिकारी के आदेश के अपना नाम अंकित करा लिया तथा वादिनी के पति राजकिशोर का नाम अभिलेखों से हटवा दिया। जिसकी कतई कोई विधिक पाबन्दी वादिनी पर नहीं है एवं उसकी कतई कोई जानकारी हम वादिनी के पति राजकिशोर व वादिनी को नहीं हो पाई। इस प्रकार विवादित भूखण्ड पर प्रतिवादी प्रथम पक्ष का नाम खतौनी में ऋटिपूर्ण तरीके से अंकित चला आ रहा है।”

22. The aforementioned paragraph nos. 3,4,5 and 6 of the plaint discloses the cause of action to the plaintiff to file suit for declaration of her right under Section 144 of U.P. Revenue Code, 2006 as such rejection of plaint or dismissal of suit under Section 144 of U.P. Revenue Code, 2006 at the very initial stage will be illegal.

23. So far as the argument advanced by the learned senior counsel for petitioner that suit is barred under Section 49 of the U.P. C.H. Act is concerned, the same shall be considered during trial at a appropriate stage. The petitioner will have full opportunity to get the issue framed on the point of Section 49 of U.P. C.H. Act and to lead evidence on the issue in accordance with law.

24. The case law cited by learned senior counsel for the petitioner will not be applicable in the circumstances of the case as indicated above.

26. Considering the entire facts and circumstances as well as ratio laid down by this Court in **Pan Kumari (supra) and Roshan Singh @ Bunti (supra)**, no interference is required against the impugned orders. The writ petition is dismissed. However, the Trial Court shall frame issue in the matter in accordance with law including the issue of Section 49 of the U.P. C.H. Act and decide the suit after giving opportunity to the parties to lead evidence in accordance with law expeditiously.

(2023) 8 ILRA 456

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 02.08.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 21339 of 2020

Prakhar Nagar **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:

Sri Siddharth Khare, Sri Jigar Khare, Sri Ashok Khare (Sr. Advocate)

Counsel for the Respondents:

C.S.C., Sri Rahul Chaudhary, Sri Rahul Chaubey, Sri Rizwan Ali Akhtar

Civil Law-Constitution of India, 1950- Article 226 Petitioner has assailed the punishment of rustication imposed by the respondents-University- Petitioner was never served a charge-sheet containing a St.ment of charges along with the adverse material which

was relied upon by the respondents-authorities while passing the impugned order- Enquiry against the petitioner which culminated in the impugned orders was passed by adopting a procedure not known to law- Enquiry report does not discuss the nature of the St.ments and the manner in which they indicted the petitioner- impugned orders of punishment perverse and illegal.

Respondent-university is directed to issue a fresh mark-sheet to the petitioner treating him as a regular student. The fresh mark sheet shall evaluate the applicant out of the 100 marks. The respondent-University shall remove the B cap and shall also refrain from making any reference to the disciplinary action against the petitioner and delete the endorsement "reappearance in September, 2020" in the fresh mark-sheet. The disciplinary action against the petitioner shall not be disclosed by the university to any other authority. (E-15)

(Delivered by Hon'ble Ajay Bhanot, J.)

1. The petitioner has assailed the punishment of rustication imposed by the respondents-University for a period of six months by order dated 25.02.2020, and the order dated 16.03.2020 in appeal reducing the punishment of rustication for a period of three months. The petitioner has also prayed for issuance of fresh marks-sheet reflecting the evaluation of the petitioner's performance out of 100 marks, and to delete the endorsement marks "Reappearance September 2020" and to remove the B Cap on the marks secured by the petitioner. Further, the prayer is that the marks-sheet should not reference the rustication of the petitioner.

2. The petitioner is a student of B.Tech (CSE) in the respondent-University. The petitioner was charged by the university for various acts of indiscipline. The substance of the charges against the

petitioner as disclosed in the impugned order 25.02.2020 are extracted hereunder:

"The Students Disciplinary Committee (SDC) in its meeting held on 11th February, 2020 discussed the case of student Mr. Prakhar Nagar student of B.Tech (CSE), Batch 2016-20, Enrollment No.A2305216644, Institute-Amity School of Engineering & Technology, who was alleged to have committed an act of indiscipline during earlier and current academic years.

The SDC examined all the available information with respect to the case and after due deliberation concluded that he had committed the following act of indiscipline-

Violation of student code of conduct - para ii, xiv, xviii.

R4/3/6/(g) Indulging in or encouraging in a conduct which involves moral turpitude.

R4/3/6/(m) Any attempt at bribing or corruption of any manner or description.

R4/3/6/(q) Causing disruption of any manner of the academic functioning of the University system.

R4/3/6/(r) Indulging in or encouraging any form of disruptive activity connected with tests, examinations or any other activity of the University or the college or the institution, as the case may be."

3. Shri Siddharth Khare, learned counsel assisted by Shri Jigar Khare, learned counsel for the petitioner makes the following submissions:

I. The charges against the petitioner are vague and of a general nature.

II. The impugned orders were passed in violation of the principles of natural justice.

III. There is no material in the record to justify the imposition of the aforesaid punishment.

IV. The punishment is disproportionate.

4. Per contra, Shri Rahul Chaudhary, learned counsel for the respondents-University submits that the charges constitute a grave act of indiscipline. An inquiry was duly conducted into the matter. The punishment is proportionate and has been imposed with a view to deter others from wrong doings. The charges are supported by material in the record.

5. Heard learned counsel for the respective parties.

6. The petitioner has specifically asserted that the petitioner was never served a charge-sheet containing a statement of charges along with the adverse material which was relied upon by the respondents-authorities while passing the impugned order.

7. The specific pleadings in the writ petition in this regard are not traversed by the respondents in their counter affidavits. Failure to serve a charge-sheet disclosing charges with material particulars upon the petitioner disabled him from tendering an effective defence of his case. The omission constitutes a grave violation of principles of natural justice. The vague nature of the charges vitiates the disciplinary proceedings.

8. The second faultline in the impugned orders is that they were passed on the foot of an ex parte enquiry. The

pleadings in the writ petition in regard to the enquiry being conducted in violation of principles of natural justice too have not been traversed in the counter affidavit. The enquiry against the petitioner which culminated in the impugned orders was passed by adopting a procedure not known to law.

9. Attention has been called by the respondents to the certain proceedings chart appended to the counter affidavit to contend that the petitioner participated in the enquiry proceedings. However, in absence of pleadings in the counter affidavit in regard to the participation of the petitioner in the enquiry proceedings, the document is of no avail to the respondents.

10. Even if the aforesaid documents are taken in the face value, the pleadings of the respondents-university do not disclose that the said documents were served upon the petitioner or that the petitioner was noticed on the aforesaid adverse material at any point in time. The said adverse material including the report appended to the writ petition became the basis of punitive action against the petitioner. The prejudice caused to the petitioner by the said procedure followed by the respondents is beyond recall.

11. The submission that the enquiry report too was not served upon the petitioner precluding him from refuting the same shall now be considered. The counter affidavit baldly asserts that the said enquiry report was sent to the petitioner along with the suspension order. There is no proof of service upon the petitioner. However, in the interest of justice, the Court has perused the report. The said report merely references some students who had mentioned the name of the petitioner. It is noteworthy that

the enquiry report does not discuss the nature of the statements and the manner in which they indicted the petitioner. Indictment of the petitioner on the basis of the enquiry report is perverse.

12. In this wake in the absence of such consideration the enquiry report is vitiated by violation of principles of natural justice and non application of mind.

13. The impugned orders of punishment passed on the foot of the said enquiry report are consequently perverse and illegal.

14. There is another aspect of the matter.

15. The scheme of punitive action in an institution of higher learning is an indispensable feature of its administration. The penal regime in a system has to amalgamate essential elements to maintain discipline in the University which is conducive to its academic atmosphere and a reformatory approach which is critical to transformation of the students. The key to an effective system of disciplinary action is the balance between deterrent effect and reformatory possibilities.

16. This Court in **Anant Narayan Mishra v. The Union of India and 4 others**¹ set its face against adoption of solely punitive regime to deal with the indiscipline or aberrant behaviour by the students to the complete exclusion of a reformist approach. **Anant Narayan Mishra (supra)** directed a composite scheme to deal with matters relating to indiscipline or aberrant behaviour by young scholars wherein a penal system is duly integrated with a reformatory approach. The UGC in compliance of the directions of this

Court issued appropriate guidelines on 13.04.2023 to all University for creating a scheme for reformation and self development for students accused of misconduct to supplement the penal regime for correcting misconduct.

17. The Court is informed that the University is implementing the guidelines of UGC dated 13.04.2023. The University is developing a comprehensive reform and self development program to deal with such matters in compliance of UGC guidelines dated 13.04.2023.

18. The petitioner passed B.Tech course in the year 2020. The marks-sheet issued to him evaluated his performance out of 70 marks instead of 100 marks for all other students while applying the B Cap. Secondly the mark-sheet also references the rustication of the petitioner.

19. The said action visits the petitioner with enduring penal consequences and will blight his future no end. The petitioner had undergone the punishment of rustication. There was no occasion to disable him perpetually by making the assailed endorsements in the marks-sheet and marking him on 70 marks instead of 100 while applying B Cap formulae.

20. The petitioner it is stated that the petitioner is a young adult person with a bright future. The university-authorities failed to leaven the punitive action with a reformatory programme which would have enabled the petitioner to turn a new leaf and make amends for his errors if any.

21. Purely punitive action was taken by the University against the petitioner, to the exclusion of opportunities to reform his

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Sri Krishnam Pandey, learned counsel for the petitioner, learned Standing Counsel for the respondent no.1, Sri H.N. Pandey, learned counsel for the respondents no.2 and 3, Sri Bharat Pratap Singh, learned counsel for the respondent no.3 and perused the record.

2. The grievance raised by the writ petitioner is that her name be changed from Pooja Devi to Pooja Yadav in Class 10th and 12th Marks-sheet as well as certificate.

3. It is contended that the petitioner now wants to be known by the name of Pooja Yadav in place of Pooja Devi.

4. The writ petition has been opposed by all the respondents and it has been argued that the identical controversy has been dealt with by the Supreme Court in the judgment dated **03.06.2021 passed in Civil Appeal No.3905 of 2011 (Jigya Yadav (Minor) through guardian/father Hari Singh Vs. Central Board of Secondary Education and others), reported in (2021) 7 SCC 535**. In fact, learned counsel for both sides have placed reliance upon the same judgment and it has been argued that even if the Apex Court has permitted change of name, different categories have been spelt out in the judgment of Jigya Yadav (supra). Reference to paragraph no.171 has been made, which reads as follows:-

"171. As regards request for "change" of particulars in the certificate issued by the CBSE, it presupposes that the particulars intended to be recorded in the CBSE certificate are not consistent with the school records. Such a request could be made in two different situations. The first is on the

*basis of public documents like Birth Certificate, Aadhaar Card/Election Card, etc. and to incorporate change in the CBSE certificate consistent therewith. **The second possibility is when the request for change is due to the acquired name by choice at a later point of time.** That change need not be backed by public documents pertaining to the candidate.*

(a) Reverting to the first category, as noted earlier, there is a legal presumption in relation to the public documents as envisaged in the 1872 Act. Such public documents, therefore, cannot be ignored by the CBSE. Taking note of those documents, the CBSE may entertain the request for recording change in the certificate issued by it. This, however, need not be unconditional, but subject to certain reasonable conditions to be fulfilled by the applicant as may be prescribed by the CBSE, such as, of furnishing sworn affidavit containing declaration and to indemnify the CBSE and upon payment of prescribed fees in lieu of administrative expenses. The CBSE may also insist for issuing Public Notice and publication in the Official Gazette before recording the change in the fresh certificate to be issued by it upon surrender/return of the original certificate (or duplicate original certificate, as the case may be) by the applicant. The fresh certificate may contain disclaimer and caption/annotation against the original entry (except in respect of change of name effected in exercise of right to be forgotten) indicating the date on which change has been recorded and the basis thereof. In other words, the fresh certificate may retain original particulars while recording the change along with caption/annotation referred to above (except in respect of change of name effected in exercise of right to be forgotten).

*(b) However, **in the latter situation where the change is to be***

***effected on the basis of new acquired name** without any supporting school record or public document, that request may be entertained upon insisting for **prior permission/declaration by a Court of law** in that regard and publication in the Official Gazette including surrender/return of original certificate (or duplicate original certificate, as the case may be) issued by CBSE and upon payment of prescribed fees. The fresh certificate as in other situations referred to above, retain the original entry (except in respect of change of name effected in exercise of right to be forgotten) and to insert caption/annotation indicating the date on which it has been recorded and other details including disclaimer of CBSE. This is so because the CBSE is not required to adjudicate nor has the mechanism to verify the correctness of the claim of the applicant."*

5. A perusal of the aforesaid judgment shows that the Supreme Court had dealt with **two categories** of situations under which change of name could be sought. The first category relates to those cases where, on the basis of public documents like Birth Certificate/ Adhaar Card/ Election Card, etc., change of name is sought in the CBSE certificate consistent to the said record and the **second category** relates to those situations where a person wants to acquire name **by choice** at a later point of time. The Apex Court has held that such change need not be backed by public documents pertaining to the candidate, but request in this regard may be entertained upon insisting for prior permission/declaration by a Court of law in that regard and publication in the Official Gazette including surrender/return of original certificate (or duplicate original certificate, as the case may be) issued by CBSE and upon payment of prescribed fees. The fresh

certificate as in other situations referred to above, retain the original entry (except in respect of change of name effected in exercise of right to be forgotten) and to insert caption/annotation indicating the date on which it has been recorded and other details including disclaimer of CBSE. This is so because the CBSE is not required to adjudicate nor has the mechanism to verify the correctness of the claim of the applicant.

6. Learned Standing Counsel has also referred to paragraphs no.156 and 157 of the same judgment and has argued that the Apex Court has insisted upon obtaining a declaration by the civil court.

7. Though the learned counsel for the petitioner has placed reliance upon another decision of this Court contained in the order dated 18.07.2022 passed in Writ-C No.16056 of 2021 (Rashmi Srivastava Vs. State of U.P. and others), I find that this Court, even in the said judgment, has referred to the judgment of Supreme Court in the case of Jigya Yadav (supra) and issued a direction for making an application before the Board in consonance with the said judgment.

8. Section 34 of the Specific Relief Act, 1963 needs to be referred here in so far as the power of civil court to grant a declaration with regard to status of a person is concerned. The said provision reads as under:-

***"34. Discretion of court as to declaration of status or right.** Any person entitled to any **legal character**, or to any right as to any property, may institute a suit against any person denying, or interested to deny, **his title to such character** or right, and the court may in its discretion make*

therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief: Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

9. It is clear from Section 34 of the Act, 1963, that power to grant or declare status as the petitioner desires, vests exclusively in Civil Court that is competent enough to grant such decree.

10. Once the Apex Court in the case of Jigyda Yadav (supra) has emphasized upon obtaining a declaration from a civil court with regard to the name which a person wants to adopt by choice, this Court cannot take a different view and therefore deciding this case on the same lines, the writ petition is **disposed off** permitting the petitioner to obtain a declaration from the civil court with regard to her claim and once such a declaration is obtained, she is at liberty to approach the Board with appropriate documents.

11. In case such requirements are completed at the end of petitioner and the representation is made along with necessary documents through proper channel i.e. through Principal of the College before the Board, the Board shall consider the same in the light of ratio laid down by the Apex Court in the case of Jigyda Yadav (supra).

(2023) 8 ILRA 463

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 21.07.2023

BEFORE

THE HON'BLE ANISH KUMAR GUPTA, J.

Writ C No. 23513 of 2022

Dinesh Kumar

...Petitioner

Versus

**Prescribed Authority/
Mirzapur & Ors.**

**SDO Sadar,
...Respondents**

Counsel for the Petitioner:

Sri Abhishek Kumar Yadav, Sri Bhola Nath Yadav, Sri Prem Prakash

Counsel for the Respondents:

C.S.C., Kanchan Keshri, Sri Kuldeep Mishra

Held:

In election petitions under the U.P. Panchayat Raj Act, 1947, the application of the Code of Civil Procedure is limited by Rule 4 of the Uttar Pradesh Panchayat Raj (Settlement of Election Disputes) Rules, 1994. The Sub - Divisional Officer is not required to record evidence in full and may restrict evidence to only what is deemed relevant. Reliance on Order 18 Rule 4 CPC and Section 137 of the Evidence Act is misplaced, as Rule 4 (Proviso ii & iv) forms a complete special procedure which overrides the general provisions of CPC. Earlier judgment in Arunesh Vs Prescribed Authority/S.D.O. Gonda and Ram Adhar Singh Vs District Judge not applicable being rendered per incuriam as they did not consider the said specific provisos.

Key Case Law Discussed:

1. Arunesh Vs Prescribed Authority/S.D.O. Gonda, Writ C No. 2904 of 2004

2. Ram Adhar Singh Vs District Judge, 1985 All WC 246

Petition dismissed with direction to the Prescribed Authority to decide the pending election petition expeditiously, preferably within two months.

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

1. Heard Shri Bhola Nath Yadav, learned counsel for the petitioner and Dr.

Kuldeep Mishra, learned counsel for respondent No.2 and Shri Surya Bhan Singh, learned Standing Counsel appearing for respondent Nos.1, 9, 10, 11 and 12.

2. The petitioner is aggrieved by the impugned order dated 08.06.2022 passed by the Sub Divisional Magistrate, Sadar, Mirzapur in Case No.7424 of 2021, Surta Nath @ Surat Nath Vs. Dinesh Kumar and others, under Section 12-C of **U.P. Panchayat Raj Act, 1947**, whereby an application of the petitioner dated 27.04.2022 seeking cross examination of the witnesses, has been rejected in view of Rule 4 Proviso (ii) & (iv) of the **Uttar Pradesh Panchayat Raj (Settlement of Election Disputes) Rules, 1994** (hereinafter referred as '1994 Rules).

3. Learned counsel for the petitioner relied upon the judgment of this Court in **Writ Petition No.2904 of 2004 (Arunesh Vs. Prescribed Authority/S.D.O. Gonda)** to contend that while recording the evidence as per Rule 4 of 1994 Rules, opportunity of cross-examination is required to be given.

4. He has further relied upon the provision of Order 18 Rule 4 of the Code of Civil Procedure, 1908 to contend that evidence submitted by way of affidavit cannot be taken on record without granting an opportunity of cross-examination.

5. He has further relied upon the Full Bench judgment of this Court in **Civil Misc. Writ Petition No.11079 of 1983, Ram Adhar Singh Vs. The District Judge and others** decided on 14.03.1985 reported in 1985 All.W.C. 246 and the provisions of Section 137 of the Evidence Act to contend that the evidence

cannot be taken on record, without giving an opportunity of cross examination.

6. On the other hand, learned counsel for the respondent No.2 has relied upon the proviso (ii) & (iv) of Rule 4 of Rules 1994 and contends that in the election petition under U.P. Panchayat Raj Act, 1947, application of Code of Civil Procedure is permitted to the limited extent. So far as recording of evidence is concerned, the provision of Code of Civil Procedure as contained in Order 18 Rule 4 of CPC are not applicable. He further submits that the provisions of C.P. C. are general in nature and the provisions of 1994 Rules are special statute which shall prevail over the general law.

7. Learned counsel for the State-respondents submits that none of the judgment cited by the learned counsel for the petitioner deals with the **proviso (ii) and (iv) of the Rule 4 of 1994 Rules** and the 1994 Rules being the special law has to prevail over the provisions of Code of Civil Procedure.

8. Rule 4 of the **Uttar Pradesh Panchayat Raj (Settlement of Election Disputes) Rules, 1994**, reads as under:-

"4. Hearing of the petition.-(1)

Subject to the provisions of the Act and these rules, every election petition shall be tried by the Sub-Divisional Officer, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908, for the trial of suits:

Provided that -

(i) the Sub-Divisional Officer may hear the petitioner or his counsel and if he finds that the petitioner has no substance,

reject the same without the issue of any notice to the opposite parties;

(ii) it shall not be necessary for the Sub-Divisional Officer to reord the evidence in full and he may maintain only a memorandum of evidence produced by the parties before him;

(iii) if there is a sole petitioner and he dies, or there is a sole respondent and he dies, the petition shall be abate;

(iv) the Sub-Divisional may allow only such evidence to be produced as he deems relevant for the purpose of deciding the petition.

(v) the District Magistrate may at any stage on sufficient cause being shown transfer an application made under sub-section (1) of Section 12-C for hearing to another Sub-Divisional Officer;

(vi) an application not presented within time or unaccompanied by a treasury challan as required under sub-rule (1) of Rule 3 may, at any time, be dismissed by the Sub-Divisional Officer; and

(vii) the Sub-Divisional Officer may, on an application of either party made within five days after the date of his decision, review his order.

(2) If the Sub-Divisional after hearing finds in respect of any person whose election is called in question by the petition, that his election was valid, he shall dismiss the petition as against such person and may award costs at his discretion and in case he finds the application to be altogether frivolous he may also order that the security deposit shall in part or whole be forfeited to the concerned Gram Panchayat.

(3) If the Sub-Divisional Officer finds that the election of any person was invalid he shall either-

(a) declare a casual vacancy to have been created; or

(b) declare another candidate to have been duly elected, whichever course appears, in the particular circumstances of the case, to be appropriate, and in either case may award costs at his discretion:

Provided that no such declaration shall be made unless a claim for it has been made in the application.

(4) The security deposit or portion thereof, as the case may be, not forfeited under sub-rule (2) and not required for payment of any costs awarded to any opposite party shall be refunded by the District Panchayat Officer to the person depositing the same or in case of his death, to his legal representative. "

9. Rule 4 of 1994 Rules provides for hearing of the election petition arising out Panchayat Election.

10. From bare reading of the aforesaid provision of 1994 Rules, it is crystal clear that the application of Civil Procedure Code has been made to a limited extent and so far as recording of evidence is concerned the proviso (ii) and (iv) of Rule 4 of 1994 Rules, are complete code in itself.

11. The reliance placed by the learned counsel for the petitioner upon Order 18 Rule 4 of CPC and Section 137 of CPC is misconceived. The aforesaid provision being general in nature shall not apply where Special Law provides specific procedure.

12. The learned counsel for the petitioner has heavily placed reliance upon the judgment **Arunesh Vs. Prescribed Authority/S.D.O. Gonda (supra)**, wherein this Court has issued the following directions;

"5. I may point out that Uttar Pradesh Panchayat Raj (Disposal of Election Disputes) Rules, 1994 have been framed under section 12-C, 12- D read with section 110 of the Uttar Pradesh Panchayat Raj Act. Rule 4 of these Rules provides that the procedure of Civil Procedure Code shall be applied in the hearing of election petitions subject to the rules made under these Rules. Rule 4 makes it clear that the procedure of CPC shall be applied. Therefore, the opposite party No.1 is directed to dispose of the pending applications for the amendment of the written statement and for summoning the documents and after disposal of these applications opposite party No.1 is directed to frame issues and after framing of tire issues, he will record the statement of the witnesses of the election petitioner and opportunity of cross-examination shall be given to the opposite parties. After that the opposite parties shall be given opportunity to adduce oral evidence. All the documents of both the parties shall be taken on the date of framing the issues. Either of the party shall be at liberty to request the Presiding Officer to summon the specific document which are required to be proved in the election petition and the Presiding Officer may pass appropriate order for summoning of the documents if those documents are required to ascertain whether a prima facie case is made out or not. The question of summoning the ballot papers or recounting be disposed of after hearing both the parties if it is found that prima facie case is made out to summon the ballot papers or the recounting of the votes. So far as the impugned order is concerned, this order will not be implemented unless the due procedure as directed above, is followed by the opposite party No. 1 and if this order is to be implemented, there will be a specific order pointing out the

particular documents after hearing both the parties"

13. From perusal of the aforesaid directions, it is apparent that the learned Single Judge has not considered the specific provision of proviso (ii) and (iv) of Rule 4 of 1994 Rules, while passing the directions regarding the cross-examination of witnesses. Therefore, in my considered view, the aforesaid judgment is per incuriam likewise judgment in **Ram Adhar Singh (supra)** also did not deal with the proviso (ii) and (iv) of Rule 4 of 1994 Rules, therefore, the same cannot be applicable in the instant case.

14. In view of the aforesaid, the instant writ petition is **dismissed** being devoid of merits.

15. In view thereof, it is hereby directed that the Sub-Divisional Magistrate, Sadar, Mirzapur shall decide the instant Election Petition at the earliest expeditiously, preferably within a period of two months from the date of production of a certified copy of this order after following due procedure of law.

(2023) 8 ILRA 466

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 10.08.2023

BEFORE

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

Writ C No. 26718 of 2023

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

Counsel for the Petitioner:
Sri Rajesh Yadav, Sri Mukul Yadav

Counsel for the Respondents:
C.S.C.

Civil Law-Constitution of India, 1950- Article 226-Filing of Affidavits- It is strange that the petitioner, Rahul Kumar has shown his address, i.e. resident of Vill-Muzaffarnagar Keshon, Block Mohd. Pur Devmal, Tehsil & District-Bijnor, whereas the residence of deponent is of different place, i.e. Vill-Bhamourapatti, Bhamori Patti, District-Sambhal. Thus the relation mentioned by the deponent as family member of the petitioners appears to be doubtful- To divulge the real fact, affidavit of the deponent; Kamas Singh is necessary. Accordingly, he is required to file an affidavit explaining his relation, specifically, with both the petitioners in the aforementioned writ petitions, within two weeks, which shall be kept on record by the office- Stamp Reporter shall take care of the fact that in such cases the affidavit be filed by the petitioner himself/herself or his/her family member. (E-15)

List of Cases cited:

1. Vivekanand Yadav Vs St. of U.P. & anr.2010 (10) ADJ 1 (FB)
2. Narendra Kumar Vs St. of U.P. & ors.2013 (1) ADJ 228
3. Rahul Kumar Vs St. of U.P. & ors-Writ-C No.26718 of 2023
4. Jaidev Vs St.te of U.P. & ors. Writ-C No 26639 of 2023
5. Smt. Shabista Praveen Vs St. of U.P. & anr.Writ-C No.22385 of 2023, decided on 09.08.2023

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

1. List revised. No one has appeared on behalf of the petitioner to press this case.

2. Mr. Anuradha Sundram, learned Additional Chief Standing Counsel is present.

3. At very outset, learned Standing Counsel states that this is complainant's petition and the petitioner being complainant has no locus to file such petition, therefore, this petition is not maintainable. In support of his contention, he has relied upon the Full Bench judgment of this Court in the case of *Vivekanand Yadav vs. State of U.P. and another*¹ and the judgment of Co-ordinate Bench of this Court in the case of *Narendra Kumar vs. State of U.P. and Ors.*²

4. In view of the above, the petitioner being complainant has no locus to file the petition.

5. Accordingly, the writ petition is *dismissed* as not maintainable.

6. Before parting with the order, this Court feels it necessary to deal with practice of affidavits filing in such petitions that today, two petitions, i.e. Writ-C Nos.26718 of 20233 and 26639 of 20234 are listed. Affidavits in both of the cases are sworn by one Kamas Singh, who in one petition, i.e. Writ-C Nos.26718 of 2023, described himself to be family member of the petitioner therein, namely, Rahul Kumar and in Writ-C No. 26639 of 2023, which is dismissed as not pressed, as friend of the petitioner therein, namely, Jaidev. It is strange that the petitioner, Rahul Kumar has shown his address, i.e. resident of Vill-Muzaffarnagar Keshon, Block Mohd. Pur Devmal, Tehsil & District-Bijnor, whereas the residence of deponent is of different place, i.e. Vill-Bhamourapatti, Bhamori Patti, District-Sambhal. Thus the relation mentioned by the deponent as family

member of the petitioners appears to be doubtful.

7. The address of the deponent mentioned in both the cases with respect to his relation with the petitioners stinks upon genuineness. To divulge the real fact, affidavit of the deponent; Kamas Singh is necessary. Accordingly, he is required to file an affidavit explaining his relation, specifically, with both the petitioners in the aforementioned writ petitions, within two weeks, which shall be kept on record by the office.

8. The Stamp Reporter shall take care of the fact that in such cases the affidavit be filed by the petitioner himself/herself or his/her family member.

9. Here, it is also pertinent that the stamp reporter will also adhere to the directions with respect to filing of affidavits in view of the directions issued by this Court in the case of *Smt. Shabista Praveen vs. State of U.P. and Another*⁵.

10. Mr. Rajesh Yadav, learned counsel for the petitioner is expected to remain attentive while verifying affidavits in such cases.

11. Registrar Compliance is directed to communicate this order to all concerned for its compliance forthwith.

(2023) 8 ILRA 468
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2023

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE MANOJ BAJAJ, J.

Writ C No. 27340 of 2019

Vinay Prakash Shukla ...**Petitioner**
Versus
State of U.P. & Ors. ...**Respondents**

Counsel for the Petitioner:

Sri Aarushi Khare, Sri Sarvesh Kumar Pandey, Sri Vinay Kumar Khare (Senior Adv.)

Counsel for the Respondents:

C.S.C.

Civil Law-Constitution of India, 1950-Article

226-Mines & Minerals- Impugned order passed without any application of mind-Only because the petitioner had deposited Rs.5 lacs on 28.9.2017 it had been concluded that the petitioner had done illegal mining- The notice had St.d that 5436 cubic meter of sand was excavated whereas the order St.s that 4302 cubic meters were illegally excavated- here was neither any inspection nor was there any report present on the basis of which order was passed- That Rs.5 lacs were accepted from the petitioner without any adjudication and without any quantification of the penalty etc which was paid by the petitioner on the oral assurance that compounding would be done and no specific denial has been made in the counter affidavit- Amount of Rs.5 lacs, which was taken from the petitioner be returned to him and interest be paid on that amount at the rate of 6% per annum from the date of deposit.

Petition partly allowed. (E-15)

List of Cases cited:

1. Anant Narayan Mishra Vs. U.O.I. & ors. 2020 (3) ADJ 466
2. Ranjit Thakur Vs U.O.I. & ors. 1987(4) SCC 611

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

1. Instructions filed today by learned Standing Counsel be kept on record.

2. In pursuance of an e-tender notice dated 9.6.2017, the petitioner applied and when he was found to be the highest bidder for the mining of *morum* of 30,351 cubic meters in Plot no. 6 of Zone-10, area 10 acre, he was given a six months permit from 9.6.2017 to 8.12.2017. While the petitioner was excavating the *morum*, he got a notice dated 25.6.2017, which was numbered as Letter No. 356, and he was to give an explanation with regard to non submission of environmental clearance certificate and non installation of CCTV camera etc. Simultaneously, another notice was served upon the petitioner on 5.7.2017, wherein, the same notice number being Letter No. 356 was given and he was required to show cause as to why royalty and penalty for illegal mining of 5436 cubic meters be not taken from him.

3. On 12.7.2017, the petitioner's reply to the notice with regard to the illegal mining was submitted wherein it was stated that the petitioner had not done any illegal mining but in fact had carved out a certain path for reaching the place of mining. When the petitioner's reply was not being considered, he filed a writ petition being Writ-C No. 55531 of 2017 and challenged the notice dated 25.6.2017. However, this Court on 22.11.2017 passed an order that the petitioner's reply be considered within a period of four weeks from the date of receipt of a certified copy of order dated 22.11.2017.

4. Pursuant to the order dated 22.11.2017 passed in Writ-C No. 55531 of 2017, an order was passed on 25.1.2018, wherein, it was alleged that since the petitioner had accepted that he had done illegal mining by depositing a penalty of Rs.5 lacs, it had to be concluded that the petitioner had done illegal mining. In

between the passing of the order dated 25.1.2018 and the issuing of the notices/orders dated 31.5.2018 and 18.8.2018 for depositing of Rs.38,88,000/- towards royalty, the petitioner had also filed an application on 6.2.2018 stating that the order was a non- speaking one and that it was based upon no inspection report etc.

5. Aggrieved by the order dated 25.1.2018 and the notice for depositing the penalty etc. dated 31.5.2018, the instant writ petition has been filed.

6. Learned counsel for the petitioner has argued that respondents have acted in a most mala fide manner. There were two notices issued on 25.6.2017 and 5.7.2017 and both were numbered as Letter No. 356. Learned counsel for the petitioner states that without any inspection and without any application of mind, notices were sent. Further, it has been submitted that after the notices were sent, an assurance was given to the petitioner that if he deposited Rs.5 lacs, then the matter would be compounded and no further action would be taken and therefore, the petitioner had deposited the Rs.5 lacs on 28.9.2017 on the basis of an oral assurance given by respondents.

7. Learned counsel for the petitioner states that petitioner on the oral assurance had deposited the money and had therefore, virtually been duped of Rs.5 lacs as it was not even taken into account while passing the impugned order dated 25.1.2018. Learned counsel for the petitioner further states that the notice dated 25.6.2017 had stated that illegal mining was to the extent of 5436 cubic meters but the order had stated that the illegal mining was to the tune of 4320 cubic meters. It is further submitted by learned counsel for petitioner that categorically in the reply, which the

petitioner had given in pursuance to the notice dated 25.6.2017 with regard to illegal mining, he had stated that he had only carved out a passage through the plot in which it was alleged that illegal mining had taken place, but this aspect of the matter was not even remotely considered.

8. With regard to the depositing of Rs.5 lacs on the oral assurance of the respondents, mention has been made by the petitioner in paragraph nos.30 to 32 of the writ petition. They are thus being reproduced herein as under:-

"30. That the petitioner has deposited Rs. 5 lacs on the assurance given by respondent no.3 that matter will be compounded under Rule 75 and notices dated 19.6.2017 and 25.6.2017 will be dropped.

31. That the petitioner has already paid the price of the mineral and has not exceeded the permitted quantity and has extracted less quantity than the quantity permitted, therefore, the demand is illegal.

32. That instead of considering the petitioner's representations, a notice was sent on 18.3.2019 by the respondent no.2. A copy of the notice dated 18.3.2019 is being filed as Annexure No.14 to this writ petition."

9. In reply, Sri Sandeep Kumar Singh, learned Additional Chief Standing Counsel has relied upon the counter affidavit and the instructions, which have been produced by him today.

10. Sri Sandeep Kumar Singh, learned Additional Chief Standing Counsel states that when the petitioner had admitted that illegal mining had been done and had deposited Rs.5 lacs then there was no other option but

to conclude that illegal mining had taken place. The other notice dated 25.6.2017 with regard to non submission of environment clearance certificate and non installation of CCTV camera etc., learned Additional Chief Standing Counsel has given a statement on the basis of instructions received from the Mining Officer that the notice was dropped and no action was taken.

11. Upon a pointed question being asked as to what reply had been given by respondents with regard to paragraph nos.30 to 32 of the writ petition, learned Additional Chief Standing Counsel drew the attention of the Court to paragraph no.12 of the counter affidavit. For convenience, paragraph no.12 of the counter affidavit is being reproduced hereas under:-

"12. That the contents of paragraph nos. 30, 31, 32, 33 of the writ petition are not admitted as stated, hence denied. In reply thereto, it is submitted that the petitioner admitted the allegation of illegal mining and deposited Rs.5,00,000/- through Challan No.MO10080 dated 28.9.2017. The petitioner received MM-11 from office of the District Magistrate, Kaushambi for transportation of 5436 cubic meter sand upto 19.6.2017. The notices were rightly issued to the petitioner."

12. A perusal of paragraph no.12 of the counter affidavit shows that allegations made in paragraph nos.30, 31, 32 & 33 have not been denied in so many words and only a vague denial had been made. In fact, it has been admitted that the petitioner was made to deposit Rs.5,00,000/- even before the notices were sent.

13. In the Court, however, the Mining Officer, Sri Ajeet Kumar Pandey was present with the instructions and he has

stated that Rs.5 lacs were not taken towards compounding but in fact they were taken towards the royalty and penalty for illegal mining.

14. Having heard learned counsel for the parties, we are of the view that the impugned order dated 25.1.2018 was passed without any application of mind. Only because the petitioner had deposited Rs.5 lacs on 28.9.2017 it had been concluded that the petitioner had done illegal mining. Further, we find that the notice had stated that 5436 cubic meter of sand was excavated whereas the order states that 4302 cubic meters were illegally excavated. All this goes to show that there was no application of mind. Still further we find that there was neither any inspection nor was there any report present on the basis of which order was passed. Apart from the fact that the order is based on no evidence, we are also pained to find that Rs.5 lacs were accepted from the petitioner without any adjudication and without any quantification of the penalty etc. This amount as per the learned counsel for petitioner was paid by the petitioner on the oral assurance that compounding would be done but no specific denial has been made in the counter affidavit.

15. The very fact that the money was taken prior to the adjudication definitely gives credence to the submission made by learned counsel for petitioner that the Rs.5 lacs were taken by the department on an assurance that compounding would be done. This reflects a deplorable state of affairs in the mining department.

16. For the reasons stated above, we do consider that the impugned order dated 25.1.2018, which was followed by the order dated 31.5.2018 cannot be sustained in the eyes of law and therefore, they have to be quashed. The subsequent notice dated

18.8.2018 is also being quashed. Before the adjudication take place, we also direct that the amount of Rs.5 lacs, which was taken from the petitioner be returned to him and interest be paid on that amount at the rate of 6% per annum from the date of deposit.

17. Needless to say that the respondents may re-adjudicate the matter on the basis of the reply given by the petitioner within a period of one month from the presentation of certified copy of this order after taking into account whatever local inspection etc. was done before the notice dated 25.6.2017 was issued.

18. With the aforesaid directions, the writ petition stands partly allowed.

(2023) 8 ILRA 471
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.08.2023

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Writ C No. 35884 of 2019

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

Counsel for the Petitioner:
 Amol Kumar, Shivanshu Mishra

Counsel for the Respondents:
 C.S.C., Piyush Pathak, R.P. Shukla, Sharad Pathak, Sukhdeo Singh, Vidya Bhushan Pandey

Held -
Maintenance and Welfare of Parents and Senior Citizens Act, 2007 - Sections 4(3) & 16 - Eviction of son from parental house - Jurisdiction of Tribunal and District

Magistrate - Scope - Property owned by father - Petitioner, son, residing in one room with wife - No hindrance to peaceful living of parents in rest of the house - Father now deceased, mother in possession - Eviction order passed without considering petitioner's maintenance obligations already being fulfilled - Order suffers from illegality and without application of judicial mind - Eviction cannot be simplicitor unless senior citizen's "need" under the Act is obstructed - Appellate order quashed - Liberty to mother to apply afresh in case of genuine hindrance.

Held: The Tribunal under Chapter - II of the Act, 2007 cannot direct eviction simplicitor. The District Magistrate, as appellate authority, must ensure no hindrance is caused to the peaceful enjoyment of senior citizens in their property, and eviction is warranted only as a last resort when the "needs" of the senior citizen are obstructed. In the present case, where the petitioner - son is residing peacefully in one room and not interfering with the mother's possession, the appellate order directing eviction was not sustainable.

Citations:

1. Randhir Singh Vs District Magistrate, Faizabad & ors., MANU/UP/1742/2019
2. Maintenance and Welfare of Parents and Senior Citizens Act, 2007 - Sections 2(b), 4(3), 5, 7(1), 16
3. Code of Criminal Procedure, 1973 - Section 125
4. Hindu Succession Act, 1956 - Section 6

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. Heard Sri Amol Kumar, Advocate assisted by Sri Shivanshu Mishra, learned counsel for the petitioner, Sri Vidyabhushan Pandey, learned counsel for the opposite party, Sri S.P. Singh, learned Standing Counsel for the State.

2. By means of the instant writ petition, the petitioner has prayed for quashing of the impugned order dated 22-11-2019 passed by the learned District Magistrate, Sultanpur, vide appeal No. 1333 of 2019 and Computer Case No. D 2019046800133, titled as 'Kallumal and another Vs. Krishna Kumar', while exercising powers under section 16 of the Maintenance and Welfare of Parents and Senior Citizen Act, 2007.

3. The factual matrix of the case is that on 16-07-1971, the grandfather of the petitioner namely late Ramdhani purchased a part of land of Gata No. 179 having area, 2 Biswa vide sale deed, from Ram Dulare and Shiv Dulare, both sons of Jagrup, in favour of the opposite party no. 4 and thereafter, the rest part of the same Gata admeasuring 2 Biswa was purchased by the father of the petitioner on 17-07-1971, out of the income of the Hindu Undivided Family(HUF), in favour of his younger son, who was minor at that period of time and thus, the same was purchased under the guardianship of his father. After purchase of aforesaid land, the grandfather of the petitioner constructed a house over the said land with the earning of HUF and was living in the same house. In between, the younger brother of opposite party no. 4 expired and thus, the property owned by late Om Prakash was divulged to opposite party no. 4 and the children of opposite party no. 4, in equal shares. The private opposite parties have three sons and two daughters namely Rajendra Prasad, Krishna Kumar, Janardan, Sushila and Anjali. The widow of Rajendra Prasad re-married after the death of Rajendra Prasad and is living with her husband, whereas the minor son born out of the wedlock of Rajendra Prasad and Savita Devi is residing with the petitioner.

4. On 16-08-2018, the petitioner married with Rajpati in a Arya Samaj Mandir who belongs to Scheduled Caste Community and thus the father of the petitioner was annoyed and never accepted the marriage aforesaid. Due to annoyance, an F.I.R. was lodged against the petitioner so as to dissolve the marriage, whereafter, the petitioner filed a case namely Writ Petition no. 25345 (M/B) of 2018, (Smt. Rajapati and another Vs. State of U.P. and Others), wherein, an interim relief was granted in their favour, though later on, the same was disposed of.

5. The private-opposite parties filed an application before the learned Principal Judge, Family Court, Sultanpur under section 125 of Cr.P.C., for grant of maintenance against the petitioner and his brother and the interim maintenance was fixed @ Rs. 8,000/-p.m. and half of the amount was to be given by the present petitioner.

6. In the house in question, there was a shop which was let out by the father of the petitioner to Sadab & Izhar, on a monthly rent of Rs. 26,500/-, but, the same was concealed while instituting an application under section 125 of Cr.P.C. Thereafter, the private opposite parties have also filed an application for maintenance under section 7(1) of the Maintenance and Welfare of Parents and Senior Citizens Act 2007 (hereinafter referred as Act 2007), wherein the Sub. Divisional Magistrate passed an order in favour of the private opposite parties though, the same was not challenged by the petitioner and the petitioner is paying the amount of maintenance to his parents on each and every month.

7. Thereafter, an appeal has been filed before the District Magistrate on 14-12-

2017, whereby the petitioner has been directed to evict the house. The private opposite parties vide sale deed dated 14-12-2017, sold out a part of the property of Gata No. 179 and being aggrieved, the petitioner filed a civil suit to declare him to be co-sharer of 1/6 share in the land in question, which is registered as Regular Suit No. 140 of 2019, (Krishna Kumar and Another Vs Kallu Mal and Others).

8. On 13-03-2019, the father of the petitioner, executed gift deed of the property to Sushila and Anjali, who are the daughters of the executor and sisters of the petitioner and the rest of the property was sold out in favour of one Suresh Narotam Das and being aggrieved, another suit was filed by the petitioner alongwith minor son, for setting aside the gift deed dated 08-02-2019 and the sale deed dated 13-03-2019, vide Regular Suit No. 944 of 2019. The present petitioner is still residing in one portion of the house, but, the Sub. Divisional Magistrate and the Appellate Authority without application of judicial mind and without considering the evidences in a right perspective, passed the impugned order, thereby directing the petitioner to evict the house in question. Thus, the petitioner being aggrieved, has filed the instant petition.

9. Contention of learned counsel for the petitioner is that admittedly, the present petitioner is son of the private opposite parties and even assuming that the property in question is the property of private opposite parties, the present petitioner being son is entitled for 1/6 part of the property and therefore, without considering all these facts, the order for eviction has been passed while exercising power under Act 2007.

10. He argued that learned District Magistrate has exceeded his jurisdiction,

while deciding the appeal, thereby passing an order of eviction and dispossession. He emphasized that Section 2(b) of the Act, 2007, which includes provision for food, clothing, residence and medical attendance and treatment, has never been denied by the petitioner to his parents, at any point of time. He next added that the appellate court has also failed to appreciate that the property which is owned by the father of the petitioner is an ancestral property.

11. Further contention is that under the proceedings of Section 125 of Cr.P.C., the maintenance has already been fixed by the court, as an amount of Rs. 8,000/- per month out of which, Rs. 4,000/- per month is to be paid by the petitioner and there is also income of Rs. 26,500/- per month to opposite parties from a shop, which was let out by the father of the petitioner.

12. Submission is that in fact the story is otherwise as the father of the petitioner was annoyed with the marriage of the petitioner and his wife, as wife belongs to Scheduled Caste Community, which is infact root cause of initiating legal proceedings against the petitioner for evicting him from the house in question and to dislodge the marriage in between the petitioner and his wife. He submits that the petitioner is taking all care of his parents, on each and every occasion prior to the marriage and due to annoyance of his father, several cases have been lodged against him and he is running pillar to post for doing pairavi.

13. In support of his contentions, he has placed reliance on a case reported in **Manu/UP/1742/2019, Randhir Singh Vs. District Magistrate, Faizabad and Others** and has referred paragraphs nos. 24, 28 & 29 of the aforesaid Judgment, which are extracted hereinunder :-

“24. The question is whether the respondent no. 3, who is daughter-in-law of the petitioner, has a right to reside in the house, which is self-acquired property of the petitioner against the wishes of the petitioner, in view of the provisions of the aforesaid 2017 Act read with Uttar Pradesh Maintenance and Welfare of Parents and Senior Citizens Rules, 2014 (hereinafter referred to as the “Rules of 2014”)

28. While passing the impugned order, the District Magistrate has gone through the enquiry report submitted by the Sub-Divisional Magistrate and on finding that the petitioner inspite of having five rooms in the house, is living with his elder daughter-in-law on his own sweet will; the matrimonial dispute between petitioner’s son and respondent no. 3 is pending; and the petitioner has not produced any evidence which could establish that the respondent No. 3 has restrained the petitioner from living in other five rooms of the house in question. In the backdrop of the aforesaid fact, the District Magistrate has recorded specific findings of fact on the basis of cogent material on record and the judgment relied by the learned Counsel for the petitioner is not applicable under the facts and circumstances of the case.

29. From the perusal of the impugned order, it reflects that the District Magistrate, on the basis of enquiry report submitted by the Sub-Divisional Magistrate, has recorded specific finding that there is no evidence on record, which establishes that the respondent No. 3 is trying to restrain the petitioner from living in other five rooms of the house in question. In fact the petitioner is residing with his elder daughter-in-law on his own sweet will at Faizabad. In order to protect the interest of the petitioner being a senior citizen, the District Magistrate in its order has specifically directed the concerned police

station to see both the parties from time-to-time and it is also expected from the parties that they live in congenial atmosphere without interfering in the peaceful life of each other."

14. Referring the aforesaid, he submits that the Division Bench of this court has held that since the senior citizen, leaving their house, were residing somewhere else whereas there was space to live and none had restrained them to live in the house, thus, no interference is warranted. He submits that the case of the petitioner is also covered with the ratio of the above said judgment as he is residing in one room of the house and he has never restrained his parents to live over there.

15. Concluding his arguments, he submits that this is a peculiar case where the parents are not infact aggrieved but the son is being harassed for his no fault. He submits that the father of the petitioner namely Kallu Mal died and now the greedy sisters and their husbands are trying to sell out the property and that's why, they are doing pairavi in the matter, yet the petitioner and his wife is residing in one portion of the house, which is on the first floor and one of the shops, beneath his room, which is under his possession and the rest of the house is in the possession of the private opposite parties. He added that it is not the intent of the act to dislodge or to harass the son but it is for protection of the interest of the old age parents, which infact, in the present case is not applicable. He thus, submits that the private opposite parties did not come with clean hands before the appellate authority as well as before the Sub. Divisional Magistrate and thus, the impugned orders assail illegality and infirmity.

16. Per contra, learned counsel appearing for the opposite parties has

opposed the contentions aforesaid and submits that no substantial or legal ground has been divulged by the learned counsel for the petitioner and only factual dispute has been raised. He added that the father of the petitioner namely, Kallu Mall was aged about 75 years and his mother namely, Samtula Devi, was about 68 years of age at the time of the alleged incident and now, Kallu Mall is no more. Further submitted that the petitioner and his wife beat his parents brutally and abused them and because of the unbearable harassment perpetrated by the petitioner and his wife, the father and mother, who were of old age and sick and infirm, felt helplessness and pain. He added that facing the trouble at every point of time, the father of the petitioner and the mother moved an application before the Sub. Divisional Magistrate, which was decided vide order dated 08-07-2019 and thereafter, an appeal was instituted wherein an order was passed on 22-11-2019. The operative portion of the order dated 22-11-2019 is quoted hereinunder :-

आदेश

"उपरोक्त विवेचना के आधार पर प्रस्तुत अपील स्वीकार की जाती है। न्यायालय माता पिता एवं वरिष्ठ नागरिक भरण पोषण एवं कल्याण अधिकरण/उपजिलाधिकारी सदर सुलतानपुर द्वारा पारित आदेश दिनांक 08.07.2019 खण्डित किया जाता है तथा विपक्षी कृष्ण कुमार को उपरोक्त सम्पत्ति (मकान व दूकान) से निष्कासित किया जाता है। विपक्षी आदेश प्राप्ति से 45 दिवस के भीतर उक्त सम्पत्ति से अपना कब्जा हटा लें यदि उनके द्वारा निर्धारित समयावधि के भीतर अपना कब्जा नहीं हटाया जाता है तो स्थानीय पुलिस बल की सहायता से उन्हें उक्त सम्पत्ति से निष्कासित करने की कार्यवाही की जाये। आदेश की एक प्रति पुलिस अधीक्षक सुलतानपुर, उप जिला मजिस्ट्रेट सदर सुलतानपुर व संबंधित पक्षों को आवश्यक कार्यवाही हेतु प्रेषित की जाये। प्रभारी निरीक्षक कोतवाली नगर, सुलतानपुर उभयपक्षों पर आदेश का तामीला कराकर एक प्रति तामीला रिपोर्ट के साथ वापस करें। आदेश की प्रति के साथ अवर न्यायालय की पत्रावली वापस भेजी जाये। बाद आवश्यक कार्यवाही पत्रावली संचित अभिलेखागार हो।

दिनांक-22.11.19”

17. Referring the aforesaid, he submits that there is no erroneousness in the order passed by the appellate authority and considering the facts and circumstances of the case and the law prevailing thereof, the order with respect to eviction of the petitioner has rightly been passed.

18. He further submits that so far as the claim of the petitioner is that he is a co-sharer of the House No. 778, from which eviction has been ordered by the learned District Magistrate, is infact not correct as the petitioner does not come in the category of co-sharer as per section 6 of the Hindu Succession Act. With the intention to claim his right as co-sharer, the petitioner made several kind of forgery and once he could not succeed, then he prepared a forged will deed executed by late Om Prakash in the year 1992. He added that the petitioner committed all kind of forgery so as to remain continue in the house of his father, but, he could not substantiate the same. It is also added that the petitioner is a person of criminal character and has got no respect to his parents and more so, he misbehaved with them in course of grabbing the property and once, it became impossible to live with the petitioner namely, Krishna Kumar and his wife, the proceedings under Act, 2007 were invoked by the opposite parties, whereupon the opposite parties have rightly passed the orders. He also added that the petitioner has beaten several times to his father and mother and they have received injuries, which is also evident from the CCTV Camera installed.

19. Further submission is that learned trial courts have passed the orders impugned after thoroughly considering the facts and

circumstances of the case and after coming to the conclusion that the opposite parties no. 4 & 5, are being ill treated by his son i.e. the petitioner and his wife and it has become impossible for the parents to live, in the same house, alongwith them. He added that there is no unlawfulness and erroneousness in the order passed by the Sub.Divisional Magistrate or the appellate court. Therefore, he submits that there is no merit in the instant petition and the writ petition is liable to be dismissed.

20. Considering the submissions of learned counsel for the parties and after perusal of material placed on record, it emerges that the present petitioner and his wife are living in the house of his parents. From the application, which was instituted by the opposite parties no. 4 & 5, it is evident that the present petitioner used to beat his father and mother, who were of old age and he was also not properly maintaining them. Further this incident is said to happen usually with opposite parties no. 4 & 5 and therefore, being aggrieved, they moved an application under section 5 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (hereinafter referred as the ‘Act, 2007’). After the aforesaid application moved, the Sub. Divisional Magistrate concerned passed the order on 08-07-2019 with the following directions :-

आदेश

“आदेश किया जाता है कि:-

(1) प्रतिवादी कृष्ण कुमार सुत कल्लूमल को निम्न शर्तों के साथ प्रतिबंधित किया जाता है कि कृष्ण कुमार सुत कल्लूमल जिस दुकान में बर्तन का कारोबार करते हैं एवं जिस कमरे में रहते हैं एवं कमरे से लगे बाथरूम के अतिरिक्त घर के दूसरे हिस्से में बिना माता पिता की अनुमति के प्रवेश नहीं करेंगे। यह प्रतिबन्ध इनकी पत्नी एवं बच्चों पर भी प्रभावी होगा।

(2) प्रभारी निरीक्षक कोतवाली नगर को आदेशित किया जाता है कि प्रत्येक 15 दिन में स्वयं अथवा क्षेत्रीय

उपनिरीक्षक इनके घर पर जाकर सी०सी०टी०वी० में लगी हार्ड डिस्क/डी०वी०आर० का परीक्षण करेंगे एवं पड़ोसियों से पूछ तॉछ करेंगे कि इनके पुत्र कृष्ण कुमार के द्वारा अपने माता पिता को प्रताड़ित तो नहीं किया जा रहा है। यदि कोई ऐसा साक्ष्य प्राप्त होता है तो न्यायालय के संज्ञान में लाते हुए आवश्यक कार्यवाही करेंगे।

(3) कृष्ण कुमार द्वारा अपने माता पिता को प्रताड़ित किया गया तो इन्हें घर से बेदखल करने की कार्यवाही की जायेगी। जैसा कि विपक्षी कृष्ण कुमार ने अपने बयान में स्वयं अंकित कराया है।

(4) माननीय प्रधान न्यायाधीश कुटुम्ब न्यायालय सुल्तानपुर के आदेश का अनुपालन करते हुए कृष्ण कुमार व जनार्दन कुमार सुतगण कल्लूमल प्रत्येक माह अपने माता पिता को भरण पोषण हेतु माननीय न्यायालय द्वारा निर्धारित भरण पोषण की धनराशि देते रहेंगे।

(5) कृष्ण कुमार एवं इनकी पत्नी एवं बच्चों के द्वारा माता पिता का पूर्णरूपेण आदर एवं सम्मान किया जायेगा।

(6) प्रभारी निरीक्षक कोतवाली नगर सुल्तानपुर को इस निर्देश के साथ कि श्री कृष्ण कुमार सुत कल्लूमल पर सतर्क दृष्टि बनाये रखेंगे कि वह अपने माता पिता को प्रताड़ित न करें। आदेश की एक प्रति प्रभारी निरीक्षक कोतवाली नगर सुल्तानपुर को अनुपालनार्थ भेजी जाय।

बाद आवश्यक कार्यवाही पत्रावली दाखिल दफ्तर हो।"

21. Being aggrieved with the order dated 08-07-2019, an appeal was instituted by the opposite parties no. 4 & 5, wherein the appellate court admitted the appeal and set aside the order passed by the Sub. Divisional Magistrate directing the petitioner to evict the house of opposite parties no. 4 & 5 within a period of 45 days from the date of the order received and in case of non eviction, it was also directed that the same shall get evicted forcibly with the help of the local police.

22. It has been stated in so many words by the petitioner that he is living in a room and there is one shop in his possession and the rest of the part of the house is in the possession of his mother and sister. It was also submitted that since the petitioner performed marriage with a lady of Scheduled

Caste and being annoyed, the parents started the proceedings for getting evicted the house of the opposite parties no. 4 & 5 and no cruelty or injury has ever been caused by the petitioner or his wife.

23. Before any discussions or coming to the conclusion in this matter, it is essential to look into the object of promulgating the Act, 2007. The Act, 2007, namely the Maintenance and Welfare of Parents and Senior Citizens Bill, 2007 was introduced in Lok Sabha on 20-03-2007 and the objective of Bill was to provide for more effective provisions for the maintenance and welfare of parents and the senior citizens guaranteed and recognized under the Constitution of India and for the matters connected therewith or the incidental thereto. It is for the maintenance of the parents, and to provide appropriate mechanism, which is need based maintenance to the parents and senior citizens including the medical facilities to the senior citizens and institutionalizing a suitable mechanism for the protection of life and property of the older persons and old age homes in every district. Now-a-days, because of steady rise in the population, the older persons in India are used to see suffering with the malnutrition and unavailability of medicines and treatment which expected to decrease the life expectancy. The traditional norms and values of the Indian society lays stress on showing respect and providing care for the aged members of the family, were normally cared for by the family itself, but, in the recent time, the society is witnessing a gradual definite withering of joint family system and therefore, a large number of parents are not being maintained by their children.

24. It is an established fact that the family is the most desired environment for senior citizens/parents to lead a life of

security, care and dignity and keeping in view of this fact and to ensure that the children should perform their moral obligation towards their parents, the Act, 2007 aims to create an enabling mechanism for the older persons 'To Claim Need Based Maintenance From Their Children'.

25. So far as the definition of maintenance is concerned, that has been envisaged under section 2(b) of the Act, 2007. This says that the maintenance includes the provisions for food, clothing, residence and medical attendant and treatment. If it is seen in context with the present case, it is evident that opposite parties no. 4 & 5 are the house owners, wherein their son and daughter-in-law are residing in a room and one shop is also in their possession, which is source of their livelihood. Though, it has been alleged as a factual matter that the house in question has been sold out, on the instigation of the sisters and brother-in-laws of the petitioner, but, without going into this factual dispute, it remains undisputed that the present petitioner is residing in a room. It is also a fact that at this stage, the opposite party no. 4 i.e. the father of the present petitioner died and only the opposite party no. 5 i.e. the mother of the petitioner is alive. While bare reading of Section 4(3) of the Act, 2007, it is evident that the obligation of the children to maintain his/her parents extends to the needs of such parents either father or mother or both, so that they may lead a normal life. Section 4(3) of the Act, 2007 is quoted hereunder :-

"4.(3) The obligation of the children to maintain his or her parent extends to the needs of such parent either father or mother or both, as the case may be, so that such parent may lead a normal life."

26. The explanation and meaning of Section 4(3) of the Act, 2007, can more particularly be derived from the heading that says 'maintenance of parents and senior citizens', meaning thereby that the maintenance of parents and senior citizens so far as they can lead a normal life by extending to the needs well fulfilled. Such maintenance of parents is objective of this Act. The present petitioner is residing in a room and one more shop is in his possession and the rest of the house is in possession of his late father now the mother, then this could not be said that there is any further need regarding residence/house to the parents of the present petitioner and more particularly, when the father is no more and being the son, he is residing in one of the room and the mother is residing with her daughters.

27. Taking note of the fact that as per the social structure of the society, sometimes, a son may not be in a position to maintain the parents, as particularly, in the present matter, the petitioner is residing in one room and there are other rooms, where the other can live, therefore, it is needed to revisit the whole scenario that as to whether the present petitioner, is actually avoiding to maintain the parents.

28. This court has also noticed the fact as was contended during course of the arguments that the sister of the petitioner is colluded with the mother and she is trying to sell out the property in question as that is the valuable property and therefore, they tried to oust the present petitioner and the hurdle is that once he remains in one room of the said house, no one will purchase the same.

29. Further, this court is of considered opinion that a Tribunal, under Chapter-II of

Act, 2007 cannot direct eviction simpliciter from the property at the instance of senior citizens, though the Tribunal can direct the children and relatives to make available a residence to such senior citizens in pursuance of an application, filed under the abovesaid chapter. It further emerges that the District Magistrate as an appellate authority under the Act, 2007, can ensure that no one should make any hindrance to a senior citizen to enjoy the property as per his 'need' and the right to eviction is the last step, where such authority finds that the need of a senior citizen is not being fulfilled. The case in hands is that the present petitioner is living in one room with his wife and he is not making any hindrance in the peaceful living of the parents, in other part of the house and therefore, so far as the objective of the Act, 2007 is concerned, is no way hampered by the petitioner.

30. Further the procedure of eviction is not at par to the procedure as prescribed in the Civil Procedure Code, where the rights and titles are determined, as the provisions of Act, 2007 is for ensuring the needs of the senior citizens and that is to be handled, carefully, so that the structure of the family may not be abrupted.

31. In view of the aforesaid submissions and discussions, the order passed by the appellate authority, so far as the eviction of the present petitioner is concerned, is not sustainable, in the eyes of law.

32. Consequently, the impugned order dated 22-11-2019 passed in Appeal No. 1333 of 2019, is hereby quashed.

33. Liberty is given to opposite party no. 5, (mother of the petitioner), to move an

appropriate application, if any sort of hindrance is been made, in furtherance to the need of her residence.

34. The petitioner is also directed, not to make any inconvenience in the needful living of the opposite party no. 5, in the house in question.

35. With the aforesaid observations, the instant petition is hereby *disposed of*.

36. No order as to costs.

(2023) 8 ILRA 479

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 17.08.2023

BEFORE

**THE HON'BLE ARUN KUMAR SINGH
DESHWAL, J.**

Writ C No. 1001013 of 1996

**M/s Zenith Electrical Pvt. Ltd. ...Petitioner
Versus
Board of Revenue U.P., Lucknow & Ors.
...Respondents**

Counsel for the Petitioner:

S.K. Kalia, Ajay Pratap Singh Vatsa, Shobhit Mohan Shukla

Counsel for the Respondents:

C.S.C., S.M.K. Chaudhary

(A) Land Law - Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952 - Rule 283A, Rule 285-A, Rule 285-I & Rule 285-J , The Limitation Act, 1963 - Section-5 - delay condonation - Proceedings before the Commissioner under Rule 285-I of the Rules, 1952 is judicial proceeding - application under Section 5 of the Act, 1963 is maintainable for condoning the delay in filing the objection - if any objection under Section-285-I of the

Rules, 1952 is filed before the Commissioner then application under Section-5 of the Act, 1963 is very well applicable and Commissioner has an authority to condone the delay in filing an objection - Commissioner empowered to consider objection of petitioner regarding violation of provision of Rules, 1952 in conducting auction proceeding/sale - reason must be recorded by the judicial or quasi-judicial authority while passing an order. (Para - 11,14,15,16)

Petitioner challenges auction proceeding of company's assets - including sale confirmation order of Sub Divisional Magistrate & order of Commissioner - delay condonation application - maintainability - power of commissioner to condone delay in filing objection after 30 days - petitioner's objection against auction sale was rejected under Rule 285-I of Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952 - revision against order of Commissioner rejected by Board of Revenue - hence petition. **(Para -3,10)**

HELD:-No finding recorded by Board of Revenue in dismissing the revision . Order passed by Commissioner as well as Board of Revenue quashed. Direction issued to Commissioner to decide application of petitioner for condonation of delay in filing objection. Maintain status quo. **(Para - 16,17,18)**

Petition allowed. (E-7)

List of Cases cited:-

Prithvipat Vs St. of U.P. & ors. , Civil Misc. Writ Petition No.5212 of 1987

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

1. Heard Shri Ajay Pratap Singh Vatsa, learned counsel for the petitioner and Shri R. K. Maurya, learned Standing Counsel representing the State-Opposite parties.

2. No one appears on behalf of opposite parties no.6 to 11.

3. By means of the present petition, the petitioner has challenged the auction proceeding of the assets of the company held on 13.06.1992 as well as sale confirmation order dated 17.07.1992 of Sub Divisional Magistrate, Ghaziabad and also the order of Commissioner, Meerut Division, Meerut dated 23.03.1993 by which an objection against the auction sale dated 13.06.1992 filed under Rule 285-I of Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952 (hereinafter referred to as the 'Rules, 1952') was rejected and also the order of Board of Revenue, Uttar Pradesh, Lucknow dated 06.11.1995 by which the revision of the petitioner against the order of Commissioner, Meerut Division, Meerut was rejected.

4. Factual matrix of the case is as follows:-

5. The petitioner-company is a registered company engaged in the production of transformer, bulb and other electrical goods and because of labour unrest in the factory, production in the company was put in halt and company suffered huge loss. Therefore the company could not clear outstanding towards sales tax, electricity dues and dues of Small Scale Industries Corporation.

6. On failing to clear the outstanding of electricity dues as well as Small Scale Industry Corporation, a recovery certificate was issued by the Collector, Ghaziabad of the amount of Rs.1,39,663.58/- to recover the electricity dues as well as the dues of Small Scale Industry. Thereafter in pursuance of the recovery citation issued

by the Tehsildar, Ghaziabad property of the petitioner-company was attached and subsequently same was auctioned on 13.06.1992 which was subsequently confirmed by the Sub Divisional Magistrate on 17.07.1992 along with delay condonation application. Against the aforesaid auction proceeding, the petitioner-company has filed an objection dated 19.08.1992 under Rule 285-I of the Rules, 1952 to set aside the sale on the ground of material irregularity and violation of statutory provisions but the Commissioner, Meerut Division, Meerut rejected the objection of the petitioner by the order dated 23.03.1993 on the ground that objection dated 19.08.1992 filed by the petitioner is time barred because as per rule 285-I of the Rule 1952 it could be filed within 30 days from the date of sale.

7. Feeling aggrieved by the order dated 23.03.1993 of the Commissioner, Meerut Division, Meerut, the petitioner preferred Revision No.15-92-93, Zenith Electricals Private Limited vs. State of U.P and others before the Board of Revenue, U.P. Lucknow.

8. Contention of the counsel for the petitioner is that the objection of the petitioner was rejected only on the ground that objection of the petitioner is time barred or the same was filed after 30 days of sale and delay condonation application of the petitioner was not considered. It is further submitted that if there is no bar for condoning the delay then the Limitation Act applies and delay can be condoned if the application is filed along with affidavit giving sufficient explanation of filing the delay.

9. It is further submitted by the counsel for the petitioner that the order of

the Board of Revenue is absolutely cryptic in nature and no reasoning was given. Lastly, it has been submitted by the learned counsel for the petitioner that the entire auction proceeding deserves to be set aside being conducted in violation of Rule 283A, Rule 285-A and Rule 285-J of the Rules, 1952.

10. Per contra, learned Standing Counsel submits that there is no provision for condoning the delay in Rule 285-I of the Rules, 1952, therefore Limitation Act does not apply. It was further contended by the learned Standing Counsel that auction proceedings was conducted as per the procedure prescribed in the Rules, 1952 therefore the present petition deserves to be dismissed.

11. After hearing the parties and on perusal of record, two questions arises for consideration of this Court :

(I) Whether delay condonation application under Section-5 of the Limitation Act, 1963 (hereinafter referred to as the 'Act, 1963') is maintainable in the proceeding under Rule 285-I of the Rules, 1952 before the Commissioner and Commissioner has power to condone the delay in filing the objection which were filed beyond the period of thirty days ?

(II) Whether the auction proceedings in question has been conducted in violation of Rules 285-II and 285-H of the Rules, 1952 ?

12. The first question mentioned above came into consideration before the Division Bench of this Court in **Civil Misc. Writ Petition No.5212 of 1987 (Prithvipat Vs. State of U.P. & Ors.)**. That Division Bench in decision dated 04.09.1997 clearly observed in paragraph

no.3 that proceedings before the Commissioner under Rule 285-I of the Rules, 1952 is judicial proceeding and application under Section 5 of the Act, 1963 is maintainable for condoning the delay in filing the objection. Paragraph no.3 of the **Prithvipat Vs. State of U.P. & Ors. (supra)** is being reproduced as under :

"3. As the judgment of Division Bench in Indu Engineering (supra) relied on by the Commissioner for rejecting the application under Section 5 of the Limitation Act and objection of the petitioner by the impugned order dated 19.2.1987 has been reversed by the Full Bench, the impugned order cannot be sustained. The proceedings initiated on an objection filed under Rule 285-I of U. P. Z. A. and L. R. Rules have been held to be Judicial proceeding. Hence we hold that Section 5 of the Limitation Act shall be applicable to the proceedings under Rule 285-I and the application of the petitioners filed for condonation of delay ought to have been decided on merits which has not been done by the Commissioner."

13. Rule 285-I of the Rules, 1952 itself mentioned that within thirty days from the date of sale, an application/objection may be made to Commissioner to set-aside the sale on the ground mentioned in the Rules, 1952. But this Rule itself does not prohibit the Commissioner to condone the delay if aforesaid application/objection against the sale is filed beyond thirty days, therefore, in the provision itself, there is no prohibition for condoning the delay in filing objection beyond thirty days. Rule 285-I of the Rules, 1952 is being reproduced as under :

"285-I. (i) At any time within thirty days from the date of the sale, application may be made to the

Commissioner to set aside the sale on the ground of some material irregularity or mistake in publishing or conducting it; but no sale shall be set aside on such ground unless the applicant proves to the satisfaction of the Commissioner that he has sustained substantial injury by reason of such irregularity or mistake."

14. Considering the above legal position, this Court is of the view that **if any objection under Section-285-I of the Rules, 1952 is filed before the Commissioner then application under Section-5 of the Act, 1963 is very well applicable and Commissioner has an authority to condone the delay in filing an objection.**

15. So far as second question is concerned regarding violation of provision of Rules, 1952 in conducting the impugned auction proceeding/sale, same can very well be dealt with by the Commissioner while considering the objection of the petitioner, therefore, this Court is of the view that no finding is required at this stage.

16. The Hon'ble Apex Court in number of judgements already observed that reason must be recorded by the judicial or quasi-judicial authority while passing an order. This Court also expressed its strong displeasure about the order passed by Board of Revenue in revision because no finding was recorded while dismissing the revision it was dismissed only on the ground that it has no force therefore order of Board of Revenue passed in revision also deserves to be set-aside.

17. In view of the above legal position, this Court is of the view that order dated 23.03.1993 passed by Commissioner,

1. Both the aforementioned cases are taken up together, as they arise of common proceedings.

2. Sri Shyam Mohan Pradhan, Advocate along with Dr. R.K. Srivastava, Advocate for the petitioner and the learned counsel for the respondent are present.

3. By means of the instant petition the petitioner has challenged the proceedings and orders passed in proceedings under the provisions of the U.P. Imposition of Ceiling on Land Holdings Act 1960 (hereinafter referred as 'Act of 1960').

4. It has been submitted that a notice under Section 10(2) of the Act of 1960 was issued to the original tenure holder Sri Labh Singh S/o Mehtab Singh, which was served on him on 03.12.1974. As per the said notice, it was proposed to declare 83.57 Acres of land as 'Surplus'.

5. The original tenure holder filed his objections to the said notice and stated that he had sold major portion of the said land by executing registered sale-deeds of 12.05 Acres on 03.06.1970 in favour of Gur Bachan Kaur; of 12.05 Acres on 08.04.1970 in favour of Jitendra Singh; of 12.05 Acre on 08.04.1970 in favour of Binder Kaur; of 12.05 Acre on 03.06.1970 in favour of Gurmeet Singh; of 12.05 Acre on 03.06.1970 in favour of Beayant Singh Kaur; of 12.30 Acre on 03.06.1970 in favour of Indrapal Singh; of 11.24 Acre on 18.04.1970 in favour of Arvind Kaur; and he further submitted that all these sale-deeds have been executed prior to the cut-of-date, i.e. 24.01.1971, prescribed in the Act of 1960 and hence the said land ought to be excluded from the holdings of the original holder. It was further submitted that after excluding the said lands there was

no land, which exceeded the ceiling-limit, which is prescribed in the said Act, and accordingly prayed for discharge of the notice issued to him. The original tenure holder had filed evidence of all sale-deeds before the Prescribed Authority and also examined himself in support of the objections raised by him.

6. The Prescribed Authority after considering all the material on record and also going through the sale-deeds, agreed with the objections filed by the original tenure holder and excluded all the lands, which have been alienated on the basis of the aforesaid sale-deeds and discharged the notices issued to the original tenure holder.

7. The controversy in the present case has started on issuance of another notice under Section 10(2) of the Act of 1960 on 08.07.1991 to Dheeraj Singh, who is the son of the original tenure holder. The objections were filed by taking the plea that this aspect of the matter has already been considered by the Prescribed Authority, when he had issued notice with regard to the same holding to the then original tenure holder Labh Singh and on the basis of the sale-deeds he had discharged the notices. It has been submitted that once notices were discharged, proceedings under the Act of 1960 came to an end and the Prescribed Authority had discharged the notices after due consideration of all the evidence on record, especially the sale-deeds where his holding was sold to seven persons prior to the cut-of-date.

8. The State, on the other hand, submitted that the sale-deeds executed by Labh Singh were Sham and fictitious and have been entered into only to evade the ceiling proceedings under the Act of 1960. It has also been stated that all the vendees

were minor, at the time the sale-deeds were executed and they were also minor on the date of coming into effect of the said Act and, in fact, the land had at all times been vested in the original tenure holder and subsequently in the petitioner, who is his son. In this way, it has been submitted that the petitioner held land more than the land as prescribed under the Act of 1960 and consequently, there was no infirmity in subjecting him to the proceeding under the said Act.

9. The Prescribed Authority by means of an order dated 22.06.1993 rejected all the objections raised by the petitioner and declared 59.182 Acre as the 'Surplus Land'. He returned a finding that all the vendees were minor on the date when the sale-deeds were executed and that Labh Singh had sold the land to his grand-children, while he continued to be in possession of the said land even pursuant to the sale-deeds. With regard to the plea that proceedings under section 10(2), Act of 1960 had been finalized, the Prescribed Authority has no power to re-open the same, as the proceedings were bad considering the principle of *res-judicata*, he rejected the contention of the petitioner stating that the parties are different and the land is also different, while deciding Issue No. 5.

10. Being aggrieved by order of the Prescribed Authority dated 22.06.1993, two appeals were preferred by the petitioner and decided by the common judgment by the Addl. Commissioner (Judicial)-I, Lucknow Mandal, Lucknow, by means of order dated 22.06.1994. The said appeals were rejected and the order of the Prescribed Authority was confirmed. While rejecting the said appeals, the Appellate Authority noticed that the State had not given any details about the age of the vendees to whom sale-deeds had been

executed by Labh Singh and further gave a categorical finding that the notices issued under section 10(2) were defective in as much as the details of the family were not properly shown and it was also not indicated as to whether they were minor or not.

11. Learned counsel for the petitioner while assailing the findings recorded by the Prescribed Authority as well as the Appellate Authority has submitted that institution of the proceedings was illegal, arbitrary and contrary to the statutory provision. He further stated that once the proceedings had previously been initiated under Section 10(2), Act of 1960 against the original tenure holder Labh Singh and his objections were sustained in as much as all these sale-deeds were found to be genuine and correct and were excluded from the original holding of Labh Singh, then the same land could not again be subjected to the provisions of the Act of 1960 and once the sale-deeds have been executed without demur, they cannot be subjected to challenge under fresh proceedings under section 10(2) of the Act of 1960. He also submitted that the principle of *res-judicata* applies with full force even to the ceiling proceedings under the Act of 1960 and any finding recorded by the Prescribed Authority binds him in subsequent proceedings. He submitted that once the objections raised by Labh Singh were found to be genuine and correct and the lands which had been alienated on the basis of the sale-deeds were excluded from his holding, same can not again be considered, as part of the holding of the petitioner.

12. Learned counsel for the petitioner has relied upon the various judgments, details of which are given below:

(1) **Devendra Nath Singh (Dead), through legal heirs & ors. V.**

Civil Judge & anr., AIR 1999 SC 2264,
para-3 of which reads as under:

"3. Having examined the provisions of Section 13-A and Section 38-B of the Act, we are of the considered opinion that under Section 13-A the Prescribed Authority has the power to reopen the matter within two years from the date of the notification under sub-section (4) of Section 14 to rectify any apparent mistake which was there on the face of the record. That power will certainly not include the power to entertain fresh evidence and re-examine the question as to whether the two sons, namely, Hamendra and Shailendra were major or not. The power under Section 38-B merely indicates that if any finding or decision was there by any ancillary forum prior to the commencement of the said Section in respect of a matter which is governed by the Ceiling Act then such findings will not operate as *res judicata* in a proceeding under the Act. That would not cover the case where findings have already reached its finality in the very case under the Act. In this view of the matter we have no hesitation to come to the conclusion that the Prescribed Authority had no jurisdiction to reopen the question of majority of the two sons in purported exercise of the power under Section 13-A. If the Authority had no jurisdiction, question of waiver of jurisdiction does not arise, as contended by learned counsel for the respondent."

(2) In the case of **Pyare and ors. V. Dy. Director of Consolidation, Camp at Faizabad & ors., Writ Petition No. 423 of 1977** the following has been observed:

"8. Learned counsel for the petitioners has contended that the rule of *res judicata* is a technical rule and the technicalities of law should not be allowed to override the interest of justice. The rule

of res judicata may be technical, but the basis on which the said rule rests is founded on consideration of public at large that finality should attach to the binding decisions pronounced by the courts of competent jurisdiction and that individuals should not be vexed twice over with the same kind of litigation. The principles of constructive res judicata also apply to the writ proceedings. The omission to raise a point in an earlier petition, which could have been raised, would debar the litigant from raising that point in the subsequent petition. (See Devilal Modi Vs. Sales Tax Officer and others, AIR 1965 SC 1150); (T. Govindraja Mudaliar Vs. The State of Tamil Nadu & others, AIR 1973 SC 974)."

13. He submits that once the finding was recorded by the Prescribed Authority that the land sold by the original tenure holder by means of the sale-deeds, ought to have been excluded, the same lands could not have been clubbed together at the hands of the petitioner, who is legal heir of the original tenure holder, now to declare the said land as falling within the ambit of Act of 1960.

14. Learned Standing Counsel, on the other hand has opposed the writ-petition. He submits that there is no infirmity in the re-initiation of proceedings under Section 10(2) of the Act of 1960. The State derived subsequent knowledge that the petitioners were minor at the time, when the sale-deeds were entered into and also on the date of coming into force of the Act of 1960 and, consequently, from the face of it is evident that the said sale-deeds were fraud and subterfuge, with a view to evade the clutches of Act of 1960. He also submits that once it is shown that all the grand-children of the original tenure holder to whom the lands were transferred, were

minor, then it would be assumed that they fell into the family of the petitioner and, consequently, all their holding have to be considered collectively as per the provisions of Section 2(7) of the Act of 1960.

15. The said argument has been contested by the learned counsel for the petitioner by stating that this aspect was considered partially in the proper perspective by the Appellate Authority, and only Indra Pal, who was born in 1949, has been held to be a major and 2.00 Hectares of land has been excluded as such. He submits that even the findings recorded by the Appellate Court in this regard are arbitrary and illegal. In his written statement, he clearly indicated that though Indra Pal was born in 1949, while Devendra/Dil Binder Kaur was born in 1952, Gur Bachan Kaur was born in 1954; Gurmeet Singh was born in 1955 and, hence all the said persons were major on the date of coming into force of the same Act, i.e., 08.06.1973 and even the finding in this regard recorded by the Appellate Authority is clearly illegal and arbitrary and contrary to records.

16. I have heard the learned counsel for the parties and perused the records.

17. The main controversy, which has engaged attention of this Court is as to whether notice under Section 10(2) of the Act of 1960 can be issued again with regard to the same holding, whereas previously the notices have been discharged, after receiving the objections of the original tenure holder, and the land has been found to be not within the ambit of Act of 1960. In the present case, undoubtedly notices were issued previously to the original tenure holder Labh Singh

and on his submitting an objection, stating that the said land had been sold prior to the cut-of-date by means of seven registered sale-deeds and the land remaining with the original tenure holder does not fall within the Act of 1960, the Prescribed Authority duly examined the said objections and dropped the proceedings. The only difference, which has been made since issue of the first notice, is that Labh Singh has died in the meanwhile and now the notice has been issued to his son, the present petitioner for the same holding. Now the stand of the respondents has changed dramatically and whereas on the first occasion they did not challenge or assailed the validity of the sale-deeds, now they have said that the said sale-deeds have been entered only to evade the provisions of the Act of 1960. It is stated that the vendees were minor at the time of execution of the sale-deeds and the Deeds have been entered only with a view to reduce the original holding of the original tenure holder. The said grounds raised by the State have been accepted by both the parties.

18. Learned counsel for the petitioner, on the other hands, has submitted that apart from the fact that he notice cannot be issued again for the same holding, it is also stated that once a finding has been returned, the validity of the sale-deeds entered into prior to the cut-of-date cannot be examined by the Prescribed Authority. In support of his submissions he has relied upon a judgment in the case of **Ramadhar Singh v. Prescribed Authority & ors., 1994 Supp. (3) SCC 702**, wherein the following has been held:

"??? The existence of the sale deed being not disputed and it having taken place, as said before, on February 24,

1969, prior to the appointed day that is January 24, 1971, the inquiry regarding the validity of the sale deed under sub-section (6) of Section 5 was totally misplaced. Thereunder, as it appears to us, the appropriate authority had no jurisdiction to be put the validity of the sale deed to test since his jurisdiction arose only when the deed of transfer had been effected on or after the appointed day. Not only the first and the appellate authority under the Act persisted in that view, but the High Court too proceeded on that basis. The effort of the appellant to have it declared that the authorities had no jurisdiction to invalidate the sale under sub-section (6) of Section 5 when read with Explanation II to sub-section (1) of Section 5 also was a futile attempt because the High Court followed the path, as did the authorities under the Act, and rejected the writ petition. We are of the view that this was a wholly erroneous approach. Sub-section (6) of Section 5 did not confer jurisdiction on the authorities to determine the validity of the sale and if that is so, any finding of theirs as to the contents of the sale, is of no assistance. In the result the appeal must succeed. Accordingly, allowing the same we set aside all the orders of the authorities below as also that of the High Court. No costs."

19. He further relies upon a judgment of this court in the case of **Indrapal Singh & ors. v. Prescribed Authority, Meerut & anr., 2007(103) RD 102**, wherein the following has been observed:

"8. The Supreme Court in *Ram Adhar Singh v. The Prescribed Authority and others*,' has held that no inquiry regarding the va- lidity of the sale-deed under section 5(6) of the Act could be made with regard to the genuineness of the sale-deed executed prior to 24.1.1971. The

Supreme Court further held that appellate authority had no jurisdiction to put the validity of the sale-deed to test since its jurisdiction arose only when the deed of transfer had been effected on or after the appointed day, i.e., 24.1.1971. Consequently, this Court holds that the prescribed authority could not consider the genuineness of the sale-deed dated 9.1.1970 and the land transferred vide sale-deed is liable to be excluded from the holding of the petitioner."

20. Rebutting the arguments of the petitioner, it is stated by the learned Standing Counsel that in the present proceedings the sale-deeds cannot be relied upon and read, as sought by the petitioner and all the lands, which have been alienated by the said sale-deeds, in fact should be taken and added as part of the original holdings of the petitioner and subjected to the provisions of the Act of 1960.

21. This court has also examined the said contention. Apart from the fact that the sale-deeds were presented before the Prescribed Authority, wherein he had issued notice in 1970 to the original tenure holder Sri Labh Singh and he had dropped the proceedings, accepting the sale-deeds and excluded the lands from the original holdings of Labh Singh. The validity of the sale-deeds, which were entered into prior to the coming into force of the Act of 1960 could not have been looked into. The judgment of the Supreme Court in the case of **Ramadhar Singh (supra)** lays down the law in this regard and there cannot be any deviation from the same.

22. In the light of the above, this court also finds itself bound to follow the aforesaid provision enunciated by the

U.O.I Vs N. Murugesan, (2022) 2 SCC 25

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Sri Ankit Pande, learned counsel for petitioner as well as learned Standing Counsel for respondents.

2. By means of the present writ petition, the petitioner has challenged the order dated 09.04.2001 passed by the Additional Commissioner (Judicial) Faizabad Division, Faizabad thereby dismissing the appeal preferred by the petitioner and declaring 9.702 irrigated land as surplus land.

3. Brief facts necessary for adjudication of present case are that a notice under Section 10(2) of the U.P. Imposition of Ceiling of Land Holdings Act, 1960 was issued to the petitioner who had filed his objection on 22.11.1974 wherein he has stated that a family settlement had taken place with regard to ancestral land about 20 years back between his father and his other brothers. In pursuance of the said partition, his father was not allotted any share of land situated at in Villages Maraila, Ranipur and Pure Chakpihani and the land in all the four villages were allotted to his uncles.

4. During the proceedings pending under Section 10(2) before the prescribed authority, Sri Dukh Haran Singh one of the real uncle of the petitioner moved an application for being impleaded and also filed written objection before the prescribed authority. He had also stated that a family partition had taken place with his three other real brothers and they have been in exclusive possession of the respective lands ever since then. He further stated that a partition suit has also been filed in respect

of villages Ranipur, Maraila and Pureprasad in the revenue court on 20.03.1970 in which a preliminary decree was passed on 21.08.1971 and a final decree was also passed sometimes in the year 1972.

5. He admitted that pursuant to the said partition, mutation has not been carried out in the revenue records. It was further stated that during the said period fire had broken out in the revenue record room of the Collectorate, Bahraich and all the papers were burnt and hence they had filed another partition suit in the year 1974 and a final decree of partition has also been passed on 31.01.1976 and as per the said partition, lands of village Benipur, district Gonda and also 20 acres of land of village Bankati was allotted to Sri Sukhraj Singh whereas the entire land of village Maraila, Pura Parasad and Ranipur was allotted to him and other brother Baijnath Singh and that no share was given to Sri Sukhraj Singh in the land of all the three villages.

6. The said application for impleadment was allowed by the prescribed authority by order dated 22.03.1979 and evidence was also adduced by the tenure holders including the petitioner as well as Dukh Haran Singh. By means of order dated 31.03.1979 the prescribed authority had dismissed all the objections holding that the said partition was not genuine partition but was entered into only for the purpose of protecting the lands from ceiling proceedings and further returned a finding that the said partition had taken place after the cut off date and consequently would not be of any assistance to a tenure holder. He accordingly declared 9.702 acre land in terms of irrigated land as surplus land of the tenure holder of the petitioner and directed that the entire surplus land be

taken from the lands of the petitioner from village Bankati.

7. Aggrieved by the aforesaid order dated 31.03.1979, the petitioner filed a Rent Appeal No. 130/1979 and Dukh Haran Singh filed Rent Appeal No. 123/1979. Both these appeals were heard and decided by the District Judge by means of judgment dated 27.11.1979. The District Judge has allowed the appeal of Dukh Haran Singh bearing Rent Appeal No. 123 of 1979 and partly allowed the appeal of the petitioner hearing Rent Appeal No. 130 of 1979 and only allowed his appeal to the extent that no surplus land Sukharaj Singh shall be taken from village Bankati as has been originally ordered by the prescribed authority vide its order dated 31.03.1979.

8. Being aggrieved by the order of District Judge dated 27.11.1979, the petitioner did not file any writ petition before the High Court. His uncle, Dukh Haran Singh filed a writ petition being Writ petition No. 145 of 1980 before this Court. The said writ petition was allowed by this court by judgement dated 12.01.1984 quashing the order dated 27.11.1979 and restored the appeal of Dukh Haran Singh to its original number and directed the appellate authority to decide in terms of order of the court.

9. The appeal of the Sri Dukh Haran Singh bearing Rent Appeal No. 123 of 1979 was heard by District Judge and it was allowed by means of order dated 28.11.1984. While allowing the said appeal the order of prescribed authority dated 31.03.1979 was upheld to the extent only that 9.702 acres of land in terms of irrigated land is declared surplus land of the petitioner and the prescribed authority was directed to take out surplus land of the

petitioner either from his exclusive land of village Benipur or out of his exclusive 28 acres land of village Bankati.

10. The petitioner after a lapse of 5 years filed a writ petition before this court being aggrieved by the fact that the area of village Benipur is only 20 acres and not 28 acres while the District Judge while allowing the appeal of the petitioner has maintained the same surplus area. This Court while dismissing the writ petition i.e. Writ Petition No. 2167 of 1985 preferred by the petitioner given liberty to the petitioner to approach District Judge only with regard to operative portion of the order to consider whether area of the land of the petitioner at Benipur was 20 acres or 28 acres.

11. In pursuance to the direction of this Court dated 16.10.1985, the appellate authority has upheld his previous findings and held that no interference is required with the same while dismissing the claim of the petitioner by means of impugned judgement dated 09.04.2001.

12. The petitioner has vehemently urged that the appellate authority while deciding the appeal No. 123 of 1979 has accepted the fact that the property was partitioned and by metes and bounds specific lands were allotted in favour of all the brothers and accordingly exempted the land from operation of Act of 1960. He submits that once the said findings has been returned by the District Judge then the petitioner would also be entitled to the same.

13. Learned Standing Counsel on the other hand has opposed the writ petition. He submits that the issue which has been canvassed before this Court was also

considered by the District Judge while deciding the appeal of the petitioner. He submits that against the appellate order dated 27.11.1979 which was common to appeal No. 123 of 1979 and 130 of 1970 only Dukh Haran Singh being aggrieved had approached this court by filing writ petition No. 450/1980. It is only at the instance of Dukh Haran Singh, this Court interfered with the appellate order and remanded the matter to the appellate authority for consider the same and to consider the aspect of partition as canvassed by the writ petitioner.

14. The petitioner did not challenge the order dated 27.11.1979 and accordingly the order passed in his appeal NO. 123 of 1979 became final and binding upon the petitioner. Further, the petitioner had an occasion to come again before this Court assailing the appellate order passed by the District Judge by filing writ petition being Writ Petition No. 2167 of 1985. Even by approaching this Court after such a long lapse of time the petitioner did not assail the findings recorded by the appellate authority in its judgment dated 27.11.1979 but challenged only the limited findings with regard to area to be declared surplus in Benipur. It was open for the petitioner to assail the findings of the appellate court dated 27.11.1979 but he was satisfied with the findings recorded therein and hence the said judgment became final and binding. In its order dated 27.11.1979 the only benefit given to the petitioner was that as per his choice lands other than Bankati may be taken as surplus land.

15. In the case in hand, the petitioner is estopped from challenging an order on the ground that he cannot be permitted to both approbate and reprobate after acquiescence of the order which has not

been challenged by the petitioner. The present circumstances of the case attract the principle of acquiescence and principle of approbate and reprobate. The concept of Acquiescence, Approbate and Reprobate has been aptly explained by the Hon'ble Supreme Court in the case titled as **Union of India v. N. Murugesan, (2022) 2 SCC 25**. The relevant paragraphs are as follows:

"25. Acquiescence would mean a tacit or passive acceptance. It is implied and reluctant consent to an act. In other words, such an action would qualify a passive assent. Thus, when acquiescence takes place, it presupposes knowledge against a particular act. From the knowledge comes passive acceptance, therefore instead of taking any action against any alleged refusal to perform the original contract, despite adequate knowledge of its terms, and instead being allowed to continue by consciously ignoring it and thereafter proceeding further, acquiescence does take place. As a consequence, it reintroduces a new implied agreement between the parties. Once such a situation arises, it is not open to the party that acquiesced itself to insist upon the compliance of the original terms. Hence, what is essential, is the conduct of the parties. We only dealt with the distinction involving a mere acquiescence.

Approbate and reprobate

26. These phrases are borrowed from the Scots law. They would only mean that no party can be allowed to accept and reject the same thing, and thus one cannot blow hot and cold. The principle behind the doctrine of election is inbuilt in the concept of approbate and reprobate. Once again, it is a principle of equity coming under the contours of common law. Therefore, he who knows that if he objects to an instrument, he will not get the benefit he wants cannot

be allowed to do so while enjoying the fruits. One cannot take advantage of one part while rejecting the rest. A person cannot be allowed to have the benefit of an instrument while questioning the same. Such a party either has to affirm or disaffirm the transaction. This principle has to be applied with more vigour as a common law principle, if such a party actually enjoys the one part fully and on near completion of the said enjoyment, thereafter questions the other part. An element of fair play is inbuilt in this principle. It is also a species of estoppel dealing with the conduct of a party.

27. We would like to quote the following judgments for better appreciation and understanding of the said principle:

27.2.State of Punjab v. Dhanjit Singh Sandhu [State of Punjab v. Dhanjit Singh Sandhu, (2014) 15 SCC 144] : (SCC pp. 153-54, paras 22-23 & 25-26)

“22. The doctrine of ?approbate and reprobate? is only a species of estoppel, it implies only to the conduct of parties. As in the case of estoppel it cannot operate against the provisions of a statute. (Vide CIT v. MR. P. Firm

Muar [CIT v. MR. P. Firm Muar, AIR 1965 SC 1216] .)

23. It is settled proposition of law that once an order has been passed, it is complied with, accepted by the other party and derived the benefit out of it, he cannot challenge it on any ground. (Vide Maharashtra SRTC v. Balwant Regular Motor Service [Maharashtra SRTC v. Balwant Regular Motor Service, AIR 1969 SC 329] .) In R.N. Gosain v. Yashpal Dhir [R.N. Gosain v. Yashpal Dhir, (1992) 4 SCC 683] this Court has observed as under : (R.N. Gosain case [R.N. Gosain v. Yashpal Dhir, (1992) 4 SCC 683] , SCC pp. 687-88, para 10)

‘10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that ?a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage?..?’

25. The Supreme Court in Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd. [Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd., (2013) 5 SCC 470 : (2013) 3 SCC (Civ) 153] , made an observation that a party cannot be permitted to ?blow hot and cold?, ?fast and loose? or ?approbate and reprobate?. Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or

binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience.

26. It is evident that the doctrine of election is based on the rule of estoppel, the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppel in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when he has to speak, from asserting a right which he would have otherwise had.?’

27.3.Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd.

[Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd., (2013) 5 SCC 470 : (2013) 3 SCC (Civ) 153] : (SCC pp. 480-81, paras 15-16)

?I. Approbate and reprobate

15. A party cannot be permitted to ?blow hot-blow cold?, ?fast and loose? or ?approbate and reprobate?. Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity, however, it must not be applied in such a manner so as to violate the principles of what is right and of good conscience. [Vide Nagubai Ammal v. B. Shama Rao [Nagubai Ammal v. B. Shama Rao, 1956 SCR 451 : AIR 1956 SC 593] , CIT v. V. MR. P. Firm Muar [CIT v. MR. P. Firm Muar, AIR 1965 SC 1216] , Ramesh Chandra Sankla v. Vikram Cement [Ramesh Chandra Sankla v. Vikram Cement, (2008) 14 SCC 58 : (2009) 1 SCC (L&S) 706] , Pradeep Oil Corpn. v. MCD [Pradeep Oil Corpn. v. MCD, (2011) 5 SCC 270 : (2011) 2 SCC (Civ) 712] , Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd. [Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd., (2011) 10 SCC 420 : (2012) 3 SCC (Civ) 685] and V. Chandrasekaran v. Administrative Officer [V. Chandrasekaran v. Administrative Officer, (2012) 12 SCC 133 : (2013) 2 SCC (Civ) 136 : (2013) 4 SCC (Cri) 587 : (2013) 3 SCC (L&S) 416] .]

16. Thus, it is evident that the doctrine of election is based on the rule of estoppel?the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppel in pais (or equitable estoppel), which is a rule of

equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had."

16. In pursuance of the remand order dated 28.11.1984 the matter was heard by Additional Commissioner (Judicial), Faizabad Mandal, Faizabad who again examined the matter and all the orders passed in the said proceedings and held that the order dated 27.11.1979 has become final against the petitioner and a surplus of 9.702 acres has been declared to be surplus to be deducted from the holdings of the petitioner and hence no interference is required in the said findings and rejected the application of the petitioner.

17. The only grievance of the petitioner is that none of lands from village Bankati should be taken as surplus and the choice given by him should be adhered to and respected by the prescribed authority.

18. Learned Standing Counsel on the other hand has relied upon the averments made in the counter affidavit where the order dated 14.05.1980 passed by the prescribed authority has been annexed where a detail of the surplus land has also been shown from which some land from village Bankati has also been declared to be surplus.

19. The findings recorded by the District Judge while dismissing the appeal of the petitioner by judgment dated 27.11.1979 had categorically held that no land from village Bankati would be taken as surplus as per the choice given by the petitioner.

20. Accordingly, respondents are directed not to deduct any land form village

Bankati and in case some land from village Bankati has been taken as surplus the same be restored to the petitioner and as per his choice land of the petitioner in other villages may be taken as surplus. In this regard liberty is given to the petitioner to move an appropriate application to the prescribed authority within next four weeks from today. In case such an application is made, the prescribed authority shall pass appropriate orders within two months thereafter strictly in accordance with the directions issued by this Court.

21. Subject to the aforesaid observations, there is no merits in the writ petition filed by the petitioner which is accordingly **dismissed**.

(2023) 8 ILRA 495

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 08.08.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 3000154 of 2003

Sri Niwas & Ors. ...Petitioners

Versus

Upper Ayukt Administration Lucknow & Ors. ...Respondents

Counsel for the Petitioners:

V.K. Pandey

Counsel for the Respondents:

C.S.C.

(A) Land Law - The U.P. Imposition Ceiling (Amendment) Act - Section 5 (6) (b) - transfer by tenure holder, if made after 27.01.1971, its bona fide consideration as per market value and in good faith, Section (8) - sale deeds which are covered by sub-section (8) of Section 5 of the Act

are to be treated as void - sale deeds executed after 24.1.1971 are to be ignored unless they are saved under clause (b) of sub-section (6) of Section 5 - prescribed authority could look into the validity of the sale deeds not only executed after 24.1.1971 but also of the sale deeds executed prior to it.(Para - 6,7,8,9)

Petitioners in possession of disputed parcels of land - agreement to sale executed on 14.12.1970 - sale deed registered on 10.06.1975 in favour of petitioner - appellate authority recorded cause for delay of one and a half year - sale deed not executed in a good faith - intent to defeat provisions of Ceiling Act. - Appellate authority under U.P. Imposition Ceiling (Amendment) Act - upheld order of prescribed authority - declared disputed parcels of land to be surplus - discarded sale deed executed in favour of petitioner - hence petition. **(Para -2,4,5,7)**

HELD:-Both authorities neglected to consider reasons for delay in execution of the sale deed. No material in the record for both the authorities to hold that the sale deed lacked bonafides or was not executed in good faith. Impugned orders fell into errors of facts and law. Order passed by appellate authority as well as by prescribed authority set aside. **(Para - 11,13,14)**

Petition allowed. (E-7)

List of Cases cited:-

1. Pramod Kumar & ors. Vs Commissioner (Administration) Division & ors. , 1999 (1) AWC 875	Additional Gorakhpur
2. Satnam Kaur Vs Commissioner Division, Writ C No. 1000541 of 1992	Lucknow

(Delivered by Hon'ble Ajay Bhanot, J.)

1. Heard Shri V. K. Pandey, learned counsel for the petitioner and learned Standing Counsel for the State.

2. The writ petition arises out of a judgement dated 10.04.2003 rendered by the appellate authority under the U.P. Imposition Ceiling (Amendment) Act (hereinafter referred to as 'the Ceiling Act') upholding the order of the prescribed authority declaring the disputed parcels of land to be surplus and discarding the sale deed executed in favour of the petitioner.

3. The petitioners are in possession of the disputed parcels of land.

4. The facts recited in the impugned order are that an agreement to sale was executed in favour of the petitioner by the original tenure holder on 14.12.1970 after payment of full consideration. The sale deed came to be registered subsequently on 10.06.1975 in favour of the petitioner.

5. The appellate authority has recorded that the cause for delay of one and a half year in executing the sale deed after execution of the agreement to sale has not been disclosed. On this footing the impugned orders finds that the sale deed was not executed in a good faith but only with an intent to defeat the provisions of the Ceiling Act.

6. The sale deed which is the subject matter of dispute has to be examined in light of under clause (b) of sub-section (6) and (8) of Section 5 of the U.P. Imposition Ceiling (Amendment) Act. The relevant provision is extracted hereinunder:

"5. Imposition of Ceiling.....

(6)

(a)

(b) a transfer proved to the satisfaction of the prescribed authority to be in good faith and for adequate consideration and under an irrevocable

instrument not being a benami transaction or for immediate or deferred benefit of the tenure holder or other members of his family.

8) Notwithstanding anything contained in sub-sections (6) and (7), no tenure-holder shall transfer any land held by him during the continuance of proceedings for determination of surplus land in relation to such tenure-holder and every transfer made in contravention of this sub-section shall be void."

7. These are two categories of sale deeds which arise for consideration in proceedings under the U.P. Imposition Ceiling (Amendment) Act. The validity of sale deeds executed prior to and after 24.01.1971 (the disputed sale deed falls in the category) and those after 10.10.1975 fell for consideration before this Court in **Pramod Kumar and Others Vs. Additional Commissioner (Administration) Gorakhpur Division and others, reported at 1999 (1) AWC 875**, wherein it was held:

"8. It may be noted that prescribed authority could look into the validity of the sale deeds not only executed after 24.1.1971 but also of the sale deeds executed prior to it. The sale deeds which are covered by sub-section (8) of Section 5 of the Act are to be treated as void.

9. The sale deeds executed after 24.1.1971 are to be ignored unless they are saved under clause (b) of sub-section (6) of Section 5. A reference in this regard may be made to the decision rendered in the case of *Raghuvir Singh v. State of U. P. and others*, 1996 AWC 1380 and *Raghuvir Singh v. State of U. P. and others*, 1979 AM 767.

10. Sub-section (8) of Section 6 has been added in the Statute by U. P. Imposition of Ceiling (Amendment] Act,

1976 (Act No. XX of 1976) which came into force with effect from 10.10.1975. Thus all sale deeds relied upon by the petitioners, i.e., dated 13.4.1973, 5.11.1974 and 20.9.1975 were executed before the enactment and enforcement of sub-section (8) of Section 5. Therefore, the said sale deeds cannot be said to be void in terms of sub-section (8) of Section 5. View taken to the contrary by the authorities below is thus, manifestly erroneous. Illegal. A reference in this regard may be made to the decision rendered by a Division Bench in the case of Om Prakash Agarwal v. A.D.J, and others, 1981 AWC 775. It was thus obligatory upon the authority below to look into the validity or otherwise of the sale deeds in question before discarding the same. The authorities below committed an error which is apparent on the face of record in holding that the aforesaid sale deeds were void and were hit by sub-section (8) of Section 5."

8. In **Pramod (supra)** this Court delineated the statutory duty of the appellate authority while examining the disputed sale deeds as under:

"11. The prescribed authority after going through the evidence on the record, recorded findings on the issues framed in the case against petitioners while dealing with sale deeds dated 5.11.1974 and 29.9.1975. It has taken the view that the said sale deeds were void on the basis of sub-section (8) of Section 5, which as stated above had no application in the present case. The appellate authority did not apply Its mind to the question as to whether the said sale deeds were executed in good faith, and for adequate consideration, under Irrevocable Instrument and as to whether they were benami or were executed for Immediate and deferred

benefit of the tenure holder and other members of his family. In accordance with law, it had to apply Its mind to the said questions before discarding the said sale deeds and rejecting the claim of the petitioners."

9. Similarly this Court in **Satnam Kaur Vs. Commissioner Lucknow Division rendered in Writ C No. 1000541 of 1992** while determining a similar issue regarding the bona fides of a sale deed in the context of the Ceiling Act stated thus:

"8. Considering the arguments of learned counsel for the petitioners as well as learned Standing Counsel and going through the contents of pleadings as well as impugned orders, it is evident that Section 5 (6) (b) of the Act, clearly provides that transfer by tenure holder, if made after 27.01.1971, its bona fide consideration as per market value and in good faith. It is not disputed that the agreement to sale related to the property in question were executed in between 31.03.1970 to 01.01.1971 as all the consideration was paid at the time of agreement and possession was also given in pursuance of the agreement, and thereafter, sale deed in respect of the property in question were executed in between 26.07.1971 to 17.10.1973. Agreements to sale with possession are not disputed and all these facts were not considered by the Prescribed Authority. Hence, the petition is allowed and the impugned orders are hereby set aside."

10. The recitals in the sale deed disclose that the delay in executing the sale deed after execution of the agreement to sale was occasioned on account of the continued ill health of the vendor. The sale deed was admittedly in the records before the appellate authority as well as prescribed

authority. However, both the authorities neglected to consider the reasons for delay in execution of the sale deed as cited in the said document.

11. In this wake, the impugned orders are vitiated due to non application of mind and it cannot be stated that the sale deed was not in a good faith. The adequacy as well as payment of consideration in regard to the lands comprised in the sale deed are not disputed. There is no material in the record for both the authorities to hold that the sale deed lacked bona fides or was not executed in good faith.

12. In light of the preceding discussion and the findings of fact made above, the judgement rendered by this Court in **Pramod (supra)** and **Satnam Kaur (supra)** also cover the facts of this case.

13. The appellate authority as well as prescribed authority while passing the impugned orders 10.04.2003 and 31.03.1999 fell into errors of facts and law.

14. The impugned order passed by the appellate authority dated 10.04.2003 as well as the order passed by the prescribed authority dated 31.03.1999 are liable to be set aside and are set aside.

15. The writ petition is allowed.

(2023) 8 ILRA 498

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 11.08.2023

BEFORE

**THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE ARUN KUMAR SINGH
DESHWAL, J.**

Writ Tax No. 1510 of 2022

Digvendra Pratap Singh ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Ami Tandon, Sri Abhinav Gaur, Sr. Advocate, Sri Vibhu Rai, Sri Anoop Trivedi (Sr. Advocate)

Counsel for the Respondents:

A.S.G.I., Sri Naveen Chandra Gupta

(A) Tax Law - The Direct Tax Vivad Se Vishwas Act, 2020 - Sections 2(1), 3, 4 & 5 - If delay in depositing the arrears of tax in resolution of scheme is caused due to extraordinary circumstance, then the court cannot close its eyes and will permit the declarant to deposit the same - while condoning the delay caused due to extraordinary circumstances in depositing the arrears of tax in the resolution scheme, the court will not amount to extending the scheme, but it is a remedial measure, considering the extraordinary circumstances of the declarant.(Para -12)

Petitioner filed declaration under Section 3 of the Act - certificate was issued adjusting his tax paid - last date for depositing arrears was extended to 31.10.2021 - On 31.10.2021, he dropped a cheque, but an accident and knee injury delayed the payment - Income Tax Department rejected the amount deposited under the "Vivad is Vishwas" Scheme - question remains whether the delay can be condoned - Apex Court did not consider the issue of condoning the delay in extraordinary circumstances - only observed that benefit of scheme cannot be extended from the time prescribed under the scheme. **(Para - 10,13)**

HELD:- Delay of three days in depositing the arrears of tax of Rs. 8,67,137/- deserves to be condoned, and the amount balance tax deposited by the petitioner be accepted by the respondents treating the same well within time as per the scheme of Act, 2020. Order /letter passed by Central Board of Direct Tax quashed. **(Para - 14)**

Writ Petition allowed. (E-7)**List of Cases cited:-**

1. I.A. Housing Solution Pvt. Ltd. Vs Principal C.I.T. - 4, Writ Petition (C) No. 3560 of 2022
2. Shekhar Resorts Ltd. Vs U.O.I. & ors., (2023) 3 SCC 220
3. M/s Ken ComputeK Pvt. Ltd. Vs Designated Committee (SVLDRS) & ors., SLP (C) No. 2116 of 2023
4. M.C.D. Vs Gurnam Kaur, (1989) 1 SCC 101,
5. Arnit Das Vs St. of Bihar, (2000) 5 SCC 488
6. Tungabhadra Industries Ltd. Vs U.O.I. & ors., (2000) 5 SCC 501

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

1. Heard Sri Anoop Trivedi, learned Senior Advocate assisted by Sri Ami Tandon and Sri Abhinav Gaur, learned counsel for the petitioner and Sri Naveen Chandra Gupta, learned counsel for the respondent Department.

2. By means of the present writ petition, the petitioner has challenged the order dated 25.8.2022 passed by respondent No.3 by which the application of the petitioner for condoning the delay of three days in depositing the balance amount payable by him under the Direct Tax Vivad Se Vishwas Act, 2020 (hereinafter referred to as "Act, 2020"), has been rejected.

3. Contentions of learned counsel for the petitioner is that the Parliament enacted the Act 2020 for the resolution of disputed tax. As per the above Act, 2020, the declarant should submit his declaration u/s 4 of the Act, 2020 before the designated authority, and thereafter the designated authority, after

receiving the declaration submitted by the declarant, will grant a certificate to the declarant containing particulars of the tax arrears and the amount payable after such determination. It is further contended by learned counsel for the petitioner that in pursuance of the scheme of the above Act 2020, for the resolution of the tax for the Assessment Year 2010-11, the petitioner submitted his declaration on 5.6.2020 as required u/s 4 of the Act, 2020. After submission of the aforesaid declaration certificate of designated authority in Form-III as per Section 5 of the Act, 2020 was also uploaded on the portal on 9.11.2020, which was also downloaded by the petitioner on the same day. As per this certificate, the petitioner was required to pay Rs. 18,67,137/- on or before 31.12.2020. Before the expiry of the last date, the Ministry of Finance issued a notification dated 27.10.2020, by which the last date of submission of the balance amount was extended up to 31.3.2021. Subsequently, the aforesaid notification dated 27.10.2020 was amended by the Central Government by issuing another notification extending the last date of payment of balance tax and lastly, by notification dated 25.6.2021, the last date for payment of balance tax was extended till 31.10.2021. On 31.10.2021, it was Sunday. Therefore, to deposit the balance tax as mentioned in the certificate issued by the designated authority u/s 5 of the Act, 2020, the petitioner dropped a cheque for the amount of Rs. 8,67,137/- (after adjusting Rs. 10 Lakh which was already deposited by him prior to issuance of Form - III) in the drop box of the bank on Sunday itself, but the receipt for the payment (Challan) was issued by the bank on 3.11.2021, on encashment of the above cheque.

4. It was further submitted by the counsel for the petitioner that petitioner also met with an unfortunate accident on

1.11.2021 in which serious injuries were caused in his right knee and he was advised complete bed rest for a period of three days i.e. from 1.11.2021 to 3.11.2021 and in support of his claim, the petitioner has also annexed the medical certificate issued by the doctor as Annexure-8 to the writ petition. However, despite depositing the money in the account of the Income Tax Department, he was not permitted to submit/file Form-IV so as to entirely avail the benefit of the scheme under the Act 2020 because of the delay of three days in the generation of challan by the bank. Feeling aggrieved by the above action of the Income Tax Department, the petitioner moved an application before the Chairman of the Central Board of Direct Taxes on 15.11.2021 with a prayer that appropriate order be issued for condoning the delay of three days in depositing the balance amount towards his tax liability, but the above application was rejected by the impugned order dated 25.8.2022 on the ground that once last date has been mentioned in the notification to deposit the balance tax liability; therefore, the same cannot be extended.

5. Learned counsel for the petitioner challenged the impugned order dated 25.8.2022 on the ground that there was a delay of three days in depositing the balance amount of tax, firstly for the reason that the last date for depositing the balance tax fell on Sunday. Secondly, because of the injury in his knee he could not approach the bank from 1.11.2021 to 3.11.2021. In support of his contention, learned counsel for the petitioner heavily relied upon the judgement of Delhi High Court passed in ***Writ Petition (C) No. 3560 of 2022 (I.A. Housing Solution Pvt. Ltd. vs. Principal Commissioner of Income Tax-4)*** decided on 2.11.2022 in which the present scheme

issued under the Act, 2020 was under consideration regarding extension of date. While allowing this petition, the Delhi High Court condoned the delay in depositing the balance amount of tax and directed the Income Tax Department to accept the balance amount as stipulated in Form-III on the ground that unforeseen and extraneous circumstances which were beyond the control of the petitioner and resulted in delayed depositing the balance tax can be condoned considering the lockdown period on account of COVID-19 from 25.3.2020.

6. Learned counsel for the petitioner further relied upon the judgement of Apex Court in the case of ***Shekhar Resorts Ltd. vs. Union of India and others***, reported in ***(2023) 3 SCC 220***. In the above judgement, Hon'ble Apex Court, after condoning the delay, permitted the petitioner to deposit the balance outstanding on the ground that the petitioner had already submitted his declaration but he could not make the payment due to legal impediment, therefore, condoning the said delay in depositing the balance amount is not the extension of the scheme, but it is taking a remedial measure.

7. Per contra, learned counsel for the Income Tax Department had submitted that after getting the declaration of the petitioner, certificate u/s 5 of the Act 2020 in Form-III was issued to the petitioner on 9.11.2020, but the petitioner by skipping the dates for depositing balance outstanding, kept on waiting for the extension of date and even could not deposit the balance outstanding of tax till last extended date. In support of his contention, learned counsel heavily relied upon the judgement of Apex Court in ***SLP (C) No. 2116 of 2023 (M/s Ken Computek***

Pvt. Ltd. vs. Designated Committee (SVLDRS) and others) decided on 6.2.2023 in which the Apex Court observed that the last date to deposit the balance of tax, prescribed under the scheme under the Act, 2020, cannot be extended and confirmed the impugned judgement of the High Court and dismissed the writ petition of the petitioner on the ground that last date prescribed under SVLDR Scheme cannot be extended.

8. In reply to the averments of learned Standing Counsel, learned counsel for the petitioner has submitted that judgement relied upon by learned Standing Counsel deserves to be ignored being *sub silentio* as no finding was recorded in the aforesaid judgement regarding the issue involved in the present petition. In support of his contention, learned counsel for the petitioner has relied upon the judgement of **Municipal Corporation of Delhi vs. Gurnam Kaur** reported in (1989) 1 SCC 101, **Arnit Das vs. State of Bihar**, reported in (2000) 5 SCC 488 as well as the judgement of **Tungabhadra Industries Ltd. vs. Union of India and others**, reported in (2000) 5 SCC 501. In the above-cited judgements by learned counsel for the petitioner, the Apex Court observed that when a particular point is not consistently determined by the court, that does not form part of the ratio *decidendi* and is not binding.

9. From the pleadings of the parties and after perusal of the record, it appears that the Ministry of Finance, Government of India, has issued the “Vivad se Vishvash” Scheme in pursuance of the Act 2020. In section 2(1), the last date means such date as may be notified by the Central Government in the official gazette. As per Section 3 of the Act 2020, if the declarant

for resolution, for resolution of disputed tax, files a declaration to designated authority in accordance with the provision of Section 4 in respect of tax arrears as mentioned in the chart before the last date, then the designated authority within 15 days from the date of receipt of declaration will determine the amount payable by the declarant and grant certificate to the declarant containing particulars of tax arrears and the amount payable after such declaration as per Form-III then the declarant shall pay the amount determined within 15 days from the date of receipt of certificate. Paragraph Nos. 3 and 5 of the Act 2020 are quoted as below:-

“3. Subject to the provisions of this Act, where a declarant files under the provisions of this Act on or before such date as may be notified, a declaration to the designated authority in accordance with the provisions of section 4 in respect of tax arrear, then, notwithstanding anything contained in the Income-tax Act or any other law for the time being in force, the amount payable by the declarant under this Act shall be as under, namely:—

Sl. No.	Nature of tax arrear.	Amount payable under this Act on or before the 31st day of December, 2020 or such later date as may be notified	Amount payable under this Act on or after the 1st day of January, 2021 or such later date as may be notified but on or before the last date
(a)	where the tax arrear is the aggregate amount of disputed tax, interest chargeable or charged on such disputed tax and penalty leviable or	amount of the disputed tax.	the aggregate of the amount of disputed tax and ten per cent. of disputed tax: provided that where the ten per cent. of disputed tax exceeds the aggregate amount of interest chargeable or

	levied on such disputed tax.		charged on such disputed tax and penalty leviable or levied on such disputed tax, the excess shall be ignored for the purpose of computation of amount payable under this Act.
(b)	where the tax arrear includes the tax, interest or penalty determined in any assessment on the basis of search under section 132 or section 132A of the Income-tax Act.	the aggregate of the amount of disputed tax and twenty-five per cent. of the disputed tax: provided that where the twenty-five per cent. of disputed tax exceeds the aggregate amount of interest chargeable or charged on such disputed tax and penalty leviable or levied on such disputed tax, the excess shall be ignored for the purpose of computation of amount payable under this Act.	the aggregate of the amount of disputed tax and thirty-five per cent. of disputed tax: provided that where the thirty-five per cent. of disputed tax exceeds the aggregate amount of interest chargeable or charged on such disputed tax and penalty leviable or levied on such disputed tax, the excess shall be ignored for the purpose of computation of amount payable.
(c)	where the tax arrear relates to disputed interest or disputed penalty or disputed fee.	twenty-five per cent. of disputed interest or disputed penalty or disputed fee.	thirty per cent. of disputed interest or disputed penalty or disputed fee:

Provided that in a case where an appeal or writ petition or special leave petition is filed by the income-tax authority on any issue before the appellate forum, the amount payable shall be one-half of the amount in the Table above calculated on such issue, in such manner as may be prescribed:

Provided further that in a case where an appeal is filed before the Commissioner (Appeals) or objections is filed before the Dispute Resolution Panel by the appellant on any issue on which he has already got a decision in his favour from the Income-tax Appellate Tribunal (where the decision on such issue is not reversed by the High Court or the Supreme Court) or the High Court (where the decision on such issue is not reversed by the Supreme Court), the amount payable shall be one-half of the amount in the Table above calculated on such issue, in such manner as may be prescribed:

Provided also that in a case where an appeal is filed by the appellant on any issue before the Income-tax Appellate Tribunal on which he has already got a decision in his favour from the High Court (where the decision on such issue is not reversed by the Supreme Court), the amount payable shall be one-half of the amount in the Table above calculated on such issue, in such manner as may be prescribed.

5. (1) The designated authority shall, within a period of fifteen days from the date of receipt of the declaration, by order, determine the amount payable by the declarant in accordance with the provisions of this Act and grant a certificate to the declarant containing particulars of the tax arrear and the amount payable after such determination, in such form as may be prescribed.

(2) The declarant shall pay the amount determined under sub-section (1) within fifteen days of the date of receipt of the certificate and intimate the details of such payment to the designated authority in the prescribed form and thereupon the designated authority shall pass an order stating that the declarant has paid the amount.

(3) Every order passed under sub-section (1), determining the amount payable under this Act, shall be conclusive as to the matters stated therein and no matter covered by such order shall be reopened in any other proceeding under the Income-tax Act or under any other law for the time being in force or under any agreement, whether for protection of investment or otherwise, entered into by India with any other country or territory outside India.

Explanation.—For the removal of doubts, it is hereby clarified that making a declaration under this Act shall not amount to conceding the tax position and it shall not be lawful for the income-tax authority or the declarant being a party in appeal or writ petition or special leave petition to contend that the declarant or the income-tax authority, as the case may be, has acquiesced in the decision on the disputed issue by settling the dispute.”

10. In the present case, the petitioner had filed his declaration as required u/s 3 of the Act 2020 before the designated authority before the last date, i.e. 5.6.2020 and on receiving the declaration of the petitioner, the designated authority had also issued a certificate as required u/s 5 of the Act, 2020 on 9.11.2020 after adjusting the tax paid by the petitioner and also informed him the tax payable by him about Rs. 18,67,137/- before 31.12.2020 and it was also mentioned in the above certificate that after 31.12.2020 the petitioner would be liable to pay the arrears of tax of Rs. 20,84,351/-. It further appeared from the record that the last date for depositing the arrears of tax was extended from time to time and lastly by notification dated 25.6.2021 till 31.10.2021. But on the last date i.e. 31.10.2021, it was Sunday; therefore, as per the petitioner's contention, he dropped the cheque in the drop box of the

bank of Rs. 8,67,137/-, after adjusting Rs.10 Lakh already deposited by him on 4.2.2019, which was cleared on 3.11.2021 and duly deposited in the account of the Income Tax Department. And the delay of three days occurred because on 1.11.2021, the petitioner met with an accident and suffered a knee injury, and, therefore, he could not approach the bank to clear the cheque or credit the amount on 1.11.2021. For this delay of three days, the Income Tax Department did not accept the amount deposited by the petitioner under the “Vivad is Vishwas” Scheme. Thereafter, the petitioner's application for condonation of delay of three days was also rejected by the Chairman of the Central Board of Direct Tax by order dated 25.8.2022. The fact of dropping of cheque in the drop box as well as the accident of the petitioner was not disputed by the respondent in the counter affidavit. Now the fact remained is whether the delay of three days in depositing the arrears of tax can be condoned, considering the fact of unforeseen circumstances which were beyond the control of the petitioner.

11. In the judgement of the Delhi High Court passed in *Writ Petition (C) No. 3560 of 2022*, a similar issue was under consideration. Delhi High Court, after considering the aforesaid issue, decided the same by judgement dated 2.11.2022 and observed that the delay in payment of arrears of tax is attributable to unforeseen and extraneous circumstances that were beyond the control of the petitioner; therefore, same is deserved to be condoned and directed the Income Tax Department to accept the declaration of the petitioner. Paragraphs No. 12 and 22 of the aforesaid judgement are being quoted as below:-

“12. This Court is further of the opinion that the delay in payments of the

amounts, in the present cases are attributable to unforeseen and extraneous circumstances that were beyond control of the Petitioners. In fact, the country was intermittently in lockdown on account of the COVID-19 pandemic from 25th March, 2020. In recognition of these difficulties as pointed out hereinabove, the scheme was amended several times to extend the deadline for payment. Moreover, death of the Managing Director of the companies was an extraordinary and exceptional event which would render non-grant of relief on equitable consideration irrational.

22 This is also a fit case where no prejudice will be caused to the Respondents by accepting the prayer of the Petitioners. Rather, the Respondents benefit and achieve the purpose of the Scheme, namely, to reduce pendency of cases, generate timely revenue for the government and provide certainty and savings of resources that would be spent on the long-drawn litigation process.”

12. Similarly, another judgement relied upon by the counsel for the petitioner in ***Shekhar Resorts Ltd. (supra)***, the Apex Court in paragraph 25 of the aforesaid judgement observed that if delay in depositing the arrears of tax in resolution of scheme is caused due to extraordinary circumstance like sickness of the declarant and there was nobody to look after his affairs, then the court cannot close its eyes and will permit the declarant to deposit the same. The Apex Court also observed that while condoning the delay caused due to extraordinary circumstances in depositing the arrears of tax in the resolution scheme, the court will not amount to extending the scheme, but it is a remedial measure, considering the extraordinary circumstances of the declarant. Paragraphs No. 23, 24 and 25 are quoted below:-

“23. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand, the appellant cannot be punished for not doing something which was impossible for it to do. There was a legal impediment in the way of the appellant to make any payment during the moratorium. Even if the appellant wanted to deposit settlement amount within the stipulated period, it could not do so in view of the bar under the IBC as, during the moratorium, no payment could have been made. In that view of the matter, the appellant cannot be rendered remediless and should not be made to suffer due to a legal impediment which was the reason for it and/or not doing the act within the prescribed time.

24. Now so far as the observations made by the High Court to the effect that the High Court cannot, in exercise of powers under Article 226 of the Constitution of India extend the period under the scheme, 2019, to some extent the High Court is right. The High Court while exercising the powers under Article 226 of the Constitution of India cannot extend the scheme. However, in the present case it is not a case of extension of the scheme by the High Court; It is a case of taking remedial measures. It is not a case where the appellant did not make any application within the stipulated time under the scheme. This is not a case where the Form No.3 determining the settlement amount was not issued during the validity of the scheme. It is not a case where the appellant deliberately did not deposit the settlement amount and/or there was any negligence on the part of the appellant in not depositing the settlement amount within the stipulated time. As observed hereinabove it is a case where the appellant was unable to make the payment due to the legal impediment and the bar to make the payment during the

period of moratorium in view of the provisions of the IBC.

25. In a given case it may happen that a person who has applied under the Scheme and who was supposed to make payment on or before 30.06.2020, became seriously ill on 29.06.2020 and there was nobody to look after his affairs and therefore he could not deposit the amount; such inability was beyond his control and thereafter, immediately on getting out of sickness he tried to deposit the amount and/or approached the Court - can the Court close its eyes and say that though there may be valid reasons and/or causes for that person's inability to make the payment, still no relief can be granted to him? There may be extra ordinary cases which are required to be considered on facts of each case. The Courts are meant to do justice and cannot compel a person to do something which was impossible for him to do. "

13. While in the judgement of M/s Ken ComputeK Pvt. Ltd. vs. Designated Committee (SVLDRS) and others, passed in SLP (C) No. 2116 of 2023, the Apex Court did not consider the issue of condoning the delay in extraordinary circumstances but only observed that benefit of scheme cannot be extended from the time prescribed under the scheme.

14. In view of the law mentioned above, as well as considering the pleadings and perusal of record, this Court is of the view that a delay of three days in depositing the arrears of tax of Rs. 8,67,137/- deserves to be condoned, and the amount balance tax deposited by the petitioner be accepted by the respondents treating the same well within time as per the scheme of Act, 2020 and also the impugned order /letter dated 25.8.2022,

passed by Central Board of Direct Tax, is hereby quashed.

15. Accordingly, the writ petition is allowed.

(2023) 8 ILRA 505
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.08.2023

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE MS. NAND PRABHA SHUKLA, J.

Criminal Misc. Writ Petition No. 6174 of 2023
 With other connected cases

Vinay Parmar & Ors. ...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:

Sri Sadrul Islam Jafri, Sri Dilip Kumar Goswami, Sri N.I. Jafri (Sr. Advocate)

Counsel for the Respondents:

A.G.A.

A. Criminal Law-Constitution of India,1950-Article 226-Criminal Procedure Code,1973-Section 154- of Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986- Section 2/3(1)-Quashing of first information report-violation of Rule 16(3) of the Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Act, 1986 as the District Magistrate has granted approval to the gang chart mindlessly without proper perusal of the facts and Such violation vitiates the impugned first information report-Held, the allegation in the base case is of transportation of the minerals and the same is necessarily for pecuniary advantage-The petitioners are therefore, fully covered by the definition of the word chart in Section 2(b) of the Act-The First Information Report

therefore, cannot be quashed.(Para 1 to 17)

B. The definition of a gang as provided under Section 2(b), which includes persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage. (para 9 to 12)

The petition is dismissed. (E-6)

(Delivered by Hon'ble Anjani Kumar Mishra, J.
&
Hon'ble Ms. Nand Prabha Shukla, J.)

1. All these writ petitions involve an identical question and therefore they have been heard and are being decided by a common order.

2. Heard Shri N.I Jafri, learned Senior Advocate for the petitioners and learned AGA for the State-respondents.

3. Writ Petition No.6174 of 2023 seeks quashing of the first information report dated 28.03.2023 giving rise to Case Crime No.76 of 2023 seeks quashing of the first information reports dated 25.03.2023, under Section 2/3 of Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Rules, 2021, Police Station Saiyan, District Agr and Writ Petition Nos.5725 of 2023, 5373 of 2023, 5502 of 2023 and 5947 of 2023 seeks quashing of the first information reports dated 25.03.2023, under Section 2/3(1) of Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986, Police Station Kotwali, District Ballia.

4. The contention of counsel for the petitioners is that there is violation of Rule 16(3) of the Uttar Pradesh Gangster and

Anti Social Activities (Prevention) Act, 1986 as the District Magistrate has granted approval to the gang chart mindlessly without proper perusal of the facts. Such violation vitiates the impugned first information report.

5. The next contention is that the petitioners do not constitute a gang as they are not covered by the definition of the gang as provided under Section 2(b) of the Act.

6. It is next submitted that a dumper belonging to the petitioner no.3 was seized at Saiyan Toll Plaza by the Toll Barrier Staff and the police during checking as is alleged in the first information report in the base case. The dumper was over-loaded with mineral dust. It was being driven by Achal Singh and his co-driver was B.S. Parmar. The truck was owned by Amit Mittal and that there is no documentation regarding a sand stone dust being transported. The number plate had been blackened to hide the registration number. It was also alleged that the driver was in constant touch with the owner of the dumper through a whatsapp group whose admins are petitioner nos.1 and 3.

7. It is next contended that the impugned First Information Report under the Gangsters Act is malicious prosecution as the police has not been able to collect any material during investigation of the base case to justify invocation of the provisions of the Gangsters Act against the petitioners. There is no independent witness of the alleged seizure. The vehicle has in any case being released in favour of the petitioner no.3. The minerals being loaded in the dumper was being transported with a valid pass for the same and the royalty of these minerals had been duly paid.

8. It is lastly contended that since the mineral and sand were loaded on the dumper, the same flow out obscured the number plate and had not been obfuscated deliberately.

9. Learned AGA has refuted the submissions made by learned counsel for the petitioners and has submitted that the petitioners fall within the definition of a gang as provided under Section 2(b), which includes persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage.

10. It is submitted that the allegation in the base case is of transportation of the minerals and the same is necessarily for pecuniary advantage. The petitioners are therefore, fully covered by the definition of the word gang in Section 2(b) of the Act. The First Information Report therefore, cannot be quashed.

11. We have considered the submissions made by learned counsel for the parties and have perused the record.

12. We have substance in the submission of learned AGA that any illegal transportation of minerals would entail undue pecuniary or material or other advantage to the persons responsible for the transportation and therefore, the petitioners are covered by definition of the word gang in Section 2(b) of the Act. This is so because the word "Gang" means a group of persons, who act singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion. These terms are not exclusive. The relevant word for the purposes of this writ petition occurring

in Section 2(b) is the 'word otherwise'. Therefore, if pecuniary or material advantage is sought to be obtained, it is not necessarily required to be by violence, or threat or show of violence, or intimidation, or coercion, alone. The aforementioned words are qualified by the word 'otherwise' and therefore violence, threat or show of violence, intimidation and coercion alone are the necessary ingredients either singly or collectively. Any other manner of disturbing public order of gaining undue material or pecuniary advantage would also bring it within the definition of a 'gang' due to the use of the word 'otherwise' in Section 2(b) of the Act. Therefore, the submission of learned counsel for the petitioners in this regard is not liable to be accepted.

13. In so far as, the other submissions made by learned counsel for the petitioners are concerned, they are in our considered opinion are the defence of the petitioners, which cannot be looked into while dealing with a writ petition seeking quashing of the first information report.

14. The submission that approval has been granted to the gang chart by the District Magistrate mindlessly and without proper perusal of the documents accompanying it also does not impress this Court.

15. Perusal of the gang chart reveals that it has been approved by the Commissioner of Police, Commissionerate, Agra, who is authorized to approve the same. The submission that such approval has been granted without perusal of the requisite documents is an assertion and without any basis and therefore, cannot be accepted.

16. Since, the submissions of counsel for the petitioners do not find favour of this

17. Accordingly, these writ petitions fail and are hereby dismissed.

BEFORE

Criminal Misc. Writ Petition No. 7948 of 2005

Counsel for the Petitioner:
Sri Rishikesh Tripathi

Counsel for the Respondents:
Govt. Advocate, Sri A.R. Dwivedi, Sri
Manish Dwivedi, Sri Prabhakar Tripathi

right to maintenance until remarriage - judgment of the revisional court flawed and directs a prompt reassessment of the wife's maintenance claim, ensuring justice is served - Held, - (i) Court of a firm view that judgement passed by revisional court in Criminal Revision filed by husband was bad in law and is therefore liable to be set-aside - (ii) and issue of enhancement of maintenance amount as was claimed by wife in Criminal Revision opens up - Hence, concerned court is directed to decide the same as per law within a period of three months from date of filing of certified copy of this judgment - Petition allowed. (Para - 23, 24, 25)

Writ Petition Allowed. (E-11)

List of Cases cited:

1. Shamim Ara Vs St. of U.P., 2002 Cri.L.J. 4726
2. Shabana Bano Vs Imran Khan, 2009 AIR SCW 7490
3. Shayara Bano Vs U.O.I., Writ Petition No.118 of 2016
4. Radhey Shyam & anr.Vs Chhabi Nath & ors., (2015) 5 SCC 423
5. Pepsi Foods Ltd. & anr.Vs Special Judge Magistrate & ors., (1998) 5 SCC 749
6. Saheda Khatoon Vs Gholam Sarwar, 2002 Cri.L.J. 4150
7. Danial Latifi & anr.Vs U.O.I., 2001 AIR SCW 3932
8. Major General A.S. Gauraya & anr.Vs S.N. Thakur & anr., (1986) 2 SCC 709
9. Shenoy and Co. Vs Commercial Tax Officer, [1985] (2) S.C.C. 512

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

1. Heard Sri Rishikesh Tripathi, learned counsel for the petitioner, Sri Manish Dwivedi, learned counsel for

respondent no.2, Sri O.P. Mishra, learned A.G.A. for the State and perused the record.

2. By means of this criminal misc. writ petition under Article 226 of the Constitution of India, the petitioner- Smt. Zahida Anjum has prayed for issuance of writ of certiorari to quash the judgment and order dated 06.05.2005 passed by Additional District & Sessions Judge in Criminal Revision No.173/2004 (connected with criminal revision no.212 of 2004) and also seeking issuance of mandamus commanding respondent no.2 to pay maintenance amount of Rs.5000/- per month to the petitioner from the date of application under Section 125 Cr.P.C.

3. Relevant facts giving rise to this petition are as below:-

The petitioner moved an application seeking maintenance from her husband-respondent no.2, Atiqur Rahman before the Magistrate concerned in 2001. The trial court passed an order on 30.06.2004 and awarded Rs.1500/- per month in her favour as maintenance, payable from the date of the order. Challenging above order the petitioner as well as respondent no.2 preferred separate criminal revisions, Criminal Revision no.212 of 2004 seeking enhancement of maintenance amount by the petitioner and Criminal Revision No.173 of 2004 filed by her husband seeking to set aside the maintenance order. The learned revisional court dismissed revision filed by the petitioner and allowed the revision of respondent no.2 quashing the maintenance order by passing a common order dated 06.05.2005.

4. Following contentions are raised by the petitioner:-

Petitioner was never divorced and false plea of divorce was taken by her husband in written statement for the purpose of stalling the grant of maintenance. Respondent no.2, to stress his plea of divorce could only file photocopy of talaqnama that too at a very late stage of the trial, hence the plea of divorce was quite doubtful; learned trial court took correct view that the petitioner was entitled for maintenance; the petitioner was never paid any amount of dower nor any other amount to maintain her during “iddat” period; learned revisional court wrongly set-aside the order of Magistrate on the basis of assumptions and conjunctures; the view taken by revisional court was not supported by the evidence on record.

5. On the other hand, respondent no.2 has averred that he divorced his wife by pronouncing talaq three times (triple talaq) in a Panchayat held on 20.04.2004; the Panchayat was attended by father and relatives of his wife; the plea of triple talaq was categorically mentioned in his written statement filed before the trial court; no replication/additional reply to counter the above averment was ever given by his wife; he paid amount of dower and maintenance for “iddat” period; that because she is a divorcee, therefore, she is not entitled for any relief under the provisions of section-125 Cr.P.C.; section- 3 of Muslim Women (Protection of Rights on Marriage) Act, 2019 shall apply in such circumstances.

6. The petitioner has filed “written arguments” before this Court. In addition to the contentions mentioned in para-4, it is argued that:-

(i) *The plea of divorce is not acceptable and further such plea cannot impinge upon her right to obtain maintenance under Section 125 Cr.P.C. in the light of pronouncement of judgement of Hon'ble Supreme Court in **Shamim Ara vs. State of U.P., 2002 Cr.L.J. 4726.***

(ii) *It was mandatory to attempt for reconciliation between the parties, hence, any divorce without such attempt is illegal.*

(iii) *The revisional court gave the findings ignoring both the points of law just mentioned above.*

(iv) *If for argument sake, the petitioner is considered as divorcee, she has not re-married till yet. And therefore, in view of the judgment of Hon'ble Supreme Court in **Shabana Bano vs. Imran Khan, 2009 AIR SCW 7490**, she is entitled for maintenance so long she did not re-marry.*

(v) *Grant of divorce by pronouncing triple talaq is illegal in view of the judgment of Hon'ble Supreme Court in the case of **Shayara Bano vs. Union of India in Writ Petition No.118 of 2016**, therefore, triple talaq cannot be a ground for denial of maintenance under Section 125 Cr.P.C.*

7. First and foremost objection has been raised by the learned A.G.A. and learned counsel for the respondent no.2 that a judicial order is not amenable to the original writ jurisdiction of the High Court under Article 226 of the Constitution of India. It is pointed out by the State that in this case the prayer is to quash the judgement and order dated 06.05.2005 passed in a revision.

8. To stress above point, judgement of Hon'ble Supreme Court in the case of **Radhey Shyam and another vs. Chhabi Nath and others, (2015) 5 SCC 423** has

been referred to. The apex court in the aforesaid judgment held that writ of certiorari lies to bring decisions of an "Inferior court", tribunal, public authority or any other body of persons for review so that the court may determine whether they should be quashed or not. However, expression "interference" the court is not referable to the judicial courts Writ of certiorari lies against patently erroneous or without jurisdiction orders of tribunals or authorities or courts other than judicial courts. The Apex Court in para 25 further observed as below:-

"25. All courts in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227. Writ jurisdiction is constitutionally conferred on all High Courts. Broad principles of writ jurisdiction followed in England are applicable to India and a writ of certiorari lies against patently erroneous or without jurisdiction orders of Tribunals or authorities or courts other than judicial courts. There are no precedents in India for High Courts to issue writs to subordinate courts. Control of working of subordinate courts in dealing with their judicial orders is exercised by way of appellate or revisional powers or power of superintendence under Article 227. Orders of civil court stand on different footing from the orders of authorities or Tribunals or courts other than judicial/civil courts. While appellate or revisional jurisdiction is regulated by statutes, power of superintendence under Article 227 is constitutional. The expression "inferior court" is not referable to judicial courts."

9. Thus, it has been clearly laid down that order of civil court could be challenged under Article 227 of the Constitution of

India and not under original writ jurisdiction under Article 226 of the Constitution of India.

10. At the same time, it is conceded that a writ petition under Article 227 of the Constitution of India may be maintainable against such an order and that there is no legal bar in converting the writ petition filed under Article 226 of the Constitution of India to one under Article 227 of the Constitution of India in the peculiarity of the circumstances to serve interest of justice.

11. I glanced over the facts and circumstances of this case. The most important facts which draw my attention are; the petitioner Zahida filed an application under section- 125 Cr.P.C. with a prayer to grant maintenance in the year 2001, the same was decided in the year 2004; the opposite party no.2 (her husband) filed a revision in 2004 which came to be decided on 06.05.2005; the wife (present petitioner) challenged that order on 14.07.2005 and the matter is pending before this Court since then i.e. last 17 years. All this while, this legal point was neither raised nor realized that this writ petition seeks to invoke powers under Article 226 instead of Article 227 Constitution of India . This is settled law that non-mentioning or wrong mentioning of provisions of law should not come in the path of granting appropriate relief, if the litigant otherwise is entitled for the same. In my view, an ordinary litigant cannot be expected of having too minute knowledge of provisions of law. This question has always been troubling my judicial conscience that what a common man or ordinary litigant has to do with the provision of law under which he may be entitled for relief. This should be the

concern of the Court of law or Court of justice or his counsel/advocate. Where no other deterrent except non mentioning or wrong mentioning of law poses a hurdle in the winding path to justice, the judge ought to play its expected role. The Judge or the Court shall be failing in its duty towards an ordinary man/litigant by not looking for solutions and dismissing the writ on technical ground. In this view of the matter, I find it fit to treat this petition as one moved under Article 227 of the Constitution of India.

12. In this regard I draw support from another judgement of Supreme Court in **Pepsi Foods Ltd. and Another vs. Special Judge Magistrate and Others, (1998) 5 SCC 749**, in which it has been held that:-

“Nomenclature under which petition is filed is not quite relevant and that does not debar the court from exercising its jurisdiction which otherwise it possesses unless there is special procedure prescribed which procedure is mandatory. If in a case like the present one the court find that the appellants could not invoke its jurisdiction under Article 226, the court can certainly treat the petition one under Article 227 or Section 482 of the Code, it may not however, be lost sight of that provisions exist in the Code of revision and appeal but sometime for immediate relief Section 482 of the Code or Article 227 may have to be resorted to for correcting some grave errors that might be committed by the subordinate courts. The present petition though filed in the High Court as one under Articles 226 and 227 could well be treated under Article 227 of the Constitution.”

In view of the facts and circumstances of the case, I am treating this

petition as one under Article 227 of the Constitution of India.

13. Two fold legal questions are involved in this case. Firstly, whether the revisionist (the instant petitioner herein) could have been treated as a divorcee and in case such a claim, if found acceptable, whether she will be entitled for grant of maintenance under section- 125 Cr.P.C.? I went through the submissions of both the sides and the laws pronounced by Hon'ble Supreme Court in **Shamim Ara (supra)**, **Shabana Bano (supra)** and **Shayara Bano (supra)**.

14. I choose to look at the law chronologically; in **Shamim Ara vs. State of U.P.** pronounced in the year 2000, the Apex Court had to deal with the question of pronouncement/proclamation of "Talaq", its proof and the repercussions in a case before it. It may be noted that in that case before the Apex Court, the contention was that husband pronounced "Talaq" on 11.07.1987; the plea was mentioned in the written statement filed on his behalf on 05.12.1990; it was argued by the other side that by filing a written statement in which the fact of "Talaq" has been mentioned, the communication as to pronouncement of "Talaq" stood completed on that date itself, therefore she shall be treated as divorcee from the date of filing of written statement. The Apex Court held as below:-

"16. We are also of the opinion that the talaq to be effective has to be pronounced. The term 'pronounce' means to proclaim, to utter formally, to utter rhetorically, to declare to, utter, to articulate (See Chambers 20th Century Dictionary, New Edition, p.1030). There is no proof of talaq having taken place on 11.7.1987. What the High Court has upheld as talaq is the plea taken in the

written statement and its communication to the wife by delivering a copy of the written statement on 5.12.1990. We are very clear in our mind that a mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effectuating talaq on the date of delivery of the copy of the written statement to the wife. The respondent No.2 ought to have adduced evidence and proved the pronouncement of talaq on 11.7.1987 and if he failed in proving the plea raised in the written statement, the plea ought to have been treated as failed. We do not agree with the view propounded in the decided cases referred to by Mulla and Dr. Tahir Mahmood in their respective commentaries, wherein a mere plea of previous talaq taken in the written statement, though unsubstantiated, has been accepted as proof of talaq bringing to an end the marital relationship with effect from the date of filing of the written statement. A plea of previous divorce taken in the written statement cannot at all be treated as pronouncement of talaq by the husband on wife on the date of filing of the written statement in the Court followed by delivery of a copy thereof to the wife. So also the affidavit dated 31.8.1988, filed in some previous judicial proceedings not inter parte, containing a self-serving statement of respondent no.2, could not have been read in evidence as relevant and of any value."

15. The Calcutta High Court in **Saheda Khatoon vs. Gholam Sarwar**, 2002 Cri.L.J. 4150, took a similar view regarding proof of pronouncement of "Talaq". In para-6 of the judgement, the High Court observed as below:-

"It will be a dangerous proposition to say that now that the O.P. has given a statement in his written objection to the effect that he divorced his

wife on any particular date, that statement should be taken to indicate that the alleged fact of divorce is thereby being communicated to the wife. The question of such communication through the averments in the pleadings could arise only if it was held that the alleged giving of divorce has been proved by the husband. But since in this case it has been held by him that the story of divorce has not been substantiated by trustworthy evidence, the question of its communication loses significance."

16. I perused the judgement of the revisional court; the learned revisional court decided two revisions; one filed by the wife and the other filed by the husband. Even a casual glance on the judgement given by the revisional court gives a clear indication that revisional court re-evaluated and re-assessed the evidence given by the parties in the proceeding under section- 125 Cr.P.C. and gave a clear finding that the husband had divorced his wife by pronouncing "Talaq" three times, therefore the wife shall not be entitled for any maintenance under the provisions of section- 125 Cr.P.C. and that from that moment, the provisions of section-3 of Muslim Women (Protection of Rights on Divorce) Act, 1986 shall come into play. After evaluating evidence afresh, the revisional court set-aside the judgement of the trial court and allowed the revision filed by husband and dismissed the revision filed by the wife.

17. In my view, a legal question therefore obviously arises whether it was legally permissible for a revisional court to re-evaluate the evidence afresh and set-aside the judgement of the trial court and reverse the finding? It may be noted that the core issues involved in the case were

firstly whether the wife should be treated as a divorcee, in other words whether the plea of divorce taken by the husband was proved? Secondly, whether even if she is treated as a divorcee, her right to obtain maintenance under section- 125 Cr.P.C. came to an end?

18. In my view, on both the issues, the findings given by the revisional court were against law of precedents and against settled principles of law. The judgement was pronounced by the revisional court in 2005, therefore it was imperative upon the revisional court to follow the judgement given by Apex Court in ***Shamim Ara (supra) in 2002. It may also be noted that in Danial Latifi and Another vs. Union of India, 2001 AIR SCW 3932***, the Constitution Bench had held by then that even a divorced Muslim woman would be entitled to claim maintenance from her former husband as long as she does not re-marry. The Constitution Bench observed that being a beneficial piece of legislation, the benefit thereof must accrue to the divorced Muslim woman. That judgement was followed in many of the subsequent cases and the law still holds good. The revisional court instead pronounced the judgment as regard plea of divorce in disregard of law laid down by Apex Court. The laws pronounced by Apex Court are binding under Article 142 of the Constitution of India on all judicial authorities. The impugned judgement is therefore not sustainable in law and is liable to be set-aside.

19. The next question which remains to be seen in this writ petition is what shall be the effect of the judgement of the Supreme Court in ***Shayara Bano vs. Union of India (supra)*** on the issues involved in this case. It may be recalled that in the

above noted case, the Supreme Court set-aside the practice of “talaq-e-biddat” i.e. triple talaq, by majority of 3:2.

20. Ordinarily, the law declared by Supreme Court under Article 141 of the Constitution of India shall be assumed to be law from very inception unless expressly or by necessary implication indicated otherwise.

21. In **Major General A.S. Gauraya and Another vs. S.N. Thakur and Another (1986) 2 SCC 709**, it has been held in para-13 that :-

“The sweep of Article 141 of the Constitution, so far as the Judgments of this Court are concerned, came up for consideration before this Court recently in *Shenoy and Co. v. Commercial Tax Officer, [1985] (2) S.C.C. 512* to which one of us was a party. It is not necessary to refer to the facts of that case, in detail. Suffice it to say that the contention that the law laid down by this Court in an appeal filed by the State would not bind the other parties against whom the State of Karnataka did not file appeals from a common Judgment, was repelled by this Court in the following words:

“....It is, therefore, idle to contend that the law laid down by this Court in that Judgment would bind only the Hansa Corporation and not the other petitioners against whom the State of Karnataka had not filed any appeal. To do so is to ignore the binding nature of a judgment of this Court under Article 141 of the Constitution. Article 141 reads as follows :

“The law declared by the Supreme Court shall be binding on all courts within the territory of India.” A mere reading of this article brings into

sharp focus its expanse and is all pervasive nature.”

22. In ***Shayara Bano vs. Union of India (supra)***, the Supreme Court took a view that such a practise of triple talaq, though largely prevalent in certain sects of the Muslim community, but it was never legal or supported by Sharia.

23. Hence, in the matters, where the issue of rights of the parties are yet to be adjudicated, the law pronounced by the Supreme Court shall be applicable. In this case, the issues involved herein cannot be treated as already adjudicated, hence the law laid down by the Supreme Court would apply.

24. The matter can be seen from another perspective as well; **firstly**, that merely saying in a written statement that the husband pronounced triple talaq on such and such date, could not have been taken at its face value and that the husband had a burden to prove the same. **Secondly**, even if for the sake of arguments, it is assumed that the husband was able to prove that he indeed divorced his wife by pronouncing triple talaq, wife’s right to obtain maintenance shall continue till she does not re-marry. In such circumstances, from whatever angle the matter is taken up, the wife had right to obtain maintenance and a reasonable amount for subsistence, which should have been paid to her within the prescribed time, but could not be limited for that period only. She was having right to obtain maintenance for the period subsequent to “iddat” period as well.

25. On the basis of above discussion, I am of a firm view that the judgement dated 06.05.2005 passed by the revisional court in Criminal Revision No.173 of 2004

was bad in law and is therefore liable to be set-aside. It may be noted as a matter of precaution that the consequent upon setting-aside the judgment of the revisional court, the issue of enhancement of the maintenance amount as was claimed by the wife in Criminal Revision No.217 of 2004 opens up. As the matter is probably one of the oldest, hence the concerned court is directed to decide the same as per law within a period of three months from the date of filing of certified copy of this judgment.

26. Accordingly, this petition is allowed.

(2023) 8 ILRA 515

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 20.07.2023

BEFORE

**THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.**

Criminal Misc. Writ Petition No. 10919 of 2023

Deepak Kumar @ Deepak Maratha & Anr.
...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Syed Imran Ibrahim, Sri Praveen Kumar Singh, Sri Manish Tiwari (Sr. Advocate)

Counsel for the Respondents:

G.A.

Criminal Law – Constitution of Indian, 1950 - Article – 226 - UP Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Sections 2, 2(b), 2(b)(iv) & 3 - Public Gambling Act, 1867 - Sections 3 & 4
- Petition – challenging the impugned FIR lodged under the Gangsters Act – based on the

single case pending under section 3/4 P.G. Act, - wherein accused-petitioner was on bail - Definition of word "Gang" – court finds that, charge-sheet in base case against the petitioners had been filed on 29.04.2023 and the impugned FIR has been lodged against them on 30.06.2023 - Court do not find any illegality in manner in which the first information report had been lodged - Moreover, allegations in first information report, in considered opinion, contain ingredients of a cognizable offence - held, provisions of the Gangsters Act can be slapped against a person on the basis of a single case – hence writ petition, dismissed. (Para – 10, 11, 13)

Writ Petition Dismissed. (E-11)

(Delivered by Hon'ble Anjani Kumar Mishra, J.
&
Hon'ble Shiv Shanker Prasad, J.)

1. Heard Shri Manish Tiwari, Learned Senior Advocate for the petitioners and Shri Pankaj Saxena, learned AGA for the State.

2. Challenge in the writ petition is to the first information report dated 30.6.2023 giving rise to Case Crime No. 441 of 2023 under Section 2/3 of the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station-Kasganj, District-Kasganj.

3. The submission of learned counsel for the petitioners is that the offences alleged in the first information report do not fall within the category of offences specified in the Act of 1986. In any case, the petitioner does not fall within the definition of the word 'gang' as occurring in Section 2(b) of the Act. Another ground taken in the writ petition is that the proceedings under the Gangsters Act are mala fide. No cognizable offence is

disclosed from the allegations made in the first information report.

4. The petitioners in the writ petition are Deepak Kumar @ Deepak Maratha and Monu Maheshwari @ Manoj Kumar. The provisions of the Gangsters Act have been imposed against them on the basis of a single case being Case Crime No. 256 of 2023 under Sections 3/4 of the Public Gambling Act wherein the petitioners are stated to be on bail.

5. The word "gang" is defined in Section 2(b) of the Act which reads as follows:-

"2(b) "Gang" means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in anti-social activities, namely-

(i) offences punishable under Chapter XVI or Chapter XVII or Chapter XXII of the Indian Penal Code (Act No. 45 of 1860), or

(ii) distilling or manufacturing or storing or transporting or importing or exporting or selling or distributing any liquor, or intoxicating or dangerous drugs, or other intoxicants or narcotics or cultivating any plant, in contravention of any of the provisions of the U.P. Excise Act, 1910 (U.P. Act No. 4 of 1910), or the Narcotic Drugs and Psychotropic Substances Act, 1985 (Act No. 61 of 1985), or any other law for the time being in force, or

(iii) occupying or taking possession of immovable property otherwise than in accordance with law, or

setting-up false claims for title or possession of immovable property whether in himself or any other person, or

(iv) preventing or attempting to prevent any public servant or any witness from discharging his lawful duties, or

(v) offences punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956 (Act No. 104 of 1956), or

(vi) offences punishable under Section 3 of the Public Gambling Act, 1867 (Act No. 3 of 1867), or

(vii) preventing any person from offering bids in auction lawfully conducted, or tender, lawfully invited, by or on behalf of any Government department, local body or public or private undertaking, for any lease or rights or supply of goods or work to be done, or

(viii) preventing or disturbing the smooth running by any person of his lawful business, profession, trade or employment or any other lawful activity connected therewith, or

(ix) offences punishable under Section 171-E of the Indian Penal Code (Act No. 45 of 1860), or in preventing or obstructing any public election being lawfully held, by physically preventing the voter from exercising his electoral rights, or

(x) inciting others to resort to violence to disturb communal harmony, or

(xi) creating panic, alarm or terror in public, or

(xii) terrorising or assaulting employees or owners or occupiers of public or private undertakings or factories and causing mischief in respect of their properties, or

(xiii) inducing or attempting to induce any person to go to foreign countries on false representation that any

employment, trade or profession shall be provided to him in such foreign country, or

(xiv) kidnapping or abducting any person with intent to extort ransom, or

(xv) diverting or otherwise preventing any aircraft or public transport vehicle from following its scheduled course;

[(xvi) offences punishable under the Regulation of Money Lending Act, 1976;

(xvii) illegally transporting and/or smuggling of cattle and indulging in acts in contravention of the provisions in the Prevention of Cow Slaughter Act, 1955 and the Prevention of Cruelty to Animals Act, 1960;

(xviii) human trafficking for purposes of commercial exploitation, bonded labour, child labour, sexual exploitation, organ removing and trafficking, beggary and the like activities.

(xix) offences punishable under the Unlawful Activities (Prevention) Act, 1966:

(xx) printing, transporting and circulating of fake Indian currency notes;

(xxi) involving in production, sale and distribution of spurious drugs;

(xxii) involving in manufacture, sale and transportation of arms and ammunition in contravention of Sections 5, 7 and 12 of the Arms Act, 1959;

(xxiii) felling or killing for economic gains, smuggling of products in contravention of the Indian Forest Act, 1927 and Wildlife Protection Act, 1972;

(xxiv) offences punishable under the Entertainment and Betting Tax Act, 1979;

(xv) indulging in crimes that impact security of State, public order and even tempo of life."

6. The contention of learned counsel for the petitioners is that a person singly or collectively can constitute a gang only if (i) by violence, or threat or show of violence, or intimidation, or coercion or otherwise tries to gain any undue temporal, pecuniary, material or other advantage for himself or any other person. The emphasis of learned counsel for the petitioners is on the words "violence, threat or show of violence, or intimidation or coercion".

7. In our considered opinion, bare reading of the provision itself would show that violence, threat or show of violence, or intimidation or coercion are not the only conditions specified under Section 2(b) of the Act. What is important and material at least for the case at hand, is the word "otherwise". The word "otherwise" in our opinion means that the words in Section 2(b) occurring before it namely violence, or its threat, intimidation & coercion are not exhaustive but only indicative or illustrative. The word "otherwise" would include within its ambit any act which disturbs public order or is aimed at acquiring temporal, pecuniary, material or other advantage and such act is anti-social. Thus, in view of the word "otherwise" a person who disturbs public order or gains undue temporal, pecuniary or material advantage for himself by indulging any anti-social activities would fall within the scope of the word "gang" occurring in Section 2(b) of the Gangsters Act.

8. Section 2(b)(vi) of Gangsters Act provides that an offence punishable under Section 3 of the Public Gambling Act, 1867 also falls within the definition of the word "gang". It is not in dispute that the base case against the petitioners is one under Section 3/4 of the Public Gambling Act.

9. Under the circumstances, therefore, the submission, that the petitioners do not fall within the definition of the word "gang" as occurring in Section 2(b) of the Act, cannot be accepted.

10. It is also not in dispute that the provisions of the Gangsters Act can be slapped against a person on the basis of a single case.

11. The charge-sheet in the base case against the petitioners had been filed on 29.04.2023 and the impugned FIR has been lodged against them on 30.06.2023.

12. Under the circumstances, we do not find any illegality in the manner in which the first information report had been lodged. Moreover, the allegations in the first information report, in our considered opinion, contain the ingredients of a cognizable offence.

13. In view of the foregoing, we do not find any ground to interfere in the impugned first information report. The writ petition is without merit and is **dismissed**.

(2023) 8 ILRA 518

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 09.08.2023

BEFORE

**THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.**

Criminal Misc. Writ Petition No. 11966 of 2023

**Abhishek Kukreti & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents**

Counsel for the Petitioners:

Sri Mahipal Singh, Sri Kripa Shankar Singh
(Sr. Advocate)

Counsel for the Respondents:

G.A.

Criminal Law – Constitution of Indian, 1950 - Article 48(a) & 226, - Criminal Procedure Code, 1973 - Sections 156(3), 173 & 190(1)(d) - Mines And Minerals (Development And Regulation) Act, 1957 - Sections 4, 21, 22, 23(A)(1) & 23(A)(2) - Mines And Minerals Development And Regulation Rules, 1957 – Rule 18 & 53 - Indian Penal Code, 1860 - Sections 378, 379, 411 & 414 - Petition – challenging the impugned proceedings of seizing of the vehicles – as well as for quashing of the FIR – Punishment for theft – Dishonestly receiving stolen property – Court finds that, everyday newspapers are flooded with the news of illegal mining from every corners of the country, raiding parties / officials / even officers are attached and due to illegal mining – there can be no dispute about the fact that the St. Exchequers must be losing huge revenue apart from damage to the public property as well – held, (i) petitioner are the owners of the vehicles which were found to be involved in the present case, therefore a cognizable offence is made out, and (ii) it is high time for Government concern to take a call on larger issue and do needful as Hon'ble Apex Court has left in to wisdom of legislature to do needful and concerned St. to perform its public duty/obligation being an elected Government – accordingly, Writ petition, dismissed. (Para – 16, 17, 18)

Writ Petition Dismissed. (E-11)

List of Cases cited:

1. Jayant Vs St. of M.P., (2021) 2 SCC 670,
2. St. (NCT of Delhi) Vs. Sanjay, (2014) 9 SCC 772.

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Rajendra Kumar-IV, J.)

1. Heard Sri Kripa Shankar Singh, learned Senior Counsel assisted by Sri Mahipal Singh, learned counsel for the petitioners and Sri Ratan Singh alongwith Sri Vibhav Ojha, learned AGA for the State.

2. Present petition has been filed seeking quashing of the first information report dated 28.04.2023, arising out of case crime no.85 of 2023, under sections 379, 411 IPC and Section 4/21 Mines and Minerals (Development and Regulation) Act, 1957, Police Station Nagina Dehat, District Bijnor. Further, the petitioners are seeking a direction in the nature of mandamus commanding the respondents to take appropriate action/departamental inquiry against the responsible respondents, who were involved in the proceeding of seizing of the vehicles concern as well as false arresting of said drivers in pursuance of the impugned first information report.

3. Sole submission of the learned counsel for the petitioners is that in view of Section 22 of the Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to 'MMDR Act') the FIR could not have been registered as it provides that only a complaint could have been lodged by the authorized person.

4. In support, it is submitted that a Co-ordinate Bench of this Court on this ground itself in the same case crime no.85 of 2023 has granted interim order vide order dated 29.05.2023 passed in Criminal Misc. Writ Petition No.7806 of 2023 (Kalyan Singh and 8 Others vs. State of U.P. and 18 Others). The said interim order reads as under:-

"1. Heard learned counsel for the petitioners and learned A.G.A. for the State.

2. This writ petition has been preferred to quash the First Information Report dated 28.4.2023 being Case Crime No.85 of 2023, under Sections 379, 411 and 4/21 of Mines and Minerals (Development and Regulations) Act, 1957, Police Station Nagina, District Bijnor with a further prayer not to arrest the petitioners.

3. Learned counsel for the petitioners relying upon section 22 of the Mines and Minerals (Development and Regulations) Act, 1957 has stated that the First Information Report itself could not have been registered.

4. Matter requires consideration.

5. Learned Standing Counsel appears for respondent nos.1, 2 and 3. Issue notice to respondent no.4 by registered post. Steps may be taken within ten days. At this stage, we are not issuing notices to respondent nos.5 to 19.

6. Respondent nos.1 to 4 may file their counter affidavits within a period of three weeks. Rejoinder affidavit, if any, may be filed within two weeks thereafter.

7. List thereafter.

8. Until further orders, no coercive action shall be taken against the petitioners."

(Emphasis Supplied)

5. It is further submitted that no cognizance can be taken by the Magistrate as per Clause 21(4) of the paragraph 21 of the judgment rendered in **Jayant Vs. State of Madhya Pradesh, (2021) 2 SCC 670.**

6. Per contra, learned AGA opposed the prayer for quashing of the first information report and submits that the present first information report is clearly

maintainable in view of the judgment of **Jayant (supra)**.

7. We have considered the rival submissions and perused the records. Interestingly, both sides have placed reliance on law laid down in **Jayant (supra)**.

8. Shorn of details facts as contained in the FIR are that on 28.04.2023 at 11:35 pm, the respondent No.4 lodged first information report against unknown persons. It is alleged in the first information report that the complainant came to Police Station- Nagina Dehat for prevention of illegal mining. He accompanied by the Station House Officer of concerned Police Station alongwith other police personnels reached at Kho river on 28.04.2023 at 08:15 pm. The complainant found that continuous illegal mining was being done. Some JCBs, dumpers, and tractor were found on the spot, drivers whereof ran away from the spot after seeing the Police team. 11 dumpers were found on the spot of which 8 dumpers were full of minerals and 3 dumpers were empty and 6 tractors trolley were standing for taking minerals. The details of all the dumpers and tractor trolley are also mentioned in the impugned first information report. The FIR was filed against unknown persons as alleged accused ran away from the spot.

9. Admittedly, the petitioners are the owners of the concerned vehicles/dumpers found on the spot and seized by the police. It is alleged that the petitioners on being harassed by the police, moved applications before the Court concern and wanted reports were submitted by the police. It has been stated in the petition that all the petitioners are legally involved in transportation of minerals, having valid transit pass (Ravanna).

10. Before proceeding further it would be appropriate to take note of Section 22 and 23-A of the MMDR Act, 1952, which is quoted as under:-

“22. Cognizance of offences.—
No Court shall take cognizance of any offence punishable under this Act or any rules made thereunder except upon complaint in writing made by a person authorised in this behalf by the Central Government or the State Government.”

23-A. Compounding of offences.-

Any offence punishable under this Act or any rule made thereunder may, either before or after the institution of the prosecution, be compounded by the person authorised under section 22 to make a complaint to the court with respect to that offence, on payment to that person, for credit to the Government, of such sum as that person may specify: Provided that in the case of an offence punishable with fine only, no such sum shall exceed the maximum amount of fine which may be imposed for that offence. (2) Where an offence is compounded under sub-section (1), no proceeding or further proceeding, as the case may be, shall be taken against the offender in respect of the offence so compounded, and the offender, if in custody, shall be released forthwith.”

11. We find that the interim order that is being relied on by the learned counsel for the petitioners nowhere reflects that the judgment of **Jayant (supra)** was placed before the Co-ordinate Bench, therefore, the sole argument, placing reliance on the interim order dated 29.05.2023 quoted above that FIR could not be registered in the light of Section 22 of the MMDR Act, has no force. Admittedly, the aforesaid order of the Co-ordinate Bench is only an

interim order and is not a final decision/order.

12. We, therefore, proceed to consider the argument of learned Senior Counsel independently of the interim order passed by the Co-ordinate Bench..

13. In **State (NCT of Delhi) v. Sanjay, (2014) 9 SCC 772** the Hon'ble Apex Court in paragraphs 60, 69, 72 and 73 has held as under :-

“60. There cannot be any two opinions that natural resources are the assets of the nation and its citizens. It is the obligation of all concerned, including the Central and the State Governments, to conserve and not waste such valuable resources. Article 48-A of the Constitution requires that the State shall endeavour to protect and improve the environment and safeguard the forests and wild life of the country. Similarly, Article 51-A enjoins a duty upon every citizen to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for all the living creatures. In view of the Constitutional provisions, the Doctrine of Public Trust has become the law of the land. The said doctrine rests on the principle that certain resources like air, sea, waters and forests are of such great importance to the people as a whole that it would be highly unjustifiable to make them a subject of private ownership.

69. Considering the principles of interpretation and the wordings used in Section 22, in our considered opinion, the provision is not a complete and absolute bar for taking action by the police for illegal and dishonestly committing theft of minerals including sand from the river bed. The Court shall take judicial notice of the

fact that over the years rivers in India have been affected by the alarming rate of unrestricted sand mining which is damaging the eco-system of the rivers and safety of bridges. It also weakens river beds, fish breeding and destroys the natural habitat of many organisms. If these illegal activities are not stopped by the State and the police authorities of the State, it will cause serious repercussions as mentioned hereinabove. It will not only change the river hydrology but also will deplete the ground water levels.

72. From a close reading of the provisions of MMDR Act and the offence defined under Section 378, IPC, it is manifest that the ingredients constituting the offence are different. The contravention of terms and conditions of mining lease or doing mining activity in violation of Section 4 of the Act is an offence punishable under Section 21 of the MMDR Act, whereas dishonestly removing sand, gravels and other minerals from the river, which is the property of the State, out of State's possession without the consent, constitute an offence of theft. Hence, merely because initiation of proceeding for commission of an offence under the MMDR Act on the basis of complaint cannot and shall not debar the police from taking action against persons for committing theft of sand and minerals in the manner mentioned above by exercising power under the Code of Criminal Procedure and submit a report before the Magistrate for taking cognizance against such person. In other words, in a case where there is a theft of sand and gravels from the Government land, the police can register a case, investigate the same and submit a final report under Section 173, Cr.P.C. before a Magistrate having jurisdiction for the purpose of taking cognizance as provided in Section

190 (1)(d) of the Code of Criminal Procedure.

73. After giving our thoughtful consideration in the matter, in the light of relevant provisions of the Act vis-à-vis the Code of Criminal Procedure and the Indian Penal Code, we are of the definite opinion that the ingredients constituting the offence under the MMDR Act and the ingredients of dishonestly removing sand and gravel from the river beds without consent, which is the property of the State, is a distinct offence under the IPC. Hence, for the commission of offence under Section 378 Cr.P.C., on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the said offence without awaiting the receipt of complaint that may be filed by the authorized officer for taking cognizance in respect of violation of various provisions of the MMRD Act. Consequently the contrary view taken by the different High Courts cannot be sustained in law and, therefore, overruled. Consequently, these criminal appeals are disposed of with a direction to the concerned Magistrates to proceed accordingly."

(Emphasis Supplied)

14. The offence of illegal mining was clearly noticed by the Apex Court in the case of **Jayant (supra)** as well and it is only thereafter conclusion was drawn that the first information report involving offences under Indian Penal Code alongwith offences under MMDR Act is maintainable. Paragraphs 17, 18, 19, 20 and 21 of the said judgment reads as under:

17. Now so far as the submission on behalf of the private appellants-violators that in view of the fact that violators were permitted to compound the violation in exercise of powers under Rule 53 of the 1996 Rules or Rule 18 of the 2006 Rules

and the violators accepted the decision and deposited the amount of penalty determined by the appropriate authority for compounding the offences/violations, there cannot be any further criminal proceedings for the offences under Sections 379 and 414 IPC and Sections 4/21 of the MMDR Act and the reliance placed on Section 23A of the MMDR Act is concerned, it is true that in the present case the appropriate authority determined the penalty under Rule 53 of the 1996 Rules/Rule 18 of the 2006 Rules, which the private appellants-violators paid and therefore the bar contained in subsection 2 of Section 23A of the MMDR Act will be attracted.

17.1 Section 23A as it stands today has been brought on the Statute in the year 1972 on the recommendations of the Mineral Advisory Board which provides that any offence punishable under the MMDR Act or any rule made thereunder may, either before or after the institution of the prosecution, be compounded by the person authorised under section 22 to make a complaint to the court with respect to that offence, on payment to that person, for credit to the Government, of such sum as that person may specify. Subsection 2 of Section 23A further provides that where an offence is compounded under subsection (1), no proceeding or further proceeding, as the case may be, shall be taken against the offender in respect of the offence so compounded, and the offender, if in custody, shall be released forthwith. Thus, the bar under subsection 2 of Section 23A shall be applicable with respect to offences under the MMDR Act or any rule made thereunder.

17.2 However, the bar contained in subsection 2 of Section 23A shall not be applicable for the offences under the IPC, such as, Section 379 and 414 IPC. In the present case, as observed and held

hereinabove, the offences under the MMDR Act or any rule made thereunder and the offences under the IPC are different and distinct offences.

17.3. Therefore, as in the present case, the mining inspectors prepared the cases under Rule 53 of the 1996 Rules and submitted them before the mining officers with the proposals of compounding the same for the amount calculated according to the concerned rules and the Collector approved the said proposal and thereafter the private appellants violators accepted the decision and deposited the amount of penalty determined by the Collector for compounding the cases in view of subsection 2 of Section 23A of the MMDR Act and the 1996 rules and even the 2006 rules are framed in exercise of the powers under Section 15 of the MMDR Act, criminal complaints/proceedings for the offences under Sections 4/21 of the MMDR Act are not permissible and are not required to be proceeded further in view of the bar contained in subsection 2 of Section 23A of the MMDR Act. At the same time, as observed hereinabove, the criminal complaints/proceedings for the offences under the IPC – Sections 379/414 IPC which are held to be distinct and different can be proceeded further, subject to the observations made hereinabove.

18. However, our above conclusions are considering the provisions of Section 23A of the MMDR Act, as it stands today. It might be true that by permitting the violators to compound the offences under the MMDR Act or the rules made thereunder, the State may get the revenue and the same shall be on the principle of person who causes the damage shall have to compensate the damage and shall have to pay the penalty like the principle of polluters to pay in case of damage to the environment. However, in

view of the large scale damages being caused to the nature and as observed and held by this Court in the case of Sanjay (supra), the policy and object of MMDR Act and Rules are the result of an increasing awareness of the compelling need to restore the serious ecological imbalance and to stop the damages being caused to the nature and considering the observations made by this Court in the aforesaid decision, reproduced hereinabove, and when the violations like this are increasing and the serious damage is caused to the nature and the earth and it also affects the ground water levels etc. and it causes severe damage as observed by this Court in the case of Sanjay (supra), reproduced hereinabove, we are of the opinion that the violators cannot be permitted to go scot free on payment of penalty only. There must be some stringent provisions which may have deterrent effect so that the violators may think twice before committing such offences and before causing damage to the earth and the nature.

19. It is the duty cast upon the State to restore the ecological imbalance and to stop damages being caused to the nature. As observed by this Court in the case of Sanjay (supra), excessive in stream sand and gravel mining from river beds and like resources causes the degradation of rivers. It is further observed that apart from threatening bridges, sand mining transforms the riverbeds into large and deep pits, as a result, the groundwater table drops leaving the drinking water wells on the embankments of these rivers dry. Even otherwise, sand/mines is a public property and the State is the custodian of the said public property and therefore the State should be more sensitive to protect the environment and ecological balance and to protect the public property the State should

always be in favour of taking very stern action against the violators who are creating serious ecological imbalance and causing damages to the nature in any form. As the provisions of Section 23A are not under challenge and Section 23A of the MMDR Act so long as it stands, we leave the matter there and leave it to the wisdom of the legislatures and the concerned States.

20. Now so far as the appeal preferred by the State on the premise that the order passed by the learned Magistrate, confirmed by the High Court, affects the powers of the authorised person to compound the offence, in exercise of powers under Rule 53 of the 1996 Rules and Rule 18 of the 2006 Rules is concerned, the same is absolutely misconceived. By the order passed by the learned Magistrate, confirmed by the High Court, by no stretch of imagination, it can be said that directing to file the first information report/crime case for the offences under the IPC and even for the offences under the MMDR Act and the rules made thereunder, it affects any of the powers of the authorised person to compound the offence. In fact, in view of the decision of this Court in the case of **Sanjay (supra)**, in which this Court has specifically observed and held that so far as the offence under the IPC is concerned, there shall not be any bar under Section 22 of the MMDR Act and when before the High Court the State supported the order passed by the learned Magistrate and rightly so and when the impugned judgment and order passed by the High Court is in favour of the State, as such, the State ought not to have filed the special leave petition/appeal.

"21. After giving our thoughtful consideration in the matter, in the light of the relevant provisions of the MMDR Act

and the Rules made thereunder visàvis the Code of Criminal Procedure and the Penal Code, and the law laid down by this Court in the cases referred to hereinabove and for the reasons stated hereinabove, our conclusions are as under:

21.1. that the learned Magistrate can in exercise of powers under Section 156(3) of the Code order/direct the concerned In charge/SHO of the police station to lodge/register crime case/FIR even for the offences under the MMDR Act and the Rules made thereunder and at this stage the bar under Section 22 of the MMDR Act shall not be attracted;

21.2. the bar under Section 22 of the MMDR Act shall be attracted only when the learned Magistrate takes cognizance of the offences under the MMDR Act and Rules made thereunder and orders issuance of process/summons for the offences under the MMDR Act and Rules made thereunder;

21.3 for commission of the offence under the IPC, on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the said offence without awaiting the receipt of complaint that may be filed by the authorised officer for taking cognizance in respect of violation of various provisions of the MMDR Act and Rules made thereunder; and

21.4 that in respect of violation of various provisions of the MMDR Act and the Rules made thereunder, when a Magistrate passes an order under Section 156(3) of the Code and directs the concerned Incharge/SHO of the police station to register/lodge the crime case/FIR in respect of the violation of various provisions of the Act and Rules made thereunder and thereafter after investigation the concerned Incharge of the police station/investigating officer submits

a report, the same can be sent to the concerned Magistrate as well as to the concerned authorised officer as mentioned in Section 22 of the MMDR Act and thereafter the concerned authorised officer may file the complaint before the learned Magistrate along with the report submitted by the concerned investigating officer and thereafter it will be open for the learned Magistrate to take cognizance after following due procedure, issue process/summons in respect of the violations of the various provisions of the MMDR Act and Rules made thereunder and at that stage it can be said that cognizance has been taken by the learned Magistrate.

21.5. in a case where the violator is permitted to compound the offences on payment of penalty as per subsection 1 of Section 23A, considering subsection 2 of Section 23A of the MMDR Act, there shall not be any proceedings or further proceedings against the offender in respect of the offences punishable under the MMDR Act or any rule made thereunder so compounded. However, the bar under subsection 2 of Section 23A shall not affect any proceedings for the offences under the IPC, such as, Sections 379 and 414 IPC and the same shall be proceeded with further."

(Emphasis Supplied)

15. In view of the decisions made hereinabove it can be safely concluded that:

(i) bar under section 22 of the MMDR Act is not attracted in case FIR is lodged/registered for offences under IPC and even for offences under the MMDR Act and Rules made thereunder, the competent magistrate in exercise of power under Section 156(3) Cr.P.C. can order/direct registration of FIR;

(ii) bar under Section 22 of the MMDR Act shall be attracted only when

the learned magistrate takes cognizance of the offences under the MMDR Act and the Rules framed thereunder;

(iii) for commission of an offence under the IPC, on police report, the competent magistrate can take cognizance of the said offences WITHOUT awaiting the receipt of complaint that may be filed by the authorised officer regarding offences under the MMDR Act and Rules framed thereunder;

(iv) in a case where violator is permitted to compound the offences on payment of penalty as per Section 23A(1), in view of Section 23A(2) of the MMDR Act, there shall not be any proceeding or further proceedings against the offender in respect of offence under the MMDR Act or Rules framed thereunder;

(v) however, importantly bar under sub-section (2) of Section 23-A of the MMDR Act shall not affect and proceedings for the offences under the IPC such as sections 379, 411, 414 and the same shall be proceeded further;

(vi) the above decisions leave no reason to doubt that as per the law settled by the Hon'ble Apex Court, offences under the MMDR Act and Rules framed thereunder and offences under the IPC stands on different footing and are procedurally distinguishable and can be differently initiated and proceeded with;

(vii) finally, it can be safely concluded that FIR involving offences under IPC alongwith offences under the MMDR Act and the Rules framed thereunder as in the present case, is clearly maintainable and can be validly registered and bar under section 22 of the MMDR Act is not attracted.

16. In such view of the matter, we are not inclined to place reliance upon the interim order granted by this Court without

noticing the law laid down by Hon'ble Apex Court in **Sanjay (supra)** and in **Jayant (supra)**. The petitioners are the owners of the vehicles which were found to be involved in the present case, therefore, a cognizable offence is made out.

17. One can take judicial notice of the fact that everyday newspapers are flooded with news of illegal mining from every corners of the country, raiding parties/officials/even officers are attacked and due to illegal mining, there can be no dispute about the fact that State Exchequer must be losing huge revenue apart from damage to the public property as well. The ecological part of such damage has already been discussed and taken note of Hon'ble Apex Court in the above noted judgments in the case of **Sanjay (Supra)** and **Jayant (supra)**. Observations made by Hon'ble Apex Court judgment in **Jayant (supra)** also gives an impression that the existing provisions of the MMDR Act are falling short of expectations in view of the volume of illegal mining. Therefore, before we part, we express our concern by highlighting concern of the Hon'ble Apex Court expressed specifically in para 18 and 19 of **Jayant (supra)** and observe that it is high time for the Government concern to take a call on the larger issue and do the needful as Hon'ble Apex Court has left in to the wisdom of the legislature to do the needful and the concerned State to perform its public duty/obligation being an elected Government.

18. To attract the attention of the State Government and for doing the needful in its own wisdom, in larger public interest, learned AGA is directed to forward a copy of this order to the respondent no.1-State of U.P. through its Secretary, Home Department, U.P. Government, Lucknow as

well as to the Chief Secretary Government of U.P. within a week.

19. For similar reasons, office is also directed to serve a copy of this order on the Additional Solicitor General of India representing Union of India in this Court for being forwarded to the Secretary of the concerned Department/Ministry, Union of India within a week.

20. From the discussions made hereinabove, we find that the writ petition is devoid of merit and is accordingly **dismissed**, however, with the observations as made above.

(2023) 8 ILRA 526

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 24.07.2023

BEFORE

THE HON'BLE JAYANT BANERJI, J.

Matters Under Article 227 No. 4923 of 2023

Chaudhary Chandra Veer Singh & Anr.

...Petitioners

Versus

President Ark City Residents Welfare Association, Meerut & Anr.

...Respondents

Counsel for the Petitioners:

Sri Kunal Shah, Sri Suvansit Kumar Jaiswal, Sri Vipul Raj Gautam, Sri Manish Goyal (Sr. Advocate)

Counsel for the Respondents:

Sri Ajay Kumar Singh, Sri Ashish Kumar Singh

Civil Law - Uttar Pradesh Apartment (Promotion, Ownership and Maintenance) Act, 2010 – Indian Easements Act, 1882 - Easementary Rights – Temporary Injunction —

8 All. Chaudhary Chandra Veer Singh & Anr. Vs. President Ark City Residents Welfare Association, 2017 (5) SCC 627
Meerut & Anr.

Common Areas and Facilities – No Objection Certificate (NOC) – Appellate Court's Jurisdiction.

Held:

1. The petitioners, claiming easementary rights over a 40 - feet road within the Ark City Housing Society based on an alleged No Objection Certificate (NOC) dated 11.12.2016, failed to establish a prima facie case for a temporary injunction. The existence and validity of the NOC were disputed, requiring evidence to prove the grant of easementary rights.

2. The trial court's order granting a temporary injunction was set aside by the appellate court, as it selectively relied on the Amin Commissioner's report and ignored alternative access routes to the petitioners' land, as indicated in the report and site map.

3. The provisions of the Uttar Pradesh Apartment Act, 2010, prevail over the Indian Easements Act, 1882, due to its overriding effect under Section 31. The 40 - feet road, part of the common areas and facilities of Ark City, cannot be used without the consent of all apartment owners and approval of the competent authority, as per Section 5 of the Apartment Act.

4. The appellate court's order dated 28.02.2023, setting aside the temporary injunction, was upheld as it was based on cogent reasons, including the absence of evidence supporting the petitioners' claim to easementary rights and the presence of alternative access routes.

5. The petitioners' failure to obtain a sanctioned layout plan for developing Plot No. 291 and their attempt to claim access to Ark City's amenities without legal basis disentitled them to equitable relief under Article 227.

Case Law Discussed:

1. Wander Ltd. Vs Antox India Pvt. Ltd., 1990 Supp SCC 727

2. Dalpat Kumar Vs Prahlad Singh, 1992 (1) SCC 719

3. Anand Prasad Agarwalla Vs Tarkeshwar Prasad, 2001 (5) SCC 568

4. Zenit Mataplast Pvt. Ltd. Vs St. of Mah., 2009 (10) SCC 388

5. Misrilal Ramratan Vs A.S. Shaik Fathimal, AIR 1995 Mad 375

6. Santosh Dubey Vs Lala Ram Pal, 2006 (2) All LJ 512

7. Levi Strauss & Co. Vs Rajesh Agarwal, AIR 2002 Del 344

8. ML Brother LLP Vs Maheshkumar Bhuralal Tanna, 2019 SCC Online Bom 1084

9. Hero Vinoth (Minor) Vs Seshammal, 2006 (5) SCC 545

10. Mathai Vs Jordi Poulouse, 2013 (2) KLT 102

11. Bhagwan Sahai Vs Narsingh Sahai, AIR 2006 Raj 125

12. Wasudeo Vs Shri Ashok, 2010 (4) MhLJ 103

13. Ram Swarup Gupta Vs Bishun Narain Inter College, 1987 (2) SCC 555

14. Prataprai N. Kothari Vs John Braganza, 1999 (4) SCC 403

15. Tamil Nadu Housing Board Vs A. Viswam, 1996 (8) SCC 259

16. M/s. Designarch Infrastructure Pvt. Ltd. Vs Vice Chairman, Ghaziabad Development Authority, 2013 (9) ADJ 598

17. Management Board, Windsor Park Residents Welfare Association Vs St. of U.P., 2015 (8) ADJ 1

Petition Dismissed.

(Delivered by Hon'ble Jayant Banerji, J.)

1. In the aforesaid petition, the array of parties is as under:-

“1. Chaudhary Chandra Veer Singh, aged about 70 years son of Sumeer Singh, Resident of Ward No.0, Daurala (Rural), Meerut, District Meerut.

2. Chaudhary Vivek Ahalawat, son of Chaudhary Chandra Veer Singh, Resident of Ward No.0, Daurala (Rural), Meerut, District Meerut

..... Petitioner/Plaintiff

Versus

1. President Ark City Residents Welfare Association, Ark City, N.H. 58, Kankerkheda, Meerut, District Meerut.

2. Secretary Ark City Residents Welfare Association, Ark City, N.H. 58, Kankerkheda, Meerut, District Meerut.

.....Respondent/Defendant”

2. This petition impugns the order dated 28.02.2023, corrected on 09.03.2023 passed by the Additional District Judge, Court No.5, Meerut in Misc. Appeal No.27 of 2020 (President Ark Society vs. Chandra Veer Singh), whereby the appeal has been allowed and the order of temporary injunction granted by the trial court on 15.01.2020 has been set aside. It may be mentioned at the outset that though the order of correction dated 09.03.2023 has been mentioned to have been filed along with the impugned order of 28.02.2023, however, the same is not enclosed. In any view of the matter, the order of correction has not been referred to by learned counsel for the petitioners.

3. The petitioners claim to be tenure-holders being bhumidhar with transferable rights over Plot No.291 admeasuring about 0.6070 hectares of land located in Village-Dayampur, District Meerut which land is stated to have been purchased by them by

means of a registered sale-deed of 11.08.2016. It is stated that the petitioners are the owners in possession of the aforesaid Plot No.291 and to the north of the petitioners' land is located a Housing Society by the name of Ark Society. It is stated that the respondents are members of the said Housing Society. It is alleged that to the north of the petitioners' land is a common 12 meters (40 feet) wide path/road¹ which goes through the Society and leads into the petitioners' land. That the predecessor-in-interest of the petitioners as well as the petitioners have been using the 40 feet road in question for their entry into the aforesaid Plot No.291 and that there is no other approach road. In view of a dispute between the petitioners and residents of the respondent-Society regarding use of the path in question, it was resolved by the intervention of Ark City Welfare Association², a Society duly registered under the Societies Registration Act, 1860³ and which, as per the provisions of the Uttar Pradesh Apartment (Promotion, Ownership and Maintenance) Act, 2010⁴, is authorised to manage the affairs in relation to the apartments and the properties appurtenant thereto and common areas and facilities, to permit use of the 40 feet road by the petitioners. It is alleged that in this regard, on 11.12.2016, the Welfare Association issued a No Objection Certificate⁵ in favour of the petitioners whereby the petitioners were permitted to use the 40 feet road as also the sewerage and electricity lines of the Society.

4. It is alleged that when on 04.07.2019, objections were raised and hurdles were created, the petitioners instituted a civil suit for permanent injunction before the court of the Civil Judge (Senior Division), Meerut, being Original Suit No.73 of 2019. An

application for temporary injunction was also filed. On 06.09.2019, the trial court granted an *ad-interim ex-parte* temporary injunction to the petitioners. Thereafter, the respondents, who were the defendants in the aforesaid suit, filed objection to the application for temporary injunction. On an application moved by the petitioners, the trial court appointed an Amin Commissioner to carry out an inspection. The Amin Commissioner made his inspection and submitted a report on 11.11.2019 enclosing therewith a site map. The petitioners also filed their reply to the objections raised by the respondents to the application for temporary injunction. The petitioners filed photographs on 18.12.2019 to evince that no boundary wall of Ark City exists to the north of the gate of Plot No.291, which is the land of the petitioners. They also filed an affidavit dated 16.12.2019 of one Sudhir Verma, who was alleged to be a former President of the Welfare Association, stating that the NOC was issued by the then office bearers of the Welfare Association and the signatures appended by him on that NOC, in capacity of the President are, in fact his signatures. By an order dated 15.01.2020, the trial court granted temporary injunction in favour of the petitioners. Against that order of temporary injunction, the respondents filed an appeal being Misc. Case No.27 of 2020 alongwith a stay application. The petitioners filed objections against the application of the respondent seeking stay of temporary injunction.

5. It is further alleged that when the respondents violated the order of temporary injunction, an application under Order XXXIX Rule 2-A of the Code of Civil Procedure, 1908 was filed and an Amin Commissioner was appointed who is stated to have submitted his spot inspection report

on 14.12.2020. By an order dated 17.12.2021, the trial court rejected the application filed by the petitioners under Order XXXIX, Rule 2-A of the CPC. Against that rejection, the petitioners filed a revision before the District Judge, which is stated to be pending.

6. By the order impugned dated 28.02.2023, the aforementioned appeal filed by the respondents was allowed and the order of temporary injunction dated 15.01.2020 passed by the trial court was set aside.

7. The contention of Shri Kunal Shah, learned counsel for the plaintiff-petitioners, is that the predecessor-in-interest of the petitioners had a permissive right of usage of the 40 feet road and the petitioners came to acquire an easementary right of usage of the 40 feet road, by way of an express grant dated 11.12.2016 made by the Welfare Association. It is stated that the reliance placed by the appellate court on the layout plan of the Ark City sanctioned by the Meerut Development Authority⁷ disclosing the presence of a boundary wall on the northern side of the petitioners' land, is by no means the actual factual position as would be existing at the spot. Learned counsel has referred to the report of the Amin Commissioner dated 11.11.2019 in which it was stated that to the north of Plot No.291, both, Ark City as well as the 40 feet road are located, and that he reached the site for inspection using that path and had used the same path while returning. It is stated that the 40 feet road is not a public road or a chak road but an internal path over which the petitioners have easementary right of usage which they came to acquire by way of an express grant dated 11.12.2016. It is alleged that the layout plan which was sanctioned on

29.01.2010, logically cannot contain the description of the 40 feet road.

It is next contended by the learned counsel that the appellate court did not consider the Amin Commissioner's report dated 11.11.2019 on the ground that the said report had not been proved and confirmed before the trial court, which is an error in law, inasmuch as under Order XXVI, Rules 9 and 10 of the CPC, the report of the Commission is not required to be proved or confirmed for it to be treated as evidence as juxtaposed to the report of the Commissioner prepared under Order XXVI, Rule 14 of the CPC for purposes of making partition. It is stated that in view of the observations of the appellate court regarding the report of the Amin Commissioner, the appellate court ought not to have relied on the report reflecting that the petitioners have two alternative access to Plot No.291 on its west and southern side. It is stated that the finding recorded by the appellate court regarding alternative routes to Plot No.291 is manifestly perverse as the unpaved road mentioned on the western side of the petitioners' land leads nowhere. It is stated that the appellate court has been swayed by the fact that easementary right with regard to the 40 feet road has not been expressly claimed in the suit, whereas in view of the settled law, easement by way of an express grant can be adduced by implication. It is contended that it is not appropriate for the appellate court to hold a mini trial at the stage of grant of temporary injunction, when the fact was that *prima facie* case regarding easementary right of the petitioners was established. It is stated that it is not open to the appellate court to reassess the material and reach a conclusion different from the one reached by the trial court if the one reached by the

trial court was reasonably possible on the basis of material on record. In support of his contentions, learned counsel for the petitioners has relied upon the following decisions :-

1. **Wander Ltd. & Anr. vs. Antox India Pvt. Ltd.**8
2. **Dalpat Kumar & Anr. vs. Prahlad Singh & Ors.**9
3. **Anand Prasad Agarwalla vs. Tarkeshwar Prasad & Ors.**10
4. **Zenit Mataplast Pvt. Ltd. vs. State of Maharashtra & Ors.**11
5. **Misrilal Ramratan & Ors. Mansukhlal & Ors. vs. A.S. Shaik Fathimal & Ors.**12
6. **Santosh Dubey & Anr. vs. Lala Ram Pal @ Lalloo Pal**13
7. **Levi Strauss & Co. vs. Rajesh Agarwal**14
8. **ML Brother LLP vs. Maheshkumar Bhuralal Tanna**15
9. **Hero Vinoth (Minor) vs. Seshammal**16
10. **Mathai vs. Jordi Poulouse @ Jordi**17
11. **Bhagwan Sahai vs. Narsingh Sahai**18
12. **Wasudeo & Anr. vs. Shri Ashok**19
13. **Ram Swarup Gupta vs. Bishun Narain Inter College & Ors.**20

8. Shri Ashish Kumar Singh, learned counsel appearing for the respondent-Welfare Society, has stated that the Amin Commissioner's report of 11.11.2019 itself reflects the presence of two alternative access roads to Plot No.291 on its western and southern sides. It is stated that the trial court completely overlooked this aspect of the matter and only relied upon the statement in the report regarding the 40 feet road existing on the north of plot no.291

which the Amin Commissioner had used to reach and leave plot no.291. It is emphatically stated that the Amin Commissioner's report is not a report under Order XXVI, Rule 9 of the CPC but a report submitted by the Amin Commissioner, who is an employee of the court, to conduct an inspection under Order XXXIX, Rule 7 of the CPC for purposes of consideration of the aforesaid application for temporary injunction. Learned counsel has placed reliance on the order of the trial court dated 07.12.2021, which was passed on the application for the petitioners moved under Order XXXIX, Rule 2-A of the CPC alleging violation of the order of temporary injunction, to contend that the trial court has observed therein that no amendment application was filed by the petitioners to amend their plaint seeking mandatory injunction which renders the statement by the petitioners suspicious that the respondents are obstructing the path of the petitioners by creating the wall and, therefore, the trial court observed that no direction can be issued for police assistance in removing the wall. It is contended that it has also been observed in the order that the report of the Amin Commissioner dated 11.11.2019 has not been approved. It is stated that the case of the petitioners claiming easementary right is completely false and has been made only for purpose of gaining unauthorised access to the Plot No.291 by using the wide road of Ark City. It is stated that due to this fraudulent claim by the petitioners, the interest and security of the residents of Ark City would be jeopardized. In support of his contentions, learned counsel has relied on the following judgments:-

1. Anand Prasad Agarwalla
(supra)

2. Prataprai N. Kothari vs. John Braganza²¹

3. Tamil Nadu Hosing Board vs. A. Viswam²²

9. A perusal of the plaint dated 06.09.2019 filed by the plaintiff-petitioners that is enclosed as Annexure-3 to the petition reveals that plot No.291 is an agricultural land which had been purchased by means of a sale-deed dated 11.08.2016. Allegations have been made therein regarding usage of the 40 feet road by the predecessors of the plaintiff-petitioners, and that when objection was raised by the defendant-respondents with regard to road usage, then on the plaintiff-petitioners' request, the defendant-respondents issued the NOC. It has been stated that the defendant-respondents are well read and rich people who keep threatening the plaintiff-petitioners. Other than the 40 feet road there is no means of ingress and egress to and from Plot No.291. It is stated that in case the plaintiff-petitioners are restrained from using the 40 feet road, they will suffer irreparable harm and the crops grown by the plaintiff-petitioners for their sustenance would be destroyed which cannot be compensated in future.

10. The contents of the alleged NOC provide a *carte blanche* to the plaintiff-petitioners not only to use the road but also to use the drain, the sewer and the electricity of Ark City and the admitted purpose being that the plaintiff-petitioners would demarcate plots on Plot No.291 and sell it to the third party. But on the contrary, the plaint case, despite reference to the NOC in paragraph no.4 of the plaint, is that the plaintiff-petitioners are growing crops for their sustenance. The plaint case is repeated in the affidavit filed in support of the application for temporary injunction.

11. On 06.09.2019, an ad interim *ex-parte* injunction order was granted in favour of the plaintiff-petitioners and, on an application (paper No. 16 Ga-2) moved by the plaintiff-petitioners before the trial court, a direction was issued to the Court Amin to furnish a report with regard to the situation on the spot in respect of the property in dispute in the light of the application 16-Ga-2.

12. The objection to the application for temporary injunction was filed on 30.10.2019 by the defendants-respondents in which it was denied that any farming activity is being carried out by the plaintiff-petitioners and it was stated that as per the information available with the defendants-respondents, the plaintiff-petitioner may carry on plotting activities over the aforesaid plot. To reach the aforesaid Plot No. 291, they are paving the existing road on the western side of the plot. It was denied that the plaintiff-petitioners have any concern with the 40 feet road and its usage by the plaintiff-petitioners was denied. The issuance of NOC was denied and it was alleged that the NOC is misleading and prepared in a fraudulent manner and that neither the defendants-respondents nor any previous President or Secretary of the Welfare Association had issued any such NOC. It was stated that the plaintiff-petitioner no.1 is a former Member of Legislative Assembly and keeps threatening the residents of the Colony managed by the Welfare Association. It was stated that the plaintiff-petitioners had satisfied themselves with regard to the existence of a road on the western side of plot No. 291 prior to its purchase for ingress and egress, but only to harass the defendants-respondents, they are attempting to use the 40 feet road by breaking the boundary wall of the Ark City.

It was stated that Ark City is an approved colony of the Development Authority and the plaintiff-petitioners are seeking to mislead by stating that plot No. 291 is also part of Ark City and thus, with *malafide* intention, is trying to jeopardize the existence of Ark City. It was stated that the plaintiff-petitioners have deliberately not shown the path on the western side of plot no. 291 in the plaint map. In the month of August 2019, there was an altercation with the plaintiff-petitioners with the residents of Ark City residing near the 40 feet road, in respect of which proceedings under Sections 107/116 of the Code of Criminal Procedure were initiated. It was stated that the boundary wall of Ark city exists and the plaintiff-petitioners are on the lookout for demolishing it to use the 40 feet road.

13. It was denied that the 40 feet road was ever used by the plaintiff-petitioners or their predecessors and in case the boundary wall does not exist on the road, the security of the residents of Ark City would be jeopardized. It was stated that Ark City is an approved colony and the plaintiff-petitioners are attempting to set up an illegal colony in plot No. 291 whose road they want to create through Ark City. It was stated that when attempt was made by the plaintiff-petitioners to demolish the boundary wall forcibly, the defendant-respondents filed a complaint against the plaintiff-petitioners and an FIR was lodged under the provisions of Section 147, 427, 506 IPC. It was stated that the names of the President and Secretary of the defendants-respondents, who keep changing from time to time, have not been stated in the plaint.

14. On 11.11.2019, the Court Amin submitted his report alongwith a map, as follows:-

"माननीय न्यायालय सिविल जज
(सी०डि०), मेरठ।

मूलवाद सं०- 735 सन् 2019
चौ० चन्द्रवीर सिंह आदि बनाम
अध्यक्ष आर्क सिटीरैजिडेन्स आदि
रिपोर्ट अमीन कमीशन

श्रीमान जी,

माननीय न्यायालय के आदेश का पालन करने के लिए दिनांक 11.11.2019 नियत की गयी थी जिसकी सूचना वादी अधिवक्ता महोदय को व्यक्तिगत रूप से तथा प्रतिवादीगण को रजि० डाक द्वारा पूर्व में दे दी गयी थी। नियत दिनांक पर वादी अधिवक्ता महोदय उपस्थित हुए, किन्तु प्रतिवादी की ओर से कोई उपस्थित नहीं हुआ, तो मैं न्यायालय अमीन वादी अधिवक्ता महोदय के साथ ग्राम दायमपुर जिला मेरठ पहुंचा। जहां पहुंचकर प्रतिवादीगण के बारे में मालूमात की, तो वहां उपस्थित व्यक्तियों ने अपना परिचय श्री सोमपाल, सुनील कुमार, अमरीश त्यागी तथा इलम सिंह कोषाध्यक्ष आर्क सिटी के रूप में दिया। मैंने पक्षकारों को अपना परिचय देते हुए माननीय न्यायालय के आदेश से अवगत कराया तथा विवादित स्थल तथा उसके आस-पास का निरीक्षण कराने का अनुरोध किया, तो पक्षकारों ने मुझे विवादित स्थल व उसके आस-पास का निरीक्षण कराया। मैंने निरीक्षण करते हुए उसका नक्शा नजरी ए,बी,सी,डी, तैयार किया जो इस रिपोर्ट का अंग है।

श्रीमान जी निरीक्षण के दौरान पाया कि वादी की सम्पत्ति खसरा नं०-291 जिसे नक्शा नजरी में अक्षर ए,बी,सी,डी से दिखाया गया है। इस सम्पत्ति के उत्तर में आर्क सिटी तथा सड़क, पश्चिम में रास्ता (खड़ंजा) व सम्पत्ति अन्य, दक्षिण में रास्ता

(खड़ंजा), पूरब में सम्पत्ति अन्य की स्थिति बतायी गयी। वादी की सम्पत्ति में उत्तर की तरफ एक लोहे का गेट लगा हुआ है। गेट के उत्तर में ईंटों का मलबा पड़ा है। मलबे के बाद एक सड़क उत्तर की तरफ को गयी है जो आर्क सिटी से होते हुए बाहर चली जाती है। ईंटों के मलबे के पश्चिम व पूरब में बिना पलास्तर की दीवार बनी है। इसी सड़क से होकर मैं विवादित स्थल तक पहुंचा तथा वापिस आया जिस स्थान पर ईंटों का मलबा पड़ा है वह स्थान नक्शा नजरी में लाल रंग से दिखाया गया है।

श्रीमान जी वादी अधिवक्ता महोदय ने बताया कि हमारी सम्पत्ति खसरा नं०-291 स्थित दायमपुर, मेरठ के हम मालिक व काबिज है जिसका एक मात्र रास्ता उत्तर की तरफ बनी सड़क जो आर्क सिटी से होकर बाहर निकल जाती है किन्तु प्रतिवादीगण हमारे लोहे के गेट के आगे दीवार लगा कर हमारा रास्ता बन्द करने की धमकी दे रहे हैं, जबकि उन्हें हमारा रास्ता बन्द करने का कोई अधिकार नहीं है जबकि मौके पर मौजूद प्रतिवादी के लोगों ने बताया कि यह सड़क आर्क सिटी की है तथा वादी का कोई वास्ता इस रास्ते से नहीं है तथा बताया कि वादी के गेट के आगे दीवार बनी थी जिसे वादी ने आज ही गिराया है जिसकी शिकायत हमने 100 नम्बर पर की थी। मौके पर पड़ी ईंटें उसी दीवार का मलबा बताया गया। अन्य कोई बात मौके पर नहीं बतायी गयी।

श्रीमान जी परवाना कमीशन रिपोर्ट अमीन मय नक्शा नजरी के उचित आदेश हेतु दाखिल माननीय न्यायालय किया जाता है।

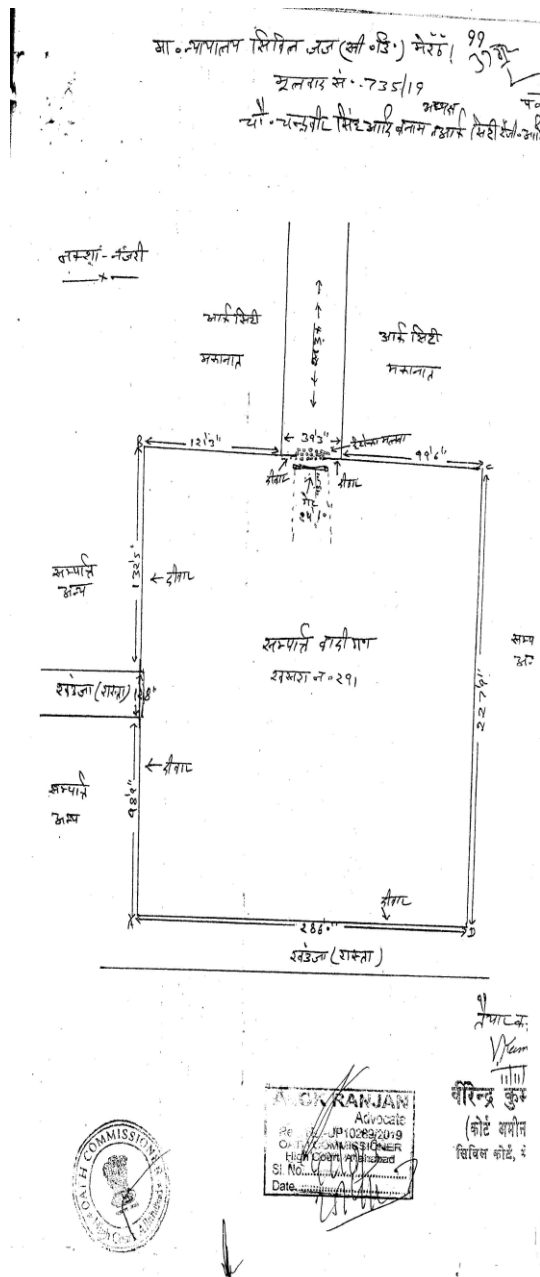
तैयारकर्ता

ह०अप०

11/11/2019

वीरेन्द्र कुमार

(कोर्ट अमीन) सिविल कोर्ट, मेरठ



respondents are not lawful President and Secretary of the so-called Society and neither is the management committee duly registered and, therefore, they are not eligible to object or oppose the suit. In paragraph 4 of the rejoinder affidavit, the plaintiff-petitioners changed their stand which they professed in their plaint and affidavit. It was stated that initially after purchase of plot No. 291, farming was started. Thereafter, the plaintiff-petitioners stopped farming activities and created a boundary wall and they are using the 40 feet road for ingress and egress and there is no road on the western side of plot no. 291 and neither are plaintiff-petitioners paving road on the western side. It was stated that the former President and Secretary of the Welfare Association had given NOC which has not been cancelled and is still in effect.

16. It was stated that in the report of the Amin, the agricultural land of the plaintiff-petitioners and the road to and from Plot No.291 has been shown, and the 40 feet road was used by the Amin to reach the site and even at that point of time, there was no wall in front of the iron gate of Plot No.291. It was stated that in five other places in Ark City, roads were open with no boundary walls through which people from nearby villages pass. Alongwith the rejoinder affidavit, the information received by the plaintiff-petitioners pursuant to an application filed by them under the Right to Information Act from the Deputy Registrar, Firms, Societies and Chits, Meerut Division, Meerut23 dated 30.10.2019 was also enclosed in which it was stated that the present Board of the Welfare Association is not registered under Section 4(1) of the Societies Act. An affidavit dated 16.12.2019 allegedly sworn by a former President of the Welfare Association was also enclosed in which he affirmed the execution of the NOC.

15. A rejoinder affidavit was filed by the plaintiff-petitioner no.2 on 18.12.2019, in which it was stated that the defendants-

17. While allowing the application for temporary injunction, the trial court refers to the NOC issued in favour of the

plaintiff-petitioners and the affidavit executed by the former alleged President of the Welfare Association. Also referred by the trial court are several documents filed by various other persons of the Board of the Welfare Association in which it was denied that any NOC was issued in 2016 regarding usage of the road belonging to Ark City in favour of the plaintiff-petitioners. The trial court observes that in case a wrong NOC was issued, then the defendant-respondents have not demonstrated what proceedings were initiated against the former President of the Welfare Association. It is observed that conflicting affidavits have been filed with regard to the NOC pertaining to the usage of the road and, therefore, the facts can be determined after evidence. It is then observed that at present the NOC supports the case of the plaintiff-petitioners. The trial court states that there is no Society working with regard to Ark City and some persons of the colony are opposing the usage of the road due to their self-interest. The information supplied by the Deputy Registrar is referred to. The trial court goes on to observe that without registration, the present Board has no authority to question the issuance of NOC by the former President of the Welfare Association. The trial court notices that both parties had filed photographs and in some photographs, a wall is reflected on the 40 feet road and in some photographs it is shown as open and that without evidence, it could not be held that which photographs are correct.

18. With regard to the Amin report, the trial court observes that neither party had filed any objection to that report. It is stated that a perusal of the Amin report makes it clear that on the north side of the Plot No.291, there is a road going through Ark City and a gate is also shown on the 40

feet road from which it can be guessed that the plaintiff-petitioners use that road for coming to their plot from Ark City. It is stated that in his report, the Amin has shown brick 'malba' (debris) on the north of the gate and has also said about the existence of the 40 feet road. The trial court observes that the defendant-respondents have said that the plaintiff-petitioners' land is surrounded by boundary wall and goes on to state that definitely after getting assurance from Welfare Association, the plaintiff-petitioners got a boundary wall constructed on their land and constructed a gate on the north side of that plot for usage of the 40 feet road but at present the defendant-respondents are opposing its usage even though they have not got their Board registered. It is stated that contrary to that, the plaintiff-petitioners had got consent of the Welfare Association to use the 40 feet road as a result of which they got a gate constructed on the 40 feet road and have been using that path to reach and leave their property. It is stated that since the former Board of the Welfare Association had issued an NOC which has not been rescinded by any other Board, therefore, there is a *prima facie* case in favour of the plaintiff-petitioners. It is further held that irreparable injury would be caused to the plaintiff-petitioners if they are not permitted to use the 40 feet road. Accordingly, the temporary injunction was granted that during pendency of the suit, neither the defendant-respondents nor any representative, employee, associate, supervisor or anti-social elements would interfere in the usage of the 40 feet road by the plaintiff-petitioners.

19. Challenging the aforesaid order of temporary injunction, the defendant-respondents filed the appeal. After considering the reply of the plaintiff-

petitioners, the appellate court allowed the appeal and set aside the order dated 15.01.2020 passed by the trial court. The appellate court observed that Plot No.291 is stated to have been owned and occupied by the plaintiffs on the basis of the sale-deed dated 11.08.2016 and the said plot has been shown in the site-map attached with the plaint. Plot No. 291 and Ark City to the north of this land, are separate plots. Plaintiffs have not stated in their application that they have any right/ownership over the property of Ark City, but only in the maps displayed at the end of the plaint it has been stated that they use the 40 feet road located in Ark City. It is observed that according to the plaintiffs, the former owner of Plot No. 291 was also using the 40 feet road. From perusal of a certified copy of the sale-deed dated 11.08.2016 which was filed by the plaintiffs in the trial court, the appellate court observed that the subject matter of the said sale-deed is Plot No. 291 measuring 0.6070 hectares which is agricultural land whose description is mentioned on the page no. 14 of the deed, and that there is no path shown to the north of the said land and nor such path has been mentioned anywhere in the entire sale-deed. It is observed that the sale-deed available on the trial court's record alongwith the revenue map also does not show any such path on the north side of plot no. 291. Contrary to this, the defendants have stated that Ark City is a colony approved by the Development Authority and the wall of Ark City has been constructed on the disputed site, the map of which is approved by the Development Authority. It was stated by defendants that the boundary walls are for the convenience of the residents of Ark City. The appellate court further observed that a copy of the map approved by the Development Authority was filed

alongwith the counter-affidavit on the record of the trial court in which the side boundary of Ark City has been shown in the map, from which it appeared that the 40 feet road ends at the side boundary of the Ark City, that is, it appears to be restricted for the use of the residents of Ark City. It is noted that in the Amin report with map, a brick paved path has been shown to the south of Plot No. 291, from west to east. It is observed by the appellate court that although, the Amin report was available in the trial court's file, the same had not been confirmed, but it is evident from the Amin Report and the map that brick paths are situated to the south and west of plot No.291. Therefore, the statement made by the plaintiffs in paragraph No.5 of the application for temporary injunction, that other than the disputed route, there is no other path to reach Plot No. 291, is *prima facie* not acceptable. It is observed by the appellate court that from the perusal of the file of the trial court, it is also evident that there is no mention of the rights/ground in the application, as to on which basis the plaintiffs are demanding the right of way on the land of the defendants, which does not belong to the plaintiffs, for the gainful use of the land owned by them in Plot No. 291. Whereas, the right to an easement on the path situated in the colony of the defendants, had not been claimed by the plaintiffs. Merely on the ground that the 40 feet road has been used or is stated to have been used by the former owner and that the 40 feet road is also stated to have been used by the plaintiff himself, it is a question of evidence and *prima facie* evidence of any such 40 feet road had not been placed before the trial court by the plaintiffs. It is observed by the appellate court that as far as the NOC is concerned, in this regard, the defendants have clearly denied to have given any such NOC. Then in such a

situation, the evidence of the parties is yet to come in relation to the said NOC. Merely on the basis of the NOC having been issued on the letter pad, *prima facie* no case is found to exist in favour of the plaintiffs and the balance of convenience was also not in favour of the plaintiffs. An FIR against the plaintiffs had been lodged. It is observed by the appellate court that the impugned order of the trial court has been passed mainly on the basis of the NOC and report of the Amin, whereas the evidence of the parties regarding the NOC in question is yet to come before the trial court. It is held by the appellate court that the order of the trial court had been passed on the basis of possibilities contrary to the evidence available on record of the trial court, which is not sustainable. The appeal was accordingly allowed.

20. The contents of the NOC are as under :-

"अनापत्ति प्रमाण पत्र

समिति द्वारा 'आर्कसिटी' कालोनी स्थित ग्राम नंगलाताशी व दायमपुर, दिल्ली-रूढ़की बाईपास रोड़, मेरठ का रख रखाव/मैन्टीनेन्स किया जा रहा है। उक्त कालोनी आर्कसिटी मेरठ विकास प्राधिकरण, मेरठ द्वारा स्वीकृत कालोनी है, जिसका स्वीकृत मानचित्र नम्बर 12/09 दिनांक 29.01.2010 है। कालोनी आर्कसिटी के दक्षिण में खसरा नम्बर 291, ग्राम दायमपुर, परगना व तहसील व जिला मेरठ की भूमि है, जिसके स्वामी श्री चन्द्रवीर सिंह पुत्र श्री सुमेर सिंह व श्री विवके अहलावत पुत्र श्री चन्द्रवीर सिंह निवासी गण डी-137, साकेत, मेरठ शहर है आर्कसिटी के दक्षिण में स्थित में स्थित उक्त खसरा नम्बर 291 की भूमि को उसके स्वामी विकसित करना चाहते हैं तथा उसमें प्लाट्स बनाना चाहते हैं। आर्कसिटी

कालोनी का 12 मीटर चौड़ा मुख्य रास्ता कालोनी के दक्षिण में स्थित अन्तिम प्लाट्स संख्या ए-85 व बी-41 के बीच जाकर समाप्त हो जाता है, जहां पर आर्कसिटी कालोनी की बाउण्ड्रीवाल और उसके उपरान्त दक्षिण में उक्त श्री चन्द्रवीर सिंह आदि की खसरा नम्बर 291 की भूमि है। आर्कसिटी स्थित उक्त 12 मीटर चौड़े रास्ते व उसके साथ बनी नालियों व सीवर लाईन को उक्त चन्द्रवीर सिंह अपनी भूमि से जोड़ना चाहते हैं जिसके लिए उन्होंने आर्कसिटी के डवलपर्स से अनुरोध किया है। तो उन्होंने कहा कि तुम लोग स्वयं इस का निर्णय करोगे इस आधार पर हमने सभी की सहमति से रास्ता प्रदान कर दिया यदि आर्कसिटी कालोनी का 12 मीटर चौड़ा रास्ता दक्षिण स्थित श्री चन्द्रवीर सिंह आदि की भूमि खसरा नम्बर 291 से जोड़ा जाता है जो कभी किसी भी अन्य आदेश पर रास्ता बन्द नहीं किया जायेगा क्योंकि उनका कोई अन्य आने जाने का रास्ता नहीं है तथा उन्हें उक्त रास्ते से आने जाने की सुविधा प्रदान की जाती है तथा रास्ते के साथ लगे सीवर व नाली व बिजली के प्रयोग की अनुमति चन्द्रवीर सिंह आदि को दी जाती है, तो इसमें समिति को कोई आपत्ति नहीं हो और न ही भविष्य में होगी।

चन्द्रवीर सिंह विवके अहलावत द्वारा जो प्लाट्स जिन लोगों को विक्रय किये जायेंगे वह कोई अन्य सोसाईटी नहीं बनायेंगे इसी सोसाईटी से अपना रजिस्ट्रेशन करायेंगे।

दिनांक:- 11.12.2016

हस्ताक्षर अध्यक्ष समिति: हस्ताक्षर सचिव समिति:"

21. In the NOC it is stated that the plaintiff-petitioners want to develop Plot No.291 and to build certain plots thereon; that the plaintiff-petitioners want to join their land to the 12 meters wide road situated in Ark City and also with the drains and sewer lines for which they requested the developer of Ark City, who

then said that decision may be taken by them; on that basis, with the consent of all, the 40 feet road has been provided and the 40 feet road would not be closed by means of any other order because the plaintiff-petitioners have no other path and they are being provided with the benefit of using the 40 feet road and permitted to use the sewer, the drains and electricity, and, in this regard, the Welfare Association would have no objection in the present or in future. It is further mentioned in the NOC that in respect of the plots which would be sold by the plaintiff-petitioners, those third parties will not form any other society but would be registered in the Welfare Association itself.

22. It is not in dispute that the 40 feet road is part of the sanctioned plan of the Development Authority in respect of Ark City. The plaintiff-petitioners are claiming their right of its usage on the basis of an alleged grant that flows from the NOC. Given the dispute being raised by the defendant-respondents, the grant has to be proved by evidence before the court can give its imprimatur to the existence of the alleged easement by grant.

23. Learned counsel for the plaintiff-petitioners has relied upon the judgment of the Supreme Court in the case of **Hero Vinoth** (supra), to contend that an easement by way of grant does not get extinguished even though another passage is available to the dominant owner. However, in that case, the Supreme Court was considering a Civil Appeal that arose from a judgment of a High Court in second appeal, that is to say, after the trial and regular first and second appeals had concluded, and not a matter arising out of an application for temporary injunction.

The Supreme Court has observed as follows:-

“25. In the case at hand the High Court found that the approach of the trial court and the first appellate court was erroneous inasmuch as they proceeded on the basis as if it is a case of easement of necessity. **Had the trial court and the first appellate court considered the evidence in the light of the respective stands of the parties and then concluded one way or the other, the position would have been different.** When the approach was fundamentally wrong the High Court cannot be faulted for having gone into the question as to what was the proved intention of the party as culled out from the partition deed. The relevant (translated) portion reads as follows:

“Aravamutha Chettiar commonly enjoy the well situate on the portion allotted to Purushothaman Chettiar, likewise Purushothaman Chettiar commonly enjoy the lane situate on the portion allotted to Aravamutha Chettiar. Well is the exclusive property of Purushothaman Chettiar and lane is the exclusive property of Aravamutha Chettiar.”

26. Though an attempt was made by learned counsel for the appellant to contend that the quoted portion was only the preamble and not the intention of the parties, the same is clearly untenable. Earlier to the quoted portion it has been noted as follows:

“As per the above arrangement we decided to enter into the partition deed and hence we are writing this partition deed. We should take possession of our respective shares and enjoy the same uninterruptedly forever.”

27. Therefore, there is no manner of doubt that the intention was clear that it

was a grant and not an easement of necessity which could be extinguished.

28. The question whether an easement is one acquired by grant (as contrasted from an easement of necessity) does not depend upon absolute necessity of it. It is the nature of the acquisition that is relevant. Many easements acquired by grant may be absolutely necessary for the enjoyment of the dominant tenement in the sense that it cannot be enjoyed at all without it. That may be the reason for the grant also. But easement of grant is a matter of contract between the parties. In the matter of grant the parties are governed by the terms of the grant and not by anything else. Easement of necessity and quasi-easement are dealt with in Section 13 of the Act. The grant may be express or even by necessary implication. In either case it will not amount to an easement of necessity under Section 13 of the Act even though it may also be an absolute necessity for the person in whose favour the grant is made. Limit of the easement acquired by grant is controlled only by the terms of the contract. If the terms of the grant restrict its user subject to any condition the parties will be governed by those conditions. Anyhow the scope of the grant could be determined by the terms of the grant between the parties alone. When there is nothing in the term of the grant in this case that it was to continue only until such time as the necessity was absolute; in fact even at the time it was granted, it was not one of necessity. If it is a permanent arrangement uncontrolled by any condition, that permanency in user must be recognised and the servient tenement will be recognised and the servient tenement will be permanently burdened with that disability. Such a right does not arise under the legal implication of Section 13 nor is it extinguished by the statutory provision under Section 41 of the Act which is applicable

only to easement of necessity arising under Section 13.

29. An easement by grant does not get extinguished under Section 41 of the Act which relates to an easement of necessity. An easement of necessity is one which is not merely necessary for the reasonable enjoyment of the dominant tenement, but one where dominant tenement cannot be used at all without the easement. The burden of the servient owner in such a case is not on the basis of any concession or grant made by him for consideration or otherwise, but it is by way of a legal obligation enabling the dominant owner to use his land. It is limited to the barest necessity however inconvenient it is irrespective of the question whether a better access could be given by the servient owner or not. When an alternate access becomes available, the legal necessity of burdening the servient owner ceases and the easement of necessity by implication of law is legally withdrawn or extinguished as statutorily recognised in Section 41. Such an easement will last only as long as the absolute necessity exists. Such a legal extinction cannot apply to an acquisition by grant and Section 41 is not applicable in such case.”(emphasis supplied)

24. As noted above, in view of the objections filed by the defendant-respondents to the application for temporary injunction, the very existence of the NOC, which document, the plaintiff-petitioners are claiming to be a grant of an easementary right, is under a cloud and it is matter of evidence whether there was a valid grant. Therefore, no benefit of that judgment can be derived by the plaintiff-petitioners.

The alleged NOC reflects permission for usage of the 40 feet road, the sewer, drain and electricity lines but the plaintiff

case is that plot no.291 is being used for agriculture purposes and there is no averment therein of any proposed or existing plotting activity, despite the NOC being mentioned in the plaint.

25. Learned counsel for the plaintiff-petitioners has relied upon several judgments to contend that for want of any objection to the Amin Commissioner's report by the opposite parties, it cannot be said that the courts erred in relying upon the report of the Amin Commissioner. It is noted that the Amin was a court Amin who was appointed by the court pursuant to an application for the purpose moved by the plaintiff-petitioners. Moreover, the Amin Commissioner's report is yet to be proved. It may always be open to the parties to file objection to the Amin Commissioner's report unless it is at a belated stage and would be subject to any order of the trial court. It does not appear that a written statement has been filed by the defendant-respondents. It is an early stage in the suit.

26. Be that as it may, the plaintiff-petitioners are relying on the report of the Amin Commissioner. In the case at hand, as is evident from the order of the trial court, the trial court has selectively referred to one part of the report of the Amin Commissioner, that is to say with regard to the 40 feet road existing on the north side of Plot No.291 and has, strangely, not referred to the paths shown as existing on the west and south side of the Plot No.291. The map enclosed with the Amin Commissioner's report reflects a path and an access from the western side of Plot No.291 that is shown perpendicular to the boundary wall of Plot No.291 marked as A, B. It also reflects a path existing on the south side of Plot No.291 that is alongside the boundary wall of Plot No.291 marked

as A, D. With regard to the contention of the learned counsel for the plaintiff-petitioners that the path shown on western side of plot no.291 leads nowhere, it is noted that neither is there any such averment in the plaint nor in the affidavits filed by the plaintiff-respondents. The plaint is completely silent about the existence of any alternate routes which are reflected in the report of the Amin Commissioner. The aforesaid report also shows brick debris lying on the north side of plot no.291 in front of an iron gate belonging to the plaintiff-petitioners.

27. It is not disputed by the plaintiff-petitioners that the provisions of the Apartment Act are applicable to Ark City, which is managed by a Welfare Association, and the plans of Ark City are sanctioned by the Development Authority. In the Apartment Act, the following terms, inter alia, are defined in Section 3, which are :-

“....

(b) “**apartment**” means a part of any property, intended for any type of independent use, including enclosed spaces located on one or more floors or any part or parts thereof, in a building to be used for residential or official purposes or for the purpose of practicing any profession, or for carrying on any occupation, trade or business (excluding shopping malls, multiplexes and commercial complexes which are maintained as single unit by the promoter or the maintenance agency) or for such other use as may be prescribed, and with a direct exit to a public street, road or to a common area leading to such street, road and includes any Parking space, or room (whether or not adjacent to the building in which such apartment is located) provided by the promoter for use

by the owner of such apartment for parking or, as the case may be, for the residence of any domestic aide employed in such apartment;

.....

(d) "**apartment owner**" means the person or persons owning an apartment or the promoter or his nominee in case of unsold apartments and an undivided interest in the common areas and facilities appurtenant to such apartment in the percentage specified in the Deed of Apartment and includes the lessee of the land on which the building containing such apartment has been constructed, where the lease of such land is for a period of thirty years or more;

(e) "**association of apartment owners**" means all the owners of the apartments therein, acting as a group in accordance with the bye-laws;

(f) "**board**" means the Board of Management of an Association of Apartment Owners elected by its members under the bye-laws;

(g) "**building**" means a building constructed on any land, containing four or more apartments, or two or more buildings in any area designated as a block, each containing two or more apartments with a total of four or more apartments in all such buildings;

Provided that an independent house constructed in a row with independent entry and exit, whether or not adjoining to other independent houses, shall not constitute a building.

(h) "**bye-laws**" means the bye-laws made under this Act;

(i) "**common areas and facilities**" means—

(i) the land on which the building is located and all easements, rights and appurtenances belonging to the land and the building;

(ii) the foundations, columns, girders, beams, supports, main walls, roofs/terraces and halls of common use, corridors, lobbies, stairs, stairways, fire-escapes and entrances and exits of the building.

(iii) The basements (area of common use only), cellars, yards, parks, gardens, community centers and common parking areas;

(iv) the premises for the lodging of janitors or persons employed for the management of the property;

(v) installations of central services, such as, power, light, gas, hot and cold water, heating, refrigeration, air conditioning, incinerating and sewerage;

vi) the elevators, tanks, pumps, motors, fans, cable pipe line (TV, gas, electricity etc.) rain water harvesting system, compressors, ducts and in general all apparatus and installations existing for common use;

(vii) such other common areas and community facilities as may be specified in the bye-laws; and;

(viii) all other parts of the property necessary or convenient to its existence, maintenance and safety, or normally in common use;

.....

(l) "**competent authority**" means any person or authority authorised by the government by notification to perform the functions of the competent authority under this Act for such areas as may be specified in the notification;

.....

(x) "**property**" means the land, the building, and all improvements and structures thereon, and all easements, rights and appurtenances belonging thereto, and all articles of personal property intended for use in connection therewith, which have been, or are intended to be submitted to the provisions of this Act;"

28. Chapter III of the Apartment Act deals with the rights and obligations of the apartment owners. Sections 5 and 6 read as under:-

“5. Rights of Apartment Owners.- (1) Every person to whom any apartment is sold or otherwise transferred by the promoter shall subject to the other provisions of this Act, be entitled to the exclusive ownership and possession of the apartment so sold or otherwise transferred to him.

(2) Every person who becomes entitled to the exclusive ownership and possession of all apartment shall be entitled to such percentage of undivided interest in the common areas and facilities as may be specified in the Deed of the Apartment and such percentage shall be computed by taking, as a basis, the area of the apartment in relation to the aggregate area of all the apartments of the building.

(3)(a) The percentage of the undivided interest of each apartment owner in the common areas and facilities shall have a permanent character, and shall not be altered without the written consent of all the apartment owners and approval of the competent authority.

(b) The percentage of the undivided interest in the common areas and facilities shall not be separated from the apartment to which it appertains and shall be deemed to be conveyed or encumbered with the apartment, even though such interest is not expressly mentioned in the conveyance or other instrument.

(4) The common areas and facilities shall not be transferred and remain undivided and no apartment owner or any other person shall bring any action for partition or division of any part thereof, and any covenant to the contrary shall be void.

(5) Each apartment owner may use the common areas and facilities in accordance with the purposes for which they are intended without hindering or encroaching upon the lawful rights of the other apartment owners.

(6) The necessary work relating to maintenance, repair and modification or relocation of the common areas and facilities and the making of any additions or improvements thereto, shall be carried out only in accordance with the provisions of this Act and the bye-laws.

(7) The Association of the Apartment Owners shall have the irrevocable right, to be exercised by the Board or Manager to have access to each Apartment from time to time during reasonable hours for the maintenance, repairs or replacement of any of the common areas or facilities therein, or accessible there from, or for making emergency repairs therein necessary to prevent damage to the common areas and facilities or to any other apartment or apartments.

6. Obligation of Apartment Owners- (1) Each apartment owner shall comply strictly with the bye-laws and with the covenants, conditions and restrictions set forth in the Deed of Apartment, and failure to comply with any of them shall be a ground for action to recover sums due for damages, or for injunctive relief, or both, by the Manager or Board on behalf of the Association of the Apartment Owners or in a proper case, by an aggrieved apartment owner.

2) No apartment owner shall do any work which would be prejudicial to the soundness or safety of the property or reduce the value thereof or impair any easement or hereditament or shall add any material structure or excavate any additional basement or cellar or alter the

external facade without first obtaining the consent of all the apartment owners.

Explanation: In this section, reference to the apartment owners shall be construed, in relation to a building in any block, pocket or other designated area, the apartment owners of the concerned building in such block, pocket or other designated area.”

29. Chapter VI of the Apartment Act deals with an association of apartment owners and bye-laws for the registration of the affairs of such association. Section 14 reads as under:-

“14. Association of apartment owners and bye-laws relating thereto. -

(1) There shall be an Association of Apartment Owners for the administration of the affairs in relation to the apartments and the property appertaining thereto and for the management of common areas and facilities :

Provided that where any area has been demarcated for the construction of buildings, whether such area is called a block or pocket or by any other name, there shall be a single Association of Apartment Owners in such demarcated area.

(2) It shall be the joint responsibility of the promoter and the apartment owners to form an Association. The Promoter shall get the Association registered when such numbers of apartments have been handed over to the owners which are necessary to form an association or 60% of apartments, whichever is more, by way of sale, transfer or possession, provided the building has been completed along with all infrastructure services and completion certificate obtained from the concerned local authority:

Provided that in case of an independent area or and independent commercial area the promoter may form a separate Association for its management, if required.

(3) In a case, where an association of the apartments owners of a building has not been formed, on the intended date of execution of a deed of apartment in favour of prospective apartment owner, it shall be obligatory for a prospective apartment owner to become member of the association within a period of 4 weeks on receipt of a written intimation about the formation of such association.

(4) Where an association of an apartment owners exist on the intended date of transfer of an apartment, it will be obligatory for the prospective apartment owner to become member of such association before execution of a deed of an apartment in his favour.

(5) On formation of the Association of the Apartment Owners under sub-section (2) above, the management of the affairs of the apartments regarding their common areas and facilities shall be deemed to be transferred from the promoter to the Association, which shall thereupon maintain them:

Provided that, till all the apartments are sold or transferred, the promoter shall proportionately share the maintenance cost of common areas and facilities:

Provided further that the amount collected by the promoter towards interest free maintenance security shall be transferred to the association at the time of handing over the common areas and facilities.

(6) The Government may by notification in the gazette frame model bye-

laws in accordance with which property referred to in subsection (1) shall be administered by the Association of Apartment Owners and the Association shall, at its first meeting, make its byelaws in accordance with the model bye-laws so framed, and in making its bye-laws the Association of Apartment Owners shall not make any departure from, variation of, addition to, or omission from, the model bye-laws aforesaid except with the prior approval of the competent authority.

(7) The model bye-laws framed under sub-section (6) shall provide for the following, among other matters, namely:

(a) the manner in which the Association of Apartment Owners is to be formed;

(b) the election, from among apartment owners, of a Board of Management by the members of the Association of Apartment Owners;

(c) the number of apartment owners constituting the Board, the composition of the Board and that one-third of members of the Board shall retire annually;

(d) the powers and duties of the Board;

(e) the honorarium, if any, of the members of the Board;

(f) the method of removal from office of the members of the Board;

(g) the powers of the Board to engage the services of a Manager;

(h) delegation of powers and duties of the Board to such Manager;

(i) method of calling meetings of the Association of Apartment Owners and the numbers of the members of such Association of Apartment Owners;

(j) election of a President of the Association of Apartment Owners from amongst the apartment owners, who shall

preside over the meeting of the Board and of the Association of Apartment Owners;

(k) election of a Secretary to the Association of Apartment Owners from among the apartment owners, who shall be an *ex-officio* member of the Board and shall keep two separate minutes books, one for the Association of the Apartment Owners and the other for the Board, pages of each of which shall be consecutively numbered and authenticated by the President of the Association of the Apartment Owners, and shall record, in the respective minutes books, the resolutions adopted by the Association of the Apartment Owners or the Board, as the case may be;

(l) election of a Treasurer from among the apartment owners, who shall keep the financial records of the Association of Apartment Owners as also of the Board;

(m) maintenance, repair and replacement of the common areas and facilities and payment therefor;

(n) manner of collecting from the apartment owners or any other occupant of the apartments, share of the common expenses;

(o) resignation and removal of persons employed for the maintenance, repair and replacement of the common areas and facilities;

(p) restrictions with regard to the use and maintenance of the apartments and the use of the common areas and facilities, as may be necessary to prevent unreasonable interference in the use of each apartment and of the common areas and facilities by the several apartment owners;

(q) any matter which may be required by the Competent Authority to be provided for in the bye-laws for the proper or better administration of the property;

(r) such other matters as are required to be, or may be, provided for in the bye-laws.

(8) The bye-laws framed under sub-section (6) may also contain provisions, not inconsistent with this Act:

(a) enabling the Board to retain certain area of the building for commercial purposes and to grant lease of the areas so retained, and to apply the proceeds of such lease for the reduction of the common expenses for maintaining the building, common areas and facilities, and if any surplus is left after meeting such expenses, to distribute such surplus to the apartment owners as income;

(b) relating to the audit of the accounts of the Association of Apartment Owners and of the Board, and of the administration of the property;

(c) specifying the times at which and the manner in which annual general meetings and special general meetings of the Association of Apartment Owners shall be held and conducted;

(d) specifying the time at which and the manner in which, the annual report relating to the activities of the Association of Apartment Owners shall be submitted;

(e) specifying the manner in which the income derived and expenditure incurred by the Association of Apartment Owners shall be dealt with or as the case may be, accounted for.”

30. Chapter VIII of the Apartment Act deals with miscellaneous matters and Section 24 reads as under:-

“24. Act to be binding on apartment owners, tenants etc. - (1) All apartment owners, tenants of owners, employees of owners and tenants, or any other person who may, in any manner, use the property or any part thereof to which

this Act applies, shall be subject to the provision of this Act and the bye-laws and the rules made thereunder :

Provided that, nothing contained in this sub-section shall effect the right, title or interest acquired by any allottee or other person in common areas and facilities from any promoter on or before the date of commencement of this Act.

(2) All agreements, decisions and determinations lawfully made by the Association of Apartment Owners in accordance with the provisions of this Act and the bye-laws shall be deemed to be binding on all apartment owners.”

31. The control of the State Government for the efficient administration of the Apartment Act is provided in Section 27 thereof. Sections 31 of the Apartment Act reads as follows:-

“31.Overriding effect of this Act.- (1) The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

(2) Save as otherwise, expressly provided in sub-section (1) the provisions of this Act, shall be in addition to, and not in derogation of any other law for the time being in force.”

32. Thus, an association of apartment owners is required to be constituted under the provisions of the Apartment Act and would remain subject to the provisions of the Apartment Act. However, registration of association of apartment owners is governed by the provisions of the Societies Act as held by two division bench decisions of this court in:- (i) **M/s. Designarch Infrastructure Pvt. Ltd. and another v. Vice Chairman, Ghaziabad Development Authority and others**24, and, (ii)

Management Board, Windsor Park Residents Welfare Association v. State of U.P. and others²⁵.

33. As is evident from the definition of 'common areas and facilities' existing in clause (i) of Section 3, the definition is wide enough to cover the 40 feet road. Sub-section (2) of Section 24 of the Apartment Act provides for all agreements, decisions and determinations **lawfully made** by the association of apartment owners in accordance with the provisions of the Apartment Act and the bye-laws shall be deemed to be binding on all the apartment owners.

34. The various rights of the apartment owners specified in Section 5 of the Apartment Act include entitlement to such percentage of undivided interest in the common areas and facilities as may be specified in the deed of the apartment. The percentage of the undivided interest of each apartment owner in the common areas and facilities shall have a permanent character, and shall not be altered without the written consent of all the apartment owners and approval of the competent authority. The percentage of the undivided interest in the common areas and facilities shall not be separated from the apartment to which it appertains and shall be deemed to be conveyed or encumbered with the apartment, even though such interest is not expressly mentioned in the conveyance or other instrument. The common areas and facilities shall not be transferred and remain undivided and no apartment owner or any other person shall bring any action for partition or division of any part thereof, and any covenant to the contrary shall be void. Each apartment owner may use the common areas and facilities in accordance with the purposes for which they are

intended without hindering or encroaching upon the lawful rights of the other apartment owners.

35. In the present case, the plaintiff-petitioners are claiming the right of permissive usage of the 40 feet road by way of a grant. Therefore, for such a decision to be binding on all apartment owners, it has to be demonstrated that the decision was taken by the association of apartment owners in a regularly summoned meeting in accordance with the Apartment Act and bye-laws and after due deliberation, the resolution having carried through. This would assume importance in view of the strong denial made by the defendant-respondents in their objections filed to the temporary injunction. And, particularly, in the light of the undivided interest of each apartment owner in the common areas and facilities that are mandated to have a permanent character, and which shall not be altered without the written consent of all the apartment owners and approval of the competent authority.

36. At this stage, it is relevant to quote the provisions of Section 2 of the Indian Easements Act, 1882²⁶, which are as under :-

“2. Saving.- Nothing herein contained shall be deemed to affect any law not hereby expressly repealed; or to derogate from—

(a) any right of the Government to regulate the collection, retention and distribution of the water of rivers and streams flowing in natural channels, and of natural lakes and ponds, or of the water flowing, collected, retained or distributed in or by any channel or other work constructed at the public expense for irrigation;

(b) any customary or other right (not being a license) in or over immovable property which the Government, the public or any person may possess irrespective of other immovable property; or

(c) any right acquired, or arising out of a relation created, before this Act comes into force.” (*Emphasis supplied*)

37. Given the opening line of the aforesaid Section 2 of the Easements Act, its provisions would not affect any law that is in force. Therefore, the Apartment Act would not be affected by the Easements Act. Thus, the provisions of the Easements Act would have no bearing on the statutory rights of apartment owners under the provisions of the Apartment Act and the rules and bye-laws made thereunder. In any view of the matter, given the provision of Section 31 of the Apartment Act, which provides for its overriding effect, any inconsistencies in the Easements Act with the Apartment Act, would stand overridden by the provisions of the Apartment Act. The provisions of sub-section (2) of Section 31 of the Apartment Act would not inure to the benefit of the plaintiff-petitioners in respect of any claim they may set up under the Easements Act which is inconsistent with the Apartment Act.

38. The decision of the trial court noted above, is fraught with illegalities and arbitrariness. Instances include the fact that a part of the Amin Commissioner's report has been relied upon for purpose of grant of injunction and the other parts have been overlooked. Further, the trial court has referred to the affidavit filed by the alleged former President, Sudhir Verma, and has observed that in case a wrong NOC was issued by the former President, then what action was taken against him has not been specified by the defendant-respondents. The

trial court was apparently searching for weaknesses in the case of defendant-respondents to grant temporary injunction to the plaintiff-petitioners, rather than considering the own case of the plaintiff-petitioners set up in the application for temporary injunction. The trial court seems to have lost sight of the fact that the property of Ark City is distinct from plot no.291 having separate ownership.

39. Further, the trial court has referred to the documents procured by the plaintiff-petitioners under the Right to Information Act from the office of the Deputy Registrar, Firms, Societies and Chits, which allegedly show that the Board of the Welfare Association is not registered and, therefore, the present Board has no authority to question the NOC issued in favour of the plaintiff-petitioners. In my opinion, such an observation is completely arbitrary and illegal, as on coming to such a finding, the first question that ought to have arisen was whether the suit would be defeated for non-joinder of necessary parties.

40. It is pertinent to mention here that, apparently, the plaintiff-petitioners have not obtained any sanctioned lay-out plan from the Development Authority for carving out plots over plot no.291 for selling to third parties. But, they are demanding access to the amenities and facilities of Ark Society including membership of third parties in the Welfare Association on the basis of the alleged NOC that purports to provide all facilities and amenities to the plaintiff-petitioners in aid of plotting and sale of the plot No.291. Such a conduct cannot entitle the plaintiff-petitioner to any indulgence of this court in exercise of equity jurisdiction.

41. The aforesaid discussion on the Apartment Act and the Easements Act, and

the interplay of these enactments has been necessitated in the facts and circumstances of the present case.

42. The impugned order passed by the appellate court dated 28.02.2023 is based on cogent reasons and deserves no interference under the facts and circumstances of the case. The defendant-respondents are entitled to maintain the boundary wall of Ark City in accordance with the plan sanctioned by the Development Authority.

43. In view of the facts and circumstances mentioned above, the impugned order of the appellate court dated 28.02.2023 calls for no interference in this petition.

44. This petition is, accordingly, dismissed.

(2023) 8 ILRA 548

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 26.05.2023

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE VIPIN CHANDRA DIXIT, J.

Writ - C No. 26767 of 2010
Alongwith other connected cases

Kamal Sharma **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:

Sri K.M. Misra, Sri P.K. Chaurasia, Sri Anil Kumar Shukla, Sri Prem Chandra Saroj, Ms. Sarita Jhingan Shukla, Sri Anil Kumar Mehrotra, Sri Pankaj Dubey

Counsel for the Respondents:

C.S.C., Sri Pranjal Mehrotra, Sri Ramendra Pratap Singh, Sri Suresh Singh, Sri Kamaljeet Singh, Sri Aditya Bhushan Singhal, Sri Shashi Prakash Rai, Sri Manish Goyal (Sr. Advocate)

(A) Civil Law - The Land Acquisition Act, 1894 - Sections 4, 6, 5-A & 17(1), The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 - Section 24(1)(a), Constitution of India, 1950 - Article 13(3)(a), 14, 19, 21, 31, 31-A, 31-C, 39(b) & (C), 300-A, Article 226 - power of judicial review - objective assessment - subjective consideration - cases where the order is based on subjective satisfaction, consideration of irrelevant or non-existent material becomes fatal and vitiates the order itself .(Para -148,149)

Acquisition of lands of nine villages - initiated by State Government - under Land Acquisition Act - notifications published under Section 4 and 6 read with Section 17(1) and (4) of the Act - quashing of acquisition notifications - purpose of acquisition - 'planned development through Yamuna Expressway Industrial Development Authority' - ground of challenge - invocation of urgency clause to dispense with enquiry under Section 5-A of the Act' - denial of opportunity of hearing to tenure holders/land holders - resulted in deprivation of valuable rights of tenure holders/land holders - exercise of acquisition arbitrary and illegal. **(Para -2,3,4)**

HELD:-No infirmity in the acquisition process. Invocation of urgency under Section 17(4) for dispensation of enquiry under Section 5-A of the Land Acquisition Act, 1894 is not fatal to the acquisitions-in-question. Turned down the challenge to the acquisition notifications under Sections 4 and 6 of the Land Acquisition Act, 1894 read with Section 17(1) and (4) of the Land Acquisition Act, 1894. **(Para -229)**

Petitions dismissed. (E-7)

List of Cases cited:-

1. Radhy Shyam (D) Thr. Lrs & ors. Vs St. Of U.P. & ors, 2011(5) SCC 553
2. Dev Sharan & ors. Vs St. of U.P. & ors., 2011 (4) SCC 769
3. H.P.C.L. Vs Darius Shahpur Chennai & ors. , 2005 (7) SCC 627
4. Devendra Kumar Tyagi Vs St. of U.P., (2011) 9SCC 164
5. Devendra Singh & ors. Vs St. of U.P. & ors , 2011 (9) SCC 551
6. Darshan Lal Nagpal & ors. Vs Govt.Of Nct Of Delhi & ors , 2012 (2) SCC 327
7. Narayan Govind Gavate Vs St. of Maha., 1977 (1) SCC 133
8. Anand Singh Vs St. of U.P. , 2010 (11) SCC 242
9. Hamid Ali Khan (D) Thr. Lrs. Vs St. Of U.P & ors. , 2021 SCC Online SC 1115
10. Ram Singh & anr. Vs St. of U.P. & ors. , 2012 (3) ADJ 588
11. Shyoraj Singh & ors. Vs St. of U.P. & ors. ,2017 (Sup) ADJ 558
12. Greater Noida Vs Devendra Kumar & ors. , 2011(6) ADJ 480
13. Rajeev & ors. Vs St. of U.P. , 2019 (9) ADJ 621
14. Munshi Singh Vs U.O.I. & ors. , AIR 1973 SC 1150
15. Nand Kishore Gupta & ors. Vs St. of U.P. & ors.,Writ Petition No. 31314 of 2009
16. Balbir Singh Vs St. of U.P. & ors., Writ Petition No. 48978 of 2008
17. Nand Kishore Gupta Vs St. of U.P. & ors. , 2010 (10) SCC 282
18. Narendra Road lines Ltd. Vs St. of U.P. & ors. , 2010 (7) ADJ 329
19. Kedarnath Yadav case , 2017 (11) SCC 601
20. Dharmendra & ors. Vs St. of U.P. & ors. , PIL No. 40484 of 2012
21. M.D.J.M.I.R.C. Vs Lieutenant Governor, Delhi & ors. , 2017 (13) SCC 458
22. Smt. Manju Lata Agarwala Vs St. of U.P. , 2007 (9) ADJ 447
23. Smt. Varsha Lakhmani Vs Hitesh Wadhva , 2008 SCC online ALL 249
24. I.D.A. Vs Manoharlal & ors. , AIR 2020 SC 1496
25. St. of Karn & anr. etc. Vs Ranganatha Reddy & anr. etc. , AIR 1978 SC 215
26. S.C.M.C. Vs M/s B.C.C.L. & anr., (1983) 1SCC 147
27. St. of T.N. & ors. Vs L. Abu Kavur Bai & ors. , (1984) 1 SCC 515
28. St. of Maha. & anr. Vs Basantibai Mohanlal Khetan & ors. , (1986) 2 SCC 516
29. Anand Singh & anr. Vs St. of U.P. & ors. , (2010) 11 SCC 242
30. Delhi Administration Vs Gurdip Singh Uban & ors. , (2000) 7 SCC 296
31. Nandeshwar Prasad Vs St. of U.P. , AIR 1964 SC 1217
32. Munshi Singh & ors. Vs U.O.I. , (1973) 2 SCC 337
33. U.O.I. & ors. Vs Mukesh Hans, etc. , 2004 (8) SCC 14
34. H.P.C.L. Vs Darius Shapur Chenai & ors., AIR 2005 SC 3520
35. P.T. Munichikkanna Reddy Vs Revamma ,(2007) 6 SCC 59
36. St. of Haryana Vs Mukesh Kumar & ors. ,(2011) 10 SCC 404
37. Babu Ram & anr. Vs St. of Har. & anr. ,(2009) 10 SCC 115

38. Om Prakash & anr. Vs St. of U.P. & ors. ,
(1998) 6 SCC 1

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

39. St. of Punj. & anr. Vs Gurdial Singh & ors. ,
(1980) 2 SCC 471

40. U.O.I. & ors. Vs Praveen Gupta & ors., AIR
1997 SC 170

41. Rajasthan Housing Board & ors. Vs Shri
Kishan & ors. , (1993) 2 SCC 84

42. A.P. Sareen & ors. Vs St. of U.P. & ors. ,
(1997) 9 SCC 359

43. Smt. Manju Lata Agrawal Vs St. of U.P. &
ors. , 2007 (9) ADJ 447 (DB)

44. Sudhir Chandra Agarwala Vs St. of U.P. &
ors. , 2008 SCC Online All 246

45. U.O.I. & ors. Vs Krishan Lal Arneja & ors. ,
AIR 2004 SC 3582

46. First Land Acquisition Collector & ors. Vs
Nirodhi Prakash Gangoli & anr. , AIR 2002 SC
1314

47. Deepak Pahwa Vs Lt. Governor of Delhi &
ors. , AIR 1984 SC 1721

48. Radhy Shyam (Dead) Through LRs. & ors.
Vs St. of U. P. & ors. , (2011) 5 SCC 553

49. Tika Ram & ors. Vs St. of U.P. & ors. ,
(2009) 10 SCC 689

50. M.D.J.M.I.R.C. Vs Lieutenant Governor,
Delhi & ors. , (2017) 13 SCC 458

51. Shyoraj Singh & ors. Vs St. of U.P. & ors. ,
Writ-C No. 30747 of 2010

52. S.I.C.C.L. & ors. Vs St. of U.P. & ors. ,
(2017) 11 SCC 339

53. H.S.I.I.D.C.L. & ors. Vs Mr. Deepak
Aggarwal & ors., [SLP(C) No.16631-
16632/2018]

54. U.O. I. & anr. Vs Mohiuddin Masood & ors. ,
(2020) 14 SCC 760

1. Heard Sri P.K. Chaurasia, Sri Anil Kumar Shukla, Sri Prem Chandra Saroj, Ms. Sarita Jhingan Shukla, Sri Anil Kumar Mehrotra, Sri Pankaj Dubey. No other counsel has appeared to argue on behalf of the petitioners in this Bunch. Sri Manish Goyal, learned Senior Advocate assisted by Sri Kamaljeet Singh, Sri Suresh Singh, Sri Aditya Bhushan Singhal, Sri Shashi Prakash Rai has made his submissions on behalf of Yamuna Expressway Industrial Development Authority. Sri Ajit Kumar Singh, learned Additional Advocate General assisted by Sri Sudhanshu Srivastava, learned Additional Chief Standing Counsel, Sri Amit Verma, Sri Apurva Hajela and Sri D.K. Mishra, learned Standing Counsels for the State respondents has adopted the arguments of Sri Manish Goyal, learned Senior Advocate appearing for the Yamuna Expressway Industrial Development Authority.

2. The present bunch of writ petitions are arising out of the acquisition proceedings initiated by the State Government under the Land Acquisition Act' 1894 (hereinafter referred as the Act' 1894) for acquisition of lands of nine villages vide acquisition notifications published under Section 4 and 6 read with Section 17(1) and (4) of the Act' 1894. A bird's eye view of the status of acquisition of lands of nine villages in tabulation form is as under:-

S. No.	Village	Date of Notification		Total area acquired (as per Award) (Hect.)	Area under litigation (Hect.)	Date of Award	
		U/s 4	U/s 6			U/s 11(1)	U/s 11(2)
1	Usmanpur	04.11.2009	18.3.2010	149.516	31.3521	31.12.2013	23.02.2012
2	Dhanori	16.11.2010	22.3.2011	414.2312	59.8231	31.12.2013	09.05.2012 13.12.2013
3	Kadarpur	02.12.2010	22.3.2011	113.8074	6.0284	30.03.2014	11.04.2012 30.03.2014
4	Rustampur	26.02.2009	26.2.2010	336.1968	53.7582	31.12.2013	20.03.2012 13.12.2013
5	Doongarpur Reelika	02.12.2010	24.3.2011	172.6197	38.6439	31.12.2013	14.03.2012 31.12.2013
6	Raujiya	02.11.2010	07.1.2011	236.686	56.2388	31.12.2013	09.05.2012 21.12.2013
7	Rampur Bangar	26.02.2009	01.2.2010	19.9990	1.1016	15.06.2013	09.02.2012 05.06.2013
		19.04.2010	28.07.2010	100.8183	20.6686	31.12.2013	20.12.2013 25.07.2013 13.03.2012
8	Pachokra	26.02.2009	19.2.2010	41.6525	16.8728	29.06.2013	22.02.2012 29.06.2013
9	Accheja Bujurg	19.04.2010	28.7.2010	197.2842	46.9867	20.12.2013	30.06.2013 20.12.201

I. The Challenge:-

3. The writ petitions have been filed with the main relief of quashing of the acquisition notifications issued under Section 4 and 6 read with Section 17(1) and (4) of the Act' 1894 and the main ground of challenge is the invocation of urgency clause to dispense with the enquiry under Section 5-A of the Act' 1894.

4. Amongst various grounds raised in the writ petitions, only issue pressed before us by the learned counsels for the petitioners was that there was no justification with the State Government for invocation of urgency clause and denial of opportunity of hearing to the tenure holders had resulted in deprivation of valuable rights of the tenure holders, which makes the entire exercise of acquisition arbitrary

and illegal. The purpose of acquisition as stated in the notifications under challenge was 'planned development through Yamuna Expressway Industrial Development Authority', for which urgency clause cannot be invoked in view of the law laid down by the Apex Court in the case of **Radhy Shyam(D) Thr. Lrs & Ors vs State Of U.P.& Ors**1.

5. The question, thus, is as to whether the invocation of urgency clause by the State Government, in the facts and circumstances of the instant writ petition, was an illegal exercise. In an effort to answer this question, we have conducted the hearing village wise and heard learned counsels for the parties on the facts of the acquisition of each village and also perused the original record produced by the State village-wise for each acquisition notification, so as to examine as to whether the exercise of power on the part of the State Government was such which would require interference in exercise of the power of judicial review under Article 226 of the Constitution of India.

6. At the outset, it may be noted that the dispossession of the petitioners from the acquired land had been stayed by this Court at the time of admission while calling for the counter affidavit. Under various interim orders passed by this Court in the writ petitions in this bunch, parties were directed to maintain status-quo. One such order dated 12.05.2010 in Writ-C No. 26767 of 2010 is noted hereinunder:-

“Notices on behalf of respondent no.1,2 and 3 have been accepted by the learned standing counsel and behalf of respondent no. 4 by Sri R.P.Singh learned counsel for the respondents.

Let counter affidavit be filed within a period of two weeks.

List thereafter.

In the meantime parties shall maintain status quo.”

7. The interim order dated 28.09.2011 in Writ C no. 56629 of 2011 is also reproduced hereinunder:-

“Issue notice pending admission.

Notice on behalf of respondent nos. 1 and 2 has been accepted by learned Standing Counsel. Notice on behalf of respondent no. 3 has been accepted by Sri Suresh Singh, learned counsel for the said respondent. Therefore, no notice need to be sent to the respondents.

Counter affidavit on behalf of respondents may be filed within four weeks. Rejoinder affidavit may be filed within three weeks thereafter.

List before appropriate Bench after expiry of the aforesaid period.

Heard on the question of grant of interim relief.

Having regard to the facts and circumstances of the case and having considered the submissions made by learned counsel for the parties, we direct that till the next date of listing, the parties shall maintain status quo as of the date in respect of nature and possession of the property in question.”

II. The arguments of the counsels for the petitioners:-

8. Sri P.K. Chaurasiya and Sri Pankaj Dubey learned Counsels appearing for the petitioners in the bunch of writ petition relating to acquisition notification of Village Pachokra have extended arguments on behalf of the writ petitioners.

9. It was argued by the learned counsels appearing for the petitioners that there was no occasion for the State Government to invoke the urgency clause under Section 17 (1) of the Act to dispense with the enquiry under Section 5-A of the Act' 1894, in as much as, the acquisition notifications for Village Pachokra were dated 26.02.2009 and 19.02.2010 under Section 4 and 6 of the Act' 1894. The above dates themselves demonstrate that about one year time was taken for issuance of the declaration notification after the proposal under Section 4 of the Act was published. There was both pre and post notification delay which is to be taken into account to examine as to whether there was any justification to deprive the tenure holders of their right to file objection against the acquisition of their lands. Only 30 days time from the date of the publication of Section 4 notification is provided under the Act' 1894 to file objection to the acquisition and when the State Government itself had taken one year time to notify the declaration notification under Section 6, there cannot be any justification for dispensation of only 30 days time to file objection on the plea of urgency. This fact is sufficient to disbelieve existence of any urgency.

10. Further, no material was before the State Government to show existence of any unforeseen urgency to invoke the urgency clause under Section 17(4) of the Act to deny the rights of the land holders to file objections. Only 198 tenure holders were affected by acquisition of Village Pachokra for which acquisition notifications were published on 26.02.2009 and 09.02.2010 under Section 4 and 6; respectively. Moreover, the purpose of acquisition as stated in the notification under Section 4 and 6 was that the land was

needed for planned development under Yamuna Expressway Industrial Development Authority (in short 'YEIDA') in District Gautam Budh Nagar. The urgency clause under Section 17(1) can be invoked only in the eventualities which are mentioned in Sub-section (2) of Section 17, i.e. if the immediate possession of the land is needed for the purpose of maintaining any structure or system pertaining to irrigation, water supply, drainage, road communication or electricity, or for reference, or any other unforeseen emergency such as sudden change in the channel of any navigable river. For publication of notice under sub-section (1) of Section 17, invoking urgency clause, previous opinion of the State Government is required. With the invocation of the urgency clause, though no award has been made, possession of the land needed for the public purpose can be taken after 15 days from the publication of notice under Section 9, and on such possession being taken, the land vests absolutely in the State Government free from all encumbrances. The consequence of acquisition by invocation of urgency clause being too harsh, much care and circumspection was required to exercise such power.

11. In the case at hands, the lands of Village Pachokra were to be utilized for commercial and residential purposes and the project has no relevance to the project of construction of Yamuna Expressway. For such development work, which obviously would take sufficient time in the planning and execution, there can be no justification for invocation of urgency though the purpose for which acquisition was made can still be treated as public purpose within the meaning of Section 4.

A. Judgements relied by the counsels for the petitioners:-

(i) Radhy Shyam (supra)

12. Heavy reliance has been placed on the decision of the Apex Court in **Radhy Shyam (supra)** to argue that it was held therein that Section 17(1) read with Section 17(4) confer extraordinary power upon the State to acquire private property without complying with the mandate of Section 5-A. These provisions can be invoked only when the purpose of acquisition cannot brook the delay of even few weeks or months. Therefore, before excluding the application of Section 5-A, the concerned authority must be fully satisfied that time of few weeks or months likely to be taken in conducting inquiry under Section 5-A will in all probability, frustrate the public purpose for which land is proposed to be acquired. It was held therein that the acquisition of land for residential, commercial, industrial or institutional purposes can be treated as an acquisition for public purposes within the meaning of Section 4 but that, by itself, does not justify the exercise of power by the Government under Section 17(1) and/or 17(4). The Apex Court therein had taken judicial notice of the fact that planning, execution and implementation of the schemes relating to development of residential, commercial, industrial or institutional areas usually take few years. It was held that the private property, therefore, cannot be acquired for such purposes by invoking the urgency provision contained in Section 17(1). In any case, exclusion of the rule of *audi alteram partem* embodied in Section 5-A (1) and (2) is not at all warranted in such matters.

13. The Apex Court having taken note of the pre-notification delay of more than one year time taken by the State Government to issue proposal under Section 4 read with Section 17(1) and 17(4) has observed that it was not possible to accept the argument that four to five weeks within which the objections could be filed under Sub-section (1) of Section 5-A and the time spent by the Collector in making inquiry under Sub-section (2) of Section 5-A would have defeated the object of acquisition. The apprehension raised by the respondent therein that delay in the acquisition of land will lead to enormous encroachment was held totally unfounded, noticing that it was beyond comprehension of any person of ordinary prudence to think that the land owners would encroach their own land with a view to frustrate the project of planned industrial development of the district.

14. Post notification delay of about one year, the time consumed between the issuance of the notification Section 4 and 6 was noted to observe that the said delay would demonstrate that the State Government could complete the exercise under Section 5-A and Section 6 both in a shorter period.

15. With the above facts noted from the material on record, it was held therein that the only possible conclusion which could be drawn was that that there was no real and substantive urgency which could justify invoking of the urgency provision under Section 17(1) and, in any case, there was no warrant to exclude the application of Section 5-A.

(ii) Dev Sharan and others versus State of UP and others²

16. Reference had been made to the decision of the Apex Court in **Dev Sharan**

and others (supra) to submit that while answering the question therein whether, in the facts of that case, invoking the urgency clause under Section 17(4) was justified, the Apex Court having noted the post-notification delay, the time elapsed between publication of Section 4(1) and 17 notifications and Section 6 declaration of almost one year, has held that at the slow pace at which the Government machinery had functioned in processing the acquisition, clearly evinced that there was no urgency for acquiring the land so as to warrant invoking of Section 17 (4) of the Act. It was held therein that valuable rights of the tenure holder under Section 5-A of the Act cannot be flattened and steamrolled on the 'ipsi dixit' of the executive authority while quashing the acquisition notification. The decision of the Apex Court in *Hindustan Petroleum Corporation Limited vs. Darius Shahpur Chennai and ors*³ was noted therein [in *Dev Sharan (supra)*] to note that the right which is conferred under Section 5A has to be read considering the provisions of Article 300-A of the Constitution and, such right so construed, should be interpreted as being akin to a Fundamental Right. It was held that the same being the legal position, the procedures which have been laid down for depriving a person of the said right must be strictly complied with.

(iii) Devendra Kumar Tyagi v. State of U.P.⁴,

17. In **Devendra Kumar Tyagi (supra)** post notification delay, the time of nearly two years taken in declaration under Section 6, after issuance of proposal under Section 4 of the Act, 1894 was viewed seriously to hold that the State Government was not justified to invoke urgency provision of Section 17(4) of the Act' 1894.

It was observed that the lackadaisical attitude of the State Government or the lethargy on the part of the official does not exhibit or depict any kind of urgency. The dereliction of responsibility being on the part of the State Government, cannot be equated with urgency contemplated in the Act' 1894. It was argued that expropriatory legislation like the Land Acquisition Act' 1894 must be given strict consideration. Section 5-A is a substantial right and akin to fundamental right which embodies a principle of giving a proper and reasonable opportunity to the land loser to persuade the authorities against the acquisition of their lands which can be dispensed with only in exceptional cases of real urgency and not by side-wind. The decisions of the Apex Court in **Radhy Shyam (supra)** and **Dev Sharan (supra)** were relied to arrive at the above noted conclusion.

(iv) **Devendra Singh & Ors. Vs. State of U.P. & Ors**⁵.

18. In another decision in **Devendra Singh (supra)** it was held that it is well settled that acquisition of land for public purpose, by itself, shall not justify the exercise of power of eliminating enquiry under Section 5-A in terms of Section 17 (1) and Section 17 (4) of the Act. The decisions in **Radhy Shyam (supra)** and **Dev Sharan (supra)** and **Devendra Kumar Tyagi (supra)** were relied to hold therein that the pre-notification delay by itself cannot justify invocation of urgency clause for acquisition, but it only accelerates or increases the urgency of need of acquisition, only in case it already exists in the nature of public purpose. It was held that that the State Government was not justified, in the facts of the said case, to invoke the emergency provision of Section 17(4) of the Act. The land holders could

not have been denied of their valuable right under Section 5-A of the Act.

(v) **Darshan Lal Nagpal & Ors vs Govt.Of Nct Of Delhi & Ors**⁶

19. Reliance has been placed upon the decision of the Apex Court in **Darshan Lal Nagpal (supra)** to submit that the Apex Court therein taking note of a catena of decisions ranging from **Narayan Govind Gavate Vs. State of Maharashtra**⁷ to **Devendra Kumar Tyagi (supra)**, has noted that the acquisition of land by invoking the urgency provisions for the public purposes like, planned residential, commercial, industrial or institutional development has been disapproved in various decisions, noted therein ranging from 1977 to 2011. The judgement of the Apex Court in **Anand Singh Vs. State of UP**⁸, has been considered therein to note that pre and post notification delay will have a material bearing on the question of invocation of urgency power, particularly in a situation where no material has been placed by the appropriate Government before the Court justifying that urgency was of such nature that necessitated elimination of enquiry under Section 5-A. It was argued therein that the decision of the government on the issue of urgency is a condition precedent to the exercise of power under Section 17(1) and the State must exercise this power with greater care and circumspection as compulsory acquisition of land is likely to make the owners landless. Compulsory acquisition of the property belonging to a private individual is a serious matter and has grave repercussions on their Constitutional right of not being deprived of his property without the sanction of law Article 300A and the legal rights. The degree of care required to be taken by the State is greater

when the power of compulsory acquisition of private land is exercised by invoking the provisions of urgency under Section 17 of the Act as it results in depriving the owner of his property without being afforded an opportunity of hearing. Pre-notification delay was held fatal to the invoking of the urgency provision. Reliance was placed upon the decision of the Apex Court in **Radhy Shyam (supra)** therein to hold that there was no justification to dispense with the application of Section 5-A, which represents two facets of the rule of hearing, i.e. the right of the land owner to file objection against the proposed acquisition of land and of being heard in the inquiry required to be conducted by the Collector. The scope of the rule of hearing i.e. *audi alteram partem* was noted to hold that it could not be established that the urgency was such that even few months time, which may have been consumed in the filing of objections by the land owners under Section 5A(1) and holding of inquiry by the Collector under Section 5A(2), would have frustrated the project.

(vi) **Hamid Ali Khan (D) Thr. Lrs. vs State Of U.P & others**⁹.

20. A recent decision of the Apex Court in **Hamid Ali Khan (D) (supra)** has been placed before us to assert that taking note of the above referred decisions, the Apex Court has held therein that the facts considered by the State for invocation of urgency, being specifically within the exclusive knowledge of the State must be laid before the Court on the basis of the principle in Section 106 of the Evidence Act. The challenge to the notification under Section 17(4) must be approached in the matter of discharging the burden of proof. Existence of the exceptional circumstances justifying invoking of Section 17(4) must

be established in the wake of a challenge on an appreciation of the evidence made available by all the parties, it is open to the Court to conclude that no occasion arose for resorting to the power under Section 17 (4) which indeed must be read as an exception to the general rule. The observation in paragraph No. '22' of the said decision has been placed before us, which is relevant to be extracted hereinunder:-

"We may cull out the principles at play. What is required of the authority is to form a subjective opinion. This does not mean that the opinion can be whimsical or capricious. There must be materials before the authority. The materials must be relevant. The authority must apply his mind to the material. This is apart from the requirement that action must not be mala fide. Undoubtedly the purpose must be a public purpose. But merely because the purpose of the acquisition is found to be a public purpose, the duty of the authority does not end. He must be satisfied that there is real agency such that the invaluable right vouchsafed to a person to ventilate his grievances against the acquisition is not unjustifiably extinguished. Section 5A of the Act guarantees a right to the person interested in the property which was the only statutory safeguard to stave off of a compulsory acquisition of his property. The power under Section 17 (4) is discretionary. Being a discretion it must be exercised with due care. It is true that if there is relevant material however meagre it may be and the authority has without being guided by extraneous considerations applied his mind and taken a decision, then the court would adopt a hands-off approach. In the ultimate analysis as with any other decision a balancing of

conflicting interests is inevitable. The authorities must remain alive and alert to the precious right created in favour of the citizens which is not meant to be a mere empty ritual”.

(vii) Narayan Govind Gavate Vs. State of Maharashtra

21. The decision in **Narayan Govind Gavate (supra)** has been read over to vehemently argue that the burden of proving the existence of circumstances which could justify invocation of urgency clause was upon the State. It was held therein that the particular onus of proving facts and circumstances lying especially within the knowledge of the official who formed the opinion which resulted in the notification under Section 17(4) of the Act rests upon that official. The recital in the order or notification, if not defective, may obviate the need to record further. There may be circumstances in the case which impel the Court to look beyond it. And, at that stage, Section 106 Evidence Act can be invoked by the party assailing an order or notification. It is most unsafe in such cases for the official or authority concerned to rests content with non-disclosure of facts especially within his or its knowledge by relying on the substantiality of a recital. Such an attitude may itself justify further scrutiny. It was held that if, in addition to the bare assertions made by the petitioners, that the urgency contemplated by Section 17(4) did not exist, there were other facts and circumstances including the failure of the State to indicate facts and' circumstances which it could have easily disclosed if they existed, the petitioners could be held to have discharged their general onus. Indeed, even if a recital in a notification is defective or does not contain the

necessary statement that the required conditions have been fulfilled, evidence can be led to show that conditions precedent to the exercise of a power' have been actually fulfilled. It must be proved that the mind of the Officer or the Authority concerned had been applied to the question whether there was an urgency of such a nature that even the summary proceedings under Section 5A of the Act should be eliminated. It is not just the existence of an urgency but the need to dispense with an inquiry under Section 5A which has to be considered. It was observed that it offers no difficulty in applying Section 17(4) in public interest and the particulars of what is obviously to be done in public interest need not be concealed when its validity is questioned in a Court of justice. There may arise questions involving consideration of facts which are especially within the knowledge of the authorities concerned, and, if they do not discharge their special burden, imposed by Section 106 Evidence Act, without even disclosing a sufficient reason for their abstention from disclosure, they have to take the consequences which flow from the non-production of the best evidence which could be produced on behalf of the State if its stand was correct.

22. It was, thus, held therein that the provision of Section 106 of the Evidence Act have to be applied to place the burden upon the State to prove those special circumstances, to discharge the burden of disclosure of the attendant facts and circumstances to show that some exceptional circumstances which necessitated the elimination of an enquiry under Section 5-A of the Act were existing and the mind of the Competent

authority/State was applied to this essential question.

(viii) Ram Singh & another Vs. State of U.P. & others¹⁰

23. Reliance has further been placed upon the decision of this Court in **Ram Singh (supra)** to assert that the acquisition notifications under Section 4 and 6 of the Land Acquisition Act were quashed therein taking note that the pre-notification delay will have a material bearing on the question of invocation of urgency powers particularly when no material was produced by the appropriate Government to justify elimination of enquiry envisages under Section 5-A of the Act.

B. Reliance on similar Dispute decided:-

(ix) Shyoraj Singh & others Vs. State of U.P. & others¹¹

24. After making the above noted submissions on the legal principles applicable to examine the question whether invocation of urgency clause, in the facts and circumstances of the case, is justified, it was urged by the learned counsels for the petitioners that in the similar facts and circumstances as that of the instant case, the acquisition notifications of Village Chandpur issued on 26.02.2009 and 19.02.2010 under Section 4 and 6; respectively, by invocation of the urgency clause with the aid of Section 17(1) & 17(4) of the Land Acquisition Act, have been held to be bad.

(a) In the said case, the purpose of acquisition in the acquisition notifications of Village Chandpur, for 'Planned development of the area by

YEIDA', was noted by the Division Bench of this Court in the judgement and order dated 24.04.2017, to hold that the purpose shown in the notification would itself, cannot justify invocation of urgency clause in view of the law laid down by the Apex Court in the case of **Radhy Shyam (supra)**. Further, the Court having gone through the original records pertaining to the notification in question had held therein that the grounds mentioned in the reports of the authorities placed on record, for recording satisfaction for invoking the power under Section 17 of the Land Acquisition Act, for dispensing with the enquiry contemplated under Section 5-A of the said Act that:- (a). there were chances of unauthorised occupations/encroachment of the land; (b). large number of farmers would be affected by the acquisition and hearing of such large number of farmers would delay the project, were untenable.

It was further noted that the period of nearly one year taken in the publication of Section 6 notification after the proposal under Section 4 was published itself was sufficient to return a finding that there was absolutely no urgency which could have justified the invoking of power under Section 17 of the Act' 1894, so as to deprive the farmers of an opportunity of hearing under Section 5A.

It is, thus, argued by the learned counsels for the petitioners herein that the findings returned by this Court in the aforesaid decision for discarding the justification given by the State for dispensation of enquiry under Section 5-A, are binding on this Court being a Co-ordinate Bench of the same Court. As in the similar facts and circumstances, a decision has already rendered by another Division Bench holding the notifications under Section 4 and 6 of the Land Acquisition Act as bad, this Court may not reach at any

contrary opinion. Following binding precedent of the Co-ordinate bench of this Court, the acquisition notifications, in the instant bunch, pertaining to nine villages published between November 2009 to March 2011, cannot but be held to be bad for invoking the power under Section 17(1) and 17(4) of the Act, 1894, without any material to justify the denial of hearing to the land holders.

Further, on the operative portion of the order in **Shyoraj Singh (supra)** wherein the Court did desist from quashing the acquisition notifications, it was argued that the ultimate relief granted therein of providing higher compensation under the provision of Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act' 2013, treating the date of the decision of the Writ Court as the date of acquisition, may not be followed, in as much as, with respect to the acquisitions before us, much development has not been carried out by the YEIDA subsequent to the acquisition notifications. It is vehemently argued that the petitioners are not interested in taking higher compensation, rather they want their land/property back, as most of them are having their dwelling units wherein they are residing with their families.

(b) Similar judgments of this Court dated 29.05.2017, deciding Writ-C No. 46776 of 2010 with respect to the acquisition notifications dated 26.02.2009 and 01.02.2010 under Section 4 and 6 of the Act' 1894, pertaining to Village Rabupura; the judgment and order dated 22.12.2016 in Writ C No. 56451 of 2011 (**Kunwar Shlivahan Singh and others Vs. State of U.P. & others**) connected with other 68 petitions challenging acquisition notifications dated 13.5.2010 and 28.07.2010 under Section 4 and 6 of the Act' 1894 pertaining to Village Mirzapur;

the judgement and order dated 22.11.2016 in Writ-C No. 44741 of 2010 (**Harpal Singh And Anr. Vs. State Of U.P. And Others**) challenging acquisition notifications dated 26.2.2009 and 01.02.2010 under Section 4 and 6 of the Act' 1894 pertaining to Village Niloni Shahpur, have been placed before us to argue that once this Court decided that invocation of urgency clause with the help of Section 17(1) and 17(4) of the Act' 1894, in the similar facts and circumstances as that of the instant cases, was bad in law, no further deliberation in the instant matter is required. All the writ petitions deserve to be allowed in light of the above noted decisions of this Court and the acquisition notifications under challenge are liable to be quashed.

C. Aid to the above arguments by other counsels in the bunch:-

26.

(i) Some of the counsels appearing for the writ petitioners, however, expressed the wish of the petitioners to whom they represent that the notifications under challenge in their cases be held bad in light of the above noted decisions of this Court in similar acquisitions made by YEIDA, with the help of urgency clause, but if higher compensation be directed to be paid as in the case of **Shyoraj Singh (supra)** to the petitioners, they would be more than satisfied.

On legal principles, the other counsels appearing in the bunch for different villages have adopted the above noted arguments.

(ii) One of the learned counsels for the petitioners Sri Pankaj Dubey has placed the decision of the Apex Court in **Greater Noida Vs. Devendra Kumar & others**¹² to assert that there was lack of

bona-fides on the part of the State Government and the acquiring authority, which is evinced from the fact that Section 17(1) and (4) was invoked without any tangible emergency, which could justify the exercise of power under Section 17(1) and warrant exclusion of the inquiry envisaged under Section 5-A. The decision of this Court in **Ram Singh (supra)**, has been placed to assert that invocation of urgency clause was found bad therein.

(iii) The Division Bench of this Court in **Rajeev & others Vs. State of U.P.**¹³ has been placed to assert that even when this Court found that the challenge to acquisition was for a small piece of land, the Court had examined the validity of the decision of the State for invocation of urgency. It was held therein that mere acceptance of the compensation or transfer of their lands by the tenure holders, would not amount to waiver of rights by such person to challenge the acquisition proceedings. No inference of implied consent or acquiescence can be drawn unless the facts of the individual case are examined. In order to constitute waiver, there must be intentional relinquishment of right to challenge the acquisition. However, in order to balance the equities noticing that the major chunks of lands had been developed and allotted to third-party after possession of the land was delivered to the acquiring authority, balancing the statutory rights of the tenure holders and the rights of allottees, the Court had concluded therein that it would not be in public interest to topple the entire acquisition at the behest of those few petitioners. Without quashing the acquisition, it was directed therein that any of the person interested who had not accepted the compensation as per the Karar Niyamawali and was before the Court in that batch of petitions, notwithstanding the fact that the declaration made under

Section 6 of the Act was held to be bad, would be entitled to the compensation according to the provisions of the Act' 1894 as per the rate prevailing on the date of the judgment as the awards in respect of the acquisition were made under the Act' 1894 before the enforcement of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

Sri Pankaj Dubey learned counsel for the petitioners would lastly submit that the petitioners to whom he is representing, would be satisfied if they are awarded compensation at the market value of the land determined on the date of the judgement in the cases where award had been made during the pendency of this litigation before the enforcement of the Act, 2013. However, in cases where no award has been made, compensation under the Act, 2013 is liable to be determined. It was placed before us the aforesaid decision in **Rajeev (supra)** has been affirmed by the Apex Court vide judgement and order dated 9.5.2022 with the dismissal of the appeal filed by NOIDA, in Civil Appeal No. 3762 of 2022 arising out of Special Leave Petition (C) No.5863 of 2020.

Sri Anil Kumar Shukla learned Advocate for the petitioner in writ petition, no.20716 of 2010 pertaining to the acquired land of Village Usmanpur would submit that the invocation of urgency clause dispensing with enquiry under Section 5-A, in the instant case, cannot be justified as the purpose of acquisition was for planned development, for which there cannot be any urgency.

Reference has been made to the decision of the Apex Court in **Munshi Singh Vs. Union of India & others**¹⁴ to submit that Section 5-A embodies a very just and wholesome principle that a person whose property is being or intended to be

acquired should have an appropriate and reasonable opportunity of persuading the authorities concerned that acquisition of the property belonging to that person should not be made. The legislature has, therefore, made complete provisions for the persons interested to file objection against the proposed acquisition and for the disposal of their objection against the same. It is only in case of urgency that special powers have been conferred on the appropriate Government to dispense with the provision of Section 5-A. The submission is that no such case of urgency could be shown/established by the respondent justifying the invocation of urgency clause.

(iv) Sri Anil Kumar Mehrotra, the learned Counsel for the petitioners appearing in Writ C No.18539 of 2013 of Village Rampur Bangar and Writ Petition No.20716 of 2010 of Village Usmanpur assailing the decision of the State Government for invoking urgency provision under the Act' 1894 would submit that there was pre-notification delay, which is evident from the facts that the proposal for acquisition was sent in the year 2006 by the development authority, three years time had been taken in finalizing the proposal. The land of village Ramapur Bangar was acquired in two phases, the first notification was issued in February-2009 and the second notifications were issued in the year 2010. It was argued that in view of the decision of the Apex Court in **Devendra Singh (supra)**, the pre-notification delay of three years shows that there was no real urgency. The right of the tenure holders to file objection and hearing granted under the Act could not be dispensed with.

Reference has been made to the decision of the Apex Court in **Anand Singh (supra)** to submit that pre and post notification delay would have a material

bearing on the claim of the State justifying invocation of urgency clause. Reference has been made to the decision in **Dev Sharan (supra)** to place observation in paragraph '15' therein to urge that in the context of recent trends in land acquisition, the concept of public purpose has to be viewed from an angle which is consistent with the concept of a welfare State. No material particulars has been placed by the State to justify urgency. The land holdings of the poor villagers had been taken in violation of Article 300-A of the Constitution of India. Burden of proving urgency on the State has not been discharged. The material which was placed by the State in other matter was similar and had been considered by the Division Bench rejecting it as non-existent so as to justify invocation of urgency.

It was urged that in the matter of dispensation of enquiry under Section 5 -A, the law laid down by the Apex Court in **Radhy Shyam (Supra)** holds the field and in view of the law laid down therein in paragraph No. '77', '78', '79', there remains no scope of doubt that in an acquisition for residential purpose, invocation of urgency clause is not permitted. It was argued that it is an admitted case of the respondents in the counter affidavit that the acquired lands would be used for residential purposes.

The attention of the Court is invited to a map appended with the affidavit filed on 15.10.2022 by the appellant at page No. '48' thereof to assert that the contention of the respondent in the counter affidavit that the lands in question is required for the integrated development is misleading, in as much as, plot No. '152' adjacent to the Peripheral Road as indicated in the map at page No. '48' has been allotted to the tenure holders whose land has been acquired under the acquisition for YEIDA. The integrated plan cannot be

executed if the land is being leased out to the villagers. The lands of the other tenure holders had been released on the premise that there exists Rural Abadi site, in view of the Greater Noida Industrial Development Rural Abadi Sites (Management and Regularization) Regulation, 2011 framed by the YEIDA for regularization of Rural Abadi sites. The leaseback policy to regularize Abadi of certain villagers is being practiced as per the whims and fancies of the officers. The development Authority (YEIDA), on the one hand, had acquired the lands of various villagers on the premise that the lands were needed for integrated development of the industrial area under the jurisdiction of the authority and, on the other, by permitting the lease back policy, pick and choose method has been adopted to release lands of certain villagers on the premise that the same were Rural Abadi sites. The malafide intention of the Authority (YEIDA) to grab the agriculture lands and existing Abadi of poor farmers/villagers is writ large on the face of the record.

About the scope of inquiry under Section 5- A of the Act, 1894, it was argued by Sri Mehrotra that the proceeding of the inquiry under Section 5-A is a quasi-judicial proceeding which requires application of mind on each and every objection of the tenure holders, including that the land is not required for the purpose stated in the acquisition notification. Inspection can be directed to ascertain existence of Abadi. The tenure holder can argue that the only right to file objection given to him under the Act' 1894, being a valuable right, hardship which would be caused to him by denial of the said right cannot be compensated in any terms. The provision of objection and hearing is compulsory being in the line of principles of natural justice. Thus, there could be no

casual denial of such an opportunity by invocation of urgency clause in acquisition where the purpose stated is residential.

It is submitted that the petitioners are in possession of the acquired lands and their claim for release of the same being Abadi site has to be considered. It is vehemently reiterated that a large chunks of lands beyond the village envisaged Yamuna Expressway has been leased out as rural Abadi site and left out from the award. The story set up by YEIDA that the lands in question are needed for integrated development of the area is wholly unbelievable. The acquisition is only for profiteering purposes.

III. On factual aspects, arguments of learned counsels for the parties:-

27. Sri Prem Chand Saroj learned advocate appearing for the petitioners in two connected Writ petition No.19406 of 2011 and Writ petition No. 19408 of 2007 would submit that both the writ petitions relate to the acquisition of plot No. 484 area 0.2930 hectares and plot No. 486 area 0.3030 hectares situated at Village Dhanauri, Pargana Dankaur, Tehsil and District Gautam Budh Nagar. The petitioners herein are recorded tenure holders and they are utilizing the plots in question as Abadi. The assertion is that the land use of the lands in question in the revenue records before establishment of YEIDA is Abadi with respect to both the plots in question. The petitioners have constructed their houses and using them as Abadi for a long time. The development authority has illegally acquired the plots in question by invoking urgency clause denying opportunity of hearing to the petitioners. It was asserted that similarly situated plots adjacent to the lands in question had not been included in the

acquisition notifications. Prayer has, thus, been made to quash the acquisition with respect to the plots in question.

28. The submission of the learned counsel for the petitioners, thus, is that the above referred facts indicate that the entire acquisition was malafide in nature and there was no justification for acquisition of Abadi plots.

29. It was further submitted by Shri Prem Chand Saroj learned counsel for the petitioners in the above noted writ petitions that the petitioners are entitled for the relief as in respect to their lands neither possession had been taken nor award has been made.

30. Refuting to the above submissions, it was urged by Sri Manish Goyal learned Senior Advocate appearing for the YEIDA, inviting attention of the Court to the counter affidavit of the State, that the possession of the acquired land has been handed over to the acquiring body on 28.06.2011. 86% of the total affected tenure holders had received compensation. Out of total acquired land of 442.3016, the possession of 414.2312 hectares of the land had been handed over to the development authority. The authority under Section 11(2) was declared on 9.5.2012 for an area of 282.5438 hectares, another award dated 20.12.2012 under Section 11(2) was declared for an area of 86.2005 hectares. The award under Section 11(1) dated 31.12.2013 has been declared for an area of 45.3834 hectares. The awarded amount of those tenure holders who have not received the same has been deposited in the Court by the Land Acquisition Officer.

31. As regards the claim of the petitioners with respect to their existing

Abadi over the plots in question prior to their acquisition, the attention of the Court is invited to paragraph No. '11' of the counter affidavit of the State to assert that a survey was conducted at the time of preparation of the proposal for acquisition and in Prapatra-16, the form for description of assets over the land in the proposal for acquisition, there was no description of Abadi, construction or trees over the plots in question. The petitioners though claim there exists Abadi over the plots in question, but no Khatauni or record of entry of Abadi has been annexed with the writ petitions. With regard to Gata No. 484, it is pointed out that the Khatauni appended at page '25' of the writ petition shows that the land in question is agriculture land and it was mortgaged by the petitioner for obtaining loan from the Oriental Bank of Commerce. With respect to the above noted plots, a categorical statement has been made in the counter affidavit of the Authority (YEIDA) in both the writ petitions, that in the joint survey conducted on 20.10.2010, no construction for living purposes was found over the plots in question. With regard to the adjacent plot No. 483, 485, 487, which were not acquired, the explanation has been given in the counter affidavit of the State that in the revenue records, plot No.483, area 0.0180 hectares and plot No.485 area 0.0270 hectares were recorded as Nali, Plot No. 487 area 0.1764 hectares was recorded as Rasta and, as such, these plots could not be acquired.

IV. Argument of the Respondent's counsel:-

32. Sri Manish Goyal learned Senior Advocate assisted by Sri Kamaljeet Singh, Sri Suresh Singh, Sri Aditya Bhushan Singhal, Sri Shashi Prakash Rai learned

counsels appearing for the respondent Authority would submit that the acquisition in question was made for an integrated development of the Notified area which came within the jurisdiction of Yamuna Expressway Industrial Development Authority (YEIDA), vide notification dated 11.07.2008 and the subsequent notifications for inclusion of Villages in District Agra, Gautam Budh Nagar, Aligarh, Mathura, Mahamaya Nagar (Hathras) within the jurisdiction of YEIDA. The YEIDA was authorized to perform various functions to secure planned development of the area including allocation and transfer by way of sale or lease or otherwise the plots of the lands for industrial, commercial, residential and other purposes. The Authority enjoys powers to sell, lease or transfer the land under Section 7 of the UP Industrial Area Development Act' 1976. For integrated development of the Notified area, a Master plan (phase-1-2031) for the Notified area of Gautam Buddh Nagar and Bulandshahr districts was prepared. For overall development of the area under the Master plan, total 22 acquisitions notifications for 16 villages were published between 22.6.2009 to 7.12.2010, within the span of 22 months, i.e. One year ten months.

33. The integrated development of the area under the Master plan-2031 is alongside Yamuna Expressway, for construction of which various notifications were issued earlier for acquiring the lands in the District of Gautam Buddh Nagar, Mathura, Aligarh, Mahamaya Nagar (Hathras) and Agra. The copy of Master plan phase-1-2031 has been placed before us to demonstrate that the acquired lands of the villages-in-question lie on both sides of Yamuna Expressway. Placing the counter affidavit of the Development Authority in

the leading case in Writ C No. 26767 of 2010, it was submitted that the development plan prepared by the Authority clearly lays down the land use. The land use within the industrial development area is not merely industrial as is sought to be contended by the learned counsel for the petitioner but, according to the development plan, the land use includes residential, commercial, industrial, institutional, greens, amenities, and such other usage as may be mentioned. With the issuance of the notification declaring the area as industrial development area, it became imminent that the acquired land would be put to such use as is set out in the plan prepared by the Authority (YEIDA). It needs to be emphasized that the acquisition is not being made for further development of the existing or old city. With the acquisition under the Master plan, an integrated newly planned city is being developed. Such development in accordance with the development plan prepared by the development Authority obviates haphazard growth and/or non-confirming use by the land owners.

34. The village wise details of acquisition, award made under the Karar Niyamawali' 1997 and contested awards, the details of lands under litigation as on the date of awards, details of compensation, development and land use for the acquired land as stated in the counter affidavit filed by the Authority (YEIDA) and the State in the writ petitions in this bunch, has been placed before us during the course of arguments in the tabular form, giving statistical figures about acquisition and development. The said village-wise charts are being enclosed with this judgement as **Addendum 'A'**.

35. The Master plan placed on record, showing the position of the planned

development Sector wise, is also made part of this judgement as **Addendum- 'B'**.

36. We may refer, at this juncture, to the affidavit dated 04.10.2021 filed by the State respondents in Writ Petition No.26767 of 2010 wherein under the directions issued by the Court, a chart has been given to indicate the position as to in how many cases the State has taken possession of the land and deposited estimated compensation of 80% in compliance of Section 17 of the Act' 1894. The Chart of the acquired lands of 14 villages acquired by 21 notifications admeasuring 2671.0871 hectares, disclosing the deposit of estimated compensation of 80% deposited under Section 17 and also the position of the transferred possession of land to YEIDA has been appended therein which is made part of the judgement as **Addendum 'C'**.

37. Placing the above noted facts brought on record, it was submitted by Sri Manish Goyal learned Senior Counsel for YEIDA that the nature and purpose of acquisition in question is to be taken into consideration to examine as to whether the declaration of the acquisition of land under Section 6 without giving opportunity to the tenure holders to raise objection to the purpose of acquisition under Section 5-A, was justified.

38. The area-wise breakup in order to show the land use of each area under the Master Plan-2031 Phase-1, District Gautam Buddh Nagar and Bulandshahr given in the above noted supplementary counter affidavit dated 14.5.2018, has been placed before us to demonstrate that out of the total acquired area under the Master plan of 18450.43 hectares, namely urban area excluding Village Abadi, an area of

2480.24 hectares to the extent of 13.4% has been allocated for transport. Under the category of mixed use "75% area shall be industrial/institutional/recreational as the main activity and the remaining area can be used for other support activities such as residential/Commercial and facilities".

39. It was urged that the Yamuna Expressway Industrial Development Authority has been declared a Municipality within the meaning of Article 243-Q of the Constitution of India entrusting it for development and maintenance of the township. The development of the Village Abadi by YEIDA has been made compulsory. The township having been conceived as an integrated project under the Phase-1 of the Master plan-2031, will be a newly planned city. The State is duty-bound to secure and ensure planned development and other facilities to all the residents and this can be achieved only when plan is permitted to be permeated in its fullest extent.

40. That under the YEIDA Phase-1, Master Plan-2021, area wise breakup is being given below in order to show the land use of each area.

41. Yamuna Expressway Industrial Development Authority area breakup for Master Plan (Phase-1) District Gautam Buddha Nagar & Bulandshahr.

Sr. No.	Land Use Category	Year 2021	
		Area (ha)	%
1.	Residential	4569.52	24.8
2.	Commercial	1275.12	6.9
3.	Industrial	2394.15	13
4.	Institutional	1617.02	8.8
5.	Greens	3751.59	20.3
6.	Transport	2480.34	13.4

7.	Mixed use	1219.82	6.6
8.	SDZ	1142.87	6.2
Total (Urban Area excluding village abadi)		18450.43	100
Village abadi areas		1124.69	
Urbanisable Area		19575.12	

42. It was argued that with respect to the challenge to the acquisition of lands for construction of Yamuna Expressway and for interchange of Expressway, mainly on the ground that there was no urgency much less any special urgency for construction of road, to acquire fertile agricultural land, the Division Bench of this Court had considered all aspects of the project in **Nand Kishore Gupta & others Vs State of UP & others**¹⁵ to examine as to whether there was justification for invocation of urgency.

43. It was placed that the Taj Expressway project conceived by the State Government in the year 2001 was an integrated project involving construction of Excess Control Expressway stretching over 160 k.m. from NOIDA to Agra and for development of 25 million square meters of land along the Expressway. The validity of the project was challenged in a Public Interest Litigation. The State Government, exercising power under the Commissioner of Inquiries Act, initiated an enquiry. The said project which was notified by the State under Built, Operate and Transfer (BOT scheme) came up under scrutiny in **Balbair Singh Vs. State of UP & others**¹⁶ wherein the acquisition was challenged on the ground that it was for the purposes of company and, thus, the provisions of Chapter VII of the Act were required to be followed. The allegations of mala fide in dispensing with the enquiry under Section 5-A were made. The notifications dated

15.10.2007 and 04.01.2008 under Section 4 and 6 of the Act' 1894 of the land situated in a Village in Mathura were subject matter of consideration therein. The writ petition was dismissed vide judgement and order dated 05.10.2009 noticing that in order to provide infrastructural facilities for developing industries throughout the Yamuna belt, the project of National importance was taken up connecting various cities of Uttar Pradesh to the National Capital.

44. It was argued that considering the mammoth scale of the project, it was opined by the State Government that the integrated project which was to cover a large area of land would be stalled, in case, the State had undertaken an enquiry into the disposal of individual objection as contemplated under Section 5-A of the Act. The satisfaction formed by the State with regard to the exercise of power under Section 17(1) and (4) of the Act had been found to be justified noticing that the exercise of power of judicial review is not concerned with the sufficiency of material, but with the issue as to whether there was material before the State justifying the formation of opinion in dispensing with the enquiry contemplated under Section 5-A of the Act. It was observed that there was sufficient compelling reasons existed in justifying the action of the State in dispensing with the enquiry under the Act. The said opinion was formed considering the statements in the counter affidavit of the State as well as the Development Authority therein. By the notification dated 11.07.2008, the name of Taj Expressway Industrial Development Authority was amended and changed into the Yamuna Expressway Industrial Development Authority (YEIDA).

45. The submission is that in these facts and circumstances of the case in **Nand Kishore Gupta (supra)**, where challenge was to the acquisition of land for construction of Expressway, the Court having examined the record of the State, the proposal justifying invocation of urgency, had opined that the record clearly demonstrated that after considering the project and making enquiries and spot inspection including the survey of the revenue records, the District Magistrate had recommended that looking to the purpose of acquisition and the large area involved, and further the fact that the land was needed for construction of road and interchange and planned development, as well as, the fact that in future, there was strong possibility of encroachment over the subject land, Section 17(4) was required to be invoked for dispensing with the enquiry. The pre-notification delay of five years from the date of Concession agreement till the publication of the proposal under Section 4 of the Act, 1894 was found to have been explained on account of intervention at every stage of the proceedings. It was noted that after dismissal of the PIL, the Board of the Authority started making surveys and the proposal for acquisition was, thereafter, submitted. The satisfaction of the State to invoke urgency clause had been found to be justified noticing that there was sufficient material and the project was in public interest. A minuscule number of the writ petitioners representing only a small piece of land were challenging the acquisition stalling a project of construction of a fast moving road.

46. It was placed before us that the Division Bench judgement of this Court in **Nand Kishore Gupta (supra)** was upheld by the Apex Court in **Nand Kishore Gupta**

Vs State of UP & others¹⁷ wherein noticing the above noted findings of the High Court, the Apex Court had expressed complete agreement stating that there was necessity in the said project, considering the enormousness of the project, likelihood of the encroachment, number of tenure holders, who would have required to be heard and the time taken for that purpose as also the pre-notification delay on account of the above noted reasons where the project had lingered from 2001 till 2008, it was held that there was no reason to take a different view than what was taken by the High Court. The reason for invocation of urgency given by the District Magistrate that the delay may result in encroachment was considered to be a relevant factor for invocation of urgency. It was noted that a large chunk of land of 25 million square meters was liable to be acquired for the purpose of development of five land parcels. There was interlinking between the acquisition of land for the highway and acquisition of land for establishing five townships.

47. It was argued by the learned Senior Counsel for YEIDA that in the case of **Radhy Shyam (supra)** heavily relied by the learned counsel for the petitioners, while answering the issue of invocation of urgency clause under Section 17 (4) of the Act' 1894, for the acquisition of land for residential/commercial/or industrial purpose, the above decision in **Nand Kishore Gupta (supra)** was distinguished noticing that the acquisition in the said case was upheld because the land was urgently needed for construction of Yamuna Expressway and by the time, the matter was decided by the Apex Court, huge amount had been spent on the project.

48. The decision of the Apex Court in the case of **Radhy Shyam (supra)** has

been read over at length to submit before us that the entire judgement has to be read in light of the facts of that case to cull out the ratio and when the same is considered with **Nand Kishore Gupta (supra)**, in light of the facts of that case and that of the instant case, the enormousness of the project, huge number of affected tenure holders as a result of acquisition for execution of the integrated project, the reasonable time taken in filing and disposal of objections followed by litigation that may arise of such decisions cannot be perceived to be irrelevant factors. The land in question, in the instant case was urgently needed for planned development of the area, with respect to which the lands parcels of Villages on both sides of the Expressway were being acquired for the purposes of development of the area alongside Expressway.

49. The decision of this Court in **Narendra Road lines Limited Vs state of UP and others**¹⁸ has been placed before us to submit that it was noted therein that the State had acquired 2500 hectares of land of 25 million square meters (for development at five locations along side Expressway) namely at Site-I: Noida (Sultanpur) (500 hectares); Site-II: between Greater Noida & Dankaur (500 hectares); Site-III: between Dankaur and proposed TEZ (500 hectares); Site IV: between proposed Airport and Tappal (500 hectares) and Site-V: near Agra (500 acres).

50. The challenge in the said case was for the acquisition of the notified land for public purpose, namely “for development under Yamuna Expressway Project through Yamuna Expressway Industrial Development Authority”. The notifications were issued recording the opinion of the Governor that the provisions of Subsection

(1) of Section (17) of the Act were applicable to the land, in as much as, the land was urgently required for development. In the said case, taking note of the factual aspects of the matter, for invoking urgency, it was noted in paragraph ‘96’ as under:-

“96. In the present case, we find that the land for development for 'Yamuna Expressway Project' through 'Yamuna Expressway Industrial Development Authority' is an integrated project. The land was initially acquired for the expressway and thereafter the land has been acquired for developing five parcels, as townships, as an integrated plan of development, both for compensating the concessionaire for the cost of the expressway, as well as the development of the area. The agreement provides that the parcels shall be developed strictly in accordance with the plan prepared by the YEIDA, by adhering to the bye-laws of YEIDA, and other laws applicable to development. The Jaippee Infratech Ltd. will be developing these five parcels strictly in accordance with the concessionaire agreement. The State Government was, therefore, not required to particularise, or to specify the public purpose by pointing out to the nature of the development on each plot of the land acquired for 'Yamuna Expressway Project.'”

51. The writ petition challenging invocation of urgency clause was dismissed therein noticing that the majority of the tenure holders had signed the settlement and had accepted the compensation. It was held that the acceptance of the compensation by the majority of the tenure holders was also a ground on which the challenge to the acquisition could not be interfered with.

52. In the Writ C No. 20585 of 2010 (**Natthi Vs. State of U.P. & others**) decided by this Court on 12.11.2010, in a challenge to the notifications dated 16.10.2009 and 01.12.2009, under Section 4 and 6 of the Act, 1894; respectively, on the plea that there was no material before the State Government for invocation of urgency, it was noted by this Court that the land acquired was for contiguous part of Yamuna Expressway. The land needed for road to connect Yamuna Expressway to residential sectors was urgently needed. The observations of the Apex Court in **Nand Kishore Gupta (supra)** were noted therein to record that it was part of an integrated project covering a large area of land and being complimentary to the creation of the Expressway, the challenge was upturned. It was specifically noted therein that though the land-in-question was not for the purposes of Yamuna Expressway or five land parcels, as noted in **Nand Kishore Gupta (supra)**, but the acquisition was for the planned development which included construction of approach road for linking Yamuna Expressway with the land parcels. The public purpose stated in the notification under Section 4 of the Act' 1894 therein be noted as under:-

“Planned development in District Gautam Budh Nagar through Yamuna Expressway Industrial Development Authority”, to record that:-

“In notification under Section 4 of the Act the public purpose was mentioned as "Planned Development in District Gautam Budh Nagar through Yamuna Expressway Industrial Development Authority". The planned development of the area is the object for which Yamuna Expressway Industrial Development Authority has been

constituted. In planned development providing for amenities is one of the functions of the Authority and it was not necessary to mention the details of the planned development in the notification under Section 4 of the Act. Mention of planned development in notification under Section 4 of the Act was sufficient to cover all categories of planned development including providing for construction of approach-road/road. Thus non mentioning of the construction of the approach road in the notification under Section 4 of the Act was not imperative.”

53. Placing the said decision, it is argued by the learned Senior Counsel for YEIDA that the language of the notifications in the instant case, under consideration, being the same, it is also to be considered in this case that the acquisition of the lands-in-question being part of an integrated project of development of the Notified area alongside Expressway through Yamuna Expressway Industrial Development Authority (YEIDA), the reasons given in the certificate in Prapatra-10 justifying urgency were sufficient to form opinion by the State Government that the proposed land was urgently needed and dispensation of enquiry under Section 5-A of the Act was necessitated.

54. The Apex Court decision in **Kedarnath Yadav**¹⁹ has been placed to submit that the purpose of acquisition in **Nand Kishore Gupta (supra)** was noted therein and it was held that the acquisition of land for planned development of this otherwise industrial backward area with the construction of the Expressway will be complementary to each other and can be viewed as part of the integrated scheme and, thus, held to be a public purpose.

55. The Division Bench judgement of this Court in **Dharmendra & others Vs. State of U.P. & others**²⁰ dated 04.08.2021 had been placed before us to submit that in the similar facts and circumstances, this Court had refused to interfere in the acquisition of land in the writ petitions pending for a long time wherein award had been passed with tendering of compensation. It was submitted that the Special Leave Petition against the said judgement has been dismissed on 27.9.2021.

56. Reliance has further been placed upon the decisions in **Meena Devi Jindal Medical Institute & Research Centre Vs. Lieutenant Governor, Delhi & others**²¹ to submit that noticing the decision in **Nand Kishore Gupta (supra)**, that the purpose of acquisition “for planned development through Yamuna Expressway” in the said case was complimentary to the construction of Expressway and being a part of the integrated project. The Apex Court decision in **Munshi Singh (supra)** has been distinguished therein noticing that in the said case there was no master plat/zonal plat in vogue in the area. Thus, when there was no plan for the area, in that context, the Court has observed that mention in the notification that it was acquisition for the purpose of planned development of the area was vague. Whereas in the said case the Master plan was in existence and the development had taken place in accordance with the Master plan, the vagueness in the notification under Section 4 of the Act' 1894 was, thus, held to be of no consequence.

57. It was vehemently argued by the learned Senior Counsel that the Court has to be conscious of the purpose that when

huge chunk of lands was acquired, time taken in identification and deciding the suitability of the land which caused pre-notification delay would have to be considered, to arrive at the decision as to whether the same would affect the statement of invocation of urgency. It was argued that the meticulous planning and preparation of Master plan had taken time in execution of the project. However, in the instant case, with the constitution of Yamuna Expressway Authority vide notification dated 11.07.2008, the Master plan was approved on 24.07.2009, the proposal for acquisition was prepared in the meantime, after survey to assess the suitability of the land for the purpose stated in the acquisition proposal. The acquisition proceedings had been commenced in the shortest possible time with the publication of the first notification on 26.02.2009. It was an acquisition for an integrated project where lands of different villages had been acquired with separate proposals, in each case, where satisfaction has been recorded by the State Government for invocation of urgency clause, for each of the acquisition proposal.

58. It is argued that the purpose of acquisition has substantially been achieved, in as much as, major area under the Master plan has already been developed. About 95% of the land owners are satisfied and received compensation, 90% did not approach this Court being satisfied. Reasons for invocation of the urgency clause had been spelled out, in each case, in the requisite form Prapatra-10. The statement in the reasons that there was likelihood of encroachment in the area in case of delay cannot be said to be extraneous consideration, in as much as, the construction of Yamuna Expressway had been completed by the time, the

acquisition notifications for development of the surrounding area alongside the Expressway were issued. It is of common knowledge that around the Highways, encroachment do take place. Expansiveness of the land required for execution of the project was a valid reason for dispensation of Section 5-A as hearing for such a huge number of tenure holders was not a viable option.

59. It was urged that sufficient material was on record and has already been placed before the Court in the shape of the original record by the State for each village, which demonstrated that there has been due application of mind at the level of the State Government and it was not a mechanical exercise. The Government has taken note of the reasons, spelled out reasons for dispensation of enquiry, justification of the same and, thereafter, granted approval/sanction. Pre-notification delay has been satisfactorily explained and noted in **Nand Kishore Gupta (supra)**. There was practically no post notification delay, as in many cases, the declaration notification under Section 6 had been issued in a span of 3-4 months. Only in one or two cases in this bunch, acquisition notification was issued in a gap of approximately one year and in those cases, the State Government had taken a serious view calling for explanation over the delay. This shows that the State was conscious of the urgent need of the land for the project in question.

60. The post notification delay was, however, explained by bringing on record that the time taken had been consumed in arranging loan for deposit of 80% of the estimated compensation. Being a huge project, YEIDA needed thousand crores of money to deposit 80% of compensation and

approached different banks. Lands of NOIDA and Greater NOIDA Authorities had been mortgaged as collateral security as banks were not ready to extend loan without security. The explanation, in this regard, can be found in the affidavit filed on behalf of the Development Authority and one such affidavit in Writ Petition No. 23542 of 2010 had been placed before us to substantiate the said submissions.

61. It was argued that the petitioners have failed to establish that;-(i) the land in question was not suitable for the project; (ii). the land was not required for public purposes; (iii) malafide in acquisition, or; (iv) public purpose would be subserved by any other land.

62. No prejudice caused to the petitioners could have been shown by dispensation of enquiry under Section 5-A. In absence of prejudice, no valuable rights of the petitioner can be said to have been violated.

63. It was further argued that Article 300-A will have no application in the present case, in as much as, the entire exercise of acquisition is in furtherance of the public policy for the public at large in accordance with the provisions of Article 39(b) saved by the protection of Article 31-C.

64. It was argued that right to compensation provided under the second proviso to Article 31-A stood duly balanced by giving a No-litigation incentive of 64.7%, grant of 7% of the Abadi Land (developed land) as also the relief granted to the tenure holders under the leaseback policy dated 10.10.2011 modified in 2011 who opted for it besides compensation for the land and

superstructure computed under the award. The judgement of **Radhy Shyam (supra)**, **Anand Singh (supra)**, having been given in different set of facts, legal principles stated therein, if considered in the facts of the instant case, will have no application. The facts of the instant case, are identical to the case of **Nand Kishore Gupta (supra)**, principle stated therein have even been followed in **Radhy Shyam (supra)** as on the fact of **Radhy Shyam (supra)**, **Nand Kishore Gupta (supra)** was distinguished.

65. The decisions of this Court in **Smt. Manju Lata Agarwala Vs. State of U.P.**²² and **Smt. Varsha Lakhmani Vs. Hitesh Wadhwa**²³, have been relied to assert that the principle of prejudice stated therein in a case of invocation of urgency under Section 5-A, thus, would be attracted in the instant case.

66. It was urged that a categorical statement has been made in the affidavit filed in the leading writ petition noted above, to establish that before publication of Section 6 notification in each case (relating to each Village), due deposit of 80% of estimated compensation of the acquired land had been made. There is no violation of the procedure prescribed in the Land Acquisition Act, 1894 for acquisition of the lands in question.

67. As regards the submission of the learned counsels for the petitioners that the controversy, in the instant case, is covered by the decision of this Court in **Shyoraj Singh (supra)**, in as much as, it has been held therein that the invocation of urgency for acquisition for public purpose “planned development of area” was bad in view of the decision of the Apex Court in **Radhy Shyam (supra)**, it was argued by the learned Senior Counsel for the Authority (YEIDA) that the

decision in the said case had been rendered ignoring the material brought on record in the shape of the counter affidavit and rejoinder affidavit. Further the fact that it was an integrated development for creation of a new township and not a development of existing or old city, was completely ignored, though the said fact was established from the record placed before the Court. The legal principle stated in **Radhy Shyam (supra)** were simply applied by this Court while rendering decision in **Shyoraj Singh (supra)** that there existed no facts before the State Government to invoke urgency. Even in **Radhy Shyam (supra)** while laying down the principle to examine the illegality and/or justification of the exercise of power under Section 17(1) and/or 17(4) for the acquisition of land for residential, commercial or industrial purpose, it was held that the Court has to scrutinize the relevant record before adjudicating upon the legality of such acquisition. Meaning thereby, in the facts of a given case, the records and all relevant material have to be considered to examine as to whether invocation of urgency clause was justified and the authorities concerned applied their mind to the relevant factors for taking such decision. The legal position stated in the **Radhy Shyam (supra)** has been mechanically applied by the Division Bench in **Shyoraj Singh (supra)** and, hence, the said decision cannot be applied to the dispute before us. It was argued that it cannot be said that the judgement in the case of **Shyoraj Singh (supra)** would squarely cover the dispute before us. It was vehemently argued that the position stated in the said case is distinguishable, in as much as, the aspect of integrated development of the area under Master plan was not placed and the wholesomeness of the project had not been brought before the Court.

68. The opinion expressed by the Court in the case of **Shyoraj Singh (supra)**

for providing higher compensation to the tenure holders in view of the decision in the case of **Sahara India (supra)** had been termed as inapplicable in view of the subsequent decision of the Apex Court in **Indore Development Authority Vs. Manoharlal and others**²⁴ wherein the applicability of Section 24 of the Act' 2013 has been considered. It was urged that in the acquisitions in question, award had been declared for the entire land, possession of which had been handed over to the development authority. The tenure holders who did not receive compensation under the award, the compensation amount had been deposited in the Court. However, for the land in question, subject matter of challenge, in the instant bunch, award could not be declared on account of the interim order of status quo passed by this Court. The status quo order, as indicated above, was not confined to the possession only. The authority could not proceed with the acquisition with respect to the land-in-question because of the interference by this Court. Any delay in making the award because of the interim order of this Court cannot be attributed to the authorities. Acquisition proceedings on the dates of filing of the writ petitions were underway and having not been completed because of interference of this Court, Section 24 of the Act' 2013 will have no application. The provision of 2013' Act cannot be applied in these cases in the matter of determination of compensation. Further, No-litigation Incentive can only be granted to those persons who have accepted compensation without protest or have withdrawn their writ petition as per the statement in the policy under the Government order dated 29.8.2014 and 04.11.2015.

69. To counter the submissions of Sri Anil Mehrotra learned Advocate appearing

for the petitioner in writ petition 18539 of 2013, the counter affidavit filed on behalf of the development authority therein has been placed before us to assert that 10% of the cost of acquisition and compensation was deposited on 17.2.2010 at the time of submission of the proposal, after which notification under Section 4(1) read with Section 17(4) of the Act, 1894 was issued on 19.4.2010. The remaining 70% of the estimated compensation was deposited on 24.6.2010 before issuance of the declaration under Section 6(1) read with Section 17(1) of the Act, 1894 on 28.07.2010. The amount under the National Rehabilitation Policy was also deposited on 08.07.2010. It was submitted that the land of Village Rampur Bangar had been acquired through different notifications for different uses like Yamuna Expressway project, acquisition of which has been upheld by the Apex Court as also for residential scheme 2009 (1).

70. As regards the claim of the petitioner namely Narendra Kumar therein in paragraph No. '5' and '6' of the writ petition that the dwelling units/houses constructed by the petitioner on the aforesaid land exists and, as such, the petitioner is entitled for exemption of his property from acquisition, in the counter affidavit of the respondent No.3, while giving parawise reply to the said statement, it is submitted that under the leaseback policy, an area of 0.2100 hectares of land of plot No. 152, (area 0.8950 hectares) had been offered to the petitioner vide letter dated 04.06.2011 informing him that the said area can be excluded under the leaseback policy and the remaining area will be treated as acquired and under possession of the authority.

71. In the rejoinder affidavit, while replying to the above noted paragraph No.'33' of the counter affidavit of YEIDA,

it is stated that the averments in paragraph No.'33' of the affidavit of YEIDA itself disclose that the dwelling unit of the petitioner was found on the spot and the respondents themselves has agreed to withdraw the acquisition proceedings of the petitioner's land.

72. Reference has been made by the learned Senior Counsel for YEIDA to the decision of this Court dated 4.8.2021 in PIL No. 40484 of 2012, dismissing the petitions seeking for quashing of the similar notifications on the ground of wrongful invocation of urgency provision. It was placed before us from the affidavit dated 26.8.2012 filed, in the instant writ petition, that the said PIL has been dismissed as infructuous noticing that the award had been passed long back with acquisition of land with tender of compensation. The Special Leave Petition No. 14753 of 2020, arising out of the decision of this Court in PIL has been dismissed on 27.09.2021. Another Special Leave Petition No.20352 of 2021 challenging the order of PIL has also been dismissed on 17.12.2021.

73. We may note, at this juncture, that the original record pertaining to the proposal of acquisitions of each notification, subject matter of challenge herein, with regard to dispensation of enquiry under Section 5-A, has been placed before us during the course of hearing and have been perused by us, carefully.

V. Record of the State and counter affidavits:-

74. We are required to record at this juncture, the factual aspects of dispensation of Section 5-A noted by us from the record of the State tallied with the statement in the

counter affidavits of the respondent, village wise.

(i) Village Pachokra:-

75. In the counter affidavit in Writ Petition No. 26767 of 2010 relating to acquisition of land for Village Pachokra, it was brought on record that the proposal for acquisition of 50.9390 hectares of land in revenue Village Pachokra, Tehsil Jewar, District Gautam Buddh Nagar was submitted by the Authority/Additional District Magistrate (Land Acquisition), Gautam Buddh Nagar, vide Office order No. 1383 dated 28.01.2009. In the said proposal, the acquiring body recommended for invoking urgency clause "keeping in view the possibility of large time being consumed in the disposal of objections under Section 5-A of the Act' 1894, and the possibility of delay in implementation of the public interest project". Vide letter No. 21 dated 13.2.2009, the said proposal was forwarded by the Additional District Magistrate (Land Acquisition)/Special Executive Officer, Yamuna Expressway Authority to the Director Land Acquisition Directorate, Board of Revenue, UP Camp Greater Noida, Gautam Buddh Nagar, after obtaining required approval in the meeting of the Land Use Committee for acquisition of land and completion of requisite formalities. The Director, Land Acquisition Directorate, Board of Revenue, U.P. by the letter No. 219 dated 14.2.2009, sent the said proposal to the State Government with his recommendation for acquisition of the land. The report of the Collector in the requisite format Prapatra 10 for justification for invocation of urgency under Section 17 of the Act, 1894 reads as under:-

धारा 4/17 औचित्य की टिप्पणी

यमुना एक्सप्रेसवे औद्योगिक विकास प्राधिकरण का गठन उत्तर प्रदेश औद्योगिक क्षेत्र विकास अधिनियम 1976 के अन्तर्गत का उद्देश्य राज्य के निर्दिष्ट क्षेत्रों में से औद्योगिक विकास तथा उससे सम्बद्ध मामलो हेतु प्राधिकरण की संरचना करना है। उक्त अधिनियम के अन्तर्गत यमुना एक्सप्रेसवे प्राधिकरण को अपने अधिसूचित क्षेत्र में भूमि अधिग्रहित करने, योजना बनाने, औद्योगिक इकाईयों हेतु भूमि चिह्नित करने, आधारभूत सुविधाएं विकसित करने, विक्रय द्वारा अथवा पट्टे पर अथवा अन्य प्रकार से औद्योगिक भू उपयोग हेतु भूमि का निस्तारण क्पेचवेंसद्ध करने, भवनों एवं औद्योगिक ईकाईयों की स्थापना को नियमित करने भू उपयोग निर्धारित करने का अधिकार दिया गया है। ग्राम पचोकरा परगना-जेवर तहसील-जेवर जिला गौतमबुद्धनगर यमुना एक्सप्रेसवे प्राधिकरण के अधिसूचित क्षेत्र में स्थित है। यमुना औद्योगिक विकास प्राधिकरण के माध्यम से जनपद गौतमबुद्धनगर में सुनियोजित विकास हेतु तत्काल आवश्यकता है। अर्जन में विलम्ब की दशा में प्रस्तावित भूमि पर अतिक्रमण बढ़ने की प्रबल सम्भावना है जिस कारण यमुना एक्सप्रेसवे की लोक हित की परियोजना पर प्रतिकूल प्रभाव पड़ेगा।

ग्राम पचोकरा की 50.9390 है० भूमि सुनियोजित विकास हेतु अर्जन प्रस्तावित है। लिखित/मौखिक आपत्ति सुने जाने तथा निस्तारण में निश्चित रूप से वर्षों लगेगें तथा अप्रत्याशित विलम्ब होगा जिससे सुनियोजित विकास ठप हो जायेगा। विधि द्वारा धारा 4(1)/17 की अधिसूचना तथा धारा-6/17 की अधिसूचना में मध्य एक वर्ष का समय निर्धारित है।

अतः जनपद गौतमबुद्धनगर में यमुना औद्योगिक विकास प्राधिकरण के माध्यम से सुनियोजित विकास हेतु भूमि का अर्जन किया जाना अपरिहार्य है। अतः राजस्व ग्राम पचोकरा परगना-जेवर, तहसील-जेवर जनपद गौतमबुद्धनगर की 50.9390 हैक्टेयर भूमि

तत्काल अधिग्रहित किया जाना है। अधिग्रहण हेतु अनुमानित प्रतिकर की 10 प्रतिशत धनराशि अर्जन निकाय से प्राप्त करके अपर जिलाधिकारी (भू०अ०), गौतमबुद्धनगर द्वारा निर्धारित लेखा शीर्षक में जमा की जा चुकी है। प्रस्तावित भूमि में कोई धार्मिक स्थल/समारक आदि नहीं बताया गया है। इस ग्राम में अर्जन से कुल 63 परिवार प्रभावित होंगे। अर्जन के फलस्वरूप 46 कृषक भूमिहीन बताये गये हैं। प्रस्तावित भूमि में अनुसूचित जाति/ जनजाति के खातेदारों की संख्या 40 है। छोटे खातेदारों की संख्या 40 है। प्राधिकरण पर कोई प्रतिकर/डिक्रीटल की धनराशि बकाया न होने का प्रमाण पत्र अपरा जिलाधिकारी (भू०अ०), गौतमबुद्धनगर द्वारा दिया गया है। उक्त को दृष्टिगत रखते हुए चयनित भूमि के अधिग्रहण हेतु भूमि अर्जन अधिनियम 1894 के अंतर्गत धारा-40 (1) के साथ पठित धारा-17 की अधिसूचना निर्गत कराये जाने का पूर्ण औचित्य है तदनुसार संस्तुति की जाती है।

76. The State Government found justification regarding urgency and recorded satisfaction that it found sufficient ground for invocation of urgency clause under Section 17 (4) of the Act' 1894. The proposal for acquisition was, thus, published on 26.02.2009. It may be noted that Village Pachokra came in the regulated area of the then Taj Expressway Authority, renamed as Yamuna Expressway Industrial Development Authority, on 12.11.2007.

77. As regards the details of compensation paid to the tenure holders and development carried out by YEIDA during the pendency of the litigation, it may be noted that out of total 198 affected tenure holders, 151 had received compensation. Total number of 18 petitioners are before us, who are agitating for the correctness of the decision of the

State Government in invocation of urgency clause. Out of the total area of 41.6525 hectares possession of which has been handed over to the development authority, the percentage of land in litigation is 40.50%.

(ii) Village Achheja Bujurg:-

78. From the counter affidavit of the State filed in Writ-C No. 10785 of 2012, relating to acquisition of the land of Village Achheja Bujurg included in the Notified area on 24.4.2001, it may be noted that the State Government had taken a policy decision for planned development of the area identified as Special Development Zone vide Government Order dated 29.12.2007. For the said development, Taj Expressway Industrial Development Authority was created vide notification dated 24.4.2001. Clause 3.0 of the said Government Order prescribes for development of Special Development Zone (SDZ). The land use of Special Development Zone as provided therein is that the Core activity, roads and open spaces shall not be less than 35%. The complementary activities such as institutional, commercial, residential (group housing etc.) were complementary to the Core activity which was included in 35% of the total area planned for development.

79. In furtherance of the said object, the authority (YEIDA) sent a proposal on 30.12.2009, for acquisition of 217.6342 hectares of land situated at village Achheja Bujurg, Pargana Dankaur, Tehsil Sadar, District Gautam Buddh Nagar for residential plot scheme. The 10% of the estimated acquisition cost and estimated compensation was deposited on 24.02.2010. For invoking the provisions of Section 17(4) of the Act' 1894, dispensation

of enquiry under Section 5-A, justification contained in Prapatra-10 with the certificate of the Collector, Gautam Buddh Nagar, placed before the State Government, on record, reads as under:-

4. आत्मिकता का औचित्य- यमुना एक्सप्रेसवे औद्योगिक विकास प्राधिकरण द्वारा आवासीय भूखण्ड योजना 2009 का डा किया जा चुका है। योजना के अंतर्गत पड रही भूमि में से 13 ग्रामो की लगभग 2042 हे० भूमि के संबंध में धारा 4/17 भूमि अध्याप्ति अधिनियम 1894 के अंतर्गत विज्ञप्ति उ०प्र० शासन द्वारा जारी की जा चुकी है। ग्राम अच्छेजा बुजुर्ग की यह प्रस्तावित भूमि धारा 4/17 से विज्ञप्ति भूमि से लगी हुयी (Contiguous) तथा आवासीय भूखण्ड योजना हेतु विस्तारित सेक्टर प्लान के अंतर्गत पड रही है। अतः इस भूमि का आवासीय भूखण्ड योजना के विकास हेतु अधिग्रहण किया जाना अपरिहार्य है

आवासीय भूखण्ड योजना 2009 प्राधिकरण द्वारा जनसामान्य को वाजिब दरों पर डा द्वारा आवासीय भूखण्ड सुलभ कराने हेतु प्रारंभ की गई है। इस योजना के अंतर्गत विभिन्न आकार के आवासीय भूखण्ड नियोजित किये गये हैं जिसका उद्देश्य समाज के प्रत्येक वर्ग को उसकी आकांक्षा एवं आर्थिक क्षमता के अनुरूप आवासीय भूखण्ड उपलब्ध कराया जाना है। इस योजना के विकास से आस पास के क्षेत्र का सुनियोजित विकास होने के साथ साथ विकास से संबंधित अन्य गतिविधियों को भी प्रोत्साहन मिलेगा जिससे क्षेत्र का समग्र एवं सुनियोजित विकास हो सकेगा। प्रकारान्तर में क्षेत्र के विकास से प्रदेश के विकास का मार्ग प्रशस्त होगा। इस प्रकार परियोजना के विकास से प्रदेश में विकास एवं पूंजी निवेश को प्रोत्साहन मिलेगा।

आवासीय भूखण्ड योजना 2009 एक समयबद्ध परियोजना है। अतः इस योजना के लिए भूमि अधिग्रहण की तत्काल आवश्यकता

है। यदि निर्धारित प्रक्रिया के अनुसार धारा 5 के अंतर्गत कृषकों की आपत्तियों को सुना जाता है तो उससे भूमि अधिग्रहण में विलंब होना संभावित है। इसके अतिरिक्त परियोजना की लागत में वृद्धि होने तथा विकास एवं पूंजीनिवेश की प्रक्रिया बाधित होने की आशंका है। इसके अतिरिक्त कृषकों की आपत्तियां सुने जाने के क्रम में विधिक जटिलताएँ उत्पन्न होने तथा आवासीय भूखण्ड योजना हेतु Contiguous भूमि प्राप्त न हो पाने की आशंका है। अतः भूमि का तत्काल अधिग्रहण किये जाने हेतु धारा 17 (4), भू अध्याप्ति अधिनियम के अंतर्गत आत्ययिकता संबंधी प्रावधान (Urgency Clause) लागू करते हुये तथा धारा 5ए भूमि अध्याप्ति अधिनियम के प्रावधानों को विवर्जित रखा जाकर भूमि अधिग्रहण कराया जाना अपरिहार्य है।

80. The 70% of the estimated compensation was deposited on 17.7.2010 and after completing all the formalities, the proposal for issuance of notification under Section 6 read with Section 17 was sent on 14.7.2010 by the Director, Land Acquisition to the State Government. The notification under Section 6 read with Section 17 for an area of 209.7736 hectares was issued on 28.7.2010.

81. The acquisition for the land of village Achcheja Bujurg was made for extension of Sector 16, a residential sector, which was part of the same project. The acquisitions were made by different notifications for one project, which was for comprehensive development of the industrial township, as conceived by the State under the Development Policy dated 29.12.2007, through the then Taj Expressway Industrial Development Authority. Out of total area, notified under Section 6, the possession of an area of 197.2842 hectares had been handed over to the authority and compensation under

Karar Niyamawali was disbursed for an area of 178.4222 hectares. The total area involved in the writ petitions pertaining to the acquisition of Village Achheja Bujurg, on the date of filing of the counter affidavit, was approximately 17.2210 hectares. It was placed before us that the contiguous land to the parcel of the land acquired for the Expressway of Village Achheja Bujurg had been upheld by the Apex Court in the case of **Nand Kishore Gupta (supra)**. We may record, at this juncture that we have perused the original record of the State regarding satisfaction for invocation of urgency clause, and the reasoning, noted here in above were found therein.

(iii) Village Rampur Bangar:-

82. The counter affidavit of the Authority with respect to acquisition of Village Rampur Bangar in Writ C No. 23542 of 2010, shows that the acquisition in question was the second acquisition of Village Rampur Bangar. The total approximately 20 hectares of land of village Rampur Bangar proposed vide notification dated 26.02.2009 under Section 4(1) read with Section 17 of the Act, 1894, was to be utilized for construction of the approach roads passing through Village Rampur Bangar to connect Yamuna Expressway. 80% of the estimated compensation was deposited prior to the declaration notification dated 01.02.2010, issued under Section 6 read with Section 17 of the Act, 1894. The reason for delay in declaration of Section 6 notification has been explained in the counter affidavit that the authority receives no financial grant from the State and it has to organize its own finances. It require more than 1000 crores for the project which was an integrated project and, as such, it had approached different banks who took time

in processing the request. These banks demanded Collateral security in terms of the land and since the authority (YEIDA) had no land to be mortgaged, it approached the neighboring Authority namely the Greater NOIDA who had agreed to mortgage its land towards the security. The advance of 500 crores was then released by the Oriental Bank of Commerce on 24.04.2009, but still it was short. Amongst various proposals, the NOIDA had also agreed for creation of mortgage of its land located in Sector 94 valued at Rs.600 crores. The Oriental Bank of Commerce then agreed to release the remaining 500 crores. The time consumed in arranging finances was the reason for the delay in declaration of Section 6 notification, as without deposit of 80% of estimated compensation, it was not possible for the State government to publish the declaration notification. It is demonstrated before us that the piece of land acquired under the notification in question was only for a part of the project which was an integrated project, and since contiguous land was needed to complete the project, it was not possible to give opportunity of hearing to the villagers, as in that eventuality, acquisition of Contiguous land was not possible.

83. The original record of Village Rampur Bangar pertaining to the acquisition in question had been placed before us and perused. The acquisition of another parcel of land of 104.9705 hectares of Village Rampur Bangar is subject matter of challenge in Writ C No. 11839 of 2012.

(iv) Village Usmanpur:-

84. For village Usmanpur, justification for acquisition by invoking the urgency clause has been given in the

affidavit of the State filed in Writ C No. 20716 of 2010. The original record has also been produced and perused by us. An area of 161.3900 hectares of Village Usmanpur was proposed to be acquired by notification under Section 4 read with Section 17(4) of the Act, 1894 dated 4.11.2009. 80% of the estimated compensation was deposited prior to the declaration notification under Section 6 read with section 17(1) dated 18.3.2010. By possession memo dated 17.7.2010, possession of an area of 141.580 hectares and the possession memo dated 22.12.2010 for an area of 7.2630 hectares were prepared and possession was handed over to the Authority (YEIDA). Out of the total area of 149.5160 hectares handed over to the development authority, the compensation of 86% of the land, i.e. 128.2950 hectares had been disbursed to the affected tenure holders till 19.5.2011. The land under the acquisition notification falling in Sector planning was needed urgently, justification for which has been given in Prapatra 10 along with Certificate of the Collector which was found in the record of the State as under:-

"आत्यिकता का औचित्य"

यमुना एक्सप्रेसवे औद्योगिक विकास प्राधिकरण द्वारा जनपद गौतमबुद्धनगर में लोक हित की परियोजनाओं के विकास हेतु अर्जुन की कार्यवाही की जा रही है जिसके अंतर्गत राजस्व ग्राम उस्मानपुर की वांछित भूमि के अर्जन की कार्यवाही की जानी है।

यमुना एक्सप्रेसवे प्राधिकरण के डवलपमेंट प्लान के अनुसार एक्सप्रेसवे के साथ-साथ यमुना एक्सप्रेसवे प्राधिकरण द्वारा जनपद गौतमबुद्धनगर में लोकहित की ढांचागत एवं आधारभूत परियोजनाओं का सुनियोजित विकास किया जाना है जिसके लिए भूमि अधिग्रहण की तत्काल आवश्यकता है। उल्लेखनीय है कि आर्थिक रूप से सीमित

संसाधनों के दृष्टिगत राज्य सरकार का मूल उद्देश्य प्रदेश में औद्योगिक एवं संगठनात्मक संरचना को अधिक मजबूत बनाना है। इसी उद्देश्य की पूर्ति हेतु राज्य में बाह्य पूंजी निवेश एवं क्रियाशील पूंजी के निवेश को बढ़ावा देकर राज्य में आर्थिक विकास को अपरिहार्य मानते हुये विकास परियोजनाओं का स्वरूप सरकार के उद्देश्यानुसार प्राधिकरण द्वारा महायोजना निर्मित करते हुये निर्धारित किया जाता है। पूंजी निवेश के फलस्वरूप आर्थिक रूप से रोजगार उन्मूलक संस्थाओं की स्थापना से क्षेत्र में रोजगार के पर्याप्त अवसर प्राप्त होने के साथ-साथ समाजिक रूप से मानव जीवन की आधारभूत आवश्यकताओं यथा आवास, सामाजिक सुविधाएं, व्यापार, शिक्षा, चिकित्सा व जनस्वास्थ्य जैसी प्राथमिक आवश्यकताओं की पूर्ति भी होती है। इसी विस्तृत लोकहित को दृष्टिगत रखते हुये प्रस्तावित भूमि अधिग्रहण हेतु निर्धारित प्रक्रिया के अनुसार धारा 5 के अंतर्गत कृषकों की आपत्तियों को सुना जाता है तो उससे भूमि अधिग्रहण में विलंब होना संभावित है। इसके अतिरिक्त परियोजना की लागत में वृद्धि होने तथा विकास एवं पूंजीनिवेश की प्रक्रिया बाधित होने की आशंका है। इसके अतिरिक्त कृषकों की आपत्तियां सुने जाने के क्रम में विधिक जटिलताएं उत्पन्न होने तथा प्रस्तावित योजना हेतु Contiguous भूमि प्राप्त न हो पाने की आशंका है। अतः भूमि का तत्काल अधिग्रहण किये जाने हेतु भू-अध्याप्ति अधिनियम की धारा 17 उपधारा 4 के अंतर्गत आत्ययिकता संबंधी प्रावधान (Urgency Clause) लागू करते हुये तथा धारा 5ए भूमि अध्याप्ति अधिनियम के प्रावधानों को विवर्जित रखा जाकर भूमि अधिग्रहण कराया जाना अपरिहार्य है।"

85. The statement in the counter affidavit of the State is that on consideration of all relevant factors and the documents including certificate of the Collector issued in Prapatra 10, the State

Government recorded a satisfaction according approval to issuance of notification by invoking urgency clause keeping in view the urgent need of the 'Contiguous land for Planned Development' in District Gautam Budh Nagar through YEIDA.

(v) Village Raunija:-

86. For the acquisition of the land of Village Raunija, the counter affidavit of the State and YEIDA Authority in Writ C No. 60651 of 2011 demonstrates that the land under the impugned notifications of the said village was needed for mixed use like residential, institutional, greens and recreational etc. under Sector 22-D and 22-E in the Master plan. In view of the policy decision of the State for development of SDZ vide Government Order dated 29.12.2007, a proposal was sent by the Authority to the competent authority on 31.8.2010 for acquisition of the land of Village Raunija. A revised proposal was sent on 16.9.2010 for acquiring the land admeasuring 255.4975 hectares of the said Village. 10% of the estimated compensation and the acquisition cost was deposited on 13.10.2010. It is stated in the counter affidavit of the Authority, that with the establishment of the area as an Industrial Development Area, it has to be assured physical, social and economic integration of the existing Village Abadi and its population. The State government had sufficient material before it for dispensing with the enquiry under section 5-A of the Act, 1894. There is no allegation of mala fide nor malice can be attributed to the acquisition proceedings. The land has been acquired for the purpose of planned development for which it is being used. The notification under Section 4(1) read with Section 17(1) and 17(4) was

issued on 02.11.2010 after completion of the necessary formalities. After deposit of 70% of the estimated compensation and the compensation towards a National Rehabilitation Policy on 6.12.2010, the proposal for issuance of notification under Section 6 read with Section 17 was sent by the Director, Land Acquisition vide letter dated 13.12.2010 to the State Government and ultimately, the declaration notification under Section 6 read with Section 17 was published on 07.01.2011.

87. It was submitted before us that No pre-or post notification delay can be attributed to the entire exercise completed by the Authority therein. Placing the averments in the counter affidavit, it was urged that the acquisition of different parcels of land for development for industries, residence, amusement etc was complimentary to the creation of Yamuna Expressway. The present scheme is also of mixed use around the Expressway and it cannot be viewed in isolation. Development of an area alongside Expressway would be complementary to each other. Out of the total area of 255.1185 hectares acquired through the Notifications-in-question of Village Raunija, the possession of 236.6860 hectares had been transferred to the YEIDA Authority. Out of 492 persons/tenure holders affected by the acquisition under the notifications in question, 476 tenure holders had received compensation under Karar Niyamawali/agreement Rules, 1997, award of which was made on 09.05.2012. The award for the remaining area, of which possession had been taken, under Section 11(1), was declared on 31.12.2013. It was, thus, submitted that the challenge to the acquisition, in piecemeal, cannot be entertained and the comprehensive scheme has to be seen to decide the question of

urgency. The land of Village Raunija acquired through the acquisition-in-question forms part of Sector 22-E and Sector 22-D which are contiguous to Yamuna Expressway. A small part of this Village falls in planning of Sector 22-D and has been utilized for creation of approach roads to the Expressway. Being strategically located, the acquisition of land of Village Raunija is demonstrated to be part of the integrated scheme of development of the Townships conceived by YEIDA, complimentary to the construction of Yamuna Expressway.

(vi) Village Dungarpur Reelka:-

88. In the counter affidavit of the State in Writ C No. 6666 of 2011 for acquisition of the land of Village Dungarpur Reelka vide Notifications dated 01.12.2010 and 24.03.2011 under Section 4 and 6 of the Act, 1894; respectively. It is stated that the proposal for acquisition of 198.6320 hectares of land of the said village in furtherance of the object of development of Special Development Zone, conceived by the State Government under the Government Order dated 29.12.2007, was sent to the competent authority on 04.11.2010. 10% of the estimated cost of acquisition and compensation was deposited on 30.10.2010. The justification of urgency as disclosed in Prapatra-10, the certificate dated 04.11.2010 submitted by the Collector, Gautam Budh Nagar, can be found in Annexure No. CA-'4' to the counter affidavit, which was relatable to the original record of the State placed before us. The justification in Prapatra-10 reads as under:-

“आत्यिकता का औचित्य

यमुना एक्सप्रेसवे औद्योगिक विकास प्राधिकरण द्वारा जनपद गौतमबुद्धनगर में लोकहित की परियोजनाओं के विकास हेतु अर्जुन की कार्यवाही की जा रही है जिसके अंतर्गत राजस्व ग्राम **डूंगरपुर रीलका** की वांछित भूमि के अर्जन की कार्यवाही की जानी है।

यमुना एक्सप्रेसवे प्राधिकरण के डवलपमेंट प्लान के अनुसार एक्सप्रेस के साथ-साथ यमुना एक्सप्रेसवे प्राधिकरण द्वारा जनपद गौतमबुद्धनगर में लोकहित की ढांचागत एवं आधारभूत परियोजनाओं का सुनियोजित विकास किया जाना है जिसके लिए भूमि अधिग्रहण की तत्काल आवश्यकता है। उल्लेखनीय है कि आर्थिक रूप से सीमित संसाधनों के दृष्टिगत राज्य सरकार का मूल उद्देश्य प्रदेश में औद्योगिक एवं संगठनात्मक संरचना को अधिक मजबूत बनाना है। इसी उद्देश्य की पूर्ति हेतु राज्य में बाह्य पूंजी निवेश एवं क्रियाशील पूंजी के निवेश को बढ़ावा देकर राज्य में आर्थिक विकास को अपरिहार्य मानते हुये विकास परियोजनाओं का स्वरूप सरकार के उद्देश्यानुसार प्राधिकरण द्वारा महायोजना निर्मित करते हुये निर्धारित किया जाता है। पूंजी निवेश के फलस्वरूप आर्थिक रूप से रोजगार उन्मूलक संस्थाओं की स्थापना से क्षेत्र में रोजगार के पर्याप्त अवसर प्राप्त होने के साथ-साथ समाजिक रूप से मानव जीवन की आधारभूत आवश्यकताओं यथा आवास, सामाजिक सुविधाएं, व्यापार, शिक्षा, चिकित्सा व जनस्वास्थ्य जैसी प्राथमिक आवश्यकताओं की पूर्ति भी होती है। इसी विस्तृत लोकहित को दृष्टिगत रखते हुये प्रस्तावित भूमि अधिग्रहण हेतु निर्धारित प्रक्रिया के अनुसार धारा 5 के अंतर्गत कृषकों की आपत्तियों को सुना जाता है तो उससे भूमि अधिग्रहण में विलंब होना संभावित है। इसके अतिरिक्त परियोजना की लागत में वृद्धि होने तथा विकास एवं पूंजीनिवेश की प्रक्रिया बाधित होने की आशंका है। इसके अतिरिक्त कृषकों की आपत्तियां सुने जाने के क्रम में विधिक

जटिलताएं उत्पन्न होने तथा प्रस्तावित योजना हेतु Contiguous भूमि प्राप्त न हो पाने की आशंका है। अतः भूमि का तत्काल अधिग्रहण किये जाने हेतु भू-अध्याप्ति अधिनियम की धारा 17 उपधारा 4 के अंतर्गत आत्ययिकता संबंधी प्रावधान (Urgency Clause) लागू करते हुये तथा धारा 5ए भूमि अध्याप्ति अधिनियम के प्रावधानों को विवर्जित रखा जाकर भूमि अधिग्रहण कराया जाना अपरिहार्य है।”

89. From a perusal of the statement in Form 10, it can be seen that the acquisition was proposed for the integrated project, to provide basic infrastructural facilities and the need for contiguous land was pressed with the assertion that in case of grant of opportunity of hearing to the land holders, there was likelihood of non-availability of the contiguous land for the proposed project which may frustrate the project itself. Total 80% of the estimated compensation was deposited on 02.02.2011, out of total 612 affected tenure holders, 437 tenure holders for a total area of 96.1808 hectares had received compensation under Karar Niyamawali/agreement rules, 1997 and the award for the said area under Section 11(2) of the Act, 1894 had been declared on 14.3.2012, copy of which is appended as Annexure No. '6' to the said affidavit.

(vii) Village Rustampur:-

90. The counter affidavit of the State in Writ C No. 61244 of 2011 for acquisition of land of Village Rustampur by the notifications dated 26.02.2009 and 26.02.2010 under Section 4 and 6 of the Act, 1894; respectively, shows that it was an acquisition for a large area of land admeasuring 360.6642 hectares. The copy

of the Certificate/report of the Collector, Gautam Buddh Nagar in Prapatra-10 shows that it was mentioned therein that the village-in-question being in the Notified area of Yamuna Expressway Industrial Development Authority, its development in a planned manner as per the Master Plan was to be made. About suitability of the land, it was specifically stated therein that no other land was available for the purpose of acquisition. From the original record of the State in the matter of invocation of urgency of Village Rustampur, it could be noted that the delay in sending papers for issuance of declaration under Section 6 before the State government, in the instant acquisition, was viewed seriously by the State and direction was given to fix the accountability of the officer concerned. It was urged that this fact demonstrated from the record shows the sensitivity of the State Government to the fact that on account of dereliction of the official in-charge of the proceedings, lapse of acquisition of such a large area would hamper development of the whole project.

(viii) Village Kadarapur:-

91. For village Kadarapur, the counter of the State and the records pertaining to recording satisfaction by the State shows that it was an acquisition for a large area of 120.8221 hectares. On the proposal submitted on 29.10.2010 before the State carrying a certificate of the Collector, the copy of the office noting on which approval of the State Government for invocation of urgency clause was given has been appended with the counter affidavit as Annexure No. '10'. The material brought before the State namely a certificate of the District Level Committee regarding grant of consent for acquisition of the land, the certificates that total 175 families will be

affected by the proposed acquisition and that 10% of the estimated compensation as well as 10% of the acquisition cost submitted alongwith the proposal, and a statement that no land except the proposed agriculture land was available, which was required for development as per the Master Plan of the area, could be found. It was stated in the counter that the land was required immediately to complete the development plan for Green belt Area to be maintained on either sides of the Expressway. It was brought before the State that, in case of grant of opportunity of hearing to the farmers/tenure holders, there was likelihood of the acquisition being entangled in litigation and the apprehension was that the authority may not be able to procure 'Contiguous land', needed for integrated development of the area. The statement in paragraph '19' of the said affidavit are relevant to be extracted hereunder:-

"19. That it will not out of place to mention here that the State Government was satisfied by looking at enormity of the number of tenure holders, the disposal of objections will cause a delay of years. Hence, the acquisition of land possession was of paramount importance. It was accordingly satisfied that the provisions of Section 5-A need to be dispensed with. A true copy of the noting of the State Government evidencing application of mind by the State Government is being annexed herewith and marked as Annexure No. CA-10 to this counter affidavit."

92. It may further be noted that 80% of the estimated compensation for the acquired land was deposited before the publication of Section 6 notification. Out of total 120.8221 hectares, possession of 113.8074 hectares was given to YEIDA.

Out of total 561 affected tenure holders, 503 tenure holders had received compensation under the Agreement rules. It has further been stated in the counter affidavit that under three writ petitions filed by the tenure holders with respect to acquisition of land of village Kadarpur, out of total six petitioners, three had received compensation. The affected area under litigation is only 5.592 hectares which comes to about 4.91% of the total acquired and possessed area. We may further note that at the time of hearing of this bunch, only two writ petitions of Village Kadirpur comprising of three petitioners remained for consideration and it seems that the other three petitioners who had received compensation had withdrawn their petition.

(ix) Village Dhanauri:-

93. For acquisition of village Dhanauri, vide notification dated 16.11.2010 and 22.3.2011 under Section 4 and 6 of the Act, 1894; respectively, in the counter affidavit of the State it was brought on record that the justification for acquisition by invocation of urgency clause had been given in Prapatra-10 in the proposal submitted by the development authority upon which satisfaction had been recorded by the State. From the record of the State and the copy of Prapatra-10 appended with the counter affidavit as Annexure No.C.A.-'3', we find justification as under:-

आत्ययिकता का औचित्य-

यमुना एक्सप्रेसवे औद्योगिक विकास प्राधिकरण द्वारा जनपद गौतमबुद्धनगर में लोकहित की परियोजनाओं के विकास हेतु अर्जुन की कार्यवाही की जा रही है जिसके अंतर्गत राजस्व ग्राम **धनौरी** की वांछित भूमि के अर्जन की कार्यवाही की जानी है।

यमुना एक्सप्रेसवे प्राधिकरण के डवलपमेंट प्लान के अनुसार एक्सप्रेसवे के साथ-साथ यमुना एक्सप्रेसवे प्राधिकरण द्वारा जनपद गौतमबुद्ध नगर में लोकहित की ढांचागत एवं आधारभूत परियोजनाओं का सुनियोजित विकास किया जाना है जिसके लिए भूमि अधिग्रहण की तत्काल आवश्यकता है। उल्लेखनीय है कि आर्थिक रूप से सीमित संसाधनों के दृष्टिगत राज्य सरकार का मूल उद्देश्य प्रदेश में औद्योगिक एवं संगठनात्मक संरचना को अधिक मजबूत बनाना है। इसी उद्देश्य की पूर्ति हेतु राज्य में बाह्य पूंजी निवेश एवं क्रियाशील पूंजी के निवेश को बढ़ावा देकर राज्य में आर्थिक विकास को अपरिहार्य मानते हुये विकास परियोजनाओं का स्वरूप सरकार के उद्देश्यानुसार प्राधिकरण द्वारा महायोजना निर्मित करते हुये निर्धारित किया जाता है। पूंजी निवेश के फलस्वरूप आर्थिक रूप से रोजगार उन्मूलक संस्थाओं की स्थापना से क्षेत्र में रोजगार के पर्याप्त अवसर प्राप्त होने के साथ-साथ समाजिक रूप से मानव जीवन की आधारभूत आवश्यकताओं यथा आवास, सामाजिक सुविधाएं, व्यापार, शिक्षा, चिकित्सा व जनस्वास्थ्य जैसी प्राथमिक आवश्यकताओं की पूर्ति भी होती है। इसी विस्तृत लोकहित को दृष्टिगत रखते हुये प्रस्तावित भूमि अधिग्रहण हेतु निर्धारित प्रक्रिया के अनुसार धारा 5 के अंतर्गत कृषकों की आपत्तियों को सुना जाता है तो उससे भूमि अधिग्रहण में विलंब होना संभावित है। इसके अतिरिक्त परियोजना की लागत में वृद्धि होने तथा विकास एवं पूंजीनिवेश की प्रक्रिया बाधित होने की आशंका है। इसके अतिरिक्त कृषकों की आपत्तियां सुने जाने के **क्रम में विधिक जटिलताएं उत्पन्न होने तथा प्रस्तावित योजना हेतु Contiguous भूमि प्राप्त न हो पाने की आशंका है।** अतः भूमि का तत्काल अधिग्रहण किये जाने हेतु भू-अध्याप्ति अधिनियम की धारा 17 उपधारा 4 के अंतर्गत आत्ययिकता संबंधी प्रावधान (Urgency Clause) लागू करते हुये तथा

धारा 5ए भूमि अध्याप्ति अधिनियम के प्रावधानों को विवर्जित रखा जाकर भूमि अधिग्रहण कराया जाना अपरिहार्य है।

94. It is stated therein that the land in question was required for the purpose of development, complimentary to the Expressway, for structural and foundational purposes of the planned development, which cannot be said to be alien to the concept of invocation of urgency. Out of total 1983 affected tenure holders under the impugned notifications, 618 tenure holders for an area 232.1773 hectares had received compensation under Karar Niyamawali, award of which under Section 11(2) was made.

(VI) Analysis:-

95. Having heard learned counsel for the parties and perused the record, on the issues raised before us, the questions before us to examine in the instant case, is (i) Whether for the acquisition of lands of nine villages made between 26.02.2009 to 02.12.2010, for the integrated development of the township by YEIDA under the Master plan-2031 (Phase-1), as alleged herein, there was any justification before the State Government for invocation of urgency clause under Section 17(1) read with Section 17(4) of the Act' 1894, to dispense with the enquiry under Section 5-A of the Act' 1894, denying opportunity of hearing to the tenure holders/land holders. (ii) Whether denial of opportunity of hearing to the tenure holders would be an illegal exercise on the part of the State which would render the entire acquisition proceedings bad in law.

96. To answer these questions, while entering into the merits of the rival submissions of the learned counsel for the

parties, at the beginning, we would be required to examine the legal aspects relating to the Scope and Object of Section 5-A.

(A) Nature, scope and ambit of Section 5-A of the Act, 1894:-

(a) Constitutional Scheme:-

97. It was argued by Sri Manish Goyal learned Senior Advocate appearing for the respondent-YEIDA that for understanding the scope and object of Section 5-A, we must look to the Constitutional scheme, right to property enshrined in Article 300-A which provides that "no person shall be deprived of his property save by authority of law". The word "law" is defined in Article 13(3)(a) which includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

98. Article 31-A saves the law providing for acquisition by the State of any estate or of any rights therein. Article 31-A(1) starts with a Non-obstante clause and provides that no such law shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19. The Second proviso to Article 31-A, however, provides that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land, as is within the ceiling limit applicable to him, under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to

acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.

99. Article 31-C saves the law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV of the Constitution and states that it shall not be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19. It further provides that no law containing a declaration that it is for giving effect to such policy shall be called in question in any Court on the ground that it does not give effect to such policy.

100. Article 39(b), containing in Part IV “Directive Principles of the State Policy” mandates the State to direct its policy, in particular, towards securing that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good.” Sovereign power of Eminent domain of the State has, thus, been exercised by the State for framing policy for development of Special Economic Zone by the Government Order dated 29.12.2007.

101. The decision of the Apex Court in **State of Karnataka and another etc. vs. Ranganatha Reddy & another etc.**²⁵ has been placed before us to submit that in a challenge to the State Act namely Karnataka Contract Carriages (Acquisition) Act, 1976, it was held therein that the Act was brought into force to implement Directive principles contained in Article 39(b), the infraction of Article 14 is, thus, cured by Article 31-C. It was noted that Article 39(b) and (c) enjoins upon the State

to see that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and that the operation of the economic system does not result in the concentration of wealth to the Common detriment.

102. Reference has been made to the observations of the Apex Court in **Sanjeev Coke Manufacturing Company vs. M/s Bharat Coking Coal Limited and another**²⁶ to bring before us as to what would be the valid exercise of Eminent domain. It was observed therein that the law seeking the immunity afforded by Article 31-C must be a law directing the policy of the State towards securing a Directive Principle, where Article 31-C comes in Article 14 goes out. There is no scope for bringing in Article 14 by a side-wind as it were, that is, by equating the rule of equality before the law of Article 14 with the broad egalitarianism of Article 39(b) or by treating the principle of Article 14 as included in the principle of Article 39(b). To insist on nexus between the law for which protection is claimed and the principle of Article 39(b) is not to insist on fulfillment of the requirement of Article 14. They are different concepts and in certain circumstances, may even run counter to each other. That is why the need for the immunity afforded by Article 31-C is there. The argument that any law seeking the protection of Article 31-C must not be a law founded on discrimination, had been turned down therein. The submission that the law founded on arbitrariness and discrimination could never be said to be a law to further the Directive Principles in clauses (b) and (c) of Article 39, had been held untenable. It was held that the expression ‘material resources of the community’ in Article 39(b) is not confined

to natural resources; it is not confined to resources owned by the public; it means and includes all resources, natural and man-made, public and private-owned.

103. The purport, significance, scope, ambit and rationale of Article 31-C has been discussed by the Constitution Bench of the Apex Court in **State of Tamil Nadu and others vs. L. Abu Kavur Bai and others**²⁷, it was observed in paragraphs '19, '20' and '21' as under:-

"19. Thus, it would appear from a combined reading of Bharati's and Minerva Mills cases as also of the subsequent decisions that the undisputed position is that Art.31C, as introduced by the twenty fifth amendment, is constitutionally valid in all respects and has survived the stormy decision of Bharati's case.

20. Similar observations were made in Waman Rao & Ors. etc. v. Union of India & Ors., where one of us (Chandrachud, CJ) observed thus:

"...Article 31 is now out of harm's way. In fact, far from damaging the basic structure of the Constitution, laws passed truly and bona fide for giving effect to directive principles contained in clauses (b) and (c) of Article 39 will fortify that structure."

(Emphasis supplied)

21. In the latest Constitution Bench decision of this Court in Sanjeev Coke Manufacturing Co. v. M/s. Bharat Coking Coal Ltd. & Anr., it has been emphasised that the constitutional validity of Art.31C is now beyond challenge and in this connection one of us (Reddy, J.) speaking for the Court made the following observations:

In the second place, the question of the constitutional validity of Art.31C

appears to us to be concluded by the decision of the Court in Kesavananda Bharati case."

104. It was further observed therein that another important facet of Article 31-C which has been emphasized by the Apex Court, is that there should be a close nexus between the Statute passed by the legislature and the twin objects mentioned in clauses (b) and (c) of Article 39, so as to make the protection of Article 31-C complete and irrevocable. By close nexus, what is meant is that there must be a reasonable connection between the Act passed and the objects mentioned in Article 39(b) and (c) before the Article 31-C can apply. The observation in paragraph '26' of the said decision, noticing the earlier decision in **Sanjeev Coke Manufacturing Company** (supra), adverting to the conflict of Article 31-C and Article 14 is relevant to be extracted hereunder:-

"In a later decision in Sanjay Coke Manufacturing Co.'s case (supra), adverting to this very point, one of us (Reddy, J.) made the following observations:

"We are firmly of the opinion that where Article 31C comes in Article 14 goes out. There is no scope for bringing in Article 14 by a side wind as it were, that is, by equating the rule of equality before the law of Article 14 with the broad egalitarianism of Article 39 (b) or by treating the principle of Article 14 as included in the principle of Article 39 (b)."

105. In **State of Maharashtra and another vs. Basantibai Mohanlal Khetan and others**²⁸, taking note of the above decisions, the interplay of Article 300-A & Article 31-C had been noticed. Relying upon the Constitution Bench decision in

Sanjeev Coke Manufacturing Company (supra), it was held therein that the Act was brought into force to implement the Directive Principle contained in Article 39(b) and hence even if there is any infraction of Article 14, it is cured by Article 31-C which gives protection to the Act, even if it enshrined the protection granted by the then Article 31(1) of the Constitution which was couched in the same language as that of Article 300-A, which came into force after enactment of the Act challenged therein. It was observed that even if the action of acquiring private properties should satisfy new Article 300-A because the proceedings to acquire the land started after Article 300-A came into force, the law cannot be tested on the standards of principles of fairness and reasonableness enshrined in Article 14. It was held that the purpose for which the lands were acquired was the public purpose. All the requirements of valid exercise of the power of Eminent domain had been fulfilled under the Act, the High Court, therefore, fell in error in holding that the impugned provisions of the Act were required to be struck down as they were neither just nor fair nor reasonable though they are protected from challenge under Articles 14, 19 and 31 of the Constitution due to the applicability of Article 31-C of the Constitution.

106. On the arguments based on Article 21 of the Constitution of the respondent, it was observed that it has little to do with the right to own property as such. Land ceiling laws, laws providing for acquisition of land for providing housing accommodation, laws imposing ceiling on urban property etc. cannot be struck down by invoking Article 21 of the Constitution.

107. The submission of the learned Senior Counsel for YEIDA, in the instant

case, thus, is that the acquisition of the lands in question by the notifications under Section 4 read with Section 17 and Section 6/17 of the Act, 1894 is a matter of public policy and it is to be left to the legislative wisdom, the State to decide as to how a development policy is framed and whether a particular scheme of development, to take over the land, should be undertaken. The preparation of Master plan by the State for development of the area being governed by Article 39(b) contained in Chapter IV of the 'Directive Principles of State Policy', the decision of the State to develop the area by creation of Yamuna Expressway Industrial Development Authority and preparation of Master plan being an Act of the State under the constitutional mandate would be saved by Article 31-C. Challenge to the law which includes the notifications issued by the State under the Land Acquisition Act, 1894 on the plea of discrimination or lack of public purpose or against the public policy cannot be sustained.

108. Once the acquisition of land is made in exercise of power of Eminent domain of the State, infraction of Article 14 shall not be attracted. Individual grievances cannot be raised to assail the acquisition being made by the law of the State which is saved by Article 31-C of the Constitution. The scope of objection under Section 5-A and challenge to the deprivation of it is covered under the statutory scheme.

(b) Statutory Scheme:-

109. As regards the invocation of urgency clause, dispensation of Section 5-A of the Land Acquisition Act, 1894, it was urged that the legislative scheme of the Act, 1894 has to be considered. Section 16 provides that after the Collector has made

an award under Section 11, he may take possession of the land, which shall thereupon vest absolutely in the State, free from all encumbrances. Section 17 is in the nature of exception. Section 17(1) provides that in case of urgency, though no award has been made, on expiration of fifteen days from the publication of notice under Section 9(1), it can take possession of any land needed for a public purpose. Such land shall thereupon vest absolutely in the State, free from all encumbrances. Section 17(2) also empowers the Collector to enter upon and take possession of such land, immediate possession of which is needed for the purposes prescribed therein, in the opinion of the State Government and on such action of the Collector with the previous sanction of the State, the land shall vest absolutely in the State, free from all encumbrances. Sub-section (3) of Section 17 provides the damages which is to be offered by the Collector to the persons interested as compensation for the Standing Crops and trees or any other damage sustained by them caused by the sudden dispossession. In case, the offer is not accepted, the value of such crops and trees and such damages shall be incorporated in the award made under the provisions of the Act. Sub-section (3A) further protects interest of the tenure holders to the extent that before taking possession under Sub-section (1) or Sub-section (2) of Section 17, the Collector has to tender 80% of the estimated compensation to the persons interested entitled thereto. In case of refusal, or any dispute relating to the entitlement of the person interested, the compensation has to be deposited in accordance with the provisions of Section 31 of the Act, 1894.

110. Sub-section (4) of Section 17, however, provides that where the State

Government has formed opinion that the provisions of Sub-section (1) or Sub-section (2) are applicable, it may direct for dispensation of enquiry under Section 5-A and if it does so, a declaration may be made under Section 6 in respect of the land at any time, after the publication of the notification under Section 4(1) of the Act, 1894. Section 5-A is the stage of making objection by the person interested in any land after the intention of the State to acquire the land has been notified under Section 4(1). The Collector is obliged to make an enquiry on the objections made to him in writing and submit his recommendations on the objections together with the record of the proceedings held by him for the decision of the State Government, approval of which on the objections of the person interested/tenure holders shall be final.

111. The Land Acquisition Act is a complete Code in itself. Being an expropriatory legislation, it is settled that its provisions are to be strictly followed. The procedure for acquisition prescribed under the Land Acquisition Act shall be subject to strict interpretation by the Court of law, whenever there is a challenge raised to any of the proceedings conducted under it. Sections 17(1) and 17(4) of the Act are independent. In case of a notification issued under Section 17(1), it is not necessary to issue notification under Section 17(4) as well. The enquiry under Section 5-A is dispensed with only when the notification both under Sections 17(1) and 17(4) are issued. With the issuance of the notification under Section 4 read with Section 17(1) and 17(4), the expression of intention of the State Government to take possession of the land without making an award is notified. In the legislative scheme, the State Government is empowered to issue

notification to notify that in view of Section 17(1), in its opinion, invocation of Section 17(4) is needed, with the result that enquiry under Section 5-A or opportunity of hearing to the tenure holder under the said provision stands dispensed with.

112. In the constitutional scheme, the right to property is protected under Article 300-A, to the extent, that no one can be expropriated of its property saved by authority of law. Article 31-A and 31-C contained in Part III of the Constitution are in the nature of exception to Article 14 or Article 19. The acquisition notifications under Sections 17(1) and 17(4), invocation of urgency and dispensation of enquiry, being under the statutory scheme of the Act, 1894 are saved by the Constitution, if they confirm to the requirements of Article 31-A and 31-C, contained in Part III of the Constitution. With the exclusion of Article 14 and Article 19 from the purview of Article 31-A and 31-C, right of the tenure holder to object to the acquisition provided under Section 5-A of the Act, 1894 cannot be said to be a fundamental right or a right akin to fundamental right protected by the Constitution. Section 5-A is a statutory right conferred on the tenure holders/person interested to object in writing to the acquisition of the land within the time provided therein. Deprivation of it by invocation of urgency clause vide notifications under Section 17(1) and 17(4) being within the statutory scheme, thus, is not hit by the Article 300-A of the Constitution. The expropriation of land by invocation of urgency clause, by itself, cannot be said to be in violation of Article 300-A. The act of the Government in deprivation of statutory right of hearing while notification issued under Section 17(4), cannot be challenged on the ground that fundamental rights of the tenure

holders under Articles 14 and 19 have been violated or it amounts to violation of Article 300-A of the Constitution, without any challenge to the procedure adopted by the State Government in issuance of the notification under Section 17(4). Indeed, there cannot be a quarrel that the notifications under Section 17(1) readwith 17(4) of the Act, 1894 can be challenged and validity can be tested on all legal parameters as is available under law, on the ground that it amounts to violation of Statutory scheme or contrary to it.

113. “Eminent domain” is the right or power of a sovereign State to appropriate the private property within the territorial sovereignty to public uses or purposes. It is exercise of strong arm of government to take property for public uses without the owner's consent. It requires no constitutional recognition; it is an attribute of sovereignty and essential to the sovereign government. The power of Eminent domain, being inherent in the government, is exercisable in the public interest, general welfare and for public purpose. Acquisition of private property by the State in the public interest or for public purpose is nothing but an enforcement of the right of Eminent domain. The Act, 1894 provides directly for acquisition of particular property for public purpose. Though the right to property is no longer a fundamental right but Article 300-A of the Constitution mandates that no person shall be deprived of his property save by authority of law. [Reference paragraphs ‘40’ and ‘41’ of **Anand Singh and another vs. State of Uttar Pradesh and others**²⁹]

114. As held by the Apex Court in **Delhi Administration vs. Gurdip Singh Uban and others**³⁰, a person interested

can file objections under Section 5-A, substantially on the following grounds:-

(i) The purpose for which the land is acquired is not a public purpose;

(ii) That even if the purpose is a public purpose, the land of the objector is not necessary to be taken as the purpose could be served by other land already proposed or some other land to which the objector may refer; or

(iii) In any event, even if the land is necessary for the public purpose, in the special facts and circumstances, in which the objector is placed, it is a fit case for omitting his land from acquisition.

(c) The Precedence:- Legal Position:-

115. There has been a long debate on the nature of right conferred on the land holders to file objection under Section 5-A to the acquisition of their property in exercise of power of Eminent domain of the State. The discussion of various decisions of the Apex Court beginning from the year 1964, at this juncture, will throw some light on the same.

116. In **Nandeshwar Prasad vs. State of U.P.**³¹, it was observed that the right to file objections under Section 5-A is a substantial right when a person's property is being threatened with acquisition and that right cannot be taken away as if by a side-wind.

117. While noticing the above observations in **Nandeshwar Prasad** (supra), it was held in **Munshi Singh and others vs. Union of India**³² in paragraph '7' that:

"7. Section 5-A embodies a very just and wholesome principle that a person whose property is being or is intended to be acquired should have a proper and

reasonable opportunity of persuading the authorities concerned that acquisition of the property belonging to that person should not be made. xxxxxxx....."

118. Noticing the provisions of Sub-section (2) of Section 5-A of the Act, it was held in **Munshi Singh** that:-

"7. xxxxxxxxxxxxx..... The legislature has, therefore, made complete provisions for the persons interested to file objections against the proposed acquisition and for the disposal of their objections. It is only in cases of urgency that special powers have been conferred on the appropriate Government to dispense with the provisions of Section 5-A."

119. In **Union of India and others vs. Mukesh Hans, etc.**³³, noticing the earlier decisions of the Apex Court, it was held that:-

"36. Right of representation and hearing contemplated under Section 5-A of the Act is a very valuable right of a person whose property is sought to be acquired and he should have appropriate and reasonable opportunity of persuading the authorities concerned that the acquisition of the property belonging to that person should not be made. Therefore, in our opinion, if the appropriate Government decides to take away this minimal right then its decision to do so must be based on materials on record to support the same and bearing in mind the object of Section 5-A".

120. In **Hindustan Petroleum Corp. Ltd. vs. Darius Shapur Chenai and others**³⁴, while dealing with the nature of right under Section 5-A, noticing the

observations in the above noted decisions, it was observed by the Apex Court in paragraphs '7' and '10' as under:-

"7. It is not in dispute that Section 5-A of the Act confers a valuable right in favour of a person whose lands are sought to be acquired. Having regard to the provisions contained in Article 300A of the Constitution of India, the State in exercise of its power of 'eminent domain' may interfere with the right of property of a person by acquiring the same but the same must be for a public purpose and reasonable compensation therefor must be paid.

10. It is trite that hearing given to a person must be an effective one and not a mere formality. Formation of opinion as regard the public purpose as also suitability thereof must be preceded by application of mind as regard consideration of relevant factors and rejection of irrelevant ones. The State in its decision making process must not commit any misdirection in law. It is also not in dispute that Section 5-A of the Act confers a valuable important right and having regard to the provisions contained in Article 300A of the Constitution of India has been held to be akin to a fundamental right. "

121. In **Anand Singh (supra)**, it was observed that:-

"42. When the government proceeds for compulsory acquisition of particular property for public purpose, the only right that the owner or the person interested in the property has, is to submit his objections within the prescribed time under Section 5A of the Act and persuade the State authorities to drop the acquisition of that particular land by setting forth the

reasons such as the unsuitability of the land for the stated public purpose; the grave hardship that may be caused to him by such expropriation, availability of alternative land for achieving public purpose etc. Moreover, right conferred on the owner or person interested to file objections to the proposed acquisition is not only an important and valuable right but also makes the provision for compulsory acquisition just and in conformity with the fundamental principles of natural justice.

43. The exceptional and extraordinary power of doing away with an enquiry under Section 5A in a case where possession of the land is required urgently or in unforeseen emergency is provided in Section 17 of the Act. Such power is not a routine power and save circumstances warranting immediate possession it should not be lightly invoked. The guideline is inbuilt in Section 17 itself for exercise of the exceptional power in dispensing with enquiry under Section 5A. Exceptional the power, the more circumspect the government must be in its exercise. The government obviously, therefore, has to apply its mind before it dispenses with enquiry under Section 5A on the aspect whether the urgency is of such a nature that justifies elimination of summary enquiry under Section 5A. "

122. The right of property is now considered to be not only a Constitutional or Statutory right but also a human right. [Reference **P.T. Munichikkanna Reddy v. Revamma**³⁵ and **State of Haryana vs. Mukesh Kumar and others**³⁶

123. In **Babu Ram and another vs. State of Haryana and another**³⁷, the observations made by the Apex Court in **Om Prakash and another vs. State of U.P. and others**³⁸ were noted to

emphasize that a right under Section 5-A is not merely statutory but also has a flavour of fundamental rights under Articles 14 and 19 of the Constitution. It was noted therein that such observation in **Om Prakash** (supra) were made in light of the observations of the Apex Court in earlier decision in **State of Punjab and another vs. Gurdial Singh and Others**³⁹.

124. In **Om Prakash** (supra), the Apex Court referring to the observations in **State of Punjab vs. Gurdial Singh** (supra), about the nature of right under Section 5-A, itself noted that right to property has no longer remained a fundamental right and is saved by Article 300-A of the Constitution. It was, however, noted that the observation in **State Of Punjab vs. Gurdial Singh** (supra) regarding Article 14 vis-a-vis Section 5-A of the Act would remain apposite.

125. The relevant observations in paragraph '21' in **Om Prakash** (supra) with reference to the statement in paragraph '16' of **State Of Punjab vs Gurdial Singh** (supra) is noted hereinunder:-

"21. Our attention was also invited by shri Shanti Bhushan, learned senior counsel for the appellants to a decisions of a two Judge Bench of this Court in the case of State of Punjab and Anr. vs. Gurdial Singh and Ors. [(1980) 2 SCC 471] wherein Krishna Iyer, J. dealing with the question of exercise of emergency powers under section 17 of the Act observed in para 16 of the Report that save in real urgency where public interest did not brook even the minimum time needed to give a hearing land acquisition authorities should not, having regard to Articles 14 and 19 burke an enquiry under Section 17

of the Act. Thus, according to the aforesaid decision of this Court, inquiry under Section 5-A is not merely statutory but also has a flavour of fundamental rights under Articles 14 and 19 of the Constitution though right to property has now no longer remained a fundamental right, at least observation regarding Article 14, vis-a-vis, Section 5-A of the Land Acquisition Act would remain apposite."

126. Simultaneously, the observations in paragraph '16' in **State Of Punjab vs. Gurdial Singh** (supra) are also noted hereinunder:-

"Without referring to supportive case-law it is fundamental that compulsory taking of a man's property is a serious matter and the smaller the man the more serious the matter. Hearing him before depriving him is both reasonable and preemptive of arbitrariness, and denial of this administrative fairness is constitutional anathema except for good reasons. Save in real urgency where public interest does not brook even the minimum time needed to give a hearing land acquisition authorities should not, having regard to Arts. 14 (and 19), burke an enquiry under Sec. 17 of the Act. Here a slumbering process, pending for years and suddenly exciting itself into immediate forcible taking, makes a travesty of emergency power."

127. A careful and conjoint reading of both the above observations of the Apex Court makes it clear that the analogy to Articles 14 and 19 had been drawn in the case of **State Of Punjab vs. Gurdial Singh** (supra) to borrow the principles of reasonableness and administrative fairness in the acquisition proceedings, to observe that save in real urgency where public interest does not brook even the minimum

time needed to give a hearing, the Land Acquisition Authorities should not, having regard to Articles 14 (and 19), burke an enquiry under Section 17 of the Land Acquisition Act.

128. The abovenoted observations in **Gurdial Singh** (supra) cannot be read to mean that the right of hearing under Section 5-A of a tenure holder has been elevated to fundamental rights under Articles 14 and 19 of the Constitution from that of a statutory right as sought to be contended by the learned counsels for the petitioners.

129. In view of the above discussion, it is evident that objections under Section 5-A of the Act, if filed, have to be dealt with in accordance with law by providing opportunity of effective hearing to every objector, as it cannot be said to be an empty formality and, in case, such a hearing is not provided, the subsequent proceedings would stand vitiated. The enquiry required under Section 5-A of the Act can be dispensed with in exercise of the power under Section 17(4) of the Act, only in grave urgency and in exceptional circumstances, and the decision of the State must be based on material on record to support the same, otherwise, it would amount to arbitrary exercise of power and denial of administrative fairness would be a constitutional anathema. The exercise of power of 'Eminent domain' may interfere with the right of property of a person by acquiring the same, but it should be made only for public purpose and should not violate the constitutional rights guaranteed under Article 300-A of the Constitution of India. Denial of enquiry under Section 5-A of the Act, without any justifiable cause, could be violative of Article 14 of the Constitution, as it cannot withstand the test

of fairness and reasonableness required in the administrative process. In absence of real and genuine urgency, it would not be appropriate to deprive a land holder (aggrieved person) of a fair and just opportunity of putting forth his objection for due consideration of the Authority concerned. [emphasis be made to the observations of the Apex Court in the above noted decisions]

B. The Procedure for invocation of Urgency Clause under Section 17(4):-

130. Now the question would be as to what procedure is required to be followed by the State for invoking the urgency clause under Section 17(4) to dispense with the enquiry required under Section 5-A of the Act.

131. In **Union of India and others vs. Mukesh Hans** (supra), there is a discussion with regard to the procedure which is required to be followed by the State while invoking the provisions of Sections 17(1) and 17(4) of the Act, 1894.

132. It was observed that Section 17(1) only contemplates that the authorities may take possession of the land even before passing of an award after expiration of 15 days of publication of Section 9(1) notice. Sub-section (2) of Section 17 contemplates a different type of urgency, which should be an unforeseen emergency. Under this Section, if Appropriate Government is satisfied that there is such unforeseen emergency, it can take possession of the land even without waiting for 15 days period contemplated under Section 9(1), as against the provisions of Sub-section (1) of Section 17. Section 17(4), however, can be invoked in cases, where the Appropriate Government has

come to the conclusion that there exists an urgency or unforeseen urgency as required under Sub-sections (1) and (2) of Section 17; respectively, and, thus, may direct that the provisions of Section 5-A shall not apply. On issuance of such direction, the enquiry under Section 5-A can be dispensed with. It is, held that Section 17(4) is an exception to the normal mode of acquisition contemplated under the Act and that mere existence of urgency or unforeseen urgency though is a condition precedent for invoking Section 17(4), but that by itself is not sufficient to direct the dispensation of 5-A enquiry. It is observed that mere existence of an urgency under Section 17(1) or unforeseen emergency under Section 17(2) would not by themselves be sufficient for dispensing with 5-A enquiry. The existence of urgency or unforeseen emergency provision in Section 17(1) and (2) would not automatically dispense with the enquiry under Section 5-A.

133. The result is that there would be requirement of application of mind by the appropriate Government while dispensing with 5-A enquiry and it is possible that in a given case the urgency noticed by the Appropriate Government under Section 17(1) or the unforeseen emergency under Section 17(2), itself may be of such decree that it could require the Appropriate Government on that very basis to dispense with the enquiry under Section 5-A. But the need for application of mind by the Appropriate government that such an urgency for dispensation of 5-A enquiry is inherent in the two types of urgencies contemplated under Section 17(1) and (2) of the Act. The nature and right under Section 5-A, thus, has been explained in paragraphs '34' and '35' as under:-

"34. A careful reading of the above judgment shows that this Court in the said case of Nandeshwar Prasad's case (supra) has also held that there should an application of mind to the facts of the case with special reference to this concession of 5A inquiry under the Act.

35. At this stage, it is relevant to notice that the limited right given to an owner/person interested under Section 5A of the Act to object to the acquisition proceedings is not an empty formality and is a substantive right, which can be taken away for good and valid reason and within the limitations prescribed under Section 17(4) of the Act. The object and importance of 5A inquiry was noticed by this Court in the case of Munshi Singh & Ors. vs. Union of India {(1973) 2 SCC 337 where this Court held thus:-

"Section 5-A embodies a very just and wholesome principle that a person whose property is being or is intended to be acquired should have a proper and reasonable opportunity of persuading the authorities concerned that acquisition of the property belonging to that person should not be made. The legislature has made complete provisions for the persons interested to file objections against the proposed acquisition and for the disposal of their objections . It is only in cases of urgency that special powers have been conferred on the appropriate Government to dispense with the provisions of Section 5-A."

134. It was further held that formation of opinion and application of mind on invocation of urgency cannot be assessed except by looking into the proceeding which culminated in the impugned order. The records of the State is, thus, required to be looked into.

135. The extract of paragraph '32' of **Union of India vs. Mukesh Hans** (supra) noted in **Anand Singh** (supra) reads as under:-

“34.....xxxxxxx 32. A careful perusal of this provision which is an exception to the normal mode of acquisition contemplated under the Act shows that mere existence of urgency or unforeseen emergency though is a condition precedent for invoking Section 17(4), that by itself is not sufficient to direct the dispensation of the Section 5-A inquiry. It requires an opinion to be formed by the Government concerned that along with the existence of such urgency or unforeseen emergency there is also a need for (2004) 8 SCC 14 dispensing with Section 5-A inquiry which indicates that the legislature intended the appropriate Government to apply its mind before dispensing with Section 5-A inquiry. It also indicates that mere existence of an urgency under Section 17(1) or unforeseen emergency under Section 17(2) would not by itself be sufficient for dispensing with Section 5-A inquiry. If that was not the intention of the legislature then the latter part of sub-section (4) of Section 17 would not have been necessary and the legislature in Sections 17(1) and (2) itself could have incorporated that in such situation of existence of urgency or unforeseen emergency automatically Section 5-A inquiry will be dispensed with. But then that is not the language of the section which in our opinion requires the appropriate Government to further consider the need for dispensing with Section 5-A inquiry in spite of the existence of unforeseen emergency. This understanding of ours as to the requirement of an application of mind by the appropriate Government while

dispensing with Section 5-A inquiry does not mean that in each and every case when there is an urgency contemplated under Section 17(1) and unforeseen emergency contemplated under Section 17(2) exists that by itself would not contain the need for dispensing with Section 5-A inquiry. It is possible in a given case the urgency noticed by the appropriate Government under Section 17(1) or the unforeseen emergency under Section 17(2) itself may be of such degree that it could require the appropriate Government on that very basis to dispense with the inquiry under Section 5-A but then there is a need for application of mind by the appropriate Government that such an urgency for dispensation of the Section 5-A inquiry is inherent in the two types of urgencies contemplated under Sections 17(1) and (2) of the Act.”

C. Scope of Judicial review:-

136. As to the scope of judicial review, in **Hindustan Petroleum Corp. Ltd.** (supra) it is held that the conclusiveness contained in Section 6 of the Act indisputably is attached to a need as also the purpose and in this regard ordinarily, the jurisdiction of the Court is limited but it is equally true that when an opportunity of being heard has expressly been conferred by a Statute, the same must scrupulously be complied with. For the said purpose, “the Court in a case, where there has been total non-compliance or substantial non-compliance of the provisions of Section 5-A of the Act, cannot fold its hands and refuse to grant a relief to the writ petitioner. Sub-section (3) of Section 6 of the Act renders a declaration to be a conclusive evidence. But when the decision making process itself is in question, the power of judicial review can be exercised by the Court in the

event the order impugned suffers from well-known principles, viz., illegality, irrationality and procedural impropriety. Moreover, when a statutory authority exercises such enormous power it must be done in a fair and reasonable manner”.

137. From **Anand Singh** (supra), relevant discussion in paragraphs ‘45’, ‘46’ and ‘47’ are to be noted hereinunder:-

“45. It is true that power conferred upon the government under Section 17 is administrative and its opinion is entitled to due weight, but in a case where the opinion is formed regarding the urgency based on considerations not germane to the purpose, the judicial review of such administrative decision may become necessary.

46. As to in what circumstances the power of emergency can be invoked are specified in Section 17(2) but circumstances necessitating invocation of urgency under Section 17(1) are not stated in the provision itself. Generally speaking, the development of an area (for residential purposes) or a planned development of city, takes many years if not decades and, therefore, there is no reason why summary enquiry as contemplated under Section 5A may not be held and objections of land owners/persons interested may not be considered. In many cases on general assumption, likely delay in completion of enquiry under Section 5A is set up as a reason for invocation of extraordinary power in dispensing with the enquiry little realizing that an important and valuable right of the person interested in the land is being taken away and with some effort enquiry could always be completed expeditiously.

47. The special provision has been made in Section 17 to eliminate

enquiry under Section 5A in deserving and cases of real urgency. The government has to apply its mind on the aspect that urgency is of such nature that necessitates dispensation of enquiry under Section 5A. We have already noticed few decisions of this Court. There is conflict of view in the two decisions of this Court viz.; Narayan Govind Gavate³ and Pista Devi⁶. In Om Prakash¹⁰ this Court held that decision in Pista Devi⁶ must be confined to the fact situation in those days when it was rendered and the two-Judge Bench could not have laid down a proposition contrary to the decision in Narayan Govind Gavate. We agree.”

138. In an earlier decision of the Apex Court in **Union of India and others vs. Praveen Gupta and others**⁴⁰, it is held that the “language” of the notification is not conclusive but the Court is required to consider the material whether there is any urgency to exercise the power under Section 17(4) of the Act. It is settled legal position that decision on urgency is an administrative decision and is a matter of subjective satisfaction of the Appropriate Government on the basis of the material available on record. Therefore, there was no need to pass any reasoned order to reach the conclusion that there is urgency so as to dispense with the enquiry under Section 5-A in exercise of power under Section 17(4).

139. In **Rajasthan Housing Board and others vs. Shri Kishan and others**⁴¹, the Apex Court has explained as to what kind of material was required for forming an opinion for invoking the urgency powers. It was noted therein that the Division Bench of the High Court therein was impressed more by the fact that the notification did not state that the Government was of the opinion that it was

a case where the inquiry under Section 5-A ought to be dispensed with under Section 17(4). The material placed before the Court in the said case, however, disclosed the reasons for invocation of urgency clause that the government, on due verification, found that holding an inquiry under Section 5-A would have resulted in uncalled for delay endangering the entire scheme and time schedule of the Housing Board. In the context of material placed before the Court therein, it was observed that :-

“It must be remembered that the satisfaction under Section 17(4) is a subjective one and that so long as there is material upon which the government could have formed the said satisfaction fairly, the Court would not interfere nor would it examine the material as an appellate authority. This is the principle affirmed by decisions of this Court not only under Section 17(4) but also generally with respect to subjective satisfaction.”

140. In **Om Prakash** (supra), the Apex Court has referred to the material placed before it, as was available to the Government therein for forming opinion under Section 5-A of the Act and then concluded that the action of dispensing with the enquiry under Section 5-A in the said case was not based on any real and genuine subjective satisfaction, depending upon any relevant data available to the State Authorities at the time, when they issued the impugned notification under Section 4(1) of the Act and dispensed with Section 5-A enquiry by resorting to Section 17(4) thereof.

141. In **Om Prakash** (supra) the Apex Court has referred to an earlier decision in **A.P. Sareen and others vs. State of U.P. and others**⁴² to observe that

the observation with regard to existence of urgency in a case of acquisition for planned development of the city or town etc. therein [**A.P. Sareen** (supra)], was made on the facts of that particular case. It was further observed that it only mean that, in appropriate cases, when acquisition is needed for planned development of any city or town, the urgency provision can be invoked, which is legislatively recognized by the enactment of Section 17(1-A) by the U.P. Legislature. However, it cannot be read to mean that in every case of planned development of city or town, necessarily and almost automatically the urgency clause has to be invoked and enquiry under Section 5-A is to be dispensed with.

142. It was, thus, held:-

“23. xxxxxxxxxxxx.....It will all depend upon the facts and circumstances of each case. The aforesaid observations cannot be held to be laying down any absolute proposition that whenever any acquisition is to take place for planned development of city or town, Section 5-A should be treated to be almost otiose or inoperative. Such is not the ratio of the aforesaid decision and nothing to that effect can even impliedly be read in aforesaid observation which is of a general nature. It only suggests that in appropriate cases, the urgency clause can be invoked when the land is proposed to be acquired for planned development of city or town.

143. The Division Bench of this Court in **Smt. Manju Lata Agrawal vs. State of U.P. and others**⁴³ while considering the law laid down in the abovenoted decisions of the Apex Court has held that:-

“39. It is a settled legal proposition that the scope of judicial

review is limited to the decision making procedure and not against the decision of the authority. The Court could review to correct errors of law or fundamental procedural requirements, which may lead to manifest injustice and can interfere with the impugned order in exceptional circumstances. In judicial review, the Court cannot trench on the jurisdiction to appreciate the evidence and arrive at its own conclusion as it is not an appeal from a decision. Review of the decision is not permissible where the findings are recorded by an authority on the basis of legal evidence and the said findings are not based either on ipsi dixit or conjectures or surmises. The Court cannot interfere on the ground that the matter requires appraisal of evidence. "Between appraisal of evidence and total lack of evidence, there is an appreciable difference which could never be lost sight of."

144. It was observed therein that the power of judicial review of the Writ court is limited, but it has competence to examine as to whether there was material to form such an opinion as required by law or the findings recorded by the authority concerned are perverse. It is settled law that non-consideration of relevant material renders an order perverse. A finding is said to be perverse when the same is not supported by evidence brought on record or they are against the law or where they suffer from the vice of procedural irregularities.

145. On the question of enquiry under Section 5-A of the Act, it was observed in **Smt. Manju Lata Agrawal** (supra) that a review on the merits of the decision making process is fundamental to the Court's jurisdiction. The power of review may even extend to a decision on a question of fact.

The error sought to be corrected must be undeniably a significant factor in the decision making process. It was further observed that:-

"43. The question whether inquiry under Section 5-A of the Act is necessary or not is a question of fact and it requires to be determined by the Government in the facts and circumstances of each case for the reason that no straight jacket formula can be evolved as under what circumstances the urgency clause should be invoked. The role of the Court is very limited and it can only see as to whether there was any material to form an opinion about invoking the urgency clause or whether the Government exercised the power in a mala fide manner. The question as to whether urgency exists or not, is primarily a matter for determination of the Government subject to the scope of judicial review by the courts of law."

146. As to the scope of judicial review in a matter where the decision is based on subjective satisfaction of the Government, the observations of the Apex Court in **Rajasthan Housing Board** (supra) was noted in **Smt. Manju Lata Agrawal** (supra) as under:-

"44. In Rajasthan Housing Board (supra) the Hon'ble Supreme Court, while dealing with the issue involved herein, held as under:

"It must be remembered that the satisfaction under Section 17(4) is a subjective one and so long as there is material upon which the Government could have formed the said satisfaction fairly, the Court would not interfere nor would it examine the material as an appellate authority. This is the principle affirmed by decisions of this Court not under Section

17(4) but also generally with respect to subjective satisfaction.”

147. It was further noted in paragraph ‘45’ as under:-

“45. The adequacy and reliability of the material on the basis, of which the conclusion is reached, cannot be permitted to be canvassed before the Court in writ jurisdiction. *Vide Rajinder Kumar Kindra v. Delhi Administration Through Secretary (Labour) and Ors.*, (1984) 4 SCC 635; *The General Court Martial and Ors. v. Col. Aniltej Singh Dhaliwal*, AIR 1998 SC 983 and *R.S. Saini v. State of Punjab and Ors.*, (1999) 8 SCC 90”

148. In paragraphs ‘47’, ‘48’, ‘49’, ‘50’, ‘51’, ‘53’, ‘55’, ‘56’ and ‘57’, it was noted that:-

“47. In *Bombay Dyeing & MFG Co. Ltd. (3) v. Bombay Environmental Action Group and Ors.*, AIR 2006 SC 1489, the Apex Court considered the scope of judicial review in a case of urban development, maintaining the ecological balance and after considering all aspects of town planning, came to the conclusion that in case of an executive action, the Court can look into and consider several factors, namely:

(i) whether the discretion conferred upon the statutory authority had been properly exercised;

(ii) whether exercise of such discretion is in consonance with the provisions of the Act;

(iii) whether while taking such action, the executive Government had taken into consideration the purport and object of the Act;

(iv) whether the same subserved other relevant factors which would affect the public at large;

(v) whether the principles of sustainable development which have become part of our constitutional law have been taken into consideration; and

(vi) whether in arriving at such a decision, both substantive due process and procedural due process had been complied with.

48. In *Sawarn Singh v. State of Punjab*, AIR 1976 SC 232 while dealing with such a issue, the Court held as under:

“In view of this, the deficiency or reference to some irrelevant matters in the order of the Commissioner, had not prejudiced the decision of the case on merit either at the appellate or revisional stage. There is authority for the proposition that where the order of a domestic tribunal makes reference to several grounds, some relevant and existent, and others irrelevant and non-existent, the order will be sustained if the court is satisfied that the authority would have passed the order on the basis of the relevant and existing ground, and the exclusion of irrelevant or non-existing ground could not have affected the ultimate decision.” (Emphasis added)

49. A similar view has been reiterated by the Hon'ble Apex Court in *Dwarka Das Bhatia v. The State of Jammu and Kashmir*, AIR 1957 SC 164; *State of Orissa and Ors. v. Bidyabhushan Mohapatra*, AIR 1963 SC 779; *The State of Maharashtra v. Babulal Kriparam Takkamore and Ors.*, AIR 1967 SC 1353; *Binny Ltd. v. Their Workmen and Anr.*, AIR 1972 SC 1975 and *P.D. Agrawal v. State Bank of India and Ors.*, AIR 2006 SC 2064

50. In view of the above, it is apparent that if the order assed by an Authority is based on a consideration of certain relevant material and some other irrelevant and non-existing material, the order can be sustained, provided the

relevant existing material was sufficient for formation of such an opinion. Thus, if the order can be passed on relevant and existing grounds, the consideration of irrelevant or non-existent material becomes immaterial.

51. However, the aforesaid legal proposition applies only in a case where the Authority has to pass an order on objective satisfaction. It carves out an exception that such a proposition would not apply where the decision is to be taken by the Authority on subjective satisfaction.

53. In *Zora Singh v. J.M. Tandon*, AIR 1971 SC 1537, the Court considered a similar issue and held as under:

“The principle that if some of the reasons relied on by a Tribunal for its conclusion turn out to be extraneous or otherwise unsustainable, its decision would be vitiated, applies to cases in which the conclusion is arrived at not on assessment of objective satisfaction. The reason is that whereas in cases where the decision is based on subjective satisfaction if some of the reasons turn out to be irrelevant or invalid, it would be impossible for a superior Court to find out which of the reasons, relevant or irrelevant, valid or invalid, had brought about such satisfaction. But in a case where the conclusion is based on objective facts and evidence, such a difficulty would not arise. If it is found that there was legal evidence before the Tribunal, even if some of it was irrelevant, a superior Court would not interfere if the finding can be sustained on the rest of the evidence. The reason is that in a writ petition for certiorari, the superior Court does not sit in appeal, but exercises only supervisory jurisdiction, and therefore, does not enter into question of the sufficiency of evidence.” (Emphasis added)

55. Thus, in case where the order is based on subjective satisfaction, consideration of irrelevant or non-existent material becomes fatal and vitiates the order itself. Such a view stands fortified by the judgments of the Hon'ble Supreme Court in *Keshav Talpade v. Emperor*, AIR 1943 FC 1; *Shibban Lal v. State of Uttar Pradesh*, AIR 1954 SC 179; *Rameshwar Lal v. State of Bihar*, AIR 1968 SC 1303; *Puspadevi v. M.L. Wadhavan* AIR, 1987 SC 1748; and *Vashisth Narain v. State of Uttar Pradesh*, AIR 1990 SC 1272.

56. Same remains the position where the Authority fails to consider the vital facts, for the reason that if the material or vital facts which would influence the mind of the Authority one way or the other, are not placed or are not considered by the Authority, it would vitiate the subjective satisfaction. The Authority must exercise due care and caution and act fairly and justly in exercise of its powers. However what is a vital fact would depend on the facts of each case. Therefore, only those matters alone should be regarded as vital which are reasonably likely to affect the decision of the Authority. Non-consideration of the vital fact may taint the satisfaction of the Authority. (Vide *Tushar Govindji v. Union of India*, AIR 1985 SC 511; *Sitaram v. State of Rajasthan*, AIR 1986 SC 1072; and *Ahmed Nissar v. State of Tamil Nadu*, AIR 1999 SC 3897).

57. In *Swadeshi Cotton Hills Co. Ltd. v. State Industrial Tribunal, U.P. and Ors.*, AIR 1961 SC 1381, a Constitution Bench of Hon'ble Supreme Court considered a case where forming the opinion after considering the material was not recited in the order and held as under:

“...The validity of the order therefore does not depend upon the recital of the formation of the opinion in the order but upon the actual formation of the

opinion and the making of the order in consequence. It would therefore follow that if by inadvertence or otherwise the recital of the format on of the opinion is not mentioned in the preamble to the order the defect can be remedied by showing by other evidence in proceedings where challenge is made to the validity of the order, that in fact the order was made after such opinion had been formed and was thus a valid exercise of the power conferred by the law. The only exception to this course would be where the statute requires that there should be a recital in the order itself before it can be validly made.

...The presumption as to the regularity of public acts would apply in such a case; but as soon as the order is challenged and it is said that it was passed without the conditions precedent being satisfied the burden would be on the authority to satisfy by other means (in the absence of recital in the order itself) that the conditions precedent had been complied with....” (Emphasis added).

149. The distinction in exercise of power of judicial review of an order based on objective assessment and another order based on subjective consideration had been considered therein to note that the principle, if an order wherein some of the reasons relied for its conclusion turn out to be extraneous or otherwise unsustainable, its decision would be vitiated, applies to cases in which conclusion is arrived at not on assessment of subjective satisfaction. The reason is that in cases where the decision is based on subjective satisfaction, if some of the reasons turn out to be irrelevant or invalid, it would be impossible for a Superior Court to find out which of the reasons, relevant or irrelevant, valid or invalid, had brought about such satisfaction. Thus, in cases where the order

is based on subjective satisfaction, consideration of irrelevant or non-existent material becomes fatal and vitiates the order itself. However, in a case, where the conclusion is based on objective facts and evidence, such difficulty would not arise, inasmuch as, there if the order of the Court or Tribunal is based on some legal evidence, even if some of it was irrelevant, a Superior Court would not interfere if the finding can be sustained on the rest of the evidence. The reason being that in a writ petition for Certiorari, the superior Court does not sit in appeal but exercises only supervisory jurisdiction and, therefore, does not enter into question of the sufficiency of evidence.

150. Another Division Bench of this Court in **Sudhir Chandra Agarwala vs. State of U.P. and others**⁴⁴ considered the law laid down in **Smt. Manju Lata Agrawal** (supra) in the matter of recording subjective satisfaction and the scope of judicial review to hold that:-

“ 25. *The sufficiency or insufficiency of the material, and the names of industries, which may have applied with concrete proposals for establishment of industrial units, is not material for the purposes of judicial review of the subjective satisfaction of the State Government. When there exists material before the State Government, in the shape of recommendations and that material is relevant for applying the mind for recording subjective satisfaction of invoking the urgency clause for acquisition of the land, the law does not permit the Court to consider the material as it was weighing the evidence for the purposes of recording subjective satisfaction of invoking the urgency clause for acquisition of the land. If the material is relevant, on*

which competent authority, as reasonable person may invoke the urgency clause for acquisition of the land, the Court would not put such material on the scales, to weigh or measure such urgency. The Court is not competent to carry out judicial review of the sufficiency or insufficiency on the material placed before it. What the Court required to see is; whether such material is relevant, and that the competent authority in the State Government could have formed an opinion without their being any motive or ill will for invoking the urgency clause. In the present case the State has given in the counter affidavit, the material on which it had placed reliance and has produced the material before us, which we find to be relevant for the purpose of invoking urgency clause. Even if we may, after perusing the record arrive on different conclusion, we would restrain ourselves from interfering, as in such case we would be substituting our opinion in place of opinion of the competent authority in the State Government. If we do so, we would be sitting in appeal over the subjective satisfaction recorded by the State Government. The legal position obtained from the judicial precedents restrain us from doing so.

151. The principle to exercise the power of judicial review in the matter of dispensation of enquiry under Section 5-A of the Act, 1894, within the scope of Article 226 of the Constitution, thus, can be summarized as under:-

(i) In exercise of discretion conferred upon the statutory authority, while arriving at a decision under Section 5-A, both substantive due process and procedural due process has to be complied with.

(ii) The question whether enquiry under Section 5-A of the Act is necessary or not is a question of fact which would be required to be examined by the State Government in the facts and circumstances of each case before invocation of urgency clause under Section 17(4) of the Act. No straight jacket formula, as such, can be evolved as to under what circumstances, the urgency clause should be invoked.

(iii) The role of the Court is limited and it can only see as to whether there was any material to form an opinion about invoking the urgency clause or whether the Government exercised the power in a malafide manner.

(iv) The question as to whether urgency exists or not, is primarily a matter for determination of the Government, subject to the scope of judicial review by the Court of law.

(v) The satisfaction under Section 17(4) is a subjective one and, so long as, there is material upon which the Government could have formed the said satisfaction fairly, the Court would not interfere nor would it examine the material as an appellate authority.

(vi) The adequacy and reliability of the material on the basis of which the conclusion is reached, cannot be permitted to be canvassed before the Court in writ jurisdiction. The truth or correctness of the material will not be questioned by the Court.

(vii) In a case where the order is based on subjective satisfaction, consideration of irrelevant or non-existent material becomes fatal and vitiates the order itself.

(viii) Same remains the position where the authority fails to consider the vital facts, for the reason that if the material or vital facts which would influence the mind of the authority, one way or the other,

were not placed or were not considered by the authority, it would vitiate the subjective satisfaction.

(ix) What is vital fact would depend on the fact of each case.

(x) The authority must exercise due care and caution and act fairly and justly in exercise of its powers.

(xi) Non-consideration of the vital fact may taint the satisfaction of the authority.

(xii) The validity of the order does not depend upon the recital of the formation of the opinion in the order but upon the actual formation of the opinion and the making of the order in consequence.

152. As in a case of subjective satisfaction, authority is not required to pass a reasoned order, there is no need to pass any reasoned order to reach at the conclusion that there is urgency so as to dispense with the enquiry under Section 5A in exercise of power under Section 17(4). The power of judicial review in a matter of invocation of urgency under Section 17(4) in dispensing with the enquiry under Section 5-A is limited to the extent as to whether there is any fault in the decision making process, to examine that the opinion of the State is not guided by any irrelevant or non-existent material, rather is based on relevant material to record its satisfaction. The Court can interfere, in a case, where there was no material at all or the material relied upon was irrelevant or non-existent. The adequacy and reliability of the material on the basis of which conclusion is arrived is beyond the scope of power of judicial review. The Court can also look into as to whether in formation of opinion, the Government has exercised the power in a malafide manner. The question as to whether urgency exists or not is

primarily a matter for determination of the Government, subject to the scope of judicial review by the Court of law.

D. On Pre-Post Notification Delay:-

153. On the issue whether the pre or post notification delay would be fatal to the exercise of power by the State in invocation of urgency clause, there is no consistency in the decisions of the Apex court.

154. In **Union of India and others vs. Krishan Lal Arneja and others**⁴⁵, the Apex Court has held that while applying the urgency clause, the State should indeed act with due care and responsibility. Invoking urgency clause cannot be a substitute or support for the laxity, lethargy or lack of care on the part of the State Administration.

155. In **First Land Acquisition Collector & Ors. Vs. Nirodhi Prakash Gangoli & another**⁴⁶, the Apex Court has observed that the post notification delay, i.e. delay in making declaration under Section 6 after invocation of urgency clause dispensing with enquiry under Section 5-A would not be fatal, specially when no mala fide on the part of the government or its officers are alleged. Opinion of the State Government can be challenged in a Court of law if it could be shown that the State Government never applied its mind to the matter or that action of the State Government is mala fide.

156. In **Deepak Pahwa Vs. Lt. Governor of Delhi & Ors.**⁴⁷, the Apex Court had rejected the argument that pre-notification delay would render the invocation of the urgency provisions void.

157. It was held that:-

“The other ground of attack is that if regard s had to the considerable length of time spent on interdepartmental discussion before the notification und, Section 4(1) was published, it would be apparent that there was no justification for invoking the urgency clause under Section 17(4) and dispensing with the inquiry under Section 5-A. We are afraid, we cannot agree with this contention. Very often persons interested in the land proposed to ha acquired make various representations to the concerned authorities against the proposed acquisition. This is bound to result in a multiplicity of enquiries, communications and discussions leading invariably to delay in if execution of even urgent projects. Very often the delay makes the problem more and more acute and increases the urgency of the necessity for acquisition. It is, therefore, net possible to agree with the submission that mere pre-notification delay would render the invocation of the urgency provisions void. We however wish to say nothing about pos notification delay. In Jage Ram v. State of Haryana , this Court pointed out the fact that the State Government or the party concerned was lethargic at an earlier stage is not very relevant for deciding the question whether o the date on which the notification was issued, there was urgency or not. In Kasireddy Papaiah v. Government of Andhra Pradesh , it was held, "...delay on the part of tardy officials to take the further action in the matter of acquisition is not sufficient to nullify the urgency which exited at the time of the issue of the notification and to hold that there was never any urgency. (Emphasis added)”

158. Having discussed the legal position with regard to invocation of urgency clause under Section 17(4),

dispensation of enquiry under Section 5-A and the scope of judicial review in exercise of power of writ jurisdiction by this Court, we are now required to discuss the legal position in the decisions relied upon by the counsels for the writ petitioners.

E. On the Apex Court decisions relied by the rival parties:-

(i) Radhy Shyam (supra):-

159. Heavy reliance has been placed on the decision of the Apex Court in **Radhy Shyam (Dead) Through LR. And others vs. State of Uttar Pradesh and others**⁴⁸ to vehemently argued that in any eventuality, the urgency clause cannot be invoked in an acquisition made for planned development. The statement in the acquisition notifications under Section 4 pertaining to the villages in question have been read and re-read to assert that from the statement therein itself, it is evident that the land was needed for planned development of the area through the Yamuna Expressway Industrial Development Authority. The issue as to whether the exercise of power under Section 17(1) and/or 17(4) for the acquisition of land for residential, commercial or industrial purpose was legal and justified has been answered by the Apex Court in **Radhy Shyam** (supra), wherein it is categorically held in paragraph 77(viii) that:-

“77 (viii). The acquisition of land for residential, commercial, industrial or institutional purposes can be treated as an acquisition for public purposes within the meaning of Section 4 but that, by itself, does not justify the exercise of power by the Government under Section 17(1) and/or 17(4). The Court can take judicial notice of

the fact that planning, execution and implementation of the schemes relating to development of residential, commercial, industrial or institutional areas usually take few years. Therefore, the private property cannot be acquired for such purpose by invoking the urgency provision contained in Section 17(1). In any case, exclusion of the rule of audi alteram partem embodied in Section 5-A (1) and (2) is not at all warranted in such matters.”

160. It was vehemently argued that in view of the mandate of the Apex Court, the acquisition of land for planned development through Yamuna Expressway Industrial Development Authority, in the instant case, for residential, commercial, industrial or institutional purpose cannot be said to urgent. There cannot be any real or grave urgency in the nature of the proposed use of the land, the dispensation of enquiry, exclusion of hearing to the land holders was, thus, unwarranted in the instant matter. The submission, thus, is that on this ground itself, the acquisition notifications are liable to be quashed.

161. We are afraid to accept the submission of the learned counsel for the petitioners, having gone through the principles laid down by the Apex Court in the case of **Radhy Shyam** (supra), wherein all the above noted points in the matter of acquisition by invocation of urgency clause, culled out from the decisions of the Apex Court noted, in the foregoing paragraphs of this judgment, has been reiterated.

162. While reading sub-para (viii) of para ‘77’, we are further required to note the principles noted in sub-paras (iii), (vi) and (ix) of Para ‘77’ as under:-

“(iii) Though, in exercise of the power of eminent domain, the Government can acquire the private property for public purpose, it must be remembered that compulsory taking of one's property is a serious matter. If the property belongs to economically disadvantaged segment of the society or people suffering from other handicaps, then the Court is not only entitled but is duty bound to scrutinize the action/decision of the State with greater vigilance, care and circumspection keeping in view the fact that the land owner is likely to become landless and deprived of the only source of his livelihood and/or shelter.

(vi) The satisfaction of the Government on the issue of urgency is subjective but is a condition precedent to the exercise of power under Section 17(1) and the same can be challenged on the ground that the purpose for which the private property is sought to be acquired is not a public purpose at all or that the exercise of power is vitiated due to mala fides or that the concerned authorities did not apply mind to the relevant factors and the records.

(ix) If land is acquired for the benefit of private persons, the Court should view the invoking of Section 17(1) and/or 17(4) with suspicion and carefully scrutinize the relevant record before adjudicating upon the legality of such acquisition.”

163. The statement in sub-para (viii) has to be seen in the context of the statements in sub-paras (vi) and (ix) of Para ‘77’.

164. The legal position which can be understood from the discussion of law in the **Radhy Shyam** (supra) is that:-

(i) the satisfaction of the Government on the issue of urgency is subjective, but is a condition precedent, to the exercise of power under Section 17(1);

(ii) the same can be challenged on the ground that (a) the purpose for which the private property is sought to be acquired is not a public purpose at all; (b) that the exercise of power is vitiated due to malafides; (c) The authorities concerned did not apply their mind to the relevant factors and records;

(iii) if the land is acquired for the benefit of private persons, the Court is required to view the invocation of urgency clause with suspicion and carefully scrutinized the relevant record before adjudicating upon the legality of such acquisition.

165. The principle stated in sub-para (viii) of Para ‘77’, thus, requires the Court to make a strict scrutiny of the record upon which the State has proceeded to acquire private property without complying with the mandate of Section 5-A. The enquiry, thus, has to be made in the facts of the particular case. The Court has to exercise the power of judicial review by carefully scrutinizing the relevant record, to adjudicate upon the legality of the acquisition.

166. Learned Senior Counsel appearing for the respondent-YEIDA tries to draw a distinction from the case of **Radhy Shyam** (supra) on factual aspects on the present case. It was argued that the entire decision of the Apex Court in **Radhy Shyam** (supra) has to be carefully read to cull out the ratio of the case. It (**Radhy Shyam**) was a case where only a substantially small area of 205.0288 hectares of a village situated in the Notified area of Greater NOIDA was acquired for

planned industrial development in District Gautam Budh Nagar through Greater NOIDA.

167. The appellants therein (**Radhy Shyam**) had challenged the acquisition on several grounds, noted in paragraph ‘4’ therein, extracted as under:-

“4. The appellants challenged the acquisition of their land on several grounds including the following:

(i) That the land cannot be used for industrial purposes because in the draft Master Plan of Greater NOIDA (2021), the same is shown as part of residential zone.

(ii) That they had already constructed dwelling houses and as per the policy of the State Government, the residential structures are exempted from acquisition.

(iii) That the State Government arbitrarily invoked Section 17(1) read with Section 17(4) of the Act and deprived them of their valuable right to raise objections under Section 5-A.

(iv) The acquisition of land is vitiated by arbitrariness, mala fides and violation of Article 14 of the Constitution inasmuch as lands of the Member of Legislative Assembly and other influential persons were left out from acquisition despite the fact that they were not in abadi, but they were not given similar treatment despite the fact that their land was part of abadi and they had constructed dwelling units.”

168. We are required to note that the plea of arbitrariness of the State Government in invoking urgency clause under Section 17(4) of the Act to dispense with the enquiry under Section 5-A, depriving the tenure holders of their valuable rights, was examined on the

objections of the tenure holders noted therein which were (i) the land in question falls in part of a residential zone in the draft Master plan of Greater NOIDA and cannot be used for industrial purposes; (ii) there existed dwelling houses and as per the policy of the State, the residential structures were exempted from acquisition.

169. The High Court therein negated the challenge of the appellants, at the threshold, mainly on the ground that the averments contained in the writ petition were not supported by proper affidavit. The petitioners therein had neither pleaded that there existed no material before the State Government to come to the conclusion that the enquiry under Section 5-A should be dispensed with by invoking Section 17(4) of the Act nor the learned counsel for the petitioners therein could place before the Court any such averment in the writ petition. Even counter affidavit of the respondents was not called upon to see as to whether there existed any material for exercising power under Section 17(1) and (4) of the Act by the High Court, saying that the question of requiring of respondents to produce the original record did not arise in view of the statements made in the writ petition which were not sworn in the affidavit at all.

170. The Apex Court, however, granted time to the respondents to file counter and had examined the record of the State and, in the facts and circumstances of that case, having noted the factors which were cited in justification of invoking the urgency provision therein, it has been observed in paragraph '79' that none of the factors noted therein furnished legally acceptable justification for the exercise of power by the State Government under Section 17(1) because the acquisition was

primarily meant to cater private interest in the name of industrial development of the district. Even if, planned development of the District was treated as public purpose within the meaning of Section 4, there was no urgency which could justify exercise of power by the State Government under Sections 17(1) and 17(4). The conclusion arrived therein that there was no real and substantive urgency which could justify invoking of the urgency provisions under Section 17(1) and, in any case, there was no warrant to exclude the application of Section 5-A, to deny the opportunity of hearing to the land holders, was in the facts and circumstances of the said case.

171. On a careful reading of the decision of the Apex Court in **Radhy Shyam** (supra), it cannot be accepted that on the mere statement made in the notification under Section 4(1) read with Section 17(1) and (4) that the land in question is needed "for planned development of the area through YEIDA", it can be concluded that there was no urgency, much less real and substantive urgency, to invoke the provisions of Section 17(1) and 17(4).

172. We may remind ourselves to the decisions of the Apex Court noted above that the statement in the notification is not a determinative factor, the language of the notification is not conclusive, nor there is any need to give any reason in the notification itself for invocation of urgency. The Court has to see the record, to examine as to whether there exists material on record, upon which the State Government had formed subjective satisfaction, to arrive at a conclusion that urgency clause be invoked and enquiry under Section 5-A be dispensed with. We cannot quash the notifications merely by the statement

contained therein without looking to the record of the State and the relevant material which has weighed the mind of the State in exercise of its inherent power of Eminent domain to acquire the land in question, denying opportunity of hearing to the land holders. [emphasis **Union of India and others vs. Praveen Gupta** (supra)]

(ii) **Nand Kishore Gupta** (supra):-

173. As noted above, the acquisition-in-question is part of an integrated project. For contiguous land to the parcels of land acquired for Yamuna Expressway, acquisition has been upheld by this Court and the Apex Court in **Nand Kishore Gupta** (supra). The project for construction of Expressway was conceived by the State in the year 2001. It was an integrated project involving construction of Excess Controlled Expressway, stretching over 160 kilometers from NOIDA to Agra and for development of 25 million sq. mtrs. of land alongside Expressway. Bids were invited but before the construction could commence, the validity of the project was challenged in a Public Interest Litigation. The State Government exercising power under the Commission of Enquiries Act, 1956 appointed a Commission in the name of Justice Siddheshwar Narain Commission. The **Civil Misc. Writ Petition (PIL) No. 30322 of 2007 (Ashutosh Srivastava vs. State of U.P. and others)** was dismissed vide judgment and order 14th March, 2008, reported in **2008 (3) ADJ 427 (DB)**.

174. The State Government, thereafter, issued various notifications acquiring the lands in the Districts of Gautam Budh Nagar, Mathura, Aligarh, Mahamaya Nagar (Hathras) and Agra for the purposes of Expressway. The

notifications under Sections 4 and 6 of the Act dated 15.10.2007 and 4.1.2008 acquiring land situated in a Village in District Mathura came up for consideration in **Balbair Singh & another vs. State of U.P. & others (Writ Petition No. 48978 of 2008)**, on the grounds that the actual purpose of acquisition was for the benefit of the Company and, therefore, the invocation of the provision under Section 17(4), dispensation of Section 5-A of the Land Acquisition Act was illegal. By the judgment and order dated 5.10.2009, the Court had dismissed the writ petition with the findings that the acquisition for construction of Expressway was otherwise for the benefit of the public at large. It was noted therein that there is tremendous growth in the population and that the roads and other facilities available to the public are seriously lacking. In order to provide infrastructural facilities for developing industries throughout the Yamuna belt, the project of National importance was taken up connecting various cities of Uttar Pradesh to the national capital. The acquisition was, thus, held to be for public purpose.

175. In the third round of litigation before this Court in **Nand Kishore Gupta** (supra), the land holders of Mathura and Agra had challenged the acquisition of land for construction of Expressway and for interchange of Expressway, mainly on the ground that there was no urgency much less special urgency, for construction of road, to acquire fertile land. The writ petitions were filed agitating that the petitioners were owners of the lands since long and had raised constructions and were using part of land for business and Abadi purposes after declaration as Abadi. The notifications under Sections 4 and 6 of the Act had been challenged having been issued in

colourable exercise of power, that there was no urgency and since no project had been specified, the notifications being vague, the action of the State in dispensing with enquiry under Section 5-A was malafide. It was brought before the Court in the case of **Nand Kishore Gupta** (supra) and noted therein that “the Taj Expressway” Project conceived by the State Government in 2001 is an integrated project involving construction of Excess Controlled Expressway project spread over 160 kilometers from NOIDA to Agra for development of 25 million sq. mtrs. of the land along with the Expressway.

176. This Court has noted therein that from the material on record it was reflected that the entire development was being carried out by the State Government through Yamuna Expressway Industrial Development Authority (YEIDA) which is an instrumentality of the State. On a challenge to the acquisition by the petitioners on the ground that Delhi was connected with Agra by National Highway No.-2 and that the need for another road connecting the two great cities at a little faster speed is not a public purpose. The development of 25 million sq. mtrs. of land by the company on the selected sites along the Expressway is for the purposes of profits of Public Limited Company and, therefore, it cannot be said that the land was needed for public purpose. In any case, there was no such urgency to acquire the land, to dispense with the enquiry and to take away the valuable right of the petitioners and farmers to object to the acquisition. It was argued that the right to property may not be a fundamental right, it is a Constitutional right and has now been recognised as human right under Article 21 of the Constitution of India, should be protected by the court. Where large tracts

of fertile land with constructions used for business purpose and agriculture as source of livelihood of the citizens is being acquired for building an alternate road, the urgency of the purpose cannot be assumed. The project was already delayed from the year 2001 till 2008 and therefore, there was no such urgency to invoke Sub-section (4) of Section 17 for acquisition of the land, dispensing with the valuable right of the citizens to have a say in the matter.

177. In order to verify whether there was any material with the State Government to form an opinion and to exercise its powers under Sections 17(1) and 17(4) of the Act, dispensing with enquiry under Section 5-A of the Act, and that the State Government had applied its mind on such material, the records of three notifications under challenge were summoned by the Court.

178. Having recorded the material of the State found from the record, it was held therein that:-

“the record clearly demonstrates that after considering the project and making enquiries and spot inspections including the survey of the revenue records, District Magistrate had recommended that looking into the purpose of the acquisition and the large area involved, and further the fact that the land is needed for construction of road and interchange and planned development, as well as the fact that in future there is strong possibility of encroachments over the subject land, Section 17(4) was required to be invoked for dispensing with the enquiry”.

179. With regard to the plea of pre-notification delay of about five years, it was noted therein that:-

“The pre-notification delay of about five years from the date of agreement i.e. 7.2.2003 to the date of Notification under Section 4 of the Act dated 28.2.2009 has been sufficiently explained in the country affidavit of the State Government and YEIDA. The State Government was conscious of its accountability and referred the matter for enquiry under the Commission of Enquiry Act, 1956 appointing Justice Siddheshwari Narain, a retired judge of Patna/ Calcutta High Court in the year 2003. The report was submitted on 12.10.2006 and was thereafter subjected to a public interest litigation. In Ashutosh Srivastava Vs. State of U.P. (Supra) the writ petition was dismissed by the Court on 14th March, 2008. The State Government, thereafter, started making surveys and that the District Magistrate made proposals for acquisition of the land for the project dispensing with the enquiry under Section 5A of the Act.”

180. It was further noted that:-

“The record produced before us by the State Government enclosing the material of invoking urgency clause and the satisfaction of the State Government on the said material, has satisfied us that the State Government had sufficient material and had applied its mind to record its opinion that there was urgency to acquire the land and to dispense with the enquiry under Section 5A of the Act. The writ petition filed in public interest was dismissed and that the Court has also rejecting the challenge on the ground that acquisition was made for the company. The requisite 80% of the cost of acquisition of the land under the agreement was deposited in the year 2007. Out of 12282 land owners of the area of 1604 hecets., 11397 have accepted the compensation. In

these 9 writ petitions, there are 35 petitioners representing only 21.03 hecets. The cost of project according to Shri Navin Sinha, Sr. Advocate has increased from initially 1700 crore in the year 2001, to 9700 crore and is going on increasing per day. The road has been laid from Noida to Greater Noida and the work is going on, on the entire road except on a small portions on which the Court had passed orders to maintain status quo. According to Shri Navin Sinha in addition to thousands of tourists, who visit Agra from all over the world every day, there is likely to be great influx of sports tourists visiting India at the time Commonwealth games. They all need a fast moving road connection to reach Agra to cut down the travelling time. The National Highway No.2 on the western bank of Yamuna passes through busy areas in the State of Haryana and Rajasthan, through the cities of Faridabad, Ballabhgarh and Palwal. The fast moving road on the eastern side of Yamuna crossing through the areas falling only in the State of U.P., with modern facilities is a felt necessity in public purpose. The construction is on the verge of completion. It will be ironical for the tourism sector and residents of the area looking for development and opportunity for employment, to be deprived of the project at such an advance stage.”

181. On pre-notification delay, it was concluded that:-

“The respondents have fully explained the pre-notification delay. The pendency of the proceedings of the Commission holding enquiry and the public interest litigation, is sufficient explanation of the delay in issuing notifications, after the agreement was signed. The fact situation as exists today, also leaves us

with no choice to exercise discretion. Out of 12282 land owners 11397 have received compensation under agreement, and that the land owners of only 21.03 hectares out of 1604 hectares are aggrieved by the acquisition of their land. The scales of justice must tilt towards the right to development, of the millions, who will be benefited from the road and the development of the area, as against the human rights of 35 petitioners, who have approached the Court complaining that they were not heard before the declaration under Section 6 of the Act acquiring the land was issued on 15.6.2009."

182. In the Special Leave Petition filed before the Apex Court to challenge the decision of the Division Bench of this Court, the findings returned by this Court on the pre-notification delay was noted to record its approval by the Apex Court for the fact that the project had lingered from 2001 to 2008 and the material before the State Government to dispense with the enquiry under Section 5-A of the Act had been mechanically examined by the High Court and there was no reason to take a different view.

183. The factors for invocation of urgency clause which weighed in the mind of the State, noted with approval by the Apex Court, in the said case were:-(i) enormousness of the project; (ii) likelihood of the encroachments; (iii) large number of appellants who would have required to be heard; (iv) the time taken for that purpose; and (v) the fact that the project had lingered already from 2001 till 2008.

184. The legal position stated in **Tika Ram and others vs. State of Uttar Pradesh and others**⁴⁹ was discussed by the Apex Court therein to note as under:-

"94. This situation was considered, firstly, in Satendra Prasad Jain & Ors. Vs. State of U.P. & Ors. reported in 1993 (4) SCC 369. It was held therein that once the possession is taken as a matter of fact, then the owner is divested of the title to the land. The Court held that there was then no question of application of even Section 11-A. Commenting upon Section 11-A, it was held that that Section could not be so construed as to leave the Government holding title of the land without an obligation to determine the compensation, make an award and pay to the owner the difference between the amount of the award and the amount of the 80% of the estimated compensation. The three Judges' Bench of the Court took the view that even where 80% of the estimated compensation was not paid to the land owners, it did not mean that the possession was taken illegally or that the land did not vest in the Government. In short, this Court held that the proceedings of acquisition are not affected by the non-payment of compensation. In that case, the Krishi Utpadan Mandi Samiti, for which the possession was made, sought to escape from the liability to make the payment. That was not allowed. The Court, in para 17, held as under:-

"17. In the instant case, even that 80% of the estimated compensation was not paid to the appellants although Section 17(3-A) required that it should have been paid before possession of the said land was taken but that does not mean that the possession was taken illegally or that the said land did not thereupon vest in the first respondent. It is, at any rate, not open to the third respondent, who, as the letter of the Special Land Acquisition Officer dated June 27, 1990 shows, failed to make the necessary monies available and who has been in occupation of the said land ever

since its possession was taken, to urge that the possession was taken illegally and that, therefore, the said land has not vested in the first respondent and the first respondent is under no obligation to make an award."

95. Further, in a judgment of this Court in *Pratap & Anr. Vs. State of Rajasthan & Ors. etc. etc.* reported in 1996 (3) SCC 1, similar view was reported. That was a case under the Rajasthan Urban Improvement Act, 1987, under which the acquisition was made using Section 17 of the Act. The Court took the view that once the possession was taken under Section 17 of the Act, the Government could not withdraw from that position under Section 18 and even the provisions of Section 11-A were not attracted. That was of course a case where the award was not passed under Section 11-A after taking of the possession. A clear cut observation came to be made in that behalf in Para 12, to the effect that the non-compliance with Section 17 of the Act, insofar as, payment of compensation is concerned, did not result in lapsing of the land acquisition proceedings. The law laid down by this Court in *Satendra Prasad Jain & Ors. Vs. State of U.P. & Ors.* (cited supra) was approved. The Court also relied on the decision in *P. Chinnanna Vs. State of A.P.* reported in 1994 (5) SCC 486 and *Awadh Bihari Yadav Vs. State of Bihar* reported in 1995 (6) SCC 31, where similar view was taken regarding the land acquisition proceedings not getting lapsed. The only result that may follow by the non-payment would be the payment of interest, as contemplated in Section 34 and the proviso added thereto by 1984 Act. In that view, we do not wish to further refer the matter, as suggested by Shri Trivedi, Learned Senior Counsel and Shri Qamar Ahmad, Learned Counsel for

the appellants. Therefore, even on the sixth question, there is no necessity of any reference."

185. It was further noted in paragraph '96' therein that the arguments based on the decision of the Apex Court in **Om Prakash** (supra) that the encroachment issue was not a relevant factor for invocation of urgency, was not convincing, inasmuch as, actual scenario in that case [**Om Prakash** (supra)] was different.

186. It was noted that in **Om Prakash** (supra), the Apex Court was considering the acquisition of area of about 500 acres comprising of 437 plots, whereas in **Nand Kishore Gupta** (supra), the area to be acquired for the Expressway alone was more than 1600 hectares, apart from the 25 million square meters of land which was liable to be acquired for the purposes of development of 5 land parcels. It was held that "there was interlinking between the acquisition of land for the Highway and the acquisition of land for establishing five townships. The post notification delay in **Om Prakash** (supra) held to be a relevant factor vital to the decision of the State for invocation of urgency clause, had been distinguished therein in the following manner:-

"96. We are not impressed by the argument that the encroachment issue was not a relevant factor. This argument was based on the reported decision in Om Prakash & Anr. Vs. State of U.P. & Ors. (cited supra). It must be said that the actual scenario in that case was different. In that case, the Court was considering the acquisition of area of about 500 acres comprising of 437 plots, whereas, in the

present case, the area to be acquired for the Expressway alone was more than 1,600 hectares. This is apart from the 25 million square meters of land which was liable to be acquired for the purposes of development of 5 land parcels. There was interlinking between the acquisition of land for the highway and the acquisition of land for establishing the 5 townships.. ”

“97. In Om Prakash & Anr. Vs. State of U.P. & Ors. (cited supra), there was unexplained delay after issuance of Section 4 notification, which is not the case here. Therefore, we do not think that what has been said in Om Prakash & Anr. Vs. State of U.P. & Ors. (cited supra) would be apposite here. Every case has to be decided on its own facts. This is apart from the fact that it is not specifically laid down in Om Prakash & Anr. Vs. State of U.P. & Ors. (cited supra) that the encroachment was never a relevant factor for dispensing with the enquiry under Section 5A. Again we hasten to add that this was not the only factor considered by the State Government and even the High Court has not held the same to be the only factor for dispensing with the enquiry”

187. Placing reliance on the judgment of the Apex Court in **Tika Ram** (supra), the challenge to the acquisition on the ground that there was no urgency and, therefore, the enquiry under Section 5-A of the Act should not have been dispensed with, has been turned down.

188. In an Apex Court decision in **Meena Devi Jindal Medical Institute and Research Centre vs. Lieutenant Governor, Delhi and others**⁵⁰, the Apex Court has noted the nature of acquisition in **Nand Kishore Gupta** (supra) in the context of the concept of public purpose

under Section 3(f) of the Act, 1894 and observed that:-

“14. This Court in Nand Kishore Gupta v. State of U.P., (2010) 10 SCC 282 has also considered the concept of public purpose under Section 3(f) of the Act and it has been discussed that a purpose complementary to public purpose is also a public purpose. When the land had been acquired for construction of Yamuna Expressway which itself was of public importance, the acquisition of the land for Yamuna Expressway for development of the same for commercial, amusement, industrial, institutional and residential purposes was held to be complementary to the creation of expressway, hence, amounted to acquisition for public purpose. xx.....”

F. Appreciation of the material on the Facts of the Instant Case:-

189. The learned Senior Counsel for the respondent-YEIDA has taken us to the decision in **Nand Kishore Gupta** (supra) extensively to vehemently urge that the project in question, “for planned development of the parcels of the lands of different villages alongside Yamuna Expressway”, is part of an integrated project under the Master plan, Phase-1, 2031. The contiguous lands in the circumference of 2 kms. on both sides of the Expressway have been acquired to complete the project which was one project for construction of Expressway and development of land parcels for establishment of townships. The Apex Court in **Nand Kishore Gupta** (supra) has noted that there was interlinking between the acquisition of land for the Highway and the acquisition of land for establishing five townships. The acquisitions were though

made by different notifications, village-wise and it was neither for Expressway nor for five land parcels as in the case of **Nand Kishore Gupta** (supra), but are part of the same integrated project. The land parcels of Village Accheja Bujurg and Rampur Bangar etc., were already included in the project for development of Taj Expressway, renamed as Yamuna Expressway. The statement in the counter affidavits, noted in the foregoing paragraphs of this judgment, were reiterated to assert that the acquisition of the land parcels of the Villages-in-question was indispensable for planned development of the area for integrated Township. There was also a need for providing basic infrastructural facilities to the Villages falling in the Notified area of YEIDA and the need for contiguous land for development which was likely to be frustrated by the delay which would have occurred, in case, the opportunity of hearing was afforded to the villagers of such a large number of lands of nine villages. The enormousness of the project is one of the factors which has weighed in the mind of the State to invoke the urgency clause.

(VII). Finding:-

A.

190. About the nature of project-in-question, we are required to note that a perusal of the Master plan and the facts brought before us establish that the land for development for Yamuna Expressway Project, 'planned development through Yamuna Expressway' is an integrated project, the land was initially acquired for the Expressway and, thereafter, for developing land parcels alongside Expressway as townships. The

development is strictly being made in accordance with the Master plan prepared by YEIDA. The planned development of the area is the object for which YEIDA has been constituted. The lands of nine villages, subject matter of acquisition herein, were acquired through different notifications issued in a span of two years between 26.2.2009 to 22.3.2011. Most of the declaration notifications were issued in a gap of 3 to 4 months barring three declaration notifications of Village Rustampur, Village Rampur Bangar and Village Pachokara, where time span of approximately one year had been spent between Section 4 and Section 6 notifications. It was specifically mentioned in the Certificate of the Collector in Prapatra-10 that the acquisition of different parcels of land was being proposed as contiguous part of the project and, in case, of providing opportunity of hearing under Section 5-A, which may eventually result in legal proceedings, there was likelihood of non-availability of contiguous land which would hamper the execution of the project as an integrated time bound project. The original record of the State and the material placed on record with the counter affidavit with respect to each Village in this bunch, contains a categorical statement of the State that the State Government, after scrutinizing the record, had accepted the proposal applying mind to the fact that, in case, objections under Section 5-A of the Act, 1894 were invited, it would adversely affect and cause delay in execution of the public interest project which is an integrated project. The said decision was taken looking to the enormousness of the project for acquisition of the lands spread over a large area of approximately 18 thousand and odd hundreds acres of lands comprising of 16 villages. The development of village and village Abadi

by YEIDA is also linked to the development of land alongside Expressway. The acquired land lies within 2 kms. of the periphery of the Expressway.

191. We may note from the counter affidavit of the State in Writ Petition No. 11839 of 2012, pertaining to the acquisition of land of Village Rampur Bangar for an area of 104.9705 hectares that the Master plan of Phase-1 of the area in question of the Yamuna Expressway Industrial Development Authority is a duly approved Master plan. The NCR Planning Board has revised the Regional Plan 2021 and has accepted the YEIDA Phase-1 Master Plan of 2031 as a part of UP Sub-Regional Plan-2031. The proposal letter dated 26.12.2009 of the acquisition appended as Annexure 'C.A.-3' to the counter affidavit includes a certificate issued under the Government Order dated 21.12.2006 which contains report on 14 points and undertaking given by YEIDA to implement National Rehabilitation and Resettlement Policy of 2003. The original record shows that Prapatra-1 is an application for acquisition of land for public purpose made under Appendix '1' of Para '14' of the Land Acquisition Manual. The preliminary enquiry report contains a statement regarding non-inclusion of any Gram Sabha land in proposed area and declaration that no Banjar or Non-Agriculture land equivalent to the proposed area was available for the project. In Prapatra-5, a calculation of estimated compensation payable on the agreement on the rate prevailing at that time, a certificate of District Land Use Committee regarding grant of consent for acquisition of the said land, a certificate that total 285 families will be affected by the proposed acquisition has been appended, the treasury deposit of Rs. 16,79,52,800/- in respect of 10% of the

estimated compensation as well as 10% of the acquisition charges are on record. The certificate in Prapatra-7 issued under the Government Order dated 12.1.2009 to the effect that for the project in question, no land except the proposed agricultural land is available, was annexed with the proposal. The Prapatra-9 contains information on 7 points required for grant of consent by the Land Use Board of U.P. Lucknow before publication of the notification, wherein it is categorically mentioned that the land is required for development plan prepared as per the Master Plan of the area and that the land for said project is required immediately. The statements to the effect that no suit is pending in respect of the proposed land, total 285 tenure holders will be affected, the proposed land will be developed as per Master Plan and on either side of the Road, Plantation will be done, the greens belt area will be maintained by the Authority is found in Prapatra-9. The Prapatra-10 is the certificate issued by the Collector in accordance with the provisions of the Government Order dated 6.8.2004 to the effect that the land proposed for acquisition is urgently required and, therefore, urgency clause, i.e. Section 17(4) of the Act, 1894, was required to be invoked for immediate completion of the project. The possession of the proposed land is urgently required by dispensing the provisions of Section 5-A. The District Collector was fully agreed to dispense with the opportunity of hearing to the affected tenure holders.

192. The said certificate is followed by the note on justification for invoking Section 17(4) of the Act, 1894, some of which has been extracted hereinabove with regard to different villages. The justification with respect to Village Rampur Bangar shows that it was noted therein that

in the residential plots scheme of YEIDA, the land of appropriately 2042 hectares of 13 villages has already been notified. The land of village Rampur Bangar for an area of 104.9705 hectares was contiguous to the land parcel of the said village already notified and was required for expansion of the Sector planning. Being part of an integrated project, in case of opportunity to the tenure holders was given, there was likelihood of non-availability of contiguous land to complete the project in a time bound manner.

193. Prapatra-13 contains certificate to the effect that there was no dues upon the authority, Prapatra-14 is a certificate which was issued regarding non-existence of any temple, mosque and graveyard on the proposed area. Prapatra-15 is a certificate certifying that out of the total estimated compensation of the land proposed for acquisition to the tune of Rs. 83,97,64,000/-, the Authority had already deposited Rs. 16,79,52,800/-. It is further mentioned in the certificate that the proposed area could not be purchased by private negotiations and within ½ Mile radius of the area, no Banjar/Non-Agriculture land equivalent to the proposed area is available. The land proposed for acquisition is indispensable for planned development. Prapatra-16 is a list of assets found on the proposed plots prepared by the Officers of Development Authority and verified by the Revenue Officers after making spot inspection of the proposed area.

194. A report on 23 points was appended along with the proposal, which contains a declaration that the compensation of the assets found on the proposed land will be paid to the concerned tenure holders after getting valuation of the

said property by the concerned department, and that, in case, payment of the compensation is made in accordance with the provisions of the Agreement Rules, 1997, there was no probability of any objection. It is stated therein that the Additional District Magistrate (Land Acquisition) after reconciliation of the documents from the revenue records and completing necessary formalities, annexing certificate in Prapatra-10 regarding urgent need of planned development, sent the said proposal vide letter dated 11.3.2010 to the Director, Land Acquisition, Directorate with the request to forward the same to the State Government and the Directorate, thereafter, forwarded the same to the State Government, with the request to issue notification under Section 4(1) of the Act and also ensure compliance of National Rehabilitation and Resettlement Policy-2003 within stipulated period by issuing direction to the District Collector. The letter of the Additional District Collector (Land Acquisition) is appended with the counter affidavit.

195. It is categorically stated in the counter affidavit of the State that the State Government having considered all the documents including the certificate of the District Collector issued in Prapatra-10 and note on justification for invoking Section 17(4) along with the proposal under Section 4(1) and, after being subjectively satisfied, accorded approval to issue notification by invoking the provisions of Section 17(4) along with Section 4(1), keeping in view the urgent need of the land for planned development in District Gautam Budh Nagar through YEIDA.

196. It is further stated therein that the State Government was satisfied by looking at the enormity of the number of tenure

holders that the disposal of objections would cause delay of years. The acquisition of land and possession was found of paramount importance. The State was, accordingly, satisfied that the provisions of Section 5-A need to be dispensed with. It cannot be said that the satisfaction of the State Government was arrived at on extraneous or irrelevant considerations. The decision of the State cannot be assailed on the ground that there was no material dispensing with the enquiry or that the order suffered from malice. It is further sought to be clarified by the State that things have to be viewed holistically. Each notification may not be viewed in seclusion. The land is being acquired through several notifications to implement the integrated scheme formulated by the Authority. It is being executed gradually and in phases.

B. Noting from the Record of the State:-

197. We have carefully perused the original record produced by the learned Additional Advocate General appearing for the State-respondents pertaining to the decision for invocation of urgency clause under Section 17(4) while granting approval of acquisition proposal under Section 4 of the Land Acquisition Act.

198. From the record, we have noted that on receipt of the proposal, queries were made with regard to the information contained in the documents appended with the proposal. A noting dated 26.3.2010 of the concerned Secretariat, with respect to Village Rampur Bangar, for acquisition of an area of 104.9705 hectares shows that the direction was issued to provide Khasra and Khatauni along with the proposal. On receipt of the same, all the points pertaining

to the proposal were carefully extracted in the Note-sheet, indicating therein that the requirements of submission of proposal for acquisition, as prescribed in different formats on all aspect of the matter, had been fulfilled. With regard to the invocation of urgency clause, the justification given by the District Magistrate for issuance of the notification under Section 17 in the prescribed format, and the justification note was extracted in the Note-sheet. The reasons given for invocation of Urgency clause as reflected from the Note-sheet was inspected at different levels of the State and lastly, the approval of the State Government was granted with the signature of the Special Secretary, Chief Minister, Government of U.P.

199. Similarly, a perusal of the record of the acquisition of land of Village Pachokra, for an area of 50.9390 hectares indicates that the Minutes of the meeting of the District Land Use Committee under the Chairmanship of the District Magistrate dated 11.2.2009 has been appended therein, which shows that the acquisition proposal of Yamuna Expressway Industrial Development Authority, Gautam Budh Nagar for planned development of the area with respect to 10 villages namely Niloni Shahpur, Mirzapur, Parsaul, Achcheypur Chandpur, Rampur Bangar, Raunija, Pachokara, Rustampur and Raghupura, within the limits of District Gautam Budh Nagar, had been considered. On the Agenda for acquisition of the land of these villages submitted by the Additional District Magistrate, Land Acquisition, the Land Use Committee made deliberations and gave consent subject to the conditions mentioned in the resolution, which is under the signature of the District Magistrate, Gautam Budh Nagar. The certificate under

the signature of the District Magistrate/Chairman, District Land Use Committee, Gautam Budh Nagar is appended with the proposal wherein approval for acquisition of 50.939 hectares of land of Village Pachokra for planned development of the area through Yamuna Expressway Industrial Development Authority had been given. It is noted therein that by the acquisition, 63 farmers/land holders would be affected. On the justification submitted by the District Magistrate for invocation of urgency clause in the prescribed format and the Note appended with the proposal in the note-sheet, extracting all relevant points pertaining to fulfillment of requirements of the proposal for acquisition, the proposal was duly perused at different levels on different dates and lastly on 26.2.2009, the approval of the State Government was recorded by the Special Secretary, Chief Minister, Government of U.P.

200. On perusal of the record of the acquisition of land of Village Dungalpur Reelka, of area 198.6320 hectares, on the proposal for invocation of urgency while issuing notification under Section 4/17 of the Act, 1894, we find that on receipt of the proposal forwarded by the Directorate to the State, queries were made on 11.11.2010 that the details in the justification for invocation of Urgency clause submitted by the Collector had not been given in the proposal and the approval of the District Land Use Committee was not appended. The noting in the Note-sheet dated 11.11.2010 indicates that the matter was deferred for submission of the proposal by completion of the necessary requirements. Fresh noting was, thereafter, prepared on the Note-Sheet when all the requirements have been fulfilled and a perusal of the noting therein indicates that

the justification given by the District Magistrate for invocation of urgency clause had been duly extracted and the reasoning given therein were noted. It was noted therein that in case opportunity of hearing was granted to the villagers, there was likelihood of delay in the acquisition of the land, which would adversely affect the execution of the project, inasmuch as, contiguous land may not be available in such a situation. The said proposal was duly inspected/enquired at different levels of the State and, lastly on 28.11.2010, the approval of the State through the Special Secretary, Chief Minister, Government of U.P. was recorded.

201. Similar is the position we found on the inspection of the original record of the State with respect to the acquisition of lands of other villages, subject matter of consideration herein.

(VIII). Conclusion:-

202. On perusal of the record, thus, it cannot be accepted that the entire exercise for invocation of urgency clause was mechanical or there was no material for recording subjective satisfaction of the State. It cannot be said that it was an exercise which was conducted without application of mind.

203. Having gone through the record and noticing the statement in the counter affidavit of the State, looking to the Master Plan and the area of land acquired under the notifications in question, there remains no doubt that the State Government had duly applied its mind to relevant factors available on the record before it, to reach at the conclusion of dispensation of enquiry under Section 5-A. The factors of (i) integrated plan for development; (ii)

expensiveness of the land or enormousness of the project; (iii) need for contiguous land for the integrated project; (iv) likelihood of encroachment of land by the outsiders being contiguous to the Expressway; (v) development project being complimentary to the development of Yamuna Expressway, were the reasons spelled out in Prapatra-10 which weighed in the mind of the State to approve the proposal of the Authority for issuance of notification under Section 17(4) along with Section 4 of the Act, 1894.

204. A careful perusal of the record and the material brought along with the counter affidavit of the State shows that there has been due application of mind at the level of the State Government and it was not a mechanical exercise. The Government had taken note of the reasons spelled out for dispensation of enquiry in the justification for the same, with respect to each notification individually, and granted approval on each file pertaining to the acquisitions-in-question of 9 villages, subject matter of challenge herein. It is brought on record that lands of Village Rampur Bangar of approximately 20 hectares, subject matter of acquisition by the notification dated 26.2.2009, Village Usmanpur of an area of 161.3900 hectares, Village Raunija falling part of Sector 22-E and 22-D were needed for construction of approach roads passing through the Villages to connect the Expressway and the Sector road and, thus, were integral part of the Sector planning.

205. We may be alive of the situation that it was not an acquisition for expansion of already existing city or developed area. With the creation of Taj Expressway Authority, the project for construction of Taj Expressway was conceived in the year

2001 which could not be implemented on account of the litigations in the Court. The Apex Court in the case of **Nand Kishore Gupta** (supra) had noted that:-

“57. The Expressway is a work of immense public importance. The State gains advantages from the construction of an Expressway and so does the general public. Creation of a corridor for fast moving traffic resulting into curtailing the traveling time, as also the transport of the goods, would be some factors which speak in favour of the Project being for the public purpose. Much was stated about the 25 million square meters of land being acquired for the five parcels of land. In fact, in our opinion, as has rightly been commented upon by the High Court, the creation of the five zones for industry, residence, amusement etc., would be complimentary to the creation of the Expressway.

58. It cannot be forgotten that the creation of land parcels would give impetus to the industrial development of the State creating more jobs and helping the economy and thereby helping the general public. There can be no doubt that the implementation of the Project would result in coming into existence of five developed parcels/centers in the State for the use of the citizens. There shall, thus, be the planned development of this otherwise industrially backward area. The creation of these five parcels will certainly help the maximum utilization of the Expressway and the existence of an Expressway for the fast moving traffic would help the industrial culture created in the five parcels. Thus, both will be complimentary to each other and can be viewed as parts of an integral scheme. Therefore, it cannot be said that it is not a public purpose.”

206. It was noted by the Apex Court therein that looking to the enormousness of the area, the land acquired for the Expressway alone, apart from 25 millions meters of land which was liable to be acquired for the purposes of development of five land parcels, it cannot be argued that the encroachment issue was not a relevant factor. The interlinking between the acquisition of land for the highway and the acquisition of land for establishing five townships has been noted with approval by the Apex Court.

207. In a bunch of writ petitions [**Nathi vs. State of U.P.** (supra)] decided on 12.11.2010 by a Division Bench of this Court challenging the acquisition notifications dated 16.10.2009 and 1.12.2009 issued under Sections 4 and 6 of the Land Acquisition Act, 1894 read with 17(1) and 17(4) of the Act, 1894; respectively, it was noted by the Division Bench that planned development of the area through Yamuna Expressway is part of an integrated project which would cover a large area of land. The acquisition would also include construction of approach road for linking Yamuna Expressway with the land parcels.

208. The plan of Yamuna Expressway Industrial Development Authority for providing basic amenities such as roads, water supply, street lighting and power supply, sewerage, drainage, collection, treatment and disposal of industrial waste and town refuse and other community facilities, services or conveniences under Section 2 (a) of the Uttar Pradesh Industrial Area Development Act, 1976 is to be considered to further note the statement from the record that the acquisition was being proposed of the contiguous land parcel as part of the integrated project, the

satisfaction of the State Government for invoking Section 17(4) of the Act cannot be said to be vitiated by arbitrariness or non-application of mind.

209. As noted above, the integrated development plan through Yamuna Expressway Industrial Development Authority of District Gautam Budh Nagar and Bulandshahar under the Master Plan, Phase-1-2031 is part of the policy decision of the State providing for development of Special Development Zone, Core activity zone. Amongst the complimentary activities of the Core activity of Special Development Zone, more than 35% of land was to be utilized for Core activity, approach road and open space. The total area (Urban area excluded Village Abadi) targeted for development under the Master Plan (Phase-1), Gautam Budh Nagar and Bulandshahar is 18450.43 hectares. By excluding the Village Abadi areas of 1124.69 hectares, the Urbanisable area is 19575.12 hectares which includes the area earmarked for residential, commercial, industrial, institutional use apart from the Greens, transport and mixed use.

210. There is no post-notification delay, inasmuch as, in 2 or 3 acquisition notifications, subject matter of challenge before us, wherein almost 1 (one) year time has been consumed in issuance of the Section 6 notification, delay has been explained by making a categorical statement in the counter affidavit that about one thousand crores of money was needed for deposit of 80% of estimated compensation for which collateral security was arranged by the Yamuna Expressway Industrial Development Authority through the authorities like NOIDA and Greater NOIDA who had mortgaged their land for sanction of loan. The deposit of 80%

estimated compensation is pre-requisite condition for issuance of Section 6 notification and only on the deposit of money with the competent authority towards 80% of estimated compensation, the process of issuance of the declaration under Section 6 was undertaken. The explanation offered by the Authority (YEIDA) for issuance of Section 6 notification on the eve of last date of the year, just before the expiry of one year from the date of Section 4 notification, is found to be a valid justification. Moreover, in all other acquisition notifications under challenge, there is no delay as Section 6 notification had been issued in a time gap of 3 to 4 months from Section 4 notification.

211. We are, therefore, not impressed with the arguments of the learned counsel for the petitioners that the acquisition notifications under challenge suffered from unexplained post-notification delay and it has to be treated as a factor to conclude that there was no urgency.

212. It was placed before us that the first phase of the Master plan' 2031 was to be completed by the year 2021. We may also note that the purpose of acquisition has been achieved as the major acquired area has already been developed. About 95% of the land owners have already received compensation and 90% of them have not approached any Court. The factors which were to be considered to be relevant in **Nand Kishore Gupta** (supra) for Yamuna Expressway project are found to be relevant in the acquisition in question as well.

213. In **Radhy Shyam** (supra), heavily relied by the learned counsels for the appellant, the decision in **Nand**

Kishore Gupta (supra) was noted in paragraphs '72' and '76' in the following manner:-

"72. In Nand Kishore Gupta v. State of Uttar Pradesh (2010) 10 SCC 282, the acquisition of land for construction of Yamuna Expressway was upheld and challenge to the decision of the State Government to dispense with the inquiry was negatived by making the following observations:

"We have deliberately quoted the above part of the High Court judgment only to show the meticulous care taken by the High Court in examining as to whether there was material before the State Government to dispense with the enquiry under Section 5- A of the Act. We are completely convinced that there was necessity in this Project considering the various reasons like enormousness of the Project, likelihood of the encroachments, number of appellants who would have required to be heard and the time taken for that purpose, and the fact that the Project had lingered already from 2001 till 2008. We do not see any reason why we should take a different view than what is taken by the High Court.

76. In Nand Kishore Gupta v. State of U. P. (supra), the acquisition was upheld because the land was urgently needed for construction of Yamuna Expressway and by the time the matter was decided by this Court, huge amount had been spent on the project. As against this, the exercise of power under Section 17(1) and/or 17(4) for the acquisition of land for residential, industrial and commercial purposes, construction of sewage treatment plant and district jails was held to be legally impermissible in Raja Anand Brahma Shah v. State of Uttar Pradesh (supra), Narayan Govind Gavate v. State of

Maharashtra (supra), Om Prakash v. State of U.P. (supra), Union of India v. Krishan Lal Arneja (supra), Esso Fabs Private Limited v. State of Haryana (supra), Babu Ram v. State of Haryana (supra) and Anand Singh v. State of Uttar Pradesh (supra)."

214. The observations in paragraph '93' in **Nand Kishore Gupta** (supra) noted in **Radhy Shyam** (supra) that there was necessity to dispense with the enquiry under Section 5-A of the Act considering various reasons like enormousness of the Project, likelihood of the encroachments, number of appellants who would have required to be heard and the time taken for that purpose, the reasons for invocation of urgency clause noted from the material before the State Government, were neither touched nor held to be irrelevant, rather the invocation of urgency clause in **Nand Kishore Gupta** (supra), on the above noted reasons, was distinguished, while proceeding in paragraph '73' to examine the legality and/or justification to exercise under Section 17(1) and/or 17(4) for the acquisition of land for residential, commercial or industrial purpose.

215. The reliance placed upon the judgment of the Apex court in **Radhy Shyam** (supra) by the counsels for the petitioners simply on the ground that urgency clause cannot be invoked in a project "for planned development of an area", from the statement in the acquisition notifications under challenge, is of no help to the petitioners, inasmuch as, this Court cannot ignore the nature of project in question, the material brought on record available before the State Government to invoke urgency. This is not a case where it can be said that there was no material before the State Government justifying invocation of

urgency clause or there has been no application of mind of the State on the material brought before it. No fault in the decision-making process could be demonstrated. It is not a case of non-application of mind. The recital of formation of opinion by the Government, in its decision, was not necessary nor would vitiate the order on the ground that reasons have not been recorded.

216. As noted above, it is a case of subjective satisfaction of the Government and once the Government forms the opinion and dispenses with the enquiry under Section 5-A of the Act, the Court, in its limited jurisdiction of judicial review, cannot declare the acquisition proceedings bad. For the elaborate discussion made above, in the present matter, we do not find any error or infirmity in the decision-making process and hence no case is made out for invoking the powers of judicial review, to quash the notifications for acquisition.

(IX). Prejudice Caused:-

217. It would not be out of place to mention here that the petitioners in the bunch of writ petitions are aggrieved by the denial of opportunity of hearing, to record their objection for the purpose of acquisition, which is found to be public purpose. In many of the writ petitions before us, it is stated that the land of the petitioners was not necessary to be taken as it was either Abadi or was being used for the purposes other than agriculture. In the facts and circumstances stated in the writ petition, in which the petitioner has been placed, it is fit case for omitting his land from acquisition.

218. In one of the Writ Petition No. 11839 of 2012, five petitioners namely Bane Singh, Smt. Sheela Devi, Smt. Suman

Devi, Khoob Chand and Narendra Kumar have raised a dispute with regard to acquisition of their plots in Gata Nos. 228, 144, 459 and 452 of Village Rampur Bangar, Pargana Dankaur, Tehsil Sadar, District Gautam Budh Nagar, on the ground that the plots in question were recorded as Abadi and further that, in the survey report prepared at the time of preparation of proposal for acquisition, it was admitted fact that the aforesaid plots were being used as Abadi. The statement in the writ petition is that the petitioners are interested only for exemption of their lands, mentioned above, for the area to the extent of existing Abadi and want compensation for the rest of the acquired area as per law. The statement is also to the effect that the petitioners were ready to pay development charges and other expenses chargeable by the Authority namely Yamuna Expressway Industrial Development Authority but without giving any opportunity of hearing and without deciding their representation for exemption of land, the respondents were bent upon to take possession of the constructed house/disputed land. The area of the plots-in-question recorded as Abadi and being used, as such, could not have been included in the acquisition under challenge. The prayer in the writ petition is to quash the acquisition notification in respect of the petitioners' land, decide their application to regularize the Abadi site and further not to dispossess from their respective land, has been made. The challenge by the petitioners has been disputed in the counter affidavit with the contention that there exist no Abadi at the time of survey of the land in question. The award in respect of plot nos. 228, 144, 452 had been declared under Section 11(2) under Karar Niyamawali, 1997 as the recorded tenure holders of the said plots had entered into an agreement with the acquiring body and accepted

compensation under Karar Niyamawali. The award in respect of plot no. 459 has been declared under Section 11(1) and since recorded tenure holders did not receive the same, it has been deposited in the District Court. A categorical statement has been made in the counter affidavit of the State that the affected tenure holders including the petitioners had received compensation under the Agreement Rules after signing the agreement without any protest or dispute. It is also stated in the counter affidavit that plot no. 452 is not recorded in the name of any of the petitioners in the revenue record. The recorded tenure holder of Plot No. 452 had already received compensation. No rejoinder to the said counter affidavit has been filed.

219. Similar facts have been noticed from the statements made in other writ petitions where the petitioners sought exclusion of their plots, on the premise, that there exists Abadi over the acquired plots at the time of preparation of the proposal and the said fact had been indicated in the survey report.

220. We are not entering into the merits of the claim of the petitioners for exclusion of their Abadi in individual cases. However, the fact remains that the petitioners herein are challenging the acquisition of their plots on the ground that, had the opportunity of hearing been provided to them, they could have prayed for exclusion of their lands from acquisition by placing the material on record that it was a fit case for omitting their lands from acquisition. The prejudice caused to the petitioners, on account of the decision of the State Government to dispense with the enquiry, has been agitated only to the above extent.

221. In this regard, it is submitted by the learned counsel for the YEIDA that there exists a Regulation namely the Yamuna Expressway Industrial Development Authority Rural abadi sites (Management and Regularization) Regulation 2011, which has been framed for providing lease back of Abadi plots to the affected tenure holders under the lease back policy of Noida, 7% Abadi land is being allotted to those whose land had been acquired. By the Government Order dated 29.8.2014 and 4.11.2015, it was decided that 64.7% of additional compensation would be paid to the affected tenure holders as “No Litigation Incentive”. The Board of the Authority has also approved the same policy and, as such, additional compensation as “No Litigation Incentive” is being given to the affected tenure holders in accordance with the terms and conditions enumerated therein. By the Government Order dated 4.11.2015, the condition of payment of 64.7% additional compensation as “No Litigation Incentive” has been relaxed wherein initial condition of the withdrawal of the writ petition has been relaxed to the extent that in those acquisition notifications of Villages where 80% of the writ petitions have been withdrawn, payment of additional compensation as “No Litigation Incentive” shall be made.

222. From the scheme of the Government Order dated 29.8.2014, it is evident that even those tenure holders who sold their lands by consent are also entitled for additional compensation as “No Litigation Incentive”.

223. We may also note that in one of the Writ Petition No. 18539 of 2013 pertaining to Village Rampur Bangar, Pargana Dankaur, Tehsil Sadar, District

Gautam Budh Nagar, the acquisition of Gata No. 152 area 0.8950 hectares has been subjected to challenge on the ground that the plot of the petitioner is completely surrounded by Abadi on all sides on which the residential house of the petitioner had been constructed and the petitioner is living therein with his family. There is no other residential house for the petitioner and his family members. In reply to the same, in the counter affidavit of the Development Authority, a categorical statement has been made that the Authority has decided to lease back plot no. 152 to the extent of 0.2100 hectares and the said decision was already communicated to the petitioner vide letter dated 4.6.2011. The statement therein is that the possession of plot no. 152 area 0.7950 hectares had been handed over to the authority on 3.11.2010 and the possession of an area 0.1000 hectares has not been given to the authority.

224. The prejudice said to have been caused to the petitioners on account of acquisition of their Abadi plots allegedly and prayer to exempt the same being recorded Abadi at the time of preparation of the proposal for acquisition under Section 4 of the Act, 1894, thus, can very well be addressed by the Authority as per the terms and conditions of the above noted scheme.

225. However, in view of the acquisition of enormous area of lands of the village-in-question, the acquisition notifications cannot be quashed as there was material before the State to invoke the urgency clause. As noted above, the decision of the State recording subjective satisfaction on the material before it cannot be interfered with on the ground of adequacy and reliability of the material on the basis of which the conclusion is

reached. The truth or correctness of the material cannot be questioned by the Court nor the same has been questioned before us, in that context. None of the material placed before the State can be said to be irrelevant or non-existent material which could be said to be fatal so as to vitiate the order itself.

226. The petitioners have failed to establish that their lands was not suitable for the project; the land was not needed for any public purpose. There is no allegation of malafide in the acquisition in question. It could not be demonstrated nor it could be argued that the public purpose behind the acquisition would be sub-served by any other land. The stand of the authority giving justification for invocation of urgency clause that the lands under acquisition was contiguous, and was indispensable, could not be disputed or denied by the petitioners.

227. We, therefore, find that apart from the contention that some of the petitioners are entitled to exemption of their Abadi land, no other plausible objection to the acquisition in question could be agitated by the petitioners. The prejudice caused to the petitioners by dispensation of enquiry under Section 5-A could not be shown or demonstrated.

228. The expropriation of the lands of the petitioners in conformity with the Constitutional scheme under Article 300-A and in furtherance of the policy framed for development of the area for the public at large, under Article 39(b) of the Directive Principles of the State policy, is saved by the provisions of Article 31-C of the Constitution of India. The right to compensation provided under the second proviso to Article 31-A of the Constitution,

stands duly balanced by giving “No Litigation Incentive” of 64.7% besides the compensation computed under the Act, 1894; grant of 7% of Abadi land (developed land) and the lease back policy framed by YEIDA dated 10.10.2011 (modified in 2014).

229. On the facts of the instant case, in light of the legal principles stated by the Apex Court in **Radhy Shyam** (supra), we find that invocation of urgency under Section 17(4) for dispensation of enquiry under Section 5-A of the Land Acquisition Act, 1894 is not fatal to the acquisitions-in-question.

(X) Reliance on Shyroj Singh (supra)

230. In so far as the reliance placed by the counsel for the petitioners on the Division Bench judgment of this Court in **Shyoraj Singh and others vs. State of U.P. and others**⁵¹ and other similar decisions noted above, we are of the considered opinion that the relevant aspect of the matter, as noted by us hereinabove, to test the merits of the contentions of the rival parties, relevant to challenge the acquisitions in question, had not been noted nor examined by the Division Bench therein. The Division Bench has not been dealt with the arguments of the counsel for the Development Authority therein that looking to the large number of farmers, the hearing would have delayed the project. It has simply gone to the record of the State, noticing the justification in Prapatra-10 to record the reasons mentioned therein for invoking the power under Section 17 of the Land Acquisition Act, 1894, dealt and rejected the same only on the ground that the post-notification delay of one year was sufficient to conclude that there was

absolutely no urgency which could have justified the invocation of the powers under Section 17 of the Land Acquisition Act, 1894, so as to deprive of farmers from an opportunity of hearing under Section 5-A.

231. Noticing the observations of the Apex Court in **Radhy Shyam** (supra), it was held therein that the invocation of urgency clause in the matter of land to be acquired for planned development for the Development Authorities has been considered therein, and the decision heavily relied upon by the Counsel for the Development Authority in **Nand Kishore Gupta** (supra), had been distinguished.

232. The Court in **Shyoraj Singh** (supra) did not consider the fact that it was an integrated project, acquisition for a portion of which has already been upheld by the Apex Court in the case of **Nand Kishore Gupta** (supra). The reasons given for justification in invocation of urgency clause had not been examined, in the context, in which in they were made. The said case having been decided on the material placed before the Court at the time of the argument by the learned counsels therein, cannot be a guiding factor to uphold the only argument of the counsels for the petitioners herein that in view of the decision of the Apex court in **Radhy Shyam** (supra), the acquisition for “planned development through Yamuna Expressway Industrial Development Authority, cannot be upheld. The crux of the arguments of the learned counsel for the petitioners simply relying upon the observations of the Apex Court in **Radhy Shyam** (supra), without anything beyond that, has been dealt with hereinabove.

233. The reliance placed upon the decision of the Division Bench of this

Court in the acquisition of land of Village Chandpur, Pargana Dankaur, Tehsil and District Gautam Budh Nagar for Yamuna Expressway Industrial Development Authority, in the case of **Shyoraj Singh** (supra) is, thus, of no help to the petitioners herein.

(XI) Relief re: compensation:-

234. Lastly, we are required to deal with the arguments of some of the learned counsels for the petitioners that the petitioners would be satisfied, in case, instead of quashing the acquisition, they are provided compensation under the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 for illegal deprivation of their landed property. As noted above, on a challenge made by the petitioners in the writ petitions, in this bunch, at the admission stage, the interim orders have been passed directing the parties to maintain status quo with respect to the lands-in-question. The result was that the possession of the lands, subject matter of acquisition herein has not been handed over to the Development Authority. No award has been made with respect to the land, subject matter of acquisition in the instant bunch. The question is as to whether by applying the decision of the Apex Court in **Sahara India Commercial Corporation Limited and others vs. State of Uttar Pradesh and others**⁵², we can grant compensation to the petitioners herein under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

235. In **Sahara India Commercial Corporation Limited** (supra), the Apex Court while relying upon the earlier

decision in **Om Prakash** (supra) has held that on identical grounds, with the same purpose of acquisition, the Apex Court in the case of **Om Prakash** (supra) had found invocation of urgency clause bad and held that the notifications under Sections 4 and 6, without holding the enquiry/hearing of objection under Section 5-A of the Act, 1894 were not justified and the acquisition proceedings as a whole would be open for interference. However, while granting relief, the Court has concluded therein that since the scheme, for which the land in question was acquired, had been implemented and on parts of the land constructions under different schemes had come up, though the acquisition had been found to be legally fragile, requiring the acquiring authority to return the land to the land owners, at that stage, would have the effect of jeopardizing the housing and other projects, which either had been completed or had reached completion. While moulding the relief, it was, thus, held therein that there will be no obligation on the part of the acquiring authority to return any part of land to any of the land owners. In case, the acquiring authority decided to retain the entire land acquired by the notifications in question, only with respect to the lands of the appellants before the Apex Court therein, the date of the order of the Apex Court would be deemed to be the date of fresh notification for acquisition of the land of the appellant. It was further held therein that in respect of the land owners who might have received any part of compensation, aforesaid directions would have no application. The compensation which was to be determined with respect to the appellants therein with reference to the date of the deemed notification, was directed to be computed in accordance with the provisions of the Right to Fair Compensation and Transparency in Land

Acquisition, Rehabilitation and Resettlement Act, 2013.

236. The principles on which the relief was granted to the appellants in **Sahara India Commercial Corporation Limited** (supra), however, are not attracted in the facts of the instant case. Firstly, as we did not find any infirmity in the acquisition process. And secondly, for the reason that in the instant case, interim orders directing the authorities to maintain status quo granted on the admission of the writ petition, are operating. On behalf of the acquiring authority, it was submitted that the period spent during the interim stay or injunction by which the authority has not been able to take possession or declare award to make payment of compensation, has to be excluded from the period prescribed in Section 24(2) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. Section 24(1)(a) prescribes that in case of land acquisition proceedings initiated under the Land Acquisition Act, 1894, where no award under Section 11 of the Act, 1894 has been made, then, all provisions of the Act, 2013 relating to the determination of compensation shall apply.

237. Section 24(2) of the Act, 2013 further provides that in case of land acquisition proceedings initiated under the Act, 1894, where an award under Section 11 has been made five years or more prior to the commencement of the Act, but the physical possession of the land has not been taken, or the compensation has not been paid, the said proceedings shall be deemed to have lapsed.

238. While dealing with the impact of Section 24(1) of the 2013 Act, in a case,

where land acquisition proceedings had been initiated prior to the enforcement of 2013 Act by publication of the notification under Sub-section (1) of Section 4 of the Land Acquisition Act, the Apex Court in **Haryana State Industrial and Infrastructure Development Corporation Ltd. & Ors. vs. Mr. Deepak Aggarwal & Ors.**⁵³, has held that for the purposes of Sub-section (1) of Section 24 of the 2013 Act, the proceedings under the Land Acquisition Act shall be treated as initiated on the publication of a notification under Sub-section (1) of Section 4 of the Act and clause (a) of Sub-section (1) of Section 24 of the 2013 Act is applicable in such matter only for the determination of compensation amount. It is pertinent to note that in the said matter, the notification for proposal under Section 4(1) of the Land Acquisition Act alone had been issued before enforcement of the 2013' Act.

239. In **Indore Development Authority (supra)**, the Apex Court has dealt with the effect and implication of Section 24(2) of 2013 Act. While considering the arguments of the acquiring authority therein for exclusion of the period spent during the interim order or injunction by which the authority have not been able to take possession or make payment of compensation, it was concluded in paragraph '289' that it is not the intendment of the 2013' Act that those who have litigated should get benefits of higher compensation as contemplated under Section 24 of the Act, 2013.

240. It was observed that "It is not intended of the provisions that in piecemeal the persons who have litigated and have obtained the interim order should get the benefits of the provisions of the 2013 Act". "It is not the

intendment of the law to deliver advantage to relentless litigants".

241. In **Union of India and another vs. Mohiuddin Masood and others**⁵⁴, the judgments in **Sahara India Commercial Corporation Limited** (supra) and **Radhy Shyam** (supra) were considered and it was held that those cases were decided in the facts and circumstances therein. It was further observed therein that the invocation of the urgency clause therein cannot be said to be bad on appreciation of the material on record and, as such, there was no justification for setting aside the notifications under Sections 4 and 6 of the Act, 1894. Further, on the submission of the writ petitioners therein that they have not been paid any compensation, it was noted that the acquiring authority had deposited 80% of the estimated compensation much earlier, but the land holders had refused to take the same. It was further held that it was not open for the original writ petitioners to make the grievance that they had not been paid any compensation, as it was still open to them to withdraw the compensation. The final award had already been published before the writ petitions was filed and the land holders themselves did not accept compensation.

242. For the above discussion, the prayer made by the learned counsels for the petitioners that by applying **Sahara India Commercial Corporation Limited** (supra), in view of the provisions of Section 24(1)(a), the petitioners herein are entitled to higher compensation, to be determined under the Act, 2013, is turned down.

243. However, it is directed that the award for the acquired lands pertaining to nine villages, subject matter of consideration herein, if not prepared in

view of the interim orders passed by this Court, the same shall be declared strictly in accordance with law, as expeditiously as possible, preferably within a period of two months from today and the compensation shall be paid or deposited immediately thereafter.

244. With regard to other beneficial schemes framed by the Authority (YEIDA) such as:- (1) regularization of rural Abadi sites known as “Yamuna Expressway Industrial Development Authority Rural abadi sites (Management and Regularization) Regulations 2011”, (amended vide First Amendment Regulations 2014); (ii) The scheme of allotment of 7% Abadi land to the affected tenure holders in lieu of acquisition; (iii) 64.7% of additional compensation under the Government Order dated 29th August, 2014, relaxed by the Government Order dated 4th November, 2015, it is provided that the writ petitioners herein shall be entitled to consideration of their claims for the benefits of the aforesaid schemes of YEIDA, which are applicable to the affected tenure holders of the Notified area of YEIDA; i.e. whose lands have been acquired for the development project of YEIDA. It is, therefore, directed that the claim of each of the writ petitioners, in this bunch, shall be considered in accordance with the terms and conditions of the Scheme.

245. We may further noted that as regards the grant of additional compensation of 64.7% to the petitioners herein, which was initially offered as “No Litigation Bonus” to the tenure holders who either did not challenge the acquisition or withdrew their writ petitions at any stage, the language of the Government Order dated 4th November, 2015 is to be

considered. The said Government Order provides for relaxation in the condition for grant of 64.7% additional compensation. It is provided therein that, in cases in respect to the Villages or acquisition proposals, where 80% of the writ petitions have been withdrawn, payment of additional compensation as “No Litigation Bonus” shall be made.

246. Drawing clue from the said Government Order dated 4th November, 2015, we provide that all the writ petitioners herein, who though have contested the matter before this Court till the final stage, are entitled for 64.7% of additional compensation, which was otherwise granted to the tenure holders affected by the acquisition-in-question, as an Incentive not to litigate with the Development Authority/YEIDA. We may make it clear that we did not find any justification for denying benefit of additional compensation of 64.7% to the affected farmers, who have approached this Court and did not relent or surrender before the Authority (YEIDA). They cannot be punished or discriminated only because of the exercise of their legal rights, to challenge the action of the State or the Authority. In any case, 64.7% additional compensation has been granted to all the affected tenure holders, even those who had withdrawn their writ petitions during the course of hearing, before the judgment, in this bunch, was reserved. Parity be applied to all the affected tenure holders in the matter of grant of 64.7% additional compensation. Further, at the cost of repetition, it is provided that all other incentives, such as, the regularization of Rural Abadi sites under the relevant regulations and 7% developed Abadi plots under the Scheme of YEIDA shall be provided to the writ petitioners, after due

consideration of the merits of their claims by adopting due process, as per the terms and conditions of the scheme.

(XII). Order:-

247. Subject to the above observations and directions, while turning down the challenge to the acquisition notifications under Sections 4 and 6 of the Land Acquisition Act, 1894 readwith Section 17(1) and (4) of the Land Acquisition Act, 1894, we **dismiss** all the writ petitions in this bunch.

No order as to cost.

ADDENDUM-‘A’

VILLAGE WISE DETAILS FOR
VILLAGE PACHOKRA

Date of Notification u/s 4	26.02.2009
Date of Notification u/s 6	19.02.2010
Date Award u/s 11(1)	29.06.2013 (15.0287168 hect.)
Date Award u/s 11(2)	22.02.2012 (25.2840831hect.) 29.06.2013 (1.3397001 hect.)
Purchase area	30.7533 hect.

I. DETAILS OF COMPENSATION

T o t a l a r e a a c q u i r e (H e c t.)	Tot al a r e a f o r w h i c h c o m p e n s i o n h a s b e e n a c c e p t e	Ar e a u n d e r l i t i g a t i o n (H e c t.)	Are a w h e r e P e t i t i o n h a v e a c c e p t e d c o m p e n s a t i o n	Are a u n d e r l i t i g a t i o n w h e r e c o m p e n s a t i o n h a s b e e n a c c e p t e d	Eff e c t i v e p e r c e n t a g e o f a r e a w h e r e c o m p e n s a t i o n h a s b e e n a c c e p t e d	Tot al n o. o f a f f e c t e d l a n d w h e r e c o m p e n s a t i o n h a s b e e n a c c e p t e d	Tot al n o. o f a f f e c t e d l a n d w h e r e c o m p e n s a t i o n h a s b e e n a c c e p t e d	To t al n o. o f W r i t P e t i t i o n e r (a s o n d a t e)

	d (He ct.)		n	epte d	acc epte d		n	
41 .6 52 5	26. 623 8	16 .8 72 8	1.3 936	15. 479 2	37. 16	19 8	151	18

II. DETAILS OF DEVELOPMENT

Total area acquired (Hect.)	Perce ntage of land under lign tion	Area devel oped and under devel opment (in percent age)	Area for future devel opment (in percent age)	Expenditure (in lacs)										Secto rs	Total no. of plots
				Sector Plann ing	Roa d	Seve r	Drain age	Water Suppl y	Hortic ulture	Elect rical Works	Vill age	Br idge	Total		
41.6525	40.50	32	27.5405	0.07 (Reside ntial and Comme rcial)	233.27	36	101.11	0	2.83	97.70	308.34	0	779.02	20	144

III. DETAILS OF LAND USE FOR
ACQUIRED LAND

Initial Demarca tion of Sectors (as per initial draft Master Plan 2031)	Land usage (as per initial draft Master Plan, 2031)	Current demarca tion of Sectors (as per final Master Plan, 2031)	Land usage (as per final Master Plan, 2031)
20	Residen tial	20	Residen tial
15B	Residen tial	15C	Commer cial

VILLAGE WISE DETAILS FOR VILLAGE ACCHEJA BUJURG

Date of Notification u/s 4	19.04.2010
Date of Notification u/s 6	28.07.2010 (209.7736 Hec.)
Date Award u/s 11(1)	31.12.2013 (7.0821 Hec.)
Date Award u/s 11(2)	30.06.2013 (184.6591 Hec.) 20.12.2013 (5.3023 Hec.)
Purchase Area	21.0678 Hec.

					no t ac ce pte d			
1 9 7. 2 8 4 2	18 9. 96 16	4 6. 9 8 6 7	22 .4 95 5	24 .4 91 2	12 .4 1	52 1	41 8	3 8

Total area acquired (Hect.)	Percentage of land under irrigation	Area developed and under development (in percentage)	Area for future development (in percentage)	Expenditure (in lacs)									Sectors	Total no. of plots	
				Sector Planning	Road	Sewer	Drain	Water Supply	Horticulture	Electrical Works	Village	Bridge			Total
19728.42	23.82	70.00	6.13+2.30.2	0.21 (Residential)	3483.28	1316.44	2502.33	941.93	186.88	21639.8	1647.64	0.00	1124.79	18	311
														19	Developing by concession re i.e., M.J.P. Infratech Pvt.Ltd.
														22B	Developing by concession re i.e., M.J.P. Infratech Pvt.Ltd.

Total arrears acquired (Hect.)	Total area for which compensation has been accepted (Hect.)	Area under litigation where acceptance of compensation is not accepted	Area under litigation where compensation is not accepted	Effective percentage of area under litigation where compensation is not accepted	Total no. of affected land owners	Total no. affected land owners accepted compensation	Total no. of Writ Petitioners (as on date)

Initial Demarcation of Sectors (as per initial draft Master Plan 2031)	Land usage (as per initial draft Master Plan, 2031)	Current demarcation of Sectors (as per final Master Plan, 2031)	Land usage as per final Master Plan, 2031

18	Residen tial	18	Residen tial
19	LFD	19	LFD
22B	LFD	22B	LFD

**VILLAGE WISE DETAILS FOR
VILLAGE RAMPUR BANGAR**

	104.9705 Hec.	20.0010 Hec.
Date of Notification u/s 4	19.04.2010 (104.9705 Hec.)	26.02.2009 (20.0010 Hec.)
Date of Notification u/s 6	28.07.2010 (104.9593 Hec.)	01.02.2010 (20.0010 Hec.)
Date of Award u/s 11(1)	31.12.2013 (11.2187 Hec.)	15.06.2013 (2.2595 Hec.)
Date of Award u/s 11(2)	20.12.2013 (0.6592 Hec.) 25.07.2013 (2.1210 Hec.) 13.03.2012 (86.8189 Hec.)	09.02.2012 (15.4718 Hec.) 05.06.2013 (2.2682 Hec.)

VII. DETAILS OF COMPENSATION

T ot al ar e a c q ui re d	To tal are a for wh ich co m pe ns ati	A re a u n d er li ti g at io	Ar ea wh ere Pe titi on ers ha ve ac ce	Ar ea un de r liti gat io n wh ere co	Ef fec tiv e pe rce nta ge of are a wh	T ot al no . of af fe ct ed la nd	To tal no . aff ect ed lan do wn ers ac	T ot al n o. of W ri t P et iti

(H e ct .)	on ha s be en ac ce pte d (H ect .)	n (H e ct .)	pte d co m pe ns ati on	m pe ns ati on t ac ce pte d	ere co m pe ns ati on t ac ce pte d	o w ne rs	ce pte d co m pe ns ati on	o n er (a s o n d ate)
For Notification under Section 4 dated 26.02.2009 bearing Ref. No. 601/77-3-2009-26 Arjan/09 and Notification under Section 6 dated 01.02.2010 bearing Ref. No. 202/-77-3-2010-26 Arjan/09								
1 9. 9 9 9	17 .7 45	1. 1 0 1 6	0	1. 10 16	5. 51	19 8	17 6	6
For Notification under Section 4 dated 19.04.2010 bearing Ref. No. 928/77-3-2010-03 Y.A.-10 Lucknow and Notification under Section 6 dated 28.07.2010 bearing Ref. No. 2046/77-3-2010-03 Y.A.-10 Lucknow								
1 0 0. 8 1 8 3	89 .5 99 6	2 0. 6 6 8 6	14 .4 65 5	6. 20 31	6. 15	28 5	21 9	3 8

VIII. DETAILS OF DEVELOPMENT

Total area acquired (Hect.)	Percent age of land under litigation	Area developed and under development (in percentage)	Area for future develop ment (in percentage)	Expenditure (in lacs)										Sector s	Total no. of plots	Total Allotment
				Sector Planning	Road	Sewer	Drain	Water Supply	Ho rticul ture	Electri cal Works	Vill age	Brid ge	To tal			
120.8173	6.04	70.00	30.00	0.19 (Resi dential)	133	547.0	791.29	429.94	21.07	820.22	505.06	0.00	44.4899	18&20	1251	1251

IX. DETAILS OF LAND USE FOR ACQUIRED LAND

Initial Demarca tion of Sectors (as per initial Master Plan 2031)	Land usage as per initial master plan	Current demarcat ion of Sectors (as per final Master Plan, 2031)	Land usage as per final Master Plan, 2031
18	Residen tial	18	Residen tial
20	Residen tial	20	Residen tial
19	L.F.D.	19	L.F.D.

VILLAGE WISE DETAILS FOR VILLAGE USMANPUR

Date of Notification u/s 4	04.11.2009
Date of Notification u/s 6	18.03.2010
Date of Award u/s 11(1)	31.12.2013 (10.1451 Hect.)
Date of Award u/s 11(2)	23.02.2012 (131.8583 Hect.) and 31.12.2013

	(7.5124 Hect.)
Details of land through mutual agreement	4.577 Hect.
Details of land under litigation as on date of Awards	7.2960 Hect.

X. DETAILS OF COMPENSATION

T o t a l a r e a f o r w h i c h c o m p e n s a t i o n h a s b e e n a c c e p t e d (H e c t .)	T o t a l a r e a u n d e r P e t i t i o n e r s a c c e p t e d (H e c t .)	A r e a w h e r e l i t i g a t i o n h a s b e e n a c c e p t e d (H e c t .)	A r e a u n d e r P e t i t i o n e r s a c c e p t e d (H e c t .)	E f f e c t i v e p e r c e n t a g e o f a r e a w h e r e c o m p e n s a t i o n n o t a c c e p t e d	T o t a l n o . o f a f f e c t e d l a n d o w n e r s	T o t a l n o . o f l a n d o w n e r s a c c e p t e d	T o t a l n o . o f W r i t P e t i t i o n e r (a s o n d a t e)
149.39	131.8583	31.8583	21.1451	6.78	490	426	51

11(2)	(179.8275 Hect.) and 21.12.2013 (22.1403 Hect.)

XIII. DETAILS OF COMPENSATION

Total area covered (Hect.)	Total area for which compensation has been accepted (Hect.)	Area under cultivation (Hect.)	Area where petitioners have accepted compensation	Area under litigation where compensation not accepted	Effective percentage of area where compensation not accepted	Total no. of affected land owners	Total no. affected land owners accepted compensation	Total no. of Writ Petitioners (as on date)
236.686	201.9676	56.2388	51.8344	4.404	1.86	946	742	48

Initial Demarcation of Sectors (as per initial Master Plan 2031)	Land usage as per initial master plan	Current demarcation of Sectors (as per final Master Plan, 2031)	Land usage as per final Master Plan, 2031
18	Residential	18	Residential

XIV. DETAILS OF DEVELOPMENT

STATEMENTS OF DEVELOPMENT																	
Total new land acquired (in acres)	Percentage of land under litigation	Acre devoted to other uses (in acres)	Acre devoted to future development (in acres)	Specimens (in lots)										Seeds in processing (in processing)	Total no. of plots	Yrs. after start	
				Phen. Spec.	Root	Stem	Seed	Yrns. in supp.	Heart in supp.	Electro. Works	Yrns. age	Re. age					
236,686	23.76	70.00	6.24 + 23.76	6.37	826	52	946	29	28,25	135	4	147.78	262	0.00	293	266.2 + 210	67

XVIII. DETAILS OF LAND USE FOR ACQUIRED LAND

Initial Demarcation of Sectors (as per initial Master Plan 2031)	Land usage as per initial master plan	Current demarcation of Sectors (as per final Master Plan, 2031)	Land usage as per final Master Plan, 2031
18	Residential	18	Residential
19	L.F.D.	19	L.F.D.

VILLAGE WISE DETAILS FOR VILLAGE RUSTAMPUR

Date of Notification u/s 4	26.02.2009
Date of Notification u/s 6	26.02.2010 (for 360.6642 Hect.)
Date of Award u/s 11(1)	31.12.2013 (24.1139 Hect.)
Date of Award u/s 11(2)	20.03.2012 (305.0529 Hect,) and 13.12.2013 (7.0155 Hect.)
Details of land through mutual agreement	19.9554 Hect.

XIX. DETAILS OF COMPENSATION

Total area acquired (Hect.)	Total area for which compensation	Area under litigation (Hect.)	Area where Petitioners have	Area where Petitioners have	Extra compensation	Total compensation	Total compensation

	ens atio n has bee n acc ept ed (He ct.)		acc ept ed co mp ens atio n	at io n w he re co m pe ns at io n not ac ce pt ed	p e r c e n t a g e of an d aw ards	f a r m ho use s	la nd for w e ll to be ac com mod ated	f or the purpose (as on date)

					e p t e d			
336. 1968	312 .08 68	53. 758 2	32. 929 3	2 0. 8 2 8 9	6 .2	9 0 2	7 3 7	7 6

XX. DETAILS OF DEVELOPMENT

Total area acqui red (Hect)	Percen tage of land under develop ment (in percentage)	Area develop ed and under develop ment (in percentage)	Area for future develop ment (in percentage)	Expenditure (in lacs)									Se cto rs	Total no. of plots	Total Allotme nt
				Sector Planni ng	Road	Seve r	Drain age	Water Supply	Horti culture	Electri cal Works	Vill age	Drin ge			
336.1 968	15.99	60	4.01 + 15.99	0.53	2718. 60	1292. 29	2315. 93	1081.3 7	131.5 9	1512.3 3	328. 57	119 3.43	105 747 2	20 21	1989 -

XXI. DETAILS OF LAND USE FOR ACQUIRED LAND

Initial Demarca tion of Sectors (as per initial Master Plan 2031)	Land usage as per initial master plan	Current demarca tion of Sectors (as per final Master Plan, 2031)	Land usage as per final Master Plan, 2031
20	Resident ial	20	Resident ial
21	Comme rcial	21	Comme rcial

VILLAGE WISE DETAILS FOR
VILLAGE KADARPUR

Date of Notification u/s 4	02.12.2010
Date of Notification u/s 6	22.03.2011 (for 120.8221 Hect.)
Date of Award u/s 11(1)	30.03.2014 (8.0953 Hect.)
Date of Award u/s 11(2)	11.04.2012 (75.1489 Hect.) and 30.03.2014 (30.4420 Hect.)
Details of land through mutual agreement	7.0417 Hect.

XXII. DETAILS OF COMPENSATION

T o t a l a r e a a c q u i r e d a s p e r A w a r d 6 5 (H e c t	T o t a l a r e a f o r w h i c h c o m p e n s a t i o n h a s b e e n a c c e p t e d (H e c t .)	A r e a u n d e r l i t i g a t i o n (H e c t .)	A r e a w h e r e P e t i t i o n h a v e a c c e p t e d c o m p e n s a t i o n	A r e a u n d e r l i t i g a t i o n w h e r e c o m p e n s a t i o n n o t a c c e p t e d	E f f e c t i v e p e r c e n t a g e o f a r e a w h e r e c o m p e n s a t i o n n o t a c c e p t e d	T o t a l n o . o f a f f e c t e d l a n d o w n e r s	T o t a l n o . a f f e c t e d l a n d o w n e r s c o m p e n s a t i o n	T o t a l n o . o f W r i t t e n P e t i t i o n (a s s o n d a t e

.)								
1138074	105909	6.028	1.4529	4.5755	4.02	561	503	3

XXIII. DETAILS OF DEVELOPMENT

Total area acquired (Hect.)	Percent age of land under develop ment (in percentage)	Area developed under develop ment (in percentage)	Area for future develop ment (in percentage)	Expenditure (in lac.)								Sect ors	Total no. of plots	Total Amount		
				Structure Planning	Road	Sewer	Drain	Water Supply	Electric al Works	Village	Bridge				Total	
1138074	5.30	75	10.70-53.0	0.10	632.34	332.9	606.00	381.67	0	100.59	143.59	0	2186.35	246.24A	6	2

XXIV. DETAILS OF LAND USE FOR ACQUIRED LAND

Initial Demarcation of Sectors (as per initial Master Plan 2031)	Land usage as per initial master plan	Current demarcation of Sectors (as per final Master Plan, 2031)	Land usage as per final Master Plan, 2031
24	Mixed Use	24	Mixed Use
24A	Mixed Use	24A	Mixed Use

VILLAGE WISE DETAILS FOR VILLAGE DHANORI

Date of Notification	16.11.2010

u/s 4	
Date of Notification u/s 6	22.03.2011 (for 442.3016 Hect.)66
Date of Award u/s 11(1)	31.12.2013 (45.3834 Hect.)
Date of Award u/s 11(2)	09.05.2012 (282.5438 Hect.) and 13.12.2013 (86.2005 Hect.)
Details of land through mutual agreement	2.6109 Hect.

XXV. DETAILS OF COMPENSATION

Total area acquired (Hect.)	Total area for which compensation is made (Hect.)	Area where land is acquired (Hect.)	Area where land is acquired (Hect.)	Area where land is acquired (Hect.)	Effective percentage of area acquired (Hect.)	Total no. of affected land owners (a.s.o.n.d.a.t.e)	Total no. of affected land owners (a.s.o.n.d.a.t.e)
414233	368782	592	22.643	37.1801	8.98	1417	12227

1		1						
2								

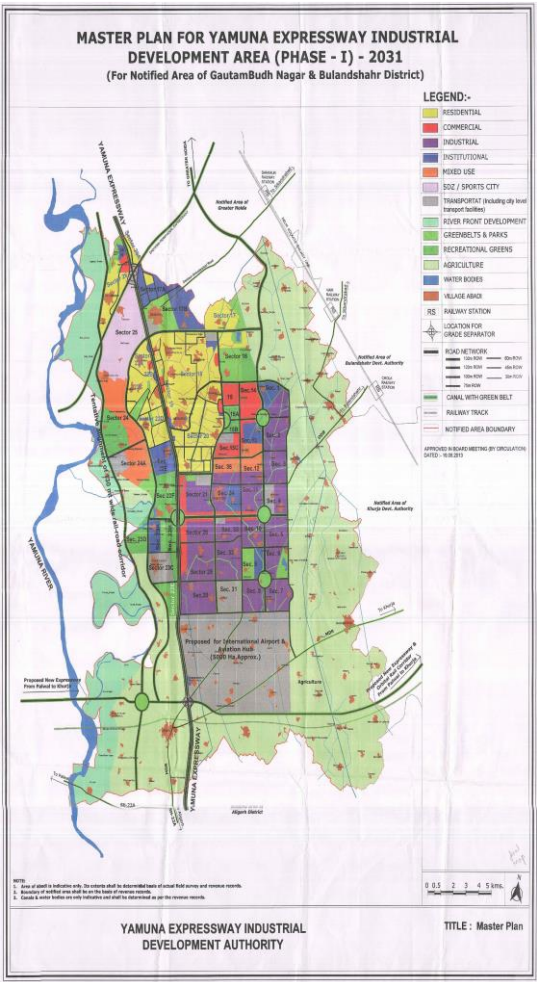
XXVI. DETAILS OF DEVELOPMENT

Total area acquired (Sect.)	Percent age of land developed (in percentage)	Area developed under development (in percentage)	Expenditure (in lac)										Sect no.	Total no. of plots	Total Allotment
			Sanitary Planning	Road	Sewer	Drain	Water Supply	Horticulture	Electric	Village	Bridge	Total			
414.23	14.44	40.00	45.50-14.44	0.65	307.65	431.08	1105.36	161.89	55.35	2.40	1077.4	3147.4	9326.95	16,17,618	3003

XXVII. DETAILS OF LAND USE FOR ACQUIRED LAND

Initial Demarcation of Sectors (as per initial Master Plan 2031)	Land usage as per initial Master Plan, 2031	Current demarcation of Sectors (as per final Master Plan, 2031)	Land usage as per final Master Plan, 2031
16	Residential	16	Residential
17	Residential	17	Residential
18	Residential	18	Residential

Addendum-‘B’



Addendum-‘C’

S . No	Vil lag e Na me	Notif icati on u/s 4(1)17/dat e	Notif icati on u/s 6/17 Date	Compensat ion Deposited u/s 17 (10%)		Compensat ion Deposited u/s 17(70%)	
				D at e	Amo unt	D at e	Amo unt
1 .	Du ng arp ur Re elk a	3080 -77- 3-10- 38 Arja n/10 Date 02-	495- 77-3- 11- 38 Arja n/10 Date 24.0	22 .1 0. 10	35,12 ,96,0 00.00	02 .0 2. 11	1,24, 74,98 ,120. 00

		12-2010	3.20 11				
2	Ru sta mp ur	605-77-3-2009-30 Arja n/09 Date 20.0 2.20 09	596-77-3-2010-30 Arja n/09 Date 26.0 2.20 10	10 .0 2. 09	57,70 ,62,7 20.00	01 .0 2. 10	2,04, 44,60 ,145. 00
3	Ac hej a Bu jur g	940-77-3-2010-02 YA/ 10 Date 19.0 4.20 10	2038-77-3-2010-02 YA/ 10 Date 28.0 7.20 10	07 .0 2. 10	34,82 ,14,7 20.00	13 .0 7. 10	1,33, 09,89 ,912. 00
4	Ra mp ur Ba gar	928-77-3-10-3/Y A Date 19.0 4.20 10	2016-77-3-10-3YA /10 Date 28.0 7.20 10	17 .0 2. 10	16,79 ,52,8 00.00	24 .0 6. 10	61,92 ,10,0 00.00
		601-77-3-2009/26 Arja n/09 Date 26.0 2.20 09	202-77-3-2009/26A rjan/ 09 Date 01.0 2.20 10	04 .0 2. 09	32,00 ,16,0 00.00	08 .0 1. 10	11,60 ,55,6 00.00
5	Us ma np ur	3483-77-3-2009-242 Arja n/09 Date 04.1 1.20 09	782-77-3-2009-242 Arja n/09 Date 18.0 3.20 10	16 .0 9. 09	25,82 ,24,0 00.00	24 .0 2. 10	92,90 ,96,5 00.00
6	Ra	2951	3402	13	44,96	06	1,61,

.	unj ia	-77-10-33Y A/10 Date 02.1 1.20 10	-77-10-33Y A/10 Date 07.0 1.20 11	.1 0. 10	,75,6 00.00	.1 2. 10	07,64 ,600. 00
7	Ka dar pur	3079-77-3-10-37Y A-10 Date 02.1 2.20 10	458/77-3-11-37Y A-10 Date 22.0 3.20 11	20 .1 0. 10	23,93 ,60,0 00.00	28 .0 1. 11	75,02 ,61,1 36.00
8	Pa ch kor a	607-77-3-2009/32/ Arja n/09 Date 26.0 2.20 09	425-77-3-2009/32/ Arja n/09 Date 19.0 2.20 10	10 .0 2. 09	8,15, 02,40 0.00	18 .0 1. 10	28,52 ,58,4 00.00
9	Par sol	604-77-3-2009-29 Arja n/09 Date 26-02-2009	423-77-3-2009/29A rjan/ 09 Date 19.0 2.20 10	04 .0 2. 09	39,39 ,77,6 00.00	25 .0 1. 10	1,49, 18,71 ,600. 00
		3484-77-03-2009/243 Arja n/09 Date 04.1 1.20 09	781-77-03-2010/243 Arja n/09 Date 26.0 3.20 10	16 .0 9. 09	6,99, 08,00 0.00	24 .0 2. 10	48,93 ,56,0 00.00
10	Bh att a	3485-77-03-2009/244	779-77-03-2010-244	16 .0 9. 09	22,35 ,45,6 00.00	24 .0 2. 10	79,85 ,34,6 00.00

		Arja n/09 Date 04.1 1.20 09	Arja n/09 Date 26.0 3.20 10				
1 1 .	Mi rja pur	608/ 77-3- 2009 -28 Arja n/09 Date 26.0 2.20 09	428/ 77-3- 2010 -28 Arja n/08 Date 19.0 2.20 10	04 .0 2. 09	2,81, 93,52 ,000. 00	18 .0 1. 10	1,21, 25,23 ,200. 00
		1338 -77- 03- 2010 - 01Y A/10 Date 13.0 5.20 10	2041 -77- 03- 2010 /01Y A/10 Date 28.0 7.20 10	04 .0 3. 10	9,32, 91,38 0.00	06 .0 7. 10	35,83 ,28,5 02.00
		2763 -77- 3- 2010 - 28Y A Date 15.1 0.20 10	3305 -77- 3- 2010 -28 Arja n 10 Date 27.1 2.20 10	25 .0 8. 10	18,14 ,67,7 92.00	25 .1 1. 10	65,47 ,90,3 68.00
1 2 .	Nil oni Sh ah pur	609/ 77-3- 2009 -34 Arja n09 Date 07.1 0.20 09	200/ 77-3- 2009 - 34Ar jan/0 8 Date 19.0 2.20 10	04 .0 2. 10	55,55 ,00,9 60.00	08 .0 1. 10	2,05, 74,93 ,360. 00
		3144 /77- 3- 3-	3797 /77- 3- 3-	14 .0 7.	15,15 ,06,3 20.00	10 .1 1.	61,37 ,52,8 01.00

		2009 - 234 Arja n 09 Date 07.1 0.20 09	2009 - 234 Arja n 09 Date 07.1 2.20 09	09		09	
		3155 /77- 3- 2010 42 Arja n09 Date 07.1 0.20 09	456/ 77-3- 2010 -42 Arja n09 Date 17.0 3.20 11	12 .1 1. 10	2,17, 94,08 0.00	22 .1 2. 10	7,93, 52,57 6.00
		2037 -77- 3- 2010 /08 Arja n/10 Date 28.0 7.20 10	2641 /77- 3- 2010 /08 Arja n/10 Date 15.1 0.20 10	10 .0 7. 10	4,08, 81,10 4.00	27 .0 8. 10	28,77 ,93,6 81.00
1 3 .	Ra bu pur a	602/ 77-3- 2009 - 27Ar jan/0 9 Date 26.0 2.20 09	203/ 77-3- 2009 - 27 Arja n/08 Date 19.0 2.20 10	13 .0 2. 09	37,71 ,63,2 00.00	08 .0 1. 10	83,70 ,83,0 74.00
1 4 .	Ac he yp ur	610/ 77-3- 2009 -35 Arja n/09 Date 26.0 2.20 09	427/ 77-3- 2010 - 35Ar jan/0 8 Date 19.0 2.20 10	04 .0 2. 09	13,10 ,59,2 00.00	22 .0 1. 10	49,07 ,32,2 00.

(2023) 8 ILRA 642
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2023

BEFORE

THE HON'BLE PRITINKER DIWAKER, C.J.

Matter under Article 227 No. 7955 of 2023

C/m Anjuman Intezamia Masajid Varanasi
...Petitioner
Versus
Smt. Rakhi Singh & Ors. ...Respondents

Counsel for the Petitioner:

Sri S F A Naqvi, Sr. Advocate, Sri Puneet Kumar Gupta, Sri Syed Ahmed Faizan, Sri Zaheer Asghar, Ms Fatma Anjum, Sri Munnaur Hussain, Sri Mumtaz Ahmad, Sri Akhlaq Ahmad, Sri Mehmood Alam, Sri Poorva Agarwal, Sri Vipul Dubey and Sri Devendra Mishra.

Counsel for the Respondents:

Sri Ajay Mishra, Advocate General, Sri Ashok Mehta, AAG, Sri M C Chaturvedi, AAG, Sri Kunal Ravi Singh, CSC, Sri Vijay Shanker Mishra, CSC, Sri Ishan Mehta, Addl. CSC, Sri Ankit Gaur, Standing Counsel, Sri Hare Ram Tripathi, Standing Counsel, Sri Manoj Kumar Mishra, Standing Counsel, Sri Ishan Dev Giri, for the State, Sri Shashi Prakash Singh, ASGI, Sri Manoj Kumar Singh and Sri Purnendu Kumar Singh for the Union of India, Sri Vishnu Shanker Jain, Sri Prabhask Pandey and Sri Saurabh Tiwari, for plaintiffs/opposite parties 1 to 5 and Sri Vineet Sankalp, for opposite party no.9.

Civil Law -Code of Civil Procedure, 1908 - Section 75(e), Order XXVI Rule 10 - A - Application for scientific investigation and survey of religious site by ASI - Plaintiffs seeking directions for GPR survey, excavation, and dating to determine whether present mosque structure stands over pre - existing Hindu temple - District Judge allowing application - Challenge to order dismissed - Held: No bar in law to appoint Commission even prior to trial for better adjudication - Order of trial court within jurisdiction - Scientific

investigation necessary to elucidate disputed facts - Affidavit of ASI clarifying no damage to structure would be caused - Supervisory jurisdiction under Article 227 not to be exercised in absence of perversity or jurisdictional error - Petition dismissed.

Held:

There is no legal bar to the appointment of a Commission for scientific investigation at a pre - trial stage. The trial court rightly exercised its jurisdiction under Section 75(e) read with Order XXVI Rule 10 - A CPC, considering the seriousness and complexity of the dispute regarding existence of a pre - existing structure beneath the Gyanvapi mosque. The ASI has assured through affidavit that no harm shall come to the existing structure and the investigation will be non - invasive. The petitioner's challenge lacks merit, and the High Court, in its supervisory jurisdiction under Article 227, cannot act as an appellate body to reappraise findings of fact or substitute its opinion unless there is a manifest error. Petition dismissed with directions for expeditious trial.

Case Law Discussed:

1. Mohd. Yunus Vs Mohd. Mustaqim, AIR 1984 SC 38
2. D.N. Banerji Vs P.R. Mukherjee, AIR 1953 SC 58
3. Nagendra Nath Bora Vs Commissioner of Hills Division, AIR 1958 SC 398
4. M. Siddiq (Ram Janmbhoomi Temple Case) Vs Mahant Suresh Das & ors., (2020) 1 SCC 1
5. Rama Avatar Soni Vs Mahanta Laxmidhar Das, 2018 Legal Eagle (SC) 933
6. Rajib Barooah Vs Purnimati Plantation (P) Ltd., 2018 (2) Gau LR 204
7. Shanta Devi Vs Pushpa Devi, 2022 Legal Eagle (Raj) 1594
8. Phoolchand Asra Vs Nagar Palika Nigam Raipur, WP (227) No.821/2019 (Chhattisgarh HC)

9. Smt. Suman Pandagre Vs Madhu Pandagre,
WP No.110376/2017 (MP HC)

(Delivered by Hon'ble Pritinker Diwaker, C.J.)

The present petition has been filed under Article 227 of the Constitution of India challenging the order dated 21.7.2023 passed by the District Judge, Varanasi in Original Suit No.18 of 2022 (693/2021) (Rakhi Singh & Others vs. State of Uttar Pradesh & Ors). It has been prayed that this Court may direct the court below not to proceed any further in pursuance of the impugned order dated 21.7.2023.

2. By the order impugned dated 21.7.2023, the Court below allowed the applications 327C and 330C of the plaintiffs and issued the following directions:

“(a) The Director of ASI is directed to undertake the scientific investigation/survey/excavation at the property in question i.e. at Settlement Plot No.9130 in the case excluding the areas sealed by the Hon'ble Supreme Court vide order dated 17.05.2022, 20.05.2022 as well as vide order dated 11.11.2022 in SLP(C) No.9388/2022 titled as Committee of Management Anjuman Intejamia Masajid Varanasi vs. Rakhi Singh & Ors.;

(b) The Director of ASI is also directed to conduct a detailed scientific investigation by using GPR Survey, Excavation, Dating method and other modern techniques of the present structure to find out as to whether same has been constructed over a pre-existing structure of Hindu temple;

(c) The Director of ASI is also directed to conduct scientific investigation in the light of the averment made in this application after associating the Plaintiffs,

Defendants and their respective counsels and submit report to this Hon'ble Court upto 04-08-2023 and also to photograph and video-graph the entire survey proceedings;

(d) The Director of ASI is also directed to investigate the age and nature of construction of the western wall of the building in question through scientific method(s);

(e) The Director of ASI is also directed to conduct Ground Penetrating Radar (GPR) survey just below the 3 domes of the building in question and conduct excavation, if required;

(f) The Director of ASI is also directed to conduct Ground Penetrating Radar (GPR) survey beneath the western wall of the building and conduct excavation, if required;

(g) The Director of ASI is also directed to conduct Ground Penetrating Radar (GPR) survey beneath the ground of all the cellars and conduct excavation, if required;

(h) The Director of ASI is also directed to prepare a list of all the artefacts which are found in the building specifying their contents and carry out scientific investigation and undertake dating exercise to find out the age and nature of such artefacts;

(i) The Director of ASI is also directed to conduct dating exercise of the pillars and plinth of the building to find out the age and the nature of construction;

(j) The Director of ASI is also directed to conduct GPR survey, excavation wherever required, dating exercise and other scientific methods for determining the age and nature of construction existing at the site in question;

(k) The Director of ASI is also directed to investigate the artefacts and other objects of historical and religious

importance existing in different parts of the building and also beneath the structure which may be found during such exercise;

The Director of ASI is also directed to ensure that there should be no damage to the structure standing on the disputed land and it remains intact and unharmed. Report will be submitted up to 04-08-2023. Put up on 04-08-2023 for further proceedings.”

3. In the aforesaid Suit, bearing O.S. No.18 of 2022 (Old Regular Civil Suit No.693 of 2021), filed by the plaintiffs, it has been prayed to protect their right to religion guaranteed under Article 25 of the Constitution of India. They also prayed for issuance of a mandatory as well as permanent injunction to the defendants to the effect that no interference be made in performance of Darshan, Pooja of Goddess Maa Shringar Gauri, Lord Ganesha, Lord Hanuman, Nandiji, visible and invisible Deities, Mandaps and Shrines, existing within old temple complex, situated at settlement Plot No.9130 in the area of Ward and Police Station Dashaswamedh, District Varanasi and the images of deities be not damaged, defaced, destroyed and no harm be caused to them.

It has been averred in the Suit that there existed a glorious lofty temple at Adivisheshwar Jyotirlinga near Dashaswamedh Ghat in the heart of the city of Varanasi. The Muslim invaders having hatred towards non-Muslims and idol worshippers started damaging/destroying and desecrating Hindu temples right from 1193-94 AD, when Mohd Gori made an attack on our mother land and demolished, plundered and looted the Shiva temple at Kashi (now Varanasi). Thereafter, a number of Muslim invaders attacked Kashi, repeated the barbarous act of Mohd. Gori. Hindus sustained such attacks and temple

was rebuilt/restored at the very same place. It has been further averred that it is a matter of history that in the year 1585, the then Governor of Jaunpur at the instance of his Guru Narayan Bhatt, reconstructed a magnificent temple of Lord Shiva at the very same place, where the temple originally existed i.e. at Settlement Plot No.9130 on large scale consisting of central sanctum (Garbh Griha) surrounded by eight Mandaps.

It has been averred in the Suit that Settlement Plot No.9130 along with five kosh land already stood vested in the deity Adivisheshwar lacs of years ago and that the deity is the de jure owner but despite this fact, Muslims, without creating any waqf or having ownership of land, forcibly, without any authority of law, raised a construction and termed the same as Gyanvapi mosque.

4. According to the plaintiffs, the structure of mosque (Gyanvapi) was a temple but sometimes in the era of 1193-94 AD, the temple was demolished by the Muslim Rulers. The plaintiffs have put forth their claims by pointing out several facts which according to them, make it clear that the structure (Gyanvapi) was nothing but a temple.

5. In the aforesaid Suit, filed by the plaintiffs on 16.8.2021, for declaration, permanent and mandatory injunction, an application (as application paper no.327C and 330C) was filed by the plaintiffs under Section 75 (e) and Order XXVI Rule 10A read with Section 151 of Code of Civil Procedure (in short ‘CPC’) for issuance of the following directions:

- to undertake the scientific investigation/survey/excavation at the

property in question i.e. at Settlement Plot No.9130 in the case excluding the areas sealed by the Hon'ble Supreme Court, vide order dated 17.5.2022, 20.5.2022 as well as vide order dated 11.11.2022 in SLP (C) No.9388/2022 titled as Committee of Management Anjuman Intezamia Masajid Varanasi vs. Rakhi Singh & Ors.;

- to conduct a detailed scientific investigation by using GPR Survey, Excavation, Dating method and other modern techniques of the present structure to find out as to whether same has been constructed over a pre-existing structure of Hindu temple;

- to conduct scientific investigation in the light of the averment made in this application after associating the Plaintiffs, Defendants and their respective counsels and submit report to this Hon'ble Court within the stipulated time as provided by the Hon'ble Court and also video-graph the entire survey proceedings;

- to investigate the age and nature of construction of the western wall of the building in question through scientific method (s);

- to conduct Ground Penetrating Radar (GPR) survey just below the 3 domes of the building in question and conduct excavation if required;

- to conduct Ground Penetrating Radar (GPR) survey beneath the western wall of the building and conduct excavation, if required;

- to conduct Ground Penetrating Radar (GPR) survey beneath the ground of all the cellars and conduct excavation, if required;

- to prepare a list of all the artefacts which are found in the building specifying their contents and carry out scientific investigation and undertake dating exercise to find out the age and nature of such artefacts;

- to conduct dating exercise of the pillars and plinth of the building to find out the age and the nature of construction;

- to conduct GPR survey, excavation wherever required, dating exercise and other scientific methods for determining the age and nature of construction existing at the site in question;

- to investigate the artefacts and other objects of historical and religious importance existing in different parts of the building and also beneath the structure which may be found during such exercise;

- Pass such other order as the Hon'ble Court may deem fit and proper in the interest of justice."

6. In the application, it was contended by the plaintiffs that pursuant to the order passed by the Court below, a Court Commissioner was appointed, who submitted his report on 18.5.2022 regarding proceedings conducted on 6.5.2022 and 7.5.2022 and from the report, it came to the knowledge of different persons that a (शिवलिंग) 'Shivlingam' was found within the property in question during the survey made on 16.5.2022 in the presence of the plaintiffs, defendant and learned counsel representing various parties.

7. Assailing the order passed by the Court below directing for appointment of an Advocate Commissioner, the Committee of Management Anjuman Intezamia Masajid preferred a writ petition, being Matter Under Article 227 No.2946 of 2022, which was dismissed by this Court, vide order dated 21.4.2022. The Committee of Management Anjuman Intezamia Masajid preferred a SLP No.9388 of 2022 before the Apex Court, challenging the order dated 21.4.2022 passed by the Allahabad High Court, upholding the order dated 8.4.2022 passed by the learned Civil Judge (Senior

Division), Varanasi. However, the Apex Court, vide order dated 20.5.2022 also passed an order transferring the Civil Suit No.693 of 2021 from the Court of Civil Judge (Senior Division), Varanasi to the Court of District Judge, Varanasi. The Apex Court also observed that:

“(i) application filed by the defendant under Order VII Rule 11 of CPC shall be decided on priority basis;

(ii) all interlocutory and ancillary proceedings in the Suit shall be addressed to and decided by the Court of District Judge;

(iii) since parties are appearing on notice, all orders in the suit shall be passed upon hearing the parties.”

8. Further, according to the plaintiffs, an ancient ‘*Shivlingam*’ was found/discovered by the Advocate Commissioner on 16.5.2022. The ‘*Shivlingam*’ found/discovered is an object of worship by Hindu devotees. It is believed that ‘*Shivlingam*’ is existing within the place in question from the time immemorial. The plaintiffs further submit that for proper adjudication of the case, scientific investigation is necessary based on which length, width, height, age, make up and constituents of the ‘*Shivlingam*’ can be ascertained.

9. Learned counsel for the applicant (defendant no.4) submits that once all the parties have been asked to maintain status quo of the property in question, no interference can be directed by the Archaeological Survey of India (hereinafter referred to as ‘the ASI’). Learned counsel submits that the issues are yet to be framed and list of witnesses has not been disclosed or exchanged, yet just to create evidence, application paper nos. 327C and 330C have

been filed. It has been submitted that since the plaintiffs are assured that they do not have any admissible evidence, therefore, false tactics are being applied. Learned counsel submits that the **Ayodhya Case, i.e. M. Siddiq (Dead) through Legal Representatives (Ram Janambhumi Temple Case) Vs Mahant Suresh Das & Others, reported in 2020 (1) SCC 1**, has taught a lesson, not to permit any such person or public agency to create evidence in such a manner. It has been argued that while deciding the applications, the Court below has not recorded any finding as to why such scientific investigation without harming the existing structures, is necessary? It has been also submitted that all the aforesaid works cannot be carried without damage to the structures. He submits that if during scientific investigation, any excavation is made, it would damage the structure in question. Learned counsel submits that scientific investigation can only be made when, after adducing evidence, the Court is unable to decide the dispute. He further submits that the Suit is barred by Places of Worship (Special Provisions) Act, 1991, as the disputed structure has been standing since prior to 1947. Learned counsel submits that earlier the plaintiffs have moved an application under Order XXIV Rule 9 CPC for appointment of Advocate Commissioner; the said application was allowed and the Advocate Commissioner was appointed, who submitted his report. The said report is still pending for disposal. It has been further argued that the ASI is not a party to the Suit and, therefore, no direction can be issued to the ASI to conduct scientific investigation of the property in question. Though the suit was filed in the year 2021, but the application has been filed only in 2023 and for two years, the plaintiffs remained silent.

10. In support of his submissions, learned counsel for the applicant (defendant no.4) has placed reliance upon the following judgments:

(i). **Rama Avatar Soni vs. Mahanta Laxmidhar Das & Ors.**, 2018 Legal Eagle (SC) 933, (Paras 4, 5, 8 & 9).

(ii). **Rajib Barooah vs. Purnimati Plantation (P) Ltd.**, 2018 (2) Guwahati Law Report, 204, (Paras 11 & 12);

(iii). **Shanta Devi vs. Pushpa Devi & Ors.** 2022 Legal Eagle (RAJ) 1594, (Para 9).

(iv). **Mohd. Aslam Alias Bhure vs. Union of India & Others**, (1994) 2 SCC 48;

(v). **Sri Kant vs. Mool Chand (Dead) & Others**, 2019 (2) CAR 758 (All.);

(vi). **Km. Chandana Mukherji Died through Smt. Sarla vs. Addl. District Judge, Special Judge, PC Act Lko & Another** (Matter Under Article 227 No.6654 of 2020);

(vii). **Naseeb Deen and Anr. v. Harnek Singh**, AIR 2019 HP 173.

11. Relying upon the judgement in the case of **Sri Kant** (supra), learned counsel for the defendant no.4 has submitted that local inspection or Commission by Court is made only in those cases where, on evidence led by parties, Court is not able to arrive at a just conclusion either way or where Court feels that there is some ambiguity in evidence which can be clarified by making local inspection or commission.

A reliance has also been placed in the case of **Naseeb Deen** (supra) to submit that the plaintiffs are trying to create evidence in their favour at this stage, which is not permissible in law and even appointment of Commissioner, before framing of issues, is erroneous.

Also, relying upon the judgments in the cases of **Km. Chandana Mukherji** (supra) and **Rajib Barooah** (supra), it has been submitted that the applications cannot be allowed merely for the purposes of facilitating the case of one or the other party and it is not the business of the courts to discharge the burden of evidence of either party. Onus is upon the plaintiffs to place whatever facts they wanted to prove their case by adducing oral and/or documentary evidence during trial and the same cannot be permitted by way of getting the Commission appointed.

Placing reliance in the case of **Rama Avatar Soni** (supra), it has been submitted that if scientific investigation of document in question facilitates ascertaining of truth, in the interest of justice, naturally it has to be ordered.

Further relying upon the judgement in the case of **Shanta Devi** (supra), it has been submitted that provisions of Order XXVI, Rule 10-A of CPC cannot be permitted to be used as a tool by the parties concerned to create evidence in their favour.

12. *Per contra*, learned counsel appearing for the plaintiffs argued that the scientific investigation, as prayed for by plaintiffs, is not going to cause any injury to any of the party, rather it would facilitate and crystallise each and every issue, so as to reach to a conclusion with the help of available evidence on record. Learned counsel further submits that the Archaeological Survey of India has mechanism and all facilities to find out the age, composition, nature and other relevant things relating to any monument, relic, artefact etc. Learned counsel for the plaintiffs has also argued that the ASI is authorized to fulfil the objects of the

provisions contained in the Ancient Monuments and Archaeological Sites and Remains Act, 1958. The ASI, under Section 22 of the said Act, has the power to excavate any area, other than the protected areas, if it has reason to believe that the area contains ruins or relics of historical and archaeological importance.

While placing reliance upon the *Ayodhya Case (supra)*, it has been argued that the law laid down by the Supreme Court is fully applicable. He referred to the following paragraphs of the said judgment:

“679. Archaeology as a science draws on multi-disciplinary or trans-disciplinary approaches. In considering the nature of archaeological evidence, it is important to remember that archaeology as a branch of knowledge draws sustenance from the science of learning, the wisdom of experience and the vision which underlies the process of interpretation. As a discipline, it nurtures a trained mind. It relies on a cross-fertilization with other disciplines such as history, sociology and anthropology. This is not a weakness but a strength. Archaeology combines both science and art. As a science, it is based on the principle of objective evaluation. As an art, it relies on a vision which is realised through years of commitment to the pursuit of knowledge based on the histories of eras. Archaeology as a discipline cannot be belittled as unreliable. The value of archaeology cannot be diluted in the manner which has been suggested by laying a claim to its being a weak form of evidence.

682. In his book titled —The Logic of Scientific Discovery, Karl Popper distinguishes the work of a scientist with that of a philosopher. Popper quotes Lord Acton when he states:

“there is nothing more necessary to the man of science than its history and the logic of discovery.... the way error is detected, the use of hypothesis, of imagination, the mode of testing.

683. The supposed distinction between science as embodying absolute truth and archaeology as unguided subjectivity is one of degree not of universes. Yet as in other disciplines of its genre, archaeology is as much a matter of process as it is of deduction. The archaeologist must deal with recoveries as much as the finds from them. Interpretation is its heart, if not its soul. Interpretations do vary and experts disagree. When the law perceives an exercise of interpretation it must recognize margins of error and differences of opinion. Archaeological findings are susceptible of multiple interpretations. This may in part be a function of the archaeologist’s perception of the past and what about the past the archaeologist seeks to decipher. Tradition based archaeology may seek facts about the past. An archaeologist, on the other hand may set about to validate a belief about the past. An archaeologist may approach the task with an open mind to unravel features that are unknown. Guided by the underlying approach to the discipline, the archaeologist will bring to bear on the task at hand the purpose underlying its own origin. So long as we understand the limits and boundaries of the discipline, we can eschew extreme positions and search for the often elusive median.”

13. In support of his submissions, learned counsel for the plaintiffs has also placed reliance upon the following judgements:

(i). **Sri Shadaksharappa vs. Kumari Vijayalaxmi**, W.P. No.201274/2022 (GM-CPC) (Karnataka High Court) (Paras 9-14);

(ii). **Phoolchand Asra v Nagar Palika Nigam, Raipur**, Writ Petition (227) No.821 of 2019 (Chhattisgarh High Court) (Para 10);

(iii). **Anurag Jaiswal v Collector, Khandwa & Ors.**, 2018 SCC Online (MP) 699 (Paras 7 and 12);

(iv). **Rajesh Kumar Gautam v Maha Mandleshwar Vedabayasanad Geeta Ashram**, 2003 SCC Online Utt. 9; (Para 6)

(v). **Narasimhaiah v Smt. Sakammanamma & Anr.**, 2000 SCC Online Kar. 564 (Paras 5 and 7)

(vi). **Smt Suman Pandagre v Madhu Pandagre**, W.P. No.110376 of 2017 (Madhya Pradesh) (Para 8).

(vii). **Filmistan Pvt. Ltd. Bombay vs. Bhagwandas Santprakash**, AIR 1971 SC 61.

14. Relying upon the judgement of **Phoolchand Asra** (supra), counsel for the plaintiffs submits that in paragraph 10 of the judgement, it has been clearly laid down that in any Suit in which the court deems a local investigation to be a requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the marked value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person, as it thinks fit, directing him to make such investigation and to report thereon to the Court.

Further, relying upon the judgment of **Smt. Suman Pandagre** (supra), which finds support of many cases mentioned therein, including that of **Maroli Achuthan** (supra), it has been submitted that it is open to the Court to pass an ex parte order for the issue of a Commission for investigation even before the defendant has entered appearance.

15. During the course of arguments, considering the peculiar facts and circumstances as well as seriousness of the issue involved in the present petition, the Court felt it necessary to seek expert's opinion in the matter from Government Agencies having expertise in such field. Therefore, a responsible Officer of ASI was called upon to assist the Court and, in turn, Sri Alok Tripathi, Additional Director General, ASI, New Delhi has appeared, to assist the Court and by means of an affidavit, he submitted that the ASI will conduct a detail survey in accordance with law and prepare a list of the antiquities which are found in building and carry out detail survey and undertake the exercise to find age and nature of the structure. He further submitted that the ASI will conduct survey, documentation, photography, detail description, GPR survey and full studies without harming the existing structures. He also submitted that all the aforesaid works would be carried without any damage to the structures. He has submitted that the scientific investigation would be carried out beyond the structure and in open areas only; no drilling, no cutting, no removal of brick or stones from the existing structure will be done while conducting the survey and study. It has been further submitted that archaeological sites will be in open place floor area which will not affect the structure at all, and no wall/structure would be damaged and the entire survey will be conducted by the non-destructive method by using techniques such as GPR survey, GPS survey, the other scientific methods and other modern techniques. It has also been submitted that in case any further investigation/excavation is required, permission of the Hon'ble Court would be sought.

16. I find no substance in the submission made by learned counsel for the

applicant/defendant no.4 that local inspection or Commission by the Court is made only in those cases, where on evidence led by parties, Court is not able to arrive at a just conclusion either way or where Court feels that there is some ambiguity in evidence, which can be clarified by making local inspection or Commission. It is settled position of law that the purpose of Order XXVI of the Code, is to secure evidence in dispute and the Commission's report and evidence taken by the Commission becomes admissible evidence. As such, there is no bar in law to appoint a Commission for the better adjudication of dispute. Hence, a Commission may be appointed even prior to the trial, if required. The Court itself can exercise the power to elucidate the disputed fact. A plain reading of the provision says that the power can be exercised at any stage and procedural law is to advance the cause of justice and not to strangle the litigant on hyper technical grounds. Thus, the judgement relied upon by learned counsel for applicant/defendant no.4 in the case of **Sri Kant** (supra) is of no help to him.

17. I find no substance in the arguments that it is not the business of courts to discharge burden of evidence of either party or the provisions of Order XXVI Rule 10-A cannot be permitted to be used as a tool by the parties concerned to create evidence in their favour. Where any question arising in a Suit involves any scientific investigation which cannot, in the opinion of the court, be conveniently conducted before the Court, the Court may, if it thinks it necessary or expedient in the interest of justice so to do, issue a commission to such person as it thinks fit, directing him to inquire into such question and report thereon to the Court. To such an investigation, sub-rule (2) of Rule 10-A

stipulates that the provisions of Rule 10 shall apply, as far as may be, as they apply in relation to a Commissioner appointed under Rule 9. It is settled proposition of law that the Court will not sit as a mute spectator and can always interfere in such matters to arrive at a particular conclusion. Thus, judgements relied upon in the cases of **Naseeb Deen** (supra), **Km. Chandana Mukherji** (supra), **Rama Avatar Soni** (supra) and **Shanta Devi** (supra) are of no help to the applicant/defendant no.4.

18. So far as the submission of the applicant/defendant no.4 that the Suit is barred by the Places of Worship (Special Provisions) Act, 1991, this question is not the subject matter, for the time being, because none of the parties has raised any grievance before the Court below while making their submission in support of their applications.

19. I find no substance in the argument of the applicant/defendant no.4 that if during scientific investigation, any excavation is made, that would damage the structure in question and scientific investigation can only be made when, after adducing evidence, the Court is unable to decide the dispute. During the course of hearing, an affidavit has been filed on behalf of the ASI mentioning therein that they will not carry out any excavation. The officer present in the Court on behalf of the ASI has also categorically stated as to what sort of invasive tests are to be done for making an attempt to get the reality of the matter just inside the wall of the property in question. This Court has repeatedly asked the officer present in the Court and learned counsel appearing for the ASI that as to what procedure would be adopted at the time of scientific investigation, and they have reiterated that no demolition of the

property will take place by any one, nor any existing structure would be altered.

20. I further find no substance in the argument of applicant/defendant no.4 that because the ASI has not been joined as a party to the Suit, it cannot be directed to do any technical investigation. Whenever, the report of the ASI would be utilized by the parties, they can submit their proposition/objection, if any.

21. I also find no substance in the argument of the applicant/defendant no.4 that without digging any wall, things cannot be finalized by the ASI. In this advance stage of time, many new things have been developed and now with the help of new technology and able guidance of responsible officers of ASI, the scientific investigation can be made. The officer present in the Court together with learned Additional Solicitor General of India has made submission in the form of an affidavit that no excavation whatsoever will take place.

22. Further, there is no substance in the argument made by the applicant/defendant no.4 that the applications filed by the plaintiffs, seeking scientific investigation of the structure in question are not tenable in the eyes of law just because the issues have not been framed as yet. The scientific investigation has nothing to do with the other evidence and whatever evidence would be collected, that may be for all the parties and not only for the plaintiffs.

23. Even otherwise the petition is under Article 227 of the Constitution of India and the scope of interference by the supervisory Court on the decisions of the fact finding forum is limited and also, it is

not the case of the applicant/defendant no.4 that the order impugned is perverse and beyond jurisdiction of the Court below. This Court, while exercising the power of the supervisory Court under Article 227 of the Constitution, cannot act as an appellate body and is not supposed to re-appreciate the facts. All, that has to be seen as to whether the Court below has proceeded within the legal provisions of law. In the present case, the Court below has not acted beyond jurisdiction and the order is inconsonance with the provisions of Section 75 (e) read with Order XXVI Rule 10A of CPC.

As per the law laid down by the Apex Court in **Mohd. Yunus v. Mohd. Mustaqim**, AIR 1984 SC 38, wherein it has been held that even the errors of law cannot be corrected in exercise of power of judicial review under Article 227 of the Constitution and the power can be used sparingly when it comes to the conclusion that the Authority/Tribunal has exceeded its jurisdiction or proceeded under erroneous presumption of jurisdiction.

The High Court cannot assume unlimited prerogative to correct all species of hardship or wrong decision. For interference, there must be a case of flagrant abuse of fundamental principle of law or where order of the Tribunal etc. has resulted in grave injustice. (Ref. Constitution Bench judgments of the Apex Court in **D N Banerji v. P R Mukherjee**, AIR 1953 SC 58 and **Nagendra Nath Bora v. Commissioner of Hills Division & Appeals**, AIR 1958 SC 398.)

For interference under Article 227 of the India, the finding of facts recorded by the Authority should be found to be perverse or patently erroneous and de hors the factual and legal position on record. (Ref. **Laxmikant Revchand Bhajwani v.**

Pratapsing Mohansing Pardeshi, (1995) 6 SCC 576; **Reliance Industries Ltd. v. Pravinbhai Jasbhai Patel**, (1997) 7 SCC 300; **Pepsi Food Ltd. v. Special Judicial Magistrate**, (1998) 5 SCC 749 and **Virendra Kashinath v. Vinayak N. Joshi**, AIR 1999 SC 162.

24. Once the Department of Archaeology and learned Senior Counsel representing the Department have made their stand clear that no damage is going to be caused to the property in question, this Court has no reason to doubt their statements and most importantly, the affidavit filed by the officer of the ASI explaining the circumstances. Further, it is settled proposition of law that issue of a Commission, at this stage, is permissible. In the opinion of the Court, the scientific survey/investigation proposed to be carried out by the Commission, is necessary in the interest of justice and shall benefit the plaintiffs and defendants alike and come in aid of the trial court to arrive at a just decision. The law laid down and discussed above, make it clear that the Court below was justified in passing the impugned order. The present petition lacks substance and is liable to be dismissed.

25. The petition is, accordingly, **dismissed**. Interim order, if any, stands vacated. The order dated 21.7.2023 passed by the District Judge, Varanasi is restored and the parties are to comply the said order, subject to the observations made by this Court hereinabove and the contents of the affidavit filed on behalf of the ASI before this Court.

26. However, dismissal of this writ petition does not affect the right of the parties to the Suit to remain present at the time of scientific investigation to be made by the ASI.

27. As the proceeding of Suit has been lingering on for long, it would be appropriate to observe that the Court concerned shall make all endeavour to conclude the proceedings expeditiously, without granting unnecessary adjournments to either of the parties by giving short dates, keeping in view of the provisions contained in Order XVII Rule 1 of CPC.

(2023) 8 ILRA 652
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.08.2023

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application u/s 482 No. 7251 of 2023

Alka Ray		...Applicant
	Versus	
State of U.P.		...Opp. Party

Counsel for the Applicant:
Pranjal Krishna

Counsel for the Opp. Party:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Section 227 - discharge application , Section 228 - framing of Charge , Indian Penal Code, 1860 - Sections 419, 420, 467, 468 , 471, 120-B, 177 and 506, the Criminal Law (Amendment) Act, 1932 - Section 7 , while considering an application for discharge of the accused under Section 227 of the Code, the Court has to form a definite opinion, upon consideration of the record of the case and the documents submitted therewith, that there is not sufficient ground for proceeding against the accused - Once the facts and ingredients of the Section exist, the court would presume that there is ground to proceed against the accused and frame the charge accordingly and the Court would not

doubt the case of the prosecution - limited scope of scrutiny at the time of discharge and framing of charges.(Para - 23,25)

Allegation in F.I.R. - registration of ambulance done on basis of forged documents - Applicant charged for entering into a criminal conspiracy - for commission of the offences alleged - Application for discharge rejected - framing charges against - copy of application not brought on record.(Para - 3,5)

HELD:-Upon consideration of the record of the case, there is sufficient ground for proceeding against the applicant. Truth of the matter will come out when evidence is led during the trial.(Para - 26)

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:-

1. St. of A.P. Vs Ramchandra Rabidas, (2019) 10 SCC 75
2. Sheila Sebastian Vs R. Jawaharaj, (2018) 7 SCC 581
3. Palwinder Singh Vs Balwinder Singh, (2008) 14 SCC 504,
4. Bhawna Bai Vs Ghanshyam, (2020) 2 SCC 217,
5. Rajbir Singh Vs St. of U.P., (2006) 4 SCC 51,
6. Ghulam Hassan Beigh Vs Mohd. Maqbool Magrey, (2022) 12 SCC 657,
7. Rajeev Kourav Vs Baisahab, (2020) 3 SCC 317,
8. St. of Maha. Vs Maroti, (2023) 4 SCC 298,
9. Bholu Ram Vs St. of Punj., (2008) 9 SCC 140,
10. St. of U.P. & anr. Vs Akhil Sharda & ors., 2022 SCC OnLine SC 820,
11. Monica Bedi Vs St. of A.P., (2011) 1 SCC 284

12. St. of U.P. Vs Ranjit Singh, (1999) 2 SCC 617

13. Amit Kapoor Vs Ramesh Chander, (2012) 9 SCC 460

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

1. Heard the arguments of Sri Pranjal Krishna, the learned counsel for the applicant, Sri Shiv Nath Tilhari, the learned AGA-I for the State and perused the records.

2. By means of instant application filed under Section 482 Cr.P.C, the applicant has assailed validity of the order dated 28.02.2023 passed by the learned Additional Chief Judicial Magistrate Court No. 19, Barabanki, whereby her application for discharge has been rejected. The applicant has also challenged the order dated 22.06.2023 passed by the aforesaid Court framing charges against her under Sections 419, 420, 467, 468 and 471 I.P.C.

3. On 02.04.2021, a First Information Report bearing Case Crime No. 0369 of 2021 was lodged by the Assistant Regional Transport Officer in Police Station Kotwali Barabanki Under Sections 419, 420, 467, 468 and 471 IPC alleging that an ambulance bearing registration number UP41 AT 7171 was registered with the Transport Department Barabanki on 21.12.2013, in the name of the applicant, showing her address to be 56, Rafi Nagar, Barabanki, claiming that the ambulance will be used for transporting the patients of Shyam Sanjeevani Hospital and Research Centre Private Limited, National Highway 24, GT Mau. The applicant had produced a photo copy of her voter identity card showing the aforesaid address, which turned out to be false and forged as it was

found that there was no house bearing No. 56 in Rafi Nagar. There is a house No. 56 in neighboring Abhay Nagar, wherein one Pradeep Mishra resides for the past several years. The F.I.R. alleges that the registration of the ambulance was done on the basis of forged documents.

4. After investigation, a charge-sheet dated 04.07./2021 has been submitted against seven accused persons, including the applicant, for commission of offences under Sections 419, 420, 467, 468, 471, 120-B, 177 and 506 I.P.C. and Section 7 of the Criminal Law (Amendment) Act, 1932. However, the applicant has challenged the order framing charges under Sections 419, 420, 467, 468, 471 I.P.C. only.

5. The applicant has approached this Court challenging the order rejecting her application for discharge, although a copy of the application has not been brought on record from which the contents of the application could be gathered.

6. In the order dated 28.02.2023, rejecting the discharge application, the learned Additional Chief Judicial Magistrate, Court No. 19, Barabanki has recorded that it has been stated in the discharge application that the FIR makes a mention of Section 55 (5) of the Motor Vehicle Act 1988 whereas the Regional Transport Officer has no authority to lodge a report in case of violation of the aforesaid provision and it contains a provision for cancellation of the registration after giving an opportunity of hearing to the registered owner of the vehicle.

7. The State has filed a counter affidavit stating that a news item was published in various newspapers, that a co-accused person Mukhtar Ansari had gone to

appear before a Court in Punjab in an ambulance registered in District Barabanki. Upon seeing this, the Inspector-in-charge of Police Station Kotwali Nagar, Barabanki, sent a letter dated 01.04.2021 to the Assistant Regional Transport Officer, Barabanki, enquiring about the details of registration of the ambulance. The Regional Transport Officer sent a letter to the Sub-divisional Magistrate Nawabganj, Barabanki, informing that the ambulance was registered in the name of the applicant and as proof of her address she had submitted a copy of her voter identity card. It was found that the voter identity card submitted by the applicant for registration of the Vehicle, was forged. The application for registration was accompanied by a letter issued on a printed letterhead of Shyam Sanjeevani Hospital and Research Centre Private Limited, National Highway 24 G.T., Mau, stating that the ambulance will be used for transport of patients without any fee.

8. A copy of the statement of the applicant recorded under Section 161 Cr.P.C. has been annexed with the counter affidavit, wherein she stated that she was running Shyam Sanjeevani Hospital along with co-accused Doctor Sheshnath Rai, in a premise taken on rent from its owner Pyarey Lal Sindhi. Pyarey Lal Sindhi had sold the house to Umesh Singh in the year 2009. Umesh Singh was said to be very close to Mukhtar Ansari and he started creating pressure for vacating the house. The applicant and co-accused Sheshnath Rai went to meet co-accused Mukhtar Ansari, who was lodged in District Jail Ghazipur and Mukhtar Ansari assured that nobody will ask her to vacate the house. She had gone to meet Mukhtar Ansari in jail again on 31.05.2013 along with some other persons and in a meeting held in the

jail, she was asked to arrange an Ambulance in the name of her hospital, which would be purchased from the Vidhayak Nidhi. The applicant stated that with the passage of time, she developed affinity with Mukhtar Ansari and she had tied a Rakhee on his wrist. Thereafter co-accused Mujahid, who was the representative of Mukhtar Ansari, and co-accused Raj Nath Yadav, who used to look after the office of Mukhtar Ansari, asked that an ambulance was to be taken in the name of her hospital for public service. Mukhtar Ansari himself had told it to her when she had got to meet him in jail. She also felt that the purchase of ambulance would be beneficial for her hospital. Therefore, she provided photocopies of the registration certificate of Shyam Sanjeevani Hospital and Research Centre Private Limited, income certificate, PAN card of herself and her hospital. She had also provided some blank printed letter-heads of the hospital by putting her signatures and seal on those and some blank cheques from the bank account of the hospital. After sometime, Mujahid and Raj Nath Yadav told her that the ambulance could not be purchased from Vidhayak Nidhi due to some technical problem and they said that the ambulance will be transferred in the applicant's name. Mujahid and Raj Nath Yadav had got her signatures on some more documents and thereafter the ambulance was purchased and it was retained by Mukhtar Ansari with him and the same was used by him. On 31.03.2021, the applicant came to know through TV news channels that Mukhtar Ansari had gone to attend hearing in a Court in Punjab by the ambulance registered in her name. On the same day, co-accused Anand Yadav came to her hospital and made her talk

to co-accused Shahid through his mobile phone and Shahid had told her what statement she would give to the authorities in this regard.

9. Statements of several other co-accused persons and some independent witnesses recorded by the investigating officer have also been annexed with the counter affidavit. On the basis of the material collected during investigation, Sections 120-B, 177 and 506 I.P.C. and Section 7 of the Criminal Law (Amendment) Act, 1932 were added in the charge-sheet.

10. On 02.09.2021, another charge-sheet was submitted against four more persons and on 05.03.2021 a third charge-sheet has been submitted against two more persons.

11. It has been stated in the counter affidavit that on the basis of the documentary, oral and electronic evidence has collected during investigation complicity of the applicant in commission of the offences has been established. The applicant was in contact with co-accused Mukhtar Ansari since the year 2009. She was well aware about the plan of purchase of ambulance. She purchased the ambulance and applied for its registration and submitted a forged voter identity card bearing her incorrect address. The applicant had purchased the vehicle claiming that it will be used for the benefit of patients but she provided it to co-accused Mukhtar Ansari for being used in his illegal activities. The vehicle remained in control of Mukhtar Ansari and it was never used for patients. When the matter relating to illegal use of the ambulance was published in the newspapers, the applicant met co-accused Anand Yadav, which fact is

evidenced by CCTV footage and she talked to co-accused Shahid through mobile phone. The material available on record reasonably connects the applicant with commission of the offences and it is established that the applicant was involved in a conspiracy with the other accused persons.

12. I have perused the material placed on the record available before the Court and considered the submissions made by the learned counsel for the parties.

13. The first submission of Sri. Pranjali Krishna, the learned Counsel for the applicant, is that the applicant is guilty of merely obtaining registration of the vehicle on the basis of a false document and consequences thereof are provided under Section 55 of the Motor Vehicle Act, 1988 as follows:

“55. Cancellation of registration.—
* * *

(5) *If a registering authority is satisfied that the registration of a motor vehicle has been obtained on the basis of documents which were, or by representation of facts which was, false in any material particular; or the engine number or the chassis number embossed thereon are different from such number entered in the certificate of registration, the registering authority shall after giving the owner an opportunity to make such representation as he may wish to make (by sending to the owner a notice by registered post acknowledgement due at his address entered in the certificate of registration), and for reasons to be recorded in writing cancel the registration.*”

14. The learned Counsel for the applicant has relied upon the decision in

State of Arunachal Pradesh v. Ramchandra Rabidas, (2019) 10 SCC 75, wherein the Hon’ble Supreme Court was testing the validity of a directions issued by the Guahati High Court in *Ramchandra Rabidas v. State of Tripura*, 2008 SCC OnLine Gau 99, that road traffic offences shall be dealt with only under the provisions of the Motor Vehicles Act, 1988 (“the MV Act”), and in holding that in cases of road traffic or motor vehicle offences, prosecution under the provisions of the Penal Code, 1860 (“IPC”) is without sanction of law, and recourse to the provisions of IPC would be unsustainable in law. The Hon’ble Supreme Court held that: -

“6. In our view there is no conflict between the provisions of IPC and the MV Act. Both the statutes operate in entirely different spheres. The offences provided under both the statutes are separate and distinct from each other. The penal consequences provided under both the statutes are also independent and distinct from each other. The ingredients of offences under both statutes, as discussed earlier, are different, and an offender can be tried and punished independently under both statutes. The principle that the special law should prevail over the general law, has no application in cases of prosecution of offenders in road accidents under IPC and the MV Act.”

15. Sri. Pranjali Krishna has submitted that the aforesaid enunciation of law by the Hon’ble Supreme Court is limited to cases relating to road accidents only and it would not justify initiation of prosecution for offences under the I.P.C. on charges of getting a vehicle registered on a wrong address.

16. Replying to the aforesaid submissions, Sri. Shiv Nath Tilhari, the learned A.G.A.-I has submitted that where

the acts committed by the accused person make out commission of an offence, lodging of an FIR cannot be said to be barred merely for the reason that some action, other than prosecution, is also provided in any other statute and the accused person has to be prosecuted for commission of the offence.

17. Section 55 of the Motor Vehicles Act does not provide for any punishment, it merely provides for cancellation of registration after giving an opportunity of hearing to the person concerned. In case the act of getting a vehicle registered on an incorrect address on the basis of forged documents, makes out commission of any offence(s) under the I.P.C. or any other penal law, the provisions of Section 55 of the Motor Vehicles Act would not create a bar against prosecution of the accused person for the offence under other statutory provisions.

18. The Hon'ble Supreme Court has categorically held in **Ramchandra Rabidas** (Supra) that the offences provided under I.P.C. and the Motor Vehicles Act are separate and distinct from each other and the penal consequences provided under both the statutes are also independent and distinct from each other. The ingredients of offences under both statutes are different, and an offender can be tried and punished independently under both statutes. The aforesaid principle of law is in no way limited in its application to the cases arising out of road accidents only. Therefore, I am unable to accept the first submission of the learned Counsel for the applicant.

19. The second submission of the learned Counsel for the applicant is that the applicant has been charged for commission of the offence of forgery without there

being any allegation that the applicant had herself forged the voter identity card which was used for getting the vehicle registered. In support of this contention, he has relied upon the judgment in the case of **Sheila Sebastian v. R. Jawaharaj**, (2018) 7 SCC 581, wherein the Hon'ble Supreme Court held that "*a charge of forgery cannot be imposed on a person who is not the maker of the same...For constituting an offence under Section 464 it is imperative that a false document is made and the accused person is the maker of the same, otherwise the accused person is not liable for the offence of forgery.*"

20. In rebuttal, Sri Shiv Nath Tilhari, the learned A.G.A.-I has submitted that the applicant has not been charged for commission of the offence of forgery only, she has been charged for entering into the conspiracy for commission of various offences, including forgery. He has submitted that when a person is charged for being a part of a criminal conspiracy, it is not necessary that the person must be involved in commission of all the offences committed in furtherance of the criminal conspiracy.

21. In this case, the applicant has not been charged for committing the offence of forgery, rather she has been charged for commission of offences under Sections 419, 420, 467, 468, 471, 120-B, 177 and 506 I.P.C. and Section 7 of the Criminal Law (Amendment) Act, 1932, which include the charge for entering into a criminal conspiracy for commission of the offences alleged. However, the applicant has preferred not to challenge the order framing charges under Section 120-B, 177 and 506 I.P.C. and Section 7 of the Criminal Law (Amendment) Act, 1932 presumably for the reason that she accepts

to be tried for those charges. When the applicant is being tried for committing the offence of criminal conspiracy for commission of offences under Sections 419, 420, 467, 468, 471, it is not necessary that the applicant is charged for committing those offences herself.

22. Therefore, I find no force in the aforesaid submission of the learned Counsel for the applicant.

23. Sri. Tilhari has placed before the Court the decisions in the cases of **Palwinder Singh v. Balwinder Singh**, (2008) 14 SCC 504, **Bhawna Bai v. Ghanshyam**, (2020) 2 SCC 217, **Rajbir Singh v. State of U.P.**, (2006) 4 SCC 51, **Ghulam Hassan Beigh v. Mohd. Maqbool Magrey**, (2022) 12 SCC 657, **Rajeev Kourav v. Baisahab**, (2020) 3 SCC 317, **State of Maharashtra v. Maroti**, (2023) 4 SCC 298, **Bholu Ram v. State of Punjab**, (2008) 9 SCC 140, **State of Uttar Pradesh and another versus Akhil Sharda and others**, 2022 SCC OnLine SC 820, **Monica Bedi versus State of Andhra Pradesh**, (2011) 1 SCC 284 and **State of U.P. versus Ranjit Singh**, (1999) 2 SCC 617, to emphasis upon the limited scope of scrutiny at the time of discharge and framing of charges.

24. The difference between the approach with which the Court should examine the matter in while considering an application for discharge under Section 227 Cr.P.C. and while framing charge under Section 228 of the Code has been explained by the Hon'ble Supreme Court in **Amit Kapoor versus Ramesh Chander**, (2012) 9 SCC 460, in the following words:—

“17. Framing of a charge is an exercise of jurisdiction by the trial court in

terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the “record of the case” and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is the expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.

* * *

30. We have already noticed that the legislature in its wisdom has used the expression “there is ground for presuming that the accused has committed an offence”. This has an inbuilt element of presumption once the ingredients of an offence with reference to the allegations made are satisfied, the Court would not doubt the case of the prosecution unduly and extend its jurisdiction to quash the charge in haste. A Bench of this Court in **State of Maharashtra v. Som Nath**

Thapa(1996) 4 SCC 659referred to the meaning of the word “presume” while relying uponBlack’s Law Dictionary.It was defined to mean “to believe or accept upon probable evidence”; “to take as proved until evidence to the contrary is forthcoming”. In other words, the truth of the matter has to come out when the prosecution evidence is led, the witnesses are cross-examined by the defence, the incriminating material and evidence is put to the accused in terms of Section 313 of the Code and then the accused is provided an opportunity to lead defence, if any. It is only upon completion of such steps that the trial concludes with the court forming its final opinion and delivering its judgment. Merely because there was a civil transaction between the parties would not by itself alter the status of the allegations constituting the criminal offence.

25. Thus the law regarding the approach to be adopted by the court while considering an application for discharge of the accused persons under Section 227 and approach while framing charges under Section 228 of the Code, is that while considering an application for discharge of the accused under Section 227 of the Code, the Court has to form a definite opinion, upon consideration of the record of the case and the documents submitted therewith, that there is not sufficient ground for proceeding against the accused. However, while framing charges, the Court is not required to form a definite opinion that the accused is guilty of committing an offence. The truth of the matter will come out when evidence is led during the trial. Once the facts and ingredients of the Section exist, the court would presume that there is ground to proceed against the accused and frame the charge accordingly and the Court would not doubt the case of the prosecution.

26. Having considered the facts of the case in light of the law laid down by the Hon’ble Supreme Court in **Amit Kapoor** (Supra) I am of the considered view that upon consideration of the record of the case, there is sufficient ground for proceeding against the applicant. The truth of the matter will come out when evidence is led during the trial.

27. The application under Section 482 Cr.P.C. lacks merits and the same is hereby **dismissed**.

(2023) 8 ILRA 659
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.07.2023

BEFORE

THE HON’BLE SURENDRA SINGH-I, J.

Application u/s 482 No. 18731 of 2023

Chandrajit Singh @ Chehku & Ors.

...Applicants

Versus

State of U.P. & Anr.

...Opp. Parties

Counsel for the Applicants:

Sri Purushottam Dixit, Sri Jitendra Kumar, Sri Keshav Hari Dixit

Counsel for the Opp. Parties:

G.A., Sri Sushil Kumar Dubey

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power , Section 311 - Power to Summon material witness, or examine person present , Indian Penal Code, 1860 - Section 147, 148, 149, 302, 395, 396, 504, Indian Evidence Act, 1872 - Section 145 - Cross-examination as to previous statements in writing - a witness cannot be tendered for cross-examination alone - If he was not examined in chief, he cannot be subjected to cross-examination.(Para-14)

Case involves charges against accused under s 302 and 395 I.P.C. - later converted and framed under s 396 I.P.C. - trial court summoned P.W.1 and P.W.3 for cross-examination - informant filed Criminal Revision - vacated - defense submitted application for summoning P.W.2, P.W.4 and Investigating Officer of C.B.C.I.D. - delay due to informant's filing of Criminal Revision - later passed by coordinate bench - staying further trial - to contradict witnesses u/s 145 evidence Act - re-examination of P.W.2, P.W.4 and Investigating Officer of C.B.C.I.D. essential - court's failure to summon witnesses - caused great injustice to accused. (Para - 3,4,13)

HELD:-Charges framed under u/s 302 and 395 I.P.C. and modified under u/s 396 I.P.C. relate to murder, so summoning P.W.2, who conducted postmortem, is unnecessary. Applicants have not provided reasons for cross-examination after the charge modification, so summoning not necessary. No ground to summon P.W.2 and Investigating Officer of C.B.C.I.D.. Applicants/defence shall be granted opportunity to examine P.W.4 on payment of Rs.4,000/- as costs. Prayer for summoning of P.W.2 and Investigating Officer of C.B.C.I.D. rejected. **(Para-13,15,18)**

Application u/s 482 Cr.P.C. partly allowed. (E-7)

List of Cases cited:-

1. Manju Devi Vs St. of Raj. & ors., AIR 2019 SC 1976
2. Natasha Singh Vs C.B.I. (St.), 2013 Lawsuit (SC) 404
3. Swapan Kumar Chatterjee Vs C.B.I., (2019) 0 Supreme (SCC) 319
4. Rajaram Prasad Yadav Vs St. of Bihar & anr., (2013) 0 Supreme (SC) 589
5. Bhim Singh Vs St. of U.P., 2022 (3) ADJ 87
6. Raghunandan Vs St. of U.P., (1974) 4 SCC 186
7. Kamal Oil & Allied Industries (P) Ltd. Vs Delhi Administration, 1982 Cr.L.J. 2046

8. Asian Resurfacing of Road Agency Pvt. Ltd. & anr. Vs C.B.I. , (2018) 16 SCC 299

9. Sukhwant Singh Vs St. of Punj. , (1995) 3 SCC 367

(Delivered by Hon'ble Surendra Singh-I, J.)

Heard Sri Purushottam Dixit, learned counsel for the applicants, Sri Sushil Kumar Dubey, learned counsel for the opposite party no. 2, Sri Prashant Saxena, learned A.G.A. for the State and perused the record.

2. The present 482 Cr.P.C. application has been filed to set-aside the order dated 06.05.2023 (State Vs. Chandrajit @ Chahku and others) and all proceedings arising out of Case Crime No. 94 of 1994 u/s 147, 148, 149, 302, 395, 396, 504 I.P.C., Police Station- Basrehar, District- Etawah as a Special Case No. 265 of 2008, pending in the court of learned Special Judge (Dacoity Affected Areas Act)/Additional Sessions Judge, Court No. 5, Etawah and witnesses V.P. Singh (Retired) S.I., R/o Phoolbagh Colony, Police Station- Nauchandi, Shahar and District- Meerut (Investigating Officer), Ghanshyam Ahirwar, Inspector (Investigating Officer C.B.C.I.D.) and Dr. S.K. Agarwal, Medical Officer, Witness (Postmortem), may be recalled for their cross-examination.

3. It has been submitted by the learned counsel for the applicant that vide impugned order dated 06.05.2023, the trial court rejected the application 354 Ka dated 26.04.2023 u/s 311 Cr.P.C. filed by the applicants/accused. The applicants/accused have filed their application u/s 311 Cr.P.C. with the averment that in the beginning, charge was framed against the accused u/s 302 & 395 I.P.C. and prosecution witnesses

were examined after framing of the charge in aforesaid sections. The second charge was framed on 13.10.2010 u/s 396 I.P.C. After framing of the altered charge u/s 396 I.P.C., on 14.02.2023, P.W.1 Rajesh and P.W.3 Vijay Kumar were cross-examined.

4. It has been next submitted by the learned counsel for the applicant that after alteration of charge, the informant had filed Criminal Revision No. 4882 of 2010, Rajesh Kumar Singh Vs. State of U.P. & Others. Vide order dated 18.11.2010, the trial of the said criminal case was stayed by the Hon'ble High Court. The stay order was vacated in the year 2023. Thereafter, P.W.1 Rajesh Kumar and P.W.2 Vijay Kumar were examined. Thus, there was no act on the part of the accused in delaying the trial of the case. Thus, the defence did not contribute for the delay caused in the trial of the case. It has also been submitted that to contradict these witnesses u/s 145 of the Indian Evidence Act, the re-examination of P.W.2 Dr. S.K. Agarwal, P.W.4 S.I. V.P. Singh and Investigating Officer of C.B.C.I.D., Ghanshyam Ahirwar is essential. By not summoning the aforesaid witnesses, the trial court has caused great injustice to the accused and thus, the impugned order may be quashed and trial court be directed to summon the aforesaid witnesses.

5. Per contra, learned counsel for the opposite party no. 2 and learned A.G.A. for the State have opposed this application u/s 482 Cr.P.C. on the ground that the applicants/accused have delayed the trial of the case by submitting various applications. It has been next submitted that on the application of the defence, the charge framed u/s 302 & 395 I.P.C. was converted to Section 396 I.P.C. on 13.10.2010. Thereafter, on the application of defence,

vide order dated 20.10.2010, the court summoned P.W.1 Rajesh Kumar and P.W.3 Vijay Kumar for cross-examination. It has also been submitted that Ghanshyam Ahirwar, Investigating Officer of C.B.C.I.D. was not earlier summoned during trial. The defence has earlier filed application for summoning P.W.1 Rajesh Kumar and P.W.3 Vijay Kumar for re-examination which was rejected by the trial court vide order dated 18.02.2008 and the case was fixed for argument. It has further been submitted that P.W.2 Dr. S.K. Agarwal, who has prepared the postmortem report, was thoroughly examined by the defence on all points. Therefore, there was no justification in the prayer of defence for summoning the witnesses for cross-examination.

6. In support of his arguments, learned counsel for the applicants has relied on the following rulings :-

- (i) **Manju Devi Vs. State of Rajasthan and others, AIR 2019 SC 1976**
- ii) **Natasha Singh Vs. C.B.I. (State), 2013 Lawsuit (SC) 404**

7. Learned counsel for the informant has also relied on the following rulings :-

- (i) **Swapan Kumar Chatterjee Vs. Central Bureau of Investigation, (2019) 0 Supreme (SCC) 319**
- (ii) **Rajaram Prasad Yadav Vs. State of Bihar and Another, (2013) 0 Supreme (SC) 589**
- (iii) **Bhim Singh Vs. State of U.P., 2022 (3) ADJ 87**

8. In the case of **Raghunandan Vs. State of U.P., (1974) 4 SCC 186**, the Apex Court has held as follows :

“In a criminal case, the fate of the proceeding cannot always be left entirely in the hands of the parties. The court has also a duty to see that essential questions are not so far reasonably possible, left unanswered. The provisions of Section 311 are intended to serve this purpose.”

9. Section 311 Cr.P.C. reads as follows :-

311. Power to summon material witness, or examine person present – Any Court may, at any stage of any inquiry, trial or other proceeding, under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

10. This section is intended to be wide as the repeated use of the word “any” throughout its length clearly indicates. The section is in two parts, the first part gives a discretionary power but the second part is mandatory. The use of the word “may” in the first part and of the word “shall” in the second part firmly establishes this difference. The first part is permissive. The court may act in one of the three ways :

- (a) summon any person as a witness,
- (b) examine any person present in the court although not summoned, and
- (c) recall or re-examine a witness already examined.

The second part i.e. if the evidence of such person appears to be essential to the just decision of the case, it is obligatory and compels the court to act in these 3 ways or

any of them. There is no limitation on the power of the court arising from the stage to which the trial may have reached, provided the court is bonafide of the opinion that for the just decision of the case, the steps must be taken. The witnesses u/s 311 Cr.P.C. can be recalled for the benefit of accused and prosecution both. The only thing is that the court has to form a bonafide opinion as to the necessity of an order u/s 311 Cr.P.C.

11. In the case of **Kamal Oil and Allied Industries (P) Ltd. Vs. Delhi Administration, 1982 Cr.L.J. 2046**, the Delhi High Court has held as follows:

“The paramount consideration is doing justice to the case and not filling up the gaps in prosecution or defence evidence.”

12. Considering the facts and circumstances of the case, it transpires that earlier charges against the accused were framed u/s 302 and 395 I.P.C. and P.W.1 Rajesh Kumar, P.W.2 Dr. S.K. Agarwal, P.W.3 Vijay Kumar and P.W.4 S.I. V.P. Singh were examined. Thereafter, vide order dated 13.10.2010, the trial court converted the charge against the accused and framed charge u/s 396 I.P.C. against them. The court vide order dated 13.10.2010 summoned P.W.1 and P.W.3 for cross-examination. Against the order of modification of charge u/s 396 I.P.C., the informant filed Criminal Revision No. 4882 of 2010, **Rajesh Kumar Singh Vs. State of U.P. & Others** and the High Court vide order dated 18.11.2010 stayed the trial of the sessions case. The aforesaid stay order was vacated in 2023 in compliance of the law propounded by Hon’ble Supreme Court in **Asian Resurfacing of Road Agency Private Limited and Another v. Central Bureau of Investigation, (2018)**

16 SCC 299. Thereafter, P.W.1 Rajesh Kumar and P.W.3 Vijay Kumar were cross-examined. The defence submitted application 354 Ka u/s 311 Cr.P.C. for summoning P.W.2 Dr. S.K. Agarwal, P.W.4 S.I. V.P. Singh and Investigating Officer of C.B.C.I.D., Ghanshyam Ahirwar who was not earlier examined as his role in the investigation of the case was inconsequential. From the aforesaid discussion, it is clear that the delay in trial of the session trial case occurred due to informant's filing of Criminal Revision No. 4882 of 2010, Rajesh Kumar Singh Vs. State of U.P. & Others and vide order dated 18.11.2010 passed by coordinate Bench of this Court staying the further trial of the related sessions trial case.

13. From the perusal of the cross-examination of P.W.1 Rajesh Kumar and P.W.3 Vijay Kumar which was done after modification of the charge, it transpires that the defence has cross-examined the aforesaid witnesses on the modified charge. Thus, to rebut the evidence of these witnesses u/s 145 of the Indian Evidence Act, defence should be granted opportunity to cross-examine P.W.4 S.I. V.P. Singh regarding statements of P.W.1 Rajesh Kumar and P.W.3 Vijay Kumar u/s 161 Cr.P.C. Since the earlier framed charge u/s 302 and 395 I.P.C. and the modified charge u/s 396 I.P.C. both of them relates to murder of a person, therefore, there is no need to summon P.W.2 Dr. S.K. Agarwal, who had conducted the postmortem of the deceased Ashok Kumar Singh and Layak Singh. Apart from this, the applicants have not given reasons why the cross-examination of P.W.2 Dr. S.K. Agarwal is necessary after modification of the charge. Therefore, summoning P.W.2 Dr. S.K. Agarwal u/s 311 Cr.P.C is not necessary and prayer of the applicant in this regard cannot be accepted.

14. As far as cross-examination of Investigating Officer of C.B.C.I.D., Ghanshyam Ahirwar, is concerned, he was not even examined earlier after framing of charge u/s 302 and 395 I.P.C. In the case of **Sukhwant Singh Vs. State of Punjab, (1995) 3 SCC 367**, the Apex Court has held that :

“a witness cannot be tendered for cross-examination alone. If he was not examined in chief, he cannot be subjected to cross-examination.”

15. Thus, there is no ground to summon P.W.2 Dr. S.K. Agarwal and Investigating Officer of C.B.C.I.D., Ghanshyam Ahirwar. Admittedly, Investigating Officer P.W.4 S.I. V.P. Singh was retired when he appeared earlier in 2006 in court for examination. Earlier, after modification of the charge, defence had filed application for summoning of P.W.1 Rajesh Kumar and P.W.3 Vijay Kumar only. They had not prayed for summoning of P.W.2 Dr. S.K. Agarwal and Investigating Officer of C.B.C.I.D., Ghanshyam Ahirwar for cross-examination. Therefore, the court vide order dated 20.10.2010 had only summoned P.W.1 Rajesh Kumar and P.W.3 Vijay Kumar for cross-examination.

16. Under the facts and circumstances of the case, the applicants/defence shall be granted opportunity to examine P.W.4 S.I. V.P. Singh on payment of Rs.4,000/- as costs which shall be paid to the witness on his arrival. The aforesaid witness shall be examined on the same date and defence shall not be granted any adjournment for cross-examination of P.W.4 S.I. V.P. Singh.

17. Under unavoidable circumstances and not due to the default of the defence, if

applicant were based on circumstantial evidence, and there was no direct evidence linking him to the crime – held, there is no justification to proceed with the present anticipatory bail application as it is legally not maintainable - hence – applicant is directed to file a regular bail application as per the guidelines laid down by the Supreme Court in similar cases – accordingly, application is rejected. (Para – 20, 21)

Application Rejected. (E-11)

(2023) 8 ILRA 664
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.07.2023

THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

1. Satender Kumar Antil Vs C.B.I. & ors. -
(2022) 10 SCC 51,

2. Siddharth Vs St. of U.P. & anr - (2022) 1 SCC 676,

3. Aman Preet Singh Vs C.B.I. through Director -
2021 SCC OnLine SC 941,

4. Arnesh Kumar Vs St. of Bihar - (2014) 8 SCC 273.

5. Motion Vs C.B.I.- (2004) 72 DRJ 629,

6. **Gaya Prasad Ramlal Vs St. of Mah. - AIR 1971 SC 1112.**

Suraj Harijan ...Applicant
Versus
State of U.P. & Anr. ...Respondents

(Delivered by Hon'ble Nalin Kuamr
Srivastava, J)

Counsel for the Applicant:
Sri Deepak Kumar Tripathi

Counsel for the Respondents:
G.A.

Criminal Law - Criminal Procedure Code, 1973 – Section 438 - Indian Penal Code, 1860 - Section 461 – Indian Telegraph Act, 1933 - Section 25 - Application for Anticipatory Bail – offence of theft - FIR – applicant’s name was not named in the FIR - no incriminating evidence was directly recovered from him - The court noted that the applicant had previously been given liberty to file a regular bail application but had not done so – court finds that, the allegations against the

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

2. Apprehending his arrest the present application has been moved on behalf of the applicant - **Suraj Harijan** seeking anticipatory bail in Case Crime No. 124 of 2021, under Section 461 IPC and Section 25 Indian Telegraph Act, Police Station-Harpur Budahat, District- Gorakhpur.

3. The prosecution story as unfolded in the FIR is that on 24.11.2021 at 7.10 AM

Technician Shreyansh Yadav working in a Door Sanchar Vodafone Mobile Tower IN1231083 informed the informant that 4 batteries have been stolen from the battery bank by breaking the lock of the main gate by some unknown person. FIR was lodged on 24.11.2021 at 16.16 hours and investigation started.

4. It has been submitted by the learned counsel for the applicant that the applicant is innocent and he has apprehension of arrest in the above-mentioned case, whereas there is no credible evidence against him. Allegations levelled against the applicant are false. Investigation is going on in the matter. It is further submitted that the applicant is not named in the FIR and no incriminating article has been recovered from any place under control or from possession of the present applicant. In case applicant is granted anticipatory bail, he shall not misuse the liberty of bail and would obey all conditions of bail.

5. Learned A.G.A. opposed the prayer for anticipatory bail.

6. At the very outset it appears from perusal of the record that earlier in Cr. Misc. Anticipatory Bail Application No. 8413 of 2022 the applicant Suraj Harijan and co-accused Vikas Gupta had been given liberty by this Court to file regular bail application before the court concerned and with the observation that since the offence alleged against the applicant was punishable with the imprisonment for a maximum period of seven years and they had no apprehension of arrest, the anticipatory bail application was disposed of in the aforesaid terms vide order dated 6.9.2022. However, no regular bail application in the light of the law laid down

by Hon'ble Apex Court in the case of **Satender Kumar Antil v. CBI and Others (2022) 10 SCC 51, Siddharth v. State of U.P. & Anr. (2022) 1 SCC 676 and Aman Preet Singh v. C.B.I. through Director 2021 SCC OnLine SC 941** was moved before the trial Court as directed by this Court and anticipatory bail application was moved by the present applicant before the Sessions Court subsequently, which was not permissible under law to the applicant but however the factum of anticipatory bail application moved before and disposed of by this Court was brought to the knowledge of the Court of Additional Session Court, Court No. 2, Gorakhpur which entertained and disposed of the said application.

7. There is a statutory provision that if the anticipatory bail application has been entertained by the High Court itself then after its disposal in any way the same applicant has no legal right to move anticipatory bail application before the Sessions Court in the same matter. Section 438 (7) Cr.P.C as amended in the state of Uttar Pradesh lays down the legislative scheme and expressly provides that *"(7) If an application under this section has been made by any person to the High Court, no application by the same person shall be entertained by the Court of Session."*

8. Now in order to circumvent the express provisions of law this Court has been approached to entertain and consider the anticipatory bail application of the applicant after rejection of the same by the Sessions Court and by this Court, as well.

9. The order dated 6.9.2022 passed by this Court in Cr. Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 8413 of 2022 commands a specific direction to the applicant in that matter to move regular bail

application before the Court concerned within 15 days from the date of the order, which was to be heard and disposed of expeditiously by the Court below in view of the law laid down in the case of **Satender Kumar Antil v. CBI and Others (2022) 10 SCC 511, Siddharth v. State of U.P. & Anr. (2022) 1 SCC 676 and Aman Preet Singh v. C.B.I. through Director 2021 SCC OnLine SC 941**. Since the said order was not complied with by the applicant he was not entitled to file second anticipatory bail before the High Court as the sanctity of the order of this Court could, in no circumstance, be permitted to have faded into oblivion.

10. In a similar matter **Mohd. Sharif Siddiqui v. The State of Uttar Pradesh and Anr. SLP No. 11316 of 2022 (07.12.2022 - SC Order) : MANU/SCOR/125299/2022** the Hon'ble Apex Court passed the following order on 07.12.2022, which is referred herein below:

"Considering the fact that the earlier anticipatory bail application was preferred and the same came to be withdrawn with liberty to surrender before the trial Court and apply for regular bail, thereafter second anticipatory bail application shall not be maintainable, more particularly, in the absence of any changed circumstances.

The High Court has rightly rejected the second anticipatory bail application. The Special Leave Petition stands dismissed. Pending applications stand disposed of."

11. The legal position as to the filing of the second and successive anticipatory bail application is settled in a plethora of judgements that the same can be filed only where there are change in circumstances to enable the petitioner to establish his

entitlement for anticipatory bail in view of the change in circumstances.

12. In **G.R. Ananda Babu v. State of T.N. and Another, 2021 SCC OnLine SC 176** the Honble Apex Court promulgated the dictum of law on the point and held thus-

"7. As a matter of fact, successive anticipatory bail applications ought not to be entertained. The specious reason of change in circumstances cannot be invoked for successive anticipatory bail applications, once it is rejected by a speaking order and that too by the same Judge."

13. Recourse may also be taken from a categorical finding given by the Hon'ble Apex Court on the issue in **Md. Shamim Khan v. The State of Jharkhand SLP (Crl) No. 9449 of 2021 (16.12.2021 - SC Order) : MANU/SCOR/53999/2021** which was made like this : *"Even before us, the learned counsel for the petitioner is unable to show any change of circumstances to invoke the jurisdiction of filing second application under Section 438 of the Code before the High Court.*

We deprecate such practice of filing second bail application under Section 438 of the Code after the first being rejected."

14. In the similar matter the Kerala High Court in **Bipin Sunny v. State of Kerala, 2023 SCC OnLine Ker 5570** held like this-

"13. Coming to the question regarding filing of anticipatory application before the Sessions Court, after dismissal of anticipatory bail plea by the High Court,

that too, after suppressing the adverse order from the High Court, cannot be justified for any reason. Therefore, in order to keep judicial discipline in tact, in cases where the High Court rejected anticipatory bail plea, second or successive anticipatory bail applications, pointing out change in circumstances, have to be filed before the High Court and not before the Sessions Court."

15. In **Suresh Chand v. State of Rajasthan 2001 SCC Online Raj 534** dealing with the question whether after rejection of anticipatory bail application by the High Court, the accused is entitled to make second bail application before the Sessions Court under Section 438 Cr.P.C., it was propounded that after rejection of bail application under Section 438 Cr.P.C. by the High Court second anticipatory bail application is not maintainable. Further, after rejection of bail application made by the accused petitioner before the High Court under Section 438 Cr.P.C. second bail application for the same relief is not maintainable even before the High Court and the Sessions Judge has absolutely no jurisdiction to entertain the second anticipatory bail application.

16. The Courts should always be circumspect while exercising their jurisdiction in any sphere of law as jurisdiction is an ornament of the Court which is embedded in it and cannot be created or assumed by any artificial means. If there is a statutory prohibition for exercise of jurisdiction by a Court such jurisdiction cannot be exercised as what is prohibited by law directly, cannot be done indirectly. At the same time it must always be borne into mind that non-pleading of issue of jurisdiction will not clothe the Court with jurisdiction when expressly

barred by any statute. Since by way of legal provision provided under Section 438 (7) Cr.P.C. as applicable in present case consideration for grant of anticipatory bail to an accused by a Sessions Court is barred, in case prior to that, anticipatory bail application had already been filed and disposed of by the High Court, hence, the Sessions Courts should be very vigilant to cross their legal limitations, as omitted in the present case.

17. One more aspect which makes the present application devoid of consideration for grant of anticipatory bail has been taken cognizance of by this Court that in para 4 of the affidavit annexed with the anticipatory bail application, the present application has been termed as the first anticipatory bail application and it is deposed that no previous application under Section 438 Cr.P.C. has been filed or pending before this Court or its Lucknow Bench for the same cause of action. On the very face of record, it is certainly suppression of a material fact as Anticipatory Bail Application No. 8413 of 2022 had already been filed and disposed of by this Court in this matter vide order dated 6.9.2022 and it indubitably negates the prayer made by the applicant for grant of anticipatory bail in his favour.

18. The view taken by this Court derives support from the judgement passed by the Hon'ble Apex Court in **Arunima Baruah v. Union of India, (2007) 6 SCC 120** wherein it was held as hereunder

"12. It is trite law that so as to enable the court to refuse to exercise its discretionary jurisdiction suppression must be of material fact. What would be a material fact, suppression whereof would disentitle the appellant to obtain a

discretionary relief, would depend upon the facts and circumstances of each case. Material fact would mean material for the purpose of determination of the lis, the logical corollary whereof would be that whether the same was material for grant or denial of the relief. If the fact suppressed is not material for determination of the lis between the parties, the court may not refuse to exercise its discretionary jurisdiction. It is also trite that a person invoking the discretionary jurisdiction of the court cannot be allowed to approach it with a pair of dirty hands."

19. A similar view has been taken in **Prestige Lights Ltd. v. State Bank of India, (2007) 8 SCC 449** wherein denuding the claim of a person not coming before the Court with clean hands, it was so observed by the Hon'ble Apex Court :

"35. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the court, the court may dismiss the action without adjudicating the matter."

20. Hence, in view of the settled law, there is no justification to proceed with the present anticipatory bail application as it is legally not maintainable and has been moved with suppression of material facts.

21. With these observations and without making any comment upon the lackadaisical approach of the court concerned which has been cavalier to entertain the anticipatory bail application which was legally not maintainable before it, it is held that the present application is not maintainable, and is accordingly, rejected.

**APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.08.2023**

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Crl. Misc. Anticipatory Bail Application No. 1703
of 2023
(U/s 438 Cr.P.C)

Dharmapal Gautam @ Bhikhari Gautam
...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Shakti Krishna Chaube, Praveen Tripathi

Counsel for the Respondents:
G.A.

Criminal Law - Criminal Procedure Code, 1973 – Sections 437(3), 438, 438(2), 438(I)(iv) & 439(2) - Indian Penal Code, 1860 - Sections 120(B), 255, 259, 260, 272, 273, 419, 420, 467, 468 & 471 -- Constitution Of India, 1950 – Article – 21 - Excise Act, 1910- Section 60 - Prevention Of Corruption Act, 1988 - Sections - 13(1)(D) & 13(2) - Prevention Of Money Laundering Act, 2002- Sections 3 & 4 - Indian Evidence Act, 1872 - Section 27-
Anticipatory Bail Application - FIR - allegations are involved the recovery of illicit liquor and certain injections from the applicant's premises – investigation – charge-sheet – applicant taken grounds that custodial interrogation was unnecessary – court finds that, no independent person has witnessed the alleged recovery proceedings, - there is serious conflict in the narration made by the police itself in the recovery memo and in the FIR - no exceptional grounds existed to deny the bail – hence, applicant's application for granting anticipatory bail is allowed – however, in the event of arrest/appearance of applicant, before the trial court, he shall be released on bail on his furnishing a personal bond and two sureties, each in the like amount, to the satisfaction of

the SHO/court concerned – directions issued accordingly. (Para – 11, 12, 13)

Application Allowed. (E-11)

List of Cases cited:

1. Gurbaksh Singh Sibbia Vs St. of Pun., (1980) 2 SCC 565 : 1980 SCC (Cri) 465
2. Jai Prakash Singh Vs St. of Bihar, (2012) 4 SCC 379
3. Mahdoo Bava Vs C.B.I., 2023 SCC Online SC 299
4. P. Chidambaram Vs Directorate of Enforcement, (2019) 9 SCC 24
5. Prakash Kadam Vs Ramprasad Vishwanath Gupta, (2011) 6 SCC 189
6. St. of U.P. Vs Amarmani Tripathi, (2005) 8 SCC 21
7. St. of U.P. Vs Deoman Upadhyaya, AIR 1960 SC 1125
8. Sushila Aggarwal Vs St. (NCT of Delhi), (2020) 5 SCC 1
9. Salauddin Abdulsamad Shaikh Vs St. of Mah., (1996) 1 SCC 667
10. Siddharam Satlingappa Mhetre Vs St. of Mah., (2011) 1 SCC 694

(Delivered by Hon'ble Subhash Vidyarthi, J)

1. Heard Sri Praveen Tripathi, the learned counsel for the applicant, Sri Rao Narendra Singh, the learned counsel for the State and perused the records.

2. The instant application has been filed by the applicant seeking anticipatory bail in Case Crime No. 277 of 2016, under Sections 60 Excise Act and Sections 255, 259, 260, 419, 420, 467, 468, 471, 272, 273 IPC, Police Station Karnailganj, District Gonda.

3. The aforesaid case has been registered on the basis of an F.I.R. lodged on 19.07.2016 against two persons - Ramesh Verma and Dharam Pal Gautam alias Bhikhari Gautam (the applicant) by a Senior Sub Inspector of Police, alleging that on the basis of information received from a mukhbir, a police party reached the polisher (small scale rice mill) of the applicant. As per FIR case, co-accused Ramesh Verma was arrested another person escaped and the person arrested told that the person who ran away, was the applicant and he is the owner of the polisher. The F.I.R. states that about 25 litres illicit liquor kept in a jerry-can, some bottles containing illicit liquor and some injections were recovered from the premises.

4. The learned AGA has raised a preliminary objection on the ground that the allegations leveled in the FIR are of a serious nature and it is settled law that an application under Section 438 Cr.P.C. for grant of anticipatory bail should be entertained only in exceptional circumstances. In support of his submission Sri. Rao Narendra Singh, the learned AGA-I has relied upon the judgment in the case of **P. Chidambaram v. Directorate Of Enforcement, (2019) 9 SCC 24**. The aforesaid judgment was passed in an appeal against an order passed by the High Court of Delhi rejecting the appellant's plea for anticipatory bail in a case registered by Central Bureau of Investigation (CBI) being under Section 120-B IPC read with Section 420 IPC, Section 8 and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 and in the case registered by the Enforcement Directorate in ECIR No. 07/HIU/2017 punishable under Sections 3 and 4 of the Prevention of Money-Laundering Act, 2002 in an offence relating to the alleged

irregularities in Foreign Investment Promotion Board (FIPB) clearance given to INX Media for receiving foreign investment to the tune of Rs 305 crores against approved inflow of Rs 4.62 crores. In this context, the Hon'ble Supreme Court had observed that: -

“69. Ordinarily, arrest is a part of procedure of the investigation to secure not only the presence of the accused but several other purposes. Power under Section 438 CrPC is an extraordinary power and the same has to be exercised sparingly. The privilege of the pre-arrest bail should be granted only in exceptional cases. The judicial discretion conferred upon the court has to be properly exercised after application of mind as to the nature and gravity of the accusation; possibility of the applicant fleeing justice and other factors to decide whether it is a fit case for grant of anticipatory bail. Grant of anticipatory bail to some extent interferes in the sphere of investigation of an offence and hence, the court must be circumspect while exercising such power for grant of anticipatory bail. Anticipatory bail is not to be granted as a matter of rule and it has to be granted only when the court is convinced that exceptional circumstances exist to resort to that extraordinary remedy.”

5. However, in a later judgment rendered by a Larger Bench of the Hon'ble Supreme Court, consisting of five Hon'ble Judges in ***Sushila Aggarwal v. State (NCT of Delhi)***, (2020) 5 SCC 1, the Hon'ble Supreme Court, after taking into consideration numerous previous judgments, including the judgment in the case of ***P. Chidambaram (supra)***, specifically held that:-

“53. It is quite evident, therefore, that the predominant thinking of the larger

Constitution Bench, in Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465], was that given the premium and the value that the Constitution and Article 21 placed on liberty—and given that a tendency was noticed, of harassment—at times by unwarranted arrests, the provision for anticipatory bail was made. It was not hedged with any conditions or limitations — either as to its duration, or as to the kind of alleged offences that an applicant was accused of having committed. The courts had the discretion to impose such limitations (like cooperation with investigation, not tampering with evidence, not leaving the country, etc.) as were reasonable and necessary in the peculiar circumstances of a given case. However, there was no invariable or inflexible rule that the applicant had to make out a special case, or that the relief was to be of limited duration, in a point of time, or was unavailable for any particular class of offences.”

6. The conclusion drawn by the Hon'ble Supreme Court in ***Sushila Aggarwal (supra)*** are reiterated in para 92 of the judgment which are as follows:-

“92. This Court, in the light of the above discussion in the two judgments, and in the light of the answers to the reference, hereby clarifies that the following need to be kept in mind by courts, dealing with applications under Section 438 CrPC:

92.1. Consistent with the judgment in Gurbaksh Singh Sibbia v. State of Punjab [(1980) 2 SCC 565], when a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence. The

application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant reasonably apprehends arrest, as well as his side of the story. These are essential for the court which should consider his application, to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.

92.2. It may be advisable for the court, which is approached with an application under Section 438, depending on the seriousness of the threat (of arrest) to issue notice to the Public Prosecutor and obtain facts, even while granting limited interim anticipatory bail.

92.3. Nothing in Section 438 CrPC, compels or obliges courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. **While considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc.** The courts would be justified — and ought to impose conditions spelt out in Section 437(3) CrPC [by virtue of Section 438(2)]. The need to impose other restrictive conditions, would have to be judged on a case-by-case basis, and depending upon the materials produced by the State or the investigating agency. Such special or other restrictive conditions may be imposed if the

case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.

92.4. **Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court.**

92.5. Anticipatory bail granted can, depending on the conduct and behaviour of the accused, continue after filing of the charge-sheet till end of trial.

92.6. An order of anticipatory bail should not be “blanket” in the sense that it should not enable the accused to commit further offences and claim relief of indefinite protection from arrest. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence.

92.7. An order of anticipatory bail does not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted pre-arrest bail.

92.8. The observations in *Sibbia* [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] regarding “limited custody” or “deemed custody” to facilitate the requirements of the investigative authority, would be

sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e. deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail. Sibbia had observed that :

“19. ... if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in *State of U.P. v. Deoman Upadhyaya*, AIR 1960 SC 1125.”

92.9. It is open to the police or the investigating agency to move the court concerned, which grants anticipatory bail, for a direction under Section 439(2) to arrest the accused, in the event of violation of any term, such as absconding, non-cooperating during investigation, evasion, intimidation or inducement to witnesses with a view to influence outcome of the investigation or trial, etc.

92.10. The court referred to in para 92.9 above is the court which grants anticipatory bail, in the first instance, according to prevailing authorities.

92.11. The correctness of an order granting bail, can be considered by the appellate or superior court at the behest of the State or investigating agency, and set aside on the ground that the court granting it did not consider material facts or crucial circumstances. [See *Prakash Kadam v. Ramprasad Vishwanath Gupta*, (2011) 6 SCC 189, *Jai Prakash Singh v. State of Bihar*, (2012) 4 SCC 379, *State of U.P. v. Amarmani Tripathi*, (2005) 8 SCC 21] .) This does not amount to “cancellation” in terms of Section 439(2) CrPC.

92.12. The observations in *Siddharam Satlingappa Mhetre v. State of Maharashtra*, (2011) 1 SCC 694 (and other similar judgments) that no restrictive conditions at all can be imposed, while granting anticipatory bail are hereby overruled. Likewise, the decision in *Salauddin Abdulsamad Shaikh v. State of Maharashtra*, (1996) 1 SCC 667 and subsequent decisions which lay down such restrictive conditions, or terms limiting the grant of anticipatory bail, to a period of time are hereby overruled.”

7. The later judgment rendered by five Hon'ble Judges of the Hon'ble Supreme Court will obviously prevail over the former judgment of two Hon'ble Judges and the law, as it now stands, is that there is no restriction that the discretion of grant of pre-arrest bail under Section 438 Cr.P.C. can be exercised only in exceptional circumstances. The factors to be considered for grant of anticipatory bail to the applicant are somewhat similar to the considerations to be kept in mind for granting bail to an accused person. The only additional consideration to be kept in mind while deciding the application under Section 438 Cr.P.C. is contained in clause (iv) of Sub-section (i) of Section 438, as per which the Court has also to take into consideration whether the accusation has been made with object of injuring or humiliating the applicant by having him so arrested. Therefore, I find myself unable to accept the aforesaid preliminary objection raised by the learned AGA and the same is rejected.

8. While advancing submissions on the merit of the application, the learned counsel for the applicant has submitted that the applicant was called by the Investigating Officer and his statement

under section 161 Cr.P.C. was recorded on 30.12.2016. After conclusion of the investigation, a charge sheet had been submitted way back in the year 2017. The investigation already having been concluded there appears to be no need of custodial interrogation of the applicant.

9. A supplementary affidavit has been filed on behalf of the applicant disclosing his involvement in three other cases bearing Nos. 106/2021, 202/2021 and 88/2020 all under Section 60 of the Excise Act, Police Station Karnailganj, District Gonda, which is a bailable offence and the learned counsel of the applicant has submitted that the applicant has been granted bail in all the aforesaid three cases.

10. The learned counsel for the applicant has also relied upon a judgment of the Hon'ble Supreme Court in **Mahdoo Bava v. Central Bureau of Investigation**, 2023 SCC OnLine SC 299, wherein the Hon'ble Supreme Court granted anticipatory bail to the appellant in a case involving serious allegations against him, on the following considerations: -

“On the strength of the aforesaid allegations, which are certainly serious in nature, the prayer of the appellants for anticipatory bail is opposed vehemently by the learned Additional Solicitor General. But in our considered view there are at least three factors which tilt the balance in favour of the appellants herein. They are:—

(i) Admittedly, the CBI did not require the custodial interrogation of the appellants during the period of investigation from 29.06.2019 (date of filing of FIR) till 31.12.2021 (date of filing of the final report). Therefore, it is difficult to accept the contention that at this stage

the custody of the appellants may be required;

(ii) In the reply/counter filed before the High Court, the CBI had taken a categorical stand that the Court had merely issued summons and not warrant for the appearance of the accused. In the case of Shri Deepak Gupta, CBI had taken a stand before the Special Court that “the presence of the accused is not required for the investigation but it is certainly required for trial” and that therefore he needs to be present. Therefore, all that the CBI wanted was the presence of the accused before the Trial Court to face trial. In such circumstances, to oppose the anticipatory bail request at this stage may not be proper; and

(iii) All transactions out of which the complaint had arisen, seem to have taken place during the period 2009-2010 to 2012-2013 and all are borne out by records. When the primary focus is on documentary evidence, we fail to understand as to why the appellants should now be arrested.”

11. Although the FIR states that several persons of the public were present at the spot, but when they were asked to witness the proceedings, nobody agreed for the same. Apparently, the FIR has been lodged after conclusion of the recovery proceedings when the police party reached the police station. Although in the F.I.R. lodged subsequently, it is recorded that nobody had witnessed the recovery proceedings, two persons have put their signatures at the bottom of the recovery memo regarding whom the learned AGA states that they are independent witnesses. Thus there is a serious conflict in the narration made by the police itself in the recovery memo and in the FIR registered

subsequently regarding presence of independent witnesses.

12. Having considered the aforesaid facts and circumstances of the case and keeping in view the fact that the FIR was lodged on 19.07.2016 alleging that certain recoveries made from the applicant's polisher in furtherance of an information received from a mukhbir; that although the FIR mentions that a large crowd had gathered at the time of recovery, no independent person has witnessed the alleged recovery; that the investigation already stands concluded and the charge sheet has been submitted way back in the year 2017, I am of the view that the aforesaid facts are sufficient for grant of anticipatory bail to the applicant.

13. In view of the above, the anticipatory bail application of the applicant is **allowed**. In the event of arrest / appearance of applicant - **Dharmapal Gautam Alias Bhikhari Gautam** before Station House Officer / the learned Trial Court in the aforesaid case, he shall be released on bail on his furnishing a personal bond and two sureties, each in the like amount, to the satisfaction of S.H.O./Court concerned on the following conditions and subject to any other conditions that may be fixed by the Trial Court:

- (i) the applicant shall not tamper with the prosecution evidence;
- (ii) the applicant shall not pressurize the prosecution witnesses;
- (iii) the applicant shall appear on each and every date fixed by the trial court.

(2023) 8 ILRA 674

**APPELLATE JURISDICTION
CRIMINAL SIDE**

DATED: LUCKNOW10.08.2023

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Crl. Misc. Anticipatory Bail Application No. 1775
of 2023
(U/s 438 Cr.P.C)

With
Crl. Misc. Anticipatory Bail Application No. 1777
of 2023
(U/s 438 Cr.P.C)

Somdev Sharma **...Applicant**
Versus
State of U.P. **...Respondent**

Counsel for the Applicant:
Amarjeet Singh Rakhra, Bashisth Muni Mishra

Counsel for the Respondent:
G.A.

Criminal Law-The Code of Criminal Procedure,1973-Section- 438 -The Indian Penal Code- 1860- Sections 409, 420, 467, 468,471 & 120B- An application for grant of anticipatory bail cannot be rejected on the ground that the applicant has failed to make out any exceptional circumstance and the merits of the application have to be examined so as to ascertain whether the applicant is entitled to be granted anticipatory bail or not- Section 46 of the Cr.P.C., which lays down the procedure of arrest of persons, does not contain any provision mandating prior sanction of the St. Government and an information of the sanction being sent to the accused, so that he may approach the Court for obtaining an order of pre-arrest bail.

Interim anticipatory bail granted. (E-15)

List of Cases cited:

1. Sushila Aggarwal & ors. Vs St. (NCT of Delhi) & anr, (2020) 5 SCC 1
2. Prem Shankar Prasad Vs St. of Bihar & ors, 2021 SCC OnLine SC 955

3. Adri Dharan Das Vs St. of W.B., (2005) 4 SCC 303

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

1. Heard Sri Amarjeet Singh Rakhra, learned counsel for the applicant, Sri Rao Narendra Singh, learned A.G.A.-I for the State and perused the records.

2. Both the aforesaid applications have been filed seeking anticipatory bail in F.I.R. bearing Case Crime No.0027 of 2021, under Sections 409, 420, 467, 468, 471, 120B I.P.C., registered at Police Station S.I.T., District Lucknow (Rural).

3. At the outset, Sri Rao Narendra Singh, the learned A.G.A. I, has raised preliminary objections against the applications on two grounds – (i) that an application for anticipatory bail should not be entertained ordinarily as a regular application for bail and it can only be entertained if there are some exceptional circumstances justifying exercise the extraordinary jurisdiction of granting pre-arrest bail and there are no exceptional circumstances in the present case; (ii) that the applicants are not named in the F.I.R. and he has instructions that their names have not surfaced in the investigation carried out till date and, therefore, there is no reasonable apprehension of arrest of the applicants. Sri. Rao Narendra Singh has further submitted that as a matter of practice even if something comes to light against a person, he/she is not arrested without obtaining permission from the State-Government and in case a need is felt for arrest of the applicants, the practice would be followed. He has relied on the Judgments of the Supreme Court in the case of **Sushila Aggarwal & Others versus State (NCT of Delhi) & Another,**

(2020) 5 SCC 1 and **Prem Shankar Prasad versus State of Bihar & Others,** 2021 SCC OnLine SC 955.

4. In support of the first objection, the learned A.G.A. – I has relied upon the following passages from the judgment of the Hon'ble Supreme Court in **Sushila Aggarwal & Others versus State (NCT of Delhi) & Anr,** (2020) 5 SCC 1: -

“7.2. While considering the issues referred to a larger Bench, referred to hereinabove, the decision of the Constitution Bench of this Court in Gurbaksh Singh Sibbia (1980) 2 SCC 565 is required to be referred to and considered in detail. The matter before the Constitution Bench in Gurbaksh Singh Sibbia arose out of the decision of the Full Bench of the Punjab and Haryana High Court. The High Court rejected the application for bail after summarising, what according to it was the true legal position, thus : (Gurbaksh Singh Sibbia versus State of Punjab, 1977 SCC OnLine P&H 157)

“(1) The power under Section 438, Criminal Procedure Code, is of an extraordinary character and must be exercised sparingly in exceptional cases only;

(2) Neither Section 438 nor any other provision of the Code authorises the grant of blanket anticipatory bail for offences not yet committed or with regard to accusations not so far levelled.

(3) The said power is not unguided or uncanalised but all the limitations imposed in the preceding Section 437, are implicit therein and must be read into Section 438.

(4) In addition to the limitations mentioned in Section 437, the petitioner must make out a special case for the

exercise of the power to grant anticipatory bail.

(5) Where a legitimate case for the remand of the offender to the police custody under Section 167(2) can be made out by the investigating agency or a reasonable claim to secure incriminating material from information likely to be received from the offender under Section 27 of the Evidence Act can be made out, the power under Section 438 should not be exercised.

(6) The discretion under Section 438 cannot be exercised with regard to offences punishable with death or imprisonment for life unless the court at that very stage is satisfied that such a charge appears to be false or groundless.

(7) The larger interest of the public and State demand that in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power, the discretion under Section 438 of the Code should not be exercised; and

(8) Mere general allegations of mala fides in the petition are inadequate. The court must be satisfied on materials before it that the allegations of mala fides are substantial and the accusation appears to be false and groundless."

5. However, Sri. Rao Narendra Singh has omitted to notice that the aforesaid legal position was summarized by the Punjab and Haryana High Court, and the judgment relied upon was passed in an appeal filed against the order passed by the High Court. While allowing the appeal, the Hon'ble Supreme Court held that: -

"12. We find ourselves unable to accept, in their totality, the submissions of the learned Additional Solicitor General or the constraints which the Full Bench of the High Court has engrafted on the power

conferred by Section 438. **Clause (1) of Section 438 is couched in terms, broad and unqualified. By any known canon of construction, words of width and amplitude ought not generally to be cut down so as to read into the language of the statute restraints and conditions which the legislature itself did not think it proper or necessary to impose. This is especially true when the statutory provision which falls for consideration is designed to secure a valuable right like the right to personal freedom and involves the application of a presumption as salutary and deep grained in our criminal jurisprudence as the presumption of innocence.** Though the right to apply for anticipatory bail was conferred for the first time by Section 438, while enacting that provision the legislature was not writing on a clean slate in the sense of taking an unprecedented step, insofar as the right to apply for bail is concerned. It had before it two cognate provisions of the Code : Section 437 which deals with the power of courts other than the Court of Session and the High Court to grant bail in non-bailable cases and Section 439 which deals with the "special powers" of the High Court and the Court of Session regarding bail. The whole of Section 437 is riddled and hedged in by restrictions on the power of certain courts to grant bail. That section reads thus:

* * *

The provisions of Sections 437 and 439 furnished a convenient model for the legislature to copy while enacting Section 438. If it has not done so and has departed from a pattern which could easily be adopted with the necessary modifications, it would be wrong to refuse to give to the departure its full effect by assuming that it was not intended to serve any particular or specific purpose. The departure, in our

opinion, was made advisedly and purposefully : Advisedly, at least in part, because of the 41st Report of the Law Commission which, while pointing out the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant anticipatory bail, said in para 39.9 that it had “considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted” but had come to the conclusion that the question of granting such bail should be left “to the discretion of the court” and ought not to be fettered by the statutory provision itself, since the discretion was being conferred upon superior courts which were expected to exercise it judicially. **The legislature conferred a wide discretion on the High Court and the Court of Session to grant anticipatory bail because it evidently felt, firstly, that it would be difficult to enumerate the conditions under which anticipatory bail should or should not be granted and secondly, because the intention was to allow the higher courts in the echelon a somewhat free hand in the grant of relief in the nature of anticipatory bail. That is why, departing from the terms of Sections 437 and 439, Section 438(1) uses the language that the High Court or the Court of Session “may, if it thinks fit” direct that the applicant be released on bail. Sub-section (2) of Section 438 is a further and clearer manifestation of the same legislative intent to confer a wide discretionary power to grant anticipatory bail. It provides that the High Court or the Court of Session, while issuing a direction for the grant of anticipatory bail, “may include such conditions in such directions in the light of the facts of the particular case, as it may think fit”, including the conditions which are set out in clauses (i)**

to (iv) of sub-section (2). The proof of legislative intent can best be found in the language which the legislature uses. Ambiguities can undoubtedly be resolved by resort to extraneous aids but words, as wide and explicit as have been used in Section 438, must be given their full effect, especially when to refuse to do so will result in undue impairment of the freedom of the individual and the presumption of innocence. It has to be borne in mind that anticipatory bail is sought when there is a mere apprehension of arrest on the accusation that the applicant has committed a non-bailable offence. A person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, insofar as one may, and to give full play to the presumption that he is innocent. In fact, the stage at which anticipatory bail is generally sought brings about its striking dissimilarity with the situation in which a person who is arrested for the commission of a non-bailable offence asks for bail. In the latter situation, adequate data is available to the court, or can be called for by it, in the light of which it can grant or refuse relief and while granting it, modify it by the imposition of all or any of the conditions mentioned in Section 437.”

(Emphasis supplied)

6. The Hon’ble Supreme Court disapproved the condition no. 1 imposed by the Full Bench of Punjab and Haryana High Court that the power under Section 438, Criminal Procedure Code, is of an extraordinary character and must be exercised sparingly in exceptional cases only and held that: -

“22. By proposition No. 1 the High Court says that the power conferred by

Section 438 is “of an extraordinary character and must be exercised sparingly in exceptional cases only”. It may perhaps be right to describe the power as of an extraordinary character because ordinarily the bail is applied for under Section 437 or Section 439. These sections deal with the power to grant or refuse bail to a person who is in the custody of the police and that is the ordinary situation in which bail is generally applied for. But this does not justify the conclusion that the power must be exercised in exceptional cases only, because it is of an extraordinary character. We will really be saying once too often that all discretion has to be exercised with care and circumspection, depending on circumstances justifying its exercise. It is unnecessary to travel beyond it and subject the wide power conferred by the legislature to a rigorous code of self-imposed limitations.”

* * *

33. We would, therefore, prefer to leave the High Court and the Court of Session to exercise their jurisdiction under Section 438 by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do. The ends of justice will be better served by trusting these courts to act objectively and in consonance with principles governing the grant of bail which are recognised over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down inflexible rules of general application. It is customary, almost chronic, to take a statute as one finds it on the ground that, after all, “the legislature in its wisdom” has thought it fit to use a particular expression. A convention may usefully grow whereby the High Court and the Court of Session may be trusted to exercise their discretionary powers in their wisdom, especially when

the discretion is entrusted to their care by the legislature in its wisdom. If they err, they are liable to be corrected.”

7. Therefore, the position in law is that an application for grant of anticipatory bail cannot be rejected on the ground that the applicant has failed to make out any exceptional circumstance and the merits of the application have to be examined so as to ascertain whether the applicant is entitled to be granted anticipatory bail or not. Accordingly, the first preliminary objection raised by the learned A.G.A.-I, which is based on a mis-reading of the law laid down by the Hon’ble Supreme Court, is rejected.

8. In support of the second limb of his preliminary objection, that an application for grant of anticipatory bail cannot be entertained unless there is a real apprehension of the applicant’s arrest, Sri. Rao Narendra Singh has relied upon the decision in **Sushila Aggarwal v. State (NCT of Delhi)**, (2020) 5 SCC 1, wherein the two questions being decided by the Hon’ble Supreme Court were as follows: -

“(1) Whether the protection granted to a person under Section 438 CrPC should be limited to a fixed period so as to enable the person to surrender before the trial court and seek regular bail.

(2) Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court.”

9. The question whether the anticipatory bail application can only be entertained in ‘exceptional circumstances’ or ‘where there is a serious apprehension of arrest’ was not involved in *Sushila Aggarwal* (supra). However, it was observed in *Sushila Aggarwal* that: -

“35. Section 438(1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has ‘reason to believe’ that he may be arrested for a non-bailable offence. The use of the expression ‘reason to believe’ shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere ‘fear’ is not ‘belief’, for which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the court objectively, because it is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested. Section 438(1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Otherwise, the number of applications for anticipatory bail will be as large as, at any rate, the adult populace. Anticipatory bail is a device to secure the individuals liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely).

10. The analysis of the facts of the case and the submissions advanced before the Hon’ble Supreme Court in Sushila Aggarwal starts from para 45 of the judgment after putting in a heading - “Analysis and Conclusions” and the final conclusions drawn by the Hon’ble Supreme are as follows: -

“FINAL CONCLUSIONS OF THE COURT

91. In view of the concurring judgments of M.R. Shah, J. and of S. Ravindra Bhat, J. with Arun Mishra, Indira Banerjee and Vineet Saran, JJ. agreeing with them, the following answers to the reference are set out:

91.1. Regarding Question 1, this Court holds that the protection granted to a person under Section 438 CrPC should not invariably be limited to a fixed period; it should enure in favour of the accused without any restriction on time. Normal conditions under Section 437(3) read with Section 438(2) should be imposed; if there are specific facts or features in regard to any offence, it is open for the court to impose any appropriate condition (including fixed nature of relief, or its being tied to an event), etc.

91.2. As regards the second question referred to this Court, it is held that the life or duration of an anticipatory bail order does not end normally at the time and stage when the accused is summoned by the court, or when charges are framed, but can continue till the end of the trial. Again, if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so.”

11. After giving answer to the two questions that were referred to the larger Bench, the Hon’ble Supreme Court clarified that certain points need to be kept in mind by the Courts dealing with the applications under Section 438 Cr.P.C., the first of which only is relevant for the present case, which is as follows: -

92.1. Consistent with the judgment in Gurbaksh Singh Sibbia v. State of Punjab, when a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts (and not vague or general allegations)

relatable to one or other specific offence. The application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant reasonably apprehends arrest, as well as his side of the story. These are essential for the court which should consider his application, to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.”

12. In **Prem Shankar Prasad versus State of Bihar & Ors**, 2021 SCC OnLine SC 955, the Hon’ble Supreme Court referred to an earlier judgment in the case of **Adri Dharan Das v. State of W.B.**, (2005) 4 SCC 303, wherein it was held as under:-

“16. Section 438 is a procedural provision which is concerned with the personal liberty of an individual who is entitled to plead innocence, since he is not on the date of application for exercise of power under Section 438 of the Code convicted for the offence in respect of which he seeks bail. **The applicant must show that he has ‘reason to believe’ that he may be arrested in a nonbailable offence. Use of the expression ‘reason to believe’ shows that the belief that the applicant may be arrested must be founded on reasonable grounds. Mere ‘fear’ is not ‘belief’ for which reason it is not enough for the applicant to show that he has some sort of vague apprehension that someone is going to make an accusation against him in pursuance of which he may be arrested. Grounds on**

which the belief of the applicant is based that he may be arrested in non-bailable offence must be capable of being examined. If an application is made to the High Court or the Court of Session, it is for the court concerned to decide whether a case has been made out for granting of the relief sought. The provisions cannot be invoked after arrest of the accused. A blanket order should not be generally passed. It flows from the very language of the section which requires the applicant to show that he has reason to believe that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant’s apprehension that he may be arrested is genuine. Normally a direction should not issue to the effect that the applicant shall be released on bail ‘whenever arrested for whichever offence whatsoever’. Such ‘blanket order’ should not be passed as it would serve as a blanket to cover or protect any and every kind of allegedly unlawful activity. An order under Section 438 is a device to secure the individual’s liberty, it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely. On the facts of the case, considered in the background of the legal position set out above, this does not prima facie appear to be a case where any order in terms of Section 438 of the Code can be passed.”

(Emphasis supplied)

13. Replying to the aforesaid submission, Sri. Amarjeet Singh Rakhra, the learned counsel for the applicant has submitted that the case has been registered on the basis of an F.I.R. lodged on 20.07.2021 against 14 sets of persons - 12 sets of office bearers of various Educational

Institutes, and two government officials and unknown employees of the Institutions and officers of the Government, stating that in furtherance of a complaint dated 19.06.2019, a Special Investigation Team was constituted, which conducted an enquiry and submitted a report to a Committee constituted by the Government and in the meeting of the Committee held on 27.05.2021 further action was directed. Upon a scrutiny of all the documentary evidence collected during enquiry and physical verification of the students it came to light that although there was a complaint of embezzlement of Rs.200 crores in payment of scholarship to students belonging to Schedule Castes and Schedule Tribes categories, merely Rs. 58 crores had been drawn by the concerned Institutes.

14. The first group of accused-persons is “Kapil Garg Registrar, Officers and other employees”. The address of the group of persons arrayed as accused No.1 is “B.L.S. Institute of Management, Shahibabad, Ghaziabad, U.P.” Regarding the BLS Institute, it is alleged that during enquiry it was found that scholarships were drawn regarding two students, Monica Gautam and Brijendra Kumar, and it transpired that both aforesaid students had not taken admission in the Institution and scholarship in respect of them was claimed in a fraudulent manner. The applicant in Criminal Miscellaneous Anticipatory Bail Application No. 1775 of 2023 is the Chairman of the Society, which manages B.L.S. Institute of Management and the applicant in Criminal Miscellaneous Anticipatory Bail Application No. 1775 of 2023 is an Office Secretary in B.L.S. Institute of Management.

15. The applicants had filed applications seeking anticipatory bail

before the Sessions Court, which have been rejected by means of an orders dated 27.07.2023 passed by Special Judge, C.B.I. (Central), Lucknow by holding that the investigation is still going on and the offence falls in the category of serious economic offences, which has wide impact on the society at large and there is no ground for grant of anticipatory bail to any of the applicants. Anticipatory bail applications have not been rejected on the ground that there is no apprehension of arrest of the applicants.

16. The Proviso appended to sub Section 1 of Section 438 Cr.P.C. provides that “*where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer-in-charge of a police station to arrest, without warrant the applicant, if there are reasonable grounds for such arrest.*”

17. The learned counsel for the applicant has submitted that the Registrar of B.L.S. Institute of Management Kapil Garg has been granted anticipatory bail by means of the order dated 13.07.2023 passed by this Court in Criminal Misc Anticipatory Bail Application No.1566 of 2023. The applicants’ applications for grant of anticipatory bail having been rejected by the Court of Session, under the statutory prescription it is open for the police to arrest the applicants without warrant. He has further submitted that the practice pointed out by the learned A.G.A. will not prevail upon and override the statutory prescription.

18. I have considered the rival submissions advanced by the learned

Counsel on the point of maintainability of the application. The expression 'any person has reason to believe' occurring in Section 438 Cr.P.C. has to be interpreted keeping in view whether any reasonable person of ordinary prudence, placed in the situation of the person seeking anticipatory bail, would have reason to believe, that there is an apprehension of arrest in the circumstances of the case.

19. The facts of the case indicate that although ordinarily the accused persons are named individually in the First Information Reports, in the present case the accused persons have been arrayed in sets and the first set of accused persons is "Kapil Garg Registrar, Officers and other employees". The address of the group of persons arrayed as accused No.1 is "B.L.S. Institute of Management, Shahibabad, Ghaziabad, U.P." This leaves the prosecution free with a long rope to include any person working for the Institute.

20. In para 42 of the affidavit filed in support of the applications, the applicants have stated that the Investigating Agency has not only got the applicants' statements recorded on more than one occasions, but has also repetitively sought information from the applicants telephonically. It has specifically been stated that after grant of anticipatory bail to the co-accused Kapil Garg, who is the Registrar of the Institute, the applicants were asked to supply certain information on the same day or to face the consequences. The applicants have pleaded that they apprehend foul play and they may be arrested.

21. Having considered the facts of the case in light of the law laid down by the Hon'ble Supreme Court in **Sushila Aggarwal and Prem Shankar Prasad** (Supra) I am of the view that the aforesaid

facts give rise to circumstances indicating that the applicant have a reason to believe that they may be arrested. The applicants do not have a vague apprehension that someone is going to make an accusation against him in pursuance of which he may be arrested. The belief of the applicants is founded on reasonable grounds and it is not a mere 'fear'.

22. One more thing is significant, that although the learned A.G.A. has vehemently opposed the maintainability of the application on the preliminary ground that presently there is no apprehension of the applicants being arrested, upon being asked whether he can make a statement that the applicants would not be arrested in future also, he stated that he has no such instructions. He merely stated that in case a need of the applicants' arrest arises in future, the proposal of their arrest will first be sent to the State Government. However, he could not point out any provision of law mandating this procedure.

23. One of the co-accused persons Kapil Garg having been granted anticipatory bail by this Court and the applicants' applications for grant of anticipatory bail having been rejected, it is open for the police to arrest the applicant without warrant in view of the statutory provision contained in the Proviso appended to sub Section (1) of Section 438 Cr.P.C.

24. Section 46 of the Cr.P.C., which lays down the procedure of arrest of persons, does not contain any provision mandating prior sanction of the State Government and an information of the sanction being sent to the accused, so that he may approach the Court for obtaining an order of pre-arrest bail.

25. Therefore, the second limb of the preliminary objection, that there is no real apprehension of the applicants' arrest, is also rejected.

26. The application requires to be considered on its merits.

27. The learned A.G.A prays for and is granted two weeks' time to file a counter affidavit. One week's time thereafter shall be available to the applicant for filing rejoinder affidavit, if he so desires.

28. List this case in the week commencing 04.09.2023.

29. Having considered the aforesaid facts and circumstances of the case and keeping and view the fact that the complaint lodged in the year 2019 allege embezzlement of Rs. 200 crores; that after enquiry, the S.I.T. found that the total disbursement of scholarship to students of the Institutes in question was Rs. 58 crores; that the FIR alleges wrongful drawl of scholarship in respect of two students to the tune of approximately 2.25 lakhs; that it appears that the amount was actually paid to the students through bank-drafts, and when the students did not continue with their studies in the Institution in question, the amount was repaid to the Department; that as per the averments made in the F.I.R., enquiry has already been completed and all the documentary and other evidence have already been collected, and that the applicants are the Chairman of the Society running the educational institution and an Office Secretary of the Institution and they have no criminal history and Registrar of the Institution has been granted anticipatory bail by this Court, I am of the view that pending final disposal of the instant anticipatory bail application the applicants

are also entitled to be granted interim anticipatory bail. As such, as an interim measure, it is directed that till the next date of listing, in the event of arrest / appearance of applicants before the learned Trial Court, they shall be released on interim anticipatory bail in the aforesaid case crime on furnishing a personal bond and two sureties each in the like amount, to the satisfaction of S.H.O./Court concerned on the following conditions and subject to any other conditions that may be fixed by the Trial Court: -

(i). The applicant will co-operate with the investigation.

(ii) The applicant will not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer or tamper with the evidence;

(iii) That the applicant will not leave India without the previous permission of the court;

(iv) The applicant will appear before the trial court on each date fixed unless personal presence is exempted.

(2023) 8 ILRA 683

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: LUCKNOW 22.08.2023

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Crl. Misc. Anticipatory Bail Application No. 1835
of 2023
(U/s 438 Cr.P.C)

Mohd. Adeeb Ahmad
Versus
State of U.P. & Anr.

...Applicant
...Respondents

Counsel for the Applicant:

Abhishek Srivastava, Vinay Kumar Verma

Counsel for the Respondents:

G.A. , Ashwani Kumar Dwivedi

Criminal Law - Criminal Procedure Code, 1973 – Sections 156(3), 482 & 438 - Indian Penal Code, 1860 – Sections 354, 420, 467, 468, 471, 504 & 506 - Registration Act, 1908- Section 58-

Anticipatory Bail Application - FIR – offence of Cheating, Forgery, Criminal Intimidation, and Assault on Woman – Anticipatory bail was sought, claiming innocence and misuse of legal provisions – court finds that, it is settled law that the principle of parity does not apply to rejection of bail application or to that of anticipatory bail application - Moreover, while dismissing the anticipatory bail application of the aforesaid co-accused the coordinate bench has not taken into consideration aforesaid aspects of the matter – held, court not inclined to reject the anticipatory bail application of applicant on ground of parity - Having considered the aforesaid facts and circumstances of the case and also keeping in view the fact that the applicant has no criminal history and without making any observations which may affect outcome of the case, Court of view that aforesaid facts are sufficient for making out a case for granting anticipatory bail to applicant - Anticipatory bail application is accordingly, allowed.(Para – 15, 16, 17, 18)

Application Allowed. (E-11)

List of Cases cited:

1. Ishwar Dass Jain Vs Sohan Lal, (2000) 1 SCC 434
2. Kamlesh & anr. Vs St. of Raj. & anr., 2019 SCC OnLine SC 1822
3. K. S. Vidyanadam Vs Vairavan, (1997) 3 SCC 1

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

1. Heard Sri Abhishek Srivastava, the learned counsel for the applicant as well as Sri Rajiv Kumar Verma, the learned

Additional Government Advocate appearing on behalf of the State and Sri Sudhir Kumar Pandey holding brief of Sri Ashwani Kumar Dwivedi, Advocate has put in appearance and filed vakalatnama on behalf of the informant, which is taken on record.

2. The instant application has been filed by the applicant seeking anticipatory bail in F.I.R. bearing Case Crime No.897 of 2019, under Sections 420, 467, 468, 471, 504, 506, 354 I.P.C., registered at Police Station Kotwali City, District Hardoi.

3. The aforesaid case has been registered on the basis of an F.I.R. lodged on 17.12.2019 against four persons, including the applicant in furtherance of an application under Section 156 (3) Cr.P.C., stating that the informant and her daughter had agreed to sell an immovable property to co-accused Mahmood Alam for an agreed consideration of Rs.45,00,000/-. Mahmood Alam paid a sum of Rs.10,00,000/- through a cheque dated 12.06.2019 and after receipt of the amount, registered agreement was executed regarding sell of the property on 16.06.2019 but the informant was not allowed to read the contents of the agreement and merely this much was asked by Registrar as to whether she has received the earnest money of Rs.10,00,000/-. When the co-accused Mahmood Alam did not pay the balance amount of sale consideration, the informant entered into another agreement with some other person to sell the same property for a higher sale consideration of Rs.48,00,000/- and she executed the sale deed dated 18.08.2019 in respect of the same property. The F.I.R. alleges that on the very next day i.e. on 19.08.2019, the other accused persons, including the applicant, who are sons of co-

accused Mahmood Alam threatened and misbehaved with the informant and her daughter. It is mentioned in the F.I.R. that on 21.08.2019 the informant had lodged an online complaint on Jansunwai Portal but the Sadar Chowki In-chargesubmitted a wrong report and disposed of the complaint.

4. The learned counsel for the applicant has submitted that in para 22 of the affidavit filed in support of the application it has been stated that co-accused Mahmood Alam has already filed a suit for specific performance of contract bearing Original Suit No.190 of 2019, in the Court of learned Civil Judge (Senior Division), Hardoi and the application under Section 156 (3) Cr.P.C. was lodged by the informant five days after filing of the aforesaid suit.

5. In the affidavit filed in support of the anticipatory bail-application it has been contended that the applicant is innocent, he has no criminal history and he has falsely been implicated in the present case.

6. The learned A.G.A. has opposed the prayer for bail on the ground that earlier the applicant had approached this court by filing an application under Section 482 Cr.P.C. No.1709 of 2021, which was disposed off leaving it open for the applicant appears to applies for bail within 30 days and it was directed that the prayer shall be considered and decided in accordance with law. He has submitted that since the applicant has not surrendered before learned trial court his anticipatory bail cannot be entertained. It has also been submitted that the non-bailable warrant has already been issued against all the accused persons, although the date of issuance of warrant has not

been mentioned in the instructions of the learned A.G.A.

7. **Kamlesh and another versus State of Rajasthan and another, 2019 SCC OnLine SC 1822**, was an appeal filed against an order passed by the High Court of Rajasthan at Jodhpur rejecting the application for anticipatory bail only on the ground that petition under Section 482 Cr.P.C., praying for quashing of FIR, has already been rejected. The Hon'ble Supreme Court held that: -

“5.We are of the view that the order of the High Court cannot be sustained. High Court ought to have considered the application on merits. The fact that petition under Section 482 Cr.P.C. was dismissed for quashing was not conclusive and could not be the reason for rejecting the application.”

8. Therefore, the mere rejection of an application under Section 482 Cr.P.C. filed by the applicant will not be a ground for rejecting his anticipatory bail application and the application has to be considered and decided on its merits taking into consideration all the relevant factors, including nature of allegations and the material relied upon.

9. The allegations leveled in the F.I.R. are that the informant had entered into a registered agreement to sell her property to the applicant's father - co-accused Mahmood Alam on 16.06.2019. She claims that as per her understanding the period during which the purchaser was required to pay the balance sale consideration, was one month, whereas the period mentioned in the agreement is one year. However, the informant is not an illiterate person and she had signed the agreement and had

presented it before the Sub-registrar, who made the requisite endorsements under Section 58 of the Indian Registration Act regarding admission of execution of the agreement by the informant and admission of receipt of consideration by her. In **Ishwar Dass Jain v. Sohan Lal, (2000) 1 SCC 434**, the Hon'ble Supreme Court held that There is a presumption of the correctness of the endorsement made by the Sub-Registrar under Section 58 of the Registration Act.

10. Therefore, the allegations leveled in the F.I.R. appear to be against the provisions of law.

11. The informant claims that when the co-accused Mahmood Alam did not pay her the balance amount of sale consideration, she executed a sale deed of the property in question in favour some other person on 18.08.2019. The informant did not send any notice to the purchaser demanding performance of his obligations under the registered agreement dated 16.06.2019. Even if the informant was under a misunderstanding regarding the period mentioned in the agreement for payment of balance consideration was one year, she could not have simply ignored the registered agreement without seeking its cancellation by the Court. In **K. S. Vidyadnam v. Vairavan, (1997) 3 SCC 1**, the Hon'ble Supreme Court has reaffirmed the well settled principle of law that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect.

12. The informant has not initiated any proceedings for specific performance of the agreement or for cancellation of agreement and she has executed the sale

deed in breach of conditions of the registered agreement without the same having been cancelled. The informant has not even refunded the amount of Rs.10,00,000/- paid by the applicant's father under the agreement dated 16.06.2019.

13. The aforesaid facts prima facie make out a civil wrong committed by the informant herself and it appears that she is abusing the process of law by filing an F.I.R. against the purchaser and his sons. The aforesaid facts evident from the F.I.R. itself certainly call for interference by this court for protecting the personal liberty of the applicant.

14. It is also relevant to notice that it is stated in the F.I.R. that the police had conducted an enquiry pursuant to the earlier complaint lodged by the informant on Jansunwai Portal and had disposed of the same without lodging an F.I.R., which appears to be the right course that was adopted by the Police.

15. The learned counsel appearing on behalf of the informant has submitted that the anticipatory bail application of the co-accused Mohd. Muzammil Ahmad has been rejected by means of an order dated 21.04.2022, passed by this court in Criminal Misc. Anticipatory Bail Application No.340 of 2022.

16. So far as the question of rejection of the anticipatory bail application of the co-accused Mohd. Muzammil Ahmad is concerned, it is settled law that the principle of parity does not apply to rejection of bail application or to that of anticipatory bail application. Moreover, while dismissing the anticipatory bail application of the aforesaid co-accused the

coordinate bench has not taken into consideration the aforesaid aspects of the matter. Therefore I am not inclined to reject the anticipatory bail application of the applicant on the ground of parity.

17. Having considered the aforesaid facts and circumstances of the case and also keeping in view the fact that the applicant has no criminal history and without making any observations which may affect the outcome of the case, I am of the view that the aforesaid facts are sufficient for making out a case for granting anticipatory bail to the applicant.

18. In view of the above, the anticipatory bail application of the applicant - **Mohd. Adeb Ahmad** is **allowed**. In the event of arrest / appearance of applicant - before the S.H.O. / the Trial Court in the aforesaid case, he shall be released on bail on his furnishing a personal bond and two sureties, to the satisfaction of S.H.O./Court concerned.

(2023) 8 ILRA 687
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 11.08.2023

BEFORE

THE HON'BLE BRIJ RAJ SINGH, J.

Crl. Misc. Bail Application No. 2611 of 2023

Mata Pher Rawat ...Applicant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Applicant:
Avinash Kumar Srivastava, Sunil Kumar Yadav

Counsel for the Respondents:
G.A.

Criminal Law – Indian Penal Code,1860 – Sections 376 - Protection of Children from Sexual offences (POCSO) Act, 2012 - Sections 5 & 6 - Bail Application - FIR - offence of Rape – Charge-sheet - Bail application – plea taken that, Infant child of 2 years while sleeping on cot had received injury on her private part by iron nail and it is not the case of rape – no opinion of sexual assault - prosecution case is not supported by medical report - held, perusing record and also considering nature of allegations, arguments advanced by learned counsel for parties, it is evident that medical report indicates that private part of victim was ruptured and vaginal bleeding is found, summary discharge report also indicates that the victim received serious injuries on her private part that is why she was referred for surgery, crime appears to be very serious as infant of about 20 months who was sleeping alone was raped by applicant and only minor contradictions in St.ments of P.W.1, P.W.-2 and P.W.-3 will not help applicant, Court do not find it to be a fit case for grant of bail – accordingly, Bail application is rejected.(Para – 10)

Bail Application Disposed of. (E-11)

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

1. This is the second bail application.

2. The first bail application of the applicant was rejected for want of prosecution by Hon'ble Mohd. Faiz Alam Khan, J, in Criminal Misc Bail Application No. 14242 of 2021 vide order dated 05.09.2022.

3. Heard Shri Avinash Kumar Srivastava, learned counsel for the accused-applicant as well as Shri Rajesh Kumar Singh, learned A.G.A.-I for the State assisted by Ms. Divya Verma, Brief Holder for the State and perused the record.

4. This bail application has been filed seeking release of the accused/applicant

Mata Pher Rawat on bail, who is involved in Case Crime No. 070 of 2020, under Sections 376 I.P.C. and 5/6 POCSO Act, Police Station Haidergarh, District Barabanki.

5. Learned counsel for the applicant has submitted that the First Information Report was lodged by the grandfather of the victim and no one had seen the incident of rape on the victim. It has been submitted by learned counsel for the applicant that the infant child of 2 years while sleeping on the cot had received injury on her private part by iron nail and it is not the case of rape. He has submitted that the medical report indicates that no opinion of sexual assault has been given by the doctor and no definite opinion of rape has been given and also no spermatozoa has been found on the body of the victim, therefore, the prosecution case is not supported by the medical report. Learned counsel for the applicant further submitted that the victim was referred to the KGMU Hospital for surgery of anal part and it indicates that rape was not committed. He further invited attention of the Court towards the statement of P.W.-1, P.W.-2, P.W.-3. P.W.-1 i.e. the mother of victim has stated that on the basis of doubt she lodged the report against the applicant and similar statements have also been given by P.W.-2 and P.W.-3 before the Court. Learned counsel for the applicant further stated that there is no criminal history against the applicant and he is in jail since 26.02.2020.

6. On the other hand, Shri Rajesh Kumar Singh, learned A.G.A.-I has argued that the grandfather of the deceased had lodged the First Information Report mentioning that his grand daughter Saumya aged about 2 years was sleeping alone and the applicant committed rape on her due to which there was bleeding in her private part.

Learned A.G.A further submitted that the medical report indicates that hymen of the victim was newly ruptured and torn and there was tear in the vaginal wall along with vaginal bleeding.

7. Learned A.G.A has further drawn attention towards the discharge summary of Department of Pediatric and findings that have been recorded are as follows:

- (i) Complete interior rectal wall tear extending into anal orifice
- (ii) Tear of Fourchette
- (iii) Tear of distal 2/3rd of posterior vaginal wall
- (iv) Tear of internal and external anal sphincter

8. Learned A.G.A for the State has further drawn attention of the Court towards the statement of P.W.-1 Ram Sanehi who has deposed before the Court that it was 2 O' Clock in the day time, he had taken food and the applicant Mata Pher had gone to other house to take food where his granddaughter was sleeping alone. The applicant did not eat food and he committed rape on her granddaughter. When the victim raised alarm, family members of the victim reached to the place of occurrence and as soon as the family members reached, the applicant ran away from the place of occurrence and P.W.-1 and his family members saw that there was bleeding from the private part of the victim. Learned A.G.A-I has further drawn attention of the Court towards the statement of P.W.-2 i.e. the mother of the deceased and P.W.-3 i.e. the father of the deceased and all the witnesses in their examination-in-chiefs have deposed the same fact and in their cross-examination, they have fortified their statement of fact which was narrated by them in their examination-in-chief.

9. Learned A.G.A for the State has further submitted that it is a heinous crime and an infant of 20 months was brutally raped by the applicant and there is no iota of doubt and no reason as to why the applicant will be implicated falsely in the present case. The applicant had come to the house of the victim who was sleeping alone and rape was committed by him. Since the applicant has committed a heinous offence therefore, he does not deserve mercy of the Court and thus, the bail application of the applicant is liable to be rejected.

10. Considering overall facts and circumstances of the case, perusing the record and also considering the nature of allegations, arguments advanced by the learned counsel for the parties, it is evident that medical report indicates that private part of the victim was ruptured and vaginal bleeding is found, the summary discharge report also indicates that the victim received serious injuries on her private part that is why she was referred for surgery, the crime appears to be very serious as the infant of about 20 months who was sleeping alone was raped by the applicant and only the minor contradictions in the statements of P.W.1, P.W.-2 and P.W.-3 will not help the applicant, thus, I do not find it to be a fit case for grant of bail.

11. The bail application of the accused/applicant **Mata Pher Rawat** is hereby rejected.

(2023) 8 ILRA 689

**APPELLATE JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 18.08.2023

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Crl. Misc. Anticipatory Bail Application No. 3370
of 2023
(U/s 438 Cr.P.C)

Kanwar Pal

Versus

State of U.P. & Anr.

...Applicant

...Respondents

Counsel for the Applicant:

Sri Inder Pal Singh Tomar, Ms. Anjali Singh Tomar

Counsel for the Respondent:

G.A. , Sri Kuldeep Singh Tomar

Criminal Law - Criminal Procedure Code, 1973 – Sections 156(3) & 438 - Indian Penal Code, 1860 - Sections 147, 148, 149, 324, 326, 307 & 504 - Application for Anticipatory Bail – FIR, was lodged with allegation that the applicant and co-accused had destroyed crops and later fired at the informant and his brother, causing serious injuries - claimed parity with co-accused who has been granted interim protection – court finds that, there were a cross FIR fortifies the prosecution allegation that the applicant was present at the place of occurrence – applicant's case is not of right of private defence – Held, applicant does not hold good on ground that anticipatory bail application of co-accused was granted anticipatory bail as an interim measure till pendency of investigation vide order dated and said anticipatory bail application has been dismissed as infructuous by coordinate Bench of Court - court do not find it a fit case to grant anticipatory bail in case - accordingly, Anticipatory Bail Application is rejected. (Para – 13, 14)

Application Rejected. (E-11)

List of Cases cited:

1. Subramani And Ors Vs St. of T.N. reported in (2002) 7 SCC 210
2. Shivam Vs St. of U.P. & anr., reported in AIR Online 2021 All 484

(Delivered by Hon'ble Krishan Pahal, J.)

1. Heard Sri Inder Pal Singh Tomar, learned counsel for applicant and Sri Kuldeep Singh Tomar, learned counsel for the informant as well as Sri Sunil Kumar, learned A.G.A. for State and also perused the material available on record.

2. The present application for anticipatory bail has been filed for protection in regard to FIR/Case Crime No. 262 of 2022, under Sections 147, 148, 149, 307 & 504 of I.P.C., P.S.- Khatauli, District- Muzaffar Nagar.

3. At the very outset, learned counsel for the applicant has claimed parity with co-accused Nitin Rathi, who has been granted interim protection by another Bench of this Court vide order dated 4.4.2023 passed in Criminal Misc. Anticipatory Bail Application u/s 438 Cr.P.C. No. 3367 of 2023.

4. On the other hand, learned counsel for the informant has vehemently opposed the above submission of learned counsel for the applicant on the ground that the applicant is not entitled to anticipatory bail as the anticipatory bail application of co-accused Nitin Rathi was dismissed as infructuous vide order dated 31.05.2023.

PROSECUTION STORY:

5. As per prosecution story, the co-accused persons, Charan Singh, Sopal and Sukhpal had destroyed the sugarcane crop of the field of the informant and that of his neighbours Rakesh and Vikky by ploughing it by his tractor. The matter was reported to Senior Officers. Subsequent to it, on 27.5.2022 at about 06:30 AM, the applicant along with co-accused persons Charan Singh, Sopal, Sukhpal and Nitin came to the field of the informant along with their tractor and

started ploughing it again. The informant and his brother Rupendra Kumar asked them to refrain from doing so at which the applicant and co-accused Nitin fired at them by the country made pistols which they were carrying besides hurling abuses at them thereby causing serious injuries to Rupendra (brother of the informant). On raising alarm by the informant, the villagers rushed there and saved the informant and his brother. The brother of the informant Rupendra Kumar was rushed to government hospital at Khatauli for treatment and was referred to district hospital, Muzaffar Nagar. After admitting his brother at Muzaffar Nagar, the informant lodged the FIR on the same day at 12:10 PM.

RIVAL CONTENTIONS

6. Learned counsel for the applicant has stated that there is a cross version to the present FIR which was instituted subsequently at FIR No.419 of 2022 on 20.08.2022 regarding the same date and time of the incident. Learned counsel has further stated that at this point of time, it cannot be ascertained as to which party was the aggressor, as such, the applicant is entitled for anticipatory bail. Learned counsel has also stated that the applicant is 55 years old person and one of the co-accused Charan Singh, who happens to be his father, is 78 years of age, as such, he is entitled for anticipatory bail on this ground also.

7. Learned counsel for the applicant has further submitted that the injury reports are fake and have been manufactured by the informant as another injured has been added later on. The injury report of Rupendra Kumar is fake as there are two lacerated wounds sustained by him which are as follows:-

"(i) L/W size 15 x 12 cm over lateral aspect of Rt. lower back just over Rt Iliac

crest. Bleeding present, depth not probed, muscle & soft tissue exposed (KUO), X-ray L.S. spine AP/Lat. and surgeon opinion for nature of injury, depth & type of weapon used, X-ray PBH AP View.

(ii) L/W size 3 x 0.5 cm, scalp deep over Rt. parietal area of skull 12' O clock position."

8. The Radiologist reported that multiple radio opaque shadows of variable sizes of metallic density are seen in Rt. Iliac region. Fracture of right iliac crest bone. In the supplementary report, the injury no.1 was found to be grievous in nature. The surgery was undertaken and foreign bodies were removed.

9. Learned counsel for the applicant has also stated that the informant has suppressed the genesis as he cooked up a story later on that there were radio opaque shadow seen on the body of Rupendra Kumar. To buttress his submission, he has placed much reliance upon the judgement of Apex Court passed in Subramani And Ors Vs. State of Tamil Nadu reported in (2002) 7 SCC 210 whereby the appeal was allowed and the appellants therein were acquitted from all the charges. The operative paras of the said judgement read as under:-

"29. Once it is held that the appellants did not exceed their right of private defence, it must logically follow that they cannot be convicted of the lesser offences under Sections 324 and 326 IPC, because in the same transaction and in exercise of their right of private defence they had caused injuries to some of the prosecution witnesses.

30. In the result, this appeal is allowed and the appellants are acquitted of all the charges leveled against them. The

appellants shall be released forthwith unless required in any other matter."

10. Learned counsel for the applicant has further stated that there are general allegations against all the accused persons and the co-accused Nitin Rathi has already been granted anticipatory bail.

11. Per contra, learned counsel for the informant as well as learned AGA have vehemently opposed the anticipatory bail prayer of the applicant on the ground that the anticipatory bail application of co-accused Nitin Rathi has been dismissed as infructuous vide order dated 31.5.2023. He was granted anticipatory bail as an interim measure vide order dated 4.4.2023 but the same has not been confirmed. Learned counsel has argued that the injury report indicates that injury no.1 was grievous in nature. The cross-FIR instituted after moving an application u/s 156(3) Cr.P.C. by the son of the co-accused Sukhpal indicates that the applicant and other co-accused persons were very much present at the place of occurrence at that time.

12. A bare perusal of the FIR No.419 of 2022 indicate towards the presence of the applicant at the place of occurrence. Learned counsel has also placed much reliance upon the judgement of this Court passed in Shivam Vs. State of U.P. and another, reported in AIROnline 2021 All 484, wherein it has been categorically stated that if there is a cross version, the accused persons are not entitled for anticipatory bail.

CONCLUSION:

13. The very first argument of the learned counsel for the applicant does not hold good on the ground that the

16. In view of the above, the present anticipatory bail application is accordingly, **rejected**.

(2023) 8 ILRA 692
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.08.2023

1. Rohit Tandon Vs Directorate Of Enforcement (2018) 11 SCC 46
2. Vijay Madanlal Choudhary & ors. Vs U.O.I.& ors., 2022 SCC OnLine SC 929
3. Gorakh Nath Prasad Vs St. of Bihar, (2018) 2 SCC 305
(Delivered by Hon'ble Subhash Vidyarthi, J.)

1. Heard Sri Purnendu Chakravarty Advocate, the learned Counsel for the applicant and Sri Rohit Tripathi, the learned counsel for the respondent-Directorate of Enforcement (hereinafter referred to as 'the E.D.').

2. The present bail application has been filed by the applicant with the prayer to enlarge him on bail in Session Case No. 1485/2022 in the Court of Session Judge / Special Court PMLA, Lucknow, arising out of ECIR/LKZO/05/2019, under Section 3/4 Prevention of Money Laundering Act, 2002, Police Station Directorate of Enforcement, District Lucknow.

3. The E.D. registered ECIR/LKZO/05/2019 on 29.06.2019 when Senior Superintendent of Police, Gautam Budh Nagar had forwarded copies of 25 F.I.Rs. registered under various Sections, including Sections 406, 420, 467, 468, 471, 506 IPC against M/s Garvit Innovative Promoters Ltd. (GIPL) and its promoter Sri Sanjay Bhati and other unknown persons / entities between 12.02.2019 and 25.04.2019, on the allegations that the aforesaid Company had lured the public to invest in its schemes with the promise of good returns, but the Company did not fulfill its promise and did not return even the invested amounts.

4. The applicant is not named as an accused in any of the aforesaid FIRs or in the ECIR.

5. The E.D. recorded the statements of the applicant under Section 50 of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as 'the PMLA'), on 22.10.2019, 23.10.2019 and 20.10.2020.

6. The ED filed a complaint on 17.02.2021 against one Manoj Tyagi.

7. The applicant's name was included as an accused person for the first time in the supplementary complaint filed by the E.D. on 13.01.2022 stating that statements of some of the complainants in the F.I.Rs. were recorded under Section 50 of the PMLA and gist of their statements is that they had invested in the Bikebot scheme of GIPL and did not receive the returns promised by the company.

8. The applicant was arrested on 21.07.2022. House No. B-2/138, Vijay Khand, Gomti Nagar, Lucknow worth Rs.6,50,00,000/- belonging to the applicant has been seized by the E.D.

9. Statement of the main accused Sanjay Bhati, a promoter and director of GIPL, was recorded on 04.11.2019, 22.11.2019 and 23.11.2019. He stated that since incorporation of GIPL, there was negligible business and almost nil income till 2016. Only a few plots of land were bought by the company. In Nov-Dec-2016, they started working on an app named BIKEBOT. In 2017, they bought bikes and introduced them as bike taxis. He stated that the applicant Badri Narayan Tiwari was one of the key decision makers for property purchase and development, alongwith Montu Bhasin, Anil Saha and Vijender Hudda.

10. Sanjay Bhati further stated that all transactions with accounts Section were looked after by the team of Noble Cooperative Bank comprising of V. K. Sharma, his son Govind and other bank officials. All works related to running of vehicles, franchisees and registration / delivery of bikes were looked after by Vijaypal Kasana. The initial capital for purchasing bikes was invested by him and later other people were invited to invest in

the bikes. However, due to difficulties in registration of bikes, they started accepting money from people in the account of the company and gave sale letters to them after purchasing the bikes. The investment plans of Bikebot were conceptualized by Sanjay Bhati, Rajesh Bhardwaj, Karanpal Singh, Atul Thakur and Virendra Malik between Jan 2017 to June 2017. Money from Bikebot investors was taken through bank accounts only. In the event of system failures or after Noble Bank stepped in August, cash was also accepted. However, payouts were made through bank accounts only. Cash counter in the company was handled by Noble Bank staff only. Cash collected at GIPL was transferred to Noble Bank and Grand Venice Mall from where it was invested in projects of Noble Buildtech, Grand Venice and Saha. He further submitted that cash was given to the applicant on two occasions.

11. Regarding the applicant, Sanjay Bhati stated that the applicant, Atul Mishra, Manoj Tyagi and Vijender Hooda had introduced him to V. K. Sharma, Managing Director & C.E.O. of Noble Co-op Bank, for selling the Noble Co-op Bank for Rs. 50 Crores. The decisions regarding payments were usually taken by V. K. Sharma, Vijender Hooda, Manoj Tyagi and the applicant.

12. Sanjay Bhati stated that there were around 1,70,000 investors in Bikebot who had paid Rs. 2,800 Crores approximately and approximately Rs. 1800- 2000 Crores had been returned to them and about 10,000 bikes had been purchased. E-bikes were launched on 11.01.2019 at New Delhi and the applicant was also present at that time. Sanjay Bhati further stated that accountant Chauhan and CA team reported to Balwant. Technical

aspects viz. GPS, app development, customer care, bike operations, etc. were looked after by Tarun Sharma. Property development & purchase was looked after by Anil Saha, B. N. Tiwari (the applicant), Vijendra Hudda and Montu (Satinder) Bhasin, etc.

13. As regards, the profit model of Bikebot, Sanjay Bhati claimed that on each bike, the company was saving Rs. 12,000/- even after meeting the registration, accessories, insurance, etc. Further, after one year, the bike would become the asset of the company. The rental plan for bikes started at Rs.10/- for the 1st Km and subsequently Rs. 4/- per km + Re.1/- per minute for travelling time and Re.1/- per min extra for the waiting time.

14. Statements of Manoj Kumar Tyagi were recorded under Section 50 of PMLA on 29.08.2019, 30.08.2019, 12.03.2020 and 04.09.2020 wherein he stated that he was an Additional Director in Independent TV Ltd. from 05.01.2016 to 15.12.2018. He was also working with M/s Pantel Technologies Pvt. Ltd. and Prema Services Pvt. Ltd. on consolidated salary basis. In addition, he was a director in Pimex Plastic (P) Ltd., Independent TV Ltd., A-one News, News Chanel Pimex Broadcast Pvt. Ltd., Time Broadcast Pvt. Ltd., Pantel Technologies Pvt. Ltd., Prema Services Pvt. Ltd., Pimex Broadcast (P) Ltd., IProf Learning Solution India Pvt. Ltd., Ethics Media Trust (P) Ltd., Macro Commerce (P) Ltd. In the year 2017, Vijender Singh took over Independent TV Ltd. (which was previously known as Reliance Big TV Ltd.) through Pantel Technologies Pvt. Ltd., from Reliance Group. He became an Additional Director in Independent TV Ltd. on 05.01.2018. He became a director in M/s Pantel Technologies Pvt. Ltd on 20.01.2015

and resigned in Dec-2018. Vijender Singh had introduced Sanjay Bhati to him as Sanjay Bhati was acquiring the companies of Vijender Singh. Vijender Singh and Sanjay Bhati told him about GIPL. He had met the applicant B. N. Tiwari in March-2018 at ITVL office in Noida when Vijender Singh required funds for ITVL operations and offered the applicant to invest in ITVL but the applicant did not invest any money then. Later when the companies of Vijender Singh were acquired by Sanjay Bhati, the applicant started looking after those companies and exercised great control over them after Sanjay Bhati resigned.

15. Manoj Tyagi also submitted copies of Share Purchase Agreement dated 31.05.2018 entered into between himself, Vijender Singh, Sanjay Bhati, Sachin Bhati and the companies viz. Pantel Technologies Pvt. Ltd., Independent TV Ltd., Prema Services Pvt. Ltd., Pimex Broadcast Pvt. Ltd. and Pimex Plastics Pvt. Ltd., etc. and a settlement agreement was entered into between the aforesaid parties, from which the E.D. came to know that all shareholding in the abovementioned companies stood transferred to Sanjay Bhati and his brother Sachin Bhati for a total consideration of Rs. 135.00 Crores. Vijender Singh and Manoj Tyagi remained on the Board of Directors of these companies till 15.12.2018. There were differences and disputes regarding payment of the consideration for shareholding and the parties had gone for Mediation in Delhi High Court in Dec-2018 and had arrived at a settlement agreement on 29.01.2019.

16. The applicant's statement was recorded under Section 50 of PMLA on 22.10.2019, 23.10.2019 and 20.03.2020 wherein he inter-alia stated that Mars

Envirotech Limited was engaged in construction and operation of solid waste management / waste to energy plants. Vijender Singh had introduced the applicant to Sanjay Bhati in Sep-2018 and had told that he was doing business with Sanjay Bhati and Sanjay Bhati needed electric bikes immediately. Sanjay Bhati had also said that there was too much pollution in Delhi and Ghaziabad due to burning of "puwal" and waste materials and he wanted to install a mini power plant in his fields in Dadri. The applicant had talked to Sanjay Bhati a couple of times regarding the supply of Garvit branded e-bikes to be manufactured by the applicant's company Accord Hydraulics Pvt. Ltd. An agreement was entered into between Accord Hydraulics and GIPL for supply of e-bikes. Another agreement was entered into between GIPL and Mars Envirotech Pvt. Ltd. for supply of biomass/ multi fuel Power Plant for which G15IPL had paid Rs. 3 Crores to Mars Envirotech. Supply of equipment was made in excess of the payment received but since balance payment was not received, further supply was not done. Pimex Plastics Pvt. Ltd. had purchased shares of Mars Envirotech Ltd. for Rs. 5 Crores. Vijender Singh had assured the applicant that after taking shares of the applicant's companies, he will expand the business and give support to develop it as a brand. Vijender Singh had also induced the applicant to become a director and operate Independent T.V. Ltd. However, when he became director of Pantel Technology Pvt. Ltd. on 03.04.2020 and read the Internal Audit Report of Independent T.V. Ltd. and discussed with the staff, he came to know that there were no documents in respect of payments made to third parties and nobody was refunding the money and all such companies were shell companies. Therefore, he resigned

from directorship. When someone informed Vijender Singh that the applicant had resigned from the companies and was going to lodge an F.I.R., Vijender Singh had called the applicant through whatsapp and had abused him. After this episode, the applicant's relations with Vijender Singh got sour. As per the applicant's knowledge, Vijender Singh had taken citizenship of Malta and was residing there. The applicant further stated that Vijender Singh wanted to take shares of his companies and, therefore, Independent TV Ltd. had deposited Rs. 7.50 Crores in the account of his company under an agreement. After adding interest thereon, shares for a total of Rs. 7.70 Crores shares were issued to Independent TV Ltd. and the requisite information was given to the Registrar of Companies. Other than this, there was no other transaction between him, his family and ITVL. The applicant stated that his sons became directors in the ITVL, but when the correct particulars were not provided to them, they had resigned on same day after remaining directors for merely 6 hours.

17. The applicant stated that he became a director of Pantel Technologies Pvt. Ltd., but when he came to know about the company, he resigned immediately, only after 03 hours. He had joined as a director in Pantel Mobility Health Pvt. Ltd. on assurance of Vijender Singh, but when in the provisional balance sheet of 31.03.2019 was prepared, he got to know that the company was in losses of approx. 14-15 Crores which was very high and, therefore, he resigned.

18. The E.D. has alleged in the Supplementary Complaint that the applicant was close to Sanjay Bhati and became his consultant and remained connected to GIPL. After Sanjay Bhati

resigned, the applicant's influence increased with continued interaction with Karanpal and other associates of Sanjay Bhati. As per Sanjay Bhati himself, the applicant was one of the key decision makers for property purchase and development of GIPL. Also, cash collected at GIPL office was given twice to the applicant. After accounts were opened at Noble Cooperative Bank, the decisions regarding payments were usually taken by V. K. Sharma, Vijender Hooda, Manoj Tyagi and the applicant, who used to present the cheques to Sanjay Bhati for his signatures.

19. The E.D. has further alleged that the Special Audit was conducted at the instance of the applicant, but he merely provided the Tally data and bank transaction details and he did not provide all the relevant documents for the audit.

20. The complaint further alleges that after December 2018, the entire management of ITVL was being carried out by the applicant as a close confidante of Mr. Sanjay Bhati. The applicant was introduced by the Management of GIPL in the launch event of e-bikes of Bikebot, as an investment advisor and trustee of the Independent TV Ltd. and nominee of Sanjay Bhati. All employees of ITVL were supposed to report to the applicant, who was actively participating in the responsibility of arranging fresh funds for Independent TV Ltd.

21. The E.D. contends that most of the contentions of the applicant in his statements are in stark contrast to the revelations from bank and the data given by the registrar of Companies and the assertions of other persons examined during the course of investigation in the

instant matter. The applicant had initially concealed that he was a director in Pantel Mobility Health Pvt. Ltd. and Iprof Learning Solutions Pvt. Ltd. The E.D. has further contended that the applicant's claim that he had joined Independent TV Ltd just for a day, appears to be far from true.

22. Rs. 25 Crores in total have been transferred to M/s Mars Envirotech Ltd. from M/s Pantel Technologies Pvt. Ltd., M/s Independent TV Ltd. and M/s Pimex Broadcast Pvt. Ltd. and the same have been portrayed as payment towards allotment of compulsorily convertible preference shares (CCPS) although the allotment process is flawed and manipulated and all relevant documents have not been submitted by the applicant during his examination. Even the appointment of the Chartered Accountant for valuation of the shares of Mars Envirotech Ltd. was in June-2019 i.e. much after the allotment process was over. The MCA filings were also done much later.

23. The E.D. claims that the funds so received were used for purchase of a house in Lucknow and a power plant in Nashik, Maharashtra. In addition, funds were transferred to a newly incorporated company named Axle Energy Pvt. Ltd. and ultimately used for purchase of a plot in Lucknow which are nothing but proceeds of crime generated by Sanjay Bhati and GIPL and laundered with the active connivance of the applicant using companies under his control. As per the E.D., upon a scrutiny of the data obtained from the Ministry of Corporate Affairs it was observed that the applicant had deliberately alienated himself from such companies so as to avoid investigation.

24. The E.D. asserts that on 06.07.2018, Independent TV Ltd. had

transferred Rs.5.00 Crores to M/s Pantel Mobility Health Pvt. Ltd. On the very same date, Rs. 2.75 Crores and Rs. 2.00 Crores were transferred towards payment for acquisition of immovable property situated at H-67, Sector- 63, Noida. This property was sold off to one M/s Cimco Projects Ltd., ostensibly on the directions of the applicant through Pushpendra Singh, who remained a Director in the company and resigned immediately after the sale was effected.

25. Sri. Purnendu Chakravarty, the learned Counsel for the applicant has submitted that the E.D. had registered the ECIR on 29.06.2019 and statement of applicant was recorded under Section 50 PMLA on 22.10.2019, 23.10.2019 and 20.03.2020, but he was not taken into custody. The applicant was taken in custody in connection with the scheduled offences on 26.02.2021, and although the applicant was named as accused in supplementary compliant filed on 30.01.2022, the E.D. did not seek his custody when the applicant was already in custody. The E.D. took the applicant into custody only on 21.07.2022, after he was granted bail by the Hon'ble Supreme Court on 13.07.2022.

26. Sri. Chakravarty submitted that one of the co-accused persons Manoj Tyagi, has been granted bail by means of an order dated 26.04.2023 passed by this Court in Criminal Miscellaneous Bail Application No. 6190 of 2022. Another co-accused Vijendra Singh, who has also been made an accused in the supplementary compliant, has been granted anticipatory bail by means of an order dated 20.05.2023 passed by the trial court on the main ground that the aforesaid co-accused was not arrested under Section 19 of the PMLA.

The learned Counsel for the applicant has submitted that the applicant is also entitled for the bail on the ground of parity, as one person has been granted Anticipatory bail and other person has been granted bail, whereas the applicant is languishing in jail since 21.07.2022 and the trial has not commenced till date. Trial will take many years to be complete because many of the named accused persons have not appeared yet or they have not been arrested yet. Investigation is still continuing. Documents running into 5,000 pages have been filed with the supplementary Complaint, which are required to be proved before the Trial Court and 11 witnesses have been named in the supplementary compliant.

27. The learned Counsel for the applicant has further submitted that the applicant is not a signatory in any of the bank accounts and he has been implicated because of allotment of Cumulative Compulsory Convertible Preference Share (CCCPS) to M/S Mars Envirotech Limited. The equity shares CCCPS have been provided in accordance with the provisions of Sections 23, 42, 55, 62(1)(c) of the Companies Act 2013, read with Companies Prospectus and Allotment of Scrutiny Rules 2014 and the Companies Share Capital and Debenture Rules 2014. The CCCPS are being issued in accordance with the Rule 9 of the Companies Share Capital and Debenture Rules 2014 as per share holder agreement of the companies.

28. The learned Counsel for the applicant has submitted that if any irregularity has been committed in allotment of shares under CCCPS, the same would lie within the jurisdiction of Ministry of Corporate Affairs and NCLT and any discrepancy in the allotment of shares or any tax evasion would not give

rise to proceedings of PMLA against applicant.

29. Opposing the bail application, Sri Rohit Tripathi, the learned counsel for the respondent - Directorate of Enforcement has submitted that the allegations in the FIR and the resultant charge-sheets was that the companies involved in the wrong doing had solicited and accepted deposits from public under several money multiplier schemes, of which the Bikebot scheme was the most publicized and popular. Under the scheme unrealistic and exorbitant returns were promised without there being any corresponding resource generating and meaningful business. Essentially, it was a ponzi scheme which was bound to fail. When the investors demanded the returns, they were handed over cheques, which were dishonored. As per the statements of the witnesses, the applicant was one of the key decision makers for property purchase and GIPL and appropriated the cash at the GIPL office. The applicant was involved in decision regarding payments made from the GIPL's account in the Nobel Cooperative Bank. A special audit of one of the companies was conducted at the behest of the applicant, who deliberately withheld the relevant documents from the chartered Accountant, who is a witness in the matter. After December, 2018, the applicant managed the affairs of the Independent TV Ltd. on behalf of Sanjay Bhati as the latter's close confidante.

30. Sri Tripathi has submitted that there is evidence to demonstrate that the applicant was introduced as an investment advisor and the Trustee of the ITV and nominee of the Mr.Sanjay Bhati at the companies event on 19/20.01.2019. All the employees were mandated to report to the applicant. As per the banking records, Mars

Envirotech Ltd., of which the applicant was a Director, had received money directly as well, though the receipts were shown to be part of intermediate transactions by portraying the same as payments towards allotment of Cumulative Compulsory Convertible Preference Shares. Thus the applicant was a direct beneficiary of the proceeds of crime.

31. Relying upon the law laid down by the Hon'ble Supreme Court in the judgment reported in (2018) 11 SCC 46, **Rohit Tandon Versus Directorate Of Enforcement**, Sri. Tripathi has submitted that the applicant / accused in a money laundering case must succeed in overcoming the threshold of the rigors of Section 45 of the PMLA.

32. Sri. Tripathi has further submitted that the main accused Sanjay Bhati is absconding and there is a reasonable and well founded apprehension of the applicant fleeing the course of justice if he is released on bail.

33. I have considered the aforesaid facts and circumstances of the case and the submissions made by the learned counsel for the parties. In **Rohit Tondan** (supra), the Hon'ble Supreme Court has held that *"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 subsequent 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"*.

34. Section 2 (u) of the PMLA defines 'proceeds of crime' as follows:-

(u) "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad;

Explanation.—For the removal of doubts, it is hereby clarified that "proceeds of crime" include property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence;

35. In **Vijay Madanlal Choudhary and others versus Union of India and others**, 2022 SCC OnLine SC 929, the Hon'ble Supreme Court held that: -

251. The "proceeds of crime" being the core of the ingredients constituting the offence of money-laundering, that expression needs to be construed strictly. In that, all properties recovered or attached by the investigating agency in connection with the criminal activity relating to a scheduled offence under the general law cannot be regarded as proceeds of crime. There may be cases where the property involved in the commission of scheduled offence attached by the investigating agency dealing with that offence, cannot be wholly or partly regarded as proceeds of crime within the meaning of Section 2(1)(u) of the 2002 Act — so long as the whole or some portion of the property has been derived or obtained by any person "as a result of" criminal activity relating to the

stated scheduled offence. To be proceeds of crime, therefore, the property must be derived or obtained, directly or indirectly, "as a result of" criminal activity relating to a scheduled offence. To put it differently, the vehicle used in commission of scheduled offence may be attached as property in the concerned case (crime), it may still not be proceeds of crime within the meaning of Section 2(1)(u) of the 2002 Act. Similarly, possession of unaccounted property acquired by legal means may be actionable for tax violation and yet, will not be regarded as proceeds of crime unless the concerned tax legislation prescribes such violation as an offence and such offence is included in the Schedule of the 2002 Act. For being regarded as proceeds of crime, the property associated with the scheduled offence must have been derived or obtained by a person "as a result of" criminal activity relating to the concerned scheduled offence. This distinction must be borne in mind while reckoning any property referred to in the scheduled offence as proceeds of crime for the purpose of the 2002 Act. Dealing with proceeds of crime by way of any process or activity constitutes offence of money-laundering under Section 3 of the Act."

* * *

284. In other words, the Authority under the 2002 Act, is to prosecute a person for offence of money-laundering only if it has reason to believe, which is required to be recorded in writing that the person is in possession of "proceeds of crime". Only if that belief is further supported by tangible and credible evidence indicative of involvement of the person concerned in any process or activity connected with the proceeds of crime, action under the Act can be taken forward for attachment and confiscation of proceeds of crime and until vesting thereof

in the Central Government, such process initiated would be a standalone process.

36. The initial action of the main accused Sanjay Bhati was of launching a Bikebot Scheme, in which around 1,70,000 persons had invested Rs. 2,800 Crores approximately. About 10,000 bikes had been purchased by the Company. E-bikes were launched on 11.01.2019 at New Delhi and thereafter bikes had started operating in several other cities also.

37. The E.D. claims that the BIKEBOT scheme promised unrealistic and exorbitant returns, without there being any corresponding resource generating and meaningful business. E.D. claims that it was a ponzi scheme which was bound to fail. However, Sanjay Bhati has stated that on each bike, the company would have saved Rs. 12,000/- even after meeting the expenses of registration, accessories, insurance, etc. and after one year, the bike would become the asset of the company. The rental plan for bikes started at Rs.10/- for the 1st Km and subsequently Rs.4/- per km + Re.1/- per minute for travelling time and Re.1/- per minute extra for the waiting time.

38. As per the statement of the main accused Sanjay Bhati, even after failure of the scheme, approximately Rs. 1800- 2000 Crores had been returned to the investors. The role of the applicant is alleged to be property development & purchase. There is nothing on record to prima facie establish that the applicant was instrumental behind planning the scheme.

39. It is said that cash collected at GIPL office was given twice to the applicant but nothing has been said about

the amount of cash paid to the applicant or the nature of the payment.

40. The E.D. claims that Rs. 25 Crores have been transferred to M/s Mars Envirotech Ltd. towards allotment of Cumulative Compulsorily Convertible Preference Shares (CCCPS) but the allotment process is flawed and manipulated. The applicant claims that CCCPS have been provided in accordance with the provisions of Sections 23, 42, 55, 62(1)(c) of the Companies Act 2013, read with Companies Prospectus and Allotment of Scrutiny Rules 2014 and the Companies Share Capital and Debenture Rules 2014. The CCCPS are being issued as per Rule 9 of Companies Share Capital and Debenture Rules 2014 as per share holder agreement of companies.

41. The learned Counsel for the E.D. has filed his written submissions, but he has not given any reply to the submission made on behalf of the applicant that even if any irregularity has been committed in allotment of shares under CCCPS, the same would lie within the jurisdiction of Ministry of Corporate Affairs and NCLT and any discrepancy in the allotment of shares or any tax evasion would not give rise to proceedings of PMLA against applicant.

42. It has been held in **Vijay Madanlal Choudhary** (Supra), that possession of unaccounted property acquired by legal means may be actionable for tax violation and yet, will not be regarded as proceeds of crime. Applying the same principle, unless the irregularities in transfer of shares are an offence under any law and such offence is included in the Schedule of the 2002 Act, the money involved in such a transfer cannot be termed as 'proceeds of crime'.

43. As has been held in **Rohit Tandon** (supra), this Court is not required to record the finding of innocence for granting bail. The facts discussed above clearly make out a prima facie satisfaction required for grant of bail to the applicant.

44. PMLA contains stringent provisions like Section 24 providing for a reverse burden of proof and Section 45 laying down additional conditions for grant of bail only after recording a prima facie satisfaction of innocence of the accused. While dealing with similar statutory provisions contained in the Narcotic Drugs and Psychotropic Substances Act, in **Gorakh Nath Prasad v. State of Bihar**, (2018) 2 SCC 305, the Hon'ble Supreme Court held that: -

“5.The NDPS Act provides for a reverse burden of proof upon the accused, contrary to the normal rule of criminal jurisprudence for presumption of innocence unless proved guilty. This shall not dispense with the requirement of the prosecution to having first establish a prima facie case, only whereafter the burden will shift to the accused. The mere registration of a case under the Act will not ipso facto shift the burden on to the accused from the very inception. Compliance with statutory requirements and procedures shall have to be strict and the scrutiny stringent. If there is any iota of doubt the benefit shall have to be given to the accused.”

45. Prima facie it appears that the applicant has been implicated in the present case merely on the basis of suspicion. It is a settled principle of law that however strong a suspicion may be, it cannot take place of a proof beyond reasonable doubt.

46. This fact is also relevant that the E.D. had registered the ECIR on 29.06.2019 and statement of applicant was recorded under Section 50 PMLA on 22.10.2019, 23.10.2019 and 20.03.2020, but he was not taken into custody. The applicant remained in custody in connection with the scheduled offences since 26.02.2021, and although the applicant was named as accused in supplementary compliant filed on 30.01.2022, the E.D. did not seek his custody even during that period. Criminal Miscellaneous Bail Application Nos. 18772 of 2021, 18775 of 2021, 19022 of 2021, 19214 of 2021 and 19379 of 2021 filed by the applicant for grant of bail in scheduled offences had been rejected by this Court, but he was granted bail in all the scheduled offences by means of an order dated 13.07.2022 passed by the Hon'ble Supreme Court, applying the principle of parity, though the Hon'ble Supreme Court recorded that the applicant's role may be overlapping or somewhat different. The E.D. took the applicant into custody on 21.07.2022, only after he was granted bail by the Hon'ble Supreme Court on 13.07.2022, after having spent about one and a half years in custody and the investigation of the case already stood completed long ago and there was no need for his custodial interrogation.

47. The trial is likely to take many years to conclude because many of the named accused persons have not appeared yet or they have not been arrested yet and 11 witnesses are to be examined by the Prosecution and documents running into 5,000 pages have to be proved.

48. Although the E.D. has expressed an apprehension that the applicant would again indulge in commission of similar

offence in case he is released on bail, the applicant has no previous criminal history, apart from the predicate offences, and no material has been placed in the counter affidavit which may give rise to a reasonable basis for the aforesaid apprehension.

49. The applicant is said to be one of the key decision makers for purchase of property by GIPL, alongwith Vijender Singh and Vijender Singh has already been granted bail and, therefore, the applicant is also entitled to be released on bail on the ground of parity.

50. Keeping in view the aforesaid facts and circumstances of the case, I am of the view that the applicant is also entitled to be released on bail. Accordingly, he the bail application stands allowed.

51. Let the applicant **Badri Narayan Tiwari** be released on bail in Session Case No. 1485/2022 in the Court of Session Judge / Special Court PMLA, Lucknow, arising out of ECIR/LKZO/05/2019, under Section 3/4 Prevention of Money Laundering Act, 2002, Police Station Directorate of Enforcement, District Lucknow, on furnishing a bail bond and two sureties each in the like amount to the satisfaction of Court concerned, subject to following conditions:-

(i) the applicant shall not tamper with the prosecution evidence;

(ii) the applicant shall not pressurize the prosecution witnesses;

(iii) the applicant shall appear on each and every date fixed by the trial court, unless his personal appearance is exempted.

(iv) that the applicant will surrender his passport before the trial Court to ensure

that he cannot go outside India without prior permission of the Court.

52. In case of breach of any of the above conditions, the prosecution shall be at liberty to move an application for cancellation of the bail.

(2023) 8 ILRA 703

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 20.07.2023

BEFORE

THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Crl. Misc. Anticipatory Bail Application No. 7420
of 2023
(U/s 438 Cr.P.C)

Brijesh	...Applicant
Versus	
State of U.P. & Anr.	...Respondents

Counsel for the Applicant:
Ms. Mamta Singh

Counsel for the Respondent:
G.A.

Criminal Law - Criminal Procedure Code, 1973 – Sections 82, 83, 161, 164, 173(2) & 438 - Indian Penal Code, 1860 - Sections 174(A), 323, 328, 376, 504 & 506 – Scheduled Castes And Scheduled Tribes Prevention Of Atrocities Act, 1989 - Sections 3(2)(v), 18, 18-A & 18-A(2) - Application for Anticipatory Bail – offence of rape and threat - FIR - the applicant sought protection from arrest - allegations include serious offenses such as rape, criminal intimidation, and administering intoxicants – prosecution argued that anticipatory bail application was not maintainable due to the bar created by Sections 18 and 18A of the Act, 1989 which prohibits the application of Section 438 in cases involving offenses under this Act - The applicant contended that the alleged offense was not committed on account of the victim's caste and that he was unaware of her belonging

to the SC/ST community - applicability of the provisions – charge sheet – cognizance has been taken by trial court – court finds that, prima facie from perusal of contents of the FIR and St.ment of prosecutrix u/s 161 & 164 there is no allegations to constitute any offence under the Act, 1989 – charge sheet submitted by the IO also does not reveals as to on what basis the said Police report u/s 173(2) Cr.P.C. was submitted under the provisions of Act, 1989 – held – there is no bar to move such an application before this court in view of the law laid down by the Apex Court – However, anticipatory bail granted can, depending on the conduct and behaviour of the accused, continue after filing of the Charge sheet till end of trial – Moreso, courts ought to be generally, guided by considerations such as the nature and gravity of the offences – Hence, considering the role attributed to the applicant and the facts of the case, and taking into account the enormity of the crime, it is not a fit case to grant anticipatory bail – accordingly, application is rejected. (Para – 9, 19, 20, 21)

Application Rejected. (E-11)

List of Cases cited:

1. Prathvi Raj Chauhan Vs U.O.I., 2020 Law Suit (SC) 143
2. Subhash Kashinath Mahajan Vs St. of Mah., (2018) 6 SCC 454
3. Sushila Aggarwal & ors. Vs St. (NCT of Delhi) & anr., (2020) 5 SCC 1

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

1. Heard learned counsel for the applicant, Shri Pankaj Kumar Tripathi, learned A.G.A. for the State and perused the record.

2. Apprehending his arrest in Case Crime No. 133 of 2022, under Sections 376, 323, 504, 506, 328 IPC and 3 (2) (V) of Scheduled Castes and the Scheduled

Tribes (Prevention of Atrocities) Act, 1989 Police Station-Civil Lines, District-Prayagraj the present anticipatory bail application has been moved by the applicant **Brijesh**.

3. The prosecution story as unfolded in the FIR is that the prosecutrix was intending to marry with co-accused Vishal Gupta and in this regard she was persuaded by the present applicant to go to Allahabad High Court with him and accordingly he took her to a hotel at Allahabad and thereafter after administering some intoxicant substance to her, in an unconscious state he committed rape with the prosecutrix and due to shame she did not disclose this incident to anyone. When co-accused Vishal Gupta came out from jail and the prosecutrix went to his home with the present applicant they kept her there for two days and again rape was committed to her. Subsequently Vishal Gupta refused to marry her and both of them threatened her for life. FIR was lodged on 30.3.2022 and investigation started, which culminated into charge sheet.

Applicability of Bar Created by Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 -

4. At the very outset learned A.G.A. has made a preliminary objection that the present anticipatory bail application moved under Sections 376, 323, 504, 506, 328 IPC and 3 (2) (V) of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 is not maintainable as Sections 18 & 18A (2) of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 specifically provide that :

“18. Section 438 of the Code not to apply to persons committing an offence

under the Act- Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act”.

“18 A. (2) The provisions of Section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court”.

5. It is submitted that in view of the provisions of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 above mentioned, the present anticipatory bail application is not maintainable.

6. Contending to that the learned counsel for the applicant has vehemently submitted that from perusal of the entire record no where even any whisper is found that the applicant at any stage of the case was known to the fact that the victim belongs to SC/ST community. It is further submitted that the alleged offence was not committed on account of the prosecutrix being a member of SC/ST community. Even in the statement of prosecutrix made under sections 161 or 164 Cr.P.C. or of other relevant witnesses made to the I.O there is no such averment that the prosecutrix belongs to SC/ST community and the accused was aware of that, hence the barring provisions of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 do not apply to this case.

7. In support of her contention learned counsel for the applicant has relied upon the judgement of the Hon'ble Apex Court passed in **Prathvi Raj Chauhan Vs. Union of India 2020 Law Suit (SC)143** wherein the law propounded by the

Hon'ble Apex Court is that if the complaint does not make out a prima facie case for applicability of the provisions of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 the bar created by Sections 18 and 18 A of the said Act does not apply. Likewise, observations made in **Subhash Kashinath Mahajan V. State of Maharashtra (2018) 6 SCC 454** in almost similar background also expound the same principle.

8. Section 3 (2)(v) Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (as substituted by Act 1 of 2016) provides that:

“Section 3(2) whoever, not being a member of the Scheduled Castes and Schedule Tribes”,- “(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 knowing 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”.

9. In the present case although the charge sheet has been submitted by the I.O. before the Court and cognizance has been taken under sections 376, 323, 504, 506, 328 IPC and 3 (2) (V) of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 but prima facie there is no allegation to constitute any offence under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. Even in the FIR there is no mentioning of the fact that the prosecutrix belongs to SC/ST community. This Court finds an opportunity to peruse the statements made by the prosecutrix under Sections 161 and 164 Cr.P.C. wherein

nowhere it has been stated by the prosecutrix that she belongs to SC/ST community and she has not even been interrogated on this point. At the time of her medical examination the prosecutrix did not disclose this fact before the doctor as well. The charge sheet submitted by the I.O. also does not reveal as to on what basis the said police report under Section 173 (2) Cr.P.C. was submitted under the provisions of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. Whether the alleged offence was committed by the applicant knowing this fact that the prosecutrix belongs to SC/ST community was the key question to bring the case under the cover of the provisions of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 but not even an iota of evidence is available on record in this regard. In such a situation in my view so far as the present anticipatory bail application is concerned there is no bar to move such an application before this Court in view of the law laid down in the cases of Prathvi Raj Chauhan (supra) and Subhash Kashinath Mahajan (supra).

Proclaimed Offenders Whether entitled for Anticipatory Bail -

10. Another preliminary objection raised by the learned counsel for the State is to the effect that the accused has been declared a proclaimed offender and on this ground also his prayer for anticipatory bail, can not be countenanced.

11. Expostulating this objection, the learned counsel for the applicant has urged that although a process under Section 82 Cr.P.C. was issued against the applicant and he has been declared a proclaimed offender by the Court and a process under Section

83 Cr.P.C. was also subsequently issued against him but since he was engaged in taking shelter of the Court of law by way of several legal proceedings and in the interregnum period such coercive processes were issued against him, he cannot be debarred from taking protection from arrest by way of anticipatory bail.

12. A perusal of the record reveals that the first anticipatory bail application was moved by the applicant before the Sessions Judge, Prayagraj on 21.10.2022 which was rejected by the said Court on 15.12.2022. In the charge sheet submitted against the applicant, the I.O. has mentioned that on 25.11.2022 process under Section 82 Cr.P.C. was ordered to be initiated under the instructions of the Court and it explicitly shows that process under Section 82 Cr.P.C. was issued against the applicant during pendency of the first anticipatory bail application before the Sessions Court, Prayagraj. The record further reveals that the order for proclamation was passed by the Court on 2.12.2022 and the said order was also challenged before this Court by way of Cr. Appeal No. 9977 of 2022, which was filed on 12.12.2022 but the same was withdrawn on 20.12.2022. In the aforesaid appeal the factum of issuance of process under Section 82 Cr.P.C. was also disclosed.

13. It is noteworthy that in continuation of the aforesaid process under Section 82 Cr.P.C. issued against the applicant Case Crime No. 43 of 2023 under Section 174 (A) I.P.C. was also registered against him. It also reflects from perusal of the record that after rejection of first anticipatory bail application on 15.12.2022, anticipatory bail was granted to the present applicant in Cr. Misc. Anticipatory Bail U/S 438 Cr.P.C. No. 234 of 2023 by the co-

ordinate Bench of this Court vide order dated 22.3.2023 although a process under Section 83 Cr.P.C. was already issued against the applicant on 24.02.2023 and attachment of his property had also taken place on 4.3.2023 as reflects from the perusal of the record, whereas he was already granted anticipatory bail till the submission of the police report under Section 173 (2) Cr.P.C. by the order dated 22.3.2023 above mentioned. The charge sheet in this matter was filed and cognizance was taken by the Court concerned on 9.5.2023 and straightway non-bailable warrant was issued on the same day by the Court concerned but in the meanwhile after submission of the charge sheet anticipatory bail application was moved before the Court concerned, which was rejected on 12.6.2023 and subsequently the present anticipatory bail application was moved before this Court on 28.6.2023. Hence, it is discernible that the applicant has been taking legal recourse and he was not absconding from the clutches of the Court or wilfully avoiding the process of the Court but he was making sincere efforts to get protection before different legal forums.

14. The Hon'ble Apex Court in the case of **Lavesh vs. State (NCT of Delhi), (2012) 8 Supreme Court Cases 730**, referred in **Prem Shankar Prasad Versus State of Bihar and Another, 2021 SCC OnLine Supreme Court 955** and relied upon by the learned counsel for the applicant has laid down the relevant law on this point and paragraph 12 of the said decision is as under :

"12. From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and

declared as "absconder". Normally, when the accused is "absconding" and declared as a "proclaimed offender", there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code is not entitled to the relief of anticipatory bail."

15. From the aforesaid dictum of law, it can safely be held that it is a normal rule that when an accused is absconding and declared as proclaimed offender, there is no question of granting anticipatory bail to him but it is not a universal rule because if the bar is made absolute, it is thereby meant that if an accused is absconding and has been declared proclaimed offender, he has no occasion to say anything to defend himself as to in what compelling circumstances he could not appear before the Court and was declared as proclaimed offender and that is the reason there is no bar to move anticipatory bail application in case the accused has been declared a proclaimed offender but, however, if he is unable to satisfy the Court regarding his bonafide, the law on the point will be applicable to him and anticipatory bail cannot be granted to him, as he is a proclaimed offender. So far as the present case is concerned, from the perusal of the record it appears that to avoid summons of the Court and to appear before the Court in compliance thereof, was not a wilful default on the part of the applicant and the coercive processes were issued against him during the interregnum period when he was engaged in adopting legal recourse to defend himself.

16. In the peculiar facts and circumstances, the applicant cannot be debarred to move an application for

anticipatory bail and the coercive processes issued against him also create no bar in considering the same.

Factual Matrix of the matter-

17. So far as the factual aspect of the matter is concerned, the prosecutrix in her statement under Section 161 and 164 Cr.P.C. has categorically stated about the guilt of the applicant. It is noteworthy that co-accused Vishal Gupta has already been exonerated in the matter and no charge sheet has been submitted against him as the Investigating Officer found no evidence against him but at the same time sufficient evidence was collected against the present applicant. It is a case of rape with the poor prosecutrix by the applicant by taking advantage of her belief and trust. The applicant cannot be given benefit of this fact that since charge sheet has been submitted and he was already been granted anticipatory bail till submission of the police report under Section 173 (2) Cr.P.C. and now no custodial interrogation is required, hence he is entitled for anticipatory bail because the active role of the accused in the commission of the heinous offence has been established by cogent and reliable evidence collected during course of investigation.

18. No doubt anticipatory bail can be extended and granted after submission of the charge sheet. In **Sushila Aggarwal and others vs. State (NCT of Delhi) and another, (2020) 5 SCC 1**, the Hon'ble Apex Court has settled the controversy finally by holding the anticipatory bail need not be of limited duration invariably. In appropriate case, it can continue upto conclusion of trial.

19. It has been further held therein that anticipatory bail granted can,

depending on the conduct and behavior of the accused, continue after filing of the charge sheet till end of trial.

20. It has been further held by the Hon'ble Apex Court that while considering an application for grant of anticipatory bail, the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence including intimidating witnesses, likelihood of fleeing justice, such as leaving the country, etc. It has further been held that Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion.

21. In view of the law laid down by the Hon'ble Apex Court and taking into account the enormity of the crime, I deem it not a fit case to grant anticipatory bail to the present applicant. Prayer made in the application is refused.

22. The anticipatory bail application is **rejected**.

23. However, it is clarified that the views expressed in this order are limited strictly only to the extent of grant of anticipatory bail and are not concerned in any way with the merits of the case and the Court concerned is always at liberty to take a different view of its own, as per law.

(2023) 8 ILRA 708
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.08.2023

BEFORE

THE HON'BLE VIKRAM D. CHAUHAN, J.

Crl. Misc. Bail Application No. 30337 of 2023

Mohammad Ubaid ...Applicant
Versus
State of U.P. ...Respondent

Counsel for the Applicant:
 Sri Imran Ullah, Sri Mohammad Daud

Counsel for the Respondent:
 G.A., Mrs. Swati Agarwal Srivastava

Criminal Law - Criminal Procedure Code, 1973 – Sections 107 & 116 - Constitution of India, 1950 - Article 21 - Indian Penal Code, 1860 - Sections 147, 148, 323, 385, 386, 504 & 506- Bail Application - FIR – charges under Sections 147, 148, 323, 504, 506, 386 of IPC - the allegations included extortion and threats for payment of ₹2 crore – court finds that, - no case beyond section 385 IPC is made out - for punishment under Section 386 IPC, it has to be shown by prosecution that there was delivery to any person any property or valuable security or anything signed or sealed, which may be converted into a valuable security - Long drawn previous enmity between the parties as both parties have contested election for and both belong to same village – and the applicant had been in jail since April 9, 2023, and there was no evidence of misuse of bail in previous cases - held, offence u/Section 386 IPC has been slapped against applicant even though ingredients of the same are not available in FIR – counsel for informant has failed to show as to how offence under Section 386 IPC is made out against applicant, demonstrate overreaching of the police authorities by slapping cases of non-bailable in nature under Section 386 IPC when only Section 385 IPC can at the best be found against applicant, which is bailable offence - Bail application is allowed – directions issued, accordingly.(Para – 27, 28, 29)

Application Allowed. (E-11)

List of Cases cited:

1. Harjit Singh Vs Inderpreet Singh @ Inder & anr., Criminal Appeal No.883 of 2021 arising from S.L.P. (Criminal) No.3739 of 2021

2. Ash Mohammad Vs Shiv Raj Singh, (2012) 9 SCC 446

3. Satyendra Kumar Antil Vs C.B.I.& anr., 2022 (10) SCC 51

4. Prabhakar Tewari Vs St. of U.P. & anr., 2020 (11) SCC 648

5. Isaac Isanga Musumba & ors. Vs St. of Mah., 2014 (15) SCC 357

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

1. Learned A.G.A. for the State submits that instructions have been received and has no objection in case the bail application is heard on merits.

2. Heard learned counsel for the applicant, Mrs. Swati Agrawal Srivastava, learned counsel for the informant, learned A.G.A. for the State and perused the record.

3. It is submitted by learned counsel for the applicant that the First Information Report was lodged on 7.4.2023 in respect of an incident dated 6.4.2023. As per FIR, it is alleged that applicant has threatened the informant for payment of extortion of Rs.2 crore and has threatened for life. He submits that the FIR has been lodged under Sections 147, 148, 323, 504, 506 and 386 IPC and subsequently investigation has been held and chargesheet has been submitted under Sections 147, 148, 323, 504, 506 and 386 IPC. He submits that in the present case, there is no delivery of amount and even if the allegation as per FIR is taken to be correct, no case beyond section 385 IPC is made out. He further

submits that for punishment under Section 386 IPC, it has to be shown by prosecution that there was delivery to any person any property or valuable security or anything signed or sealed, which may be converted into a valuable security. He further submits that there is a long drawn previous enmity between the parties as both the parties have contested the election for Pradhani and both belong to same village. Learned counsel for the applicant further submits that applicant has previous history of 10 cases. However his submission is based on the fact that even if the allegation of FIR is taken to be true then only under Section 385 IPC would be made out which is bailable offence.

4. Learned counsel for the applicant further submits that on previous occasion, bail was granted, however till date no bail cancellation has been moved by the informant as per the knowledge of applicant for cancellation of bail in previous cases. He submits that once it is shown that offence is bailable then applicant cannot be permitted to be remain in jail only on the ground of previous criminal history. He further submits that long drawn criminal history against the applicant is only on account of political enmity. He relied upon para 21 of the affidavit to submit that informant is the witness of the sale deed of the land being transferred in favour of the son of police personnel, which itself is indicative of the fact that the manner in which police is being handled by the informant as friends. It is further submitted that arrest of co-accused persons have already been stayed by this Court in Criminal Misc. Writ Petition No.7242 of 2023, copy of which has been filed at Annexure No.10. Applicant is languishing in jail since 9.4.2023 and in case he is released on bail,

he will not misuse the liberty of bail and will cooperate in the trial.

5. Learned counsel for the informant submits that applicant has criminal history of 10 cases. She submits that on previous occasion, FIR was lodged by the informant against applicant where on account of Pradhani election dispute, applicant is harassing the informant and is demanding a sum of Rs.2 crores. She has relied upon the judgment of the Apex Court in **Harjit Singh Vs. Inderpreet Singh @ Inder and another passed in Criminal Appeal No.883 of 2021** arising from S.L.P. (Criminal) No.3739 of 2021, to submit that once there is a history of 10 cases, applicant is not entitled to be released on bail.

6. It is submitted by learned counsel for the informant that when the first FIR was lodged against applicant by the informant and bail granted, the applicant had again committed crime against informant as a result of same, an application was moved by the informant before the police authorities on the basis of which proceedings under Sections 107/116 Cr.P.C. was initiated. Learned counsel for the informant submits that another FIR being Case Crime No.44 of 2023 was lodged in respect of assault made by the applicant on informant, in which also applicant was enlarged on bail. The submission of learned counsel for the informant is that in case the applicant is released on bail, he might again commit crime.

7. Learned A.G.A. for the State opposed the prayer for bail and submits that a demand of Rs.2 crore for extortion has been made from Village Pradhan, who is a elected representative. He submits that

applicant has been charge sheeted under Sections 147, 148, 323, 504, 506 and 386 IPC and has previous criminal history.

8. Learned AGA for the State has pointed out the criminal antecedents of the applicant. No material or circumstance has been brought to the notice of this Court with regard to tampering of evidence or intimidating of witness in previous criminal cases. In **Ash Mohammad Vs. Shiv Raj Singh, (2012) 9 SCC 446**, the Apex Court in para 30 has observed:-

"We may hasten to add that when we state that the accused is a history-sheeter we may not be understood to have said that a history-sheeter is never entitled to bail. But, it is a significant factor to be taken note of regard being had to the nature of crime in respect of which he has been booked."

9. In the case of **Prabhakar Tewari Vs. State of U.P. and another, 2020 (11) SCC 648**, the Hon'ble Supreme Court has observed that pendency of several criminal cases against an accused may itself cannot be a basis for refusal of bail.

10. In so far as criminal antecedents of the applicant is concerned, it is not the case of the State that applicant might tamper with or otherwise adversely influence the investigation, or that he might intimidate witnesses before or during the trial. The State has also not placed any material that applicant in past attempted to evade the process of law. If the accused is otherwise found to be entitled to bail, he cannot be denied bail only on the ground of criminal history, no exceptional circumstances on the basis of criminal antecedents have been shown to deny bail to accused, hence, the Court does not feel it

proper to deny bail to the applicant just on the ground that he had criminal antecedent.

11. The principle that Bail is a rule and Jail is an exception has been well recognised by Apex Court more specifically on the touch stone of Article 21 of the Constitution. The said principle has been reiterated by the Apex Court in **Satyendra Kumar Antil Vs. Central Bureau of Investigation and another, 2022 (10) SCC 51**. Learned AGA has not shown any exceptional circumstances which would warrant denial of bail to the applicant.

12. It is settled principle of law that the object of bail is to secure the attendance of the accused at the trial. No material particulars or circumstances suggestive of the applicant fleeing from justice or thwarting the course of justice or intimidating witnesses and the like have been shown by learned AGA for the State.

13. Learned AGA for the State has not shown any material or circumstances that the accused/applicant is not entitled to bail in larger interests of the public or State.

14. On a pointed query being made to learned counsel for the informant as well as learned AGA as to whether offence under Sections 385 IPC is bailable offence, learned counsel for the informant as well as learned AGA do not dispute the fact that Sections 385 IPC is bailable in nature.

15. It is to be seen that in the present case, allegation in the FIR are with regard to demand of money by way of extortion for sum of Rs.2 crore from a Village Pradhan. The applicant also contested the election of Village Pradhan against informant and after election were over, present FIR has been

lodged for demand of Rs.2 crore, which is alleged by the prosecution to be extortion. The extortion has been defined in Section 383 IPC, which is reproduced hereinbelow:

"383. Extortion.—*Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into a valuable security, commits "extortion".*"

16. Under Section 383 IPC, one of the essential ingredient is that to deliver to any person any property or valuable security or anything signed or sealed, which may be converted into valuable security.

17. The Apex Court in **Isaac Isanga Musumba and others Vs. State of Maharashtra, 2014 (15) SCC 357** has held that "

"3. We have read the FIR which has been annexed to the writ petition as Annexure P-7 and we find therefrom that the complainants have alleged that the accused persons have shown copies of international warrants issued against the complainants by the Ugandan Court and letters written by Uganda Ministry of Justice & Constitutional Affairs and the accused have threatened to extort 20 million dollars (equivalent to Rs.110 crores). In the complaint, there is no mention whatsoever that pursuant to the demands made by the accused, any amount was delivered to the accused by the complainants. If that be so, we fail to see as to how an offence of extortion as defined in Section 383 IPC is made out. Section 383 IPC states that :

"383. Extortion.- *Whoever intentionally puts any person in fear of any*

injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property, or valuable security or anything signed or sealed which may be converted into a valuable security, commits 'extortion'. "

Hence, unless property is delivered to the accused person pursuant to the threat, no offence of extortion is made out and an FIR for the offence under Section 384 could not have been registered by the police."

18. On a further query being made to learned counsel for the informant as well as learned AGA as to whether there was any delivery of property or the amount, both the counsel fairly submit that there was no delivery of any amount, the only allegations are with regard to demand of Rs.2 crore.

19. It is further to be noted that for offence under Section 386 IPC, the allegation should come within four corners of Section 383 IPC and as such, there should be a delivery of amount demanded. In the present case, there is only demand, no delivery of amount.

20. It is further to be seen that Section 385 IPC pertains to case where there is a attempt for extortion. Section 385 IPC is quoted hereinbelow:

"385. Putting person in fear of injury in order to commit extortion.—*Whoever, in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."*

21. Perusal of aforesaid section would demonstrate that where any person in order

to extort puts any person in fear or attempts to put any person fear, of any injury then he is punishable for such offence for a maximum period of two years. The aforesaid offence under Section 385 IPC is bailable in nature as has been agreed between the parties.

22. Once the legislature itself has provided the offence to be bailable in nature then the person cannot be put in jail as the right under Article 21 of the Constitution of India would be affected. The prosecution is required to show that offence under Section 386 IPC is made out in the present case. The prosecution has failed to demonstrate from the record as to how offence under Section 386 IPC is made out, once there is no delivery of amount.

23. Considering the fact that the allegation against the applicant does not come within the four corners of Section 386 IPC and would at best, triable by Section 385 IPC, which is bailable offence. The right of applicant for bail cannot be curtail in view of Article 21 of the Constitution of India.

24. Learned counsel for the informant as well as learned AGA fairly concede both the aspect of the matter that there is no delivery of amount demanded and as such, Section 386 IPC may not applicable in the facts and circumstances of the case. Once the offence at the best is under Sections 385 IPC, which is bailable in nature, the right of the applicant being enlarged on bail cannot be curtailed.

25. In the present case, applicant is also implicated under Section 323 IPC. There is no injury report of any injured person. The same would imply that no

dangerous weapons were used by the applicant as per prosecution case. The sentence provided under Section 323 IPC is extendable upto one year. The applicant has also been implicated under Sections 504 and 506 IPC with the allegation that applicant has threatened and demanded money otherwise, informant would not be fit for the office of Pradhani and threatened for life. Maximum sentence provided in the aforesaid sections is two years and in case of death or grievous hurt, the same is seven years.

26. The criminal history of applicant has been disclosed from paragraph nos. 30 to 44 of the affidavit filed in support of bail application. In the aforesaid cases, applicant has already been enlarged on bail. There is political rivalry between applicant and the informant. It cannot be denied as a matter of fact that once there is a political rivalry, false implication of applicant can be raised by the applicant more specifically in view of paragraph no. 21 of the affidavit filed in support bail application. The applicant has alleged that informant is in touch and in connection with local police has earlier also implicated the applicant in false FIR. The details of which are provided in paragraph no.22 of the affidavit where applicant has already been enlarged on bail.

27. The manner in which the offence under Section 386 IPC has been slapped against applicant even though the ingredients of the same are not available in the FIR or otherwise, learned AGA as well as learned counsel for informant has failed to show as to how offence under Section 386 IPC is made out against applicant, demonstrate the overreaching of the police authorities by slapping cases of non-bailable in nature under Section 386 IPC

when only Section 385 IPC can at the best be found against applicant, which is bailable offence.

28. Considering the facts and circumstances of the case, nature of offence, evidence, complicity of the accused, submissions of learned counsel for the parties and without expressing any opinion on the merits of the case, the Court is of the view that the applicant has made out a case for bail. The bail application is allowed.

29. Let the applicant **Mohammad Ubaid** involved in Case Crime No. 066 of 2023, under Sections 147, 148, 323, 504, 506, 386 IPC, Police Station Puramufti, District Prayagraj be released on bail on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to the following conditions:-

i. The applicant will not tamper with the evidence during the trial.

ii. The applicant will not pressurize/intimidate the prosecution witness.

iii. The applicant will appear before the trial court on the date fixed, unless personal presence is exempted and/or the applicant shall make himself available for interrogation by a police officer as and when required.

iv. The applicant shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected.

v. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence.

vi. The applicant shall not leave India without the previous permission of the Court.

vii. In the event, the applicant changes residential address, the applicant shall inform the court concerned about new residential address in writing.

30. It is also provided that applicant shall not come within the periphery of 100 meter from the house of informant and shall not disturb the peace and tranquillity of the informant and in case any disturbance take place, recourse of law shall be taken by the parties.

31. SHO concerned shall maintain peace and tranquillity between the parties.

32. In case of breach of any of the above condition, the prosecution shall be at liberty to move bail cancellation application before this Court.

(2023) 8 ILRA 714

**APPELLATE JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 04.08.2023

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Crl. Misc. Bail Application No. 42807 of 2021

Aftab Khan		...Applicant
	Versus	
State of U.P.		...Respondent

Counsel for the Applicant:

Sri Manvendra Singh, Sri Bal Krishna Yadav (A.C.)

Counsel for the Respondent:

G.A.

Criminal Law - Criminal Procedure Code, 1973 – Sections 156(3) & 438 - Indian

Penal Code, 1860 - Sections 147, 148, 149, 324, 326, 307 & 504 - Application for Bail – FIR – applicant is in jail and has no criminal history – applicant argued that he was falsely implicated due to ulterior motives and assured cooperation with legal proceedings - court finds that, earlier applicant was enlarged on bail by this case in present case – but, owing to his weak financial condition, he is unable to furnish sureties, as such, he is languishing in jail – held, court granted bail to applicant, considering the several factors, including the nature of the accusations, the severity of punishment, the applicant's lack of criminal history, and the overcrowding of jails during the pandemic - the court also emphasized the reformatory theory of punishment and the mandate of Article 21 of the Constitution of India – accordingly, application is allowed. (Para – 5, 6, 7)

Application Rejected. (E-11)

List of Cases cited:

1. Sukhari @ Sobrati case in – Criminal Misc. Bail Application no. 19185/2022,

2. In Re Strategy For Grant of Bail Vs Mr. Gaurav Agrawal – MANU/SCOR/14591/2023.

3. Moti Ram & ors. Vs St. of M.P. – 1978 vol. 4 SCC 47.

(Delivered by Hon'ble Krishan Pahal, J.)

**Order on Criminal Misc.
Modification Application No. 2 of 2023**

1. List has been revised.

2. Heard Sri Bal Krishna Yadav, learned Amicus Curiae for the applicant as well as Sri Deepak Kumar Singh, learned A.G.A. for the State.

3. The applicant has filed his modification application. The applicant is in jail since 5.1.2021 in the said case and

has no criminal antecedents to his credit. The applicant was enlarged on bail by this Court in the present case vide order dated 25.1.2022. The applicant is an indigent person as is evident from Annexure-2 as reported by District Jail as the applicant, owing to his weak financial condition, is unable to furnish sureties, as such, he is languishing in jail for no fault of his.

4. Learned Amicus Curiae has placed reliance on the judgement of this Court in ***Sukhari @ Sobrati passed in CRIMINAL MISC. BAIL APPLICATION No. - 19185 of 2022***, whereby the delinquent person was directed to furnish a personal bond of Rs. 10,000/- and two sureties of the like amount.

5. Learned Amicus Curiae has also placed reliance on the judgement of the Apex Court passed in In ***Re Policy Strategy For Grant of Bail vs. Mr. Gaurav Agrawal, Adv. is Amicus Curiae, MANU/SCOR/14591/2023***, which reads as under :-

"With a view to ameliorate the problems a number of directions are sought. We have examined the directions which we reproduce hereinafter with certain modifications:

1) *The Court which grants bail to an undertrial prisoner/convict would be required to send a soft copy of the bail order by e-mail to the prisoner through the Jail Superintendent on the same day or the next day. The Jail Superintendent would be required to enter the date of grant of bail in the e-prisons software [or any other software which is being used by the Prison Department].*

2) *If the accused is not released within a period of 7 days from the date of grant of*

bail, it would be the duty of the Superintendent of Jail to inform the Secretary, DLSA who may depute para legal volunteer or jail visiting advocate to interact with the prisoner and assist the prisoner in all ways possible for his release.

3) *NIC would make attempts to create necessary fields in the e-prison software so that the date of grant of bail and date of release are entered by the Prison Department and in case the prisoner is not released within 7 days, then an automatic email can be sent to the Secretary, DLSA.*

4) *The Secretary, DLSA with a view to find out the economic condition of the accused, may take help of the Probation Officers or the Para Legal Volunteers to prepare a report on the socio-economic conditions of the inmate which may be placed before the concerned Court with a request to relax the condition (s) of bail/surety.*

5) *In cases where the undertrial or convict requests that he can furnish bail bond or sureties once released, then in an appropriate case, the Court may consider granting temporary bail for a specified period to the accused so that he can furnish bail bond or sureties.*

6) *If the bail bonds are not furnished within one month from the date of grant bail, the concerned Court may suo moto take up the case and consider whether the conditions of bail require modification/relaxation.*

7) *One of the reasons which delays the release of the accused/ convict is the insistence upon local surety. It is suggested that in such cases, the courts may not impose the condition of local surety."*

6. After hearing the arguments tendered at Bar and taking into consideration the case laws furnished by

learned Amicus Curiae, this Court is of the view that in light of the arguments tendered, the case law adduced and also the judgement of the Apex Court passed in ***Moti Ram and Ors. vs. State of Madhya Pradesh (1978) 4 SCC 47***, the modification application is allowed. The relevant paragraph 15 of the said judgement reads hereinunder:-

"15. It is interesting that American criminological thinking and research had legislative response and the Bail Reforms Act, 1966 came into being. The then President, Lyndon B. Johnson made certain observations at the signing ceremony :

Today, we join to recognize a major development in our system of criminal justice : the reform of the bail system.

This system has endured-archaic, unjust and virtually unexamined-since the Judiciary Act of 1789.

The principal purpose of bail is to insure that an accused person will return for trial if he is released after arrest.

How is that purpose met under the present system ? The defendant with means can afford to pay bail. He can afford to buy his freedom. But the poorer defendant cannot pay the price He languishes in jail weeks, months and perhaps even years before trial.

He does not stay in jail because he is guilty.

He does not stay in jail because any sentence has been passed.

He does not stay in jail because he is any more likely to flee before trial.

He stays in jail for one reason only-because he is poor...."

7. Let the applicant- **Aftab Khan** involved in aforementioned case crime number be released on bail with the condition that the trial court shall take

every endeavour in light of paragraph 5 and 6 of the judgement passed in ***In Re Policy Strategy For Grant of Bail (supra)*** and he shall be enlarged on bail after furnishing the personal bond of Rs. 10,000/- and two sureties each in the like amount to the satisfaction of the court concerned subject to the conditions imposed on the applicant vide order dated 25.1.2022 passed in the present bail order.

(2023) 8 ILRA 716
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.08.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Appeal No. 661 of 2003

Pawan Sut @ Ram Sukh Tiwari

...Appellant

Versus

The State of U.P.

...Respondent

Counsel for the Appellant:

M.S. Khan, Pradeep Kumar Shukla

Counsel for the Respondent:

G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 107 & 306 - Abetment of suicide - Code of Criminal Procedure, 1973 - Section 313 - Appeal against conviction - Imprisonment with fine - No other witnesses except PW3 supported prosecution case - Accused used to have drinks frequently, not taking care of his wife and children - Evidence by PW3 shows that wife was feeling harassed and exasperated by conduct of her husband and was cause of bickering between them - On day of occurrence, he returned home, asked for food, she said how food can be cooked when there was no ration, enraged over this reply, physically assaulted his wife - She became disturbed, counselled

by witness, decided to take her life, put herself on fire, proved by dying declaration - In dying declaration, she said her husband was drunkard, he harassed her and sold of all property - Except this St.ment, she said nothing which compelled her to take her life, corroborated by PW3 - Act of accused may be deplorable but do not amount to instigation to commit suicide unless there was something more to add upon - Thus, impugned order set aside, acquitted. (Para 2, 18 to 20)

Appeal allowed. (E-14)

List of Cases cited:

Ude Singh & ors. Vs St. of Har., (2019) 17 SCC 301, (Para 16)

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

1. Heard Sri Pradeep Kumar Shukla, learned counsel for the appellant and Sri Jugal Kishore, learned AGA for the State.

2. This criminal appeal has been filed by the appellant- Pawan Sut @ Ram Sukh Tiwari challenging the order of conviction and sentence dated 24.04.2003 passed by the Additional Sessions Judge/FTC III, Sultanpur in ST No. 37 of 2021 whereby the appellant has been convicted under section 306 IPC and sentenced to undergo imprisonment of 8 years and a fine of Rs. 5,000/- and further 6 months in default of fine.

3. A number of legal and factual points have been raised by the appellant which shall be dealt with at appropriate stages in the body of the judgment.

4. Relevant facts in nutshell are as below:-

(i) *The informant Satya Narayan Tiwari gave a written report before the police station concerned with the allegations that his sister-Meera Devi was married to Pawan Sut @ Ram Sukh Tiwari; Pawan Sut @ Ram Sukh (the accused), Ram Das, Gurprasad, Sri Chand set her ablaze at about 9.00 pm on 26.09.2000; it is alleged in the FIR that her husband was selling of all his property gradually and he used to ask his sister that he should have brought at least Rs. 10,000/- per month from her 'maika' to meet out his expenses; it is further alleged that when his sister disclosed all the matter to him, he counseled her and left her at her husband's place; he received the information of the incident next day at about 4.00 pm, therefore they reached the district hospital, Sultanpur; his sister (the deceased) told him that accused got annoyed when she asked whether he had brought vegetables or not; he poured kerosene oil on her and rest of the accused persons assisted and she was set to fire by her husband; her condition deteriorated and she succumbed to her injuries on 28.09.2000; on the basis of this information, case crime no. 402 of 2000 under section 304 IPC was registered and investigated upon; the postmortem of the dead body was conducted; a dying declaration was recorded; the statement of witnesses were recorded and thereafter accused Pawan Sut @ Ram Sukh Tiwari was chargesheeted under section 306 IPC.*

(ii) *The prosecution examined PW1-Satya Narayan (the first informant), PW2-Hare Ram, Pw3-Ravi Dutt Tiwari, PW4-Asharfi Lal (the witnesses of fact), PW5-Dr. Anil Kumar, PW6-Dr. B.N. Tiwari, PW7-ASI Pramod Kumar, PW8-Nayab Tehsildar, PW9-Asha Ram (Nayab Tehsildar), PW10-the investigating officer.*

(iii) *The statement of the accused was recorded under Section 313 Cr.P.C.; the*

accused denied that his wife died of burn injuries but admitted that his wife died on 28.09.2000 at about 6.30 am; after flatly denying all other facts of the case, he stated that the clothes of her wife caught fire when she was cooking food and that he is innocent.

5. Heard and perused the papers on record in the light of the contentions of both the sides.

6. PW1-Satya Narayan Tiwari who admittedly is the real brother of the deceased has chosen not to support the prosecution case and denied that his sister ever told him that the accused- Pawan Sut @ Ram Sukh Tiwari (husband of the deceased) poured kerosene oil and set her ablaze; from the statement given by him this fact is sufficiently proved that when he visited his sister in the hospital, she was lying there with extensive burn injuries on her body and the next day she died.

7. PW2-Hari Ram denied having knowledge of any bickering between the deceased and her husband or that he ever used to maltreat her; he said that he was not in the village when the incident happened.

8. PW3-Ravi Dutt Tiwari, who belongs to same family as that of accused, has stated that Pawan Sut @ Ram Sukh Tiwari is a drunkard; he did not do any job and that he was selling of all his property gradually, therefore none was left to take care of his children; he has stated that his wife (the deceased) tried to check him from indulging in such habit and also from dissipating his property pleading that how she and her children shall survive, if no source of sustenance is left; he has further stated that her children often used to go to sleep hungry and many time it was him

who helped them out by providing meals; he also used to quarrel with his wife on this issue of neighbors providing meals to her kids; his wife was much harassed by his tactics and wanted that he shunned his habit of having liquor; he used to physically assault his wife time and again; deposing about the occurrence he has said that on that day accused returned to his house and asked for meals; his wife retorted that when there is no ration then how food can be cooked; enraged over this reply, he began beating his wife; his kids were crying aloud; he (the witness) intervened and tried to mediate and counsel them; the accused exited out of his house and returned at about 8 in the evening; he categorically stated that at the time of departing from his house, he taunted her by saying that she should stay in the house and that he is leaving; thereafter the deceased came to the witness's house; the witness and others tried to counsel her; after sometime he heard loud cries; he rushed to the house of Meera Devi and found smoke bellowing out of the doors; the kids were crying; he and other witness-Hari Ram etc reached the place of incident; the deceased opened the door and that her clothes had burnt down; she was crying; she was made to put on another set of clothes and was taken to the hospital; she was referred to the district hospital but she succumbed to her injuries.

9. PW4-Asharfi Lal has not supported the prosecution case.

10. PW5-Dr. Anil Kumar, who conducted the postmortem has deposed that except a small portion of the body, her whole of the body was having burn injuries and there were some blisters on certain parts; she was having 80 to 90% of burn injuries.

11. PW6-Dr. B.N. Tiwari has given statement that she was referred for taking dying declaration before the S.D.M.

12. PW8-Nayab Tehsildar has proved the dying declaration which is on record; in her dying declaration she stated as below:-

“मेरा पति शराबी है रोज शराब पीकर हमें प्रताड़ित करता है और सारी सम्पत्ति बँच डाला है जिससे तंग आकर मैंने खुद अपने शरीर में आग लगाकर झुलस गयी हूँ। मेरे बड़े लड़के का नाम मनीष उम्र लगभग 9 वर्ष, दूसरे लड़के का नाम विपिन उम्र लगभग 5 वर्ष है तीसरी सन्तान लड़की है जो तीन वर्ष की है मेरे पिता का नाम शीतला प्रसाद तिवारी निवासी चौपड़िया थाना लम्हूआ जनपद सुलतानपुर है। आग मैंने अपनी साड़ी में लगायी थी। मिट्टी का तेल आदि नहीं डाला था। बयान पढ़कर सुनाया गया तस्दीक की तथा हस्ताक्षर बनवाया जा रहा है।”

13. Before proceeding to evaluate the evidence produced by the prosecution, it will be useful to first examine the scope of section 306 IPC, the abetment to commit suicide and see broadly what kinds of acts can be construed as bringing the matter within the confines of section 306 IPC.

Section 306 IPC is as below:-

"306. Abetment of suicide: - If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

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 facilitate the commission thereof, is said to aid the doing of that act."

14. The essential ingredients of the offence under Section 306 I.P.C. are the abetment and commission of suicide in consequence thereof. The 'abetment' may mean intentionally aiding or instigating or engaging in a conspiracy.

15. A two Judges Bench of the Supreme Court in **Ude Singh and Ors. vs. State of Haryana, (2019) 17 SCC 301** observed as below:-

"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 behavior 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."

16. For the application of section 306 IPC, the law requires that there should be a proximity between the act of suicide with the acts and conduct or treatment meted out by the accused to the victim or acts which would amount to intentionally aiding or instigating or abetting the deceased to take his/her life.

17. In the instant matter, the case of the prosecution is that the accused instigated the commission of crime. As has been held by the Supreme Court, the 'instigation' means to goad, urge forward, provoke, incite or encourage to do "an act". Obviously the intention is to be gathered on the basis of peculiar facts and circumstances of each and every case. No formula for general application can be laid down.

18. Now coming back to the facts of this case, no other witnesses except PW3-Ravi Dutt Tiwari has supported the prosecution case. The evidence on facts given by him has been reproduced in para-8 of this judgment. If all the facts deposed by him are taken at its face value or as being credible and reliable, it appears that the accused used to have drinks frequently and was not taking enough care of his wife and

children. He was squandering away his property by selling it off and that was the cause of confrontation between accused and his wife. The evidence given by PW3 gives a very clear impression that the wife was feeling harassed and exasperated by the conduct of her husband and this was the cause of frequent bickering between them. On the day of the occurrence, he returned home and asked for food, to this she reacted by saying that how food can be cooked when there is no ration; enraged over this reply, he physically assaulted his wife taunting that she may stay in the house and he is leaving. The evidence given by him further suggests that she became very disturbed and was counseled by the witness, however she decided to take her life and put herself on fire. She put herself on fire on her own, is a fact which has been clearly proved by her own dying declaration. If the dying declaration is perused, she has simply said that her husband is a drunkard and used to harass her and also squandered/sold off all the property and added that *जिससे तंग आकर मैंने खुद अपने शरीर में आग लगाकर झुलस गयी हूँ।* Except the above statement, she has said nothing which could have thrown additional light on the circumstances which compelled her to take her life. The statement given by her in her dying declaration is corroborated by the statement given by PW3. There appears no reason to doubt the above two important pieces of evidence i.e., the dying declaration and the other testimony of PW3. Now the short question which arises whether these facts and circumstances will constitute the offence under section 306 IPC.

19. The pain and suffering of a wife who was the mother of small kids, the problem of sustenance she was facing, the inability to mold her husband to see the

reason, the problem of poverty, the intricate human equations between husband and wife, the impact of such situations on domestic peace etc. can easily be imagined. The habit of drinking, the act of squandering away the property, physical assault, domestic dispute bickerings or quarrels over not able to make two ends meet, lack of money for taking good care of children are quite unfortunate and arouse empathy and emotions from everyone not merely the people living in the vicinity, near relatives or well-wishers of the deceased and her children. But the court has a duty to take decisions on the basis of facts not on the basis of sentiments. In my view the act of the accused may be deplorable but do not amount to **"instigation to commit suicide"** unless there was something more to add upon. In my view, some more overt act, though may be an indirect one, was required on the part of the accused to bring his acts or conduct within the meaning of the word "instigation".

20. The unfortunate story does not end here. With a sense of guilt, I am constrained to write that this appeal has come up for hearing after the accused had already undergone whole of the term of sentence and was set free. In fact, he was detained for a month over and above the period of imprisonment by inadvertent turn of events which need not be elaborated here. Suffice it to say that chinks in the majesty of law are wide open. The failings and the frailty of justice delivery system is showing by itself.

21. In view of the discussion in the paras preceding para no. 20, the judgment given by the learned Sessions Judge convicting the accused is not sustainable and the accused deserves to be acquitted.

12. Sahadevan & anr. Vs St. of T.N. reported in (2012) 6 SCC 403, (SCC p. 412, para 16)

13. Chandrapal (earlier M.P.) Vs St. of Chhattisgarh reported in 2022 LiveLaw (SC) 529, (Para 11)

14. Subramanya Vs St. of Karn. reported in 2022 LiveLaw (SC) 887, (Para 54, 57, 58, 59)

15. Pawan Kumar Chourasia Vs St. of Bihar reported in 2023 LiveLaw (SC) 197, (Para 5)

16. Sharad Birdhichand Sarda Vs St. of Mah. reported in (1984) 4 SCC 116, (SCC p. 185, para 153)

17. Nikhil Chandra Mondal Vs St. of W.B. reported in (2023) 6 SCC 605, (SCC p. 609, para 11)

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

1. This appeal has been filed against the judgment and order of conviction dated 01.08.2015 passed by learned Additional District and Sessions Judge, Court No. 5, Lakhimpur Khiri in S. T. No. 761 of 2010, whereby the learned Additional District & Sessions Judge, Court No. 5, Lakhimpur Khiri (hereinafter referred to as the 'trial court') has convicted the appellant Nangu @ Rambabu for the offence punishable under Section 302, 377/511 and under Section 201 I.P.C.

2. Factual matrix of the case is that the informant Mahesh submitted a written complaint dated 01.11.2009 to the inspector In-charge of Police Station Gola, District Lakhimpur Khiri (Ex. Ka-13) to the effect that the son of the informant namely Ankur aged about 10 years on 31.10.2009, at about 7:00PM, had gone to the nearby shop for purchasing toffee but did not return in the night. The complainant along with his family members searched for his son Ankur

and at about 09:00 AM, in the morning, the clothes of his son Ankur (Pant, underwear & vest) were found near the pond situated towards north of the village and after making search body of his son Ankur was found in the pond. It was requested that necessary action be taken.

3. After recovery of the body, post mortem was conducted on 02.11.2009 (Ex. Ka-3A), thereafter a G.D. entry (Ex. Ka-12) was made with Case Crime No. 1341 of 2009 under Section 302 & 201 I.P.C.

4. Another written complaint (Ex. Ka-1) was submitted by the informant Mahesh on 18.11.2009 to the In-charge of Police Station Gola, District Lakhimpur Khiri to the effect that on 18.11.2009, accused Nangu @ Ram Babu came to cousin brother of the informant namely Rajesh Kumar and said that he had committed a huge mistake, under the influence of liquor and ganja, he had taken Ankur in the bushes for the purposes of sodomizing and on hue and cry made by Ankur, he had killed him and after taking off the clothes from the body he had disposed of the dead body of Ankur in the pond. It was further stated that Nangu @ Ram Babu said to his cousin brother that he may take money and get the matter settled with Mahesh. Therefore, the informant has stated that he has full confidence that his son Ankur has been murdered by Nangu @ Ram Babu and he may be sent to jail.

5. After the First Information Report was lodged, the Police investigated the crime and after collecting the evidence, a charge-sheet Ex. Ka-7 was submitted under Section 173(2) Cr.P.C. against Nangu @ Ram Babu under Section 302, 201 & 377 read with Section 511 I.P.C. The learned Magistrate after taking cognizance and

complying with the provisions of Section 207 Cr.P.C. committed the case for trial to the court of Sessions. On 09.02.2011, accused Nangu @ Rambabu was charged under Section 302, 201 & 377 read with Section 511 I.P.C. During the trial, statement of seven persons were recorded by the prosecution namely Mahesh (father of the deceased Ankur) PW-1, Rajesh Kumar PW-2, Dr. S. P. Singh (doctor who had conducted post mortem of the deceased) PW-3, Dr. A. K. Sharma PW-4, Ram Narayan Singh PW-5, S.I. Manoj Kumar Yadav PW-6 and Shahabuddin PW-7. Statement of accused namely Nangu @ Rambabu was recorded under Section 313 Cr.P.C.

6. The prosecution produced written complaint Ex. Ka-1, Inquest report Ex. Ka-2, Recovery Memo Ex. Ka-3, Post Mortem Report Ex. Ka-3A, Pathology report Ex. Ka-4, Site plan Ex. Ka-5, Charge Sheet Ex. Ka-6, Photograph Deadbody Ex. Ka-7, Memo of Deadbody Challan Ex. Ka-8, Specimen Mohar Ex. Ka-9, Letter to C.M.O. Ex. Ka-10, Police Station Report Ex. Ka-11, Copy of G.D. Report Ex. Ka-12 and written report Ex. Ka-13 as documentary evidence.

7. After considering the entire evidence, the learned Sessions Judge convicted the accused Nangu @ Rambabu under Section 302 I.P.C. and sentenced the accused/appellant with life imprisonment and fine of Rs. 20,000/- and in case of default of payment of fine, one year simple imprisonment, under Section 377/511 I.P.C. sentenced the accused/appellant five years imprisonment and fine of Rs. 5,000/- and in case of default of payment of fine, six months simple imprisonment and under Section 201 I.P.C., sentenced the accused/appellant three years imprisonment

and fine of Rs. 2,000/- and in case of default of payment of fine, one month simple imprisonment. All the sentences are directed to be run concurrently.

8. Heard learned counsel for the accused/appellant, learned A.G.A. for the State and perused the material on record.

9. Learned counsel for the accused-appellant assailed the order of conviction and made following submissions:

I) The case of the prosecution is solely based upon the extra judicial confession of the accused which is not reliable. This extra judicial confession cannot form the basis of conviction of the appellant since it has no corroboration and when examined in the light of settled principles of law, it is inconsequential, thus, the accused is entitled to the benefit of doubt.

II) The extra judicial confession, besides being inadmissible is also a very weak piece of evidence and in a case of circumstantial evidence like the present, one cannot form a valid basis for returning the finding of guilt against the accused.

III) There is no reason for accused appellant to have made confession before the PW-2 as admittedly PW-2 is not in good terms with the accused and was also related with the PW-1 (cousin brother) who was admittedly having enmity with the accused appellant.

IV) In the present case, there was neither any eye witness nor had the prosecution proved the complete of chain circumstances, there was no direct evidence of involvement of the appellant in the commission of crime.

V) In any case, the objects recovered by the police have no link with the commission of the crime, as such, it would be impermissible in law to use these

recoveries against the accused for sustaining the conviction. No recovery has been made in furtherance to confessional statement of the accused.

VI) The recovered articles of the deceased (pant, vest & underwear) were not sent for chemical analysis by the investigating officer nor there is any forensic report on record. In the pathology report Ex. Ka-4, no sperms were found in the slide.

VII) The alleged extra judicial confession made before the PW-2 is not reliable for the reasons that the PW-2 is related and inimical witness and moreover the alleged extra judicial confession of the accused was made before PW-2 Rajesh Kumar after 16-17 days of the occurrence.

VIII) No blood was found by the investigating officer on the spot. There is an inordinate delay in lodging the F.I.R.

IX) The Court have failed to appreciate the medical and other evidence placed on record in its correct perspective.

X) No motive have been established by the prosecution for commission of the crime by the accused.

XI) The case of the prosecution is based on circumstantial evidence and chain of circumstances proved by the prosecution is not complete and the prosecution has miserably failed to establish the fact that only the accused appellant and no one else could have committed the offence.

XII) The prosecution has miserably failed to prove its case beyond reasonable doubt. It is settled position of law that suspicion howsoever grave cannot take place of the proof.

XIII) The appellant is innocent and has been falsely implicated in this case on account of enmity.

XIV) No recovery under Section 27 of the Indian Evidence Act was made by the investigating agency.

10. Per contra, learned A.G.A. argued that the extra judicial confession in the present case is admissible as it is duly corroborated by other prosecution witnesses, and thus, the trial court was fully justified in convicting the accused appellant. It was also contended by the learned A.G.A. for the State that the present case is of circumstantial evidence and the prosecution has succeeded in establishing every circumstance of chain of events that would fully support the view that the accused is guilty of the offence. The trial court while dealing with the judgment under appeal, upon proper appreciation of evidence, thus, has come to right conclusion.

11. With the help of both the counsel, learned counsel for the appellant and learned A.G.A. for the State, we have perused the record of the case from which it is clear that PW-1 is not the eye-witness of the incident. In his examination-in-chief, PW1 has stated that his cousin brother Rajesh Kumar PW-2 and one Sahabuddin PW-7 told PW-1 that the accused came to them and said that the accused has committed a huge mistake under the influence of liquor and ganja, in the evening of Saturday, the accused has taken Ankur son of PW-1 with a view to sodomise him to the bushes and attempted to sodomise Ankur on which Ankur raised hue and cry and therefore, he killed Ankur and disposed of the dead body in the pond. It was further stated by the accused that as the police came to know about these facts, requested them to take money and get the matter settled with Mahesh (PW-1). In his cross-examination PW-1 deposed that he has raised suspicion for murder of his son Ankur against Nangu @ Rambabu. It has been further stated by PW-1 that he had enmity with the accused appellant Nangu

@ Rambabu with regard to agriculture and police had drawn proceedings under Section 107/16 Cr.P.C. against both the parties. It had also been admitted by the PW-1 in his cross-examination that he had long standing family enmity with the Nangu @ Rambabu and prior to the incident Nangu @ Rambabu said to PW1 that he would murder one or two persons. In his cross-examination, it had also been stated by PW-1 that at about 19 days later, the PW-1 came to know that Nangu @ Rambabu has murdered his son Ankur but subsequently he said that this news came to him 5-6 days after the incident and he got the report lodged in this regard after 6 or 7 days. In his cross-examination, PW-1 had also admitted that Rajesh Kumar PW-2 is his real cousin brother (चचेरा भाई). In his cross-examination, he had also stated that Rajesh Kumar PW-2 had informed the PW-1 that his son was murdered by Nangu @ Rambabu and prior to this information given by Rajesh Kumar PW-2, he had no information in this regard that Nangu @ Rambabu had murdered his son Ankur. It has further stated that nobody else in the village had informed the PW-1 that his son was murdered by Nangu @ Rambabu.

12. PW-2 Rajesh Kumar in his examination-in-chief had stated that after 16-17 days of the incident, accused Nangu @ Rambabu came to him and told that the accused has taken Ankur son of PW-1 with a view to sodomise him to the bushes and attempted to sodomise Ankur on which Ankur raised hue and cry and therefore, he killed Ankur and disposed of the dead body in the pond. It was further stated by the accused that as the police came to know about these facts, requested them to take money and get the matter settled with Mahesh (PW-1). It was further stated by the PW-2 that he informed Mahesh PW-1, then

PW-1 gave a written complaint to the police. In his cross-examination by the defence, PW-2 has admitted that Mahesh is his cousin brother (चचेरा भाई). It has been further stated by PW-2 that the PW-2 or his family had no quarrel with Nangu @ Rambabu or his family. Other family members had quarrel with Nangu @ Rambabu. It had been further stated by PW-2 in his cross-examination that Nangu @ Rambabu used to quarrel and abuse him after drinking liquor and therefore, there was enmity. It had been admitted by PW-2 in his cross-examination that Nangu @ Rambabu used to abuse under the influence of liquor. It had been further stated by PW-2 in his cross-examination that Nangu @ Rambabu told about the incident to PW-2 in his agricultural field and there was nobody in the agricultural field except PW-2. It had been further stated by PW-2 that he could not recollect the time whether it was morning or evening when the accused told him about the incident.

13. PW-3 Dr. S. P. Singh is the doctor who has proved the post mortem report of the deceased Ankur.

14. PW-4 Dr. A. K. Sharma, pathologist in his examination-in-chief has stated that on examination of slide, no sperms were found.

15. PW-5 Sri Ram Narayan Singh, C. O. Laharpur, Sitapur has proved the investigation.

16. PW-6 S. I. Manoj Kumar Yadav has proved the inquest report and other relevant documents.

17. PW-7 Sahabuddin son of Sher Ali was declared hostile as he denied that

Nangu @ Rambabu ever confessed his guilt before him.

18. The accused was examined under Section 313 Cr.P.C. and denied the allegation leveled against him. In reply to question no. 8 that why case has been lodged against him, the accused appellant replied that because of old enmity. In his additional statement under Section 313 Cr.P.C., the accused has denied of making extra judicial confession before Rajesh Kumar.

19. From the oral evidence as referred above, we find that there is no direct evidence against the accused appellant of committing the crime.

20. The learned trial court relying upon the extra judicial confession made by the accused before PW-2 has convicted the accused.

21. It has been submitted by the learned counsel for the appellant that there is no eye-witness account of the crime being committed by the accused appellant and the case is of circumstantial evidence. It was also contended by the learned counsel for the appellant that the trial court committed grave error in relying upon the uncorroborated extra judicial confession alleged to have been made by the accused before PW-2 Rajesh Kumar.

22. It has been further contended by the learned counsel for the appellant that the prosecution has miserably failed to prove the complete chain of circumstances to bring the guilt of the accused.

23. Per contra, learned A.G.A. has submitted that extra judicial confession

could be relied upon by the Court even without there being any corroboration of the same. In this connection, learned A.G.A. has placed reliance upon the decision of the Apex Court in case of **Ram Lal v. State of Himachal Pradesh reported in (2019) 17 SCC 411**. It has been further contended by learned A.G.A. that the prosecution has proved its case by leading evidence that it was only the accused who could have committed the crime and except for the accused no one else has committed the crime.

24. There is no doubt that in the present case there is no eye-witness account. It is a case based upon circumstantial evidence. In case of circumstantial evidence, the onus lies upon the prosecution to prove the complete chain of evidence, which shall undoubtedly point towards the guilt of the accused. Furthermore, in case of circumstantial evidence, where the prosecution relies upon the extra judicial confession, the Court has to examine the same with greater degree of care and caution.

25. It is settled principles of criminal jurisprudence that extra judicial confession is a weak piece of evidence. Wherever, the Court upon due appreciation of entire prosecution evidence, intends to base a conviction on an extra judicial confession, court must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, extra judicial confession suffers from the material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the Court to base conviction on such a confession. In such circumstance, the Court would be fully

justified in ruling such evidence out of consideration.

26. Confessions may be divided into two classes, i.e. judicial and extra-judicial. Judicial confessions are those which are made before Magistrate or Court in the course of judicial proceedings. Extra-judicial confessions are those which are made by the party elsewhere than before a Magistrate or Court. Extra judicial confessions are generally those that are made by a party to or before a private individual which includes even a judicial officer in his private capacity. It also includes a Magistrate who is not especially empowered to record confessions under Section 164 of the Code or a Magistrate so empowered but receiving the confession at a stage when Section 164 does not apply. As to extra-judicial confessions, two questions arise: (i) were they made voluntarily? and (ii) are they true? As the section enacts, a confession made by an accused person is irrelevant in a criminal proceedings, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, (1) having reference to the charge against the accused person, (2) proceeding from a person in authority, and (3) sufficient, in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. It follows that a confession would be voluntary if it is made by the accused in a fit state of mind, and if it is not caused by any inducement, threat or promise which has reference to the charge against him, proceeding from a person in authority. It would not be involuntary, if the inducement, (a) does not

have reference to the charge against the accused person, or (b) it does not proceed from a person in authority; or (c) it is not sufficient, in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that, by making it, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. Whether or not the confession was voluntary would depend upon the facts and circumstances of each case, judged in the light of Section 24. The law is clear that a confession cannot be used against an accused person unless the Court is satisfied that it was voluntary and at that stage the question whether it is true or false does not arise. If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the Court may refuse to act upon the confession, even if it is admissible in evidence. One important question, in regard to which the Court has to be satisfied with is, whether when the accused made confession, he was a free man or his movements were controlled by the police either by themselves or through some other agency employed by them for the purpose of securing such a confession. The question whether a confession is voluntary or not is always a question of fact. All the factors and all the circumstances of the case, including the important factors of the time given for reflection, scope of the accused getting a feeling of threat, inducement or promise, must be considered before deciding whether the Court is satisfied that its opinion the impression caused by the inducement, threat or promise, if any, has been fully removed. A free and voluntary confession is deserving of highest credit, because it is presumed to flow from the highest sense of guilt. (See *R. v.*

Warwickshall: (1783) 1 Lesch 263). It is not to be conceived that a man would be induced to make a free and voluntary confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true. Deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in law. An involuntary confession is one which is not the result of the free will of the maker of it. So where the statement is made as a result of the harassment and continuous interrogation for several hours after the person is treated as an offender and accused, such statement must be regarded as involuntary. The inducement may take the form of a promise or of threat, and often the inducement involves both promise and threat, a promise of forgiveness if disclosure is made and threat of prosecution if it is not. (See Woodroffe Evidence, 9th Edn., Page 284). A promise is always attached to the confession, alternative while a threat is always attached to the silence-alternative; thus, in the one case the prisoner is measuring the net advantage of the promise, minus the general undesirability of a false confession, as against the present unsatisfactory situation; while in the other case he is measuring the net advantages of the present satisfactory situation, minus the general undesirability of the confession against the threatened harm. It must be borne in mind that every inducement, threat or promise does not vitiate a confession. Since the object of the rule is to exclude only those confessions which are testimonially untrustworthy, the inducement, threat or promise must be such as is calculated to lead to an untrue confession. On the aforesaid analysis the Court is to determine the absence or presence of inducement, promise etc. or its sufficiency and how or in what measure it

worked on the mind of the accused. If the inducement, promise or threat is sufficient in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil, it is enough to exclude the confession. The words 'appear to him' in the last part of the section refer to the mentality of the accused.

27. Now we may examine some judgments dealing with this aspect:

1) In **State of Rajasthan v. Raja Ram reported in (2003) 8 SCC 180**, the Apex Court laid down the principles that (SCC p. 192, para 19 & 20):

“19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the Court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any Court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful

statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility.

20. If the evidence relating to extra judicial confession is found credible after being tested on the touchstone of credibility and acceptability, it can solely form the basis of conviction. The requirement of corroboration as rightly submitted by learned counsel for the respondent-accused, is a matter of prudence and not a invariable rule of law.....”

II) In **Balwinder Singh v. State of Punjab**, reported in **1996 SCC (Cri) 59**, the Apex Court stated the principle that: (SSC p. 265, para 10)

“10. An extra-judicial confession by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extra-judicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance.”

III) In **Pakkirisamy v. State of T. N.** reported in **(1997) 8 SCC 158**, the Apex Court held that: (SCC p. 162, para 8)

“8. It is well settled that it is a rule of caution where the court would generally look for an independent reliable corroboration before placing any reliance upon such extra-judicial confession.”

IV) Again in **Kavita v. State of T. N.** reported in **(1998) 6 SCC 108**, the Apex Court stated the dictum that: (SSC p. 109, para 4)

“4. There is no doubt that convictions can be based on extra-judicial confession but it is well settled that in the very nature of things, it is a weak piece of evidence. It is to be proved just like any other fact and the value thereof depends upon the veracity of the [witnesses] to whom it is made.”

V) In the case of **Aloke Nath Dutta v. State of W.B.** reported in **(2007) 12 SCC 230**, the Court, while holding the placing of reliance on extra-judicial confession by the lower courts in absence of other corroborating material, as unjustified, observed: (SCC pp. 265-66, paras 87 & 89)

“87. Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. It is, however, trite that for the said purpose the court has to satisfy itself in regard to: (i) voluntariness of the confession; (ii) truthfulness of the confession; (iii) corroboration.

* * *

89. A detailed confession which would otherwise be within the special knowledge of the accused may itself be not sufficient to raise a presumption that confession is a truthful one. Main features of a confession are required to be verified. If it is not done, no conviction can be based only on the sole basis thereof.”

VI) Accepting the admissibility of the extra-judicial confession, the Court in the

case of **Sansar Chand v. State of Rajasthan** reported in (2010) 10 SCC 604 held that : (SCC p. 611, paras 29-30)

“29. There is no absolute rule that an extra-judicial confession can never be the basis of a conviction, although ordinarily an extra-judicial confession should be corroborated by some other material. [Vide *Thimma and Thimma Raju v. State of Mysore* (1970) 2 SCC 105, *Mulk Raj v. State of U.P.* AIR 1959 SC 902, *Sivakumar v. State* (2006) 1 SC 714 (SCC paras 40 and 41 : AIR paras 41 & 42), *Shiva Karam Payaswami Tewari v. State of Maharashtra* (2009) 11 SCC 262 and *Mohd. Azad v. State of W.B.* (2008) 15 SCC 449”

VII) Dealing with the situation of retraction from the extra-judicial confession made by an accused, the Court in the case of **Rameshbhai Chandubhai Rathod v. State of Gujarat** reported in (2009) 5 SCC 740, held as under : (SCC pp. 772-73, para 53)

“53. It appears therefore, that the appellant has retracted his confession. When an extra-judicial confession is retracted by an accused, there is no inflexible rule that the court must invariably accept the retraction. But at the same time it is unsafe for the court to rely on the retracted confession, unless, the court on a consideration of the entire evidence comes to a definite conclusion that the retracted confession is true.”

VIII) Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witnesses must be clear, unambiguous and should clearly convey that the accused is the perpetrator of the crime. The extra-judicial confession can be

accepted and can be the basis of conviction, if it passes the test of credibility. The extra-judicial confession should inspire confidence and the court should find out whether there are other cogent circumstances on record to support it. [Ref. *Sk. Yusuf v. State of W.B.* (2011) 11 SCC 754 and *Pancho v. State of Haryana* (2011) 10 SCC 165.

IX) In **Sahadevan & Anr. v. State of Tamil Nadu** reported in (2012) 6 SCC 403, the Apex Court laid down the principles that: (SCC p. 412, para 16)

“16. Upon a proper analysis of the above-referred judgments of this Court, it will be appropriate to state the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused.

(i) *The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.*

(ii) *It should be made voluntarily and should be truthful*

(iii) *It should inspire confidence.*

(iv) *An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.*

(v) *For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.*

(vi) Such statement essentially has to be proved like any other fact and in accordance with law.

X) In **Chandrapal (earlier M.P.) v. State of Chhattisgarh** reported in **2022 LiveLaw (SC) 529**, (Para 11) the Apex Court laid down the principle that however, the Apex Court has consistently held that an extra-judicial confession is a weak kind of evidence and unless it inspire confidence or is fully corroborated by some other evidence of clinching nature, ordinarily conviction for the offence of murder should not be made only on the evidence of extra-judicial confession.

XI) In **Subramanya v. State of Karnataka** reported in **2022 LiveLaw (SC) 887**, the Apex Court held that: (paras 54, 57, 58 & 59)

“54. Extra judicial confession is a weak piece of evidence and the court must ensure that the same inspires confidence and is corroborated by other prosecution evidence. It is considered to be a weak piece of evidence as it can be easily procured whenever direct evidence is not available. In order to accept extra judicial confession, it must be voluntary and must inspire confidence. If the court is satisfied that the extra judicial confession is voluntary, it can be acted upon to base the conviction.

57. The sum and substance of the aforesaid is that an extra judicial confession by its very nature is rather a weak type of evidence and requires appreciation with great deal of care and caution. Where an extra judicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance like the case in hand. The courts generally look for an independent

reliable corroboration before placing any reliance upon an extra judicial confession.

58. This Court in **Kashmira Singh v. The State of Madhya Pradesh** reported in AIR 1952 SC 159, had observed as under:

“The confession of an accused person is not evidence in the ordinary sense of the term as defined in Section 3. It cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept. [para 8, 10]”

59. In the case on hand, the High Court committed a serious error in making the confessional statement as the basis and thereafter going in search for corroboration. The High Court concluded that the confessional statement is corroborated in material particulars without first considering and marshalling the evidence against the appellant convict herein excluding the conviction altogether from consideration. As held in the decision, cited above, only if on such consideration on the evidence available, other than the confession a conviction can safely be based

then only the confession could be used to support that belief or conclusion.

XII) In **Pawan Kumar Chourasia v State of Bihar** reported in **2023 LiveLaw (SC) 197**, the Apex Court held that: (para 5)

“5. As far as extra-judicial confession is concerned, the law is well settled. Generally, it is a weak piece of evidence. However, a conviction can be sustained on the basis of extra-judicial confession provided that the confession is proved to be voluntary and truthful. It should be free of any inducement. The evidentiary value of such confession also depends on the person to whom it is made. Going by the natural course of human conduct, normally, a person would confide about a crime committed by him only with such a person in whom he has implicit faith. Normally, a person would not make a confession to someone who is totally a stranger to him. Moreover, the Court has to be satisfied with the reliability of the confession keeping in view the circumstances in which it is made. As a matter of rule, corroboration is not required. However, if an extra-judicial confession is corroborated by other evidence on record, it acquires more credibility.”

28. Having stated the principles which may be kept in mind by the Court while examining the acceptability and evidentiary value of the extra judicial confession, we may now refer the facts of the present case.

29. PW-1 in his statement has stated that his cousin brother (चचेरा भाई) Rajesh Kumar PW-2 and one Sahabuddin PW-7 has informed the PW-1 that Nangu @ Rambabu came to them and said that he committed a huge mistake and further told that in the evening of Saturday, he had

taken Ankur in the bushes for sodomizing and when he attempted, Ankur raised hue and cry, therefore, the accused killed Ankur and disposed of the dead body in the pond. It was further stated by the accused before these witnesses as per the evidence of PW-1 that as the police came to know about the incident, requested them to get the matter compromised with PW-1 by taking money.

30. Rajesh Kumar cousin brother of PW-1 was examined as PW-2. Sahabuddin PW-7, the other person before whom the alleged extra judicial confession was made by the accused was declared hostile as he has deposed that the accused has never confessed before him.

31. It has come in the evidence of PW-1 Mahesh and PW-2 Rajesh Kumar that both the witnesses were close relatives i.e. cousin brothers and were on inimical terms with the accused appellant. PW-1 had even admitted that proceedings under Section 107/16 Cr.P.C. were drawn against PW-1 and accused appellant. Though PW-2 had not admitted of having any criminal case but has admitted that accused used to abuse PW-2 after drinking.

32. In our opinion, it is improbable that the accused would repose confidence in a person who is inimical towards him and confess his guilt. The other independent witness as alleged by the prosecution i.e. PW-7 has not supported the prosecution story.

33. From the perusal of the evidence on record, it is also clear that except for the extra-judicial confession made by the accused appellant before PW-2 Rajesh Kumar, there is no other evidence worth mentioning proving involvement of the accused appellant in the crime. There was

no recovery on the pointing out of the appellant. The clothes which were recovered from the place of incident were never sent for forensic examination. There was no evidence of even last seen against the accused.

34. PW-2 Rajesh Kumar who is the only witness of extra-judicial confession, was not able to depose about the exact time when the aforesaid confession was made by the accused-appellant i.e. whether the accused made confession in the morning or in the evening. Even if PW-2 was not in inimical terms with the accused-appellant, he admitted that the accused-appellant used to abuse PW-2 and in this regard, PW-2 has also made complaint to the brother of the accused-appellant but has not lodged any report to the police. It was also stated by PW-2 that he was not in a position to tell that whether there was any criminal case between PW-2 and family members of accused-appellant Nangu @ Rambabu. Further PW-2 was the cousin brother ((चचेरा भाई) of PW-1 (informant and father of the deceased Ankur) who admittedly was having enmity with the accused and both PW-1 and accused-appellant were challaned under Section 107/16 Cr.P.C. by the police.

35. In view of the law laid down by Apex Court in State of **Rajasthan v. Raja Ram** (Supra) that: (SCC p. 192, para 19)

“19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the Court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the

evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any Court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility.”

We are of the view that evidence of PW-2 Rajesh Kumar cannot be relied upon as there was no reason that accused would repose faith in a person who was inimical with him and was closely related to a person whose son was victim of crime.

36. A reference may be made to an earlier decision in **Sharad Birdhichand Sarda v. State of Maharashtra reported in (1984) 4 SCC 116**. Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be

cured by false defence or plea. The conditions precedent in the words of the this Court, before conviction could be based on circumstantial evidence, must be fully established. They are: (SCC p. 185, para 153)

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

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

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

37. Recently in case of **Nikhil Chandra Mondal v State of West Bengal** reported in (2023) 6 SCC 605, the Apex Court has held that: (SCC p. 609, para 11)

“11. It can thus be seen that this Court has held that the circumstances from which the conclusion of guilt is to be drawn should be fully established. It has been held that the circumstances concerned “must or should” and not “may be” established. It has been held that there is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved”. It has been held that 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. It has been held that the circumstances should be of a conclusive nature and tendency and they should exclude every possible hypothesis except the one sought to be proved, and that there must be a chain of evidence so complete so 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.

38. From the perusal of the evidence which has been brought on record, we are of the opinion that except for the extra-judicial confession made by the appellant before PW-2 Rajesh Kumar, there was no evidence against the accused-appellant as has such the prosecution has miserably failed to prove the circumstances and complete chain of events to prove the guilt of the accused-appellant.

39. So far as the judgment in case of **Ram Lal v. State of Himachal Pradesh** (Supra) relied upon by learned A.G.A., the Apex Court has held that : (p. 418, para 14)

“14. It is well settled that conviction can be based on a voluntarily confession but the rule of prudence requires that wherever possible it should be corroborated by independent evidence. Extra-judicial confession of accused need not in all cases be corroborated. In Madan Gopal Kakkad v. Naval Dubey and Another (1992) 3 SCC 204, this court after referring to Piara Singh and Others v. State of Punjab (1977) 4 SCC 452 held that the law does not require that the evidence of an extra-judicial confession should in all cases be corroborated. The rule of prudence does not require that each and every

circumstance mentioned in the confession must be separately and independently corroborated.

40. There is no doubt that extra-judicial confession by an accused need not in all cases to be corroborated. In the aforesaid case, the court was dealing with a matter with regard to the offence of embezzlement made by an employee of the bank.

41. In the present case, the accused-appellant has been held guilty for the offence under Section 302 Cr.P.C. and we have already held that the statement of PW-2 is not worth reliance for the reasons mentioned above. The contention of learned counsel for the appellant though correct in principle but is not attracted in the facts of the present case.

42. To summarize, we hold that the evidence on the point of extra-judicial confession does not inspire confidence and cannot be relied upon. There is no reliable evidence to satisfy the judicial mind that why the appellant will repose faith and make confess before a person who is in inimical terms with the accused-appellant.

43. In the aforesaid facts and circumstances, we find and hold that the prosecution has failed to substantiate the charges levelled against the accused-appellant. If, extra-judicial confession is excluded, nothing remains in the prosecution case, therefore, the accused-appellant is legitimately entitled to avail the benefit of doubt. Hence, the impugned judgment and order of conviction passed by Additional District and Sessions Judge, Court No. 5, Lakhimpur Khiri could not withstand the legal position and requires to be reversed by acquitting the accused-appellant from the charges levelled against him. Consequently, the appeal deserves to be allowed by setting aside the impugned judgment and order of conviction.

In view of that following order:-

I) The appeal stands allowed.

II) The judgment and order of conviction dated 01.08.2015 passed by learned Additional District and Sessions Judge, Court No. 5, Lakhimpur Khiri in S. T. No. 761 of 2010, under Section 302, 377, 511 & 201 I.P.C., Police Station Gola, District Lakhimpur Khiri, stands quashed and set aside.

III) The accused-appellant, Nangu @ Rambabu is acquitted of the offence punishable under Section 302, 377, 511 & 201 I.P.C.

IV) The accused be released from jail forthwith, if not required in any other offence.

V) The appellant is directed to file a personal bond and two sureties each in the like amount to the satisfaction of the Court concerned in compliance of Section 437-A of the Code of Criminal Procedure within six weeks from the date of release.

VI) Let the lower Court records along with a copy of this judgment be transmitted to the Trial Court and the Chief Judicial Magistrate concerned for taking necessary action. A copy of this judgment shall also be forwarded to the appellant through the Chief Judicial Magistrate or the Trial Court concerned, as the case may be.

VII) The amount of fine, if deposited, be refunded to the accused.

(2023) 8 ILRA 736

**REVISIONAL JURISDICTION
CRIMINAL SIDE**

DATED: LUCKNOW 11.08.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Revision No. 374 of 2010

Gaya Prasad Shukl

...Revisionist

Versus

State of U.P.

...Respondent

Counsel for the Revisionist:

Anil Kumar Tripathi

Counsel for the Respondent:

Govt. Advocate

(A) Criminal law - The Code of Criminal Procedure, 1973 - Sections 397/401 - Revision , Indian Penal Code, 1860 - Section 353, 504, 506 , The Probation of Offenders Act, 1958 - Section 4 - release on probation - non-examination of eye-witness cannot be pressed into service like a ritualistic formula for discarding the prosecution case with a stroke of pen - Court can convict an accused on statement of sole witness even if he is relative of the deceased - non examination of independent witness would not be fatal to the case of prosecution.(Para -13)

1994 case - 29 years lapsed - no injury caused by accused - Revisionist convicted - Collection Peon (PW -1) & Collection Ameen (PW -2) – witnesses of fact - filed a complaint for lodging an F.I.R. - Claimed that while trying to recover arrears of Rs.13, 399/- in village - they were arrested by a man - who became angry, pushed them, and threatened to shoot them with a country-made pistol - threatened to cut them into pieces within a week - asked for witnesses from their side - complaint aims to establish the truth about the incident – complaint registered - charge-sheet – cognizance - statement of the accused under section 313 Cr.P.C.(**Para -3,17)**

HELD:-Trial court and first appellate court concluded that alleged offense was caused by accused revisionist. Prosecution proved the case against beyond reasonable doubt. No merit in revision. Order of conviction recorded by both courts not liable to be interfered with . As the revisionist has become a senior citizen and has no criminal history, it would be appropriate to enlarge the accused on probation instead of sending him to jail for serving the sentence. (**Para -16,17**)

Revision partly allowed. (E-7)

List of Cases cited:-

1. St. of Har. Vs Krishan, A.I.R 2017 SC 3125,

2. Bhagwan Jagannath Markand Vs St. of Maha., (2016) 10 SCC 537

3. Mukesh Vs St. of NCT of Delhi & Ors., AIR 2017 SC 2161 (Three-Judge Bench),

4. Sadhu Saran Singh Vs St. of U.P, (2016) 4SCC 357

5. St. of Karna. Vs Muddappa, (1999) 5 SCC 732

6. Mohd. Monir Alam Vs St. of Bihar, (2010) 12 SCC 26

7. Krishna Deo & Ors. Vs St., Criminal Appeal No. 735 of 1982

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

1. Heard Sri Anil Kumar Tripathi, learned counsel for the revisionist, Sri Dinesh Kumar Gupta, learned A.G.A for the State and perused the record.

2. The instant criminal revision under Sections 397/401 Cr.P.C has been preferred by the revisionist against the judgment and order dated 24.09.2010 passed by the Additional Sessions Judge / Special Judge (SC ST Act), Court No. 8, District Sultanpur, in Criminal Appeal No. 15 of 2009 (Gaya Prasad Shukl) Versus State of U.P), convicting the revisionist under Section 353 I.P.C for one year rigorous imprisonment and Rs. 1,000- as fine, and in case of default additional two month's rigorous imprisonment, under Section 504 I.P.C for six month's rigorous imprisonment and for Section 506 I.P.C one years' rigorous imprisonment and also against the judgment and order dated 25th March, 2009 passed by Chief Judicial Magistrate, Sultanpur in Criminal Case No. 2076 of 2002, Crime No. 457 of 1994, (State Vs. Gaya Prasad Shukl), Police Station Kotwali Nagar, District Sultanpur,

under the aforesaid Sections by which, the accused was convicted and sentenced under Section 353 I.P.C for two years rigorous imprisonment and Rs.1,000/- fine under Section 504 I.P.C one month's imprisonment and Rs.500/- fine under Section 506 I.P.C two year's simple imprisonment with default of stipulation. It was also directed by both the courts below that all the sentences shall run concurrently.

3. In brief, facts of the case are that on 15.05.1994 at about 3:00 p.m. Anil Kumar Mishra, Collection Peon and Tulsi Prasad Mishra, Collection Ameen, moved a written complaint for lodging an F.I.R stating therein that on 15.05.1994 when they both went to village Palhipur to recover Rs.13,399/- as arrears of Bank and informed about the arrest warrant and tried to take him to the Tehsildar Sadar, Sultanpur, he got angry and pushed them and started abusing after that he said he was coming with country made pistol and shoot on both of them and will tear their stomach. He also threatened that he will cut themselves into pieces within a week, you go and do whatever you want to do, I will see who will be the witness from your side.

4. It was also written that the accused is a very influential and bad person, none is ready to state against him as he is a person of dominating personality.

5. On the basis of the aforesaid written complaint, a complaint was registered on 16.05.1994 at Crime No. 457 of 1994 under Sections 353, 224, 504 and 506 I.P.C. S.I. Jaipal Singh Bishnoi investigated the case and after collecting the evidence submitted the charge-sheet (Ex.Ka-6) under the aforesaid Sections.

6. The cognizance was taken and charge under Section 353, 504 and 506 I.P.C was framed. The prosecution examined the following witnesses:

1. P.W 1. Tulsi Prasad Mishra, Collection Ameen.

2. P.W. 2. Anil Kumar Mishra, Collection Peon.

3. P.W. 3. Constable Rajendra Prasad Mishra.

After closure off the statement of the accused under Section 313 Cr.P.C was recorded, in which he denied the allegation and stated that on account of pressure of recovery, the witnesses had testified themselves against him. He also stated that no information regarding Proforma Nos. 69 and 70 was given to him, which does not bear his signature.

7. In defense D.W 1 – Ram Milan of the same village has been examined.

In this revision the revisionist-accused has taken grounds that the trial court and the learned appellate court failed to appreciate the evidence available on record and they erred in convicting and sentencing the revisionist, there is no material on record to carry conviction against the revisionist. There was no evidence regarding the service of the demand notice called as Proforma 69 upon the revisionist and there is mandatory provision regarding the service of the notice; and the same has been ignored by the courts below as without following the procedure of Proforma 69, Procedure of Section 70, recovery notice cannot be issued. No independent witness has been produced by the prosecution, because the illegal demand of the complainant was not fulfilled by the revisionist, the prosecution has been

launched by the informant, there is no signature of the revisionist on the Proforma 69. The revisionist has no knowledge about the Proforma 70. The sentence is too severe. For the above reasons, the order passed by the courts below be set aside.

8. It is no where denied that Rs.13,399/- of the bank was not due against the revisionist.

9. From the evidence of P.W. 1 and P.W 2, it has been proved that before reaching to the revisionist with arrest warrant issued on Proforma 70, they had also met with the revisionist-accused and had requested to pay the amount due against him. They had proved that Proforma 69 was served upon the revisionist in proper manner about one week ago of the incident and at that time it was signed by the accused before the witness, but when the amount due was not paid, an arrest warrant on Proforma 70 was issued and in compliance to that, P.W 1 and P.W 2 had gone to arrest the accused-revisionist.

10. It has been proved from the evidence that both the witnesses of fact were pushed by the accused and he got him free from their custody and also abused and threatened as described above. It has also been proved that when they could not arrest the accused and the accused did not pay the amount due, the matter was reported to the Tehsildar and on his direction, this case had been lodged.

11. So far as the non-examination of the independent witnesses is concerned, it has to be seen that this incident had occurred in the village of the accused, therefore no one came forward to testify himself in support of the prosecution.

However, it has not been proved that P.W 1 & P.W 2 were inimical to the accused and had any interest in false implication of the accused in a criminal case. Both the witnesses of the fact may be treated to be an injured witness, therefore their testimony cannot be denied.

12. In *State of Haryana Vs. Krishan, A.I.R 2017 SC 3125, Bhagwan Jagannath Markand Vs. State of Maharashtra, (2016) 10 SCC 537*. It has been held that deposition of an injured witness should be relied upon unless there are strong grounds for rejection of his evidence. On the basis of major contradictions and discrepancies for the reason that his present on the scene stands established in the case and it is proved that he suffered with the injuries during the said incident.

13. In *Mukesh Vs. State of NCT of Delhi & Others, AIR 2017 SC 2161 (Three-Judge Bench), and in Sadhu Saran Singh Vs. State of U.P, (2016) 4SCC 357*. It has been held that if a witness examined in the Court is otherwise found reliable and trustworthy, the fact sought to be proved by that witness need not be further proved through other witnesses though there may be other witnesses available who could have been examined but were not examined. It is settled law that non-examination of eye-witness cannot be pressed into service like a ritualistic formula for discarding the prosecution case with a stroke of pen. Court can convict an accused on statement of sole witness even if he is relative of the deceased and non examination of independent witness would not be fatal to the case of prosecution.

14. In this case D.W - 1 is a neighbour of the accused and his status and evidence has been properly evaluated by

the learned appellate court who has rightly concluded that he was deposing, only being neighbour and villager of the accused.

15. This defence witness has also accepted that probably he would have gone to his relation on 15.05.1994, which is the date of occurrence, therefore the evidence of D.W 1 becomes non trustworthy. There is no ground to reject the testimony of P.W 1 and P.W. 2 with regard to the facts of the case. So far as as the evidence of P.W. 3 is concerned, this witness has proved the documentary evidence as secondary evidence, because the I.O. was not available and in this regard, no argument has been advanced by the learned counsel for the revisionist.

16. The trial court and the learned first appellate court has properly discussed the facts and circumstances of the case and also the evidence available on record and has rightly concluded that the alleged offence had been caused by the accused revisionist and the prosecution has successfully proved the case against him beyond the reasonable doubt. Therefore, this Court is of the considered view that as far as the conviction is concerned, there is no merit in revision at all and the order of conviction recorded by both the courts below is not liable to be interfered with.

17. So far as the sentencing is concerned, since it is a case of the year 1994 and about 29 years have been lapsed and the concerned Sections are triable by the Court of Magistrate, no injury had been caused by the accused. The revisionist has become a senior citizen and there is no pre or post criminal history of the accused, therefore it would be proper to enlarge the accused on probation rather to send him in

jail for serving the sentence. Hence, this revision is liable to be decided accordingly.

18. In *State of Karnataka Vs. Muddappa*, (1999) 5 SCC 732 it has been held as follows:-

"2. The learned Counsel for the appellant is not in a position to assail the acquittal of the accused under Section 302 I.P.C., but he vehemently contends that the Court did be not bear in mind germane considerations for releasing the accused on probation after convicting him under Section 304 Part II I.P.C. Whether the benefit of the Probation of Offenders Act could be extended in any particular case depends upon the circumstances of that case. Admittedly, there is no statutory bar for application of the Act to an offence under Section 304 Part II where the maximum punishment is neither death nor imprisonment for life. In that view of the matter and on examining the impugned judgment of the High Court, we find that the Court did consider the relevant material and then came to the conclusion that the accused should be released on probation by applying the provisions of Section 4 of the Probation of Offenders Act. We see no infirmity with that order to be interfered with by this Court after this length of time, more so when nothing has been pointed out as to whether the accused has, in any way, violated the terms and conditions of allowing him on probation.

3. We, accordingly, dismiss this appeal. Bail bonds of the respondent stand discharged."

19. In the case of *Mohd. Monir Alam Vs. State of Bihar*, (2010) 12 SCC 26, it was held as under:-

"8. We have considered Mr. Suri's submissions very carefully. We see from the documents that the appellant Md. Monir Alam has secured a Doctorate and is presently employed as a Senior Assistant Professor in the Department of Strategic and Regional Studies, University of Jammu and that he had secured this appointment in the year 1997. His professional attainments have also been provided to us which shows his expertise in his speciality and also portrays his association with prestigious organizations worldwide in the field of strategic studies. We are, therefore, of the opinion that his conduct and attainments after his involvement in this matter justifies his release on probation. We, accordingly, dismiss the appeal but direct that he shall be released on probation under Section 4 of the Probation of Offenders Act, 1958 on terms to be settled by the trial court."

And also in *Krishna Deo and Others Vs. State, Criminal Appeal No. 735 of 1982*, it has been observed as under:-

"23. We are also not interfering with the conviction of appellants- Smt. Jalkall and Smt. Bhagwandel under Section 147 & 323/149 of the IPC. As discussed above, considering the facts and circumstances of the case, instead of sentencing the appellant no. 1 for the offence under Section 304 Part-II r/w Section 34, 147. 323/149 of the IPC., we think it proper in the interest of justice to release the appellant- Krishnadeo, after giving him the benefit of Section 4 of the Probation of Offenders Act. We are not inclined to interfere with the sentence passed against the appellant- Smt Jaikali. Smt. Bhagwander, who were only directed to pay fine. Appellant-Krishna Deo is directed to surrender in the court below. The learned court below is directed to release him as per the provisions of Section 4 of the Probation of

Offenders Act. The learned court below shall take all coercive steps for realizing the fine from appellants-Jaikali and Bhagwandel, if the same has not been deposited by them."

ORDER

20. This revision is ***partly dismissed***, as far as the conviction under Sections 353, 504 and 506 I.P.C is concerned. This revision is partly allowed with regard to sentencing awarded by both the courts below and the accused revisionist is directed to remain on probation for a period of one year for his good conduct and behaviour rather to serve the sentence modified and awarded by the learned appellate court.

21. It is directed that within a period of thirty days from today, accused- Gaya Prasad Shukla shall execute two sureties bonds, personal bonds and an undertaking before the District Probation Officer, Sultanpur, to remain on probation on his good conduct and behaviour for one year, if he does so he shall not be sent to jail otherwise he would be sent to jail for serving the sentence as decided by the learned A.S.J / Special Judge (SC. ST Act), Court No. 08, Sultanpur.

22. The fine awarded by the learned appellate court would also be deposited within a period of thirty days from today otherwise he would serve the default of stipulation as directed by the appellate court.

23. A copy of this judgment along with lower courts record be sent back to the learned Chief Judicial Magistrate, Sultanpur to ensure compliance and for consignment.

(2023) 8 ILRA 742
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.08.2023

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE MS. NAND PRABHA SHUKLA, J.

Criminal Misc. Writ Petition No. 6543 of 2023
with
Criminal Misc. Writ Petition No. 5214 of 2023
&
Criminal Misc. Writ Petition No. 6664 of 2023

Uday Rajgarhia ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Ajeet Singh, Sri Sageer Ahmed (Sr. Advocate)

Counsel for the Respondents:

G.A., Sri Vinod Kumar Srivastava, Sri V.P. Srivastava(Sr. Advocate)

A. Criminal Law-Constitution of India,1950-Article 226-Criminal Procedure Code,1973-Section 173(8)- three separate FIRs were lodged by the petitioners against accused/respondent Nos. 5 and 6. The respective investigations were conducted and charge sheets were submitted before the Competent Court, cognizance was taken and charges were framed. After the commencement of trial, the petitioners have been summoned and examined as prosecution witnesses- At this stage, during the pendency of the trial, the petitioners/first informants have been served with the notice under Section 160 Cr.P.C. to appear personally before the respondent no.4 to get their statement recorded before the Special Investigating Agency (SIT) under Section 161 Cr.P.C. directing further investigation-The petitioners, being aggrieved, have challenged the said order particularly on the ground that No Formal Permission was sought by the Investigating Agency from

the Learned Trial Court for further investigation-The said order has neither been informed nor intimated to the Learned Trial Court- order directing further investigation at this belated stage shall benefit the accused/respondent Nos. 5 and 6 causing prejudice to the petitioners-Held, the police has unfettered power of investigation and such investigation can continue even after the charge sheet has been filed under section 173 (8) Cr.P.C. and cognizance has been taken thereon. No formal permission of the Magistrate is required for carrying out further investigation even thereafter. (Para 1 to 21)

The petition is dismissed. (E-6)

List of Cases cited:

1. Vinubhai Haribhai Malaviya Vs St. of Guj. (2019) 17 SCC 1
2. St. thru CBI Vs Hemendhra Reddy & anr. (2023) SCC Online SC 55
3. Anant Thanur Karmuse Vs St. of Mah. & ors. (2023) 5 SCC 802
4. Subodh Kumar Jain @ Subodh Jain Vs St. of U.P. & ors. CRLP No. 6555 of 2021
5. Nirmal Singh Kahlon Vs St. of Pun. reported in (2009) SCC 44

(Delivered by Hon'ble Ms. Nand Prabha Shukla, J.)

1. Heard Sri Sageer Ahmed, learned Senior Advocate assisted by Sri Ajeet Singh, learned counsel for the petitioners and Sri V.P. Srivastava, learned Senior Advocate assisted by Sri Vinod Kumar Srivastava, learned counsel for the respondent No. 5 and 6 and learned A.G.A. for the State.

2. The petitioners are the first informants of their respective First

Information Report and have challenged the order dated 27.02.2023 (common in all three writ petitions) passed by respondent No.2. Hence, all the three aforesaid writ petitions have been clubbed together and are being decided by a common order.

3. The petitioners/first informants have approached the Hon'ble High Court seeking quashing of the impugned order dated 27.02.2023 directing further investigation under Section 173(8) Cr.P.C. being conducted by the Special Investigating Team (SIT), ostensibly on the basis of fresh inputs received.

4. The details of the three case crime numbers are as follows :

<u>Sl. No.</u>	<u>Criminal Misc. Writ Petition No.</u>	<u>Cas e Crime No.</u>	<u>Under Sections</u>	<u>Police Station</u>	<u>District</u>	<u>Cas e No.</u>	<u>Common Impugned order dated</u>
1.	5214 of 2023	28 of 2021 Shailendra Agarwal (informant)	419, 420, 467, 468, 471, 406, 506 IPC	Bhel pur	Varanasi	8903 of 2017	27.02.2023
2.	6543 of 2023	698 of 2020 Udai Rajgarhia (informant)	419, 420, 467, 468, 471, 406, 409 and 506 IPC	Shiv pur	Varanasi	8006 of 2021	27.02.2023

3.	6664 of 2023	41 of 2023 Anand Prakash (informant)	419, 420, 467, 468, 471, 406, 506 IPC	Sigra	Varanasi	8763 of 2021	27.02.2023

5. The brief facts of the case are that : the petitioners/first informants individually invested huge amount (in crores) in the business of coal (Mining and Trading Company) PT Suryansh Total Indo Resources (STR), Indonesia, run and managed by accused/respondent Nos. 5 and 6. After a lapse of certain period, the petitioners demanded back their invested amount, profits earned as well as the Bank Guarantees but the same were not returned. Rather they were told that the said Bank Guarantees are forged.

6. Thus, three separate FIRs were lodged by the petitioners against accused/respondent Nos. 5 and 6. The respective investigations were conducted and charge sheets were submitted before the Competent Court, cognizance was taken and charges were framed. After the commencement of trial, the petitioners have been summoned and examined as prosecution witnesses.

7. At this stage, during the pendency of the trial, the petitioners/first informants have been served with the notice under Section 160 Cr.P.C. to appear personally before the respondent no.4 to get their statement recorded before the Special Investigating Agency (SIT) under Section 161 Cr.P.C. pursuant to the order dated 27.02.2023 directing further investigation.

8. The petitioners, being aggrieved, have challenged the said order particularly on the ground that No Formal Permission was sought by the Investigating Agency from the Learned Trial Court for further investigation. The said order has neither been informed nor intimated to the Learned Trial Court. It has further been pleaded that the order directing further investigation at this belated stage shall benefit the accused/respondent Nos. 5 and 6 causing prejudice to the petitioners.

9. Per contra, learned A.G.A. for the State and counsels for the accused/respondents have opposed the aforesaid prayer and asserted that the Police has ample power to further investigate the matter by virtue of Section 173(8) Cr.P.C. There is no mandatory requirement to seek leave of the Court even if charge sheet has been submitted and cognizance being taken.

10. Upon hearing the contentions raised by the counsel for the parties and upon perusal of record, it cannot be denied that the Police has unfettered powers of investigation which can continue even after the charge sheet has been submitted and cognizance thereon has been taken, in case, further material comes to light. It is always open to the investigating agency to file a supplementary report or charge sheet as may be required within statutory powers of the investigating agency.

11. In **Nirmal Singh Kahlon v. State of Punjab reported in (2009) SCC 44**, this Court held as follows:

“An order of further investigation in terms of Section 173(8) of the Code by the State in exercise of its jurisdiction under Section 36 thereof stands on a

different footing. The power of the investigating officer to make further investigation in exercise of its statutory jurisdiction under Section 173(8) of the Code and at the instance of the State having regard to Section 36 thereof read with Section 3 of the Police Act, 1861 should be considered in different contexts. Section 173(8) of the Code is an enabling provision. Only when cognizance of an offence is taken, the learned Magistrate may have some say. But, the restriction imposed by judicial legislation is merely for the purpose of upholding the independence and impartiality of the judiciary. It is one thing to say that the court will have supervisory jurisdiction to ensure a fair investigation, as has been observed by a Bench of this Court in *Sakiri Vasu v. State of Uttar Pradesh and Others* [(2008) 2 SCC 409], correctness whereof is open to question, but it is another thing to say that the investigating officer will have no jurisdiction whatsoever to make any further investigation without the express permission of the Magistrate.”

12. In the context of the arguments raised at the bar, it is relevant to refer Section 3 of The Police Act, 1861, which reads as under :

“Superintendence in the State Government - The Superintendence of the Police throughout a general police district shall vest in and shall be exercised by the State Government to which such district is subordinate and except as authorized under the provisions of this Act, no person, officer or Court shall be empowered by the State Government to supersede or control any police functioning.”

13. Even by virtue of Section 36 Cr.P.C., the State Police has ample power to

investigate a crime to its satisfaction. Relevant portion of Section 36 Cr.P.C. reads as follows :

“ Powers of superior officers of police - Police officers superior in rank to an officer in charge of a police station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station.”

14. Considering the aforesaid facts and circumstances, the Hon'ble Supreme Court while giving interpretation to the provisions of Section 173(8) Cr.P.C. in the light of “fair and proper investigation” has culled out certain paradigms/canons emphasizing that investigation must be unbiased, honest, just and in accordance with law. The entire emphasis on a fair investigation is to bring out the truth of the case before the Court of competent jurisdiction and repel the very basis of an unfair and tainted investigation or cases of false implication. Even Article 21 of the Constitution of India demands fair and just investigation.

15. This Court in **Criminal Misc. Writ Petition No. 6555 of 2021 (Subodh Kumar Jain @ Subodh Jain vs. State of U.P. and others)** has already decided the issue with the observation that further investigation can be resorted to even after filing of a charge sheet and that no prior permission of the Magistrate is required for the said purpose. Relevant portion of the aforesaid judgment, it is extracted below :

“ The provisions of law provides that nothing precludes further investigation in respect of an offence after a report under Section 173 (2) Cr.P.C. has been forwarded to the Magistrate. It also provides that in

case such further investigation is made and some evidence oral or documentary is obtained, a further or supplementary report shall be made to the Magistrate concerned in the manner prescribed and that the provisions of Sections 2 to 6 shall apply to such supplementary, additional or further report. In this connection, the position of law has been settled in the case of State of A.P. Vs. A.S. Peter, 2008 AIR SCW 637. This judgment has held -

“ Indisputably, the law does not mandate taking of prior permission from the Magistrate for further investigation. Carrying out of a further investigation even after filing of the charge sheet is a statutory right of the police.”

This law as it stands is that according to the language of Section 173 (8), it is implicit that a Police Officer can suo motu make further investigations in cognizable cases. Otherwise also, under Section 156 (1), he can carry on further investigation and in non cognizable cases, once the order of 156 (1) has been passed by the Magistrate, he cannot do so.”

16. The Apex Court in **Vinubhai Haribhai Malaviya Vs. State of Gujarat (2019) 17 SCC 1** has considered the powers of the Magistrate and has held that the power of the police to further investigate the offence continues right till the stage the trial commences, subject of course to Magistrate's nod.

17. Recently, the Hon'ble Supreme Court has reiterated its observations in **State through Central Bureau of Investigation vs. Hemendhra Reddy and another, 2023 SCC Online SC 55** and also observed in **Anant Thanur Karmuse v. State of Maharashtra and others, (2023) 5 SCC 802.**

“We are conscious of the fact though a satisfaction of want of proper, fair, impartial and effective investigation eroding its credence and reliability is the precondition for a direction for further investigation or reinvestigation, submission of a charge sheet ipso facto, or the pendency of the trial can by no means, be a prohibitive impediment. The contextual facts and the attendant circumstances have to be singularly evaluated and analyzed to decide the needfulness of further investigation or re-investigation to unravel the truth and mete out justice to the parties. The prime concern and the endeavour of the Court of law should be to secure justice on the basis of true facts which ought to be unearthed through a committed, resolved and a competent investigating agency.”

18. The case in hand pertains to a cognizable offence, and, therefore, we are constrained to hold that submissions made by counsel for the petitioner are without substance.

19. The police has unfettered power of investigation and such investigation can continue even after the charge sheet has been filed under section 173 (8) Cr.P.C. and cognizance has been taken thereon. No formal permission of the Magistrate is required for carrying out further investigation even thereafter.

20. Accordingly, for the reasons stated above and since the submissions of counsel for the petitioners are found to be without substance, the writ petition fails and is liable to be dismissed.

21. The writ petition stands dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.07.2023

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE VIVEK KUMAR SINGH, J.

Writ-A No. 7938 of 2023

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

Counsel for the Petitioner:
Sri Sudarshan Singh

Counsel for the Respondents:
G.A., C.S.C.

A. Criminal Law-Constitution of India, 1950-Article 226 - U.P. Cow Slaughter (Prevention) Act, 1955-Sections 3/5A/8 -Animal Cruelty Act, 1960 - Section 11 - maintainability of- Pick-up, registered in the name of the petitioner, was seized as it was found transporting cows-Proceedings under Section 5A(7) of the U.P. Prevention of Cow Slaughter Act, 1955 were drawn based on the reports of the Superintendent of Police and Deputy Inspector After hearing the parties, the vehicle was confiscated in favour of the State- Sub-section 7 reveals that the District Magistrate/Commissioner of Police has been authorized to deal with proceedings of confiscation and release of a vehicle-No appeal or revision is provided against such order-However, in view of Section 11 which provides that where the Act of relevant rules in context of search, acquisition, disposal and seizure are silent, the relevant provisions of Code of Criminal Procedure shall apply-The order impugned would, therefore, be revisable under Section of Code of Criminal Procedure- The writ petition is, therefore, dismissed as not maintainable granting liberty to the petitioner to file revision against the order impugned for redressal of his grievances.(Para 1 to 11)

The writ petition is dismissed. (E-6)

(Delivered by Hon'ble Anjani Kumar Mishra, J. & Hon'ble Vivek Kumar Singh, J.)

1. Heard learned counsel for the petitioner and learned AGA for the State.

2. The instant writ petition seeks the following relief:-

"(i) issue, a writ, order or direction in the nature of quash the order dated 03.02.2023 passed by respondent no.2 (District Magistrate, District Chandauli) in Case No. 1032/2022 Computer Case No. D202214180001032) (State Vs. Ravi Kumar Gautam and others) U/s 5(A) of U.P. Cow Slaughter (Prevention) Act, 1955, arising out in Case Crime No. 205 of 2022, U/S 3/5A/8 U.P. Cow Slaughter (Prevention) Act and 11 Animal Cruelty Act, P.S. Chandauli, District Chandauli. "

3. A Pick-up, bearing registration number UP65JT6230 which is stated to be registered in the name of the petitioner, was seized as it was found transporting cows. Proceedings under Section 5A(7) of the U.P. Prevention of Cow Slaughter Act, 1955 were drawn based on the reports of the Superintendent of Police and Deputy Inspector dated 05.11.2022 and 04.11.2022. After hearing the parties, the vehicle was confiscated in favour of the State. The SHO Chandauli has been authorized to auction the vehicle and to deposit the sale proceeds in the relevant account, vide order dated 03.02.2023, passed by the respondent no.2.

4. The petitioner is aggrieved by this order dated 03.02.2023 and, therefore, this instant petition.

5. The contention of learned AGA is that the writ petition is not maintainable and that the order impugned is, revisable.

6. For considering the issue raised, it would be relevant to refer Section 5A of the Act which deals with regulation of transport of cows etc. The relevant Section is Sub-section 7 which reads as follows:-

"(7) The vehicle by which the beef or cow and its progeny is transported in violation of the provisions of this Act and the relevant rules, shall be confiscated and seized by the law enforcement officers. The concerned District Magistrate/ Commissioner of Police will do all proceedings of confiscation and release, as the case may be."

7. Also relevant for the purposes of this writ petition is sub-section 11 which is quoted below:-

"(11) Where the provisions of this Act or the related rules in context of search, acquisition, disposal and seizure are silent, the relevant provisions of the Code of Criminal Procedure, 1973 shall be effective thereto."

8. Perusal of Sub-section 7 reveals that the District Magistrate/Commissioner of Police has been authorized to deal with proceedings of confiscation and release of a vehicle. No appeal or revision is provided against such order. However, in view of Section 11 which provides that where the Act of relevant rules in context of search, acquisition, disposal and seizure are silent, the relevant provisions of Code of Criminal Procedure shall apply.

9. Under the circumstances, the submission of learned AGA appears to have force. The order impugned in the writ petition would, therefore, be revisable under Section of Code of Criminal Procedure which reads as follows:-

"Section 397. Calling for records to exercise powers of revision.

(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order,- recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record. Explanation.- All Magistrates whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 398.

(2) The powers of revision conferred by sub- section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them."

10. Under the circumstances and since the order impugned is a final order, we are constrained to hold that against the impugned order, the petitioner has a

statutory alternative remedy of filing a revision under Section 397 Cr.P.C..

11. The writ petition is, therefore, dismissed as not maintainable granting liberty to the petitioner to file revision against the order impugned for redressal of his grievances.

12. It would be relevant to observe that in our considered opinion, the petitioner may be entitled to the benefit of Section 11 of the Limitation Act in case, such plea is raised before the revisional court.

(2023) 8 ILRA 748

**APPELLATE JURISDICTION
CIVIL SIDE**

DATED: LUCKNOW 29.08.2023

BEFORE

**THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.**

First Appeal No. 170 of 2023

Eti Tyagi

...Appellant

Versus

Prince Tyagi

...Respondent

Counsel for the Appellant:

Atul Dixit

Counsel for the Respondent:

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(A) Family Law - Family Court Act, 1984 - Section 19(1) - Appeal, The Hindu Marriage Act, 1955 - Section 13-B - Divorce by mutual consent - all amicable settlements is bound to be respected and recognized by the courts of law in all such cases where the MOU remains unquestionable and the parties have acted upon freely in the pursuit of Article 21 of the Constitution of India to live with dignity - an amicable settlement deserves

**to be recognized in law with promptitude.
(Para – 6,7)**

case of two parties - amicably settled their matrimonial dispute through 'Memorandum of Understanding' - chosen to part ways in a situation where marital relationship had turned completely irretrievable - parties acted upon the MOU – parties - both educated and employed.
(Para -5)

HELD:-In the peculiar circumstances of the case, the Family Court's order has been set aside and the matter is remitted for a fresh decision. Remaining six months waived and application 12-C allowed. Family Court is directed to finalize proceedings under Section 13-B within two weeks. (Para – 8)

First appeal disposed of. (E-7)

List of Cases cited:-

1. Shilpa Sailesh Vs Varun Shreenivasan, 2023 Live Law (SC) 375
2. Amit Kumar Vs Suman Beniwal , 2021 SCC Online 1270
3. Naveen Kohli Vs Neelu Kohli, (2006) 4 SCC 558

(Delivered by Hon’ble Attau Rahman
Masoodi, J. & Hon’ble Om Prakash
Shukla, J.)

1. Shri Vishwakant Srivastava, Advocate, has filed his Vakalatnama on behalf of respondent, which is taken on record.

2. Heard learned Counsel for the appellant and learned Counsel for the respondent.

3. This appeal filed under Section 19(1) of Family Court Act, 1984 has arisen out of the judgement/order dated 27.07.2013 passed by Family Court in

Family Dispute No.1524 of 2023 whereby the first motion of the parties under Section 13-B of Hindu Marriage Act for dissolution of marriage initiated on 29.04.2023 accompanied with an application i.e. C-12 for waiver of cooling-off period was rejected. The proceedings had been instituted after a period of more than one year since when the parties lived separately and had arrived at an amicable settlement on 28.04.2023 to part ways due to irretrievable breakdown of marriage.

4. Both the parties were present before the Family Court and this fact is not disputed. The learned Family Court having regard to the statutory mandate was not impressed by the argument-built on the premise of judgment reported in **2023 Live Law (SC) 375 : Shilpa Sailesh Vs. Varun Shreenivasan** for the reason that Hon'ble the Apex Court in the said judgment had merely dealt with the scope of Article 142(1) of the Constitution of India. The Hon'ble Apex Court had granted the decree of divorce in the light of powers under Article 142(1) of the Constitution of India. To this extent we do not find any illegality in the order passed by the Family Court.

5. The case before us is a case of two parties having amicably settled their matrimonial dispute through 'Memorandum of Understanding' (hereinafter referred to as 'MOU') on 28.04.2023. The parties had chosen to part ways in a situation where marital relationship had turned completely irretrievable. The parties have also acted upon the MOU. Both the parties are educated and employed.

6. This Court may note that legitimacy or otherwise of an MOU arrived at between the parties out of their free will is not open to judicial scrutiny except on

7. The Hon'ble Apex Court in the case of ***Amit Kumar Vs. Suman Beniwal*** reported in ***2021 SCC Online 1270*** has though observed that the institution of marriage is to be saved by preventing hasty dissolution of marriage, but at the same time once the parties have separated and separation has continued on account of the irretrievable breakdown, in such a situation the Apex Court taking the aid of ***Naveen Kohli Vs. Neelu Kohli (2006) 4 SCC 558*** has also opined otherwise. The parties to a marriage if allowed to litigate would also not achieve the purpose of law and would thus damage the institution of marriage in equal measure. It is for this reason that an amicable settlement deserves to be recognized in law with promptitude.

9. With the aforesaid observation, the instant appeal is **disposed of**.

Counsel for the Respondents:

A. Srivastava, Anil Srivastava, J.P. Maurya

A. Civil Law - Railway Claim Tribunal Act, 1987-Section 23 read with Railway Claim Tribunal (Procedure) Rules, 1989- the son of the claimants died in an accident and application was filed for compensation before the Tribunal- one day the claimants were absent and the application was dismissed for default- Tribunal dismissed the application in default and for restoring the matter stating that the provisions of the Limitation Act for filing application will not be applicable-Tribunal held that There is a time limit of 30 days in filing the application-If sufficient cause is made out, Tribunal has got power to condone the delay under section 5 of the Limitation Act as there is no specific exclusion or prohibition in the section for extending the time. Hence, considering the mandate of section 29(2) of the Limitation Act, section 5 of the Limitation Act is applicable-Here, adequate reasons are given by the appellants for condoning the delay-Therefore, the Tribunal ought to have condoned the delay.(Para 1 to 14)

B. Rule 18 of the Railway Claims Tribunal (Procedure) Rules prescribes the time limit of 30 days in filing an application for setting aside an order dismissing the application for default. But, there is no specific exclusion or prohibition in the section for extending the time. Hence, considering the mandate of section 29(2) of the Limitation Act, section 5 of the Limitation Act is applicable. It is true that before Mukri Gopalan's case, there were a large number of decisions to the effect that section 5 of the Limitation Act is applicable only to a civil court. Now it has been consistently held that in the absence of specific exclusion or prohibition, it limitation is prescribed in a special law for filing an application, by virtue of section 5 read with section 29(2) of the Limitation Act, Tribunal which has all the trappings of court can condone delay on sufficient reasons. This is all the more applicable to the Railway Claims Tribunal in setting aside any order of dismissal for default of the applicant in view of section 18(3) of

the Railway Claims Tribunal Act, 1987. (Para 6,7)

The appeal is allowed. (E-6)

List of Cases cited:

1. Shyam Santaram Sali (Marathi) Vs UOI, Guj. HC
2. Mukri Gopalan's case (1995) AIR SC 2272

(Delivered by Hon'ble Ajay Bhanot, J.)

1. Heard Shri Ashok Kumar Bhatnagar, learned counsel for the appellant and Shri Varun Pandey, learned counsel for the respondent-Union of India.

2. The instant first appeal from order arises out of a judgement and order dated 09.02.2000 as well as 21.01.2002 under Section 23 of the Railway Claim Tribunal Act in Claim Case No.9700392 passed by the learned Railway Claims Tribunal, Lucknow Bench, Lucknow dismissing the claim of the appellant in default on 09.02.2000 and rejecting the restoration application by order dated 21.01.2002.

3. The learned Tribunal in the impugned judgement dated 21.01.2002 has declined the application for restoration on the footing that it was time barred and the delay cannot be condoned since the Limitation Act does not apply to the proceedings under the Railway Claim Tribunal Act, 1987 read with Railway Claim Tribunal (Procedure) Rules, 1989.

4. The facts are narrow in compass. The claim case filed by the appellant was dismissed for non prosecution on 09.02.2000. Thereafter, the appellant filed a restoration application on 04.10.2000. There was a delay of 8 months in instituting the application for restoration.

The time limit for filing an application to set aside the order dismissing the application for default is 30 days.

5. The question is whether the application under Section 5 of the Limitation Act applies to the proceedings under the Railway Claim Tribunal Act, 1987 read with Railway Claim Tribunal (Procedure) Rules, 1989 and whether the delay condonation application was liable to be heard on merits. The legal issue which arises for determination has been decided by the Hon'ble Gujarat High Court in **Shyam Santaram Sali (Marathi) v. Union of India** by holding as under:

"6. Rule 18 of the Railway Claims Tribunal (Procedure) Rules prescribes the time limit of 30 days in filing an application for setting aside an order dismissing the application for default. But, there is no specific exclusion or prohibition in the section for extending the time. Hence, considering the mandate of section 29(2) of the Limitation Act, section 5 of the Limitation Act is applicable. It is true that before Mukri Gopalan's case, AIR 1995 SC 2272, there were a large number of decisions to the effect that section 5 of the Limitation Act is applicable only to a civil court. Now it has been consistently held that in the absence of specific exclusion or prohibition, its limitation is prescribed in a special law for filing an application, by virtue of section 5 read with section 29(2) of the Limitation Act, Tribunal which has all the trappings of court can condone delay on sufficient reasons. This is all the more applicable to the Railway Claims Tribunal in setting aside any order of dismissal for default of the applicant in view of section 18(3) of the Railway Claims Tribunal Act, 1987.

7. In view of the above discussions, we are of the opinion that section 5 of the Limitation Act is applicable and Tribunal should have condoned the delay as sufficient reasons are given for condoning the delay. Here, the son of the claimants died in an accident and application was filed for compensation before the Tribunal. It is true that on one day the claimants were absent and the application was dismissed for default. By filing an application for setting aside the order dismissing the application in default and for restoring the matter, the provisions of the Limitation Act for filing application will not be applicable. There is a time limit of 30 days in filing the application. Therefore, it has to be filed within 30 days. If sufficient cause is made out, Tribunal has got power to condone the delay under section 5 of the Limitation Act and liberal approach has to be adopted by the Tribunal. Here, adequate reasons are given by the appellants for condoning the delay. Therefore, the Tribunal ought to have condoned the delay. Therefore, we condone the delay in filing the application for setting aside the order dismissing the application for default and the matter is remanded to the Tribunal for deciding the question on merits. We are not expressing any opinion regarding the merits of the matter. Parties shall appear before the Tribunal on 14.01.2008. The appeal is allowed."

6. The same issue fell for consideration before the Hon'ble Gujarat High Court in **Dharmesh Madhubhai Parmar v. Union of India** wherein the applicability of Section 5 of the Limitation Act to the proceedings under the Railway Claim Tribunal Act, 1987 read with Railway Claim Tribunal (Procedure) Rules, 1989 was affirmed and the application for

delay condonation was allowed on merits stating the legal position as under:

"6. Rule 18 of the Railway Claims Tribunal (Procedure) Rules prescribes the time limit of 30 days in filing an application for setting aside an order dismissing the application for default. But, there is no specific exclusion or prohibition in the section for extending the time. Hence, considering the mandate of section 29(2) of the Limitation Act, section 5 of the Limitation Act is applicable. It is true that before Mukri Gopalan's case, AIR 1995 SC 2272, there were a large number of decisions to the effect that section 5 of the Limitation Act is applicable only to a civil court. Now it has been consistently held that in the absence of specific exclusion or prohibition, it limitation is prescribed in a special law for filing an application, by virtue of section 5 read with section 29(2) of the Limitation Act, Tribunal which has all the trappings of court can condone delay on sufficient reasons. This is all the more applicable to the Railway Claims Tribunal in setting aside any order of dismissal for default of the applicant in view of section 18(3) of the Railway Claims Tribunal Act, 1987.

7. In view of the above discussions, we are of the opinion that section 5 of the Limitation Act is applicable and Tribunal should have condoned the delay as sufficient reasons are given for condoning the delay. Here, the son of the claimants died in an accident and application was filed for compensation before the Tribunal. It is true that on one day the claimants were absent and the application was dismissed for default. By filing an application for setting aside the order dismissing the application in default and for restoring the matter, the provisions of the Limitation Act

for filing application will not be applicable. There is a time limit of 30 days in filing the application. Therefore, it has to be filed within 30 days. If sufficient cause is made out, Tribunal has got power to condone the delay under section 5 of the Limitation Act and liberal approach has to be adopted by the Tribunal. Here, adequate reasons are given by the appellants for condoning the delay. Therefore, the Tribunal ought to have condoned the delay. Therefore, we condone the delay in filing the application for setting aside the order dismissing the application for default and the matter is remanded to the Tribunal for deciding the question on merits. We are not expressing any opinion regarding the merits of the matter. Parties shall appear before the Tribunal on 14.01.2008. The appeal is allowed."

8. The judgments rendered by the Hon'ble Gujarat High Court in **Shyam Santaram Sali (Marathi) (supra)** and **Dharmesh Madhubhai Parmar (supra)** will govern the fate of this case as well.

9. In the wake of the preceding discussion, this Court finds that Section 5 of the Limitation Act is applicable to the proceedings taken out under the Railway Claim Tribunal Act, 1987 read with Railway Claim Tribunal (Procedure) Rules, 1989. The delay condonation application filed in support of the restoration application is liable to be considered on merits.

10. The cause shown for the application for delay condonation discloses that the case was transferred from the Tribunal at Gorakhpur to the Railway Claims Tribunal at Lucknow. Due to oversight on part of the office of the learned counsel for the appellant, this fact could not be

communicated to the appellant. The absence of the appellant /his counsel when the matter was taken up for hearing before the learned Railway Claims Tribunal at Lucknow was due to bonafide reasons and for circumstances beyond his control. The appellant upon getting knowledge of the order dismissing the claim petition for non prosecution immediately filed a restoration application without further delay. The application for delay condonation discloses that the cause for delay was genuine, bonafide and the delay was not intentional. This Court also finds that the appellant was always diligent in the prosecution of his claim. Moreover, when the substantive rights of the parties are engaged before the courts, the endeavour of the courts is always to serve substantive justice and not shut the doors of justice to the claimants on technicalities.

11. In this wake, the application for delay condonation is liable to be entertained and is allowed. The restoration application is liable to be allowed and is allowed.

12. The judgement and order dated 09.02.2000 as well as 21.01.2002 passed by the learned Railway Claims Tribunal, Lucknow Bench, Lucknow is liable to be set aside and is set aside.

13. The matter is remitted to the learned tribunal for decision on merits.

14. The instant first appeal from order is allowed.

(2023) 8 ILRA 754

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 10.07.2023

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

First Appeal from Order No. 301 of 2020

Ruhi Arora & Anr. ...Appellants

Versus

Smt. Monika & Ors. ...Respondents

Counsel for the Appellants:

Sri Santosh Tripathi, Sri Ajay Kumar Singh, Sri Ashok Kumar Bais, Sri Ramesh Chandra Srivastava, Sri Dev Dutt Arora(In-Person), Sri M.D. Singh

Counsel for the Respondents:

Sri S.D. Ojha

Civil Law-Motor Vehicle Act, 1988-Section 173-Challenge to-award of compensation-unmarried sister and father of the deceased filed seeking to modify the award - The appellant No. 1(unmarried sister) has not been awarded any compensation-The appellant No. 2 (father) has been awarded 10% of the compensation computed i.e. Rs.5,23,032.80 or Rs.5,28,033/-. The wife and minor children of the deceased have been awarded 60%, 15% and 15% of the compensation along with 6% interest per annum-Tribunal manifestly erred in law in denying the compensation to the appellant No. 1 (sister of the deceased) on the ground that she could not be treated to be dependent upon her deceased brother during the life time of her father (Appellant No. 2)-She was also liable to be awarded compensation to the extent of 15% of the amount of compensation awarded- Moreso, the Tribunal wrongly apportioned 10% amount for the appellant No. 2 whereas he ought to have been awarded 20% as he lost his only son-As per Apex Court decision in *Magna General Insurance Case* and the decision in *Pranay Sethi Case*, the surviving spouse (wife of the deceased) is entitled for spousal consortium to the extent of 40,000/- instead of Rs. 2,500/- awarded-Likewise the funeral expenses are liable to be increased to Rs. 15,000/- from Rs. 2,500/- awarded - The appellants herein

being the unmarried sister and father of the deceased are entitled to a sum of Rs. 40,000/- each on account of loss of filial consortium. (Para 1 to 26)

The Apex Court held that '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, co-operation, 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.(Para 20)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Sarla Verma & ors. Vs DTC & anr. (2009) 6 SCC 121
2. Reshma Kumari & ors. Vs Madan Mohan & anr. (2013) 9 SCC 65
3. National Ins. Co. Ltd. Vs Pranay Sethi (2017) 16 SCC 680
4. Santosh Devi Vs Mahaveer Singh (2018) 9 SCC 146

5. Sureshchandra Bagmal Doshi Vs New India Assr. Co. Ltd (2018) 15 SCC 649

6. Magma Gen. Ins. Co. Ltd. Vs Nanu Ram @ Chuhru Ram (2018) 18 SCC 130

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

1. Heard Shri Dev Dutt Arora (appellant No. 2) In-person for the appellants and Shri S. D. Ojha, learned counsel for the claimant-respondent Nos. 1 to 3. No one appeared for respondent Nos. 4 & 5 despite service.

2. This First Appeal From Order dated 17.8.2013, at the instance of the unmarried sister and father of the deceased, has been filed seeking to modify the judgment/award of the Motor Accident Claims Tribunal, Saharanpur rendered in MACP No. 149 of 2011 (Smt. Monika Arora and others versus Vishnu Kumar Meena and others) by making re-apportionment of the share of the awarded compensation of Rs.52,80,328/- and grant appropriate share to appellant No. 1 (unmarried sister of the deceased) and to enhance the share of the appellant No. 2 from 10% of the award to 20% by making adjustment from the 60% share of claimant respondent No. 1-Smt. Monika Arora (widow of the deceased).

3. The appellant No. 2, In-person, submits that his only son Vikalp Arora died in a road accident which took place on 22.4.2011 at 3:30 PM near Chachura Nahar Thana Kakor District Gautam Budh Nagar on the Bulandshahr Noida Road. Vikalp was traveling in a Alto Car bearing registration No. UP-21-T-7739 along with his friends Ankit and Surjeet when a Truck bearing registration No. RJ-11-GA-2075 overturned over the Alto car crushing the

occupant Vikalp Arora resulting in his death on the spot. Vikalp Arora was 33 years of age and employed as a Territory Sales Officer with Hindustan Unilever Ltd., and earning approx Rs.70,000/- per month. He was survived by his wife Monika Arora, a minor daughter Ananya Arora and minor son Luv Arora besides the appellants herein. A claim petition under Section 166 of the Motor Vehicles Act, being Claim Petition No. 149 of 2011 was filed before the MACT, Saharanpur by the claimant-respondent Nos. 1 to 3 along with the appellants herein claiming a compensation of Rs.1,57,10,000/- besides Rs.50,000/- immediately under Section 140 of the Motor Vehicles Act and 12% interest per annum from the date of accident upto the date of actual payment under Section 171 of the Act. The claims Tribunal under the impugned award dated 17.8.2013 awarded a sum of Rs.52,80,328/- as compensation with 6% simple interest from the date of institution of the claim petition. The claims Tribunal did not award any compensation to the appellant No. 1 herein (unmarried sister) on the ground that she could not be treated to be dependent upon the deceased brother during the life time of the father (appellant No. 2 herein). The Tribunal, however, apportioned 10% of the amount awarded as compensation in favour of the appellant No. 2 (father of deceased). 60% of the award was apportioned in favour of the wife of the deceased (claimant respondent No. 1 herein) while the dependent minor children of the deceased (claimant respondent Nos. 2 & 3 herein) were apportioned 15% each of the compensation awarded.

4. The wife of the deceased i.e. Monika Arora along with her two minor children i.e. the claimant-respondent Nos. 1 to 3 herein assailed the award dated

17.8.2013 passed by the Motor Accident Claims Tribunal, Saharanpur before this Court by means of FAFO (D) No. 290 of 2014. The appeal filed by the wife and minor children of the deceased (i.e. the claimant-respondent Nos. 1 to 3 herein) came to be decided in terms of a settlement arrived at before the National Lok Adalat held before this Court vide order dated 3.10.2021 wherein the Insurance Company (ICICI Lombard General Insurance Co. Ltd.) and the claimants amicably settled the appeal for a full and final consideration of Rs.26,25,000/- over and above the amount that had already been received by the claimants (if any). The settlement also contained a stipulation that nothing beyond the above amount settled would be payable to the claimants by the Insurance Company (ICICI Lombard General Insurance Co. Ltd.).

5. Shri S. D. Ojha, learned counsel for respondent Nos. 1 to 3 submits that the settlement arrived at on 3.10.2021 has already been given effect to and the claimants have received the amount of the compensation in the same proportion as has been awarded by the Tribunal under the impugned award. The appellant No. 2 Dev Dutt Arora has been released 10% of the awarded amount i.e. Rs.2,62,500/-.

6. This Court in the aforesaid backdrop is required to decide the present appeal.

7. Shri Dev Dutt Arora, the appellant No. 2, who has appeared in person has made the following submissions:-

- the Claims Tribunal manifestly erred in law in denying the compensation to the appellant No. 1

(sister of the deceased) on the ground that she could not be treated to be dependent upon her deceased brother during the life time of her father (Appellant No. 2). She was also liable to be awarded compensation to the extent of 15% of the amount of compensation awarded.

- the Claims Tribunal wrongly apportioned 10% amount for the appellant No. 2 whereas he ought to have been awarded 20% as he lost his only son.
- the compensation amount is not just and proper and is not commensurate with the loss suffered by the claimants/appellants on the accidental death of Vikalp Arora, the only brother/son of the appellant Nos. 1 & 2.
- refusing compensation to the appellant No. 1 is based on no evidence and the appellant No. 1 cannot be treated to be financially dependent upon her father (appellant No. 2) specially when the appellant No. 2 himself was dependent upon the income of his deceased son Vikalp Arora.

8. It is accordingly prayed that the appeal is liable to be allowed and the award of the Motor Accident Claims Tribunal is liable to be modified accordingly as prayed.

9. Shri S. D. Ojha, learned counsel for claimant/respondent Nos. 1 to 3, however,

submits that the award of the Motor Accident Claims Tribunal, Saharanpur is just and proper and needs no interference by this Court. The Tribunal has found that the appellant No. 1, Ruhi Arora was dependent upon her father (appellant No. 2) who was running a general merchant shop. He, thus, submits that the appeal warrants rejection.

10. I have heard the respective parties and have perused the record.

11. So far as the denial of the compensation consequent to the death of Vikalp Arora to the appellant No. 1, Juhi Arora (unmarried sister) on the ground that she could not be held to be dependent upon the deceased during the life time of her father (appellant) appears to be justified in the absence of any evidence that the deceased had been contributing towards the fee etc., for the education of the appellant No. 1. No evidence was led before the Claims Tribunal in this regard and no evidence to this effect has been led before this Court. It has come in evidence that the appellant No. 2 had been running his Kirana shop which fact has not been denied. In such view of the matter, the Court is not inclined to interfere in the finding of the Tribunal in this regard.

12. The Apex Court in the case of *Sarla Verma and others versus Delhi Transport Corporation & another*, reported in **2009 (6) SCC 121**, has held that where the deceased was married the deduction towards personal and living expenses should be 1/3rd if the number of dependent family members is two to three; 1/4th if the number of dependent family member is four to six; and 1/5th if the number of dependent family members exceeds six. If the deceased was a bachelor

and the claim was filed by the parents, the deductions would normally be 50% as personal and living expenses of the bachelor. Subject to the evidence to the contrary the father was likely to have his own income and would not be considered to be a dependent. Hence, the mother alone will be considered to be a dependent. In the absence of any evidence to the contrary, brothers and sisters of the deceased bachelor would not be considered to be dependents because they would usually either be independent and earning, or married, or dependent on the father.

13. The above view taken in the case of *Sarla Verma (supra)* has been upheld by a three Judges Bench in *Reshma Kumari and others versus Madan Mohan and another* reported in **2013 (9) SCC 65** as also by a subsequent constitutional Bench in the case of *National Insurance Co. Ltd., versus Pranay Sethi* reported in **2017 (16) SCC 680**.

14. Now, coming to the quantum of the compensation determined by the Claims Tribunal under the impugned award and the apportionment of the same in favour of the appellant No. 2 (father of the deceased) the Court finds that the Tribunal has followed the principles for assessment of compensation in case of death as evolved by judicial dicta i.e. *Sarla Verma* (supra) in particular and has arrived at just compensation by applying the correct multiplier and making deductions for personal and living expenses following the standards prescribed in Para 30, 31 & 32 of the decision in the case of *Sarla Verma* (supra). This Court finds that the Tribunal proceeded to compute the compensation payable to the claimants as under:-

i)	Income	Rs. 4,19,562/- p.a.
ii)	Deduction	Rs.1,39,854/-

	towards personal expenses (1/3)	
iii)	Multiplied and bonus	Rs.2,79,708/- + Rs.50,000/- =Rs.3,29,708/- = (Rs.4,19,562 - Rs.1,39,854 + Rs.50,000)
iv)	Loss of dependency	Rs.3,29,708 x 16 = Rs.52,75,708/-
v)	Funeral expenses	Rs.2,500/-
vi)	Loss of spousal consortium	Rs.2,500/-
	Total compensation	Rs.52,80,328/-

15. The Claims Tribunal thus proceeded to award a sum of Rs.52,80,328/- to the claimants. The appellant No. 1 has not been awarded any compensation. The appellant No. 2 has been awarded 10% of the compensation computed i.e. Rs.5,23,032.80 or Rs.5,28,033/-. The wife and minor children of the deceased have been awarded 60%, 15% and 15% of the compensation along with 6% interest per annum.

16. A perusal of the impugned award of the Claims Tribunal reflects that a sum of Rs. 2,500/- has been awarded towards loss of spousal consortium and Rs.2500/- towards funeral expenses.

17. In *National Insurance Company Ltd. versus Pranay Sethi reported in (2017) SCC 680* the Constitution Bench of the

Apex Court held that the conventional and traditional heads (i.e. loss of estate, loss of consortium and funeral expenses) 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 of 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 of the Courts and Tribunals are likely to be unguided. Therefore, the reasonable figures on the conventional heads namely, loss of estate, loss of consortium and funeral expenses should be 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. The Apex Court observed that it would be condign that the amounts that has quantified as above 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 which will bring in consistency in respect of those heads.

18. In **Santosh Devi v. Mahaveer Singh [(2018) 9 SCC 146]** a Three-Judge Bench of the Apex Court granted compensation on conventional heads, in terms of the figures standardized by the Constitution Bench in the year 2017, in Pranay Sethi, (supra) to the wife and children of one Puran Chand, who died in a

motor accident, which occurred on 30.12.1992.

19. In **Sureshchandra Bagmal Doshi v. New India Assurance Company Limited [(2018) 15 SCC 649]** the Apex Court granted the figures on conventional heads standardised by the Constitution Bench in the year 2017, in Pranay Sethi, i.e., Rs.15,000/- as loss of estate; Rs.40,000/- towards loss of consortium; and Rs.15,000/- as funeral expenses to the parents [appellants before the Apex Court], who lost their only daughter in a motor accident which occurred on 16.08.1998. In the said decision, Rs.40,000/- granted in Pranay Sethi towards loss of consortium was granted to the appellants, who are the parents of the deceased, towards loss of love and affection. Paragraphs 1 and 14 of the said decision read thus;

"1. Fate can be cruel. This is a tragic case where the only daughter of a lawyer husband and a doctor wife, who got married early and unfortunately became a widow also at a young age, died in a vehicular accident, which took place on 16.8.1998. The claim of the parents (appellants herein) in respect of this unfortunate demise forms the subject matter of the present appeal.

xxx xxx xxx

14. Now coming to the last aspect, i.e., the conventional heads, in National Insurance Company Ltd. v. Pranay Sethi [(2017) 16 SCC 680], it has been standardised at Rs.15,000 for loss of estate; Rs.40,000 towards loss of consortium (in the present case loss of love and affection) and Rs.15,000 towards funeral expenses. The total amount, thus, would be Rs.70,000, which as per the said judgment is capable of being enhanced @ 10 per cent in the span of every three years. However, we are

still within the window of three years."
"underline supplied"

20. In ***Magma General Insurance Co. Ltd. v. Nanu Ram @ Chuhru Ram [(2018) 18 SCC 130]***, after referring to the decision in Pranay Sethi (supra), the Apex Court held that 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. 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, co-operation, 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*** (supra), the Apex Court held that consortium is a special prism reflecting changing norms about the status and worth of actual relationships. Modern jurisdictions world-over have recognized 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. The Motor Vehicles Act is a beneficial legislation aimed at providing relief to the victims or their families, in cases of genuine claims. In a case where parents have 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 Motor Vehicles Act. The Apex Court held further that, 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 (supra).

22. In the case of ***Magma General Insurance*** (supra), the deceased was aged 24 years, who was engaged in the business of manufacturing 'namkeen products', who died in a motor accident which occurred on 01.12.2013. The father, brother and sister of the deceased filed claim petition under Section 166 of the Motor Vehicles Act. The Claims Tribunal did not award any compensation to the brother of the deceased, as he could not be considered to be a dependent. Compensation was awarded to the father and unmarried sister of the deceased, who were held to be dependents. The father and sister of the deceased filed appeal before the Punjab and Haryana High Court for enhancement of the compensation awarded by the Claims Tribunal. The High Court found that the

Claims Tribunal used the wrong principle for application of multiplier. The multiplier ought to have been taken on the basis of the age of the deceased and not that of his father. The High Court, while re-assessing the compensation granted a sum of Rs.1,00,000/- (Rs.50,000/- x 2) towards loss of love and affection to the father and unmarried sister of the deceased. The insurer filed S.L.P. before the Apex Court contending, inter alia, that the father and sister of the deceased could not be considered as dependents, and were not entitled to compensation. In case of death of bachelor, only the mother could be considered to be a dependent. The grant of Rs.1,00,000/- on account of loss of love and affection, and Rs.25,000/- towards funeral expenses is erroneous. It was contended that only Rs.30,000/- could have been awarded as per the judgment in *Pranay Sethi* (supra). [i.e., loss of estate - Rs.15,000/- and funeral expenses - Rs.15,000/-] The Apex Court held that, considering that the deceased was living in a village, where he was residing with his aged father, who was about 65 years old, and an unmarried sister, the High Court correctly considered them to be dependents of the deceased, and made a deduction of 1/3rd towards personal expenses of the deceased. [Para.16 @ page 135 of SCC] The Apex Court found that the deceased was a bachelor, whose mother had pre-deceased him. The father of the deceased was about 65 years old and his sister was unmarried. The deceased was contributing a part of his meager income to the family for their sustenance and survival. Therefore, the Apex Court held that the father and unmarried sister of the deceased would be entitled to compensation under his dependents. [Para.18 @ page 136 of SCC] Dealing with the contention of the insurer that the High Court had wrongly awarded Rs.1,00,000/- towards loss of love and affection, and Rs.25,000/- towards

funeral expenses, the Apex Court, after quoting Para 52 of the decision in *Pranay Sethi* (supra), decreased the compensation under the head funeral expenses from Rs.25,000/- to Rs.15,000/-. However, the amount awarded under the head loss of love and affection was maintained. After explaining the concept of spousal consortium, parental consortium and filial consortium, the Apex Court deem it appropriate to award the father and unmarried sister of the deceased, an amount of Rs.40,000/- each for loss of filial consortium.

23. In view of the law laid down by the Constitution Bench of the Apex Court in *Pranay Sethi* (supra), which was followed in *Santhosh Devi and Suresh Chandra Bagmaldoshi* referred to supra, the compensation payable under the conventional heads of loss of estate, loss of consortium and funeral expenses should be Rs.15,000/-, 40,000/- and Rs.15,000/- respectively. The aforesaid figures quantified by the Apex Court should be enhanced on percentage basis, at the rate of 10%, in a span of every three years.

24. In view of the law laid down by the Apex Court in *Magna General Insurance Company Ltd* (Supra) after referring to the decision in *Pranay Sethi* (Supra) the surviving spouse (respondent no. 1 herein) is entitled for spousal consortium to the extent of 40,000/- instead of Rs. 2,500/- awarded. Likewise the funeral expenses are liable to be increased to Rs. 15,000/- from Rs. 2,500/- awarded by the Claims Tribunal. The appellants herein being the unmarried sister and father of the deceased are entitled to a sum of Rs. 40,000/- each on account of loss of filial consortium.

25. Learned counsel for the respondent nos. 1 to 3 has vehemently argued that the respondent nos. 1 to 3 settled the claim with the Insurance Company in the Appeal filed by them and the settlement has already been given effect to and now the Appellants herein may not be entitled to any further compensation. In the opinion of the Court the above submission does not merit consideration in as much as the present appellants were not party to the settlement arrived at with the Insurance Company and the decision rendered in the FAFO (D) No. 290 of 2014 dated 03.10.2021 shall not bind the present appellants. Ideally both the Appeals ought to have been decided/ settled together. This having not been done the present Appeal has been considered on its own merits. Since this Court has upheld the 10% apportionment of the impugned award dated 17.08.2013 in favour of the Appellant no. 2, the Appellant having already received a sum of Rs.5,28,033/- (being 10% of the award) and Rs.2,62,500/- (on account of the enhancement in the compensation in FAFO (D) No. 290 of 2014), the appellant No. 2 shall stand entitled to Rs. 40,000/- on account of loss of filial consortium only. The appellant no. 1 shall stand entitled to a sum of Rs. 40,000/- on account of loss of filial consortium. All payments to the appellants shall carry an interest of 6% per annum from the date of the claim petition till the date of actual payment/realization. The 5th respondent/ Insurer/ ICICI Lombard General Insurance Company through Branch Manager Parsvanath Plaza Court Road, Saharanpur (Insurer of Truck No. RJ-11GA-2075) shall satisfy the additional compensation granted in this Appeal together with interest, within a period of two months from the date of service of certified copy of this judgment.

26. The Appeal is *partly allowed* to the extent above. The impugned award shall stand modified accordingly. No order as to costs.

(2023) 8 ILRA 762
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.07.2023

BEFORE

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

First Appeal from Order No. 302 of 1996

Lalti Devi & Ors. ...Appellants
Versus
Jagdish Kumar & Ors. ...Respondents

Counsel for the Appellants:

Sri Surendra Kumar Mishra, Sri Rajendra Tiwari,
 Sri Rajesh Tiwari

Counsel for the Respondents:

Sri Arun Kumar Shukla, Sri Ashok Kumar Pandey

A. Civil Law - Motor Vehicle Act, 1988-Section 173-Challenge to-award of compensation- The deceased was 41 years of age and was working as a vaccinator in P.H.C -his income is considered to be Rs. 2000/- p.m to which as the deceased was in the age bracket of 40 to 50 years, 30% as future loss of income requires to be added in view of the Pranay Sethi Case- As far as amount under the head of non-pecuniary damages are concerned, it should be Rs.70,000/-, granted multiplier of 14-The tribunal erroneously deducted the amount of family pension and amount receivable as salary to the widow-These findings are against the mandate of the Apex Court-Amount of Rs. 32,000/- be deducted and interest be recounted on enhanced amount-The interest on Rs. 32,000/- would remain unaltered-As far as issue of rate of interest is concerned, it would be reduced to 9% from 12% , hence on the

enhanced amount rate of interest would be 6% from the date of filing of the claim petition till decision of the claim petition and 3% thereafter- Tribunal shall follow the guidelines issued by the Apex Court in Bajaj Allianz Case as the purpose of keeping compensation is to safeguard the interest of the claimants-No amount shall be kept in fixed deposit as the accident is of the year 1991.(Para 1 to 15)

The appeal is disposed of. (E-6)

List of Cases cited:

1. National Ins. Co. Ltd Vs Pranay Sethi & ors. (2017) 0 Supreme (SC) 105
2. Vimal Kanwar & ors. Vs Kishore Dan & ors. (2013) 7 SCC 476
3. A.V. Padma Vs Venugopal (2012) 1 GLH SC 442
4. Smt. Hansaguri P. Ladhani Vs The Oriental Ins. Co. Ltd. (2007) 2 GLH 291
5. Smt. Sudesna & ors. Vs Hari Singh & anr.. FAFO No.23 of 2001
6. Bajaj Allianz Gen. Ins. Co. Pvt. Ltd. Vs UOI & ors.

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

1. Heard learned counsel for the appellants and learned counsel for the respondent-insurance company.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 7.3.1996 passed by M.A.C.T, Varanasi (hereinafter referred to as "Tribunal") in M.A.C. Case No. 105 of 1992.

3. Brief facts as culled out from the record are that on 14.12.1991 Ram Lakhan

Ram alongwith Harvinder Singh was going towards Rohania market. At about 5 p.m when he reached near the curve of G.T Road near Jagatpur, vehicle no. UMG 9121 DCM Toyota being driven rashly and negligently by its driver coming from the side of Allahabad and going towards Varanasi reached there and dahed Ram Lakhan Ram, who sustained injuries on his person and was taken to S.S.P.G. Hospital, Varanasi and then shifted to S.S.L. Hospital, B.H.U, Varanasi and succumbed to his injuries on 29.12.1991.

4. The deceased Ram Lakhan Ram was 41 years of age and was working as a vaccinator in P.H.C Chiraigaon, Varanasi earning Rs. 2000/- p.m. who has left behind him his wife, three sons and two daughters. The tribunal for an accident in the year 1991 despite the judgments of the Apex Court even in those days namely in the year 1996 deducted the amount granted towards pension and other death benefits and held that as widow was granted compassionate appointment the salary cannot be considered for grant of compensation and granted only a meager amount of Rs. 32,000/- with 12% interest.

5. The deceased was 41 years of age, his income is considered to be Rs. 2000/- p.m to which as the deceased was in the age bracket of 40 to 50 years, 30% as future loss of income requires to be added in view of the decision of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 105**. As far as amount under the head of non-pecuniary damages are concerned, it should be Rs.70,000/-, granted multiplier of 14. The tribunal erroneously deducted the amount of family pension and amount receivable as salary to the widow. These findings are against the

mandate of the Apex Court. The judgment of Apex Court in **Vimal Kanwar & Ors Vs. Kishore Dan & Ors, 2013 7 SCC 476** would apply to the facts of this case.

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

- i. Income : Rs.2000/-
- ii. Percentage towards future prospects : 30% namely Rs.600/-
- iii. Total income : Rs. 2000 + 600 = Rs. 2600/-
- iv. Deduction of 1/3rd= Rs. 867/- (rounded up)
- v. Income after deduction of 1/3rd : Rs. 1733/-
- vi. Annual loss : Rs. 1733 x 12 = Rs. 20,796/-
- vii. Multiplier applicable : 14
- vii. Total loss : Rs. 20,796 x 14 = Rs. 2,91,144/-
- viii. Amount under non-pecuniary head : Rs.70,000/- + Rs. 30,000/-
- ix. Total compensation : Rs. 3,91,144/- (rounded upto Rs. 4,00,000/-)

7. Amount of Rs. 32,000/- be deducted and interest be recounted on enhanced amount. The interest on Rs. 32,000/- would remain unaltered. As far as issue of rate of interest is concerned, it would be reduced to 9% from 12% as per the oral submission of Sri Arun Kumar Shukla, hence on the enhanced amount rate of interest would be 6% from the date of filing of the claim petition till decision of the claim petition and 3% thereafter. This is just compensation offered by the respondents which means Rs. 3,70,000/- with interest is decided by and between the parties.

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

9. In view of the above, the appeal is partly allowed. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the additional amount within a period of 12 weeks from today with interest as directed above.

10. 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 Vs. Venugopal, Reported in 2012 (1) GLH (SC), 442**, the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

11. 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.

12. 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.

13. The Tribunal shall follow the guidelines issued by the Apex Court in **Bajaj Allianz General Insurance Company Private Ltd. v. Union of India and others** vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. No amount shall be kept in fixed deposit as the accident is of the year 1991.

14. Record be sent back to the tribunal.

15. This Court is thankful to both the learned counsels for getting this old appeal disposed of.

(2023) 8 ILRA 765

APPELLATE JURISDICTION
CIVIL SIDE

DATED: ALLAHABAD 06.07.2023

BEFORE

**THE HON'BLE DR. KAUSHAL JAYENDRA
THAKER, J.**

First Appeal from Order (Defective) No. 430 of
2008

U.P.S.R.T.C. & Anr. ...Appellants
Versus
Chandra Bhan Sahu & Anr. ...Respondents

Counsel for the Appellants:

Sri Nripendra Mishra, Sri Deo Dayal

Counsel for the Respondents:
Sri Kamal Mehrotra

**Civil Law-Motor Vehicle Act, 1988-
Sections 173 -Limitation Act, 1963 –
Section 5 -Challenge to-award of
compensation-challenged the sum of Rs.
50,000/- awarded as compensation after
delay of 333 days-such delay is not
explained properly-The matter has once
dismissed under Chapter 12 Rule 4 in not
taking steps to serve the other side, this
dismissal was in year 2023 after about 14
years of not taking steps- The issue of
contributory negligence cannot be
interfered as the accident took place in
the morning at the by-pass and the
injured was not at all liable for the
accident it was the driver of the bus who
has been considered to be negligent by
tribunal- it is solemn duty of the owner of
the vehicle to produce the licence of its
driver to show that the driver was a
qualified driver, no doubt the vehicle was
insured and the accident occurred during
this period that will not shift the burden-
It is the prima facie duty of owner to
discharge the burden by holding valid
licence of driver which is not done in this
case- this appeal both on question of
delay and on question of merits is
dismissed.(Para 1 to 17)**

There is no presumption that delay in approaching the court is always deliberate. No person gains from deliberate delaying a matter by not resorting to take appropriate legal remedy within time but then the words "sufficient cause" show that delay, if any, occurred, should not be deliberate, negligent and due to casual approach of concerned litigant, but, it should be bona fide, and, for the reasons beyond his control, and, in any case should not lack bona fide. If the explanation does not smack of lack of bona fide, the Court should show due consideration to the suiter, but, when there is apparent casual approach on the part of suiter, the approach of Court is also bound to change. Lapse on the part of litigant in approaching Court within time

is understandable but a total inaction for long period of delay without any explanation whatsoever and that too in absence of showing any sincere attempt on the part of suiter, would add to his negligence, and would be relevant factor going against him.(Para 6)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Collector, Land Acqn. Vs Katiji (1987) 2 SCC 107
2. P.K. Ramachandran Vs St. of Ker. (1998) AIR SC 2276
3. Shakuntala Devi Jain Vs Kuntal Kumari (1969) AIR SC 575
4. Brij Indar Singh Vs Kanshi Ram (1918) ILR 45 Cal 94
5. St. of Nagaland Vs Lipok AO & ors. (2005) AIR SC 2191
6. Vedabai @ Vijayanatabai Baburao Vs Shantaram Baburao Patil & ors., JT (2001) 5 SC 608
7. Pundlik Jalam Patil (dead) by LRS. Vs Ex. Eng. Jalgaon Medium Project & anr. (2008) 17 SCC 448
8. Maniben Devraj Shah Vs Municipal Corp. of Brihan Mumbai (2012) 5 SCC 157
9. Pappu & ors. Vs Vinod Kumar Lamba & ors. (2018) SC 592

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

1. Heard Sri Deo Dayal, learned counsel for the appellants and Sri Komal Mehrotra, learned counsel for the respondents.

2. This is a defective appeal of the year 2008 preferred by U.P. State Road

Transport Corpaoration challenging the sum of Rs. 50,000/- awarded as compensation under M.V.Act, 1988. The delay is of 333 days which occurred is not explained properly, the judgment is dated 10.01.2007 granting a sum of Rs. 50,000/- and granted right to recovery from the appellant herein. The delay which is sought to be condoned is a huge delay of one year, therefore, no reason to condone the delay. The matter has once dismissed under Chapter 12 Rule 4 in not taking steps to serve the other side, this dismissal was in year 2023 after about 14 years of not taking steps.

3. The expression "sufficient cause" in Section 5 of Act, 1963 has been held to receive a liberal construction so as to advance substantial justice and generally a delay in preferring appeal may be condoned in interest of justice where no gross negligence or deliberate inaction or lack of bona fide is imputable to parties, seeking condonation of delay. **In Collector, Land Acquisition Vs. Katiji, 1987(2) SCC 107**, the Court said, that, when substantial justice and technical considerations are taken against each other, cause of substantial justice deserves to be preferred, for, the other side cannot claim to have vested right in injustice being done because of a non deliberate delay. The Court further said that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

4. In **P.K. Ramachandran Vs. State of Kerala, AIR 1998 SC 2276** the Court said:

"Law of limitation may harshly affect a particular party but it has to be applied

with all its rigour when the statute so prescribe and the Courts have no power to extend the period of limitation on equitable grounds."

5. The Rules of limitation are not meant to destroy rights of parties. They virtually take away the remedy. They are meant with the objective that parties should not resort to dilatory tactics and sleep over their rights. They must seek remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The statute relating to limitation determines a life span for such legal remedy for redress of the legal injury, one has suffered. Time is precious and the wasted time would never revisit. During efflux of time, newer causes would come up, necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The statute providing limitation is founded on public policy. It is enshrined in the maxim *Interest reipublicae up sit finis litium* (it is for the general welfare that a period be put to litigation). It is for this reason that when an action becomes barred by time, the Court should be slow to ignore delay for the reason that once limitation expires, other party matures his rights on the subject with attainment of finality. Though it cannot be doubted that refusal to condone delay would result in foreclosing the suiter from putting forth his cause but simultaneously the party on the other hand is also entitled to sit and feel carefree after a particular length of time, getting relieved from persistent and continued litigation.

6. There is no presumption that delay in approaching the court is always

deliberate. No person gains from deliberate delaying a matter by not resorting to take appropriate legal remedy within time but then the words "sufficient cause" show that delay, if any, occurred, should not be deliberate, negligent and due to casual approach of concerned litigant, but, it should be bona fide, and, for the reasons beyond his control, and, in any case should not lack bona fide. If the explanation does not smack of lack of bona fide, the Court should show due consideration to the suiter, but, when there is apparent casual approach on the part of suiter, the approach of Court is also bound to change. Lapse on the part of litigant in approaching Court within time is understandable but a total inaction for long period of delay without any explanation whatsoever and that too in absence of showing any sincere attempt on the part of suiter, would add to his negligence, and would be relevant factor going against him.

7. I need not to burden this judgment with a catena of decisions explaining and laying down as to what should be the approach of Court on construing "sufficient cause" under Section 5 of Act, 1963 and it would be suffice to refer a very few of them besides those already referred.

8. In **Shakuntala Devi Jain Vs. Kuntal Kumari**, AIR 1969 SC 575 a three Judge Bench of the Court said, that, unless want of bona fide of such inaction or negligence as would deprive a party of the protection of Section 5 is proved, the application must not be thrown out or any delay cannot be refused to be condoned.

9. The Privy Council in **Brij Indar Singh Vs. Kanshi Ram** ILR (1918) 45 Cal 94 observed that true guide for a court to exercise the discretion under Section 5 is

whether the appellant acted with reasonable diligence in prosecuting the appeal. This principle still holds good inasmuch as the aforesaid decision of Privy Council as repeatedly been referred to, and, recently in **State of Nagaland Vs. Lipok AO and others**, AIR 2005 SC 2191.

10. In **Vedabai @ Vijayanatabai Baburao Vs. Shantaram Baburao Patil and others**, JT 2001(5) SC 608 the Court said that under Section 5 of Act, 1963 it should adopt a pragmatic approach. A distinction must be made between a case where the delay is inordinate and a case where the delay is of a few days. In the former case consideration of prejudice to the other side will be a relevant factor so the case calls for a more cautious approach but in the latter case no such consideration may arise and such a case deserves a liberal approach. No hard and fast rule can be laid down in this regard and the basic guiding factor is advancement of substantial justice.

11. In **Pundlik Jalam Patil (dead) by LRS. Vs. Executive Engineer, Jalgaon Medium Project and Anr.** (2008) 17 SCC 448, in para 17 of the judgment, the Court said :

"...The evidence on record suggests neglect of its own right for long time in preferring appeals. The court cannot enquire into belated and state claims on the ground of equity. Delay defeats equity. The court helps those who are vigilant and "do not slumber over their rights."

12. In **Maniben Devraj Shah Vs. 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."

13. In view of this Court, the kind of explanation rendered herein does not satisfy the observations of Apex Court that if delay has occurred for reasons which does not smack of mala fide, the Court should be reluctant to refuse condonation. On the contrary, I find that here is a case

which shows a complete careless and reckless long delay on the part of applicant which has remained virtually unexplained at all and the matter was also dismissed. Therefore, I do not find any reason to exercise judicial discretion so as to justify condonation of delay in the present case.

14. Even on merits it is solemn duty of the owner of the vehicle to produce the licence of its driver to show that the driver was a qualified driver, no doubt the vehicle was insured and the accident occurred during this period that will not shift the burden. This Court is fortified in its view by decision of Apex Court in **Pappu and others Vs. Vinod Kumar Lamba and others, reported in AIR 2018 SC 592**, where it is held that it is prima facie duty of owner to discharge the burden by holding valid licence of driver which is not done in this case.

15. Even in issue no. 2, the tribunal has held that insurance company has examined D.W.-1 who is an officer of R.T.O, that the licence issued in name of Sri Kailashi Chandra son of Sri Nahar Singh was for light motor vehicle and heavy goods vehicle which was operative from 06.01.2004 to 05.01.2007. There is no dispute that it was Kailashi Chandra who was driving the vehicle. Kailashi Chandra was not examined. And therefore, it was found that the licence which was produced was not of the driver of the bus. This fact will not permit this Court to interfere in the well penned judgment of the tribunal.

16. The issue of contributory negligence cannot be interfered as the accident took place on 22.06.2005 in the morning at the by-pass and the injured was not at all liable for the accident it was the

driver of the bus who has been considered to be negligent by tribunal.

17. Hence, this appeal both on question of delay and on question of merits is dismissed. Amounts if not deposited be deposited as expeditiously as possible.

(2023) 8 ILRA 769

APPELLATE JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 02.08.2023

BEFORE

THE HON'BLE JASPREET SINGH, J.

First Appeal From Order No. 488 of 2014
with
First Appeal From Order Nos. 439 of 2014
& 442 of 2014

Smt. Pushpa Singh & Ors. ...Appellants
Versus
Manoj Kumar Singh & Ors. ...Respondents

Counsel for the Appellants:
Mohd. Saeed

Counsel for the Respondents:
Anil Kumar Srivastava

A. Civil Law - Motor Vehicle Act, 1988 - Section 173--Challenge to-award of compensation- enhancement of compensation for personal injury-Tribunal has not considered the issue of pain and suffering and non-pecuniary damages in the correct perspective and not noticing that a young child had suffered an injury who had to undergo surgical procedures, though simple on his foot, and remained hospitalized and also certain injuries which were received by Smt. Pushpa Singh- the appellants namely Master Ahan and Smt. Pushpa Singh are entitled to an additional sum of Rs.25,000/- each for suffering and pain and other ancillary non-pecuniary heads.

(a) Thus, First Appeal From Order No.488 of 2014 is partly allowed the claimants shall now be entitled to a total sum of Rs.18,55,008/- with interest at the rate of 7% per annum from the date of application till the date of its payment

(b) The First Appeal From Order Nos. 439 of 2014 shall also stand partly allowed ,the claimant shall now be entitled to a total sum of Rs.59,679/- with interest at the rate of 7% per annum from the date of application till the date of its payment.

(c) The First Appeal From Order No.442 of 2014 shall stand partly allowed the claimant shall now be entitled to a total sum of Rs.38,000/- with interest at the rate of 7% per annum from the date of application till the date of its payment.(Para 1 to 56)

B. One factor which must be kept in mind while assessing the compensation in a case like the present one is that the claim can be awarded only once. The claimant cannot come back to court for enhancement of award at a later stage praying that something extra has been spent. Therefore, the courts or the tribunals assessing the compensation in a case of 100% disability, especially where there is mental disability also, should take a liberal view of the matter when awarding compensation. While awarding this amount we are not only taking the physical disability but also the mental disability and various other factors. This child will remain bedridden for life. Her mental age will be that of a nine month old child. Effectively, while her body grows, she will remain a small baby. We are dealing with a girl who will physically become a woman but will mentally remain a 9 month old child. This girl will miss out playing with her friends. She cannot communicate; she cannot enjoy the pleasures of life; she cannot even be amused by watching cartoons or films; she will miss out the fun of childhood, the excitement of youth; the pleasures of a marital life; she cannot have children who she can love let alone grandchildren. She will have no pleasure. Her's is a vegetable

existence. Therefore, we feel in the peculiar facts and circumstances of the case even after taking a very conservative view of the matter an amount payable for the pain and suffering of this child should be at least Rs.15,00,000/-,(Para 27)

The three appeals are partly allowed. (E-6)

List of Cases cited:

1. Kajal Vs Jagdish Chand & ors. (2020) 4 SCC 413
2. Magma General Ins. Co. Ltd Vs Nanu Ram @ Chuhru Ram (2018) 18 SCC 130
3. Deokar Exports Pvt. Ltd. Vs New India Assr. Co. Ltd.(2008) 14 SCC 598
4. Balu Krishna Chavan Vs Reliance Gen. Ins. Co. Ltd. & ors. (2022) LiveLaw SC 932
5. Miss Devi Vs Rajkumar & anr.. (2021) 2 T.A.C. 413 Raj.
6. UOI Vs Ibrahim Uddin & anr. (2012) 8 SCC 148

(Delivered by Hon'ble Jaspreet Singh, J.)

1. These are a bunch of three appeals arising out of the award dated 23.01.2014 passed by Motor Accident Claims Tribunal/ Special Judge (Ayodhya Prakaran), Lucknow. Amongst the four initial appeals, Appeal bearing No.441 of 2014 (Smt. Shweta Lamba vs. Manoj Kumar Singh and another) was dismissed on 10.02.2017 on account of default and though an application for recall was moved, but that too was defective, hence, the Court was not inclined to take the matter forward. Consequently, the appeal stood dismissed. Thus, only three appeals bearing First Appeal From Order Nos. 488 of 2014, 439 of 2014 and 442 of 2014 are before this Court for consideration.

2. In order to appreciate the controversy and how the three appeals have evolved, it would be relevant to notice that one Shri Ajit Singh expired in a motor accident on 11.02.2010 while he was driving his Honda City Car bearing no. UP78-AZ-1116. He was travelling along with his family members, however the offending vehicle bearing no. UP32-T-8252, which was being driven rashly and negligently, hit the Honda City as a result of which, Shri Ajit Singh expired while his wife Smt. Pushpa Singh, his daughter Smt. Shweta Lamba and his grandson Master Ahan suffered injuries.

3. It is in the aforesaid backdrop that Claim Petition No.78 of 2011 came to be filed by all the legal heirs of deceased Ajit Singh, i.e. his wife Smt. Pushpa Singh, daughter Smt. Shweta Lamba and son Vivek Lamba and another daughter who was impleaded as respondent no.3 in the Claim Petition, namely Reshma (who was not travelling in the car with the family members). This Claim Petition was primarily in respect of compensation on account of death of Shri Ajit Singh.

4. Another Claim Petition was filed by Smt. Pushpa Singh in her personal capacity bearing no.77 of 2011 on account of injuries sustained by her. Smt. Shweta Lamba the daughter travelling with the family filed her Claim Petition bearing no. 425 of 2010 seeking compensation for the injuries sustained by her and so also a Claim Petition bearing no.76 of 2011 was filed on behalf of her son Master Ahan (grandson of late Ajit Singh). In this fashion four Claim Petitions were filed, one for compensation for death of Ajit Singh, whereas other three were for seeking compensation on account of injuries sustained by the respective persons as

mentioned above. All the four Claim Petitions were clubbed and were contested together.

5. Primarily the owner of the offending vehicle/ Truck bearing no.UP32-T-8252, namely Manoj Kumar Singh filed his written statement denying the allegations, however he stated that his vehicle in question was duly insured and also the driver possessed a valid and a subsisting license and the truck also possessed all necessary documents, thus, in case if any award is passed, it would be the Insurance Company who would be liable to subrogate the award.

6. The Insurance Company filed its separate written statement and contested on the plea that the truck in question was not insured on the given date and time inasmuch as it was stated that the accident occurred on 11.02.2010 at around 11 a.m. whereas the insurance policy issued by the Company though dated 11.02.2010 was effective from 6.13 p.m. and thus at the time when the accident occurred the truck in question was not insured, hence no liability could be fastened on the Insurance Company.

7. Upon the exchange of pleadings, the Tribunal framed 6 issues and the parties respectively lead their documentary as well as oral evidence. It will be relevant to notice at this stage that Manoj Kumar Singh, the owner of offending truck did not put in appearance as a witness nor his driver was examined as a witness and practically the matter proceeded ex-parte against him.

8. The Tribunal, while noticing the Claim Petitions before it on merit, found that the accident had occurred on

11.02.2010 and also found that it was on account of rash and negligent driving of the offending truck driver bearing no. UP32-T-8252. The Tribunal while considering the issues nos.2 and 3 found that the driver did possess a valid and subsisting license and the truck also had a valid fitness certificate, a pollution certificate, however it recorded that the truck did not have any permit as no such document was placed on record.

9. The Tribunal while considering the fact whether the truck was insured or not, noticed that the truck was insured on 11.02.2010 but since the policy which was brought on record indicated that the policy was valid with effect from 6.13 in the evening, therefore, at the time when the accident occurred, i.e. 11 a.m., the truck could not be said to be duly insured. The Tribunal thereafter went ahead to compute the compensation and in the case relating to the death of Ajit Singh awarded a sum of Rs.10,69,000/- along with 7 percent interest in favour of the claimants by means of award dated 23.01.2014, however it absolved the Insurance Company of its liability and directed the award to be honoured by the owner namely, Manoj Kumar Singh. This award passed in Claim Petition No.78 of 2011 has given rise to First Appeal From Order No.488 of 2014.

10. Similarly, in the Claim Petition filed by Smt. Pushpa Singh bearing no. 77 of 2011 the Tribunal awarded a sum of Rs.13,000/- as compensation towards the injuries sustained by her by means of an award dated 23.01.2014 also fastening the liability of the award on the owner of the truck and absolving the Insurance Company. Thus the award passed in Claim Petition No.77 of 2011 has given rise to First Appeal From Order No.442 of 2014.

11. In so far as Claim Petition filed by Smt. Shweta Lamba bearing no.425 of 2010, seeking compensation for her injuries is concerned, the same was also allowed awarding sum of Rs.50,939/- along with 7 percent interest vide award dated 23.01.2014 fastening the award on the owner of the truck and absolving the Insurance Company which has given rise to First Appeal From Order No.441 of 2014. As already noticed above, First Appeal From Order filed by Smt. Shweta Lamba bearing no.441 of 2014 was dismissed in default on 10.02.2017 and the attempt of the appellant- Smt. Shweta Lamba to restore the appeal also failed, consequently, First Appeal From Order No.441 of 2014 got a quietus.

12. The Claim Petition preferred by Master Ahan bearing no.76 of 2010 was also allowed for a sum of Rs.34,679/- along with 7 percent interest and the owner of the truck was required to pay the same, which has given rise to First Appeal From Order No.439 of 2014.

13. In the aforesaid factual backdrop, the three subsisting appeals : (I) Appeal bearing no. 488 of 2014, which relates to the compensation on account of death of Ajit Singh, (II) Appeal bearing no. 439 of 2014, filed by Master Ahan for the enhancement of compensation for the injuries sustained by him, and (III) Appeal bearing no. 442 of 2014 filed by Smt. Pushpa Singh seeking enhancement of compensation for the injuries sustained by her, are now being considered on merits.

14. The Court has heard Shri Mohd. Saeed, learned counsel for the appellant in all the three appeals and Shri Anil Kumar Srivastava, learned counsel for the respondent- Insurance Company. Even

before this Court, the owner of the truck Manoj Kumar Singh despite service has not put in appearance.

15. The submission of learned counsel for the appellants is two-fold. It has been urged that the Tribunal has erred in fastening the liability on the owner, whereas from the record it was clearly established that the insurance policy was issued on 11.02.2010 at 12 noon. Even though if the time of commencement has been mentioned as 18.13 hours yet it would relate back from the midnight of the previous day. He has further urged that the record would indicate that the owner of the truck had filed the insurance policy before the criminal Court for getting his truck released and the appellants had obtained the documents from the said Court which was filed before the claims Tribunal and the said policy as filed by the appellants indicated that the policy was valid from 11.02.2010 till 10.02.2011 midnight to midnight. It is urged that the policy which was furnished by the Insurance Company indicated that though the insurance policy was issued at 12 noon and it was made effective from 18.13 hours, but there was a discrepancy between the two policies. Nevertheless, the witness who was examined on behalf of Insurance Company, Pawan Kumar Sharma, in his cross examination clearly stated that the insurance policy is issued only after receiving the premium amount from the customer. He further stated that the time of issuance of the policy indicated 12 noon which is the default time generated by the system. The learned counsel has pointed out that as per the aforesaid witness the policy was issued at 12 noon yet it would relate to the time of midnight of the previous day.

16. It has been urged by the learned counsel for the appellants that the policy filed by the appellants has not been disputed at any stage by the Insurance Company. It is thus submitted that the finding recorded by the Tribunal to the extent that the truck was not insured at the given time and date and fixing the liability on the owner is apparently erroneous and is against the dictum of the Apex Court in **Oriental Insurance Co. Ltd. Vs. Dharam Chand & others; 2010 (28) LCD 1353** and **National Insurance Co. Ltd. vs. Mrs. Chinto Devi; ALR (40) page 645 (SC)**. Apart from the aforesaid two decisions of the Apex Court the learned counsel for the appellants has relied upon a decision of a Division Bench of this Court in **Oriental Insurance Company Ltd. vs. Jagat Pal and others; 2013 (31) LCD page 849** to buttress his submissions.

17. The other limb of the argument of learned counsel for the appellants is that the Tribunal in case of death of Ajit Singh noticing that there were four legal heirs of the deceased yet it erred by going against the decision of the Apex Court in **Sarla Verma and others vs. Delhi Transport Corporation and another; (2009) 6 SCC 121** and made deductions for personal expense of one-third instead of one-fourth.

18. Learned counsel for the appellants further submits that the amount of compensation awarded to Master Ahan for his injuries is also on a much lower side inasmuch as merely a meager sum of Rs.34,679/- has been awarded, whereas he was entitled to a larger sum inasmuch he had undergone a surgery and this aspect has not been appropriately considered by the Tribunal.

19. In so far as the appeal preferred by Smt. Pushpa Singh for enhancement of her compensation towards personal injuries is concerned, it has been urged that the Tribunal has failed to consider the injuries suffered and in a casual manner has awarded a meager amount of Rs.13,000/-. It is also submitted that the award is bad for directing the owner to pay the liability apart from the fact that appropriate compensation has also not been awarded, thus the same deserves to be enhanced.

20. Shri Anil Kumar Srivastava, learned counsel for the Insurance Company has submitted that the Tribunal has correctly recorded a finding that the truck was not insured on the given day and time. It has further been submitted that the claimants had filed a photocopy of a policy bearing Paper No. C16/10 which indicated that the period of insurance was from 11.02.2010 to 10.02.2011 from midnight to midnight. It is further submitted that this particular policy was verified and it was contrary to the policy which was issued by the Company, a copy of which has been placed on record as Paper No. C-44/5. Another policy has been placed on record bearing Paper No. C-25/2, which indicates that though the policy was issued on 11.02.2010 at 12 noon, but was made effective from 18.13 hours commencing from 11.02.2010 to 10.02.2011 midnight. It is relying upon the aforesaid document bearing Paper No. C-25/2 that it has been urged that the Company is bound by the aforesaid insurance policy which is nothing but a contract and there is enough leverage available with the Company to put terms on the commencement of the insurance policy and in this case it was made effective from 18.13 hours on 11.02.2010 and as the accident occurred on 11.02.2010 at around 11 a.m., thus at the given date and time the

truck was not insured and this has been appropriately dealt with by the Tribunal, hence this finding of fact which is based on evidence requires no interference.

21. It has further been submitted that in so far as the deduction towards personal expenses is concerned, the Insurance Company does not have much objection as the same is now well settled by the decision of the Apex Court in case of **Sarla Verma (supra)** which has further been approved and reiterated in the Constitution Bench decision of the Apex Court in **National Insurance Company Ltd. vs. Pranay Sethi; (2017) 16 SCC 680**. However, it is further submitted that in so far as the enhancement of compensation for the personal injuries is concerned, the Tribunal has taken a holistic view and has awarded appropriate compensation. All the documents which were filed by the claimants have been appropriately considered and noticing the same the compensation has been awarded. It is also urged that there is no evidence on record that any functional disability was suffered by any of the claimants seeking compensation for personal injuries and taking note of the aforesaid as well as the documents filed indicating the amounts spent for the medical treatment, which has been duly noticed by the Tribunal, the award has been made which does not require any interference. Hence, it is submitted that all the three appeals deserve to be dismissed.

22. The learned counsel for the appellants in rejoinder has tried to point out that the entire premise upon which the Insurance Company has laid its submissions is not quite correct and in order to buttress his submissions he has also relied upon an application preferred by

the appellant under Order XLI Rule 27 of the Code of Civil Procedure, 1908 bringing certain additional documents on record to indicate that certain questionnaires were served in the criminal Court which indicate that the policy which was submitted before the criminal Court did not contain any time of commencement of the insurance policy. The submission is that in so far as the insurance policy submitted by the appellants is concerned, which was corroborated by the said questionnaires hence in the aforesaid circumstances there can be no manner of doubt that the Insurance Company would be liable and the appeals deserve to be allowed.

23. Before proceeding further it will be necessary to take a glance at the application filed by the appellants under Order XLI Rule 27 of the Code of Civil Procedure, 1908 bearing C.M. Application No.111177 of 2017 along with which certified copy of the application filed by Manoj Kumar Singh for the release of his truck, a questionnaire dated 29.04.2017 obtained from the Court of ACJM, Court No.15, Raebareilly, a questionnaire dated 19.05.2017 obtained from the Court of A.C.J.M., Court No.15, Raebareilly and another questionnaire dated 30.05.2017 obtained from the Court of A.C.J.M., Court No.15, Raebareilly and a statement of the witness recorded in course of enquiry of criminal case No.4017 of 2010 has been filed. The respondent- Insurance Company has also filed its objections to the same.

24. From the perusal of the said application it would indicate that in paragraph no.8 it has been stated that it is only after the case was decided that the appellants made efforts to get the copies of the documents which have been enumerated above and are being filed in

terms of Order XLI Rule 27 of the Code of Civil Procedure, 1908.

25. At the very outset it may be stated that Order XLI Rule 27 of the Code of Civil Procedure, 1908 commences with a non obstante clause and it is not as a matter of right that any appellant is entitled to introduce evidence at the appellate stage. The said provision contains the conditions which necessarily have to be fulfilled to enable the Appellate Court to receive the said documents on record. It is in the aforesaid light if the facts of the instant case are seen it would indicate that the accident in question took place on 11.02.2010 and the Claim Petitions have been pending before the Tribunal from 2010 itself inasmuch as the earliest Claim Petition was filed by Smt. Shweta Lamba, however, the other Claim Petitions of the claimants were filed in the year 2011 and the award came to be passed in the year 2014. The documents said to have been brought on record, all relate to the year 2010. It is only the said questionnaires which have been obtained by the appellants on 29.04.2017 there is nothing on record to indicate or even in the affidavit to indicate as to what prevented the appellants from receiving the said questionnaires earlier.

26. In the first instance the veracity of such questionnaires is in itself doubtful in context of the fact and noticing the provision under which such questionnaires are issued. It will be relevant to notice Rule 141 of the General Rules (Criminal) and Rule 224 and 225 of the General Rules (Civil), which reads as under:-

“[Extracted from General Rules (Criminal)]:

141. Application for information.

Any person desiring to ascertain the serial number, date of institution or other registered particulars respecting a case or any proceeding therein, or of any judicial proceeding, the record of which is in the judge's or the magistrate's court or record-room, shall present or send by post to the officer in-charge of the record-room, an application preferably in Form 7(Part IX, no. 45), to which shall be affixed a court-fee label of five rupees⁵² giving the best particulars he can as to the year of institution and names of parties. He shall be entitled to have a search made and the information, if obtainable, given to him in writing signed by the record-keeper within ten days of the date of receipt of application.

The record-keeper shall mark each application with a serial number. In case the information be not supplied within ten days as aforesaid, the recordkeeper shall forthwith on the expiration of the said period of ten days report in writing to the court the cause of noncompliance with the application.

The application shall after disposal be pasted under a separate serial number in a file book kept for the purpose and consigned to the record-room annually.

Where the applicant desires that the information be supplied to him by post, he shall give his address at which it may be sent and affix to his application postage stamps of the requisite value.

A printed copy of this rule in Hindi shall be posted on a notice-board in a conspicuous place in every court and also in the record-room.

[Extracted from General Rules (Civil)]:

224. Application for information.

Any person desiring to ascertain the serial number and date of institution of any suit or other registered particulars

respecting a suit, or any proceedings therein, or of any judicial proceeding, shall present or send by post to the Munsarim a written application stamped with a Court fee label of Rs. 5.0038 and giving the best particulars he can as to the year of institution and the names of parties. The Munsarim shall mark such application with a serial number and direct the official in charge of the relevant register to make a search. The information, if obtainable, shall be given to the applicant in writing, signed by the official in charge of the register, within three days from the date of the receipt of the application. In case such information cannot be given within three days, the Munsarim shall forthwith, on the expiration of the said period, report in writing to the Judge for his orders, the cause of the noncompliance with the application. A printed copy of this rule in Hindi shall be kept posted on the notice – board in a conspicuous place in every Court, and also in the office of every Munsarim.

After disposal the application for search shall be posted in a file book in serial order. Each such file book shall be consigned to the record room at the end of each calendar year.

225. Application for information in pending cases.

In pending cases, it will be open to a party to obtain certain information by means of written questions and answers in form No. VI-122. To this form must be affixed a Court – fee label of 50 paise for every two questions or less asked pertaining to the same case.

N.B.- In no circumstance shall the right conferred by this rule be so exercise as to be in substitution of the method of obtaining more detailed information by inspection of the record or by copies.”

27. Apparently in terms of extracted Rules (General Rules (Civil and Criminal)) from above, it is provided that no questionnaire shall be issued in respect of any document of which a certified copy can be obtained. It is also to be noticed that the questionnaire cannot be issued by any authority to explain the content of any document and thus the said documents in terms of questionnaire are not valid to substantiate the contents as sought to be attempted by the appellants.

28. Leaving aside the aforesaid, for a moment, yet the fact remains that the issue raised by the Insurance Company was very well in the knowledge of the appellants and they had contested the entire proceedings on the aforesaid plea. This Court finds that the claimants themselves had filed the document bearing Paper No. C-16/10 on the record of the Tribunal along with the document list on 17.07.2012. Even once the award had been passed in the year 2014 and the appellants were aware of the reasons which have been recorded by the Tribunal in not accepting the submission of the claimants, yet they waited and the application has been moved in the year 2017.

29. Insofar as the statement of a witness filed with the document list alongwith the application under Order XLI Rule 27 of the Code of Civil Procedure, 1908 is concerned, that does not have too much of relevance to the issue involved in the instant appeal however, much emphasis has been laid by learned counsel for the appellants on the questionnaire which has been issued on 29.04.2017, 19.05.2017 and 30.05.2017. In light of the decision of the Apex Court in the case of **Union of India vs. Ibrahim Uddin and another; (2012) 8 SCC 148** where the Apex Court had

considered the scope and the applicability of the provisions of Order XLI Rule 27 of the Code of Civil Procedure, 1908 and noticing the principles culled out there from, this Court finds that there has been no worthwhile explanation given by the appellants as to why the said documents could not be filed earlier.

30. Apparently from the consideration of the provisions contained in Order XLI Rule 27 of the Code of Civil Procedure, 1908 neither Clause (a) nor Clause (aa) are attracted in the instant case as it is not the case of the appellants that these documents were filed before the Tribunal but the Tribunal has failed to take note of it or that the documents came into light only after the award was passed. Now the only residue is Clause (B) of Order XLI Rule 27 of the Code of Civil Procedure, 1908 which vests ample power with the Court to take it on record if the said documents are considered necessary in the opinion of the Court to arrive at a conclusion and deliver an effective judgment.

31. It is in this view of the matter that the Court had heard the learned counsel for the parties and after perusing the application and the documents sought to be produced on record this Court cannot persuade itself to come to the conclusion that the documents which have been produced as additional evidence have any relevance and would be relevant and imperative for this Court to consider and would be helpful in passing an effective order or to do complete justice between the parties. Consequently, the said application under Order XLI Rule 27 of the Code of Civil Procedure, 1908 is rejected.

32. The reliance placed by the learned counsel for the appellants on a decision of

the Rajasthan High Court in **Miss Devi vs. Rajkumar and another; 2021 (2) T.A.C. 413 (Raj.)** would reveal that it is factually quite different to the facts of the present case and for the reasons recorded herein-above, the decision of the Rajasthan High Court is not helpful to the appellants.

33. Now coming to the merits of the contentions raised by learned counsel for the parties, the point for consideration involved in the instant appeal is two-fold. (I) Whether the appellants who otherwise have been awarded the compensation and it has been held that the truck was not insured, consequently, the owner is entitled to subrogate the award then in these circumstances where the owner of the truck has not assailed such finding whether the claimant can raise such issue in its appeal. (II) The other point involved is in respect of enhancement as claimed by the appellants on the ground as already noticed herein above.

34. In respect of the first submission and the point for consideration, apparently, from the facts available on record, it is the case of the appellant that the accident occurred on 11.02.2010 at 11 a.m. Even taking the submission of learned counsel for the appellants on its face value it would indicate that the insurance policy which has been brought on record and relied upon by the Insurance Company indicates that it has been issued at 12 noon, however made effective from 18.13 hours. Another insurance policy which has been brought on record is Paper No. C-44 indicating that the insurance policy though issued at 12 noon but was made effective from midnight to midnight.

35. In the aforesaid backdrop, the issue before the Tribunal in this regard was

regarding the rival insurance policies, to arrive at a conclusion. The Tribunal noticed that the witness who had come on behalf of the Insurance Company clearly indicated that the policy issued and filed on behalf of the Insurance Company contained the logo and the seal of the Insurance Company. The witness stated that the time of issuance of the policy is by default, as generated, from the system and he further stated that in the instant case since the owner of the offending vehicle had come to the Office and had paid the premium vide a demand draft, consequently, the policy was made effective from 18.13 hours on 11.02.2010.

36. Taking note of the aforesaid, the Tribunal came to the conclusion that apparently on the date when the accident occurred the owner got the truck insured and the premium was paid vide a demand draft which is also dated 11.02.2010 and in the circumstances the demand draft could not have been received from the issuing Bank prior to lunch hours, and therefore after having received the consideration/premium, the Tribunal held that, the policy even if issued at 12 noon would not cover the accident as it had occurred at 11 a.m. and admittedly at that point of time no insurance cover for the offending truck had been purchased by the owner of the truck.

37. It is at this stage if the decision cited by the learned counsel for the appellants is noticed in case of **Dharam Chand (supra)** it would reveal that in the said case the Apex Court noticing the concession made by the counsel for the Insurance Company held that even though the insurance policy was issued and the premium was received at an earlier point of time, yet it would deem that the policy has become effective from the time of receipt of premium. The said decision is based on

the concession of the counsel for the Insurance Company hence for the said reason it does not lay down a binding precedent and even otherwise factually seen it would reveal that in **Dharam Chand (supra)** premium was received at 4 p.m. and accident took place 4 hours later while policy was to commence from next day. Even in the instant case if the policy is made effective from the time of receiving premium even then it would be clear that there is no insurance as the accident took place at 11 a.m. and the premium was paid vide demand draft of same date, i.e. 11.02.2010 much after noon and moreover there is no evidence to the contrary, hence the said decision is of no help to the appellant.

38. While in **Mrs. Chinto Devi (supra)**, the Apex Court noticed that generally when a policy is issued it will cover its liability from midnight preceding the same date but in case of any special contract as mentioned in the policy it will be made operative as per special contract. Since there was dispute regarding the time of purchase of policy hence the matter was remanded. However in the instant case it is admitted that accident took place at 11 a.m. and while the policy which was proved was issued at 12 noon after the time of accident, of which premium was paid through demand draft much after noon and the policy was to commence at 18.13 hours much after the accident, hence this decision of **Mrs. Chinto Devi (supra)** also does not help the appellants.

39. The Division Bench of this Court in **Jagat Pal (supra)** has held that the contract of insurance which is voluntarily signed by the parties then the time provided in the contract and mentioned in the insurance policy is binding on the parties.

In the said case before the Division Bench the accident occurred on 26.07.1991 at 2 p.m. and the accident also occurred at the same time therefore contention was since it would take time for the Insurance Company to complete the formalities to issue the policy and therefore it was not possible that the insurance was procured simultaneously at the time the accident occurred. In the aforesaid circumstances the Insurance Company had raised a plea that the vehicle was not insured. Negating the aforesaid contention, the Division Bench held that once in the policy it was mentioned that the time and date is indicated then the policy would come into effect at the time i.e. 2 p.m. and accident also occurred at 2 p.m. hence the Insurance Company cannot avoid its liability. This decision again is factually quite at variance with the facts of the instant case and does not aid the appellants, but if the ratio is imported to the instant case and applied it may go against the appellants as the time in the policy in the instant case is 18.13 hours much after the accident and as per **Jagat Pal (supra)** case the Insurance Company is bound by the time in the policy.

40. From the provisions as noticed and for the decisions as stated by learned counsel for the appellants, this Court finds that if the propositions are made applicable in the instant case apparently the accident occurred at 11 a.m., this fact is not disputed. Even if the insurance policy is seen, it would indicate that it was issued at 12 noon and made effective from 18.13 hours on the same day. The fact that the policy which has been relied upon by the appellants is a copy which they say have been received from the criminal Court but is not accepted by the witness of the Insurance Company. Another important aspect which needs to be considered is that

the owner of the truck did not enter into the witness box. He was the best person to have explained about the original policy which would be available with the said owner however that was not placed on record nor he was summoned as a witness by the claimants. It will also be noticed that there is another reason apart from the discrepancy in the insurance policy and that is that there was no permit of the truck which was placed on record and this finding has been recorded and not assailed either by the owner or by the claimants.

41. It is understood that in so far as claimants are concerned, they can be treated as an aggrieved party seeking enhancement of compensation but primarily a motor accidental claim is a claim in the law of Tort where the liability is between the tortfeasor and against whom the tort has occurred. In the instant case the claimants are the heirs of a deceased party and also persons who have received personal injuries. They have filed a claim against the tortfeasor who is a driver who was actually driving the truck but he has not been made a party but for the reasons of constructive/ vicarious liability it is the owner who is liable, who is a party to the proceedings.

42. The contract of insurance is between the insurer and the insured and is a separate contract altogether with which the claimants are not concerned. They are only entitled to recover the amount from tortfeasor and in the instant case it would be the driver and the owner of the truck, who is vicariously responsible. The provisions of the Motor Vehicle Act, 1988 makes it compulsory to get a vehicle insured with a minimum third party risk covered and in case of third party claim arising against such insured vehicle then it

is the Insurance Company who is obliged to indemnify the award provided and subject to the provisions and defenses available to an Insurance Company and only on such limited grounds it can avoid its liability which amongst others include where there is no valid insurance policy on the date and time of the accident.

43. In this regard the decision of the Apex Court in **Balu Krishna Chavan vs. the Reliance General Insurance Co. Ltd. & Ors.**; 2022 LiveLaw (SC) 932 can be gainfully referred and the relevant paragraphs reads as under:-

“ 8. Hence, the only aspect for our consideration herein, is as to whether in the facts and circumstances of the present case, an order to direct the Insurance Company to “pay and recover”, is required to be made. On this aspect, the law is well settled that if the liability of the Insurance Company is decided and they are held not to be liable, ordinarily, there shall be no direction to “pay and recover”. However, in the facts and circumstances arising in each case, appropriate orders are required to be made by this Court to meet the ends of justice.

10. Therefore, on the legal aspect, it is clear that in all cases such order of “pay and recover” would not arise when the Insurance Company is not liable but would, in the facts and circumstances, be considered by this Court to meet the ends of justice.”

44. In **Deokar Exports Pvt. Ltd. vs. New India Assurance Co. Ltd.**; (2008) 14 SCC 598 the Apex Court considering the importance of an insurance contract in context with its terms and conditions has held as under:-

“A policy of insurance is a contract based on an offer (proposal) and an acceptance. The appellant made a proposal. The respondent accepted the proposal with a modification. Therefore, it was a counter proposal. The appellant had three choices. The first was to refuse to accept the counter-proposal, in which event there would have been no contract. The second was to accept either expressly or impliedly, the counter-proposal of the respondent (that is respondent's acceptance with modification) which would result in a concluded contract in terms of the counter proposal. The third was to make a counter proposal to the counter-proposal of the respondent in which event there would have been no concluded contract unless the respondent agreed to such counter-counter-proposal. But the appellant definitely did not have the fourth choice of propounding a concluded contract with a modification neither proposed nor agreed to by either party. If the appellant did not agree to the policy covering the period 26.8.1988 to 25.8.1989 instead of the period 12.3.1988 to 12.9.1989, the result would never create an insurance contract effective from 30.6.1989 or any other date.”

45. Now, in the aforesaid background of legal propositions as notice above, from the material available on record and the findings recorded by the Tribunal, this Court is unable to persuade itself to take a different view for the reason that the policy which is relied upon by the appellants does not inspire confidence. The appellants are not the persons from whom the policy can be said to have come from proper custody. The original policy can either come from the owner or the Insurance Company and in both cases it is not so. The appellants could not have proved the alleged photocopy of the policy which in any case was disputed by the Insurance Company. The

Insurance Company has filed a copy wherein time and date has been mentioned and even assuming if the issuance of the policy is 12 noon but it has been made effective from 18.13 hours. The truck would not be insured even at the time of insurance as mentioned in the policy, which is 12 noon, and if considered and certainly not if it is treated to have commenced from 18.13 hours, as the accident occurred at 11 a.m. thus in any case prior to the time of insurance or time of commencement as mentioned in the policy.

46. Even otherwise there is no denial of the fact that the premium was paid vide a demand draft on the same date and this has been amply explained by the witness appearing for the Insurance Company and taken note of by the Tribunal while recording its finding. Another fact of significance is that the last policy of the insurance of the offending vehicle had already expired about 40 days prior to the date of accident. Hence, noticing the entire chronology it would reveal that on 11.02.2010 the accident took place at 11 a.m. while the last policy had expired 40 days ago. On 11.02.2010, the premium is paid vide a demand draft of the same date after getting it issued from the banker and then purchasing the policy. Thus the policy was issued and the time of issuance was 12 noon and made effective from 18.13 hours and this policy is bearing the logo of the company with seal.

47. Thus for all the above noted reasons this Court finds itself in agreement with the Tribunal insofar as it recorded that the truck was not insured and the liability would vest with the owner.

48. Now the next issue regarding adequacy of the compensation is concerned, this Court finds that the grant of compensation towards conventional head

have not also been appropriately granted inasmuch as the consortium which is available not only to the wife as spouse but also to the children as parental consortium has not been appropriately awarded which is also contrary to the decision of Apex Court in **Magma General Insurance Co. Ltd vs Nanu Ram Alias Chuhru Ram; (2018) 18 SCC 130**. Even the deduction towards personal expenses has not been made correctly and one-fourth should have been deducted instead of one-third. Thus, to this extent the submission of learned counsel for the appellants finds favour and by adding the aforesaid amount the claimants of Claim Petition No.78 of 2011 shall be entitled to the following amount :

**"Income = Rs.26,350/- per month
Less:- (1/4) = Rs. 6,588/- per month
(from the income as
personal expenses
as there are four
dependents)**

Thus total income = Rs.19,762/- per month

Age 65

Multiplier 7

**Thus compensation payable =
Rs.19,762 x 12 x 7 = Rs.16,60,000/-**

Add:-

**Spouse consortium :- appellant no.1
= Rs.40,000/-**

**Parental consortium :- for two
daughters= Rs.80,000/-**

**Parental consortium :- for one son
= Rs.40,000/-**

Total = Rs. 1,60,000/-

Loss of estate = Rs.15,000/-

Funeral expenses = Rs.15,000/-

Total = Rs. 30,000/-

**Thus, total compensation payment
shall be = Rs.18,50,000/-**

49. Coming to the other limb of the submission of learned counsel for the appellants regarding enhancement of compensation for personal injury, this Court finds that apparently the Tribunal has not considered the issue of pain and suffering and non-pecuniary damages in the correct perspective and not noticing that a young child had suffered an injury who had to undergo surgical procedures, though simple on his foot, and remained hospitalized and also certain injuries which were received by Smt. Pushpa Singh.

50. Considering the dictum of the Apex Court in case of **Kajal vs. Jagdish Chand and others; (2020) 4 SCC 413** wherein the Apex Court in Para 26 to 29 noticed and held as under:-

"Pain, Suffering and Loss of Amenities

26. Coming to the nonpecuniary damages under the head of pain, suffering, loss of amenities, the High Court has awarded this girl only Rs.3,00,000/. In *Mallikarjun v. Divisional Manager, The National Insurance Company Limited and Ors.*, this Court while dealing with the issue of award under this head held that it should be at least Rs.6,00,000/-, if the disability is more than 90%. As far as the present case is concerned, in addition to the 100% physical disability the young girl is suffering from severe incontinence, she is suffering from severe hysteria and above all she is left with a brain of a nine month old child. This is a case where departure has to be made 14 2013 (10) SCALE 668 from the normal rule and the pain and suffering suffered by this child is such that no amount of compensation can compensate.

27. One factor which must be kept in mind while assessing the compensation in a case like the present one is that the claim can be awarded only once. The claimant cannot come back to court for enhancement of award at a later stage praying that something extra has been spent. Therefore, the courts or the tribunals assessing the compensation in a case of 100% disability, especially where there is mental disability also, should take a liberal view of the matter when awarding compensation. While awarding this amount we are not only taking the physical disability but also the mental disability and various other factors. This child will remain bedridden for life. Her mental age will be that of a nine month old child. Effectively, while her body grows, she will remain a small baby. We are dealing with a girl who will physically become a woman but will mentally remain a 9 month old child. This girl will miss out playing with her friends. She cannot communicate; she cannot enjoy the pleasures of life; she cannot even be amused by watching cartoons or films; she will miss out the fun of childhood, the excitement of youth; the pleasures of a marital life; she cannot have children who she can love let alone grandchildren. She will have no pleasure. Her's is a vegetable existence. Therefore, we feel in the peculiar facts and circumstances of the case even after taking a very conservative view of the matter an amount payable for the pain and suffering of this child should be at least Rs.15,00,000/-,

Loss of marriage prospects

28. The Tribunal has awarded Rs.3,00,000/-for loss of marriage prospects. We see no reason to interfere with this finding.

Future medical treatment

29. The claimant has been awarded only Rs.2,00,000/- under this head. This

amount is a pittance. Keeping in view the nature of her injuries and the fact that she is bedridden this child is bound to suffer from a lot of medical problems. True it is that there is no evidence in this regard but there can hardly be such evidence. She may require special mattress which will have to be changed frequently. In future as this girl grows, she may face many other medical issues because of the injuries suffered in the accident. Keeping in view her young age and assuming she would live another 5060 years, it would not be unjust to award her Rs.5,00,000/- for future medical expenses. How the compensation should be invested?"

51. This Court is of the view that the appellants namely Master Ahan and Smt. Pushpa Singh are entitled to an additional sum of Rs.25,000/- each for suffering and pain and other ancillary non-pecuniary heads.

52. Thus, First Appeal From Order No.488 of 2014 is partly allowed and the award dated 23.01.2014 passed in Claim Petition No.78 of 2011 shall be modified to the extent that the claimants shall now be entitled to a total sum of **Rs.18,55,008/-** with interest at the rate of 7% per annum from the date of application till the date of its payment.

53. The First Appeal From Order Nos. 439 of 2014 shall also stand partly allowed and the award dated 23.01.2014 passed in Claim Petition No.76 of 2011 shall be modified to the extent that the claimant shall now be entitled to a total sum of **Rs.59,679/-** with interest at the rate of 7% per annum from the date of application till the date of its payment.

54. The First Appeal From Order No.442 of 2014 shall stand partly allowed

55. The record of the Tribunal shall be returned forthwith, leaving it open for the appellants to recover the aforesaid sums from the owner of the truck/ respondent no.1 in accordance with law.

**A. Civil Law - Motor Vehicle Act, 1988-
Section 173--Challenge to-compensation-
deceased was a contractor in U.P. Jal
Nigam-the certificate proves that income of
the deceased was Rs. 3696/- p.m to which
as self employment 40% be added as per**

2. This appeal, at the behest of the claimants, challenges the judgement and

decree dated 7.11.1997 passed by M.A.C.T/Special Judge (E.C. Act), Mainpuri (hereinafter referred to as "Tribunal") in M.A.C.P. No. 164 of 1996. The accident is not in dispute. His death by the accident is not in dispute. The issue of negligence decided by the Tribunal is not in dispute. The only issue to be decided is, the quantum of compensation awarded.

3. Brief facts as culled out from the record are that on 05.03.1996 deceased Sahab Singh were travelling in Tempo no. U.T.M. 9478. At about 10:00 A.M in front of Shankar cold storage Bewar on G.T. road the said tempo collided with truck no. H.R. 26/6368 resulting in the death of many persons including Sahab Singh. It is alleged that truck no. H.R. 26/6368 was being driven very rashly and negligently by its driver as a result of which accident occurred.

4. The deceased Sahab Singh was 30 years of age was a contractor in U.P. Jal Nigam and his legal heirs consist of his widow and minor son. Being a contractor in U.P. Jal Nigam there is a certificate issued at Ex. 39 Kha pg 16 which is mentioned in the judgment also but the tribunal did not consider this amount and held that the income can be considered to be Rs. 1500/-p.m to which the deduction was 1/3rd, 20% was granted as lump sum compensation and at the end applied multiplier of 15 and Rs. 1,48,000/- with 12% interest was awarded.

5. It is submitted by Sri B.R. Singh, learned counsel for the appellants that the certificate proves that income of the deceased was Rs. 3696/- p.m to which as he was a contractor and in self employment 40% be added as per the judgment of **Gobald Motor Services Ltd. and another**

Vs. R.M.K.Veluswami and other, 1962, SCR(1) 929 which had presidential values even in those days, the deduction of 20% lump sum has been deprecated by the Supreme Court time and again, the deduction of 1/3rd is not assailed, multiplier of 16 and non pecuniary damages be granted as per the judgment of the Apex Court **National Insurance Co. Ltd. Vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093** or as per the rules applied in U.P and the interest of 12% is maintained. It is further submitted by Sri B.R.Singh, learned counsel for the appellants that no amount under the head of future loss of income has been granted.

6. Per contra, As against this, it is submitted by Sri A.K.Shukla, learned counsel for the respondents that in absence of any proof except the certificate there is no error which calls for any interference, however, Sri A.K. Shukla, learned counsel for the respondent could not point out as to non grant of future prospects and that multiplier of 16 be applied.

7. After hearing the counsel for the parties and perusing the judgment and order impugned, this Court feels that his income can be considered to be Rs.3500/- per month. To which as the deceased was 30 years at the time of accident, 40% of the income would have to be added as future loss of income to the deceased, deduction would have to be of 1/3rd, multiplier of 16 and Rs. 50,000/- for widow, Rs. 50,000/- for son. The oral objection of Sri A.K.Shukla, learned counsel is accepted.

8. Further, this Court feels that the quantum/compensation requires to be recalculated. Hence, the total compensation payable to the appellants is computed herein below:

- i. Income : Rs.3500/-
- ii. Percentage towards future prospects : 40% namely Rs.1400/-
- iii. Total income : Rs. 3500 + 1400 = Rs. 4900/-
- iv. Income after deduction of 1/3rd : Rs. 3266/- (rounded of)
- v. Annual loss : Rs. 3266 x 12 = Rs. 39,192/-
- vi. Multiplier applicable : 16
- vii. Total loss : Rs. 39,192 x 16 = Rs. 6,27,072/-
- xii. Amount under non-pecuniary head : Rs.1,00,000/-
- xiii. Total compensation : 7,27,072/-

9. As far as issue of rate of interest is concerned, 7% from the date of filing of the claim petition till decision of the claim petition and 6% thereafter.

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

11. In view of the above, the appeal is partly allowed. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the recalculated amount within a period of 12 weeks from today with interest as directed above.

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

13. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of

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

14. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and judgment of **A.V. Padma (supra)**. The same is to be applied looking to the facts of each case.

15. The Tribunal shall follow the guidelines issued by the Apex Court in **Bajaj Allianz General Insurance Company Private Ltd. v. Union of India and others** vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. As more than 10 years have elapsed, the

amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

16. Record be sent back to the tribunal.

17. This Court is thankful to Sri B.R.Singh, learned counsel for the appellants and Sri A.K.Shukla, learned counsel for respondents for ably assisting this Court.

(2023) 8 ILRA 787

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 11.07.2023

BEFORE

**THE HON'BLE DR. KAUSHAL JAYENDRA
THAKER, J.**

First Appeal from Order No. 665 of 1997

Pawan Kumar Agarwal ...Appellant
Versus
U.P.S.R.T.C. & Anr. ...Respondents

Counsel for the Appellant:
Sri R.B.D. Mishra, Sri Sharve Singh

Counsel for the Respondents:
Sri S.K. Mishra

A. Civil Law-Motor Vehicles Act,1988-Section 173- this appeal is preferred by the owner of the vehicle for damages caused to the vehicle and for the loss of business due to the said accident-claimant is entitled to the deficit amount of Rs. 76,500/- the tribunal has held that the accident had occurred due to the negligence of the bus of U.P. being driven rashly and negligently therefore, the appellant had been reimbursed only by the insurance company for the salvage but for the torturous act for loss of business it is tortfeasor who has to make good - the vehicle was insured with the insurance

company and a sum of Rs. 58,000/- as salvage was paid which was not just compensation for the damages caused to the vehicle. The vehicle in the year 1987, if the appellant wanted to buy a new vehicle for his survival it would have cost him Rs. 1,25,000/- and therefore, the remaining amount should have been ordered to be paid by the U.P.S.R.T.C.-The cardinal principal under the provision of M.V. Act and as per law of torts once it is held that the driver of U.P.S.R.T.C was negligent, it goes without saying that the tribunal has to award compensation for the same-The amount of Rs. 58,000/- cannot be said to be full payment for the damages caused to the appellant- The vehicle had gone in total loss and therefore salvage was paid-This aspect has been overlooked by the tribunal while deciding the same issue- The tortfeasor namely U.P.S.R.T.C will deposit an additional sum of Rs. 50,000/- with 7% interest within 12 weeks from today before the tribunal. (Para 3 to 7)

The appeal is allowed. (E-6)

List of Cases cited:

Colonel Bheem Singh Vs Rajnish National Ins. Co. 1-1992 Consumer (C.P.J) page 205

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

1. Heard Sri Sharve Singh, learned counsel, learned counsel for the appellant and Sri S.K. Mishra, learned counsel for the U.P.S.R.T.C.

2. By way of this appeal the claimant has challenged the dismissal of claim petition by the order dated 3.5.1997 passed by MACT/District Judge, Saharanpur, who dismissed claim petition No. 71 of 1988 preferred by the appellant for claiming compensation/damages to his taxi car bearing no. U.M.T. 7855 which collided

with the bus owned by U.P.S.R.T.C. bearing no. U.H.I. 30, the accident resulted into death of three people and the vehicle taxi car was rendered not road worthy. As far as death claim were concerned claim petition nos. 64 of 1988, 65 of 1988 and 71 of 1988 were filed and are pending before M.A.C.T till the date of the judgment in this matter.

3. Brief facts as culled out from the record are that appellant was the owner of the taxi car bearing no. U.M.T. 7855. On 26.12.1987 at about 3:00 p.m, his taxi was driven by one Prem Kumar at normal speed going from Roorkee to Haridwar when it reached at place of accident between Jwalapur and Bahadarabad a U.P.S.R.T.C bus bearing no. U.H.I. 30 of Dhurmalpur Depo hit the taxi of the appellant on the front side resulting in death of three people on the spot and caused damages to taxi of appellant.

4. The appeal challenges the non payment of compensation on the ground that the accident occurred due to rash and negligent driving of the driver of the bus and not due to driving of the driver of the car and directed Uttar Pradesh State Road Transport Corporation to pay compensation.

5. The taxi was the only vehicle by which the appellant could earn his livelihood, the vehicle was insured with the insurance company and a sum of Rs. 58,000/- as salvage was paid which was not just compensation for the damages caused to the vehicle. The vehicle in the year 1987, if the appellant wanted to buy a new vehicle for his survival it would have cost him Rs. 1,25,000/- and therefore, the remaining amount should have been ordered to be paid by the U.P.S.R.T.C.

6. The finding contrary to the same are bad in eye of law. The cardinal principal under the provision of M.V. Act and as per law of torts once it is held that the driver of U.P.S.R.T.C was negligent, it goes without saying that the tribunal has to award compensation for the same. The amount of Rs. 58,000/- cannot be said to be full payment for the damages caused to the appellant. The vehicle had gone in total loss and therefore salvage was paid. This aspect has been overlooked by the tribunal while deciding the same issue. The judgment of **Colonel Bheem Singh Vs. Rajnish National Insurance Company 1-1992 Consumer (C.P.J) pabe 205** also goes to show that claimant is entitled to the deficit amount of Rs. 76,500/- with 6% rate of interest. The submission of Sri S.K.Mishra, learned counsel for the respondents that the appellant had settled the dispute with the insurance company and therefore, U.P.S.R.T.C. has rightly not been saddled with any liability by tribunal, this submission cannot be accepted as it is for the tort feisor to do the good for the wrong, this is not double benefit but the deficit has been asked. In our case, the tribunal has held that the accident had occurred due to the negligence of the bus of U.P. being driven rashly and negligently and therefore, the contradictions has arisen because of non consolidation of matters. Claim petition nos. 64 of 1988 and 65 of 1988 were allowed holding that the driver of the bus was negligent, therefore, the tort feisor has to make good the deficit. In that view of the matter the appellant had been reimbursed only by the insurance company for the salvage but for the torturous act for loss of business it is tort feisor who has to make good and therefore this order. The appellant had taken a loan on the said vehicle which had to be also fulfilled. The findings of the tribunal are perverse and are

set aside. The bills have been produced and therefore this additional sum will have to be paid by the U.P.S.R.T.C is the owner of the vehicle for the tort of its employees. Rs. 58,000/- is paid by the Insurance Company is under other head as insured. The judgments of Consumer Forum would not be applicable. This appeal is preferred by the owner of the vehicle for damages caused to the vehicle and for the loss of business due to the said accident (tort committed) is allowed.

7. In view of the above, this appeal is allowed. The tortfeasor namely U.P.S.R.T.C will deposit an additional sum of Rs. 50,000/- with 7% interest within 12 weeks from today before the tribunal. The amount shall not be kept in fixed deposit as long time has elapsed.

8. Record and proceedings be sent back to the Court below forthwith.

9. This Court is thankful to Sri Sharve Singh, learned counsel for the appellant and Sri S.K.Mishra, learned counsel for U.P.S.R.T.C.

(2023) 8 ILRA 789

**APPELLATE JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 12.05.2023

BEFORE

**THE HON'BLE DR. KAUSHAL JAYENDRA
THAKER, J.**

First Appeal from Order No. 757 of 1997

**Smt. Baijanti Devi & Anr. ...Appellants
Versus
Rajesh Sisodiya & Ors. ...Respondents**

Counsel for the Appellants:
Sri Madhav Jain

Counsel for the Respondents:

Sri Vinod Kant Srivastava (Senior Advocate), Ms. Anita Srivastava

A. Civil Law-Motor Vehicles Act,1988-Section 173-Challenge to-award of compensation-Tribunal did not grant any amount towards future loss of income. the income of the deceased can be considered to be Rs.2,400/- per month- The deceased falls within the category of self employed and his age was in the age bracket of 35 years at the time of accident, hence, 40% of income shall be added towards future loss of income even as per *Gobald Motor Case* and 1/3rd shall be deducted for personal expenses as held in *Pranay Sethi Case* - multiplier of 16 will be admissible as per *Smt. Sarla Verma Case*- the wife of the deceased shall be entitled to get Rs.30,000/- towards loss of consortium in the light of Judgment in the case of *Pranay Sethi* - Further, Rs.50,000/- to the son of the deceased be granted in view of the decision in *Kurvan Ansari*- Hence, the total amount of compensation is granted Rs. 5,10,080/-, the rate of interest would be 7% from the date of filing of the claim petition till award and 6% thereafter till deposit of amount.(Para 1 to 16)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Kurvan Ansari @Kurvan Ali Vs Shyam Kishore Murmu (2021) 0 AIJEL-SC 67995
2. Gobald Motor Services Ltd. & anr. Vs R.M.K. Velusamy (1962) SCR 1 929
3. National Ins. Co. Vs Pranay Sethi (2014) 4 TAC 637 SC
4. Smt. Sarla Verma Vs DTC (2009) 2 TAC 677 SC

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

1. By way of this appeal, the appellants has challenged the judgment and

order dated 7.2.1997 passed by Motor Accident Claims Tribunal/ XIIIth Additional District Judge, Agra (hereinafter referred to as 'Tribunal') in M.A.C. Case No. 359 of 1995 (Smt. Baijanti Devi and another Vs. Rajesh Sisodiya and others) awarding a sum of Rs.1,00,500/- as compensation to the claimants/appellants with interest at the rate of 12% per annum from the date of filing the claim petition till the amount is deposited.

2. Heard Mr. Madhav Jain, learned counsel for the appellants and Ms. Anita Srivastava, learned counsel for the respondent no.5-Oriental Insurance Co. Ltd. Perused the record and judgment.

3. Though, there are two vehicles involved, one insured by Oriental Insurance Co. Ltd. and other by New India Assurance Co. Ltd. None has appeared on behalf of New India Assurance Co. Ltd.]

4. The brief facts of the case are that claimants-appellants filed a Motor Accident Claim Petition before the Tribunal for claiming the compensation under Motor Vehicles Act, 1988 for the death of Suresh Babu in a road accident with the averments that on 25.9.1995 Suresh Babu-deceased was traveling as a passenger in bus bearing no. U.P. 80G 9898, which was going on the Agra and Mathura Road. When the bus reached near the 220 KV Vidyut Station, a truck no. U.P. 85A 9705 came from the opposite side, which was being driven very rashly and negligently by its driver. The truck driver lost the control of the truck and hit the bus. In this accident, passenger/deceased sustained grievous injuries and succumbed to the said injuries.

5. Aggrieved mainly with the compensation awarded, the appellants have preferred this appeal.

6. The accident is not in dispute. The issue of negligence has attained finality as neither the Insurance Company nor the owner of the vehicle has disputed the same even in oral submissions. The driver of the said vehicle was having valid and effective driving licence on the date of accident is also a decided fact. The vehicle being insured and there being no breach of policy condition is a finding, which has attained finality. The only issue to be decided is the quantum of compensation awarded by the Tribunal.

7. The only dispute which now remains is that compensation of Rs.1,00,500/- with 12% interest is not acceptable to the appellant. The learned Tribunal did not grant any amount towards future loss of income. The learned Tribunal has considered the income of the deceased to be Rs.17,500/- per annum, though, he had his business and thereafter erroneously deducted 40% holding that the deceased was negligent. The learned Tribunal has applied the multiplier of 15, the Tribunal has granted Rs.3,000/- towards funeral expenses and Rs.3,000/- towards loss of consortium.

8. Though, it is submitted that it was a case of composite negligence and not of contributory negligence as the deceased was passenger in the bus and the accident occurred between bus and truck.

9. The bone of contention is that deceased was a passenger in the bus and even if the driver of the bus is considered to have contributed to the tune of 60% and 40% for the truck. No amount could have been deducted from the compensation payable to the legal heirs of the deceased.

10. It is also submitted by learned counsel for the appellants that the amount

awarded under non-pecuniary heads is also on the lower side and is required to be enhanced. It is further stated that the deceased was 35 years of age at the time of accident, hence, the multiplier applicable would be 16. He has relied on the decision in **National Insurance Co. Ltd. Vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093 & Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121** in support of above arguments.

11. Learned counsel for the respondent-Oriental Insurance Co. Ltd. has submitted that they may be given recovery rights against the other tort-feasor. The Insurance Company of the truck, who have may deposit the entire amount would be entitled to recover from the Insurance Company of the bus, who have failed to appear for a period of 23 years. It is also submitted that any cogent evidence of his income of the deceased and he was not income tax payer, therefore, the income fixed by the learned Tribunal does not require any interference by this Court.

12. Having heard learned counsel for the parties, the income of the deceased can be considered to be Rs.2,400/- per month. The deceased will fall within the category of self employed and his age was in the age bracket of 35 years at the time of accident, hence, 40% of income shall be added towards future loss of income even as per the judgment of Hon'ble Apex Court in the case of **Gobald Motor Services Ltd. and another v. R.M.K. Velusamy, 1962 SCR (1) 929** and 1/3rd shall be deducted for personal expenses as held by Hon'ble Apex Court in **National Insurance Company vs. Pranay Sethi [2014 (4) TAC 637 (SC)]**. Keeping in view the age of the deceased, multiplier of 16 will be admissible in the light of the judgment of Hon'ble Apex

Court in the case of **Smt. Sarla Verma vs. Delhi Transport Corporation [2009 (2) TAC 677 (SC)]**.

13. As far as non-pecuniary damages are concerned, the wife of the deceased shall be entitled to get Rs.30,000/- towards loss of consortium in the light of Judgment in the case of Pranay Sethi (supra). Further, Rs.50,000/- to the son of the deceased be granted in view of the decision in **Kurvan Ansari Alias Kurvan Ali Vs. Shyam Kishore Murmu, 2021 (0) AIJEL-SC 67995**.

14. Hence, the total amount of compensation, in view of the above discussions, payable to the appellants-claimants is being computed herein below:

- (i) Annual Income : Rs.28,800/- Per annum (Rs.2,400 X 12)
- (ii) Percentage towards future prospects 40% : Rs. 11,520/-
- (iii) Total income : Rs. 28,800/- + Rs.11,520/- = Rs. 40,320/-
- (iv) Income after deduction 1/3: Rs.40,320/- – Rs.13,440/- = Rs.26,880/-
- (v) Multiplier applicable : 16
- (vi) Loss of Dependency : Rs. 26,880/- X 16 = Rs.4,30,080/-
- (vii) Amount under loss of consortium : Rs. 30,000/- + Rs.50,000/- = Rs.80,000/-
- (viii) Total compensation : Rs.4,30,080/- + Rs.80,000/- = Rs.5,10,080/-

15. As far as issue of rate of interest is concerned, the rate of interest would be 7% from the date of filing of the claim petition till award and 6% thereafter till deposit of amount.

16. In view of the above, the appeal is partly allowed. Judgment and decree passed by the Tribunal shall stand modified

to the aforesaid extent. The respondent-Insurance Company shall deposit the amount within a period of 8 weeks from today with interest as directed above. The amount already deposited be deducted from the amount to be deposited.

17. If the Oriental Insurance Company deposit the entire amount, they would be entitled to recover 60% amount from the owner, driver and the Insurance Company of the bus, who have failed to appear before this Court.

18. Record and proceedings be sent back to the Tribunal forthwith. The amount be paid to the claimants and no amount be kept in fixed deposit.

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

20. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of Smt. Hansaguri P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from

the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another) while disbursing the amount. The said decision has also been reiterated by High Court Gujarat in R/Special Civil Application No.4800 of 2021 (The Oriental Insurance Co. Ltd. v. Chief Commissioner of Income Tax (TDS) decided on 5.4.2022.

21. 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.

22. The Tribunal shall follow the guidelines issued by the Apex Court in Bajaj Allianz General Insurance Company Private Ltd. v. Union of India and others vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. As long period has elapsed, the amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

(2023) 8 ILRA 792
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2023

BEFORE

**THE HON'BLE DR. KAUSHAL JAYENDRA
 THAKER, J.**

First Appeal from Order No. 1726 of 2001

U.P.S.R.T.C.

...Appellant

Versus

Smt. Neerja Bhatiya & Ors. ...Respondents

Counsel for the Appellant:

Sri Sunil Kumar Misra, Sri Samir Sharma, Sri Ram Singh

Counsel for the Respondents:

Sri Ansar Ahmad, Sri Kashi Naresh Mishra, Sri Rajneesh Tripathi, Sri V.B. Kesarwani, Ms. Tanisha Jahangir Monir

A. Civil Law-Motor Vehicles Act,1988-Section 173-Challenge to-award of compensation-Tribunal did not grant any amount under the head of future loss of income though the deceased was a salaried person-the income of the deceased looking to his profession can be considered to be Rs.23,803/- per month-To which, 25% to be added towards future loss of income-The deduction towards personal expenses of the deceased would be 1/3rd as the deceased was 47 years of age in view of the decision of the Apex Court in Pranay Sethi- The deceased being 47 years of age, the multiplier applicable would be 13 in view of the decision in *Sarla Verma*-As far as amount under the head of non pecuniary damages are concerned, Rs.70,000/- is granted-Hence, the total compensation Rs.31,64,390/-the claimants would be entitled to 6% rate of interest on the enhanced compensation from the date of filing the claim petition till the amount is deposited-The rate of interest granted by the Tribunal on originally awarded amount is maintained. (Para 1 to 28)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Gobald Motor Services Ltd. & anr. Vs R.M.K. Velusamy (1962) SCR 1 929
2. National Ins. Co. Vs Pranay Sethi (2014) 4 TAC 637 SC
3. Smt. Sarla Verma Vs DTC (2009) 2 TAC 677 SC
4. UPSRTC Vs Km. Mamta & ors. (2016) AIR SC 948

5. Deepal Girishbhai Soni & ors. Vs United India Ins. Co. Ltd Baroda (2004) AIR SC 2017

6. Bajaj Allianz Gen. Ins. Co.Ltd. Vs Smt. Renu Singh & ors. FAFO No. 1818 of 2012

7. Ram Dev Singh Vs Chudasma Vs Hans Raj Bhai Kodalo (1999) 2 TAC-331.

8. The New India Assc. Co. Ltd Vs Rukshana Khatoon & ors. FAFO No. 3096 of 2004

9. National Ins. Co. Ltd. Vs Smt. Vidyawati Devi & 2 Ors FAFO No. 2389 of 2016

10. Gen. Mgr., Ker. S.R.T.C Vs Susamma Thomas (1994) SCC (2) 176

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

1. Heard Sri Sunil Kumar Misra, learned counsel for appellant and Sri Rajneesh Tripathi, learned counsel for the claimants. None has appeared for co-respondent.

2. By way of this appeal, the UPSRTC has felt aggrieved by the judgment and decree dated 20.8.2001 passed by the Motor Accident Claims Tribunal/ XI Additional District Judge, Bulandshahar whereby the respondent-claimants No. 1 to 3 had preferred M.A.C.T. Case No. 95 of 1999 claiming compensation for the death of sole breadwinner. The parties are referred as claimants- and appellants- UPSRTC. The tribunal granted a sum of Rs.24,85,012/- with interest at the rate of 9%.

3. At the outset in view of the Judgment of Apex Court in **UPSRTC Vs. Km. Mamta and others, reported in AIR 2016 SC 948**, all the issues which are raised before the appellate court must be decided.

4. The facts as they unfurl from the judgment and record appears that the claimants had preferred the claim petition for damages but inadvertently in caption mentioned petition under Section 163A of the Motor Vehicles Act, 1988 as was mentioned in the caption of the claim petition. The other averments and claim petition was preferred under Section 166 of Motor Vehicles Act, 1988 (hereinafter referred to as 'Act, 1988').

5. The claimants are the legal representatives of the deceased – Rakesh Chandra who died in the vehicular accident. Rakesh Chandra Bhatia, according to claimants was a senior assistant engineer posted in Harduaganj Power Station, Kashimpur, District Aligarh under the U.P. State Electricity Department. This monthly income when the accident occurred was Rs.23,803/- per month. He was survived by his widow and two daughters.

6. The accident took place on 28.1.1999 at 1:30 p.m. at National Highway in the vicinity of village Sikandarabad, just ahead of Idgah between Sikandarabad and Dadari in the district of Bulandshahar. The deceased was in fiat car No. DL-2 C-3693 which met with the bus belonging to UPSRTC bearing No. U.G.U.7161. It is averred that the before the deceased breath his last he had sustained multiple accidental injury. The deceased was moved to Sikandarabad Government Hospital where he was declared dead. The deceased succumbed to the accidental injuries sustained during the accident. The claimants claimed that they were legal representatives of the deceased as one was widow and two and three were his children (daughter).

7. The claimants claimed a sum of Rs.31,29,500/-. The deceased along with

the claimants was going from Aligarh to Delhi in his fiat car No. DL-2 C-3693 the parents of the deceased later on were impleaded as proforma parties as opponents. The parents have supported the claim of the petitioner and have also claimed their share. The appellant-UPSRTC filed reply through its Regional Manager denying the claims made in paragraph no. 1 to 10 of the claim petition, they admitted the averment made in paragraph no. 11, 12 and 13 but again as far as paragraph no.13 and 14 the appellant did not admit as the appellant had no knowledge about the said facts.

8. In the additional reply it is contended by appellants that the claimants are not entitled to get any amount. The appellants pleaded mis-joinder of the parties. The appellants have even denied the factum of manner in which the accident occurred. It is stated that there was rain on the said date. Para 13 of the reply when translated it states that the accident is accepted but the car when it reached the place of occurrence tired to overtake one other vehicle and that is how it came and dashed the bus and, therefore, it is averred that the the deceased was totally negligent whereas the driver of the bus was skilled driver and there was no negligence in driving on his part. It was averred that the insurance company of the car having not been made party, the claim petition required to be dismissed.

9. The parties led evidence and the Tribunal though the petition was captioned to under Section 163A of the Motor Vehicles Act, 1988 treated it to be under Section 166 of Motor Vehicles Act, 1988 which is culled out from the issues raised by the Tribunal. The Tribunal raised five issues first was regarding **negligence in**

driving by the drivers involved in the accident. The second issue raised was whether the deceased died out of injuries caused in the accident. The third issue was whether the claim petition was bad for non joinder of the owner and the insurance company of fiat car D.L.2 C-3693 and whether the claimants were entitled to any amount or not and lastly the issue no. 5 related to proving as to whether the respondents- appellants herein was liable to pay compensation or not and how much.

10. The Tribunal considered the claim petition as if it was under Section 166 of Motor Vehicles Act, 1988 the reason being as far as issue no. 1 is concerned, it decided the issue of negligence which under Section 163A of Motor Vehicles Act, 1988 is not required to be decided as parties led evidence to that effect. As far as issue no. 5 is concerned, the Tribunal has considered the salary as Rs.23803/- per month and has considered the income also as per Section 166 of the Act, 1988 and not as stipulated under Section 163A of the Motor Vehicles Act, 1988. From the record it is culled out that when the issues were framed the appellant herein did not raise any objection to the matter being considered as one under Section 166 of Motor Vehicles Act, 1988. The Act is a beneficial piece of legislation just because of misnomer in heading it cannot be detrimental to the widow and minor daughters.

11. While admitting this appeal, this Court directed the issuance of notice. From 2001 till 2003 no steps had been taken to see that the respondents are served. The appellants herein were directed to deposit a sum of Rs.15,00,000/- with the claims Tribunal within three weeks and the respondent no.1 was entitled to withdraw Rs.5,00,000/-. This order is dated

26.11.2001 and we are in the year 2023 today. The challenge to the issues on the basis of judgment of ***Deepal Girishbhai Soni and Ors. Vs. United India Insurance Company Limited, Baroda, AIR 2004 SC 2017*** is also not raised before the Tribunal.

12. The UPSRTC preferred the appeal before the Apex Court against the interim order. The said appeal before the Apex Court came to be decided on 15.7.2002, twenty one years thereafter deciding this appeal.

13. Even in the grounds of challenge against the award of tribunal the UPSRTC has contended in one ground that the petition was under Section 163A not under Section 166 of the Motor Vehicles Act, 1988. The parties before the Tribunal and this Court have accepted the fact that the Tribunal had considered the matter under Section 166 of the Act when it decided what is known as the issue of negligence. As far as the issue of compensation is concerned the amount under the IIInd Schedule it is not argued that maximum amount admissible where claim could be filed if maximum income of deceased was Rs.40,000/- per month as the income of the deceased. The IIInd Schedule is not applicable to the fatal cases. Section 163A of the Motor Vehicles Act, 1988 which read as under :

“163A. Special provisions as to payment of compensation on structured formula basis.—

(1)Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having the force of law, the owner of the 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 motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be. Explanation.—For the purposes of this sub-section, “permanent disability” shall have the same meaning and extent as in the Workmen’s Compensation Act, 1923 (8 of 1923).

(2) In any claim for compensation under sub-section (1), 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 or vehicles concerned or of any other person.

(3) The Central Government may, keeping in view the cost of living by notification in the Official Gazette, from time to time amend the Second Schedule.]”

14. In that view of the matter when the parties have accepted both before the Tribunal and also before this Court that the claim petition was to be decided as per provision of Section 166 of Motor Vehicles Act, 1988 no such ground can now be raised before this Court that it was a petition under Section 163A of the Act. The mention of Section was only in the caption that it was petition under Section 163A that it was mentioned as under Section 163A of the Act. In the pleadings before Tribunal and even in the reply by the appellant it is not objected that the issues were wrongly framed and the issues are required to be recast. Thus the appellant herein with full knowledge had contested the litigation even before the Apex Court nor before this Court and though it is raised as a ground in the memo of appeal, therefore, this Court would also decide this litigation as it was under Section 166 of the Motor Vehicles Act, 1988.

15. The grounds of objection raised as grounds no. 1 to 7 to the award reads as follows

“1. Because, the Corporation bus was being driven at a moderate speed with due care and caution and the view taken by the claims tribunal to the contrary is erroneous.

2. Because, the accident had taken place solely due to the rash and negligent driving of the fiat car no. DL 2C/3693 being driven by the deceased Sri Rakesh Chandra Bhatiya, hence the Corporation was not liable to pay any compensation.

3. Because the Claims Tribunal placed undue emphasis on the evidence adduced on behalf of the claimants and is not fully appreciating the evidence adduced on behalf of the Corporation.

4. Because, the evidence adduced on behalf of the claimant by Smt. Neerja Bhatiya PW-1 (claimant herself) was not trust worthy as she was a highly interested witness and the Claims Tribunal erred in placing undue reliance on the same.

5. Because, the evidence adduced on behalf of the Corporation by Gajraj Singh D.W.-1 (driver of the Corporation bus) and Sangam Lal (conductor of the bus) were most trust worthy and the Claims Tribunal erred in not relying on the same.

6. Because, in the facts and the circumstances of the case it was evident that the deceased rashly and negligently had tried to over take another vehicle without taking into account that the Corporation bus was being coming from the opposite direction and as such despite beset efforts of the Corporation bus driver to avert the accident, yet the accident was caused.

7. Because, in the facts and the circumstances of the case, the Claims Tribunal clearly erred in taking the view

that even if the fiat car had suddenly tried to over take a vehicle, yet it was the responsibility of the heavier on coming vehicle to be cautious so as to avoid the accident..”

16. In ground no. 12 for the first time it is averred as follows :

'12. Because, the Claims Tribunal erred in awarding compensation under Section 163A of the Motor Vehicle Act, 1988, wherein the Tribunal went beyond the maximum income as provided under the second schedule appended to Section 163A to the Act, while taking the annual income of the deceased as Rs.2,85,636 per year. '

17. This ground is not available to the appellant and the judgments relied by the appellant would not apply to the facts of this case once the appellants have contested litigation as a litigation under Section 166 of the Motor Vehicles Act. It was only passing heading in the memo of claim petition that the wrong section was mentioned, the Section of 166 of the Motor Vehicles Act that the parties were well aware that the matter was to proceed as the petition under Section 166 of the Motor Vehicles Act. Even before the Apex Court it was never raised as an issue, hence the said ground fails and is rejected.

Decision on issue of Negligence

18. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance or taking action which such a reasonable person would not. Negligence can be both intentional or accidental which is normally accidental. More particularly, it connotes reckless driving and the injured must always

prove that the either side is negligent. If the injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of "res ipsa loquitur" meaning thereby "the things speak for itself" would apply.

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

20. The Division Bench of this Court in First Appeal From Order No. 1818 of 2012 (Bajaj Allianz General Insurance Co.Ltd. Vs. Smt. Renu Singh And Others) decided on 19.7.2016 has held as under :

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

principles, the negligence of drivers is required to be assessed.

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

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

19. *In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in Rylands V/s. Fletcher; (1868) 3 HL (LR) 330. From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles,*

highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.

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

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

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

21. Tribunal while deciding the issue of negligence has categorically given its finding on issue no.1 in favour of the claimants. The finding of facts is very clear that the bus dashed with fiat car on the right side. The instantaneous death goes to show that the Tribunal has not committed any error in holding that the driver of bus was the sole author of the accident. The witnesses have categorically mentioned that the driver of bus was driving the bus during manson in rash and negligent manner. However, this statement of PW-1, driver has been categorically refuted by the version of PW-1 that on that date there was no rain. The accident between two vehicles of unequal magnitude goes to show the bus dashed with fiat car and, therefore, the finding of fact cannot be found fault with.

22. As far as the question of considering the case under Section 163A of Motor Vehicles Act, 1988, the parties had to with open eyes when the issues were framed. Had the respondent - appellant herein objected immediately after the issues were framed. The claimant could have amended the heading as per the judgment of Hon'ble Gujrat High Court in **Ram Dev Singh Vs. Chudasma Vs. Hans Raj Bhai Kodalo, 1999 (2) TAC-331**. Thus the grounds raised based of judgment of **Deepal Girishbhai Soni and Ors. Vs. United India Insurance Company Limited, Baroda, AIR 2004 SC 2017** will not apply to the facts of this case. Hence, the grounds no. 12, 13, 14, and 15 could not have been

pressed into service. This is nothing else but after thought. The said grounds are raised for the first time before this Court. The judgment of this Court in **First Appeal From Order No. 3096 of 2004 (The New India Assurance Company Limited Vs. Rukshana Khatoon and others) decided on 3.5.2019** wherein a similar view is taken will enure for the benefit of claimants.

23. This takes this Court to the compensation awarded by the Tribunal, the Tribunal did not grant any amount under the head of future loss of income though the deceased was a salaried person. The income of the deceased was Rs.23,803/- per month and which is proved by cogent evidence. The Tribunal has deducted 1/3rd towards personal expenses and granted multiplier of 13 as the deceased was 47 years of age. The Tribunal has granted Rs.35000/- under the head of non pecuniary damages. It is contended by counsel for claimants that as per the decision of this Court in **F.A.F.O. No.2389 of 2016 (National Insurance Co. Ltd. Vs. Smt. Vidyawati Devi And 2 Others) decided on 27.7.2016** and the judgment of Apex Court in **General Manager, Kerala S.R.T.C Versus Susamma Thomas, 1994 SCC (2) 176**.

24. The Appellate Court must grant just compensation even in absence of written cross objection by claimants. The Tribunal was under an obligation to grant what is known as future loss of income which has not been granted in view of the judgment of **Gobald Motor Services Ltd. and another v. R.M.K. Velusamy, 1962 SCR (1) 929**. Thus, it can be said that the Tribunal has erred in granting compensation nor the compensation is on the higher side.

25. Having heard learned counsel for the parties, the income of the deceased looking to his profession can be considered to be Rs.23,803/- per month. To which, 25% to be added towards future loss of income. The deduction towards personal expenses of the deceased would be 1/3rd as the deceased was 47 years of age in view of the decision of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050**. The deceased being 47 years of age, the multiplier applicable would be 13 in view of the decision in **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121**. As far as amount under the head of non pecuniary damages are concerned, Rs.70,000/- is granted.

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

- i. Income per annum : Rs.23803 x 12 = 2,85,636/-
- ii. Percentage towards future prospects : 25% namely Rs.71,409/-
- iii. Total income : Rs.2,85,636 + 71,409 = Rs.3,57,045/-
- iv. Income after deduction of 1/3 towards personal expenses : Rs.36,000/-
- v. Multiplier applicable : 13
- vi. Loss of dependency: Rs.2,38,030 x 13 = Rs.30,94,390/-
- vii. Amount under non pecuniary heads : Rs.70,000/-
- viii. Total compensation : Rs.31,64,390/-

27. As far as issue of rate of interest is concerned, the claimants would be entitled to 6% rate of interest on the enhanced compensation from the date of filing the claim petition till the amount is deposited. The rate of interest granted by the Tribunal

on originally awarded amount is maintained.

28. In view of the above, the appeal sans merits and is dismissed. The oral cross objection is allowed as per the judgment of this Court passed in **F.A.F.O. No.2389 of 2016 (National Insurance Co. Ltd. Vs. Smt. Vidyawati Devi And 2 Others) decided on 27.7.2016**. The earlier amount be paid to the claimants after ascertaining their identity as more than 20 years have elapsed from the date of filing of this appeal.

29. Interim relief shall stand vacated forthwith. The record of the Tribunal be sent back forthwith.

(2023) 8 ILRA 800
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.05.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

First Appeal from Order No. 2367 of 2013

The New India Assurance Co. Ltd.

...Appellant

Versus

Sri Yamin & Ors.

...Respondents

Counsel for the Appellant:

Sri Brijesh Chandra Naik

Counsel for the Respondents:

Sri Nigamendra Shukla, Sri Ashok Kumar Singh,
Sri Rohit Nandan Pandey

A. Civil Law-Workmen's Compensation Act, 1923-Section 30, 4(1)(a)-Commissioner has awarded compensation of Rs.301034/- with 1% rate of interest-Challenge against- The death happened during the course of employment and arose out of employment of the deceased

with the insured-The income of the deceased determined by the Workmen's Commissioner is Rs. 2714.56/- per month-the accidental death is proved beyond reasonable doubt - Section 4(1)(a) of the Workmen's Compensation Act, 1923 provides for under the head of future prospects is fifty percent of the wages - The claimants/workmen are entitled to grant of future prospects while calculating compensation under the E.C. Act since the conditions precedent for the same are duly satisfied- --Thus, the total compensation is granted Rs. 4,52,800/- at the rate of 12%.(Para 1 to 68)

B. Substantial question of law- Section 4(4) of the E.C. Act, 1923-the funeral expenses have been explicitly provided for under the scheme of E.C. Act. Hence there can be no lawful recourse to or authorities arising out of the M.V. Act while granting compensation under the EC Act under that head If the injury of the [employee] results in his death, the employer shall, in addition to the compensation under sub-section (1), deposit with the Commissioner a sum of [two thousand and five hundred rupees] for payment of the same to the eldest surviving dependant of the [employee] towards the expenditure of the funeral of such [employee] or where the [employee] did not have a dependant or was not living with his dependant at the time of his death to the person who actually incurred such expenditure. (Para 63)

The appeal is dismissed. (E-6)

List of cases cited:

1. National Ins. Co. Vs Pranay Sethi & ors. (2017) 16 SCC 680
2. New India Assr. Co. Ltd Vs Urmila Shukla & Ors (2021) SCC OnLine SC 822
3. New India Assr. Co. Ltd. Vs Amit Kumar Yadav & anr.

4. K. Suresh Vs New India Assc. Co. Ltd. & ors.
5. Lancashire & Yorkshire Railway Co. Vs Highley (1917) AC 352
6. Mackinnon Mackenzie & Co. Pvt. Ltd Vs Ibrahim Mahommed Issak
7. Reg.Dir. Employees' St. Ins. Corp. Vs High Land Coffee Works of P.F.X. Saldanha & Sons & ors. S.K. Gupta & ors. Vs K.P. Jain & ors.
8. Ramanlal Bhailal Patel & ors. Vs St. of Guj.
9. Sunita Devi Vs Autar Singh & ors.
10. A & F Overseas Trade Ltd. Vs Appellate Authority under the Payment of Gratuity Act & ors.
11. Div. Mgr. TATA AIG Gen. Ins. Co. Ltd Vs A.C. Jagadeesann & anr..
12. Regional Provident Fund Commr. Vs Hooghly Mills Co. Ltd & ors.
13. Brahampal @ Sammay & anr.. Vs National Ins. Co.
14. Board of Control for Cricket in India Vs Reg. Dir. Employees' St. Ins. Corp. & ors.
15. Chillu Kahar Vs Burn & Co. Ltd

(Delivered by Hon'ble Ajay Bhanot, J.)

1. The judgment is being structured in the following conceptual framework to facilitate the discussion:

I	Introduction
II	Findings in the impugned award
III	Submissions of learned counsels
IV	Substantial questions of law
V	Consideration and analysis
VI	Conclusions & Directions
VII	Appendix

I. Introduction

2. The instant appeal arises out of an award made by the learned Workmen's Compensation Commissioner & Assistant Labour Commissioner, U.P. Ghaziabad Region, Ghaziabad in Case No. W.C. 239/2009 (Sri Yamin Vs M/s Saini @ Private Ltd. and another) on 19.06.2013 under the Workmen's Compensation Act, 19231.

3. By Section 4 of the Workmen's Compensation (Amendment) Act, 2009 (45 of 2009) nomenclature of the Act has been amended by substituting the word "Employee's" for the word "Workmen's" (w.e.f. 18.01.2010). Now the Act stands as THE EMPLOYEE'S COMPENSATION ACT, 1923 (8 of 1923) (Came into force on 1.7.1924). In this view the Workmen's Compensation Act shall be referred to as Employee's Compensation Act, 19232.

4. The appeal has been filed by the insurance company. Cross objections have been raised on behalf of the claimants-respondents.

II. Findings in the impugned award

5. The learned Workmen's Compensation Commissioner found these facts in the impugned award. The deceased worked as a helper and tasked to clean the truck. The deceased received his wages from the truck owner and worked under his orders. The employer did not contest the employer employee relationship between former and the deceased. The deceased died of injuries sustained in an accident while he was travelling in the truck on 27/28.06.2006. The death happened during

the course of employment and arose out of employment of the deceased with the insured. The income of the deceased determined by the Workmen's Commissioner is Rs. 2714.56/- per month.

6. On the fateful day the truck stood duly insured by the appellant insurance company which was found liable to pay the compensation. The learned Workmen's Commissioner awarded compensation depicted in tabulated form hereunder:

Sr. No.	Heads	Amount (in Rupees)
1.	Annual Income	32774.72
2.	Factor- 219.95 as per Schedule IV to the Workmen's Compensation Act	
3.	Income- Rs. 2714.56 wages per month as per Minimum Wages Act, 1948	
4.	Compensation- $2714.56 \times 219.95 \times 50\%$	2,98,534/-
5.	Non pecuniary (funeral expenses)	2500
6.	Total compensation	3,01,034/-
7.	Interest	1

III. Submissions of learned counsels

7. Sri B.C. Naik, learned counsel for the appellant insurance company contends that employee-employer relationship was not established and is a substantial question of law.

8. This Court finds that impugned order reflects full application of mind to the material and impeccable appraisal of evidences in the record which show that the deceased was in the employ of the insured. He drew his salary from the employer and worked directly under the orders of the latter. All ingredients of employer employee relationship are matters of fact which were established before Tribunal by credible evidence. There is no infirmity in these findings nor any perversity could be pointed out. No substantial question of law arises from these findings of facts as regards employer employee relationship.

9. Sri Nigamendra Shukla, learned counsel for the claimants-respondents presses the cross objections. It is contended that the compensation was not granted in adherence to the statutory provisions.

10. Initial objections of the appellant to the maintainability of cross objections were fairly waived by the appellant insurance company after arguments. The cross objections are held to be maintainable since they disclose fault lines in the award which go to the root. The grounds in the objections raise substantial questions of law.

IV. Substantial questions of law

11. Sri Nigamendra Shukla, learned counsel for the respondents submits that provisions of Employee's Compensation Act and Motor Vehicles Act, 1988 sometimes overlap, and in such common areas of operation the provisions/judicial authorities under the M.V. Act can be applied to award just compensation under E.C. Act. Future prospects and funeral expenses payable under the M.V. Act, can be claimed by claimants

under the Employee's Compensation Act, 1923.

12. Sri B.C. Naik, learned counsel for the appellant submits that the E.C. Act and the M.V. Act cover separate fields and provisions of one Act cannot be applied to proceedings under the other enactment. Particularly funeral expenses are duly provided for under the E.C. Act and applying said provisions/judicial authorities under the M.V. Act would be contrary to the scheme of former Act.

13. After the arguments learned counsel for the parties agree that the following substantial questions of law arise in the facts of the case:

(a) Whether future prospects are liable to be granted to claimants in the instant proceedings under the Employee's Compensation Act? If yes, the prerequisites to be established for grant of said benefits and the manner of computation of the same?

(b) Whether the claimants under the Employee's Compensation Act, 1923 are entitled to funeral expenses in line with compensation granted under the same head in proceedings taken out under the Motor Vehicles Act, 1988?

V. Consideration and analysis:

14. In these dear times welfare legislation often holds the only security for workmen and their dependents against vagaries of fate. "Just compensation" flowing from law and awarded by courts provides succour to claimants from privations imposed by misfortune.

15. The beneficent intent of the legislature while enacting the Employee's

Compensation Act, 1923 is disclosed in the object of the legislation which is to provide for payment of compensation for injury/death by accident by certain class of employers to their employees. The settled canons of statutory interpretation require that the E.C. Act, 1923 being a welfare legislation is liable to be interpreted liberally to ensure that just compensation is provided to the class of workmen who are targeted beneficiaries of the E.C. Act, 1923. At the same time caution has to be exercised to ensure that no illegal benefit accrues to an unentitled person. [Ref: **A & F Overseas Trade Ltd. Vs Appellate Authority under the Payment of Gratuity Act and others**⁴; **Divisional Manager, TATA AIG General Insurance Company Limited Vs A.C. Jagadeesann and another**⁵; **Regional Provident Fund Commissioner Vs Hooghly Mills Company Limited and others; Brahampal alias Sammay and another Vs National Insurance Company**⁶; **Board of Control for Cricket in India Vs Regional Director, Employees' State Insurance Corporation and others**⁷].

16. The concept of "stretched construction" propounded by the Calcutta High Court in **Chillu Kahar Vs Burn & Co. Ltd.**⁸ holds true today and will apply to this case:

"16. Reading the reports in the books, it is impossible to avoid the feeling that a desire to assist a workman in distress, who has undoubtedly suffered from causes arising out of his employment, has often led to a stretching of the language of the statute. Even in the cases where the decision was in favour of the workman, the observations of the learned Judges make it perfectly clear that they felt the pressure of reason on the other side and perhaps

decided in favour of the workman in pursuance of what they conceived to be the policy of the Act. Mr. Sanyal pointed out, and in my opinion rightly, that with the progress of the times, the conception of the circumstances in which the workman is entitled to compensation has widened and become more and more liberal. Even if, therefore, the view taken by the highest courts in recent times, on facts which are more or less similar to the facts one has to deal with, be a view which only a stretched construction of the Act can bear, it will not be wrong to follow it so long as it is not something violently opposed to fundamental principles."

17. It would also be apposite to refer to the holdings of the Jharkhand High Court in **Sunita Devi Vs Autar Singh and others**.⁹ While interpreting the scheme of the Employee's Compensation Act, 1923:

"12. It is well settled that the Act is a piece of social security and welfare legislation, Its dominant purpose is to protect the workman and, therefore, the provisions of the Act should not be interpreted too narrowly so as to debar the workman from compensation which the Parliament thought they ought to have. The intention of the legislature was to make the employer an insurer of the workman responsible against the loss caused by the injuries or death, which ought have happened, while the workman was engaged in his work."

18. A birds eye view of the legislative scheme for grant of compensation will preface the discussion. Section 2 (m) of the E.C. Act, 1923 defines wages while Section 3 of the enactment imposes the liability on the employer for compensation. The method of calculating the compensation is

stated in Section 4 read with the Schedule, and the manner of computing wages is provided in Section 5 of the E.C. Act.

19. Section 2(m) of the E.C. Act, 1923 defines wages in the following manner:-

*"(m) "wages", includes any privilege or benefit which is capable of being estimated in money, other than a travelling allowance or the value of any travelling concession or a contribution paid by the employer of a *[employee] towards any pension or provident fund or a sum paid to a *[employee] to cover any special expenses entailed on him by the nature of his employment; "*

20. The provision contains an inclusive definition of 'wages' and confers a wide ambit to the said term. There is an implicit legislative acknowledgment that the term wages has several components. Monthly salary which is a principal ingredient has to be aggregated with other components to determine "wages" for grant of compensation under the E.C. Act. Enlarged scope of the word "wages" created by inclusive definition is supported by the holding of Supreme Court in **Ramanlal Bhailal Patel and others Vs State of Gujarat**¹⁰, which explained the scope inclusive definition in statutes in these terms:

"Where the definition is an inclusive definition, the use of the word 'includes' indicates an intention to enlarge the meaning of the word used in the Statute. Consequently, the word must be construed as comprehending not only such things which they signify according to their natural import, but also those things which the interpretation clause declares that they

shall include. Thus, where a definition uses the word 'includes', as contrasted from 'means', the word defined not only bears its ordinary popular and natural meaning, but in addition also bear the extended statutory meaning."

(Also see **Regional Director, Employees' State Insurance Corporation Vs High Land Coffee Works of P.F.X. Saldanha and Sons and others**¹¹, **S.K. Gupta and others Vs K.P. Jain and others**¹²).

21. Just wages of labour cannot be denied. Future rise in income is a given in economics and law. Criteria for fixing wages for example (consumer price index, inflation etc.) witness a constant rise thus creating the need for corresponding increase in wages. This inexorable economic reality has received statutory recognition. Regular notifications hiking wages are taken out by appropriate governments from time to time under the Minimum Wages Act acknowledging the imperative of timely raise in wages. In this regard Section 4 (IB) of the E.C. Act, 1923 may also be referenced (quoted below):

"[(1B) The Central Government may, by notification in the Official Gazette, specify, for the purposes of sub-section (I), such monthly wages in relation to an employee as it may consider necessary.]"

22. Enhanced wages in future is a legislative safeguard for the worker class against uncertainties arising from escalating costs of living. Assurance of hike in future wages is the bulwark of industrial peace, and the engine of industrial growth. The legislative intent to provide just compensation to a worker and the preambled constitutional goal of

securing social and economic justice to all citizens are achieved by this measure. Rise in future wages comes within the meaning of "wages" as defined in the E.C. Act, 1923.

23. The computation of the amount of compensation is described in Sections 4 and 5 of the E.C. Act, 1923. The relevant paras of Section 4 are extracted below:-

"4 (1) (a) where death results from the injury	: an amount equal to fifty per cent. of the monthly wages of the deceased [employee] multiplied by the relevant factor; or an amount of [one lakh and twenty thousand rupees], whichever is more;

24. Section 5 (insofar as it is applicable here) states as under:-

“Section 5. Method of calculating wages.- In this Act and for the purposes thereof the expression "monthly wages" means the amount of wages deemed to be payable for a month's service (whether the wages are payable by the month or by whatever other period or at piece rates), and calculated as follows, namely:--

(emphasis supplied)

(a) where the *[employee] has, during a continuous period of not less than twelve months immediately preceding the accident, been in the service of the employer who is liable to pay compensation, the monthly wages of the *[employee] shall be one-twelfth of the

total wages which have fallen due for payment to him by the employer in the last twelve months of that period;

(b) where the whole of the continuous period of service immediately preceding the accident during which the *[employee] was in the service of the employer who is liable to pay the compensation was less than one month, the monthly wages of the *[employee] shall be the average monthly amount which, during the twelve months immediately preceding the accident, was being earned by a *[employee] employed on the same work by the same employer, or, if there was no *[employee] so employed, by a *[employee] employed on similar work in the same locality;

(c) in other cases [including cases in which it is not possible for want of necessary information to calculate the monthly wages under clause (b)], the monthly wages shall be thirty times the total wages earned in respect of the last continuous period of service immediately preceding the accident from the employer who is liable to pay compensation, divided by the number of days comprising such period. "

25. Section 4 and Section 5 are reproduced in their entirety in the appendixi.

26. Most established practices in industrial jurisprudence make wages payable on a monthly basis. Future rise in wages is based on past service and last wages drawn. The claim for future wages matures with each day of service of a workman. The amount and period when future wages are payable cannot be determined ex-ante with exactitude. The phrase "whatever other period" in Section 5 of the E.C. Act brings in its fold future prospects which

comprise enhanced wages payable at a yet undefined future date.

27. In summation, wages is the foundational basis and future prospects is an essential component of “wages” under the E.C. Act, 1923. The monthly wages will be determined strictly in accordance with the E.C. Act, 1923. Method of calculating future prospects is not provided under the E.C. Act. Body of judicial precedents under the Motor Vehicles Act, 1988 and statutory rules (Uttar Pradesh Motor Vehicle Rules, 1998) framed thereunder can enable determination of compensation under that head.

28. The discussion shall be taken forward by making a comparative and parallel evaluation of provisions of E.C. Act and M.V. Act.

29. Section 2(e) of the E.C. Act, 1923 defines ‘employer’ as follows:

2. Definitions.- (e) “employer” includes any body of persons whether incorporated or not and any managing agent of an employer and the legal representative of a deceased employer, and, when the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, means such other person while the workman is working for him;

30. Section 2 (30) of the Motor Vehicles Act, 1988, defines ‘owner’ as follows:

“(30) “owner” means a person in whose name a motor vehicle stands registered, and where such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase, agreement, or an agreement of lease or an

agreement of hypothecation, the person in possession of the vehicle under that agreement.”

31. The definition of “employer” under the EC Act and of “owner” under the M.V. Act establishes that any owner of a vehicle can be the employer under the E.C. Act too. Obligation cast by the M.V. Act on the owner for the compulsory insurance of the vehicle may also bind an employer.

32. Similarly, the workman under the E.C. Act who is plying the owner’s vehicle can be entitled to third party cover under the M.V. Act. If entitlement to third party benefits under M.V. Act is established, it will be difficult to justify denial of the same.

33. The entitlements of third party under the M.V. Act is provided in Section 146 which is extracted hereunder:

“146. Necessity for insurance against third party risk.—(1) No person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of this Chapter: 1

[Provided that in the case of a vehicle carrying, or meant to carry, dangerous or hazardous goods, there shall also be a policy of insurance under the Public Liability Insurance Act, 1991 (6 of 1991).]

Explanation.—A person driving a motor vehicle merely as a paid employee, while there is in force in relation to the use of the vehicle no such policy as is required by this sub-section, shall not be deemed to act in contravention of the sub-section

unless he knows or has reason to believe that there is no such policy in force.

(2) Sub-section (1) shall not apply to any vehicle owned by the Central Government or a State Government and used for Government purposes unconnected with any commercial enterprise.

(3) The appropriate Government may, by order, exempt from the operation of sub-section (1) any vehicle owned by any of the following authorities, namely:—

(a) the Central Government or a State Government, if the vehicle is used for Government purposes connected with any commercial enterprise;

(b) any local authority;

(c) any State transport undertaking:

Provided that no such order shall be made in relation to any such authority unless a fund has been established and is maintained by that authority in accordance with the rules made in that behalf under this Act for meeting any liability arising out of the use of any vehicle of that authority which that authority or any person in its employment may incur to third parties.

Explanation.—For the purposes of this sub-section, “appropriate Government” means the Central Government or a State Government, as the case may be, and— (i) in relation to any corporation or company owned by the Central Government or any State Government, means the Central Government or that State Government; (ii) in relation to any corporation or company owned by the Central Government and one or more State Governments, means the Central Government; (iii) in relation to any other State transport undertaking or any local authority, means that Government which has control over that undertaking or authority.”

34. The scope of limitations of the insurance contracts are described in Section 147 of the M.V. Act which states thus:

“147. **Requirements of policies and limits of liability.**—(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which—

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

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

(i) against any liability which may be incurred by him in respect of the death of or bodily 1 [injury to any person, including owner of the goods or his authorized representative carried in the vehicle] or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

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

Provided that a policy shall not be required—

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

(a) engaged in driving the vehicle, or

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

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

(ii) to cover any contractual liability.”

1[Requirement of policies and limits of liability. --(1) In order to comply with

the requirements of this Chapter, a policy of insurance must be a policy which--

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

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

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

(ii) against the death of or bodily injury to any passenger of a transport vehicle, except gratuitous passengers of a goods vehicle, caused by or arising out of the use of the motor vehicle in a public place.

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

(2) Notwithstanding anything contained under any other law for the time being in force, for the purposes of third party insurance related to either death of a person or grievous hurt to a person, the Central Government shall prescribe a base premium and the liability of an insurer in relation to such premium for an insurance policy under sub-section (1) in consultation with the Insurance Regulatory and Development Authority.

(3) A policy shall be of no effect for the purposes of this Chapter unless and

until there is issued by the insurer in favour of the person by whom the policy is effected, a certificate of insurance in the prescribed form and containing the prescribed particulars of any condition subject to which the policy is issued and of any other prescribed matters; and different forms, particulars and matters may be prescribed in different cases.

(4) Notwithstanding anything contained in this Act, a policy of Insurance issued before the commencement of the Motor Vehicles (Amendment) Act, 2019 shall be continued on the existing terms under the contract and the provisions of this Act shall apply as if this Act had not been amended by the said Act.

(5) Where a cover note issued by the insurer under the provisions of this Chapter or the rules or regulations made thereunder is not followed by a policy of insurance within the specified time, the insurer shall, within seven days of the expiry of the period of the validity of the cover note, notify the fact to the registering authority or to such other authority as the State Government may prescribe.

(6) Notwithstanding anything contained in any other law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons.]"

35. The liability incurred under the E.C. Act may also be covered by a contract executed under the M.V. Act. The insurance policy in this case pertains to the period prior to the Motor Vehicles. (Amendment) Act, 2019. However, even as per the unamended provisions of the M.V. Act and the insurance contract executed

between the insurer and the insured in the instant case cover the liability of an employer/insured under the E.C. Act.

36. There is another aspect of the controversy. The cause of action for claim petition under the M.V. Act arises when the death is caused by negligent driving of the insured vehicle.

37. Liability to pay compensation arises under the E.C. Act only if death by accident occurs in course of the employment of the workman-deceased.

38. Negligent driving happens when there is failure to drive prudently and non adherence to the norms of safe driving. In other words, failure of the driver of the offending vehicle to take "reasonable care".

39. Similarly, an employee under the E.C. Act is expected to observe reasonable care while performing the chores of his employment. The case of a claimant is weakened when death of an employee is caused by sheer negligence or imprudence of the deceased.

40. The discussion can be fortified by authority in point. The Supreme Court in **Mackinnon Mackenzie & Co. Pvt. Ltd vs Ibrahim Mahommed Issak**¹³ while considering the impact of a workman's imprudence on grant of compensation under the Workmen's Compensation Act held:

"5. To come within the Act the injury by accident must arise both out of and in the course of employment. The words "in the course of the employment" mean "in the course of the work which the workman is employed to do and which is incidental

to it." The words "arising out of employment" are understood to mean that "during the course of the employment, injury has resulted from some risk incidental to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered." In other words there must be a causal relationship between the accident and the employment. The expression "arising out of employment" is again not confined to the mere nature of the employment. The expression applies to employment as such — to its nature, its conditions, its obligations and its incidents. If by reason of any of those factors the workman is brought within the zone of special danger the injury would be one which arises 'out of employment'. **To put it differently if the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless of course the workman has exposed himself to an added peril by his own imprudent act.** In *Lancashire and Yorkshire Railway Co.v.Highley*[(1917) AC 352] Lord Sumner laid down the following test for determining whether an accident "arose out of the employment":

"There is, however, in my opinion, one test which is always at any rate applicable, because it arises upon the very words of the statute, and it is generally of some real assistance. It is this: Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yes, the accident arose out of his employment. If nay, it did not, because, what it was not part of the employment to hazard, to suffer, or to do, cannot well be the cause of an accident arising out of the employment. To ask if the cause of the workman was within the sphere of the

employment, or was one of the ordinary risks of the employment, or reasonably incidental to the employment, or conversely, was an added peril and outside the sphere of the employment, are all different ways of asking whether it was a part of his employment, that the workman should have acted as he was acting, or should have been in the position in which he was, whereby in the course of that employment he sustained injury.”

41. The phrase “just compensation” in Section 168 of the M.V. Act, 1988 discloses the legislative intent of achieving a welfare measure through adjudication by courts in accordance with evolved judicial standards.

42. The phrase “just compensation” has not been defined in the M.V. Act. Content and the scope of the expression of “just compensation” under the M.V. Act has been evolved by courts in light of good authorities in law of torts. The compensation under the E.C. Act is liable to be a just compensation which has to be calculated in adherence to the scheme of the E.C. Act.

43. The Supreme Court in **K. Suresh Vs. New India Assurance Company Ltd. and Others**¹⁴, advocated the path of golden mean while granting “just compensation” by setting forth as under:

“2. ... There cannot be actual compensation for anguish of the heart or for mental tribulations. The quintessentiality lies in the pragmatic computation of the loss sustained which has to be in the realm of realistic approximation. Therefore, Section 168 of the Motor Vehicles Act, 1988 (for brevity “the Act”) stipulates that there should be

grant of “just compensation”. Thus, it becomes a challenge for a court of law to determine “just compensation” which is neither a bonanza nor a windfall, and simultaneously, should not be a pittance.”

44. More recently in an injury case the Allahabad High Court in **New India Assurance Company Ltd. Vs. Amit Kumar Yadav and another**¹⁵ emphasized on foot of good authority that just compensation envisages that “compensation should fully and adequately restore claimant to the position prior the accident” by holding:

“It observed that scheme of Act, 1988 shows that award must be “just”, which means that compensation should, to the extent possible, fully and adequately restore claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. A person is not only to be compensated for physical injury, but also for the loss which he suffered as a result of such injury. It means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned.”

45. Concept of just compensation consistent with the scheme of the E.C. Act enables realisation of the legislative mandate.

46. In the facts of this case the appellant had the option to take out proceedings under M.V. Act and the E.C. Act for seeking compensation. He chose the latter. In this regard reference may be

had to Section 167 of the M.V. Act, which is reproduced below:

“167. Option regarding claims for compensation in certain cases.— Notwithstanding anything contained in the Workmen’s Compensation Act, 1923 (8 of 1923) where the death of, or bodily injury to, any person gives rise to a claim for compensation under this Act and also under the Workmen’s Compensation Act, 1923, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both.”

47. The question is whether provisions of M.V. Act, Rules framed thereunder and cases in point can aid the computation of future prospects under the E.C. Act.

48. M.V. Act and E.C. Act are separate statutes which cover distinct fields and envisage proceedings in different tribunals. However, diversity of statutes does not necessarily depict disparate legislative intendments and multiplicity of forums cannot cause denial of legal entitlements. Comparative examination of the statutes made in the preceding paragraphs also manifests the overlapping areas of operation of the two enactments. The overarching congruency of purpose and the underlying similarity of objects of the two statutes evidenced in the common fields of operation can be achieved by an integrated interpretation of the enactments. Provisions of one statute and authorities thereunder can be applied by analogy to the other enactment to realise the legislative intent of the latter.

49. Integrated approach of statutory construction will ensure that the claimants

are not denied their legal entitlements under the enactments merely because one forum is chosen in preference to proceedings under the other Act. Integrated interpretation will entail a composite reading of the statutes and conflated application of analogous judicial authorities. The statutes will be read as part of an extended legislative scheme to the extent of their overlapping and consistent fields of operation.

50. Now the caution. Before invoking the integrated method of statutory interpretation certain prerequisites have to be established and while applying it various limitations have to be observed. Firstly, it has to be established for a fact that the claimants had a right to equally approach either of the two tribunals under the respective statutes. Secondly, the legal entitlements of the claimants have to be affirmed in the facts of a case. Thirdly this line of enquiry shall be applied only in common and overlapping areas of the statutes. Lastly this method of construction shall not extend to provisions which disclose a contrary intent or fields which are covered by specific provisions under the respective enactments.

51. The endeavour of the Court should be to realise the statutory intent of both enactments by benefiting the claimants without prejudice to other party. The Court cannot depart from any express provisions or Act in a manner contrary to the statutory scheme of either enactment.

52. The entitlement of claimants to future prospects as seen earlier flows from the provisions of the E.C. Act, but the method of calculation of the amount is absent in the said statute.

53. The method of computing future wages under the M.V. Act/Rules framed thereunder and cases in point can reliably guide the determination of compensation under the E.C. Act.

54. The head of future prospects was evolved by courts while awarding just compensation under the M.V. Act. With the advantage of such judicial authorities, Rules have been framed in regard to the same in the State of U.P.

55. The Uttar Pradesh Motor Vehicles Rules, 1998¹⁶ provide for calculation of future prospects. Rule 220A-3(iii) of the Rules is relevant and is reproduced hereunder:

“(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.”

56. The UP Rules, 1998 came up for consideration before the Supreme Court in **New India Assurance Co. Ltd. vs. Urmila Shukla and others**¹⁷. In **Urmila Shukla (supra)** upon consideration of various judgements including **National Insurance Company Ltd. Vs. Pranay Sethi and others**¹⁸ held:

“10. The discussion on the point in Pranay Sethi was from the standpoint of arriving at “just compensation” in terms of Section 168 of the Motor Vehicles Act, 1988.

11. If an indicia is made available in the form of a statutory instrument which affords a favourable treatment, the decision in Pranay Sethi cannot be taken to have limited the operation of such statutory

provision specially when the validity of the Rules was not put under any challenge. The prescription of 15% in cases where the deceased was in the age bracket of 50-60 years as stated in Pranay Sethi cannot be taken as maxima. In the absence of any governing principle available in the statutory regime, it was only in the form of an indication. **If a statutory instrument has devised a formula which affords better or greater benefit, such statutory instrument must be allowed to operate unless the statutory instrument is otherwise found to be invalid.**” (emphasis supplied)

57. The Uttar Pradesh Motor Vehicles Rules, 1998 were not under consideration before the Supreme Court in **Pranay Sethi (supra)** or **Sarla Verma (Smt) and others Vs. Delhi Transport Company and another**¹⁹. Future prospects in Pranay Sethi (supra) were determined without noticing the U.P. Rules, 1998. This fact was adverted to in **Urmila Shukla (supra)**:

“8. It is submitted by Mr. Rao that the judgment in Pranay Sethi does not show that the attention of the Court was invited to the specific rules such as Rule 3(iii) which contemplates addition of 20% of the salary as against 15% which was stated as a measure in Pranay Sethi. In his submission, since the statutory instrument has been put in place which affords more advantageous treatment, the decision in Pranay Sethi ought not to be considered to limit the application of such statutory Rule.”

58. The U.P. Rules, 1998 are statutory in nature and their operation is not stymied by **Pranay Sethi (supra)**. The U. P. Rules, 1998 have the force of law and shall apply with full force in appropriate cases. The U.P. Rules, 1998 are more beneficial for the claimants than the provisions made in

Pranay Sethi (*supra*) for them. The holdings in *Pranay Sethi (supra)* can not dilute the advantages conferred by U.P. Rules, 1998 upon the eligible beneficiaries.

59. In this wake, this Court finds that the claimants/respondents are entitled to 50% of the wages under the head of future prospects in proceedings under the E.C. Act, since the prerequisites discussed above are satisfied.

VI. Conclusions and Directions

60. The first substantial question of law is answered as follows:

61. The claimants/workmen are entitled to grant of future prospects while calculating compensation under the E.C. Act since the conditions precedent for the same are duly satisfied. The amount payable under the head of future prospects is fifty percent of the wages determined under the E.C. Act.

62. Coming to the second substantial question of law, this Court finds that there is merit in the submissions of Sri B.C. Naik, learned counsel for the insurance company that the funeral expenses have been explicitly provided for under the scheme of E.C. Act. Hence there can be no lawful recourse to or authorities arising out of the M.V. Act while granting compensation under the EC Act under that head. The conditions precedent for adoption of integrated interpretation are not established in this issue.

63. Attention is called to Section 4(4) of the E.C. Act, 1923 which states thus:

“(4) If the injury of the [employee] results in his death, the employer shall, in addition to the compensation under sub-

section (1), deposit with the Commissioner a sum of [two thousand and five hundred rupees] for payment of the same to the eldest surviving dependant of the [employee] towards the expenditure of the funeral of such [employee] or where the [employee] did not have a dependant or was not living with his dependant at the time of his death to the person who actually incurred such expenditure.

[Provided that the Central Government may, by notification in the Official Gazette, from time to time, enhance the amount specified in this sub-section.]”

64. The second substantial question of law is accordingly answered as follows:

65. The determination of funeral expenses and other benefits shall be made in accordance with Section 4 (4) of the E.C. Act, 1923.

66. In light of the answers to the substantial questions of law, the compensation to which the claimants/cross objectors are entitled is tabulated below:

- i. Date of accident - 27/28.06.2006
- ii. Name of deceased - Rashid
- iii. Age of the deceased - 23 years
- iv. Occupation of the deceased
- Helper/cleaner
- v. Name, Age and Relationship of claimants with the deceased

Sr. No.	Name	Relation
1.	Yamin	Father
2.	Munni	Mother
3.	Wahid	Brother

Computation of compensation

Sr. No.	Heads	Amount (in Rupees)
1.	Annual Income	32774.72
2.	Deduction - 50% as per section 4(1)(a) of E.C. Act 1923	
3.	Factor- 219.95 as per Schedule IV to the E.C. Act, 1923	
4.	Income- Rs. 2714.56 wages per month as per Minimum Wages Act, 1948	
5.	Compensation- 2714.56 x 219.95 x 50%	2,98,533.74
6.	Future prospects	1,49,266.87
7.	Non pecuniary (funeral expenses)	5000
8.	Total compensation	4,52,800.61
9.	Interest	12%

67. The compensation calculated under the M.V. Act by applying the multipliers and the rate based calculation under the E.C. Act eventually arrived at almost the same figures. A chart in this regard is part of the appendix. The chart does not depict material differences in the compensation amount in the facts and circumstances of this case. (see appendixii).

68. Cross objection filed on behalf of the claimants-respondents is allowed to the extent indicated above and the appeal is accordingly dismissed.

(2023) 8 ILRA 815
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.04.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

First Appeal from Order No. 2576 of 2012

The New India Assurance Co. Ltd.
...Appellant
Versus
Smt. Nirmala Devi & Ors. ...Respondents

Counsel for the Appellant:
Sri Rahul Sahai, Sri Aditya Singh Parihar

Counsel for the Respondents:
Sri S. Jaiswal, Sri Ajit Singh Rana, Sri Ashok K. Jaiswal, Sri Bharat Pratap Singh, Sri Devendra Gupta, Sri Vipul Singh

A. Civil Law-Motor Vehicle Act, 1988-Section 173-enhancement of compensation- The deceased sustained injuries in the accident and died-On the date of the accident the offending vehicle was insured by the appellant-The claimants were dependants of the deceased-The deceased was 39 years of age at the time of the accident- Uttar Pradesh Motor Vehicles Rules, 1998 Rule 220A-3(i) of the Rules provides for future prospects of a deceased- Since the deceased below 40 years of age ,50% of the salary shall be added in the actual salary--Thus, the total compensation is granted Rs. 32,69,710/- at the rate of 7%.(Para 1 to 52)

B. Order XLI Rule 33 of the Code of Civil Procedure prescribing the power of court of appeal clearly provides that the Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made as the case may require, and this power may be exercised in favour of all or any of the respondents or parties though they may

not have filed any cross appeal or objection.(Para 28, 29)

The appeal is dismissed. (E-6)

List of Cases cited:

1. National Ins. Co. Vs Pranay Sethi (2014) 4 TAC 637 SC

2. Smt. Sarla Verma Vs DTC (2009) 2 TAC 677 SC

3. National Ins. Co. Ltd. Vs Smt. Vidyawati Devi & ors. FAFO No. 2389 of 2016

4. Delhi Electric Supply Undertaking Vs Basanti Devi

5. Mahant Dhangir & anr. Vs Madan Mohan & ors.

6. Jitendra Kimshankar Trivedi & ors. Vs Kasam Daud Kumbhar & ors.

7. Arun Kumar Agarwal & anr. Vs National Ins. Co. Ltd. & ors.

8. New India Assr. Co. Ltd. Vs Urmila Shukla & ors.

(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	Case of the claimants & the respondents before the learned tribunal		
III	Compensation awarded by the learned tribunal		
IV	Submissions of learned counsels for parties		
V	Issues for consideration: <table border="1"> <tr> <td>A.</td><td>Factum of the accident</td></tr> </table>	A.	Factum of the accident
A.	Factum of the accident		

	B.	Liability of Insurance Company								
	C.	Maintainability of oral cross objection								
	D.	Quantum of compensation under different heads: <table><tr><td></td><td>Future Prospects</td></tr><tr><td></td><td>Conventional Heads</td></tr><tr><td></td><td>Multiplier</td></tr><tr><td></td><td>Interest</td></tr></table>		Future Prospects		Conventional Heads		Multiplier		Interest
	Future Prospects									
	Conventional Heads									
	Multiplier									
	Interest									
	E.	Determination of Compensation to which claimants-respondents are entitled								
VI	Conclusion and Directions									

I. INTRODUCTION

2. This first appeal from order arises from the judgment and award dated 05.03.2012 passed by the learned Motor Accident Claims Tribunal/learned Additional District Judge/ Special Judge, in Motor Accident Claim Petition No.171 of 2010 (Smt. Nirmala Devi and others Vs. Ramdev Shukla and others), partly allowing the claim made by the claimants.

3. The first appeal from order has been filed by the Insurance Company contesting the liability to pay the compensation and also the quantum of compensation awarded by the learned Tribunal.

II. Case of the claimants and the respondents before the learned Tribunal:

4. Briefly the case of the claimants before the learned tribunal was that the

deceased-Rajesh Kumar was serving a constable in Border Security Force. On the fateful day of 06.05.2010, he was riding a motorcycle bearing registration No. UP 30-M-1588 when tractor trolley laden with sand bearing Registration No. UP27-C-2688 collided with the said motorcycle. The accident was caused by solely rash and negligent driving of the driver of the offending tractor trolley. The deceased sustained died of injuries sustained in the said accident. On the date of the accident the offending vehicle was insured by the appellant-New India Assurance Company Ltd. The claimants were dependants of the deceased. The deceased was 39 years of age at the time of the accident.

III. Compensation awarded by the learned tribunal:

5. The learned tribunal found that the accident was caused by the rash and negligent driving of the driver of tractor trolley. The insurance company was liable to pay the compensation.

6. The learned tribunal in the impugned judgment dated 05.03.2012 awarded compensation depicted in a tabulated form hereunder:

Sr. No.	Heads	Amount Awarded by the tribunal
1	Monthly Income (A)	15,801/-
2	Annual Income (B)	$15801 \times 12 = 1,89,612/-$
3	Future prospects (C)	NILL
4	Annual Income +	NILL

	Future Prospects (B + C = D)	
5	Deduction towards personal expenses	$1,89,612 \times 1/3 = 63,204/-$
6	Total income after deduction (E)	$1,89,612 - 63,204 = 1,26,410/-$
7	Multiplier (F)	11
8	Total loss of dependency (E x F)	$1,26,410 \times 11 = 13,90,510/-$
9	Funeral expenses	2000/-
10	Loss of love and affection	5000/-
11	Loss estate	2500/-
12	Total compensation	14,00,010/-
13	Interest	6%

IV. Submissions of learned counsels for parties:

7. Shri Aditya Singh Parihar, learned counsel holding brief of Shri Rahul Sahai, learned counsel for the appellant-Insurance Company contends that the accident never occurred. This is a false claim. Secondly, the liability was that of the tractor owner since there was a breach of the Insurance policy. Thirdly the compensation was wrongly awarded.

8. Shri Vipul Singh, learned counsel for the respondents-claimants supports the findings affirming the liability of the insurance company and has raised an oral

cross objection to the effect that the future prospects to which the claimants were undisputedly entitled have been unlawfully denied by the learned trial court.

9. Per contra, Shri Aditya Singh Parihar, learned counsel holding brief of Shri Rahul Sahai, learned counsel for the appellant Insurance Company contends that the claimants-respondents cannot raise oral cross objection at the stage of the appeal.

V. Issues for consideration:

10. After advancing their arguments, learned counsel for both the parties agree that though many grounds have been pleaded, only the following questions fall for consideration in this appeal:-

(A) Whether the accident as depicted in the claim petition actually happened or the offending vehicle was falsely implicated only for the purpose of seeking compensation?

(B) Whether there was breach of the insurance policy by the owner of the offending vehicle?

(C). Whether the oral cross objection can be raised by the claimants at the stage of appeal? If yes, to what extent?

(D). Whether learned Tribunal correctly computed the compensation these various heads:- future prospects, multiplier, conventional heads and interest ?

(E). Compensation amount to which the claimants-respondents are entitled.

V A. Issue no. 1 :

Factum of the accident

11. The claimants introduced two witnesses to establish the factum of the

accident and negligence of the driver of the offending tractor trolley.

12. P.W. 2-Mahesh who is the brother of the deceased testified before the learned tribunal that he had witnessed the accident. He deposed that on the fateful day he was riding pillion on the motorcycle being driven by his deceased brother. The offending tractor trolley came at an uncontrollable speed and collided head on with the motorcycle. The accident was caused solely by the rash and negligent driving of the offending tractor trolley. The deceased fell to the ground under the impact of the collision and died of injuries sustained in the accident. The tractor trolley driver tried to flee at the spot. However, he was overpowered by the villagers who gathered at the site of the accident. The tractor trolley as well as driver were taken to the police station by the witnesses and the villagers. The police authorities detained the driver and seized the vehicle. P.W. 2 Mahesh was also the informant who had promptly lodged an F.I.R. He had stated under cross examination that the registration number of the tractor trolley painted on the vehicle was illegible.

13. P.W.-3 Sheesh Ram upon entering the witness box asserted that he was an eye witness to the accident. He too confirmed the death of the deceased in the accident and the fault of the driver of the offending vehicle.

14. The testimonies of both P.W.2 Mahesh and P.W. 3-Sheesh Ram were not shaken under cross examination. Some minor contradictions were highlighted on behalf of the Insurance Company as regards the testimony of the two witnesses. However, these contradictions are not

material and do not take away the credit of the said witnesses.

15. The F.I.R. version is in conformity with the statements of the witnesses before the learned tribunal. The argument on behalf of the Insurance Company that the vehicle details were missing in the F.I.R., does not adversely impact the compensation claim made by the claimants. It is well settled that the F.I.R. is not an encyclopedia of all facts. Moreover satisfactory reasons have been given by the informant for absence of said details in the F.I.R.

16. The learned trial court which had the advantage of observing the demeanour of the witnesses also found them to be worthy of credit and believed their testimonies. This Court has no reason to take any other view regarding the depositions of the said witnesses. The oral testimonies of the eye witnesses are also corroborated in substance by the F.I.R.

17. The learned counsel for the Insurance Company emphasised some discrepancies in evidence collected during investigations and faulted the seizure memo. This may reflect that some aspects deficiencies in the police investigations. But the same can not have an adverse bearing on the claim made by the claimants under the M V Act. Criminal proceedings including police investigations into the offence are distinct from compensations claims under the Motor Vehicles Act. Both proceedings differ in scope, purpose, procedure, standard of evidence and relief sought.

18. In this wake, this Court finds that all relevant facts to establish the factum of the accident and the rash and negligent driving on the part of the driver of the offending vehicle were fully established by the

applicable standards of evidence before the learned Motor Accident Claims Tribunal. The findings of the learned tribunal on the issue are upheld.

V B. Issue No. 2 : Liability of Insurance Company

19. The submission on behalf of the Insurance Company that there was breach in the insurance policy by the owner of the tractor trolley, inasmuch, it was being used for commercial purposes. Mere fact of loading the tractor trolley with sand and wooden doors ipso facto does not lead to inference that the vehicle was for commercial purposes and there was breach of insurance policy.

20. The burden of proof of breach of the insurance policy was on the Insurance Company which they failed to do before the learned tribunal. No such material was brought to the notice of this Court as well.

21. The finding of the learned tribunal to the effect that the breach of the insurance policy could not be established by the Insurance Company is not liable to be interference with. This Court finds for the claimant and respondent against the appellant-Insurance company on this issue.

22. To sum up, the accident was caused solely by the negligence of the driver of the tractor trolley, and the Insurance Company and is fully liable to pay compensation.

V C. Issue No. 3 : Maintainability of oral cross objection

23. Grant of compensation under the head of future rise in income is

indispensable part of just compensation which duly settled by good authorities in point. Both learned counsels for the parties agree on the position of law. However, the argument on behalf of the appellant-Insurance Company that this ground cannot be taken in oral cross objection at this stage of the appeal, shall now be dealt with. Various judgements have been cited at the Bar by the respective parties to support their case.

24. The question whether oral objections can be raised for an enhancement of compensation at the stage of appeal has been well settled by good authorities in point.

25. The jurisdiction of the appellant court to allow the parties to take oral objections is traceable to the power of the court of appeal enumerated in Order XLI Rule 33 of the CPC. The Order XLI Rule 33 of the CPC is reproduced hereinafter :-

“Rule 33. Power of Court of Appeal.- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further other decree or order as the case may require, and this order may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decree.”

26. The phraseology implied by the legislature in Order XLI Rule 33 of the

CPC empowers the Appellate Court as under:

“to pass or make such further or other decree or order as the case may require”.
(emphasis supplied)

27. The provision ensures that the arms of law are long enough to reach injustice and the arms of the Court strong enough to serve justice. Drawing its power from the aforesaid provision to the Appellate Court may issue necessary directions to serve the ends of justice. Specifically in cases arising out of the Motor Vehicles Act, 1988 the appellate court may exercise these powers for grant of just compensation.

28. A Division Bench of this Court in *National Insurance Co. Ltd. vs. Smt. Vidyawati Devi and others*¹ while construing the ambit of Order XLI Rule 33 of the CPC held as under:

“Order XLI Rule 33 of the Code of Civil Procedure prescribing the power of court of appeal clearly provides that the Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made as the case may require, and this power may be exercised in favour of all or any of the respondents or parties though they may not have filed any cross appeal or objection.”

29. Scope of Order XLI Rule 33 of the CPC also fell for consideration before the Supreme Court in **Mahant Dhangir and another v. Madan Mohan and others**². While interpreting the vast ambit of the phrase “as the case may require” employed in Order XLI Rule 33 of the CPC the Court opined that the provision enjoins the appellate court to do complete justice

by in **Mahant Dhangir (supra)** holding as under:

"The sweep of the power under Rule 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The appellate Court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate court could also pass such other decree or order as the case may require. The words "as the case may require" used in Rule 33 Order 41 have been put in wide terms to enable the appellate Court to pass any order or decree to meet the ends of justice. What then should be the constraint ? We do not find many. We are not giving any liberal interpretation. The rule itself is liberal enough. The only constraint that we could see, may be these : That the parties before the lower Court should be there before the appellate Court. The question raised must properly arise out of the judgment of the lower Court. If these two requirements are there, the appellate Court could consider any objection against any part of the judgment or decree of the lower Court. It may be urged by any party to the appeal. It is true that the power of the appellate Court under Rule 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The Court should not refuse to exercise that discretion on mere technicalities."

30. The powers of the appellate court were interpreted in similar terms in **Delhi Electric Supply Undertaking vs. Basanti Devi**³:

"We are of the considered view that the conditions as laid down in provisions of

Order XLI Rule 33 are satisfied in the present case. In Delhi Electric Supply Undertaking (Supra) the Hon'ble Apex Court has observed that when circumstances exist which necessitate the exercise of discretion conferred by Rule 33, the court cannot be found wanting when it comes to exercise its powers."

31. Per contra, the judgement relied upon by the Insurance Company rendered by the Supreme Court in *Ranjana Prakash v. Divl. Manager*⁴, restricts the scope of the appellate court according to the learned counsel for the appellant. In particular, the following observations in *Ranjana (supra)* relied upon to support their contention to negate the claim of the claimants:

"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.”

32. I am afraid the judgement of the Supreme Court rendered in *Ranjana* (supra) has to be read in light of the law settled by good authorities in point which do not import any such restrictions on the appellate power. The said authorities including **Smt. Vidyawati Devi (supra)**, **Mahant Dhangir (supra)** and **Basanti Devi (supra)** were not referred to the Court in *Ranjana* (supra).

33. The scope of the powers of the appellate court should also be construed in light of the nature of the legislation. Motor Vehicles Act is a welfare legislation and the endeavour of the appellate court should be to ensure that the beneficial entitlements under the Motor Vehicles Act are not

denied to any party and the lis is decided quickly. Error in the face of the record by the learned tribunal cannot remain uncorrected by the appellate court if cross objections are raised. Remanding the matters in such cases will only prolong the litigation. This may result in the exhaustion of the claimants who are already suffering from the privation imposed by misfortune.

34. Upon consideration of the authorities discussed in the preceding paragraphs, the legal position in regard to the scope of the appellate court to entertain oral cross objections at the stage of hearing of the appeal is distilled thus:

A. Oral cross objections have to be considered only in the event that the case requires the court to do so for doing complete justice between the parties and to award just compensation.

B. Parties before the lower court should arrayed as parties in the appeal.

C. The oral cross objections should arise directly out of the judgement rendered by the learned tribunal.

D. Parties which are likely to be adversely affected by the findings of the appellate court have to be afforded an opportunity of hearing while exercising the powers under Order 41 Rule 33 CPC.

E. If the award of the tribunal is contrary to or in ignorance of the holdings of constitutional courts which settle the fundamental heads of just compensation and the issue only requires application of simple math formula the court may entertain and allow the oral cross objection.

F. The appellate may always take measures, pass orders, or mould relief to mitigate hardship or obviate prejudice to the parties while entertaining oral cross objections at a belated stage in the interests of justice.

G. In case the oral cross objections require a complex reappraisal of evidence or consideration of elaborate arguments or laboured reasoning the appellate court may even decline the prayer for consideration of oral cross objection.

35. The entitlement of the claimants for future prospects is settled by good judicial authorities. The fundamental facts (income etc.) have been established before the learned tribunal. Computing future prospects requires application of a simple mathematical formula in this case. The learned tribunal has admittedly failed to make any award under the aforesaid head consistent with said authorities.

36. The pre-requisites of exercising the powers to entertain the oral cross objections by exercising powers under Order 41 Rule 33 of C.P.C. are established in this case.

37. In the instant case, rise in future income is a given and grant of future prospects has been held to be an entitlement of the claimants in **Sarla Verma and others Vs. Delhi Transport Company and another**⁵ and **National Insurance Company Ltd. Vs. Pranay Sethi and others**⁶.

38. Settled holdings of court, courts crystallise entitlements of rival parties. Refusal of entitlement results in denial of just compensation.

39. The appellate court can take all necessary steps to exercise its power to award just compensation at the stage of the appeal. Once law is settled, endeavour of the court is to award just compensation in terms of such authorities in point and the statute empowers the appellate court to do

so. [See: **Jitendra Kimshankar Trivedi and others vs. Kasam Daud Kumbhar and others**⁷, **Arun Kumar Agarwal and another vs. National Insurance Company Ltd. and others**⁸]

V D. Issue no. 4:

Quantum of compensation under different heads

a. Future Prospects :

40. The future prospects are liable to be calculated in accordance with the Uttar Pradesh Motor Vehicles Rules, 1998. Rule 220A-3(i) of the Rules is relevant and is reproduced hereunder:

“(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.”

41. The UP Rules, 1998 came up for consideration before the Supreme Court in **New India Assurance Co. Ltd. vs. Urmila Shukla and others**¹⁰. In **Urmila Shukla (supra)** upon consideration of various judgements including **National Insurance Company Ltd. Vs. Pranay Sethi and others**¹¹ held:

“10. The discussion on the point in **Pranay Sethi** was from the standpoint of arriving at “just compensation” in terms of Section 168 of the Motor Vehicles Act, 1988.

11. If an indicia is made available in the form of a statutory instrument which affords a favourable treatment, the decision in **Pranay Sethi** cannot be taken to have limited the operation of such statutory provision specially when the validity of the Rules was not put under any challenge. The

prescription of 15% in cases where the deceased was in the age bracket of 50-60 years as stated in *Pranay Sethi* cannot be taken as maxima. In the absence of any governing principle available in the statutory regime, it was only in the form of an indication. *If a statutory instrument has devised a formula which affords better or greater benefit, such statutory instrument must be allowed to operate unless the statutory instrument is otherwise found to be invalid.*” (emphasis supplied)

42. The Rules of the Uttar Pradesh Motor Vehicles Rules, 1998 were not under consideration before the Supreme Court in *Pranay Sethi (supra)* or *Sarla Verma (Smt) and others Vs. Delhi Transport Company and another*¹². Future prospects in *Pranay Sethi (supra)* were determined without noticing the U.P. Rules, 1998. This fact was adverted to in *Urmila Shukla (supra)*:

“8.It is submitted by Mr. Rao that the judgment in *Pranay Sethi* does not show that the attention of the Court was invited to the specific rules such as Rule 3(iii) which contemplates addition of 20% of the salary as against 15% which was stated as a measure in *Pranay Sethi*. In his submission, since the statutory instrument has been put in place which affords more advantageous treatment, the decision in *Pranay Sethi* ought not to be considered to limit the application of such statutory Rule.”

43. The U.P. Rules, 1998 are statutory in nature and their operation is not stymied by **Pranay Sethi (supra)**. The U. P. Rules, 1998 have the force of law and shall apply with full force in appropriate cases. The U.P. Rules, 1998 are more beneficial for the claimants than the provisions made in *Pranay Sethi (supra)* for them. The holdings in *Pranay Sethi (supra)* can not dilute the

advantages conferred by U.P. Rules, 1998 upon the eligible beneficiaries.

44. This Court finds that the claimants/respondents are entitled to 50% enhancement in wages towards future prospects, consistent with the UP Rules, 1998. The necessary changes in the award shall be accordingly made.

45. In this wake, the issue of grant of future prospects and oral cross objection are found in favour of the claimants and against the Insurance Company.

b. Conventional Heads:

46. The amount determined under conventional heads in the impugned award is at variance with **Pranay Sethi (supra)**. The conventional heads were fixed in **Pranay Sethi (supra)** by holding as under:

“54. 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/- funeral expenses should be Rs. 15,000/-, Rs. 40,000/- And Rs. 15,000/- respectively.”

47. The figure under conventional heads determined in Pranay Sethi (supra) shall be applicable to the facts of this case. The award is modified accordingly.

c. Multiplier:

48. The age of the deceased was 39 years at the time of his death. Multiplier of 15 which has been correctly applied by the learned tribunal and in line with the **Pranay Sethi (supra)** and **Sarla Verma (supra)**.

d. Interest:

49. Interest of 7% is just and lawful in the facts of this case.

V E. Issue No. 5:

Determination of Compensation to which claimants-respondents are entitled:

50. In the wake of preceding discussion, the amount of compensation awarded to the claimants is tabulated below:

- i. Date of Accident - 06.05.2010
- iii. Name of the deceased - Rajesh Kumar
- iv. Age of the deceased - 39 years
- v. Occupation of the deceased - Constable (BSF)

(Govt. Servant)

vi. Income of the deceased - 15,801/-

vii. Name, Age and Relationship of claimants with the deceased

Sr. No.	Name	Age	Relation
1	Smt. Nirmala Devi	38	Wife
2	Km. Anuradha	15	Daughter
3.	Km. Anupam	13	Daughter
4.	Abhishek	11	Son
5.	Vivek	8	Son
6.	Smt. Ram Shree	60	Mother

vii. Computation of Compensation

Sr. No.	Heads	Amount (in Rupees)
1	Monthly Income	15,801/-
2	Annual Income	1,89,612/-
3	Future Prospects	30% 1,89,612 x 30% = 94,806/-
4	Annual Income + Future Prospects	1,89,612+ 94,806 = 2,84,418/-
6	Deduction 1/4th	2,84,418 x 1/4 = 71,104/-
7	Total income after 1/4th deduction	2,84,418 - 71,104 = 2,13,314/-

8	Multiplier (G)	2,13,314 x 15 = 31,99,710/-
9	Total loss of dependency	31,99,710/-
10	Conventional Heads (a) Loss of consortium (b) Loss of Estate (c) Funeral Expenses	70,000/-
11	Total Compensatio n	32,69,710/-
12	Interest	7%

VI. Conclusion and Directions:

51. The amount of compensation to which the claimants have thus been found entitled shall be deposited by the Insurance Company within three months before the learned tribunal. Thereafter the learned tribunal shall release the amount to the claimants without delay. The amount already disbursed to the claimants (if any) shall be duly adjusted.

52. The amount of Rs.25,000/- deposited by the appellant while instituting the appeal shall be forthwith remitted to the learned tribunal. The amount shall be paid to the claimants as part of the awarded compensation amount.

53. The cross-objection filed on behalf of the respondents-claimants is allowed and the appeal is accordingly dismissed.

(2023) 8 ILRA 826
APPELLATE JURISDICTION

CRIMINAL SIDE
DATED: ALLAHABAD 18.08.2023

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE MANISH KUMAR NIGAM, J.

Government Appeal No. 356 of 2022
With
Crl. Appl. No. 1823 of 2022
&
Crl. Appl. u/s 372 Cr.P.C. No. 672 of 2022

State of U.P. ...Appellant
Versus
Anil Kumar & Ors. ...Respondents

Counsel for the Appellant:
Sri Shiv Kumar Pal

Counsel for the Respondents:

Sri Siddharth Shankar, Sri Satish Chandra Mishra, Sri Sathish Chandra Pandey, Sri Siddharth Shankar

Criminal Law – Indian Penal Code, 1860 - Sections 498 - A, 304 - B, 120 - B & 302/34 - Dowry Prohibition Act, 1961 - Section 4 - conviction under Section 306 IPC (abetment of suicide) was legally impermissible - charges of homicidal death cannot culminate in conviction for suicidal death - no independent witness of cruelty produced - allegations of dowry harassment made solely through phone calls without contemporaneous written complaints or electronic evidence - postmortem showed intact hyoid bone; medical opinion suggested suicide by hanging - not a case of murder - failure of prosecution to prove cruelty or dowry demand beyond reasonable doubt - benefit of doubt must go to accused - appeal of accused - appellant allowed - conviction set aside - appeals by St. and informant against acquittal dismissed.

Relevant Sections:

Sections 498 - A, 304 - B, 120 - B, 302/34, 306 IPC; Section 4 Dowry Prohibition Act; Section 107 IPC; Section 372 Cr.P.C.

Case Law Discussed:

1. Sangaraboina Sreenu Vs St. of Andhra Pradesh, AIR 1997 SC 3233
2. Harjit Singh Vs St. of Pun., Crl. Appeal No.756/1999
3. Mangat Ram Vs St. of Har., Crl. Appeal No.696/2009
4. Satbir Singh & anr. Vs St. of Har., (2021) 6 SCC 1
5. St. of M.P. Vs Jogendra & anr., (2022) 5 SCC 401
6. Mariano Anto Bruno & anr. Vs Inspector of Police, Crl. Appeal No.1628/2022

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

1. Upon the death of Krishna Kumari, the daughter of the first informant Lajja Ram Baisala, a First Information Report was lodged on 18.12.2014 with the allegation that Krishna Kumari, who was the daughter of the first informant, had been married to Lalit Mohan Poswal on 15.2.2014 and that Lalit Mohan Poswal; his father Anil Kumar; his mother Simla @ Seema and sister Bhawna tortured Krishna Kumari mentally as well as physically for getting further dowry and ultimately killed her. In the First Information Report, it was stated that the deceased on various occasions had complained about physical torture. It was also stated that the first informant had on three occasions visited the house of the in-laws of the deceased daughter to make them understand that it was not possible for him to give further dowry, yet the in-laws kept on demanding further dowry. It was alleged that the in-laws of the deceased daughter openly asked for a Fortuner Car; 11 lacs rupees; 40 tola gold; a big necklace for the mother-in-law

and a gold chain for the husband. It was stated in the First Information Report that the first informant was told by his deceased daughter on an earlier occasion that she used to tell her in-laws that her father would not be able to give any further dowry as he had three more daughters to look after. She allegedly also used to tell her father-in-law that she was in a job earning Rs.40,000/- per month and which money she was always giving to her in-laws. Ultimately in the First Information Report it was alleged that the daughter of the first informant was murdered by the accused on 18.12.2014 for dowry. In this connection, the allegation was that Lalit Mohan Poswal (husband of the deceased daughter); Anil Kumar (father-in-law); Simla @ Seema (mother-in-law); Bhawna (nanad) and Tejpal (mama of Lalit Mohan Poswal) were responsible for the death of Krishna Kumari, the daughter of the first informant and it was prayed that they be punished for having committed murder.

2. The police investigated into the matter and submitted its charge-sheet before the Court which in its turn framed charges against Lalit Mohan Poswal; Anil Kumar, Smt. Simla @ Seema under sections 498-A, 304-B, 120-B and 302/34 of Indian Penal Code and section 4 of Dowry Prohibition Act on 20.6.2016. On 22.11.2016 charges were also framed against Tejpal and Bhawna under the very same sections of Indian Penal Code and Dowry Prohibition Act. Since twice charges were framed, two Sessions Trials came into existence namely Sessions Trial No.332 of 2015 and Sessions Trial No.239 of 2016.

3. A trial was undergone. In it, the prosecution had produced nine prosecution witnesses and the defence had produced 14 defence witnesses. The accused were given

an opportunity to give their statements under section 313 Cr.P.C.

4. PW-1 Lajja Ram Baisala was the first informant and the father of the deceased; PW-2 Rajbala was the mother of the deceased; PW-3 Suneel Kumar was the brother of the deceased; PW-4 Dr. Lalit Kumar Singh was the doctor who had conducted the post-mortem; PW-5 Pravin Yadav was the Tehsildar who was given the responsibility of preparing the inquest report; PW-6 Bijendra Singh was the Sub-Inspector who had lodged the First Information Report and had also proven the same and PW-7 Dr. Anoop Singh, PW-8 Anil Kumar and PW-9 Jitendra Kumar were the Investigating Officers.

5. During the trial various documentary evidence were brought on record. Ultimately upon the conclusion of the sessions trial, the accused Anil Kumar and Shimla @ Seema were held not guilty in Sessions Trial No.332 of 2015. Likewise; Tejpal and Bhawna were also held to be not guilty in Sessions Trial No.239 of 2016. However, Lalit Mohan Poswal, the husband of the deceased was convicted for the charge under section 306 IPC in Sessions Trial No.332 of 2015.

6. Aggrieved thereof, the appellant Lalit Mohan Poswal has filed Criminal Appeal No.1823 of 2022. The first informant Lajja Ram Baisala also filed an appeal against acquittal being Criminal Appeal Under Section 372 Cr.P.C. No.672 of 2022. It was filed against the acquittal of Anil Kumar; Shimla @ Seema; Bhawna and Tejpal and for the conviction of Lalit Mohan Poswal under sections 498-A, 304-B, 120-B and 302/34 of Indian Penal Code and section 4 of Dowry Prohibition Act. The State of Uttar Pradesh also filed an

appeal being Government Appeal No.356 of 2022 against the judgment and order of acquittal.

7. During the trial, PW-1 had appeared in the witness box and had stated that his daughter had been murdered by the accused persons as their demands for dowry were not fulfilled. He has stated in his statement given before the Court that after the marriage had taken place, he had gone to the house of the in-laws thrice to make them understand that it was not possible for him to give any further dowry. On 12.6.2014, he has stated, he had gone to the house of the in-laws of the daughter and he stayed there for a day and took his daughter back to his house but because of the social pressure, he again sent back her daughter to her in-laws' house. In July, 2014 again he had brought his daughter to her Maika but again had sent her back to her in-laws' house. He had stated in his statement-in-chief that Tejpal, one of the accused who was the Mama of the accused Lalit Kumar Poswal, as per his daughter, used to come in the evening everyday and used to instigate other accused persons to ask for dowry. He has further stated that when the accused persons continued with their atrocities then on 11.12.2014 upon getting a phone call from his daughter on 10.12.2014 that the in-laws were indulging in cruelties, had sent his son for bringing the daughter to her Maika. He had stated that on 18.12.2014 before the death had taken place in the morning also his daughter talked to him and had expressed her concern that she would be killed. He has stated that while he was preparing go to to the house of the in-laws of his daughter, he received a message that the daughter had died. The message was received from his son who was living in Pune and was working in the Army. He then reached the

spot where the police was present. He had also stated about the articles which he had given at the time of the marriage. In the cross-examination, PW-1 is consistently firm on the statement given in the statement-in-chief and had replied to the questions put to him.

8. PW-2 who was the mother of the deceased also gave her statement and has reiterated the fact that the daughter was being tortured by the in-laws while she was alive and because of the demand of dowry, the in-laws killed her.

9. PW-3 who was the brother of the deceased and son of the first informant also gave his statement and has throughout stated that on various occasions there were phone calls with regard to atrocities which were being meted out to her and has stated that consequent to the atrocities, the deceased was killed.

10. PW-4 Dr. Lalit Kumar Singh who has proved the post mortem report and has stated that the hyoid bone was intact has stated that the death was on account of ante-mortem injuries and because of asphyxia due to hanging.

11. PW-5 was the witness of the inquest. The other witnesses i.e. PWs.-6, 7, 8 and 9 were the Investigating Officers.

12. Sri Satish Chandra Mishra, learned counsel appearing for the appellant, assailing the judgment and order of the Sessions Court dated 5.3.2022, has raised the following grounds :-

(i) The charges were under sections 498-A, 304-B, 120-B and 302/34 of Indian Penal Code and section 4 of Dowry Prohibition Act but the punishment was

under section 306 IPC. He has, therefore, submitted that a punishment under section 306 IPC was not possible when the charge was under section 302 as the two offences are of distinct and different categories. He has stated that while the basic constituent of an offence under section 302 is homicidal death, the offence under section 306 is suicidal death and abetment thereof. He, therefore, has submitted that the Court erred in convicting the appellant under section 306 IPC when no case was made out under sections 498-A, 304-B, 120-B and 302/34 of IPC and section 4 of Dowry Prohibition Act. In this regard, learned counsel for the appellant has relied upon a judgment of the Supreme Court in **Sangaraboina Sreenu vs. State of Andhra Pradesh** reported in **AIR 1997 SC 3233**.

(ii) Learned counsel for the appellant has submitted that the PWs.-1, 2 and 3 were all family members of the deceased and they were all interested witnesses. Even though there were neighbours who must have witnessed the cruelty etc., no independent witness was produced.

(iii) Learned counsel for the appellant has submitted that when throughout PWs.-1, 2 and 3 had stated that the deceased was continuously complaining of harassment, cruelty, demand of dowry and about the apprehension that she might be killed, then complaint ought to have been lodged, but in fact no complaint was made anywhere in writing by the complainants' family. Learned counsel for the appellant submits that even though on various occasions it has been mentioned that there were phone calls being made by the deceased but no complaint/written complaint was ever made by the deceased with regard to cruelty before any forum whatsoever.

(iv) Learned counsel for the appellant, therefore, states that when there was no documentary evidence and when there was

no independent witness then the phone calls which have been mentioned by the complainant's side have no importance as it was not clear as to what conversation the deceased had with her family members.

(v) Learned counsel for the appellant has argued that all the family members of both sides were earning members and they were economically and financially independent and nobody required the money of the other, yet the prosecution had tried to come up with a case that the family of the in-laws was demanding money.

(vi) Learned counsel for the appellant argued that the statement of the Doctor and the post mortem report clearly went to show that the deceased had died due to suicide and, therefore, submitted that definitely there was no case of murder.

(vii) Learned counsel for the appellant submitted that even the conviction under section 306 IPC was erroneously done as absolutely no evidence was found by which it could be held that the appellant had abetted the deceased to commit suicide. There was no evidence on record indicating that the harassment before the death was such that the deceased was forced to commit suicide.

(viii) Learned counsel for the appellant has submitted that under section 107 IPC, abetment has been defined. Since the learned counsel has laid much stress on section 107 IPC, the same is being reproduced here as under :

"107. Abetment of a thing.--A person abets the doing of a thing, who--

First.-- Instigates any person to to 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, an 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 facilitate the commission thereof, is said to aid the doing of that act."

Learned counsel for the appellant, therefore, submitted that there was no instigation whatsoever which could have been said to have instigated the deceased to such an extent that she committed suicide.

(ix) Learned counsel for the appellant in the end submitted that the appellant is a peace loving person and was never involved in any criminal case and, therefore, the conviction be set-aside and the appellant be acquitted.

13. Sri Nipun Singh, learned counsel appearing for the complainant while making his submissions in Criminal Appeal No.672 of 2022 i.e. the appeal which he had filed against the acquittal of Anil Kumar; Simla @ Seema; Bhawna and Tejpal and for the enhancement of the sentence viz.-a-viz. Lalit Kumar Poswal has stated that if the statement of PW-1 is seen then it would reveal that after the marriage of the deceased-Krishna Kumari and the accused-Lalit Kumar Poswal was solemnized on 15.2.2014, continuously their demand for dowry was there; because of the demand, on 12.6.2014, the father of the deceased had taken Krishna Kumari to his home and kept her for 10-12 days. Thereafter the deceased was once again

taken back by her father in July, 2014. The PW-1, as per the learned counsel for the first informant, has stated in his statement-in-chief that on 10.12.2014, the deceased had rung up and had said that she was beaten on the previous day. PW-1 thereafter sent his son on 11.12.2014 to fetch Krishna Kumari but the in-laws had refused to send Krishna Kumari back to her Maika. Learned counsel for the complainant further submitted that PW-1 had spent around Rs.40 lacs in the marriage. Quite a bit of it was spent on account of the pressure exerted on him. He has stated that the EMIs for the car of the deceased were also being paid by his son. PW-1 had stated that he had himself seen a wound on the side of neck of the deceased. In effect, learned counsel for the complainant has stated that there was a demand for dowry which included the demand of a Fortuner Car, 11 lacs rupees and a gold chain and which when were not given, the accused Lalit Kumar Poswal and other family members, who were also accused, had killed the deceased.

14. Similarly on the basis of the statements made by PW-2 and PW-3, learned counsel for the complainant has stated that the accused had actually killed the deceased. Learned counsel for the complainant has further stated that the call details of the phone calls which were made by the deceased were also on record and he has pointed out to the number of seconds the calls had lasted and he tried to correlate the dates which were given in the statements of the prosecution witnesses with the dates which were there in the call reports and has tried to establish that even if there was no independent witness, the fact that the call details matched with the timings which were given in the statements of the prosecution witnesses clearly

established that there was a demand of dowry and because of the non-fulfillment of the demand, the deceased was tortured and that ended in the murder.

15. Learned counsel for the complainant relying upon the judgments of the Supreme Court in **Harjit Singh vs. State of Punjab (Appeal (Crl.) No.756 of 1999 decided on 8.12.2005)**; **Mangat Ram vs. State of Haryana (Criminal Appeal No.696 of 2009 decided on 27.3.2014)**; **Satbir Singh & Anr. vs. State of Haryana (2021) 6 SCC 1**; **State of Madhya Pradesh vs. Jogendra & Anr. (2022) 5 SCC 401** and in **Mariano Anto Bruno & Anr. vs. The Inspector of Police (Criminal Appeal No.1628 of 2022 decided on 12.10.2022)** has stated that when mental and physical torture, cruelty and demand of dowry were there, the only inevitable conclusion was that the deceased was murdered. The conclusion was all the more inevitable when the death had occurred within seven years of the marriage of deceased and the accused. He, therefore, submitted that the accused had to defend themselves and had to prove that they were not guilty.

16. Learned AGA has also adopted the arguments made by learned counsel for the complainant and submitted that since there were clear evidence available on record with regard to the cruelty and demand of dowry which had resulted in the death of the deceased, the judgment and order of acquittal be set aside and the appellant be convicted under sections 498-A, 304-B, 120-B and 302/34 of IPC and section 4 of Dowry Prohibition Act.

17. Having heard Sri Satish Chandra Mishra, learned Senior Counsel assisted by Sri Ashutosh Mishra and Sri Siddharth

Shankar, learned counsel for the appellant, Sri Nipun Singh, learned counsel for the complainant and the learned AGA, we are of the view that Criminal Appeal No.1823 of 2022 filed by the accused Lalit Kumar Poswal be allowed and the Criminal Appeal Under Section 372 Cr.P.C. No.672 of 2022 and the Government Appeal No.356 of 2022 be dismissed.

18. Firstly, we are definitely of the view that the judgment and order of the Sessions Court was erroneous in as much as when the charges were under sections 498-A, 304-B, 120-B and 302/34 IPC and section 4 of Dowry Prohibition Act and the accused persons were tried for a homicide, then the appellant could not have been held guilty for a charge under section 306 IPC which was for the abetment of a suicide. Suicide is something which a person commits on his own and murder is an act by which the accused with an intention to kill, kills another person and, therefore we find that when the accused-appellant was being charged under sections 498-A, 304-B, 120-B and 302/34 of IPC and section 4 of Dowry Prohibition Act, he could not be held guilty under section 306 IPC.

19. Though we could have allowed the appeal for the simple reason that the trial was undergone was for homicide but the punishment was given for suicide, we are also adverting to the other arguments made by learned counsel for the parties.

20. Definitely, we find that there was no independent witnesses brought during the trial for establishing that there was cruelty. The accused and the deceased both were living in urban areas where there were houses in the neighbourhood. Definitely independent witnesses could have been produced from amongst the neighbours

who had seen and witnessed the cruelty and when no independent witness was produced, the only inevitable conclusion is that in fact the cruelty was not witnessed by any independent witness and, therefore, the allegation of cruelty becomes doubtful.

21. We also find that whenever the deceased complained about cruelty to her family members, it was always on the phone and never in writing. In the present age of e-communication, when we tend to text messages, e-mail, WhatsApp and use other messaging systems, not one single message was sent by the deceased to her parents to indicate that there was any cruelty taking place viz.-a-viz. her. Thus the allegation of cruelty definitely becomes doubtful.

22. Also the Court finds that the family of the deceased was an educated family. The father and brother were working in the Armed Forces. If there was any complaint of such a magnitude which was shown in the First Information Report and in the statements of the prosecution witnesses then the Court feels that an educated person should have made a complaint before some appropriate forum. In the absence of any complaint being made, the allegations of cruelty become doubtful.

23. Learned counsel for the complainant has taken us through various statements and has laid much stress on various telephone calls which were allegedly made by the deceased to her parents. We, however, are not convinced with this argument of learned counsel for the complainant. We feel that daughters do make phone calls to their parents and if those phone calls were made, then there was nothing very extraordinary. Further we

find that not many phone calls exceeded a minute's time and, therefore, it appears that there were phone calls only to say 'hello' and 'Good Morning'. It cannot, therefore, be concluded that these phone calls were made to make complaints to the parents or to the brother with regard to cruelty. If such complaints were made, they would take much more time than the phone calls details show.

24. Further we find that there was no instigation to the deceased to the extent that she could end her life. The hyoid bone was intact and, therefore, the only conclusion was that it was a suicide. If the hyoid bone is broken then, under the medical jurisprudence, normally it would mean that the death was caused due to strangulation. The Doctor has also concluded that the death occurred because of hanging which had resulted in asphyxia.

25. Upon considering all the aspects, we are of the view that the appellant Lalit Kumar Poswal in Criminal Appeal No.1823 of 2022 was not guilty of the charges which were framed against him. He, therefore, is being acquitted.

26. Under such circumstances, the judgment and order dated 5.3.2022 passed by the Additional Sessions Judge/FTC-1, Gautam Buddha Nagar, so far as it convicts the appellant Lalit Kumar Poswal, is quashed and is set-aside. The appellant be released forthwith if he is not required in any other criminal case.

27. Since we had allowed the Criminal Appeal No.1823 of 2022, for all the reasons stated above, Criminal Appeal U/S 372 Cr.P.C. No.672 of 2022 and Government Appeal No.356 of 2022 stand dismissed.

(2023) 8 ILRA 833
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.08.2023

BEFORE

**THE HON'BLE SURYA PRAKASH
 KESARWANI, J.
 THE HON'BLE MS. NAND PRABHA
 SHUKLA, J.**

Government Appeal No. 1873 of 1984

State of U.P. ...Appellant
Versus
Har Dayal Singh & Ors. ...Respondents

Counsel for the Appellant:
 A.G.A.

Counsel for the Respondents:
 Sri P.N. Mishra, Sri Suresh Dhar Dwivedi, Sri
 Vidya Kant Tripathi

Criminal Law - Code of Criminal Procedure, 1973 – Section 378 – Appeal against acquittal – Principles reiterated – Trial Court's judgment of acquittal not found perverse – Medical evidence inconsistent with prosecution story – Injuries on deceased and eyewitnesses unexplained – Doubt regarding presence of PW - 1 and PW - 2 at the spot – Minor contradictions not sufficient to overturn acquittal – High Court declined to interfere.

Held: Where two views are reasonably possible on the basis of the evidence on record, the one favouring the accused should be upheld in appeal against acquittal. In the present case, prosecution failed to convincingly establish presence of eyewitnesses, motive, or credible explanation for injuries. Trial Court's findings not perverse or irrational. Hence, interference unwarranted.

Appeal Dismissed.

Case Law Discussed:

1. Ravi Sharma Vs State, (2022) 8 SCC 536;
2. Kuldeep Singh Vs Commr. of Police, (1999) 2 SCC 10;
3. Vijay Mohan Singh Vs St. of Karn., (2019) 5 SCC 436;
4. Chandrappa Vs St. of Karn., (2007) 4 SCC 415;
5. Dhanapal Vs State, (2009) 10 SCC 401;
6. N. Vijayan Kumar Vs St. of T.N., (2021) 3 SCC 687;
7. Hakeem Khan Vs St. of M.P., (2017) 5 SCC 719;
8. St. of Karn. Vs K. Gopalkrishna, (2005) 9 SCC 291.

(Delivered by Hon'ble Surya Prakash
Kesarwani, J.)

1. Heard Sri K.P. Pathak, learned A.G.A. for the appellants and sri Suresh Dhar Dwivedi Vidya Kant, learned counsel for the accused-opposite parties.

2. Briefly stated, facts of the present case are that a First Information Report being Case Crime No.14/1983 dated 11.02.1983 under Section 302/324 I.P.C., P.S. S.M. North, Sub-District Puwaya, District Sahajahanpur, was lodged by the informant eyewitness PW-1 Avtar Singh, who is the son of the deceased Kundan Singh. As per FIR version, there arose a dispute of return of buffaloes purchased by the deceased from the accused Hardayal Singh and simple scuffle took place about three or four months before the date of incident, i.e. 11.02.1983. This resulted in enmity. When the deceased Kundan Singh along with the informant were cutting barseem in their agricultural field, the accused Hardayal Singh came at the place

with sooja and started abusing and thereafter called his brothers - the accused Tirlok Singh, Balvinder Singh and also his relative Bhura. Tirlok Singh and Balwinder Singh were having swords and Bhura was having "Kanta". They all started beating the deceased Kundan Singh and when the informant's uncle, Dileep Singh and his son Sardar and the informant's mother ran to protect the deceased, the accused Hardayal assaulted on the chest of the deceased, Tirlok and Balwinder assaulted with swords and Kanta and also assaulted on Dileep Singh, Sardar Singh and informant's mother and caused injuries to them and thereafter fled away. The time of incident was said to be 01:00 P.M. and FIR was registered at 09.15 P.M. Delay in lodging first information report was explained by the informant in the FIR itself. The I.O. proceeded on spot and took samples of blood lying on the earth and on leaves of wheat Exhibit (Ka-13 and Ka-14) and white pagri with blood stains (Ka-15). The injuries of the informant Avtar Singh was examined by the medical officer on 11.02.1983 before lodging of the FIR which were found to be simple caused by some sharp edged object. The injuries of Sardar Singh was examined by the medical officer on 11.02.1983, but the prosecution has not examined him during trial. The injuries of Dileep Singh was examined on 11.02.1983 by medical officer and he was examined by prosecution as PW-2. The mother of the informant, namely Surinder Kaur, also got herself medically examined on 14.02.1983 at 01:45 P.M. and her injury No.2 was found to be simple caused by a sharp edged object and injury No.1 and 3 were found caused by hard or blunt object. All the injuries were found to be simple. Autopsy of the deceased's body was done and the following ante-mortem injuries were found:-

“(1) Penetrating wound with clean margins-2.5 c.m. x 1 c.m. x chest cavity deep at right anterior chest wall 6 c.m. from anterior at 3 o'clock in relation to right nipple, direction backwards.

(2) Incised wound 8 c.m. x 2 c.m. x bone back left hand transversely placed coming upto web between thumb and index finger, cutting 3rd, 4th and 5th metacarpal bones.

(3) Lacerated wound 2 c.m. x 1 c.m. x muscle left side scalp 8 c.m. above left ear.

(4) Contusion 2 c.m. x 2 c.m. upper part pinna left ear.

(5) Two incised wounds on one line, two c.m. apart, each 2 c.m. x 0.2 c.m. x skin, back right wrist.

(6) Abrasion 2.5 c.m. Long x .6 c.m., top left shoulder.”

3. The doctor conducting the autopsy found 500 m.l. blood in the chest cavity, right lung had collapsed, heart was empty, in the stomach there were three ounces of semi-digested food, in large intestine faecal matter was present, in small intestine, digested food was present. The medical officer opined that cause of death of the deceased is due to shock and haemorrhage caused by ante-mortem injuries. The post-mortem report was filed as Exhibit K-19.

4. The prosecution examined the informant Avtar Singh as PW-1, (eye-witness), Dileep Singh as PW-2 (eye-witness), Dr. Habib Ahmed as PW-3, who examined injuries of injured, Ram Swarup Verma SHO as PW-4, Man Singh - constable as PW-5, who carried the body for post-mortem, Dr. Satyapal as PW-6, who conducted autopsy. Sri Vishnu Dutt Agnihotri was examined as CW-1. From defence side, statement under Section 313 Cr.P.C. of accused Hardayal, Tirlok, Balvinder and Palvindar Singh @ Bhura

Singh were recorded. One Mahendra Singh was examined as DW-1 and Ram Pal, Junior Clerk, was examined as DW-2. Considering the evidences, learned Session Judge, Sahajapur, passed the impugned judgment and order dated 31.03.1984 in Session Trial No. 351 of 1983 (State Vs. Hardayal and three others) under Section 302/307 I.P.C., P.S. S.M. North and acquitted all the accused, namely Hardayal Singh, Tirlok, Balvinder Singh and Palvindar Singh @ Bhura Singh from the charges under Section 302/34 IPC and under Section 307 I.P.C. Aggrieved with this judgment and order, the present government appeal has been filed by the State.

5. Sri K.P. Pathak, Learned AGA, submits that the Learned Trial Court has arbitrarily and illegally acquitted the accused persons on account of minor contradiction in the FIR, inquest report, evidences of prosecution witnesses, whereas the prosecution has proved beyond reasonable doubt the motive, place of occurrence, common intention and object, injuries received by the deceased and injured witnesses. Thus, the prosecution case is consistent and minor contradictions cannot be said to be fatal for the prosecution.

6. Learned counsel for the accused persons - respondents submits that the injuries do not corroborate with the injury report and evidences. Prosecution has completely failed to prove motive. PW-1 and PW-2 are interested witnesses and their presence has been found to be completely doubtful. Reference in this regard may be had to paragraphs 30, 31, 32, 34, and 38 of the impugned judgment. It is settled law that appeal against acquittal can be interfered by the High Court only if the

findings of the Trial Court are so perverse that no prudent person would believe on it. He further submits that sooja is a sharp edged pointed thing, not similar to Barchha. Neither any recovery of sooja was made, nor in the FIR, or in the statement under Section 161, informant witnesses have stated, at any stage, that the alleged sooja was double-edged. He further submits that it is only for the first time that PW-1 has made all these allegations in his evidence recorded before the court. He further submits that the alleged injured witnesses, after due consultation, lodged the FIR so as to falsely implicate the accused opposite parties, i.e. three real brothers and one relative. He further submits that the prosecution has completely failed to establish the guilt of the accused persons beyond reasonable doubt. He further submits that the scope of interference in appeal by the High Court is limited, and in the event, if two views are possible on a given set of evidences, the view taken by the trial court to acquit the accused has to be followed. He further submits that the findings recorded by the learned Trial Court are not perverse, rather the same are based on proper consideration of relevant evidences on record.

7. We have carefully considered the submissions of the learned counsels for the Parties and perused the record of the appeal.

8. We find that the learned Session Judge has acquitted the accused persons on the grounds that the three injuries of the deceased could not be explained by the prosecution, the medical evidence and the evidences of the prosecution witnesses are not corroborative, there is major contradiction between the medical report and the evidences of the alleged

eyewitnesses, the PW-3 who examined the injured has opined that injuries are simple and may be a fabricated one. PW-3 doctor who examined the injuries of the injured is a partisan witness. The PW-1 and PW-2 are interested witnesses. The presence of PW-1 and PW-2 at the place of occurrence is doubtful and the conduct of the PW-3 is also doubtful. The injuries of the deceased could not be proved by the prosecution. The prosecution completely failed to prove that the injuries of the deceased were caused by sooja. The injuries which caused death of the deceased Kundan Singh, as found by the medical officer, have already been extracted above. There was one penetrated wound 2.5 cm x 1 cm, three incised wounds, one lacerated wound, one contusion and one abrasion. Undisputedly, sooja is made of a bar either round or square with pointed point over its one end.

9. The injury No.1 of Kundan Singh was caused by some weapon like spear or 'barchha' having two sharp edges and width of more than two centimetres. The informant has specifically mentioned the weapon in the hands of Hardayal as sooja. It is for the first time that the PW-1 attempted to improve the case by stating that sooja was having two edges. Even in his statement under Section 161 Cr.P.C., the PW-1/ complainant Avtar Singh had not stated that sooja used by the accused Hardayal Singh was double edged. **Thus, it is evident that the injury No.1 found on the body of the deceased Kundan Singh could neither be explained nor it could be proved that it was caused by sooja by the accused Hardayal.**

10. Over the body of the deceased Kundan Singh, one lacerated wound 2 c.m. x 1 c.m. x muscle deep, one contusion 2 c.m. x 2 c.m. and one abrasion 2.5 c.m. X

0.6 c.m. were found. As per medical evidence, these injuries were caused to the deceased by some blunt object. The weapons shown in the hands of the accused persons are sooja, sword, and kanta. The prosecution has not alleged use of any blunt object by the accused persons to cause the said injury to the deceased. No explanation could be offered by the prosecution that by what weapon and in what manner the aforesaid injuries were received by the deceased. Non-explanation of these injuries leads to two possible conclusions. The **first** is that for causing the lacerated wound, the bar of kanta was used as a blunt object and the contusion and abrasion were caused by falling down. The **second** conclusion may be that these injuries were caused by some blunt object not seen by the complainant Avtar Singh PW-1 and **Dileep Singh PW-2**. From both the conclusions, one conclusion can very well be drawn that either PW-1 Avtar Singh and PW-2 Dileep Singh were not present at the place of occurrence or they concealed some material facts during trial. Both the circumstances are fatal to the prosecution case. The burden to explain occurrence and the injuries, was on the prosecution but the prosecution has failed to discharge its burden.

11. So far as the injuries of **Smt. Surinder Kaur** is concerned, as per injury report, she suffered simple injuries of one abrasion, one incised wound and one contusion. The prosecution had not examined the aforesaid Smt. Surinder Kaur as a prosecution witness, whose husband Kundan Singh deceased had also suffered contusion and abrasion. The prosecution had not examined Smt. Surinder Kaur, who could be the best person to explain her injuries. No explanation for non-examination of Surinder Kaur as a prosecution witness has been offered by the prosecution.

12. Medical examination of **Avtar Singh PW-1** was done before lodging of the FIR. In the GD Report No. 24, Exhibit Ka.7, it is not mentioned that the PW1 Avtar Singh was having some bandaged wound in his hand. Even in his statement under Section 161 Cr.P.C., the PW-1 Avtar Singh had not informed that he suffered injuries in the incident in question. Instead, Avtar Singh had stated in his statement under Section 161 Cr.P.C. that he escaped injury. The PW-1 Avtar Singh for the first time stated before the trial court that he had suffered injuries in the incident in question, which creates doubt upon the prosecution case.

13. The conduct of **PW-3 Dr. Habib Ahmed** is also doubtful. Perusal of the injury reports of the PW-1 Avtar Singh, PW-2 Dileep Singh and Sardar Singh shows that the PW-3 examined them on 11.02.1983 between 4 P.M. to 5 P.M. without any request made by any police officer. For medical examination of these persons, the PW-3 has chosen even not to inform the police of police station Banda about the aforesaid three injuries.

14. Thus, it is doubtful that these three persons had suffered injuries in the same occurrence in which the deceased Kundan Singh was murdered. As per injury report, Dileep Singh was brought by one Preetam Singh, but the identity of Preetam Singh was not disclosed before the trial court. **The PW-3 himself admitted that injuries suffered by the aforesaid three injured could be self-inflicted**, if they had tolerance. Thus, the medical report of the aforesaid three injured prepared by the PW-3 do not inspire confidence.

15. Considering the fact as discussed above, the presence of both eyewitnesses

i.e. PW1 and PW2 at the place of occurrence appears to be doubtful. Both the aforesaid witnesses have stated that the deceased Kundan Singh was wearing white pagri, whereas the investigating officer in his inquest report found the pink pagri near the dead body. The PW-1 complainant - Avtar Singh also failed to disclose that who was driving the cart carrying food from 'langar' and whether the cart was being pulled by bullocks or buffaloes. If he was actually present at the place of occurrence, he could have disclosed that the cart was pulled by bullocks or buffaloes. He has not mentioned in the FIR that he was injured in the occurrence in question. PW-1 Avtar Singh has stated in his cross-examination, that the cart was of Gurdwara, but he does not know whether it was driven by bullocks or buffaloes. Thus, the view taken by the learned Trial Court doubting the presence of PW-1 and PW-2 at the place of occurrence is one possible view which a man of ordinary prudence can believe on the basis of evidences on record.

16. For all the reasons stated above, we find that the view taken by the learned Trial Court who disbelieved the presence of PW-1 at the place of occurrence, non-explanation of injuries of the deceased by the prosecution, evidence of PW-3, and the injuries of PW-1, PW-2 and Surinder Kaur, do not inspire confidence, to hold that the prosecution has failed to establish his case beyond doubt, is not perverse, and the conclusion so reached is based on evidences on record, which does not require any interference.

**Principles Governing Appeal
Against Acquittal:-**

17. In the case of Ravi Sharma vs. State, (2022) 8 SCC 536, Hon'ble Supreme

Court referred to several judgments and held that in appeal under Section 378 Cr.P.C., the presumption of innocence gathers strength before the Appellate Court. Therefore, the onus on the prosecution becomes more burdensome as there is a double presumption of innocence. Certainly, the Court of first instance has its own advantages in delivering its verdict, which is to see the witnesses in person while they depose. The Appellate Court is expected to involve itself in a deeper, studied scrutiny of not only the evidence before it, but is duty bound to satisfy itself whether the decision of the trial court is both possible and plausible view. When two views are possible, the one taken by the trial court in a case of acquittal is to be followed on the touchstone of liberty along with the advantage of having seen the witnesses. This court while exercising appellate jurisdiction can interfere with the findings recorded by the trial court, if findings of fact recorded by the trial court is perverse or if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality vide **Rajinder Kumar Kindra v. Delhi Admn.** [(1984) 4 SCC 635], **Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons** [1992 Supp (2) SCC 312], **Triveni Rubber & Plastics v. CCE** [1994 Supp (3) SCC 665], **Gaya Din v. Hanuman Prasad** [(2001) 1 SCC 501], **Aruvelu v. State**, [(2009) 10 SCC 206] and **Gamini Bala Koteswara Rao v. State of A.P.** [(2009) 10 SCC 636]."

18. In **Kuldeep Singh v. Commr. of Police** [(1999) 2 SCC 10], Hon'ble

Supreme Court held that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse, and the findings would not be interfered with.

19. In the case of **Vijay Mohan Singh v. State of Karnataka**, [(2019) 5 SCC 436] (Paras-31 and 31.1 to 31.4), Hon'ble Supreme Court considered the scope of Section 378, Cr.P.C. and referring to its earlier judgments in **Sambasivan v. State of Kerala**, [(1998) 5 SCC 412], **K. Ramakrishnan Unnithan v. State of Kerala**, [(1999) 3 SCC 309], **Atley v. State of U.P.**, [AIR 1955 SC 807], **Wilayat Khan v. State of U.P.** [AIR 1953 SC 122], **K. Gopal Reddy v. State of A.P.**, [(1979) 1 SCC 355] and **Umedbhai Jadavbhai v. State of Gujarat**, [(1978) 1 SCC 228] and held that once the appeal is entertained against the order of acquittal, the High Court was entitled to re-appreciate the entire evidence independently and come to its own conclusion. Ordinarily, the High Court would give due importance to the opinion of the Sessions Judge if the same were arrived at after proper appreciation of the evidence but this rule will not be apply where the Sessions Judge has made an absolutely wrong assumption of a very material and clinching aspect in the peculiar circumstances of the case or that the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable or that the trial court has rejected creditworthy evidence for slender reasons and takes a view of the evidence which is but barely possible. In such cases, it is the

obvious duty of the High Court to interfere in the interest of justice and exercise its wide power of court of appeal to appreciate the evidences against the order of acquittal in such manner as it may appreciate evidences against an order of conviction, subject to the riders that the presumption of innocence with which the accused person starts in the trial court continues even up to the appellate stage and that the appellate court should attach due weight to the opinion of the trial court which recorded the order of acquittal.

20. In the case of **Chandrappa v. State of Karnataka**, [(2007) 4 SCC 415 (para-42)], Hon'ble Supreme Court considered large number of its earlier judgments and Section 378 Cr.P.C. and summarised the **principles regarding powers of the appellate court while dealing with the appeal against an order of acquittal**, as under:

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

(1) An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded;

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

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to 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 available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

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

21. In the case of **Dhanapal and others vs. State**, [(2009) 10 SCC 401 (para-39)], Hon'ble Supreme Court has culled out five principles, as under:

"39. The following principles emerge from the cases above:

1. The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court.

The trial court's acquittal bolsters the presumption that he is innocent.

2. The power of reviewing evidence is wide and the appellate court can reappraise the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law, but the Appellate Court must give due weight and

consideration to the decision of the trial court.

3. The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanour of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.

4. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

5. If two reasonable or possible views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused."

22. In a recent judgment in **N. Vijayan Kumar vs. State of Tamilnadu**, [(2021) 3 SCC 687], Hon'ble Supreme Court held that under Section 378, Cr.PC, no differentiation should be made between an appeal against acquittal and the appeal against conviction.

23. In the case of **Hakeem Khan & Ors. v. State of Madhya Pradesh** (2017) 5 SCC 719, Hon'ble Supreme Court held that if the "possible view" of the trial court is not agreeable for the High Court, even then such "possible view" recorded by the trial court cannot be interdicted. It has been further held that so long as the view of trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not, verdict of trial court cannot be interdicted and the High court cannot supplant over the view of the trial court.

24. In **Government Appeal No.506 of 2019 (State of U.P. vs. Salim and 4 others, decided on 28.01.2020 (Para-11))**, a coordinate bench of this Court held, as under:

“11. While considering the scope of interference in an appeal or revision against acquittal, it has been held by the Supreme Court that if two views of the evidence are reasonable possible, one supporting the acquittal and other indicating conviction, the High Court should not, in such a situation, reverse the order of acquittal recorded by the trial Court. In the matter of State of Karnataka vs. K. Gopalkrishna reported in (2005) 9 SCC 291, the Hon'ble Supreme Court, while dealing with an appeal against acquittal, observed as under:

“In such an appeal the Appellate Court does not lightly disturb the findings of fact recorded by the Court below. If on the basis of the same evidence, two views are reasonably possible, and the view favouring the accused is accepted by the Court below, that is sufficient for upholding the order of acquittal. However, if the Appellate Court comes to the conclusion that the findings of the Court below are wholly unreasonable or perverse and not based on the evidence on record, or suffers from serious illegality including ignorance or misreading of evidence on record, the Appellate Court will be justified in setting aside such an order of acquittal.”

25. Applying the principles summarized by Hon. Supreme Court in the case of **Chandrappa** (supra) and **Dhanapal** (supra) on the facts of the present case, we find that the learned trial court has taken a reasonable view which leads to acquittal. The view taken is not perverse. Therefore, we do not find any good reason to set aside or disturb the order of the acquittal passed by the session court.

26. For all the reasons aforesaid, we do not find any merit in this government appeal, which is pending in this court from last about 40 years.

27. The **appeal** lacks merit and is, therefore, **dismissed**. Records be sent back forthwith.

(2023) 8 ILRA 841
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.08.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Habeas Corpus Writ Petition No. 167 of 2023

Anjali **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
 Pradeep Kumar Tripathi

Counsel for the Respondents:
 G.A., Vikas Sharma

HABEAS CORPUS - Minority of detainee - Determination of age - Conflicting entries in Aadhar Card, High School Marksheet and other certificates - Detenue denying DOB in school certificate - No birth certificate issued by municipal authority - Court directing ossification test - Detenue found major - Married by choice - Not willing to go with natural guardian (father) - Held: Where age determination by documents under Section 94(2)(i) & (ii) of the Juvenile Justice Act is unreliable, ossification test under clause (iii) becomes the only valid basis - Personal liberty of detainee under Article 21 must be upheld - Detenue found not to be in illegal custody.

Held:

Where the age of the detainee is disputed and documents like school certificates and Aadhar card bear conflicting dates of birth, and where the detainee herself disputes the school - recorded DOB, the ossification test becomes the only reliable method as per Section 94(2)(iii) of the Juvenile Justice (Care and Protection of Children) Act, 2015. In the present case, the ossification test established that the detainee is

about 18 years old. The detenue has married the respondent of her own volition and refuses to accompany her natural guardian. It is not a case of abduction or illegal detention. Hence, the petition was dismissed, and the detenue was set at liberty to go as per her own will.

Petition dismissed.

Case law discussed:

1. Alamelu & anr. Vs St. Represented by Inspector of Police,
2. (2011) 2 SCC 385
3. Birad Mal Singhvi Vs Anand Purohit,
4. (1988) 3 SCC 24
5. Narbada Devi Gupta Vs Birendra Kumar Jaiswal, (2003) 8 SCC 745
6. Jaya Mala Vs Govt. of J&K, (1982) 2 SCC 538
7. Ravinder Singh Gorkhi Vs St. of U.P.,(2006) 5 SCC 584

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

1. The present petition has been filed for issuance of a writ in the nature of HABEAS CORPUS with the prayer to direct the opposite parties to produce the petitioner/detenue before this Court and may be set at liberty under the care and custody of their father.

2. Heard Shri Pradeep Kumar Tripathi, learned counsel for the petitioner and Shri Alok Tewari, learned A.G.A. for the State and the detenue Anjali, who has been produced by Mr. Ram Vishal Singh Sub-Inspector and Manisha Sharma Constable before this Court, as well as perused the record.

3. Learned Counsel for the respondent nos. 4 and 5 are not present although

respondent no.4 Sher Singh @ Sera is present before this Court, who has been identified by the detenue.

4. This Court vide order dated 8.8.2023 has passed the following orders:-

"1.In compliance of order dated 24.7.2023, the detenue Anjali has been produced by S.I. Ram Vishal Singh and lady Constable Manisha Sharma.

2.On a query being made, the detenue Anjali has stated that her date of birth is 18.8.2004 and she is presently 20 years old. She further states that the date of birth recorded in her High School mark sheet varies from her date of birth in the Aadhar Card and no reliance can be placed thereon. She has further stated that she does not want to go with her father; deponent; rather she wants to reside with respondent No.4 with whom she is married.

Respondent No.4 Sera and the detenue both have submitted that they have been brought from Punjab today before this court. They were living together in Punjab and earning their livelihood there.

Shera has further submitted that he along with the detenue is residing with his uncle at police station Madiyaon and both of them will reside there for some time.

3.Learned A.G.A. submits that considering the fact that the detenue asserts that she is major and she is disputing the date of birth in High School mark sheet, it would be appropriate if the ossification test of the detenue is conducted by the Chief Medical Officer, Sitapur to find out the age of the detenue.

Learned A.G.A. has further submitted that the deponent has given an application dated 9.5.2023 before the concerned police station in the form of Tahrir where he himself has shown the date of birth of the detenue to be 20 years.

4.Learned counsel for the petitioner on being confronted with the submission advanced by learned A.G.A. has submitted that the deponent is illiterate and he is not even aware as to what has been written in the application exactly.

On a query being put to the learned counsel for deponent as to on what basis the date of birth of the detenue in the High School mark sheet has been recorded as 8.6.2006 and how it varies from the date of birth recorded in the Aadhar Card as stated by the detenue, he submits that he has no proof and in this context, he has not taken any instruction by his client.

5.The deponent is directed to file a supplementary affidavit bringing on record the initial school(s) certificates of the detenue where she has studied.

6.Considering the fact that mere recording of date of birth of the detenue in the High School mark sheet cannot be said to be exclusive proof of age, it would be appropriate that the ossification test of the detenue is conducted by the Chief Medical Officer.

7.It is provided that the police personnel present in Court shall take the detenue before the Child Welfare Committee, Sitapur today where the detenue will be kept, till further orders of the court. They shall take the detenue tomorrow before the Chief Medical Officer, Sitapur who shall conduct ossification test of the detenue within 24 hours and submit the report to the concerned police officer.

8.Learned A.G.A. shall file counter affidavit within three days.

9.List on 11.8.2023. On that date, the detenue shall again be produced."

5. Today, learned A.G.A. has produced the original copy of the ossification test conducted by the Medical Board, Sitapur and according to

radiological and general physical appearance the age of the detenue has been assessed to be about 18 years by the Medical Board and certificate to that extent has been issued by the office of Chief Medical Officer, Sitapur. The photo-copy of the certificate provided by learned A.G.A. is taken on record.

6. In paragraph 2 of the order dated 8.8.2023 (quoted above) the statement of the detenue Anjali was recorded by this Court. Today again, upon query being made, the detenue Anjali has stated that she has married to Sher Singh @ Sera and in support of her statement/contention she has produced the marriage certificate issued by Arya Samaj Mandir Lucknow with registration no.1867, which shows that the detenue Anjali has married with Sher Singh on 15.6.2023. The photocopy of the marriage certificate is taken on record. She further stated that the marriage took place three months back in Lucknow. After the marriage she was residing with Sera in State of Punjab. She wants to live with her husband Sher Singh @ Sera. A copy of the Aadhar card of Anjali has been provided by Sera, who is present in the court. A perusal of the same shows that the date of birth of the detenue is 1.1.2004 which corroborates the statement given by the detenue on the last date that her date of birth in Aadhar card varies from her date of birth recorded in the High School mark sheet.

7. Learned Counsel for the petitioner has submitted that the actual date of birth of the detenue is 8.6.2007 and the date of birth written in the High School mark-sheet is incorrect.

8. In support of his contention, he has given the Scholar's Register and Transfer Certificate form dated 8.12.2022 of Class

10th issued by Arunodaya Inter College, Sitapur and also the mark-sheet of class 8th, which also shows date of birth of the detainee as 8.6.2007 and the High School mark-sheet which again shows date of birth as 8.6.2006.

9. A perusal of the educational certificates produced on behalf of the petitioner relating to the age of the detainee it is clear that there is conflict relating to exact date of birth.

10. Learned counsel for the deponent, while giving statement before this court on the last date, has not been able to inform as to on what basis date of birth of the detainee was recorded in the various school certificates. It is also in variance with the Aadhar card.

11. Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (in short hereinafter referred to as Act) provides the manner and mode of the presumption and determination of age of a juvenile. Section 94 of the Act is extracted below:-

"Presumption and determination of age.

(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt

regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining?

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

12. Thus, as per provisions of Section 94(2) of the Act, the Child Welfare Committee or the Board in case of reasonable grounds for doubt as to 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, firstly, the date of birth certificate from school, or matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof; secondly, the birth certificate given by a corporation or a municipal authority or a panchayat; and thirdly, in absence of educational certificate or birth certificate as aforementioned, the

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.

13. So far as the first contingency under Section 94 (2)(i) i.e. the matriculation or equivalent certificate or date of birth certificates from the school are concerned, the High School mark-sheet as well as intermediate mark-sheet and the other certificates submitted on behalf of the petitioner and the statement of the learned counsel for the petitioner that the date of birth written in the high school mark-sheet is incorrect and the actual date of birth becomes doubtful.

14. Admittedly, there are conflicting date of births in the educational certificates submitted on behalf of the petitioner which show the detainee is minor, thus, it will not be safe to rely on the date of birth of the detainee mentioned in the high school certificate given by the deponent coupled with the fact that the deponent (father) while giving application before the police in the form of tahrir dated 9.5.2023 has mentioned that the detainee is 20 years old, which has not been disputed by the deponent. The statement given by learned A.G.A. on 8.8.2023 is extracted below:-

"Learned A.G.A. has further submitted that the deponent has given an application dated 9.5.2023 before the concerned police station in the form of Tahrir where he himself has shown the date of birth of the detainee to be 20 years."

15. It is relevant to note that in this case the detainee herself has disputed the date of birth mentioned in the matriculation certificate and according to her statement given before this court her exact date of

birth is 8.8.2004, thus, in backdrop of this inconsistency regarding the exact date of birth of the detainee and in absence of any other certificate/documents as mentioned under Section 94(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 this court has no other option but to rely on the ossification test report, which has already been done in this case and according to which the detainee is major and 18 years of age.

16. Hon'ble Supreme Court in the case of ***Alamelu and Another Vs. State represented by Inspector of Police reported in (2011) 2 Supreme Court Cases 385***, the following has been held in Paragraphs 39, 40 and 42 to 49 (relevant portion):

"39. We will first take up the issue with regard to the age of the girl. The High Court has based its conclusion on the transfer certificate, Ext.P16 and the certificate issued by PW8 Dr. Gunasekaran, Radiologist, Ext.P4 and Ext.P5.

40. Undoubtedly, the transfer certificate, Ext.P16 indicates that the girl's date of birth was 15th June, 1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31st July, 1993. The transfer certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under Section 35 of the Indian Evidence Act, 1872. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no

evidentiary value unless the person, who made the entry or who gave the date of birth is examined.

42. Considering the manner in which the facts recorded in a document may be proved, this Court in case of *Birad Mal Singhvi Vs. Anand Purohit I*, observed as follows: (SCC pp. 618-19, para 14).

"14....The date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined???. Merely because the documents Exts. 8, 9, 10, 11, and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exts. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted."

43. The same proposition of law is reiterated by this Court in *Narbada Devi Gupta Vs. Birendra Kumar Jaiswal* where this Court observed as follows: (SCC p.75, para 16)

"16...The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the evidence of those persons who can vouchsafe for the truth of the facts in issue."

44. In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in the transfer certificate can not be relied upon to definitely fix the age of the girl.

45. In fixing the age of the girl as below 18 years, the High Court relied solely on the certificate issued by PW8 Dr. Gunasekaran. However, the High Court failed to notice that in his evidence before the Court, PW8, the X-ray Expert had clearly stated in the cross-examination that on the basis of the medical evidence, generally, the age of an individual could be fixed approximately. He had also stated that it is likely that the age may vary from individual to individual. The doctor had also stated that in view of the possible variations in age, the certificate mentioned the possible age between one specific age to another specific age. On the basis of the above, it would not be possible to give a firm opinion that the girl was definitely below 18 years of age.

46. In addition, the High Court failed to consider the expert evidence given by PW13 Dr. Manimegalaikumar, who had medically examined the victim. In his cross-examination, he had clearly stated that a medical examination would only point out the age approximately with a variation of two years. He had stated that in this case, the age of the girl could be from 17 to 19

years. This margin of error in age has been judicially recognized by this Court in the case of *Jaya Mala Vs. Government of Jammu & Kashmir*. In the aforesaid judgment, it is observed as follows: (SCC p. 541, para 9)

"9...However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side."

47. We are of the opinion, in the facts of this case, the age of the girl could not have been fixed on the basis of the transfer certificate. There was no reliable evidence to vouchsafe the correctness of the date of birth as recorded in the transfer certificate. The expert evidence does not rule out the possibility of the girl being a major. In our opinion, the prosecution has failed to prove that the girl was a minor, at the relevant date.

48. We may further notice that even with reference to Section 35 of the Indian Evidence Act, a public document has to be tested by applying the same standard in civil as well as criminal proceedings. In this context, it would be appropriate to notice the observations made by this Court in the case of *Ravinder Singh Gorkhi Vs. State of U.P.* held as follows: (SCC p. 595, para 38)

"38. The age of a person as recorded in the school register or otherwise may be used for various purposes, namely, for obtaining admission; for obtaining an appointment; for contesting election; registration of marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum e.g. necessity of being represented in a court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor he was not appropriately represented therein or any transaction made on his behalf was void as

he was a minor. A court of law for the purpose of determining the age of a party to the lis, having regard to the provisions of Section 35 of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under Article 21 of the Constitution, as in that case the accused may unjustly be convicted."

49. In such circumstances, we are constrained to hold that the High Court without examining the factual and legal issues has unnecessarily rushed to the conclusion that the girl was a minor at the time of the alleged abduction. There is no satisfactory evidence to indicate that she was a minor."

17. On consideration of the aforesaid judgement it is evident that age of the person recorded in school register or certificate issued by the school can be used for so many purposes such as for obtaining admission, appointment, contesting the election, registration of marriage or for any other purposes. Mere production and making of a document as exhibit by the court cannot be held to be a due proof of its contents, more so in the given facts of this case when there is apparent inconsistency in recording the date of birth in the various educational certificates of the detinue coupled with fact that the detinue herself is disputing her date of birth recorded in the matriculation certificate and also considering the fact that learned counsel for the deponent on the last date has submitted that he could not disclose the source as to

20. Considering the fact that in the radiological examination conducted by the medical board the detainee is major; the detainee has refused to go with the company of natural guardian; she is married and wants to live with her husband; the marriage certificate has also been produced before this Court and it is not the case of the any party that she has been abducted or kidnapped, the detainee cannot be ordered to be kept in Nari Niketan or can be asked to live against her wishes with her parents.

23. On due consideration to the statement given by learned counsel for the petitioner; so also the statement of the detinue; ossification test report; and the record given otherwise; on merit, the petition fails and is accordingly dismissed. The detinue is set at liberty to go as per her own wish.

**Civil Law-Constitution of India, 1950-
Article 226 - Code of Criminal**

Procedure, 1973-Section 167(2))- From a bare reading of proviso a(ii) of Section 167 sub-section 2, it is clear that on the expiry of 60 days of judicial and police remand an accused is entitled to default bail. This entitlement is subject to a prayer and readiness of the accused to furnish bail and such bail should be actually furnished-No such prayer was made when the order of remand was passed nor has it been stated in the petition or submitted by learned counsel for the petitioner that bail was actually furnished-Since the petitioners have been remanded to judicial custody by a legal order, such detention is not illegal-Writ of habeas corpus is not maintainable. **(Para 17, 18 & 21)** (E-15)

List of Cases cited:

1. Pradeep Ram Vs St. of Jharkhand & ors., AIR 2019 Supreme Court 3193
2. Natabar Parida Bisnu Charan Parida Batakrushnaparida Balaji Vs St. of Orissa AIR 1976 SC 1465
3. Suresh Kumar Bhikamchand Jain Vs St. of Mah. (2013) 3 SCC 77

(Delivered by Hon'ble Anjani Kumar Mishra, J. & Hon'ble Vivek Kumar Singh, J.)

1. Shri G. S. Chaturvedi, learned Senior Advocate for the petitioner and Shri Gyan Prakash for the respondents.

2. This petition which has been titled as a Habeas Corpus Petition seeks the following reliefs:-

"i) Issue a writ, order or direction in the nature of Certiorari quashing the impugned order dated 26.06.2023 passed by Special Judge, P.C. Act (C.B.I., Ghaziabad) in Criminal Misc. Case No. 04/2023 (C.B.I. Vs. Ramit Lala & others), pertaining to RC No. 2162023A0004 u/s 120-B and Section 7, 8, 9, 10 & 12 P.C. Act, 1988 (As amended in 2018), P.S.

CBI/AC-I/New Delhi (Annexure No.1) to this writ petition).

ii). Issue a writ, order or direction in the nature of Habeas Corpus directing the respondent concerned to release the petitioners from custody and produce before this Hon'ble Court on the date fixed."

3. On the matter being taken, a prayer was made by learned counsel for the petitioner for deleting the first petitioner, Ramit Lala, from the array of the parties which permission was granted and necessary deletion has been made in the array of the parties.

4. The petition has been entered in the data base as Ramit Lala and three others. Since the name of the first petitioner has been deleted, the petition should now be entered in the data base as Monica Dhawan and two others. This requisite correction be made by the Computer Section in the computer data base.

5. The brief facts of the case are that the petitioners were arrested on 25.04.2023 in connection with RC No. 2162023A0004 under Sections 120B IPC and Sections 7, 8, 9, 10 & 12 of the Prevention of Corruption Act, 1988, P.S. CBI/AC-I/New Delhi.

6. It is submitted that the charge-sheet was filed on 22.06.2023 and thereafter, the case was registered as a miscellaneous case and 26.06.2023 was fixed for hearing on the question of cognizance. On the next date i.e., 26.06.2023, the impugned order was passed. The court did not take cognizance on that date since requisite sanction for prosecuting Ramit Lala, a General Manager of Broadcast Engineering Consultants India Pvt. Ltd., had not been obtained. The next date fixed was

10.07.2023. Simultaneously, the petitioners were remanded to judicial custody under Section 309 Cr.P.C.

7. It is contended that the power under Section 309 Cr.P.C., can be invoked by a Court only after cognizance had been taken and not before that. Under the circumstances, remanding the petitioners to judicial custody is illegal and renders custody of the petitioner illegal.

8. It would be relevant to note that the petitioners in this writ petition are Managing Director, President & Business Head and Director respectively of M/s Fusion Corporate Solutions Pvt. Ltd.

9. The contention of Shri Gyan Prakash, ASGI, appearing for respondents is two fold. He has submitted that upon perusal of the charge-sheet itself, it is clear that the investigation is still not complete. He has referred to Page 68 of the paper book especially paragraph 16.91 of the charge-sheet. The said paragraph reads as follows:-

"16.91- Investigation in respect of certain points with regard to obtaining bribe by Shri Ramit Lala from some other contractors is yet not completed and separate supplementary report will be submitted under Section 173(8) Cr.P.C., on conclusion of investigation. Further investigation in respect of purportedly fake bills submitted by M/s. Fusion Corporate Solutions Pvt. Ltd., to BECIL is also kept open. "

10. He has next submitted that the remand order is one under Section 167(2) of the Act as it has been passed when the investigation is still not complete. He further submits that in any case mere

mention of Section 309 I.P.C., would not render the order non-est because the Magistrate did possess the power to order judicial remand under Section 167.

11. He has placed reliance upon a decision of Apex Court namely **Pradeep Ram Vs. State of Jharkhand and others, AIR 2019 Supreme Court 3193** wherein it has been held in paragraph 65 as follows:-

"65. The special Judge in his order has neither referred to Section 309 nor Section 167 under which accused was remanded. When the Court has power to pass a particular order, non-mention of provision of law or wrong mention of provision of law is inconsequential. As held above, the special Judge could have only exercised power under Section 309(2), hence, the remand order dated 25.06.2018 has to be treated as remand order under Section 309(2) Cr.P.C. The special Judge being empowered to remand the accused under Section 309(2) in the facts of the present case, there is no illegality in the remand order dated 25.06.2018 when the accused was remanded to the judicial custody."

12. We have considered the submissions made by learned counsel for the parties and perused the order impugned dated 26.06.2023.

13. There is no doubt that Section 309 Cr.P.C. cannot be invoked by a Magistrate or the Special Judge as in the instant case, at the pre-cognizance stage. The power under this Section can be exercised only after the Court has taken cognizance. It is not in dispute that cognizance has not been taken as requisite sanction for prosecution for some of the accused had not been obtained.

14. Under the circumstances, the only provision which permits an accused to be remanded to judicial custody is Section 167(2) of the Criminal Procedure Code. In this context, it would be relevant to examine Section 167(2) Cr.P.C. which reads as follows:

"167. Procedure when investigation cannot be completed in twenty four hours:-

(1).....

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction: Provided that-

(a). the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days; if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub- section shall be deemed to be so

released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police. Explanation I.- For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail; Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention."

15. The first proviso to the said Section namely a(ii) provides that the total period of remand of an accused cannot be more than 60 or 90 days depending upon the offence. An accused who has completed 60/90 days in custody as per the offence under investigation shall be released on bail if investigation has not been concluded and if he is prepared and does furnish bail.

16. This provision came for consideration before the Apex Court in **Natabar Parida Bisnu Charan Parida Batakrushnaparida Balaji Vs. State of Orissa AIR 1976 SC 1465** as observed as follows:-

"But then the command of the Legislature in proviso (a) is that the accused person has got to be released on bail if he is prepared to and does furnish bail and cannot be kept in detention beyond

the period of 60 days even if the investigation may still be proceeding."

17. From a bare reading of proviso a(ii) of Section 167 sub-section 2, it is clear that on the expiry of 60 days of judicial and police remand an accused is entitled to default bail. This entitlement is subject to a prayer and readiness of the accused to furnish bail and such bail should be actually furnished.

18. In the case at hand, on a pointed query by the Court, Shri Gopal Chaturvedi has stated that no such prayer was made on 26.06.2023 seeking bail when the order of remand was passed nor has it been stated in the petition or submitted by learned counsel for the petitioner that bail was actually furnished.

19. The Apex Court in **Suresh Kumar Bhikamchand Jain Vs. State of Maharashtra (2013) 3 SCC 77** has laid down as follows:-

"17. In our view, grant of sanction is nowhere contemplated under Section 167 Cr.P.C. What the said Section contemplates is the completion of investigation in respect of different types of cases within a stipulated period and the right of an accused to be released on bail on the failure of the investigating authorities to do so. The scheme of the provisions relating to remand of an accused, first during the stage of investigation and, thereafter, after cognizance is taken, indicates that the Legislature intended investigation of certain crimes to be completed within 60 days and offences punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, within 90 days. In the event, the investigation is not completed by the investigating authorities,

the accused acquires an indefeasible right to be granted bail, if he offers to furnish bail. Accordingly, if on either the 61st day or the 91st day, an accused makes an application for being released on bail in default of charge-sheet having been filed, the Court has no option but to release the accused on bail. The said provision has been considered and interpreted in various cases, such as the ones referred to hereinbefore. Both the decisions in Natabar Parida's case (supra) and in Sanjay Dutt's case (supra) were instances where the charge-sheet was not filed within the period stipulated in Section 167(2) Cr.P.C. and an application having been made for grant of bail prior to the filing of charge-sheet, this Court held that the accused enjoyed an indefeasible right to grant of bail, if such an application was made before the filing of the charge-sheet, but once the charge-sheet was filed, such right came to an end and the accused would be entitled to pray for regular bail on merits.

18. None of the said cases detract from the position that once a charge-sheet is filed within the stipulated time, the question of grant of default bail or statutory bail does not arise. As indicated hereinabove, in our view, the filing of charge-sheet is sufficient compliance with the provisions of Section 167(2)(a)(ii) in this case. Whether cognizance is taken or not is not material as far as Section 167 Cr.P.C. is concerned."

20. Under the circumstances, therefore, the order of remand cannot be said to be illegal. For the same reason and since the remand order dated 26.06.2023 was not per se illegal in the absence of a prayer for default bail and in the absence of any bail bond, security etc., having been furnished. Moreover, the charge-sheet had already been filed and therefore, question

of granting default bail did not arise even if cognizance had not been taken.

21. Therefore, the order of judicial remand passed on 26.06.2023 cannot be said to be illegal in any manner despite mention of section 309 Cr.P.C. in the order of remand dated 26.06.2023, in view of the pronouncement of the Supreme Court in Pradeep Ram (Supra). Since the petitioners have been remanded to judicial custody by a legal order, such detention is not illegal. Therefore, no habeas corpus will lie. The petition, insofar as it claims issuance of a writ of habeas corpus is not maintainable

22. Since a charge-sheet had been filed against the petitioners on 22.06.2023, they were not entitled to default bail. Their judicial remand by the impugned order dated 26.06.2023 is fully justified. The order, therefore, is not liable to be quashed.

23. Since, both the reliefs claimed in the writ petition cannot be granted for the reasons given above, this writ petition fails and is dismissed.

(2023) 8 ILRA 853
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2023

BEFORE

THE HON'BLE SYED QAMAR HASAN RIZVI, J.

PIL No. 1843 of 2023

Bhoopendra Singh ...**Petitioner**
Versus
State of U.P. & Ors. ...**Respondents**

Counsel for the Petitioner:
 Sri Rajeev Kumar, Sri Prashant Yadav

Counsel for the Respondents:

C.S.C., Sri Krishna Kant Singh, Sri Pradeep Kumar Upadhyay

Civil Law - Public Interest Litigation - Maintainability - Chapter XXII - Rule 1(3-A) of the Allahabad High Court Rules, 1952 - Petitioner failed to disclose specific and precise credentials as mandated - No prima facie public cause established - Mere assertion of being a resident and Gaon Sabha member insufficient - Petition filed for personal or oblique motive - Frivolous PIL discouraged in view of Supreme Court precedents - Petition dismissed.

Held - The petitioner, while seeking relief in a PIL regarding installation and location of a borewell in village Garhi Madusua, failed to disclose his credentials in the specific and precise manner as required under Rule 1(3-A) of Chapter XXII of the High Court Rules. No public interest or violation of public rights was shown. The averments were vague and lacked supporting documents. In absence of prima facie case and proper disclosures, the petition was not maintainable as a PIL. Dismissed with liberty to approach concerned authorities.

PIL dismissed.

Case law discussed:

1. St. of Uttaranchal Vs Balwant Singh Chaufal, 2010 AIR SCW 1029
2. Pankaj Srivastava Vs High Court of Judicature at Allahabad, (2014) 3 UPLBEC 1832
3. Ashok Kumar Pandey Vs St. of W.B., AIR 2004 SC 280
4. Dattaraj Nathuji Thaware Vs St. of Mah., (2005) 1 SCC 590
5. M/s Holicow Pictures (P) Ltd. Vs Prem Chandra Mishra, (2007) 14 SCC 281

(Delivered by Hon'ble Syed Qamar Hasan Rizvi, J.)

1. Heard Sri Rajeev Kumar, learned counsel for the petitioner, Sri Dinesh Kumar Verma, learned Standing Counsel for respondent nos. 1 to 4 and Sri Krishna Kant Singh, learned counsel for the Land Management Committee-respondent no.6.

2. The present writ petition has been filed seeking the following relief:

"(i) To issue an order or direction commanding the respondent authorities specially respondent no.3 to direct the respondent authorities to complete the installation of incomplete bore well and to construct the over head water tank also upon the Gata No. 728 area 0.144 hectare in Mauja Garhi Madusua, Pargana Patiyali, Tehsil Aliganj, District Etah according to the proposal dated 26.06.2023 passed by the authority.

(ii) To issue an order or direction commanding the respondent authority to restrain from shifting the bore well from Gata No. 728 area 0.144 hectare to Gata No. 581 area 0.150 hectare.

(iii) To issue any other writ, order or direction, which this Hon'ble Court may deem fit and proper under the circumstances of the present case.

(iv) Award the cost of the petition to the petitioner."

3. At the very outset, learned Standing Counsel has raised a preliminary objection regarding the maintainability of the present Public Interest Litigation as the petitioner has not disclosed his credentials and other details that are required under Sub-Rule (3-A) of Rule 1 of Chapter XXII of the Allahabad High Court Rules (Rules of Court, 1952), which has been amended in the light of judgment passed by the Hon'ble Supreme Court in **State of Uttranchal versus Balwant Singh Chaufal & others reported in 2010 AIR SCW 1029.**

4. Sri Krishna Kant Singh, learned Counsel for the Land Management Committee-Respondent No. 6 submits that the present petition by way of Public Interest Litigation has been filed by the petitioner with oblique motive and with concealment of material facts. He further submits that the petitioner has not annexed the resolution dated 26.06.2023 said to have been passed by the Gaon Sabha on the basis of which he is claiming the relief in the present petition.

5. On the question of maintainability of the present petition for want of non-disclosure of the credentials as required under Sub-Rule (3-A), Rule 1 of Chapter XXII of the Allahabad High Court Rules, it would be pertinent to note that the aforesaid Rule has been framed in exercise of the Rule making power of the High Court, which is of quasi-legislative nature and has been incorporated as an amendment to Rule 1 of XXII with effect from 01.05.2010 and the validity of the same has been tested and upheld by the Division Bench of this Court in the case of **Pankaj Srivastava versus High Court of Judicature at Allahabad reported in (2014) 3 UPLBEC 1832.**

6. For ready reference, the said Rule is reproduced as under:

"(3-A) In addition to satisfying the requirements of the other rules in this chapter, the Petitioner seeking to file a Public Interest Litigation, should precisely and specifically state, in the affidavit to be sworn by him giving his credentials, the public cause he is seeking to spouse; that he has no personal or private interest in the matter; that there is no authoritative pronouncement by the Supreme Court or High Court on the question raised; and that

the result of the litigation will not lead to any undue gain to himself or anyone associated with him, or any undue loss to any person, body of persons or the State."

7. In the above-mentioned Rule, the words '**should precisely and specifically state**' as has been envisaged, itself indicates the importance and necessity of the disclosure of the credentials by the petitioner. The same cannot be ignored/overlooked by the Courts before entertaining a petition as Public Interest Litigation. The said Rule requires a person espousing a public cause, to file an affidavit narrating his credentials in precise and specific manner and also the public cause which is sought to be espoused.

8. The requirement of disclosure of credentials from the petitioner is indeed necessary to bring on record the complete background of the person who is coming before the Court. This information helps to establish the petitioner's credibility, locus standi, and his genuineness. Providing credentials also demonstrates that the petitioner has the necessary expertise, knowledge and understanding of the gravity and seriousness involved in the matter. The said information should not be vague and indefinite. The word 'credentials' connotes the qualities and the experience of a person that make him suitable for doing a particular job.

9. The word 'credential' has a specific connotation and meaning. It has been defined in Black's Law Dictionary, 8th Edition as "*1. A document or other evidence that proves one's authority or expertise. 2. A testimonial that a person is entitled to credit or to the right to exercise official power. 3. The letter of credence given to an ambassador or other*

representative of a foreign country. 4. Parliamentary law. Evidence of a delegate's entitlement to be seated and vote in a convention or other deliberative assembly."

10. Moreover, the Oxford English-English-Hindi Dictionary, 2nd Edition, explains credentials as the quality which makes a person perfect for the job or a document that is a proof that he has the training and education necessary to prove that he is a person qualified for doing the particular job.

11. The Hon'ble Supreme Court in the case of **Ashok Kumar Pandey versus State of West Bengal & Others** reported in AIR 2004 SC 280 has been pleased to lay down the parameters to be considered while entertaining a Public Interest Litigation, the extract of relevant para 14 is reproduced below:

"14. The Court has to be satisfied about (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. Court has to strike balance between two conflicting interests; (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others: and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motive, justifiable executive actions. In such case, however, the Court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the, Executive and the Legislature..."

12. At this stage, it is worth mentioning that the Hon'ble Apex Court in the case of **Balwant Singh Chauhan & Ors.** (Supra) has dealt with the issues of abuse of public interest litigation and the remedial measures by which its misuse can be prevented or curbed. The relevant portion of the said judgement is reproduced below:

"161. Unfortunately, of late, it has been noticed that such an important jurisdiction which has been carefully carved out, created and nurtured with great care and caution by the courts, is being blatantly abused by filing some petitions with oblique motives. We think time has come when genuine and bona fide public interest litigation must be encouraged whereas frivolous public interest litigation should be discouraged.

162. In our considered opinion, we have to protect and preserve this important jurisdiction in the larger interest of the people of this country but we must take effective steps to prevent and cure its abuse on the basis of monetary and non-monetary directions by the courts."

13. In another case of **Dattaraj Nathuji Thaware v. State of Maharashtra** reported in (2005) 1 SCC 590, the Hon'ble Supreme Court was pleased to hold as follows,

"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."

14. Time and again, the Hon'ble Supreme Court has issued guidelines to the Courts entertaining the Public Interest Litigations to be extra cautious to ensure that there is no abuse of the process of the Court and further to see that in the guise of redressing a public grievance, the public interest litigation must not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature. This note of caution has been very categorically dictated by the Hon'ble Apex Court in the case of **M/s Holcow Pictures Private Limited versus Prem Chandra Mishra and Others** reported in (2007) 14 SCC 281. .

15. The Hon'ble Apex Court as well as this Court in a catena of judgments has reiterated the importance of the public interest litigation but with certain reservations. The jurisdiction of the public interest litigation is exercised by the Constitutional Courts. The said jurisdiction has been carved out by judicial creativity. However, the courts while exercising this jurisdiction must exercise the same with extreme caution and responsibility.

16. In the instant petition that has been filed in the nature of public interest litigation; all what is brought to the fore is that the petitioner is raising an issue regarding the shifting of the place of installation of the bore-well from one place to another within the same village. The petitioner has neither filed any document to show the bona fide of his contention nor he

could establish any violation of basic human rights of the public at large.

17. Furthermore, from the perusal of the averments made in the present petition, the petitioner in paragraph No.4 of the same has simply stated that *"he is a resident of village Nagla Ajeet Gram Panchayat Garhi Madusua, Pragna Patiyali, Tehsil Aliganj, District Etah, and as such he is member of Gaon Sabha"*. Except the aforesaid declaration, the petitioner has not made any other averment towards his credentials. The said description is undoubtedly vague and indefinite and cannot be accepted as a disclosure of his credentials.

18. In view of the above, this Court has no hesitation to note that the petitioner has not disclosed any credential, much less in consonance with the words *'should precisely and specifically state'* as mandated in the aforesaid Sub-Rule (3-A), Rule 1 of Chapter XXII of the Allahabad High Court Rules (Rules of Court, 1952) as amended in the light of the judgment passed by the Hon'ble Supreme Court in the case of Balwant Singh Chauhan (*Supra*).

19. Furthermore, from the perusal of the averments made in writ petition as well as the arguments advanced by the learned counsel for the petitioner, this Court could not find any element of public interest involved in the present petition.

20. In view of the foregoing reasons, the instant petition is not entertainable as a public interest litigation and is accordingly, **dismissed**.

21. Needless to say that it is always open for the residents of the concerned village including the petitioner to raise their

grievances before the concerned authorities in accordance with law and the authorities are duty bound to thoroughly look into the genuine grievances of the aggrieved people and ensure redressal of the same within the legal framework.

(2023) 8 ILRA 857
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.08.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Rera Appeal (D) No. 85 of 2023

M/S, Supertech Realtors Pvt. Ltd., New Delhi **...Applicant**

Versus

Amber Hasan **...Opp. Party**

Counsel for the Applicant:

Abhishek Khare, Aahuti Agarwal

Counsel for the Opp. Parties:

Akshat Srivastava

Real Est. Law - Real Est. (Regulation and Development) Act, 2016- Sections 19(10), 44(1), 58 - Clean Hands Doctrine, Offer of Possession, Allotment Cancellation, Project Delay, Promoter's Liability, Regulatory Authority, Appeal Limitation, Third Party Rights - Real Est. (Regulation and Development) Act, 2016 -

FACTS

The appellant-promoter M/S Supertech Realtors Pvt. Ltd. allotted Flat No. 3201 in "Super Nova" project to respondent-allottee Amber Hasan vide allotment letter dated 18.12.2015 for Rs. 1,84,83,403/- with completion deadline of June 2017 (with 6 months grace period). The allottee paid Rs. 1,14,34,893/- leaving balance amount payable at possession stage. Despite obtaining completion certificate on 18.07.2018, promoter failed to offer proper possession. When allottee inspected the flat and found defects, promoter demanded outstanding payment through letter dated 25.09.2018. RERA directed allottee to pay within 90 days, but promoter cancelled

allotment on 31.05.2020 before period expiry and allegedly sold unit to third party. Appellate Tribunal allowed allottee's appeal directing proper offer of possession.

HELD

Promoter who cancels allotment before expiry of authority-granted payment period and sells unit to third party without disclosure during proceedings does not come with clean hands and is disentitled to equitable relief. Mere demand for outstanding payment without proper offer of possession does not constitute valid offer under real eSt. agreement. Payment becomes due only upon proper offer of possession as per agreement terms. Promoter cannot cancel allotment before expiry of period granted by regulatory authority on promoter's own application. Such cancellation amounts to frustrating the authority's order.

Appeal dismissed with cost.

Case Law Cited:

Ramjas Foundation Vs U.O.I., (2010) 14 SCC

(Delivered by Hon'ble Alok Mathur, J.)

1. Learned counsel for the appellant has opposed the report of the Stamp Reporter wherein it was reported that the appeal was delayed by 2-days.

2. The said report of the Stamp Reporter was taken into consideration that limitation was to be computed from the date of passing of the order, i.e. 31.05.2023. This aspect of the matter was considered by this Court on 09.08.2023 and the following order was passed:

“1. Heard Sri Abhishek Khare, learned counsel for petitioner as well as Sri Akshat Srivastava, learned counsel for respondents.

2. From perusal of the record, it reveals that the Stamp Reporter has

reported that the appeal has been filed beyond time by two days.

3. Learned counsel for petitioner has contested the above facts and stated that the report of the Stamp Reporter is based on the date of order passed by Real Estate Appellate Tribunal on 31.05.2023. It is stated that the said order was uploaded on 06.06.2023 as an endorsement to that effect has been made in the impugned order itself as well as the the status report of the said case indicating that the said order was uploaded on 06.06.2023.

4. With regard to the limitation, he has submitted that according to Section 58 of the Real Estate (Regulation and Development) Act, 2016 the appeal can be filed within 60 days from the date of communication of the decision or the order of the Appellate Tribunal.

5. It is in the aforesaid facts, it is stated that the period of limitation was started from the date of uploading of the said order i.e. 06.06.2023.

6. In light of the above, let a fresh report be sought from the Stamp Reporter considering the fact that the order was uploaded on 06.06.2023.

7. List this case tomorrow i.e. 10.08.2023 in top ten case.”

3. Today, when the matter has been taken up, it is noticed that the Stamp Reporter has reported that ?although no date of communication of the service of the impugned order, affidavit of service has been annexed in the instant R.E.R.A. Appeal by the learned counsel, therefore, limitation could not be calculated from the date of service and the same has been calculated from the impugned order dated 31.05.2023, providing limitation period of 60 days.?

4. This order has been passed despite a clear finding recorded by this court on the previous date vide its order dated 09.08.2023, i.e., in the present case the period of limitation was started from the date of uploading of the said order dated 06.06.2023.

5. It is surprising that despite clear directions issued by this Court the Stamp Reporter has ignored the direction issued by this court and failed to comply with the same. It is not expected of the Officers of the Registry to act in such a callous manner.

6. Let a report be sought from the official concerned by the Joint Registrar (Listing) and placed before me on the Administrative side on 12.09.2023.

7. Considering the fact that the limitation has to be computed from 06.06.2023 and there is no dispute in this regard amongst the parties, this court is of the considered view that there was no delay in filing the said appeal.

8. Heard Sri Abhishek Khare, learned counsel for the appellant, Sri Akshat Srivastava, Learned counsel for the respondent, and perused the record.

9. The present appeal under section 58 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as 'Act of 2016'), has been preferred by the appellant being aggrieved by the order dated 31.05.2023 passed by the Real Estate Appellate Tribunal, Lucknow, thereby rejecting the appeal preferred by the appellant (Promoter).

10. It has been submitted by the learned counsel for the appellant that the

appellant is a Private Limited Company, involved in construction of infrastructure development related activities and was involved in a Project known in the style of "Super Nova" situated at Plot No. 3, Sector-94, Noida. The respondent was interested in purchase of a Flat and accordingly he moved an application to the appellant and on 18.12.2015 an allotment letter was issued and the respondent was allotted Flat No. 3201 (Unit No.R203NEAST, Tower A/Nova-East on 32nd Floor, measuring 2040 Sq. Ft.) for a total consideration of Rs. 1,84,83,403 (Rs. One Crore Eighty Four Lacs Eighty Three Thousand Four Hundred and Three only). According to the allotment-letter, the Unit was to be given to the respondent by June 2017, with a grace period of 6 months, which comes to December 2017. Admittedly, the respondent has already paid an amount of Rs. 1,14,34,893/- (Rs. One Crore Fourteen Lacs Thirty Four Thousand Eight Hundred and Ninety Three only) to the appellant and only the amount to be paid at the stage of possession remained outstanding, according to the Agreement between the parties.

11. It has been submitted by the learned counsel for the appellant that the completion-certificate of the said Project was also obtained from the New Okhla Industrial Development Authority by means of letter dated 18.07.2018 and, accordingly, as per provisions of Section 19(10) it is their case that the respondent at this stage should have paid the entire amount prior to seeking possession of the said Flat. It has been stated that by means of letter dated 25.09.2018 the respondent, were asked to deposit the outstanding amount of Rs. 82,72,533.00 (Eighty Two Lacs Seventy Two Thousand Five Hundred and Thirty Three only). The appellant has

styled the said letter as "Offer of Possession", but a perusal of the aforesaid letter clearly indicates that it was only a notice for payment of the outstanding amount. The appellant had also written to the respondent stating that the now the Project is at possession stage and formalities have to be completed and directed them to pay the said amount within 15 days, but still there was no mention regarding the date of offer of possession by the appellant.

12. The respondent, on receipt of the aforesaid letter, had replied to the appellant by mail on 14.11.2018, stating that the respondent had visited and inspected the said Flat and there were numerous defects and it was not in a position, where possession of the same could have been obtained and had annexed various photographs in support of the contentions.

13. It is in the aforesaid circumstances that the appellant (Promoter) was of the view that despite occupancy-certificate having been received by the respondent, he was not paying the balance-amount and consequently he preferred a complaint to the Real Estate Regulatory Authority, where he had made a prayer to direct the allottee to pay the outstanding dues of Rs. 90,59,687/- (Ninety Lacs Fifty Nine Thousand Six Hundred and Eighty Seven only) alongwith penalty and to take possession of the booked unit.

14. The respondent-allottee was put under notice and the said complaint was decided by means of order dated 02.03.2020. While deciding the said application, an inspection was conducted on the direction of the Authority on 27.12.2019. In the said inspection, it was found that the Project was 90% complete and despite the same, the

Authority disposed of the complaint by directing the respondent-allottee to pay the balance amount within 90 days of the said order and the complainant was directed to see that all the facilities and guarantees made by him, were complete and made available to the allottee and in case the allottee fails to make the payment within a period of 90 days, the complainant was given liberty to proceed according to the terms of the Agreement.

15. The appellant on 31.05.2020 cancelled the allotment of the respondent. In the said order it was categorically held stated as under:

"In view of the above, we hereby cancel your booking against Unit No. Nova East/3201 at Supernova as per booking form/allotment letter signed by you and the amount standing to your credit against the said booking stands forfeited as per terms and conditions of the booking/company's policy."

16. Though the appellant has contested the fact that the said letter is merely a notice of cancellation, but the perusal of the same clearly indicates that in an unequivocal terms allotment of the respondent has been cancelled.

17. At this stage, it would be relevant to mention that the order of the Authority dated 02.03.2020, while disposing of the complaint of the appellant, had given liberty to the respondent to make the entire outstanding payment within a period of 90 days and, admittedly, before expiry of the said period, the appellant has proceeded to cancel the allotment.

18. Once the allotment has been cancelled, the respondent would have no reason to pay the outstanding amount or to

comply with the order of the Real Estate Regulatory Authority.

19. The respondent-allottee, being aggrieved by the order of the Real Estate Regulatory Authority, filed an appeal under section 44(1) of the Act of 2016 before the Appellate Tribunal at Lucknow. It was vehemently submitted in the appeal that the Authority has illegally directed the respondent to pay the remaining amount prior to even seeing that the Project is complete and in this regard it has been submitted that there are various infirmities in the Flat, as inspected by the allottee and all these defects and infirmities were duly pointed out to the Promoter, but without addressing at any of the said issue defects/discrepancies neither the Promoter addressed the said infirmities nor has been the Regulatory Authority taken due cognizance of the same and, therefore, the said order was illegal and arbitrary. It was further submitted that the Promoter himself has violated the terms of the order in as much as the said offer has been cancelled even prior to the time provided to make the payment and in fact he has frustrated the efforts of the allottee to comply with the order of the Authority. The Promoter cannot be allowed to deliberately flout the order of the Authority. It was further submitted that as per the Agreement between the parties, the Project ought to have been completed by December, 2017 and it was the delay on the part of the Promoter, which has led to the dispute and consequently the Allottee was also entitled to claim interest and penalty for the delay in completion of the said Project.

20. The Tribunal, after issuing notice to the Appellant, has duly considered all the objections and decided in favour of the respondent. The Tribunal had framed five

issues while deciding the said appeal and they had examined the Agreement between the parties and with regard to the question as to whether the Project was delayed. It concluded that undoubtedly the Project was to be completed by December 2017 and there was considerable delay in completion of the said Project, accordingly the issue was decided in favour of the Allottee.

21. The contentious issue, which has been raised before this Court is that Issue No. 6, whereby the Tribunal was required to examine as to whether the Allottee was required to make any payment before offer of possession as per the payment-plan indicated in the Allotment-letter in this regard. After examining the Allotment-letter and the Agreement between the parties, the Tribunal was of the considered view that the remaining payment was to be made at the stage of possession. It verified the said Agreement and stated that the payment had to be made on receipt of the offer of possession and only then the Allottee was required to make payment. After examining the material placed, it returned a finding that no offer of possession was given by the Promoter and, therefore, any demand made before the offer of possession was neither proper nor justified on their part, and it was further stated that the Promoter was only interested in demanding dues, which were to be paid by the Allottee on offer of possession and they had gone to the extent of filing a complaint seeking a direction against the Allottee for making payment and without expiry of the period granted by the Regulatory Authority to the Allottee for clearing the dues, proceed to cancel the Unit.

22. The issues were decided in favour of the Allottee and the appeal was allowed,

directing the Promoter to offer possession to the Allottee alongwith a copy of the complaint and completion-certificate within a period of 45 days and also directed the Allottee to clear the dues within 15 days and the Promoter would be entitled to pay interest at the rate MCLR + 1% from the date of offer of possession till the receipt of OC/CC/Offer of Possession, whichever is later. It is against the aforesaid direction that the present appeal has been filed.

23. Learned counsel for the appellant has submitted that the order passed by the Tribunal is illegal, arbitrary and requires interference of his Court. It has been submitted that the Promoter had required the Allottee to pay the remaining outstanding amount, but the Allottee having paid the entire outstanding amount, delayed in giving possession of the Unit to the Allottee and the direction issued by the Tribunal could not have been honoured in the facts of the present case.

24. Learned counsel for the Allottee, on the other hand has opposed the appeal. He has vehemently submitted that apart from other factual controversies, the conduct of the Promoter needs to be examined and looked into in the present case. He has submitted that the Promoter was all along interested in the outstanding amount, without taking care of the formalities and conditions which itself had to fulfill so as to deliver the final product/Flat in completed shape to the Allottee. He submitted that when the Allottee had made inspection of the said Flat and it had found several deficiencies and infirmities and the same were duly communicated by means of email dated 14.11.2018. No cognizance of the said mail was ever taken by the appellant/Promoter, and repeatedly letters were written to the respondent for payment of the outstanding

amount. It has been further submitted that till date neither the completion-certificate is available nor has been placed on record in any of the proceedings below, and unless the completion-certificate is there, there is no question of entering into the said premises.

25. It has been further submitted that the appellant has not come with clean hands, considering the fact that prior the period of expiry of 90 days they cancelled the allotment of the Allottee/respondent and apart from the same, they have also sold the said Unit to a third party. He further submitted that their conduct is manifest from the fact that all these developments have taken place during pendency of proceedings initiated by them, wherein neither of any of the pleadings or details of the said transactions been detailed and have been deliberately concealed. Even in the present appeal in para-51 only a cryptic averment has been made that third party rights have been created, without giving any details of the transactions or the name of the person to whom the said Flat has been sold. He also submits that these facts are sufficient in itself to show that the appellant has not come with clean hands.

26. Considering the aforesaid submissions of the contesting parties, it is noticed that the allottee had made an application for allotment of a Flat in the Scheme developed by the appellant. He had paid all the amount, which was due, except the amount which was to be paid at the stage of possession. Dispute in the present case has arisen at the final stages of the said Project. Possession-certificate, according to the Promoter has been got obtained on 18.7.2018 and limited demand has been made to the allottee to make his entire payment.

27. On the other hand, the Allottee has been trying to enforce his rights requiring the

Promoter to complete the said Project and remove all the infirmities and deficiencies as noticed by him. The proceedings leading to the present case have been initiated at the behest of the Promoter seeking a direction from the RERA to the Allottee to make the balance payment, so that the booked Unit can be handed over to him. The complaint was favourably considered and the RERA has made certain directions to the Allottee to make the payment within 90 days. Even before expiry of the said period the allotment has been cancelled. The Promoter did not even wait for expiry of the period, which was granted on their application itself and it seems that in the meanwhile, without intimation or permission of any of the Authority the said Unit has been sold. They did not deem it appropriate to disclose the said details either before any of the Authorities below or even before this Court in the present appeal. This court is of the considered view that the conduct of the Appellant does not entitle it for any relief in the present matter, as he has not come to the Court with clean hand. The Hon'ble Supreme Court has laid down in catena of judgments that if appellant has not come forward with clean hand, he would not be entitled to any equitable relief. In the case of **Ramjas Fondation and anr. v. Union of India & ors., (2010) 14 SCC 38**, the following has been observed:

"21. The principle that a person who does not come to the court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed under Articles 32, 226 and 136 of the Constitution, but also to the cases instituted in other courts and judicial forums. The object underlying the principle is that every court is not only entitled but is duty bound to protect itself from unscrupulous litigants who do not have any respect for truth and who try to pollute the stream of justice by resorting to falsehood or by making misstatement or by suppressing facts

which have a bearing on adjudication of the issue(s) arising in the case."

28. Apart from the above, finding as recorded by the Tribunal have been duly considered and examined by this Court also. We do not find any infirmity with the findings recorded by the Tribunal that the said Project was delayed and despite their statement that the Project shall be completed in June 2017, the same was not completed even when the appellant had approached the R.E.R.A.

29. With regard to the Issue "As to whether any possession-letter was issued by the Promoter to the Allottee after receipt of the occupancy-certificate", the issue was decided against the promoter, as even according to the Allottee, no offer of possession was given to him after obtaining the occupancy-certificate and, lastly, their conduct that they have cancelled the allotment prior to the expiry of 90 days, has been held by the Tribunal to be non-sustainable.

30. In the light of the aforesaid findings, no interference is required by this Court in the said matter. No question of law arises for determination by this Court. The Appeal is accordingly **dismissed** and considering the conduct of the Appellant, it is dismissed with costs of Rs. 10,000.00 (Ten thousand only).

(2023) 8 ILRA 863
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.08.2023

BEFORE
THE HON'BLE IRSHAD ALI, J.

Writ-A No. 2221 of 2005

U.P. State Sugar Corp. & Anr. ...Petitioners
Versus
Dhirendra Kumar Singh ...Respondent

Counsel for the Petitioners:

P.K. Sinha, Anish Srivastava Lal

Counsel for the Respondents:

C.S.C., P.N. Singh

A. Labour Law – UP Industrial Disputes Act, 1947 – Sections 3-B – Standing Order – Clause B-1(4) – Engagement as Daily wager – Termination from service – Award – Workmen has not completed 240 days – Effect – Labour Court passed the award treating the daily wager as seasonal workmen – Legality challenged – Jurisdiction of Labour Court questioned – Held, promotion from one category to another category was clearly a managerial function which could not have been discharged by the Labour Court – In the absence of a finding to the effect that the workman has worked for the crushing seasons in accordance with his case and has completed his probation period envisaged under Clause B-1(4) of the Standing Orders, the Labour Court could not have granted seasonal status to the workman under the Standing Orders. In absence of that finding, the impugned award is rendered manifestly illegal. (Para 21 and 23)

Writ petition allowed. (E-1)

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Shri P.K. Sinha, learned counsel for the petitioners and Shri P.N. Singh, learned counsel for the respondents.

2. By means of the present writ petition, the petitioners have prayed for the following reliefs:

(i) Issue a writ, order or direction in the nature of Certiorari quashing the impugned award dated 21.4.2004 passed by the opposite party no.2 as contained in Annexure No. 1 to this writ petition.

(ii) Issue a writ order or direction in the nature of Mandamus restraining the

respondents in any manner from executing, implementing the impugned award as contained in Annexure-1 to this writ petition.

(iii) Pass such other orders or directions which this Hon'ble Court deem fit and proper in the circumstances of the case in favour of the petitioners.

(iv) Allow the writ petition with cost in favour of the petitioners.

3. Facts of the case are that the U.P. State Suger Corporation is a company registered under Section 617 of the Company's Act and the same has its various industrial units located in various parts of the State of U.P. manufacturing sugar by vacuum pan process. The petitioner no.1 is one of such industrial units of petitioner no.2 situated at Kasba Jarwal Road, Bahraich manufacturing sugar by vacuum pan process. The petitioners are public sector holding companies of the State of U.P. The opposite party no.1 raised an industrial dispute before the authority designated under the U.P. Industrial Disputes Act, 1947 that his services have been illegally and arbitrarily terminated with effect from 14.11.1994 from the services of the petitioner no.1 where he was working in the factory as Magmaman.

The State Government referred the matter for adjudication to the opposite party no.2 where the same was registered as Adjudication Case No.13 of 1996. Opposite party no.1 filed written statement before the opposite party no.2 wherein the opposite party no.1 claimed the declaration and cancellation of oral termination of the services of the opposite party no.1 with effect from 14.11.1994 and further sought a declaration that opposite party no.1 be declared to be continuing as working on the post of Magmaman continuously since

14.11.1994 and further that the opposite party no.1 may be declared as permanent seasonal Magmaman.

Petitioner no.1 also filed the writtten statement before opposite party no.2 on 9.8.1996 wherein it has been stated that opposite party no.1 is not entitled for any notice in view of Standing Order L-3 nor he was required to be paid salary in view of notice. It has also been stated that the petitioners were entitled to engage persons on daily wage basis and opposite party no.1 has not completed 240 days. Rejoinder reply was filed by opposite party no.1 wherein he has reiterated his allegation as made in the written statement. On behalf of opposite party no.1, opposite party no.1 examined himself and on behalf of petitioner no.1 the time keeper Sri Nand Kishore was examined.

The matter was heard by the opposite party no.2 but failed to appreciate the true facts as stated by the parties. The opposite party no.2 failed to appreciate that the terms and conditions of employment of workman in the Sugar Industry manufacturing sugar by Vacuum Pan Process is governed by the Standing Order issued under Section 3b of the U.P. Industrial Disputes Act, 1947 but the opposite party no.2 in most illegal and arbitrary manner passed the impugned award against the petitioners. Hence this writ petition.

4. Learned counsel for the petitioners submitted that opposite party no.2 alltogether failed to appreciate the fact that under Standing Order as applicable to the Vacuum Pan Industries there is no provision for conversion of status of workman. He next submitted that opposite party no.2 also failed to appreciate that once a workman is engaged as casual or permanent he has to continue with the said

status till employer changes his status in its own discretion.

5. Learned counsel for the petitioners next submitted that opposite party no.2 exceeded his jurisdiction in treating the declaring the opposite party no.1 as Seasonal Workman although the opposite party no.1 himself admitted that he was daily wager engaged on availability of work.

6. Learned counsel for the petitioner next submitted that opposite party no.2 failed to appreciate that no notice is required to be given for terminating the services of the casual workman until the workman qualifies to be entitled to get a notice under Section 6-N of the U.P. Industrial Disputes Act.

7. Learned counsel for the petitioner next submitted that opposite party no.2 failed to appreciate the relevant facts that opposite party no.1 was not getting the retaining allowance nor he was ever claimed for the same and as such, he was not a Seasonal Workman.

8. Learned counsel for the petitioner next submitted that opposite party no.2 also failed to appreciate that in the beginning of the season notice is always sent to all the Seasonal Workmen of the factory which opposite party no.1 has specifically admitted in his statement that same has not been sent to him and as such, the inference of opposite party no.1 being a Seasonal Workman by the opposite party no.2 is conjectures, illegal and without any evidence on the basis of which the opposite party no.1 could have been declared Seasonal Workman.

9. Learned counsel for the petitioner lastly submitted that opposite party no.1

has nowhere stated that he has worked during off after March, 1994 to 14.11.1994 and as such, the finding to the effect that services of the respondent no.1 were terminated on 14.11.1994 is illegal and arbitrary.

10. Per contra, learned counsel for the opposite parties submitted that prior to passing of the termination order dated 14.11.1994 neither notice nor salary of one month's period has been given, therefore award passed by the Labour Court in favour of respondent no.1 is just and proper and is not required to be interfered with.

11. Learned counsel for the respondent no.1 next submitted that the Labour Court has not committed any error of law or jurisdiction in passing the award which is based on the Standing Orders.

12. I have considered the submissions advanced by learned counsel for the parties as well as law report cited by learned counsel for the petitioner.

13. Learned counsel for the petitioner has relied upon the judgment in the case of U.P. State Sugar and Cane Development Corporation Limited (supra), operative portion of which is extracted hereinbelow:

"22. From the facts as set out hereinabove and the submissions made by the respective parties, we are left to decide the question as to whether even in the light of the Tribunal's finding that the work performed by Respondents 2-15 was of a permanent nature on account whereof their services were required throughout the year, it could have declared the said workmen to be permanent or whether such declaration amounted to usurpation of the

management's functions which were beyond its powers.

23. That there are different categories of workers employed in the sugar industries, and, in particular, during the crushing season, is not disputed by any of the parties. It is not denied that part from the permanent workmen, the other categories of workmen are employed during the crushing season which begins in the month of October in a given year and continues till the month of April of the following year. It is the period during which the sugarcane crop is harvested, and, thereafter, transported to different mills where they are crushed for production of sugar. Admittedly, as will appear from Standing Order 2, a muster roll of all employees, who are not permanent, is maintained by the different sugar mills and at the beginning of the crushing season the seasonal labour who had worked during the previous crushing season are asked to join their duties for the crushing season in their old jobs. It is also not denied that the pay scales of the different categories of workmen are different.

24. It has been submitted on behalf of the appellant that even when the seasonal workmen are employed during the off season, they are paid the same wages as are paid to them during the crushing season, which is one of the basic distinctions between them and the permanent workmen who are on the rolls of the sugar mills.

25. It is also an admitted position that in terms of the policy followed by the sugar mills, promotions are given from one category to the next higher category depending on the number of vacancies as are available at a given point of time. Even in the instant case, of the 39 workmen referred to in the terms of reference, 13 had been made permanent by the appellant

which supports the case of the appellant that promotion is given from one category to the higher categories as and when vacancies are available and that such function was clearly a managerial function which could not have been discharged by the Labour Court.

26. We are in the agreement with the views expressed by the Constitution Bench of this Court in Brooke Bond case as also those of the three-Judge Bench in Hindustan Lever Ltd. In our view, this is not a case of fitment depending on the nature of the work performed, but a case of promotion as and when vacancies are available. Both the Labour court as well as Hon'ble Court do not appear to have considered this aspect of the matter with the attention it deserved and proceeded on the basis that this was a case where respondents 2-15 had been denied their right to be categorised as permanent workmen on account of the nature of the work performed by them throughout the year. The High Court has, in fact, merely relied on the findings of the Labour Court without independently applying its mind to the said respect of the matter."

14. Perusal of the above-extracted order reveals that promotion is given from one category to the higher categories as and when vacancies are available and that such function was clearly a managerial function which could not have been discharged by the Labour court.

15. In the case in hands, the opposite party no.1 raised an industrial dispute on the ground that his services have been illegally and arbitrarily terminated with effect from 14.11.1994 from the services of the petitioner no.1 where he was working in the factory as Magmaman. State Government referred the matter to opposite

party no.2 where the same was registered as Adjudication Case No.13 of 1996 in which the opposite party no.2 has been pleased to declare that the opposite party no.1 is entitled to get the benefits of retrenched workman under Section 6-N of the U.P. Industrial Disputes Act, 1947.

16. I have examined the material on record in the light of the law report cited by learned counsel for the petitioner.

17. The opposite party no.1 has not completed 240 days and he was not a seasonal workman as have been averred in the written statement filed by the petitioner no.1. Working for more than 240 days in a year was relevant only for the purpose of application of Section 6-N of the U.P. Industrial Disputes, 1947 providing for conditions precedent to workman to retrench the workman. It does not speak of acquisition of a right by the workman to be regularized in service. In this view of the matter, Labour Court while passing the impugned award, has not considered this aspect that the opposite party no.1 has not completed 240 days' working in a year.

18. It is not denied that part from the permanent workmen, the other categories of workmen are employed during the crushing season which begins in the month of October in a given year and continues till the month of April of the following year. It is the period during which the sugarcane crop is harvested, and, therefore, transported to different mills where they are crushed for production of sugar.

19. Admittedly, as will appear from Standing Order 2, a muster roll of all employees, who are not permanent, is maintained by the different sugar mills and at the beginning of the crushing season the

seasonal labour who had working during the previous crushing season are asked to join their duties for the crushing season in their old jobs. It is also not denied that the pay scale of the different categories of workmen are different.

20. Even when the seasonal workmen are employed during the off season, they are paid the same wages as are paid to them during the crushing season, which is one of the basic distinctions between them and the permanent workmen who are on the rolls of the sugar mills.

21. It is also admitted position that in terms of the policy followed by the sugar mills, promotions are given from one category to next higher category depending on the number of vacancies as available at a given point of time. The promotion is given from one category to the higher categories as and when vacancies are available and that such function was clearly a managerial function which could not have been discharged by the Labour Court. In this view of the matter, the Labour has committed grave illegality in declaring the respondent no.1 as Seasonal Workman, although the respondent no.1 himself admitted that he was daily wager engaged on availability of work.

22. In order to judge the entitlement of the workmen to be declared seasonal under the Standing Orders, the Labour Court was required to examine whether on the evidence before it, the workmen or one or more of them fulfill the requirements of being seasonal hand(s) as defined under Clause B-1(2) of the Standing Orders. It would also have to be determined whether the requirement of probation envisaged under Clause B-1(4) are fulfilled on the evidence before the Labour Court in case of

workman, and if he was entitled to the status of seasonal employee.

23. The Labour Court on the evidence led before it and the adverse inference it has drawn due to non-production of record by the employer, despite an application by the workmen in that behalf, could possibly have held that the workmen have worked with the employer for the whole of the crushing seasons and completed the probationary period, entitling him to the status of seasonal workmen. But, that specific finding has not been recorded. In the absence of a finding to the effect that the workman has worked for the crushing seasons in accordance with his case and has completed his probation period envisaged under Clause B-1(4) of the Standing Orders- at least a finding that the workman has been engaged for a certain crushing season and completed his probationary period- the Labour Court could not have granted seasonal status to the workman under the Standing Orders. In absence of that finding, the impugned award is rendered manifestly illegal.

24. Thus, the findings in the impugned award are not based on any legal evidence and also not supported by valid reasons. Principles laid down in the aforesaid judgment clearly apply on the facts of the present case.

25. Considering in totalities of facts and circumstances of the case, this writ petition is allowed. Award dated 21.4.2004 passed by the opposite party no.2 (Annexure-1 to this writ petition) is hereby quashed, remanding the matter to the opposite party no.2 to decide the case afresh in accordance with law and in the light of the observations made in the body of this judgment, as expeditiously as possible

preferably within a period of six months from the date a certified copy of this judgment is filed by the petitioners before him.

26. It is made open to both the parties to lead such further evidence, particularly, documentary in support of their respective cases, as may be advised. The Labour Court shall consider all evidence before it including any further evidence, if led, as directed hereby, before making a fresh award. It is also made clear that all submissions advanced before this Court would remain open to the parties to urge before the Labour Court, except the one relating to lack of jurisdiction with the Labour Court to pronounce upon the workmen's case that he is seasonal workman, and not temporary. It is also clarified that the possibility of one inference that the Labour could have drawn from the evidence in favour of workman mentioned hereinabove, shall in no way be construed as an expression of opinion on this issue. The Labour Court shall be absolutely free to draw its own conclusions on the issue, whether the workmen on the evidence on record is entitled to the status of seasonal workmen under the Standing Orders.

27. There shall be no order as to costs in any of writ petitions decided today.

(2023) 8 ILRA 869
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.08.2023

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-A No. 3180 of 2023

Prof. Ranjana Sharma & Anr. ...Petitioners

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioners:

Abhineet Jaiswal, Gaurav Mehrotra

Counsel for the Respondents:

C.S.C.

A. Service Law – Constitution of India – Article 300-A – UP Retirement Benefits Rules, 1961 – Rules 5 and 9 – Right to property – Gratuity and pension – Depriving the petitioner by an executive order – Permissibility – Held, right to pension and gratuity flow in favour of the petitioners by virtue of the mandate of Rules, 1961 – Taking away the gratuity by an executive order is not permissible – High Court held it clear violation of Article 300-A of the Constitution of India – *Dr. Hira Lal's case* and *Jitendra Kumar Srivastava's case* relied upon. (Para 14, 15, 16 and 20)

B. Service Law – Constitution of India – Article 14 – Right to equality – Discrimination – While the petitioner, being doctor of a medical college was refused to get the benefit of gratuity, the same benefit has been granted to the doctors working in the Provincial Health Services even when the age of such doctors were increased from 60 to 62 years and were paid salaries for the extended period – Held, it is a clear violation of Article 14. (Para 20)

Writ petition allowed. (E-1)

List of Cases cited:

1. Dr. Hira Lal Vs St. of Bihar & ors.; (2020) 4 SCC 346
2. St. of Jharkhand & ors. Vs Jitendra Kumar Srivastava & anr.; (2013) 12 SCC 210

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

1. Heard Sri Gaurav Mehrotra, learned Counsel for the petitioners and learned Standing Counsel.

2. Despite stop order passed on 23.05.2023 granting four weeks' and no more time to file counter affidavit, the State has chosen not to file the counter affidavit. The instructions have been produced by the learned Standing Counsel indicating the reasons, as to why, the claim of the gratuity is not being paid to the petitioners. The said instructions are taken on record and the matter is decided finally as the issue hinges upon the interpretation of legal grounds, there being no dispute on facts.

3. The facts in brief are that the petitioners no.1 and 2 were appointed in the Ganesh Shankar Vidyarthi Memorial Medical College, Kanpur and in the Medical College, Meerut respectively and continued to serve till attaining the age of superannuation, however, the State Government with a view to tide over the requirement of super specialty doctors, issued a Government Order dated 06.02.2015 increasing the age of retirement from 60 years to 65 years, a copy whereof has been filed as (Annexure-7) to the writ petition. It appears from the record that on attaining the age of superannuation i.e. 60 years, the petitioner no.2 applied for voluntary retirement, however, no orders were passed and both the petitioners, in the absence of any order on the voluntary retirement application of petitioner no.2, continued to serve till they attained the age of 65 years. After the retirement, the grievance of the petitioners is that they have not been paid the death-cum-retirement gratuity, to which, they are entitled as well as the benefit of commutation of pension. It bears from record that a doctor similarly placed who was denied the said benefit had approached this Court by filing Writ-A No.281 of 2022 (Dr. Suneel Kumar Garg vs State of U.P. and others), which was disposed off, vide

order dated 10.02.2022, directing the respondents State Government to take a decision on the grievance of the petitioner of Writ-A No.281 of 2022. In response to the said directions, an order came to be passed on 13.12.2022 in respect of the said petitioner of Writ-A No.281 of 2022 denying the benefits of payment of gratuity to him. In the order dated 13.12.2022, the reasons recorded for denying the said benefits are contained in paragraph 3 of the said order noticing that it came to the knowledge of the authority that in similar circumstances in respect of the teachers working with Basic Shiksha, Madhyamik Shiksha, High Education and Technical Education where the age of retirement was extended but the gratuity is not being paid to the said persons and drawing parallel from that, the petitioners, whose services were extended from 60 years to 65 years also do not appear to be entitled for payment of gratuity. The said order further records that the petitioners were will within their rights to have opted for voluntary retirement despite knowing their rights, continued to work till 65, thus they were not entitled for gratuity. Based upon the said reasoning, the representation of the petitioner Dr. Suneel Kumar Garg stood rejected.

4. The contention of the Counsel for the petitioner Gaurav Mehrotra is that the petitioners are similarly situated as Dr. Suneel Kumar Garg, whose representation for payment of gratuity was rejected. The reasoning recorded for non-payment of the gratuity would squarely apply to the petitioner no.2 and partly on the petitioner no.1 and, thus, the present petition has been filed seeking the benefit of death-cum-retirement gratuity and the benefit of commutation of pension and that this Court may decide the issue as the stand of the State is now clear.

5. Sri Gaurav Mehrotra, learned Counsel for the petitioners argues that the entitlement of the death-cum-retirement gratuity and commutation of pension flow in favour of the petitioners in terms of the Uttar Pradesh Retirement Benefit Rules, 1961 (hereinafter referred to as 'the 1961 Rules') and the same could not have been taken away except in accordance with law, as according to him, the gratuity and pension are the rights which cannot be taken away except in accordance with 'law' in terms of the mandate of Article 300-A of the Constitution of India. He argues that there is no 'law' framed by the State in pursuance to the mandate of Article 300-A so as to deny the benefit of gratuity. He further argues that reasoning as are available and discerned from the document on record that the benefit of gratuity has been denied to the petitioners in terms of the executive order passed by the State Government on 01.04.2021 wherein, in respect of the grant of pension and gratuity as well as commutation, the resolution and the decision of the KGMU University dated 19.07.2019 was adopted by the State Government with regard to the pension, gratuity and commutation. He draws my attention to the decision taken by the KGMU in respect of the grant of benefit including the commutation of pension, gratuity and pension in respect of persons who had served after the date of retirement for an extended period of five years a decision was taken by the University that they would not be entitled to the benefit of gratuity and the commutation of pension.

6. He argues that the decision of the University has been adopted by the State Government but the same would still not fall within the scope of 'law', which is required to deny or take away the benefit in terms of the mandate of Article 300A. He

places reliance on the judgment in the case of ***Dr. Hira Lal vs State of Bihar and others; (2020) 4 SCC 346.***

7. In the light of the said and on the foundation of Article 300A, Sri Gaurav Mehrotra argues that on the one hand, the petitioners were made to serve without taking any consent from them, only to serve the interest of the State and the petitioners continued to serve till they attained the age of 65 years and on the other hand, they have been denied the benefit, which flow in their favour in terms of the statutory Rules without any authority of law and thus, the action of the State is wholly arbitrary and illegal and violates the Constitutional rights of the petitioners.

8. In context of petitioner no.2, who had applied for voluntary retirement, he argues that it was the State, who had to pass an order on the application of the voluntary retirement, which the State conveniently failed to do so and on account of the said failure, the petitioner no.2 forced to continue to serve till the age of 65 years.

9. It appears from the record that the entire amount of gratuity, as claimed by the petitioners, in terms of the Rule of 1961, stands denied to the petitioners merely on the ground that they continued in service till 65 years and for which they were paid their salaries in accordance with law.

10. The Counsel for the petitioner argues that in respect of the Provincial Medical Services, the age of the doctors was increased from 60 to 62 years, however, the benefit of gratuity was extended to them and was not denied and thus, too that extent, there is a violation of the rights guaranteed under Article 14 of

the Constitution of India in respect of the petitioners.

11. Learned Standing Counsel has produced the instructions, which are taken on record, and prays for further time to file counter affidavit, however, as this Court had passed a stop order, coupled with the fact that the defence for denying the benefits of gratuity has been brought on record by means of the instructions, no useful purpose would be served in granting further time, as the instructions specifically records that on strength of the order dated 19.07.2019 passed in the case of KGMU and duly adopted by the State Government through an administrative order dated 01.04.2021, the petitioners were not entitled to any gratuity and thus, the claim of the petitioners deserved to be rejected.

12. In the light of the pleadings and arguments as recorded above, this Court is to decide "whether the benefit of gratuity and pension is a property of the petitioners and whether, it can be denied to the petitioners by an administrative order in violation of Constitutional Rights under Article 300A of the Constitution of India".

13. Article 300-A of the Constitution of India is quoted below:

"300A. Persons not to be deprived of property save by authority of law. - No person shall be deprived of his property save by authority of law."

14. All the issues as raised and arise in the present petition are squarely covered by the judgment of the Hon'ble Supreme Court in the case of ***State of Jharkhand and others vs Jitendra Kumar Srivastava and another; (2013) 12 SCC 210***, wherein while deciding the issue "as to whether

pension and gratuity amounts to property and whether the same can be taken away without framing a law as defined under Article 300-A, the Hon'ble Supreme Court observed as under:

"14. The right to receive pension was recognised as a right to property by the Constitution Bench judgment of this Court in Deokinandan Prasad v. State of Bihar [(1971) 2 SCC 330 : 1971 Supp SCR 634] , as is apparent from the following discussion: (SCC pp. 342-43, paras 27-33)

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

28. According to the petitioner the right to receive pension is property and the respondents by an executive order dated 12-6-1968 have wrongfully withheld his pension. That order affects his fundamental rights under Articles 19(1)(f) and 31(1) of the Constitution. The respondents, as we have already indicated, do not dispute the right of the petitioner to get pension, but for the order passed on 5-8-1996. There is only a bald averment in the counter-affidavit that no question of any fundamental right arises for consideration. Mr Jha, learned counsel for the respondents, was not prepared to take up the position that the right to receive pension cannot be considered to be property under any circumstances. According to him, in this case, no order has been passed by the State granting pension. We understood the learned counsel to urge that if the State had passed an order

granting pension and later on resiles from that order, the latter order may be considered to affect the petitioner's right regarding property so as to attract Articles 19(1)(f) and 31(1) of the Constitution.

29. We are not inclined to accept the contention of the learned counsel for the respondents. By a reference to the material provisions in the Pension Rules, we have already indicated that the grant of pension does not depend upon an order being passed by the authorities to that effect. It may be that for the purposes of qualifying the amount having regard to the period of service and other allied matters, it may be necessary for the authorities to pass an order to that effect, but the right to receive pension flows to an officer not because of the said order but by virtue of the rules. The rules, we have already pointed out, clearly recognise the right of persons like the petitioners to receive pension under the circumstances mentioned therein.

30. The question whether the pension granted to a public servant is property attracting Article 31(1) came up for consideration before the Punjab High Court in Bhagwant Singh v. Union of India [AIR 1962 Punj 503]. It was held that such a right constitutes 'property' and any interference will be a breach of Article 31(1) of the Constitution. It was further held that the State cannot by an executive order curtail or abolish altogether the right of the public servant to receive pension. This decision was given by a learned Single Judge. This decision was taken up in letters patent appeal by the Union of India. The Letters Patent Bench in its decision in Union of India v. Bhagwant Singh [ILR (1965) 2 Punj 1] approved the decision of the learned Single Judge. The Letters Patent Bench held that the pension granted to a public servant on his retirement is 'property' within the meaning of Article

31(1) of the Constitution and he could be deprived of the same only by an authority of law and that pension does not cease to be property on the mere denial or cancellation of it. It was further held that the character of pension as 'property' cannot possibly undergo such mutation at the whim of a particular person or authority.

31. The matter again came up before a Full Bench of the Punjab and Haryana High Court in K.R. Erry v. State of Punjab [AIR 1967 Punj 279 : ILR (1967) 1 Punj 278]. The High Court had to consider the nature of the right of an officer to get pension. The majority quoted with approval the principles laid down in the two earlier decisions of the same High Court, referred to above, and held that the pension is not to be treated as a bounty payable on the sweet will and pleasure of the Government and that the right to superannuation pension including its amount is a valuable right vesting in a government servant. It was further held by the majority that even though an opportunity had already been afforded to the officer on an earlier occasion for showing cause against the imposition of penalty for lapse or misconduct on his part and he has been found guilty, nevertheless, when a cut is sought to be imposed in the quantum of pension payable to an officer on the basis of misconduct already proved against him, a further opportunity to show cause in that regard must be given to the officer. This view regarding the giving of further opportunity was expressed by the learned Judges on the basis of the relevant Punjab Civil Service Rules. But the learned Chief Justice in his dissenting judgment was not prepared to agree with the majority that under such circumstances a further opportunity should be given to an officer when a reduction in the amount of pension

payable is made by the State. It is not necessary for us in the case on hand, to consider the question whether before taking action by way of reducing or denying the pension on the basis of disciplinary action already taken, a further notice to show cause should be given to an officer. That question does not arise for consideration before us. Nor are we concerned with the further question regarding the procedure, if any, to be adopted by the authorities before reducing or withholding the pension for the first time after the retirement of an officer. Hence we express no opinion regarding the views expressed by the majority and the minority Judges in the above Punjab High Court decision on this aspect. But we agree with the view of the majority when it has approved its earlier decision that pension is not a bounty payable on the sweet will and pleasure of the Government and that, on the other hand, the right to pension is a valuable right vesting in a government servant.

32. *This Court in State of M.P. v. Ranojirao Shinde [AIR 1968 SC 1053 : (1968) 3 SCR 489] had to consider the question whether a 'cash grant' is 'property' within the meaning of that expression in Articles 19(1)(f) and 31(1) of the Constitution. This Court held that it was property, observing 'it is obvious that a right to sum of money is property'.*

33. *Having due regard to the above decisions, we are of the opinion that the right of the petitioner to receive pension is property under Article 31(1) and by a mere executive order the State had no power to withhold the same. Similarly, the said claim is also property under Article 19(1)(f) and it is not saved by clause (5) of Article 19. Therefore, it follows that the order dated 12-6-1968, denying the petitioner right to receive pension affects the fundamental right of the petitioner under Articles*

19(1)(f) and 31(1) of the Constitution, and as such the writ petition under Article 32 is maintainable. It may be that under the Pension Act (23 of 1871) there is a bar against a civil court entertaining any suit relating to the matters mentioned therein. That does not stand in the way of writ of mandamus being issued to the State to properly consider the claim of the petitioner for payment of pension according to law."

15. *In State of W.B. v. Haresh C. Banerjee [(2006) 7 SCC 651 : 2006 SCC (L&S) 1719] this Court recognised that even when, after the repeal of Article 19(1)(f) and Article 31(1) of the Constitution vide Constitution (Forty-fourth Amendment) Act, 1978 w.e.f. 20-6-1979, the right to property no longer remained a fundamental right, it was still a constitutional right, as provided in Article 300-A of the Constitution. Right to receive pension was treated as right to property. Otherwise, challenge in that case was to the vires of Rule 10(1) of the West Bengal Services (Death-cum-Retirement Benefit) Rules, 1971 which conferred the right upon the Governor to withhold or withdraw a pension or any part thereof under certain circumstances and the said challenge was repelled by this Court.*

16. *The fact remains that there is an imprimatur to the legal principle that the right to receive pension is recognised as a right in "property". Article 300-A of the Constitution of India reads as under:*

"300-A. Persons not to be deprived of property save by authority of law.—No person shall be deprived of his property save by authority of law."

Once we proceed on that premise, the answer to the question posed by us in the beginning of this judgment becomes too obvious. A person cannot be deprived of this pension without the authority of law,

which is the constitutional mandate enshrined in Article 300-A of the Constitution. It follows that attempt of the appellant to take away a part of pension or gratuity or even leave encashment without any statutory provision and under the umbrage of administrative instruction cannot be countenanced.

17. It hardly needs to be emphasised that the executive instructions are not having statutory character and, therefore, cannot be termed as “law” within the meaning of the aforesaid Article 300-A. On the basis of such a circular, which is not having force of law, the appellant cannot withhold even a part of pension or gratuity. As we noticed above, so far as statutory Rules are concerned, there is no provision for withholding pension or gratuity in the given situation. Had there been any such provision in these Rules, the position would have been different.”

15. Similarly in the case of **Dr. Hira Lal (Supra)**, while deciding an identical issue, the Hon’ble Supreme Court observed as under:

“18. In our considered view, the Circulars dated 22-8-1974 and 31-10-1974, and Government Resolution No. 3104 dated 31-7-1980, were merely administrative instructions/executive orders. They were not issued in exercise of the power under Article 309 of the Constitution and cannot be said to have the force of law.

19. The Government Resolution dated 31-7-1980 came up for consideration before this Court in *State of Jharkhand v. Jitendra Kumar Srivastava* [State of Jharkhand v. Jitendra Kumar Srivastava, (2013) 12 SCC 210 : (2014) 1 SCC (Civ) 315 : (2014) 2 SCC (L&S) 570]. After considering Rule 43(b) of the Bihar

Pension Rules and Government Resolution No. 3104 dated 31-7-1980, this Court held that the State had no authority or power to withhold the full amount of pension or gratuity of a government servant during the pendency of judicial or departmental proceedings. This Court held that : (SCC pp. 216-17 & 220-21, paras 9-11, 13 & 16-17)

“9. Having explained the legal position, let us first discuss the rules relating to release of pension.

10. The present case is admittedly governed by the Bihar Pension Rules, as applicable to the State of Jharkhand. Rule 43(b) of the said Pension Rules confers power on the State Government to withhold or withdraw a pension or part thereof under certain circumstances. This Rule 43(b) reads as under:

* * *

11. From the reading of the aforesaid Rule 43(b), following position emerges:

(i) The State Government has the power to withhold or withdraw pension or any part of it when the pensioner is found to be guilty of grave misconduct either in a departmental proceeding or judicial proceeding.

(ii) This provision does not empower the State to invoke the said power while the departmental proceeding or judicial proceeding are pending.

(iii) The power of withholding leave encashment is not provided under this Rule to the State irrespective of the result of the above proceedings.

(iv) This power can be invoked only when the proceedings are concluded finding guilty and not before.

* * *

13. A reading of Rule 43(b) makes it abundantly clear that even after the conclusion of the departmental inquiry, it is permissible for the Government to withhold

pension, etc. [Ed. : The matter between two asterisks has been emphasised in original.] Only [Ed. : The matter between two asterisks has been emphasised in original.] when a finding is recorded either in departmental inquiry or judicial proceedings that the employee had committed grave misconduct in the discharge of his duty while in his office. There is no provision in the Rules for withholding of the pension/gratuity when such departmental proceedings or judicial proceedings are still pending.

* * *

16. ... A person cannot be deprived of this pension without the authority of law, which is the Constitutional mandate enshrined in Article 300-A of the Constitution. It follows that attempt of the appellant to take away a part of pension or gratuity or even leave encashment without any statutory provision and under the umbrage of administrative instruction cannot be countenanced.

17. It hardly needs to be emphasised that the executive instructions are not having statutory character and, therefore, cannot be termed as "law" within the meaning of the aforesaid Article 300-A. On the basis of such a circular, which is not having force of law, the appellant cannot withhold even a part of pension or gratuity. As we noticed above, so far as statutory Rules are concerned, there is no provision for withholding pension or gratuity in the given situation. Had there been any such provision in these Rules, the position would have been different." (emphasis supplied)

It was held that pension is "property" within the meaning of Article 300-A of the Constitution, and executive instructions which do not have any statutory sanction cannot be termed as "law" within the meaning of Article 300-A. It was further held that in the absence of statutory rules

permitting withholding of pension or gratuity, the State could not do so by way of executive instructions. It was observed that : (Jitendra Kumar Srivastava case [State of Jharkhand v. Jitendra Kumar Srivastava, (2013) 12 SCC 210 : (2014) 1 SCC (Civ) 315 : (2014) 2 SCC (L&S) 570] , SCC p. 221, para 17)

"17. ... so far as statutory Rules are concerned, there is no provision for withholding pension or gratuity in the given situation. Had there been any such provision in these Rules, the position would have been different." (emphasis supplied)

22. It is well settled that the right to pension cannot be taken away by a mere executive fiat or administrative instruction. Pension and gratuity are not mere bounties, or given out of generosity by the employer. An employee earns these benefits by virtue of his long, continuous, faithful and unblemished service. [State of Jharkhand v. Jitendra Kumar Srivastava, (2013) 12 SCC 210 : (2014) 1 SCC (Civ) 315 : (2014) 2 SCC (L&S) 570] The right to receive pension of a public servant has been held to be covered under the "right to property" under Article 31(1) of the Constitution by a Constitution Bench of this Court in Deokinandan Prasad v. State of Bihar [Deokinandan Prasad v. State of Bihar, (1971) 2 SCC 330 : 1971 Supp SCR 634] , which ruled that : (Deokinandan Prasad case [Deokinandan Prasad v. State of Bihar, (1971) 2 SCC 330 : 1971 Supp SCR 634] , SCC pp. 343-44, paras 30-31 & 33)

"30. The question whether the pension granted to a public servant is property attracting Article 31(1) came up for consideration before the Punjab High Court in Bhagwant Singh v. Union of India [Bhagwant Singh v. Union of India, 1962 SCC OnLine P&H 27 : AIR 1962 P&H 503] . It was held that such a right

constitutes “property” and any interference will be a breach of Article 31(1) of the Constitution. It was further held that the State cannot by an executive order curtail or abolish altogether the right of the public servant to receive pension. This decision was given by a learned Single Judge. This decision was taken up in letters patent appeal by the Union of India. Letters Patent Bench in its decision in *Union of India v. Bhagwant Singh* [Union of India v. Bhagwant Singh, 1964 SCC OnLine P&H 275 : ILR (1965) 2 P&H 1] approved the decision of the learned Single Judge. The Letters Patent Bench held that the pension granted to a public servant on his retirement is “property” within the meaning of Article 31(1) of the Constitution and he could be deprived of the same only by an authority of law and that pension does not cease to be property on the mere denial or cancellation of it. It was further held that the character of pension as “property” cannot possibly undergo such mutation at the whim of a particular person or authority.

31. The matter again came up before a Full Bench of the Punjab and Haryana High Court in *K.R. Erry v. State of Punjab* [K.R. Erry v. State of Punjab, 1966 SCC OnLine P&H 255 : ILR (1967) 1 P&H 278] . The High Court had to consider the nature of the right of an officer to get pension. The majority quoted with approval the principles laid down in the two earlier decisions [*Bhagwant Singh v. Union of India*, 1962 SCC OnLine P&H 27 : AIR 1962 P&H 503] , [*Union of India v. Bhagwant Singh*, 1964 SCC OnLine P&H 275 : ILR (1965) 2 P&H 1] of the same High Court, referred to above, and held that the pension is not to be treated as a bounty payable on the sweet will and pleasure of the Government and that the right to superannuation pension including

its amount is a valuable right vesting in a government servant. It was further held by the majority that even though an opportunity had already been afforded to the officer on an earlier occasion for showing cause against the imposition of penalty for lapse or misconduct on his part and he has been found guilty, nevertheless, when a cut is sought to be imposed in the quantum of pension payable to an officer on the basis of misconduct already proved against him, a further opportunity to show cause in that regard must be given to the officer. This view regarding the giving of further opportunity was expressed by the learned Judges on the basis of the relevant Punjab Civil Service Rules. But the learned Chief Justice in his dissenting judgment was not prepared to agree with the majority that under such circumstances a further opportunity should be given to an officer when a reduction in the amount of pension payable is made by the State. It is not necessary for us in the case on hand to consider the question whether before taking action by way of reducing or denying the pension on the basis of disciplinary action already taken, a further notice to show cause should be given to an officer. That question does not arise for consideration before us. Nor are we concerned with the further question regarding the procedure, if any, to be adopted by the authorities before reducing or withholding the pension for the first time after the retirement of an officer. Hence, we express no opinion regarding the views expressed by the majority and the minority Judges in the above Punjab High Court decision on this aspect. But we agree with the view of the majority when it has approved its earlier decision that pension is not a bounty payable on the sweet will and pleasure of the Government and that, on the other hand, the right to pension is a valuable right vesting in a government servant.

33. Having due regard to the above decisions, we are of the opinion that the right of the petitioner to receive pension is property under Article 31(1) and by a mere executive order the State had no power to withhold the same. Similarly, the said claim is also property under Article 19(1)(f) and it is not saved by clause (5) of Article 19. Therefore, it follows that the order, dated 12-6-1968, denying the petitioner right to receive pension affects the fundamental right of the petitioner under Articles 19(1)(f) and 31(1) of the Constitution, and as such the writ petition under Article 32 is maintainable.”

(emphasis supplied)

23. The aforesaid judgment was followed in *D.S. Nakara v. Union of India* [*D.S. Nakara v. Union of India*, (1983) 1 SCC 305 : 1983 SCC (L&S) 145] by another Constitution Bench of this Court, which held that : (SCC pp. 320 & 323-24, paras 20, 29 & 31)

“20. The antiquated notion of pension being a bounty, a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in *Deokinandan Prasad v. State of Bihar* [*Deokinandan Prasad v. State of Bihar*, (1971) 2 SCC 330 : 1971 Supp SCR 634] : wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon anyone's discretion. It is only for the purpose of quantifying the amount

having regard to service and other allied matters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was reaffirmed in *State of Punjab v. Iqbal Singh* [*State of Punjab v. Iqbal Singh*, (1976) 2 SCC 1 : 1976 SCC (L&S) 172] .

29. Summing up it can be said with confidence that pension is not only compensation for loyal service rendered in the past, but pension also has a broader significance, in that it is a measure of socio-economic justice which inheres economic security in the fall of life when physical and mental prowess is ebbing corresponding to aging process and, therefore, one is required to fall back on savings. One such saving in kind is when you give your best in the heyday of life to your employer, in days of invalidity, economic security by way of periodical payment is assured. The term has been judicially defined as a stated allowance or stipend made in consideration of past service or a surrender of rights or emoluments to one retired from service. Thus, the pension payable to a government employee is earned by rendering long and efficient service and therefore can be said to be a deferred portion of the compensation or for service rendered. In one sentence one can say that the most practical *raison d'être* for pension is the inability to provide for oneself due to old age. One may live and avoid unemployment but not senility and penury if there is nothing to fall back upon.

31. From the discussion three things emerge : (i) that pension is neither a bounty nor a matter of grace depending upon the sweet will of the employer and

that it creates a vested right subject to 1972 Rules which are statutory in character because they are enacted in exercise of powers conferred by the proviso to Article 309 and clause (5) of Article 148 of the Constitution; (ii) that the pension is not an ex gratia payment but it is a payment for the past service rendered; and (iii) it is a social welfare measure rendering socio-economic justice to those who in the heyday of their life ceaselessly toiled for the employer on an assurance that in their old age they would not be left in lurch.”

(emphasis supplied)

24. *The right to receive pension has been held to be a right to property protected under Article 300-A of the Constitution even after the repeal of Article 31(1) by the Constitution (Forty-Fourth Amendment) Act, 1978 w.e.f. 20-6-1979, as held in State of W.B. v. Haresh C. Banerjee [State of W.B. v. Haresh C. Banerjee, (2006) 7 SCC 651 : 2006 SCC (L&S) 1719].”*

16. In the present case, the right to pension and gratuity flow in favour of the petitioners by virtue of the mandate of The Uttar Pradesh Retirement Benefits Rules, 1961 (in short ‘1961 Rules’) and particularly Rule 5 thereof, which is as under:

“5. Death-cum-Retirement Gratuity.-

(1) An officer may, on retirement, be paid an additional gratuity, the amount of which shall, subject to a maximum of 16-1/2 times the emoluments, be an amount equal to one-fourth of the emoluments multiplied by the total number of completed six monthly periods of qualifying service.

(2) If an officer dies while in service, a gratuity, the amount of which shall, subject to a minimum of 12 times and a maximum of 16-1/2 times the emoluments, be an

amount equal to one-fourth of the emoluments of the officer multiplied by the total number of six monthly periods of qualifying service, shall be paid to the person or persons on whom the right to receive the gratuity is conferred under sub-rule (1) to (8) of Rule 6 and if there is no such person, it shall be paid in the manner indicated in sub-rule (9) of that rule.

(3) If an officer who has become eligible for or has actually received, a pension or gratuity under part I of these Rules, dies within a period of five years from the date of retirement and the aggregate of any sums admissible to him or actually received by him till the time of death on account of such gratuity or pension together with the gratuity granted under sub-rule (1) and the commuted value of any portion of pension commuted by him is less than the amount equal to 12 times his "emoluments" a gratuity equal to the deficiency shall be granted to the person or persons referred to in sub-rule (2).

(4) The amount of gratuity admissible in accordance with sub-rule (1) or sub-rule (2) above shall in no case, exceed Rs.36,000 and the emoluments exceeding Rs.2,500 per month shall be ignored in computing the amount of such gratuity.

[Clause 4 amended vide Government order dated 23.12.2016]

17. Similarly the rights of commutation of pension flow in favour of the petitioner by virtue of Rule 8 of the 1961 Rules, which is quoted hereinbelow:

“8. Commutation.-Facilities for commuting pension in accordance with the Uttar Pradesh Civil Pension (Commutation) Rules will continue, but the maximum amount of pension which may be committed will be restricted to one- third of

the pension admissible under Part 1 of these Rules.

Provided that where option had been exercised under Rule 11, the maximum amount of pension which may be commuted will be restricted to one-third of the pension admissible after deduction of the pension equivalent of death-cum-retirement gratuity subject to the condition that the pension actually payable after commutation is not in any case less than one-half of the pension admissible under Article 474 and 474-A of the Civil Service Regulations:

Provided further that the pension actually payable after commutation is not less than Rs. 20."

18. The rights as conferred in favour of the petitioner by virtue of Rule 5 can be denied only when the circumstances enumerated in Rule 9 of the said 1961 Rules are made out. Rule 9 is quoted hereinbelow:

9. Miscellaneous.-(1) Government will have the right to effect recoveries from a gratuity or family pension sanctioned under Parts II and III in the same circumstances as recoveries can be effected from an ordinary pension under Article 351-A of the Civil Service Regulations.

(2) No gratuity or family pension may be granted-under Parts II and III if the officer was dismissed or removed for misconduct, insolvency or inefficiency. Compassionate grant may, however, be made under these Parts in accordance with Article 353 of the Civil Service Regulations.

(3) A gratuity or family pension shall be sanctioned under parts II and III after giving due regard to the provisions of Article 470 of the Civil Service Regulations.

(4) Death-cum-retirement gratuity admissible in addition to pension calculated at the rate given in the annexure shall be treated as gift and recoveries of any Government dues may be effected from the same.

(5) The existing rules which apply to the grant of an ordinary pension shall also apply in respect of a gratuity or family pension that may be sanctioned under parts II and III in so far as such rules are not inconsistent with the Rules."

19. Admittedly none of the conditions specified in Rule 9 are present in respect of the petitioners of the present case.

20. The gratuity are proposed to be taken away by an executive order dated 01.04.2021, as referred above, is neither permissible nor can be done in view of the judgments as quoted above and squarely applicable to the facts of the present case, as such, there is a clear violation of Article 300-A of the Constitution of India. Further more, the State Government has itself granted the benefits of gratuity to the doctors working in the Provincial Health Services even when the age of such doctors were increased from 60 to 62 years and were paid salaries for the extended period, as such, to that extent, there is a clear violation of Article 14 also. Thus on both the reasoning i.e. violation of Article 300-A and Article 14, the petition deserves to be allowed and is accordingly **allowed**.

21. The respondents are directed to pay the gratuity to both the petitioners to which they are entitled ignoring the Government Order dated 01.04.2021 within a period of three months from the date of production of a certified copy of this order.

22. The respondents shall ensure the payment of interest on the amount of

gratuity from the date of retirement till actual payment/ realization @ 7% per annum.

23. As regards the commutation of pension, the respondents shall take a decision on the application for commutation of pension in respect of both the petitioners within a period of three months as per law.

(2023) 8 ILRA 881
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.08.2023

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ-A No. 5564 of 2023

Surendra Kumar ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Ajay Pandey

Counsel for the Respondents:
A.S.G.I., Kushagra Dikshit

A. Service Law – Administrative Tribunal Act, 1985 – Section 22 (3) – Central Administrative Tribunal (Procedure) Rules, 1987 – R. 17 – Limitation Act, 1963 – Ss. 5 and 29 – Exercise of review power – Belated Review Petition was filed along with Delay Condonation Application – Maintainability – Tribunal rejected the application on the ground of lack of provision relating to condonation of delay – Validity challenged – Earlier, the High Court has given liberty to petitioner to file review application before Tribunal – Effect – Held, having traced the review making power of the Tribunal, it can be safely deduced that neither section 22 of the Act, which gives the power of review to an

Administrative Tribunal, nor rule 17, which provides for application of review, expressly excludes the applicability of the Limitation Act – Provisions of S. 5 of the Limitation Act would be applicable to a review Application filed before the Administrative Tribunal – An application for condonation of delay in Review Application is maintainable. (Para 9, 28, 35 and 46)

Writ petition allowed. (E-1)

List of Cases cited:

1. Akshaya Kumar Parida Vs U.O.I. & ors.; AIR 2015 Orissa 49
2. Haris K.M. & ors. Vs Jahfar & ors.; 2020 SCC Online Ker 4009
3. Ajit Kumar Rath Vs St. of Orissa; (1999) 9 SCC 596
4. Gopalbandhu Biswal Vs Krishna Chandra Mohanty; (1998) 4 SCC 447
5. N. Balakrishnan Vs M. Krishnamurthy; (1998) 7 SCC 123
6. Mangu Ram Vs Municipal Corporation Delhi; (1976) 1 SCC 392
7. Mukri Gopalan Vs C.P. Aboobacker; (1995) 5 SCC 5
8. Commissioner of Sales Tax, U.P. Vs Madan Lal Dan & Sons. Bareilly; (1977 (1) SCR 683
9. Commissioner of Sales Tax, U.P. Vs Madan Lal Dan & Sons. Bareilly; (1977 (1) SCR 683
10. B. Madhuri Goud Vs B. Damodar Reddy; (2012) 12 SCC 693
11. C. Nara Simha Rao Vs Regional Joint Director of School Education; 2003 SCC Online AP 1068
12. K. Ajit Babu & ors. Vs U.O.I.; (1997) 6 SCC 473
13. W.P (c) 3034/2021; U.O.I. & ors. Vs Chanchal Nag decided on 27-03-2023
14. S.S. Rathore Vs St. of M. P.; (1989) 4 SCC 582
15. U.O.I. & ors. Vs Central Administrative Tribunal; (2002) SCC Online Cal 597

16. Civil Appeal No. 6213 of 2008; U.O.I. & others Vs Chitra Lekha Chakraborty decided by Supreme Court

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

A. INTRODUCTION

(1) This writ petition under Article 226 of the Constitution of India has been filed by the petitioner, with the following reliefs :-

i. Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 13.03.2023 passed by the Centra Administrative Tribunal, Lucknow in review application No. 20/2016 in Original Application No. 561/2005, Surendra Kumar Vs. Union of India and others.

ii. Issue a writ, order or direction in the nature of mandamus directing the Central Administrative Tribunal, Lucknow to decide the review application No. 20/2016 in Original Application No. 561/2005, Surendra Kumar Vs. Union of India and others on merits.”

B. FACTUAL MATRIX

(2) In the year 2001, the petitioner was engaged as daily wage casual labour under the Joint Commissioner, Income Tax, Faizabad and continued to work as such till his services was terminated orally w.e.f. 02.09.2005.

(3) The aforesaid oral order of termination w.e.f. 02.09.2005 was challenged by the petitioner by preferring Original Application No. 561 of 2005 before the Central Administrative Tribunal, Lucknow (hereinafter referred to as ‘**the Tribunal**’). The Tribunal, vide judgment

and order dated 30.09.2011, dismissed the aforesaid original application.

(4) Feeling aggrieved by the judgment and order of the Tribunal dated 30.09.2011, the petitioner preferred writ petition No. 1551 (S/B) of 2013 before this Court. A Co-ordinate Bench of this Court, while recording the submission of the petitioner that in an identical matter, a review application was filed before the Tribunal and the Tribunal has proceeded to allow the review application, disposed of the writ petition with liberty to the petitioner to file review application before the Tribunal, vide judgment and order dated 21.01.2016.

(5) Apparently, pursuant to the aforesaid judgment and order dated 21.01.2016, the petitioner preferred Review Application No. 20 of 2016 before the Tribunal, seeking review of the judgment and order dated 30.09.2011 passed by the Tribunal in Original Application No. 561 of 2005. The learned Tribunal, noting the provision of Rule 17 of the Central Administrative Tribunal (Procedure) Rules, 1987 and also the fact that though in writ petition No. 1551 (S/B) of 2013, this Court had passed the order regarding filing of review application to the Tribunal on 21.01.2016, however, the petitioner preferred review application only on 17.05.2016 and thus arrived at a conclusion that there being no provision for condonation of delay under Rule 17 of Central Administrative Tribunal (Procedure) Rules, 1987, the review application would not be maintainable and accordingly, vide judgment and order dated 13.03.2023, the learned Tribunal dismissed the review application. It is this order dated 13.03.2023, which has been challenged in the instant writ petition.

C. SUBMISSIONS

(6) Heard Shri Ajay Pandey, learned Counsel representing the petitioner and Shri Kushagra Dikshit, learned Counsel representing the respondents/Union of India. This court records valuable suggestion by Mr. Apoorva Tiwari, Advocate, who was requested by this Court to give his assistance, keeping in view the significant question of law involved in this petition.

(7) Learned Counsel representing the petitioner, at the outset, has fairly submitted that in the instant writ petition, he has not challenged the order dated 30.09.2011 passed by the learned Tribunal in Original Application No. 561 of 2005, but this writ petition is limited to the extent of challenging the order dated 13.03.2023, by which the learned Tribunal has dismissed the review application seeking review of the aforesaid order dated 30.09.2011 (supra) only on the ground that the learned Tribunal has no power to condone the delay in filing the review application.

(8) It has been contended by the learned Counsel for the petitioner that the order sought to be reviewed was passed by the learned Tribunal on 30.09.2011 and the same was initially challenged by the petitioner before this Court in Writ Petition No. 1551 of 2013 (S/B). During pendency of the said writ petition, the learned Tribunal itself entertained a bunch of review application involving identical issue, the leading being Review Application No. 332/00028/2014 and vide common judgment and order dated 24.12.2014, the learned Tribunal was pleased to allow the bunch of review applications by reviewing/modifying the order sought to be reviewed in the said

bunch of review application and resultantly, the learned Tribunal directed the respondents to consider the case of the applicants for regularization in accordance with law within six months. According to him, on coming to know the aforesaid order dated 24.12.2014 (supra), the petitioner has drawn the attention of the same to a Co-ordinate Bench of this Court in Writ Petition No. 1551 (S/B) of 2013, which had ceased of the said matter.

(9) Apparently, the said Co-ordinate Bench of this Court, appreciating the submission of the petitioner in this regard, disposed of the said writ petition by granting liberty to the petitioner to file a review application before the Tribunal by means of an order dated 21.01.2016. Thereafter, the petitioner has sought legal opinion and prepared review application No. 20 of 2016 and filed the same before the learned Tribunal. The petitioner claimed that the delay in filing the review application was bona fide as the petitioner is a Class-IV employee and he has no legal knowledge in this regard. According to him, there is no deliberate or intentional delay on the part of the petitioner, however, without considering the bona fide reasons for filing the review application belatedly, the learned Tribunal has dismissed the review application by means of the impugned order only on the ground that the Tribunal has no power to condone the delay.

(10) The learned Counsel for the petitioner, placing reliance on the judgment of the Full Bench of the Orissa High Court in **Akshaya Kumar Parida (dead) through L.Rs. Vs. Union of India and others** : AIR 2015 Orissa 49, has submitted that in **Akshaya Kumar Parida (supra)**, a Full Bench of Orissa High Court has held

that the Administrative Tribunal Act, 1985 is a Special Act and Rule 17 of the Central Administrative Tribunal (Procedure) Rules, 1987 (hereinafter referred to as “**Rules, 1987**”) provides a period of limitation for filing a review different from the schedule of the Limitation Act, 1963. According to the learned Counsel for the petitioner, the Orissa High Court has held in that judgment that Rule 17 of the Rules, 1987 does not contain any express rider prohibiting filing of a review application after 30 days and neither does it specifically exclude the application of Section 5 of the Limitation Act 1963, hence the learned Tribunal has jurisdiction to entertain an application for condonation of delay in filing a review application under Section 5 of the Limitation Act. According to him, the Full Bench of the Kerala High Court in the case of **Haris K.M. and others Vs. Jahfar and others** : 2020 SCC OnLine Ker 4009 has also held that delay in filing a review application before the Central Administrative Tribunal can be condoned by application of Section 5 of the Limitation Act, 1963 by operation of Section 29 (2) of the Limitation Act, 1963.

(11) Learned Counsel for the petitioner, thus, has submitted that the review application filed by the petitioner is maintainable and the learned Tribunal has ample power to condone the delay, if he satisfies the Tribunal that the delay in filing the review application has been satisfactorily explained. Thus, it has been submitted that the impugned order passed by the learned Tribunal, dismissing the review application on the ground that the Tribunal has no power to condone the delay, is liable to be set-aside and the matter be remitted to the learned Tribunal for its adjudication on merits.

(12) *Per contra*, learned Counsel representing the Union of India has

opposed the aforesaid submissions of the learned counsel for the petitioner and has argued that Rule 17 (1) of the Rules, 1987 indicated of the intent to make it mandatory that no application for review can be entertained unless it is filed within thirty days from the date of receipt of a copy of the order sought to be reviewed.

(13) According to the learned Counsel for the respondents, no other explanation or advantages can be made to the aforesaid Rules, 1987 as Rule 17 (1) of Rules, 1987 prohibited entertainment of any application for review beyond thirty days. He submits that admittedly, the petitioner has filed the Review Application No. 20 of 2016 after thirty days as provided under Rule 17 (1) of the Rules, 1987, hence the learned Tribunal has rightly dismissed the review application as not maintainable by means of the impugned order. Thus, the instant writ petition is liable to be dismissed.

D. ANALYSIS

(14) Having regard to the submissions advanced by the learned Counsel for the parties and going through the record available before this Court in the instant writ petition, we find that a very interesting question emerges for consideration, which can be framed as herein below:-

“Whether the Central Administrative Tribunal has power to condone the delay in filing a review application against its judgment exercising power under Section 5 of the Limitation Act, 1963 in view of section 21 & 22 of the Administrative Tribunal Act 1985 and Rule 17 (1) of the Central Administrative Tribunal (Procedure) Rules, 1987 ?”

(15) Before analyzing the aforesaid question, we deem it apt to go through the

relevant statutory provision touching the issue involved in the instant writ petition.

(16) Presumably, part-XIV-A was inserted in the constitution of India by the forty-second amendment in the year 1976. The said part consists of two articles. Article 323A of the Constitution of India provides for establishment of Administrative Tribunals by law made by Parliament for the adjudication of disputes and complaints related to recruitment and conditions of service of Government servants under the Central Government and the State Government. It includes the employees of any local or other authority within the territory of India or under the control of the Government of India or of a corporation owned or controlled by the Government. On the other hand, Article 323B of the Constitution of India empowers the legislatures of states to provide for the adjudication of certain disputes as enumerated in clause 2 of the said Article, for adjudication by the said Tribunals.

(17) In pursuance of the provisions in Article 323A of the Constitution of India, Parliament passed the Administrative Tribunal Act, 1985, providing for all the matters falling within Clause (1) of Article 323-A of the Constitution of India. According to the Administrative Tribunal Act, 1985, there must be a Central Administrative Tribunal (CAT) at the Centre and a State Administrative Tribunal (SAT) at the State Level for every State.

(18) Without burdening this Judgment with the various provisions of the Administrative Tribunal Act, 1985, it is stated that Section 19 of the Administrative Tribunal Act, 1985 (hereinafter referred to as “**Act, 1985**”) provided that subject to the

other provisions of the Act, a person aggrieved by any order pertaining to any matter within the jurisdiction of a Tribunal may make an application to the Tribunal for the redressal of his grievance. Section 21 of the Act, 1985 deals with limitation in filing the original application. It would be profitable to extract section 21 of the Act, which inter-alia states as under:

“21. Limitation.—(1) A Tribunal shall not admit an application,—

(a) in a case where a final order such as is mentioned in clause (a) of sub-section (2) of section 20 has been made in connection with the grievance unless the application is made, within one year from the date on which such final order has been made;

(b) in a case where an appeal or representation such as is mentioned in clause (b) of sub-section (2) of section 20 has been made and a period of six months had expired thereafter without such final order having been made, within one year from the date of expiry of the said period of six months.

(2) Notwithstanding anything contained in sub-section (1), where—

(a) the grievance in respect of which an application is made had arisen by reason of any order made at any time during the period of three years immediately preceding the date on which the jurisdiction, powers and authority of the Tribunal becomes exercisable under this Act in respect of the matter to which such order relates; and

(b) no proceedings for the redressal of such grievance had been commenced before the said date before any High Court, the application shall be entertained by the Tribunal if it is made within the period referred to in clause (a), or, as the case may be, clause (b), of sub-section (1) or within a

period of six months from the said date, whichever period expires later.

(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), an application may be admitted after the period of one year specified in clause (a) or clause (b) of sub-section (1) or, as the case may be, the period of six months specified in sub-section (2), if the applicant satisfies the Tribunal that he had sufficient cause for not making the application within such period.”

(19) It is apparent from a reading of the aforesaid provisions, specifically section 21(3) that the Act itself bestows power on the Tribunal to condone delay in filing of the original application, of course the applicant has to satisfy the Tribunal relating to “sufficient cause” for not making the said application within the period of limitation as provided under the Act.

(20) Since, the present issue is relating to condonation of delay in filing the review before the Tribunal, this Court finds that section 22(3)(f) of the Administrative Tribunal Act, 1985 relates to the power of a Central Administrative Tribunal to review its own decision. Therefore, as far as the power of the Administrative Tribunal to review its own decision is concerned, sufficient power has been vested as per the statute itself. Apparently, the extent of power to be exercised by the Tribunal can be well understood from the provision that the said power of review is to be found under the larger umbrella of section 22 (3) of the Act, 1985, which inter-alia states:

“22 (3) A tribunal shall have, for the purpose of discharging its function under this Act, the same powers as are vested in a

civil court, under the Code of Civil procedure, 1908, while trying a suit, in respect of the following matters, namely:-

- (a) Xxx
- (b) Xxx
- (c) Xxxx
- (d) Xxxx
- (e) Xxxx
- (f) Reviewing its decisions;
- (g) Xxx
- (h) Xxxx

(i) Any other matter which may be prescribed by the Central Government.

(Emphasis Supplied)

(21) In view of the above provisions, the power of review vested with an Administrative Tribunal is equated to a Civil Court and, thus, while considering and disposing of any review application, the Administrative Tribunal is to follow the Code of Civil Procedure. Thus, by necessary implications the provisions of review as found under the Civil procedure Code i.e Section 114 and Order XLVII Rule 1 of the Civil Procedure Code came to be incorporated along with the power of review of an Administrative Tribunal. Moreover, the power of the Tribunal to review its judgment has been well explained by the Hon’ble Supreme Court in the case of **Ajit Kumar Rath v. State of Orissa : (1999) 9 SCC 596 and Gopalbandhu Biswal Vs Krishna Chandra Mohanty : (1998) 4 SCC 447**, wherein the Hon’ble Supreme Court had held review power of a Tribunal to be similar as has been granted to a Civil Court under Section 114 or under Order XLVII Rule 1 of the Civil Procedure Code. In any case, the power of review is not absolute and is hedged in by the restrictions indicated in Order XLVII Rule 1 of the Civil Procedure Code and the same can be exercised on the application of a person on

restricted grounds of 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 of fact or error apparent on the face of record or for any other sufficient reason. It may be pointed out that the expression "any other sufficient reason" used in Order XLVII Rule 1 of the Civil Procedure Code means a reason sufficiently analogous to those specified in the rule and is squarely applicable to the Tribunal.

(22) Further, it is significant to note that section 22(1) of the Act, 1985 clearly and in somewhat mandatory manner mentions that the Tribunal shall not be bound by the procedure laid down in the Code of Civil procedure, but shall be guided by the principles of natural justice and subject to the other provisions of this Act and of any rules made by the Central Government. The very said provisions also says that the Tribunal shall have power to regulate its own procedure including the fixing of places and times of its inquiry and deciding whether to sit in public or in private.

(23) This Court finds that the Tribunal in the first instance should be guided by the principles of natural justice, which shall be subject to rules and secondly the Tribunal has been given a certain amount of power to regulate its own procedure and to fix the time of its inquiry. Rule 21(3) of the Act, 1985 is in consonance to the said regulation for fixing of time of its inquiry as it gives certain amount of discretion on the Administrative Tribunal to fix the time of inquiry and in that regard also condone the delay, provided sufficient cause is shown

by the applicant. In any case, Section 21(3) of the Act, 1985 says that an application may be admitted even after the period of limitation, if the applicant satisfies the Tribunal that he had sufficient cause for not making the application within the period prescribed. Section 21(3) of the Act, 1985 is similarly worded as Section 5 of the Limitation Act. Thus, section 21 of the Act, 1985 has to be read along with section 29 of the Limitation Act, which says that where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law.

(24) However, the procedure for filing and consideration of an application for condonation of delay of review application is conspicuously absent from the provisions of the Act, although Section 21 relating to the limitation for filing and consideration of an original application is specifically mentioned in the said Act itself and Section 21 (3) provides for condonation of delay, but similar provision for review is not mentioned in the Administrative Act.

(25) Since, the issue engaging the attention of this Court relates to condonation of delay in filing of a review Application and the necessary process and since the limitation thereof are not specifically mentioned in the Administrative Act, 1985, one has to see

and refer to section 35 of the Act, which provides for power of central Government to make rules in the following terms :-

“35. Power of the Central Government to make rules.—(1) The Central Government may, subject to the provisions of section 36, by notification, make rules to carry out the provisions of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the case or cases which shall be decided by a Bench composed of more than 3 [two members] under clause (d) of sub-section (4) of section 5;

(b) the procedure under sub-section (3) of section 9 for the investigation of misbehaviour or incapacity of 4 [Chairman or other Member];

(c) the salaries and allowances payable to, and the other terms and conditions of, the 5 [Chairman and other Members];

(d) the form in which an application may be made under section 19, the documents and other evidence by which such application shall be accompanied 6 [and the fees payable in respect of the filing of such application or for the service or execution of processes;]

(e) the rules subject to which a Tribunal shall have power to regulate its own procedure under sub-section (1) of section 22 and the additional matters in respect of which a Tribunal may exercise the powers of a civil court under clause (i) of sub-section (3) of that section; and

(f) any other matter which may be prescribed or in respect of which rules are required to be made by the Central Government.”

(26) Apparently, section 35 (2) (e) of the Act, 1985 provides for rule making power of the Central Government as far as it tends

to regulate its own procedure by the Tribunal under sub-section (1) of section 22 and also in respect of all those powers for which the Tribunal may exercise the power of Civil Court under clause (i) of sub-section (3) of that section. Even this section does not specifically provides for making of rules as far as the provision of review is concerned and merely authorizes the Central Government to frame rules as to how the principles of natural justice has to be followed while regulating its own procedure by the Tribunal and as to how and in what manner the Tribunal is to exercise the powers vested with it as a Civil Court under the provisions of Code of Civil Procedure. This Court finds that a residual power to frame rules has been given to the appropriate Government in terms of section 36(3) of the Act, for those matters, which are not mentioned in section 35 of the Act. Since, the issue relating to competency relating to framing of rules is not before this court in the present matter, this court does not wish to express its view on the same and restricts itself to the issue raised in the present petition.

(27) Nevertheless, the Administrative Rules came to be framed in 1987 and Rule 17 contains the provisions for application of review in the following words:

“17. Application for review- (1) No application for review shall be entertained unless it is filled within thirty days from the date of receipt of copy of the order sought to be reviewed.

(2) A review application shall ordinarily be heard by the same Bench which has passed the order, unless the chairman may, for reasons to be recorded in writing, direct it to be heard by any other bench.

(3) Unless otherwise ordered by the Bench concerned, a review application shall be disposed of by circulation and the

Bench may either dismiss the application or direct notice to the opposite party.

(4) Where an application for review of any judgment or order has been made and disposed of, no further application for review shall be entertained in the same manner.

(5) No application for review shall be entertained unless it is supported by a duly sworn affidavit indicating therein the source of knowledge, personal or otherwise, and also those which are sworn on the basis of the legal advice. The counter-affidavit in review application will also be a duly sworn affidavit wherever any averment of fact is disputed.”

(28) Although, the aforesaid rule provides that any review filed before an Administrative Tribunal cannot be entertained unless it is filed within thirty days from the receipt of the copy of the order. However, having traced the review making power of the Tribunal, it can be safely deduced that neither section 22 of the Act, which gives the power of review to an Administrative Tribunal, nor rule 17, which provides for application of review, expressly excludes the applicability of the Limitation Act. Further, the word; “no application for review shall be entertained”, intended to mean that no review application would be entertained until and unless the same is filed within 30 days. It does not say and perhaps it cannot say to curtail the scope of statute that no application for condonation of delay in filing the same, could be made when an application for review was not filed within the time framed in Rule 17. Apparently, Rule 17 prescribes for making of the application for review to save the purpose of statute and cannot be extended to mean that an application for condonation of delay is specifically barred. In fact, the Tribunal bound by the

principle of natural justice and some provisions of Code of Civil Procedure were created to ensure an expeditious process unlike the time taking process by the Civil Courts in the matter of civil disputes. The bar of remedy was never an intention of law. The meaning and import of the negative couching of the said rule 17 relating to maintainability of review within 30 days can be well explained as held by a full bench of the Kerala High Court in the case of **Haris K.M Vs. Jahfar : 2020 SCC Online Kerala 4009** in the following words:

“18.....The reason according to us is apparent, since the power granted is the power to review under the Code of Civil Procedure. The provisions relating to Review in the Code of Civil Procedure, 1908 are contained in Section 114 and Order XLVII. Article 124 of the Limitation Act prescribes the period of limitation for a petition for review under the Civil Procedure Code as 30 days. However, since the provisions of Limitation Act are applicable, Section 5 of the Limitation Act is also applicable and a Review Petition can be filed beyond the period of 30 days, if the petitioner is able to show sufficient cause for the delay.

19. In exercise of power conferred under Section 35(2)(d), (e) and (f) and Section 36(c), the Central Government has promulgated the Kerala Administrative Tribunal (Procedure) Rules, 2010. Rule 21 of the Rules says that no application for review shall be entertained unless it is filed within thirty days from the date of the order of which the review is sought. As already observed, the rule making power does not take in power to make rules for fixing a period of limitation for filing a review application. Such a prescription of 30 days, which is the same as the one prescribed

under the Limitation Act, for filing a review petition under the Code of Civil Procedure, was totally unnecessary and uncalled for. Even without Rule 21, the review application ought to be filed within 30 days. Since the period of limitation prescribed in Rule 21 is the same as that applicable for a review petition under the Code of Civil Procedure, we do not think it is necessary to strike down Rule 21. All the same, Rule 21 has to be necessarily subject to the provisions of Section 29 of the Limitation Act which specifically says that provisions contained in Sections 4 to 24 of the Limitation Act will apply to a prescription of limitation under any special or local law. That is to say, an application under Section 5 of the Limitation Act, for condoning the delay in preferring a Review Petition is maintainable”.

(Emphasis Supplied)

(29) Having said so, this Court cannot be oblivious of the fact that in case sufficient reasons are pleaded for maintainability of review, the Tribunal should not shut its doors on the ground of limitation. Observing that the rules of limitation are not meant to destroy the rights of the parties, the Hon’ble Apex Court in the case of **N. Balakrishnan v. M. Krishnamurthy (1998) 7 SCC 123**, held as under:-

“11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up

necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.” As pointed out earlier, an appeal under Section 96 CPC is a statutory right. Generally, delays in preferring appeals are required to be condoned, in the interest of justice, where there is no gross negligence or deliberate inaction or lack of bonafide is imputable to the party seeking condonation of delay.”

(30) Essentially, the law of limitation is founded on the anvil of public policy. However, while examining rule 17, we are countered with the disability which is present in the peremptory form for preference of a review application, in case they are filed after 30 days. At this juncture, it would be apt to mention that the Hon’ble Supreme Court in the case of **Mangu Ram V/s Municipal Corporation Delhi, (1976) 1 SCC 392** has held that prescription by a special Act of a mere provisions of a period of limitation however peremptory or imperative language is not sufficient to displace the applicability of section 5 of the Limitation Act, in the following words:

“7. There is an important departure made by the Limitation Act, 1963 in so far as the provision contained ins. 29, sub-s. (2) is concerned, whereas under the

Indian Limitation Act, 1908, s. 29, sub-s. (2), cl. (b) provided that for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law the provisions of the *Indian Limitation Act, 1908*, other than those contained in ss. 4, 9 to 18 and 22, shall not apply and, therefore, the applicability of s. 5 was in clear and specific terms excluded, s. 29, sub-s. (2) of the *Limitation Act, 1963* enacts in so many terms that for the purpose of determining the period of limitation prescribed for any suit, appeal or application by any special or local law the provisions contained in ss. 4 to 24, which would include s. 5, shall apply in so far as and to the extent to which they are not expressly excluded by such special or local law. Section 29, sub-s. (2), cl. (b) of the *Indian Limitation Act, 1908* specifically excluded the applicability of s. 5, while s. 29, sub-s. (2) of the *Limitation Act, 1963* in clear and unambiguous terms provides for the applicability of s. 5 and the ratio of the decision in *Kaushalya Rani's case* (1) can, therefore, have no application in cases governed by the *Limitation Act, 1963*, since that decision proceeded on the hypothesis that the applicability of s. 5 was excluded by reason of s. 29(2)(b) of the *Indian Limitation Act, 1908*. Since under the *Limitation Act, 1963* s. 5 is specifically made applicable by s. 29, sub-s. (2), it can be availed of for the purpose of extending the period of limitation prescribed by a special or local law if the applicant can show that he had sufficient cause for not presenting the application within the period of limitation. It is only if the special or local law expressly excludes the applicability of s. 5, that it would stand displaced. There, as pointed out by this Court in *Kaushalya Rani's case* (1) the time limit of sixty days laid down in sub-s.

(4) of s. 417 is a special law of limitation and we do not find anything in this special law which expressly excludes the applicability of s. 5. It is true that the language of sub-s. (4) of s. 417 is mandatory and compulsive, in that it provides in no uncertain terms that no application for grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of sixty days from the date of that order of acquittal. But that would be the language of every provision prescribing a period of limitation. It is because a bar against entertainment of an application beyond the period of limitation is created by a special or local law that it becomes necessary to invoke the aid of s. 5 in order that the application may be entertained despite such bar. Mere provision of period of limitation in however peremptory or imperative language is not sufficient to displace the applicability of s. 5. The conclusion is, therefore, irresistible that in a case where an application for special leave to appeal from an order of acquittal is filed after the coming into force of the *Limitation Act, 1963*, s. 5 would be available to the applicant and if he can show that he had sufficient cause for not preferring the application within the time limit of sixty days prescribed in sub-s. (4) of s. 417, the application would not be barred and despite the expiration of the time limit of sixty days, the High Court would have the power to entertain it. The High Court, in the present case, did not, therefore, act without jurisdiction in holding that the application preferred by the Municipal Corporation of Delhi was not barred by the time limit of sixty days laid down in sub-s. (4) of s. 417 since the Municipal Corporation of Delhi had sufficient cause for not preferring the application within

such time limit. The order granting special leave was in the circumstances not an order outside the power of the High Court."

(31) This brings us immediately to section 29 (2) of the Limitation Act, which rises to the occasion and says in the following words:

"29(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

(32) Now, therefore the question arises as to when the provisions of the Limitation Act, 1963 would apply to court/Tribunals functioning under Special Act by virtue of section 29(2) of the Limitation Act, 1953. This court finds that the Hon'ble Supreme Court in the case of **Mukri Gopalan V/s C.P. Aboobacker, (1995) 5 SCC 5**, in an elaborate manner while dealing with the provisions of Kerala Rent Act, 1965, under which rent tribunals have been founded, noted an earlier decision passed by the Apex court in **Commissioner of Sales Tax, U.P. Vs. Madan Lal Dan & Sons. Bareilly (1977 (1) SCR 683)** by a bench of three learned Judges, to conclude that the period of limitation prescribed therein under Section 18 of the Kerala Act governing appeals by aggrieved parties will be computed keeping in view the provisions of Sections

4 to 24 of the Limitation Act, 1963 as such proceedings will attract Section 29(2) of the Limitation Act and consequently Section 5 of the Limitation Act would also be applicable to such proceedings.

(33) The Hon'ble Apex Court refuted one of the submissions of the party in the aforesaid Mukri Gopalan's Case that Sections 4 to 24 of the Limitation Act would apply to civil courts as duly constituted under the Civil Procedure Code, wherein it was argued by a contesting party that, if section 29(2) of the Limitation Act are to be made applicable to suit, appeal or application governed by periods of limitation prescribed by any special or local law, they necessarily require such suit, appeal or application to be filed under special or local law before full-fledged civil courts as otherwise Sections 4 to 24 of the Act by themselves would not apply to them. The Apex Court not only agree to the said proposition, but also observed in the following words :-

"It has to be kept in view that Section 29(2) gets attracted for computing the period of limitation for any suit, appeal or application to be filed before authorities under special or local law if the conditions laid down in the said provision are satisfied and once they get satisfied the provisions contained in Sections 4 to 24 shall apply to such proceedings meaning thereby the procedural scheme contemplated by these Sections of the Limitation Act would get telescoped into such provisions of special or local law. It amounts to a legislative shorthand. Consequently, even this contention of Shri Nariman cannot be countenanced."

(Emphasis supplied)

(34) Apparently, the Apex Court in the **Commissioner of Sales Tax, U.P. Vs. Madan Lal Dan & Sons. Bareilly (1977 (1) SCR 683)** has held that for the purpose

of determining any period of limitation prescribed for any application by any special or local law, the provisions contained in Section 12(2), inter alia, shall apply in so far as, and to the extent to which they are not expressly excluded by such special or local law, and noted that there was nothing in the U.P. Sales Tax Act expressly excluding the application of Section 12(2) of the Limitation Act.

(35) Thus, the provisions of Section 5 of the Limitation Act would be applicable to a review Application filed before the Administrative Tribunal as the provisions of limitation are not specifically barred by the Administrative Tribunal Act or the Rules framed therein. However, the Tribunal should exercise great caution while applying the said provision of the limitation Act, so as to balance between a right of a party to review the order on limited legally permissible grounds available to him and public policy which provides for finality of a lis between the parties. Besides, the other provisions for condoning the delay, the Tribunal should be guided by the following principle, which came to be devised by the Hon'ble Supreme Court in **B. Madhuri Goud v. B. Damodar Reddy: (2012) 12 SCC 693**, by referring various earlier decisions, while considering the application for condonation of delay. Ordinarily the Tribunal should be guided by the following conditions as devised by the Hon'ble Supreme Court in the said judgment :-

(i) There should be a liberal, pragmatic, justice oriented, non pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

(ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

(iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

(iv) No presumption can be attached to deliberate cause of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

(v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

(vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

(vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.

(viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

(ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

(x) *If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such litigation.*

(xi) *It is to be borne in mind that no one gets away with fraud, is representation or interpolation by taking recourse to the technicalities of law of limitation.*

(xii) *The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.*

(xiii) *The State or a public body or an entity representing a collective cause should be given some acceptable latitude.*

(36) Both the parties have fairly admitted that there is no direct judgment by the Hon'ble Supreme Court on the aforesaid aspect. However, this Court finds and as also relied upon by the contesting parties that the aforesaid question had directly been considered by the Full Benches of Hon'ble Calcutta High Court, Hon'ble Orissa High Court, Hon'ble Andhra Pradesh High Court and a Division bench of Kerala High Court and the Gauhati High Court.

(37) Learned Counsel for the respondent would place reliance on the relevant portion of Full Bench judgment in the case of **C. Nara Simha Rao Vs Regional Joint Director of School Education, 2003 SCC Online AP 1068**, wherein the Full Bench was considering Rule 19 of A.P. Administrative Tribunal (Procedure) Rules, framed under Administrative Tribunal Act. These Rules are *pari materia* to Rule 17 as is under consideration by this court. The Full Bench took note of decision in **K. Ajit Babu and others V/s Union of India, (1997) 6 SCC 473**

wherein the Hon'ble Supreme Court was examining as to the right of review or as to who is "a person aggrieved" to file a review Application and returned its findings in the following manner:

"12. Even otherwise the provisions of the Limitation Act which unless expressly excluded would be attracted can be made applicable to the nature of the proceedings under the Act/Rules, but the same is not what Section 29(2) of the Act says because it provides that Sections 4 to 24 (inclusive) shall apply only insofar as and to the extent to which they are not expressly excluded by such special or local law. If none of them are excluded all of them are applicable whether those sections are applicable or not is not determined by the terms of those sections, but by their applicability or inapplicability to the proceedings under the special or local law. Section 6 of Limitation Act, which provides for the extension of the period of limitation till after the disability in the case of a person who is either minor or insane or an idiot, is inapplicable to the proceedings under the Act/Rules. Similarly Sections 7 to 24 are in terms inapplicable to the proceedings under the Act, particularly in respect of filing of applications and the procedure to be followed under the Act/Rules. The applicability of those provisions has, therefore, to be judged not from the terms of limitation Act but by the provisions of the Administrative Tribunals Act 1985 and the Rules made thereunder relating to the filing of original applications and review applications and their disposal to ascertain whether it is a complete code in itself which does not admit of the application of any of the provisions of the Limitation Act mentioned in Section 29(2) of the Act.

13. Rule 19 is couched in negative form and disables the person from seeking review under Section 22(e)(f) of the Act, in case review is not filed within 30 days of

the order. However, in the Act nowhere it is stated the method or manner or time limit to file such review except Rule 19. In view of the same, the power of Tribunal to condone the delay under Section 21 of the Act is applicable only to the applications filed under Section 19, but the same cannot be made applicable to the review sought under Section 22(3)(f). Sub-section (1) of Section 22 puts an embargo on exercise of such power by the Tribunal, namely that the power of the Tribunal shall be guided by the principles of natural justice and of any rules made by the Central Government. In the absence of any provisions prescribed for condoning the delay either in the Act or in the Rules, the Tribunal will not have jurisdiction to condone the delay in taking aid and assistance of Section 5 of the Limitation Act on the premise that Limitation Act is made applicable in view of Sub-section (2) of Section 29 of the Limitation Act."

(38) It is evident that the Full Bench of the Hon'ble High Court of Andhra Pradesh relied upon the decision in K. Ajit Babu's case and thereafter answered the question in negative regarding the powers and jurisdiction of the Central Administrative Tribunal to condone the delay in case of Review beyond prescribed period of limitation. However, this court finds that in K. Ajit Babu's case, the Hon'ble Supreme Court was examining as to who is "a person aggrieved" to file a review Application and was not concerned with the power of condonation of delay in preferring a review Application by the Tribunal.

(39) Similarly, a Division bench of the Gauhati High Court in "**Union of India & Ors. Vs. Chanchal Nag**" : (W.P(c) 3034/2021 decided on 27-03-2023), held

that the Tribunal shall have no power to condone the delay unless it has been expressly conferred by the statute creating it. As Rule 17 of the Central Administrative Tribunal (Procedure) Rules, 1987 expressly provides a timeline of 30 days for entertaining a review application, unless the statutory provision is declared to be ultra vires such power cannot be read into the statute by a judicial pronouncement. The learned Division bench noted the judgment of K. Ajit Babu case (supra) as well as the judgment passed by the Hon'ble Supreme Court in **S.S. Rathore V/s State of Madhya Pradesh, (1989) 4 SCC 582**, which held that the Civil Courts jurisdiction has been taken away by the Act of 1985 and as such held that, as far as government servants are concerned, Article 58 may not be invocable in view of the special limitation. The Gauhati High Court after noting that K. Ajit Babu's case and S.S. Rathore's case were not recorded by the Full Bench of the Calcutta High Court in the case of **Union of India & Ors. Vs. Central Administrative Tribunal** : (2002) SCC Online Cal 597 and as such held that the Calcutta High Court judgment did not lay the correct proposition of law. Thus, the Gauhati High Court concluded as follows:

"8. As stated above, the limitation for filing a review application is 30 days, as provided in Rule 17 of the Rules of 1987. Thus, the Act of 1985 lays down specific provisions with regard to limitation as well as the power for condonation thereof. Hence, the proceedings under the Act of 1985 cannot be governed by the provisions of the Limitation Act, which is a general law governing issues of limitation arising in proceedings before Courts. This view is further fortified when we consider the ratio of the judgments relied upon by Dr. Sharma in the cases of International Asset (supra)

and Sakuru (supra), wherein it has been stipulated that the proceedings before a statutory Tribunal cannot be placed at par with proceedings before a court. The Tribunal shall have no power to condone the delay unless expressly conferred the power by the statute creating it. As Rule 17 of the Rules of 1987 expressly provides timeline of 30 days for entertaining a review application, unless the statutory provision is declared to be ultra vires such power cannot be read into the statute by a judicial pronouncement."

(40) This Court finds that both K. Ajit Babu's case (supra) and Constitutional Bench Judgement in S.S. Rathore's case (supra) are not on the issue of limitation relating to the power of review of a Tribunal. As recorded herein above, in K. Ajit Babu's case, their Lordship of the Hon'ble Supreme Court was examining as to the right of review or as to who is "a person aggrieved" to file a review Application under the Administrative Tribunal Act and similarly, as far as the Judgment in S.S. Rathore's case is concerned, the same was relating to limitation as provided under section 21 of the Act for preferring an original application. Noticeably, in S.S. Rathore's case, the Apex Court observed that the Civil Court's Jurisdiction has been taken away by the Administrative Tribunal Act and did not observe anything relating to the application/observance of principle of natural Justice as per section 22(1) of the Act or the applicability to the provisions of Civil procedure Code as per section 22(3) of the Act, which also contains the provisions relating to reviewing of its own judgment by the Tribunal.

(41) On the other hand, learned counsel for the petitioner relied upon the Full Bench

judgments of Hon'ble High Court of Calcutta and Hon'ble High Court of Orissa in the case of **Union of India & Anr V/s Central Administrative Tribunal, (2002) SCC Online Cal 597 and Akshaya Kumar Parida V/s Union of India, AIR 2015 Orissa 49**, wherein direct question with regard to the jurisdiction of this Tribunal to condone the delay in the event an application for review is filed beyond the prescribed period of limitation has been answered. In the case of Akshaya Kumar Parida (Dead) (supra), the Full Bench of Hon'ble High Court of Orissa distinguished the decision of the Apex Court in the case of K. Ajit Babu (supra), which has been relied upon by the Hon'ble Andhra High Court, in the following manner:

21. Before parting with the case, we would like to observe that in Smt. Kanchana Badaseth (supra), the Bench relied upon a decision of the apex Court in the case of K.Ajit Babu (supra). In K.Ajit Babu (supra), the short question arose for consideration was whether the application filed by the appellants under Section 19 of the Act was maintainable. The apex Court held that often in service matters the judgments rendered either by the Tribunal or by the Court also affect other persons, who are not parties to the cases. In that context, the apex Court held that ordinarily, right of review is available only to those who are party to a case. It was further held that right of review is available if such an application is filed within the period of limitation on the grounds mentioned in Order 47 of the Code of Civil Procedure. Thus K.Ajit Babu (supra) cannot be understood as laying a law that the Tribunal is de hors of its power in entertaining an application for review filed beyond the prescribed period of limitation, if the same is accompanied by an

application under Section 5 of the Limitation Act.”

(42) After distinguishing the judgment delivered by Hon'ble Supreme Court in K. Ajit Babu's case, the Full Bench of Hon'ble High Court of Orissa in the case of Akshaya Kumar Parida (Dead) (supra) held that :

22. The logical sequitur on the analysis made in the preceding paragraphs is that neither Section 22 of the Act nor Rule 17 of the Rules expressly excluded the applicability of Section 5 of the Limitation Act. In the event an application for review is filed beyond the period of limitation along with an application for condonation of delay and the applicant satisfies the Tribunal that he had sufficient cause for not preferring an application within the time, the Tribunal can condone the delay.

(Emphasis Supplied)

(43) Further, this Court finds and as has been rightly relied upon by the Counsel for the petitioner that the Full Bench of the Calcutta high Court had formulated the question, which in view of this Court is the correct formulation of question as the implication of Rule 17 cannot be decided in seclusion, merely by reading the said provision only, but the said provision has to be read in conjunction to Section 21 of the Act providing for general limitation under the Administrative Tribunal Act and section 22 providing for application of Civil Procedure Code for exercising the power of review by the Tribunal, so that a harmonious construction can be given to all the provisions of the Administrative Tribunal Act as well as the rules framed therein. Be that as it may, the Full Bench of the Calcutta High Court in the case of **“Union of India Vs. Central Administrative Tribunal & Others”** (supra),

formulated the question to be decided in the following manner :-

“Whether having regard to the provisions of Rule 17 of the Central Administrative Tribunal (Procedure) rules, 1987 and section 21 and 22 of the Administrative Tribunal Act, 1985, the Tribunal has Jurisdiction to condone the delay in filing a review Application?”

(44) The Full Bench of the Hon'ble High Court of Calcutta after discussing the various judgments and law on the subject, concluded that the Tribunal is conferred with power under the Act and the Rules to condone delay under section 5 of the Limitation Act in filing a review application, despite Rule 17 of the said rules.

(45) Recently, a Full Bench of the Kerala High Court had examined the same issue as is engaging the attention of this Court in the present matter, in the case of **Haris K.M Vs Jahfar: 2020 SCC Online Kerala 4009**. The said Full Bench was brought to the notice an unreported decision of the Hon'ble Supreme Court in **Union of India & others vs. Chitra Lekha Chakraborty** passed in Civil Appeal No.6213 of 2008, wherein the Apex Court held that since there is a specific provision in Rule 17 of the Administrative Tribunals Rules for filing of Review applications before the Central Administrative Tribunal, Section 5 of Limitation Act was not applicable to a petition under Rule 17. The Full Bench after extracting the relevant portion of the judgement of the Apex Court held as follows :-

“22. In our humble opinion, with all the respect at our command, we are of the considered view that the said judgment cannot be treated as a binding precedent since it falls under both the exceptions viz. per incuriam and sub silentio. We have already indicated the statutory provisions

which govern the filing of a review petition before the Tribunal. The Hon'ble Supreme Court, in the aforesaid decision was not apprised of the statutory provisions, which relate to the power of review available with the Tribunal. In fact the application for review is not one filed under Rule 17 but under Section 22(3)(f) of the Administrative Tribunals Act. Section 22 of the Act which says that the Tribunal shall have the same powers as that of a civil court for reviewing its decisions was not considered. The provisions of the Civil Procedure Code and that of the Limitation Act, which governs the power of review were also not considered. Even if Rule 21 is to be treated as the specific provision prescribing limitation, the fact that the said prescription is subject to Section 29 of the Limitation Act was also not considered."

(Emphasis Supplied)

E. CONCLUSION

(46) Accordingly, this Court observes that the judgments of Full Benches of Hon'ble High Court of Orissa, Hon'ble High Court of Kolkata and Hon'ble High Court of Kerala are relevant law on the issue. Hence, this Court holds that an application for condonation of delay in Review Application filed before the Central Administrative Tribunal (Procedure) Rules, 1987 is maintainable and accordingly, it is held that the Tribunal can condone the delay under Section 5 of the Limitation Act, if it is satisfied that sufficient cause for not preferring an application within the time has been supplemented.

(47) As a sequitur, we hereby allow the writ petition and quash the impugned order dated 13.03.2023 passed by the Central Administrative Tribunal, Lucknow, in review Application No. 20/2016 in Re:

Original Application No. 561/2005 and accordingly restore the review application along with the condonation of delay application filed by the petitioner to its original file.

(48) It is also directed that the Review Application and Condonation of Delay Application be decided by the Central Administrative Tribunal, Lucknow on its own merits.

(49) This Court makes it clear that it has not expressed any opinion on the merits of the case and respective parties are permitted to agitate all their grounds and submission before the learned Tribunal, as may be permissible to them under law.

(50) There shall be no order as to cost.

(2023) 8 ILRA 898

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 17.07.2023

BEFORE

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

Writ-A No. 6453 of 2023

Shobhit Srivastava & Ors. ...Petitioners

Versus

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

Counsel for the Petitioners:

Sri Rajesh Dwivedi

Counsel for the Respondents:

C.S.C., Sri Anand Prakash Paul

Service Law – U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 – Compassionate Appointment – Requirement of Typing Proficiency – Limited Opportunities under Rules – No

Scope for Third Typing Test – Mandamus Issued – Validity of Appointment Cannot Be Questioned Thereafter-Compassionate Appointment, Typing Test, Service Law, Rule 5(1)(i) - Dying-in-Harness, Kanpur Development Authority - 13th Amendment Rules 2022, Proficiency Requirement, Mandamus

Where the petitioners were appointed on compassionate grounds under the U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974, and failed the first typing proficiency test but passed the second within the permissible time, the Kanpur Development Authority (KDA) could not compel them to undergo a third test on the ground of performance complaints. Rule 5(1)(i) of the 1974 Rules (pre and post 13th Amendment, 2022) allows only two attempts to clear the typing test. Once the second test is passed, the authority is functus officio on the matter. Even if the employer doubts proficiency, no third test is legally sustainable. Disciplinary action for inefficiency, if warranted, must be taken separately under applicable service rules but cannot affect the legality of appointment.

Citations:

1. Committee of Management, Vaidik Kanya Inter College & anr. Vs St. of U.P. & ors. Citation: (2023) 7 ILRA
2. Kul Bhushan Mishra & anr. Vs St. of U.P. & ors. Citation: (2023) 7 ILRA
3. Dinesh Chandra Verma Vs St. of U.P. & ors. Citation: (2023) 7 ILRA
4. Rajat Yadav Vs St. of U.P. & ors. Citation: (2023) 8 ILRA
5. St. of U.P. & ors. Vs Shiv Jag Sharma & ors. Citation: (2023) 8 ILRA
6. Jitendra Kumar Tiwari Vs St. of U.P. & anr.& Connected Cases Citation: (2023) 8 ILRA
7. Shobhit Srivastava & ors. Vs St. of U.P. & ors. Citation: (2023) 8 ILRA

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

1. This writ petition has been filed seeking to quash an order dated 28.03.2023 passed by the Officer on Special Duty (Establishment), Kanpur Development Authority, Kanpur to the extent alone that it directs a further typing test to be taken by the petitioners on 12.04.2023 in compliance with an order of the Vice-Chairman of the Development Authority aforesaid. The petitioners have further sought a mandamus to restrain the holding of the scheduled typing test on 12.04.2023 in terms of the impugned order dated 28.03.2023.

2. The petitioners are all Clerks in the employ of the Kanpur Development Authority, Kanpur (for short, 'the KDA') and all of them have been appointed on compassionate ground. The first petitioner Shobhit Srivastava was appointed on 28th January, 2018 whereas the second petitioner Ajay Srivastava was appointed on 30th May, 2017. The third petitioner Abhishek Tripathi was appointed on 20th December, 2017.

3. It is common ground between parties that notwithstanding the petitioners' appointment under the dying in harness Rules, the post held by them requires the petitioners to qualify with a typing speed of 25 words per minute. The aforesaid qualification is essential. In this regard, reference may be made to the Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 (for short, 'the Rules of 1974'). These Rules have been amended by the Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness (13th Amendment) Rules, 2022 (for short, 'the 13th Amendment Rules'), that have been published in the official gazette on 27th December, 2022. Rule 5 of the Rules of 1974 has been amended by the 13th

Amendment Rules and it would be gainful to reproduce the amended and unamended Rule 5 in extenso:

Substitution of rule 5	2. In the Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974, for existing rule 5(1)(i) set out in column 1 below, the rule as set out in column 2 shall be substituted, namely:-
COLUMN 1 Existing rule	COLUMN 2 Rule as hereby substituted
5.(1) Recruitment of a member of the family of the deceased- 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 shall, on making an application for the purpose, be given a suitable employment in Government Service on a	5.(1) Recruitment of a member of the family of the deceased- 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 shall, on making an application for the purpose, be given a suitable employment in Government Service on a

controlled by the Central Government or a State Government, if such person-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 purpose, 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, (i) fulfils the educational qualifications prescribed for the post:	Provided that in case appointment is to be made on a post for which typewriting has been prescribed as an essential qualification and the dependent of the deceased Government servant does not possess the required proficiency in typewriting, he shall be appointed subject to the condition that he would acquire the requisite speed of 25 words per minute in typewriting well within one year and if he fails to do so, his general annual increment shall be withheld and a further period of one year shall be granted to him to acquire the requisite speed in typewriting and if in the extended period also he again fails to acquire the requisite speed in typewriting, then an order will be issued to provide him appointment on the post of class IV. <u>The appointment so granted shall be deemed to be a fresh appointment and shall not be reversion. If he does not join the post of class IV within stipulated</u>

Commission , in relaxation of the normal recruitment rules, if such person-	<u>time his services will be terminated.</u>	speed of 25 words per minute in typewriting well within one year and if he fails to do so, his general annual increment shall be withheld and a further period of one year shall be granted to him to acquire the requisite speed in typewriting and if in the extended period also he again fails to acquire the requisite speed in typewriting, his services shall be dispensed with.	<u>order will be issued to provide him appointment on the post of class IV. The appointment so granted shall be deemed to be a fresh appointment and shall not be reversion. If he does not join the post of class IV within stipulated time his services will be terminated.</u>
(i) fulfils the educational qualification s prescribed for the post:	Provided further that in case appointment is to be made on a post for which the knowledge of computer operation and typewriting has been prescribed as an essential qualification and the dependent of the deceased Government servant does not possess the required proficiency in computer operation and typewriting, he shall be appointed subject to the condition that he would acquire the 'C.C.C' certificate in computer operation awarded by the DOEACC Society or a certificate equivalent thereto from an Institution recognised by the Government together with the required speed of 25 words per minute in typewriting well within one year and, if he fails to do so, his general annual increment shall be withheld and a further period of one year shall be granted to him to acquire the required certificate in computer operation and the required certificate in computer operation and the required speed in typewriting and if in the extended period also he again fails to acquired certificate in computer operation and the required speed in typewriting, <u>then an</u>		
Provided that in case appointment is to be made on a post for which typewriting has been prescribed as an essential qualification and the dependent of the deceased Government servant does not possess the required proficiency in typewriting, he shall be appointed subject to the condition that he would acquire the requisite		Provided further that in case appointment is to be made on a post for which the	

knowledge of computer operation and typewriting has been prescribed as an essential qualification and the dependent of the deceased Government servant does not possess the required proficiency in computer operation and typewriting, he shall be appointed subject to the condition that he would acquire the 'C.C.C' certificate in computer operation awarded by the DOEACC Society or a certificate equivalent thereto from an Institution recognised by the Government together

with the required speed of 25 words per minute in typewriting well within one year and, if he fails to do so, his general annual increment shall be withheld and a further period of one year shall be granted to him to acquire the required certificate in computer operation and the required certificate in computer operation and the required speed in typewriting and if in the extended period also he again fails to acquire certificate in computer operation

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his services
shall be
dispensed
with.

4. A perusal of the first proviso to the pre-amended Rules shows that in case of appointment made under the Rules of 1974 to a post for which typewriting has been prescribed as an essential qualification, a dependent of the deceased government servant, who did not possess the required proficiency in typewriting, would be conditionally appointed, subject to acquisition of the requisite typing speed of 25 words per minute within one year. If he failed to do that, his general annual increment would be withheld and a further period of one year granted to acquire the requisite typewriting speed. If within the extended period of one year, the compassionate appointee failed to acquire the requisite speed in typewriting, his services would stand determined.

5. Under the amended Rule 5(1)(i), the time period of one year to acquire the requisite speed in typewriting remains unchanged and in the event of failure, the extended period of one year to acquire the necessary typewriting speed also remains unchanged. It is, however, upon a failure within the extended one year that consequences have changed. Earlier, it would lead to determination of the compassionate appointee's service, whereas now the compassionate appointee would be offered a fresh appointment on a Class-IV post.

6. So far as the present case is concerned, there could be some issue

whether the unamended Rule 5 would apply in the petitioners' case or their rights would be governed by the 13th Amendment Rules. But, on facts that controversy does not arise. The reason is that it is common ground between parties that each of the petitioners after their respective appointments under the Rules of 1974 did not possess the requisite proficiency in typing or the prescribed speed of 25 words per minute. It is also common ground that all the three petitioners took the typewriting test for the first time in the year 2019 in accordance with Rule 5(1)(i) and failed it. All the petitioners, therefore, had a further year to acquire the necessary proficiency in typewriting. The petitioners took the typing test a year later, that is to say, a second time on 25.08.2022 and passed it along with four other similarly circumstanced appointees. In this connection, the attention of the Court has been drawn by the learned Counsel for the petitioners to the impugned order dated 28.03.2023. The order has been issued by the Officer on Special Duty (Establishment), KDA. In the first part of the order, a declaration of result of the second typing test for the petitioners, besides four others, is carried. It clearly says that in the typing test held on 25.08.2022, seven Clerks had passed it, including the three petitioners here. There is no objection to the order dated 28.03.2023 to this extent; nor can it be.

7. In the later part of the order, it is mentioned that the Vice-Chairman of the KDA in terms of his approval order dated 10.03.2023 has directed that the employees who have passed the examination would undergo a typing test under the supervision of the Secretary on 12.04.2023 at half past twelve in the afternoon. The venue would be the KDA's Computer Department, located on the third floor. The order appoints two

Officers of the KDA as Invigilators, to whom it is addressed. It is this part of the order requiring the petitioners to undergo a typing proficiency test for a third time that the petitioners impugn.

8. The submission of the learned Counsel for the petitioners is that Rule 5 of the Rules envisages only two typing test for an appointee under the Rules of 1974, if he does not initially possess the requisite proficiency and speed of 25 words per minute. If he fails the first, he has the second and last chance a year afterwards of failing the first test to achieve the requisite speed and retain his appointment. Here, the petitioners have passed the second test and no third test is envisaged under the Rules of 1974, either before the amendment, or after the 13th Amendment. The petitioners have for a fact passed the second test held to determine their proficiency on 25.08.2022, the result whereof was declared on 28.03.2023. There is, thus, according to the petitioners no occasion for the KDA to hold a third test to verify their proficiency.

9. This Court granted time to the KDA to file a counter affidavit on 05.07.2023 and a return has been filed today, which is taken on record.

10. By consent of parties, this Court has heard the matter.]

11. Heard Mr. Rajesh Dwivedi, learned Counsel for the petitioners, Mr. Anand Prakash Paul, learned Counsel appearing for respondent Nos. 2 and 3 and Ms. Monica Arya, learned Additional Chief Standing Counsel appearing on behalf of the respondent No.1.

12. In Paragraph No.4 of the counter affidavit, it is admitted that the petitioners

though could not clear the proficiency test in typing in the first attempt, but they did pass it in the second attempt. In Paragraph No.5, it is said that approval to the petitioners' appointment was granted by the Vice-Chairman, presumably on the petitioners passing the typing test in the second instance, but subsequently upon complaints received from certain Department Heads under whom the petitioners are working with regard to their typing skills, it was found necessary that a verification be done. It is on this account that the order dated 28.03.2023 was issued requiring all candidates, who cleared the examination, to appear in what the respondents describe as "a conformity routine typing test" to be held on 12.04.2023. It is also averred in Paragraph No.3 that out of the seven candidates, who cleared the proficiency test in the second attempt, three alone have preferred this writ petition, whereas the other four have submitted to the impugned order and taken the test a third time. It is also averred that under the Rules once the candidate clears the test, he cannot be asked to appear for a further skill test, but that does not debar the Authority to take action against employees, who are found to be totally incompetent in their work. More or less, Mr. Paul has made submissions in conformity with the stand taken in the counter affidavit, which he has put across to the Court in more lucid words.

13. Upon hearing learned Counsel for the parties, this Court is of opinion that the KDA have neither the right nor jurisdiction to hold a third test whether a candidate appointed under the Rules of 1974, passes or fails the typing proficiency test held in the second instance. Rule 5(1)(i) of the Rules of 1974, both pre-amended and post amendment contemplate only two tests for a compassionate appointee, who does not

have the requisite skill and speed of 25 words per minute in typewriting. The first test, an appointee, with this shortcoming, must take at the end of one year of his appointment, and failing that, he must take the second test in the following, year after improving his skills. If he passes the skill test in the second instance, there is no further authority left with the KDA to ask him to undergo a typing skill or proficiency test a third time. After all, the second test was held by the KDA and the petitioners were found successful in the said test. It is not even that the KDA having held the second test it binds them with the result in some manner of an estoppel. The crux of the matter is that passing the typing skill test in the second instance under Rule 5(1)(i) closes the chapter under the Statute once and for all. There is no jurisdiction, as already said, with the KDA to hold a third test to verify or confirm the result of the second. Even if they did hold it and found the petitioners not upto the mark, it would be of no consequence.

14. This position of the law, Mr. Paul could not very seriously dispute. However, he said that for poverty of skill in typewriting, action could be taken against the petitioners. The taking of action if permissible under the service rules for inefficiency of an employee is another matter. It has nothing to do with his appointment. The issue here is about the validity of the compassionate appointment given to the petitioners and with them passing the typewriting proficiency test in the second instance, their appointment cannot be put in jeopardy. If that cannot be done, there is no point about the KDA holding a third test for ascertaining the typewriting proficiency or the petitioners' typing speed, who have already passed the necessary test in accordance with Rules of

1974. Mr. Paul could not bring to this Court's notice any authority taking a contrary view on principle.

15. In this view of the matter, this petition **succeeds** and is **allowed**. The impugned order dated 28.03.2023 to the extent it directs the holding of a typing skill test for a third time is **quashed**. The respondents are restrained by a *mandamus* from holding a typing test in future for the purpose of determining the validity of the petitioners' appointment.

16. There shall be no order as to costs.

(2023) 8 ILRA 905
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.08.2023

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ-A No. 6758 of 2004
connected with
Writ-A No. 6145 of 2002

Anil Kishore Gupta ...Petitioner
Versus
S.B.I. & Ors. ...Respondents

Counsel for the Petitioner:

K.K. Gautam, Amit Kr. Singh Bhadauriya, L.B. Singh Bhadauraiya

Counsel for the Respondents:

N.K. Seth, Gopal Kumar Srivastava

A. Service Law – Punishment – Promotional examination – Use of unfair means – Departmental enquiry – Punishment of ‘Warning’ was given by making entry in the service book, which was also confirmed by appellate authority – Petitioner was also restrained from getting benefit for grant of appointment to the post of Senior Assistant w.e.f

01.04.2002 – Legality challenged – Held, loss of seniority to a government servant with consequent loss of promotional prospects, higher pay and emoluments is a matter of serious consequence to him – Once, the punishment of ‘warning’ has been awarded to him and a note in this regard has been made in his service book, there is no occasion to deny the petitioner's claim for appointment on the post of Senior Assistant w.e.f. 01.04.2002. (Para 24, 25, and 26)

Writ petition allowed. (E-1)

List of Cases cited:

1. Writ Petition No.3988 (S/S) of 1992; K.K. Gautam Vs The St. Bank of India & anr. decided on 24.11.1993
2. Service Single No. 331 of 2012; Ram Prakash Bajpai Vs St. of U.P. Through Prin. Secy. Civil Aviation Deptt. Lko. decided on 15.03.2021.
3. St. of U. P. & ors. Vs Saroj Kumar Sinha; (2010) 2 SCC 772.
4. Roop Singh Negi Vs Punjab National Bank & ors.; (2009) 2 SCC 570.
5. L.P.A. No.155/2013; Varun Bhardwaj Vs St. Bank of India & ors. decided on 24.11.2015.
6. Civil Appeal No. 4455 of 2019; Rajbir Surajbhan Singh Vs The Chairman, Institute of Banking Personnel Selection, Mumbai decided on 29.04.2019.
7. Civil Writ Petition No.7345 of 2022; Ravi Kumar Kulhari Vs Rajasthan Rajya Vidyut Prasaran Nigam Ltd. & anr. decided on 09.09.2022
8. Civil Appeal No. 263 of 2013; St. Bank of India & ors.Vs Narendra Kumar Pandey decided on 14.01.2013.
9. Tara Chand Vyas Vs Chairman & Disciplinary Authority & ors.; (1997) 4 SCC 565

(Delivered by Hon’ble Irshad Ali, J.)

1. Heard Sri Sudeep Seth, learned Senior Counsel assisted by Sri Amit Kumar Singh Bhadauriya, learned counsel for the

petitioner and Sri Gopal Kumar Srivastava, learned counsel for the respondent(s) - Bank.

2. Since both the writ petitions arise and give rise to a similar controversy, the same are being decided by means of this common judgment and order.

3. By means of present writ petition, the petitioner has prayed for issuance of a writ, order or direction in the nature of certiorari quashing the impugned disciplinary order dated 31.03.2004 along with appellate order dated 05.08.2004 as well as order dated 04.09.2004, whereby the petitioner was appointed on the post of Senior Assistant with a further prayer to issue a writ, order or direction in the nature of mandamus commanding the respondents to give effect to order dated 01.08.2003 treating the petitioner to be appointed on the post of Senior Assistant with all consequential benefits w.e.f. 01.04.2002 along with 24% interest on delayed payment.

3. Brief facts giving rise to the present writ petition are as under:

Writ-A No.6145 of 2002:

Sr. No.	Relevant Facts of the Case
a.	The petitioner completed his B.Com. in IInd Division from Lucknow University, Lucknow in the year 1981 and LL.B. in IInd Division with 64% Marks from Lucknow University and has passed Ist part Examination of C.A.I.I.B. (Certificate of All India Institute of Bankers).
b.	He was appointed on the post of Clerk

	/ Typist by the respondent Bank on 17.07.1984 after having been qualified in written test and interview. He joined on the said post on 27.07.1984 at State Bank of India, Nanpara Branch, District Bahraich.		marks.
c.	The petitioner was sent on deputation to Inspection Department on Mobile Duty and posted at Zonal Inspection Office, Lucknow on 21.01.1988 and was paid a sum of Rs.325/- per month, as special allowance in addition to other monthly salary.	i.	On 18.02.2001 and 25.02.2001, the exam for JMGS-I was again held by the respondent - Bank and the petitioner again participated in the same, however, he was not informed about marks obtained and was not called for interview.
d.	He remained on deputation between the period 21.01.1988 to 19.08.1990.	j.	On 02.09.2001, the respondent - Bank held exam for promotion as Trainee Officers effective w.e.f. 01.08.2000, wherein the petitioner appeared and secured 38.67 marks out of 70 marks but was not called for interview as minimum cut of mark was 40.
e.	On 20.08.1990, the respondent - Bank absorbed the petitioner as Clerk / typist in Inspection Department and the payment of deputation allowance of Rs.325/- was stopped.	k.	On 28.01.2002, the petitioner applied for study leave and remained on leave from 05.02.2002 to 08.03.2002.
f.	On 12.12.1997, on petitioner's own request, he was transferred and posted at SBI's Circle Audit Department, Local Head Office, Lucknow.	l.	On 10.03.2002, the respondent - Bank held written examination for promotion as Trainee Officer and the petitioner participated in the same, however, he was not informed about result of the same.
g.	On 14.08.1999, the petitioner was relieved for joining on deputation to SBI, Zonal Inspection Office, Jaipur, Rajasthan to work as Inspection Assistant on mobile duty with special deputation allowance of Rs.750/- per month.	m.	On 19.06.2002 & 20.06.2002, the respondent - Bank held interview for the same, but the petitioner was not called for.
h.	Under merit cum Seniority channel, the respondent - Bank held examination for promotion to Junior Management Grade Scale - I Officer (for short, "JMGS - I) to be effective w.e.f. 01.08.1998, wherein the petitioner participated and secured 52 marks out of 60 marks but was not called for interview as he had no seniority marks to his credit by that time and was lower in merit by 4.5	n.	On 28.07.2002, the respondent - Bank held examination for promotion to the post of JMGS-I Officer effective w.e.f. 01.08.2001 and 01.08.2002 and the petitioner appeared in the same but he was not called for interview.
		o.	Vide letter dated 31.07.2002, the petitioner asked the respondent - bank to inform him the marks, which he had obtained in the examination held on 10.03.2002 for promotion as Trainee Officer effective from 2001.
		p.	Vide letter dated 12.08.2002, the

	Inspection and Audit Department of SBI, Jaipur, Rajasthan informed the petitioner that in the exam held on 10.03.2002 for promotion to Trainee Officer w.e.f. 01.08.2001, he had secured 46.75 marks out of 70 marks.
q.	While acknowledging the above letter vide registered letter dated 20.08.2002 / 29.08.2002, the petitioner requested the respondent to inform the reasons for not calling him to appear in the interview despite having secured 46.75 marks, whereas candidates lesser than him in marks were called for, however, he has not received any reply since then.
r.	On 21.08.2002, the petitioner was repatriated to Lucknow vide order dated 26.07.2002 and was relieved from his duties from Jaipur Rajasthan and he reported for duties at SBI, Local Head Officer, Lucknow on 24.08.2002.
s.	On 02.09.2002, the petitioner was transferred to SBI, Zonal Officer, Lucknow for further posting. As petitioner was on leave on 3rd, 4th and 5th September, 2020, the said order was served upon him on 06.09.2002 and he immediately reported for duties at SBI, Zonal Office, Lucknow and since then he is awaiting for further posting orders.
t.	Since 16.09.2002 till date, the petitioner was on medical leave as he was not well.
u.	Vide letter dated 13.09.2002, which was received by the petitioner on 11.10.2002, the personnel section of SBI, Zonal Office, Lucknow had directed him to report to Assistant General Manager, Region-II, SBI,

	Zonal Office, Lucknow for further posting.
v.	The petitioner being ill, vide application dated 12.10.2002 requested the AGM, SBI, Zonal Office, Lucknow to extend his medical leave, however, no reply has been made to him and he was not informed the reasons as to why despite his having secured higher marks, he was not called for in the interview held on 19.06.2002 and 20.06.2002 for promotion as Trainee Officer effective w.e.f. 01.08.2001, whereas persons securing lesser marks were called for and got promoted.

Writ-A No.6758 of 2004:

a.	The petitioner was appointed as Clerk cum Typist in the respondent Bank on 27.07.1984. He was chosen for Inspection Department. He after having completed requisite length of service with approved track record, was allowed for promotional test for promotion to the post of JMGS-I w.e.f. 01.08.1998. In the examination, scoring 52 marks out of 60, he was not called for interview.
b.	The petitioner again appeared in the promotional test for JMGS-I held on 18.02.2001 & 25.02.2001, however, the marks obtained were not disclosed to him.
c.	The petitioner appeared in the examination for the post of Trainee Officer on 02.09.2001 and secured 38.67 marks out of 70.
d.	He again appeared in the competitive test for promotion to the post of

	Trainee Officer w.e.f. 01.08.2001 but was not called for interview followed by admitting him to written test for promotion to the post of Officer JMGS-I effective from 01.08.2001 and 01.08.2002. The test was held on 28.07.2002 but the petitioner was not called for interview.	l.	On 01.08.2003, the petitioner was promoted in the cadre post of Senior Assistant based on seniority cum suitability w.e.f. 01.04.2002 i.e. date subsequent to petitioner's participation in the impugned examination.
e.	Petitioner having not been called for interview, requested the respondents to show his marks in the exam held on 10.03.2002.	m.	In the news paper "The Pioneer" dated 24.11.2003, the IBPS, who conducted the Trainee Officers written test, which was held under control of Deputy General Manager of respondent Bank, a news item was published regarding IBPS having been involved in leakage of examination papers including CAT and Probationary Officers of SBI.
f.	Respondent No.2 vide letter dated 12.08.2002 informed the petitioner that he has secured 46.75 marks out of 70, however, he was not promoted.	n.	On 03.12.2003, a visit was made by respondent No.5 to Patti Branch to hold oral inquiry, wherein the petitioner stated that matter in dispute is subjudiced before Hon'ble Court in Writ Petition No.6145 (S/S) of 2002, therefore, no useful purpose will be served by holding the inquiry, however, he was forced to sit and sing the proceedings, however, in the inquiry, no prosecution documents were examined.
g.	When the persons securing lesser marks than the petitioner were called for interview, he filed Writ Petition No.6145 (S/S) of 2002, which is pending before this Court.	o.	In pursuance to directives of presenting officer vide brief dated 03.12.2003 stepping into role of respondent No.5, the petitioner submitted his defense brief.
h.	The petitioner was repatriated from Inspection Department, Jaipur to Local Head Office, Lucknow and then to Region-II of Zonal Office, Lucknow and then to village Branch, Patti in District Pratapgarh.	p.	In the meantime, pending inquiry, a loan of Rs.2.00 Lacs was sanctioned to the petitioner by respondents, however, under the shadow of disciplinary proceedings, the same is not entitled for.
i.	Vide letter dated 31.03.2003, respondent No.4 issued a show cause notice to the petitioner that as to why disciplinary proceeding should not be initiated against him for alleged misconduct.	q.	Vide letter dated 26.03.2004, respondent No.4 forwarded a tentative order passed to the petitioner. It is alleged that the said order was passed
j.	The petitioner submitted reply to the same on 12.04.2003 denying the allegations levelled.		
k.	Vide letter dated 09.06.2003, the petitioner was charge sheeted for allegedly using unfair means in the impugned examination and was desired to submit reply within seven days.		

	without affording opportunity of making submissions against the inquiry officer's finding.
r.	On 30.03.2004, the petitioner requested the respondent No.4 to review his punishment order keeping in view the circumstances that he himself had concurred with award of 10/10 marks in petitioner's appraisal and promoted him to the post of Senior Assistant w.e.f. 01.04.2002.
s.	On 31.03.2004, respondent No.4 passed final order warning the petitioner instead of censure entry earlier proposed.
t.	Vide letter dated 10.05.2004 respondent No.4 stated that inquiry report has already been provided to the petitioner and vide order dated 14.05.2004, he confirmed the tentative order stating that if the petitioner is having any grievance, he may file an appeal within 45 days.
u.	On 27.05.2004, the petitioner filed appeal stating that he has gathered information that the invigilator upon query has denied that any unfair means have been used.
v.	Vide letter dated 02.08.2004, the petitioner requested the Branch Manager, Patti to relieve him for Korwa Branch.
w.	Vide order dated 05.08.2004, respondent No.3 rejected the petitioner's appeal taking same view as of respondent No.4.
x.	On 04.09.2004, a fresh order was issued by respondent No.4 directing the petitioner's posting to Lalganj.
y.	Vide letter dated 23.09.2004, Branch Manager, Patti relieved the petitioner

	for Diwaganj Branch instead of Lalganj Branch and after five days, he was again relieved for Kumbhi Aima Branch to assist the inspection.
z.	On 11.10.2004, the petitioner was relieved from Kumbhi Aima Branch to Lalganj Branch.
aa.	The entire action of respondents being alleged to be malafide, false, prejudicial, illegal, biased, vindictive, unequal and beyond jurisdiction denying the promotion to the petitioner to the post of Trainee Officer, the present writ petitions have been preferred before this Court.

4. Submission of learned Senior Counsel for the petitioner is that the petitioner has never used unfair means in promotional examination to the post of Trainee Officer and he has scored higher marks than Sri. A.K. Barkley, who had himself admitted having used unfair means in the said examination.

5. He further submitted that the impugned charge sheet is nothing but an after thought with ulterior motive to somehow justify the deprivation of promotion to the petitioner. The respondents have never taken the plea of using unfair means by the petitioner prior to filing of Writ Petition No.6145 (S/S) of 2002 claiming promotion to the post of Trainee Officer. He submitted that the respondents even did not come forth with the allegation of use of unfair means while communicating the marks secured by the petitioner. Even after query made by the petitioner in this regard, the respondents did not spell out any reason.

6. He next submitted that the impugned order has been passed on the

basis of surmises and conjectures and in absence of any constructive evidence to substantiate the allegations. He submitted that on the one hand no evidence has been lead by the respondents during course of inquiry and on the other hand, the respondent -IBPS itself failed to support its contention lead by evidence.

7. He further submitted that the appellate authority erred in stating that the inquiry officer had duly considered the petitioner's brief, however, the same is against inquiry officer's own statement, whereby he has stated that he had not receive the defense brief of the petitioner.

8. He submitted that the petitioner having been promoted to the post of Senior Assistant w.e.f. 01.04.2002 vide order dated 01.08.2003 is entitled to get salary and other benefits and denial of the same is illegal, malafide and prejudicial.

9. He lastly submitted that subsequent order of promotion to the post of Senior Assistant dated 04.09.2004 is redundant in nature and beyond jurisdiction and is liable to be quashed by this Court. In support of his submissions, he placed reliance upon following judgments:

a) K.K. Gautam Vs. The State Bank of India and another; Writ Petition No.3988 (S/S) of 1992 decided on 24.11.1993.

b) Ram Prakash Bajpai Vs. State of U.P. Through Prin. Secy. Civil Aviation Deptt. Lko.; Service Single No.331 of 2012 decided on 15.03.2021.

c) State of Uttar Pradesh and others Vs. Saroj Kumar Sinha; (2010) 2 SCC 772.

d) Roop Singh Negi Vs. Punjab National Bank and others; (2009) 2 SCC 570.

10. On the other hand, learned counsel for respondent(s) - Bank submitted that the petitioner while posted as Assistant (Accounts / Typist) in Zonal Inspection and Audit Department of respondent - Bank at Jaipur Zone appeared in written examination held on 10th March, 2002 for appointment on the post of Trainee Officer, 2001. As per report dated 17.05.2002, submitted by IBPS (Institute of Banking Personnel Selection), he used unfair means in the objective part of written test. Therefore, the respondent - bank decided for initiation of disciplinary proceeding against him and for the said reason, he was not considered for interview held on 29.06.2002 and 20.06.2002.

11. The petitioner went on leave w.e.f. 16.09.2002 to 28.10.2002 on the ground of sickness and in the mean time he filed Writ Petition No.6145 (S/S) of 2002 before this Court, which is pending consideration. He had filed another Writ Petition No.801 (S/S) of 2003, which was dismissed vide order dated 05.02.2003 and against the said order he filed Special Appeal No.80 of 2003, which has also been dismissed by Division Bench of this Court vide order dated 28.02.2003.

12. He submitted that in terms of bank's policy under the scheme of Career Progression, the petitioner was promoted to the post of Senior Assistant w.e.f. 01.08.2004 and was transferred to Lalganj Branch, District Pratapgarh vide letter dated 04.09.2004. However, as per bank's norms, name of petitioner, who was under disciplinary proceedings, could not be considered and therefore, he could not be appointed as Senior Assistant w.e.f. 01.04.2002.

13. He next submitted that for using unfair means in the examination, a charge

sheet was served upon the petitioner on 09.06.2003 for which ample opportunity of hearing was provided to the petitioner and the inquiry authority submitted his finding on 12.12.2003. He submitted that having considered the entire material placed before the disciplinary authority, the tentative order dated 26.03.2004 was passed awarding punishment of censure to the petitioner providing one more opportunity to place his submissions against the proposed punishment within three days, reply to which was submitted by the petitioner on 30.03.2004 stating that the order is discriminatory in nature as Sri A.K. Barkley was also charge sheeted along with the petitioner for copying from each other, was only warned but the petitioner has been awarded censure entry. The petitioner also submitted that the respondent - bank has appreciated his work and he has been granted promotion in cadre on the post of Senior Assistant with retrospective effect, whereupon the disciplinary authority has observed as under:

"(i) Under the rules governing the services of the EPA, if the charge of resorting to unfair practices of any nature whatsoever in any examination is accepted by the charged employee, it is considered a "MINOR MISCONDUCT", whereas if the employee does not accept the charge and the same is subsequently proved against him, it constituted "GROSS MISCONDUCT". The MISCONDUCT of both the employees was considered and punishment awarded to them accordingly. Although there is no discrimination or bias as alleged but as both the punishments "WARNED" or "CENSURED" are defined in the same clause 6(h) of the settlement, the Disciplinary Authority considered the punishment of warning for the sake of uniformity as claimed by the EPA.

(ii) Report received by the IBPS was considered by the bank under the rules framed in this regard. The report published in the newspaper against IBPS in no way affects its credibility in the instant case. Thus, over-ruled the objectives.

(iii) The performance and other achievements of the employees are not relevant while deciding the gravity of the MISCONDUCT nor it reduces his culpability in the instant case. Rather his in cadre promotion from retrospective dates speaks against his allegation of bias on the part of the management, therefore, find no merit / subsistence in his objections."

14. He submitted that the disciplinary authority after considering the entire material placed before him modified the tentative order to the extent that the petitioner be warned to be more careful in this regard with a note to this effect in his service record. Against the said order, the petitioner filed an appeal before the appellate authority, which was rejected confirming the condign punishment order. He submitted that as per Award Staff Debarment Policy, when disciplinary proceedings are in progress, following procedure may be followed:

(i) An employee, against whom disciplinary action is contemplated for an offence amounting to fraud, misappropriation of money, forgery or any other act which prima facie amounts to criminal misconduct, shall be debarred from promotion for a period not exceeding 3 years reckoned from the date such contemplation if advised to the employee in writing (ref. Circular Staff No.125 of 1978 dated 26.6.78).

(ii) In all other cases of disciplinary action, the bar will operate as from the date the employee is served with a charge-

sheet (ref. Circular Staff No.125 of 1978 dated 26.6.78).

(iii) Normally, the 3-year period of debar should commence from the date of charge sheet. However, in some cases, issuance of charge sheet is sometimes not possible owing to the Bank desiring to investigate a matter fully before a charge sheet is framed. It is quite possible that an employee, whose alleged misconduct is being investigated, may become eligible for promotion in the meantime. Under such circumstances, it may become necessary to advise the employee that disciplinary action is contemplated against him. He may not, therefore, be considered eligible for promotion. It should, of course, be ensured in the interest of the Bank as well as that of the employee, that the investigation is expeditiously completed and charge sheet issued as early as possible (ref. Circular Staff No.125 of 1978 dated 26.6.78).

(iv) Where the employee has been charge sheeted or the disciplinary action is contemplated against him for a minor misconduct, he may be permitted provisionally to appear in the test, interview etc. for promotion to higher cadre subject to his being eligible otherwise, but the result of such an employee should be withheld until such time as the case is decided (ref. Circular Staff No.125 of 1979), where after, such cases would be considered in the following manner:-

(a) If the employee is completely exonerated on the conclusion of disciplinary proceedings and it is found that he was successful in the test / interview, he would be promoted with retrospective effect alongwith other employees. (Ref. Circular Staff No.107 of 1980 dated 2.7.80).

(b) In terms of debarment policy, warning / censure is not treated as a bar to

eligibility for promotion. There is, therefore, a case for considering those employees for promotion, who are warned / censured on the conclusion of disciplinary proceeding and who are found suitable for promotion, with effect from a future date. The fact of the disciplinary proceedings contemplated / pending against an employee and of the warning / censure, if the punishment has been awarded before the interview, is known to the interview Committee and if despite this the employee is found suitable for promotion, it would be appropriate not to cancel his result and consider him for promotion from a future date. The punishment to such an employee would thus be the loss of seniority vis-a-vis others, who appeared at the same test and got promoted earlier. Accordingly, such employees may be promoted with the batch promoted subsequent to the award of punishment without having to appear again in the promotion test. (Ref. Circular Staff No.107 of 1980 dated 2.7.80).

(c) In the case of any other punishment, the result of the promotion test should be cancelled. The employee in all such cases would have to appear afresh in the test after the debarment period is over. However, their appearance in the test, the result of which is not declared, would not be counted as a change availed (Ref. Circular Staff No.107 of 1980 dated 2.7.80).

(d) In all the cases, where employees are provisionally permitted to appear in the test etc., they should be advised clearly in the initial stage itself that their promotion, in the event of their being successful in test, interview etc., would depend on the outcome of the disciplinary proceedings pending against them and that their appearance in the test etc. is only provisional. (ref. Circular Staff No.125 of 1979 dated 3.10.79)."

15. He further submitted that the petitioner is habitual of filing successive writ petitions and the grounds taken in the present writ petition has already been taken in the earlier writ petitions, which is not tenable in view of Rule 7 Chapter 22 of Allahabad High Court Rules, 1925.

16. He lastly submitted that the punishment order impugned in the writ petition is just and valid and does not call for any interference from this Hon'ble Court and the writ petitions are liable to be dismissed. In support of his submissions, he placed reliance upon following judgments:

a) Varun Bhardwaj Vs. State Bank of India and ors.; L.P.A. No.155/2013 decided on 24.11.2015.

b) Rajbir Surajbhan Singh Vs. The Chairman, Institute of Banking Personnel Selection, Mumbai; Civil Appeal No.4455 of 2019 decided on 29.04.2019.

c) Ravi Kumar Kulhari vs. Rajasthan Rajya Vidyut Prasaran Nigam Ltd. and another and connected writ petitions; S.B. Civil Writ Petition No.7345 of 2022 decided on 09.09.2022.

d) State Bank of India and Ors. Vs. Narendra Kumar Pandey; Civil Appeal No.263 of 2013 decided on 14.01.2013.

e) Tara Chand Vyas Vs. Chairman & Disciplinary Authority and Ors.; (1997) 4 SCC 565, para 3.

17. I have considered the submissions advanced by learned counsel for the parties and perused the material on record as well as law reports cited by learned counsel for the parties.

18. To resolve the controversy involved in the matter, relevant portion of

the judgments relied upon by learned counsel for the parties are being quoted below:

Judgments relied upon by learned Senior Counsel for the petitioner:

a) K.K. Gautam (Supra):

"25. In service jurisprudence next below rule is the guiding principle in the matter of promotion. When ever an employee is passed over by his juniors due to some administrative error or pendency of disciplinary proceedings, his seniority has to be restored back vis-a-vis his juniors as soon as the error is detected or such an employee is exonerated of the charges. Hon'ble Supreme Court of India had the occasion to reiterate this principle again in the matter of Arun Kumar Chatterjee v. South Eastern Railway and others reported in 1985 (2) SCC 451 and while dealing with somewhat similar situation of denial of correct seniority held as follows:

"We find no justification for the attitude adopted by the Railway Administration in depriving the appellant of his legitimate rights. Loss of seniority of a government servant with consequent loss of promotional prospects, higher pay and emoluments is a matter of serious consequence to him. When the appellant by his representations drew the attention of the departmental authorities to the injustice done to him, it was their duty to have rectified the mistake and re-fixed the seniority of the appellant."

26. After hearing both the parties at great length, petitioner in person and opposite parties represented through a senior counsel and perusing the record, we are of the confirmed view that the opposite parties failed to consider the representation of the petitioner in the light of the

recommendations made by their own senior officers to give the petitioner promotion with effect from 1975 with open mind and in accordance with the practice and policy of the bank itself as well as the settled position of law. Thus, there has been a clear violation of equality clause contained in Articles 14 and 16 of the Constitution of India. We hold that after exoneration from the alleged charges, bank ought to have restored the status-quo ante regarding promotion of the petitioner to the post of J.M.G.S.-I (redesignated). It is indeed regrettable that the subordinate official has been treated by his superiors in such a callous manner. We have no doubt whatsoever that the petitioner has been a victim of most unfair and arbitrary action and had been made to suffer for no fault of his for all these years. His agony, therefore, must come to an end without any further delay.

27. In these circumstances, this writ petition succeeds and deserves to be allowed. A writ of mandamus is hereby issued directing the opposite parties to treat the petitioner as having duly passed the written test held on 26-10-1975 and treat him appointed on the redesignated post of J.M.G.S.-I with effect from 1975 from the date any of his junior was so promoted / appointed with all the consequential benefits including further promotions to all the next higher posts. Opposite parties are further directed to implement this order forthwith and in any event not later than one month from the date a certified copy of this judgment and order is produced before them."

b) Ram Prakash Bajpai (Supra):

10. So far as the second submission of the petitioner is concerned, a perusal of the record of departmental proceedings shows

that no witness appeared in the departmental enquiry or proved any document against the petitioner. The law in this regard is well settled.

11. (A) This Court in Subhas Chandra Sharma vs. Managing Director and another 4, said:-

"In our opinion after the petitioner replied to the charge-sheet a date should have been fixed for the enquiry and the petitioner should have been intimated the date, time and place of the enquiry and on that date the oral and documentary evidence against the petitioner should have been led in his presence and he should have been given an opportunity to cross-examine the witnesses against him and also he should have been given an opportunity to produce his own witnesses and evidence. If the petitioner in response to this intimation had failed to appear for the enquiry then an ex parte enquiry should have been held but the petitioner's service should have not been terminated without holding an enquiry. In the present case it appears that no regular enquiry was held at all. All that was done that after receipt of the petitioner's reply to the charge-sheet he was given a show-cause notice and thereafter the dismissal order was passed. In our opinion this was not the correct legal procedure and there was violation of the rules of natural justice. Since no date for enquiry was fixed nor any enquiry held in which evidence was led in our opinion the impugned order is clearly violative of natural justice."

(B) The above judgment was followed by another Division Bench in Subhas Chandra Sharma vs. U.P. Co-operative Spinning Mills and others⁵ where Court held:

"In cases where a major punishment proposed to be imposed an oral enquiry is

a must, whether the employee request, for it or not. For this it is necessary to issue a notice to the employee concerned intimating him date, time and place of the enquiry as held by the Division Bench of this Court in Subhash Chandra Sharma v. Managing Director, (2000) 1 UPLBEC 541, against which SLP has been dismissed by the Supreme Court on 16-8-2000." (emphasis added)

(C) In State of Uttar Pradesh vs. Saroj Kumar Sinha⁶, the Supreme Court said:

"An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/ disciplinary authority/ Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the un rebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.

When a departmental enquiry is conducted against the government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The inquiry officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service."

12. From the above facts, it is found that the enquiry held against the petitioner is not held as per the procedure established by law. Thus the punishment order passed against the petitioner on the basis of such an defective and illegal enquiry cannot stand.

13. Given the aforesaid, the writ petition is allowed. Both the order of dismissal dated 04.08.1995 as well as the order dated 30.12.2011 rejecting the representation of the petitioner are set aside. Petitioner would be entitled to all benefits of service as are granted to other two delinquent employees i.e. Sri V.K. Saxena, Junior Aircraft Mechanic and Sri Harish Chandra @ Munna, Cleaner."

c) State of Uttar Pradesh and others (Supra):

"27. A bare perusal of the aforesaid sub-Rule shows that when the respondent had failed to submit the explanation to the charge sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the Government servant despite notice of the date fixed failed to appear that the enquiry officer can proceed with the inquiry ex parte. Even in such circumstances it is incumbent on the enquiry officer to record the statement of witnesses mentioned in the charge sheet. Since the Government servant is absent, he would clearly lose the benefit of cross examination of the witnesses. But nonetheless in order to establish the charges the department is required to produce the necessary evidence before the enquiry officer. This is so as to avoid the charge that the enquiry officer has acted as a prosecutor as well as a judge.

28. An inquiry officer acting in a quasi judicial authority is in the position of an

independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the department, even in the absence of the delinquent official to see as to whether the un rebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.

30. When a department enquiry is conducted against the Government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The enquiry officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service."

d) Roop Singh Negi (Supra):

14. Indisputably, a departmental proceeding is a quasi judicial proceeding. The Enquiry Officer performs a quasi judicial function. The charges leveled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the Investigating Officer against all the accused by itself could not be treated to be evidence in the disciplinary

proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the Enquiry Officer on the FIR which could not have been treated as evidence.

15. We have noticed hereinbefore that the only basic evidence whereupon reliance has been placed by the Enquiry Officer was the purported confession made by the appellant before the police. According to the appellant, he was forced to sign on the said confession, as he was tortured in the police station. Appellant being an employee of the bank, the said confession should have been proved. Some evidence should have been brought on record to show that he had indulged in stealing the bank draft book. Admittedly, there was no direct evidence. Even there was no indirect evidence. The tenor of the report demonstrates that the Enquiry Officer had made up his mind to find him guilty as otherwise he would not have proceeded on the basis that the offence was committed in such a manner that no evidence was left.

23. Furthermore, the order of the disciplinary authority as also the appellate authority are not supported by any reason. As the orders passed by them have severe civil consequences, appropriate reasons should have been assigned. If the enquiry officer had relied upon the confession made by the appellant, there was no reason as to why the order of discharge passed by the Criminal Court on the basis of self-same evidence should not have been taken into consideration. The materials brought on record pointing out the guilt are required to be proved. A decision must be arrived at on some evidence, which is legally admissible. The provisions of the Evidence Act may not be applicable in a departmental proceeding but the principles

of natural justice are. As the report of the Enquiry Officer was based on merely ipse dixit as also surmises and conjectures, the same could not have been sustained. The inferences drawn by the Enquiry Officer apparently were not supported by any evidence. Suspicion, as is well known, however high may be, can under no circumstances be held to be a substitute for legal proof."

• Judgments relied upon by learned Senior Counsel for the respondent(s) - Bank:

a) Varun Bhardwaj (Supra):

"14. The SBI also deposed in its affidavit before the learned single judge that as many as 976 candidates had similarly adopted unfair means in the written test conducted by it. The SBI informed the Court that this could be ascertained by the adoption of the methodology evolved by IBPS, uniformly to detect the pattern of incorrect answers beyond a certain number. The learned single judge was satisfied that SBI's action was not arbitrary and that the court in exercise of its judicial review jurisdiction, would not substitute the opinion of experts with their own.

16. SBI relies on IBPS's document entitled "Detection of use of unfair means/Malpractices in objective tests". Part III of the said document states that IBPS consider two important criteria; one, where a pair of candidates answer 12 or more identical wrong answers; and the mismatches (number of questions with different answers) being small, i.e 5 or less. The other, criteria is to detect those scoring high in tests, but having used unfair means, discernable by application of a two pronged filter (a) criteria by which pairs of

candidates have more than 90 % number of questions, containing wrong answers are picked up. Identical wrong answers (IWWs) should be a minimum number for a different set of total number of questions: (i) for a 50 item test, IWW should be more than 5 or more; (ii) where the total number of questions is 75, the identical wrong answers should be minimum 7, etc and so on. The document further states as follows:

"It can be concluded that the candidates under criteria (A) have used unfair means beyond all reasonable doubts.

It can be inferred based on the very low probability of such an event occurring by chance with good degree of accuracy that the candidates under Criteria (B) have resorted to use of unfair means."

Other material parts of the said document are extracted below:

"PROCESS FOLLOWED AT IBPS FOR IDENTIFYING CASES OF USE OF UNFAIR MEANS :

(i) IBPS has a practice of analyzing the responses of all candidates who have appeared in objective tests of all the examinations at a particular centre (city/town) for identifying cases of use of unfair means.

(ii) IBPS has indigenously developed software for identifying such cases based on an internationally accepted method. The responses of each candidate are compared with the responses of all the remaining candidates at each centre (city/town) and matched for identical responses. The software generates report of all pairs of cases which have identical responses mainly identical wrong responses.

(iii) This report is critically reviewed by group of IBPS experts. The expert group considers the following in addition to identical wrong answers while deciding on reporting use of unfair means and a final

report is prepared only after the committee reviews other factors supporting the analysis and the cases are forwarded to the bank for taking necessary action:

- (1) Evidence of any random/pattern marking*
- (2) Identical matches of 'intermittent' and 'end' skipped questions*
- (3) Item which otherwise show different answer across centre*
- (4) Evidence of copying by a common group of candidates.*

IPBS removes these candidates from the result of its own examinations (CWEs). For all other examinations, the report is sent to the concerned organization."

24. The Court is conscious that technology often empowers citizens; at the same time it has the potential to facilitate misuse. In the context of the facts of this case, this Court is not persuaded with the appellant's submission that without tangible material or evidence, the SBI could not have inferred the employment of "unfair means" by candidates generally and the petitioner in particular. Use of electronic devices to transmit information - either in the form of text messages or by use of hidden listening devices which go undetected may be hard to establish. That does not mean that LPA 155/2013 Page 17 patterns which are discernible and are thrown up on application of scientific formulae or statistical models, which leads to further examination of the primary material should be eliminated by the Courts. In the present case, the pattern which emerged showed that the appellant's results in respect of wrong answers matched with some other candidates who also appeared in the New Delhi centre. On further scrutiny, the

reasonableness of the suspicion was strengthened by the manner of his attempting the answers. These, in the opinion of the Court, were sufficient basis for the SBI to conclude that unfair means had been employed and withhold his result. The directions sought are, therefore, unavailable in exercise of judicial review discretion under Article 226 of the Constitution. As a result, this Court finds that the impugned judgment and order of the learned Single Judge does not call for interference. The appeal is, therefore, dismissed without any order as to costs."

b) Rajbir Surajbhan Singh (Supra):

"12. There is no manner of doubt that a Writ Petition under Article 226 is maintainable even against a private body provided it discharges public functions. While deciding the question as to whether ICRISAT is amenable to the writ jurisdiction under Article 226, this Court held that it is not easy to define what a public function or public duty is. It can reasonably be said that such functions as are similar to or closely related to those performable by the State in its sovereign capacity, are public functions. The primary activity of ICRISAT is to conduct research and training programmes in the sphere of agriculture, purely on a voluntary basis which according to this Court, is not a public duty¹⁰. A private company carrying on banking business as a scheduled commercial bank cannot be termed as an institution or a company carrying on any statutory or public duty." 15. This Court in Federal Bank case held that a Writ Petition under Article 226 of the Constitution is not maintainable against a scheduled bank on the ground that the business of banking does not fall within the expression "public duty". As the activity of

the Respondent of conducting the selection process for appointment to the banks is voluntary in nature, it cannot be said that there is any public function discharged by the Respondent. There is no positive obligation, either statutory or otherwise on the Respondent to conduct the recruitment tests. For the reasons above, we are of the considered opinion that the Respondent is not amenable to the Writ Jurisdiction under Article 32 or Article of the Constitution of India."

c) Ravi Kumar Kulhari (Supra):

"15. These writ petitions filed by the petitioners deserve to be dismissed for the reasons; firstly the respondents have taken a conscious decision based on the report of the Expert Committee for withholding the result of the petitioners as they were found using unfair means; secondly, this court cannot sit as an Appellate Authority over the decision of the respondents based on the report of the Expert-Committee, thirdly the judgment cited by the learned counsel for the petitioners of Hon'ble Supreme Court in the matter of Union of India (Supra) is not applicable in the facts of the present case as in the aforesaid matter the lecturers were appointed and after joining the services were terminated without giving any opportunity of hearing while in the present matters the petitioners have not even been selected as yet and, thirdly as the petitioners have participated in the selection process after careful reading of the terms, and conditions of the advertisement, as such they are estopped to challenge the same in view of the judgment passed by the Hon'ble Supreme Court in the matter of Ashok Kumar (supra) and lastly, in my considered view no illegality has been committed by the respondents for invoking clause 10(6) of the advertisement

based on the report of the Expert-Committee."

d) State Bank of India and Ors. (Supra):

"12. The first infirmity pointed out by the High Court was that charge- sheet did not mention anything about the documents or the witnesses which/whom it proposed to rely to prove the charges, nor appended any list of documents or witnesses. The presenting officer had also, according to the High Court, failed to provide the list of documents and witnesses to the charged officer. Further, the High Court also pointed out that minutes of the proceedings would indicate that forty eight more documents were produced before the Inquiring Authority and the rest of the documents were permitted to be produced on 07.11.1997. On 07.11.1997, thirty four more documents were produced and marked as Ex. 51 to 84. The High Court also pointed out that no witness was examined by the Bank in support of charges and hence to hold the charges relating to Government Business Branch proved was in fact a finding supported with no evidence.

20. We are of the view that the High Court also committed an error in holding that since no witness was examined in support of charges, it was a case of no evidence. In an ex parte inquiry, in our view, if the charges are borne out from documents kept in the normal course of business, no oral evidence is necessary to prove those charges. When the charged officer does not attend the inquiry, then he cannot contend that the Inquiring Authority should not have relied upon the documents which were not made available or disclosed to him. Of course, even in an ex parte inquiry, some evidence is necessary to establish the

charges, especially when the charged officer denies the charges, uncontroverted documentary evidence in such situation is sufficient to prove the charges."

e) Tara Chand Vyas (Supra):

"Shri B.D. Sharma, learned counsel for the petitioner, contends that for proof of the charges none of the witnesses was examined nor any opportunity was given to cross-examine them and the petitioner has disputed his liability. As a consequence, the entire enquiry was vitiated by manifest error apparent on the face of the record. We find no force in the contention. The thrust of the imputation of charge was that he had not discharged his duty as a responsible officer to safeguard the interest of the Bank by securing adequate security before the grant of the loans to the dealers, and has not ensured supply of goods to the loanees. It is based upon the documentary evidence which has already been part of the record and copies thereof had been supplied to the petitioner. Under those circumstances, we do not think there is that any manifest error apparent on the face of the record, warranting interference. It is then contended that no reasons have been given in support of the conclusions to substantiate the charges. The enquiry officer had elaborately discussed each charge and given reasons which were considered by the disciplinary authority and reach the conclusion that the charges were proved. So, had the appellate authority. They are not like civil Court."

19. On perusal of judgments cited by learned Senior Counsel for the petitioner, it is evident that in service jurisprudence next below rule is the guiding principle in the matter of promotion. When ever an employee is passed over by his juniors due

to some administrative error or pendency of disciplinary proceedings, his seniority has to be restored back vis-a-vis his juniors as soon as the error is detected or such an employee is exonerated of the charges.

20. However, on perusal of judgments cited by learned counsel for respondent(s) - Bank, it is reflected that if the charges are borne out from documents kept in the normal course of business, no oral evidence is necessary to prove those charges. When the charged officer does not attend the inquiry, then he cannot contend that the Inquiring Authority should not have relied upon the documents which were not made available or disclosed to him. Of course, even in an ex parte inquiry, some evidence is necessary to establish the charges, especially when the charged officer denies the charges, uncontroverted documentary evidence in such situation is sufficient to prove the charges.

21. In the case in hand, vide impugned order dated 31.03.2004, following findings were recorded:

"2. इस सम्बन्ध में, आपके प्रतिवेदन पर विचार करने के उपरान्त मैं अपने अस्थाई आदेश दिनांक 26.3.2004 को इस सीमा तक संशोधित करता हूँ कि आपको "Warned" किया जावे। मेरा अंतिम आदेश दिनांक 31.3.2004 संलग्न है।"

ORDER

3. I have carefully considered the issues raised by Shri Gupta and observed as under:

i) *Under the rules governing services of the EPA, if the charge of resorting to unfair practice of any nature whatsoever in any examination is accepted by the charged employee it constitute a "Minor Misconduct" whereas if the employee does*

not accept the charge and the same is subsequently proved against him, it constitutes a "Gross Misconduct". The misconduct of the both employees was considered and punishment awarded to them accordingly. Although there is no discrimination or bias as alleged but as both the punishments "Warned or Censured" are defined in the same clause 6 (h) of the Settlement, I may consider the punishment of warning for the sake of uniformity as claimed by the EPA.

ii) The report received by IBPS was considered by the Bank under the rules framed in this regard. The report published in news papers against IBPS, in no way affects its credibility in the instance case. The objection is, thus, overruled.

iii) The performance and other achievements of the employee are not relevant while deciding gravity of his misconduct nor it reduces his culpability in the instant case. Rather his in cadre promotion from the retrospective date speaks against his allegation of bias on part of the management. I, therefore, found no merit/substance in his above objections.

4. Considering the entire material on record once again, under the facts and circumstances of the case, for the sake of uniformity as claimed by the EPA, I modify my Tentative Order to such extent and finally decide that Shri Anil Kishore Gupta be warned to be more careful in this regard with suitable noting to this effect in his service record."

22. Vide impugned order dated 05.08.2004, the appellate authority recorded following findings:

"2. इस सम्बन्ध में अपीलीय अधिकारी द्वारा आपकी अपील पर विचारोपरांत पारित आदेश दिनांक 4 अगस्त 2004 संलग्न है जिसके द्वारा आपकी अपील को अस्वीकृत / निरस्त कर दिया है।

4. I have carefully examined the grounds of appeal after going through the entire material on record including the Chargesheet, its reply, enquiry Proceedings, defence brief, findings of the Enquiry Officer, Disciplinary Authority's order of proposed punishment and the appellant's submission thereagainst etc. and my observations are as under:-

(i) The Enquiry in the matter was concluded on 03.12.2003 and Presenting Officer's brief was received on the same day but defence brief could be received by the Enquiry Officer only on 22.12.2003 who after consideration put up the same before the Disciplinary Authority. The Disciplinary Authority taking into his consideration the entire material on record, including the defence brief, passed his Tentative Order dated 23.03.2004 which was served on the Appellant on 27.03.2004. The submissions of the Appellant called for against the Tentative Order were received by the Disciplinary Authority on 30.03.2004 in which he inter alia made repeated references of the findings of the Enquiry Officer. As such, I find that the prescribed procedure for conducting Disciplinary Proceedings in the Bank has been complied with and there is no violation of any procedural rule or law on the subject, which may have prejudiced the appellant.

(ii) The evidence relied upon by the Disciplinary Authority is a report submitted by the Institute of Banking Personnel Selection (IBPS), Mumbai, an independent expert body who was entrusted with holding of the test. The report shows analytical data of merit listed pairs of candidates established to have copied/used unfair means. The data appears to be based on the theory of probability, an accepted scientific formula in probing such malpractices in the tests after the

ORDER

examination is over. The pair of candidates has 12 identical wrong answers and 4 mismatches which is the established case of use of unfair means beyond all reasonable doubts under the norms. As such the facts established on the scientific basis of calculation afford sufficient grounds for holding the charges as proved against the appellant.

(iii) The IBPS detected the case of use of unfair means by the Appellant and Shri A.K. Barkley on the basis of analysis of responses given by them in their respective answer sheets. Shri Barkley accepted his guilt but the appellant did not accept but denied. Under the rules contained in Para7(m) and 5(o) of the Bipartite Settlement dated the 16th April 2002, the misconduct of Shri Barkley was considered as the "minor misconduct" and that of the appellant as a "Gross misconduct", punishable under para 8 and ibid. Accordingly, the disciplinary proceedings were initiated against both of them and punishment awarded accordingly to the nature, content and gravity of their misconducts. The punishment awarded to the appellant is, therefore, justifiable, adequate and equitable.

(iv) The claim for consideration of the past good record of the appellant being extraneous to his lapse is not tenable under the facts and circumstances of his case before me.

5. In view of the above and making an independent assessment of the entire material on record, I am of the considered view that the appellant has not raised any considerable issue and thus failed to bring out any ground which may attract my interference in the Disciplinary Authority's order.

6. I, therefore, confirm the order awarding a condign punishment and reject the Appeal.

I order accordingly."

23. While vide impugned order dated 04.09.2004, the petitioner was appointed on the post of Senior Assistant and was directed to be posted at Lalganj Branch, District Pratapgarh.

24. Even, if case of the respondent(s) - Bank is admitted on its face value and if charge of using unfair means against the petitioner was found proved and as a result, warning was issued to him by the disciplinary authority by making a suitable note in this regard in his service book, which was also affirmed by the appellate authority and there was no whisper by the respondent(s) at any point of time imposing the rider that the petitioner shall not be entitled to get benefit for grant of appointment to the post of Senior Assistant w.e.f 01.04.2002, the same cannot be denied to him, if similarly situated persons have been provided the same.

25. It is specific case of respondent(s) that, as per bank's norms, name of petitioner, who was under disciplinary proceedings, could not be considered and therefore, he could not be appointed as Senior Assistant w.e.f. 01.04.2002. Once, the punishment of "warning" has been awarded to him and a note in this regard has been made in his service book, there is no occasion to deny the petitioner's claim for appointment on the post of Senior Assistant w.e.f. 01.04.2002.

26. Loss of seniority to a government servant with consequent loss of promotional prospects, higher pay and emoluments is a matter of serious consequence to him.

27. The judgments relied upon by learned counsel for the respondents do not

fundamental to good administration – High Court held the order rejecting the representation dated 14.06.2022 unsustainable in law being non-speaking – S. N. Mukherjee's case relied upon. (28 and 29)

Writ petition allowed. (E-1)

List of Cases cited:

1. Punjab and Sind Bank & ors.Vs Durgesh Kuwar; AIR 2020 SC 3040
2. Ramana Dayaram Shetty Vs International Airport Authority of India & ors.; (1979) 3 SCC 489
3. U.O.I. Vs K.P. Joseph & ors.; (1973) 1 SCC 194
4. Dharmendra Kumar Saxena Vs St. of U.P. & ors.; 2013 (7) ADJ 153
5. Param Singh & ors. Vs St. of U.P. & ors.; 2018 SCC OnLine All 5677
6. Dr. Amarjit Singh AhluwaliaVs The St. of Punjab; (1975) 3 SCC 503
7. S.N. Mukherjee Vs U.O.I.; 1990 (4) SCC 594
(Delivered by Hon'ble Ajit Kumar, J.)

1. Heard Mohd. Atif, learned counsel for the petitioner and Sri Ravi Prakash Srivastava, learned counsel for all the respondents.

2. The petitioner by means of this petition has invoked extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India assailing the order dated 09.06.2022 whereby he has been transferred to Airport of Bhuvaneshwar from Airport of Varanasi while working as Sub-Inspector in Central Industrial Security Force (CISF).

3. Petitioner is aggrieved by the order for the reason that he has served for more than 11 years and 6 months out of home

sector and as per their own policy of transfer and adjustment promulgated by the respondents, petitioner was entitled to be given posting in home sector. Learned counsel has also assailed the order on the ground that once he has been given posting in his home sector at Varanasi in the year 2018 after having served out at places of posting out of home sector, he could not have been declared as surplus staff to be adjusted at a different place out of his home sector. It is submitted that the persons junior to him were adjusted within the home sector by placing them from Varanasi to Patna. He in this regard has taken names of juniors to the petitioner namely, Anuprekha Kumari, Akshita Sinha and Bharat Chaubey who according to him in the first instance should have been placed out of his home sector. Thus he pleads discrimination meted out to him in matter of transfer and posting.

4. In support of his above arguments learned counsel for the petitioner has relied upon the transfer policy/rules framed by the department itself that provides for a tenural period to be spent by Constables, Head Constables, Assistant Sub-Inspectors and Inspectors at different sectors during service career and which would not include the period of basic training.

5. Vide paragraph 12 it is contended that the first, second, third and fourth tenure period of service are treated to be with a division of seven years as out of home sector, 12 years in home sector then again six years out of home sectors and the last four years in home sector. He submits that the petitioner having already spent more than 11 years and 6 months since the date of initial appointment in the year 2006, deserved to be posted in home sector and this is the reason perhaps why he was given

posting at Varanasi on 03.04.2018. He submits that Varanasi is a place falling within his home sector because the petitioner's permanent residence is located at district Kaimur in the State of Bihar and Varanasi district falls within the eastern sector which includes the districts of Bihar vide Clause 13 of the transfer policy/rules.

6. *Per contra*, it is argued by learned counsel for the respondents that the transfer and posting rules contain also discretionary powers of authority in matters of transfer and postings vide Clause 10(c) and Clause 39 (xx). According to him this transfer policy/rules would be laying down broad parameters for transfer and postings of the personnels and the final decision would rest with the competent authority of the C.I.S.F., inasmuch as vide Clause 39 (xx) these transfer rules would not come in the way of discretion of the competent authority in posting any personnel at a particular place even without assigning any reason. It is argued that transfer policy/rules or notifications or circulars by whatever name it is known are purely administrative instructions and are aimed at providing guidelines to meet administrative exigencies and are not enforceable as such.

7. It is further submitted that the petitioner's application to give him posting at Patna which would fall within the home sector has already been rejected by the competent authority by passing order dated 14.06.2022, which is not under challenge.

8. In rejoinder to the above affidavit, learned counsel for the petitioner has submitted that even if the policy lays down broad principles with discretionary powers vested with authorities but this power is to be exercised in exceptional circumstances only. The authority should abide by its own

policies and guidelines otherwise it will be an absolutely uncanalised power in the name of discretion to shift an employee from one place to another for various extraneous considerations and at times for whims. He argues, therefore, that policy/rules/instructions/notification or circular by whatever name it is called, it would be rendered to be a waste paper. He argues that no administrative power vested in an authority can be unchecked in a rule of law society.

9. It is also argued by learned counsel for the petitioner that he need not challenge the order dated 14.06.2022 because it has not been passed by any competent authority. According to him the competent authority in the matter is Director General (C.I.S.F.) as per Sub clause (i) of Clause 10 of the guidelines. It is further argued that if it is taken to be a delegated power, the delegation will have to be to a competent authority having territorial authority over and above the sector concerned to which the petitioner/employee belongs and not the officer of the rank who has passed the order being D.I.G., Northern Sector. He submits that the petitioner admittedly belongs to eastern sector.

10. Having heard learned counsel for the respective parties and their arguments raised across the bar, in my view two main issues arise for consideration by this Court which are as follows:

a) Whether the authorities are bound by their own transfer rules and guidelines under transfer policy that they have themselves framed at their own discretion and any violation thereof would not warrant judicial intervention by this Court under Article 226 of the Constitution of India;

b) Whether the authorities were justified in ignoring claim of the petitioner in the matter of seniority while giving him posting at the place within the sector to which the petitioner would be entitled as his home sector.

11. In my considered view, if the first question stands un-answered in favour of the petitioner the second would only require to be looked into the extent as to whether the order that has been relied upon by the respondents to have rejected the claim of the petitioner is justified enough and has been passed by the competent authority or not.

12. As far as the transfer policy is concerned, I have carefully gone through the entire transfer policy and guidelines given therein that has been issued vide Circular No.134 dated 25.09.2017.

13. The Central Industrial Security Force is the security force that has been brought into existence with the specific purpose to safeguard security at the airport and other public industrial Sectors and Government establishments as may be required by the Central Government. The duty that is to be discharged by the Security Officers who are drawn from different places of the country and are required to render their rigorous service to have a constant vigil so as to ensure security of the airport, other industrial places and Government establishments throughout day and night i.e. 24x7. Keeping this in mind and in order to ensure better deployment of force guidelines lay down different sectors vide clauses 13. Clause 13 is reproduced hereunder:

“13. For the purpose of this policy there shall be following Sectors.

i) North Sector- Comprising of J&K, Punjab, Himachal Pradesh, Haryana, Rajasthan, Chandigarh, Uttarakhand & UP excluding the districts under Eastern UP as mentioned under Eastern Sector.

ii) NCR Sector - comprising of units under NCR Zone,SSG,GBS, DMRC & other Units as notified under NCR Sector from time to time.

iii) Eastern Sector - Comprising of Bihar, Jharkhand and Eastern UP(districts of Varanasi, Jaunpur, Ghazipur, Chandauli, Mirzapur, Sant Ravidas Nagar, Sonbhadra, Deoria, Gorakhpur, Kushi Nagar, Maharaj Ganj, Ambedkar Nagar, Faizabad, sultanpur, Amethi,Barabanki, Bahraich, Balrampur, Gonda, Shravasti, Basti, Sant Kabir Nagar, Siddharth Nagar, Azamgarh, Balia, Mau, Allahabad, Fatehpur, Kaushambi, Pratapgarh).

iv) South Eastern Sector- Comprising of West Bengal, Orissa, Andaman & Nicobar Islands and Sikkim.

v) North Eastern Sector Assam, Arunachal Pradesh, Nagaland, Manipur, Mizoram, Meghalaya and Tripura.

vi) Central Sector - Madhya Pradesh and Chhattisgarh.

vii) Western Sector - Maharashtra, Goa, Gujarat, Daman & Diu and Dadra Nagar Haveli.

viii) Southern Sector - Andhra Pradesh, Karnataka, Kerala, Telangana, Tamil Nadu, Puducherry and Lakshadweep.

However, the area under Sectors can be changed by the DG/CISF at any time depending upon administrative requirement and operational exigencies.”

14. Upon bare reading of the aforesaid clause it is clear that the country has been divided into as many as eight sectors so as to deploy Central Industrial Security Force. Now eastern sector comprises of the entire State of Bihar,

Jharkhand and eastern Uttar Pradesh that includes district Varanasi where the petitioner was posted at the time when the impugned order of transfer and adjustment came to be passed.

15. The question therefore arises as to whether it would not be pragmatic for a welfare state to consider posting of such personnel or officers in the Central Industrial Security Force in or around their home districts/sectors for certain period in their entire service career and in my view it would be and that is why the Central notification in question provides for the tenure of postings also and vide Clause 12 the policy lays down tenure postings, which is reproduced hereunder:

“12. TENURE OF POSTING

The Out of Home Sector(OHS) and Home Sector(HS) tenure for posting in respect of NGOs are subject to availability of vacancies, operational and administrative needs and new inductions. The details are as follows:

OUT OF HOME SECTOR/HOME SECTOR TENURE FOR CONSTABLEs HCs, ASIs SIs & INSPECTORs OF ALL SECTORS EXCEPT FOR EXCEPTIONS MENTIONED IN THIS CIRCULAR

*BASIC TRAINING PERIOD :
NEITHER TO BE COUNTED IN HOME SECTOR NOR OUT OF HOME SECTOR -*

a) 1st Tenure- 07 Years in Units in Out of Home Sector (excluding basic training)

b) 2nd Tenure- 12 Years in Units in Home Sector

c) 3rd Tenure- 06 years in Out of Home Sector

d) 4th Tenure (Remaining Service)- Home Sector

Note:

1. During the Inter Sector Transfer for 3rd tenure the individuals shall be asked their choice of Out of Home Sector(OHS) from among the existing OHSs by giving their preference for the OHSs in the order of priority and efforts shall be made to accommodate their Out of Home Sector(OHS) choices on merit subject to availability of vacancies.

Explanation

i) Merit shall be based on the duration of OHS (in months) already served.

ii) In case of tie, preference would be given to those having higher age. If there is still tie between two or more personnel, the preference will be given to those who have joined CISF earlier (Date of joining).

2. Home Sector posting will be considered subject to availability of vacancies in Home Sector (Vacancies would be calculated with stipulation that the Sector should not have more than 60% of HS personnel). This shall be applicable for both HS tenures (2nd and 4th tenures)

3. During Inter Sector Transfer if an individual has become eligible for HS posting from OHS, he/she can also give his preference for maximum of two OHS (other than where he/she is presently posted) where he can be posted in the event he is not posted to his HS on account of his low merit. However, once posted to OHS as per his preference, he will have to complete the full tenure of 02/03 years as applicable, depending upon the location of unit, before he is again considered for HS posting. But such OHS posting shall not be counted against HS posting even though he had given preference for the same, as he could

not be accommodated in his HS despite being due for HS posting This shall be applicable to postings for both the HS tenures.(2nd and 4th tenure)”

16. The above clause therefore, clearly demonstrates that in the entire period of service while a personnel or an officer would be rendering total about 29-30 years of service in the force, maximum period he/she would be serving out of the home sector. It is the maximum period of 12 years that he/she would be allowed posting in home sector. Home sector as I have already perused above, is not necessarily to be a place of permanent address of the personnel but it comprises of a very large area, like for instance, if a person belongs to State of Bihar, he can be posted in Jharkhand or Eastern Uttar Pradesh and that would all amount to a posting within the home sector. No one needs to explain as to what is the distance between Bihar and Jharkhand or Jharkhand and district Ballia or between District Kaimur of Bihar and Pratapgarh and Kaushambi districts that fall within eastern sector.

17. In the circumstances therefore, it appeals to reason that the policy was framed with a view to give posting to the personnels in the home sector. The postings are broadly made definitely in tune with the guidelines and the principles that have been laid down in the notification. However, in so far as the argument that the guidelines are only to be considered in the broader perspective inasmuch as they do not create a bar for the discretion to be exercised by the authority in giving posting at any place, in my considered view would normally be taken into account where special circumstances are assigned for posting an officer repeatedly at a particular place. The

authorities should adhere to the rules framed by them normally and overriding power to exercise discretion should be only special circumstances where situation so demands. So normally when no special reasons are assigned, it is expected that the Government would certainly be relying upon its own guidelines that have been laid down. Normally, the rule framing authority should adhere to the guidelines have to be complied with by the authority framing it giving a pragmatic view. Only in exceptional circumstances, the authority can bypass the guidelines. It is not the case where any exceptional circumstance has been placed before this Court by learned counsel for the respondents. Nothing has been stated in the entire counter affidavit which may justify the adjustment of the petitioner from the airport of Varanasi to airport of Bhuvaneshwar which falls outside the home sector.

18. Petitioner was given posting in the home sector only in the year 2018 and, therefore, he could have been continued for further more period but he has been shifted to Bhuvaneshwar under the order impugned assigning reasons that he is a surplus staff.

19. Learned counsel for the petitioner has drawn the attention of the Court towards the chart which has been appended alongwith the writ petition as Annexure-9 that shows Anuprekha Kumari, Bharat Chaubey and Akshita Sinha were junior to the petitioners and had been given posting at Varanasi which is also their home sector.

20. It is claimed that they were juniors to the petitioner so naturally they must have rendered lesser service than the petitioner.

21. Now Rakesh Kumar who was posted alongwith the petitioner and Bharat

Chaubey, have been shifted from Varanasi to Patna. Patna also falls within the home-sector as the Varanasi falls in the same sector as per the transfer rules.

22. In the circumstances, therefore the persons who were junior to the petitioner should have been first taken to be surplus staff to be shifted to a different place of posting outside the sector.

23. Thus in the given facts and circumstances of the case it cannot be said to be a decision taken by the authority in the public interest or in the administrative exigency which are the powers that can be enforced in the light of what has been pleaded by learned counsel for the respondent invoking powers given provisions contained under Clause 10 (c) and 13 (xx) of the transfer rules. If this kind of action is sustained in law and is said to be outside the purview of judicial review by this Court, then it would certainly be defeating the very object and purpose with which the policy is framed.

24. This Court is conscious of the well laid position of law that transfer being in exigency of service, an employee cannot have a choice of posting and administrative circulars and guidelines as a mode of transfer policy cannot confer any vested right upon an employee to make it enforceable by writ court (*AIR 2020 SC 3040: Punjab and Sind Bank and Ors. vs. Durgesh Kuwar*), but there are well laid exceptions to the above rule, like malafide exercise of discretion, transfer affecting monetary benefits to employee's prejudice, discriminatory exercise of discretion upsetting the seniority or meeting out unequals equally to their prejudice. Even in the case of infraction of policy guidelines or executive instructions made of course,

may warrant judicial intervention. In *Ramana Dayaram Shetty v. International Airport Authority of India and others: (1979) 3 SCC 489*, Supreme Court very categorically held thus:

It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr Justice Frankfurter in Viteralli v. Saton [359 U.S. 535: Law Ed (Second series) 1012] where the learned Judge said:

An executive agency must be rigorously held to the standards by which it professes its action to be judged Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword."

25. Even earlier in the case of *Union of India vs. K.P. Joseph and others: (1973) 1 SCC 194*, the Supreme Court held that:

"9. Generally speaking, an administrative Order confers no justiciable right, but this rule, like all other general rules, is subject to exceptions. This Court has held in Sant Ram Sharma v. State of Rajasthan and Another (AIR 1967 SC 1910) that although Government cannot supersede statutory rules by administrative instructions, yet, if the rules framed under Article 309 of the Constitution are silent on any particular point, the Government can fill up gaps and supplement the rules and

issue instructions not inconsistent with the rules already framed and these instructions will govern the conditions of service."

26. A Coordinate Bench of this Court in the case of ***Dharmendra Kumar Saxena vs. State of U.P. And others: 2013 (7) ADJ 153*** has held that:

"23.....the Government is bound by executive orders/policies. The guidelines are made to follow it and not to breach it without any justifiable reasons. Whenever the Government deviates from its policies/guidelines/ executive instructions, there must be cogent and strong reasons to justify the order; when transfer order is challenged by way of representation, there must be material on record to establish that the decision was in public interest and it does not violate any statutory provision, otherwise the order may be struck down as being arbitrary and violative of Article 14 of the Constitution. The authorities cannot justify their orders that breach of executive orders do not give legally enforceable right to aggrieved person. As observed by Justice Frankfurter "An executive agency must be rigorously held to the standards by which it professes its action to be judged".

24. It is true that the Supreme Court has consistently taken the view that in transfer matters breach of guidelines/policy/ executive orders do not confer upon government servants any legally enforceable right. But on a careful reading of the judgements of the Supreme Court on this issue, it is also evident that in all those cases the Supreme Court has ruled that in case of breach of executive instructions/orders, the Government Servant can make representation to the appropriate authority and if any such representation is made, the appropriate

authority must consider it in proper perspective and in accordance with law."

27. The aforesaid judgment of co-ordinate Bench was cited with approval by Division Bench in the case of ***Param Singh and others vs. State of U.P. and others: 2018 SCC OnLine All 5677*** and on the issue of compliance of administrative instructions by the executive, the Division Bench relying upon the judgment of the Supreme Court in the case of ***Dr. Amarjit Singh Ahluwalia v. The State of Punjab: (1975) 3 SCC 503*** vide paragraph 21, 22, 23 and 24 has held thus:

"21. We are in agreement with the said view. The object of framing the transfer policy/ guidelines is to ensure that the power of transfer should be exercised in public interest and for the efficiency in the service. It cannot be done for unauthorized purpose. We find that law laid down in Dharmendra Kumar Saxena (supra) is based on the principle laid down by the Supreme Court in a Constitution Bench judgment in the case of Ramana Daya Ram Shetty v. International Airport Authority of India and others, (1979) 3 SCC 489 and the other cases referred in the judgment.

22. In the case of ***Dr. Amarjit Singh Ahluwalia v. The State of Punjab and others, (1975) 3 SCC 503*** the Supreme Court applied the principle enunciated by Mr. Justice Frankfurter in *William Vincent Vitarelli v. Fred A. Seaton, Secretary of Interior, et al., 359 U.S. 535 (1959): Manu/USSC/0176/1959* where the learned Judge said:

"An executive agency must be rigorously held to the standards by which it professes its action to be judged. See Securities & Exchange Commission v. Chenery Corp., 318 U.S. 80, 318 U.S. 87-88. Accordingly, if dismissal from

employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. See Service v. Dulles, 354 U. S. 363. This judicially evolved rule of administrative law is now firmly established, and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword. "

23. *In Dr. Amarjit Singh Ahluwalia (supra) the Supreme Court preferred the view taken by U.S. Supreme Court while interpreting the administrative instructions. The British Courts take rather conservative view on the administrative orders. The following discussion and conclusion are apt and relevant for our purposes:*

"8. ...Now, it is true that clause (2) (ii) of the memorandum dated 25th October, 1965 was in the nature of administrative instruction, not having the force of law, but the State Government could not at its own sweet will depart from it without rational justification and fix an artificial date for commencing the length of continuous service in the case of some individual officers only for the purpose of giving them seniority in contravention of that clause. That would be clearly violative of Articles 14 and 16 of the Constitution. The sweep of Articles 14 and 16 is wide and pervasive. These two articles embody the principle of rationality and they are intended to strike against arbitrary and discriminatory action taken by the, 'State' Where the State Government departs from a principle of seniority laid down by it, albeit by administrative instructions, and the departure is without reason and arbitrary, it would directly infringe the guarantee of equality under articles 14 and 16. It is interesting to notice that in the United States it is now well settled that an

executive agency must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. vide the judgment of Mr. Justice Frankfurter in Vitaralli v. Seaton, 359 US 535, 546-547 : 3 L Ed. 2nd 1012. This view is of course not based on the equality clause of the United State Constitution and it is evolved as a rule of administrative law. But the principle is the same, namely, that arbitrariness should be eliminated in State action."

24. It is trite that non-statutory direction is not enforceable in Court. The transfer policy framed by the Government is non-statutory guideline, therefore, it cannot be enforced. The legal position in this regard is too well settled to require any reiteration. But the Supreme Court in Dr. Amarjit Singh Ahluwalia (supra) has taken a middle path that administrative orders are binding on State and it cannot completely ignore the instructions issued by it."

(Emphasis added)

28. I may further add here that if genuine reasons are not given so as to exercise discretion overriding the general rules of transfer, it would amount to an exercise vitiated for malice and not necessary for any fact but it can be in law as well. The manner in which by means of a very cryptic order the representation of the petitioner has been rejected as has been brought on record by means of counter affidavit, non application of mind is writ large on the face of record. Any discretion if exercised by passing the normal rule, if represented against must be defended by reasoned or well informed decision. A mere order that representation is turned down would only lead to an inevitable inference

that authority had no reason to defend its order on parameters of rules and policies and so it simply turned down the respondents. This is malice in law. The Supreme Court in the case of ***Somesh Tiwari vs. Union of India: (2009) 2 SCC 592*** has held that “Mala fide is of two kinds - one malice in fact and the second malice in law. The order in question would attract the principle of malice in law as it was not based on any factor germane for passing an order of transfer and based on an irrelevant ground i.e. on the allegations made against the appellant in the anonymous complaint. It is one thing to say that the employer is entitled to pass an order of transfer in administrative exigencies but it is another thing to say that the order of transfer is passed by way of or in lieu of punishment. When an order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal.”

29. An administrative authority while taking a decision must ensure that its decision is well informed dealing with the aspect with which a representation has been made by an employee questioning his transfer. While it is a well laid principle of law that in exercise of administrative discharge of duty an executive must give reasons for decision to be taken as its fundamental to good administration. A Constitution Bench of the Supreme Court in ***S.N. Mukherjee vs. Union of India:1990 (4) SCC 594*** has reiterated the necessity of recording reasons by administrative body/authority. Thus the order rejecting the representation dated 14.06.2022 being non-speaking is held to be unsustainable in law.

30. In the circumstances therefore, the impugned decision taken by the authority is

such an administrative action that deserves judicial intervention by this Court.

31. Coming to the second issue, I find that the petitioner had been given posting at Varanasi in the year 2018 like other two persons, Rakesh Kumar and Bharat Chaubey .

32. It has not been disclosed in the order that has been enclosed with the counter affidavit, as to why these persons were continued at their home sector and the petitioner has been picked to be shifted out of his home sector as surplus staff.

33. Still further I find merit in the argument advanced by learned counsel for the petitioner holds merit that the competent authority in the matter would be the Director General (Central Industrial Security Force) vide Clause 10 (a) of the guidelines/policies which is reproduced hereunder:

“A) The Director General shall be the final authority for deciding all such transfers/postings.”

34. Admittedly, the order has been passed by the D.I.G. (Central Industrial Security Force), North Zone, Airport Sector who is not the competent authority.

35. In any view of the matter, since I am not able to sustain the order passed by the authority to treat the petitioner as surplus staff at Varanasi leaving juniors to him to continue at that place of posting, the order passed by the authority dated 09.06.2022 in respect of the petitioner is hereby quashed and so also the consequential order dated 17.06.2022 passed in the matter.

36. The respondents are directed to consider the claim of the petitioner and pass appropriate orders within three weeks of presentation of certified copy of this order, giving him posting at any place within his home sector. The decision shall be taken by the competent authority within a period of four weeks and under any circumstances on or before 25.08.2023.

37. It is, however, made clear that until such decision petitioner would continue at the present place of posting and shall be paid salary.

38. The writ petition thus succeeds and is *allowed* in above terms.

(2023) 8 ILRA 934

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 10.08.2023

BEFORE

THE HON'BLE MANJIVE SHUKLA, J.

Writ-A No. 9429 of 2023

Sunil Kumar Srivastava ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sunil Kumar Srivastava

Counsel for the Respondents:
C.S.C., Sri Madan Lal Srivastava

A. Service Law – Constitution of India – Article 226 – Writ – Maintainability – Suppression of material fact – Petitioner was fully aware about the order dated 11.4.2023 passed in earlier writ petition, but he deliberately has not disclosed this fact, which have direct bearing on the result of present writ petition – Effect – Held, a person who conceals material facts while filing writ petition is not entitled for

any relief from the High Court in exercise of its extraordinary jurisdiction under Article 226 – Petitioner approaching the Writ Court must come with clean hands and must put forward all the facts before the Court without concealing or suppressing anything. (Para 13, 15 and 18)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Prestige Lights Ltd. Vs St. Bank of India; (2007) 8 SCC 449
2. K. D. Sharma Vs Steel Authority of India Ltd. & ors.; (2008) 12 SCC 481
3. K. Jayaram & ors. Vs Bangalore Development Authority & ors.; (2022) 12 SCC 815

(Delivered by Hon'ble Manjive Shukla, J.)

1. Heard Mr. Sunil Kumar Srivastava, petitioner in person and learned Standing Counsel appearing for Respondents No.1 to 4 as well as Mr. Madan Lal Srivastava, learned counsel appearing for Respondent No.5.

2. Petitioner in his writ petition has stated that he has filed a complaint to District Basic Education Officer, Prayagraj wherein he has mentioned that one Mr. Arun Kumar Mishra has obtained appointment on the post of Assistant Teacher in Bal Kalyan Purv Madhyamik Vidyalaya, Buxi Khurd, Daraganj, Prayagraj on the basis of forged documents, therefore, inquiry may be conducted in the matter and the appointment of aforesaid Mr. Arun Kumar Mishra be cancelled.

3. Petitioner appearing in person has submitted that though cognizance of the aforesaid complaint lodged by the petitioner has been taken by the District Basic Education Officer, Prayagraj but till

date the inquiry in the matter has not been completed, therefore it is in the interest of justice that a direction be issued by this Court for completion of the inquiry and consequential action over the complaint of the petitioner.

4. Mr. Madan Lal Srivastava, learned counsel appearing for the Respondent No.5 has vehemently submitted that the petitioner while filing the present writ petition has concealed material facts which were in his knowledge at the time of filing of this writ petition and therefore, the writ petition filed by the petitioner is liable to be dismissed by this Court as it is well settled through catena of judgments of the Hon'ble Supreme Court that if petitioner while filing the writ petition conceals material facts then he is not entitled for any relief from the High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India.

5. Learned counsel appearing for the Respondent No.5 has submitted that this writ petition was listed before this Court on 26.5.2023 and when this fact was brought to the notice of this Court, then following order was passed:-

“Vakalatnama as preferred by Sri Madan Lal Srivastava, learned counsel for respondent no.5 is taken on record.

Put up this case on 30.05.2023 as fresh alongwith Writ Petition No.4262 of 2023.”

6. Learned counsel appearing for the Respondent No.5 has further submitted that on the complaint of the petitioner, District Basic Education Officer, Prayagraj has passed an order on 6.2.2023 whereby inquiry against Mr. Arun Kumar Mishra has been instituted and further direction was

given to stop the payment of salary to aforesaid Mr. Arun Kumar Mishra.

7. It has also been brought to the notice of this Court that aforesaid Mr. Arun Kumar Mishra has challenged the order dated 6.2.2023 passed by District Basic Education Officer, Prayagraj by filing Writ-A No.4262 of 2023 wherein he has also prayed that proceedings arising out of the complaint submitted by complainant Mr. Sunil Kumar Srivastava may be quashed.

8. This Court after hearing the aforesaid Writ-A No.4262 of 2023 has passed order on 11.4.2023 which is extracted as under:-

“Heard Shri Anil Bhushan, learned Senior Counsel assisted by Shri Himanshu Srivastava, learned counsel for the petitioner; learned Standing Counsel for the State-respondents and Shri Arun Kumar, learned counsel for respondent No. 3.

The challenge in this writ petition is to an order dated 6.2.2023 passed by the respondent No. 3/District Basic Education Officer, Prayagraj whereby and whereunder the payment of salary to the petitioner on the post of Assistant Teacher has been withheld. Prayer for mandamus directing the respondents not to conduct further inquiry upon the issue which already stands decided has also been made. Further prayer for mandamus directing the respondents to disburse regular monthly salary as well as arrears of salary to the petitioner has also been made.

It is contended by learned counsel for the petitioner that the petitioner possessing the requisite qualification of High School, Intermediate and B.T.C., was appointed in the Institution in the year 1983 and since then the petitioner is discharging his duties diligently and has unblemished record.

Similar motivated complaints were moved in the year 2021 which was inquired into by the Block Education Officer, who found the complaint to be fabricated and submitted his report on 2.11.2021. It is further contended that the present complaint was filed by Shri Sunil Kumar Srivastava in counterblast as an FIR was lodged by the Manager of the Institution against Smt. Pushpa Srivastava, wife of the complainant for getting the documents lost and fabricating forged documents (Annexure-6 to the writ petition). The inquiry has been initiated on the motivated complaint and during the pendency of inquiry, the salary of the petitioner has been stopped.

This Court finds that the petitioner was appointed in the year 1983. The petitioner has annexed the appointment letter and the application form in which the qualification of the petitioner is mentioned that he has passed BTC (Annexure-2 to the writ petition). No concrete finding has yet been returned as regards the non eligibility of the petitioner for appointment on the post of Assistant Teacher.

In the opinion of the Court, the salary of the petitioner cannot be withheld in absence of any concrete finding regarding his non eligibility to the post in question. It is not disputed that the petitioner has been continuously discharging his duties on the post of Assistant Teacher in the Institution in question.

Matter requires consideration.

Shri Arun Kumar, learned counsel for the respondent No. 3 prays for and is granted three weeks' time to file counter affidavit. Learned Standing Counsel representing the State-respondent Nos 1 and 2, if so advised, may file counter affidavit in the meanwhile.

List this case after expiry of aforesaid period.

Until further orders of this Court, an interim mandamus is issued to the respondent No. 3 to disburse the current salary of the petitioner month to month, as and when the same falls due."

9. It has also been brought to the notice of this Court that even Mr. Sunil Kumar Srivastava, who is the petitioner in the present writ petition, has filed an application for his impleadment in Writ-A No.4262 of 2023 on 3.3.2023 on which this Court has passed an order dated 15.3.2023 whereby his application was directed to be listed with previous papers at an early date.

10. Learned counsel appearing for the Respondent No.5 has vehemently submitted that Mr. Sunil Kumar Srivastava in his present writ petition i.e. Writ-A No.9429 of 2023 has not disclosed regarding filing of the aforementioned Writ-A No.4262 of 2023 (Arun Kumar Mishra vs. State of U.P. and others) and further has also not disclosed the aforesaid order dated 11.4.2023 passed in Writ-A No.4262 of 2023 though he has already put in appearance in the aforesaid writ petition by filing impleadment application.

11. Learned counsel appearing for the Respondent No.5 has further argued that petitioner Mr. Sunil Kumar Srivastava was fully aware about the filing of Writ-A No.4262 of 2023 and the order dated 11.4.2023 passed in the said writ petition but he has deliberately concealed the said facts while filing his present writ petition i.e. Writ-A No.9429 of 2023. It has been further stressed upon that the intention of Mr. Sunil Kumar Srivastava is crystal clear that by concealing material facts he has made an attempt to obtain an order from this Court for conclusion of the inquiry and consequential action pursuant to his

complaint filed against aforesaid Mr. Arun Kumar Mishra.

12. I have considered the rival submissions advanced by the learned counsels appearing for the parties and I find that petitioner Mr. Sunil Kumar Srivastava was fully aware about filing of Writ-A No.4262 of 2023 (Arun Kumar Mishra vs. State of U.P. and others) and the order dated 11.4.2023 passed in the said writ petition but he deliberately has not disclosed those facts in his present writ petition i.e. Writ-A No.9429 of 2023.

13. It is well settled through catena of judgments of the Hon'ble Supreme Court as well as judgments of this Court that a person who conceals material facts while filing writ petition is not entitled for any relief from the High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India.

14. The Hon'ble Supreme Court in the case of **Prestige Lights Ltd. v. State Bank of India, (2007) 8 SCC 449** has held that in exercising power under Article 226 of the Constitution of India, the High Court is not just a court of law, but is also a court of equity and a person who invokes the High Court's jurisdiction under Article 226 of the Constitution, is duty bound to place all the facts before the court without any reservation. If there is suppression of material facts or twisted facts have been placed before the High Court then it will be fully justified in refusing to entertain petition filed under Article 226 of the Constitution. Relevant portion of the judgment rendered by the Hon'ble Supreme Court in the case of *Prestige Lights Ltd. v. State Bank of India* (supra) is extracted as under:-

"32. It is thus clear that though the appellant Company had approached the High Court under Article 226 of the Constitution, it had not candidly stated all the facts to the Court. The High Court is exercising discretionary and extraordinary jurisdiction under Article 226 of the Constitution. Over and above, a Court of Law is also a Court of Equity. It is, therefore, of utmost necessity that when a party approaches a High Court, he must place all the facts before the Court without any reservation. If there is suppression of material facts on the part of the applicant or twisted facts have been placed before the Court, the Writ Court may refuse to entertain the petition and dismiss it without entering into merits of the matter.

33. The object underlying the above principle has been succinctly stated by Scrutton, L.J., in R v. Kensington Income Tax Commrs. in the following words:

"It has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts - facts, not law. He must not misstate the law if he can help it- the Court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside, any action which it has taken on the faith of the imperfect statement".

34. It is well settled that a prerogative remedy is not a matter of course. In exercising extraordinary power, therefore, a Writ Court will indeed bear in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not

disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, the Court may dismiss the action without adjudicating the matter. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible."

15. The Hon'ble Supreme Court vide its judgment rendered in the case of **K. D. Sharma vs. Steel Authority of India Limited and others**, reported in (2008) 12 SCC 481 has held that jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary and since prerogative writs mentioned therein are issued for doing substantial justice, therefore, it is of utmost necessity that petitioner approaching the Writ Court must come with clean hands and must put forward all the facts before the Court without concealing or suppressing anything and if there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his writ petition may be dismissed at the threshold without considering the merits of the claim. Relevant portion of the judgment rendered in the case of *K. D. Sharma vs. Steel Authority of India Limited and others* (supra) is extracted as under:-

"36. A prerogative remedy is not a matter of course. While exercising extraordinary power a Writ Court would certainly bear in mind the conduct of the party who invokes the jurisdiction of the

Court. If the applicant makes a false statement or suppresses material fact or attempts to mislead the Court, the Court may dismiss the action on that ground alone and may refuse to enter into the merits of the case by stating "We will not listen to your application because of what you have done". The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it.

37. In *Kensington Income Tax Commrs, Viscount Reading, C.J.* observed: (KB pp.495-96)

"... Where an ex parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the applicant was not candid and did not fairly state the facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that this Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit". (emphasis supplied)

38. The above principles have been accepted in our legal system also. As per settled law, the party who invokes the extraordinary jurisdiction of this Court under Article 32 of a High Court under

Article 226 of the Constitution is supposed to be truthful, frank and open. He must disclose all material facts without any reservation even if they are against him. He cannot be allowed to play 'hide and seek' or to 'pick and choose' the facts he likes to disclose and to suppress (keep back) or not to disclose (conceal) other facts. The very basis of the writ jurisdiction rests in disclosure of true and complete (correct) facts. If material facts are suppressed or distorted, the very functioning of Writ Courts and exercise would become impossible. The petitioner must disclose all the facts having a bearing on the relief sought without any qualification. This is because, "the Court knows law but not facts".

39. If the primary object as highlighted in Kensington Income Tax Commissioners 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, 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."

16. The Hon'ble Supreme Court vide its judgment rendered in the case of **K.**

Jayaram and others vs. Bangalore Development Authority and others, reported in (2022) 12 SCC 815 has held that if petitioner while filing writ petition conceals material facts from the Court, then he is not entitled for any relief in exercise of extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India. Relevant portion of the judgment rendered by the Supreme Court in **K. Jayaram and others vs. Bangalore Development Authority and others** (supra) is extracted as under:-

"14. It is necessary for us to state here that in order to check multiplicity of proceedings pertaining to the same subject-matter and more importantly to stop the menace of soliciting inconsistent orders through different judicial forums by suppressing material facts either by remaining silent or by making misleading statements in the pleadings in order to escape the liability of making a false statement, we are of the view that the parties have to disclose the details of all legal proceedings and litigations either past or present concerning any part of the subject-matter of dispute which is within their knowledge. In case, according to the parties to the dispute, no legal proceedings or court litigations was or is pending, they have to mandatorily state so in their pleadings in order to resolve the dispute between the parties in accordance with law.

15. In the instant case, since the appellants have not disclosed the filing of the suit and its dismissal and also the dismissal of the appeal against the judgment of the civil court, the appellants have to be non-suited on the ground of suppression of material facts. They have not come to the court with clean hands and they have also abused the process of law. Therefore, they are not entitled for the extraordinary, equitable and discretionary relief."

17. I find that the Hon'ble Supreme Court has categorically laid down the law that the petitioner while approaching the High Court under Article 226 of the Constitution of India must disclose all the relevant facts in his writ petition and if petitioner does not disclose the relevant facts and material, then he is not entitled for any relief from the High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India and such writ petition is liable to be dismissed.

18. In the present case, petitioner at the time of filing of the writ petition was fully aware about the filing of Writ-A No.4262 of 2023 (Arun Kumar Mishra vs. State of U.P. and others) and was also aware of the order dated 11.4.2023 passed by this Court in the aforesaid writ petition but deliberately he has not disclosed the said facts in the present writ petition. Petitioner has not disclosed the aforesaid facts in his writ petition only with an intention to somehow obtain an order from this court for conclusion of the inquiry and consequential action pursuant to his complaint. Since petitioner has concealed material facts which have direct bearing on the result of this writ petition, as such I am of the view that petitioner is not entitled for any relief from this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India and the present writ petition is liable to be dismissed.

19. I further find that when the facts of the present writ petition are seen in the light of the aforementioned law laid down by the Hon'ble Supreme Court, then it becomes crystal clear that petitioner has concealed material facts while filing present writ petition before this Court and

therefore, this writ petition is liable to be dismissed.

20. In view of the aforesaid reasons and the law laid down by the Hon'ble Supreme Court, mentioned herein above, present writ petition filed by the petitioner is dismissed.

(2023) 8 ILRA 940
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.07.2023

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 9955 of 2023

Km. Haseen Bi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
 Sri Ikram Ahmad, Sri Asar Mukhtar

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

A. Service Law – Family Pension – Entitlement of daughter after death of widow – Requirement to produce the succession certificate issued by District Judge – Permissibility – GO dated 08.08.1986 – Para 9 – GO dated 03.12.2012 – Under the GOs, the succession certificate can be required to be furnished, only when the the department was not able to verify the facts regarding claim of the petitioner that he is dependent of the deceased employee – Non-compliance thereof – Effect – Held, there is no such consideration accorded in the order impugned to compel the authority to ask the petitioner to furnish succession certificate – High Court remitted the matter to the authority to consider the claim in the light of GO dated 08.08.1986 and 03.12.2012. (Para 5 and 10)

Writ petition allowed. (E-1)

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

1. Heard Sri Ikram Ahmad, learned counsel for the petitioner, learned Standing Counsel for respondent nos.1 and 2 and Sri Pankaj Srivastava, learned counsel for the respondent no.3.

2. The petitioner in this writ petition as assailed the order dated 18.11.2022 whereby the petitioner has been directed to furnish a succession certificate issued by the District Judge in support of her claim for family pension. The petitioner is the daughter of Late Kalbe Ali Khan who was a Government Employee and after his death his wife Smt. Khateeja Begum was receiving pension vide P.P.O. No.318152. However, later on she died in the year 2015 and the petitioner was made to run from pillar to post for getting family pension cleared for her.

3. It is argued by learned counsel for the petitioner that the petitioner is entitled to family pension in terms of the Government Order dated 03.12.2012 which provides that even after attaining the age of 25 years, the dependent would be entitled to family pension that includes an unmarried daughter. It is submitted that in the light of the relevant provisions that lay down the procedure as per the Government Order dated 08.08.1986 for the purpose of family pension, an applicant is required to furnish necessary succession certificate or an affidavit filed before the Executive Magistrate/Tehsildar in the event the department concerned has not been able to verify the facts regarding claim of the petitioner as dependent of the deceased employee or his widow, who used to receive pension and family pension

respectively. 4. Relevant Government Order dated 3.12.2012 is reproduced hereunder:

"उत्तर प्रदेश शासन

वित्त (सामान्य) अनुभाग-3

संख्या सा-3-1665/दस-2012-308-97

लखनऊ: दिनांक 03 दिसम्बर, 2012

कार्यालय ज्ञाप

विषय. दिनांक 01 जनवरी 2006 के पूर्व सेवानिवृत्त/मृत राज्य सरकार के पेंशनरों/कर्मचारियों की अविवाहित/विधवा/तलाकशुदा पुत्रियों को पारिवारिक पेंशन की पात्रता के सम्बन्ध में।

शासनादेश संख्या-सा-3-1508/दस-2008-308-97, दिनांक 08 दिसम्बर, 2008 द्वारा दिनांक 01 जनवरी 2006 को अथवा उसके उपरान्त सेवा निवृत्त/मृत सरकारी कर्मचारियों की पारिवारिक पेंशन की अनुमन्यता हेतु परिवार को निम्न प्रकार वर्गीकृत किया गया है-

वर्ग (I)

(क) विधवा/विधुर, आजन्म अथवा पुनर्विवाह जो भी पहले हो

(ख) पुत्र/पुत्री (विधवा पुत्री सहित) को विवाह/पुनर्विवाह अथवा 25 वर्ष की आयु तक अथवा जीविकोपार्जन की तिथि, जो भी पहले हो, तक।

वर्ग (II)

(ग) अविवाहित/विधवा/तलाकशुदा पुत्री, जो उपरोक्त वर्ग (I) से आच्छादित नहीं है को विवाह/पुनर्विवाह तक अथवा जीविकोपार्जन की तिथि अथवा मृत्यु की तिथि तक, जो भी पहले हो,

(घ) ऐसे माता पिता जो सरकारी सेवक पर उसके जीवनकाल में पूर्णतः आश्रित रहे हों तथा मृत सरकारी सेवक ने अपने पीछे कोई विधवा/विधुर अथवा बच्चे नहीं छोड़े हैं।

आश्रित माता/पिता, अविवाहित/तलाकशुदा/विधवा पुत्री को पारिवारिक पेंशन जीवन पर्यन्त मिलेगी।

वर्ग (II) से आच्छादित अविवाहित/विधवा/तलाकशुदा पुत्री तथा आश्रित माता/पिता को पारिवारिक पेंशन की अनुमन्यता उसी दशा में होगी जब मृतक के परिवार में उपर्युक्त वर्ग-(I) में सम्मिलित पात्र व्यक्ति उपलब्ध न हों तथा मृतक सरकारी सेवक के परिवार में ऐसी कोई संतान न हो, जो विकलौंग हो। पारिवारिक पेंशन की अनुमन्यता बच्चों को उनकी

जन्मतिथि के क्रम में होगी अर्थात् पहले जन्म लिये बच्चे को अनुमन्यता पहले होगी और उसकी पात्रता समाप्त होने के उपरान्त बाद में जन्म लेने वाले बच्चे की पात्रता स्थापित होगी।

उपर्युक्त व्यवस्था दिनांक 01 जनवरी, 2006 से प्रभावी किये जाने के कारण दिनांक 01 जनवरी 2006 के पूर्व सेवा निवृत्त/मृत सरकारी कर्मचारियों की अविवाहित/तलाकशुदा/विधवा पुत्रियों को उपर्युक्त लाभ अनुमन्य नहीं हो पा रहा है।

2- शासन को इस आशय के प्रत्यावेदन प्राप्त हो रहे हैं कि दिनांक 01 जनवरी 2006 के पूर्व सेवानिवृत्त/मृत सरकारी कर्मचारियों की अविवाहित/विधवा/तलाकशुदा पुत्रियों को भी उपर्युक्तानुसार पारिवारिक पेंशन की सुविधा अनुमन्य की जाय।

3- केन्द्र सरकार में दिनांक 01 जनवरी 2006 के पूर्व अथवा उसके पश्चात सेवानिवृत्त/मृत पेंशनरों/कर्मचारियों की अविवाहित/विधवा/तलाकशुदा पुत्रियों को पारिवारिक पेंशन 25 वर्ष की आयु के उपरान्त भी संगत शर्तों के साथ समान रूप से अनुमन्य है, चाहे उनका वैधव्य/तलाक 25 वर्ष की आयु के पूर्व हुआ हो अथवा उसके पश्चात।

4- उपर्युक्त के सम्बन्ध में मुझे यह कहने का निदेश हुआ है कि दिनांक 01 जनवरी 2006 के पूर्व सेवानिवृत्त/मृत पेंशनरों/सरकारी कर्मचारियों की अविवाहित/विधवा/तलाकशुदा पुत्रियों को, चाहे उनका वैधव्य/तलाक, उनकी 25 वर्ष की आयु के पूर्व अथवा पश्चात् घटित हुआ हो, दोनों ही दशाओं में, पारिवारिक पेंशन उपर्युक्त शासनादेश संख्या-सा-3-1508/दस-2008-308-97, दिनांक 08 दिसम्बर 2008 के प्रस्तर 7(3). (4) एवं (5) में विनिर्दिष्ट शर्तों के अधीन तत्काल प्रभाव से अनुमन्य कराये जाने की श्री राज्यपाल महोदय सहर्ष स्वीकृति प्रदान करते हैं।

5- ऐसे प्रकरण जिनमें अविवाहित/विधवा/तलाकशुदा पुत्रियों को पारिवारिक पेंशन हेतु आश्रितों की सूची में सम्मिलित नहीं किया गया है, उन प्रकरणों में पेंशन प्रपत्र के भाग-2 में सम्बन्धित पेंशनरों/पारिवारिक पेंशनरों द्वारा अविवाहित/विधवा/तलाकशुदा पुत्रियों के नाम तथा जन्म तिथि (यथेष्ट प्रमाण पत्र के साथ) अंकित कर सम्बन्धित कार्यालयाध्यक्ष/विभागाध्यक्ष को प्रस्तुत किया जायेगा। कार्यालयाध्यक्ष/विभागाध्यक्ष उपरोक्त नामांकन प्रपत्र (पेंशन प्रपत्र का भाग-2) को सत्यापित करते हुए सम्बन्धित पेंशन स्वीकर्ताधिकारी को प्रेषित करेंगे। पेंशन स्वीकर्ताधिकारी उक्त नामांकन प्रपत्र के आधार पर पारिवारिक पेंशनरों की पात्रता सूची में अविवाहित/विधवा/तलाकशुदा पुत्रियों के नाम एवं जन्मतिथि अंकित किये जाने सम्बन्धी आदेश सम्बन्धित

कोषाधिकारी एवं प्रतिलिपि सम्बन्धित कार्यालयाध्यक्ष/विभागाध्यक्ष तथा पेंशनर/पारिवारिक पेंशनर को प्रेषित करेंगे।

आनन्त मिश्र
प्रमुख सचिव, वित्त।"

(emphasis added)

5. Learned Standing Counsel though has tried to defend the order for the reason assigned therein but could not meet the argument which finds support in paragraph 9 of the Government Order dated 08.08.1986 that there is no such consideration accorded in the order impugned to compel the authority to ask the petitioner to furnish succession certificate. Paragraph 9 of the Government Order is reproduced hereunder:

9- प्रार्थना पत्र प्राप्त होने के उपरान्त आवेदक को सम्बन्धित कार्यालयाध्यक्ष/विभागाध्यक्ष को इस बात से सन्तुष्ट करना होगा कि वह सम्बन्धित सरकारी सेवक की विधवा/विधुर अथवा पात्र संतान है। सम्बन्धित कार्यालयाध्यक्ष/विभागाध्यक्ष उपरोक्त की पुष्टि प्रथमतः अपने कार्यालय में उपलब्ध अभिलेखों अथवा आवेदक द्वारा प्रस्तुत संगत दस्तावेजों के आधार करेंगे/यदि आवेदक अपनी पहचान हेतु कोई दस्तावेज प्रस्तुत न कर सकें और इस कार्यालय में भी इस हेतु कोई अभिलेख उपलब्ध न हो तो सम्बन्धित कार्यालयाध्यक्ष/विभागाध्यक्ष अपने कार्यालय के किन्हीं दो वरिष्ठ तथा स्थायी कर्मचारियों से आवेदक की शिनाख्त करवा ले। यदि उपर्युक्तानुसार भी कार्यावाही किया जाना सम्भव न हो सके तो सम्बन्धित आवेदक को निम्न में से एक साक्ष्य प्रस्तुत करना होगा-

1- न्यायालय द्वारा प्रस्तुत उत्तराधिकार प्रमाण-पत्र या

2- कार्यकारी मजिस्ट्रेट अथवा तहसीलदार के समक्ष दिया गया शपथ पत्र।"

(Emphasis added)

6. Learned Standing Counsel at this stage submits that the matter may be remitted to the authority concerned to pass order afresh in the light of the relevant

rules and Government Order issued from time to time.

7. Learned counsel for the respondent no.3 submits that it is for the authority concerned to pass appropriate order.

8. Having heard learned counsel for the parties and their arguments raised across the bar, I find that the order dated 18.11.2022 impugned here in this petition is quite an unreasonable order so as to justify the directions issued therein inasmuch as there is no consideration accorded to the procedure laid down in paragraph no.9 of the aforesaid Government Order.

9. In the circumstances, therefore, the order dated 18.11.2022 cannot be sustained in law and is hereby, accordingly, quashed.

10. The matter is remitted to the authority concerned to look into and consider the claim of the petitioner in light of the relevant provisions as contained under the Government Order dated 03.12.2012 and as per the procedure prescribed vide paragraph 9 of the Government Order dated 08.08.1986 to determine the claim for family pension.

11. The order shall be passed within a period of thirty days from the date of production of certified copy of this order.

12. Accordingly, the writ petition succeeds and is allowed as above.

(2023) 8 ILRA 943

ORIGINAL JURISDICTION
CIVIL SIDE

DATED: ALLAHABAD 12.07.2023

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 10448 of 2023

Balram Gupta ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Dharmendra Kumar Srivastava

Counsel for the Respondents:
C.S.C.

Service Law – U.P. Revenue Code, 2006 – Section 225 – Preliminary Fact-Finding Inquiry – Tehsildar facing internal departmental scrutiny based on complaint by Bar Association – No regular departmental proceedings initiated – Challenge to preliminary report on grounds of statutory bar under Section 225, U.P. Revenue Code, 2006 – Maintainability – Held: Where only a preliminary fact-finding inquiry has been conducted by the Revenue Department based on complaints, and no formal disciplinary proceedings or charge-sheet has been initiated, judicial review under Article 226 of the Constitution is premature. Section 225 of the U.P. Revenue Code, 2006 provides protection to government officials acting in good faith in the discharge of official duties, but such statutory protection is relevant only after initiation of formal proceedings. The Court declined to interfere at this stage, holding that an internal departmental communication or preliminary report is not amenable to judicial review unless it forms the basis of a regular enquiry impacting civil rights. The petition was dismissed, leaving it open to the petitioner to challenge any future disciplinary action if initiated.

Petition dismissed.

Case Law Citations:

1. *Zunjarrao Bhikaji Nagarkar Vs U.O.I. & ors.*, (1999) 7 SCC 409
2. *Ramesh Chandra Singh Vs High Court of Allahabad & anr.*, (2007) 4 SCC 247

3. Anjali Chaurasia Vs St. of U.P. & ors., Special Appeal Defective No. 40 of 2023 (All HC)

4. Government of T.N. Vs K.N. Ramamurthy, (1997) 7 SCC 101

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

1. Heard Sri Dharmendra Kumar Srivastava, learned counsel for the petitioner and learned Standing Counsel for the State.

2. Petitioner who has been working as a Tehsildar, Tehsil Jalaun, District Jalaun, is aggrieved by some departmental preliminary fact finding report submitted on 03.02.2023 on the complaint made by the Tehsil Bar Association.

3. It is submitted by learned counsel for the petitioner that in view of the bar created under Section 225 of U.P. Revenue Code, 2006, no such enquiry was tenable in the matter of conduct of the petitioner in discharge of official duty. It is further submitted that this internal departmental enquiry may be a preliminary fact finding enquiry which has been forwarded to the Board of Revenue upon which he apprehends that the competent authority may set into motion a regular departmental enquiry. Learned counsel in order to advance his argument has relied upon a number of judgments by the Supreme Court as *Zunjarrao Bhikaji Nagarkar versus Union of India and others: 1999 VII Supreme Court Cases 409, (2007) 4 SCC 247; Ramesh Chandra Singh versus High Court of Allahabad and another* and recent judgment by a division Bench of this Court passed in *Special Appeal Defective No.40 of 2023, Anjali Chaurasia versus State of U.P. and others*.

4. Per contra, it is argued by learned Standing Counsel that this is not the stage to interfere in the matter as the preliminary fact finding report has yet not been taken into consideration by the competent authority to set into motion any regular enquiry. It is submitted that mere apprehension cannot be a ground to move to this Court invoking its extra ordinary jurisdiction under Article 226 of the Constitution of India. Learned Standing Counsel further submits that the provisions as contained under Section 225 of U.P. Revenue Code, 2006 may also not be attracted at this stage. He argued that writ petition is premature.

5. Having heard learned counsel for the parties, having perused the record and even going through the report which has been impugned here in this petition, I find that on the basis of certain complaints made against the petitioner, the competent authority in the Revenue Department held some preliminary fact finding enquiry in which a report was submitted holding the petitioner, prima facie, guilty of the allegations made in the complaint.

6. The question as to whether this preliminary fact finding enquiry report at this stage can be gone into on the ground that the allegations made were bald allegations and had no basis and that there was no evidence available, in view of the fact that the allegations were regarding official discharge of duty by the petitioner in the capacity of Tehsildar of the tehsil concerned in view of the provisions as contained under Section 225 of U.P. Revenue Code, 2006.

7. I proceed to first examine the provisions as contained under Sections 225 of the U.P. Revenue Code, 2006. The

provisions for better appreciation as contained under Section 225 of the U.P. Revenue Code are reproduced hereunder:-

"(1) No officer or servant of the State Government shall be liable in any civil or criminal proceeding in respect of any act done or purporting to be done under this Code or any rules made thereunder, if the act was done in good faith and in the course of execution of the duties or the discharge of functions imposed by or under this Code.

(2) No suit or other proceeding shall lie against the State Government for any damage caused or likely to be caused or any injury suffered or likely to be suffered by virtue of any provisions of this Code or by anything in good faith done or intended to be in pursuance of the provisions of this Code or any rules made thereunder."

8. Upon a bare reading of the aforesaid provision, it is very much clear that an officer in discharge of his administrative and quasi judicial function has been protected from any criminal or civil proceedings being drawn in respect of any act done by him. In other words as statute provide, if in purported exercise of power under the Act, an act has been in good faith and in the course of execution or discharge of functions as may be assigned to him/her under the Act, no civil or criminal liability can be fastened upon such officer.

9. This above stage, in my considered view would come, if the petitioner is visited with a chargesheet and an enquiry as such, is set into motion. It is at that stage it may remain open for the petitioner to question a disciplinary proceeding drawn if in respect of any of his act in discharge of duty in good faith while exercising quasi judicial power.

10. Looking to the facts, I find that there were some complaints made by the Revenue Bar Association which led to the department concerned to hold some preliminary enquiry. A preliminary enquiry report unless and until forms basis of a regular employee and such proceeding which is set into motion, such inhouse enquiry cannot be questioned. It will be only an internal departmental communication and thus there is no occasion for this Court to judicially review such internal communication.

11. In my above view, I find support in the judgment cited by learned counsel for the petitioner himself. In the case of Zunjarrao Bhikaji Nagarkar (Supra), Supreme Court proceeded to hold that negligence in exercise of quasi judicial power in order to constitute misconduct should be a mere carelessness for inadvertence but not a culpable negligence and that in order to appreciate it before the regular enquiry is set into motion, the authority must give consideration to the documents that have been lead in evidence. Vide Paragraph 42 and 43, the Court held thus:

"42. Initiation of disciplinary proceedings against an officer cannot take place on an information which is vague or indefinite. Suspicion has no role to play in such matter. There must exist reasonable basis for the disciplinary authority to proceed against the delinquent officer. Merely because penalty was not imposed and the Board in the exercise of its power directed filing of appeal against that order in the the Appellate Tribunal could not be enough to proceed against the appellant. There is no other instance to show that in similar case the appellant invariably imposed penalty.

43. *If every error of law were to constitute a charge of misconduct, it would impinge upon the independent functioning of quasi judicial officers like the appellant. Since in sum and substance misconduct is sought to be inferred by the appellant having committed an error of law, the charge-sheet on the face of it does not proceed on any legal premise rendering it liable to be quashed. In other words, to maintain any charge-sheet against a quasi judicial authority something more has to be alleged than a mere mistake of law, e.g., in the nature of some extraneous consideration influencing the quasi judicial order. Since nothing of the sort is alleged herein the impugned charge-sheet is rendered illegal. The charge-sheet, if sustained, will thus impinge upon the confidence and independent functioning of a quasi judicial authority. The entire system of administrative adjudication whereunder quasi judicial powers are conferred on administrative authorities, would fall into disrepute if officers performing such functions are inhibited in performing their functions without fear or favour because of the constant threat of disciplinary proceedings."*

12. Having held so, the Court finally observed vide paragraph 44 that looking to the entire aspect of the matter, it was not a case for initiation of any disciplinary proceeding against that appellant before the Supreme Court, as the charge to his conduct was held to be not dropped.

13. There can be no quarrel about the proposition laid down by the Supreme Court as above. The only issue is when this Court will intervene. Any exercise of power under Article 226 of the Constitution of India whether it is a case of issuance of writ of certiorari or writ of mandamus, the issue

will be whether a particular document, which is sought to be quashed or whether the authority was under an obligation to discharge duty has really discharged it or not, as the case may be, so as to warrant interference by this Court.

14. In the present case, the preliminary enquiry or to hold it as internal departmental communication has yet not found basis as per own admission of the petitioner to hold a regular enquiry till date. In the circumstances, therefore, the case of the petitioner is distinguishable from that one decided by Supreme Court.

15. Coming to the second judgment which relates to holding of an enquiry for any judicial order, as I have already held above that in case of petitioner herein, no regular enquiry has yet been set into motion, so the occasion does not arise to examine the enquiry at this stage. The action in discharge of function by the competent authority has yet not happened so as to bind it under any obligation that before holding an enquiry it has to form a view that framing of the charges are really based upon cogent and tenable evidence, may be prima facie, so as to render the act amounting to such negligence that can be termed as culpable negligence. In the case of Ramesh Chandra Singh (Supra) disciplinary enquiry was set into motion qua a judicial order passed by the officer but that stage has yet not come here in this case. This judgment is also distinguishable on facts.

16. In the case of Anjali Chaurasia (Supra) the issue was as to whether there being no affidavit in respect of the complaint made against judicial officer in discharge of his judicial function, any disciplinary proceedings could have been

set into motion or not. In that case, admittedly, the judicial officer Anjali Chaurasia was under suspension and the writ court had directed for an enquiry to be concluded. Upon an intra court appeal being preferred, the Court took the view that merely on the basis of a complaint without being supported by an affidavit, no disciplinary enquiry could have been initiated, as the complaint was regarding judicial discharge of function in which some order had been passed. The disciplinary proceeding, it was held, could not have been initiated.

17. Relying upon the case of Zunjarrao Bhikaji Nagarkar (Supra), as discussed above, vide paragraph 26 and 27 the Division Bench held thus:

" 26. It will be thus seen that once there was a case of imposition of penalty only the amount of penalty to be levied was left to the discretion of the assessing authority on the facts of the case.

27. In Government of Tamil Nadu vs. K.N. Ramamurthy (1997 (7) SCC 101) it has been held that failure to exercise quasi judicial power properly amounts to misconduct. In this case, the respondent working as Deputy Commercial Tax Officer was served with the following charges:

"(i) That he failed to analyse the facts involved in each and every case referred to above;

(ii) that he failed to check the accounts deeply and thoroughly while making final assessment;

(iii) that he failed to subject the above turnover to tax originally; and

(iv) that he failed to safeguard government revenue to a huge extent of Rs.44,850."

18. I find this case also to be one where an order was already passed placing the officer under suspension and the departmental disciplinary enquiry was also set into motion which was directed by the writ court initially to be concluded in accordance with law, without granting any indulgence.

19. Since, in the present case no disciplinary enquiry has been set into motion, nor the petitioner has been placed under suspension, the question of interference in the preliminary fact finding enquiry by this Court at this stage does not arise.

20. The obligation of an authority competent in the matter to hold an enquiry on flimsy or unavailable grounds would be called in question when the regular enquiry itself has been set into motion and has been challenged before this Court. It is then in that case writ of mandamus would be maintainable. The writ of certiorari would also be maintainable where some disciplinary proceedings has been drawn which would have adverse effect upon the civil rights of the petitioner, if brought to its logical end. That report of the disciplinary proceedings would be questionable and judicially reviewable at that stage only.

21. In view of the above, I decline to interfere in the matter at this stage. It will, however, remain open for the petitioner to question proceedings in the event regular enquiry is set into motion on the basis of such preliminary report.

22. The question as to whether the complaint could have been entertained without it being supported by an affidavit, in violation of the provisions as contained

under the Government Order dated 09.05.1997, would also remain open.

23. This petition is accordingly, *dismissed at this stage* subject to aforesaid liberty.

(2023) 8 ILRA 948

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 31.07.2023

BEFORE

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

Writ-A No. 10537 of 2023

Brijesh Bahadur Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Satyendra Singh

Counsel for the Respondents:
C.S.C., Sri Pawan Kumar Singh

Civil Law - U.P. Government Servants (Medical Attendance) Rules, 2011 - Centralised Service Rules, 1985 - Rule 37(2) - Medical Reimbursement - Retired Employee of Development Authority - Centralised Services - Right to Reimbursement Not Dependent on Government Ratification of Board Resolution - Rule 37(2) - Centralised Service Rules, 1985 - Attracted - Entitlement Recognized

Held: A retired Junior Engineer of the Prayagraj Development Authority (PDA) was denied reimbursement for medical treatment expenses of his wife during the Covid-19 pandemic on the ground that the Medical Attendance Rules, 2011, though adopted by the PDA Board, had not been ratified by the St. Government. The Court held that even if such adoption was not treated as a regulation under Section 56 of the U.P. Urban Planning and Development Act, 1973, the benefit of the Medical Attendance Rules, 2011 would still be available to the petitioner under Rule 37(2) of the U.P.

Development Authorities Centralised Services Rules, 1985. This rule mandates that in matters not covered by those Rules, members of the centralised service (including retirees) are to be governed by rules applicable to U.P. Government servants. Since medical reimbursement was not provided under the 1985 Rules or the Retirement Benefit Rules, 2011, the Medical Attendance Rules, 2011 automatically applied. The impugned order rejecting the reimbursement was quashed. Mandamus issued to the Vice-Chairman and Secretary, PDA, to verify and reimburse the medical bill submitted by the petitioner within one month of receipt of the order.

Writ Petition Allowed.

Key Cases Cited:

1. Praveen Kumar Agarwal Vs St. of U.P., (2011) ILR 1 All 21
2. Rajendra Prasad Dwivedi Vs St. of U.P., 2023:AHC-LKO:32771

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

1. This writ petition is directed against an order passed by the Secretary, Prayagraj Development Authority, Prayagraj dated February the 4th, 2023, rejecting the petitioner's claim for reimbursement of medical expenses incurred on his wife's treatment.

2. The petitioner is a retired Junior Engineer, who was in the employ of the erstwhile Allahabad Development Authority, Allahabad. He retired on 31.07.2017 upon attaining the age of superannuation. The Allahabad Development Authority, Allahabad has since been re-named as the Prayagraj Development Authority, Prayagraj, and the petitioner, therefore, is a retired employee of the last named Authority. The Prayagraj Development Authority, Prayagraj shall hereinafter be referred to as 'the PDA'.

3. The petitioner has disclosed in minute detail facts relating to his recruitment in the PDA, his regularization in service, the amendments made to rules affecting his service at different points of time, but all that is unnecessary for the purpose of the issue that arises in this petition. What is of significance is that while the petitioner was in service of the PDA, the Under Secretary, Department of Planning and Development, Government of U.P., addressed a memo dated 17.04.2012 to the Vice-Chairmen of all the Development Authorities, established under the Uttar Pradesh Urban Planning and Development Act, 1973 (for short, 'the Act of 1973'), conveying the Government's inclination to extend the provisions of the Uttar Pradesh Government Servants (Medical Attendance) Rules, 2011 (for short, 'the Medical Attendance Rules, 2011') to employees of the Development Authorities. All the Vice-Chairmen of Development Authorities across the State were required to give their consent, indicating that the Development Authority is capable and willing to bear the financial burden of adopting the Medical Attendance Rules, 2011 for employees of their respective Development Authorities. This was true of the PDA also, the Vice-Chairman whereof had to consent in order that the Medical Attendance Rules, 2011 would become available to the employees. A reminder on March the 5th, 2013 was addressed by the Under Secretary, Government of U.P. to the Vice-Chairmen of Development Authorities across the State, asking them to send their consent for adoption of the Medical Attendance Rules, 2011.

4. The PDA, in response to the Memoranda dated 17.04.2012 and 05.03.2013, last mentioned, considered the

matter in their 107th Board Meeting held on 06.04.2013. The proposal to apply the Medical Attendance Rules, 2011 to the PDA was discussed and unanimously accepted by the Board of the PDA vide Resolution No.1601 dated 06.04.2013. The said resolution that dealt with Proposal No.7 of the day, is on record. The Vice-Chairman of the PDA vide memo dated 24th October, 2013 duly informed the Department of Housing and Urban Planning, Government of U.P. that the Board of the PDA have unanimously resolved and adopted the Medical Attendance Rules, 2011 for the benefit of their employees in their meeting held on 06.04.2013. The petitioner says that the Department of Housing and Urban Planning has not passed any orders, accepting or approving the resolution of the PDA dated 06.04.2013. Rule 2 of the Medical Attendance Rules, 2011 provides for the application of the Rules and reads:

“2. Application—They shall apply to—

(a) All Government Servants while they are on duty, or on leave or under suspension and their family.

(b) Retired Government Servants and to their family and in case of deceased Government Servants such members of their family as are eligible for family pension.”

5. The petitioner says that after adoption of the Medical Attendance Rules, 2011 by the PDA vide resolution dated 06.04.2013, all provisions of the said Rules would be applicable and enure to the benefit of the employees as well as retired employees and their dependent family members.

6. During the second wave of the CoVid-19 pandemic, the petitioner's wife,

Smt. Kusum Singh was diagnosed positive for Covid-19 on 15.04.2021. Four days later, on 19th April, 2021, her blood oxygen saturation sank to a dangerous level. On medical advice, she had to be admitted to a dedicated Covid Hospital, to wit, Vineeta Hospital, Phaphamau, Prayagraj. Smt. Kusum Singh was treated and finally discharged on the 6th of May, 2021. The medical bill involved in the treatment ran into a figure of Rs.2,75,000/-. The petitioner moved an application on 23rd July, 2021 along with a summary of the bill, the medical bill, the discharge summary and the follow up prescriptions relating to his wife for her CoVid-19 treatment before the Chairman of the PDA with a request for reimbursement of the medical bills. No action on the said application was taken by the Vice-Chairman of the PDA. The petitioner then moved a representation dated 16th October, 2022 before the Chairman, PDA, carrying the same request. The Chairman marked and forwarded the petitioner's representation to the PDA for appropriate action. The Secretary, PDA by the order impugned dated 04.02.2023 rejected the petitioner's application for reimbursement of expenses incurred in the medical treatment aforesaid on the ground that though the PDA had unanimously adopted the Medical Attendance Rules, 2011 for their employees in the meeting dated 06.04.2013, but so long as the said Rules were not extended by a decision of the Government to the PDA, no reimbursement could be granted. The said order was passed on 4th February, 2023 and impugned in this petition under Article 226 of the Constitution.

7. A counter affidavit has been filed by Mr. Arun Kumar on behalf of respondent Nos.2, 3 and 4. The short case

taken there is that despite the PDA adopting the Medical Attendance Rules, 2011 and accepting the financial burden therefor, the State Government have not ratified the aforesaid decision, making the Rules aforesaid available for the benefit of the PDA employees. It is the PDA's case that in the absence of ratification by the State Government of the PDA Board's resolution and notifying the aforesaid Medical Attendance Rules for the employees of the PDA, the same cannot be enforced. It is pleaded on behalf of the PDA that under Section 56 of the Act of 1973, the Development Authority, with previous approval of the State Government, can make regulations, not inconsistent with the Act and the Rules for administration of the Authority. It is emphasized that sub-Section (2)(c) of Section 56 further contemplates that regulations framed under sub-Section (1) may relate to salaries, allowance and conditions of service of the Secretary, Chief Accounts Officer and other officers and employees. In view of the said provisions, adoption of the Medical Attendance Rules, 2011 by the Board of the PDA would not extend the benefit of the Rules to the PDA employees.

8. Heard Mr. Satyendra Singh, learned Counsel for the petitioner, Mr. Dinesh Kumar Singh, learned Additional Chief Standing Counsel for the State and Mr. Arun Kumar, learned Counsel appearing on behalf of respondent Nos. 2, 3 and 4.

9. Learned Counsel for the petitioner has advanced two submissions in criticism of the impugned order dated 04.02.2023. He submits in the first place that the Medical Attendance Rules, 2011 come to life upon their adoption by the PDA Board ipso facto. There is no requirement for the Board's resolution to be ratified or accepted

in any manner by the State Government. He has drawn the Court's attention to the provisions of Section 56 of the Act of 1973 to submit that the said provision refers to the power of a Development Authority to make regulations. In the event, a Development Authority, like the PDA, wish to make regulations, as envisaged under Section 56 of the Act of 1973, previous approval of the State Government, before exercise of the power, is necessary. Mr. Satyendra Singh submits that in the present case, the power to make regulations by the PDA has not been invoked at all while accepting the Medical Attendance Rules, 2011, already framed by the State Government for government servants.

10. The other submission, on the foot of which learned Counsel for the petitioner assails the impugned order, is that after notification of the Uttar Pradesh Development Authorities Centralised Services Rules, 1985 (for short, 'the Centralised Service Rules, 1985'), the service conditions as well as retirement benefits of employees/ ex-employees, belonging to the centralised services of Development Authorities, are governed by the Centralised Service Rules, 1985 and also by the Uttar Pradesh Development Authorities Centralized Services Retirement Benefit Rules, 2011 (for short, 'the Retirement Benefit Rules, 2011'). The learned Counsel for the petitioner has called attention to Rule 37 of the Centralised Service Rules, 1985, which reads:

“37. Regulation of other matters–

(1) If any dispute or difficulty arises regarding interpretation of any of the provisions of these rules, the same shall be referred to the Government whose decision shall be final.

(2) In regard to the matters not covered by these rules or by special orders, the members of service shall be governed by the rules, regulations and orders applicable generally to U.P. Government servants serving in connection with the affairs of the State.

(3) Matters not covered by sub-rules (1) and (2) above shall be governed by such orders as the Government may deem proper to issue.”

(emphasis by Court)

11. The submission of the learned Counsel for the petitioner is that since the Centralised Service Rules, 1985 do not provide for medical benefits, sub-Rule (2) of Rule 37 of the said Rules would attract application of rules, regulations and orders applicable generally to U.P. Government Servants serving in connection with the affairs of the State. The submission on this score, therefore, is that the Medical Attendance Rules, 2011 would apply by virtue of Rule 37(2) of the Centralised Service Rules, 1985, even if the PDA were not to adopt by a resolution of the Board, the Medical Attendance Rules, 2011 applicable to U.P. Government servants.

12. Mr. Dinesh Kumar Singh, learned Additional Chief Standing Counsel appearing on behalf of the State and Mr. Arun Kumar, learned Counsel for respondent Nos.2, 3 and 4, have supported the impugned order.

13. This Court has considered the submissions advanced by both parties.

14. It would be gainful to refer to certain provisions of the Act of 1973 and some of the statutory Rules, governing the service conditions of employees of the Development Authorities, including the

PDA. Section 4 of the Act of 1973 provides:

“Section 4. The Development Authority

(1) The State Government may, by notification in the Gazette, constitute for the purposes of this Act, an Authority to be called the Development Authority for any development area.

(2) The Authority shall be a body corporate, by the name given to it in the said notification, having perpetual succession and a common seal with power to acquire, hold and dispose of property, both movable and immovable and to contract and shall by the said name sue and be sued.

(3) The Authority in respect of a development area which includes the whole or any part of a city as defined in the Uttar Pradesh Municipal Corporation Act, 1959, shall consist of the following members, namely—

(a) a Chairman to be appointed by the State Government:

(b) a Vice-Chairman to be appointed by the State Government:

(c) the Secretary to the State Government, incharge of the Department in which, for the time being, the business relating to the Development Authorities is transferred, ex-officio;

(d) the Secretary to the State Government, incharge of the Department of Finance, ex-officio.

(e) the Chief Town and Country Planner, Uttar Pradesh, ex-officio;

(f) the Managing Director of the Jal Nigam established under the Uttar Pradesh Water Supply and Sewerage Act, 1975, ex-officio;

(g) the Mukhya Nagar Adhikari, ex-officio;

(h) the District Magistrate of every district any part of which is included in the development area, ex-officio;

(i) four members to be elected by Sabhasads of the, Nagar Mahapalika for the said city from amongst themselves:

Provided that any such member shall cease to hold office as soon as he ceases to be Sabhasad of the Municipal Corporation:

(j) such other members not exceeding three as may be nominated by the State Government.

(4) The appointment of the Vice-Chairman shall be whole time.

(5) The Vice-Chairman shall be entitled to receive from the funds of the Authority such salaries and allowance and be governed by such conditions of service as may be determined by general or special order of the State Government in this behalf.

(6) A member referred to in clause (c), clause (d), clause (e) or clause (f) of sub-section (3) may instead of attending a meeting of the Authority himself depute an officer, not below the rank of Deputy Secretary in the department, in the case of a member referred to in clause (c) or clause (d) and below the rank of Town Planner in the case of a member referred to in clause (e) and not below the rank of Superintending Engineer in the case of a member referred to in clause (f) to attend the meeting. The officer so deputed shall have the right to take part in the proceedings of the meeting and shall also have the right to vote.

(7) The Authority in respect of a development area other than that mentioned in Sub-section (3) shall consist of a Chairman, a Vice-Chairman and not less than five and not more than eleven such other members, including at least one member from the Municipal Boards and

Notified Area Committees having each jurisdiction in the development area, who shall hold office for such period and on such terms and conditions, as may be determined by general or special order of the State Government in this behalf:

Provided that the Vice-Chairman or a member other than an ex-officio member of the Authority may at any time by writing under his hand addressed to the State Government resign his office and on such resignation being accepted shall be deemed to have vacated his office.

(8) No act or proceedings of the Authority shall be invalid by reason of the existence of any vacancy in, or defect in the constitution of the Authority.”

15. Section 5 of the Act of 1973 may also be quoted with profit:

“Section 5. Staff of the Authority

(1) The State Government may appoint two suitable persons respectively as the Secretary and the Chief Accounts Officer of the Authority who shall exercise such powers and perform such duties as may be prescribed by regulations or delegated to them by the Authority or its Vice-Chairman.

(2) Subject to such control and restrictions as may be determined by general or special order of the State Government, the Authority may appoint such number of other officers and employees as may be necessary for the efficient performance of its functions and may determine their designations and grades.

(3) The Secretary, the Chief Accounts Officer and other Officers and employees of the Authority shall be entitled to receive from the funds of the Authority such salaries and allowances and shall be governed by such salaries and allowances

and shall be governed by other conditions of service as may be determined by regulations made in that behalf.”

16. Section 5A of the Act of 1973 was brought in by amendment vide U.P. Act No.21 of 1985, and provides for the creation of centralised services in the Development Authorities. Section 5-A provides as follows:

“5-A. Creation of Centralised Services.—

(1) Notwithstanding anything to the contrary contained in Section 5 or in any other law for the time being in force, the State Government may at any time, by notification, create one or more ‘Development Authorities Centralised Services’ for such posts, other than the posts mentioned in Sub-section (1) of Section 59, as the State Government may deem fit, common to all the Development Authorities and may prescribe the manner and conditions of recruitment to, and the terms, and conditions of service of persons appointed to. such service.

(2) Upon creation of a Development Authorities Centralised Service, a person serving on the posts included in such service immediately before such creation; not being a person governed by the U.P. Palika (Centralized) Services Rules, 1966, or serving on deputation, shall, unless he opts otherwise, be absorbed in such service—

(a) finally, if he was already confirmed in his post, and

(b) provisionally, if he was holding temporary or officiating appointment.

(3) A person referred to in Sub-section (2) may, within three months from the creation of such Development Authorities Centralised Service communicate to the Government in the Housing Department,

his option not to be absorbed in such Centralised Service, failing which he shall be deemed to have opted for final or provisional, as the case may be, absorption in such Centralised Service.

(4) Suitability of a person absorbed provisionally, for final absorption in a Development Authorities Centralised Service, shall be examined in the manner prescribed and if found suitable he shall be absorbed finally.

(5) The services of an employee who opts against absorption or who is not found suitable for final absorption, shall stand determined and he shall, without prejudice to his claim to any leave, pension, provident fund or gratuity which he would have been entitled to be, entitled to receive as compensation from the Development Authority concerned, an amount equal to—

(a) three months' salary if he was a permanent employee:

(b) one month's salary, if he was a 'temporary employee.

Explanation.— For the purposes of this sub-section, the term 'salary' includes dearness allowance, personal pay and special pay, if any.

(6) It shall be, lawful for the State Government or any officer authorised by it in this behalf, to transfer any person holding any post in a Development Authorities Centralised Service from one Development Authority to another."

17. It is also important to refer to Section 20 of the Act of 1973, which occurs in Chapter VII, dealing with finance, accounts and audit. Section 20 aforesaid is quoted below:

"Section 20. Fund of the Authority

(1) The Authority shall have and maintain its own fund to which shall be credited—

(a) all moneys received by the Authority from the State Government by way of grants, loans, advances or otherwise;

(b) all moneys borrowed by the Authority from sources other than the State Government by way of loans or debentures;

(c) all fees tolls and charges received by the Authority under this Act;

(d) all moneys received by the Authority from the disposal of lands, buildings and other properties, movable and immovable; and

(e) all moneys received by the Authority by way of rents and profits or in any other manner or from any other source.

(2) The fund shall be applied towards meeting the expenses incurred by Authority in the administration of this Act and for no other purposes.

(3) Subject to any directions of the State Government, the Authority may keep in current account of any Scheduled Bank such sum of money out of its fund as it may think necessary for meeting its expected current requirements and invest any surplus money in such manner as it thinks fit.

(4) The State Government may, after due appropriation made by Legislature by law in that behalf, make such grants advances and loans to the Authority as that Government may deem necessary for the performance of the functions of the Authority under this Act and all grants, loans and advances made shall be on such terms and condition's as the State Government may determine.

(5) The Authority may borrow money by way of loans or debentures from such sources (other than the State Government) and on such terms and conditions as may be approved by the State Government.

(6) The Authority shall maintain a sinking fund for the repayment of moneys borrowed under sub-section (5), and shall

pay every year into the sinking fund such sum as may be sufficient for repayment within the period fixed of all moneys so borrowed.

(7) The sinking fund or any part thereof shall be applied in, or towards, the discharge of the loan for which such fund was created, and until such loan is wholly discharged it shall not be applied for any other purpose.”

18. After introduction of Section 5-A, amending the Act of 1973, the State Government (vide notification dated 25.06.1985) notified the Centralised Service Rules, 1985 and the Retirement Benefit Rules, 2011, already introduced and referred to hereinbefore.

19. So far as the first contention of the petitioner is concerned, it is true that the power to make regulations vested in the PDA under Section 56 of the Act of 1973, can be exercised with previous approval of the State Government and with the limitation that the regulations made are not inconsistent with the provisions of this Act and the Rules made thereunder. Clause (c) of sub-Section (2) of Section 56 speaks about salaries, allowance and conditions of service of the Secretary, Chief Accounts Officer and other officers and employees. But, the moot question is whether the PDA, or for that matter any Authority established under the Act of 1973, while acting by its resolution to extend the benefit of any existing Rules applicable to government servants, to the employees of the Development Authority, does so in the exercise of its power to make regulations under Section 56. This Court does not think so. The term 'Rules' has a definite connotation under the Act of 1973 and the power to make Rules is vested under Section 55 of the Act of 1973 exclusively

in the State Government. If the PDA, or for that matter, any Development Authority, by virtue of Section 55 of the Act of 1973, cannot make Rules, it cannot adopt Rules framed by the State Government for government servants for the benefit of its employees, if one were to go strictly by the connotation of the term 'Rules', occurring in Section 55. There is hardly any difference in making Rules or adopting them, because the power to make Rules is traceable to Section 55 of the Act of 1973. That power is exercisable exclusively by the State Government; not by the Development Authorities. The making of Rules or adopting ones, already made by the Government, is only a difference in the mode of exercise of power; nothing else.

20. Notwithstanding the aforesaid remarks, this Court does not wish to pronounce on the said issue, inasmuch as the controversy involved in the present petition can be decided on the other issue raised. Since the rights of parties can be determined with reference to the other issue, the question is left open to be decided in a suitable matter.

21. The other alternate submission canvassed on behalf of the petitioner is founded on the provisions of the Centralised Service Rules, 1985. These Rules have been framed by the State Government, wherefor they have ample authority by virtue of Section 55 read with Section 5-A of the Act of 1973. Rule 37 of the Centralised Service Rules, 1985 has been referred to hereinabove and sub-Rule (2) of Rule 37 provides that in matters not covered by these Rules or special orders, the members of the service, which means the Uttar Pradesh Development Authorities Centralised Service, shall be governed by Rules, Regulations and Orders applicable

generally to U.P. Government servants serving in connection with affairs of the State, almost to borrow the phraseology of Rule 37(2).

22. The Retirement Benefit Rules, 2011 also framed in the exercise of power under Section 55 of the Act of 1973 do not provide anything relating to reimbursement of medical expenses, or for that matter anything to do with medical expenses at all. The Retirement Benefit Rules, 2011 deal with pension, gratuity, including death-cum-retirement pension, family pension and its commutation. It is perhaps for this reason that the State Government required the Development Authorities, including the PDA to adopt the Medical Attendance Rules, 2011 framed by the State Government for government servants. Admittedly, the Medical Attendance Rules, 2011 provide for reimbursement of medical expenses, not only for a retired government servant, but their family as well and such members of a deceased government servant's family, as are eligible for family pension.

23. Now, assuming that the Board's resolution, adopting the Medical Attendance Rules, 2011, does not qualify as a Regulation under Section 56 of the Act of 1973 and by its own force, cannot be a Rule under Section 55, because the rule making power is not available with the Development Authorities, but with the State Government exclusively, the provisions of sub-Rule (2) of Rule 37 of the Centralised Service Rules, 1985 make the Medical Attendance Rules, 2011 applicable to members of the centralised services as defined under sub-Rule 1(vi) read with sub-Rule 1(vii) of Rule 2 of the Centralised Service Rules, 1985.

24. Now, the position that the Centralised Service Rules, 1985 take within their fold not only conditions of service of members, who are in harness, but also the rights and privileges of retired members is more than evident from the provisions of sub-Rule (4) of Rule 34 of the said Rules. Rule 34(4) provides:

“34. Age of retirement.—

(4) A retiring pension and/or other retirement benefits, if any, shall be available in accordance with and subject to the provisions of the relevant rules applicable to every officer or other employee who retires or is required or allowed to retire under this rule.”

25. The aforesaid provisions make available to a retired employee of the centralised service a retiring pension and/or other benefits, if these are available in accordance with and subject to the provisions of the relevant rules applicable to an employee. After enactment of the Retirement Benefit Rules, 2011, pension and gratuity, including family pension are provided for by the said Rules in all detail as to entitlement, computation, commutation of pension etc. The Retirement Benefit Rules, 2011, however, do not govern the subject of medical reimbursement or provide about it. Therefore, by virtue of sub-Rule (4) of Rule 34 of the Centralised Service Rules, 1985 while entitlement to pension and gratuity, including family pension would be governed by the Retirement Benefit Rules, 2011, the entitlement to medical reimbursement clearly follows on the provisions of sub-Rule (2) of Rule 37 of the Centralised Service Rules, 1985 by virtue of which the Medical Attendance Rules, 2011 become applicable to retired members of the centralised service, including their

family. Since the Centralised Service Rules, 1985 does not define what the term 'family' would imply in relation to a member of the centralised service, the definition of 'family' provided under the Medical Attendance Rules, 2011 would apply.

26. It is particularly so, as already said, that a reading of sub-Rule (4) of Rule 34 and sub-Rule (2) of Rule 37 of the Centralised Service Rules, 1985 makes it evident that the rights of retired members of the centralised service and their family with regard to their entitlement for medical reimbursement, would be governed by the Medical Attendance Rules, 2011. The Medical Attendance Rules on their own terms by virtue of Rule 2(b), quoted in this judgment, apply to retired government servants and to their families. The provisions of sub-Rule (2) of Rule 37 of the Centralised Service Rules, 1985 and the Medical Attendance Rules, 2011 read in the context of Rule 34(4) of the Centralised Service Rules, 1985 form an integrated scheme to advance the welfare of the members of the centralised service and their family. Therefore, the construction to be placed upon them has to be one, which advances the purpose rather than inhibiting it by a pedantic constrict.

27. Much before the Retirement Benefit Rules, 2011 were enacted, the question about entitlement to pension of members of centralised service under the Centralised Service Rules, 1985 arose before a Division Bench of this Court at Lucknow in **Praveen Kumar Agarwal and others v. State of U.P. and others, (2011) ILR 1 All 21**. Though, their Lordships found for the retired members of the centralised service a right to receive pension on a plain reading of Section 5-A read with Section 24 of the Act of 1973, the

right was held traceable also to the provisions of Rule 37(3) and Rule 34(4) of the Centralised Service Rules, 1985 read with the provisions contained in the Financial Handbook and Civil Services Regulations, entitling employees of the State Government to pension. In **Praveen Kumar Agarwal** (supra), it was held by their Lordships of the Division Bench:

“40. There is one other aspect of the matter. Rule 34 of the Rules, covers all the employees of the Development Authorities with regard to retiral pension and other retiral benefits. Rule 37 categorically provides that matter not covered under Sub-Rule (1) and (2), shall be governed by all such orders as the State Government may deem proper. Sub-Rule (3) of Rule 37 has been meant to fill up vacuum. Sub-rule (2) specifically provides that matters not covered by these Rules or by special orders, the members of service shall be governed by the Rules, Regulations and Orders applicable generally, to U.P. Government Servant serving in connection with the affairs of the State.

41. The two Government orders dated 4.3.1983 and 17.3.1983 seem to have been issued to clarify the position keeping in view the Sub-Rule (2) of Rule 37. Admittedly, employees of State Government are being paid pension in pursuance of provisions contained in Financial Handbook and Civil Services Regulations. Accordingly, unless the separate provision is made, the petitioners case shall be governed by Sub-rule (2) of Rule 37 of 1985 rules.”

28. Until time, that **Praveen Kumar Agarwal** was decided, there were no separate rules governing the entitlement to retirement pension for members of the centralised service, and, therefore, in the

concluding remarks in Paragraph No.41 of the report in **Praveen Kumar Agarwal**, it was said that the petitioner's case shall be governed by sub-Rule (2) of Rule 37 of the Centralised Service Rules, 1985. At that time, by virtue of sub-Rule (2) of Rule 37 aforesaid, the right to receive pension for members of the centralised service would be the same as those of State Government employees serving in connection with affairs of the State under the rules applicable to them, be it the Financial Handbook or the Civil Service Regulations. Now, that position stands changed with the framing of the Retirement Benefit Rules, 2011, which apply to a retired member of the service by virtue of sub-Rule (4) of Rule 34.

29. However, so far as medical reimbursement is concerned, the position would be the same as it was before their Lordships in **Praveen Kumar Agarwal** and the provisions of sub-Rule (2) of Rule 37 of the Centralised Service Rules, 1985, would ipso facto attract the provisions of the Medical Attendance Rules, 2011 to retired members of the centralised service and their families for the purpose of reimbursement of medical expenses.

30. More or less on similar line of reasoning, a learned Single Judge of this Court, when confronted with the issue in **Rajendra Prasad Dwivedi v. State of U.P. Thru. Principal Secretary, Department of Housing and Urban Planning, Lko., 2023:AHC-LKO:32771**, regarding reimbursement of medical bills of a retired employee of the centralised service, who had claimed against the Banda Development Authority, held:

“15. The second issue with regard to payment of medical bills, it is clear from the

records that the benefits which were accorded by the State Government to their employees were adopted by the respondent no.2 on 18.11.2015, thus, there is no reason why the respondents will not pay the medical reimbursement allowance which have been duly verified by the CMO and are pending before the respondent no.1.....”

31. This Court is, therefore, of opinion that the petitioner has clearly established his right to medical reimbursement of expenses incurred in his wife's treatment, about which there is no issue that she falls within the definition of his ‘family’ under the Medical Attendance Rules, 2011 applicable in the case.

32. In the result, the petition **succeeds** and is **allowed**. The impugned order dated 04.02.2023 passed by the Secretary, PDA (Annexure No.1 to the writ petition) is hereby **quashed**. Let a mandamus issue to the Vice-Chairman, PDA and the Secretary, PDA to reimburse the medical bill submitted by the petitioner for his wife's treatment on 23.07.2021, after verification in accordance with law and the Rules applicable, within a month of receipt of a copy of this order.

33. Costs easy.

(2023) 8 ILRA 958
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-A No. 12283 of 2023

Ram Kumar

...Petitioner

Versus

State of U.P. & Anr.

...Respondents

Counsel for the Petitioner:

Sri Harishchandra Dubey, Sri Aadiya Dhar Dwevedi

Counsel for the Respondents:

C.S.C., Sri Gautam Dubey

Petitioner was appointed as a **Safai Karmchhari** on **01.10.1990**. Although his papers for regularization were forwarded in **1996**, services were regularized only in **2008**. He **retired** on **31.07.2020**, but **post-retiral benefits including pension were not released**. Whether denial/delay in granting post-retirement benefits to the petitioner is justified? **Withholding of retiral benefits is arbitrary, illegal, morally obnoxious, and socially reprehensible**. The Court **condemned the inaction** by public authorities and called it a **"sin if not an offence."** It invoked the **constitutional mandate of Article 12**, placing responsibility on public functionaries.

The writ is allowed.

Citations:

1. Cassell & Co. Ltd. Vs Broome, 1972 AC 1027
2. Rooks Vs Barnard & ors., 1964 AC 1129
3. Lucknow Development Authority Vs M.K. Gupta, JT 1993 (6) SC 307
4. Ghaziabad Development Authority Vs Balbir Singh, JT 2004 (5) SC 17
5. Registered Society Vs U.O.I. & ors., (1996) 6 SCC 530
6. Shivsagar Tiwari Vs U.O.I., (1996) 6 SCC 558
7. Delhi Development Authority Vs Skipper Construction & anr., AIR 1996 SC 715
8. Mukti Nath Rai Vs St. of U.P., (1992) 2 AWC 644

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Sri Harishchandra Dubey, learned counsel for the petitioner and

learned Standing Counsel for the State-respondents.

2. Sri Gautam Dubey has accepted notice on behalf of the respondent no.3.

3. The submission of learned counsel for the petitioner is that the petitioner was appointed on the post of Safai Karmchhari on 01.10.1990 and though papers for regularization were forwarded in the year 1996, his services were regularized in 2008 and, after serving the respondent municipality, he retired from his post after attaining the age of superannuation on 31.07.2020.

4. The grievance of the petitioner is that post retiral benefits including pension have not been released in his favour despite certain applications moved by him.

5. Withholding of retiral benefits of retired employees for years together is not only illegal and arbitrary but a sin if not an offence since no law has declared so. The officials, who are still in service and are instrumental in such delay causing harassment to the retired employee must however feel afraid of committing such a sin. It is morally and socially obnoxious. It is also against the concept of social and economic justice which is one of the founding pillars of our constitution.

6. The respondents being "State" under Article 12 of the Constitution of India, its officers are public functionaries. Under our Constitution, sovereignty vests in the people. Every limb of constitutional machinery, therefore, is obliged to be people oriented. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour. It is high time that this

Court should remind respondents that they are expected to perform in a more responsible and reasonable manner so as not to cause undue and avoidable harassment to the public at large and in particular their ex-employees and their legal heirs like the petitioner. The respondents have the support of entire machinery and various powers of statute. An ordinary citizen or a common man is hardly equipped to match such might of State or its instrumentalities. Harassment of a common man by public authorities is socially abhorring and legally impressible. This may harm the common man personally but the injury to society is far more grievous. Crime and corruption, thrive and prosper in society due to lack of public resistance. An ordinary citizen, instead of complaining and fighting mostly succumbs to the pressure of undesirable functioning in offices instead of standing against it. It is on account of, sometimes, lack of resources or unmatched status which give the feeling of helplessness. Nothing is more damaging than the feeling of helplessness. Even in ordinary matters, a common man who has neither the political backing nor the financial strength to match inaction in public oriented departments, gets frustrated and it erodes the credibility in the system. This is unfortunate that matters which require immediate attention are being allowed to linger on and remain unattended. No authority can allow itself to act in a manner which is arbitrary. Public administration no doubt involves a vast amount of administrative discretion which shields action of administrative authority but where it is found that the exercise of power is capricious or other than bona fide, it is the duty of the Court to take effective steps and rise to occasion otherwise the confidence of the common man would shake. It is the responsibility of Court in such matters to

immediately rescue such common man so that he may have the confidence that he is not helpless but a bigger authority is there to take care of him and to restrain arbitrary and arrogant, unlawful inaction or illegal exercise of power on the part of the public functionaries.

7. In our system, the Constitution is supreme, but the real power vests in the people of India. The Constitution has been enacted "for the people, by the people and of the people". A public functionary cannot be permitted to act like a dictator causing harassment to a common man and, in particular, when the person subject to harassment is his own employee.

8. Regarding harassment of a common man, referring to observations of **Lord Hailsham in Cassell & Co. Ltd. Vs. Broome, 1972 AC 1027** and **Lord Devlin in Rooks Vs. Barnard and others 1964 AC 1129**, the Apex Court in **Lucknow Development Authority Vs. M.K. Gupta JT 1993 (6) SC 307** held as under:

"An Ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities. That is provided by the rule of law..... A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. No law provides protection against it. He who is responsible for it must suffer it.....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." (para 10)

9. The above observations as such have been reiterated in **Ghaziabad**

Development Authority Vs. Balbir Singh JT 2004 (5) SC 17.

10. In a democratic system governed by rule of law, the 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 the Government or its officials have acted with gross negligence and unmindful action causing harassment of a common and helpless man, this Court has never been a silent spectator but always reacted to bring the authorities to law.

11. In **Registered Society Vs. Union of India and Others (1996) 6 SCC 530** the Apex court said:

"No public servant can say 'you may set aside an order on the ground of mala fide but you can not hold me personally liable' No public servant can arrogate in himself the power to act in a manner which is arbitrary".

12. In **Shivsagar Tiwari Vs. Union of India (1996) 6 SCC 558** the Apex Court has held:

"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."

13. In **Delhi Development Authority Vs. Skipper Construction and Another AIR 1996 SC 715** has held as follows:

"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 defeat 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."

14. This Court, way back in the year 1992, in the case of **Mukti Nath Rai Vs. State of U.P. (through the Superintending Engineer, P.W.D.) and others: (1992) 2 AWC 644**, had issued **GENERAL MANDAMUS** to all the Departments under the State Government to expeditiously complete all formalities for releasing the post retiral dues. Relevant directions issued by the said judgment are being extracted herein below:-

"6. In these hard days it is essential that payment of pension should begin promptly. A society is judged by the care it takes for its aged and infirm. In these circumstances I regard it necessary to issue a general mandamus to all U.P. government departments.

7. The relevant procedural rules for grant of pension are contained in the U.P. Civil Service Regulations (Published in the U.P. Pension Manual), and other rules, and government orders relevant to pension. Rules 906 to 960 of the Civil Service Regulations meticulously lay down the procedure for grant of pension, and throughout these rules the emphasis is on promptness (as is evident from the repeated use of the word 'promptly', 'immediately' etc.). Rule 906 lays down that every Head of Department shall have a list prepared every six months, i.e. on the 1st January, and 1st July each year and of all gazetted and non-gazetted Government servants who are due to retire within the

next 12 to 18 months of that date. A copy of the list shall be sent to the Audit officer not later than 31st January or 31st July, as the case may be of that year.

9. I, therefore, direct that henceforth rules 906 to 960 of the Civil Service regulations be followed strictly by all concerned officials, and payment of pension must begin promptly on the retirement of U.P. Government employee. This mandamus must be strictly complied with, and all those responsible for its violation, whether in the parent department of the retiring employee or in the Accountant General's office shall be held accountable at this Court for such violation.

12. A copy of this judgment will be sent to the Chief Secretary, U.P. Government, Lucknow and also the Accountant General, U.P., Allahabad. The Chief Secretary is directed to circulate copies of this judgment to all heads of departments for compliance of the general mandamus hereinbefore issued."

15. As a matter of experience and with most anguish, it is observed that **the said general mandamus is not being obeyed by the departments and, therefore, this Court is flooded with hundreds and thousands of writ petitions claiming post retiral benefits.**

16. This writ petition is being **disposed of** in the following terms:-

(a) The Executive Officer, Nagar Palika Parishad, Seohara, District Bijnor (respondent no.2) shall take up the matter with utmost priority and take a decision on the admissibility of post retiral benefits payable to the petitioner, **not later than by 15.10.2023.**

(b) The Registrar General of this Court is directed to send a copy of this order to the Chief Secretary of the State Government, U.P., Lucknow for the purposes of issuance of requisite circular to all the Departments under the control of the State Government to ensure that the directions issued by this Court in the case of Mukti Nath Rai (supra), as mentioned herein above, be complied with in their true letter and spirit so that the State, its instrumentalities and common man may not indulge in unnecessarily litigation.

(2023) 8 ILRA 962

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 17.08.2023

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 12438 of 2023
alongwith
Writ- A No. 17855 of 2022

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

Counsel for the Petitioner:
Sri Rajesh Kumar Pandey

Counsel for the Respondents:
C.S.C.

A. Service Law – Police Act, 1861 – Section 7 – UP Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991 – R. 14 – Appendix-1 – Departmental enquiry – Procedure – No approval to the chargesheet by competent authority was alleged – Later on another chargesheet was issued with the approval of competent authority – Effect – Held, the earlier chargesheet, that was issued and signed by the inquiry officer himself. was not at all required to be approved by

the disciplinary authority – However, since now a fresh chargesheet has been issued with the same charges and this time approved by the higher authority, namely, disciplinary authority, the earlier chargesheet stands superseded by the subsequent chargesheet – The disciplinary inquiry will now be held strictly as per the procedure prescribed for under Appendix - 1 to the Rules, 1991. (Para 8 and 10)

B. Service Law – UP Government Service Rules, 1999 – Special law Vs General law – Applicability – Rules, 1991 is the special rules applicable to the police department and so on the principle that special law will override the general law, the 1999 Rules will not be applicable in so far as the disciplinary proceedings in respect of the police personnel are concerned. (Para 12)

Writ petition disposed of. (E-1)

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

1. Both above petitions are being heard and decided together as they raise common question of law and facts.

2. Heard learned counsel for the petitioner and learned Standing Counsel for the State respondents.

3. Learned Advocate appearing for the petitioner in Writ ? A No.- 17855 of 2022 has argued that chargesheet that was issued to the petitioner leveling certain charges to set up in motion disciplinary proceedings, had no approval of the competent authority as per the U.P. Police Officers of Sub-ordinate Ranks (Punishment and Appeal) Rules, 1991 (hereinafter referred to as 'Rules, 1991'). This Court while entertaining this petition noted the ground raised by petitioner and directed that the disciplinary proceedings pursuant to the chargesheet in question shall abide by decision of the petition.

4. It transpires that while the matter remained pending before this Court and counter affidavit was filed, the department proceeded to issue another chargesheet and now this time by the Additional Deputy Commissioner, Agra with the approval of the higher competent authority. This chargesheet has now come to be challenged in the writ petition being Writ ? A No.- 12438 of 2023 on the ground that once the competence of authority in issuing chargesheet was already under challenge before this Court and the chargesheet had not been stayed, respondents were not justified in issuing another chargesheet, this time, may be, with the approval of the higher authority.

5. Learned counsel for the petitioner while defending the first writ petition and assailing the chargesheet has drawn the attention of the Court towards Rule 14 of the U.P. Police Officers of Sub-ordinate Ranks (Punishment and Appeal) Rules, 1991 that provide for procedure for conducting departmental inquiry. According to him the procedure prescribes that the chargesheet shall be issued and inquiry be conducted in terms of the Appendix- 1 to the rules that lays down the procedure.

6. Per contra, it is argued by Mr. S.K. Pal, learned Additional Chief Standing Counsel that the rules are absolutely silent as to whether a chargesheet is required to be approved further by the higher authority and the inquiry officer would not be competent in the matter. He submits rather there is a form that has been prescribed for issuance of chargesheet under the Police Act, 1861 that authorizes even the inquiry officer to issue chargesheet because it is he who has to sign the document containing article of charges and, therefore, he submits

that petitioner is not justified in assailing the chargesheet on the ground that it was not approved by the disciplinary authority. However he submits that now this time the chargesheet has stood approved by the higher authority and the charges are the same as leveled in the earlier chargesheet impugned in writ petition being Writ ? A No.- 17855 of 2022 petitioner should not have any grievance.

7. Having heard learned counsel for the respective parties and having perused the records and having gone to the relevant provisions of the rules as cited by the learned counsel for the respective parties and the chargesheet that have been challenged in both the writ petitions, I find in the first place that the charges are same except with the modality that this time approved by higher competent authority while the earlier chargesheet was issued by the inquiry officer.

8. In such above view of the matter, therefore, the controversy should not detain this Court any longer as once the chargesheet has stood substituted by another chargesheet, which according to the petitioner, would be a competent one, now the petitions can be disposed of with a direction to the authorities/ disciplinary authority to proceed with the disciplinary proceedings in accordance with law. However, it would be relevant at the same time to reproduce Rule 14 of the Rules, 1991 that runs as under:

"14. Procedure for conducting departmental proceedings- (1) subject to the provisions contained in these rules, the departmental proceedings in the case referred to in sub-rule (1) of rule 5 against to the police officers may be conducted in

accordance with the procedure laid down in appendix- I.

(2)- *Notwithstanding anything contained in sub-rule (1) punishments in cases referred to in sub-rule (2) of Rule 5 may be imposed after informing the police officer in writing of the action proposed to be taken against him and of the imputations of act or omission on which it is proposed to be taken and giving him a reasonable opportunity of making such representation as he may wish to make against the proposal.*

(3)- *The charged police officer shall not be represented by Counsel in any proceedings instituted under these rules."*

(Emphasis added)

9. Now, I find upon bare reading of relevant rules that refers to Appendix-1 to the rules that lays down the procedure of holding an inquiry and conduct the disciplinary proceedings in detail. The Appendix-1 talks about various procedures to be adopted by the inquiry officer in the matter of inquiry against the chargesheet and, in the first place, it provides that grounds on which the disciplinary authorities is proposed to take action shall be used in the form of definite charge or charges as per Form-1. The Form-1 has been prescribed for the disciplinary proceedings under Section 7 of the Police Act, 1861 and upon bare reading of the same, I find that it is required to be issued under the signature of the Inquiry Officer. The Appendix of Form-1 to the Rules 1991 are reproduced hereunder:

*"APPENDIX-1
PROCEDURE RELATING TO THE
CONDUCT OF DEPARTMENTAL
PROCEEDINGS AGAINST POLICE
OFFICER*

[See RULE 14(1)]

Upon institution of a formal enquiry such police officer against whom the enquiry has been instituted shall be informed in writing of the grounds on which it is proposed to take action and shall be afforded an adequate opportunity of defending himself. The ground on which it is proposed to take action shall be used in the form of definite charge or charges as in FORM-I appended to these Rules which shall be communicated to the charged police officer and which shall be so clear and precise to give sufficient indication to the charged police officer of the facts and circumstances against him. He shall be required, within a reasonable time, to put in, in a written statement of his defence and to state, whether he desires to be heard in person. If he so desires, or if the Inquiry Officer so directs an oral enquiry shall be held in respect of such of the allegation as are not admitted. At that enquiry such oral evidence will be recorded as the Inquiry Officer considers necessary. The charge police officer shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called as he may wish:

Provided that the Inquiry officer may for sufficient reasons to be recorded in writing refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and statement of the finding and the ground thereof. The Inquiry officer may also separately from these proceedings make his own recommendation regarding the punishment to be imposed on the charged police officer.

FORM-I
Form of charge to be used in
proceeding under section 7 of the Police
Act, 1861

Office of the
To

Date: 199...

(Full name and designation of the police officer charged)

You are hereby charged as follows:

(1) that you on (or about) (or between).....and
 dated) while posted as (designation)

and hereby

(Facts of the case)

committed a breach of rule
o
 r, were quality of discharge your duty, or etc.

Evidence which it proposed to consider in support of the charge---

(I)+

(II)+

(III)+

(2) that you* etc.

(3) that you* etc.

+ (to be repeated as many times as there charges)

You are hereby required on or before.....to put in a written statement of your defence in reply to each of the charges. You are warned that if no such statement is received from you by the undersigned within the time allowed , it be presumed that you have none to furnish and order's will be passed in your case accordingly.

You are further required simultaneously to inform the undersigned in writing whether you desire to be heard in person and in case you wish to examine or cross-examine any witnesses to submit along with your written statement their names and addresses together with a brief indication of the evidence which each such witness shall be expected to give.

*(Signature and designation of
Inquiring officer)
(For and on behalf of*)*

*CERTIFIED that the charge has read
over and explained
to.....(party charged) in
simple Hindi and a copy of the same was
handed over to.....Received a
copy of charge.*

*(Signature and Designation of
inquiring officer)
Signature and party charged"
(Emphasis added)*

10. Thus, from the above, it is absolutely clear that even the earlier chargesheet that was issued to the petitioner and was signed by the inquiry officer himself was not at all required to be approved by the disciplinary authority. However, since now a fresh chargesheet has been issued with the same charges and this time approved by the higher authority, namely, disciplinary authority, I hold that the earlier chargehseet stands superseded by the subsequent chargehseet issued on 17th June, 2023 and accordingly disciplinary inquiry will now be held strictly as per the procedure prescribed for under Appendix -I to the Rules, 1991, into the charges leveled under the chargehseet dated 17th June, 2023.

11. It appears that the petitioner has raised certain grounds regarding applicability of the U.P. Government Service Rules, 1999 which provide that the chargesheet should be approved by the disciplinary authority.

12. In my considered view the Rules, 1991 are the special rules applicable to the police department and so on the principle that special law will override the general law, the 1999 Rules will not be applicable in so

far as the disciplinary proceedings and in respect of the police personnel are concerned.

13. Petitioner is to submit his reply within a period of four weeks from today and, thereafter to cooperate in the disciplinary proceedings.

14. With the above observations and directions, both these petitions stand disposed of.

(2023) 8 ILRA 966
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2023

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ-A No. 13308 of 2021

Pankjesh **...Petitioner**
Versus
Chairman/Appellate Auth. & Anr.
...Respondents

Counsel for the Petitioner:
Ms. Roshni Shukla, Sri Prashant Vardhan

Counsel for the Respondents:
Sri Satish Kishore Kakkar, Sri Amrish Sahai

A. Service Law – Bank's Vigilance Manual – Clause 1 – Dismissal from service – Departmental enquiry – Chargesheet was served upon the petitioner on 18.10.2018 just 12 days prior to the retirement – Allegation of committing irregularity in respect of loan transactions happened between 2005 to 2010 – Delay of eight years in initiating the departmental enquiry – From 2010 to 2018, regular annual financial inspections of the Branch were conducted, but the respondent-Bank never took any step against the petitioner on the basis of any alleged illegality – Manual provide four years limitation to

initiate any enquiry – Non-compliance – Effect – Held, there is a specific bar on initiating proceedings after four years of the incident. It is not open for the respondent-Bank to manipulate the said guidelines of C.V.C. which are binding upon the Bank, merely by issuing a show cause notice after a lapse of eight years. (Para 5, 6, 16, 18 and 21)

Writ petition allowed. (E-1)

List of Cases cited:

1. Uco Bank & ors. Vs Rajendra Shankar Shukla; (2018) 14 SCC 92
2. Uco Bank & ors. Vs Prabhakar Sadashiv Karvade; (2018) 14 SCC 98
3. Mahanadi Coalfields Ltd. Vs Rabindranath Choubey; (2020) 18 SCC 71
4. St. of U.P. Vs Mohd. Sharif (dead); AIR 1982 Supreme Court 937

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Present writ petition is filed by the petitioner challenging the order dated 07.09.2020 passed by the Disciplinary Authority whereby petitioner was dismissed and the order dated 15.06.2021 passed by the appellate authority whereby appeal of the petitioner against the punishment order was also rejected.

2. Facts of the case are that the petitioner was initially appointed as an Officer in Tulsi Gramin Bank (erstwhile Allahabad U.P. Gramin Bank and now Aryavart Bank since 01.04.2019) (hereinafter referred to as 'Bank') in the year 1983 and he was due to superannuate on 31.10.2018. While in service of the Bank, from 23.09.2010 till 10.01.2011, he worked in the capacity of Temporary Manager in Chakaundh Branch-Chitrakoot. On 11.01.2011, petitioner was posted as Permanent Manager in the same Branch till

he was transferred on 20.07.2012. During his posting as Temporary Manager in the said Branch, some loans were sanctioned under a scheme sponsored by the National Scheduled Castes Finance & Development Corporation set up by the Government of India under the Ministry of Social Justice & Empowerment.

3. It is stated by the petitioner that as per the process prescribed, all the loans were recommended/approved by the Block Development Officer concerned and were also duly verified by the Bank and thereafter sanctioned. The beneficiaries of the said loans also purchased and received articles subjected to loans and recorded their satisfaction. The disbursement of loans was made as per the procedure prescribed by the Bank. The said loans were evaluated, sanctioned and disbursed and assets were created under the supervision of the Assistant Development Officer (Social Welfare), Pahari, Chitrakoot along with Sri Atmaram Gupta, who was the permanent officer posted in the Branch. The disbursement of loans was made as per the procedure and the said fact was duly reported by the petitioner to the competent authority by communications dated 17.02.2010, 30.03.2010 and 20.04.2010. The internal audit inspection of the Branch was also carried out by the Inspection Officer from 09.06.2010 to 14.06.2010. In the audit inspection report dated 15.06.2010, it was pointed out that disputed loans were sanctioned without approval of the Manager.

4. At the relevant time there were only two Officers posted in the said Branch namely Sri Atmaram Gupta as Evaluation Officer and the petitioner as the Temporary Manager (having no authorization to

sanction the loan as per the Bank guidelines).

5. Right after the aforesaid irregularities were pointed out in the inspection report dated 15.06.2010, Sri Atmaram Gupta was transferred to another Branch by order dated 19.07.2010, with clear instruction not to deal with any loan transactions. The irregularities pointed out in the inspection report were not rectified as per the Bank. Thereafter 08 further financial annual internal inspections were conducted by the Bank till 2018 and no irregularities were pointed out in the said inspections. Surprisingly, after 08 years of the aforesaid incident, which had occurred in the year 2010, petitioner was served with a show cause notice on 23.08.2018 with regard to irregularities in the said loan transactions. After issuance of the show cause notice again a special inspection was carried out with regard to 14 loans transactions mentioned in the show cause notice dated 23.08.2018. The said special inspection was conducted on 27.09.2018.

6. A charge sheet was issued by the respondent-Bank to the petitioner on 11.10.2018 which was served on 18.10.2018, i.e., just 12 days prior to the retirement of the petitioner, containing total 18 charges levelled against the petitioner. Out of the 18 charges, Charge nos. 1 to 14 are with regard to wrong information provided by the petitioner in his explanation letter dated 10.09.2018, allegedly written by him, with regard to loans sanctioned during his tenure at the Chakaundh branch in the year 2010. Charge No. 15 is with regard to dereliction of duty while sanctioning a loan which later turned N.P.A. and caused financial loss of Rs. 43,924 to the respondent bank and Charge No. 16 is regarding misleading

reports submitted by the petitioner to the Head Office and relate to different loans of the year 2010 having only variation of names of borrowers and the loan amounts etc. Charge No. 17 again refers to wrong information provided by the petitioner with regard to signature of the officer, who issued banker's cheque drafted on 25.03.2010 and 29.03.2010, in his letter dated 10.09.2018. So far as the Charge no.18 is concerned, it alleged that the petitioner failed to follow the Bank guidelines during his tenure at the Chaukandh Branch, as an amount of Rs.1,07,302/- was incorrectly shown in Saving Bank Account of Sri Gulab Singh as Rs.2,07,302/- on 06.12.2005 and, thus, an excess amount of Rs.91,439/- was withdrawn by the account holder, causing financial loss of the said amount to the Bank. All of the 18 charges pertain to transactions that happened between 2005 to 2010 i.e., 8 years before the chargesheet was issued to the petitioner.

7. First submission made by learned counsel for the petitioner challenging the punishment order is that the incident is of the year 2010 and it was also always in the knowledge of the respondent-Bank. In fact, Sri Atmaram Gupta was transferred from the Bank by order dated 19.07.2010 with the instructions that he shall not be given any loan sanctioning authority. However, the charge sheet to the petitioner was issued on 11.10.2018 i.e. around 08 years after the incident took place and that too merely 12 days prior to retirement of the petitioner. Counsel for the petitioner relies upon Clause 1 of the Chapter-VII of the Bank Vigilance Manual wherein it is provided that no disciplinary action shall be taken against an official 4 years after the commission of the alleged act. Thus, the charge sheet is highly belated and,

therefore, the entire proceedings are liable to be set aside. In support of his submission, counsel for the petitioner relies upon the judgments of Supreme Court in the cases of **Uco Bank & Ors. vs. Rajendra Shankar Shukla; (2018) 14 SCC 92** and **Uco Bank & Ors. vs. Prabhakar Sadashiv Karvade (2018) 14 SCC 98**, wherein departmental proceedings against the employee were set aside by the Supreme Court on the ground of there being inordinate delay between the alleged act and issuance of chargesheet.

8. In reply to the same, learned counsel for the respondent-Bank submits that a perusal of each and every charge shows that the charge sheet is issued on the basis of a reply submitted by the petitioner 10.09.2018. He further submits that the aforesaid judgments relied upon by the counsel for the petitioner stands overruled by a larger bench of the Supreme Court in the case of **Mahanadi Coalfields Ltd. v. Rabindranath Choubey; (2020) 18 SCC 71**.

9. Learned counsel for the petitioner further disputes that petitioner never issued any explanation letter dated 10.09.2018 and also denied petitioner's signature on the same. He further submits that the charges in the charge sheet are vague and do not give any details whatsoever. Reliance is placed upon the language of the charges which merely state that the petitioner while working as Manager of the Branch - Chakaundh had given loans with regard to named persons and in the said references has made false and misleading report to the Head Office. He further adds that vague charges in the chargesheet are in itself a sufficient ground to set aside the whole proceeding. In support of his argument, learned counsel for the petitioner relies

upon the judgment of the Supreme Court in the case of **State of U.P. vs. Mohd. Sharif (dead) through L. Rs; AIR 1982 Supreme Court 937**.

10. Replying to the same, learned counsel for respondent submits that along with the charge sheet documents were annexed giving details in support of the charges levelled against the petitioner. In the said annexure with regard to charge nos. 1 to 14, it is specifically stated that in response to the Head Office letter dated 23.08.2018, a reply was submitted by the petitioner on 10.09.2018 which was vague and false. The said annexures also gave details of the different loan accounts and the amount sanctioned in the same. Thus, the same are sufficient details and it cannot be said that the charges are vague. With regard to charge no.15, it is stated that after the purchase of Buffalo neither any health certificate was issued nor the buffalo was insured. Further, no security on the loan amount of Rs.40,000/- was ever furnished and now the loan amount cannot be recovered and thus the Bank has suffered a loss of Rs.43,924/- against the amount as it stood on the date of the charge sheet.

11. With regard to Charge no.16, details of the aforesaid loan amounts are provided and it is stated that the petitioner did not ask for any security for the loan disbursed by him and, thus, later the same turned as N.P.A. and are now causing loss to the Bank. With regard to Charge No.17, annexures again state that his explanation dated 10.09.2018 to the Bank's letter dated 23.08.2018 gives incorrect and false information and thus charge is made out. For Charge no.18, it gives details of amount incorrectly shown in the said saving Bank account of Sri Gulab Singh.

12. On the basis of the aforesaid, learned counsel for the respondent-Bank states that sufficient details are given in the charge sheet and the same is not delayed and the same is on the basis of communication dated 10.09.2018 given by the petitioner which itself is vague and false. Thus, he says that since the cause of action occurred in the year 2018, when incorrect reply was submitted by the petitioner, hence there is no delay in issuing the charge sheet. Learned counsel for the respondent-Bank further states that the letter dated 10.09.2018 is written by the petitioner himself and he is wrongly disputing the same.

13. A perusal of the inquiry report shows that Charge Nos. 1 to 14 are proved, charge No.15 is partly proved whereas petitioner is exonerated from charge No.16, charge No.17 is proved and Charge No. 18 is partly proved.

14. I have heard learned counsel for the parties and perused the records.

15. The first submissions of the petitioner is with regard to the delay in initiating the disciplinary proceedings against him.

16. It is not in dispute between the parties that all the loans were sanctioned in and other acts referred to in the charge sheet are of the year 2010 or prior in time. The charge sheet is issued to the petitioner on 11.10.2018, which was served upon him on 18.10.2018, while petitioner was due to retire on 31.10.2018. It has not been disputed by the respondent-Bank that from the year 2010 to the year 2018, regular annual financial inspections of the Branch were conducted. Thus, if there was any irregularity and illegality committed by the

petitioner, it was always in the knowledge of the respondent-Bank. The respondent-Bank never took any step against the petitioner on the basis of any alleged illegality, even if they existed. The Bank cannot by calling explanation, by its letter dated 23.08.2018, can get over the delay of 08 years committed by it in initiating the departmental enquiry with regard to any illegality committed by the petitioner, by saying that in response thereto a response/letter dated 10.09.2018 was sent/submitted by the petitioner, which is false and vague and thus now the departmental proceedings are being initiated. All the charges relates to the loan granted under the Government scheme for the poor persons in the year 2010 and discrepancy in debiting a customer's account in the year 2005.

17. The explanation sought by communication dated 23.08.2018 is only with regard to the said loans of the year 2010 and discrepancy of the year 2005. There is no proper explanation for the delay of 08 years even in issuing a show cause notice to the petitioner and the admission that a show cause notice itself is issued after 08 years shows that there is inordinate delay.

18. Bank's Vigilance Manual has been prepared with an objective to streamline and standardize the process of disciplinary proceedings. Chapter-VII deals with "Processing of Investigation Report & Fixing Staff Accountability". Clause 1 thereof provides the time limit for initiation of disciplinary proceedings, it reads as follows:-

"As per prevailing system, all borrowal/non-borrowal accounts are subjected to credit audit/inspection and

they are kept under close scrutiny. This audit/inspection would scrutinise pre-sanction appraisal, documentation and disbursement of loans/advances and post sanction follow-up. If any irregularity is missed out by auditors/inspectors in the first audit/inspection, it is reasonable to expect that the remaining undetected irregularities will be detected in the 2nd audit/inspection and necessary disciplinary proceeding would be initiated against the concerned officials in the follow up action. Normally the second audit/inspection would be completed within 3-4 years. The CVC has accordingly approved the proposal that no disciplinary proceeding will ordinarily lie against any official for any lapse not detected within two successive internal regular audits/inspections of the same account or 4 years from the date of event, whichever is later. In case any irregularity is detected subsequent to the second audit/inspection, the auditors/inspectors concerned will be held accountable and be liable for disciplinary proceedings. However, this time limit will not apply to cases of i) frauds, ii) other criminal offences or iii) cases where malafides are inferable.

19. Applicability of the Bank's Vigilance Manual has not been disputed in the counter filed by the respondent Bank. During course of arguments, counsel for the Bank agrees that the same is applicable, however, he submits that the proceedings are initiated on the basis of false explanation dated 10.09.2018 submitted by the petitioner.

20. A perusal of the aforesaid shows that if any irregularity was found in the first audit/inspection and even if it is missed, it is reasonably expected that the same would be detected in the second audit/inspection.

Thus, immediately after the second audit inspection necessary disciplinary proceedings are expected to be initiated against the concerned official in the follow up action. Such an exercise is normally completed within a period of 3-4 years. The C.V.C. accordingly approved that no disciplinary proceeding will ordinarily lie against any official for any lapse not detected within two successive internal regular audits/inspections of the same account or 4 years from the date of event, whichever is later. In case irregularities are detected subsequent to second audit/inspection, the auditors/inspectors concerned will be held accountable and liable for disciplinary proceedings. Only exception to the same are cases of fraud, other criminal offences or where malafides are inferable.

21. In the present case, it is not the case of the respondent-Bank that the irregularities were not detected in the audit inspections. Once they were detected, it was incumbent upon the Bank to forthwith proceed with the departmental proceedings. There is no case set up by the respondent-Bank that the present is a case of fraud or other criminal offences or where malafides are inferable. There is no case set up by the Bank that irregularities did not come in the knowledge of the Bank in time. There is a specific bar on initiating proceedings after four years of the incident. It is not open for the respondent-Bank to manipulate the said guidelines of C.V.C. which are binding upon the Bank, merely by issuing a show cause notice after a lapse of 08 years. Any show cause notice was also required to be issued by the Bank within the said period prescribed under the C.V.C. guidelines. Thus, the initiation of disciplinary proceeding is directly hit by the aforesaid guidelines.

22. Learned counsel for the respondent has placed reliance upon the judgment of the Supreme Court in the case of **Mahanadi Coalfields (supra)**, that delay in issuing chargesheet cannot be a ground for quashing of the departmental proceedings. Relevant paragraph of the same reads as follows-

"38. In *UCO Bank v. Rajendra Shankar Shukla* [*UCO Bank v. Rajendra Shankar Shukla*, (2018) 14 SCC 92 : (2018) 2 SCC (L&S) 625] this Court did not interfere on the ground that there was an enormous delay of about seven years in issuing a charge-sheet. Efficiency bar was permitted to be crossed during that period, and the employee was not paid the subsistence allowance or pension during the pendency of the disciplinary inquiry. It was observed that the employee was entitled to subsistence allowance during the inquiry. The decision of *UCO Bank v. Prabhakar Sadashiv Karvade* [*UCO Bank v. Prabhakar Sadashiv Karvade*, (2018) 14 SCC 98 : (2018) 2 SCC (L&S) 630] was referred. An observation was made that punishment of dismissal could not have been imposed after superannuation, but the same could not be said to be the ratio of the decision. It was mainly for the reasons mentioned by this Court concerning delay, non-payment of subsistence allowance and the employee was deprived of meaningful participation under the departmental enquiry. After giving the aforesaid findings, it was not necessary to go into the aforesaid question. Thus, the opinion expressed as to the punishment of dismissal could not be said to be the ratio of the decision. The reliance was placed on *UCO Bank v. Prabhakar Sadashiv Karvade* [*UCO Bank v. Prabhakar Sadashiv Karvade*, (2018) 14 SCC 98 : (2018) 2 SCC (L&S) 630] . Though the decision of *UCO*

Bank v. Rajinder Lal Capoor [*UCO Bank v. Rajinder Lal Capoor*, (2007) 6 SCC 694 : (2007) 2 SCC (L&S) 550] was referred to by this Court, but it did not consider the effect of deeming fiction of continuance of inquiry and continuance of the employee in the service as pointed out above in the various decisions and it relied upon Regulation 48 providing for pecuniary loss caused to the bank. Whereas in *Ramesh Chandra Sharma v. Punjab National Bank* [*Ramesh Chandra Sharma v. Punjab National Bank*, (2007) 9 SCC 15 : (2008) 1 SCC (L&S) 337] it was held to the contrary that once the inquiry is initiated under Regulation 4 of the (Discipline & Appeal) Regulations, Regulation 48 of the Pension Regulations had no application, and order of dismissal was upheld. The decision in *Ramesh Chandra Sharma v. Punjab National Bank* [*Ramesh Chandra Sharma v. Punjab National Bank*, (2007) 9 SCC 15 : (2008) 1 SCC (L&S) 337] and other decisions which were binding upon the Division Bench were not considered. In the absence of consideration of the said decision and other decisions mentioned above in which it was held that legal fiction of deemed continuation has to be taken to a logical conclusion consequently, the observation made that after superannuation punishment of dismissal cannot be imposed in *UCO Bank v. Rajendra Shankar Shukla* [*UCO Bank v. Rajendra Shankar Shukla*, (2018) 14 SCC 92 : (2018) 2 SCC (L&S) 625] , was not the ratio of decision, and the opinion expressed on the strength of the said decision in *UCO Bank v. Prabhakar Sadashiv Karvade* [*UCO Bank v. Prabhakar Sadashiv Karvade*, (2018) 14 SCC 98 : (2018) 2 SCC (L&S) 630] suffers from infirmity and cannot prevail." (emphais supplied)

A perusal of the Judgment in the case of **Mahanadi Coalfields (supra)** as relied

upon by the counsel for the respondent has only overruled **Rajendra Shankar Shukla (supra)** and **Prabhakar Sadashiv Karvade (supra)** insofar they have observed that punishment for removal cannot be passed after superannuation of the delinquent employee, otherwise the law regarding unexplained inordinate delay in initiating disciplinary proceedings still holds good. The law settled by the Supreme Court in this regard is that if in case there is inordinate delay, it shall be no more open for the respondent-department to proceed to initiate departmental proceedings. Respondent bank can not get over such an inordinate delay on the basis of an explanation letter, which the petitioner disputes is written by him, regarding events which happened atleast 8 years ago.

23. So far as reply letter dated 10.09.2018 is concerned, petitioner has specifically denied the same. Both the parties have submitted their hand writing expert reports. Their experts have given contradictory reports as the expert to the Bank states that signature of petitioner do match while that of the petitioner states that the signature of petitioner do not match. Thus, there was no conclusive evidence on record to show that the alleged signature claimed to be of the petitioner on communication dated 10.09.2018, match/tally with his original signature. This Court also by its order dated 07.10.2021 required the signature to be sent to forensic expert for verifying from the State forensic laboratory.

24. The finding regarding whether the signature on the letter dated 10.09.2018 is attributed to the petitioner is inconclusive and thus there could be no question of re-appreciation of the factual evidence available on record therefore, this Court is within its powers

to get the same examined and give a finding on the same. The expert forensic report dated 12.02.2021 submitted under the directions of this Court also states that the signature of petitioner do not tally/match with the signature on the alleged document dated 10.09.2018. The same in itself sufficiently proves that the letter dated 10.09.2018 is not written by the petitioner. Thus, any incorrect statement in the said communication cannot be assigned to the petitioner and the departmental proceedings on the basis of the same cannot be initiated. Even otherwise, this Court has also inspected the specimen signature maintained by the Bank filed along with annexure no.10 of the writ petition (Page 81-B) and also Officers Authorized Signature Book of the Bank submitted by the Bank under seal cover with the signature on the said communication dated 10.09.2018, at Page 83 of the writ petition. The said communication dated 10.09.2018 runs into two pages and the first page of the same does not contain any signature. It is the second page of the said communication which contains alleged signature of the petitioner (at Page-83) and when the same is compared with the specimen signature maintained by the Bank and filed at Page 81-B, the same on the face of it do not tally at all. These are two different signatures.

25. Thus, this Court finds that communication dated 10.09.2018, on the basis of which the charge sheet is issued cannot stand. Thus, the Bank cannot even take any benefit of the said communication dated 10.09.2018 against the petitioner.

26. In light of the aforesaid, this petition is **allowed**. Impugned orders dated 07.09.2020 and order dated 15.06.2021 is set aside.

27. The Officers Authorized Signature Book of the Bank is also

submitted by the Bank under the sealed cover of this Court. Let the original Book be returned to learned counsel for the respondent-Bank by the Registrar General of this Court.

(2023) 8 ILRA 974

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 18.08.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-A No. 16385 of 2008

Ramesh Chandra Pandey ...Petitioner
Versus
Central Bank of India & Ors...Respondents

Counsel for the Petitioner:

Sri Vijay Tripathi, Sri A.P. Pandey, Sri Abhishek Misra, Sri J.S.P. Singh, Sri O.P. Singh, Sri R.C. Pandey (In person), Sri Santosh Kumar Mishra, Sri Shashwat Anand, Sri Om Subhash Tripathi

Counsel for the Respondents:

Sri A.C. Tripathi, Sri Abhishek Tandon, S.C.

**Service Law – Dismissal from Service –
 Departmental Enquiry – Natural Justice –
 Banking Services – Financial Probity**

The petitioner, a former Assistant Manager and officiating Branch Manager at Central Bank of India, challenged his dismissal from service, following a departmental enquiry on charges of financial irregularities, including misappropriation, unauthorized retention of funds, and abuse of official position. The Enquiry Officer partially upheld some charges but found no mala fide intent or fraudulent withdrawal. The Disciplinary Authority, differing from the Enquiry Officer's findings, imposed dismissal, which was upheld by the Appellate Authority. The petitioner argued violation of natural justice and disproportionate punishment, citing prior court orders quashing earlier dismissal orders. The respondent-Bank contended that the petitioner's actions

compromised financial probity, justifying the penalty, and that the Disciplinary Authority provided cogent reasons for differing with the Enquiry Officer. The court found that the Disciplinary Authority had recorded cogent reasons for differing with the Enquiry Officer's findings, analyzing the charges and evidence afresh after remand, as per the court's earlier orders. The petitioner's actions, including unauthorized handling of funds and abuse of position, constituted serious misconduct in banking services, where financial probity is paramount. The punishment of dismissal was deemed just and proportionate.

The writ petition was dismissed.

References:

1. Ajay Kumar Choudhary Vs U.O.I. (2015) 7 SCC 291
2. Ram Ratan Vs St. of U.P. (2019) 4 ADJ 870 (LB)
3. St. of U.P. Vs Saroj Kumar Sinha (2010) 1 Supreme 561
4. S.B.I. Vs Ramesh Dinkar Punde (2006) 7 SCC 212
5. Chairman and Managing Director, United Commercial Bank Vs P.C. Kakkar (2003) 4 SCC 364

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Shri O.P. Singh, learned Senior Advocate assisted by Shri Ramesh Chandra Pandey, the petitioner in person, who is a practising lawyer of this Court since long, along with Shri Om Subhash Tripathi, learned counsel for the petitioner and Shri Abhishek Tandon, learned counsel appearing on behalf of respondent-Bank.

2. By order dated 26.09.2022, the Apex Court made a request from this Court to take up this writ petition at an early date and conclude the proceedings as early as

possible, preferably within a period of six months from the date of receipt of copy of order. The period of six months has already expired in March, 2023.

3. The matter has been placed before me for the first time.

4. Having heard the learned counsel for the parties at length on 21.07.2023, the judgment was reserved.

5. This writ petition has been filed challenging the order dated 20.12.2006, whereby the petitioner was dismissed from banking services and also the order dated 30.11.2007, whereby his departmental appeal against the punishment order was dismissed. A writ of mandamus has also been sought regarding reinstatement of the petitioner on the post of Assistant Manager in the respondent-Bank with all financial and other consequential benefits as per the pleadings contained in the writ petition.

6. As per the pleadings contained in the writ petition, the petitioner was appointed on the post of Clerk-cum-Cashier in the office of Central Bank of India at Ram Kola Branch Deoria and, thereafter, he was promoted on the post of Sub Accountant/Assistant Manager, Padrauna Branch on 28.8.1985. On 31.12.1990, a new branch of the Central Bank of India was opened at Village Vishnupura, which was about 9 Kms. away from the office of Padrauna Branch Deoria and in addition to his duties, the petitioner was given the charge of the Branch Manager of the Vishnupura Branch. The petitioner worked on the post of Assistant Manager, Padrauna Branch as well as also discharged his duties on the post of Branch Manager, Vishnupura from 31.12.1990 to 22.06.1991 and during the said period, except the petitioner, no

other employee was posted at Vishnupura Branch. Apart from the duty of officiating Branch Manager at Vishnupura, the petitioner had to work in the capacity of clerk, cashier and peon and also Manager to run cash remittance as per Banks Rules and norms and was also to fetch cash remittance to its nearest Padrauna Branch. There was no regular conveyance in between the Branches of Village Vishnupura and Padrauna, and the petitioner had to cover the said distance up and down, either by Rickshaw or Tanga, which created a lot of complications to the petitioner in attending the office of both the Branches on every working day due to non availability of other staffs. On 09.05.1991, the then Regional Manager, Central Bank of India, Gorakhpur issued a show cause notice to the petitioner with regard to delay in deposit of remittance of Vishnupura Branch to the Padrauna Branch, which was replied by the petitioner on 18.05.1991. Vide order dated 12.08.1991, the petitioner was placed under suspension by the Regional Manager, Gorakhpur w.e.f. 13.08.1991 in contemplation of the departmental enquiry. On 02.12.1991, the Regional Manager, Regional Office, Central Bank of India, Gorakhpur issued a charge sheet to the petitioner on flimsy, fake and vague allegations describing the following five charges:

(i) While working at Padrauna Branch Sri Pandey was deputed to Vishnupura Branch occasionally as Officiating Branch Manager from where he look cash of Rs. 1345/- of Rs. 2100/- of on 18.02.1991, 21.02.1991, 10.04.1991 respectively to deposit the same at Padrauna Branch. Though Sri Pandey reached at Padrauna Branch well in this the office of these dates, but he did not deposit the cash & kept the same with him unauthorisedly and

deposited only after one two days the cash which he look on 18.02.1991 deposited on 20.02.1991, 21.02.1991 on 22.02.1991, and 10.04.1991 on 11.04.1991. He had thus defalcated Bank's money temporarily.

(ii). Sri Pandey misappropriated a credit entry of Rs. 800/- dated 24.03.1990 from term loan (Tractor) A/C Radha Kishan Singh & others to term loan (Kirana shop) A/C Chhedi Yadav by altering the credit voucher dt. 23/24.03.1990 for Rs. 800/- and making a fake entry in C/P sundry credits of the same amount on 24.01.1991 and withdraw the same on 29.01.1991 itself through a debit cash voucher putting his signature on overleaf as a taken of having received the amount for Chhedi Yadav. Thus, Sri Pandey withdraw Rs. 800/- in a fraudulent SION Oway.

(iii). Sri Pandey to minimize the overdrawings in his personal overdraft account, credited Rs. 11000/- on 13.11.1990 intentionally in his personal overdraft account, which was deposited by M/S Patna Pharmacy for credit to the overdraft account. To cover up the same, he also posted cheque No. 0515435 for Rs. 6831/- issued by M/S Patna Pharmacy for issue of a demand draft in his personal overdraft account on 13.11.1990 itself. This, Sri Pandey had acted unlawfully,

(iv). Sri Pandey passed his own conveyance reimbursement bill on 02.02.1991 for the month of January 1991 for Rs. 887.60 in the capacity of Manager though no power was vested in him to his own bill. He had this unauthorisedly taken the conveyance reimbursement and derived under pecuniary benefit.

(v). Sri Pandey released a voucher for Rs. 800/- on 21.01.1991 being the medical aid for the year 1991 in his favour without any sanction from the competent authority. He has thus, abused his official position.

7. A departmental enquiry was conducted against the petitioner and concluded with submission of report dated 31.03.1993 by the Inquiry Officer recording the following findings:

(i) The charge No. 1 is not proved.

(ii) The charge No. 2 is proved upto the extent that C.S.O. has altered the entry of Rs. 800/- without verification etc. but he was not found guilty of withdrawing Rs. 800/- in fraudulent way. Thus, this part of the charge is not proved.

(iii) The charge is proved upto the extent that C.S.O. has posted the voucher/cheque in wrong account but mala fide intention not proved.

(iv) The fact remains that C.S.O. was not having power to pass his own conveyance bill thus he is found guilty of passing his own conveyance bill without any power. But other part of the charge that he derived undue pecuniary benefit could not be proved.

(v) C.S.O. not been found guilty for abusing his official position.

8. Thereafter, the Disciplinary Authority, by order dated 03.11.1993, recording his dissatisfaction with the conclusion drawn by the Enquiry Officer, awarded punishment to the petitioner in the following terms:

(i) CHARGE NO. 1: Discharge from service in terms of Regulation 4(g) of Central Bank of India Officer Employee (Discipline & Appeal) 1976.

(ii) CHARGE NO. 2: Discharge from service in terms of regulation 4 (g) of Central Bank of India Officer Employee (Discipline & Appeal) 1976.

(iii) CHARGE NO. 3: "Reduction of two Increments in a time scale" in terms of Regulation 4 (e) of Central Bank of India

Officer Employee (Discipline & Appeal) 1976).

(iv) CHARGE NO. 4: "Censure" in terms of regulation 4 (a) of Central Bank of India Officer Employee (Discipline & Appeal) 1976.

(v) CHARGE NO. 5: "Censure" in terms of regulation 4 (a) of Central Bank of India Officer Employee (Discipline & Appeal) 1976.

Looking to the above charges, I hereby award a consolidated punishment of DISCHARGE FROM SERVICE in terms of regulation 4 (a) of Central Bank of India Officer Employee (Discipline & Appeal) 1976 with immediate effect.

9. The petitioner preferred an appeal, which was also dismissed by the Appellate Authority by order dated 25.06.1994.

10. The aforesaid two orders were set aside by the Division Bench of this Court by order dated 15.09.1999 passed in Civil Misc. Writ Petition No. 35032 of 1994 (Ramesh Chandra Pandey vs Central Bank of India & others), leaving it open to the Bank to proceed in accordance with law. The Division Bench took a view that principles of Natural Justice had been violated, particularly, in relation to the aspect when the Disciplinary Authority was proceeding to take a view different from what had been taken by the Enquiry Officer.

11. Pursuant to the order dated 15.09.1999, the Bank again proceeded with the matter and, by order dated 01.03.2001, awarded consolidated penalty of dismissal from service as per Regulations of 1976. The appeal preferred against the said order was also dismissed on 21.05.2001.

12. The petitioner again challenged the punishment and appellate orders before this Court by filing Civil Misc. Writ Petition No. 46839 of 2002 (Ramesh

Chandra Pandey vs Central Bank of India, Mumbai & others), which was allowed by the Division Bench by order dated 21.08.2006. The relevant portion of the said order is extracted herein-below:

*"In the result, the impugned orders dated 1.3.2001 (Annexure No. 28 to the writ petition) passed by the disciplinary authority and the order dated 11.3.2002 (Annexure No. 32 to the writ petition) passed by the appellate authority are hereby quashed. **The matter is sent back to the disciplinary authority for reconsideration of the quantum of punishment as observed herein above by passing a reasoned and speaking order after affording fullest opportunity of hearing to the petitioner, in accordance with law within a period of one month from the date of communication of this order and in case any appeal is filed the appellate authority will decide the same in the same manner positively within a period of one month from the date of filing of such appeal. It is made clear that the observations made by this Court will not have any binding effect on the disciplinary authority or in case of appeal upon the appellate authority and it will reconsider the matter afresh in the same manner.***

13. This Court, while remanding the matter to the Disciplinary Authority, made it clear that the Authority had to take a decision on quantum of punishment and that the observations made in the order would not have any binding effect on the Disciplinary Authority or in case of appeal, upon the Appellate Authority.

14. After remand, the Disciplinary Authority again awarded same major penalty of dismissal from service by order

dated 20.12.2006 (first order impugned in the present writ petition), which has been affirmed by the Appellate Authority by dismissing the appeal by order dated 30.11.2007 (second order impugned in the present writ petition).

15. The submission of Shri O.P. Singh, learned Senior Advocate appearing on behalf of the petitioner, is to the effect that once the Enquiry Officer had clearly recorded in the enquiry report that the charge No. 1 was not proved, the petitioner was not found guilty of withdrawing Rs. 800/- in fraudulent way, while considering the charge No. 2, charge No. 3 was proved to some extent, but mala fide intention of the petitioner was not proved, the petitioner was not found deriving any undue pecuniary benefit under the charge No. 4 and lastly, while considering the charge No. 5, a clear finding was recorded by the Enquiry Officer that the petitioner was not found guilty for abusing his official position, it was not just and proper for the respondent to award any punishment to the petitioner.

16. It has further been argued by Shri O.P. Singh that initial order of Disciplinary Authority and Appellate Authority were quashed by this Court on 15.09.1999 by recording cogent findings and, even after remand, same view was taken by the Authorities and same punishment was awarded, which was again set aside by this Court by order dated 21.08.2006, in which once it was clearly recorded that some delay occurred in deposit of cash amount from one Branch to another and that admitted case of the parties is of not withholding the amount by the petitioner with him and in absence of any proof of mala fide intention on the part of the petitioner, again extreme penalty of

dismissal from services was unjustified. It has further been argued that the Bank Authorities had made their mind to somehow punish the petitioner, despite successive intervention made by this Court in the aforesaid decisions and, hence, the orders impugned are in the teeth of orders passed by this Court.

17. On merits of the punishment order and the departmental proceedings held against the petitioner, reliance has been place by Shri O.P. Singh on the following authorities:

(1) *Ajay Kumar Chaudhay vs U.O.I. through its Secretary & Another*; 2015 (7) SCC 291

(2) *Ram Ratan vs State of U.P. and others*; 2019 (4) ADJ 870 (LB)

(3) *State of U.P and others. vs Saroj Kumar Sinha*; 2010 (1) Supreme 561

(4) *Indrani Bai (Smt.) vs Union of India and others*; 1994 Supp (2) SCC 256

(5) *Tajmahal Hotel vs Industrial Tribunal & others*; 2010 (0) Supreme (DEL) 428

(6) *Roop Singh Negi vs Punjab National Bank and others*; 2009 (1) Supreme 438

(7) *Punjab National Bank and others vs Kunj Behari Misra*; 1998 (7) SCC 84

(8) *State Bank of India and others vs K.P. Narayanan Kutty*; 2003(2) SCC 449

(9) *State Bank of India and others vs Arvind K. Shukla*; 2004 (13) SCC 797

(10) *Ranjit Singh vs Union of India and others*; 2006 (4) SCC 153

(11) *Lav Nigam vs Chairman & MD ITI Ltd. & another*; 2006 (9) SCC 440

(12) *S.P. Malhotra vs Punjab National Bank and others*; 2013 (7) SCC 251

(13) *Punjab National Bank and others vs K.K. Verma*; 2011 AIR (SC) 120

(14) *State Bank of India. vs D.C. Aggarwal*; 1992 Law Suit (SC) 671

(15) *Oriental Bank of Commerce and others vs S.S. Sheokand and Another*; 2014 (5) SCC 172

(16) *S.N. Narula vs Union of India and others*; 2011 (4) SCC 591

(17) *Joint Action Committee of Air Line Pilots' Association of India (ALPAI) and others vs Director General of Civil Aviation and others*; 2011 (5) SCC 435

(18) *Mohd. Yunus Khan vs State of U.P. and others*; 2010 (7) Supreme 970

(19) *Chairman-cum-M.D. Coal India Ltd. and others vs Ananta Saha and others*; 2011 (5) SCC 142

(20) *Nishith Chandra Tiwari vs Uttar Pradesh Sahkari Gramya Vikas Bank Ltd.*; 2003 Law Suit (ALL) 532

(21) *Gopal Kumar Mahur vs State of U.P. and another*; 2008 Law Suit (All) 517

(22) *Union of India vs Hemraj Singh Chauhan and others*; 2010 (2) Supreme 521

(23) *M.P. Gupta vs Syndicate Bank and others*; 2011 (2) AWC 1193

(24) *Shripati Tripathi vs State of U.P. and others*; 2010 (10) ADJ 331 (DB)

(25) *Syam Babu Savita vs State of U.P. and another*; 2015 (2) ADJ 614

(26) *Ram Niyadi Rai vs State of U.P. and another*; 2016 (9) ADJ 603 (DB)

(27) *Constable AP-90 Shashi Kant Pandey vs State of U.P. Through Principal Secretary and another* (Writ A No. 36620 of 2008 decided on 24.04.2015)

(28) *N. Ram vs Union of India and others*; 2017 (11) ADJ 300 (DB)

(29) *Rahman Bakhsh Mansoori vs Union of India and another*; 2017 Law Suit (ALL) 1182

(30) *S.K. Dua vs State of Haryana and another*; 2008 (1) Supreme 95

18. Placing reliance upon the aforesaid authorities, it has been argued

that once violation of principles of Natural Justice at different stages of the departmental proceedings is well established, punishment order vitiates in law. It has further been argued in the light of ratio laid down that once the enquiry report reads in favour of the delinquent employee, either wholly or in part, but the Disciplinary Authority proceeds to take a view different from the one taken by the Enquiry Officer, while passing the final order, it is the duty of the Disciplinary Authority to record cogent reasoning as to why it has taken a different view in the matter and the punishment orders impugned in the present writ petition suffer from the said error, which is apparent on the face of the record. It has further been argued that once the punishment orders are held to be illegal, the petitioner would be entitled to be reinstated in his services with all consequential benefits. However, Shri Singh submits that since the petitioner has already crossed the age of superannuation long back, though his actual reinstatement on the post is not possible, he may be awarded financial benefits setting aside the termination order which the petitioner would have been entitled, had the punishment order not been passed.

19. Shri O.P. Singh has also emphasized upon the aspect that the Disciplinary Authority has recorded that the petitioner is habitual of defrauding the Bank by dishonesty for his own personal gains and that the said opinion formed by the Authority is based upon the punishment order passed earlier, whereby four increments had been stopped. He submits that the said order of stoppage of increments formed subject matter of Writ A No. 14246 of 1984 (Ramesh Chandra Pandey vs Union of India & others), which was allowed by this Court by an order

dated 30.03.2018 and the petitioner was found entitled to benefits including 50% of the arrears of salary.

20. Per contra, Shri Abhishek Tandon, learned counsel appearing on behalf of respondent-Bank submits that the petitioner was found indulged in activities contrary to the financial interest of the Bank as well as customers and the Disciplinary Authority, time and again, after conducting thorough analysis of the material before it, rightly awarded punishment, inasmuch as, it is well settled that in banking services slightest financial embezzlement or misappropriation made by any employee of the Bank is sufficient to award major penalty. Insofar as various proceedings held before this Court as argued by Shri O.P. Singh, the submission of Shri Abhishek Tandon is that though it is true that the initial punishment orders were set aside on 15.09.1999, intervention was made on the ground that there was some violation of principles of Natural Justice at the time when the Disciplinary Authority was proceeding to take a view different from the opinion formed by the Enquiry Officer. He further submits that insofar as second round of litigation covered by Civil Misc. Writ Petition No. 46839 of 2002 is concerned, though the punishment order was set aside by this Court, despite making certain observations in the order dated 21.08.2006, this Court made it clear that observations made in the order would not have any binding effect on the Disciplinary Authority or in case of appeal, upon the Appellate Authority and that they would reconsider the matter afresh in the same manner. Shri Tandon further argues that though in the impugned punishment order dated 20.12.2006, inflicting an earlier penalty of stoppage of four increments has been referred to by the Disciplinary

Authority and it has been observed that the petitioner is habitual of defrauding the Bank by dishonesty for his own personal gains, this was not the only reason recorded by the Disciplinary Authority, but was only a passing observation and, therefore, the petitioner cannot get advantage merely because learned Single Judge allowed Writ A No. 14246 of 1984 by order dated 30.03.2018 setting aside the punishment order of stoppage of four increments. He further emphasises that even otherwise, the judgment of learned Single Judge dated 30.03.2018 was set aside by the Division Bench of this Court by allowing Special Appeal No. 117 of 2019 (The Central Bank of India and 2 others vs Ramesh Chandra Pandey and 3 others) by order dated 13.02.2019 and apart from setting aside the order of learned Single Judge, the writ petition was also dismissed. It is further contended that against the order of Special Appellate Court dated 13.02.2019, though a Special Leave Petition (Civil) Diary No(s). 22415 of 2019 (Ramesh Chandra Pandey vs Central Bank of India & others) was filed by the petitioner, there is no interim order passed by the Apex Court and, hence, insofar as the stoppage of four increments is concerned, the said punishment has also attained finality and mere pendency of Special Leave Petition before the Supreme Court would confer no benefit upon the petitioner.

21. Regarding the principle of finality attached to an adjudication, Shri Abhishek Tandon, learned counsel for the Bank, has placed reliance upon the judgment of the Apex Court in the case of ***S. Ramachandra Rao vs S. Nagabhushana Rao and others***, reported in 2022 SCC Online SC 1460, which deals with the principle of res judicata. He has also placed reliance upon another judgement of Supreme Court in the

case of *Tapan Kumar Mondal vs Smt. Suprava Mondal & others*, reported in 2018 SCC Online Cal 2312, to emphasis that the order of remand passed by this Court was limited to the extent of providing opportunity of hearing to the petitioner and, hence, the petitioner cannot get any advantage out of any order passed by this Court while allowing various writ petitions particularly when it was left open for the Disciplinary Authority as well as the Appellate Authority to take an independent decision without being influenced by the observations recorded in the order passed by the writ court.

22. Having heard the learned counsel for the parties, I find that though the Enquiry Officer, in his report dated 31.03.1993, had recorded that the charge No. 1 is not proved; the charge No. 2 is proved upto the extent that C.S.O. has altered the entry of Rs. 800/- without verification etc. but he was not found guilty of withdrawing Rs. 800/- in fraudulent way, thus, this part of the charge is not proved; the charge is proved upto the extent that C.S.O. has posted the voucher/cheque in wrong account but mala fide intention not proved; the fact remains that C.S.O. was not having power to pass his own conveyance bill thus he is found guilty of passing his own conveyance bill without any power, but other part of the charge that he derived undue pecuniary benefit could not be proved; the C.S.O. not been found guilty for abusing his official position, the Disciplinary Authority had recorded cogent reasoning to take a different view after analysing the entire material on record, which formed part of the record of enquiry proceedings. Although the said order was set aside by this Court in Civil Misc. Writ Petition No. 46839 of 2002, once the matter was remanded for the purposes of taking an

independent decision without being influenced by the observations recorded in the order dated 21.08.2006, the Disciplinary Authority again analysed five charges levelled against the petitioner and found that he was guilty of misappropriating the credit entry of Rs. 800/- of T.L. account in the name of Radha Krishna and others and withdrew it fraudulently. The Disciplinary Authority also recorded that the petitioner credited Rs.11000/- on 13.11.1990, which was deposited by M/s Patna Pharmacy for credit of their overdraft cheque account and to cover up the same, he posted cheque for Rs. 6831/- issued by M/s Patna Pharmacy for issuance of demand draft in his personal overdraft account on 13.11.1990. It was further recorded that the petitioner abused his official position by taking payment of medical aid for 1991 without having sanction from the Competent Authority. It is further recorded that the petitioner himself utilized the bank funds some way or the other for his own benefit, he acted in a manner to benefit himself by ignoring Rules and Regulations as well as service condition of the Bank and that the Enquiry Officer while submitting the report had not gone into the details of conduct of the petitioner, which was apparent on record.

23. I also find that insofar as punishment in the nature of stoppage of four increments and its effect is concerned, it was only a sweeping observation made by the Disciplinary Authority in the order dated 20.12.2006 and the punishment order was passed considering the entire facts and circumstances and not merely because in the opinion of the Disciplinary Authority, the petitioner was habitual of defrauding the Bank by dishonesty for his own personal gains in view of the previous punishment. Moreover, as already

discussed, though the punishment order of stoppage of four increments was set aside by the learned Single Judge of this Court, the said judgement was reversed and the writ petition was dismissed by the Division Bench while allowing Special Appeal filed by the Bank and the said order has neither been stayed nor has it been set aside by the Apex Court, though the Special Leave Petition against the same may be pending.

24. The Supreme Court has time and again emphasized the importance of financial probity in Bank Services. It is an inbuilt requirement for the functioning of the banking system. The officers and employees of bank act as trustee of the people's faith and confidence in the banking system and if the officer/employee commits misconduct and if it is found that for his personal gain, he has acted against the interest of the depositor, he must be dealt with iron hands and does not deserve to be dealt with any sympathy.

25. In *State Bank of India Vs. Ramesh Dinkar Punde*, (2006) 7 SCC 212, the Supreme Court has taken the similar view by observing that a bank officer is required to exercise higher standards of honesty and integrity. He deals with the money of the depositors and the customers. Every officer/employee of the bank is required to take all possible steps to protect the interests of the bank and to discharge his duties with utmost integrity, honesty, devotion and diligence and to do nothing which is unbecoming of a bank officer. Good conduct and discipline are inseparable from the functioning of every officer/employee of the bank. The very discipline of an organisation more particularly a bank is dependent upon each of its officers and officers acting and operating within their allotted sphere.

Acting beyond one's authority is by itself a breach of discipline and is a misconduct. It is for this reason that when a bank officer commits misconduct, as in the present case, for his personal ends and against the interest of the bank and the depositors, he must be dealt with iron hands and he does not deserve to be dealt with leniently.

26. In the case of *Chairman and Managing Director, United Commercial Bank v. P.C. Kakkar*, (2003) 4 SCC 364 a submission was made before the Supreme Court that on account of misconduct of the employee, the bank did not suffer any loss. The said submission was rejected by the Supreme Court and it was held that the conduct and discipline are unseparable from the functioning of the bank employee.

27. Reference in this regard on identical lines can also be made to judgments of this Court in the case of *Tribhuvan Nath Mishra Vs. Committee of Management of Allahabad Dist. Coop. Bank Ltd. And Others*, reported in 2007 (3) ADJ 220, decision of Supreme Court in the case of *Kailash Nath Gupta vs Enquiry Officer, R.K. (Rai), Allahabad Bank and Others*, reported in JT 2003 (3) SC 322 and in the case of *Ram Prasad Gupta vs Allahabad Bank and another* reported in 2004 (1) AWC 697.

28. Considering the entire material on record as placed before this Court, having heard the learned counsel for the parties and also the petitioner in person and having scrutinized the law referred to hereinabove, I find that punishment awarded to the petitioner was just and proper and does not call for any interference by this Court.

29. The writ petition fails and is, accordingly, **dismissed.**

(2023) 8 ILRA 983**ORIGINAL JURISDICTION****CIVIL SIDE****DATED: LUCKNOW 24.08.2023****BEFORE**

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ-A No. 19467 of 2021

State of U.P. & Ors. ...Petitioners
Versus
Krishna Gopal & Anr. ...Respondents

Counsel for the Petitioners:
 C.S.C.

Counsel for the Respondents:
 Shikhar Anand, Karunanidhi Yadav, Raj Bahadur Singh Yadav

A. Service Law – UP Police Officers of Sub-ordinate Ranks (Punishment and Appeal) Rules, 1991 – Rule 14 (1) – Disciplinary proceedings – Dismissal from service – Charge of absent from duty without permission – Defence of medical treatment was taken – Tribunal quashed the order of dismissal on the ground that it was breach of principle of natural justice; no personal hearing was afforded during the course of preliminary enquiry; no charge-sheet was properly served; etc. etc. – Validity challenged by the St. – Held, the Tribunal ought to have remitted the case concerned to the Disciplinary Authority to conduct the inquiry from the point that it stood vitiated and to conclude the same after furnishing the charge-sheet to the delinquent employee and to give opportunity to the delinquent to submit his comments on the charge-sheet. (Para 22 and 25)

Writ petition partly allowed. (E-1)

List of Cases cited:

1. Raj Kumar Mehrotra Vs Government of Bihar & ors.; 2006 SCC (L&S) 679
 2. U.O.I. Vs Mohan Lal Kapoor; (1973) 2 SCC 836
 3. Kranti Association (P) Ltd. Vs Masood Ahmad Khan & ors.; (2010) 9 SCC 510
 4. G. Valli Kumar Vs Andhra Education Society; 2010 (2) SCC 947
 5. Ram Chandra Vs U.O.I. & ors.; 1986 (53) F.L.R. 1991 (SC)
 6. Krishna Kant B. Parmar Vs U.O.I. & ors.; (2012) 3 SCC 178
 7. D.K. Yadav Vs J.M.A. Industries Ltd.; 1993 (3) SCC 259
 8. Depot Manager, A.P.S.R.T.C. & anr. Vs Surendra; 2008 AIR SCW 5446
 9. Managing Director, ECIL Vs B. Karunakaran; 1994 SCC Suppl (2) 391
 10. St. of U.P. & anr. Vs Manmohan Nath Sinha & anr.; (2010) 8 SCC 310
 11. Karushnakant B. Parmar Vs U.O.I. & anr.; (2012) 3 SCC 178
 12. St. of Uttaranchal Vs Kharak Singh; (2008) 8 SCC 236
 13. Chairman-cum-Managing Director, Coal India Limited & anr. Vs Mukul Kumar Choudhuri & ors.; (2009) 15 SCC 620
 14. Nirmala J. Jhala Vs St. of Guj.; (2013) 4 SCC 301
 15. St. of Uttar Pradesh & ors. Vs Rajit Singh; 2022 SCC Online SC 341
 16. Chairman, Life Insurance Corporation of India & ors. Vs A. Masilamani; (2013) 6 SCC 530
- (Delivered by Hon'ble Om Prakash Shukla, J.)

A. INTRODUCTION

(1) This writ petition has been filed by the State authorities, questioning the judgment and order dated 09.03.2021 passed by the State Public Services Tribunal, Lucknow (hereinafter referred to

as “**Tribunal**”), whereby Claim Petition No. 701 of 2018 preferred by the claimant/respondent no.1 was allowed by quashing the order of dismissal dated 21.09.2001 as well as appellate order dated 21.03.2018 and further the learned Tribunal directed the petitioners/State authorities to grant the following relief to the respondent No.1:-

I. the claimant/respondent no.1 shall be reinstated in service with immediate effect;

II. since claimant/respondent no.1, in para-6 of his explanation, had mentioned that he got medical treatment from Government Hospital w.e.f. 12.09.2000 to 19.09.2000, therefore, the competent authority, on the basis of medical documents furnished by the claimant/respondent no.1, shall pass speaking and reasoned order in case medical leave for the aforesaid period shall be granted to claimant/respondent no.1;

III. the claimant/respondent no.1 has not worked w.e.f. 22.11.2000 to 20.09.2001 and w.e.f. 21.09.2001 till 09.03.2021 (the date when the Tribunal passed the order), therefore, the claimant/respondent no.1 would not be entitled to get salary and allowances for the aforesaid period on the principle of ‘No Work No Pay’, however, the aforesaid period shall be reckoned as regular services of the claimant/respondent No.1 for the purposes of pension only; and IV. the whole direction shall be complied with within three months from the date of receipt of a certified copy of this order”

B. FACTUAL MATRIX

(2) The records of the present writ reveal that the respondent no.1-Krishna Gopal, while posted as Lansk Nayak (Constable No. 53557) in ‘B’ Company,

45th Battalion, P.A.C., Aligarh, unauthorizedly absented himself from 12.09.2000 at 20 hours to 19.09.2000 at 11:30 hours. As he was absent from duties for 7 days 11 hours and 30 minutes without permission. Further on 19.11.2000, he was granted leave for two days, however, even after expiry of leave of two days, he did not report back for duties. Thus, a preliminary inquiry was instituted against him, wherein the Assistant Commandant-II, 45th Battalion P.A.C., Aligarh, after conducting the preliminary enquiry, recommended for initiating regular disciplinary proceedings under Rule 14 (1) of the Uttar Pradesh Police Officers of Sub-ordinate Ranks (Punishment and Appeal) Rules, 1991 (hereinafter referred to as ‘Rules, 1991’) against the respondent no.1 vide report dated 01.04.2001. Thereafter, final disciplinary proceedings against the respondent no.1 was instituted and the Deputy Commandant, 45th Battalion, P.A.C., Aligarh was assigned the duty to conduct the disciplinary proceedings in the matter against the respondent no.1.

(3) Resultantly, a charge-sheet dated 05.07.2001 was issued to the respondent No.1, levelling charges of his unauthorized absence from duty during the period from (i) 12.09.2000 to 19.09.2000 and (ii) with effect from 22.11.2019 to onward.

(4) According to the petitioners, when special messenger went to serve the aforesaid charge-sheet to respondent no.1, he was not found in his house and his father refused to receive the same and as such, on 07.07.2001, the aforesaid charge-sheet was pasted outside the house of the respondent no.1 in the presence of two witnesses, namely, Shiv Ram Singh and Kailash Babu. Thereafter, the aforesaid charge-sheet dated 05.07.2001 was also sent through registered

post on 10.07.2001 but even then, the respondent no.1 had neither reported to the Enquiry Officer nor submitted any his reply to the charge-sheet dated 05.07.2001. In this background, the Enquiry Officer had proceeded ex parte against the respondent no.1. Thereafter, the Enquiry Officer, after adopting due process, conducted the enquiry and submitted its report dated 18.08.2001 to the Disciplinary Authority, recommending that (i) the respondent no.1 shall not be paid salary for the period of unauthorized absent i.e. w.e.f. 12.09.2000 to 19.09.2000 and w.e.f. 22.11.2000 to onward on the principle of 'No Work No Pay'; and (ii) the respondent no.1 be dismissed from service.

(5) The Disciplinary Authority, on receipt of the enquiry report dated 18.08.2001, issued a show cause notice dated 24.08.2001 to the respondent no.1 enclosing a copy of the enquiry report. The respondent no. 1 had allegedly come forward this time and tendered his reply dated 31.08.2001 to the show cause notice dated 24.08.2001, stating therein that he was under medical treatment w.e.f. 12.09.2000 to 19.09.2000 at Government Hospital, Etawah and medical certificate in this regard was annexed with the reply to show cause notice; and for the period w.e.f. 22.11.2000 to onward, he was staying in residence of Zamanatgir, namely, Mr. Prashuram Ojha and Mr. Ramashankar Yadav situated in village and post Karri, P.S. Chaubiya, District Etawah under protection of Article 496/497 of the Police Regulation.

(6) The Disciplinary Authority did not accept the explanation of the respondent no.1 and held the respondent guilty and imposed a punishment of dismissal vide order dated 21.09.2001, against which, the

respondent no.1 preferred an appeal, which was however rejected vide order dated 23.05.2002 on the ground that his appeal was barred by limitation. Thereafter, the respondent no.1 preferred revision, which was also rejected vide order dated 17.10.2002.

(7) Feeling aggrieved by the aforesaid order of dismissal dated 21.09.2001, appellate order dated 23.05.2002 and revision order dated 17.10.2002, the respondent no.1 preferred Claim Petition No. 793 of 2015 before the Tribunal. The learned Tribunal, vide order dated 24.11.2017, allowed the claim petition partly; quashed the appellate order dated 23.05.2002 as well as revision order dated 17.10.2002; and further directed the appellate authority to decide the appeal afresh on merit by a speaking and reasoned order within three months from the date of receipt of a certified copy of the order and the decision so taken should be communicated to the respondent no.1 immediately.

(8) In compliance of the aforesaid judgment and order dated 24.11.2017, the appellate authority considered the appeal of the respondent no.1 afresh and dismissed the same vide order dated 21.03.2018, which was served upon the respondent no.1 on 27.03.2018.

(9) Dissatisfied with the appellate order dated 21.03.2018, the respondent no.1 preferred Claim Petition No. 701 of 2018 before the Tribunal. The learned Tribunal, noting the facts and circumstances of the case and also placing reliance upon the decisions of the Apex Court in **Raj Kumar Mehrotra Vs. Government of Bihar and others** : 2006 SCC (L&S) 679, **Union of India Vs.**

Mohan Lal Kapoor : (1973) 2 SCC 836, **Kranti Association (P) Ltd. Vs. Masood Ahmad Khan and others** : (2010) 9 SCC 510, **G. Valli Kumar Vs. Andhra Education Society** : 2010 (2) SCC 947, **Ram Chandra Vs. Union of India and others** : 1986 (53) F.L.R. 1991 (SC), **Krishna Kant B. Parmar Vs. Union of India and others** : (2012) 3 SCC 178, **D.K. Yadav Vs. J.M.A. Industries Ltd.** : 1993 (3) SCC 259, **Depot Manager, A.P.S.R.T.C. and another Vs. Surendra** : 2008 AIR SCW 5446, allowed the claim petition; quashed the order of dismissal dated 21.09.2001 and appellate order dated 21.03.2018; and a slew of direction as stated hereinabove in paragraph-1 was also issued by the Tribunal. It is this order dated 09.03.2021, which has been challenged in the instant writ petition.

C. SUBMISSIONS

(10) Heard learned Standing Counsel representing the petitioners/ State and Shri Karunanidhi Yadav, learned Counsel representing the respondent no.1/claimant.

(11) Assailing the impugned judgment/order dated 09.03.2021 passed by the learned Tribunal, learned Standing Counsel representing the petitioners/State has submitted that the learned Tribunal, while passing the impugned order, has erred in arriving to the conclusion that the claimant/respondent no.1 was not afforded an opportunity of hearing in the enquiry proceedings and the enquiry officer had submitted an ex parte report. According to the Ld. Standing counsel, the claimant/respondent no.1 himself had refused to endorse acknowledgment on the letter/notice on 25.07.2001 and as such the charge-sheet was duly served upon him by pasting of the same on his front doors of his

permanent residences. According to him, despite service of the charge-sheet by pasting the same in the presence of two witnesses through special messenger at the main door of the permanent residence of the claimant/respondent no.1, he did not deliberately participate in the enquiry proceedings nor he turned up to attend his duties nor even informed the reason behind his unauthorized absence to the authorities. He submits that since the respondent no.1 deliberately absented himself from his duties and he did not participate in the enquiry, therefore, having no other option left, the Disciplinary Authority has rightly passed the order of dismissal dated 21.09.2001 in accordance with law and there is no infirmity or illegality in the order of dismissal.

(12) Learned Standing Counsel representing the petitioners has further submitted that the learned Tribunal has erred in appreciating the statement of the claimant/respondent no.1 made in paras 6 and 7 of his reply to the show cause notice that he was under treatment of Dr. M. Singhal in the District Hospital, Etawa during the period 13.09.2000 to 17.09.2000 i.e. for five days. According to him, the story of medical treatment is an afterthought and the learned Tribunal has failed to appreciate the fact that there is nothing on record to substantiate the said claim of the claimant/respondent no.1. According to the Ld. Standing counsel, his contention is further fortified by the fact that the respondent No.1 has himself not able to justify his unauthorized absence since 22.11.2000 till the passing of the order of dismissal dated 21.09.2001.

(13) Elaborating his submissions further, the learned Standing Counsel representing the petitioners has drawn our

attention to the judgment and order dated 24.11.2017 passed by the learned Tribunal in Claim Petition No. 793 of 2015 filed by the respondent no.1 earlier and has submitted that the learned Tribunal, while passing the order dated 24.11.2017, did not interfere with the order of punishment/dismissal dated 21.09.2021 nor quashed the same and merely the claim petition preferred by the petitioner was partly allowed by quashing the appellate order as it was passed only on the ground of limitation and not on merit and as such, the learned Tribunal directed the appellate authority to pass the order on merit. Therefore, it was not proper for the learned Tribunal while passing the impugned judgment and order dated 09.03.2021 to revisit its earlier judgment and order dated 24.11.2017 by quashing the order of dismissal dated 21.09.2021.

(14) Learned Standing Counsel has also drawn our attention to the conduct of the respondent no.1 and has submitted that earlier in connection with a maar-peat committed by the respondent no.1 with a Constable driver at Post Atrauli, District Aligarh, respondent no.1 was placed under suspension and an inquiry was initiated against him and after due inquiry, punishment order dated 29.08.2000 was also passed against the respondent no.1, imposing punishment equivalent to 30 days salary along with leave without pay for 9 days on account of the fact that he remained unauthorized absent for the period 01.07.2000 to 09.07.2000. On 14.07.2000, the claimant/respondent no.1 was again suspended by the Commandant, 45th Battalion, P.A.C., Aligarh in respect of Case Crime No. 6224420000216, under Section 6 (Kha) of the P.A.C. Act registered at Police Station Tappal, District Aligarh, which is still pending in the Court of

Additional District Judge, Room No. 19, District Aligarh. According to the Ld. Standing Counsel, the respondent No.1 is a habitual absentee and has engaged himself in activities unbecoming of a person in uniform and therefore, the conduct of the respondent no.1 is not fit to be in the disciplined force like Provincial Armed Constabulary (P.A.C.).

(15) Placing reliance upon the judgment of the Apex Court in **Managing Director, ECIL versus B. Karunakaran** : 1994 SCC Suppl (2) 391 and **State of U.P. and another Vs. Manmohan Nath Sinha and another** : (2010) 8 SCC 310, learned Standing Counsel has submitted that the punishment order is detailed, well-reasoned and specific and as such, it does not suffer from any infirmity and even if the learned Tribunal noticed some technical defects in the enquiry report, it could have very well remanded the matter to the disciplinary authority with liberty to proceed from the stage the defects has been noticed by it. However, according to him, the learned Tribunal, while allowing the claim petition, has erred in not remanding the matter to the disciplinary authority from the stage the defects has been noticed by it. Therefore, the impugned judgment and order passed by the learned Tribunal is liable to be set-aside.

(16) *Per contra*, learned Counsel representing the respondent no.1 has opposed the aforesaid submissions of the learned State Counsel and has submitted that the charge sheet was not personally served to the claimant/respondent no.1, therefore, the learned Tribunal had rightly given a finding that the order of punishment has been passed in utter violation of principle of natural justice.

(17) Learned Counsel for the respondent no.1 has further submitted that the allegation of absent w.e.f. 12.09.2000 to 19.09.2000 and again since 21.11.2000 onward was not willful but is bona fide, therefore, it does not qualify to be termed as a misconduct. To substantiate this submission, learned Counsel has submitted that for the period 12.09.2000 to 19.09.2000, a medical certificate of Government Hospital Etawah was submitted to the Commandant, 45th Battalion, P.A.C., Etawah where he was posted and the same was also in his official record. So far as absent for the period of 22.11.2000 onward, respondent no.1 was staying in residence of Zamanatgir Parashuram Ojha and Ramashankar Yadav of village and post Karri, Police Station Chaubiya, District Etawah under Para 496 and 497 of the Police Regulation vide letter of the respondent no.1 dated 26.11.2000, letter of Commandant, 45th Battalion, PAC, Etawah dated 20.12.2000, letter of Zamanatgir dated 10.01.2001 and letter of Commandant dated 20.06.2001 contained in Annexures No. 10 to 14, respectively, to the claim petition. Thus, it has been submitted that, since disciplinary authority has failed to examine the aforesaid facts while conducting the departmental enquiry even though the aforesaid facts have been mentioned by the respondent no.1 in paras 6-7 of his reply to the show cause notice, the whole disciplinary proceeding was vitiated. Moreover, the disciplinary authority has failed to prove that the absence of the respondent no.1 is willful, hence the absence of the respondent no.1 for the aforesaid period cannot be said to be misconduct. In support of this submission, he has placed reliance upon the judgment of the Apex Court in **Karushnakant B. Parmar Vs. Union of India and another:** (2012) 3 SCC 178.

(18) Learned Counsel for the respondent no.1 has further submitted that the Enquiry Officer, in its ex parte report dated 18.08.2001, has recommended the disciplinary authority for dismissal of the respondent no.1 from service and also stopping the salary for the period of absent from duty on the principle of 'No Work No Pay'. Learned Counsel has drawn our attention to the decision of the Apex Court in **State of Uttaranchal Vs. Kharak Singh** : (2008) 8 SCC 236 and has argued that the Enquiry Officer cannot make recommendation for imposing of a particular punishment as it is for the punishing/disciplinary authority to impose appropriate punishment and the Enquiry Officer has no role in awarding punishment as it is merely a recommending authority. Therefore, according to the learned Counsel for the respondent No.1, the very recommendation of the proposed punishment by the Enquiry Officer is contrary to law. The learned Tribunal, after going through the record, has rightly observed that the punishment order dated 21.09.2001 has been passed to the respondent no.1 on the basis of the recommendation of the enquiry officer and while passing the punishment order dated 21.09.2001, the disciplinary authority had not applied its mind.

(19) Learned Counsel for the respondent no.1 has next submitted that the respondent no.1 was dismissed from service vide punishment order dated 21.09.2001 merely because of his absence from duty w.e.f. 12.09.2001 to 19.09.2001 i.e. 7 days 11 hours and 30 minute and w.e.f. 22.11.2000 onward on placing reliance upon the recommendation of the Enquiry Officer. Thus, the punishment of dismissal dated 21.09.2001 for the aforesaid period is too excessive and

cannot be said to be proportionate to the charges levelled against the respondent no.1. In support of his submission, he relied upon the judgment of the Apex Court in **Chairman-cum-Managing Director, Coal India Limited and another Vs. Mukul Kumar Choudhuri and others** : (2009) 15 SCC 620.

(20) Placing reliance upon the decision of the Apex Court in **Nirmala J. Jhala Vs. State of Gujarat** : (2013) 4 SCC 301, learned Counsel for the petitioner has submitted that in **Nirmala J. Jhala (Supra)**, the Apex Court has held that evidence recorded in preliminary enquiry cannot be used in regular enquiry as delinquent is not associated with it and opportunity to cross-examine persons examined in preliminary enquiry is not given, therefore, using such evidence violates principles of natural justice. He submits that in the instant case, preliminary enquiry officer and witness no.8 of the final enquiry is the same person and in the final enquiry, opportunity to cross-examine witness no.8/preliminary enquiry officer was not provided to the respondent no.1, therefore, the Enquiry Officer's report, finding the guilt of the respondent no.1 on placing reliance upon the witness no.8/preliminary enquiry, violates the principle of natural justice.

(21) It is, thus, submission of the respondent no.1 that the learned Tribunal has rightly allowed the claim petition preferred by the respondent no.1 vide impugned order.

D. ANALYSIS AND FINDING

(22) Having regard to the rival submissions advanced by the parties and going through the record available before

this Court in the instant writ petition, it is required to be noted that the learned Tribunal has quashed the order of punishment/dismissal passed by the Disciplinary Authority on the ground that the same was in breach of principles of natural justice, inasmuch as, the respondent no.1 was not afforded personal hearing during the course of preliminary enquiry; charge-sheet was not properly served upon the respondent no.1; enquiry officer had submitted its enquiry report ex parte; enquiry officer submitted its report on merely placing reliance upon the recommendation of the preliminary enquiry officer; the preliminary enquiry officer was made as witness in the final enquiry; the enquiry officer while submitting its report, had not made its recommendation separately in terms of Appendix-I to the Rules, 1991; the Disciplinary Authority had passed the order of punishment merely placing reliance on the recommendation of the enquiry officer and did not consider the reply of the respondent no.1 furnished by him to the show cause notice.

(23) It is to be noted that the respondent no.1/delinquent was facing the departmental inquiry with respect to a charge of unauthorized absence from duty. Therefore, the learned Tribunal ought to have remitted the matter back to the Disciplinary Authority to conduct the inquiry from the point that it stood vitiated.

(24) The Apex Court in the case of **State of Uttar Pradesh and Ors. Vs. Rajit Singh** : 2022 SCC Online SC 341, while considering its earlier decision in the case of **Chairman, Life Insurance Corporation of India and Ors. Vs. A. Masilamani**, (2013) 6 SCC 530, has held in paragraph-15 as under :-

“15. It appears from the order passed by the Tribunal that the Tribunal also observed that the enquiry proceedings were against the principles of natural justice in as much as the documents mentioned in the charge sheet were not at all supplied to the 5 delinquent officer. As per the settled proposition of law, in a case where it is found that the enquiry is not conducted properly and/or the same is in violation of the principles of natural justice, in that case, the Court cannot reinstate the employee as such and the matter is to be remanded to the Enquiry Officer/ Disciplinary Authority to proceed further with the enquiry from the stage of violation of principles of natural justice is noticed and the enquiry has to be proceeded further after furnishing the necessary documents mentioned in the charge sheet, which are alleged to have not been given to the delinquent officer in the instant case. In the case of Chairman, Life Insurance Corporation of India v. A. Masilamani, (2013) 6 SCC 530, which was also pressed into service on behalf of the appellants before the High Court, it is observed in paragraph 16 as under:—

“16. It is a settled legal proposition, that once the court sets aside an order of punishment, on the ground that the enquiry was not properly conducted, the court cannot reinstate the employee. It must remit the case concerned to the disciplinary authority for it to conduct the enquiry from the point that it stood vitiated, and conclude the same. (Vide ECIL v. B. Karunakar [(1993) 4 SCC 727], Hiran Mayee Bhattacharyya v. S.M. School for Girls [(2002) 10 SCC 293], U.P. State Spg. Co. Ltd. v. R.S. Pandey [(2005) 8 SCC 264] and Union of India v. Y.S. Sadhu [(2008) 12 SCC 30]).”

(emphasis supplied)

D. CONCLUSION

(25) Applying the law laid down by the Apex Court in the aforesaid decisions to the facts of the case on hand, we are of the firm view that as the order of dismissal has been quashed by the Tribunal on the ground that the same was in breach of principles of natural justice apart from other defects in the enquiry proceedings, the Tribunal ought to have remitted the case concerned to the Disciplinary Authority to conduct the inquiry from the point that it stood vitiated and to conclude the same after furnishing the charge-sheet to the delinquent employee and to give opportunity to the delinquent to submit his comments on the charge-sheet.

(26) In view of the above and for the reasons stated above, present writ petition is **allowed partly**. The impugned judgment and order dated 09.03.2021 passed by the learned Tribunal, punishment order dated 21.09.2001 passed by the Disciplinary Authority as well as the Appellate Order dated 21.03.2018 are hereby quashed and set-aside. However, as the enquiry is found to be vitiated and is found to be in violation of the principles of natural justice in as much as it is alleged that apart from other defects in the enquiry, charge-sheet was not served upon the respondent no.1/delinquent employee and no opportunity to defend himself by the Enquiry Officer was afforded by the Enquiry Officer, we remand the matter to the Disciplinary Authority to conduct a fresh enquiry from the stage it stood vitiated, i.e., serve charge-sheet to the respondent no.1 and to proceed further with the enquiry after furnishing all the necessary documents mentioned in the charge sheet and after following due principles of natural justice. Since, the issue relates to the year 2000, the aforesaid

exercise shall be completed expeditiously, preferably within a period of six months from today.

(2023) 8 ILRA 991

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 09.08.2023

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

THE HON'BLE VINOD DIWAKAR, J.

Writ-A No. 19678 of 2019

**Vivek Kumar Sharma & Anr. ...Petitioners
Versus**

**High Court of Judicature at Allahabad &
Ors. ...Respondents**

Counsel for the Petitioners:

In Person

Counsel for the Respondents:

C.S.C., Sri Ashish Mishra

Civil Law – Uttar Pradesh Higher Judicial Service (UPHJS) Examination, 2016 – Challenge to selection process – Alleged irregularities in interview process – Moderation of marks – Eligibility of candidates – Postponement of interviews – Compliance with U.P. Higher Judicial Service Rules, 1975.

Held: No Illegality in Interview Process: The petitioners' claim of inadequate interview duration (8-10 minutes instead of the prescribed 25-30 minutes under Appendix 'G' of the U.P. Higher Judicial Service Rules, 1975) was rejected. The court held that the time limit is directory, not mandatory, as no consequence is prescribed for non-compliance. The interview boards, as expert panels, have discretion to assess candidates' suitability based on ability, character, personality, and physique, and no evidence of unscientific or unfair evaluation was found. Writ dismissed.

Case Law:

1. Sandeep Gupta Vs High Court of Judicature at Allahabad (Writ Petition No. 594 of 2016, Supreme Court, 19.07.2018)
2. Dheeraj Mor Vs High Court of Delhi (2020 SCC OnLine SCC 213)
3. Hirandra Kumar Vs High Court of Judicature at Allahabad (2020) 17 SCC 401
4. Suraj Bali Singh Vs Registrar General, High Court of Allahabad (Writ-A No. 20708 of 2012, Allahabad High Court, 08.05.2017)
5. Dalpat Abasaheb Solunke Vs Dr. B.S. Mahajan (1990) 1 SCC 305
6. Ashok Kumar Yadav Vs St. of Har. (1985) 4 SCC 417
7. Satpal Vs St. of Har. 1995 Supp (1) SCC 206
8. Sardara Singh Vs St. of Pun. (1991) 4 SCC 555
9. St. of Bihar Vs Bihar Rajya Bhumi Vikas Bank Samiti (2018) 9 SCC 472
10. Topline Shoes Ltd. Vs Corporation Bank (2002) 6 SCC 33
11. Kailash Vs Nanhku (2005) 4 SCC 480
12. New India Assurance Comp. Ltd. Vs Hilli Multipurpose Cold Storage Pvt. Ltd. (2015) 16 SCC 20
13. Pranav Verma Vs Registrar General, High Court of Punjab & Haryana (Writ Petition No. 565 of 2019, Supreme Court, 13.12.2019)

Result: Writ petition dismissed. No costs.

(Delivered by Hon'ble Saumitra Dayal Singh, J. & Hon'ble Vinod Diwakar, J.)

1. Heard Shri Vivek Kumar Sharma (petitioner no.1) and Shri Praveen Singh (petitioner no.2), in person; Shri Ashish

Mishra, learned counsel for the High Court and Shri Arimardan Singh Rajput, learned Additional Chief Standing Counsel for the State.

2. Present petition has been filed seeking a direction upon the High Court, to moderate and revise the marks awarded to the petitioners at the scale of average marks awarded by the two Boards constituted for the purpose of conducting the interviews at the U.P.H.J.S. 2016 Examination. Further direction has been sought to thereafter consider the petitioners for appointment on the post of Additional District Judge.

3. First, it may be noted, the petitioners are practising Advocates. They have chosen to pursue the writ proceedings, in person. Yet, they have filed numerous pleadings. Many of those are repetitive and not on the format prevalent, here. Therefore, at the beginning of the hearing itself, we sought a clarification (from both the petitioners), as to the documents and affidavits they seek to rely. It was then stated by the petitioners, they would be pressing the Writ Petition as supported by the documents and affidavit appended thereto as also the Ist Supplementary Affidavit dated 23.9.2020, running into 253 pages, the IInd Supplementary Affidavit dated 4.12.2021, running into 26 pages, and the Rejoinder Affidavit dated 14.3.2022, running into 25 pages. Of other affidavits, they specifically stated, such documents came to be filed erroneously. No reliance may be placed on them.

4. On 10.05.2016, the High Court of Judicature at Allahabad (hereinafter referred to as the High Court) advertised the Uttar Pradesh Higher Judicial Service 2016 Examination to fill up 72 vacancies in all. 37 of those vacancies fell under the

Unreserved category; 15 vacancies were reserved for Scheduled Caste category; 19 vacancies were reserved for Other Backward Classes and, 1 vacancy was reserved for candidates belonging to Scheduled Tribes. The petitioners claiming to be practising advocates, applied for direct recruitment. Being successful at the Preliminary Examination, they wrote the Written Examination, on 11.11.2016. They were again declared successful, vide result declared on 24.3.2017. In all, 61 candidates were invited for the Interview, originally scheduled to be held on 22.04.2017 and 23.04.2017. However, the Interview was rescheduled for 29.04.2017 and 30.04.2017. The reason disclosed to the petitioners was non-availability of the Chairman of Selection & Appointment Committee (hereinafter referred to as the Committee). Two Boards were constituted to conduct the interviews, over two days. The petitioners contend, they along with 29-30 others were interviewed by Board 'A' whereas another Board 'B' was also constituted. It interviewed the remaining candidates. It is the principal grievance of the petitioners that the two Boards did not observe any symmetry in award of marks such that all candidates who appeared before Board 'B' were awarded 80 marks, being the pass marks required to qualify the Interview test, whereas candidates who appeared before Board 'A' were generally awarded less than 80 marks. To the extent the petitioners were awarded 60 marks by Board 'A', they pray for moderation/scaling of those marks awarded to them. The petitioners further claim malice. They would assert that the interview originally scheduled for 22.04.2017 and 23.04.2017 was purposely postponed accommodating 14 ineligible candidates. Twelve out of those fourteen candidates were judicial officers who had

not completed seven years of continuous practice, before applying for the selection. Remaining two were overaged advocates. Only to cause undue benefit to the 14 ineligible candidates, the interview was postponed. Of those, the two advocates were eventually declared successful. They are respondent nos. 4 & 5. Reliance has been placed on a decision of a coordinate bench of this Court, in **Suraj Bali Singh & Ors. vs Registrar General High Court of Judicature at Allahabad (Writ – A No. 20708 of 2012)** decided on 08.05.2017. There, it was ruled against that petitioner (in that case), being more than 45 years of age on the cut-off date, he was ineligible.

5. Second, it has been submitted, under Rule 18(1) of the U.P. Higher Judicial Service Rules, 1975 (hereinafter referred to as the 'Rules'), the Committee should have called for interview only such candidates who may have clearly qualified for the Interview after scrutiny of their forms and the Written Examination. Respondent no.4 (Sandeep Gupta) and respondent no.5 (Pratima) were only permitted to provisionally participate at the Written Examination. However, their results were required to be retained in sealed cover, under order dated 22.07.2016, passed by the Supreme Court in the case of respondent no.4 i.e., **Sandeep Gupta vs High Court of Judicature at Allahabad Through Its Registrar General [Writ Petition(s) (Civil) No(s). 594 of 2016]** and another order to the similar effect dated 18.7.2016, passed in the case of respondent no.5, by a division bench of this Court in **Service Bench No. 13984 of 2016 (Pratima vs Hon'ble High Court of Judicature at Allahabad Thru R.G. & Ors.)**. Since no further order was passed, either by the Supreme Court or by this Court to allow either respondent no.4 or

respondent no.5 to participate in the Interview, the Committee erred in allowing those candidates an opportunity to be interviewed and be selected, contrary to the provisions of Rule 18(1) of the Rules.

6. Third, referring to the Appendix 'G' to the Rules, it has been strenuously urged, the stipulation contained in the Rules is mandatory. The petitioners had to be granted interview for not less than 25 minutes. That procedure was not followed. In fact, it was impossible to be followed since 61 candidates (in all) were scheduled for interview, over two days, by two Boards ('A' & 'B') only. On the first day of the interview, one set each of 20 candidates was scheduled to be interviewed by the two separate Boards and, on the second day, the remaining candidates were similarly equally distributed between those two Boards. If one interview was conducted for a necessary period of 25 minutes, the interview of 20 candidates by each Board would have taken more than ten hours. Since, the interview started at about 10:30 AM and they got over at 5:30 PM with breaks for tea and lunch, that mandatory stipulation stood violated. In that regard, it has been emphasized, petitioner no.1 came to be interviewed on 30.04.2017 whereas petitioner no.2 was interviewed on 29.4.2017, both by Board 'A'. The petitioners are further aggrieved that they were not granted proper interview and were sent away after being interviewed over eight to ten minutes each.

7. Fourth, it has been submitted, upon completion of the interview, the result was declared on 18.08.2017, declaring 43 candidates successful. That result was however changed unilaterally - both in the terms of number of candidates declared successful as also the candidates who were

declared successful. Thus, later, on 01.10.2020, a second result was declared wherein 37 candidates were declared successful. The entire seniority list was altered. Thus, it has been submitted, the marks awarded to individual candidates were changed in the meanwhile, to accommodate certain ineligible persons, including respondent nos. 4 & 5.

8. Fifth, relying on the vast variance (alleged) in the marks awarded by the two Boards, it has been asserted that all the candidates who appeared before Board 'B' came to be qualified whereas very few candidates who faced Board 'A' came to be qualified. In such circumstance, it has been strenuously urged, there is need to moderate the marks. If 20 marks were awarded to the petitioners, for that reason, they would also be qualified for appointment. Here reliance has been placed on a decision of the Supreme Court in **Pranav Verma And others Vs. The Registrar General of the High Court of Punjab and Haryana at Chandigarh (Writ Petition (Civil) No. 565 of 2019, 617 of 2019 and 651 of 2019, decided on 13.12.2019)**.

9. Sixth, it has been further submitted, respondent No. 5 had earlier filed a writ petition before the High Court. While that writ petition was kept pending, she instituted a parallel proceeding by filing **I.A. No. 42562 of 2017** before the Supreme Court. That she may have never done. The High Court also did not inform the Supreme Court about the pendency of that writ petition. Consequently, she was illegally accommodated in the final select list. That itself has been cited to be a malicious illegality committed by the High Court.

10. Last, it has been submitted, another candidate Sri Krishna Kumar, judicial officer was allowed to participate in the examination in two categories. First, as an advocate and second as a judicial officer. The same was wholly contrary to the Rules. In fact, by allowing such participation the Committee completely flouted the Rules.

11. Relying on the ratio of the Supreme Court in **Dalpat Abasaheb Solunke and Others Vs. Dr. B.S. Mahajan and Others (1990) 1 SCC 305**, it has been asserted, in face of the patent illegalities and irregularities committed during the selection process, the same is wholly vitiated.

12. On such submissions, we had required Sri Ashish Mishra learned counsel for the High Court (by order passed on hearing him, on 07.8.2023) to produce the original result as may establish the marks awarded to various candidates at the interview. Upon perusal of the same it transpires - 61 candidates were called for interview held on 29-30 April 2017. One candidate absented. Of the 60 candidates interviewed, all but the two petitioners were awarded more than 80 marks. The marks of the selected candidates awarded ranged from 80-125. There does not appear any pattern in the award of marks, as suggested by the petitioners. It may never be inferred from a perusal of the marks awarded at the Interview, either that all the selected candidates had been awarded 80 marks each or that any one Board had awarded marks leniently or strictly, as compared to the other. Of about 30 candidates interviewed by each Board, only 2 candidates came to be rejected, they have failed to obtain the pass marks (80). Both are before us.

13. Sri Ashish Mishra learned counsel for the High Court would submit, there is absolutely no illegality in the selection procedure adopted by the Committee. As to the exact vacancies advertised, it has been made clear, originally 37 vacancies were advertised under the Unreserved category and 35 under the Reserved category (as disclosed by the petitioner). At the same time, 12 vacancies were carried forward from the earlier recruitment. Both the petitioners applied under the Unreserved category. At the stage of conducting the Preliminary Examination, scrutiny of application forms was neither necessary nor it could be done, under the norms adopted by the Committee. Thus, all the candidates who had submitted completed forms, were allowed to participate at the Preliminary Examination, provisionally.

14. As to the first submission advanced by the petitioners alleging manipulation upon interviews being postponed, it has been submitted, the same is misconceived arising from misconstruction of facts. During submissions, Sri Ashish Mishra has also produced the original record of the meeting of the Committee dated 23.1.2017, which has also been shown to the petitioners during hearing, itself. It will be referred to a little later.

15. In the first place, the postponement of interviews by one week, per se does not raise any doubt as to the fairness of the procedure adopted. It is not the case of the petitioners that they were thereby prevented from participating at the Interview. As a result of the Written Examination, 61 candidates were found provisionally successful and accordingly they were invited for the Interview. The lone candidate who did not appear at the

Interview conducted (on the postponed dates), has not even complained. Thus, no prejudice was caused to the petitioners or to any candidate by such postponement. No other or new candidate was called for Interview other than the candidates who were originally invited for interview scheduled to be held on 22.04.2017 and 23.04.2017. No candidate was deprived of that opportunity, either.

16. Submission of the petitioners that the ineligible candidates had been invited for the Interview contrary to the Rule 18(1) of the Rules, has been met on the strength of the proviso to Rule 18(1-A) read with Appendix 'G' of the Rules. The Interview is part of the Main Examination. Under Rule 18 of the Rules, the Main Examination had to be conducted in accordance with Appendix 'G' that prescribes six papers. Five papers comprise the Written Examination with the sixth paper being described as the Interview. Thus, in his submission, the Interview was an inseparable part and parcel of the Main Examination. Therefore, referring to the language of the interim order passed by the Supreme Court and the High Court, in the cases of the respondent nos. 4 & 5, he would submit, the respondents and others who were similarly provisionally permitted to participate at the Main Examination, were provisionally permitted to participate at the Interview.

17. Alternatively, it has been submitted, in any case, the candidature of respondent nos. 4 & 5 remained provisional, at the Interview. The Committee had passed a further resolution dated 11.04.2017 permitting certain candidates including respondent nos. 4 & 5 to participate at the Interview, provisionally. That was done in view of the

directions issued by the Supreme Court and this Court, on the judicial side. Yet, it remained an administrative decision, not in conflict with any judicial order.

18. Further, Sri Mishra would submit, as per the record of the High Court, both respondent Nos. 4 & 5, secured the requisite merit position, to be included in the provisional select list, declared on 18.8.2017. However, at that stage, owing to various pending litigation, their names were not disclosed in the select list. Only upon the final order being passed by the Supreme Court on 19.7.2018 in **Writ Petition (Civil) No.594 of 2016**, the result was published on 1.10.2020 wherein their names were first disclosed, against their correct/respective merit position.

19. Third, it has been submitted, the requirement that the Interview be conducted over a period of 25 to 30 minutes is only directory in nature. However, in case of any deviation resulting in any Interview being completed in lesser time, no consequence has either been provided under the Rules nor any consequence may otherwise be inferred as may allow the requirement of Note-I of Appendix 'G' of the Rules to be read, mandatory. He has relied on the decision of the Supreme Court in the **State of Bihar & Ors. vs Bihar Rajya Bhumi Vikas Bank Samiti, (2018) 9 SCC 472**.

20. It is in the very nature of things - an Interview Board may determine the suitability of a candidate, in lesser time. Being experts, the members of the Board act in that capacity, to test the suitability of the candidates before them. Unless any patent illegality or error is shown to have existed in the process adopted by the concerned Board, in granting that Interview

to either of the petitioners, no inference may be drawn that a candidate could not have been found suitable, because the interview of any of the candidate got over in less than 25-30 minutes. Here, he has also emphasized, there are no pleadings made in the writ petition to establish that the interview of the present petitioners got over in less than 25-30 minutes or in 8 minutes as has been orally contended by the petitioners.

21. Next, it has been submitted, in the original result declared on 18.08.2017, names of 12 judicial officers were provisionally included. Upon pronouncement of the decision of the Supreme Court in **Dheeraj Mor vs Hon'ble High Court of Delhi, (2020) SCC OnLine SCC 213**, it became necessary to revise that result. Since, the 12 judicial officers (provisionally included in the result dated 18.08.2017), were ineligible, their names were excluded. However, in that process, the entire select list itself got revised because some of the selected candidates who were originally shown selected against reserved category came to be selected under the General category. However, that change did not involve award of new or fresh marks. Thus, the apprehension expressed by the petitioners as to change of marks awarded, is described as unfounded.

22. Then, it has been submitted, respondent no.4 had preferred **Writ Petition (Civil) No. 594 of 2016** before the Supreme Court whereas respondent no.5 had filed **I.A. No. 42562 of 2017** therein. Those were allowed by the Supreme Court. At that stage, the Supreme Court exercised its Constitutional powers under Article 142 of the Constitution of India and allowed those respondents to be appointed. That

order was passed on July 22, 2016. Inasmuch as the original result declared on 18.08.2017, was provisional and the result was declared on 01.10.2020, that result was published after the final order of the Supreme Court. There is no infirmity in the result, thus declared.

23. As to the participation of Sri Krishna Kumar, it has been submitted, it is true, the said candidate participated in the Written Examination provisionally. At that stage, it was in doubt if he could participate as an advocate, being a serving judicial officer or in the Limited Competitive Examination (LCE in short). Since the judgement in the case of **Dheeraj Mor (supra)** had not been delivered, he had been provisionally permitted to participate, subject to his candidature being cleared. In any case, his name does not find mention in the final select list published on 01.10.2020.

24. Having heard the learned counsel for the parties and having perused the record, insofar as a ground of mala fide has been raised, resulting in alleged illegality in postponing the Interview test, to cause undue benefit to the eventually selected candidates, we find, it is undisputed to the parties that the Interview test was postponed by one week from 22-23 April 2017 to 29-30 April 2017. Per se, there may be no illegality in such postponement. It may arise for administrative reason/s that may remain outside the pale of limited scope of judicial review, that we may exercise, in such proceedings. In the absence of any material to establish - even a single person may have been added or deleted to the final list of candidates than those originally called for the Interview test, it would be wholly unreasonable and far-fetched an argument to acknowledge

(for any serious consideration), that such postponement was meant to cause any undue benefit to any individual.

25. The fact that the respondent may have taken a stand in the counter affidavit that such postponement was occasioned by certain administrative work involving the Chairman of the Committee, which fact is disputed on the strength of information received by the petitioners under the Right to Information Act, 2005, from the Registry of the Supreme Court, is not of such quality or tenor as may require this Court to even suspect that there was any gross irregularity or mala fide, occasioning the postponement of the Interview test. It not being the case of the petitioners that any individual or other person came to be called/refused interview, occasioned by that postponement of the Interview test scheduled for 22-23 April 2017, that ground of challenge remains imaginary and sensational, yet completely unfounded. The issue of the exactness or even the correctness of the information furnished to the petitioners under the Right to Information Act apart, in absence of any undue benefit shown to have arisen to any individual, the ground being pressed by the petitioners remains purely speculative and at best, academic.

26. No event took place in that intervening time as may have created or destroyed any right in favour of any aspirant. Merely because certain legal proceedings were pending, amongst others, at the instance of the 12 judicial officers and the 2 lawyers, who were provisionally allowed to participate at the Interview test, occasioned by the orders passed in those judicial proceedings instituted by them, no prejudice was caused to any candidate otherwise eligible to be called for the Interview test. It remains an undisputed fact

between the parties that though those 12 judicial officers were initially declared successful in the provisional result declared on 18.8.2017 yet, their names were not included in the final Select List published on 01.10.2020. Giving effect to the decision of the Supreme Court in **Dheeraj Mor Vs. Hon'ble High Court of Delhi (supra)**, the provisional Select List was revised as the candidature of those 12 provisionally selected candidates (judicial officers) was rendered ineligible. The case of the two lawyers (respondent nos. 4 & 5) shall be discussed, a little later.

27. As to the application of Rule 18 (1) of the Rules, it may be useful to reproduce it here. It reads as below:

“18. Procedure of Selection--(1) The selection Committee referred to in Rule 16 shall scrutinize the applications received and shall thereafter hold a Written Examination as prescribed in Appendix (G) for judging the suitability of the candidates. The Committee shall call for interview such of the applicants who in its opinion have qualified for interview after scrutiny and Written Examination,

(1A)[The Selection Committee may hold a preliminary examination for judging the suitability of the candidates to be admitted in the Written Examination as referred in sub-rule (1). The preliminary examination shall consist of one paper consisting of 100 marks of two hours duration from the syllabus prescribed for the Written Examination in Appendix "G" of the Rules:

Provided that only those candidates shall be treated to be eligible for the main Written Examination who secure minimum 45% marks in the preliminary examination subject to 20 times of the number of vacancies category-wise i.e. General,

Scheduled Castes, Scheduled Tribes and Other Backward Classes.

(2) In assessing the merits of a candidate the Selection Committee shall have due regard to his professional ability, character, personality and health.

(3) The Selection Committee shall make a preliminary selection and submit the record of all candidates to the Chief Justice and recommend the names of the candidates in order of merit who, in its opinion, are suitable for appointment to the Service.

(4) The Court shall examine the recommendations of the Selection Committee and having regard to the number of direct recruits to be taken, prepare a list of elected candidates in order of merit and forward the same to the Governor.”

28. Also, for ready reference, Appendix 'G' to the Rules may be extracted as below:

*“APPENDIX 'G'
[See Rule 18]*

Syllabus prescribed for the recruitment of the officers in Uttar Pradesh Higher Judicial Service.

The Examination for Uttar Pradesh Higher Judicial Service will include the following subjects:

Paper No. 1 General Knowledge

This paper will be of 100 marks and 3 hours duration.

There will be a paper of 'General Knowledge'. The paper may include questions based on topics relating to History of India and Indian Culture,

Geography of India, Indian Polity, current national issues and topics of social relevance, India and the World, Indian Economy, International Affairs, and Institutions and Development in the field of Science and Technology. communication and space.

*The nature and standards of questions in these papers will be **such that a well educated person will be** able to answer them without any specialised*

Paper No. 2 Language

This paper will be of 100 marks and 3 hours duration. It shall comprise four questions as specified below:-

(i) Essay to be written in English - 30 marks

(ii) English Precis writing -30 marks

(iii) Translation of passage from Hindi to English -20 marks

(iv) Translation of passage from English to Hindi -20 marks

Paper No. 3: Law-I (Substantive Law)

This paper will be of 200 marks and 3 hours duration.

The question set will be restricted to the field covered by -

The Law of Contracts, the Law of Partnership, the Law concerning easement and torts, the Law relating to Transfer of Property including the Principles of Equity specifically applicable thereto, the Principle of equity with special reference to the law of trust and specific relief, Hindu Law and Mohammedan Law, and Constitutional Law.

There shall be questions of 50 marks in relation to Constitutional Law alone.

Paper No. 4 Law-II (Procedure and evidence)

This paper will be of 200 marks and 3 hours duration.

Question set will be restricted to the field covered by-

The Law of evidence, the Criminal Procedure Code, and Code of Civil Procedure, including the principles of pleading. The question set will relate mainly to practical matters such as the framing of charges and issues, the methods of dealing with the evidence of witnesses, the writing of judgment of session trials, appeals, revision and the conduct of cases generally, but will not be restricted to them.

Paper No. 5 Law III (Penal, Revenue and Local Laws)

This paper will be of 200 marks and 3 hours duration.

Questions set will be restricted to the field covered by -

Indian Penal Code, Uttar Pradesh Revenue Code, 2006, Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. U.P. Municipalities Act, U.P. Panchayatraj Act, U.P. Consolidation of Holdings Act, U.P. Urban Planning and Development Act, 1973, together with Rules, framed under the aforesaid Acts.

*Answer to the questions of Local Laws will be compulsory. Question pertaining to penal Laws will be of **50** marks, whereas that of Revenue and Local Laws will be of 150 marks.*****

Clarification -The candidates will have a choice to answer General Knowledge and Law papers either in Hindi or in English.

Paper No. 6-Interview***The interview will be of 200 marks-***

The suitability of the candidate for employment in the U.P. Higher Judicial Service will be tested with reference to his merit giving due regard to his ability, character, personality, and physique.

Notes-

(i) The candidates securing minimum aggregate 45% marks in the Written Examination shall be called to appear in the interview subject to maximum thrice the number of vacancies category-wise.

The interview shall be in a thorough and scientific manner and shall take any thing between 25 and 30 minutes for each candidates.

(ii) The candidates securing minimum 40% marks in the interview shall only be eligible to be included in the select list. The marks obtained in the interview will be added to the marks obtained in the written papers and the candidate's place in the select list will depend on the aggregate of both."

29. In the first place, Rule 18(1) conceives a Written Examination as prescribed in Appendix 'G', to judge the suitability of the candidates. That examination is required to be held amongst the eligible candidates, based on the scrutiny of their application forms. Thereafter, the Rule requires such of the applicants to be called for the Interview who, in the opinion of the Committee, may have qualified the Written Examination.

30. Later by Notification dated 8 May 2014, sub-Rule (1-A) was introduced. It allows the Committee to first hold a Preliminary Examination, to judge the suitability of the candidates to be admitted at the Written Examination, referred to in sub-Rule (1) of Rule 18 of the Rules. Under

the proviso to sub-Rule (1-A), the eligibility for the "Main Written Examination" has been prescribed at 45% marks at the Preliminary Examination. Appendix 'G' to the Rules prescribes the syllabus for recruitment of officers at the Uttar Pradesh Higher Judicial Services. It segregates the syllabus into six papers, five of them being written papers and the sixth being the Interview test.

31. Thus, by virtue of the structure of the Rules, the Interview test is included as a part of the main examination of the Uttar Pradesh Higher Judicial Services. It is described as a separate subject, being paper No. 6, under the prescribed syllabus, under Appendix G to the Rules. Relevant to the same, paragraph-3 of the Advertisement on which the impugned selection has arisen, dated 10.5.2016, reads as below:]

"A Preliminary Examination (objective type) will be held on 31stth July, 2016 at Allahabad and only those candidates shall be called to appear in the Main Written Examination who secure 45% or more marks in the Preliminary Examination, provided candidates not more than 20 times of number of vacancies category-wise i.e. separately for General, Scheduled Castes, Scheduled Tribes and Other Backward Classes shall be admitted to the Main Written Examination."

32. Therefore, to our mind, the Rules and the Advertisement speak of four events to test the suitability of any candidate for selection at the Uttar Pradesh Higher Judicial Services.

(i) first, a Preliminary Examination, is conducted to determine the suitability of the candidates to be admitted at the next stage/Written Examination. There is no

dispute between the parties with respect to that examination.

(ii) second, is the scrutiny of the application forms.

(iii) third, is the Written Examination.

(iv) fourth, is the conduct of the Interview test.

33. At the same time, both - the proviso to Rule 18(1-A) of the Rules and the Advertisement use the term - "Main Written Examination" to prescribe the eligibility to the Written Examination (provided under Rule 18(1) of the Rules), in terms of minimum marks to be obtained at the Preliminary Examination. Therefore, upon a co-joint reading of the Rules and the Advertisement, the "Main Written Examination" may only refer to Written Examination covering the five subjects specified under schedule 'G'.

34. Further, that eligibility prescription has no bearing on the candidates to be called for the Interview test. It is so because, under Rule 18(1) of the Rules, the Committee may call for the Interview test, only such candidates, as may in its opinion have qualified the "Written Examination" and whose application forms may have been found in order. Thereafter, the final merit list and in conformity thereto, the Select List was to be prepared.

35. It is not in dispute that the Select List is prepared on the strength of the sum of marks obtained at the Written Examination (but not the Preliminary Examination) and the Interview test. Thus, the Interview test is a necessary part of the Main Examination, as prescribed under the Rules. Yet, it is not part of the Written Examination. Therefore, the language employed by the Supreme Court and this

Court in the interim orders passed by them is relevant. The interim order dated 22.7.2016 passed by the Supreme Court, in the case of respondent No. 4 reads as under:

"Heard.

Issue notice.

Dasti, in addition, is also permitted.

Pending further orders from this Court, the petitioners shall be permitted to appear in the preliminary examination for Uttar Pradesh Higher Judicial Service scheduled to be held on 31st July, 2016, subject to the following conditions:

(1) They make an application before the Registrar General of the High Court of Judicature at Allahabad within two days from today.

(2) Upon scrutiny of the applications, the Registrar General finds the petitioners to be within the upper age limit of 45 years as on 1 January, 2016 for general category candidates and within the upper age limit of 48 years, as prescribed for the reserved category candidates in terms of Rule 12 of the relevant rules. (3) In case they qualify in the preliminary examination they shall be permitted to appear in the Uttar Pradesh Higher Judicial Service Examination, 2016 (Main).

(4) The result of the Main Examination (subject to their qualifying in the preliminary examination) shall be kept in a sealed cover.

Post along with W. P. (C) No. 414 of 2016 and connected matters."

36. Similarly, the order of the coordinate bench of this Court (sitting at Lucknow) passed in the case of respondent No. 5, dated 18.7.2016 reads as below:

"Heard learned counsel for the applicant-petitioner and Sri Upendra Nath

Misra, learned counsel appearing for the High Court.

The petitioner through this writ petition has prayed that she may be permitted to appear in the preliminary examination as well as in the final examination, inter alia, on the grounds stated in the writ petition.

Learned counsel for the petitioner submits that the matter is engaging the attention of the apex Court in Writ Petition (s) (Civil) No(s).414 of 2016, Dr. Anil Kumar Singh and others vs. The Hon'ble High Court of Allahabad and another, along with SLP(C) No.15750 of 2016 and other connected Special Leave Petitions and the apex Court has passed the following order :-

"W.P. (C) No.414 of 2016, W.P. (C) No.405 of 2016, W.P. (C) No.423 of 2016, SLP (C) No.15764 of 2016:

Pending further orders from this Court, the petitioners shall be permitted to appear in the preliminary examination for Uttar Pradesh Higher Judicial Service scheduled to be held on 31st July, 2016. In case they qualify in the same they shall also be permitted to appear in the Uttar Pradesh Higher Judicial Service Examination, 2016 (Main). The result of the Main Examination insofar as the petitioners are concerned shall however be withheld and kept in a sealed cover.

SLP (C) No.15750 of 2016 and SLP (C) No.15644 of 2016:

The petitioners shall also be allowed to appear in the Uttar Pradesh Higher Judicial Service Examination, 2016 scheduled to be held on 31st July, 2016, subject to the following conditions:

(1) They make an application before the Registrar General of the High Court of Judicature at Allahabad within two days from today.

(2) Upon scrutiny of the applications, the Registrar General finds the petitioners to be within the upper age limit of 45 years as on 1st January, 2016 for general category candidates and within the upper age limit of 48 years, as prescribed for the reserved category candidates in terms of Rule 12 of the relevant rules.

(3) The result of the Main Examination (subject to their qualifying in the preliminary examination shall be kept in a sealed cover."

Learned counsel for the petitioner submits that case of the petitioner is identically situated, therefore, she is also entitled for appearing in the preliminary examination as well as in the Main Examination subject to the condition that the result shall be kept in a sealed cover.

We accordingly permit the petitioner to appear in the preliminary examination as well as in the Main Examination as directed by the apex Court subject to the condition that the result of the petitioner shall be kept in a sealed cover and shall be governed by the final verdict of the apex Court in the aforesaid cases.

Subject to above observation, application is disposed of".

37. The interim orders passed by the Supreme Court and the coordinate bench of this Court, must be read in the backdrop of the law they were dealing with, in the context of the fact situation that arose before them. That appraisal of the facts and the law gave rise to the orders, providing for interim measures. Here, despite qualifying at the Preliminary Examination, respondent No. 4 and 5, were faced with disqualification to participate further in the main examination i.e., the Written Examination and consequently the Interview test, occasioned by the fact that they were over aged. In dealing with that

contingency and in the light of the submissions that may have been advanced, the Supreme Court and this Court provided that their result of the Main Examination be kept in sealed cover however, subject to those respondents qualifying the Preliminary Examination.

38. Therefore, to our mind, the respondent nos. 4 and 5 were permitted to participate further – both at the third and fourth events of the selection process, noted above, subject to their qualifying at the first stage (as explicitly provided under the interim orders). Those two events taken together, constituted the main examination, described under the interim orders passed by the Supreme Court and a coordinate bench of this Court. In absence of any restraint placed in those judicial orders, to prevent the participation of the persons (in whose favour those orders had been passed), at the Interview test, or to permit them to appear only at the Main Written Examination, the submission advanced by the petitioners, to the contrary, carries no weight. It is rejected.

39. The phrase “Main Written Examination” used in the proviso to Rule 18 (1A) of the Rules and the Advertisement must be read to mean the second event of the selection process, only i.e., the Written Examination. The word “Main” prefixed to the expression “Written Examination” (in the proviso to Rule 18(1A) and the Advertisement), only clarify that the marks awarded at the Preliminary Examination would only be considered relevant for participation at the next event of the selection process. Yet, no expression has been used and no provision has been made to indicate that those marks would be included for the purpose of short listing of candidates to be called for the Interview

test and/or for preparation of the inter se merit list of the finally selected candidates. It cannot, by any stretch of imagination, be read as conveying any other criteria.

40. As to Appendix 'G', merely because paper No. 6 has been described as Interview carrying 200 marks, it cannot therefore lead to an inference – the Interview test was part of the “Written Examination”. To read the Appendix ‘G’ in that manner would be to create a conflict within the Rule. Rule 18(1) is the substantive part of the Rule. It clearly provides, the Committee shall first hold a Written Examination, to judge the suitability of the candidates and that it shall thereafter call for Interview such candidates who may have qualified that Written Examination, after scrutiny of their application forms. In absence of any language used to indicate a contrary intent, there is no room to treat the Interview test, part of the Written Examination. That interpretation, if accepted, would necessitate calling for the Interview test, all candidates who may have qualified the Preliminary Examination. That would be in violation of Rule 18(1) of the Rules, that clearly treats the Written Examination to be different from the Interview test. Also, it contemplates the Written Examination to be held at a stage prior to the Interview test.

41. Seen in this light, the wording of the orders passed by the Supreme Court and this Court is relevant. The order passed by the coordinate bench of this Court in the writ petition filed by respondent No. 5 was in the terms of the order passed by the Supreme Court. In turn the Supreme Court had made a clear observation that the result of the “main examination” shall be kept in a sealed cover. At that stage, the Supreme Court did not use the restrictive expression

“Main Written Examination”, used in the proviso to Rule 18(1A) and the Advertisement.

42. Since, the judicial orders employed the phrase “main examination”, it was expected of the Committee to allow respondent Nos.4 and 5 and other similarly situated persons to provisionally participate at both stages of the “main examination” and not at the “main written examination”, alone. Read plainly, those interim orders included within their ambit, both, the Written Examination, and the Interview test, of course, subject to suitability being first earned at the Main Written Examination. However, in view of the further stipulation contained in that order that their results shall be kept in a sealed cover, they could neither have been declared successful nor they could not have been granted appointment, except with the leave of the Supreme Court/this Court (on the judicial side).

43. During hearing, we have also been taken through the contents of the original resolution of the Committee dated 23.3.2017. Perusal of the same reveals that following decisions were taken:

“1. As per the combined merit list prepared by the Computer Section, number of candidates, who could secure minimum qualifying 45% marks or more in aggregate, category wise, in the main Written Examination, out of 1603 candidates, (declared successful in the Preliminary Examination, under ratio of 1:20 category wise), are tabulated as below:

<i>Sl</i>	<i>Category</i>	<i>No. of Candidates</i>	<i>No. of Candid</i>	<i>En cl.</i>

		<i>called Main Written Examination under 1:20</i>	<i>in a tes secured min. 45% qualifying marks</i>	
<i>1.</i>	<i>Unreserved</i>	<i>753</i>	<i>32</i>	<i>A-1</i>
<i>2.</i>	<i>OBC</i>	<i>480</i>	<i>06</i>	<i>A-2</i>
<i>3.</i>	<i>SC</i>	<i>367</i>	<i>00</i>	<i>-</i>
<i>4.</i>	<i>ST</i>	<i>03</i>	<i>00</i>	<i>-</i>
<i>Total</i>		<i>1603</i>	<i>38</i>	<i>A</i>

Thus, above 38 candidates are called to provisionally appear in the interview. A list of such 38 candidates is made part of this resolution as Annexure-A.

2. Out of 39 candidates, who are/have been in employment and were permitted to appear in the main Written Examination provisionally in their respective categories over and above the Ratio 1:20, 04 candidates have secured minimum qualifying marks or above. Thus, 04 candidates are called to appear provisionally in the interview. A list of such 04 candidates is made part of this resolution as Annexure-B.

3. Out of 25 candidates, who are having less or discontinued practice of seven years and permitted to appear in the main Written Examination provisionally in their respective categories over and above the Ratio 1:20, only 01 candidate has secured minimum qualifying marks or above. Thus, 01 candidate is called to appear provisionally in the interview. The name of the candidate is made part of this resolution as Annexure-C.

4. Out of 17 candidates, who are overage and permitted to appear in the main Written Examination provisionally in their respective categories over and above the Ratio 1:20, only 01 candidate has secured minimum qualifying marks or above. Thus, 01 candidate is called to provisionally appear in the interview. The name of the candidates is made part of this resolution as Annexure-D.

5. Out of 03 candidates, whose forms are found incomplete in various aspect and permitted to appear in the main Written Examination provisionally in their respective categories over and above the Ratio 1:20 none could secure minimum qualifying marks or above.

Therefore, out of above 84 candidates (point No. 2 to 5), in whose application forms, some deficiencies were found and were provisionally declared successful over & above the ratio of 1:20. 06 candidates be called to appear provisionally in the Interview. A list of such 06 candidates is made part of this resolution as **Annexure-E**.

6. Out of 35 Judicial Officers who were called to appear provisionally in the main Written Examination, 2016 over and above the ratio 1:20 in their respective categories, in pursuance with the orders of the Hon'ble Courts, 15 candidates have secured minimum qualifying marks or above. Thus, 15 candidates are called to appear provisionally in the interview. A list of such Judicial Officer/petitioners is made part of this resolution as Annexure-F. The result of such 15 candidates shall be subject to final out come of the petitions filed by them.

7. Out of 10 candidates who are Advocates and have been permitted by the order of the Hon'ble Courts called to appear in the Main Written Examination, 2016 provisionally in their respective

categories over and above the ratio 1:20, only 02 candidates have secured minimum qualifying marks or above. Thus, 02 candidates be called to appear provisionally in the interview and the list of such 02 candidate/petitioners is made part of this resolution as Annexure -G. The result of such 02 candidates shall be subject to final out come of the petitions filed by them.

Thus, out of above 45 Judicial Officers/petitioners (point no. 6 & 7) permitted by judicial orders were provisionally declared successful over & above the ratio of 1:20, 17 candidates are called to appear provisionally in the the interview. A list of such 17 candidates is made part of this resolution as Annexure-H.

The Committee has been apprised that the petitions filed by the Judicial Officers/Advocates for appearing in the U.P. Higher Judicial Service Direct Recruitment Examination, 2016 in Hon'ble Supreme Court and this Court are still pending. Thus, as resolved above, the result /candidature of such 17 candidates who are being called to appear provisionally in the Interview, will be subject to the final orders/decision of the Court in pending petitions filed by them and shall be kept in sealed **cover till the final disposal of their re respective pending petitions.**

Thus, out of above stated 129 candidates (84 candidates in whose application forms deficiencies are found + 45 candidates who have been permitted by judicial orders), 23 candidates (04+01+01+15+02) are being called to appear provisionally in the Interview. The break up of such 23 candidates is provided in the paras 2-7 above.

Hence, total 61 (38+ 23) candidates (out of a total of 1732 candidates) inclusive of over and above the ratio of 1:20

category-wise, who could secure 360 (i.e. 45%) or above marks out of maximum 800 marks are called to provisionally appear in the Interview of U.P. Higher Judicial Direct Service Direct Recruitment 2016. A combined list of such 61 candidates is made part of this resolution as Annexure-J.

The Committee reiterates its decision that the candidature of all such 61 candidates to appear in the interview shall be purely provisional.

The combined merit list of all the candidates who appeared in the main Written Examination be kept in closed envelop.

The Committee approves the format of Interview letter (Annexure-R) and resolves that the interview letters be issued to above 61 candidates whose names are included in **Annexure-J**.

A final scrutiny of Application forms of such 61 successful candidates be made and discrepancy, if any, be reported to the Committee. The application forms of such 61 candidates be kept separately and be placed before the respective interview boards during the interviews.

The Committee further resolves that the roll numbers of all the candidates who have been called to appear (provisionally) in the interview of U.P. Higher Judicial Service Direct Recruitment Main Written Examination, 2016 along with their names and category shall be uploaded on the website of this Court along with relevant instructions and details of interview, indicating the candidates who are permitted by the Courts and declared over and above 1:20.

The Interview call letters be made available on the website and a notice to this effect be also uploaded on the website in a manner that the successful candidates may download the same without any problem from the website. The Interview

call letters of such candidates be also sent through "Speed Post/Registered Post to their corresponding addresses as available in their application forms of UPHJS-2016.

Limited Competitive Departmental Examination, 2016 Under Rule 5(b) of U.P. Higher Judicial Service Rules, 1975

Recruitment against 23 vacancies of LCDE was also held along with direct recruitment and the candidates appeared in Law-I, Law-II & Law-III papers. The total number of candidates who had submitted applications for appearing in the LCDE were 113. The attendance in Limited Competitive Examination, 2016 is as below:

Sl	Subject	Attendance	Present	Absent
1.	Law-I	113	77	36
2.	Law-II	113	76	37
3.	Law-III	113	76	37
	Total	339	229	110

As per Note of Appendix-H of the U.P. Higher Judicial Service Rules, 1975, the cut off marks in the Written Examination is 45% for the candidates of Limited Competitive Departmental Examination, 2016. The Note runs as below:

Note The candidates securing minimum aggregate 45% marks in the Written Examination shall be called to appear in the interview subject to maximum thrice the number of vacancies.

As only 14 judicial officers could secure 45% or more marks in aggregate in the limited competitive departmental examination, hence all of them be called to appear in the interview provisionally.

The Committee had earlier deliberated over the representation dated 29.09.2016 of Sri Krishna Kumar VI, Civil Judge (Sr.Div.), Chitrakoot (Roll No.7578) in its meeting held on 19.10.2016, in which the officer concerned had expressed his desire to appear in the Main Written Examination, 2016 as a direct recruit and also as an LCE candidate, as Hon'ble Supreme Court has permitted him to appear as Direct Recruit in UPHJS, 2016 and he was also eligible for LCE-2016.

The Resolution of the Committee in the matter was as below.

"...Admit cards be issued to the officer so that he may appear in both the streams along with the Direct Recruits and his candidature be considered in both the streams against the roll number already issued, subject to the orders ultimately passed by the Hon'ble Supreme Court...."

The result of Sri Krishna Kumar, Civil Judge (Sr. Div.), Chitrakoot who has been considered in both the streams viz. Main Written Examination and Limited Competitive Examination, 2016, is as below:

SL	Examination	Marks	Max. Marks	%age	Result
1.	Main Written Examination	436	800	54.5	Pass
2.	Limited Competitive Examination	312	600	52.0	Pass

The officer has qualified for both the streams. Thus, the Committee resolves to call him to appear provisionally in the interview in both the streams and admit card be issued accordingly. An information to this effect be inserted in the result of Main Written Examination, 2016.

*A merit list of all 113 candidates permitted to appear in the Limited Competitive Examination, 2016 has been prepared by the Computer Section and the same be kept in closed envelop. It has been reported that only 14 candidates could achieve 45% or more marks (including Sri Krishna Kumar, Civil Judge (Sr. Div.), Chitrakoot, who has been considered in both the streams viz. Direct and LCDE). A list containing such 14 officer-candidates is made part of this resolution as **Annexure-K**.*

*Let the aforesaid 14 officers be also called to provisionally appear in the interview on 23.04.2017. Their Roll numbers be also uploaded on the website with a notice regarding the date of interview. Their Interview call letters be made available on the website so that the same shall be downloaded by the candidates and also be sent through 'Speed Post/Registered Post' to the officers. The Committee approves the format of Interview Call Letter for the successful candidates of Limited Competitive Departmental Examination, 2016 and is made part of this resolution as **Annexure - L**.*

The Duplicate admit cards be issued to the candidates, in case they fail to receive the same, from 21.04.2017 to 23.04.2017 (from 9:30 a.m.) from the office of Selection & Appointment Cell. A note to this effect be inserted.

The Committee approves the result for uploading on the official website and is

made part of this resolution as Annexure-M.”

44. Two Interview Boards were also constituted to conduct the interview 61 candidates, provisionally invited for the Interview test.

45. Thus, a conscious decision was taken by the Committee, to allow 61 candidates declared successful at the Written Examination to participate at the Interview test, provisionally. Neither the candidature of any of the candidates thus permitted to participate was rejected nor confirmed, at that stage. By allowing such candidates to participate provisionally, the Committee did not take any final decision, in that regard, at that stage. Rather, it deferred that to a future date.

46. In the face of pending litigation and the interim orders passed therein, by the Supreme Court and the coordinate bench of this Court, allowing certain candidates including respondent Nos. 4 and 5 to participate at the “main examination” provisionally, was an administrative decision that may have been taken for the sake of convenience and efficient conduct and completion of the selection process. Insofar as that administrative decision was neither in conflict to any law nor it is seen to be contrary to the interim orders granted by the Supreme Court and the coordinate bench of this Court and further, in absence of any challenge raised to the resolution dated 23.3.2017, we find no error on part of the Committee in having allowed the selection process to be completed allowing the respondent nos. 4 and 5 and other similarly permitted persons to participate at the Interview, provisionally.

47. Here, it may also be noted, by allowing such participation to arise, the Committee did not prejudice the rights of the petitioners. Each candidate was to be interviewed on his own attributes and he were to be awarded marks, accordingly. Insofar as the administrative decision taken by the Selection Committee did not impinge on any rights of the petitioners to be evaluated on their own merit and further insofar as the petitioners were evaluated by the Interview board they faced; we find no merit in the objection being raised on the strength of Rule 18 read with Appendix 'G' to the Rules.

48. Insofar as challenge has been raised that the petitioners had not been granted interview for the desired duration of 25-30 minutes, we find while making the Rules, a maximum time limit has been prescribed to assess a candidates' suitability to appointment, by the Committee. It may only be by way of an indication. Currently, it is pegged to 25-30 minutes. However, there is absolutely no stipulation under the Rules and there is complete absence of any law compelling the Interview Board/s to, necessarily spend a minimum of 25-30 minutes with every candidate - to judge his suitability to the appointment sought. Moreover, there is absolutely no prescription in law providing for the consequence of invalidation of any Interview test, if that indicated time limit of 25-30 minutes were to be breached i.e., if the Interview board may proceed to assess the merit of any candidate, in a shorter time. As summarized, in **State of Bihar and Others Vs. Bihar Rajya Bhumi Vikas Bank Samiti (supra)**, the consistent law on the subject has remained - in absence of any consequence prescribed, a provision may not be inferred to be mandatory rather, it may remain directory.

49. Though that decision arose on the dispute - whether the requirement of issuance of prior notice and endorsement of filing of affidavit of compliance being requirements of Section 34(5) of the Arbitration & Conciliation Act, 1996 were mandatory or directory, considering the use of the word “shall” and though no such dispute exists in the present case, in the context of a procedural law requirement claimed to have been flouted (in the present case), a useful discussion is contained in that decision of the Supreme Court.

50. First, considering its earlier decision in **Topline Shoes Ltd. Vs. Corporation Bank, (2002) 6 SCC 33**, it was noted with approval that the provision prescribing a fixed timeline to submit defence statement, without prescription of any consequence of its non-compliance would remain a directory requirement. Thus, the Supreme Court quoted with approval, the following contents (paragraph no.8) of that report. It reads as under:

“8.The Statement of Objects and Reasons of the Consumer Protection Act, 1986 indicates that it has been enacted to promote and protect the rights and interests of consumers and to provide them speedy and simple redressal of their grievances. Hence, quasi-judicial machinery has been set up for the purpose, at different levels. These quasi-judicial bodies have to observe the principles of natural justice as per clause 4 of the Statement of Objects and Reasons, which reads as under:

“4. To provide speedy and simple redressal to consumer disputes, a quasi-judicial machinery is sought to be set up at the district, State and Central levels. These quasi-judicial bodies will observe the principles of natural justice and have been

empowered to give reliefs of a specific nature and to award, wherever appropriate, compensation to consumers. Penalties for non-compliance of the orders given by the quasi-judicial bodies have also been provided.”

(emphasis supplied)

Thus the intention to provide a time-frame to file reply, is really meant to expedite the hearing of such matters and to avoid unnecessary adjournments to linger on the proceedings on the pretext of filing reply. The provision, however, as framed, does not indicate that it is mandatory in nature. In case the extended time exceeds 15 days, no penal consequences are prescribed therefor. The period of extension of time “not exceeding 15 days”, does not prescribe any kind of period of limitation. The provision appears to be directory in nature, which the consumer forums are ordinarily supposed to apply in the proceedings before them. We do not find force in the submission made by the appellant-in-person, that in no event, whatsoever, the reply of the respondent could be taken on record beyond the period of 45 days. The provision is more by way of procedure to achieve the object of speedy disposal of such disputes. It is an expression of “desirability” in strong terms. But it falls short of creating any kind of substantive right in favour of the complainant by reason of which the respondent may be debarred from placing his version in defence in any circumstances whatsoever. It is for the Forum or the Commission to consider all facts and circumstances along with the provisions of the Act providing time-frame to file reply, as a guideline, and then to exercise its discretion as best as it may serve the ends of justice and achieve the object of speedy disposal of such cases keeping in mind the

principles of natural justice as well. The Forum may refuse to extend time beyond 15 days, in view of Section 13(2)(a) of the Act but exceeding the period of 15 days of extension, would not cause any fatal illegality in the order."

51. Next, the Supreme Court also noted with approval the ratio in **Kailash Vs. Nanhku & Ors., (2005) 4 SCC 480**. There again, in the context of the language of Order VIII Rule 1 of CPC incorporated to expedite civil proceedings, it was observed as under:

"30.....
.....
.....Merely
because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form.

34. Justice G.P. Singh notes in his celebrated work *Principles of Statutory Interpretation* (9th Edn., 2004) while dealing with mandatory and directory provisions:

"The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. In an oft-quoted passage Lord Campbell said: 'No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is

the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered.'" (p. 338)

" 'For ascertaining the real intention of the legislature', points out Subbarao, J. 'the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered'. If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory." (pp. 339-40)"

52. Then, the doubt that had arisen in view of another decision of the Supreme Court in **New India Assurance Company Ltd. Vs. Hilli Multipurpose Cold Storage Pvt. Ltd., (2015) 16 SCC 20** was also taken note of. The ratio of **Topline (supra)** and **Kailash (supra)** was re-emphasised.

53. In the context of our situation, it cannot be lost sight that the prescription of time limit for the Interview test as mentioned in the Appendix 'G', was 25-30 minutes. Being part of the procedure prescribed to be followed for that test, it may not be read to create a substantive

right in favour of any candidate, to be necessarily interviewed for a duration of 25-30 minutes. Second, that timeline is only indicative as to the need to grant sufficient time to each candidate to present himself for assessment on the prescribed parameters of ability, character, personality, and physique.

54. What would be sufficient time in an individual case, would however remain subjective and variable, depending upon the unique, unpredictable, and irreplicable ways in which an individual interview proceeding may arise, be continued, and be completed. Too many variables exist and operate in such subjective proceedings. They make it difficult, to prescribe any rigid format or conditions as to its conduct. Therefore, such proceedings are entrusted to the collective wisdom of a board of experts rather than an individual expert, to rule out bias, arbitrariness, inaccuracies, and inconsistencies, that may otherwise creep into any assessment made by an individual expert. The total time required at such an Interview test would also remain subjective to the quality of interaction that may arise during an individual interview granted to any candidate.

55. For the foregoing reasons, primarily in the absence of any consequence provided under the Rules, as to breach of the indicative timeline of 25-30 minutes, no consequence may arise in law - to infer invalidity of the Interview test, on that occurrence itself. Only this much may be inferred in law, that the indicative timeline may not be unreasonably curtailed or increased as may itself ex facie establish an unscientific approach adopted at the Interview test.

56. Thus the 'note' appended to Appendix 'G' to the Rules, is clearly a legislative help or guideline provided under the Rules. However, by no means it was mandatory. The members of the Interview Board being experts and well equipped to consider the individual merit of the candidates appearing before them, collectively, they had to be left with enough elbow room to put such questions to the individual candidates as may appear relevant and adequate to judge their suitability on the statutorily prescribed criteria of "ability, character, personality and physique".

57. How many minimum questions and in what manner they may be put and for what minimum duration of time an interview may be continued, would depend on individual facts of each interview. It is not only difficult to prescribe such time limit, but it may be undesirable and counterproductive to the efficiency of the selection process to prescribe a mandatory minimum time limit.

58. Thus, the strict prescription of time as claimed by the petitioners and the consequence of its violation is not only, not - prescribed under the Rules but if enforced strictly, it would be wholly undesirable. As suggested by Sri Mishra, it may lead to absurd results where assuming a candidate is unable to answer a single question and is unable to interact productively with the Interview Board, the latter would remain confounded and compelled to be confined in his silent company for 25-30 minutes, for no good purpose. For the reasons noted above, submission being advanced by the petitioners, on that count is liable to be rejected.

59. Here, we may also note, the pre-existing law on the subject. In **Ashok Kumar Yadav & Ors. vs State of Haryana & Ors., (1985) 4 SCC 417**, in the context of interview conducted by the Haryana Public Service Commission to fill up vacancies at Haryana Civil Service (Executive) and other Allied Services. About 1300 candidates were invited for viva voce against 119 available posts. Amongst others, the unsuccessful candidates assailed the selections amongst others on the ground – at the viva voce, wholly inadequate time had been granted by the Interview Board to judge the suitability of individual candidates. Such large number of candidates having been invited for viva voce interaction granted inadequate time i.e., less than 10 to 30 minutes was assailed as wholly inadequate for the purpose of making an objective evaluation of the merit of the individual candidate.

60. In that challenge, a four-judge bench of the Supreme Court made the following valuable observation:

“We do not think we can agree with this conclusion reached by the Division Bench. But whilst disagreeing with the conclusion, we must admit that the Haryana Public Service Commission was not right in calling for interview all the 1300 and odd candidates who secured 45% or more marks in the Written Examination. The respondents sought to justify the action of the Haryana Public Service Commission by relying on Regulation 3 of the Regulations contained in Appendix I of the Puniab Civil Service (Executive Branch) Rules, 1930 which were applicable in the State of Haryana and contended that on a true interpretation of that Regulation, the Haryana Public Service Commission was

bound to call for interview all the candidates who secured a minimum of 45% marks in the aggregate at the Written Examination. We do not think this contention is well founded. A plain reading of Regulation 3 will show that it is wholly unjustified. We have already referred to Regulation 3 in an earlier part of the judgment and we need not reproduce it again. It is clear on a plain natural construction of Regulation 3 that what it prescribes is merely a minimum qualification for eligibility to appear at the viva voce test. Every candidate to be eligible for appearing at the viva voce test must obtain at least 45% marks in the aggregate in the Written Examination. But obtaining of minimum 45% marks does not by itself entitle a candidate to insist that he should be called for the viva voce test. There is no obligation on the Haryana Public Service Commission to call for the viva voce test all candidates who satisfy the minimum eligibility requirement. It is open to the Haryana Public Service Commission to say that out of the candidates who satisfy the eligibility criterion of minimum 45% marks in the Written Examination, only a limited number of candidates at the top of the list shall be called for interview. And this has necessarily to be done because otherwise the viva voce test would be reduced to a farce. It is indeed difficult to see how a viva voce test for properly and satisfactorily measuring the personality of a candidate can be carried out, if over 1300 candidates are to be interviewed for recruitment to a service. If a viva voce test is to be carried out in a thorough and scientific manner, as it must be in order to arrive at a fair and satisfactory evaluation of the personality of a candidate, the interview must take anything between 10 to 30 minutes. In fact, Herman Finer in his book on Theory and Practice of Modern

Government points out that “the interview should last at least half an hour”. The Union Public Service Commission making selections for the Indian Administrative Service also interviews a candidate for almost half an hour. Only 11 to 12 candidates are called for interview in a day of 5½ hours. It is obvious that in the circumstances, it would be impossible to carry out a satisfactory viva voce test if such a large unmanageable number of over 1300 candidates are to be interviewed. The interviews would then tend to be casual, superficial and sloppy and the assessment made at such interviews would not correctly reflect the true measure of the personality of the candidate. Moreover, such a course would widen the area of arbitrariness, for even a candidate who is very much lower down in the list on the basis of marks obtained in the Written Examination, can, to borrow an expression used by the Division Bench, ‘gatecrash’ into the range of selection, if he is awarded unduly high marks at the viva voce examination. It has therefore always been the practice of the Union Public Service Commission to call for interview, candidates representing not more than twice or thrice the number of available vacancies. Kothari Committee’s Report on the “Recruitment Policy and Selection Methods for the Civil Services Examination” also points out, after an in-depth examination of the question as to what should be the number of candidates to be called for interview:

“The number of candidates to be called for interview, in order of the total marks in written papers, should not exceed, we think, twice the number of vacancies to be filled. . .”

Otherwise the Written Examination which is definitely more objective in its assessment than the viva voce test will lose

all meaning and credibility and the viva voce test which is to some extent subjective and discretionary in its evaluation will become the decisive factor in the process of selection. We are therefore of the view that where there is a composite test consisting of a Written Examination followed by a viva voce test, the number of candidates to be called for interview in order of the marks obtained in the Written Examination, should not exceed twice or at the highest, thrice the number of vacancies to be filled. The Haryana Public Service Commission in the present case called for interview all candidates numbering over 1300 who satisfied the minimum eligibility requirement by securing a minimum of 45% marks in the Written Examination and this was certainly not right, but we may point out that in doing so, the Haryana Public Service Commission could not be said to be actuated by any mala fide or oblique motive, because it was common ground between the parties that this was the practice which was being consistently followed by the Haryana Public Service Commission over the years and what was done in this case was nothing exceptional. The only question is whether this had any invalidating effect on the selections made by the Haryana Public Service Commission”.

(emphasis supplied)

60. Then, in **Satpal vs State of Haryana, 1995 Supp (1) SCC 206**, in the context of extremely large number of candidates namely, 400-600 called for the interview on a single date, it was observed as below:

“Now so far as the selection process is concerned, the learned counsel for the appellants invited our attention to the affidavit filed on behalf of the Board in the

High Court wherein it was stated in reply to the allegation in para 5 of the petition that about 400 candidates were called for interview daily at different places and the interviews commenced from 9.00 a.m. with a lunch break of half an hour, till late hours. It was further stated that sufficient time was devoted in interviewing each and every candidate to adjudge his/her ability and suitability for the said post. Some of the candidates could not even reply to a single question and hence very little time was taken away by such candidates. A copy of this affidavit was made available to us in the course of arguments. Our attention was also drawn to a short counter-affidavit filed by the Secretary of the Board in the present proceedings wherein it is stated in paragraph 4 that 400-600 candidates were interviewed on each day from 9.00 a.m. till late hours. From the said averments made on behalf of the Board in the present proceedings both before the High Court and this Court, it clearly emerges that on one single day as many as 400-600 candidates were interviewed by each committee appointed by the Board. Even if one were to assume that the committee devoted as many as 12 hours i.e. from 9.00 a.m. to 9.00 p.m. on a single day for interviewing candidates it would not be able to devote more than two minutes' time per candidate. Assuming for the sake of argument that as some of the candidates were not able to answer even a single question the time taken by them was brief it could not be less than a minute and, therefore, it is difficult to hold that the interviews were meaningful and purposive to enable proper assessment of the knowledge and suitability of each candidate for the post. The High Court was, therefore, right in commenting that the interviews were a mere farce or mockery and it was humanly impossible in

effectively interview as many as 400-600 candidates on a single day.”
(emphasis supplied)

61. At the same time, while considering similar challenge raised, in **Sardara Singh vs State of Punjab, (1991) 4 SCC 555**, the Supreme Court considered the ratio of its earlier four-judge bench decision in **Ashok Kumar Yadav (supra)** and found the same inapplicable to the facts brought before it. There, 821 candidates were found to have been interviewed over a period of 35 hours (as against 15 hours claimed by the petitioner in that case). On an average, interview time of 3 minutes per candidate was granted for the purpose of making selections on the post of Patwari (as Class III post). It was observed to be adequate to the extent no intervention was made for that reason. Relevant to our discussion, paragraph 6 of the report reads as below:

“6. It is next contended that there was no proper opportunity given to the appellants in the interview. Only 15 hours were spent to interview 821 candidates and the selection, therefore, is a farce. This contention also was not raised before the High Court, but raised in these appeals for the first time. In the counter filed in this Court, it was refuted. It was stated that they had spent 35 hours in total at the rate of 7 hours per day. That means they spent 5 days in selecting the candidates. The selection is for the Patwaris in the Class III service. The ratio in Ashok Kumar Yadav v. State of Haryana [(1985) 4 SCC 417 : 1986 SCC (L&S) 88 : 1985 Supp 1 SCR 657] has no application to the facts in this case. Therein the selection was to the Class I service of the State service and sufficient time was required to interview each candidate. In this case, on

calculation, we found that on an average three minutes were spent for each candidate for selection. Rule 7 of the Rules provides the qualifications, namely, pass in the Matriculation or Higher Secondary Examination; knowledge in Hindi and Punjabi up to the Middle Standard and good knowledge of rural economy and culture. The educational qualifications are apparent from record and need no interview in this regard. It could be seen that candidates normally hailing from rural backgrounds had presumptively good knowledge of rural economy and culture. Therefore, there is no need for special emphasis to ascertain their knowledge of the rural economy or culture. Under those circumstances much time need not be spent on each candidate for selection except asking some questions on general knowledge and aptitude for work as Patwari etc.”

(emphasis supplied)

63. Insofar as it is the petitioners' own case that they were offered interaction by the Interview Board “A” for 8-10 minutes and since it is not the case of the petitioners that they were not allowed any interaction with that Interview Board that they faced, per se, it is not possible to reach a conclusion that the Interview test conducted was unscientific or unreliable. In that light, we find no pleading whatsoever has been made in the writ petition to establish that the petitioners or either one of them was granted insufficient or inadequate interview time. By means of the IInd Supplementary Affidavit, only this much has been stated in paragraphs nos. 72, 73 & 74 as quoted below:

“72. I say that interview lasted hardly for five to ten minutes for each candidate including Deponents. I further say that in

course of five to ten minutes it is hardly possible to assess the capability of each candidates including Deponents. In most cases the first impression need not necessarily be the best impression. That in UPHJS 2016, more than 70 candidates have been qualified for interview. Only Two boards were constituted for more than 70 candidates for interview.

73. I say that it was not possible to conduct interview of All candidates in such a small duration. The relevant para of Appendix G (See Rule 18) in UPHJS Rules 1975 is

“The interview will be of 200 marks-

The suitability of the candidate for employment in the U.P. Higher Judicial Service will be tested with reference to his merit giving due regard to his ability, character, personality, and physique.

Notes-

(ii) The candidates securing minimum aggregate 45% marks in the Written Examination shall be called to appear in the interview subject to maximum thrice the number of vacancies category-wise.

The interview shall be in a thorough and scientific manner and shall take any thing between 25 and 30 minutes for each candidates.”

74. I say that the oral test of the interview has been much criticized on the ground of its subjectivity and uncertainty. Different interviewers have their own notions of good personality for some, it consists more in attractive physical appearance and dress rather than anything else, and with them the breezy and shiny type of candidate scores highly while the rough uncut diamonds may go unappreciated. The atmosphere of the interview is artificial and prevents some candidates from appearing at their best. Its duration is short, the few questions of the hit or miss type, which are put, may fail to reveal the real worth of the candidate.”

64. Thus, besides stating that each candidate was interviewed for 5-10 minutes and that the same was inadequate, as it may not have been enough to judge the suitability of each and every candidate selected, no fact pleading has been made to establish either that the petitioners were not subjected to any relevant questioning or that they were summarily relieved by the Interview Board without allowing them to present their best suit - in terms of their ability, character, personality etc.

65. In the absence of the petitioners having discharged that essential burden to prima facie establish before the Court - either that the line of questioning/interaction offered to them was such as may not have been relevant or that to which answers had been given as may have led to award of any higher marks, or that they were discriminated against or any such or other sustainable line of attack as may first be recognised in law (in the context of a purely subjective satisfaction drawn by the Interview Board), and as may have been substantiated, to further lead this Court to believe that any grave error of judgement had arisen owing to any hurry on the part of the Interview Board, in making its subjective assessment as to the true merit of the petitioners, we see no reason to doubt the subjective opinion formed by the Interview Board constituted by the Committee, that conducted the Interview test of the petitioners.

66. Further, there exist no pleadings to establish that the petitioners were summarily dispatched without any relevant question being put to them, to judge their suitability on the statutorily prescribed criteria. It is not to the candidates/petitioners to themselves certify their suitability at any selection test,

undergone by them, to contest the assessment of their suitability by the expert panel, to whom they had subjected themselves, for such an evaluation. It must be left best to the panel of experts to test each candidate on his merit, sufficiently. Unless some fact circumstance had been shown to exist on the face of record, as may have required a deeper scrutiny as to the fairness and completeness of the procedure followed, no interference is warranted.

67. No man may be restrained from assessing his self-worth. That he is free to do. Thus, each may believe he is more meritorious than the others. To that, the law does not offer any concern. It may only give rise a healthy competition amongst such persons/citizens. At the same time in the context of an open competitive examination that must survive the test of equality enshrined under Article 16 of the Constitution of India, any citizen/person who chooses to face such a competition, necessarily subjects himself to render proof of such belief, on the strength of a test by a third person/agency. While such a participant may not like that assessment itself, at the same time, he cannot be permitted to question the correctness of that subjective assessment, on the strength of his self-assessment.

68. The Interview test having been faced by the petitioners, in absence of any illegality or irregularity shown to exist, its result cannot be doubted on an innocent suspicion voiced by the petitioners, based on their subjective self-assessment, as to their true merit. While the Court is neither required to nor it has made any assessment of the petitioners' individual merit at the Interview test, it has no material or reason to doubt that assessment made by the Committee.

69. The pleadings as to bias and malice are scandalous rather than being objective. Wild and reckless allegations have been made against the Chairman of the Board. The petitioners have given wings to their worst imaginations and fears. As discussed above, the Committee is seen to have acted in accordance with the law in permitting certain candidates to participate at the main examination, provisionally, in compliance of the interim orders of the Supreme Court and this Court. However, all who were ineligible were removed from the final Select List.

70. As to the marks awarded to the individual candidates, upon perusal of the original record, it is disclosed that different marks have been awarded to individual candidates. Of 61 candidates called for the Interview, only 60 participated. Barring the two petitioners, 58 others have obtained pass marks or more ranging from 80-125, at the Interview test. There is nothing apparent from perusal of that record, as may ever lead this Court to even remotely suspect that marks were awarded only on a single criterion i.e., pass at 80 marks and fail below 80.

71. Per se, perusal of the marks awarded to different candidates itself indicates that the individual merit of each candidate had been assessed by the two Interview Boards, before whom any of the candidates may have appeared. Therefore, the assumption made by the petitioners is completely unfounded. It is nothing more than a suspicion, sadly, arising from the fate of failure met by the petitioners.

72. As to what followed the completion of interview process, again unsubstantiated suspicions have led the petitioners to believe, that they had been

wronged. Interview test being complete, initially, a provisional result was declared on 18.8.2017. In that, 43 candidates were found included in the Select List, in order of inter se merit, assessed by the Committee. However, in view of various interim orders operating in favour of those who had been provisionally included in that Select List and in view of the further stipulations in the various interim orders - to keep the result of such candidates in a sealed cover, names of 14 such candidates-in-litigation, were not disclosed. The result itself was described as provisional. It had to be so since the litigation with respect to 14 provisionally selected candidates included in that list was pending, on that date.

73. Undisputedly, the writ petition filed by respondent No. 4 before the Supreme Court being **Writ Petition No. 594 of 2016 (Sandeep Gupta Vs. High Court)**, came to be disposed of vide order dated 19.7.2018. It would be useful to quote that entire order, to bring an end to the doubts being expressed by the petitioners. That order reads as below:

“1. I.A. No.42562/2017 is allowed.

2. As per the advertisement dated 10.05.2016, applications were invited for filling up 72 posts in the Uttar Pradesh Higher Judicial Service along with 12 carried over vacancies against the reserved categories.

3. The writ petitioner approached this Court challenging the vires of the Rules on the ground that as per the advertisement he had crossed the age of 45 years. Pursuant to the interim order dated 22.07.2016 the candidates were permitted to participate in the selection process.

4. We are informed that only 43 candidates were successful in the final round, which includes the petitioner-

Sandeep Gupta and the intervenor-Pratima. As a matter of fact, on account of certain peculiar circumstances, the the examination of the U.P. Higher Judicial Service could not be held for the last more than three years, even though, the Rules do not contemplate so.

5. Having heard the learned counsel appearing for the petitioner, intervenor and the respondent/High Court and considering the peculiar facts and circumstances of the case, we think it fit that this Court should invoke its jurisdiction under Article 142 of the Constitution of India for doing complete justice.

6. Accordingly, this writ petition is disposed of, directing the respondent(s)/High Court to clear the results of the petitioner/Sandeep Gupta and the intervenor/Pratima. Since they have otherwise come out successful, they shall be appointed without further delay.

7. We make it clear, in order to avoid any dispute regarding seniority, that the seniority would depend on their position in the select list.

8. Since, this order is passed in the peculiar facts and circumstances of the case, it shall not be treated as a precedent.

9. The Registry of this Court is directed to send back the results received from the High Court, in a sealed cover.

10. Pending application(s), if any, shall stand disposed of.”

74. Thus, not only respondent No. 4 Sandeep Gupta but also respondent No. 5 - Ms. Pratima (in view of her I.A. No. 42562 of 2017) were granted relief by the Supreme Court. At the surface itself, that relief is traceable to the extraordinary and unique power of that Court under Article 142 of the Constitution of India, to do complete justice, in the peculiar facts of any case. That truly unique power of the

Supreme Court, bestows on it the “Midas touch” to make the rigid prescriptions of the laws yield to the pure needs of justice, in deserving facts. In no uncertain terms, the Supreme Court directed that the results of both respondent nos. 4 & 5, be declared by the High Court. Till date, neither the petitioners nor any other person has applied for recall of that order of the Supreme Court, nor the said order has been modified, till date.

75. The fact that that order was initially stayed by the Supreme Court in another proceeding and later that stay order was also vacated, is of no consequence to the dispute before us. It is only relevant to the extent that on the date of declaration of the result (final), on 01.10.2020, there did not operate any injunction against that declaration of that result. In fact, before that date, a further development (having material bearing on the present case), took place, namely, the Supreme Court passed another order dated 19.2.2020 in **Dheeraj Mor (supra)**. Thereby it clearly ruled against the 12 judicial officers who had appeared at the Written Examination and whose names had been included in the provisional select list dated 18.08.2017.

76. Thus, it was held - the requirement of seven years' continuous practice was a condition to be fulfilled on the cut-off date by any candidate seeking direct recruitment. Any judicial officer who may have been in practice before he had joined service therefore remained ineligible to apply for direct recruitment at the Uttar Pradesh Higher Judicial Service Examination. Thus, out of 14 candidates provisionally included in the result declared on 18.8.2017, 12 (i.e., all excluding respondent Nos. 4 and 5) became ineligible. They were judicial officers

whose claim had to be rejected in terms of the decision of the Supreme Court in **Dheeraj Mor (supra)**.

77. In view of the above law laid down by the Supreme Court, the provisional result declared on 18.8.2017 had to be revised by the Committee, to exclude the 12 judicial officers. It led to some new names being included and their category and inter se merit position being revised. That in turn had an immediate impact on the working of the list of candidates selected against reservation.

78. Consequently, lesser number of total candidates came to be selected. Because of the change of the merit order, not only a lesser number of candidates (37 in all) were now included in the Select List based on inter se merit but also the category under which some of those selections were made, also came to be altered. Thus, some of the candidates who were earlier included in the Reserved category in the provisional Select List, now found themselves included against Unreserved posts. Only one candidate was selected under OBC category. Remaining reserved posts remained unfilled.

79. In that regard, the notification of final result declared on 01.10.2020 reads as below:

*“THE HIGH COURT OF
JUDICATURE AT ALLAHABAD
DIRECT RECRUITMENT TO
THE UTTAR PRADESH HIGHER
JUDICIAL SERVICE-2016*

*NO. 49 / S & A Cell/2020
Dated: Allahabad : October 01, 2020
(DIRECT RECRUITMENT FROM
AMONGST THE ADVOCATES)*

Pursuant to the order dated 19.02.2020 passed by Hon'ble Supreme Court in Civil Appeal No. 1698 of 2020 arising out of S.L.P. (C) No. 14156 of 2015 Dheeraj Mor Vs. Hon'ble High Court of Delhi and other connected petition, the result of U.P. Higher Judicial Service Direct Recruitment Examination, 2016 declared on 18.08.2017 and 05.03.2019 has been revised and the following candidates, category-wise and in order of merit, have been recommended by the High Court for appointment for appointment by Direct Recruitment to the Uttar Pradesh Higher Judicial Service under Rule 5(c) read with Rule 15 of the Uttar Pradesh Higher Judicial Service Rules, 1975.

UNRESERVED CATEGORY

1.	2506	JAY PRAKASH	G E N
2	3195	MANMEET SINGH PURI	G E N
3	4420	PRATHAM KANT	G E N
4	4101	PARULJAIN [F]	G E N
5	1106	ASHOK KUMAR	G E N
6	7182	VIKAS GOSWAMI	G E N
7	5991	SATYEN RA NATH TRIPATHI	G E N

8	5445	ROHIT RAGHU WANSHI	G E N
9	5827	SANTOS H KUMAR GAUTA M	G E N
10	5019	RAKES H PANDEY	G E N
11	2465	JAINEN DRA KUMAR PANDEY	G E N
12	4424	PRATIK SHA NAGAR[F]	G E N
13	5293	RAVI KARAN SINGH	G E N
14	6754	SUREN DER KUMAR	G E N
15	7609	SANDE EP GUPTA	G E N
16	1903	DHRUV A RAI	G E N
17	224	AJAY SRIVAST AVA	G E N
18	4151	PAWAN KUMAR SHARM A	G E N
19	6104	SHAILE NDRA SACHAN	G E N
20	3106	MANMO	G

		HAN SINGH	E N
21	2343	HONEY GOEL	G E N
22	5383	REKHA SHARM A[F]	G E N
23	2526	JEETEN DRA KUMAR DWIVE DI	G E N
24	609	ANCHA L LAVANI A	G E N
25	5866	SANTOS H KUMAR TRIPAT HI	G E N
26	7200	VIKAS SRIVAST AVA	G E N
27	6223	SHASH I	G E N
28	4425	PRATIM A[F]	G E N
29	4622	RAHUL MISHRA	G E N
30	7129	VIJAY KUMAR HIMANS HU	G E N
31	7544	YOGES H KUMAR	G E N
32	4150	PAWAN	G

		<i>KUMAR SHARM A</i>	<i>E N</i>
33	521	<i>AMIT VERMA</i>	<i>O B C</i>
34	7116	<i>VIJAY KUMAR</i>	<i>O B C</i>
35	6808	<i>SUIRES H KUMAR GUPTA</i>	<i>O B C</i>
36	7450	<i>VIVEK KUMAR</i>	<i>O B C</i>

O.B.C. CATEGORY

1.	6141	<i>SHAKIR HASAN</i>

***Note:** Names of 05 OBC category candidates have been included in the list of unreserved category candidates on the basis of their marks in the Written Examination and Interview and they are being treated as unreserved category candidates.*

**(Ajai Kumar Srivastava-I)
Registrar General ”**

80. Clearly, the doubts being voiced by the petitioners as to manipulation in the result are completely unfounded. The record (as has also been seen by the petitioners during the hearing, both with respect to the result as also with respect to the resolution dated 23.3.2017), clearly reflects otherwise.

81. As to the claim made by petitioner No. 1 on the strength of parity with respondent Nos. 4 and 5, it has to be rejected for the simple reason that that parity was not granted by the Committee on exercise of its own discretion rather, the Committee had only given effect to the order passed by the Supreme Court under Article 142 of the Constitution of India. Not one candidate is shown to have been granted age relaxation, by way of law laid down by any court or by way of any entitlement in law or by way of concession, otherwise granted.

82. The law on the subject remains otherwise inasmuch as in **Hirandra Kumar Vs. High Court of Judicature at Allahabad and Another (2020) 17 SCC 401**, similar claim made by Hirandra Kumar, a candidate who had appeared at the HJS Examination 2018 was repelled by the Supreme Court and the parity sought by that petitioner with **Sandeep Gupta Vs. High Court of Judicature at Allahabad (supra)**, was declined for the reason that the said decision did not constitute binding precedent, it having been made in exercise of extraordinary powers of the Supreme Court, under Article 142 of the Constitution.

83. The contention of the petitioners, advanced on the strength of the decision of the division bench in **Suraj Bali Singh Vs. High Court of Allahabad (supra)** is also of no relevance in view of the law declared by the Supreme Court in **Hirandra Kumar (supra)**.

84. We also do not find any merit in the submission advanced by the petitioners that any invalidity arose in the selection process owing to Shri Krishna Kumar being allowed to participate in the selection

process, provisionally. As has been noted above, at the relevant time, the position in law was unclear. It became clear upon the subsequent pronouncements made by this Court and the Supreme Court. Insofar as no right accrued to Shri Krishna Kumar, contrary to any law declared by any Court and insofar as he remains an unsuccessful candidate, we find no good ground to interfere on the plea set up by the petitioners.

85. Much emphasis was also laid to the fact that respondent No. 5 did not withdraw the writ petition and chose to file an I.A. before the Supreme Court in the writ proceedings instituted by respondent No. 4. While that may have been the conduct offered by respondent No.5 before the Supreme Court, it is not for this Court, to examine that issue any further. Here, petitioners claim to have been wrongly declared unsuccessful at the Interview test. If at all, that issue should have been raised before the Supreme Court. What prevailed with the Supreme Court that had led to the order being passed by it, is not for this Court to consider, in these proceedings. That litigation having reached a fair end and the order passed therein having attained finality, the issue being raised by the petitioners is found to be non-existent, at present.

86. Insofar as the other respondents are concerned, it is undisputed case of the petitioners that their names were excluded in the result declared by the Selection Committee. That exclusion was enforced upon decision of the Supreme Court in **Dheeraj Mor (supra)**.

87. No further issue survives for consideration, in the present proceedings.

88. In view of the discussions made above, no illegality either fundamental or real is seen to have been committed in the entire selection process as may warrant any interference by this Court. The principle being invoked by the petitioners on the strength of the decision of the Supreme Court in **Dalpat Abasaheb Solunke and Ors. Vs. Dr. B.S. Mahajan and Ors. (1990) 1 SCC 305**, is therefore wholly inapplicable.

89. The writ petition lacks merit and is accordingly **dismissed**. Since the petitioners are practicing lawyers, no order as to costs.

(2023) 8 ILRA 1022
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.08.2023

BEFORE

THE HON'BLE VIKAS BUDHWAR, J.

Writ-A No. 61055 of 2016

Ram Krishna @ Ram Krishna Yadav
...Petitioner
Versus
I.O.C. & Ors. ...Respondents

Counsel for the Petitioner:
 Sri Rahul Sripat, Sri Siddharth Khare, Sri Ashok Khare (Sr. Advocate)

Counsel for the Respondents:
 Sri Prakash Padia, Sri Anand Tiwari

Service Law – Discipline and Appeal Rules, 1980 – Rules 26, 31 & 38 - Disciplinary Proceedings – Confessional Statement – CCTV Footage – Natural Justice – Conduct -- Evidence Act, 1872 – Sections 65A, 65B – Validity of Dismissal Order – Requirement of Reasoned Orders by Disciplinary and Appellate Authorities

Facts: The petitioner, an Operations Officer at Indian Oil Corporation's Bitumen Drum Filling Plant (BDFP), Mathura, was dismissed from service following allegations of misconduct involving the theft of 184 bitumen drums. The charges were based on an alleged oral confession made on 17.02.2015 before police in the presence of three prosecution witnesses and manipulation of CCTV footage. The petitioner denied the charges, alleging torture and coerced confession. The inquiry officer found the charges partially proved, and the Disciplinary Authority, after issuing a disagreement note, dismissed the petitioner on 01.08.2016. The Appellate Authority rejected the appeal on 02.12.2016. The petitioner challenged both orders, contending that the inquiry was defective, the confession was not proved, and the orders lacked reasoning.

Held: The court held that the inquiry proceedings were defective due to: (i) the absence of the alleged confessional statement as an exhibit and failure to produce police officials as witnesses to corroborate the confession; (ii) the prosecution witnesses' admission of threatening language used during interrogation and the petitioner's distressed statement, suggesting coercion; (iii) failure to produce the Security Supervisor to whom the keys were allegedly handed; and (iv) lack of certification of CCTV footage as required under Sections 65A and 65B of the Evidence Act, 1872. The petitioner was placed under suspension, with directions for payment of subsistence allowance, and consequential benefits were made subject to the inquiry's outcome.

Writ Petition Partly Allowed.

Case Law Discussed:

1. Roop Singh Negi Vs PNB (2009) 2 SCC 570
2. Yaswant Redkar Vs Hindustan Petroleum Ltd. (1998) 3 Bom CR 743
3. R.P. Bhatt Vs U.O.I.(1986) 2 SCC 651
4. Ram Chander Vs U.O.I.(1986) 3 SCC 103
5. Divisional Forest Officer Vs Madhusudhan Rao (2008) 3 SCC 469

6. Arjun Panditrao Khotkar Vs Kailash Kushanrao Gorantyal (2020) 7 SCC 1

7. Ravindra Singh Vs St. of Pun. (2022) 7 SCC 581

8. K.L. Sinha Vs St. of Mysore (1976) 3 SCC 766

9. St. of Haryana Vs Ratan Singh (1977) 2 SCC 491

10. J.D. Jain Vs Management of S.B.I.(1992) 1 SCC 143

11. Workmen of Balmadi Est.s Vs Management (2008) 4 SCC 517

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Heard Sri Ashok Khare learned Senior Counsel assisted by Sri Siddharth Khare learned counsel for the petitioner and Sri Anand Tiwari learned counsel for the respondents.

2. Briefly stated facts shorn of unnecessary details as worded in the writ petition are that pursuant to the selections conducted by the Indian Oil Corporation Ltd., Indian Oil Bhawan G-9 Ali Yavar Jung Marg, Bandra (East), Mumbai, Maharatna (in short respondent Corporation) under the financial aegis of the Union of India, Ministry of Petroleum and Natural Gas, the petitioner was selected as a Steno/Typist and was accorded appointment on 15.03.1999. It is further the case of the writ petitioner that the writ petitioner was promoted on 30.07.2012 as Sales Officer and was posted at Azamgarh and subsequently on 05.05.2014 he was transferred from Azamgarh to Mathura Terminal "A" as Operation Officer and he assumed the charge on the said date in Bitumen Plant in Mathura.

3. According to the writ petitioner while he was posted as Operation Officer

BDFP, Mathura Emp. No. 30090 on “B” shift duty in the plant on 13.02.2015 from 2:00 P.M. To 10:00 P.M., he after completing his duty hours on the said date at 10:00 P.M. along with the Security Supervisor sealed the locks of the gates as per the rules, however, it is alleged that a theft took place of 184 drums containing Bitumen and the matter was reported in the morning on 14.02.2015.

4. It is further the case of the writ petitioner that on 17.02.2015 the writ petitioner along with Amrit Lal Gupta, Operation Officer, Dipanjan Barai, Plant Incharge and Girija Shankar, Deputy General Manager were called at Police Station, Mathura Refinery, Mathura and the writ petitioner was put to third degree torture and signatures of the writ petitioner were taken on a blank sheet against his wishes and he was arrested formally on 18.02.2015 in Case Crime No. 110 of 2015 under Section 380, 381, 411, 120B I.P.C. P.S. Refinery Mathura and thereafter the writ petitioner was languished in jail. Ultimately the Courts came in his rescue and he was released from judicial custody on 04.08.2015. The criminal trial is going on before the Judicial Magistrate, Mathura in Case Crime No. 667 of 2015.

5. Alleging, indulging in an act which led to theft of corporation's property from the premises entailing financial loss and tarnishing the image of the corporation, in exercise of the provisions under Rule 26, sub-rule 1(a) of the Conduct, Discipline and Appeal Rules, 1980 of the Indian Oil Corporation the writ petitioner was placed under suspension on 18.02.2015 by the third respondent, General Manager, Incharge, U.P.S.O. II, Indian Oil Corporation Ltd, Indian Oil Bhawan, E-8, Sector 1, NOIDA, Gautam Buddh Nagar.

As per the records on 07.08.2015 the ED U.P. SO-II Competent and Disciplinary Authority thereafter reviewed the suspension while continuing the suspension which has already been made with effect from 18.02.2015. A charge sheet was issued to the writ petitioner on 31.08.2015 containing as many as two charges relatable to the allegation that while he was posted as Operation Officer from May, 2014 till February, 2015 at BDFP, Mathura on “B” shift duty at the plant on 13.02.2015 as per the standard procedure upon closure of “B” shift, required to close the gates with key under his custody and also seal the gate with unique number plastic seals and paper seal under signature is required to be posted on the key-whole over the locks containing signature of “B” shift officer as well as security supervisor on duty and keys of the locks was supposed to be retained with the outgoing officer and in the morning “A” shift officer is required to check lock paper seal lock and unique number, plastic seal on the gate with record of provision of the same by night shift officer and open the lock with the key available with him but the writ petitioner violated the said standard procedure and handed over the main gate key to Sri Bhagwan Singh Security Supervisor after conclusion of “B” shift duty on 13.02.2015 and he collected the keys from Bhagwan Singh afterwards. As regard the second statement of imputation in the shape of the charge No. 2 it is alleged that CCTV footage of Cam 05 located near CRMB zone shows unwarranted entry and exit of two trucks on 14.02.2015 morning hours between 00:18 hours and 2:18:19 hours establishing unwarranted movement of trucks within the plant premises on the early morning hours of 14.02.2015 and it was also observed that other CCTV cameras were also disturbed with their direction facing upward to ensure

that no recording of ground movement could have seen. On account of the said acts and omissions 184 numbers of filled drums containing Bitumen were stolen. The said charge also depicts that the writ petitioner made a confession to the Police on 17.02.2015 in the presence of Sri Girja Shankar DGM (RC), Mathura, Sri Dipanjan Barai, Plant Incharge, BDFP, Mathura and Sri Amrit Lal Gupta AM (RC) of handing over the keys to Sri Bhagwan Singh Security Supervisor BDFP, Mathura and collecting the same from him, which even otherwise shows that the petitioner had admitted his guilt by means of the confession.

6. In order to bring home the charges as many as 9 documents were exhibited and the prosecution produced (a) Sri Girija Shankar, DGM (RC), Mathura; (b) Sri Amrit Lal Gupta, AM (RC), BDFP, Mathura; (c) Sri Dipanjan Barai Deputy MGR (ENGG), Durgapur DO; (d) any other witness considered necessary during the inquiry proceedings.

7. Petitioner claims to have been shocked and surprised to receive for charge memo, tendered his reply/objection on the same on 27.09.2015 denying the allegations contained in the charge sheet dated 31.08.2015 coming up with stand that the writ petitioner is innocent and the charges so sought to be levelled upon him had no leg to stand and he has not committed misconduct. In the said reply it was also stated that the writ petitioner at no point of time had handed over the keys to Sri Bhagwan Singh, Security Supervisor and since other employees of the corporation were also having keys of the depot in question, thus, the theft, if any, might have been occurred due to their fault and he had not manipulated the CCTV Camera so as to

mask the alleged activity of commission of theft and also specifically denied that he had at no point of time made a confession before the Police Authorities in the presence of prosecution witness that he handed over the key and he was negligent and he had committed the said misconduct.

8. Consequent to the service of charge sheet and submission of the reply by the writ petitioner denying the charges the Competent Disciplinary Authority appointed one Sri Shailesh Kumar Singh, the then Chief Terminal Manager, Agra (TOP) as Inquiry Officer (IO) and Sri Gaurav Gupta Deputy Mgr (P), Mathura BP as presenting officer.

9. The inquiry officer proceeded with the inquiry while fixing number of dates. The Inquiry Officer after conducting the inquiry tendered his report before the competent disciplinary authority on 20.05.2016 holding that charge Nos. 1 and 2 being partly proved.

10. On 13.06.2016 the General Manager/IC U.P.S.O. II Competent Disciplinary Authority, third respondent issued a disagreement note containing the reasons for disagreement putting the writ petitioner to notice to submit its objection against the same. The writ petitioner claims to have submitted his writing representation/objection against disagreement note dated 13.06.2016 on 20.07.2016.

11. The third respondent General Manager, Incharge, U.P.S.O. II, Indian Oil Corporation Ltd, Indian Oil Bhawan, E-8, Sector 1, NOIDA, Gautam Buddh Nagar thereafter proceeded to pass an order dated 01.08.2016, whereby the punishment of dismissal was imposed upon the writ petitioner.

12. The writ petitioner being aggrieved against the same preferred a statutory appeal on 04.10.2016 before the Appellate Authority, second respondent Executive Director Incharge (Supplies), Indian Oil Corporation Ltd., Indian Oil Bhawan G-9, Ali Yavar Jung Marg, Bandra (East), Mumbai which came to be rejected by the second respondent, Executive Director Incharge (Supplies), Indian Oil Corporation Ltd., Indian Oil Bhawan G-9, Ali Yavar Jung Marg, Bandra (East), Mumbai on 02.12.2016.

13. Questioning the orders dated 01.08.2016 passed by the third respondent General Manager, Incharge, U.P.S.O. II, Indian Oil Corporation Ltd, Indian Oil Bhawan, E-8, Sector 1, NOIDA, Gautam Buddh Nagar, dismissing the writ petitioner from service as well as the order dated 02.12.2016 passed by the second respondent Executive Director Incharge (Supplies), Indian Oil Corporation Ltd., Indian Oil Bhawan G-9, Ali Yavar Jung Marg, Bandra (East) rejecting the appeal the writ petitioner has filed the present writ petition and has further sought a direction to the respondents to permit the writ petitioner to continue in service while reinstating with full benefits.

14. This Court entertained the writ petitioner on 22.12.2016 requiring the respondents herein to file their response.

15. A counter affidavit has been filed on behalf of respondents No. 1 to 4 sworn on 07.10.2021 by the Senior Manager (Employee Relations) Indian Oil Corporation Ltd. to which the writ petitioner has filed his rejoinder affidavit also. A supplementary affidavit has also been filed by the writ petitioner which is on record.

16. Before embarking an inquiry upon the arguments advanced by the rival parties with relation to the legality and validity of the orders impugned in the writ petition it would be apposite to notice not only the statutory provisions but also the contents of charge memorandum, reply as well as finding recorded by the Disciplinary and the Appellate Authorities (Relevant Extracts).-

Statement of the imputation of charges against Sri Ram Krishna Yadav (petitioner) dated 31.08.2015:

Ref. No.: IR/R(30090)

Statement of the imputation in support of the Articles of Charge framed in respect of Shri Ram Krishna Yadav, Emp No. 30090, Operations Officer, BDFP, Mathura (under suspension).

It is alleged that Shri Ram Krishna Yadav, Emp No. 30090 while posted as Operations Officer, from May 2014 till February 2015 at BDFP, Mathura, committed the following acts of omission and commission. The imputations are narrated below:

1. That Shri Ram Krishna Yadav, Emp No. 30090, Operations Officer, BDFP Mathura was on 'B' shift duty at the plant on 13.02.2015. As per standard procedure upon closure of 'B' shift the officer on duty is required to close the gates with key under his custody and also seal the gate with unique number plastic seals. Paper seal under signature is also required to be pasted on the keyhole cover of the locks, containing signature of "B" shift officer as well as the Security Supervisor on duty. Keys of the locks were supposed to be retained with the outgoing officer. In the morning 'A' shift officer is required to check lock, paper seal on lock, and unique no. plastic seal on gate with record of provision of the same by night shift officer

and open the lock with the key available with him.

However, Shri Ram Krishna Yadav violated the standard procedure and handed over the keys of the main gate to the Shri Bhagwan Singh, Security Supervisor after conclusion of his "B" shift duty on 13.02.2015. He collected the keys from Shri Bhagwan Singh afterwards.

Thus Shri Ram Krishna Yadav had violated the standard procedure in handling the keys of the main gate of the plant.

2. That CCTV footage of CAM 05 located near CRMB shows unwarranted entry and exit of two trucks on 14.02.2015 morning hours between 00.18 hours and 02:18:19 hrs establishing unwarranted movement of trucks within the plant premises on the early morning hours of 14.02.2015. It was also observed that the other CCTV cameras of the plant were also disturbed with their directions facing upwards to ensure that no recording of the ground movement could be seen. Upon taking inventory of the plant on the evening of 14.02.2015 it was observed that there was a shortage of 184 nos. of drums.

The sequence of events establishes the fact that the act of handing over the keys by Shri Ram Krishna Yadav to the Security Supervisor before leaving the plant on the closure of 'B' shift had resulted in the theft of around 184 nos of filled bitumen drums from the plant on the night of 13.02.2015/14.02.2015. It also points to involvement of Shri Ram Krishna Yadav in the alleged theft of 184 nos of filled drums from the BDFP Plant on the night of 13/14.02.2015. The news clippings appearing in the news daily also points out to the fact that Shri Ram Krishna Yadav was also involved in the alleged theft.

Further, Shri Ram Krishna Yadav had made a confession to the police on 17.02.2015 in presence of Shri Girija

Shankar, DGM(RC), Mathura, Shri Dipanajan Barai, Plant Manager, BDFP Mathura and Shri Amrit Lal Gupta, AM(RC), Mathura of handing over the keys to Shri Bhagwan Singh, Security Supervisor before leaving BDFP Mathura and collecting the same from him afterwards.

The confession made by Shri Ram Krishna Yadav of handing over the keys without following due procedure coupled with the sequence of events which includes tampering with the CCTV cameras, unwarranted movement of trucks within the premises in the night/morning of 13/14.02.2015 indicates connivance of Shri Ram Krishna Yadav in the alleged theft of around 184 filled bitumen drums from the plant thereby resulting in loss to the property of the Corporation.

Thus Shri Ram Krishna Yadav handed over the keys which are in violation of the standard procedure with an ulterior motive thereby resulting in theft of around 184 nos of filled bitumen drums from the plant on the night of 13.02.2015 which has led to loss to the property of the Corporation. Further, the CCTV cameras of the plant were also disturbed to ensure that no recording of the ground movement could be seen."

List of documents in the form of the exhibit proposed to be relied upon by the prosecution:

- 1. Report on physical inventory of Drums done on 14.02.2015.*
- 2. Statement dated 11.08.2015 of Sri Girija Shankar, DGM (RC), Mathura.*
- 3. Statement dated 11.08.2015 of Sri Amrit Lal Gupta, AM (RC), BDFP, Mathura.*
- 4. Investigation Report ref. MRT/Theft dated 16.02.2015.*

5. Attendance Register for the month of February, 2015.

6. Letter ref. Nil dated 15.02.2015 addressed to Police Incharge, Police Station, Mathura Refinery.

7. Police charge sheet No. 80/2015 dated 12.04.2015.

8. CCTV footage from CAM 5.

9. Any other document/s considered necessary during the course of departmental inquiry proceedings.

List of witnesses relied upon by the prosecution:

(a) Sri Girija Shankar, DGM (RC), Mathura;

(b) Sri Amrit Lal Gupta, AM (RC), BDFP, Mathura;

(c) Sri Dipanjan Barai Deputy MGR (ENGG), Durgapur DO;

(d) any other witness considered necessary during the inquiry proceedings.

Reply of the petitioner dated 27.09.2015 to the charge sheet dated 31.08.2015:

REPLY OF ALLEGATION NO. 1

This is to confirm you that I had ensured proper locking of both the Main Gates (In/Out) which was properly recorded in the Seal Book and seals bearing unique plastic Seal No. 5401662 (Big/Main Gate No.1) and seal No. 5401695 (Big/Main Gate No.2) as well as Paper Seal was properly done on both the Gates before I had left the premises on 13/02/2015. This is to further confirm that I did not hand over the keys available with me to Shri Bhagwan Singh, Security Supervisor and I also did not have any relationship to him. It may also kindly be noted that keys were available with other officers also in addition to the copy of

Master Keys for opening and closing these locks.

REPLY OF ALLEGATION NO. 2

I was deployed in "B" shift and my duty was 22:00 hours only on 12.02.2015 therefore, I am not in a position to comments on the movements of Trucks between 00:18 hours and 2:18:19 hours. Sir, the BDF Plant is having a provision of CCTV Cameras so it can be clearly seen with the help of footage of other Cameras that I did not indulge in disturbing the position of the Cameras.

This is to also confirm that I do not have any knowledge of disturbing the position of the Cameras at all and how the same was done. I did participate in the physical Inventory of the drums but theoretical availability was recorded based on the inventory available with other officers of the Plant. Physical Inventory commenced at about 23:00 hours on 14.02.2015 and continued till next day early morning i.e. 15.02.2015 at 2:00 hours.

I have already mentioned that I have not handed over the keys to the Security Supervisor, It is further stated that I have no contribution towards news clippings.

I was badly beaten by the Police including application of electric shock to ensure forceful confession from me. I shall be reiterating the truth of not handing over the keys before the Hon'ble Court in due course including torture by the Police to get confession under extreme torture, threat and electric shock.

I have already confirmed that I did not give the keys to Security Supervisor and did not indulge in tampering with CCTV cameras and I am not in a position to comments of the Trucks in the night/morning of 13/14.02.2015 as because

I had already left the Bitumen Plant at 22:00 hours.

It is also to convey you that BDFP was under watch and ward of security personnel under "C" shift i.e. 22:00 hours to 06:00 hours am. No employee of the Corporation was available during night/"C" shift of the Plant. I was not on the duty at that time and hence all the charges served upon me are based on speculation, make me a scape-goat and forceful confession obtained by Police.

Sir, I would like to inform you that I have never been involved/indulged in any unlawful activities for more than 15 years of my service in the Corporation. I have always followed the highest level of moral standards along with Integrity, Dignity and devotion to the duties, followed orders/instructions word by word with responsibilities and accountabilities. Sir, I have also worked with highest level of authorities at State Office level and keeping the records of very sensitive nature/confidential along with keys of Almirah but there has not been any single such instance of allegation.

I may humbly request you to be exonerate from all the charges and kindly may also revoke my suspension.

Relevant extract of the inquiry proceedings dated 15.12.2015:

Examination-in-chief of P.W. 1 Sri Giriji Shankar, DGM (CR), Mathura by Presenting Officer:

Q 10: Were you called at Mathura Refinery Police Station on 17.02.2015? what happened there?

A10: Four persons from BDFP Plant/DGM (RC), Mathura office were called in Mathura Police Station Refinery on 17.02.2015. Myself, Sh. Dipanjan Barai then PM BDFP, Mathura, Sh. Girija Shankar DGM (RC), Mathura and Sh. Ram

Krishna Yadav (CSE) Ops Officer, BDFP, Mathura, SSP Mathura was present in Mathura Refinery Police Station at that time Sh. Bhagwan Singh security supervisor was already present there, SSP Mathura asked us to introduce ourselves, CSE and Security Supervisor were taken for questioning by Police.

When CSE returned he accepted in front of DGM (RC), Mathura, myself and Sri Dipanjan Barai gave the key of main gate to security supervisor on 13.02.2015 night.

Q 11: Did CSE accept his involvement in front of the Police regarding the theft that took place of 184 number of bitumen drums that took place at BDFP, Mathura in the night of 13.02.2015 and morning of 14.02.2015?

A 11: Yes, he confessed he was involved in the theft in BDFP, Mathura on 13.02.2015 night and that he had handed over the keys of the main gate to security supervisor Sh. Bhagwan Singh on 13.02.2015 night in front of Police, myself Sh. Dipanjan Barai and Girija Shankar.

Cross examination of P.W. 1, Girija Shankar DGM (RC), Mathura dated 15.12.2015.

Q 5: Was any manhandling done of Police while questioning CSE in front of you?

A5: No man handling was done but CSE was questioned in threatening language. Q 6: Do you remember what Police asked the CSE?

A 6: No, I don't remember exactly.

Q 7: When CSE was taken away by the Police for some time and when he returned did he appear to you he had been man handled?

A 7: I do not know exactly what happened inside but he came out weeping.

Q 8: When verbal confession was obtained from CSE Police in front of you after CSE came out from inside was any manhandling done?

A 8: No manhandling was done but in order to threatening language was used.

Examination-in-chief of P.W. 2 Sri Amrit Lal Gupta AM (RC) BDFP, Mathura dated 18.01.2016.

Q 7: Were you called at Mathura Refinery Police Station on 17.02.2015? What happened there?

*A 7: Yes, I received a call from DGM (RC) on 17.02.2015 morning to report to Mathura Refinery Police Station as he received a call from Mathura Refinery Police Station. I along with DGM (RC) Mathura and Amrit Lal Gupta, AM (RC) reported at Mathura Refinery Police Station around 11:00 hours CSE reached there after 10-15 mins. **P.W. 2: Examination-in-chief of P.W. 2 dated 18.01.2016***

Q 4: Did any Police official other than SSP also interrogated CSE inside Police Station?

A 4: Other senior officials were also present but mainly SSP, Mathura was interrogating with us.

Q 5: Was CSE taken away for some time for interrogation within the Police Station?

A 5: Yes, he was taken away out of the cabin of 2-3 minutes.

Relevant extract of the inquiry report dated 20.05.2016.-

“Indian Oil Corporation Limited
(Marketing Division)

Ref: EO/SKS/2015-16/RKY/30090

Subject: Enquiry Officer's Report on Disciplinary Enquiry against shri Ram Krishna, Employee No. 30090, 00 U/S,

Mathura Terminal A, Charge sheet reference: IR/R(30090) dtd 31.08.2015.

DE in his summing up report has also submitted that CSE was tortured and confession was extracted from him by police under duress which has been denied by CSE, which is yet to pass the judicial scrutiny, does not prove the involvement of CSE.

All the witnesses presented by the PO confirmed confession by the CSE in Mathura Refinery Police Station in their presence of handing over the keys to the Security Supervisor, Shri Bhagwan Singh on 13.02.2015 by the CSE. They also confirmed in their deposition that the CSE was taken away from the room, where they were sitting together in front of Police officials, for some time and after returning the CSE confessed the handing over of the keys. PW1 in his deposition has confirmed in cross examination that the CSE came out weeping. The question and answer is reproduced below:

Q7: When CSE was taken away by the police for some time and when he returned did it appear to you he was manhandled?

A7: I don't know exactly what happened inside but he came out weeping.

Hence after examining the exhibits and deposition by the witnesses the charge is only partially” proved.”

Charge No. 2:

“Tilting of camera was done in the night of 13-14.02.2015 is also conclusively proved through the recordings and analysis of CCTV footage. At least two of them (CAM 27 and CAM 31) were tilted when the SCE was present in the BDFP plant. Since theft took place on the same night hence the position of cameras was disturbed so that ground movement could not be recorded. Hence this charge no. 2 is also partially proved.

Conclusion: In view of the facts presented through exhibits, deposition of witnesses and findings and conclusion against each charge, it is concluded that both the charges leveled against the CSE has been partially established."

Relevant extract of the disagreement note dated 13.06.2016:

"1. Shri Amrit Lal Gupta, AM(T), Mathura Terminal(PW-1), Shri Dipankan Barai, the then BDFP. incharge now Dy.Manager(Engg), Durgapur BP(PW-2) and Shri Girija Shankar, DGM(RC), Mathura (PW-3) have clearly stated that they were present in the police station when Shri Ram Krishna Yadav had admitted of handing over the keys to Shri Bhagwan Singh, Security Supervisor on 13.02.2015. All three have confirmed that Shri Ram Krishna was taken away from the room and after returning he had confessed to handing over the keys of the main gate to the security supervisor Shri Bhagwan Singh on 13.02.2015.

Shri Ram Krishna in his defense has said that he was tortured and confession was extracted from him by police under duress. In his deposition dated 21.03.2016 he has inter alia stated that "The SSP told me that he is not saying correct and asked the SHO and other policeman to take me inside another room. When I reached there they removed my clothes and started beating me with stick and "patta"(a type of belt), they continued to beat me for 15-20 mins. When I got unconscious they sprinkled water on. my face and then gave me tea to drink. After drinking tea they asked me to tell correct version of the incident, when I repeatedly told that I am not involved in the incident and I do not know who is involved then they used electric shock on my private parts. After

that they took me back to SSP. SSP again asked me to tell the correct version. SSP Mathura also told me that other officials of Indian Oil sitting in the room are not lying and you tell the truth/correct version. After that SHO and CO started to beat me in front of everyone. After that I told SSP that I am not involved in the theft but in order to avoid further torture I told her to write whatever she wants. Then one policeman came with a piece of blank paper and took my signature on it.

The version of Shri Ram Krishna Yadav that he was tortured has not been corroborated by the prosecution witnesses. In this regard PW1 in his deposition has confirmed that when CSE returned to the room he was weeping. In response to Q8 whether any manhandling was done PW-1 had deposed that "no manhandling was done but threatening language was used".

Representation of the writ petitioner dated 20.07.2016 to the disagreement note dated 20.05.2016:

"This particular fact/alleged confession cannot be treated true due to the following reasons:-

(a) the CSE denied any such purporting confession of handing over keys to Security Supervisor, Shri Bhagwan Singh.

(b) The CSE was tortured by the Police, it is a well proved fact.

(c) The alleged purporting confession in Mathura Refinery Police Station is nothing but a concocted story of PW-1, PW-2 and PW-3 and other management officials of RC/BDFP, Mathura Refinery which has no factual or legal footing as per Evidence Act."

Order dated 01.08.2016 dismissing the writ petitioner from service passed

by the Competent Disciplinary Authority:

“Having applied my mind, and taking into consideration the fact and circumstances as brought out on records, I agree with the findings of the Enquiry Officer and find you guilty of the following acts of misconduct:-

7(1) Theft, fraud or dishonesty in connection with the business or property of the Corporation

7(5) Acting in a manner prejudicial to the interests of the Corporation

7(9) Neglect of work or negligence in the performance of duty

7(10) Causing damage to any property of the Corporation either willfully or through negligence

Taking into consideration the gravity of the act of misconduct proved against you, I hereby inflict upon you the penalty of “Dismissal” as a measure of disciplinary action.

You are further informed that as per provision contained in Rule 38 of the Conduct, Discipline & Appeal Rules, 1980 of the Corporation, you may, if you so desires, prefer an appeal against the order of penalty within 60 days from the date of receipt of this order. The appeal may be addressed to the Appellate Authority through the undersigned.”

Memo of Appeal dated 04.10.2016:

ARGUMENTS IN APPEAL:-

A (I) That I (CSE/Appellant) denied any such purporting confession of handing over the keys to Security Supervisor, Shri Bhagwan Singh or any other security persons.

ii) That I (CSE/Appellant) was tortured by the Police, it is a well proved fact.

iii) That I (CSE/Appellant) denied all the Charges fully during proceedings.

D (ii) As the prosecution/management witnesses are also telling a lie and fabricated statements that alleged confession was made by me (CSE/Appellant). Whereas, P.W.-3 in his cross examination on 02.03.2016 Q2 & A2: said “..... but Security Supervisor Sh. Bhagwan Singh confessed in the Police Station in front of all officers of IOCL present there...”

(iii) Moverover, the alleged confession by these witnesses was concocted story and against the documentary evidence. The PO/management was bound to produce recorded alleged/purported confessional statement during the proceedings but failed to produce the same and hence, no penalty/punishment can be awarded on the basis of any such oral evidence/statements against the documentary evidence.

(iv) It means and proves that on 17.02.2015 no confession/alleged confession/confession statements was made as alleged by above three prosecution/management witnesses.

M (i) Unauthentic and selective video footage of only two/three cameras were shown by PO out of 34 CCTV cameras installed in Bitumen Plant as per PE-7. But only two or three video footage contains CD shown in proceedings and other footage categorically had not been shown during enquiry as more footage had been hidden due to some vested interest of said witnesses. No officer who was monitoring CCTV cameras/their maintenance was produced for his observation/cross examination, which itself a doubtful/suspicion. No conclusion could be drawn on the basis of such CCTV footage nor may it be treated as evidence in the proceedings.

(ii) CCTV footage which was presented as evidence has not been compared with the original nor a certificate

of original/authenticity has been produced by PO/Management during departmental inquiry. Moreover, such footage neither could prove anything nor did it have any evidentiary value.

(iii) It is not possible for a prudent person that when he was present in a room then he could not see the activities outside any away from the room. Neither a person can see behind his back nor can do anything."

Appellate Order dated 02.12.2016:

"(8) With regard to your contentions in your appeal, I find that :

i Inquiry proceedings were held on 02.11.2015, 26.11.2015, 15.12.2015, 18.01.2016, 02.03.2016 and 21.03.2016.

ii 3 Management Witnesses and 11 prosecution exhibits i.e. PW 1 to PW 3 and PE 1 to PE 11 were produced during the Inquiry proceedings.

Iii Defense has presented DW1 as witness and DE1 as defense exhibit.

iv The inquiry has been held as per Rule 31 of the CDA Rules, 1980 and in compliance to natural justice.

v. After denial of the charges by you, the facility of defending was provided to you and you chose Shri Asim Tiwari, CM (RS), UPSO II as your Defending Employee.

vi. Inquiry was held in your presence and in the presence of DE including submission of evidences and adducing witnesses. Examination and cross examination of all witnesses were held.

Vii. The requested documents were made available to you during the inquiry held on 15.12.2015.

viii All 3 Management Witnesses adduced in the inquiry proceedings have mentioned that you had confessed to the Investigation Officer in the Police Station in front of them that after closure of B shift

on 13.02.2015, you handed over the keys of the Main Gate of BDFP Mathura to Shri Bhagwan Singh, the Security Supervisor and that Shri Bahgwan Singh returned the keys to you next day early morning somewhere near Mathura Refinery Township.

ix During cross examination of the 3 Management Witnesses nothing has come on record to refute the evidence adduced by the said witnesses.

x. During the inquiry held on 21.03.2016, to a question of Inquiry Officer (IO) to Defending Employee (DE), DE has mentioned that "I do not have any other witnesses and with above I conclude my presentation".

xi. Further to a question of IO to you, you have mentioned that "I would like to say that I am not involved in this incidence and the charges against me are not correct. Hence I request you for justice". Thereafter IO advised to submit Summing Up and accordingly PO and you/DE submitted Summing UP.

Xii. CDA while taking a view on the findings of the Inquiry Officer by a detailed order has differed with the findings of the Inquiry Officer which was furnished to you for submitting your written representation.

Xiii. The CDA vide final order dated 01.08.2016 has passed a reasoned speaking order and inflicted the penalty of 'Dismissal' upon you.

I have applied my mind and I find that you have not brought out any new facts/ circumstances in your Appeal dated 04.10.2016, which may warrant my interference with the Final Order of the CDA dated 01.08.2016. Further the penalty of "Dismissal" is found to be just and proportionate to the proved acts of misconduct committed by you. Accordingly, I hereby reject your appeal."

Rule 26 of the Conduct, Discipline and Appeal Rules, 1980:

Rule 26 Suspension

(1) The Disciplinary Authority or any other authority empowered in that behalf by the Management by general or special order may place an employee under suspension.-

(a) where a disciplinary proceeding against him is contemplated or is pending; or

(b) where a case against him in respect of any criminal offence is under investigation or trial.

(2) An employee who is detained in police custody, whether on a criminal charge or otherwise, for a period exceeding 48 hours shall be deemed to have been suspended with effect from the date of detention, by an order of the Disciplinary Authority, and shall remain under suspension until further orders.

(3) Where a penalty of dismissal or removal from service imposed upon an employee under suspension is set aside on appeal or on review under these rules and the case is remitted for further inquiry or action or with any other directions, the order of his suspension shall be deemed to have continued in force on and from the date of the original order of dismissal or removal and shall remain in force until further orders.

(4) Where a penalty of dismissal or removal from service imposed upon an employee is set aside or declared or rendered void in consequences of or by a decision of a Court of law and the disciplinary authority, on consideration of the circumstances of the case, decides to hold a further enquiry against him on the allegation on which the penalty of dismissal or removal was originally imposed, the employee shall be deemed to

have been placed under suspension by the Disciplinary Authority from the date of the original order of dismissal or removal and shall continue to remain under suspension until further orders."

17. Sri Ashok Khare, learned Senior Counsel assisted by Sri Siddharth Khare appearing for the writ petitioner submits that the orders dated 01.08.2016 passed by the third respondent as well as the order dated 01.12.2016 passed by the second respondent imposing the punishment of dismissal and rejecting the appeal are unsustainable in the eyes of law. Elaborating the said submission it has been sought to be argued that the entire chain of events disclosed that an allegation has been levelled that on account of the certain acts and omissions being the alleged to have done on 13.02.2015 while the writ petitioner was posted as Operation Officer, BDFP, Mathura on 13.02.2015 when he was on "B" shift duty he against the prevalent norms handed over the key of the main gate to Sri Bhagwan Singh Security Supervisor and collected the same even otherwise on account whereof 184 numbers of drums of bitumen were stolen which not only caused financial loss but also tarnished the image of the corporation. According to the learned counsel for the writ petitioner the said theft was reported in the morning of 14.02.2015 and on 17.02.2015 the petitioner along with P.W. 1 Sri Girja Shankar DGM (CR), P.W. 2 Sri Amrit Lal Gupta AM (CR) BDFP, Mathura and P.W. 3 Deputy Manager were called at Police Station, Mathura Refinery Mathura wherein the writ petitioner was put to third degree torture and signatures were taken on blank sheet and he was formally arrested on 18.02.2015 and he was accorded bail on 31.07.2015 released from judicial custody on 04.08.2015.

18. The submission is that the entire charge sheet proceeds upon the alleged confession made by the writ petitioner before the police authorities in the concerned Police Station in the presence of P.W. 1, P.W. 2 and P.W. 3, however, the truth is that he has not confessed his guilt of committing the said misconduct or offences and the entire story was cooked up is nothing but bundle of lies just in order to slap the writ petitioner with criminal and disciplinary proceedings while ousting him from duty.

19. In a nutshell, learned Senior Counsel for the writ petitioner submits that had the writ petitioner made any confession about the handing over the keys against the norms as prevalent therein to Sri Bhagwan Singh, Security Supervisor and manipulated with the CCTV then it ought to be reduced in writing as confession cannot partake the character of an admissible evidence or give a hand to the prosecution to hold the writ petitioner guilty until and unless it is not only corroborated but surrounding circumstances also clearly point out towards the same.

20. Sri Khare further submits that the very basis of framing of the charges against the writ petitioner is the confessional statement and the three prosecution witnesses have come up with the case that the writ petitioner confessed his crime on 17.02.2015 with relation to any incident dated 13.02.2015 in the Police Station in the presence of the Police Officers and the prosecution witness. Sri Khare has further invited the attention of the Court towards the examination-in-chief of P.W. 1 Girja Shankar DGM (RC), Mathura dated 15.12.2015 being question No. 10 in which the P.W. 1 had deposed that the writ

petitioner had accepted in front of the prosecution witness that he had given key of the main gate to Security Supervisor on 13.02.2015, he further submits that in the cross examination of the P.W. 1 (Girja Shankar) in reply to question No. 5 the P.W. 1 had replied that though no manhandling was done but the writ petitioner was questioned in threatening language. Even the said stand has come in the deposition of P.W. 1 in reply to question No. 8. Sri Khare has also invited the attention of the Court towards the cross examination of P.W. 1 Girja Shankar in relation to the answer of question No. 7 wherein the P.W. 1 had deposed that though he did not exactly know what happened inside the cabin where interrogation was done but the charge sheeted employee (writ petitioner) came out weeping.

21. The argument advanced by the learned counsel for the writ petitioner is that had there been a confessional statement then it ought to have been made one of the exhibits and the part and parcel of the charge sheet so as to bring home the charges and once the basic document on whose base the entire allegations have been levelled and structured is non-existent then the charges cannot be said to be proved against the writ petitioner.

22. It has also been emphasized by Sri Khare that even once the prosecution witnesses have come up with stand that threat had been administered to the charge sheeted employee and he came out weeping and the interrogation was done by the Senior Superintendent of Police in the presence of the prosecution witness and other Police officials then the said circumstances clearly show that the confession, if any, could not be a voluntary confession as the same by all probabilities

and possibilities is a force confession under duress and the same cannot be a ground to hold the writ petitioner guilty.

23. As regards the manipulation of the CCTV camera so as to mask the said incident is concerned the writ petitioner submits that he had been right from the very beginning asking for the original CCTV footage which is to be verified and certified but in absence of any certification it cannot be said that the writ petitioner is guilty particularly when the keys of the depot in question was with other employee or staff of the corporation.

24. Sri Khare has relied upon the judgment in the case of *Roop Singh Negi Vs. PNB & Another* 2009 (2) SCC 570 and the judgment of *Bombay High Court in Yaswant Redkar Vs. Hindustan Petroleum Ltd. reported in 1998(3) Bom. CR 743* The learned Senior Counsel for the writ petitioner further submits that the inquiry report dated 28.05.2016 though it holds the writ petitioner partially guilty of both the charges, however, the said inquiry is bereft of any reasons in coming to the conclusion as to how the charges stood partially proved against the writ petitioner. Consequent to the receipt of disagreement note on 13.06.2016 of the Disciplinary Authority, the writ petitioner tendered his objection on 20.07.2016 point by point on each issues while giving not only detailed reasons that the charges were not proved but the Disciplinary Authority by virtue of order dated 01.08.2016 has rejected the objection of the writ petitioner and has proceeded to pass the dismissal order without recording any reasons in coming to the conclusion while passing a cryptic order. Against the order of dismissal the writ petitioner preferred a statutory appeal on 14.10.2016 taking all the grounds

demonstrating that none of the charges stood proved, the same has been rejected by totally a non-speaking and reasoned order and, thus, according to the learned Senior Counsel the presence of the word “to consider” implies that the Appellate Authorities are enjoined to pass a reasoned and speaking order while applying his mind. Reliance has been placed upon the judgments of *R.P. Bhatt Vs. Union of India* (1986) 2 SCC 651 & *Ram Chander Vs. Union of India & Others* (1986) 3 SCC 103.

25. Further reliance has been placed upon the decision in the case of *Divisional Forest Officer Kathgudem & Others Vs. Madhusudhan Rao* (2008) 3 SCC 469 so as to contend that even the order of affirmation in the matter of departmental proceedings at the stage of Appellate and Revisional Authorities must be speaking and reasoned order.

26. Sri Khare learned Senior Counsel has also relied upon the judgment in the case of *Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal & Others, reported in (2020) 7 SCC 1 & Ravindra Singh alias Kaku Vs. State of Punjab, reported in (2022) 7 SCC 581* so as to contend that under Sections 65A and 65B of the Evidence Act, 1872 with regard to the admissibility of electronic records, compliance of the said provisions are mandatory.

27. Countering the said submission, Sri Anand Tiwari who appears for the respondent corporation submits that the orders passed by the disciplinary authority as well as the appellate authority are perfectly justified and no exception can be carved out particularly in view of the fact that the writ petitioner herein was entrusted

with the duty to keep the keys with him and not to hand over the same to anybody else and he being the Operation Officer had committed acts and omissions on account whereof not only financial loss was sustained by the corporation but image was tarnished.

28. According to Sri Tiwari there have been no violation of principles of natural justice as the writ petitioner has been issued a charge sheet, he submitted his reply and in accordance with the rules in question inquiry proceedings were conducted, though the charges were found to be partially proved by the Inquiry Officer but disagreement note was issued and after considering the objections ultimately order of dismissal was passed which was carried in appeal and the same was also affirmed.

29. The submission is that principles of natural justice is not a strait jacket formula but doctrine of prejudice also plays a role and further there has been no prejudice caused to the writ petitioner so as to warrant any interference.

30. As regards the allegation of the writ petitioner that he has not confessed his misconduct is concerned the same is patently misconceived besides being false particularly in view of the fact that the writ petitioner on 17.02.2015 in the presence of the prosecution witnesses who are three in number made confessional statement before the Police Authorities, however, as an afterthought after commencement of disciplinary proceedings a new story is being sought to be cooked up. The submission of the counsel for the respondents is that might be from the records available with him the confessional statement is not on record but that does not in any manner whatsoever exonerate the

writ petitioner from the charges as the corroboration and surrounding circumstances by way of the statement of the prosecution witness itself points out that the writ petitioner had confessed the misconduct. Reliance has been placed upon by Sri Anand Tiwari upon various judgments including the judgments in the case of *K.L. Sinha Vs. State of Mysore 1976 (3) SCC 766*, *State of Haryana Vs. Ratan Singh 1977 (2) SCC 491*, *J.D. Jain Vs. Management of State Bank of India 1992 (1) SCC 143 & Workmen of Balmadi States 2008 (4) SCC 517* so as to contend that the Evidence Act is not applicable in the departmental proceedings and further principles of natural justice cannot be applied in abstract and this Court under Article 226 would not come to the rescue of delinquent employee where charges of misconduct are explicit and proved. Sri Tiwari, thus, prayed that the writ petition be dismissed in to to.

31. I have heard the learned counsel for the parties and perused the record which has been placed before this Court pursuant to the order dated 04.07.2023 on 20.07.2023.

32. Undisputedly, the writ petitioner while posted as officer in-charge of the BDFP, Mathura is stated to have committed certain acts and omissions whereby on 13.02.2015, he while violating the standard procedure upon closure of "B" shift handed over the keys to Sri Bhagwan Singh Security Officer which was to be retained by him and thereafter took it from Sri Bhagwan Singh afterwards creating a situation whereby 184 numbers of Bitumem drums were stolen causing financial loss to the corporation and tarnishing its image. Charges further reveal that the writ petitioner in order to cover up

the mis-deeds manipulated with CCTV camera while turning it on a different direction so that the acts and omissions committed by him are not recorded. Further the writ petitioner also made a voluntary confession on 17.02.2015 before the SSP, Mathura at the Police Station, Mathura Refinery in the presence of the prosecution witness that he handed over the key to Sri Bhagwan Singh on account whereof theft took place and he pleaded guilty and recorded is misconduct. It is also not in dispute that the said alleged confession is dated 17.02.2015 after four days of the incident which is stated to be 13.02.2015.

33. Parties are also in agreement that the writ petitioner was arrested on 18.02.2015 and by the order of the Court dated 31.07.2015 the writ petitioner was granted bail and he was released on 04.08.2015 from the judicial custody. Thereafter on 31.08.2015 a charge sheet was issued to the writ petitioner which has been extracted in the earlier part of the judgment. In order to prove the charges as many as 9 exhibits were taken into account to bring home the charges. Importantly, though the letter dated 15.02.2015 addressed to Police in-charge of the Police Station, Mathura Refinery and Police charge sheet No. 80 of 2015 dated 12.04.2015 were made the exhibit but the alleged confessional statement of the writ petitioner dated 17.02.2015 was not made the part and parcel of the charge sheet though, the charge sheet itself contains the allegation based on the alleged confession of the writ petitioner. Further in the list of witnesses, the 3 witnesses being the officials of the Indian Oil Corporation were marked as the prosecution witnesses but the Senior Superintendent of Police as well as the Police officials who were present during the course of making of

confessional statement were not marked as witnesses. The petitioner in its reply to the charge sheet dated 27.09.2015 specifically denied the said charges while coming up with a stand that he had not given keys to Sri Bhagwan Singh and further in the third page of the reply the writ petitioner came up with stand that he was badly beaten by Police including application of electric shock to ensure forceful confession from him.

34. In the examination-in-chief of P.W. 1 Sri Girja Shankar DGM (RC), Mathura dated 15.12.2015 question Nos. 10 and 11 relating to confessional statement being given by the writ petitioner was taken note of, however, in the cross examination of P.W. 1 in reply to question Nos. 5 and 8 it is an admission on the part of P.W. 1 that though no manhandling was done but threatening language was used against the writ petitioner and in reply to question No. 7 it has been further stated that P.W. 1 was not aware as to what happened inside but the writ petitioner came outside weeping. The same is also the statement of P.W. 2. Though the Inquiry Officer in his inquiry report as discussed above has held the charges to be partly proved but the basic premise on which the charges were found to be partly proved also does not inspire the confidence of this Court particularly as there is no discussion with regard to the reasons in coming to the said conclusion but the disciplinary authority issued a disagreement note dated 13.06.2016 wherein in the second page of the same the charges have been shown to be proved against the writ petitioner on the ground that the writ petitioner had confessed the misconduct and offence in the presence of the prosecution witnesses in the Police Station itself, thus, the charges stood proved against the writ petitioner. The writ

petitioner after receipt of the disagreement note tendered his reply on 20.07.2016 specifically denied the same also demonstrating that he had not confessed the said misconduct alleged to have been committed by him by giving instances and details but the disciplinary authority by virtue of its order dated 01.08.2016 rejected the objection and imposed the punishment of dismissal against which an appeal was filed on 14.10.2016 which were also rejected by a totally non-speaking order.

35. Notably, the entire charges stems from the alleged confessional statement. The confessional statement is stated to be made by the writ petitioner in the Police Station of Mathura Refinery, Mathura in the presence of the Police officials including SSP and the prosecution witness. In the list of the witnesses appended to the charge sheet neither the SSP before whom the said confession has been stated to be made nor the other Police officials who were present are the part and parcel of the same which even in fact does also not inspire confidence of the Court particularly when the confessional statement is not on record. On a repeated query being made from Sri Anand Tiwari, who appears for the respondent corporation as to whether there is any confessional statement or not, to which Sri Anand Tiwari had made a specific statement at bar that confessional statement is not a part of the Police record and it is also not available in the record. He submits that the confessional statement is oral and not reduced in writing and, thus, on the said basis the charges have been framed against the writ petitioner.

36. The Courts of law would in appropriate cases would rely upon the oral confessional statement but here, in the present case there are some redeeming

features which would not by application of abstract principle impel the Court to rely upon the confessional statement without corroboration and evaluation of the circumstantial evidence; (a) the confessional statement has been recorded on 17.02.2015 whereas the incident took place on 13.02.2015; (b) the Senior Superintendent of Police or the Police officials before whom the confessional statement was orally recorded in the Police Station are neither marked as prosecution witness nor produced to prove the prosecution story; (c) as per the prosecution witnesses threat was administered though manhandling was not done and the charge sheeted employee came out weeping. Sri Ashok Khare learned Senior Counsel has relied upon a judgment in the case of *Roop Singh Negi* (supra) in order to contend that the confessional statement cannot be made a basis for holding charges against the charge sheeted employee. In the case of *Roop Singh Negi* (supra) the confessional statement was pressed into service to hold the charge sheeted employee guilty, however, the confession was not proved though the same was made before the Police Authorities.

37. The Hon'ble Apex Court in paras 4, 5, 14 and 15 observed as under:-

4. After five years of the said incidence, a disciplinary proceeding was initiated against the appellant stating that during the period 18.11.1991 and 09.10.1993, he had taken away one blank draft issue book bearing Nos. 626401 to 62645. A show-cause notice was issued. Cause was shown by him. He was found guilty by the inquiry officer. In the said proceeding, reliance was placed on the purported confession of the appellant before the police authorities in the year 1993. It was marked as Exhibit PE-3.

5. *Indisputably, the forms and other important books and documents belonging to a bank never remain in the custody of a peon. It was accepted that documentary evidences were collected by the police officers. Those documents were simply produced; they were not proved. The purported confession by the appellant was also not proved. Only because the said confession was made before the police authorities, the enquiry officer inferred on the basis thereof that the appellant had connection with those persons who had used those bank drafts, stating:*

"... Therefore, the undersigned is of the opinion that Exhibit PE-4 proves that Shri Roop Singh Negi has connections with the said culprits. On examination of witness MDW 1 on 20.07.1999, he has said that according to the statement of Shri Roop Singh Negi, he has confessed that on the instructions/saying of Rajbir, Devinder alias Mental, Asif and Brahmpal, who are the residents of trans-Yamuna area he had stolen the draft book...."

It was, inter alia, concluded:

"In view of the above details/proceedings it is proved that the delinquent employee has admitted that drafts being No. QWA-626401 to 626425 have been stolen from Branch Office, Mall Road, Delhi Branch vide Page No. 25057 and has caused financial loss to the Bank but he has not admitted that he has stolen the said drafts.

As the main charge on the delinquent employee is of stealing the draft books and other documents, therefore, in such matters direct proof/evidence are not available generally and the conclusion has been arrived at on the basis of assumption...."

14. *Indisputably, a departmental procedure is a quasi-judicial proceeding. The inquiry officer performs a quasi-judicial function. The charges levelled*

against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the inquiry officer on the FIR which could not have been treated as evidence;

15. *We have noticed hereinbefore that the only basic evidence whereupon reliance has been placed by the enquiry officer was the purported confession made by the appellant before the police. According to the appellant, he was forced to sign on the said confession, as he was tortured in the police station. The appellant being an employee of the Bank, the said confession should have been proved. Some evidence should have been brought on record to show that he had indulged in stealing the bank draft book. Admittedly, there was no direct evidence. Even there was no indirect evidence. The tenor of the report demonstrates that the inquiry officer had made up his mind to find him guilty as otherwise he would not have proceeded on the basis that the offence was committed in such a manner that no evidence was left."*

38. *Insofar as the judgment in the case of **Yaswant Redkar** (supra) is concerned that was a case where the entire proceedings were initiated pursuant to hearsay evidence, the Bombay High Court opined that it would not be justified to hold the delinquent employee guilty only on the basis of hearsay evidence without there*

being any direct or circumstantial evidence in support of the finding.

39. Here, in the present case the entire charges so levelled upon the writ petitioner is based upon the confessional statement though sought to be supported by the prosecution witnesses. However, in order to find out as to whether the same was a statement made or not the only thing which would be relevant at least for the sake of knowledge is the written document bearing signature of the person who had made confessional statement. In this case though on one hand the delinquent is denying the confessional statement but, on the other hand, the prosecution is coming up with opposite stand. Since the entire imputation of the charges are based upon the confessional statement but the confessional statement has neither been made the part and parcel of the charge sheet nor the police officials before whom the confessional statement alleged to have been made by the writ petitioner has been put to cross examination, thus, in the opinion of the Court the sole reliance placed upon the confessional statement vitiates the entire proceedings particularly when the prosecution witnesses have not disputed the fact and have deposed that threat was administered upon the writ petitioner and he came weeping out, thus, in the circumstances to hold the writ petitioner guilty on the basis of confessional statement is neither justified nor proper.

40. With regard to the handing over the keys by the writ petitioner to Sri Bhagwan Singh, Security Supervisor is concerned he has not been marked as one of the witness. Once the writ petitioner denied the charges then in order to prove the said fact it was the duty of the prosecution to have produced Sri Bhagwan

Singh, Security Supervisor before the inquiry proceedings and the same not being done which is also a crucial factor vitiating the inquiry.

41. Now so far as the second charge with regard to manipulating the CCTV Camera is concerned the writ petitioner had disputed doing any manipulation with the CCTV Camera to mask the activity in that regard. Further in the reply dated 20.07.2016 to the disagreement note dated 13.06.2016 the writ petitioner in para 24 (c)(d) and (e) has specifically sought comparing of the original CCTV footage and questioned the authenticity of the same. The said ground was also taken in the memo of appeal dated 14.10.2016, however, the same was ignored and not considered. Though the provisions of Evidence Act 1872 not be applicable, however, it was a duty of the Disciplinary Authority to have addressed the said issued in order to find out as to whether the CCTV footage was doctored, manipulated or not. The legislature was quite conscious about the improvisation of technology with the advent of present times and accordingly, Sections 65A and 65B have been inserted in the Evidence Act, 1872 and it has been held to be mandatory that a certificate is to be obtained under Section 65B(4) of the Evidence Act, 1872 as held in *Arjun Panditrao Khotkar* (supra) and *Ravindra Singh* (supra) by the Hon'ble Apex Court.

42. The rule-making authority was conscious while employing the word “consider” in Rule 38 of the Conduct, Discipline and Appeal Rules, 1980 dealing with the manner in which the appeals are to be considered against the punishment order. The word “consider” has been taken note in series of judgments and dealing with the same in *R.P. Bhatt* (supra), the Hon'ble

Supreme Court in para 4 and 5 observed as under:

“4. The word 'consider' in Rule 27 (2) implies 'due application of mind'. It is clear upon the terms of Rule 27 (2) that the appellate authority is required to consider (1) whether the procedure laid down in the Rules has been complied with; and if not, whether such non-compliance has resulted in violation of any provisions of the Constitution or in failure of justice;

(2) whether the findings of the disciplinary authority are warranted by the evidence on record; and (3) whether the penalty imposed is adequate; and thereafter pass orders confirming, enhancing etc. the penalty, or may remit back the case to the authority which imposed the same. Rule 27 (2) casts a duty on the appellate authority to consider the relevant factors set forth in clauses (a), (b) and (c) thereof.

5. There is no indication in the impugned order that the Director General was satisfied as to whether the procedure laid down in the Rules had been complied with; and if not, whether such non-compliance had resulted in violation of any of the provisions of the Constitution or in failure of justice. We regret to find that the Director General has also not given any finding on the crucial question as to whether the findings of the disciplinary authority were warranted by the evidence on record. It seems that he only applied his mind to the requirement of clause (c) of Rule 27(2), viz. whether the penalty imposed was adequate or justified in the facts and circumstances of the present case. There being non-compliance with the requirements of Rule 27 (2) of the Rules, the impugned order passed by the Director General is liable to be set aside.”

43. Following Judgment in the case of **R.P. Bhatt** (supra) the Hon’ble Apex Court

in the case of **Ram Chander** (supra) observed as under:

“5. To say the least, this is just a mechanical reproduction of the phraseology of Rule 22(2) of the Railway Servants Rules without any attempt on the part of the Railway Board either to marshal the evidence on record with a view to decide whether the findings arrived at by the disciplinary authority could be sustained or not. There is also no indication that the Railway Board applied its mind as to whether the act of misconduct with which the appellant was charged together with the attendant circumstances and the past record of the appellant were such that he should have been visited with the extreme penalty of removal from service for a single lapse in a span of 24 years of service. Dismissal or removal from service is a matter of grave concern to a civil servant who after such a long period of service, may not deserve such a harsh punishment. There being non-compliance with the requirements of Rule 22(2) of the Railway Servants Rules, the impugned order passed by the Railway Board is liable to be set aside.”

44. Further in the case of **Divisional Forest Officer (supra)** the Apex Court in para 19 and 20 held as under:

“19. Having considered the submissions made on behalf of the respective parties and also having regard to the detailed manner in which the Andhra Pradesh Administrative Tribunal had dealt with the matter; including the explanation given regarding the disbursement of the money received by the respondent, we see no reason to differ with the view taken by the Administrative Tribunal and endorsed by the High Court. No doubt, the Divisional

Forest Officer dealt with the matter in detail, but it was also the duty of the appellate authority to give at least some reasons for rejecting the appeal preferred by the respondent. A similar duty was cast on the revisional authority being the highest authority in the Department of Forests in the State. Unfortunately, even the revisional authority has merely indicated that the decision of the Divisional Forest Officer had been examined by the Conservator of Forests, Khammam wherein the charge of misappropriation was clearly proved. He too did not consider the defence case as made out by the respondent herein and simply endorsed the punishment of dismissal though reducing it to removal from service.

20. It is no doubt also true that an appellate or revisional authority is not required to give detailed reasons for agreeing and confirming an order passed by the lower forum but, in our view, in the interests of justice, the delinquent officer is entitled to know at least the mind of the appellate or revisional authority in dismissing his appeal and/or revision. It is true that no detailed reasons are required to be given, but some brief reasons should be indicated even in an order affirming the views of the lower forum.”

45. A close scanning of the provisions of the Conduct, Discipline and Appeal Rules, 1980 as amended upto 23.12.2014 of the respondent corporation goes to show that Rule 29 deals with two types of penalties namely minor penalty and major penalty. Separate procedure has been laid down for imposition of minor or major penalty. So far as the controversy in hand is concerned the same relates to major penalty, thus, Rule 31 of the 1980 Rules would apply. In principle, Rule 31 of the 1980 Rules lays down the procedure which

has to be adhered to, step by step for holding inquiry.

46. A charge sheet containing the memorandum of charges is to be served upon the delinquent containing not only the imputation of charges but also the documents and the witnesses on the basis of which the charges are to be proved, in case, the delinquent denies the charges then after appointment of an inquiry officer, he has to fix date, time and venue for oral inquiry, and submit its report to the Disciplinary Authority who in case of disagreement is to issue a disagreement note along with the show cause notice disagreeing with the reasons of the inquiry officer and after submission of the objection/reply by the delinquent a final order is to be passed. Practically the principles of natural justice are to be followed step by step. In order to hold the charges proved against the delinquent the inquiry officer is to conduct inquiry and the prosecution is not only to produce the material witnesses but also prove the documents which are material exhibit in that regard. As noticed above here in the present case the Inquiry itself was defective as neither the prosecution produced nor proved the confessional statement. 3

47. Now a question arises that once a conclusion is drawn that the inquiry proceedings was defective and not in conformity with the rules then what would be the next course of action. There are two options available before the Court of law either to set aside the order impugned and foreclose the right of the Discipline Authority to conduct inquiry and award reinstatement to the delinquent or to remit the matter back to the Competent Disciplinary Authority to hold a fresh inquiry from stage where the defect

occurred while placing the delinquent under suspension for the purposes of holding of fresh inquiry and payment of consequential benefit be made subject to the outcome of the fresh inquiry.

48. In order to determine as to whether which course is to be adopted and the courts of law has to bear in mind the gravity of the charges and the nature of the defect in the inquiry proceedings.

49. Rule 26(4) of the 1980 Rules itself gives light on the said subject as according to it where a penalty of dismissal or removal from service is imposed upon an employee is set aside or declared or rendered void in consequence of or by a decision of the Court of law and the disciplinary authority on consideration of the circumstances of the case decides to hold further inquiry against the delinquent on the allegations on which penalty of dismissal or removal was originally imposed the delinquent shall be deemed to be placed under suspension by the Disciplinary Authority from the date of the original order of dismissal or removal and shall continue to remain under suspension till further orders.

50. Since, there is a defect in holding of departmental inquiry culminating into passing of the punishment order, thus, in the facts of the present case looking into the nature of allegations levelled upon the delinquent, this Court is of the opinion that the orders impugned be set aside and a direction be issued to the Disciplinary Authority to conduct the inquiry and conclude the same within the time stipulated by the Court. At this juncture, Sri Anand Tiwari, learned counsel for the respondent corporation submits that in case the matter is remitted back for holding

fresh inquiry then it should be from the stage when there was defect occurred in the inquiry and according to him it should be from the stage of submission of reply by the delinquent to the charge sheet. Sri Ashok Khare learned Senior Counsel appearing on behalf of the writ petitioner submits that since the writ petitioner has submitted his reply to the charge sheet dated 31.08.2015 on 27.09.2015, thus, the inquiry be directed to be concluded within the time stipulated by this Court from that stage.

51. Accordingly, in view of the foregoing discussion, the writ petition is decided on the following terms; (a) the orders dated 01.08.2016 passed by the third respondent, General Manager, Incharge, U.P.S.O. II, Indian Oil Corporation Ltd, Indian Oil Bhawan, E-8, Sector 1, NOIDA, Gautam Buddh Nagar, dismissing the writ petitioner from service as well as the order dated 02.12.2016 rejecting the appeal of the writ petitioner dated 04.10.2016 passed by the second respondent Executive Director Incharge (Supplies), Indian Oil Corporation Ltd., Indian Oil Bhawan G-9, Ali Yavar Jung Marg, Bandra (East), Mumbai are set aside; (b) consequent to the setting aside of the orders dated 01.08.2016 and 02.12.2016 the writ petitioner shall be placed under suspension; (c) the writ petitioner shall prefer an application/representation before the third respondent seeking arrears, subsistence allowance and for payment of subsistence allowance on month to month basis and on the receipt of the same the third respondent shall ensure payment of arrears, if any, and pay current subsistence allowance as per rules; (d) since the order dated 01.08.2016 passed by the Disciplinary Authority has been set aside, thus, the matter stands remitted to the Disciplinary Authority for conducting

inquiry against the writ petitioner from the stage of submission of the reply dated 27.09.2015 to the charge sheet dated 31.08.2015; (e) the inquiry shall be conducted and concluded within a period of four months from the date of production of the certified copy of the order by either of the parties strictly in accordance with law, as per the rules governing the field and after affording opportunity to the delinquent employee; (f) the writ petitioner shall render full cooperation in the inquiry proceedings; (g) the grant of consequential benefits including arrears of salary, and other allied benefits shall be subject to the outcome and the fate of the inquiry proceedings.

52. With the aforesaid observations, the writ petition stands partly allowed.

(2023) 8 ILRA 1045
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2023

BEFORE

THE HON'BLE SAURABH SHYAM
SHAMSHERY, J.

Writ-B No. 7376 of 1980

Amar Singh & Ors. ...Petitioners
Versus
D.D.C. Agra & Ors. ...Respondents

Counsel for the Petitioner:

Sri R.P. Tiwari, Sri H.N. Singh, Sri Satyam Singh, Sri Shiv Nath Singh, Sri Surya Bhan Singh, Sri Yadvendra Krishna

Counsel for the Respondents:

Sri Ashutosh Kumar Rai, A.C.S.C., Sri Man Bahadur Singh, Sri Rajeev Kumar, Sri Nagendra Singh Chaudhary, Sri R.P. Singh

Civil Law - U.P. Consolidation of Holdings Act, 1953 - Sections 9-A(2),

11 & 48 - Dispute regarding pedigree and share in agricultural holding - Evidence of Genealogy Priest (Panda) and documents maintained in 'Bahi' - Accepted by Revisional Authority - Held: In absence of strong and reliable contrary evidence, Panda's oral and documentary evidence maintained in regular course of tradition and having corroboration from past entries cannot be discarded - Revisional Court's interference under Section 48 justified - Petition dismissed after 43 years - Court emphasizes need for collective responsibility of Bar and Bench in avoiding judicial delays.

Held:

"The oral evidence of Genealogy Priest (Panda) supported by documents of his *Bahi* has more weight in comparison to oral evidence of petitioners' witnesses. There is no reasonable ground to disbelieve the evidence of Panda. Revisional Authority rightly exercised jurisdiction under Section 48 of the Act. No illegality found in the impugned order. Writ petition dismissed. Further, this Court cannot ignore the delay of more than 43 years in deciding the matter - Justice delayed is justice denied - Bar and Bench both must accept responsibility and work for timely disposal of cases." (Para 25, 26, 27)

Case law relied on:

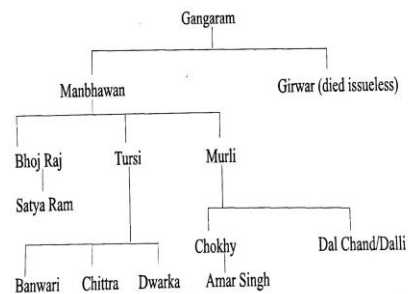
1. Dukh Haran Tewary & ors. Vs Dulhin Bihasa Kuer & anr., AIR 1963 Pat 390
2. The Collector of Farrukhabad Vs Gajraj Singh, 15 Ind Cas 625

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

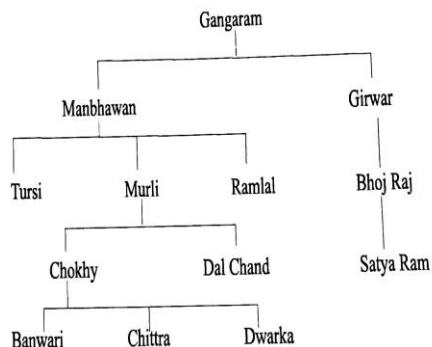
1. Heard Sri R.P. Tiwari, learned counsel for petitioners, Sri Man Bahadur Singh and Sri Rajeev Kumar, learned counsel for respondent No.4 and Sri Ashutosh Kumar Rai, learned Additional C.S.C. for State.

2. Facts in brief are that the disputed land are Khata No.94 area 6.47 acres and Khata No.4 area 2.01 acres situated in village-Shittalpur, Pargana- Etah Saket, District-Etah. The said village was brought under consolidation operations, wherein an objection was filed by one of original petitioners under Section 9-A(2) of U.P. Consolidation of Holdings Act, 1953 (Act of 1953) that the share of Satya Ram S/o Bhoj Raj (original respondent No.4) in land in dispute was 1/3 and it was wrongly been shown as 1/2 in basic year, which required a correction.

3. According to petitioners pedigree of parties to lis is as follows:-



Whereas per contra, the pedigree as given by respondents is as follows :-



4. The Consolidation Officer, after considering the facts, oral and documentary evidence on record vide order dated 16.08.1976, has rejected the objections set up by original respondent No.4 and maintained the basic year entry, holding him to be co-sharers of land in question, only to the extent of 1/3 share. The relevant findings returned by the Consolidation Officer are as follows:-

“इस तरह से जहाँ तक वंशावली का सवाल है सत्यराम यह साबित नहीं कर सके कि भोजराज गिरवर के लड़के थे और यह बात कतई तौर पर साबित हो जाती है कि भोजराज मनभावन के लड़के थे और जहाँ तक शजरा बनवारी बगैरहा ने दिया है वह सही है सत्यराम ने गलत शजरा हिस्सा ज्यादा पाने की गरज से दिया है।”

XXX

“उपरोक्त के आधार पर जमीन की आइडेन्टी और कन्टीनटी एक नहीं रह जाती है और यदि जमीन की आइडेन्टी और कन्टीनटी एक ही है तो वह मूरसान की पैदा की हुई नहीं कही जा सकती है इसके अलावा सत्यराम का बहुत निश्चित केश है कि आराजी निजाई गंगाराम की पैदा की हुई है मगर सत्यराम कोई भी कागज ऐसा दाखिल नहीं कर सके जिससे यह सिद्ध हो सकता कि कोई जमीन कभी भी गंगाराम के नाम रही हो जबकि बनवारी आदि का निश्चित केश यह है आराजी निजाई में कुछ जमीन गिरवर व मनभावन के नाम और थी जो उन्होंने पैदा की थी मगर उन्होंने छोड दिया था।”

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“ ऐसी सूरत में आइडेन्टी और कन्टीनटी साबित होना निहायत जरूरी है उपरोक्त से यह सिद्ध हो जाता है कि भूमि निजाई की आयडेन्टी है न कन्टीनटी है।”

(Emphasis supplied)

5. Two appeals were preferred under Section 11 of U.P. Consolidation of Holdings Act, 1953 against above referred order and both were dismissed by an order dated 23.10.1978 passed by the Settlement

Officer, Consolidation. The relevant findings thereof are as follows:-

“1901 में विवादित भूमि का रकबा 13-10 एकड़ मन भावन व गिरवर के पास था। 1931 के जमींदारी बटवारे में भी यही रकबा यह के वाद 24 बीघा जमीन बेची गई। और इसी का रकबा अब भूमि का रकबा 8-50 एकड़ रह गया है। इसलिये यह तर्क गलत है कि 1901 से अब तक भूमि की एक रूपता तथा तरितम्यता समाप्त हो गई है। 1347 फ० में व 1336 फ० में सत्यराम डाल चन्द्र अमर सिंह और तुरसी दर्ज थे यदि अमर सिंह और तुरसी दर्ज थे यदि अमर सिंह आदि को सत्यराम का हिस्सा हड़पना होता, 1347 व 1336 की प्रविष्टियों के आधार पर सत्यराम का 1/4 अंश भी कह सकते थे अमर सिंह आदि की ओर से जबानी सबूत में जालिम सिंह गवाह है जिनकी उम्र 85 साल है पेश हुआ इसका बयान है कि गिरवर सिंह अक्षम व्यक्ति थे उनकी शादी नहीं हुई थी और मनभावन के राम लाल लड़का नहीं था बल्कि भोजराज लड़का था जालिम सिंह शीतलपुर का ही रहने वाला है चित्तर सिंह की आयु 75 वर्ष है और उसने जिरह में कहा है कि, गिरवर की शादी नहीं हुई थी उन पैर में खुजली और आँख में फली थी भोजराज मन भावन का लड़का था। +

उपरोक्त से प्रकट है कि सत्यराम भोजराज का लड़का है और भोजराज का लड़का है और भोजराज मन भावन का लड़का था इस प्रकार दोनो अपील के अवधानिक है च०अ०का निर्णय सही है इसमें हस्तक्षेप की आवश्यकता नहीं है।”

(Emphasis supplied)

6. The original respondent No.4 being aggrieved by above referred orders filed a revision under Section 48 of Act of 1953, which was allowed by impugned order 17.05.1980. The relevant part of order is mentioned hereinafter :-

“अब सवाल इस बात का है कि भोजराज किसका लड़का है मनभावन का यह गिरवर का। इसमें दोनो ओर से जुबानी सहादत दी गई है। सदाशिव पंडा की ओर से जो कागज दाखिल हुये है उसमे भोजराज गिरवर के बेटे लिखे हैं। यह पेपर फाइल पर 16/1, 16/2 व 16/3 है। इन कागजातों में तो इस खानदान के अन्य लोगों का विवरण दिया है वह दोनो पक्षों के दिये गये विवरणों से काफी तालमेल खाता है।

प्रतिपक्षी का केस यह है कि पहले यह जमीन मनभावन व गिरवर की थी और वाद में तुलसी, मुरली व भोगराज ने दुबारा पैदा की।

मैने पूरे कागजात का अध्ययन किया पर ऐसी कोई चीज न मिली जिससे कि यह पता चलता कि यह दुबारा पैदा की गई है। अगर रकबा बढ़ा है तो वह उन्ही नम्बरों में बढ़ा है जो पहले थे और प्रत्येक बन्दोबस्त में ऐसा होता भी है। इसका प्रमाण इसी बात से है कि जमीन की वैयत एक सी बदस्तूर है। प्रतिपक्ष की ओर से यह कहा गया कि पंडे की बही का इन्द्राज मानने योग्य नहीं है। मैने यह बही जिसका कि हवाला दिया गया है तो नहीं देखी, पर स्वयं सोरों के पंडे जो अपने जिजमानो के बारे में सूचना रखते हैं और सूचना रखने की जो कार्यप्रणाली अपनाते है उसको देखा। उसमें वह लोग किसी के अधिकारों को या जायदाद में हिस्सों को ध्यान में रखकर नहीं बनाते बल्कि खानदान के आदमियों का और उनके सम्बन्धियों का ही नाम पता आदि इसलिए रखते हैं कि उनके जिजमानों का पूरा पूरा ज्ञान उनको हो। पंडा की जो तीन कागज फाइल पर है वह बनावटी नहीं प्रतीत होते है और न प्रतिपक्ष ने कोई ऐसा सबूत दिया कि जो वंशावली दूसरे पक्ष ने यानी रिवीजनकर्ता ने दी है वह त्रुटिपूर्ण है जो जमीन बढ़ी है वह भी पूरे खाते में बढ़ी है। केवल यह बात मानना कि तीन आदमियों ने तीन खेत 8,8 बीघे के बेचे यह सिद्ध नहीं करता कि वह पूरे जमीन में तिहाई के हिस्सेदार हैं।

अमर सिंह आदि की ओर से जो गवाह पेश हुये है जालिम और चित्तर। उनकी गवाही पर विश्वास किया जाना उचित प्रतीत नहीं होता। चित्तर सिंह कहते है कि जमीन उनके सामने उठाई गई थी परन्तु यह कहते है कि जब जमीन उठाई गई थी तो मनभावन उससे पहले ही मर चुके है। अगर ऐसा है तो मनभावन का नाम 1901 में कैसे आ गया। प्रतिपक्ष में ऐसा कोई सबूत नहीं दिया कि जिससे सत्यराम द्वारा दिया गया सजरा गलत सिद्ध हो और न कोई ऐसी बात का प्रमाण है कि यह जमीन कभी दुबारा ली गई थी। रिवीजनकर्ता का जो सबूत जबानी है वह उसके पक्ष को प्रमाणित करने के लिए पर्याप्त है अतः मै अवर न्यायालय के आदेशों को निरस्त करते हुये रिवीजन स्वीकार करता हूँ। और आदेश देता हूँ कि सत्यराम आदि इस जायदाद में आधे के और विपक्षी शेष आधे भाग के सजरे के अनुसार हिस्सा तदनुसार कागजात में इन्द्राज किया जावे।”

(Emphasis supplied)

7. Learned counsel for petitioner has submitted that the Revisional Court has erroneously placed heavy reliance on evidence of ‘Panda’ and documents of his Bahi, which was placed on record being document paper No.16/1, 16/2 and 16/3 without being marked as exhibit and as such they were not duly proved.

8. Learned counsel has further submitted that the Deputy Director of

Consolidation has not set aside the findings returned by the Appellate Court in specific words. The Revisional Court has not considered the specific finding returned by the Appellate Court that identity and continuity of land does not remain same and land does not originally belong to 'Ganga Ram' as well as no reasoning was assigned in impugned order that how land in question belonged to 'Ganga Ram'.

9. Learned counsel has further submitted that the Deputy Director of Consolidation has neither accepted the finding in regard to pedigree submitted by petitioners nor given any reason to accept the pedigree given by respondents.

10. Learned counsel for petitioners has read out the reasons given by Consolidation Officer and Settlement Officer Consolidation as referred above and has also referred the order passed by Revisional Court that it has interfered with a well reasoned order without considering the factors given in Section 48 of Act of 1953.

11. Learned counsel for contesting respondents have vehemently opposed the above submissions and submitted that oral evidence of 'Panda' i.e. Sadashiv, which was a relevant document as it was based on Bahi, was on record. Bahi of Samvat 1973, 1997 and 2022 has disclosed that Bhoj Raj was son of Girwar. It was a material and admissible evidence and no better evidence was available which could contradict it.

12. Learned counsel for respondents has placed reliance on **Dukh Haran Tewary And Ors. Vs. Dulhin Bihasa Kuer And Anr. :AIR 1963 Pat 390.** Learned counsel also placed reliance on a judgment passed by this Court in the case

of **The Collector of Farrukhabad Vs. Gajraj Singh, 15 Ind Cas 625** and the relevant paragraph thereof is mentioned hereinafter :-

"In default of this he has sought for documentary evidence in the books kept by certain Brahmins known as pandas at Soran on the Ganges and at the sacred city of Mutfra. These pandas are priests who receive pilgrims visiting sacred places for purposes of devotion and assist them in the performance of ceremonies appropriate to the occasion. Their livelihood depends on the fees paid them by the pilgrims who thus employ their services, and there is doubt that they are exceedingly jealous of their traditional or prescriptive rights to receive and minister to all pilgrims belonging to any family which has once definitely enrolled itself in their lists of jaimnns or clients. For this purpose, they maintain certain books or registers one of which has been produced before us by the plaintiff's witness.

xxx

xxx

A good deal of trouble seems to be taken to keep the entries relating to particular villages together or, at any rate, to facilitate reference when entries relating to the same village have got into different parts of the book. There seems, moreover, to be a certain amount of system employed in grouping villages together so as to connect with one another entries relating to different branches of one and the same family residing in different villages. The entries themselves consist very largely of pedigrees or fragments of pedigrees sometimes purporting to be made by, or at the dictation of, a particular member of the family concerned on the occasion of a visit paid to the Ganges at Soran in a specified year and month, sometimes merely jotted

down underneath some other entry, without any specific record either of the occasion or of the particular person on whose authority the entry is made. Of course, the book is not, and does not profess to be, a systematic record of family pedigrees. The pages are not consecutively numbered. It is admitted that the binding is unstitched and fresh pages inserted whenever the "panda" finds it convenient to do so. Blank spaces, and even blank pages, occur from time to time in the body of the book. It is admitted that if a page gets very much worn or tattered, the "panda" will copy out what he can decipher of the entries upon it on to a fresh page and will insert the same in its place. It must, also be borne in mind that the "panda" does not hold himself responsible for the identification of pilgrims who appear before him and represent themselves as being members of such and such a family."

(Emphasis supplied)

13. Heard Counsel for the parties and perused the record and written submission provided by counsel for parties.

14. The dispute is between rival pedigree submitted by petitioners and respondents that- Whether Girwar died issueless? If yes, then whether Bhoj Raj is son of Manbhawan or, if not, then whether Bhoj Raj is son of Girwar? and the other issue is whether land was self acquired by Ganga Ram or by Manbhawan and Girwar?

15. Parties have tried to prove their respective pedigree. Respondents' case are mainly based on the oral evidence of 'Panda' and documents produced by him being papers from Bahi, to show pedigree maintained therein.

16. Whereas petitioners' case mainly rest upon oral evidence of two old persons stating that Girwar never married and died issueless and that Bhoj Raj was son of Manbhawan.

17. The Court has to decide out of above referred evidences, which are more reliable i.e. statement of two old persons from the side of petitioners or statement of 'Panda' along with documents from his Bahi, provided from respondents' side.

18. The details of family members are preserved by Pandas (genealogy priest) which is a very old tradition. They followed a particular manner to maintain details of family genealogy/pedigree. Even from numbers of register they could take out the relevant register/entry, conveniently. It can not be presumed that while preparing record they entered details of pedigree, keeping in mind that in future, it would be a part of legal proceeding and, therefore, entries were made to cause benefit to one party only. The documents are of Samvat 1973, 1997 and 2022 (i.e. of the year 1916, 1940 and 1965), whereas testimony of Panda was recorded in the year 1976 i.e. after 60, 36 and 11 years respectively, therefore, element of making entry with a particular intention is absolutely ruled out as well as there is no contrary material to disbelief that entries made in said documents were not based on information given by members of family correctly. In **Dukh Haran Tewary (supra)** and **The Collector of Farrukhabad (supra)**, the Patna High Court and this Court respectively, have held that it would be doubtful that they (Pandas) would make wrong entry to support any one member of the family.

19. The next issue for consideration is that whether documents produced by Panda (Paper No.16/1, 16/2, 16/3) were part of genuine Bahi and were duly proved or not. One Sada Shiv Panda has appeared as witness. The author of said entries had not appeared but Sada Shiv Panda who was also a custodian of record appeared and had proved papers referred above. The Consolidation Officer has rejected the evidence that Bahi was neither properly arranged nor name of village was mentioned, however, the Deputy Director of Consolidation has believed the papers of Bahi to be genuine in absence of any contrary evidence and that there was no reason to disbelieve such evidence.

20. Genealogy priests (Panda) are maintaining and preserving ancestry records from years and in some cases, their records dates back 15 to 20 generations. These records contain crucial information about people's place of origin, names, births, death, reason of death, place of residence, caste, clan etc. The records are available at many religious centre such as Prayagraj, Nashik, Gaya, Pehowa and in present case at Mathura. Indian Council of Historical Research (ICHR) has also recognised ancestry records preserved by genealogy priests (Panda).

21. Copy of statements of witnesses are not on record, therefore, Court is proceedings on basis of discussions made by three Court in that regard. (i.e. by Consolidation Officer, Settlement Officer Consolidation and Deputy Director of Consolidation).

22. The evidence based on 'Ancestry Record' cannot be lightly brushed away as it carries an element of genuineness of record and in order to disregard it, there

must be a very strong evidence. The doubts put on ancestry record by Consolidation Officer and Settlement Officer, Consolidation were that the papers were not in serial, name of village was not mentioned etc. but one aspect has skipped from consideration of Consolidation Officer and Settlement Officer Consolidation, that in the pedigree, names of all family members were mentioned, which are undisputed, except entry in regard to Bhoj Ram, which cannot be an outcome of fraud and, therefore, this piece of evidence cannot be disbelieved or rejected entirely, except when a very strong and reliable contrary evidence is available.

23. In order to contradict above referred evidence, petitioners have examined one Jalim Singh (85 year old) and one Chitter Singh (75 year old) that Girwar was not a married person and he died issueless, however, their evidence was disbelieved by Deputy Director of Consolidation on ground that they had no knowledge how land was devolved upon Manbhawan which appears to be a correct reasoning, since they would have known it in normal course but they miserably failed to disclose source i.e. how and in what manner land had devolved upon Manbhawan.

24. At this juncture, it would be apposite to mention paragraph of **Dukh Haran Tewary (*supra*)** wherein while referring to the evidence of Genealogy Priest has observed that :-

“6. xxxxx
xxxxx

The comment of the appellants about non-examination of any witness from Nainijor or absence of any enquiry in that village by the plaintiffs is justified. But

there are more dependable documentary evidence in the case which would help a decision on the point. P. W. 1 is a Panda from Mathura. He deposed that Ramgati had gone on pilgrimage to Mathura and was his Jajman. He signed entries in the Jajmanika book of the witness where the names of Ramgati, his father Lila Tewari and his grandfather Narkhu Tewari were written. Those entries were marked as Ext. 1 (e) and the signature of Ramgati as Ext. 2. Several other entries in that book were exhibited to show that other persons from the same village Bachri visited Mathura with Ramgati on that occasion and the names of those persons with the names of their fathers and grand-fathers were written in the book. This Jajmanika book was the subject-matter of a partition suit between P. W. 1 and others and by the decree in that suit, the relevant pages of the book were allotted to the share of P. W. 1. Learned Counsel objected to the admissibility of this book and the entries made therein. Ramgati is dead.

His statement, written or verbal, is admissible under Section 32 of the Evidence Act, when that statement was made in the ordinary course of business and in particular when it consisted of an entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty or when the statement related to the existence of any relationship between persons as to whose relationship Ramgati had special means of knowledge and when such statement was made before the question in dispute was raised. Sub-clauses (2) and (5) of Section 32 make such statement admissible and relevant. There is not the slightest reason why P. W. 1 would come to depose falsely or the entries in the Jajmanika book would be fabricated by him to support the plaintiffs. The appearance of

the book also inspires confidence. There is no doubt that the entries were made in the usual course and in the discharge of the professional or religious duties of P. W. 1 and Ramgati (sic) P. W. 9 deposed that he went to Mathura with Ramgati and he proved the entries made in the Jajmanika book of P. W. 1.”

(Emphasis supplied)

25. The outcome of above discussion is that oral evidence of Genealogy Priest (Panda) supported by documents of his Bahi has more weight in comparison of oral evidence of Jalim Singh and Chitter Singh and there is no reasonable ground to disbelieve evidence of Genealogy Priest (Panda), therefore, Revisional Authority has legally interfered in findings returned by Consolidation Officer and Settlement Officer Consolidation within the jurisdiction of revision provided under Section 48 of Act of 1953.

26. Therefore, as there is no illegality or irregularity in the impugned orders, therefore, writ petition is **dismissed**.

27. Before parting with the judgment, it is necessary to note that this Court has decided the present writ petition finally after 43 years. This writ petition was dismissed for want of prosecution three times, though restored on each occasion. Meanwhile due to death of some of the parties, matter kept pending to bring their legal heirs on record. On few dates petition was adjourned on request of counsel for parties. In four decades, generation changes, but Court has failed to decide this writ petition expeditiously. Role of Advocates is also matter of concern, when they failed to appear or sought adjournment but Court also cannot shun away from its responsibility to decide cases expeditiously

in accordance with law. "Justice delayed is justice denied", a legal maxim which we all have to keep always in mind. No reasons could be assigned to justify the delay occurred in finally deciding the present writ petition after more than four decades. Bar and Bench both have to accept blame for such a huge delay. Both have to work together for better administration of justice so that cases be decided expeditiously, in accordance with law so that situation such in hand may remain as an exception only and not as a routine.

(2023) 8 ILRA 1052
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2023

BEFORE

THE HON'BLE SURYA PRAKASH
KESARWANI, J.
THE HON'BLE ANISH KUMAR GUPTA, J.

Writ-C No. 2637 of 2023

Tehsil Bar Association Ghaziabad
...Petitioner
Versus
U.P.P.C.L. & Ors. ...Respondents

Counsel for the Petitioner:
 Sri Vivek Prakash Mishra

Counsel for the Respondents:
 Sri Pranjal Mehrotra, Sri Krishna Agarwal

Civil Law - Electricity Act, 2003 - Tariff Classification - Advocates' Chambers in Tehsil Premises - Whether liable to be charged at domestic or commercial rate - Rate Schedule LMV-1 for domestic usage includes professional chambers such as those of lawyers - Circulars dated 28.11.1983 and 08.10.1985 mandate LMV-1 rate for lawyers' offices - UPPCL charged LMV-2 (commercial) on basis of Clause 13 of Rate Schedule 2022-23 (residuary clause) - Held: Legal profession not a commercial activity - Advocates not

engaged in trade or business - Their work akin to social service and judicial function - Charging commercial tariff to advocates' chambers in court/tehsil premises contrary to tariff policy, circulars and legal interpretation - Direction issued to treat electricity connections in advocates' chambers as domestic category under LMV-1.

Held: "The legal profession is a solemn profession and not a commercial activity. Lawyers, who assist in the administration of justice, are not engaged in trade or commerce. Hence, their chambers - even in tehsil premises - cannot be billed under commercial tariff schedule LMV-2, but under domestic category LMV-1, as per previous circulars and established principles."

Case Laws relied on:

1. Sakha Ram Narayan Kherdekar Vs City of Nagpur Corp., AIR 1964 Bom 200
2. Dr. D.M. Surti Vs St. of Guj., AIR 1969 SC 63
3. VS Sasidharan Vs M/s Peter & Karunakar, AIR 1984 SC 1700
4. M.P. Electricity Board Vs Shiv Narayan, (2005) 7 SCC 283
5. Sudha Vs President, Advocates Association, Chennai, (2010) 14 SCC 114
6. Arup Sarkar Vs C.E.S.C. Ltd., 2020 STPL 4200 Calcutta
7. Ramanathan Vs St. of Kerala, 1991 (1) KerLT 89
8. B.N. Magon Vs South Delhi Municipal Corp., 217 (2015) DLT 55

Interpretation of:

1. U.P. Electricity Supply Code, 2005 (Clause 3.3(e), 1.5)
2. Electricity Act, 2003 (Sections 3, 61, 86)
3. Rate Schedule LMV-1 & LMV-2 (FY 2022-23)

4. Circular Nos. 4177-HC/R-83 dated 28.11.1983 & 2446-HC/R-83 dated 08.10.1985

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

1. In this writ petition, the petitioner, Tehsil Bar Association, Sadar Tehsil Parisar, Gandhi Nagar, Ghaziabad, is an association of advocates registered under Societies Registration Act, 1860. The members of the petitioner association are the advocates engaged in a legal practice and all the advocates have got their chambers at the Tehsil Sadar campus with valid electricity connection installed by the respondent Power Corporation. As per the tariff schedule for Financial Year 2016-17 available on the website of respondent Power Corporation, the residential premises of professionals such as advocates including their chambers are treated as domestic and well covered under schedule LMV-1. After the grant of electricity connection in the chambers of such advocates the respondent started charging the electricity charges at commercial rates which were objected by the petitioner association and since their grievances were not redressed, they filed the Writ C No. 6115 of 2019 (Tehsil Bar Association and 12 others v. State of UP and 6 others), which was disposed of by this Court vide order dated 22.02.2019, as under:-

"Heard Sri Vivek Prakash Mishra, learned counsel for the petitioners.

By means of this writ petition, the petitioners have come to this Court raising a grievance that in the court campus of Tehsil Bar Association, Sadar Tehsil, Gandhi Nagar district Ghaziabad in the advocates chamber, the electricity connection has been installed and the bill is being charged on commercial basis

whereas tariff schedule for the Financial Year 2016-17 clearly states that LMV-1 (domestic) would be applicable to the chambers of professionals such as advocates, doctors, artists, consultants etc. Under the Right to Information Act, the information supplied to the petitioner on 13.8.2017 is that the meters installed in the advocates' chamber comes under domestic category. However, it is stated that the bills are being sent for commercial category.

The writ petition is disposed of with the observations that in case the petitioners make a representation to the Executive Engineer, Paschimanchal Vidyut Vitran Nigam Ltd., Meerut, the same be considered and appropriate orders be passed and, if so required, electricity bills be corrected. The said decision shall be taken by the Executive Engineer within a period of two months from the date a certified copy of this order is produced before him. "

2. In the aforesaid order, it was categorically observed that the tariff schedule for the Financial Year 2016-17 clearly states that LMV-1, domestic rates would be applicable to the chambers of professionals such as advocates, doctors, artists, consultants etc. It was observed that under the Right to Information, the information supplied on 13.08.2017, it is categorically stated that the electricity connection installed in the chambers of advocates in District and Sessions Court, Ghaziabad, were issued under domestic category and the electricity charges are charged upon as per the tariff rates LMV-1 as determined by the UP State Electricity Regulatory Commission.

3. In terms of the aforesaid order dated 22.02.2019 passed by this Court, the petitioner association made a representation

before the respondent no. 4, which has been disposed of by order dated 27.07.2019. The respondent no. 4, relying upon clause 3.3 (e) of the UP Electricity Supply Code, 2005, observed that since the chambers of the advocates in the tehsil compound are not in the category of domestic use of electricity, therefore, electricity consumed cannot be treated as domestic consumption. The aforesaid order is reproduced hereinbelow:-

"सकारण आदेश

अध्यक्ष/सचिव तहसील बार एसोसियेशन, गाजियाबाद के द्वारा दिनांक 18.07.2019 को प्रस्तुत किये गये प्रत्यावेदन विषय तहसील बार एसोसियेशन के 13 नम्बर अधिवक्ता / सदस्यों के द्वारा प्रत्यावेदन एवं मा० उच्च न्यायालय के दायर याचिका 6115/2019 एवं 3874 / 2019 में पारित आदेश के अनुपालन में प्रकरण में अध्ययन करने पर पाया गया कि विद्युत नगरीय वितरण खण्ड- तृतीय, गाजियाबाद द्वारा तहसील परिसर में अधिवक्ताओं के चैम्बर में दिये गये संयोजन उ०प्र० इलैक्ट्रिसिटी कोड-2005 के अनुसार लागू टैरिफ दर पर निर्गत है।

उ०प्र० विद्युत प्रदाय संहिता 2005 के नियम 3.3. (ई) जो निम्नलिखित है--

Professionals architects chartered accountants, engineers, doctors, lawyers and teachers etc. may utilize a maximum of 50 square meters of residential space in their possession, for carrying out professional practice of consultancy work, and this shall not attract non-domestic tariff के अनुसार अधिवक्ता द्वारा घरेलू परिसर का अधिकार प्राप्त होने पर उस परिसर क्षेत्र में अधिकतम 50 वर्ग मी० ऐरिया को प्रोफेशनल या कन्सलटेन्सी में प्रयोग करने पर उक्त घरेलू क्षेत्र का प्रयोग ***Non-domestic Tariff*** में नहीं होगा। उक्त प्रकरण में अधिवक्ता तहसील परिसर में विद्युत का प्रयोग कर रहे हैं जो कि घरेलू परिसर का क्षेत्र नहीं है। **तहसील परिक्षेत्र में अधिवक्ता कक्ष को घरेलू विद्या में नहीं लिया जा सकता है।**

तहसील परिसर में ऊर्जीकृत अधिवक्ता कक्ष के संयोजन वाणिज्यिक विद्या से घरंतु विद्या में परिवर्तित करने योग्य नहीं है। अतः आवेदन दिनांक 18.07.2019 को निस्तारित किया जाता है।

अधिशाली अभियन्ता
अधिशाली अभियन्ता
विद्युत नगरीय वितरण खण्ड-तृतीय
गाजियाबाद"

4. The aforequoted order has been modified vide order dated 13.04.2023, as under:-

"सकारण आदेश

माननीय उच्च न्यायालय, इलाहाबाद द्वारा पारित निर्णय दिनांक 06.04.2023 के. अनुपालन में खण्ड कार्यालय द्वारा पूर्व में पारित सकारण आदेश सं०-4667 दिनांक 27.07.2019 को पुनः निम्नवत् संशोधित किया जाता है।

विद्युत नगरीय वितरण खण्ड-तृतीय, गाजियाबाद द्वारा उत्तर प्रदेश पावर कारपोरेशन लि० एवं माननीय उत्तर प्रदेश विद्युत नियामक आयोग द्वारा समय समय पर जारी आदेश एवं निर्धारित रेट शेड्यूल के अनुसार विद्युत संयोजनों की बिलिंग करने हेतु प्राप्त आदेशों का पालन किया जाता है। वर्तमान में माननीय उत्तर प्रदेश विद्युत नियामक आयोग द्वारा अनुमोदित वर्ष 2020-21 के टूअप वर्ष 2021-22 की ए०पी०आर० तथा वर्ष 2022-23 के सकल राजस्व एवं टैरिफ के सम्बन्ध में पुनरीक्षित दरों को लागू करने हेतु प्राप्त दिशा निर्देश के अनुपालन में सामान्य नियमों / प्राविधानों के अन्तर्गत टैरिफ के बिन्दु सं०- 13 निम्नवत् आदेशित है:-

CONSUMER NOT COVERED UNDER ANY RATE SCHEDULE OF EXPRESSLY EXCLUDED FROM ANY CATEGORY:

For consumers of light, fan & power (excluding motive power loads) not covered under any rate schedule of expressly excluded from any LMV rate

schedule will be categorized under LMV-2.

उत्तर प्रदेश पावर कारपोरेशन लि० को माननीय विद्युत नियामक आयोग द्वारा समय समय पर निर्धारित रेट शैड्यूल के अनुसार संयोजनों की श्रेणीवार बिलिंग करने हेतु आदेशित किया जाता है। विद्युत नियामक आयोग द्वारा जारी रेट शैड्यूल (टैरिफ) में अधिवक्ताओं के तहसील परिसर में स्थित कक्ष में स्थापित विद्युत संयोजनों की बिलिंग घरेलू श्रेणी के अन्तर्गत करने हेतु कहीं कोई विशेष स्पष्ट आदेश नहीं है। अधिवक्ता चैम्बर में स्थापित संयोजनों का किसी श्रेणी के अन्तर्गत परिभाषित ना होने के कारण अघरेलू

श्रेणी के अन्तर्गत एलएमवी-2 विद्या रेट अनुसार बिलिंग की जा रही है।

एवं उत्तर प्रदेश विद्युत प्रदाय सहित 2005 के नियम 3.3 (ई) जो कि निम्न प्रकार

परिभाषित है:-

Professionals architects chartered accountants, engineers, doctors, lawyers and teachers etc. may utilize a maximum of 50 square meters of residential space in their possession, for carrying out professional practice of consultancy work, and this shall not attract non-domestic tariff. के अनुसार अधिवक्ता द्वारा घरेलू परिसर का अधिकार प्राप्त होने पर उस परिसर क्षेत्र में अधिकतम 50 वर्ग मी० ऐरिया को प्रोफेशनल या कनसेलटेन्सी में प्रयोग करने पर उक्त घरेलू क्षेत्र का प्रयोग Non-domestic Tariff नहीं होगा/उक्त प्रकरण में अधिवक्ता तहसील परिसर में विद्युत का प्रयोग कर रहे हैं।

अतः इस प्रकार के संयोजनों का विद्युत नियामक आयोग द्वारा जारी टैरिफ शेड्यूल के अन्तर्गत घरेलू क्षेत्र (एलएमवी-1) के अन्तर्गत तहसील परिसर में स्थित अधिवक्ता चैम्बर को परिभाषित नहीं किया गया है। एवं उत्तर प्रदेश विद्युत प्रदाय सहित 2005 के धारा-3.3(ई) के अनुसार तहसील परिसर के अन्तर्गत अधिवक्ता चैम्बर की बिलिंग अघरेलू श्रेणी (एलएमवी-2) के अन्तर्गत की जा रही है। खण्ड द्वारा माननीय नियामक आयोग के नियमों के अनुपालनार्थ टैरिफ / बिलिंग से भिन्न टैरिफ में बिलिंग करने का कोई अधिकार प्राप्त नहीं है। अतः तहसील परिसर स्थित अधिवक्ता चैम्बर में विद्युत संयोजन की किसी अन्य विधा (श्रेणी) में बिलिंग हेतु माननीय उत्तर प्रदेश विद्युत नियामक आयोग द्वारा आदेश जारी किये जाने की आवश्यकता है। याचिकाकर्ता माननीय उत्तर प्रदेश विद्युत नियामक आयोग के समक्ष भी प्रकरण प्रस्तुत कर सकते हैं।"

5. Aggrieved by the aforesaid order dated 27.07.2019, the petitioner has filed the instant petition praying for the following relief:-

"I. Issue a writ, order or direction in the nature of certiorari to quash impugned order dated 27.07.2019 passed by the respondents (Annexure No.6 to this writ petition).

II. Issue a writ order or direction in the nature of mandamus directing to the respondents to stop the arbitrary act of the respondents whereby they have treated them as commercial power user and continuously sent electricity bills with levied of commercial tariff plan @ Rs. 8.50 per unit.

III. Issue a writ order or direction in the nature of mandamus directing to the respondents to re-adjust the extra bill paid amount as commercial user being treated as domestic power user.

IV. Issue a writ order or direction in the nature of mandamus directing to the respondents to stop the recovery of current bill from petitioner Association and its members till disposal of its conversion into domestic bills.

V. Issue any other suitable writ, order of direction, which this Hon'ble court may deem fit and proper in the circumstances of the case.

VI. Award costs of the writ petition to the petitioner."

6. Learned Counsel for the petitioner submitted that as per the tariff schedule for the Financial Year 2016-17, residential premises of the professionals such as advocates, doctors, artists, consultants etc., including their chambers were covered under the category of LMV-1 (domestic), therefore, also according to the admission by the respondent no. 4, in the information annexed as Annexure-3 to the writ petition, the electricity connection in the Advocates' chambers, is issued under the domestic category in District and Sessions Court, Ghaziabad. Likewise, having regard to the order dated 22.02.2009 passed in Writ C No. 6115 of 2019, the Noida Power Corporation Limited has accepted the observations made in the said order and it

started charging for the electricity in the chambers of advocates at District Bar Association, Noida, at domestic rates. The members of the petitioner Association should also be treated as domestic consumer of electricity and they should be charged at the rate applicable to the domestic users of electricity. Learned counsel for the petitioner further submitted that the profession of an advocate is not a commercial activity rather it is service to the society and the lawyers are active players in the administration of justice like the judges. Professional activity by an advocate or a Judge goes side by side on the bar and both are the same profession. The function of each are different but it is the same profession, the object is administration of justice according to law. Therefore, the lawyers' profession is a kind of profession which can be said to be carried as social service, which is certainly not a profession of commercial nature. Therefore, the commercial rates of electricity, supplied to the Chambers of advocates in the court campus cannot be applied and they must be charged as per the domestic schedule of electricity supply.

7. Learned Counsel for the petitioner has placed reliance on the following judgments:-

1. Sakha Ram Narayan Kherdekar v. City of Nagpur Corporation reported in AIR 1964 Bombay 200.

2. Ramanathan v. State of Kerala reported in 1991 Vol. I KerLT 89.

3. B.N. Magon v. South Delhi Municipal Corporation reported in 217 (2015) DLT 55.

4. M.P. Electricity Board and Others v. Shiv Narayan and Another reported in (2005) 7 SCC 283.

5. Arup Sarkar v. C.E.S.C. Limited and others reported in 2020 STPL 4200 Calcutta.

6. Sasidharan v. M/s Peter and Karunakar reported 1984 AIR SC 1700.

8. Learned Counsel for the petitioner has also relied upon a Circular No. 4177-HC/R-83 dated 28.11.1983 which provides the rate schedule under category LMV-1, which is applicable to the judiciary. He further relied upon Circular No. 2446-HC/R-83 dt. 08.10.1985 which provides that office of a lawyer or firm of lawyers is to be billed under rate schedule LMV-1, applicable to domestic light, fan and power consumers.

9. Learned counsel for the petitioner relying upon Clause 1.5 of U.P. Electricity Supply Code, 2005, submits that the aforesaid circulars which specifically provide for applicability of rate schedule under category LMV-1 to the office or firm of lawyers are saved as per clause 1.5 of the U.P. Electricity Supply Code as there is no specific provision in the new rate schedule with regard to the electricity supply to the lawyers chambers.

10. Sri Pranjal Mehrotra, learned Counsel for the respondent no. 4 relying upon the rate schedule as approved for the year 2022-23 by the U.P. Electricity Regulatory Commission submits that activity in the lawyers' chambers is not a domestic activity. Thus, the activity of lawyers in their chambers is a non-domestic activity. Therefore, as per Clause 13 of rate schedule for Financial Year 2020-23, the use of electricity in the advocates' chambers is a non-domestic activity and LMV-2 will apply for the supply of electricity to the lawyers' chambers. The rate schedule for the year

2022-23 does not provide for specific rate schedule for Lawyers' Chambers, therefore, Clause 13 provides for the applicability of LMV-2, for an activity/ category, which is not covered in any rate Schedule. Mr. Mehrotra, learned counsel for the respondent, further submits that the rate schedules are approved by the U.P. Electricity Regulatory Commission and the respondent no. 4 being the distribution company is bound by the rate schedule as approved by the U.P. Electricity Regulatory Commission. If the petitioner has any grievance with regard to the rate schedule as approved by the U.P. Electricity Regulatory Commission, they can raise their grievances before the U.P. Electricity Regulatory Commission itself. Hence, in view of the availability of the alternative remedy, the writ petition is not maintainable and is liable to be dismissed.

11. Learned counsel for the petitioner has heavily placed reliance on the decision of the Hon'ble Supreme Court in ***MP Electricity Board and Another v. Shiv Narayan and Another reported in (2005) 7 SCC 283***, whereby the matter was referred to Larger Bench, doubting the correctness of the judgement in ***New Delhi Municipal Council v. Sohan Lal Sachdev reported in (2002) SCC 494***. The Larger Bench of the Hon'ble Supreme Court had affirmed the judgement in ***Sohan Lal Sachdev (Supra)***, holding that the same does not require any re-consideration. However, it is pertinent to note that the Hon'ble Supreme Court has not gone into the question as to whether or not the advocate can be said to be carrying on any commercial activity.

12. In view of the aforesaid submissions of the counsel for the parties the following questions emerges for determination by this Court:-

1. Whether the activities/profession of an advocate is a commercial activity, which will attract the commercial rate of electricity consumption?

2. Whether the Rate Schedule LMV-2, which is applicable for the commercial activities, can be applied for the electricity supplied to the Lawyers Chambers?

3. Whether the respondents can discriminate between the electricity supply to the advocates' chambers in different court compounds?

13. **Circular No. 4177-HC/R-83 dated 28.11.1983** read as under:-

"Central and State Government offices who are engaged in commercial activities should be billed at the Rate Schedule LMV-2 applicable to Commercial Light fan and Power while others at the Rate Schedule LMV-1 as detailed below:

<i>A. Where LMV-2 is applicable</i>	<i>B. Where LMV-1 is applicable</i>

1. All India Radio	1. Revenue Departments

2. Doordarshan	2. Police Department

3. State Road Transport Corporation	3. Judiciary

4. Bridge Corporation

5. Development Authorities of Towns

6. All State Govt./Central Govt. Undertakings and Corporations

7. P&T Deptt.,

8. Railways (upto 5 kW)
[Beyond 5 kW to be billed under LMV-10(4)(b)]

9. *U. P. Rajkiya Nirman Nigam*

10. *U. P. Housing Board*"

14. Circular No. 2446-HC/R-83 dt. 08-10-85 provides as under:-

"Office of a lawyer or firm of lawyers is to be billed under rate schedule LMV-1, applicable to domestic light, fan and power consumers."

15. As per rate schedule LMV-1 for the Financial Year 2022-23, the applicability clause is as under:-

"Premises for residential / domestic purpose, Accommodation for Paying Guests for Domestic purpose (Excluding Guest Houses), Janata Service Connections, Kutir Jyoti Connections, Jhuggi / Hutments, Places of Worship (e.g. Temples, Mosques, Gurudwaras, Churches) and Electric Crematoria, Shelter Homes, orphanages, old age homes, Institutions run for mentally retarded and forsaken children. Non- commercial places occupied by religious persons, of any religion, are also entitled in this category, for a maximum load up to 5 kW, subject to the condition that such non-commercial place shall have a valid registration/recognition from a charitable trust."

16. The rate schedule LMV-2 for non-domestic light, fans and power is applicable to all consumers as under:-

"This schedule shall apply to all consumers using electric energy for Light, Fan and Power loads for Non-Domestic purposes, like all type of Shops including Patri Shopkeepers, Hotels, Restaurants, Private Guest Houses, Private Transit

Hostels, Private Students Hostels, Marriage Houses, Show-Rooms, Commercial/Trading Establishments, Cinema and Theatres, Banks, Cable T.V. Operators, Telephone Booths / PCO (STD / ISD), Fax Communication Centres, Photo Copiers, Cyber Café, Private Diagnostic Centres including X-Ray Plants, MRI Centres, CAT Scan Centres, Pathologies and Private Advertising / Sign Posts / Sign Boards, Commercial Institutions / Societies, Automobile Service Centres, Coaching Institutes, Private Museums, Power Looms with less than 5 kW load and for all companies registered under the Companies Act, 1956 with loads less than 75 kW."

17. The rate schedule LMV-4 light and power of public and private institutions applies to the following:-

"This schedule shall apply to:

(a) Government Hospitals / Government Research Institutions / Offices of the Government Organizations other than companies registered under Companies Act 1956.

(b) Government & Government aided (i) Educational Institutions (ii) Hostels (iii) Libraries.

(c) Religious and charitable trusts & Institutions having a valid registration under Section 12 AA & 80 G issued by the Income Tax department including hospitals, colleges and those providing services free of cost or at the charges / structure of charges not exceeding those in similar Government operated institutions.

(d) Railway Establishments (excluding railway traction, industrial premises & Metro) such as Booking Centres, Railway Stations & Railway Research and Development Organization, Railway rest houses, Railway holiday homes, Railway inspection houses.

(e) All India Radio and Doordarshan.

(f) Guest houses of Government, Semi-Government, Public Sector Undertaking Organisations."

18. From the careful perusal of the rate schedules, as approved for the Financial Year 2022-23 by the U.P. State Regulatory Commission it is apparent that the activities of advocates and professionals or the public institutions like Judiciary do not find place in any of the rate schedule. Clause 13 of the general provisions with regard to rate schedule for Financial Year 2022-23 provides as under:-

"CONSUMERS NOT COVERED UNDER ANY RATE SCHEDULE OR EXPRESSLY EXCLUDED FROM ANY CATEGORY:

For consumers of light, fan & power (excluding motive power loads) not covered under any rate schedule or expressly excluded from any LMV rate schedule will be categorized under LMV-2."

19. Clause 1.5 of the U.P. Electricity Supply Code, 2005 provides as under:-

"1.5 Existing Provisions in Licensee's own Manuals :

The licensee may refer to their own manual or orders in the matters not specifically covered in this Supply Code, provided that such guidelines are not inconsistent with any of the provisions in this Supply Code and the Electricity Act 2003."

20. Sub Clause (e) of Clause 3.3 provides as under:-

"(e) Professionals, architects, chartered accountants, engineers, doctors, lawyers and teachers etc. may utilize a

maximum of 50 square meters of residential space in their possession, for carrying out professional practice or consultancy work, and this shall not attract non-domestic tariff."

21. Sub-section (1) of Section 3 of the Electricity Act, 2003 enshrines a duty upon the Central Government to formulate the tariff policy in consultation with the State Government. Sub-section (3) of Section 3 of Electricity Act, 2003 further provides for review and revision of the National Electricity Policy and tariff policy by the Central Government from time to time with the consultation of the State Governments and the Authority. Section 86 of the Electricity Act empowers the State Commission to determine the tariff for generation, supply, transmission and wheeling of electricity. While determining the tariff policy, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy published under section 3, as provided in Sub-section (4) of Section 86. Clause (f) of Sub-section (1) of Section 86 of the Electricity Act empowers the State Commission to adjudicate upon the disputes between the licensee and generating companies and to refer any dispute for arbitration.

22. LMV-2 is applicable for non-domestic purposes like all type of shops including Patri Shopkeepers, Hotels, Restaurants, Private Guest House, Private Transit Hospitals, Private Student Hostel, Marriage House, Show Rooms, Commercial/Trading Establishment, Cinema and Theatres, Banks, Cable TV, Operator, Telephone Booths, Photo Copiers shop, Cyber Cafe etc. If we look into the non-domestic purposes as indicated in rate schedule LMV-2, the profession of a lawyer

is not covered under the non-domestic purpose as has been illustrated in this rate schedule. The proposition is well established that the words occurred in the same context must take its colour from each other. In order to bring the lawyers' office within the categories of non-domestic purposes, the activity must be established to be of similar nature as illustrated in rate schedule under category LMV-2. In **Dr. D.M Surti Vs. State of Gujarat, (AIR 1969 SC 63)**, the Hon'ble Supreme Court has held as under:

"The words take as it were their colour from each other that is, the more general is restricted to sense analogous to a less general. "Associated words take their meaning from one another under the doctrine of noscitur a sociis the philosophy of which is that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it; such doctrine is broader than the maxim Ejusdem Generis."

Thus from the plain reading of the illustrative definition of the non-domestic purpose as indicated in the rate schedule under LMV-2, we are of the firm view that the lawyers' chambers would not come within the definition of non-domestic purpose as illustrated in rate schedule LMV-2 as the illustrative activities indicate the activities of commercial nature. The legal profession in catena of cases has been held to be non-commercial activity and it is not a trade or business. By the Rules framed by the Bar Council of India, the Lawyers are also prohibited from actively participating in any trade or profession. Hon'ble Supreme Court in **M.P. Electricity Board and Ors. v. Shiv Narayan Chopra (Supra)** held that the advocates' office cannot be charged additional tariff at the

commercial rate as the legal profession is not a commercial activity.

23. In **Dr. D.M Surti Vs. State of Gujarat (Supra)**, Hon'ble Supreme Court further observed that "a professional activity must be an activity carried on by an individual by his personal skill and intelligence. There is fundamental distinction between a professional activity and an activity of commercial character."

24. In **Sudha v. President, Advocates Association, Chennai and Ors. reported in (2010) 14 SCC 114** observed as under:-

"The legal profession is a solemn and serious occupation. It is a noble calling and all those who belong to it are its honourable members. Although the entry to the profession can be had by acquiring merely the qualification prescribed by different universities, the honour as a professional has to be maintained by its members by their exemplary conduct both in and outside the court. The legal profession is different from other professions in that what the lawyers do, affects not only an individual but the administration of justice which is the foundation of the civilised society."

25. The word 'profession' has been defined in Black's Law Dictionary - Sixth Ed. as under:

'Profession- A vocation or occupation requiring special, usually advanced education, knowledge, and skill; e.g. law or medical professions. Also refers to whole body of such profession.

The labour and skill involved in a profession is predominantly mental or intellectual, rather than physical or manual.

The term originally contemplated only technology, law and medicine, but as applications of science and learning are extended to other departments of affairs, other vocations also receive the name, which implies professed attainments in special knowledge as distinguished from mere skill.

Act of professing; a public declaration respecting something. Profession of faith in a religion."

26. The word 'profession' has also been defined in the Advanced Law Laxicon Volume-3 at page-3764 which reads as under:

"Profession- A 'profession' involves the idea of an occupation requiring either purely intellectual skill or any manual skill, as in painting and sculpture or surgery, skill controlled by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangements for the production of sale of commodities. C.I.T. v. Manmohan Das (1966) 59 ITR 699, 710 (SC) Income Tax Act, 1961. Sec.28."

At page 3765 it has been further stated as follows :

"One definition of a profession is an employment, especially an employment requiring a learned education, as those of law and physics (Worcester Dict.). In the Century Dictionary the definition of profession is given, among others, as a vocation in which a professional knowledge of some department of science or learning is used by its practical application to the affairs of others, either in advising, guiding, or teaching them, or in serving, their interest or welfare in the practice of an art founded on it."

"The word implies professional attainment in special knowledge as distinguished from mere skill; a practical dealing with affairs as distinguished from mere study or investigation; and an application of such knowledge to use for others as a vocation as distinguished from its pursuits for its own purposes."

"The term is applied to an occupation or calling which requires learned and special preparation in the acquirement of scientific knowledge and skill."

1. The occupation which one professes to be skilled in and to follow; any calling or occupation by which a person habitually earns his living (S.2(36), Income Tax Act and S. 150, Indian Evidence Act); 2. S.7, North Eastern Hill University Act."

"An activity to be a profession must be one carried on by an individual by his personal skill, intelligence and an individual by his personal skill, intelligence and dependent on individual characteristics. Sakharan Narayan Kherdekar v. City of Nagpur Corporation, (AIR 1964 Bom 200, 210 (Bombay Shops and Establishment Act (79 of 1948, S. 2(4)).

The multifarious functions call for the exercise of integrity; intelligence and personal skill by the Chartered Accountant in the service of his client and so the preamble of the Chartered Accountant Act, 1949 describes the avocation of a chartered accountant as a profession. N.E. Merchant v. State. (AIR 1968 Bom 283, 287. Bombay Shops and Commercial Establishment Act (76 of 1948)"

"A profession or occupation is carried on for the purpose of earning a livelihood and a profit motive does not underline such carrying of profession or occupation. L.M. Chitala vs. Commissioner of Labour. (AIR 1964 Mad.131, 133 (Constitution of India, Art. 19(6))"

"Profession as distinguished with 'commercial' means a person who enters into a profession. It involves certain amount of skill as against commercial activity where it is more of a matter of things or business activity. In profession, it is purely use of skill activity. Therefore, two are distinct concepts in commercial activity - one works for gain or profit and as against this, in profession, one works for his livelihood."

27. In **V. Sasidharan v. M/s Peter and Karunakar** reported in **AIR 1984 (4) SCC 230**, Hon'ble Supreme Court has held that the office of a lawyer or a firm of lawyers is not a commercial establishment within the meaning of the provisions of Kerala Shops Commercial Establishment Act, 1960. It was further observed in para-9 of the said judgment 'whatever may be the popular conception or misconception regarding the role of today's lawyer and the alleged narrowing of the gap between a profession on one hand and a trade or business on the other, it is trite that, traditionally, lawyers do not carry on a trade or business nor do they render services to 'customers'.

28. In **Chairman, M.P. Electricity Board vs. Shiv Narayan** reported in **2005 7 SCC 283**, the Hon'ble Supreme Court has observed as under:

"12. A professional activity must be an activity carried on by an individual by his personal skill and intelligence. There is a fundamental distinction, therefore, between a professional activity and an activity of a commercial character. Considering a similar question in the background of Section 2(4) of the Bombay Shops and Establishments Act (79 of 1948), it was held by this Court in Dr. Devendra M. Surti

v. The State of Gujarat (AIR 1969 Sc 63) that a doctor's establishment is not covered by the expression "Commercial establishment".

"14. Even if it is accepted that the user was not domestic, it may be non-domestic. But it does not automatically become "commercial". The words "non-domestic" and "commercial" are not interchangeable...."

29. The legal profession has been described in a passage in the book of Ethics of Bar and Bench by Hicks at pages 229 and 230, as follows:

"The practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a State Board appointed for that purpose. The right to practise law is in the nature of a franchise from the State conferred only for merit....."

"The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent and it cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he would be subject to the directions of the corporation antithetical to the directions of the client. There would be neither contract nor privity between, him and the client and he would not owe even the duty of counsel to the actual litigant. The corporation would control the litigation, the money earned would belong to the corporation, and the attorney would be responsible to the corporation only. His master would not be the client but the corporation, conducted it may be wholly by

layman organised simply to make money and not to aid in the administration of justice which is the highest function of an attorney and counsellor at law. The corporation might not have a lawyer among its stockholders, directors, or officers. Its members might be without character, learning, or standing. There would be no remedy by attachment or disbarment to protect the public from imposition or fraud, no stimulus to good conduct from the traditions of an ancient and honourable profession and no guide except the sordid purpose to earn money for stockholders. The bar, which is an institution of the highest usefulness and standing, would be degraded if even its humblest members became subject to the orders of a money-making corporation engaged not in conducting litigation for itself, but in the business of conducting litigation for others. The degradation of the bar is an injury to the State."

30. In **Ramanathan Vs. State of Kerala (1991 (1) KLJ 410)**, the Kerala High Court, while dealing with the matter relating to the Kerala Shops and Commercial Establishment Act, 1960, observed that the profession of a lawyer does not involve commercial or industrial activity.

31. In **Arup Sarkar Vs. CESE Limited & Others**, (Writ Petition No. 18367 of 2019 Judgment dated 11.02.2020), the Calcutta High Court has held that the Chambers of litigation Lawyers are clearly used for his livelihood based on his personal professional skills, therefore, their activity cannot be said to be commercial activity. Hence, they cannot be charged under the category commercial (urban) and directed the lawyer's chambers

to be charged under the category "Domestic (Urban).

32. In **Sakharam v. Nagpur Corporation (AIR 1960 Bombay 200)**, a Division Bench of Bombay High Court dealt with the question as to whether Advocate's office can be declared as establishment under Bombay Shops and Commercial Establishment Act. After examining the various facets of legal profession, it was observed that the activity of a lawyer is one carried out by him by his personal skill, intelligence, study, integrity and individual characteristics. Finally, the Division Bench after analysing the salient features of legal profession concluded that the office of a legal professional is not a commercial establishment under the provisions of the said Act.

33. An advocate or a legal practitioner is duty-bound to act as an officer of the Court. An advocate is prohibited to do any business or involve in any commercial activity and they are also restrained by the rules framed by the Bar Council of India from advertising their professional activities. The Bar Council of India has also defined the duties of an Advocate towards his client and towards the Court, towards colleagues and opponents. An advocate is prohibited from creating any self interest in the subject matter of the case, for he is engaged. He cannot stipulate a fee contingent on the result of the case nor he can agree to share the proceeds of the case. All these are the features, which categorically distinguish, the legal profession from the trade or business. Therefore, the legal profession by no stretch of imagination can be called as the commercial activity, trade or business.

34. Having held that the legal profession is not a commercial activity, involving any trade or business, the rates schedule LMV-2, which is though phrased as 'non-domestic users under the LMV-2, categorically indicates commercial activities, which are purely commercial relating to trade and business. Hence the said rates schedule cannot be applied to the offices of the legal professionals, whether such offices are in the residential buildings or are situate in the court premises. The lawyers' chambers, which are within the court compounds are part of the judicial premises, where as per the circular dated 28.11.1983, LMV-1 is applicable. The circular dated 08.10.1985 also mandated that office of a lawyer or firm of a lawyer is to be billed at the rate schedule LMV-1 applicable to domestic light and power consumers, which is an established practice. However, in the rate schedule issued for the financial year 2022-23, the lawyer's profession or activities do not find place in any of the rate schedules prescribed. Merely because of Clause - 13 of the rate schedule, which is a residuary clause, the rate Schedule LMV-2, which is applicable to commercial activities, cannot be applied in case of the lawyer's chambers in Court premises.

35. It has been argued by learned counsel for the petitioner that after the order dated 22.02.2019 passed by this Court in earlier Writ Petition being Writ C No. 6115 of 2019, the Noida Power Corporation Limited has started to charge for the electricity consumption at the Lawyers Chambers situated in Court Compound, Surajpur District Courts of District Gautam Budh Nagar as per the rate schedule LMV-1. Hence, the petitioner also being similarly situated cannot be treated differently and the same rate schedule

ought to have been applied to their chambers as well. In support of their contention the petitioner has also produced a copy of the electricity bill dated 31.12.2022 of one of such lawyer's chamber. Learned Counsel for the respondent submitted that electricity supply to lawyers chambers in District Court, Gautam Budh Nagar are governed by the different power corporation and not by the U.P. Power Corporation, hence, the said rate cannot be applied. It is apparent that in the entire State of U.P., the rate schedule are approved by the U.P. Electricity Regulatory Commission and the same rates are applicable in the entire State of U.P. Hence, the contention of the learned counsel for the respondent is baseless and is devoid of merit. Therefore, the different power corporation and companies cannot treat the consumers of electricity in different manner in the same State.

36. The advocate's profession cannot be categorised to be charged under LMV-2, which is applicable to the commercial activities. The lawyer's activities are not commercial establishment as held by the Supreme Court and by various High Courts.

37. In view of the aforesaid conclusions, we sum up the answers to the issues raised in the instant petition in the following manner:

1. The activities/profession of an advocate is a not a commercial activity, attracting the commercial rate of electricity consumption as prescribed in Rate Schedule LMV-2, as applicable in the State of U.P. approved by the U.P. Electricity Regulatory Commission.

2. The Rate Schedule LMV-2, which is applicable for the commercial activities,

cannot be applied for the electricity supplied to the Lawyers Chambers. The Lawyers chambers / offices shall be charged only under LMV-1 Domestic category as the lawyers neither do any trade or business nor are involved in any commercial activity.

3. The respondents cannot discriminate between the electricity supply to the advocates' chambers in different court compounds, in the same State, where the rate schedules are approved by the same authority.

38. Thus in view of the above discussion, the writ petition is allowed. The respondents are directed to charge for the consumption of electricity by the lawyers in their chambers in the court premises as per the rate schedule LMV-I as approved by the U.P. Electricity Regulatory Commission.

(2023) 8 ILRA 1065
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.08.2023

BEFORE

THE HON'BLE MAHESH CHANDRA
TRIPATHI, J.
THE HON'BLE PRASHANT KUMAR, J.

Writ-C No. 10037 of 2020
 with
 Writ-C No. 37119 of 2022

Chhatarpur Crasher Asso. & Anr.

...Petitioners

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioners:

Sri Birendra Singh, Sri Shubham Agarwal,
 Sr.Advocate(Sri Shashi Nandan), Sri Siddharth
 Seth

Counsel for the Respondents:

C.S.C., Sri Deepak Kumar Jaiswal, Sri Nand
 Kishor Mishra, Ms.Shilpa Ahuja

**Civil Law - Uttar Pradesh Minor Minerals
 (Concession) Rules, 2020 - Rule 21(4) &
 70(2)**

- The writ petitions challenging the vires of Rule 21(4) and Rule 70(2) of the Uttar Pradesh Minor Minerals (Concession) Rules, 2020, Rule 21(5) and Rule 72(2) of the Uttar Pradesh Minor Minerals (Concession) Rules, 2021, and Government Orders dated 24.02.2020 and 10.08.2022 imposing regulatory fees of Rs. 50/- and Rs. 100/- per cubic meter respectively on minor minerals (building stones, ballast, boulders) transported from other St.s into Uttar Pradesh are dismissed. The impugned rules and government orders are intra vires the Mines and Minerals (Development and Regulation) Act, 1957 (MMRD Act), as the St. Government has the power under Section 15(1-A)(g) to impose fees for regulating transportation of minerals, including those legally excavated in other St.s, as per Section 4(1-A) and Section 23-C, which empower the St. to frame rules for transportation and storage of minerals, not limited to illegal mining. The regulatory fees are imposed to fund infrastructure (check gates, weighbridges, AI technology) to prevent illegal mining, transportation, and storage, aligning with the objectives of the MMRD Act and the National Mineral Policy, 2021. The imposition of regulatory fees does not violate Part XIII of the Constitution of India, as it constitutes a reasonable restriction in public interest under Article 304(b), not impeding the freedom of trade, commerce, and intercourse under Article 301. The petitioners' association lacks locus standi, as its members are not directly engaged in mining or inter-St. transportation of minerals. Parties to bear their own costs.

Case Law:

1. St. of Tamil Nadu Vs M.P.P. Kavery Chetty, (1995) 2 SCC 402;
2. St. of Gujarat Vs Jayeshbhai Kanjibhai Kalathiya, (2019) SCC OnLine SC 297;
3. Ultratech Cement Ltd. Vs St. of M.P., Writ Petition No. 9330 of 2021 (MP HC);

4. Sri Sai Keshava Enterprises Vs St. of Karn., Writ Petition No. 8851 of 2021 (Karn HC);
5. St. of Orissa Vs M.A. Tulloch, AIR 1964 SC 1284;
6. Sheo Varan Singh Vs St., AIR 1980 All 92;
7. D.K. Trivedi Vs St. of Guj., (1986) Supp SCC 20;
8. St. of Tamil Nadu Vs Hind Stone, (1981) 2 SCC 205;
9. St. of West Bengal Vs Kesoram Industries, (2004) 10 SCC 201;
10. Jindal Stainless Ltd. Vs St. of Har., (2017) 12 SCC 145;
11. Atiabari Tea Co. Ltd. Vs St. of Assam, AIR 1961 SC 232;
12. Automobile Transport (Rajasthan) Ltd. Vs St. of Raj., AIR 1962 SC 1406.

(Delivered by Hon'ble Mahesh Chandra Tripathi, J. for the Bench under Chapter VII Rule 1(2) of the Allahabad High Court Rules, 1952)

1. By means of writ petition (C.M.W.P. No.10037 of 2020) the petitioners, who are members of registered society are, in the business of extracting, crushing transporting, and selling the minor minerals in Madhya Pradesh and in other States, are challenging the 48th Amendment in Uttar Pradesh Minor Minerals (Concession) Rules, 1963, Rule 21 (4) and Rule 70 (2) of the Uttar Pradesh Minor Mineral (Concession) Rules, 2020, and Rule 21 (5) and Rule 72 (2) of the Uttar Pradesh Minor Mineral (Concession) Rules, 2021 and the Government Order dated 24.02.2020 and 10.08.2022.

2. While the aforesaid writ petition was pending, the petitioners preferred a Special Leave Petition before the Hon'ble Supreme Court stating that the writ petition was listed but neither the stay application was heard, nor the main petition. On this, Hon'ble Supreme Court directed this Court to decide the proceedings expeditiously. In view of the direction of the Hon'ble Supreme Court, we have taken up the present writ petition.

BACKDROP OF THIS CASE

3. Mines and Minerals (Regulation and Development) Act, 1957 (herein after referred as MMRD Act 1957 for the sake of brevity), has been enacted by the Parliament to provide for development and regulation of mines and minerals. The relevant section which are important for the adjudication of the current issues are being reproduced herein for reference:

4. Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957 is as follows:-

“15. (1) The State Government may, by notification in the Official Gazette, make rules for regulating the grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals and for purposes connected therewith.

(1A) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(a) the person by whom and the manner in which, applications for quarry leases, mining leases or other minerals concessions may be made and the fees to be paid therefor;

(b) *the time within which, and the form in which, acknowledgement of the receipt of any such applications may be sent;*

(c) *the matters which may be considered where applications in respect of the same land are received within the same day;*

(d) *the terms on which, and the conditions subject to which and the authority by which quarry leases, mining leases or other mineral concessions may be granted or renewed;*

(e) *the procedure for obtaining quarry leases, mining leases or other mineral concessions;*

(f) *the facilities to be afforded by holders of quarry leases, mining leases or other mineral concessions to persons deputed by the Government for the purpose of undertaking research or training in matters relating to mining operations;*

(g) *the fixing and collection of rent, royalty, fees, dead rent, fines or other charges and the timewithin which and the manner in which these shall be payable;*

(h) *the manner in which the rights of third parties may be protected (whetherby way of payment of compensation or otherwise) in cases where any such party is prejudicially affected by reason of any prospecting or mining operations;*

(i) *the manner in which the rehabilitation of flora and other vegetation, such as trees, shrubs and the like destroyed by reasons of any quarrying or mining operations shall be made in the same area or in any other area selected by the State Government (whether by way of reimbursement of the cost of rehabilitation or otherwise) by the person holding the quarrying or mining lease;*

(j) *the manner in which and the conditions subject to which, a quarry lease, mining lease or other mineral concession may be transferred;*

(k) *the construction, maintenance and use of roads, power transmission lines, tramways, railways, aerial ropeways, pipelines and the making of passage for water for mining purposes on any land comprised in a quarry or mining lease or other mineral concession;*

(l) *the form of registers to be maintained under this Act;*

(m) *the reports and statements to be submitted by holders of quarry or mining leases or other mineral concessions and the authority to which such reports and statements shall be submitted;*

(n) *the period within which and the manner in which and the authority to which applications for revision of any order passed by any authority under these rules may be made, the fees to be paid therefor, and the powers of the revisional authority; and*

(o) *any other matter which is to be, or may be prescribed.*

5. On 18.12.1999, the MMRD Act 1957 1 was amended Statement of Objects and Reasons of the Amendment of the Act, are as follows:

“STATEMENT OF OBJECTS AND REASONS

The Mines and Minerals (Regulation and Development) Act, 1957 provides for the regular and development of minerals other than petroleum and natural gas. Consequent upon the decisions taken in the Conference of the State Ministers/Secretaries of Mines and Geology held in December, 1996, a Committee under the Chairmanship of the then Secretary, Ministry of Mines was constituted in February, 1997 to, inter alia, make recommendations regarding delegation of powers to the State

Governments relating to grant and renewal of prospecting licences and mining leases and other related approvals and to suggest measures to reduce delay in this regard, review of the existing laws and procedures governing the regulation and development of minerals to make them more compatible with the changed policies and measures for prevention of illegal mining. The Committee in its report made wide-ranging recommendations in the area of delegation of powers to the state Governments, procedural simplifications, etc. which will go a long way to mitigate the problems faced by the States and the prospective investors while, at the same time, keeping the interests of the mining industry in particular and the national interest, in general, intact. After careful consideration of the recommendations of the Committee, the Government has decided to amend the Mines and Minerals (Regulation and Development) Act, 1947.

2. Some of the more important amendments to be made are as follows:

(i)

(ii)

(iii) A new provision is proposed to be inserted in the Act prohibiting transportation or storage or anything causing transportation or storage of any mineral except under the due provisions of the Act, with a view to preventing illegal mining. Further, the Act is proposed to be amended to cover the breach of the provisions of the proposed new provision of the Act to be punishable. It is also proposed to insert a new provision to provide for anything seized under the Act as liable for confiscation under court orders. A new section is proposed to be inserted to empower the State Governments to make rules for preventing illegal mining, transportation and storage of minerals and for purposes connected therewith."

The amended Sections were as follows:-

Section 4 (1A), Section 23-A and 23 (C)

Section 4 (1A) No person shall transport or store or cause to be transported or stored any mineral otherwise than in accordance with the provisions of this Act and the rules made thereunder.

Section 23-C (1) The State Government may, by notification in the Official Gazette, make rules for preventing illegal mining, transportation and storage of minerals and for the purposes connected therewith.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(a) establishment of check-posts for checking of minerals under transit;

(b) establishment of weigh-bridges to measure the quantity of mineral being transported;

(c) regulation of mineral being transported from the area granted under a prospecting licence or a mining lease or a quarrying licence or a permit, in whatever name the permission to excavate minerals, has been given;

(d) inspection, checking and search of minerals at the place of excavation or storage or during transit;

(e) maintenance of registers and forms for the purposes of these rules;

(f) the period within which and the authority to which applications for revision of any order passed by any authority be preferred under any rule made under this section and the fees to be paid therefor and powers of such authority for disposing of such applications; and

*(g) any other matter which is required to be, or may be, prescribed for the purpose of prevention of illegal mining, transportation and storage of minerals. *

(3) Notwithstanding anything contained in section 30, the Central Government shall have no power to revise any order passed by a State Government or any of its authorised officers or any authority under the rules made under sub-sections (1) and (2)."

6. Again an amendment was made in the Act in 2021 wherein explanation was added in Section 21

Section 21 Penalties.—5 [(1)]

Explanation.—On and from the date of commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2021, the expression "raising, transporting or causing to raise or transport any mineral without any lawful authority" occurring in this section, shall mean raising, transporting or causing to raise or transport any mineral by a person without prospecting licence, mining lease or composite licence or in contravention of the rules made under section 23C.

Amended (Ins. By Act 16 of 2021, S. 20 (w.e.f. 28-3-2021)2.

7. The State Government, under the powers conferred under Section 15 of the MMRD Act 1957 had framed Uttar Pradesh Minor Minerals (Concession) Rules, 1963.

8. The State of Uttar Pradesh in exercise of power granted under the Section 23 (C) framed a Rule which was "Uttar Pradesh Minerals (Prevention of Illegal Mining, Transport and Storage) Rules 2002".

These Rules were superseded in 2018 by a new Rules which was "Uttar Pradesh Minerals (Prevention of Illegal Mining, Transport and Storage) Rules 2018".

These Rules of 2018 were again amended in 2019 and the said Rules were called "Uttar Pradesh Minerals (Prevention of Illegal Mining, Transport and Storage) Rules 2019"

9. The Uttar Pradesh Minor Minerals (Concession) Rules, 1963 was amended in 2020 by the State Government, and was called "Uttar Pradesh Minor Minerals (Concession) (Forty Eight Amendment) Rules, 2020", By this Rule 21 and Rule 70 were amended, and "Regulating Fees was introduced". The amended Rules reads as follows:-

"Rule 21. Royalty – (1) *The holder of a mining lease granted on or after the commencement of these rules shall pay royalty in respect of any mineral removed by him from the lease area at the rates for the time being specified in the First Schedule to these rules.*

(1-a) Notwithstanding anything to the contrary contained in rule 3, royalty should be payable by concerned brick kiln owner or user of ordinary clay on ordinary earth at the rate, for the time being, specified in First Schedule to these rules:

Provided that the State Government shall take fees to be known as Regulating Fees from brick kiln owners in respect of district categorized, on the basis of pay on at such rates as may be notified from time to time by it.

(2) The State Government may, by notification in the Gazette, amend the First Schedule so as to include: therein or exclude there from or enhance or reduce the rate of royalty in respect of any mineral

with effect from such date as may be specified in the notification:

Provided that the State Government shall not enhance the rate of royalty in respect of any mineral for more than once during any period of three years and shall not fix the royalty at the rate of more than 20 percent of the pit's mouth value.

(3) Where the royalty is to be charged on the pit's mouth value of the mineral, the State Government may assess such value at the time of the grant of the lease and the rate of royalty will be mentioned in the lease deed. It shall be open to the State Government to re-assess not more than once in a year the pit's mouth value if it considers that an enhancement is necessary.

(4) Regulating Fees may be determined by the State Government from time to time on minerals entering the State from other States."

Further, the amended Rule 70 (2) reads as follows:-

"70. Restriction on transport of the Minerals – (1) The holder of a mining lease or permit or a person authorised by him in this behalf shall issue a pass in Form MM-11 or Form e-MM-11 prepared through electronic to process to every person carrying, a consignment of minor mineral by a vehicle, animal or any other mode of transport, the State Government may, through the District Officer, make arrangements for the supply of printed MM-11 Form books on payment basis.

(2) No person shall carry, within the State a minor mineral by a vehicle, animal or any other mode of transport, excepting Railway, without carrying a pass in Form MM-11/ Form e-MM-11 issued under sub-rule (1), Valid transit pass issued under rule 7(3) of Uttar Pradesh Mineral

(Prevention of illegal Mining, Transportation and storage) Rules, 2018 or similar valid transit pass issued by any other State:

Provided that if the State Government enters into an agreement to collect the Royalty through contractor, receipt of royalty or zero receipt as the case may be shall be issued by such contractor and in such cases carrying out such receipt with Form MM-11/Form e-MM-11 will be mandatory for transportation:

Provided further that the transportation of the mineral will be valid only after the State Government has determined the regulation fees imposed from time to time on the mineral coming from other State.

(3) Every person carrying any minor mineral shall, on demand by any officer authorised under Rule 66 or such officer as may be authorised by the State Government in this behalf, show the said pass to such officer and allow him verify the correctness of the particulars of the pass with references to the quantity of the Minor Mineral.

(4) The State Government may establish a check-post for any area included in any mining lease or permit and when a check post is so established public notice shall be given to this fact by publication in the Gazette and in such other manner as may be considered suitable by the State Government.

(5) No person shall transport a minor mineral for which these rules apply from such area without first presenting the mineral at the check post established for that area for verification of the Weight or measurement of the mineral.

(6) Any person found to have contravened any provision of this rule then the District Magistrate will recover penalty of Rs. 25, 000/- (twenty five thousands)

along with the price of such minor mineral including royalty. After deposit of the entire amount mentioned above the vehicle etc including minor mineral will be released."

10. The Uttar Pradesh Minor Minerals (Concession) Rules, 1963 was again amended in 2021 by the State Government, this was called "Uttar Pradesh Minor Minerals (Concession) Rules, 2021". In this Clause (5) was added in Rule 21 which reads as follows:-

Rule 21(5)- Regulating Fees may be determined by the State Government from time to time on minerals entering the State from other States.

Rule 72(2)-.....

Provided further that the transportation of mineral will be valid only after the State Government has determined the regulation fee imposed from time to time on the mineral coming from other State.

This rule amended was only for minerals which were brought in the State of U.P. from the other States.

11. In furtherance to the Rules the state government issued a Government Order on 24.02.2022, imposing a Regulatory Fee of Rs. 50/- per cubic meter in respect of transportation of Building Stones, Ballast, Bolder transported from other States into the State of Uttar Pradesh. The reasons and object for issuing this G.O. were as follows :-

"1- उपर्युक्त विषय के सम्बन्ध में अवगत कराना है कि खनिजों के अवैध परिवहन पर प्रभावी नियंत्रण शासन का शीर्ष प्राथमिकता है, जिस हेतु प्रदेश में खनिज वाहनों की जांच को प्रभावी बनाये जाने की आवश्यकता है। प्रदेश में अन्य राज्यों से भी काफी संख्या में खनिज लदे वाहन आते हैं जिनके जांच हेतु सीमावर्ती विभिन्न स्थानों पर आर्टिफिसियल इन्टेलीजेन्स युक्त चेक

गेट्स, जिस पर वे ब्रिज, कैमरा आदि की सुविधा होगी, लगाये जाने का निर्णय लिया गया है। उपखनिजों के परिवहन को विनियमित करने के उद्देश्य से ऐसे चेक गेट्स की स्थापना प्रदेश के अन्य प्रमुख मार्गों पर भी किया जाना है।

2- अतः अन्य राज्यों से आने वाले उपखनिजों के वाहनों की सुगमतापूर्वक जांच किये जाने आदि के उद्देश्य से स्थापित किये जा रहे चेक गेट्स की अवस्थापना/ अनुरक्षण में होने वाले व्यय के दृष्टिगत राज्य सरकार द्वारा उत्तर प्रदेश उपखनिज (परिहार) नियमावली, 1963 (यथासंशोधित) के नियम- 21(4) तथा नियम- 70(2) के प्राविधान के अन्तर्गत उपखनिज ईमारती पत्थर, गिट्टी, बोल्डर, बालू मौरम के वाहनो पर ₹0-50 प्रतिघन मी0 की दर से विनियमन शुल्क अवधारित करते हुये उसे अधिरोपित किये जाने का निर्णय लिया गया है।"

12. The state government issued another Government Order on 10.08.2022, whereby which the Regulatory Fee of Rs. 50/- per cubic meter in respect of transportation of Building Stones, Ballast, Bolder transported from other States into the State of Uttar Pradesh, was increased to Rs 100/- per cubic meter.

13. A plain reading of the objects of the Government Order, make it very clear that the reasons for imposing the regulatory fees was only to set up a proper infrastructure for the strict compliance of the conditions laid down by the in Section 23(c) of the MMRDA Act.

PETITIONER ARGUMENT

14. Heard Shri Siddharth Seth in Writ Petition No. 10037 of 2020 on behalf of the petitioners and Shri Shashi Nandan, learned Senior Couns assisted by Shri Birendra Singh on behalf of the petitioner in Writ Petition No. 37119 of 2022.

15. The petitioner who claims himself to be an association of stone-crusher, by means of the writ petition (C.M.W.P.

No.10037 of 2020) challenged the vires of the Rules and the G.O. issued for charging Regulatory Fees. The prayers made in the writ petition were as follows :-

“(i) declare the sub-Rule (4) to Rule 21 of the Uttar Pradesh Minor Minerals (Concession) Rules, 1963 as amended by the State Government through Uttar Pradesh Minor Minerals (Concession) (Forty Eight Amendment) Rules, 2020 dated 05.02.2020 as ultra-vires to the Constitution of India.

(ii) declare the proviso of sub-Rule (2) of Rule 70 of Uttar Pradesh Minor Minerals (Concession) Rules, 1963 as amended by the State Government through Uttar Pradesh Minor Minerals (Concession) (Forty Eight Amendment) Rules, 2020 dated 05.02.2020 as ultra-vires the Constitution of India.

(iii) issue a writ, order or direction in the nature of certiorari quashing the Government Order dated 24.02.2020 issued by the Secretary (Bhutatav Evam Khaniz Karm), Government of Uttar Pradesh, Lucknow ;

(iii-a) issue a writ, order or direction in the nature of certiorari quashing the Government Order dated 10.08.2022 ;

(iii-b) this Hon’ble Court may be pleased to declare Rule 21 (5) and Rule 72 (2) U.P. Minor Minerals (Concession) Rules, 2021 and the corresponding Rules under the U.P. Mines and Minerals (Concession) Rules, 2021 which prescribes the imposition/levy of such regulating fee as ultravires the provisions contained in Mines and Minerals (Development and Regulation) Act, 1957 and the relevant provisions emanated under Constitution of India.

(iv) issue any other writ, order or direction in favour of the petitioners, which this Hon’ble Court may deem just and

reasonable in the circumstances of the case; and

(v) award the cost of the petition in favour of the petitioners.”

16. The counsel for the petitioner submitted that on 05.02.2020 by way of the 48th amendment the State Government notified Uttar Pradesh Minor Minerals (Concession) (Forty Eight Amendment) Rules, 2020 (herein after referred to as ‘Rules 2020’), whereby, the State Government has added Rule 21 (4) as well as added a proviso under the Rule 70 (2) of Rules 1963. By Rule 21 (4) of the Amended Rules 2020, the State Government has reserved the power to impose regulating fees, on minerals which were brought from other States into the State of Uttar Pradesh.

17. Counsel for the petitioners submitted that the Regulating Fees was imposed because of the difference of rate in minor minerals in other State as compared to the State of Uttar Pradesh. This reason for imposing regulating fees violates the very objective for which the Rules have been framed. The State has exceeded its jurisdiction by incorrect interpretation of law and passed such an order. Therefore, the Government Order dated 24.02.2020 and G.O. dated 10.08.2022 deserves to be quashed.

18. He further submitted that the amended rules under challenge and the government orders, dated 24.02.2020 and 10.08.2022 have been issued by the State Government under the purported exercise of powers conferred under Section 15 read with Section 23(C) of the Act, 1957. By way of these amended rules, the State has illegally and arbitrarily levied a Regulation Fees of Rs. 50/- per cubic meter which was

later enhanced to Rs. 100/- per cubic metre, by two different Government Orders, which is grossly arbitrary and illegal and is also ultra vires the provisions contained in the Act of 1957. The State has no authority to levy any fees or tax on the minerals which have been legally extracted by them and on which royalty has been paid. Further, These Government Orders are illegal as the reason given by the State Government is beyond the statutory provisions and Rules framed there under

19. The field of minerals is already covered by the parliamentary Act within the parameters laid down under List-1. Hence, the State has no control after a mineral that has been excavated in other States. The State cannot create any impediment on the management of these minerals into the State of U.P.

20. Article 301 of the Constitution of India grants freedom of trade, commerce, and intercourse through out the territory of India, and any impediment created would amount to violation of the said article. Imposition of Regulatory Fee, amounts to restriction of freedom of Trade by virtue of Article 301 of the Constitution of India.

21. The Rules under challenge herein, violate Part XIII of the Constitution of India as the effect thereof is to fetter the freedom of trade, commerce and intercourse under Article 301 of the Constitution. Under this Article, the expression 'freedom' must be read with the expression 'throughout the territory of India'

22. Under Article 302, Parliament may impose restrictions on the freedom of trade, commerce or intercourse between one State and another as may be required in

the public interest. However, Article 302 is qualified by Article 303 which prohibits Parliament and the State Legislatures from making any law that gives preference to one State over another or discriminates between one State and another. The power of State Legislature to impose reasonable restrictions on the freedom of trade, commerce or intercourse, as may be required in the public interest, requires such a Bill or amendment to be moved in the State Legislature only after receiving previous sanction from the President. The President, being the head of the State and the guardian of the federation, must be satisfied that such a law is indeed required and, thus, acts as a check on the promotion of provincial interests over national interest.

23. He further submitted that MMRD Act, 1957 was amended with the objective of preventing illegal mining, transportation and storage of minerals, except in accordance with the provisions of the MMRD Act, 1957 and Rules framed thereunder with a view to preventing illegal mining, transportation and storage. Prohibition or restriction of inter-State trade of any minerals was neither intended nor provided or envisaged either expressly or by necessary implication.

24. The composite scheme of the Act, 1957 contained in the provisions of Sections 4(1-A), 15, 18, 21 and 23-C of the Act, 1957 clearly indicate that the delegation of power to regulate or make Rules for transportation or storage of minerals, including minor minerals, does not empower and cannot be stretched to empower the State Government to make Rules directly prohibiting or imposing additional charges in movement of minerals, in the name of Regulating Fees.

25. Section 15 of the Act, 1957, which empowers the State Government to make Rules in respect of mines and minerals, does not extend to the Regulation of already excavated minor minerals under the terms and conditions of a mining lease. The Hon'ble Supreme Court in the case of **State of Tamil Nadu Vs. M.P.P. Kavery Chetty, (1995) 2 SCC 402**,⁴ upheld the striking down of Rules made by the State of Tamil Nadu, where the State Government had fixed minimum price on the sale of granite after its excavation. In that case, the Hon'ble Supreme Court had emphatically held that, the State Government had no power under Section 15 of the Act, 1957 to exercise to control over minor minerals after they had been excavated.

26. Counsel for the petitioners further argued that Section 15 of the MMRD Act 1957 gives power to the State Government to make rules to regulate the grant of mining leases and for the 'purposes connected therewith'. This phrase 'purpose connected therewith' will not include charging of fees on transportation of minor minerals from other State. He further submitted that minerals legally excavated from different States, which are brought in the State of Uttar Pradesh and on that the State of U.P. cannot charge a regulating fees. The Rules under which Regulatory Fee is charged and the Government Order dated 24.02.2020 and 10.08.2022 should be quashed as the same are ultra vires.

27. Counsel for the petitioners submitted that the State can only recover fees which are conferred by Section 15 and Section 23-C of the Act of 1957, and Section 23-C makes it very clear that the purpose behind it is to prevent illegal mining, transportation and it does not give

any power to impose any fees on the legally excavated minerals, to buttress this argument he relied heavily on the judgment passed by Hon'ble Supreme Court in the matter of **State of Gujarat and Others etc. Vs. Jayeshbhai Kanjibhai Kalathiya etc.**⁵ and also placed reliance of a Division Bench judgment passed by the Madhya Pradesh High Court at Indore in the matter of **Ultratech Cement Vs. State of Madhya Pradesh**.⁶

28. Even under powers granted under Section 15 of the Act of 1957, the State of U.P. while framing Minor Mineral (Concession) Rules, cannot frame any law in respect of minor mineral excavated in another State. Hence, the state of UP lacks the power to frame any rules for the minerals excavated in other states.

29. Section 15(1) or 15(1-A) of the MMRD Act does not provide for imposing a regulatory fee. The word used is "fixing and collection". The Rule making power is confined only for fixing and collection and there is no power to impose "Regulatory Fee".

30. The sub-ordinate legislation made under the provisions of Section 15(1) of the MMRD Act can only be exercised in respect of minerals found and excavated in Uttar Pradesh. It is the burden on the State to prove that, it has legislative power to impose tax or fee in respect of minerals, which is not mined or excavated in U.P.

31. The provisions of Section 23-C will only apply in respect of minerals which have been found and excavated in the State of Uttar Pradesh. Further, the basic word in this Section is "illegal mining" and all the activities enumerated in this Section are confined to the activities

around illegal mining and further this Section does not give power to the State to impose fees on the goods which are legally excavated and are just brought in the state of U.P.

32. The purpose of fixing a check-post is to prevent illegal transportation of mineral for that the check-post should be made in the entire State of U.P. and not necessarily on the borders of the State. If illegal mineral is transported within the State of U.P. then there is no mechanism to check such transportation. If the purpose of check-post is to prevent illegal transporting then the check-post have to be on all the roads in the State.

33. If the provisions of rule 21(5) and rule 72(2) of the 2021 Rules are read together which shows that the imposition of fees is only for certain class of minerals which are brought from other States. The minerals excavated in U.P. does not attract Regulatory Fees, whereas minerals brought from other States do attract a Regulatory Fees. This is clearly discriminatory. It seems the purpose of imposing Regulatory Fees is not to check illegal transportation but to make a source of income.

34. The Regulatory Fees which is being imposed through Rules 2021, is clearly not for preventing illegal mining but it is just a fee on import of minerals, or to prevent free trade from other states. Going by the aforesaid scheme, it becomes apparent that when there are such restrictions on a State Legislature, then the State Government could not have imposed such a prohibition under a statute whose object is to regulate mines and mineral development, and not trade and commerce per-se.

35. The enforcement of the Regulatory fees on the minerals brought from other States is a clear discrimination as compared with the minerals mined and excavated in the state of Uttar Pradesh, as there is no such Regulating Fee/ restriction on their transportation.

36. The petitioner placed reliance on a judgment passed by Hon'ble Supreme Court in the matter of **State of Tamilnadu vs. M.P.P. Kavery Chetty (supra)**,⁷ wherein, the court has held as follows:-

22. Rules 8D and 19B empowers the State Government company or corporation as the State Government may direct to control the sale by every permit-holder of quarried granite or other or rock suitable for ornamental or decorative purposes. They also empower the State Government or its officers or a State Government company or corporation, as the case may be, to fix the minimum price for the sale thereof. The object, as is shown by the terms of Government Order No. 214 dated 10th June, 1992, quoted above, is to conserve and protect granite resources.

23. It is difficult to see how granite resource can be protected by controlling the sale of granite after its excavation and fixing the minimum price thereof.

24. There is no power conferred upon the State Government under the said Act to exercise control over minor minerals after they have been excavated. The power of the State Government, as the subordinate rule making authority, is restricted in the manner set out in Section 15. The power to control the sale and the sale price of minor mineral is not covered by the terms of clause (o) of sub-section (IA) of Section 15. This clause can relate only to the regulation of the grant of quarry and mining leases and other mineral

concessions and it does not confer the power to regulate the sale of already mined minerals.

This judgment makes it clear that the State can not exercise control over the minerals after they have been excavated.

37. The counsel for the petitioner then placed reliance on a judgment passed by the Hon'ble Supreme Court in the case of **State of Gujarat and Others v. Jayeshbhai Kanjibhai Kalathiya and Others (supra)**⁸ wherein the Court has held as follows:-

*“17) To support the above plea, he invited the attention of this Court to the judgment in **D.K. Trivedi & Sons and Others v. State of Gujarat and Others** this Court considered the power of the State Governments to make rules under the said Section 15 enable them to charge dead rent and royalty in respect of leases of minor minerals granted by them and to enhance the rates of dead rent and royalty during the subsistence of such leases – a power exercised by the State to govern conditions subsequent to the grant of the lease. After tracing the legislative history in respect of minor minerals, it was observed that by virtue of the Act the whole of the field was taken over by Parliament and thereafter all powers in respect of minor minerals had been delegated to the State Governments. The Court also observed, inter alia, that the power to regulate minor minerals under Section 15 is extremely wide; that control over minor minerals fell exclusively within the domain of the State Governments; that minor minerals have historically been viewed by the Legislature, both pre and post Independence, as being for the use of local areas and local purposes; and it is left to the State Governments to prescribe such restrictions as they think fit by rules made under Section 15 (1).*

*26) Having regard to the fact that it is the Union which can regulate and control the minerals in this country and States exercise power of minor minerals as delegates of the Union, this Court had deemed it fit to issue notice of these proceedings to Union of India as well in order to elicit its stand on this issue. The Union of India has filed its reply, taking a specific stand that there is no such power to frame rule like 44-BB of the 1966 Rules or Rule 71 of the 2010 Rules. Ms. Madhavi Divan, learned Additional Solicitor General, appeared for Union of India and pitched the case to even a higher level. Her argument was that there is no such power even with the Union of India to frame rules of the nature impugned in these proceedings as these would be offensive of Article 301 of the Constitution. Therefore, under no circumstances, such a power can vest with the State Government. She argued that Section 15 which empowers the State Government to make rules in respect of minor minerals does not extend to the regulation of already excavated minor minerals under the terms and conditions of a mining lease. This is made clear by the three Judge Bench in **M.P.P. Kavery Chetty** wherein this Court upheld the striking down of rules made by the State Government to fix minimum price for the sale of granite after its excavation. The Court emphatically held that the State Government had no power under Section 15 of the MMRD Act to exercise to control over minor minerals after they had been excavated. The power under Section 15 was restricted and did not empower the State to control the sale or sale price of minor minerals once they had been mined. The latter judgment has been followed in another three Judge Bench judgment in **K. T. Varghese & Ors. v. State of Kerala & Ors.** In the latter case, one of the impugned conditions of the license was that*

minerals could be sold only within the State of Kerala, that too for domestic and agricultural purposes. The same was found impermissible. She also submitted that there is no conflict whatsoever between the judgments of this Court in *Amritlal Nathubhai Shah and D.K. Trivedi & Sons* on the one hand and *M.P.P. Kavery Chetty* on the other. Her contention was that in *Amritlal Nathubhai Shah*, while it was emphatically stated that the State Government is the 'owner of minerals' within its territory and minerals vest in it, this was held in the context of a challenge to the reservation by the State Government of certain areas of exploitation of bauxite in 13 (2008) 3 SCC 735 the public sector. Private parties challenged the notification to that effect and the Central Government to whom they applied for revision held that the minerals vested in the State Government which was its owner and that the State Government had the inherent right to reserve any area for exploitation in the public sector. She did not quarrel with such a proposition. However, her caveat was that this was a matter where there were no leases in favour of private parties but rather the private parties were petitioning the government for the grant of leases.

28) The learned Additional Solicitor General also rebutted the argument of the appellants that power to regulate would encompass power to restrict the movement beyond the State. She argued that while it is well settled that the expression 'regulation' has many shades of meaning and can refer to prohibition (*Sudhir Ranjan Nath and Hind Stone*), the issue in the present case is whether a prohibition on the transportation of legally mined materials can be imposed under the provisions of the MMRD Act. There is no doubt that a prohibition can be imposed on mining under certain circumstances or on the grant of leases

under the aforesaid Act but not on transportation de hors illegal mining.

34) From the subject matter of these appeals as well as arguments noted above, it clearly follows that the main issues that arise for consideration are as under:

(a) Whether the impugned rules framed by the State of Gujarat as a delegate of Parliament are beyond the powers granted to it under the MMRD Act? In other words, whether the impugned rules are ultra vires Sections 15, 15! and 23-C of the MMRD Act?

(b) Whether the impugned rules are violative of Part XIII of the Constitution of India?

36) It is difficult to accept the aforesaid contention in view of the judgments of this Court in *M.P.P. Kavery Chetty and K.T. Varghese*. In those judgments, it has been categorically held that power of the State Government under Section 15 of the MMRD Act does not include control over minor minerals after they are excavated. Following observations from the said judgment are extracted herein:

"19. The High Court quashed Rules 8-D and 19-B principally on the ground that Section 15 of the said Act gave no power to the State Government to frame rules to regulate internal or foreign trade in granite after it had been quarried. Section 15 also did not empower the State Government to frame rules to enable a State Government company or corporation to fix a minimum price for granite.

20. Learned counsel for the appellant State submitted that Rules 8-D and 19-B were valid having regard to the Preamble of the said Act and Section 18 thereof. He submitted that the rule-making power of the State under Section 15 (o) was wide enough to encompass Rules 8-D and 19-B.

21. *The said Act is enacted to provide for the regulation of mines and the development of minerals under the control of the Union. Section 2 of the said Act declares that it is expedient in the public interest that the Union should take under its control the regulation of mines and the development of minerals to the extent provided in the said Act. Section 13 empowers the Central Government to make rules for regulating the grant of prospecting licences and mineral leases in respect of minerals and for purposes connected therewith. Sub-section (1) of Section 15 empowers the State Government to make rules for regulating the grant of quarry leases, mining leases and other mineral concessions in respect of minor minerals and for purposes connected therewith. Sub-section (1-A) of Section 15 states that such rules may provide for the matters set out therein, namely, the person by whom and the manner in which an application for a quarry lease, mining lease and the like may be made; the fees to be paid therefor; the time and the form in which the application is to be made; the matters which are to be considered where applications in respect of the same land are received on the same day; the terms and conditions on which leases may be granted or regulated; the procedure in this behalf; the facilities to be afforded to lease-holders; the fixation and collection of rent and other charges and the time within which they are payable; the protection of the rights of third parties; the protection of flora; the manner in which leases may be transferred; the construction, maintenance and use of roads, power transmission lines, etc. on the land; the form of registers to be maintained; reports and statements to be submitted and to whom; and the revision of any order passed by any authority under the said Rules. Clause (o) of sub-section (1-*

A) reads "any other matter which is to be or may be prescribed". Section 18 of the said Act states that it shall be the duty of the Central Government to take all such steps as may be necessary for the conservation and systematic development of the environment by preventing or controlling any pollution which may be caused by prospecting or mining operations.

22. Rules 8-D and 19-B empower the State Government or its officers or a State Government company or corporation as the State Government may direct to control the sale by every permit-holder of quarried granite or other rock suitable for ornamental or decorative purposes. They also empower the State Government or its officers or a State Government company or corporation, as the case may be, to fix the minimum price for the sale thereof. The object, as is shown by the terms of Government Order No. 214 dated 10-6-1992, quoted above, is to conserve and protect granite resources.

23. It is difficult to see how granite resources can be protected by controlling the sale of granite after its excavation and fixing the minimum price thereof.

24. There is no power conferred upon the State Government under the said Act to exercise control over minor minerals after they have been excavated. The power of the State Government, as the subordinate rule-making authority, is restricted in the manner set out in Section 15. The power to control the sale and the sale price of a minor mineral is not covered by the terms of clause (o) of sub-section (1-A) of Section 15. This clause can relate only to the regulation of the grant of quarry and mining leases and other mineral concessions and it does not confer the power to regulate the sale of already mined minerals."

41) Insofar as Section 23-C of the MMRD Act is concerned, it was inserted by the Amendment Act of 1999 with the objective to prevent illegal mining. That is clearly spelled out in the Statement of Objects and Reasons.....:

42) It is in this context the words 'transportation' and 'storage' in Section 23-C are to be interpreted. Here the two words are used in the context of 'illegal mining'. It is clear that it is the transportation and storage of illegal mining and not the mining of minor minerals like sand which is legal and backed by duly granted license, which can be regulated under this provision. Therefore, no power flows from this provision to make rule for regulating transportation of the legally excavated minerals.

38. The State of Madhya Pradesh had vide notification NO.F-19-3-2017-XII-1 dated 22.10.2021 amended the Madhya Pradesh Mineral Rules, 1996 by substituting sub-rule (6) of Rule 29, whereby a levy in the name of 'Regulation Fee' had been imposed on minor minerals coming from other States into the State of Madhya Pradesh. The above mentioned amendment was under challenge before the High Court of Madhya Pradesh at Indore bench, in Writ Petition No.9330 of 2021 (**M/s Ultratech Cement Limited Vs. State of M.P.**). While deciding this Writ Petition the Madhya Pradesh High Court relying heavily on **Jayeshbhai's** case held as follows:-

“33. Another argument was canvassed by relying upon a decision of this Court in the case of *V.S. Lad and Sons (supra)* to the effect that the State Government has an executive power to deal with the subjects envisaged under Section 23-C. However,

Section 23-C will not apply at all to regulating the entry of minerals lawfully excavated in other States. The substantial part of the arguments canvassed on behalf of the State Government is on the issue of quid-pro-quo regarding co-relation between the fees collected and the services being rendered. The said argument is relevant provided that there is a power conferred on the State to make the rules to regulate the entry of minor minerals lawfully excavated from other States by levying fee. Such power is not vesting in the State Government.”

39. Counsel for the petitioners further relied on a judgment passed by the Division Bench of Karnataka High Court in **Sri Sai Keshava Enterprises Vs State of Karnataka** ⁹ passed in Writ Petition No. 8851 of 2021 which was decided on 07.07.2021. Wherein the Court held that Section 15 is very clear, the State Government can only make Rules for preventing illegal mining, transportation and storage of minerals. They cannot impose fee on minerals which has already been legally excavated in some other State, and these minerals are just being brought in from that State into the State of U.P.

Relevant paragraphs of the said judgment are as follows:-

“19. Thus, sub-section (1) of Section 15 of the said Act of 1957 confers power on the State Government to make rules for regulating the grant of quarrying leases, mining leases or other minerals concession and allied purposes. Clause (g) of sub-section (2) of Section 15 confers rules making power on the State Government for fixing and collection of rent, royalty, fees, dead rent, fines or other charges and the time within which and the manner in which they shall be payable.

24. While dealing with the submissions, the Apex Court formulated two questions which are quoted in paragraphs 34.1 and 34.2 which read thus:

"34.1. Whether the impugned Rules framed by the State of Gujarat as a delegate of Parliament are beyond the powers granted to it under the MMRD Act? In other words, whether the impugned rules are ultra vires Section 15, 15-A and 23-C of the MMRD Act? 34.2. Whether the impugned Rules are violative of Part XIII of the Constitution of India?"

25. The Apex Court also considered its earlier Judgment in the case of *State of Tamil Nadu vs. M.P.P. Kavery Chetty*.

In paragraph 42 while dealing with the said judgment, the Apex Court held thus:

"42. It is in this context the words "transportation" and "storage" in Section 23-C are to be interpreted. Here the two words are used in the context of "illegal mining". It is clear that it is the transportation and storage of illegal mining and not the mining of minor minerals like sand which is legal and backed by duly granted licence, which can be regulated under this provision. Therefore, no power flows from this provision to make rule for regulating transportation of the legally excavated minerals".

26. Hence, the Apex Court held that the words 'transportation' and 'storage' used in Section 23-C of the said Act of 1957 are in the context of illegal mining and not the mining of minor minerals like sand which is legal and backed by duly sanctioned licence. Hence, the Apex Court specifically held that there is no power vesting in the State under Section 23-C of the said Act of 1957 to make a rule for regulating transportation of lawfully excavated minerals.

34. An argument was also canvassed based on entry 66 in list-II of seventh schedule of the Constitution. Entry 66 is about fees in respect of any of the matters in list-II. List-II is about the Legislative Powers of the State Governments. Therefore, the State Legislature is empowered to make a plenary legislation by invoking Entry-66 of List-II. However, the subject of regulating mining operations outside the State is not included in entry-66, List-II. Entry-66 is about prescribing fees in respect of any of the matters in list-II. Entry-23 in List-II is about regulation of mines and mineral development subject to the provisions of List-I with respect to regulation and development under the control of the Union. The field is occupied by the said Act of 1957 enacted by the Union Government which does not provide for levy of fees as provided in the impugned sub-rule. Moreover, the State Government has not enacted any law in terms of entry-66 of the said list. Assuming that such a power to levy fee is vested in the State Legislature by virtue of Entry-66 of List-II, a rule making power can be exercised provided that a law is enacted."

40. Hence, in view of the law laid down by the Hon'ble Supreme Court in **State of Gujarat Vs. Jayeshbhai** and followed by Madhya Pradesh High Court in **M/s Ultratech Cement** and by **Karnataka High Court in Sri Sai Keshava Enterprises**, it is clear that the State Government has no power to make any rules or impose a Regulatory Fees on minerals, which are legally mined in the other States, and brought into the State of Uttar Pradesh. Further, the rules, which puts impediment in the free trade are in violation of Part XIII of the Constitution of India, and hence, the impugned rules and the Government Orders may be declared ultra-vires.

STATE ARGUMENT

41. Mr. M.C. Chaturvedi, learned Additional Advocate General assisted by Mr. Devesh Vikram, Mr. Ambrish Shukla & Ms. Uttara Bahuguna, learned Additional Chief Standing Counsel, Sri Ankur Tandon, learned Standing Counsel and Sri Pradeep Tripathi, learned AGA for the State respondents in Writ Petition No.10037 of 2020 and Mr. Manish Goyal, learned Additional Advocate General assisted by Sri A.K. Goel, learned Additional Chief Standing Counsel for the State respondents in Writ Petition No.37119 of 2022 submitted as follows :-

42. Mr. Chaturvedi submitted that the petitioners' Association in Writ Petition No.10037 of 2020 has no locus to prefer the instant writ petition. He brought to the notice of this Court about the objects for which the society was formed. As per the objects the society was framed to address the problems faced by the members who were in the business of crushing stones. None of the members of the society are in the business of mining or transporting minerals to other States. The members of the association was not even remotely connected with the rules which they have challenged in the writ petition. Hence, the writ petition ought to be dismissed on Locus at the outset. To buttress this argument he pressed reliance on judgments of **Jasbhai Motibhai Desai vs. Roshan Kumar, Haji Bashir Ahmad and others**¹⁰ and **Vinoy Kumar Vs. State of U.P. and others** reported in 2001 (4) SCC 734.¹¹

43. Learned Additional Advocate General submitted that under Articles 245 and 246(3) of the Constitution of India, the State has the power to make laws in respect to any matters enumerated in List-II of the

7th Schedule of the Constitution. Further, the State can make regulations for mines and mineral as per Entry-23 and also can impose fees in respect of any matters falling in this List as per Entry-66 of List-II of the 7th Schedule of the Constitution of India.

44. He submitted, that the State is charging "Regulatory Fees" under powers enshrined by the Constitution of India in the Seventh Schedule of List-II Entry 23 and the power conferred under Entry 66 of this List-II.

45. He further submitted that The Mines Act, 1952 was enacted with the object of regulation of labour and safety in mines. Section 2 (1) (j) and (v) of the Mines Act, 1952, are as follows:-

"(j) "mine" means any excavation where any operation for the purpose of scratching for or obtaining minerals has been or is being carried on includes—

.....

—(v) all conveyors or aerial ropeways provided for the bringing into or removal from a mine or minerals or other articles or for the removal of refuse therefrom;

Here the conveyors and ropeway are nothing but a mode of transportation, which falls in the ambit of Section 3 (i) of the MMRD Act.

46. By virtue of Section 2 of MMRD Act, 1957, it had been declared that it is expedient in the public interest that the Union should take under its control the regulation of mines and development of mineral to the extent hereinafter provided. The Section imposes an additional restriction on the ambit of Entry-54 by limiting it to the provisions of MMRD Act, 1957.

47. The provisions of **Section (3)** of the MMRD Act, which are as follows:-

“(aa) “minerals includes all minerals except mineral oils;

(ae) “mineral concession” means either a reconnaissance permit prospecting licence, mining lease, composite license or a combination of any of these and the expression “concession” shall be construed accordingly;

(b) “mineral oils” includes natural gas and petroleum;

(e) “minor minerals” means building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed purpose and any other mineral which the Central Government may, by notification in the Official Gazette, declare to be a minor mineral;

(ea) “notified minerals” means any mineral specified in the Fourth Schedule.”

Section 4 provides the General Restrictions on undertaking prospecting and mining operations. Relevant subsections of Section 4 read as under :

(1A) No person shall transport or store or cause to be transported or stored any mineral otherwise than in accordance with the provisions of this Act and the rules made thereunder.

(3) Any State Government may, after prior consultation with the Central Government and in accordance with the rules made under Section 18, undertake reconnaissance, prospecting or mining operations with respect to any mineral specified in First Schedule in any area within the State which is not already held under any mineral concession.

Likewise **Section 4A** provides for termination of prospecting license or mining leases also places the State Government in an important regulatory role with respect to minerals over which Central Government exercises control.

Section 13 empowers the Central Government to make Rules for regulating the grant of mineral concession in respect of minerals and for purposes connected therewith.

Section 14 of the Act excludes quarry leases, mining leases and other mineral concessions in respect of minor minerals and for purposes connected therewith from the application of Section 5 to 13 of the Act.

Section 18 of the Act provides for conservation and systematic development of minerals and for protection of the environment and reads as follows :

Section 18. Mineral development. (i) It shall be the duty of the Central Government to take all such steps as may be necessary for the conservation and systematic development of minerals in India and for the protection of environment by preventing or controlling any pollution which may be caused by prospecting or mining operations and for such purposes the Central Government may, by notification in the Official Gazette, make such rules as it thinks fit.

48. A combined reading of Section 4(3) and Section 18 shows that even with respect to minerals under the control of the Central Government, the State Government is entitled to undertake reconnaissance, prospecting and mining operations which effectively amounts to regulation vesting with the State Government. The provisions thus reflect the regulatory power of the State Government with respect to specified minerals over which the Central Government exercises control.

49. In the year 1999, the Union considered the development of mines and minerals to be more important than its regulation, whereby serious amendments were carried out in the Act the

nomenclature of the MMRD Act, 1957 came to be changed by Act No.38 of 1999 as Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred as MMDR Act), and by the said amendment Sections 4 (1A), Section 23-A and Section 23-C were inserted.

50. Section 23 (C) of the MMRD Act, 1957 (which was incorporated by an amendment in 1999) empowers the State legislature to frame rules for preventing illegal, mining, transportation and storage of minerals. Exercising this power granted under the Act the State Government has framed separate rules in order to fulfill the obligations enumerated in Section 23-C (2) (a) & (b).

51. In Section 15 of the MMRD Act, the State has been given power to make rules and Regulation in respect of minor minerals. In Section 15 (1-A) (a), & (g) the word “Fees” has been mentioned, which goes to show that the State Government has power to make rules for imposing fees and also has a power to fix and collect rent, royalty, fees, dead rent, fines or other charges. It is under this power which have been granted under the Act to the State, The Rules were made, and the notifications were issued, which are under challenge. The State has full authority and power to enact such rules and impose “Regulating Fees”. The State under the power conferred under the MMRDA Act, in super-session of 1963 rules has framed a new rules called the Uttar Pradesh Mining and Minerals (Concessions) Rules, 2021 which was a composite rule. Under these rules, the States have full authority to charge various fees under different heads. Rule 21(2), 26 and 27 grants the States power to charge the fees. The power to charge fee under these rules are similar to the power granted under Section 15

of the MMRDA Act. Hence, the rules framed and the Government Order dated 24.02.2020 and 10.08.2022 are in consonance with the provisions of the MMRD Act, 1957.

52. The Mineral Concession Rules, 1960 were framed by the Central Government in exercise of powers conferred under Section 13 of the Mines and Minerals (Development and Regulation) Act, 1957.

Rule 27 provides for the conditions to which that every mining lease shall be subjected. Sub-rule (1)(o) of Rule 27 states that

(o) In respect of any mineral, which is relation to its use for certain purposes is classified as a major mineral and in relation to its use for other purposes as a minor mineral, the lessee who holds a lease for extraction of such minerals under these rules whether or not it is specified as a major mineral in the lease deed, shall not use or sell the mineral or deal with it in whatsoever manner or knowingly allow anyone to use or sell the mineral or deal with it in whatsoever manner as a minor mineral.

Provided that if on an application made to it in this behalf by the lessee, the State Government is satisfied that having regard to the inferior quality of such mineral, it cannot be used for any of the purposes by reason of which use it can be called a major mineral or that there is no market for such mineral as a major mineral, “the State Government may by order/permit the lessee to dispose of the mineral in such quantity and in such manner as may be specified therein as a minor mineral.”

This reflects that even the Rules framed by the Central Government under Section 13 empower the State Government to make a decision on the nature of

minerals (major or minor) and further empower the State Government to regulate the same.

A comprehensive perusal of the Scheme of the Act and the Rules made thereunder, reflects a consistent vesting of regulatory power with the State Government and control with the Central Government.

53. Mr. Manish Goyal, learned Additional Advocate General further submitted that the VIIth Schedule of the Constitution of India, Entry-54 of List I deals with the regulation of mines and mineral development to the extent it is under the Control of Union and declared by the parliament, has to be given strict interpretation. Unlike Entry 23 of List II which is of general nature and as reserved in List I and nothing is reserved in List II.

54. Section 3 (aa) of MMRD Act gives definition of minerals which includes all minerals except mineral oil. Minor Mineral is defined in Section 3 (e). There is no definition of Major Minerals under the Act. Section 23-C (1) provides that the State Government may by notification in the official gazette make rules for preventing illegal mining, transportation and storage of minerals and for the purposes connected therewith.

55. The State of Goa had formulated Goa (prevention of illegal mining storage and transportation of minerals) Rules 2013, under the powers granted under section 23-C of the MMDR Act 1957 these rules were considered by the apex court in the matter of **Goa Foundation Vs Union of India** ¹², wherein the court held:-

“62. CEC in its report has stated that in the State of Goa, there is no system of

periodic verification of the quantity of iron ore produced in the mining leases, the payments of royalty, the permits issued for transportation of mineral by the Mining Department, the transit permits issued by the Forest Department nor any reconciliation of the quantity of the mineral stated to have been produced in the mining lease with the quantity of the mineral for which royalty has been paid and transit permits have been issued, and there is no verification of the transit permits at the check posts and no verification of the quantity of the mineral exported/domestically used vis-a-vis the quantity legally produced. According to CEC, in the absence of such checks/verifications/controls, illegal mining can easily be undertaken and the actual quantity of iron ore produced and transported from the mining leases may not be accounted for by the State of Goa or by the lessees, resulting in leakage of revenue.....

63. We entirely agree with the CEC report that in absence of proper checks, verifications and controls, there is bound to be illegal mining, storage and transportation of minerals, but we find that after the CEC report, the Goa (Prevention of Illegal Mining, Storage and Transportation of Minerals) Rules, 2013 have been framed by the State Government under Section 23-C of the MMRD Act. A reading of these Rules shows that several provisions have been made in these Rules to prevent illegal mining and to regulate the sale, export and transit of ore, storage of mineral and transportation and winning and weighbridges and inspection of minerals in transit. Moreover, these Rules empower any person authorised by the Government to enter, inspect, search and seize articles. These Rules will have to be strictly enforced by the State Government

and we hope that by such strict enforcement of these Rules, the mining, storage and transportation of minerals in the State of Goa will get controlled and regulated and the leakages and evasion of revenue will, to a large extent, be prevented.”

56. In 2008 the Government of India formulated National Mineral Policy, 2008 (with effect from March, 2008). Apparently this policy more or less was only on paper, and was not effectively implemented perhaps due to the involvement of very powerful people with the vested interests. The people responsible to curb the menace of illegal mines and transportation turned a Nelson's eye to rampant illegal or unlawful mining which had a catastrophic impact both on the environment and the tribal people living in that area. This issue was brought to the notice of the Hon'ble Supreme Court in the matter of **T.N. Godavarman** about the rampant illegal mining going on in the State of Orissa, wherein the Court appointed a Commission of Justice M.B. Shah, (retired Judge of Supreme Court). The commission gave its report in the year 2013.

57. The Hon'ble Supreme Court in the matter of **Common Cause Vs. Union of India**¹³ considered the report of Justice M.B. Shah and also the National Mineral Policy of 2008 and came to the conclusion that the National Mineral Policy 2008, since was not implemented, and was not effective policy, as it lack any proper mechanism to check illegal mining operation. The Court was of the view that the National Mineral Policy 2008, because of ineffective enforcement mechanism only turned out to be a paper policy, and could not be enforced. Further the Court was of the view that the Mining Policy was a decade old and it needed an overhaul as a

chain of events have taken place including the advent of rapacious mining in several parts of the country. The Court held as follows:-

“230. We direct the Union of India to have a fresh look at the National Mineral Policy, 2008 which is almost a decade old, particularly with regard to conservation and mineral development. The exercise should be completed by 31.12.2017.”

58. As per the directions of the Hon'ble Supreme Court, the Government of India came out with the new **National Mineral Policy, 2019**, (which was approved by the Cabinet on 28.02.2019). The relevant portion of the policy is as follows:-

1.Vision

.....Since mining contributes significantly to state revenues, there is a need for an efficient regulatory illegal mining and value leakages.....

2.Regulation of Minerals

2.1 Management of mineral resources is the responsibility of both the central and state governments in terms of entry 54 of the Union List (List I) and entry 23 of the State List (List II) of the Seventh Schedule of the Constitution of India.

2.2 In order to make the regulatory environment conducive to ease to doing business, the procedures for grant of mineral concessions shall be transparent and seamless with an assured security of tenure along with transferability of concessions playing a key role in mineral sector development.

2.3 To ensure enforcement of mining plans, the Indian Bureau of Mines (IBM) and the State Directorates of Mining & Geology will be strengthened with adequate

man power, equipment and skill sets upgraded to state-of-the-art levels.

2.4 There will be an emphasis on strengthening the regulatory mechanism by incorporating E-Governance including satellite and remote sensing applications. Provisions shall be made for end-to-end accounting of mineral/ore in the supply chain with use of IT enabled systems. Efforts shall also be made to devise appropriate mechanism (s) for awareness and information campaigns and also for involvement of local populations to supplement the law enforcement capabilities in preventing illegal mining.

3. Role of State in Mineral Development

3.1 The core functions of state in mining will be facilitation and regulation of exploration and mining activities making provision for development of infrastructure and tax collection.....

59. Under this new **National Mineral Policy, 2019** the States were obliged to bring in efficient and effective regulatory mechanism with high penetration of e-governance systems to prevent illegal mining. For that there has to be an emphasis on strengthening the regulatory mechanism by incorporating E-Governance including satellite and remote sensing applications. Provisions had to be made for end-to-end accounting of mineral/ore in the supply chain with use of IT enabled systems. Efforts shall also be made to devise appropriate mechanisms for awareness and information campaigns and also for involvement of local populations to supplement the law enforcement capabilities in preventing illegal mining. The core functions of state in mining would be facilitation and regulation of exploration and mining activities, making provisions

for development of infrastructure and tax collection.

60. As per learned Additional Advocate General the reasons for amendment in the rule was because of an issue which arose when some people similarly situated to the petitioner, had approached this Court, seeking a direction that the State of U.P. should cooperate in bringing in the legally mined minor minerals from the State of Madhya Pradesh into the State of U.P. after depositing any fee imposed by the State of U.P. A Writ Petition No.52892 of 2016 (**M/s Digiana Industries Pvt. Ltd. Vs. Union of India and others**)¹⁴ was filed in this Court, wherein a division bench of this Court held that, there is no such provision to carry out minor mineral outside the State of U.P. or bring minor mineral from other States inside the State of U.P. The Court granted two months' time to the state government to frame policy on the minor minerals which were brought in from other States into the State of U.P.

61. In pursuance to the direction of this Court in **M/s Digiana Industries Pvt. Ltd. (supra)**, the State Government took a policy decision to regulate Inter State Transportation of Minor Minerals whereby, by framing U.P. Minor Mineral (Concession) (48th Amendment) Rules, 2020, Sub Rule (4) of Rule 21 and proviso of sub-Rule (2) of Rule 70 was inserted in U.P. Minor Mineral (Concession) Rules, 1963.

62. By its Amendment and by Rules, 2020, the State reserved the power to impose "Regulatory Fees" which may be determined by the State Government from time to time, on transportation of minerals from other States into the State of U.P.

Subsequently. In pursuance of these amended Rules Government order dated 24.02.2020 was issued by the state government prescribing Regulation fees on minor minerals coming from other States. The objects and reasons of the Government Order dated 24.02.2020 clearly shows that the Regulating Fee was imposed just to meet the obligations laid down in Section 23-C (2) (a) & (b) of MMDR Act. The Rule and the Government Order are in line with the guidelines laid down by the National Mineral Policy, 2019.

63. Thereafter, U.P. Minor Minerals (Concession) Rules 2021 (hereinafter referred to as the Rules of 2021) were framed. Rule 21(5) and the 2nd Proviso to Rule 72(2) of the Rules of 2021 are pari materia to the Rules of 1963 post the 48th Amendment and employ the same language. The Rules under challenge in the present case and the Government order dated 24.2.2020 and Government Order dated 10.8.2022 were passed in pursuance of the same, and are also in furtherance of the National Mineral Policy, 2019.

64. Mr. Goyal further submitted that, there is no specific provision under the Act that bars the State Government from imposing Regulatory Fees, rather this MMDR Act, 1957 contains enabling provisions for the State to regulate the minor and minerals development. There are enabling provisions to regulate in the hands of the State Government. In fact, the Rules were framed under Section 15 (1) of the MMDR Act to curb illegal transportation by putting check gates, using artificial intelligence and latest available technology. It was just not providing the physical infrastructure, but also went to the extent of issuing e-entry pass which is generated at the point of loading (i.e. in other State) this

quarry transit e-pass is generated to avoid any human interaction and also to avoid any illegal transportation.

65. Mr. Goyal placed a brochure depicting various measures taken to curb the transportation of illegally excavated minerals, which is an obligation on the state as per the provisions of Section 23-C of the Act. As per the brochure the State has spent a huge amount in creating the infrastructure, which are as follows:-

(i) Geofencing of all boundaries of the mining lease with Geo-coordinates plotted on map displaying the virtual geographical parameters of all the mining sites, till date more than 518 leased areas have been Geofenced.

(ii) PTZ Camera at Weighbridge were set up for active surveillance of mining activity with IR sensor of the range of 100 meters which work in minimum light and ultra low light. Weighbridges are installed at all mining areas to track actual volume of minerals loaded on vehicles coming from the mining area, till date more than 466 such weighbridges have been installed and are working in the state.

(iii) MINE TAG: A unique RFID tag is issued to authenticate the vehicle engaged in transportation of minerals within the State. The tag contains the details of necessary permissions/instructions issued by the department to the vehicle. The RFID Tag installed on the vehicle will be mapped with the vehicle master database through Android based mobile application. When the vehicle with installed tag passes through the Check Gate, the RFID Reader will access the tag, and send the entire information to the central database. As on 20.9.2022 more than 95000 mine tags were issued and installed in mineral carrying vehicles.

(iv) RFID Handheld Readers with m-Check App were provided to the mining officers in various districts. This is a smart device equipped with features like data acquisition, processing and transmission with wireless communication and Ultra High Scanning (UHF Scanning) features. It is configured with Android 6.0 OS and possesses high reliability and expansibility. It has an inbuilt unique android based mobile application for getting real-time Checkgate alerts and notifications along with the mapping of RFID Tags with the vehicle data. With this the department officials can issue e-Notice through m-Check App.

(v) m-Check Mobile App : An App is created for Online verification of all types of Transit Passes (e-TP) i.e. e-MM-11/ e-Form-C/ ISTP documents by suing MINE tag, Vehicle Number, e-TP No. or QR code. Authentication of other State Transit Pass can also be checked through integration of other states API. Details of pending e-notices are automatically generated and displayed for taking appropriate action. Verification of vehicles using VAHAN API with real time legal mineral transportation and raising an instant alert/notification for further action to the nearest enforcement team. This App also helps in collection of evidence and sending e-Notices. Once anomalies are found during the on-spot verification, the app collects all evidences like vehicle number, photo, document, driver details, enforced offense, MINE-Tag status etc. Onspot real-time e-Notice can be sent to vehicles having anomalies. Real-time alerts (SMS/ MineMitra App notification) are sent to the vehicle owner immediately. Further it also provides monitoring mechanism at the manual barriers. It tracks the vehicle which passes through the manual barriers and captures the data.

(vi) Mining CheckGates: Mining CheckGates is an AI and IoT based Smart Enforcement System installed at major mining routes to track suspicious vehicles and raise an alarm to the mining department. via Decision Support Software (DSS) at the Command Center. The solution is designed to set a standard legal regime with zero tolerance towards unlawful activities as per the rules and regulations set by the Mining Department, which is equally applicable to each and every stakeholder without bias, prejudice or favouritism of any sort irrespective of the experience, background or size of business. With the help of Artificial Intelligence these unmanned CheckGates work as a e-barrier to curb illegal mining. It checks each mineral carrying vehicle. It also overreaches technology related frauds such as bogus transit pass, photoshopped transit pass, phishing sites etc. It also avoids collusion between local enforcement teams and defaulters.

(vii) It also provides for setting up a Unified Revenue Command Centre where all the transportation of minerals can be monitored at a single place.

Apart from these activities the State is taking various other measures to curb the menace of illegal mining and also transportation of such illegally mined minerals. The amount collected from the Regulatory Fees is spent on creating this infrastructure.

66. Regulating fee cannot be equated to tax as has been argued. The State is not imposing a tax nor it can be argued that the State is controlling the sale proceeds. It is only for the purposes of controlling illegal mining and its transport which are required to be controlled. State is fully competent

and has full authority to impose regulatory fees.

67. Learned AAG further submitted that the counsel for the petitioner has placed heavy reliance on the decision of Hon'ble Supreme Court in the matter of **State of Tamil Nadu vs. M.P.P. Kavery Chetty (supra)** wherein the Court held that the Section 15 did not empower the State Government to frame rules to enable State Government, Company or Corporation to fix a minimum price for granite. The State had no power under the Act to exercise control over the minor mineral after they have been excavated. The power to control the sale and the sale price of minor mineral is not covered by the terms of clause (o) of sub-section (IA) of Section 15. This clause can relate only to the regulation of the grant of quarry and mining leases and other mineral concessions and it does not confer the power to regulate the sale of already mined minerals and was declared ultra vires.

This judgment is distinguishable as the facts are entirely different. Here the State is not fixing any cost upon something which has been transported in the State. There, the Court was dealing with the issue as to whether the State has the power to fix a sale price of minerals which have already been mined. Hence the ratio of this judgment will not be applicable in the present case.

68. In **State of Haryana and Anr. v. Chanan Mal**,¹⁵ the constitutional validity of the state enactment framed under the provisions of the MMRD Act, 1957 was under challenge. The Constitution Bench held that subject to the overall supervision of the Central Government, the State Government has a sphere of its own power and can take legally specified action under

the Central Act and rules made thereunder. Thus, the whole field of control and regulation under the provisions of the Central Act of 1957 cannot be said to be reserved for the Central Government.

69. The vires of Section 15(1) of the MMRD Act was challenged in **D.K. Trivedi and others vs. State of Gujarat and others**¹⁶ on the ground that it provided excessive delegation of legislative power to the executive. The Hon'ble Supreme Court held that :

"76. To summarize our conclusions :

(1) Sub-section (1) of section 15 of the Mines and Minerals (Regulation and Development) Act, 1957, is constitutional and valid and the rule-making power conferred thereunder upon the State Governments does not amount to excessive delegation of legislative power to the executive.

(2) There are sufficient guidelines provided in the 1957 Act for the exercise of the rule-making power of the State Governments under section 15(1) of the 1957 Act. These guidelines are to be found in the object for which such power is conferred, namely, "for regulating the grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals and for purposes connected therewith; the meaning of the word 'regulating'; the scope of the phrase "for purposes connected therewith"; the illustrative matters set out in sub-section (2) of section 13; and the restrictions and other matters contained in sections 4 to 12 of the 1957 Act.

(3) The power to make rules conferred by section 15(1) includes the power to make rules charging dead rent and royalty.

(4) The power to make rules under section 15(1) includes the power to amend

the rules so made, including the power to amend the rules so as to enhance the rates of royalty and dead rent.

(5) A State Government is entitled to amend the rules under section 15(1) enhancing the rates of royalty and dead rent even as regards leases subsisting at the date of such amendment.

(6) Sub-section (3) of section 15 does not confer upon the State Governments the power to make rules charging royalty or to enhance the rate of royalty so charged from time to time.

(7) The sole repository of the power of the State Governments to make rules and amendments thereto, including amendments enhancing the rates of royalty and dead rent, is sub-section (1) of section 15.

(8) A State Government is not required to give an opportunity of a hearing or of making a representation to the lessees who would be affected by any amendments of the rules before making such amendments."

70. Hon'ble Supreme Court in **State of Tamil Nadu vs. M/s Hind Stone and Others**¹⁷ dealing with the Rule making powers of the State qua Section 15 of MMRD Act and whether the restrictions was in violations of Part-XIII of Constitution of India and ultra vires. The Court has held as follows:-

We are satisfied that Rule 8-C was made in bona fide exercise of the rule-making power of the State Government and not in its misuse to advance its own self-interest. We however guard ourselves against being understood that we have accepted the position that making a rule which is perfectly in order is to be considered a misuse of the rule-making power, if it advances the interest of a State, which really means the people of the State.

.... We do not think that "regulation" has that rigidity of meaning as never to take in "prohibition". Much depends on the context in which the expression is used in the statute and the object sought to be achieved by the contemplated regulation.

.... "The word 'regulation' has no fixed connotation. Its meaning differs according to the nature of the thing to which it is applied." In modern statutes concerned as they are with economic and social activities, "regulation" must, of necessity, receive so wide an interpretation...

.... "the restrictions freedom from which is guaranteed by Article 301 would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade" (Atiabari Tea Co. Ltd. v. State of Assam [AIR 1961 SC 232 : (1961) 1 SCR 809]). And, "regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of restrictions contemplated by Article 301". "They are excluded from the purview of the provisions of Part XIII of the Constitution for the simple reason that they do not hamper, trade, commerce or intercourse but rather facilitate them" [Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan [AIR 1962 SC 1406 : (1963) 1 SCR 491]]. The Mines and Minerals (Regulation and Development) Act is, without doubt a regulatory measure, Parliament having enacted it for the express purpose of "the regulation of mines and the development of minerals". The Act and the rules properly made thereunder are, therefore, outside the purview of Article 301. Even otherwise Article 302 which enables Parliament, by law, to impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in

the public interest also furnishes an answer to the claim based on the alleged contravention of Article 301. The Mines and Minerals (Regulation and Development) Act is a law enacted by Parliament and declared by Parliament to be expedient in the public interest. Rule 8-C has been made by the State Government by notification in the Official Gazette, pursuant to the power conferred upon it by Section 15 of the Act. A statutory rule, while ever subordinate to the parent statute, is, otherwise, to be treated as part of the statute and as effective. "Rules made under the statute must be treated for all purposes of construction or obligation exactly as if they were in the Act and are to be of the same effect as if contained in the Act and are to be judicially noticed for all purposes of construction or obligation"

71. The counsel for the respondent further submitted that earlier an identical issue came up, before this court in **Ramdhani Singh Vs. Collector Sonebhadra and others**¹⁸ where the State of Uttar Pradesh started charging cess on the minor minerals. The Constitutional validity of the provisions of the Act under which cess on mineral were being charged, was challenged on the ground that the field of mines and mineral was occupied under MMRD Act 1957, hence, it was not open for the State to charge a cess, by another state enactment, on a mineral, which was governed under the MMRD Act 1957. Since this power was exclusively exercisable by the central government, hence, any act or rule framed by the State Government would be ultra vires. This Court upheld the power of the State to charge cess on minerals. Against this order, appeal was preferred before the Hon'ble Supreme Court, which was tagged along with other cases the constitution bench of

five judges heard it in the matter of State of West Bengal vs. Kesoram Industries Ltd. and Ors. 19. The constitution bench of the apex court came to a conclusion that the power to charge cess by the State Government on miner minerals were valid and intra vires.

72. The ratio laid down by Hon'ble Supreme Court in **D.K. Trivedi (supra)** was also considered by the Constitution bench of five judges of Hon'ble Supreme Court in **State of West Bengal vs. Kesoram Industries (supra)** wherein it was held as follows:-

98., *A perusal of several provisions of the Act and in particular Section 9A, 15, 15 (1-A)(a) and (g), 15(3), 17(3), 21(5), 25 goes to show that the power of recovery is invariably given to the State Government and obviously the word 'Government' in Section 25 refers to the State Government, which only is empowered to recover the sums due as arrears of land revenue.*

112. The State could levy any fee based on quid pro quo. The seven-Judges Bench decision lends support to the view we are taking that in the field occupied by the Centre for regulation and central, power to levy tax and fee is available to the State so long as it does not interfere with the regulation - the power assumed and occupied by the Union.

114. *A reasonable tax or fee levied by State legislation cannot, in our opinion, be construed as trenching upon, Union's power and freedom to regulate and control mines and minerals.*

129. *The relevant principles culled out from the preceding discussion are summarized as under:-*

.....(8) *The primary object and the essential purpose of legislation must be*

distinguished from its ultimate or incidental results or consequences, for determining the character of the levy. A levy essentially in the nature of a tax and within the power of State Legislature cannot be annulled as unconstitutional merely because it may have an affect on the price of the commodity. A State legislation, which makes provisions for levying a cess, whether by way of tax to augment the revenue resources of the State or by way of fee to render services as quid pro quo but without any intention of regulating and controlling the subject of the levy, cannot be said to have encroached upon the field of 'regulation and control' belonging to the Central Government by reason of the incidence of levy being permissible to be passed on to the buyer or consumer, and thereby affecting the price of the commodity or goods. Entry 23 in List II speaks of regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union, Entries 52 and 54 of List I are both qualified by the expression "declared by Parliament by law to be expedient in the public interest". A reading in juxtaposition shows that the declaration by Parliament must be for the 'control of industries' in Entry 52 and for regulation of mines or for mineral development' in Entry 54. Such control, regulation or development must be 'expedient in the public interest'. Legislation by the Union in the field covered by Entries 52 and 54 would not like a magic touch or a taboo denude the entire field forming subject matter of declaration to the State Legislatures. Denial to the State would extend only to the extent of the declaration so made by Parliament. In spite of declaration made by reference to Entry 52 or 54, the State would be free to act in the field left out from the

declaration. The legislative power to tax by reference to Entries in List II is plenary unless the entry itself makes the field 'subject to' any other entry or abstracts the field by any limitations imposable and permissible. A tax or fee levied by State with the object of augmenting its finances and in reasonable limits does not ipso facto trench upon regulation, development or control of the subject. It is different if the tax or fee sought to be levied, by State can itself be called regulatory, the primary purpose whereof is to regulate or control and augmentation of revenue or rendering service is only secondary or incidental.

(9) The heads of taxation are clearly enumerated in Entries 83 to 92B in List I and Entries 45 to 63 in List II. List III, the Concurrent List, does not provide for any head. of taxation. Entry 96 in List I, Entry 66 in List II and Entry 47 in List III deal with fees. The residuary power of legislation in the field of taxation spelled out by Article 248 (2) and Entry 97 in List I can be applied only to such subjects as are not included in Entries 45 to 63 of List II. It follows that taxes on lands and buildings in Entry 49 of List II cannot be levied by the Union. Taxes on mineral rights, a subject in Entry 50 of List II can also not be levied by the union though as stated in Entry by itself the union may impose limitations on the power of the State and such limitations, if any, imposed by the Parliament by law relating to mineral development and to that extent shall circumscribe the States power to legislate. Power to tax mineral rights is with the States; the power to lay down limitations on exercise of such power, in the interest of regulation, development or control, as the case may be, is with the union. This is the result achieved by homogeneous reading of Entry 50 in List II and Entries 52 and 54 in List I. So long as a tax or fee on mineral rights remains in

pith and substance a tax for augmenting the revenue resources of the State or a fee for rendering services by the State and it does not impinge upon regulation of mines and mineral development or upon control of industry by the Central Government, it is not unconstitutional.

.....

142. As we have pointed out earlier, a cess may be tax or fee. So far as the present case is concerned, this distinction does not need any further enquiry by reference to the facts of the case inasmuch as the impugned cess is constitutionally valid considered whether a tax or a fee. We do not propose to continue dealing therewith any more inasmuch as it would be an exercise in futility. We would only place on record briefly our reasons for upholding the validity of the impugned levy whether a tax or a fee.

143. There is nothing wrong in the state legislation levying cess by way of tax so as to generate its funds. Although it is termed as, a 'cess on mineral right', the impact thereof falls on the land delivering the minerals. Thus, the levy of cess also falls within the scope of Entry 49 of List II Inasmuch as the levy on mineral rights does not contravene any of the limitations imposed by the Parliament by law relating to mineral development, it is also covered by Entry 50 of List II. The power to levy any tax or fee lying within the legislative competence of the State Legislature can be delegated to any institution of local government constituted by law within the meaning of Entry 5 in List II. The Entries 5, 23, 49, 50 and 66 of List II provide adequate constitutional coverage to the impugned levy of cess. True it is that the method of quantifying the cess is by reference to the quantum of mineral produced, This would not alter the character of the levy. There are myriad

methods of calculating the value of the Sand for the purpose of quantifying the tax reference whereto has already been made by us In the other part of this judgment.

145. The following observations of Constitution Bench in Hingir-Rampur Coal Co. squarely apply to SADA Act and SADA Rules for upholding their constitutional validity -

".....In pith and substance the impugned Act is concerned with the development of the mining areas notified under it. The Central Act, on the other hand, deals more directly With the control of all industries Including of course the industry of coal."

"The functions of the Development Councils constituted under this Act prescribed by Section 6 (4) bring out the real purpose and object of the Act. It is to increase the efficiency of productivity in the scheduled Industry or group of scheduled industries, to improve or develop the service that such industry or group of industries renders or could render to the community, or to enable such industry or group of industries to render such service more economically."

".....the object of the Central Act is to regulate the scheduled industries with a view to improvement and development of the. service that they may render to the society, and thus assist the solution of the larger problem of national economy. It is difficult to hold that the field covered by the declaration made by Section 2 of this Act, considered in the light of its several provisions, is the same as the field covered by the impugned Act. That being so, it cannot be said that as a result of Entry 52 read with Act LXV of 1951 the vires of the impugned Act can be successfully challenged,"

"Our conclusion, therefore, is that the impugned Act is relatable to Entries 234

and 66 in List II of the Seventh Schedule, and its validity is not impaired or affected by Entries 52 and 54 In List I read with Act LXV of 1951 and Act LIII of 1948 respectively,"

146. As stated earlier also, the impugned cess can be justified as fee as well. The term cess is commonly employed to connote a tax with a purpose or a tax allocated to a particular thing. However, it also means an assessment or levy. Depending on the context and purpose of levy, cess may not be a tax; it may be a fee or fee as well. It is not necessary that the services rendered from out of the fee collected should be directly in proportion with the amount of fee collected. It is equally not necessary that the services rendered by the fee collected should remain confined to the persons from whom the fee has been collected. Availability of indirect benefit and a general nexus between the persons bearing the burden of levy of fee and the services rendered out of the fee collected is enough to uphold the validity of the fee charged. The levy of the impugned cess can equally be upheld by reference to Entry 66 read with Entry 5 of Schedule II."

73. As per the decision of the constitution bench the State has power to charge cess on the goods coming from the other State. Entry 54 has to be strictly interpreted and is not generic Entry which is qualified by subsequent phrases. State list is generic and central list which is union list has to be construed strictly. In this case the real object of imposing regulatory fee was to check the rampant illegal mining of minerals and its transportation. Regulatory fee is being spent to address the larger interest of the

country and increase the national economy Which is the main ."

74. Counsel for the State submits that **State of Gujarat and Others v. Jayeshbhai Kanjibhai Kalathiya and Others (supra)** is per in-curium as it does not consider the ratio laid down in the judgment of **State of West Bengal vs. Kesoram Industries Ltd. and Others (supra)** and **Automobiles Transport Vs. State of Rajasthan**²⁰.

The State of Gujarat had imposed a complete ban on the movement of minerals out of State of Gujarat, hence, in the matter of **State of Gujarat and Others v. Jayeshbhai Kanjibhai Kalathiya and Others (supra)** the Hon'ble Supreme Court held that the complete ban on the free trade of minerals to other States, would be violative of Article 301, 303 and 304 of the Constitution, however, in the present case the State of Uttar Pradesh has not imposed any kind of ban or restriction, which would violate Part XIII of the Constitution of India

75. Heard counsel for the parties. Perused the documents and the judgment cited by them.

FINDINGS:

76. On the objection regarding locus of the petitioner in Writ Petition No.10037 of 2020 raised by the learned Additional Advocate General, we have serious reservations on the locus of the petitioner's association but as the matter have been referred by the Hon'ble Supreme Court, we will proceed to consider the matter on merits.

77. In the present writ petitions the petitioners have challenged the vires of

Rule 21(4) and Rule 70(2) of U.P. Minor Minerals (Concession) Rules 2020 and Rule 21(5) and Rule 72(2) of U.P. Minor Minerals (Concession) Rules 2021 and G.O. dated 24.2.2020 and G.O. dated 10.8.2022 on the ground that the same are violative of the provisions of MMRD Act and Part XIII of the Constitution of India.

78. From the subject matter of these writ petitions, as well as the arguments advanced by the parties, the following issues are being crystallized for consideration:-

(I) Whether Rule 21(4) and Rule 70(2) of U.P. Minor Minerals (Concession) Rules 2020 and Rule 21(5) and Rule 72(2) of U.P. Minor Minerals (Concession) Rules 2021 are ultra vires to the provisions of the MMRD Act, 1957?

(II) Whether the Rule framed for charging Regulatory Fees on the minerals coming from other States in to the State of Uttar Pradesh and the G.O. dated 24.2.2020 and G.O. dated 10.8.2022 are in line with the objects of the MMDR Act and Rules framed thereunder, and whether they are in sync with the new mining policy of 2019?

(III) Whether imposition of regulatory fees is in violation of Part XIII of the Constitution of India.

79. Before we proceed to examine the merits of the submissions and counter submissions made on behalf the parties, it will be useful to recapitulate and summarize a few principles relevant for interpreting the provisions of MMRD Act, 1957.

80. The fields of legislation by Union and States in regard to regulation of mines and mineral development, so far it relates to controversy involved in instant writ

petition, can be appreciated by considering relevant provisions of the Constitution of India, 1950, Mines Act, 1952 and Mines and Minerals (Development and Regulation) Act, 1957

81. The Mines Act, 1952 was first enacted with the object of regulation of labour and safety in mines. Thereafter, parliament enacted MMRD Act, 1957 wherein it was declared that it is expedient in the public interest that the Union should take under its control the regulation of mines and the development of minerals. Whereas, **Section 13** of the MMRD Act 1957 gives power to Central Government to make Rules in respect of major minerals for regulating the grant of reconnaissance permits, prospecting licenses and mining leases with respect to minerals. **Section 15** of the MMRD Act gives the same power to the State Government to make rules in respect of minor minerals, and the State Government by way of notification in the official gazette, may make Rules for, regulating the grant of quarry leases and mining leases or other minerals concession in respect to minor minerals and **“for purposes connected therewith”**. The power of Central Government and the State Government are identical in these two Sections i.e. Section 13 and 15 of the MMRD Act, 1957.

82. Section 13, 14 and 15 which forms a group, have to be read together. Section 15 (1) is in pari materia with Section 13 (1), each conferring power to make rules for ‘regulating’. In view of the dictionary meaning of the word ‘regulate’, the power to regulate by rules given by Section 13 (1) and 15 (1) is a power to control, govern, and direct by rules, the grant of prospecting licences and mining leases in respect of minerals other than

minor minerals and for purposes connected therewith in the case of Section 13 (1) and the grant of quarry leases, mining leases and other mineral concessions in respect of minor minerals and for purposes connected therewith in the case of Section 15 (1) and to subject such grant to restrictions and to adapt them to the circumstances of the case and the surroundings with reference to which such power is exercised. The power to regulate conferred by Section 13 (1) and 15 (1) is not only with respect to the grant of licences and leases mentioned in those sub-sections but is also with respect to “purposes connected therewith”. This phrase gives government a wider power to frame Rules with regard to all tasks which are incidental to the minor minerals.

83. A plain reading of Section 15 (1), 15 (1) (g) and 15 (1) (o) shows that the State Government is bestowed with the power to make rules, and such rules would provide power, to fix, collect rent, fees and other charges. Further such rules may be made for any other matter, which is to be or may be prescribed.

84. When the parliament in its wisdom, amended MMRD Act, 1957 on 18.12.1999 and proceeded to add Section 4 (1A), 23 (A) & 23 (C). The very object of this amendment was to prohibit transportation and storage of minerals with the sole intention of preventing illegal mining. Section 4 (1A) clearly lays down that no person shall transport or store any mineral contrary to the provisions of the Act and the Rules framed therein. Further, Section 23 (C) (1) mandatorily calls upon the State to frame rules to curb illegal mining, transportation and storage and also lays down as to what all the State are supposed to do for preventing illegal mining, their transport and storage. The

State is obliged to take several measures such as setting up check posts for checking minerals under transit and also setting up the other allied infrastructure using the latest technologies to curb transportation of illegal minerals.

85. Section 15 of the MMRD, which is a parent Act provides, that the State Government has power to make Rules in respect of Minor Minerals. The Parliament made an amendment²¹ in the 1957 Act and had added Section 4(1-A), Section 23-A and Section 23-C in the Act. The objects of these amendments were to prevent illegal mining and the transportation of such illegally excavated minerals. It clearly empowered the State Government to make rules for preventing illegal mining of minerals, transportation of minerals and storage of minerals. Section 23-C also gave a guideline as what has to be done to curb the illegal mining and transportation.

86. Section 15 (1) of Mines and Minerals (Development and Regulation) Act, 1957, provides general power to States to frame rules for regulating the grant of query leases and mining leases and other mineral concession in respect of minor minerals and for purposes connected therewith. However, Section 15(1-A), which was inserted in statute book vide Act No.37 of 1986 w.e.f. 10.02.1987, sets out that the State Government may make rules, without prejudice to generality of powers conferred under Section 15(1).

87. The State Government, in exercise of the powers conferred under Section 15 and Section 23(C) of the MMDR Act 1957 had framed Uttar Pradesh Minor Minerals (Concession) Rules, 1963. The State of Uttar Pradesh in exercise of power granted under the Section 23(C) framed a Rule

which was “Uttar Pradesh Minerals (Prevention of Illegal Mining, Transport and Storage) Rules 2002”. These Rules were superseded in 2018 by a new Rules which was “Uttar Pradesh Minerals (Prevention of Illegal Mining, Transport and Storage) Rules 2018”. This Rules of 2018 was again amended in 2019 and the said Rules were called “Uttar Pradesh Minerals (Prevention of Illegal Mining, Transport and Storage) Rules 2019”.

88. The definition of “Mines” and “Mineral” provided in statute book is relevant to be considered. At the time of 48th Amendment made in U.P. Minor Mineral (Concession) Rules, 1963, the provisions of Mines Act, 1952 were applicable and the provision of Section 2 (1) (j) of the Mines Act provides definition of “Mines” and 2(1)(jj) defines “minerals”. By virtue of Section 3(i) of MMRD Act, 1957 the word ‘Mine’ has the same meaning as defined in Mines Act, 1952. However, “minor minerals” is defined in Section 3 (e) of Mines and Minerals (Development and Regulation) Act, 1957.

89. The Uttar Pradesh Minor Minerals (Concession) Rules, 1963 was amended in 2020 by the State Government, and was called “Uttar Pradesh Minor Minerals (Concession) (Forty Eight Amendment) Rules, 2020”, By this Rule 21 and Rule 70 were amended, and “Regulating Fees was introduced”. The amended Rule 21 (4) paved way for imposition of regulating fee on the minerals coming from other State and entering the State of Uttar Pradesh. The quantum of the fees was to be determined by the State from time to time. Further, the provisions of Rule 70 (2) clearly lays down the transportation of minerals would be valid only after the determined Regulating Fees is paid.

90. The Uttar Pradesh Minor Minerals (Concession) Rules, 2020 was yet again amended in 2021 by the State Government, this was called “Uttar Pradesh Minor Minerals (Concession) Rules, 2021”. In this Clause (5) was added in Rule 21, which gave power to the state to impose “Regulating Fees” which would be determined by the State Government from time to time on minerals entering from other States into the State of Uttar Pradesh, and Rule 70 (2) laid down the transport of minerals would only be valid after the determination of regulatory fee by the State.

91. It was only in exercise of powers granted under Section 23-C of the MMRD Act, the State Government had framed rules. The impugned Government Order dated 24.02.2020 and 10.08.2022 issued by the State Government were under the rules framed by the State Government. The objects of imposing the regulating fees by these government orders, were very clear, this regulating fees was being charged only to meet out the expenses for setting up the infrastructure (which included the use of latest technology) to curb and prevent illegal mining and its transportation and storage. Initially vide Government Order dated 24.02.2022 a regulatory fees of Rs.50 per cubic meter was fixed on building stones, ballast, boulders which were transported from other State into the State of Uttar Pradesh, thereafter, the State Government issued another Government Order dated 10.08.2022 by which the regulatory fees was increased from Rs.50 to 100 per cubic meter.

92. It was submitted by the State, that the regulatory fees so collected was not for the enrichment of the State but was spent for setting up State of the art infrastructure

which included check gates, camera, weighbridges using artificial intelligence and other latest technologies and also for generating e-challans using QR code and various other devices just to prevent and check the transportation of illegally mined minerals, at important roads of different parts of the State. U.P. being such a big State, with its boundary running into hundreds of kilometers, to check the transportation of illegal minerals is a herculean task. In order to set up this infrastructure, the State would be burdened with the huge cost and the only way to set off this huge cost, is to charge regulatory fees on the minerals coming from the other State.

93. The power contained under Section 4(1-A) of the MMDR Act, 1957 demonstrates that transportation is an activity, which is within the domain of the State Government and is to be regulated by the State Government. The State Government is required to frame Rules in this regard and has to regulate the transportation of the minerals that have been excavated and also to inspect, check and search the minerals during transit.

Therefore, the State derives power to regulate the minerals that stand already excavated and also to take penal action in case of contravention.

Section 23-C envisages three (3) distinct aspects, which are to be regulated by the State Government:

(a) Ensure mining in accordance with the terms of lease/licence so as to arrest the activity of illegal mining.

(b) Ensure proper transportation of the minerals excavated in accordance with law.

(c) Ensure proper storage of the minerals after its excavation in accordance with law.

All these activities by their very character are regulating the activity of mining and are not connect with mineral development. The said activities are the natural corollary associated with the mining which needs to be regulated particularly in view of the provisions contained in Article 39(b) of the Constitution of India.

A perusal of the Rules and the Section discloses that full regulatory control vests with the State over transportation of minerals more so, upon minor minerals. However, from bare reading of Section 23-C and also from perusal of the Rules framed by the State Government and the forms appended thereto, it is evident that the transportation is being regulated within the State where in the minerals have been excavated within that State.

On the other hand, Section 4(1-A) gives plenary power to the State Government to regulate transportation of mineral. The entire field of transportation stands regulated at the hands of the State Government whether it is intra-State or it is inter-State. This is demonstrated inter alia, from perusal of Rule 12 of the 2018 Rules where the jurisdiction of the officers have been provided and limits their jurisdiction for transportation within the State.

Issue No. 1

(I) Whether Rule 21(4) and Rule 70(2) of U.P. Minor Minerals (Concession) Rules 2020 and Rule 21(5) and Rule 72(2) of U.P. Minor Minerals (Concession) Rules 2021 are ultra vires to the provisions of the MMRD Act, 1957?

94. Before adjudicating with the first issue, we would like to consider the history,

as to how the vires of the rules have been tested in the past.

95. The Supreme Court, in **State of Orrisa vs. M.A. Tulloch** ²⁴ where the question was whether fee could be imposed by the State Legislature under Entry 66 of List II observed:

16... ..The material words of the Entries are : "Fees in respect of any of the matters in this List". It is therefore a pre requisite for the valid imposition of a fee that it is in respect of a "matter in the list". If by reason of the declaration by Parliament the entire subject matter of "conservation and development of minerals" has been taken over for being dealt with by Parliament, thus depriving the State of power which it therefore possessed, it would follow that the "matter" in the State List is, to the extent of the declaration, substrate from the scope and ambit of Entry 23 of the State List. There, would, therefore, after the Central Act of 1957, be "no matter in the List" to which the fee could be related in order to render it valid....

96. The Division Bench of Allahabad High Court in **Sheo Varan Singh Vs. State**, ²⁵ has dealt with Section 15 (1) of MMRD Act, the Court held that :-

"Some of the words of Sub-section (1) of Section 15 are important for the purpose of considering the argument of the petitioner's counsel. These words are: "regulating" and "for purposes connected therewith".

...The word "regulation" is of wide import and the dictionary meaning of the word "regulation" given in Shorter Oxford Dictionary is "the act of regulation", and the word "regulate" is given the meaning

"to control, govern or direct by rule or regulation". This thus gives the power to the State Government to make Rules for the purpose of laying down the conditions necessary for regulating

Section 15 (1) is couched in a language which confers wide power on the State Government.

19. the Legislature has empowered the State Governments to make rules for all such "purposes connected therewith". The expression "for purposes connected therewith" has been a subject matter of interpretation before a Full Bench of this Court in Dr. Shamshuddin v. Smt. Zaibunnisa²⁶. The view taken by the Full Bench in this case establishes that this expression enables the rule making power to make provisions which may effectively administer the Act. For the purposes of grant of a lease of minor minerals, laying down of the period and the consideration being the necessary ingredients, the Rule cannot be said to be invalid on that ground."

97. A Division Bench of this Court in **M/s Digiana Industries Ltd. (supra)** has held that, as per the scheme of things provided at that point of time, the minor minerals of one State cannot be transported to another State. To allow the interstate transportation of minor minerals the State Government had to take a policy decision. Two months time was granted to the State Government to regulate the transportation of minor minerals. In response to the direction issued in this case, State of Uttar Pradesh had framed U.P. Minor Minerals (Concession) Rules, 2020 wherein a provision of regulating fees was introduced. This Rule of 2020 was again amended in 2021 wherein regulating fees on minerals entering from other State into the Uttar Pradesh was introduced.

98. In **G.K. Krishnan v.State of Tamil Nadu**²⁷ : it was held that "The word 'regulation' has no fixed connotation. Its meaning differs according to the nature of the thing to which it is applied." In modern statutes concerned as they are with economic and social activities, "regulation" must receive so wide an interpretation that in certain situations, it must exclude competition to the public sector from the private sector. More so in a welfare State. An identical view was also taken by the Privy Council in **Commonwealth of Australia v. Bank of New South Wales**²⁸.

99. The amount of levy of fee is based upon the expenses incurred by the State in rendering the services, the amount may not be arithmetically commensurate with the expenses as held by the apex court in **D.C.M. v Chief Commissioner**²⁹. Further, the Hon'ble Supreme Court in the matter **State of U.P. & others vs. Sitapur Packing Wood Suppliers and others**³⁰ has held that if a fees is regulatory then the State Government need not establish a *quid pro quo*.

100. Hon'ble supreme court in the matter of **State of Rajasthan Vs. Sajjanlal Panjwat**³¹ has held that, a fee may be justified where the object of the levy is to raise the expenses of a service and not to make any profit out of it.

101. Hon'ble supreme court in the matter of **Indian Mica and Nicanite Industries Vs. State of Bihar**³², and in the matter of **Corporation of Calcutta Vs. Liberty cinema**³³ has held that the State makes the law for regulation of any trade or business by means of licensing, it is open to it to charge licence fee to defray the cost of administering the regulation. In these cases although the principles of *quid pro quo* do

not apply; but the fee so charged should have broad co-relationship with the cost of administering the regulation. What is essential is that fee should not be excessive or exorbitant.

102. Hon'ble Supreme Court in the matter of **State of Tamil Nadu vs. M/s Hind Stone and Others**³⁴, dealing with the Rule making powers of the State qua Section 15 of MMRD Act held, that Rule when made in bona fide exercise of the rule-making power of the State Government and not in its misuse to advance its own self-interest, such a rule cannot be considered a misuse of the rule-making power, if it advances the interest of the State. The Court further, held that prohibitory exploitation by the private agencies was the correct method to conserve the mineral. The prohibition imposed by the State cannot be said to be ultra vires to the provisions of the MMRD Act. The relevant paras are as follows:

'124. Entry 23 of List II of the Seventh Schedule to the Constitution is, "Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union". Entry 54 of List of the Seventh Schedule is "Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest". Thus while 'regulation of mines and mineral development' is ordinarily a subject for State legislation. Parliament may, by law, declare the extent to which control of such regulation and development by the Union is expedient in the public interest, and, to that extent, it becomes a subject for Parliamentary legislation. Parliament has

accordingly enacted the Mines and Minerals (Regulation and Development) Act, 1957. the Act it is declared that it is expedient in the public interest that the Union should take under its control the regulation of mines and the development of minerals to the extent thereafter provided. It is now common ground between the parties that as a result of the declaration made by Parliament, the State legislatures are denuded of the whole of their legislative power with respect to regulation of mines and mineral development and that the entire legislative field has been taken over by Parliament.

103. The vires of Section 15(1) of the MMRD Act was challenged in **D.K. Trivedi and others vs. State of Gujarat and others** ³⁵ on the ground that it provided excessive delegation of legislative power to the executive, on this the Hon'ble Supreme Court held as follows:

"76. To summarize our conclusions :

(1) Sub-section (1) of section 15 of the Mines and Minerals (Regulation and Development) Act, 1957, is constitutional and valid and the rule-making power conferred thereunder upon the State Governments does not amount to excessive delegation of legislative power to the executive.

(2) There are sufficient guidelines provided in the 1957 Act for the exercise of the rule-making power of the State Governments under section 15(1) of the 1957 Act. These guidelines are to be found in the object for which such power is conferred, namely, "for regulating the grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals and for purposes connected therewith; the meaning of the word 'regulating'; the scope of the phrase "for

purposes connected therewith"; the illustrative matters set out in sub-section (2) of section 13; and the restrictions and other matters contained in sections 4 to 12 of the 1957 Act.

(3) The power to make rules conferred by section 15(1) includes the power to make rules charging dead rent and royalty.

(4) The power to make rules under section 15(1) includes the power to amend the rules so made, including the power to amend the rules so as to enhance the rates of royalty and dead rent. amendment.

(6) Sub-section (3) of section 15 does not confer upon the State Governments the power to make rules charging royalty or to enhance the rate of royalty so charged from time to time.

(7) The sole repository of the power of the State Governments to make rules and amendments thereto, including amendments enhancing the rates of royalty and dead rent, is sub-section (1) of section 15.

(8) A State Government is not required to give an opportunity of a hearing or of making a representation to the lessees who would be affected by any amendments of the rules before making such amendments."

104. In this case the issue was whether Section 15A of MMRD Act suffers from excessive delegation of legislative power to the executive. The Hon'ble Supreme Court held that, though Section 13 and 14 does not apply on minor minerals but Section 13(1) is pari materia with the language of Section 15(1). Each of these provisions confers the power to make rules for "regulating". The Shorter Oxford English Dictionary, Third Edition, defines the word "regulate" as meaning "to control, govern, or direct by rule or regulations; to subject to guidance or restrictions; to adapt to circumstances or surroundings". Thus, the power to regulate by rules given by

sections 15(1) is a power to control, govern and direct by rules and grant of quarry leases, mining leases and other mineral concessions in respect of minor minerals and for purposes connected therewith. It is pertinent to bear in mind that the power to regulate conferred by sections 13(1) and 15(1) is not only with respect to the grant of licences and leases mentioned in those sub-sections but is also with respect to "purposes connected therewith", that is, purposes connected with such grant. The Court further held that Section 15 (1) of the MMRD Act is constitutional and valid and the rule-making power conferred thereunder upon the State Government does not amount to excessive delegation of legislative power to the executive. There are sufficient guidelines provided in the 1957 Act for the exercise of the rule-making power of the State Government. These guidelines are to be found in the object for which such power is conferred namely, "for regulating the grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals and for purposes connected therewith, the meaning of the word 'regulating', and the scope of the phrase "for purposes connected therewith" are set out in the provisions of the Act. The power to make rules under Section 15 (1) includes the power to amend the rules so made, including the power to enhance the rates of royalty and dead rent.

105. The landmark judgments on this issue right from *Municipal Corporation of the City of Toronto v. Virgo* (1896 AC 88)³⁶ and *Attorney-General for Ontario v. Attorney-General for the Dominions* (1896 AC 348) up to *State of U.P. v. Hindustan Aluminium Corporation Ltd.*³⁸ lays down that "regulation" has that rigidity of meaning as never to take in

"prohibition". Much depends on the context in which the expression is used in the statute and the object sought to be achieved by the contemplated regulation.

106. In *State of Haryana and Anr. v. Chanan Mal*,³⁹ referring to the provisions of the MMRD Act, 1957 and a State enactment of Haryana, (the constitutional validity whereof was under challenge) the Constitution Bench held that, subject to the overall supervision of the Central Government, the State Government has a sphere of its own power and can take legally specified action under the Central Act and rules made thereunder. Thus, the whole field of control and regulation under the provisions of the Central Act of 1957 cannot be said to be reserved for the Central Government.

107. Thereafter a constitution bench of five judges of Hon'ble Supreme Court in *State of West Bengal Vs. M/s Kesoram Industries (supra)* have held that :-

"98. A perusal of several provisions of the Act and in particular Sections 9-A, 15, 15(1-A)(a) and (g), 15(3), 17(3), 21(5) and 25 goes to show that the power of recovery is invariably given to the State Government and obviously the word "Government" in Section 25 refers to the State Government, which only is empowered to recover the sums due as arrears of land revenue.

114. A reasonable tax or fee levied by State legislation cannot, in our opinion, be construed as trenching upon the Union's power and freedom to regulate and control mines and minerals.

129 (8) A levy essentially in the nature of a tax and with the power of the State Legislature cannot be annulled as unconstitutional merely because it may

have an effect on the price of the commodity. A State legislation, which makes provision for levying a cess, whether by way of tax to augment the revenue resources of the State or by way of fee to render services as quid pro quo but without any intention of regulating and controlling the subject of the levy, cannot be said to have encroached upon the field of "regulation and control" belonging to the Central Government....

.....A reading in juxtaposition shows that the declaration by Parliament must be for the "control of industries" in Entry 52 and "for regulation of mines or for mineral development: in Entry 54. Such control, regulation or development must be "expedient in the public interest". Legislation by the Union in the field covered by Entries 52 and 54 would not like a magic touch or a taboo denude the entire field forming the subject-matter of declaration to the State Legislatures. Denial to the State would extend only to the extent of the declaration so made by Parliament.....

129(9) So long as a tax or fee on mineral rights remains in pith and substance a tax for augmenting the revenue resources of the State or a fee for rendering services by the State and it does not impinge upon regulation of mines and mineral development or upon control of industry by the Central Government, it is not unconstitutional.

142. As we have pointed out earlier, a cess may be tax or fee. So far as the present case is concerned, this distinction does not need any further enquiry by reference to the facts of the case inasmuch as the impugned cess is constitutionally valid whether considered as a tax or a fee.....

143. What is under challenge is only the levy of cess. There is nothing

wrong in the State legislation levying cess by way of tax so as to generate its funds.....

.....Thus, the levy of cess also falls within the scope of Entry 49 of List II. Inasmuch as the levy on mineral rights does not contravene any of the limitations imposed by Parliament by law relating to mineral development, it is also covered by Entry 50 of List II. The power to levy any tax or fee lying within the legislative competence of the State Legislature can be delegated to any institution of Local Government constituted by law within the meaning of Entry 5 in List II. Entries 5, 23, 49, 50 and 66 of List II provide adequate constitutional coverage to the impugned levy of cess.

108. The counsel for the petitioners has placed reliance on a judgment passed by the Hon'ble Supreme Court in the matter of **State of Gujarat and Others v. Jayeshbhai Kanjibhai Kalathiya and Others (supra)**. In this case, the State of Gujarat amended the Gujarat Minor Minerals Rules 2010 and inserted Rule 44BB, wherein, by this Rule the movement of sand beyond the State of Gujarat was completely prohibited. This Rule was purportedly made under Section 23-C of the MMDR Act. The vires of the Rules completely prohibiting the movement of sand beyond the State of Gujarat was challenged before Gujarat High Court. The High Court held that prohibiting Rules is ultra vires of Section 15 and Section 23-C of the MMDR Act and also held it to be violative of Article 301 of the Constitution of India, this order of Gujarat High Court was assailed by the State of Gujarat by filing an appeal before the Apex Court, wherein, the Apex Court had held that a prohibition by the State Government on sale of sand beyond the State cannot be said to be in line with the objects of the

provisions of the MMDR Act. Section 23-C of the MMDR Act was inserted for the sole intention of preventing illegal mining. The Court further held, it is in this context the words ‘transportation’ and ‘storage’ in Section 23-C are to be interpreted in the context of ‘illegal mining’. It is clear that it is the transportation and storage of illegal excavated minerals and no rules can be framed which would prohibit movement of minerals (sand) beyond the boundaries of the State, when this mineral is legally mined backed by duly granted license. Therefore, no power flows from this provision to make rule for regulating transportation of the legally excavated minerals.

109. In **Jayeshbhai’s** case, the question was whether rule can be made to completely ban movement of mineral outside the State boundary. The Hon’ble Court took note of the decision in *Amrit Lal Nathu Bhai Shah, D.K. Trivedi & Sons and Hind Stones* in paragraph 39 of the judgment. However, the judgment does not take note of the ratio of Common Cause judgment of the Apex Court, wherein the court had directed for framing the National Mineral Policy and hence, observation in Paragraph 42 may not fall in line with what has been held in *Goa Foundation case* and *Common Cause case* read with National Mineral Policy. Further so far as discussion on the power under Articles 301 and 304 are concerned, the judgment does not take note of nine (9) Judges Bench decision in *Jindal Stainless* that holds field and hence, the ratio decidendi of *Jindal Stainless* will cover the field vis-a-vis interpretation of Articles 301 and 304 would eclipse the finding of *Jayeshbhai* judgment.

Moreover, in Paragraph 47, the judicial notice has been taken by the

Hon’ble Apex Court that a discrimination is being made by the State of Gujarat whereby it is placing a ban for export of sand but putting no ban on import of sand. This ban falls foul of Part-XIII of the Constitution of India.

The ratio of this decision would not squarely cover the case in hand inasmuch as in State of U.P. there is no ban for either export or import of minerals from other States. It is a two way traffic in the State. The power to regulate is available. **Jayeshbhai** judgment was delivered in a different set of circumstances and cannot outlay the issue in hand.

110. In **Jayeshbhai’s** case it was considered that Section 23-C was inserted with specific object to curb “illegal mining”. Therefore, the words “transportation” and “storage” occurring therein would take their colour from the expression “illegal mining” on the principle of *noscitur a sociis*. That was clear from the Statement of Objects and Reasons as well. The prohibition would have been permissible provided it had any direct nexus with the conservation, exploitation and excavation of mineral. The prohibition on the transport or sale of the already mined minerals outside the State has no direct nexus with the objects and purpose of the MMDR Act. In this case, the conclusion arrived by the Court was on the basis of that prohibitory rules framed by the State Government, which was held beyond the scope and object of Section 15 (1-A) and Section 23 (C) of the Act.

111. The State of Madhya Pradesh had also imposed regulating fees but following the judgment of **Jayeshbhai** the Hon’ble Madhya Pradesh High Court in the matter of **Ultratech Cement Limited v.**

State of Madhya Pradesh (supra), held that charging of regulation fees on minerals brought from other State to the State of M.P. would be beyond the power of the State Government unless the minerals have been illegally mined. Section 15 and Section 23 (C) does not authorise the State Government to make rules for minor minerals lawfully excavated in other States.

112. Similarly, the State of Karnataka started collecting entry fees on certain minerals, under Rule 42(7) of Karnataka Minor Minerals Concession Rules, 1994 which were brought in from other States into the State of Karnataka. The validity of Rule 42(7) of Karnataka Minor Minerals Concession Rules, 1994 by which entry fees was charged, was challenged before the Karnataka High Court. The Karnataka High Court in the matter of **Sri Sai Keshava Enterprises v. State of Karnataka**⁴¹ relying on the decision of **Jayesh Bhai** passed by the Apex Court, held that neither under Section 15 nor under Section 23-C of the said Act of 1957, there is a power vesting in the State Government to make rules for regulating the entry of lawfully excavated minerals from the other State, and cannot levy fees on entry of lawfully excavated minerals from other States into the State of Karnataka.

113. The counsel for the petitioner had heavily relied on the judgment of **Jayeshbhai**, which was followed by M.P. High Court in **Ultratech Cement** and Karnataka High Court in **Sri Sai Keshava Enterprises**. On the other hand, counsel for the respondent had categorically stated that reliance cannot be placed on the ratio of **Jayeshbhai** as it was not in sync with the ratio of the earlier judgment laid down by the Hon'ble Supreme Court in the matter of

Hind Stone and D.K. Trivedi. Both these judgments were though mentioned in **Jayeshbhai** but their ratio were neither considered nor distinguished. Moreover, the ratio laid down by the Constitution Bench in **Kesoram's** case were not even considered in **Jayeshbhai's** case. Further, the Constitution Bench in the **Kesoram's** case had dealt with issues, which are identical to the present case. In that case, this imposition of cess and vires of the Rules were under challenge. The Division Bench of this Court in **Ram Dhani's** case upheld the vires and when the same was challenged by the State, it was clubbed along and decided in **Kesoram's** case.

In this judgment, the ratio laid down by the Apex Court in **MPP Kaveri Chetty** and **D.K. Trivedi** was not considered. Even the ratio of Constitution Bench of the Hon'ble Supreme Court in the matter of **State of W.B. v. Kesoram Industries and Others** was not even considered.

114. Counsel for the petitioner had relied on a judgment passed by the Hon'ble Supreme Court in **State of Tamil Nadu v. M.P.P. Kavery Chetty (supra)** in this judgment, State Government fixed price on certain mineral under the guise of regulatory role, the State Government restricted the same by determining the minimum price of minor mineral. On this issue, the Apex Court held that the State Government does not possess any power to regulate the sale of already mined minerals. This was again a situation which was with respect to the minerals mined within the State and the State Government was restricting the mineral. Apart from regulating the price of the mineral, the State had also imposed a condition that the mining will only be undertaken by the State owned company or corporation. Though the

mining to be undertaken by the State Corporations/company was upheld but only the fixation of minimum price of mineral was set aside.

The aforesaid judgment, therefore, has no application to the facts of the instant case as fixation of price of minerals was beyond the realm of the objects of the provisions of the Act. Here the sale price is neither regulated nor minimum sale price is being fixed upon any mineral which has been excavated in another State. Only a regulatory fee is being imposed to achieve the object of the provisions of Section 15 (1-A) and Section 23 (C) of the Act, and further it is a step in aid to effectuate the National Mineral Policy.

115. The facts of both **M.P.P. Kaveri Chetty** and **Jayeshbhai's** case were entirely different, as the first one relates to control the price and the sale price of a minor mineral, and in the second case, the State Government had imposed complete ban on the movement of minor mineral, whereas in the present case, Regulatory Fees has been imposed upon the inter-State transportation of the minor minerals. This imposition is set to be as per the objects of the provisions of Section 15(1-A) and 23(1) of the Act and was imposed to provide for setting up a proper infrastructure to curb illegal mining, transportation and its storage.

116. It is clear that the competence of the State Government to frame rules under MMRD Act has been challenged several times and has been tested by Hon'ble Supreme Court in various judgments. First time a division bench of this Court in Sheo Varan Singh's case, which dealt with this issue, has held that Section 15 (1) is couched in a language which confers wide

power on the State Government to frame rules to achieve the object of the act. Further, it held that the legislature had empowered the State Government to make rules for all 'purposes connected herewith'.

117. The rules making power of the State Government was again questioned in **State of Tamil Nadu Vs. M/s Hind Stone and others (supra)**, where the Hon'ble Supreme Court held that MMRD Act itself gives power to frame rules. Rules made under the Statute must be read for all purposes of construction or obligation exactly as if they were in the Act and are to be of the same effect as if contained in the Act and the Rules impugned herein in framed from the power derived from the Statute.

118. The constitution bench of the Hon'ble Supreme court in **Kersoram Industries (supra)** once again upheld the power of the State to frame rules, the Court even went to the extent of saying the power to levy any tax or fee lying within the legislative competence of the State Legislature can be delegated to local authorities as well.

119. Moreover, the Rules so framed were under the directions passed in **M/s Digiana Industries Pvt. Ltd. Vs. Union of India and others**⁴² and also the Rules, which are impugned herein, are made in conformity with the new mining policy of 2021 issued by the Government of India.

120. The Hon'ble Supreme Court in the matter of **Common Cause (supra)** had directed the Government of India to frame a new mining policy, in compliance of the order of the Hon'ble Supreme Court, the Government of India framed 'Mining Policy 2021'. This policy was approved by

the cabinet on 28.02.2021 while **Jayeshbai's** judgment was pronounced on the very next morning i.e. 01.03.2021 probably, that was a reason the Court while pronouncing the judgment was not aware of the new mining policy and the same was not considered in the judgment.

121. The MMRD Act was enacted, with the sole object of developing and regulating the minerals. Hence, any rules framed or regulations made for development, excavation, transportation would not tantamount to be in violation of provisions of the MMDR Act even if the same is regulating in nature. As in **Kesoram's** case the Constitution Bench has held that a reasonable fee levied by State legislation cannot be construed as trenching upon the Union's power and freedom to regulate and control Mines and Mineral. The whole field of control and regulation under the provisions of MMRD Act, 1957 cannot be said to be reserved for the Central Government.

122. The phrase used in Section 23-C (1) of the MMRD Act is 'illegal mining', transportation and storage. All these three words i.e. illegal mining, transportation and storage have to be read separately and not in conjunction. The Section clearly gives power to the State Government to independently frame rules for all these issues though all these three issues are an integral part of the mining industry, but the plain reading of the Section is that the rules can be framed independently for illegal mining of minerals, separate rules and regulations for transportation of minerals, and altogether different rules and regulations for storage of minerals, this will include both legally and illegally excavated minerals. This further gets corroborated from the amendment in Section 21 of

MMRD Act brought in 2021 where an explanation was added in the penalty section (Section 21), which clarified that penalty would be imposed on raising or transportation of any minerals, which are in contravention of the rules made under Section 23 (2), this amendment clarifies that illegal mining, transportation and storage cannot be read in conjunctive.

123. The entries in the list of VIIth Schedule must receive a liberal construction inspired by broad generous spirit and not in a narrow pedantic sense. This is because the allocation of the subject to the lists is not by way of scientific or logical definition but by way of mere "simplex enumeratio" of broad categories. The power to legislate shall also include within its expanse the legislations touching incidental and ancillary matters. In the scheme of lists in the Seventh Schedule there exists clear distinction between general subjects of legislation the subject with specific or wider implications. The amended Section 15(1-A) of the MMDR Act, starts with a non-obstante clause giving wide power to make rules, which were specified to the subjects. In view of the aforesaid, it is clear that Section 15(1-A) of the MMDR Act, empowers the State to make such rules to achieve the objects of the amended provisions of Section 15 of the MMDR Act. Section 15(1-A)(g) of the MMDR Act further empowers the State to make rules for imposing fees. Hence, Regulatory Fees imposed by the State by framing Rule 21(4) and Rule 70(2) of 2020 Rules and also by framing Rule 21(5) and Rule 70(2) of the 2021 Rules was well within the ambit of the powers enshrined under Section 15(1-A) of the MMDR Act.

124. Hence, Rule 21(4) and Rule 70 (2) of 2020 Rules and Rule 21(5) and Rule

70(2) of the 2021 Rules are intra vires in accordance with the provisions of MMDR Act.

Whether the Rule framed for charging Regulatory Fees on the minerals coming from other States in to the State of Uttar Pradesh and the G.O. dated 24.2.2020 and G.O. dated 10.8.2022 are in line with the objects of the MMDR Act and Rules framed thereunder, and whether they are in sync with the new mining policy of 2019.

125. The parliament in its wisdom, has enacted the MMRD Act, 1957 which was amended from time to time and fresh provisions were added. These amendments were carried out, to address the need for proper implementation of the provisions of the Act and also to achieve the objects of the Statute. The amendment, which came into affect from 18.12.1999 where to give State a wider power to frame rules on transportation and storage of minerals. Section 4 (1-A) lays down that the State would frame rules for transport and storage of minerals as per the provisions of the Act. This section does not restrict the rule making power of the State only for illegally mined minerals but also for the legally mined minerals.

126. Section 41-A of the MMDR Act empowers the State to make rules for transportation and storage of minerals. There is no distinction between legally mined and illegally mined minerals whereas in Section 23 (C-1) the phrase used is 'illegal mining, transportation and storage'. A plain reading of both the sections make it clear the phrase 'illegal mining, transportation and storage' have to be read separately and not in conjunction. The Section clearly gives power to the

State Government to independently frame rules for all these subjects though all these three subjects are an integral part of the mining industry, but the plain reading of the Section is that the rules can be framed independently for illegal mining of minerals, separate rules and regulations for transportation of minerals, and altogether different rules and regulations for storage of minerals, this will include both legally and illegally excavated minerals. This further gets corroborated from the amendment in Section 21 of MMRD Act brought in 2021 where an explanation was added in the penalty section (Section 21), which clarified that penalty would be imposed on raising or transportation of any minerals, which are in contravention of the rules made under Section 23 (2), it does not state whether it is legally or illegally excavated minerals.

127. Hence, the argument of the petitioner that the State Government has no power to impose regulatory fees or to issue Government Orders for the minerals, which have been legally extracted in other States, cannot be held valid, as the State Government has independent power to frame rules for transportation of minerals brought in from other States into the State of Uttar Pradesh. Moreover, the objects of the Government Order dated 24.02.2020 and 10.08.2022 is in line with the objects of the Act and further the regulatory fees so collected has been spent towards setting up the infrastructure and using the latest technology, which would definitely rein in the illegal mining of minerals and its transportation. The use of Geofencing, PGZ cameras, mine tags, RFID readers, setting up of weighbridges and Checkgates using artificial intelligence and other latest technologies, by generating e-challans using QR Code and various other devices

which would definitely prevent and check the transportation of illegally mined minerals, at important roads of different parts of the State. Being such a big State, with its boundary running into hundreds of kilometers, to check the transportation of illegal minerals is a herculean task. In order to set up this infrastructure, the State undoubtedly has been burdened with the huge cost and the only way to set off this huge cost, is by charging regulatory fees on the minerals coming from the other States. In view of the steps taken in imposing regulatory fees it would not be wrong to say that the regulatory fees so collected by the State was not for the enrichment of the State but was spent to fulfill the obligations of the State as provided in Section 23-C of the Act. Further, the regulatory fees so imposed was to achieve the objects for which an amendment was brought (on 18.12.1999) in the MMDR Act, wherein under the statute the State Government was bound to frame rules to prevent illegal mining, transportation and storage of minerals. Moreover, the regulatory fees so imposed was in furtherance of the Mining Policy 2021 made by the Government of India.

128. Hence, the Regulatory Fees so imposed was to meet the extra expenses incurred in fulfilling the obligations of the State as provided under the Act and Rules. The G.O.s dated 24.2.2020 and 10.8.2022 are completely in sync with the provisions of the Act and Rules and are also in sync with the Mining Policy of 2019 issued by the Government of India.

(III) Whether imposition of regulatory fees is in violation of Part XIII of the Constitution of India

129. The petitioners while assailing the rules have submitted that the impugned

rules violate Part XIII of the Constitution, as the effect thereof is to fetter the freedom of trade, commerce and intercourse under Article 301 of the Constitution.

The relevant Articles of Part XIII of the Constitution of India are as follows:-

“301. Freedom of trade, commerce and intercourse.- Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free”

302. Power of Parliament to impose restrictions on trade, commerce and intercourse.— Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest.

303. Restrictions on the legislative powers of the Union and of the States with regard to trade and commerce.—(1) Notwithstanding anything in article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule.

(2) Nothing in clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India. 304. Restrictions on trade, commerce and intercourse among States.— Notwithstanding anything in Article 301 or

303, the Legislature of a State may by law—

(a) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced;

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:

Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President."

130. Under this Article, the expression 'freedom' of trade, commerce and intercourse must be read with the expression 'throughout the territory of India'. Under Article 302, Parliament may impose restrictions on the freedom of trade, commerce or intercourse between one State and another as may be required in the public interest. The expression 'public interest' may include a regional interest as well. However, Article 302 is qualified by Article 303 which prohibits Parliament and the State Legislatures from making any law that gives preference to one State over another or discriminates between one State and another. Situations of scarcity are to be dealt with by Parliament under Article 303 (2). The power of State Legislature to impose reasonable restrictions on the freedom of trade, commerce or intercourse, as may be required in the public interest, requires such a Bill or amendment to be moved in the State Legislature only after

receiving previous sanction from the President.

131. Article 301 is inspired by Section 92 of the Australian Constitution, however, Article 301 is subject to limitations and conditions in Articles 302, 303 and 304 which are borrowed from the commerce clause under Article 1 of the US Constitution. Therefore, Part XIII is an amalgam of the United States and Australian Constitutions which brings out the difference between regulatory and taxing powers.

Section 92 of the Australian Constitution provides for freedom of trade and commerce. However, it has been held in numerous decisions of the Privy Council and the Australian High Courts that Section 92 leaves open the regulation of trade and commerce at all events until the regulation is enacted provided it does not impede the true freedom of inter-State commerce. This reasoning is based on the principle that all trade and commerce must be conducted subject to law. Thus, we have the difference between taxing and regulatory laws. This is how the concept of "regulatory charges" came about.

Section 8 of Article 1 of the US Constitution contains what is called the "Commerce Clause", which regulates trade and commerce. Keeping in mind the dual form of government in USA and the concept of "Police Power" vis-a-vis the "Taxing Power", the US Supreme Court has held that the commerce power embodied in the commerce clause implies the power to regulate; that is the power to prescribe the rule by which commerce is to be governed (see Constitutional Law by Stone).

In Cooley v. Board of Wardens of Port of Philadelphia (1851), the Supreme Court agreed with the state of Pennsylvania that it had the right, under an act of Congress in 1789, to regulate matters concerning pilots on its waterways, including the port of Philadelphia. The Court held that Congress had never intended to deprive the states of all power to regulate commerce.

132. Article 301 states that subject to the other provisions of Part XIII, trade, commerce and intercourse throughout India shall be free. It is not freedom from all laws but freedom from such laws which restrict or affect activities of trade and commerce amongst the States. Although Article 301 is positively worded, in effect, it is negative as freedom correspondingly creates general limitation on all legislative power to ensure that trade, commerce and intercourse throughout India shall be free. Article 301, therefore, refers to freedom from laws which go beyond regulations which burdens, restricts or prevents the trade movement between States and also within the State. Since “freedom” correspondingly imposes “limitation”, we have the doctrine of “direct and immediate effect” of the operation of the impugned law on the freedom of trade and commerce in Article 301 was first enunciated in **Atiabari Tea Co. Ltd. Vs. State of Assam**.⁴³

133. Article 301 is, therefore, not only an authorisation to enact laws for the protection and encouragement of trade and commerce amongst the States but by its own force creates an area of trade free from interference by the State and, therefore, Article 301 per se constitutes limitation on the power of the State. Article 301 is, however, subject to the other provisions of Articles 302, 303 and 304. It states that subject to other provisions of Part XIII,

trade, commerce and intercourse throughout India shall be free.

134. Article 301 is binding upon the Union Legislature and the State Legislatures, but Parliament can get rid of the limitation imposed by Article 301 by enacting a law under Article 302. Similarly, a law made by the State Legislature in compliance with the conditions imposed by Article 304 shall not be hit by Article 301. Article 301 thus provides for freedom of inter-State as well as intra-State trade and commerce subject to other provisions of Part XIII and correspondingly it imposes a general limitation on the legislative powers.

135. The interpretation of any provision of the Constitution will be true only when Court looks on the Constitution holistically and keeps in view of important and significant factors of the Constitutional Scheme constantly reminding itself of a need for a harmonious construction lest interpretation placed on a given provision has effect of dilute or whittling down the effect and importance of other provision or feature of the Constitution. So interpreted, Article 301 appearing in Part XIII does not work as an impediment on the State power for this case.

136. The restrictions, freedom which is guaranteed by Article 301 would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Regulatory measures do not come within the purview of restrictions contemplated by Article 301. The Mines and Minerals (Development and Regulation) Act, 1957 is without doubt a regulatory measure, Parliament having enacted it for the express purpose of regulation of mines and development of minerals. The Act and the Rules properly

made thereunder are, therefore, outside the purview of Article 301. Even otherwise Article 302 which enables Parliament, by law, to impose such restrictions on freedom of trade, commerce or intercourse between one State and another, as may be required in the public interest also furnishes an answer to the claim based on the alleged contravention of Article 301.

137. Before a seven-Judges Constitution Bench of the Apex Court in **The Automobile Transport (Rajasthan) Ltd. v. The State of Rajasthan and Ors.**⁴⁴, the question arose if State could make laws imposing regulatory restrictions on free trade, commerce and intercourse guaranteed by Article 301 of constitution and whether a State tax could be treated as impeding freedom under Article 301 of Constitution. The Apex Court held that

..... *The States must also have revenue to carry out their administration and there are several items relating to the imposition of taxes in list II. The Constitution-makers must have intended that under those items the States will be entitled to raise revenue for their own purposes. If the widest view is accepted, then there would be for all practical purposes, an end of State autonomy even within the fields allotted to them under the distribution of powers envisaged by our Constitution. An examination of the entries in the lists of the Seventh Schedule to the Constitution would show that there are a large number of entries in the State list (list II) and the Concurrent list (list III) under which a State Legislature has power to make laws. Under some of these entries the State Legislature may impose different kinds of taxes and duties, such as property tax, sales tax, excise duty etc., and legislation in respect of any one of these*

items may have an indirect effect on trade and commerce. Even laws other than taxation laws, made under different entries in the lists referred to above, may indirectly or remotely affect trade and commerce. If it be held that every law made by the Legislature of a State which has repercussion on tariffs, licensing, marketing regulations, price-control etc., must have the previous sanction of the President, then the Constitution in so far as it gives plenary power to the States and State Legislatures in the fields allocated to them would be meaningless."

The freedom guaranteed by Article 301 does not mean freedom from taxation. The power of levying tax is essentially for the very existence of Government, though its exercise may be controlled -by constitutional provisions made in that behalf. Power to tax is not outside constitutional limitations. It is for Parliament to exercise power in the field made available to it by Entry 52 and 54 in List I. It is also for Parliament to state by law the limitations - and the sweep thereof - which it may choose to impose on field available to states for taxation by reference to Entry 50 in List II, It may not be for Courts to venture into enquiry in just an individual case to find and hold what tax would hamper mineral development if Parliament has chosen to observe silence by not legislating or failed to say something explicit.

138. In **Jindal Steels Ltd. vs. State of Haryana, (2017) 12 SCC 1**⁴⁵ the Hon'ble Supreme Court held that :-

"76. The sum total of what we have said above regarding Articles 301, 302, 303 and 304 may be summarised as under:

76.1 Freedom of trade, commerce and intercourse in terms of Article 301 is not

absolute but is subject to the provisions of Part XIII.

76.2. Article 302 which appears in Part XIII empowers Parliament to impose restrictions on trade, commerce and intercourse in public interest.

76.3 The restrictions which Parliament may impose in terms of Article 302 cannot however give any preference to one State over another by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule.

76.4 The restriction that Parliament may impose in terms of Article 302 may extend to giving of preference or permitting discrimination between one State over another only if Parliament by law declares that a situation arising out of scarcity of goods warrants such discrimination or preference.

76.5. Article 304 (a) recognises the availability of the power to impose taxes on goods imported from other States, the legislative power to do so being found in Article 245 and 246 of the Constitution.

76.6. Such power to levy taxes is however subject to the condition that similar goods manufactured or produced in the State levying the tax are also subjected to tax and that there is no discrimination on that account between goods so imported and goods so manufactured or produced.

76.7. The limitation on the power to levy taxes is entirely covered by clause (a) of Article 304 which exhausts the universe insofar as the State Legislature's power to levy of taxes is concerned.

76.8. Resultantly, a discriminatory tax on the import of goods from other States alone will work as an impediment on free trade, commerce and intercourse within the meaning of Article 302.

76.9. Reasonable restrictions in public interest referred to in clause (b) of Article 304 do not comprehend levy of taxes as a

restriction especially when taxes are presumed to be both reasonable and in public interest.

139. The imposition of regulatory fees is undoubtedly a reasonable restriction imposed in the public interest. The impugned rules and Government Orders by their very character are regulating the activity of mining. The said activities are the natural corollary associated with the mining which needs to be regulated particularly in view of the provisions contained in Article 39(b) of the Constitution of India.

140. A perusal of the Rules and the Section discloses that full regulatory control vests with the State over transportation of minerals more so, upon minor minerals. Section 4(1-A) gives plenary power to the State Government to regulate transportation of mineral. The entire field of transportation stands regulated at the hands of the State Government whether it is intra-State or it is inter-State.

141. Hence, the Regulatory Fees imposed by Rules 2020 and Rules 2021 to meet out the obligations set out by the State under Section 23(C) of the Statute, cannot be said to be in violation of Part XIII of the Constitution of India.

142. In view of the aforesaid, we come to a conclusion that :

(a) State has the power to frame rules under Section 15-1 of the MMDR Act. The Rule 21(4) and Rule 70(2) of Rule, 2020 and the Rule 21(5) and Rule 72(2) of UP Mining and Concession Rules, 2021 is intra vires to the provisions of MMDR Act.

(b) The G.O. dated 24.02.2020 and 10.08.2022 issued charging the regulatory fees on the minerals dropped from other State into the State of U.P. is held valid as the same has been issued in accordance with the aforementioned rules and in furtherance of the new Mining Policy, 2021.

(c) The Regulatory Fees imposed does not violate Part XIII of the Constitution of India.

143. Accordingly, the writ petitions filed by the petitioners are hereby dismissed. Parties to bear their own costs.

**(2023) 8 ILRA 1114
ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 19.07.2023

BEFORE

**THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE ARUN KUMAR SINGH
DESHWAL, J.**

Writ-C No. 11292 of 2021

Lakshya Infra. Power Pvt. Ltd.

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Sri Atul Kumar Tiwari, Sri Nitin Sharma

Counsel for the Respondents:

C.S.C., Sri Sanjai Singh

Civil Law - U.P. Minerals (Prevention of Illegal Mining, Transportation and Storage) Rules, 2018 - Rules 7 & 10 - Storage licence - Cancellation of licence - Forfeiture of security - Held, though petitioner failed to prove compliance of CCTV and display board condition, but no finding recorded about financial loss to St. - Forfeiture of security without such

finding is unsustainable - Word "may" under Rule 10 indicates discretion, not compulsion - Action of forfeiture must be backed with reasons - Forfeiture order set aside, licence cancellation upheld.

Held: Even if it was found that the CD was not to the satisfaction of the authority, there was no finding at all with regard to any financial loss to the St.. Therefore, the authorities erred in forfeiting the security amount. Though cancellation of licence is upheld, the forfeiture of security deposit is set aside.

Case Law Discussed:

1. Style (Dress Land) Vs Union Territory Chandigarh & anr., (1999) 7 SCC 89

2. Ranveer Singh Vs St. of U.P. & ors., 2017 (1) ADJ 240 (DB)

3. Oryx Fisheries Ltd. Vs U.O.I., (2010) 13 SCC 427

Petition partly allowed.

(Delivered by Hon'ble Siddhartha Varma, J. & Hon'ble Arun Kumar Singh Deshwali, J.)

1. Heard Sri Nitin Sharma, learned counsel for the petitioner and Sri Rahul Srivastava, learned Standing Counsel for the State.

2. The petitioner was granted a licence for storage under U.P. Minerals (Prevention of Illegal Mining, Transportation and Storage) Rules, 2018 (hereinafter referred to as '2018 Rules') for a period starting from 11.06.2020 and ending on 15.10.2020 over Gata no.333 area 0.5990 hectare and Gata no.330 area 0.5307 hectare totaling 1.1257 hectares for the storage of 20,000 cubic meter sand/morang. The '2018 Rules' provides that if a licence is provided under Rule 7, the licensee shall prominently display the sale price at sale points; shall deploy CCTV

cameras and shall provide check gates for proper monitoring of the stocks. Licensee shall also maintain a correct and intelligible account of minerals procured and transported daily to different destinations in the format prescribed in e-form 'C'/ Form 'C'/ Form 'G' which will be corresponding to the quality of valid transit pass by which licensee had received the minerals.

3. For convenience, the Rule 7 of the '2018' Rules is reproduced hereinunder;

"7. General conditions for grant of Storage licence. - The licence shall be granted in Form B subject to the following conditions:

(i) The licensee shall prominently display the sale price at the storage point.

(ii) The licensee shall deploy CCTV camera and check gates for proper monitoring of the stocks

(iii) The licensee shall maintain a correct and intelligible account of minerals procured and transported daily to different destinations in the format prescribed in e-Form 'C' / Form 'C' /Form 'G' which will be corresponding to the quantity of valid transit pass by which licensee has received the mineral.

(iv) The licensee shall submit the monthly return in Form 'E' of the accounts maintained under clause (ii) and (iii) respectively for every month within the first week of the succeeding month to the District Officer;

(v) All the reports, returns and registers shall be maintained by the licensee and kept in the place of business and be made available to the inspecting officer;

(vi) The licensee shall not pollute the environment by storing the minerals or

while utilizing them in the processing plant or beneficiation' plant or the factory.

(vii) The licensee shall allow the Inspecting Officers of the Directorate of Mines to inspect the store, factory, processing plant, beneficiation plant to verify the stock of minerals and to take samples and extract of records.

(viii) The District Officer may impose such further condition as may be necessary in the interest of the public."

4. The licensee on 05.09.2020 on the basis of the inspection made on 04.09.2020 got a notice that he had not installed CCTV cameras and had also not displayed the sale price at the storage point.

5. In reply to the notice, on 07.09.2020 the petitioner submitted his reply along with CD of the footages of the CCTV cameras. He had also submitted that display board of sale price was also there at the storage point. Not satisfied with the reply, the petitioner's licence was cancelled under Rule 10 of '2018 Rules' by the District Magistrate on 10.09.2020 after recording a finding that the CD which was supplied by the petitioner did not provide the date and time of the recording. He had also given a finding that no loading and unloading of sand/morang was found and therefore after disbelieving the reply given by the petitioner, the licence of the petitioner was cancelled. Also the security as was deposited by the petitioner of Rs.15,00,000/- was forfeited.

6. Aggrieved by the order dated 10.09.2020, the petitioner filed an appeal under Rule 15 of the '2018 Rules' and upon dismissal of the appeal, the instant writ petition has been filed.

7. Learned counsel for the petitioner has submitted that when the petitioner had

submitted the CD of the recording of the CCTV camera which was installed as per the Rule 7 of '2018 Rules' then no punishment ought to have been given to the petitioner. The display board was also very much there.

8. Learned counsel for the petitioner, with regard to the forfeiture of the security, has submitted that there was absolutely no reason given in the order for forfeiting the security money. He submits that if the security amount had to be forfeited then a definite finding ought to have been given as to what was the financial loss which had occurred to the State which necessitated the forfeiture of the security amount.

9. Relying upon Rule 10 of the '2018 Rules', the counsel for the petitioner submits that the punishment as was provided in Rule 10 states that not only the licence could be cancelled, but the District Officer could also forfeit the security deposit along with the interest accrued thereon. He, therefore, submits that the word 'forfeit' did not compulsorily mandate the forfeiture of the security amount. It was optional for the District Officer to order for the forfeiture of the security amount and for exercising this option, he should have given reasons.

10. Learned counsel for the petitioner has relied upon the judgements in the cases of **Style (Dress Land) vs. Union Territory Chandigarh and another 1999 (7) SCC 89, Ranveer Singh vs State of U.P. and 7 others 2017 (1) ADJ240 (DB) and Oryx Fisheries Ltd. vs U.O.I reported in 2010 (13) SCC 427.**

11. While relying on 1999 (7) SCC 89, learned counsel submitted that when the statute is silent with regard to when the

forfeiture ought to be done and when it ought not to be done then the State should act with prudence and should not impose the penalty of forfeiture arbitrarily. Since learned counsel relied on paragraphs 10 and 11 of the judgement reported in 1999 (7) SCC 89 they are being reproduced here as under;

"10. In the absence of the rules, the action of the respondents regarding imposition of the terms and conditions of the lease including the enhancement of rent is required to be fair and reasonable and not actuated by considerations which could be termed as arbitrary or discriminatory. The Government cannot act like a private individual in imposing the conditions solely with the object of extracting profits from its lessees. Governmental actions are required to be based on standards which are not arbitrary or unauthorised. This Court in Ramana Dayaram Shetty v. International Airport Authority of India while agreeing with the observations of Mathew, J. held: (SCC) pp.505-06, para 12)

"12. We agree with the observations of Mathew, J., n V. Punnen Thomas v. State of Kerala that:

'The Government is not and should not be as free as an individual in selecting the recipients for its largesse. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal.'

The same point was made by this Court in Erusian Equipment and Chemicals Ltd. v. State of W.B. where the question was whether blacklisting of a person without giving him an opportunity to be heard was bad? Ray, C.J., speaking on behalf of

himself and his colleagues on the Bench pointed out that blacklisting of a person not only affects his reputation which is, in Popundian terms, an interest both of personality and substance, but also denies him equality in the matter of entering into contract with the Government and it cannot, therefore, be supported without fair hearing. It was argued for the Government that no person has a right to enter into contractual relationship with the Government and the Government, like any other private individual, has the absolute right to enter into contract with anyone it pleases. But the Court, speaking through the learned Chief Justice, responded that the Government is not like a private individual who can pick and choose the person with whom it will deal, but the Government is still a Government when it enters into contract or when it is administering largesse and it cannot, without adequate reason, exclude any person from dealing with it or take away largesse arbitrarily. The learned Chief Justice said that when the Government is trading with the public, 'the democratic form of government demands equality and absence of arbitrariness... The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure'. This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a

private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas licences, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

11. Even the administrative orders and not (sic only) quasi-judicial are required to be made in a manner in consonance with the rules of natural justice, when they affect the rights of the citizens to the property or the attributes of the property. While exercising the powers of judicial review the court can look into the reasons given by the Government in support of its action but cannot substitute its own reasons. The Court can strike down an executive order, if it finds the reasons assigned were irrelevant and extraneous. The courts are more concerned with the decision-making process than the decision itself."

12. Sri Rahul Srivastava, learned Standing Counsel opposed the writ petition and submitted that when it was found that the petitioner had not installed the CCTV Camera and also had not displayed the sale price at the storage point then it was mandatory for the District Officer to impose the punishment as has been given in Rule 10 of 'Rules 2018'. He submits that word 'may' also had to be interpreted in such a manner that if licence had been

15. With the aforesaid observations, the writ petition is partly **allowed**.

(2023) 8 ILRA 1118
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.08.2023

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-C No. 22367 of 2023

Shivnath & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Abhishek Bhushan, Sri Arpan Srivastava, Sri Pavan Kumar Pandey, Sri Anil Bhushan, Sri Anil Bhushan (Sr. Advocate)

Counsel for the Respondents:

C.S.C., Sri Ashok Kumar Rai, Sri Pavan Kumar Pandey, Sri Rajesh Kumar, Sri Mangla Prasad Rai (Sr. Advocate)

Constitution of India, 1950 - Article 226 –
When an order is passed in violation of principles of natural justice, alternative remedy is no bar - Writ is maintainable.

Civil Law -U.P. Revenue Code, 2006 - Sections 31/32, 38(4) & 210 – Summary proceedings - Long-standing entry expunged without impleading recorded tenure holder - Violation of natural justice - Orders liable to be quashed - Direction to hear afresh after affording opportunity.

Held:

Expunging a long-standing revenue entry without impleading the affected parties and without affording them an opportunity of hearing violates principles of natural justice. Even in summary proceedings under Sections 31/32 of the U.P. Revenue Code, 2006, proper notice must be given to the recorded tenure holder. Alternative remedy under Section 210 of the Code does not bar the writ petition where there is manifest violation of natural justice. The impugned orders dated 17.2.2018, 9.3.2021, and 13.4.2023 are set aside. Matter remanded to the Sub-Divisional Magistrate, Sadar, Varanasi for fresh adjudication after affording opportunity of hearing to the petitioners. Writ allowed.

Case Law Discussed:

1. Chaturgan Vs St. of U.P. & ors., 2005 (98) RD 244

2. Committee of Management & anr.Vs Vice-Chancellor & ors., 2009 (1) AWC 437 (SC)

3. Whirlpool Corporation Vs Registrar of Trade Marks, AIR 1999 SC 22

4. Godrej Sara Lee Ltd. Vs Excise & Taxation Officer, AIR 2023 SC 781

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

1. Heard Mr. Anil Bhushan, learned Senior Counsel assisted by Mr. Abhishek Bhushan, Counsel for petitioners and Mr. Mangla Prasad Rai, learned Senior Counsel assisted by Mr. Ashok Kumar Rai for respondent nos. 4 to 6 and Mr. Abhishek Shukla, learned Additional Chief Standing Counsel for the State-respondents. Respondent nos. 7 to 18 are stated to be proforma respondents, as such, notice to respondent nos. 7 to 18 are dispensed with.

2. The writ petition is being heard and disposed of finally with the consent of the learned Counsel for the parties without inviting counter-affidavit.

3. Brief facts of the case is that respondent no.4 filed an application dated 29.8.2014 under Section 33/39 of U.P. Land Revenue Act impleading State of U.P. as opposite party with the prayer to expunge the name of petitioners from Arazi No. 1052 area 0.134 hectare situated at Village- Akhari, Pargana- Kaswar Raja, Tehsil- Sadar, District- Varanasi. The aforesaid application filed by respondent no.4 was registered as case No. 9582 of 2016, Computerized case No. T20161470019582 under Section 31/32 of U.P. Revenue Code, 2006 before respondent no.3/ Sub-Divisional Magistrate, Sadar, Varanasi. A report was submitted on 20.6.2015 by Lekhpal and a report was submitted on 26.6.2015 by Revenue Inspector as well as Naib Tehsildar and Tehsildar have also submitted their report on 18.3.2016/ 10.2.2018 in the aforementioned proceedings. Respondent no.3 heard the aforementioned case and vide his order dated 17.2.2018 expunged the petitioners' entry. Petitioners applied for restoration on 29.8.2018 which was rejected as not maintainable vide order dated 9.3.2021.

Petitioners filed an appeal No. 00683 of 2021, Computerized case No. C202114000000683 under Section 38 (4) of U.P. Revenue Code, 2006 against the order dated 9.3.2021, the aforementioned appeal filed by petitioners was dismissed as not maintainable by respondent no.2/ Additional Commissioner vide order dated 13.4.2023 hence this writ petition on behalf of petitioners challenging the orders dated 17.2.2018, 9.3.2021 passed by respondent no.3 and 13.4.2023 passed by respondent no.2.

4. Learned Senior Counsel for the petitioners submitted that long-standing entry of the petitioners have been expunged in the summary proceeding under Section 31/32 of the U.P. Revenue Code, 2006 without affording opportunity of hearing to the petitioners. He further submitted that in the summary proceeding, the long-standing entry cannot be expunged. He further submitted that petitioners' ancestors were recorded over the plot in dispute since 27.10. 1952 on the basis of registered sale deed. He further submitted that during consolidation operation, petitioners' right was also recognized. He further submitted that petitioners were even not impleaded in the proceeding, as such, there was no question of any opportunity of hearing to the petitioners. He placed reliance upon the judgment of this Court reported in ***Chaturgan vs. State of U.P. and Others, 2005(98) RD 244*** in order to demonstrate that opportunity of hearing must be afforded to the recorded tenure holder before expunging the entry by the authority.

5. On the other hand, Mr. Mangla Prasad Rai, learned Counsel for the respondents submitted that notice was issued to the petitioners by the authorities

and the order has been passed in accordance with law. He further submitted that jurisdiction has rightly been exercised under Section 31/32 of the U.P. Revenue Code, 2006, as such, no interference is required against the impugned order. He further submitted that order passed by Additional Commissioner under Section 38 (4) of U.P. Revenue Code, 2006 is revisable under Section 210 of the U.P. Revenue Code, 2006, as such, writ petition is liable to be dismissed on the ground of alternative remedy.

6. Mr. Abhishek Shukla, learned Additional Chief Standing Counsel for the State-respondents submitted that order is revisable as provided under Section 38 (4) of the U.P. Revenue Code, 2006, as such, writ petition is not maintainable and petitioners should approach the Revisional Court for redressal of their grievance against the impugned orders.

7. I have considered the arguments advanced by learned Counsel for the parties and perused the records.

8. There is no dispute about the fact that petitioners' entry has been expunged without impleading the petitioners in the proceeding under Section 31/32 of U.P. Revenue Code, 2006.

9. In order to appreciate the controversy, the perusal of Section 38 of the U.P. Revenue Code, 2006 will be relevant which is as under:-

"38. Correction of error and omission?(1) An application for correction of any error or omission in the map, field-book (Khasra) or record of rights (Khatauni) shall be made to the Tahsildar in the manner prescribed.

[(2) On receiving an application under sub-section (1) or on any error or omission otherwise coming to his knowledge, the Tahsildar shall make such inquiry as may appear to him to be necessary, and refer the case along with his report to the Collector in the case of map correction and to the Sub-Divisional Officer in matter of other correction.

(3) The case shall be decided by the Collector or the Sub-Divisional Officer, as the case may be, after considering any objection filed and evidence produced before him or before the Tahsildar.

(4) Any person aggrieved by an order of the Collector or the Sub-Divisional Officer, as the case may be, under sub-section (3), may prefer an appeal to the Commissioner within a period of thirty days from the date of such order, and [The decision of the Commissioner shall, subject to the provisions of Section 210, be final].

[(5) Any forged or manipulated entry in the map, the khasra or the record of rights (khatauni) may be expunged under this section.

(6) Notwithstanding anything contained in other provisions of this Code, the Revenue Inspector may correct any undisputed error or omission in the record of rights (khatauni) or khasra in such manner and after making such inquiry, as may be prescribed.]

Explanation.?The power to correct any error or omission under this section shall not be construed to include the power to decide a dispute involving question of title."

10. This Court in the case of Chaturgan (Supra) has held that before expunging the long-standing entry, proper opportunity of hearing be afforded to the recorded tenure holder by the Court.

Paragraph No. 8 of the judgment is relevant which are as follows:-

"8. Accordingly it is held that whenever an entry in the revenue record is to be cancelled and substituted particularly when the entry is continuing for more than a year, notice must be given to the party in whose favour entry stands even if prima facie authority/Court concerned (i.e. Deputy Collector/Sub Divisional Officer in most of the cases) is of the opinion that the entry is result of fake order or fraud. Similarly if name of an Asami pattedar is to be expunged from the revenue records on the ground of expiry of period of patta or any other ground, notice must be given to him before expunging his name. In a recent authority reported in Hari Ram v. Collector, 2004 (2) RD 360 it has been held by this Court that apart from suit for ejectment under Section 202 of UPZA and LR Act Asami pattedar may be evicted after expunging his name from the revenue records under Section 34 of UPZA and LR Act but it can be done only after providing opportunity of hearing to the pattedar/les-see. However if entry is expunged or any other order is passed without hearing the person affected then he is entitled to file an application for post decisional hearing and recall of the order before the court/authority which passed the ex-parte order. If such an application is filed then the court/authority concerned shall hear the applicant and in case it comes to the conclusion that the earlier order is not correct then the said order shall be set aside. In such situation it is not necessary to first set aside the order and then hear the party concerned. Along with such application such evidence must be filed which the party considers necessary for his case. It has been held by

the Supreme Court in A.M.U. Aligarh v. M.A. Khan, (2000) 7 SCC 529 : AIR 2000 SC 2783 that a person who complains about denial of opportunity of hearing must show that in case opportunity had been provided to him, what cause he would have shown or what defence he would have taken. (Similar view has been taken in S.L. Gupta v. A.D. Gupta, 2003 AIR SCW 7089 (para 29) and Canara Bank ((2003) 4 SCC 557 : AIR 2003 SC 2041) (supra). Against ex-parte orders of expunging of names it is not proper to file revision and appeal etc. directly. However, if revision, appeal etc. is directly filed then revisional court/appellate Court may also instead of deciding the revision or appeal on merit may grant leave to the affected party to apply for post decisional hearing and recall of order before the trial court/authority. The, revisional/appellate authority may also decide the matter on merit after providing opportunity of post decisional hearing (i.e. opportunity to show that earlier entry was not fake) as mentioned in the judgment of Supreme Court in Canara Bank (supra)."

11. The perusal of the application filed under Section 33/39 of the U.P. Land Revenue Act/ 31/32 of U.P. Revenue Code, 2006 reveals that petitioners were not impleaded in the proceeding, as such, the order expunging/ altering the petitioners' entry from the revenue records in respect to the plot in dispute cannot be sustained.

12. So far as alternative remedy is concerned, the Apex Court in the case reported in 2009 (1) AWC 437 (SC) Committee of Management and another Vs. Vice-Chancellor and Others has held that if the order has been passed in violation of principles of natural justice, the alternative remedy will not be bar to

entertain the writ petition under Article 226 of the Constitution of India. Paragraph Nos. 21, 24, 25 and 26 of the judgment rendered in Committee of Management (Supra) shall be relevant for perusal which are as under:-

"21. Furthermore, when an order has been passed by an authority without jurisdiction or in violation of the principles of natural justice, the superior courts shall not refuse to exercise their jurisdiction although there exists an alternative remedy. In this context, it is appropriate to refer to the observations made by this Court in the case of Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors. AIR 1999 SC 22.

15. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

In this case, albeit, before us for the first time, the vires of the proviso appended to Section 16 of the Act is in question, besides other points noticed by us hereinbefore.

24. Whether in a case of this nature such a power has properly been exercised or not, in our opinion, being an intricate question should ordinarily fall for determination by the High Court itself. Our attention has also been drawn to a decision of a Seven-Judge Bench of this Court in the case of P.A. Inamdar and Ors. v. State of Maharashtra and Ors. AIR 2005 SC 3226 wherein it has been held :

126. The observations in para 68 of the majority opinion in T.M.A. Pai Foundation v. State of Karnataka AIR 2003 SC 355 on which the learned Counsel for the parties have been much at variance in their submissions, according to us, are not to be read disjointly from other parts of the main judgment. A few observations contained in certain paragraphs of the judgment in Pai Foundation if read in isolation, appear conflicting or inconsistent with each other. But if the observations made and the conclusions derived are read as a whole, the judgment nowhere lays down that unaided private educational institutions of minorities and non-minorities can be forced to submit to seat-sharing and reservation policy of the State. Reading relevant parts of the judgment on which learned Counsel have made comments and counter-comments and reading the whole judgment (in the light of previous judgments of this Court, which have been approved in Pai Foundation) in our considered opinion, observations in para 68 merely permit unaided private institutions to maintain merit as the criterion of admission by voluntarily agreeing for seat-sharing with the State or adopting selection based on common entrance test of the State. There are also observations saying that they may frame their own policy to give freeships and scholarships to the needy and poor students or adopt a policy in line with the reservation policy of the State to cater to the educational needs of the weaker and poorer sections of the society.

25. Keeping in view the legal questions arising in the matter, we are of the opinion that it was not a fit case where the High Court should have refused to exercise its discretionary jurisdiction to entertain the writ application.

26. For the aforementioned reasons, the impugned order cannot be sustained and is set aside accordingly. The appeal is allowed accordingly. The High Court is requested to consider the matter on merits. No costs."

13. Hon'ble Apex Court recently in the case reported in AIR 2023 Supreme Court 781 M/s Godrej Sara Lee Ltd. Vs. Excise and Taxation Officer-Cum-Assessing Authority and others has held that power to issue prerogative writs under Article 226 is plenary in nature and does not impose any limitation or restraint on the exercise of power to issue writs.

14. In the instant case, petitioners' ancestors were recorded since 27.10.1952 and even during consolidation operation petitioners' right were recognized, as such, petitioners should be afforded proper opportunity of hearing by respondent no.3 so that petitioners as well as contesting respondents may demonstrate as to whether long standing entry can be expunged in summary proceedings or not.

15. Considering the ratio of law laid down by this Court in **Chatrugaan (Supra)** as well as by Apex Court in **Committee of Management and another (Supra)**, the impugned orders dated 17.2.2018, 19.3.2021 passed by respondent no.3 and 13.4.2023 passed by respondent no.2 are liable to be set aside and the same are hereby set aside. The writ petition is allowed in part and the matter is remitted back before the respondent no.3, Sub-Divisional Magistrate, Sadar, Varanasi to register the proceeding on its original number and implead the petitioners in the proceeding under Section 31/32 of the U.P. Revenue Code, 2006. It is further directed that respondent no.3, Sub-Divisional

Magistrate, Sadar, Varanasi shall decide the case after affording opportunity of hearing to the parties expeditiously preferably within period of **three months** from the date of production of certified copy of this order.

(2023) 8 ILRA 1123
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.07.2023

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE PRASHANT KUMAR, J.

Writ-A No. 27553 of 2019

M/s Santosh Preservation Pvt. Ltd. & Anr.
...Petitioners

Versus
Dakshinanchal Vidyut Vitran Nigam Ltd. & Anr.
...Respondents

Counsel for the Petitioners:

Sri Mayank Kumar Agarwal

Counsel for the Respondents:

Sri Baleshwar Chaturvedi, Ms. Usha Kiran, Ms. Usha Kiran

Facts: The petitioners, operating a cold storage with a 280 KVA power load under HV-2 tariff, were inspected on 12.06.2019. The inspection revealed tampering with the main meter and pole meter, with cut wires in R and B phases, resulting in zero recorded consumption despite transformer readings indicating usage. An inspection report confirmed electricity theft under Section 135 of the Electricity Act, 2003. The petitioners paid Rs. 56 lakhs as a compounding fee and Rs. 10 lakhs towards anticipated assessment. A provisional assessment of Rs. 23,48,452 was issued, later reduced to Rs. 20,54,895 in the final assessment dated 22.08.2019. The petitioners challenged the assessment, alleging procedural lapses, including the lack of opportunity to test the meter at an independent laboratory, and sought a refund of the deposited amounts. The

court dismissed the petition, holding that the tampering was evident during inspection, as the meter recorded nil consumption, making the conclusion of electricity theft independent of a test report. Clause 5.6(c)(iii) was deemed inapplicable, as the finding of theft did not rely on laboratory testing. The assessment for 59 days was unchallenged, and the court found no illegality in the final assessment order. The Rs. 56 lakhs was confirmed as a compounding fee to avoid criminal prosecution, not electricity charges, and the petitioner's claim for a refund was rejected. The court emphasized that electricity is a public good and upheld the assessment to prevent meter tampering.

Keywords: Electricity theft, meter tampering, U.P. Electricity Supply Code 2005, Clause 5.6(c)(iii), compounding fee, assessment order, unauthorized use of electricity, Section 135 Electricity Act 2003, public good, independent laboratory testing, writ petition, Article 226.

Petition Dismissed.

Case Law Discussed:

1. Mohd. Sagir Vs Dakshinanchal Vidyut Vitran Nigam Ltd.
2. Smt. Amrawati Devi Vs Purvanchal Vidyut Vitran Nigam Ltd. & anr.
3. KC Ninan Vs Kerala St. Electricity Board & ors.

(Delivered by Hon'ble Manoj Kumar Gupta, J. & Hon'ble Prashant Kumar, J.)

BACKDROP

1. The petitioners were having a contracted power load of 280 KVA for running a cold storage. The tariff applicable was HV-2, with facility of MRI downloading. On 12.06.2019, a checking was made at the petitioners' premises and window seal of Main meter and TP seal of NET meter were found tampered. On opening TP cover, it was found that R and B phases wire had been cut. As a result,

metering of electric current got disrupted. The meter was showing NIL consumption.

2. The seal of window cover of Pole meter was also found tampered. Two seals of TP cover were also tampered. In said meter also, on account of cutting of wires of R and B phases, the meter was recording zero consumption. However, the transformer was recording 112 Amp on R phase, 120 Amp on Y phase and 125 Amp on B phase when tested with trunk tester. Apparently, the petitioner had rendered the meter dysfunctional so as not to record any electricity consumption. The respondents took MRI reading and thereafter all the three meters were dismantled and sealed in presence of the petitioners' representative and sent for testing. An inspection report was prepared on the spot mentioning the aforesaid facts and that it amounted to theft of electricity, punishable under Section 135 of the Electricity Act, 2003 (for short 'the Act'). It bears signatures of the inspecting team and also the representative of the petitioner's Company.

3. The petitioners, on the same date, handed over a cheque of Rs.56 lakhs to the Electricity Department. According to the respondent-Electricity Department, the said cheque was given by the petitioner towards compounding fee with oral request not to encash the same as the petitioner would deposit the amount by online mode through RTGS within 48 hours.

4. On very next date i.e. 13.06.2019, respondent no.2 wrote to Superintending Engineer, Electricity Distribution Division-III, Saifai, Etawah that assessable unit would be 138221 for a period of 59 days.

5. According to the respondent-Electricity Department, as the petitioner

had handed over cheque of Rs. 56 lakhs towards compounding fee and had also assured the Department that he would substitute the cheque with cash amount within 48 hours, therefore on 13.6.2019, a new meter was installed at the petitioner's premises and the electricity supply was restored.

6. It is relevant to note that the petitioner deposited Rs. 56 lakhs through RTGS (Rs. 30 lakhs on 14.6.2019 and Rs. 26 lakhs on 15.6.2019). A consolidated receipt of Rs. 56 lakhs was issued by the respondent-Electricity Department on 17.6.2019 and the cheque was returned. The receipt states that the amount deposited was towards compounding fee, on basis of checking carried out at the petitioner's premises on 12.6.2019.

7. The petitioner also deposited Rs. 10 lakhs, mentioning it as a deposit made towards "electrical expenses". This, according to the petitioner, was to partially satisfy the assessment that would be made against him. It is alleged that the electricity supply was restored only after the said amount was deposited.

8. On 15.06.2019, the petitioner was served with a show cause notice alongwith a provisional assessment of Rs.23,48,452/- calling upon the petitioner to file objection within fifteen days. On 29.06.2019, the petitioner submitted its reply denying theft of electricity and challenging the procedure adopted by the respondents.

9. On 22.8.2019, the respondents issued a final assessment order. The order mentions that it was a case of theft of electricity by tampering the meter. The assessment amount of Rs. 23,48,452/- proposed earlier, was reduced to Rs.

20,54,895/-. The petitioner who had deposited Rs. 10 lakhs on provisional basis in anticipation of the final assessment order, was given due adjustment of the said amount. Rs. 2,000/- was appropriated towards dis-connection and re-connection charges and remaining Rs. 9,98,000/- was adjusted against the assessment amount. The said fact was duly mentioned in the office memo dated 27.8.2019, issued under the signatures of the Executive Engineer, Electricity Distribution Division – III, Saifai, Etawah.

10. Initially, the petitioner had challenged the recovery notice dated 27.7.2019. Subsequently, by amendment in the writ petition, the petitioner has also assailed the final assessment order dated 22.8.2019. He has also prayed for a mandamus directing the respondents to refund Rs. 56 lakhs and Rs. 10 lakhs realized from him so far, along with interest @ 18% per annum.

RIVAL CONTENTIONS

11. The case of the petitioner is that the assessment made by the respondents is based on test report of Executive Engineer (Test Division) DVVNL dated 13.6.2019. It is submitted that when assessment is made on basis of test report, it was mandatory to give opportunity to the petitioner to get the meter tested from an independent laboratory. Since the aforesaid option was not given to the petitioner, therefore, the assessment made was illegal. In support of his contention, he has placed reliance on two Division Bench judgements of this Court - (i) **Mohd. Sagir Vs. Dakshinanchal Vidyut Vitran Nigam Ltd.**¹ and (ii) **Smt. Amrawati Devi Vs. Purvanchal Vidyut Vitran Nigam Ltd. and another**².

12. It is further submitted that the proposed assessment was of Rs. 23,48,452/-, whereas the notice dated 22.8.2019 mentions that Rs. 10,56,895/- was recoverable from the petitioner. Moreover, no reason has been given in the final assessment order for arriving at the aforesaid figure. It is also urged that the assessment order is a non-speaking order and therefore, not sustainable in law.

13. On the other hand, learned counsel for the respondent-Electricity Department, submitted that it was a case of theft of electricity. The petitioner was caught red-handed, extracting electrical energy by tampering the Main meter, as well as the Pole meter. In order to save itself and its directors from criminal proceedings, the petitioner chose to get the offence compounded by depositing the compounding fee. The petitioner deposited another sum of Rs. 10 lakhs against the proposed assessment and requested for electric supply being restored. The Department having regard to the fact that the petitioner was running cold storage, sympathetically considered the request of the petitioner and replaced the old meter with a new meter and also restored the electric supply. It is submitted that since theft of electricity was evident to naked eye therefore, there was no impediment in proceeding to make best judgment assessment. It is urged that when a consumer uses any artificial means, or means not authorized by the Board, or licensee and thereby commits theft of electricity, there is a presumption under law that the abstraction, consumption or use of electricity has been dishonestly caused by the consumer. The petitioner had failed to rebut the said presumption. The conclusion relating to theft of electricity in the instant case, is not based on the test result. It was

discovered at the time of inspection itself. Therefore, it was not necessary to get the meter tested or to afford opportunity to the petitioner to have the same tested at an independent laboratory of its choice. It is further submitted that the petitioner had in fact, accepted its guilt and deposited the compounding fee and for the said reason, no other coercive action was taken against it. Having regard to the above admitted fact, it cannot be said that the order of final assessment is in any manner illegal, or warrant interference in exercise of equitable and discretionary jurisdiction.

ISSUE

14. The main issue which falls for consideration is whether in the facts and circumstances of the instant case, the assessment proceedings can be held to be illegal for the reason that the petitioner was not given option to get the meter tested at an independent laboratory of its choice, as contemplated under Clause 5.6(c)(iii) of the U.P. Electricity Supply Code, 2005.

RELEVANT STATUTORY PROVISIONS

15. Section 126 of the Electricity Act, 2003 (for short, hereinafter referred to as “the Act”) empowers the assessing officer to provisionally assess to the best of its judgment, the electricity charges payable by any person who on an inspection of any place or premises, or after inspection of equipments, gadgets, machines, devices, found connected, or used, or after inspection of records maintained by any person, comes to the conclusion that such person is indulging in unauthorized use of electricity. The phrase “unauthorized use of electricity” has been defined under Explanation to Section 126(6), thus:

"(b) "unauthorised use of electricity" means the usage of electricity

(i) by any artificial means; or

(ii) **by a means not authorised by the concerned person or a licensee; or**

(iii) **through a tampered meter; or**

(iv) for the purpose other than for which the usage of electricity was authorised; or

(v) for the premises or areas other than those for which the supply of electricity was authorised."

(emphasis supplied)

16. According to sub-section (5), such an assessment would be for the entire period during which such unauthorized use of electricity has taken place and if, however, the period during which such unauthorized use of electricity has taken place cannot be ascertained, such period shall be limited to a period of twelve months immediately preceding the date of inspection.

17. Relevant part of Section 135 which deals with "theft of electricity" is as follows: -

"135. Theft of electricity.-(1) Whoever, dishonestly, (a) taps, makes or causes to be made any connection with overhead, underground or under water lines or cables, or service wires, or service facilities of a licensee or supplier, as the case may be; or

(b) tampers a meter, installs or uses a tampered meter, current reversing transformer, loop connection or any other device or method which interferes with accurate or proper registration, calibration or metering of electric current or otherwise results in a manner whereby electricity is stolen or wasted; or

(c) damages or destroys an electric meter, apparatus, equipment, or wire or causes or allows any of them to be so damaged or destroyed as to interfere with the proper or accurate metering of electricity; or

(d) uses electricity through a tampered meter; or

(e) uses electricity for the purpose other than for which the usage of electricity was authorised,

so as to abstract or consume or use electricity shall be punishable with imprisonment for a term which may extend to three years or with fine or with both:

Provided that in a case where the load abstracted, consumed, or used or attempted abstraction or attempted consumption or attempted use-

(i) does not exceed 10 kilowatt, the fine imposed on first conviction shall not be less than three times the financial gain on account of such theft of electricity and in the event of second or subsequent conviction the fine imposed shall not be less than six times the financial gain on account of such theft of electricity;

(ii) exceeds 10 Kilowatt, the fine imposed on first conviction shall not be less than three times the financial gain on account of such theft of electricity and in the event of second or subsequent conviction, the sentence shall be imprisonment for a term not less than six months, but which may extend to five years and with fine not less than six times the financial gain on account of such theft of electricity:

Provided further that in the event of second and subsequent conviction of a person where the load abstracted, consumed, or used or attempted abstraction or attempted consumption or attempted use exceeds 10 kilowatt, such person shall also be debarred from getting any supply of

electricity for a period which shall not be less than three months but may extend to two years and shall also be debarred from getting supply of electricity for that period from any other source or generating station:

Provided also that if it is provided that any artificial means or means not authorised by the Board or licensee or supplier, as the case may be, exist for the abstraction, consumption or use of electricity by the consumer, it shall be presumed, until the contrary is proved, that any abstraction, consumption or use of electricity has been dishonestly caused by such consumer.

(1A) Without prejudice to the provisions of this Act, the licensee or supplier, as the case may be, may, upon detection of such theft of electricity, immediately disconnect the supply of electricity:

Provided that only such officer of the licensee or supplier, as authorised for the purpose by the Appropriate Commission or any other officer of the licensee or supplier, as the case may be, of the rank higher than the rank so authorised shall disconnect the supply line of electricity:

Provided further that such officer of the licensee or supplier, as the case may be, shall lodge a complaint in writing relating to the commission of such offence in police station having jurisdiction within twenty four hour from the time of such disconnect:

Provided also that the licensee or supplier, as the case may be, on deposit or payment of the assessed amount or electricity charges in accordance with the provisions of this Act, shall, without prejudice to the obligation to lodge the complaint as referred to in the second proviso to this clause., restore the supply line of electricity within forty-eight hours of such deposit or payment;"

(emphasis supplied)

18. Sub-section (2) of Section 152 which speaks of compounding of offences reads thus: -

"(2) On payment of the sum of money in accordance with sub-section (1), any person in custody in connection with that offence shall be set at liberty and no proceedings shall be instituted or continued against such consumer or person in any criminal court."

(emphasis supplied)

19. The State Commission has framed the U.P. Electricity Supply Code, 2005 in exercise of its powers under Section 50 of the Act. The aforesaid provisions have been made to effectuate the objects of the Act. Clause 5.6 of the Code relates to defective meters. The relevant part thereof is reproduced below: -

"5.6 Defective Meters: (a) The Licensee shall have the right to test any meter and related apparatus if there is a reasonable doubt about the accuracy of the meter and the consumer shall provide the Licensee necessary assistance in conduct of test. However, the consumer shall be allowed to be present during the testing.

(b) A consumer may request the Licensee to test the meter installed on his premises if he doubts its accuracy of meter readings not commensurate with his consumption of electricity, stoppage of meter, damage to seal, by applying to the Licensee in prescribed format (Annexure 5.1) along with the requisite testing fee. The Licensee shall test the meter:

(1) Within 15 days of the receipt of the application, at consumer's premises, or

(ii) Within 30 days at licensee's lab, or Independent lab, or

(iii) By installing a tested check meter in series with the existing meter within 7 days of filing of application.

(c) In case of testing of meter at consumer's premises, the testing of meter shall be done for a minimum consumption of 1 kWh. The meter testing team of the licensee shall carry heating load of sufficient capacity to carry out the testing. Optical Scanner may be used for counting the pulses / revolutions or meter shall be tested as per the procedure described in IS/IER 1956 or through aqua-check for LT meters and through RSS for others. The aqua Check and RSS shall be calibrated in laboratory of national repute once in a year.

(i) **In case the meter is found O.K., no further action shall be taken.**

(ii) **In case the meter is found fast / slow by the licensee, and the consumer agrees to the report, the meter shall be replaced by a new meter within 15 days, and bills of previous three months prior to the month in which the dispute has arisen shall be adjusted in the subsequent bill as per the test results.** In case meter is found to be slow, at the request of the consumer, these charges may be recovered in installments not exceeding three.

(iii) **If the consumer disputes the results of testing, or testing at consumer's premises is difficult,** the defective meter shall be replaced by a new tested meter by the Licensee, and, **the defective meter after sealing in presence of consumer, shall be tested at licensee's lab/Independent lab/Electrical Inspector, as agreed by consumer. The option once exercised by consumer shall not be changed. The decision on the basis of reports of the test lab shall be final on the Licensee as well as the consumer.**

(i) Consumer shall be informed of the proposed date of testing at least 7 days in

advance so that he may be present at the time of testing, personally or through an authorized representative.

(ii) The signature of the consumer or his authorized representative, if any present, shall be obtained on the Test Result Sheet.

(iii) **The results of testing, billing, and in case the consumer disputes the results of testing, shall be same as provided in clause 5.6 (c) above.**

Note: (i) The licensee may submit a proposal, with a list of reputed and approved test labs, along with their test charges to the Commission.

(ii) The provisions of IER 1956 shall however be followed until rules are made under Section 53 and 55 of the Act.

(e) In case a check meter is installed, and if after 7-15 days of the period of test, the existing meter is found to be fast or slow beyond the permissible limits, and the test results are not disputed by the consumer, then the same would be removed leaving the check meter in its place for future metering, and bills of previous three months prior to the month in which the dispute has arisen shall be adjusted in the next bill as per the test results. Where the test results are disputed, the procedure as per clause 5.6 (c) as above, as the case may be, shall be followed."

(emphasis supplied)

ANALYSIS

20. In **Smt. Amrawati Devi** (supra), the checking team found that the meter was running slow and therefore it was sent for testing at the laboratory of the Department. During testing, it transpired that the meter had been tampered. The consumer was not given option to get the meter tested at an independent laboratory. In the aforesaid backdrop, relying on Clause 5.6(c)(iii), it

was held that when the demand for additional electricity charges was based on test report, the consumer should have had the opportunity to get the meter tested from outside agency, in view of Clause 5.6(c)(iii) of the Code. The relevant extract from the said judgment is as follows: -

"6. From reading of Clause 5.6 (c) it is clear that this clause in unequivocal terms declares that the defective meter after sealing in presence of consumer, shall be tested. at licensee's lab/independent lab/Electrical Inspector, as agreed by the consumer. Therefore, the agreement by the consumer is essential for testing of the meter either at the laboratory of the Nigam or at the laboratory of some other independent agency. It further provides that option exercised by consumer once cannot be changed. The clause, therefore, empowers the authorities to seal the meter and get it tested with consumer's agreement. Since the clause operates harshly against the consumer it has to be construed strictly. The consumer has a right to get the meter tested with independent agency. The authorities, therefore have a corresponding duty to apprise the consumer of the right. Failure to discharge this duty, which flows from sub-clause (c) (ii) by the authorities while exercising their right to send the meter for testing, renders the entire proceedings for sealing the meter irregular and illegal."

21. In **Mohd. Sagir** (supra), on which also, heavy reliance has been placed by learned counsel for the petitioner, it is noteworthy that at the time of inspection, the meter seal, lead seal, ultrasonic welding seal, were found in order. However, since the respondents were suspecting tampering in the meter, therefore, they took the meter in their custody. A date was fixed under due

intimation to the consumer and on which date, the meter was opened before a Committee constituted for the said purpose. It was found that although outer seals were intact, but the petitioner had inserted extra wires and remote control sensing device inside the meter. Thereafter, the consumer was assessed for unauthorized use of electricity on basis of inspection of the meter done by the Committee. The assessment order was assailed on the ground that the consumer was not given opportunity to get the meter tested at an independent laboratory in terms of Clause 5.6(c)(iii). On the other hand, the Electricity Department contested the claim by contending that it was a case of tampering of meter, as a foreign device was found inside the meter, therefore, Clause 5.6 which deals with "defective meters" would not be applicable. The aforesaid contention was repelled by holding that Clause 5.6(a) cannot be interpreted in a narrow manner so as to exclude from it cases of meter tampering, as it would not advance the object of the Act. It is held that a tampered meter would also be a defective meter and will fall within the ambit of Clause 5.6. The relevant observations are as under: -

"25. Now the submission and the stand taken by the learned counsel for the respondents in the impugned order as well as in the counter affidavit is that Clause of 5.6 of the Code, 2005 is not applicable when there is an allegation that the meter has been tampered. Clause 5.6 (a) of the Code, 2005 provides The Licensee shall have he right to test any meter and related apparatus". Although the heading of the word is "defective meters", but the said heading cannot control the substantive provision when the provision is clear and categorical. **The right of a licensee to test**

the meter where licensee has a reasonable doubt that the meter is tampered cannot be taken away and in event the right is only confined to defective meters as alleged by the respondents, the said interpretation shall not advance the object of the Act, 2003.

26. Clause 5.9 of the Code, 2005 deals with cost of Replacement of Defective/ Burnt Meters. Sub-clause (a) (ii) of the Code, 2005 uses the words "as a result of testing, that the meter was rendered defective due to tampering or any other deliberate act by the consumer to interfere with the meter". Thus, when the sub-clauses 5.6 and 5.9 are read together, it is clear that the meter is to be treated as a defective meter consequent to tampering or any other deliberate act by the consumer. Thus, in the cases where the allegations are that the consumer has tampered the meter the said meter is fully covered by the definition of defective meters as given in Cause 5.6 of the Code, 2005 and the case of the respondents that Clause 5.6 is not attracted is incorrect."

22. The aforesaid interpretation definitely advances the object of the Act. However, the seminal issue is whether in all cases of tampering, is it mandatory to give option to the consumer to get the meter tested at an independent laboratory, failing which assessment made would be rendered illegal?

23. Clause 5.6 of the Code gives right to both licensee and consumer to get the meter tested. In the first instance, the testing is done at consumer's premises. If no defect is detected, no further action is taken. However, if the meter is found running fast/slow and the consumer agrees to the report, the meter shall be replaced by a new meter and bills of previous three

months prior to the month in which the dispute has arisen, shall be adjusted in the subsequent bills as per the test results. On the other hand, if he disputes the test result or the testing at his premises is not possible, the defective meter shall be tested at licensee's laboratory/independent laboratory/ Electrical Inspector, as agreed by the consumer. The option once exercised, by the consumer shall not be changed. The decision on the basis of reports of the test lab shall be final and binding on the licensee as well as the consumer.

24. The Scheme of the Code reveals that the above procedure is required to be followed only in cases where it is to be ascertained on basis of test report as to whether meter is running slow or fast. It could happen on account of mechanical defect in metering apparatus or because of tampering which may or may not be visible to naked eye. When visible to naked eye, as in the instant case, and meter was recording 'NIL' consumption, the conclusion of theft of electricity is not dependent upon test report.

25. The object of Clause 5.6(c) (iii) is to rule out any complaint of bias if meter is tested in the licensee's Lab or by electrical inspector in a case where it is to be ascertained from test report whether meter is running fast/slow because of tampering or any other reason. There, option has to be given to the consumer under Clause 5.6(c)(iii) to get the meter tested at a lab of his choice. However, when the conclusion of tampering is not based on report of test laboratory/Electrical Inspector, the mere fact that Department had sent the meter for testing, would not result in conferment of any new right in favour of the consumer, which in fact, never existed. Clause

5.6(c)(iii) would not be attracted in such cases.

26. Recently, the Supreme Court in **KC Ninan vs. Kerala State Electricity Board and others**³ held that “electricity constitutes a 'public good'. The Courts interpretation of the law must foster this position”. In our opinion, the above interpretation would help combat brazen acts of meter tampering and prevent loot of 'public good' apart from advancing the object of the Act and the Code.

27. **Mohd. Sagir** (supra) was a case where tampering was not obvious at the time of inspection. The licensee had only a suspicion and therefore, it sent the meter for testing. As the ultimate conclusion regarding tampering was based on test report of three member committee, therefore, the consumer was rightly held to have right to get the meter tested at laboratory of his choice. Same was the position in **Smt. Amrawati Devi**. In the instant case, there is no iota of doubt that the tampering was obvious. Moreover, the meter was recording zero consumption, therefore, even the extent to which the meter was running slow was not in issue.

28. The instant case is akin to a case of theft of electricity by tapping the main line, by-passing the meter. The formula for making assessment in such cases is governed by sub-section (5) of Section 126 which states that the assessment would be made for the entire period during which such unauthorized use of electricity has taken place and if the said period is unascertainable, such period shall be limited to a period of twelve months immediately preceding the date of inspection.

29. In the instant case, the respondents have made assessment only for 59 days. It has not come on record why the assessment was made for 59 days only, but the period of assessment has also not been disputed by the petitioner, therefore, we find no illegality in the same.

30. As a result of above discussion, we find no merit in the contention that assessment order is liable to be quashed because it is a non speaking one inasmuch as the finding relating to tampering of meter, as noted above, was a foregone conclusion. Moreover, it is not at all a fit case for interference in exercise of power under Article 226 of the Constitution.

31. Before parting, we note one more contention which though taken in the pleadings was not specifically argued. It is that Rs.56 lakhs was not paid towards compounding fee but as electricity charges and is liable to be adjusted against the assessment amount. We find that the receipt issued by the respondents clearly mentions that the aforesaid sum was paid towards compounding fee. The specific case of the respondents in the counter affidavit is that the petitioner, having regard to the fact that all seals were found broken and meter was not recording any consumption of electricity, accepted the offence and itself offered to pay compounding fee so that criminal proceedings are not taken against the petitioner and its directors and officers. Concededly, under the provisions of the Act, in such cases, criminal prosecution is launched against the offender. In the instant case, the petitioner has nowhere pleaded that the licensee instituted any criminal proceeding against the petitioner or its directors. Therefore, we find no reason to disbelieve the case of the respondents that Rs.56 lakhs was deposited by the petitioner

on 14/15.06.2019 towards compounding fee to save itself from criminal prosecution. The contention, therefore, has no merit and is rejected.

32. The petition is dismissed.

(2023) 8 ILRA 1133

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 31.05.2023

BEFORE

**THE HON'BLE MAHESH CHANDRA
TRIPATHI, J.**

THE HON'BLE MANJIVE SHUKLA, J.

Writ-C No. 27768 of 2019

**Bata India Ltd. & Anr. ...Petitioners
Versus**

**U.P. State Micro & Small Entp. Facilitation
Council & Anr. ...Respondents**

Counsel for the Petitioners:

Sri Chandra Bhan Gupta, Sri Neeraj Grover

Counsel for the Respondents:

Sri Ashok Kumar Singh, Sri Ashok Kumar Singh,
Sri Sujeet Kumar, Sri Anil Kumar Mehrotra, Sri
Srijan Mehrotra

**Civil Law - Micro, Small and Medium
Enterprises Development Act, 2006 –
Sections 18(3) & 24 – Arbitration and
Conciliation Act, 1996 – Section 80 –
Overriding Effect of MSMED Act –
Facilitation Council's Jurisdiction to
Arbitrate – Prohibition under Section 80 –
Applicability**

Held: The Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act), being a special legislation, overrides the provisions of the Arbitration and Conciliation Act, 1996, by virtue of Section 24. The Facilitation Council, under Section 18(3) of the MSMED Act, has absolute discretion to either arbitrate the dispute itself or refer it to an institution providing alternate dispute resolution services,

notwithstanding the prohibition under Section 80 of the Arbitration and Conciliation Act, 1996, which bars a conciliator from acting as an arbitrator. The Supreme Court's decision in *Gujarat St. Civil Supplies Corporation Ltd. Vs Ramkrishna Foods Pvt. Ltd.* (2022 SCC OnLine SC 1492) and the Division Bench judgment of the Allahabad High Court in Writ - C No. 7785 of 2020 affirm that the Facilitation Council, having acted as a conciliator, is not barred from arbitrating the dispute under Section 18(3). The Council's composition as a statutory body with expert members negates concerns of bias, and its jurisdiction to arbitrate is not affected by an independent arbitration agreement between the parties. The orders of the Facilitation Council dated 11.6.2019 and 24.7.2019, deciding to arbitrate the dispute itself, were upheld as legal and valid. The petitioners' argument that the dispute should be referred to the Delhi International Arbitration Centre for its expertise was rejected, as the Facilitation Council is equipped with experts to handle such disputes.

Writ petition dismissed.

Case Law Discussed:

1. Gujarat St. Civil Supplies Corp. Ltd. Vs Ramkrishna Foods Pvt. Ltd., 2022 SCC OnLine SC 1492.
2. Gujarat St. Petronet Ltd. Vs Micro and Small Enterprises Facilitation Council, Writ Petition No. 5459 of 2015 (Bombay High Court, 06.08.2018) (partly set aside by Supreme Court).
3. Principal Chief Engineer Vs Mani Bhai and Brothers (Gujarat High Court), affirmed by Supreme Court in SLP No. 17434/2017.
4. Writ - C No. 7785 of 2020 (Allahabad High Court, 03.03.2020).
5. Silpi Industries (Supreme Court) – on supplier registration under MSMED Act.

(Delivered by Hon'ble Manjive Shukla, J.)

1. Heard Mr. Neeraj Grover and Mr. Chandra Bhan Gupta, learned counsel for

the petitioners, Mr. Anil Kumar Mehrotra assisted by Mr. Srijan Mehrotra, learned counsel for Respondent No. 2.

2. Petitioners by filing this writ petition have challenged the order dated 11.6.2019 passed by U.P. State Micro and Small Enterprises Facilitation Council (hereinafter referred to as the 'Council'), whereby the decision has been taken that in view of Section 18(3) of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as the 'Act of 2006'), the Council itself will arbitrate the dispute in between the petitioners and Respondent No.2. Petitioners have also challenged the order dated 24.7.2019 passed by the Council whereby the petitioners' representation pursuant to order dated 2.7.2019 passed by Delhi High Court in Arbitration Petition No.402/2019, for referring the arbitration between petitioners and Respondent No.2 to any institution or centre providing alternate dispute resolution services, has been rejected.

Brief facts of the Case

3. Brief facts of the case are that Petitioner No.1 is a company incorporated under Indian Companies Act, 1930 and is India's largest retailer and leading manufacturer of footwear and accessories. Petitioner No.1 in addition to manufacturing its goods in its own factories also appoint various manufacturers during the course of its business for manufacturing certain goods for its retail sales as well as for institutional supply including the supply to various government organizations.

4. Respondent No.2 - AVS International Private Limited is a company incorporated under the Companies Act, 1956 and is also manufacturer of footwear.

Petitioner No.1 and Respondent No.2 entered into an agreement on 7.1.2016 for supply of goods by Respondent No.2 to the petitioners. The said agreement was valid for a period of one year and thereafter, a fresh agreement was entered into in between Petitioner No.1 and Respondent No.2 on 10.1.2017 and under the said agreement Respondent No.2 agreed to manufacture and supply the footwear to the petitioners who were having rate contract with the Government of India to supply the footwear to Indian Navy. Respondent No.2 in the aforesaid agreement was under obligation to supply the footwear as per the terms of the rate contract in between Petitioner No.1 and Government of India.

5. Petitioners in the writ petition have pleaded that Respondent No.2 committed several breaches of the terms of the manufacturing agreement and the purchase order regarding timely delivery of goods and further several issues were raised by the Indian Navy regarding inferior quality and defective supply of the footwear manufactured and supplied by Respondent No.2. It has been further pleaded in the writ petition that due to aforesaid reasons Indian Navy rejected the goods thrice and levied late delivery penalty which, as per the agreed terms, was to be borne by Respondent No.2 and as such, the petitioners deducted such charges from the amount payable to Respondent No.2.

6. Respondent No.2 raised demand regarding its pending amounts through various legal notices and thereafter, petitioners and Respondent No.2 attempted to resolve the disputes amicably amongst themselves.

7. Respondent No.2 is a registered Micro, Small and Medium Enterprise and

as such, the provisions of the Act of 2006 are applicable to it.

8. Respondent No.2, in the aforesaid circumstances, approached to U.P. State Micro and Small Enterprises Facilitation Council at Kanpur Nagar by filing Claim Petition No.58 of 2019. The Council while entertaining the aforesaid claim petition issued conciliation notice to petitioners in exercise of its powers under Section 18(2) of the Act of 2006 for joining conciliation proceedings on 21.5.2019. Petitioners' representative and the representative of Respondent No.2 appeared in the conciliation proceedings before the Council on 21.5.2019 and the Council was apprised that parties themselves are negotiating for a settlement and for that reason the Council granted one month's time to the parties to conclude negotiations. However, the parties could not arrive at the settlement and petitioners decided to terminate the conciliation proceedings as per Section 76(4) of Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act of 1996').

9. Since there was provision for arbitration under Clause 25 of the agreement entered into in between Petitioner No.1 and Respondent No.2, as such petitioners filed the petition under Section 11(6) of the Act of 1996 before Delhi High Court for appointment of Arbitrator. Petitioners also informed regarding termination of conciliation proceedings with Respondent No.1 to the Council in aforementioned Claim Petition No.58 of 2019. The Council again issued a notice on 6.6.2019 to the parties for conciliation proceedings on 11.6.2019. Petitioners' authorized representative attended the proceedings on 11.6.2019 before the Council and apprised the

Council that petitioners have already approached Delhi High Court for reference of the dispute between petitioners and Respondent No.2 for institutional arbitration through the Delhi International Arbitration Centre under the aegis of Delhi High Court and further requested the Council to formally terminate the conciliation proceedings pending before it. The Council passed an order dated 11.6.2019 whereby exercising powers under Section 18(3) of the Act of 2006 the Council itself decided to arbitrate the dispute in between petitioners and Respondent No.2.

10. Petitioners, in the aforesaid circumstances, again approached to Delhi High Court by filing I.A. No.8574 of 2019 in Arbitration Petition No.402 of 2019. The Vacation Bench of Delhi High Court issued notice to Respondent No.2 on the application and fixed the date for hearing in the matter on 24.6.2019. While the aforesaid I.A. was pending adjudication before the Delhi High Court, petitioners filed a representation on 19.6.2019 before the Council requesting therein to withdraw its proposal of entertaining arbitration issue through itself and refer to the parties for institutional arbitration through "Delhi International Arbitration Centre", an alternate dispute resolution arbitration centre set up under the aegis of Delhi High Court.

11. The Delhi High Court heard the aforesaid I.A. No. 8574 of 2019 filed in Arbitration Petition No.402 of 2019 and passed an order on 2.7.2019. The order dated 2.7.2019 is reproduced as under:-

"I.A. 8572/2019 (exemption)

1. Exemption allowed subject to all just exceptions.

ARB.P. 402/2019

2. Learned counsels for the parties have been heard at considerable length. By way of the present petition, the Petitioner prays that the parties may be referred for arbitration under the aegis of Delhi International Arbitration and Conciliation Centre. Learned counsel for the Petitioner has raised several grievances and inter alia impugns the order dated 11th June, 2019, passed by the U.P. Micro Small Enterprises Facilitation Council whereby it has entered upon reference in terms of Section 18(3) of the Micro Small and Medium Enterprises Act, 2006. Learned Counsel for the Petitioner contends that since the facilitation council acted as Conciliator, it is now impermissible for them to assume the role of the Arbitral tribunal. At the outset, the learned counsel for the Respondent opposes the present petition on the ground of maintainability. However on instruction from her client she states that Respondent has no objection, in case, the matter is referred to any institution or centre providing alternate dispute resolution services for such arbitration. However, she further contends that this decision should be left open to be considered by the Facilitation Council.

3. At this juncture, learned counsel for the Petitioner informs the court that, his client has made a representation dated 19th June, 2019, wherein inter alia, a request has been made to refer the matter for arbitration to an institution. This representation is presently pending. He says that though in the said representation a request has been made for referring the matter to Delhi International Arbitration and Conciliation Centre, however, his clients would have no objection in case, the arbitration is carried out under the aegis of any other institution or centre providing

alternate dispute resolution services. Thus, both the counsels without prejudice to the rights and contentions agree that the facilitation council may make a decision for referring the matter to an institution.

4. Accordingly, in view of the statements made by both the counsels, before hearing the matter any further, it is considered appropriate to direct the Facilitation Council to decide the representation dated 19th June, 2019 for referring the parties to arbitration under any institution or centre. The decision shall be conveyed to this court within two weeks from today. The centre while deciding the representation shall take into consideration the stand of the parties as noted above.

5. List on 26th July, 2019.

6. Registry is directed to send a copy of this order to U.P. Micro Small Enterprises Facilitation Council.

7. Copy of this order be given *dasti*.”

12. Thereafter, the Council pursuant to the aforesaid order dated 2.7.2019 heard the matter pending before it and ultimately rejected the representation of the petitioners for referring the dispute for arbitration to an institution providing alternate dispute resolution services and further affirmed its earlier decision dated 11.6.2019 and thereby Council itself proceeded to arbitrate the dispute. Later on, Arbitration Petition No.402 of 2019 was heard and decided by Delhi High Court vide judgment and order dated 9.8.2019. The Delhi High Court vide aforesaid judgment and order dated 9.8.2019 rejected the prayer of the petitioners for referring the dispute to the Arbitrator as per arbitration clause contained in the agreement, exercising its powers under Section 11(6) of the Act of 1996.

Submissions On Behalf Of The Petitioners

13. Learned counsel for the petitioners has submitted that Clause 25 of the agreement entered into by the parties categorically provides for mechanism of arbitration in respect of disputes arising out of the said agreement. Clause 25 of the agreement is reproduced as under:-

25. Governing Laws and Arbitration:

In case of any dispute between the Parties, the Parties shall attempt to resolve the dispute amicably and the aggrieved Party shall send a notice to the other Party requesting to settle the dispute amicably. If the Parties are unable to resolve such dispute within 15 days as of the initial communication as stated above, the aggrieved Party may refer the matter to arbitration under the provisions of the Arbitration and Conciliation Act, 1996, to be decided by a sole arbitrator appointed by BIL. The venue of the Arbitration proceedings shall be at Delhi. The proceedings and the award shall be in English and the arbitrator's decision shall be final and conclusive. The parties shall bear the arbitration expenses in equal proportion.

The courts of Delhi shall have exclusive jurisdiction regarding any issue arising out of the arbitration process above and with respect to interim relief, all in accordance with the Arbitration and Conciliation Act, 1996.

This Agreement shall be governed by and interpreted in accordance with the laws of India with specific territorial jurisdiction of Delhi Courts.

Each party hereto shall be bound by the award rendered by the arbitrators."

14. Learned counsel for the petitioners has further submitted that since there was a dispute between the petitioners and Respondent No.2 and as per the

agreement the said dispute was to be resolved by referring the matter to an Arbitrator as per clause 25 of the agreement, therefore the petitioners filed Arbitration Petition No.402 of 2019 before Delhi High Court and a prayer was made that an institutional arbitrator providing alternate dispute resolution services may be given the responsibility to arbitrate the dispute in question.

15. Learned counsel for the petitioners has also submitted that the dispute in question involves adjudication of complicated technical issues and therefore, Delhi International Arbitration Centre under the aegis of Delhi High Court would be a best institution to arbitrate the dispute between the petitioners and Respondent No.2.

16. Learned counsel for the petitioners has invited attention of this Court towards the provisions of Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006. For ready reference, Section 18 of the Act of 2006 is extracted as under:-

"18. Reference to Micro and Small Enterprises Facilitation Council.—

(1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.

(2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions

of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.

(3) Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer to it any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act.

(4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference."

17. Learned counsel for the petitioners has vehemently argued that Section 18(2) of the Act of 2006 provides that the Council on receipt of a reference shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and in the said conciliation proceedings the provisions of

Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 will be applicable. Learned counsel for the petitioners has further argued that no doubt Section 18(3) of the Act of 2006, in case of failure of conciliation proceedings, gives power to the Council either itself take up the dispute for arbitration or to refer it to any institution or centre providing alternate dispute resolution services but since conciliation proceedings initiated by the Council under Section 18(2) of the Act of 2006 failed and since the Council itself was Conciliator, therefore in view of the prohibition contained in Section 80 of the Act of 1996, the Council itself could not have taken up to arbitrate the dispute between the parties. For ready reference, Section 80 of the Act of 1996 is extracted as under:-

"80. Role of conciliator in other proceedings.—Unless otherwise agreed by the parties,-

(a) the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings;

(b) the conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings."

18. Learned counsel for the petitioners has empathetically argued that Section 18(2) of the Act of 2006 categorically provides that Sections 65 to 81 of the Act of 1996 will apply in the conciliation proceedings before the Council and therefore, the categorical prohibition imposed under Section 80 of the Act of 1996 that the Conciliator cannot be an Arbitrator, will be applicable in the case in question and thereby the Council could not have taken to itself to arbitrate the dispute

between the petitioners and Respondent No.2.

19. Learned counsel for the petitioners has relied upon a judgment dated 6.8.2018 rendered by the Division Bench of High Court of Bombay in **Writ Petition No.5459 of 2015, Gujrat State Petronet Ltd. vs. Micro and Small Enterprises Facilitation Council and others**. Learned counsel for the petitioners has submitted that the aforesaid judgment squarely covers the issues in question and the Division Bench of the High Court of Bombay in the aforesaid judgment has categorically held that Section 18(2) of the Act of 2006 categorically provides that Section 80 of the Act of 1996 will be applicable and where the Council itself was Conciliator and in the event of conciliation proceedings having been failed, the Council itself cannot take up to arbitrate the dispute between the parties. Relevant portion of the judgment dated 6.8.2018 is extracted as under:-

19. A plain reading of sub-sections (2) and (3) of Section 18 of the MSMED Act makes it clear that it is obligatory for the Council to conduct conciliation proceedings either by itself or seek assistance of any institute or centre providing alternative dispute resolution services. The provisions of Sections 65 to 81 of the Arbitration Act 1996 are made applicable to conciliation proceedings. In the event, the conciliation proceedings are unsuccessful and stand terminated, the Council can either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration. The provisions of Arbitration Act 1996, in its entirety, are made applicable as if the arbitration was in pursuance of the

arbitration agreement referred to in sub-section (1) of Section 7 of the Arbitration Act, 1996.

20. It is thus evident that sub-section (2) and sub-section (3) of the MSMED Act vests jurisdiction in the Council to act as conciliator as well as arbitrator. The question is in view of the provisions of Section 80 of the Arbitration Act 1996, the Council which has conducted the conciliation proceedings is prohibited from acting as arbitrator. As stated earlier, certain provisions of Arbitration Act 1996 including Section 80 are specifically made applicable to conciliation proceedings contemplated by Section 18(2) of the MSMED Act. Whereas provisions of Arbitration Act 1996, in its entirety, are made applicable to the arbitration and conciliation proceedings contemplated by sub-section (3) of Section 18 of the MSMED Act.

21. A harmonious reading of these provisions clearly indicate that Section 80 of the Arbitration Act, 1996 is applicable to conciliation as well as arbitration proceedings under sub-sections (2) and (3) of Section 18 of the MSMED Act. Section 80 of the Arbitration Act, 1996 reads thus :

"80. Role of conciliator in other proceedings

Unless otherwise agreed by the parties

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(a) the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings; and

(b) the conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings.

22. A plain reading of Section 80 makes it clear that the conciliator cannot act as an arbitrator or his representative or

counsel of a party in any arbitral or judicial proceedings in respect of a dispute. It is thus evident that the MSEFC cannot act as conciliator as well as arbitrator, or it may choose to refer the dispute to any centre or institution providing alternate dispute resolution services for the parties to conciliation or arbitration. However, once the MSEFC acts as conciliator, in view of provisions of Section 80, it is prohibited from acting as arbitrator.

23. Admittedly, in the present case, respondent No.1 conducted the conciliation proceedings between the petitioner and respondent No.3 and by the impugned order, terminated the same as being unsuccessful. What is surprising is that respondent No.1 - MSEFC, having conciliated the dispute between the parties and conciliation proceedings being unsuccessful and terminated, the MSEFC itself initiated to arbitrate the dispute between the same parties. In our view, respondent No.1-MSEFC itself, could not have initiated arbitration proceedings between the petitioner and respondent No.3. In terms of the provisions of sub-section (3) of Section 18 the MSMED Act, respondent No.1 - MSEFC ought to have referred the dispute between the petitioner and respondent No.3 to any institution or centre providing alternate dispute resolution services for arbitration. The impugned order, so far as it relates to authorising respondent No.1 - MSEFC to initiate arbitration proceedings/arbitral dispute cannot be sustained and the same deserves to be quashed and set-aside.

24. We, accordingly, dispose of the petition by passing the following order :

1. We hold that the despite independent arbitration agreement between the petitioner and respondent No.3, respondent No.1 - MSEFC has jurisdiction

to entertain reference made by respondent No.3 under Section 18 of the MSMED Act.

2. Clause 2 of the operative part of the impugned order i.e. "Arbitration proceeding be initiated U/s 18(3) of MSMED Act 2006 and that this council shall act as an Arbitrator Tribunal" is quashed and set-aside and respondent No.1 - MSEFC is directed to refer the dispute between the petitioner and respondent No.3 to any institution or centre providing alternate dispute resolution services for arbitration. Respondent No.1 - MSEFC Shubhada S Kadam 23/24 wp 5459.15.doc shall take necessary steps as expeditiously as possible and, in any case, within a period of four weeks from the date of receipt of this order.

3. Rule is, accordingly, made absolute in the above terms."

20. Learned counsel for the petitioners has also argued that the Micro, Small and Medium Enterprises Council is not well equipped to arbitrate the dispute between petitioners and Respondent No.2 whereas Delhi International Arbitration Centre under the aegis of Delhi High Court is well equipped to carry out the quality arbitration proceedings and thereby has submitted that even if the discretion was with the Council either itself to arbitrate the dispute or to refer it to an institution dealing with alternate dispute resolution services, it was in the fitness of things that Council ought to have referred the matter to an institution.

21. Learned counsel for the petitioners has thus concluded his arguments and has prayed that the petitioners' writ petition deserves to be allowed by this Court in the light of the aforesaid judgment and order dated 6.8.2018 passed by the Division Bench of the High Court of Bombay in Writ Petition

No.5459 of 2015 and thereby to quash the impugned orders dated 24.7.2019 and 11.6.2019 passed by the Council.

Submissions On Behalf Of Respondent No.2

22. Learned counsel appearing for Respondent No.2 has submitted that Arbitration Petition No.402 of 2019 filed by the petitioners before Delhi High Court was dismissed vide judgment and order dated 9.8.2019 but the petitioners without disclosing and annexing the copy of the aforesaid judgement has filed the writ petition before this Court challenging therein the orders passed by the Council whereas the Delhi High Court has considered the provisions of the Act of 2006 as well as the Act of 1996 and has rejected the petition filed by the petitioners vide judgment and order dated 9.8.2019. Relevant portion of the aforesaid judgment and order dated 9.8.2019 is extracted as under:-

“20. However, the difference of opinion and contrasting views of various High Courts does not affect or impede this Court to decide the present petition. In so far as the jurisdiction of the MSME Council, under Section 18 of the MSME Act is concerned, there cannot be any doubt that in all the decisions referred above, the Courts have consistently held that the provisions of the MSME Act are applicable dehors the arbitration clause. In this regard it is relevant to note the decision of the Gujrat High Court in Principal Chief Engineer v Mani Bhai and Brothers, wherein the Court held:

“6.1. It cannot be disputed that the Act 2006, is a Special Act and as per Section 24 of the Act, 2006, the provisions of sections 15 to 23 shall have effect

notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Therefore, Section 18 of the Act, 2006 would have overriding effect or any other law for the time being in force including Arbitration Act, 1996 and therefore, if there is any dispute between the parties governed by the Act, 2006, the said dispute is required to be resolved only through the procedure as provided under Section 18 of the Act, 2006. Thus, considering Section 18 of the Act, 2006, after conciliation has failed as per Section 18(2) of the Act, 2006, thereafter as per sub-Section (3) of Section 18, where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer to it any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (2) of Section 18 of the Council shall have jurisdiction to take up dispute for arbitration. Therefore, once the Council itself is acting as an Arbitrator in that case, thereafter the Council who acts as an Arbitrator has no authority and/or jurisdiction to entertain the application under Section 8 of the Arbitration Act, 1996. Section 8 of the Arbitration Act, 1996 would be applicable in case where any proceedings are pending before the "Judicial Authority". "Judicial Authority" is not defined in the Arbitration Act, 1996. However, in the case of SBP & Co. vs Patel Engineering Ltd and anr., (2005) 8 SCC 618, it is observed by the Hon'ble Supreme Court that "Judicial Authority" as such is

not defined in Section 2(e) of the Act and would also, in our opinion include other courts and may even include a special Tribunal like the Consumer Forum. Even in the case of *Morgan Securities and Credit Pvt Ltd* (supra), the Hon'ble Supreme Court has observed that in its ordinary parlance "Judicial Authority" would comprehend a Court defined under the Act but also courts which would either be a Civil Court or other authorities which perform judicial functions or quasi judicial functions.

7.0 Identical question came to be considered by the Division Bench of the Allahabad High Court in the case of *Paper and Board Convertors* (supra). While interpreting the very provision of Section 18 of the Act, 2006, in para 12, the Division Bench has observed and held as under:

12. The non-obstante provision contained in sub-section (1) of section 18 and again in sub-section (4) of Section 18 operates to ensure that it is a Facilitation Council which has jurisdiction to act as an arbitrator or Conciliator in a dispute between a supplier located within its jurisdiction and a buyer located anywhere in India. The Facilitation Council had only one of the two courses of action open to it: either to conduct an arbitration itself or to refer the parties to a centre or institution providing alternate dispute resolution services stipulated in sub-section (3) of Section 18.

10. In view of the above and for the reasons stated above, no error has been committed by the learned Council in not entertaining the application under Section 8 of the Arbitration Act, 1996. We see no reason to interfere with the order passed by the learned Council. As observed herein above and considering the sub-section (1) of Section 18 of the Act, 2006 the Facilitation Council has jurisdiction to act as Arbitrator and /or

conciliator any dispute between the parties and that Council had only one of two courses of action open to it, either to conduct an arbitration itself or to refer the parties to a centre or institution providing alternative dispute resolution services stipulated in Section 18(3) of the Act, 2006. Therefore, while dismissing the present appeal, it is observed that Council shall now act in accordance with provision of sub-section (3) of Section 18 and either to conduct an arbitration itself or refer the parties to a centre or institution providing alternate dispute resolution services. With the above observations, present appeal is dismissed. No costs. In view of dismissal of the First Appeal, Civil Application stands dismissed accordingly."

21. The said decision was challenged before the Supreme Court in *Principal Chief Engineer v. M/s Manibhai & Bro*, SLP No. 17434/2017 decided on 5th July 2017 where the Supreme Court by a speaking order observed as under:

"We have given our thoughtful consideration to the submissions advanced before us yesterday and today.

We are satisfied, that the interpretation placed by the High Court on Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006, in the impugned order, with reference to arbitration proceeding is fully justified and in consonance with the provisions thereof.

Having affirmed the above, we are of the view, that all other matters dealt with in the impugned order are not relevant for the adjudication of the present controversy, and need not be examined.

The special leave petition is dismissed in the above terms. Pending applications stand disposed of."

22. Since the decision of the Gujarat High Court has been affirmed by the Supreme Court, I have no hesitation to hold

that Section 18 of the MSME Act, would override the provisions of the arbitration clause agreed to between the parties and consequently the arbitration proceedings before the Council are in accordance with law. Petitioner's contention qua the bar under Section 80 of the A&C Act, is subject matter of different views of the High Courts, referred above. However, notwithstanding the conflicting views on this issue, the Court cannot grant the relief sought in the present proceedings. The provisions of Section 11(6) of the A&C Act would be attracted only under the situations which are enumerated under the said provision, which reads as under:

"(6) Where, under an appointment procedure agreed upon by the parties,--

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request 1[the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

23. Petitioner is unable to show as to how any of the aforesaid sub-clauses can be invoked in the present case. Thus, the petition is not maintainable. There is also merit in the submission of the Respondent that the facts of the case as noted above do not indicate that the Council has indeed performed the role of a Conciliator. No doubt the Conciliation proceedings were initiated and the Petitioner joined the conciliation process, but that was only to request the Council to defer its decision

since the parties were negotiating settlement. Thereafter, the Council was informed that the settlement had not fructified and notice of termination of the Conciliation process was sent. Thus, the Council never actively acted as a Conciliator between the parties.

24. Be that as it may, under Section 11(6) of the A&C Act, I would not have the jurisdiction to test the legality of the decision dated 24 th July, 2019, passed by the Council. The Petitioner would have to avail its remedies under the relevant provisions of the A&C Act to challenge the jurisdiction of the Arbitral Tribunal. I do not find any merit in the present petition and same is dismissed. Pending applications if any are disposed of.

O.M.P.(I) (COMM.) 201/2019

25. The present petition inter alia seeks the following prayers:

"31. In light of the aforesaid facts and circumstances, it is most respectfully prayed that this Hon'ble Court may be pleased to stay the proposed arbitration proceedings scheduled to be initiated before the respondent no.2 on 19/5/2019 and restrain the respondent no.2 from passing any order in the proposed arbitration during the pendency of petitioner's petition under section 11(6) for reference of dispute between the parties to arbitration under the aegis of Delhi International Arbitration Centre."

26. In view of the decision rendered in arbitration petition bearing No. ARB.P. 402/2019, there is no ground to grant the relief sought in the present petition. More so since the existence of the Arbitration agreement is not disputed and the arbitration proceedings initiated under the MSME Act are in accordance with law, there is no ground or reason to entertain the present petition and the same is dismissed.

23. Learned counsel appearing for Respondent No.2 has argued that keeping in view to provide for facilitating the promotion and development and enhancing the competitiveness of micro, small and medium enterprises and matters connected therewith or incidental thereto, the legislature has enacted the Micro, Small and Medium Enterprises Development Act, 2006. Section 24 of the aforesaid Act of 2006 categorically gives overriding effect to Sections 15 to 23 of the Act notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Section 24 of the Act of 2006 is extracted as under:-

“24. Overriding effect.—The provisions of sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

24. In the light of the aforesaid Section 24 of the Act of 2006, learned counsel appearing for Respondent No.2 has vehemently argued that in view of the provisions made in aforementioned Section 24 thereby giving overriding effect to Sections 15 to 23 of the Act, the reference made by Respondent No.2 to the Council and thereby order passed by the Council to itself proceed to arbitrate the dispute is well within the jurisdiction of the Council.

25. Learned counsel appearing for Respondent No.2 has vehemently argued that the legislature under Section 18(2) of the Act has given discretion to the Council either to proceed to conciliate itself or to seek assistance of any institution or centre providing alternate dispute resolution services and Sections 65 to 81 of the Act of 1996 have been made applicable only in respect of the procedure to be adopted by

the Conciliator during the conciliation proceedings. It has been further argued that the legislature under Section 18(3) of the Act of 2006 has given absolute discretion to the Council that in the event of failure of conciliation proceedings either to itself arbitrate the dispute or to refer the matter to an institution providing alternate dispute resolution services, therefore, the bar of Section 80 of the Act of 1996 providing prohibition that the conciliator cannot become Arbitrator will not be applicable in the matters under the Act of 2006. It has been further stressed upon that so far as the jurisdiction of the Council to arbitrate the disputes is concerned, the legislature has given absolute discretion to the Council and in respect of that discretion the provisions of the Act of 1996 will not be applicable as the Act of 2006 is a special legislation dealing with a particular field and further, the provisions of Sections 65 to 81 of the Act of 1996 have been made applicable only in respect of procedure adopted by the Council while conciliating or carrying out the arbitration proceedings.

26. Learned counsel appearing for Respondent No.2 has relied upon the Division Bench judgment of this Court rendered on 3.3.2020 in Writ-C No.7785 of 2020 wherein it has been held that the prohibition contained in Section 80 of the Act of 1996 will not be applicable to the Council while exercising its jurisdiction enshrined under Sections 18(2) and 18(3) of the Act of 2006. Relevant portion of the judgment and order dated 3.3.2020 is extracted as under:-

“59. Karnataka High Court in fact followed the judgment of Bombay High Court in Gujarat State Petronet Ltd. Vs. Micro and Small Enterprises Facilitation Council and others (supra) and Gujarat

High Court in Principal Chief Engineer Vs. M/s Manibhai and Brothers (supra).

We find that in para-15, learned Single Judge has observed that Section 80 of Act, 1996 incorporates a salutary principle that a 'Conciliator' cannot act also as an Arbitrator and this salutary principle cannot be whittled down or excluded by inferring a contrary intent in the provisions of Section 18(3) and applying Section 24. Unfortunately, when we enquired, are not shown any such alleged salutary principle which could have been given an overriding effect over express statutory provision providing otherwise. Further, we also find that Section 18(4) has been completely overlooked and no reason has been given by referring to Section 18(4) as to why MASEF Council cannot act as Arbitrator, when a specific declaration has been made that it shall have jurisdiction to act an Arbitrator. For application of Section 18(4) to that extent, there is no such condition provided. In our view, therefore, aforesaid Single Judge judgment will not help petitioners and we record our respectful disagreement with the aforesaid authority of the learned Single Judge of Karnataka High Court.

60. We inquired from learned counsel for petitioner as to where such alleged salutary principles that a Conciliator cannot act as an arbitrator is laid down but he could place nothing before us except Section 80 of Act, 1996. Having gone through Section 80, we find that even prohibition therein that Conciliator shall not act as an Arbitrator or as Representative or Counsel of the party in any arbitration or judicial proceedings is not absolute proposition but it permits parties to have an agreement otherwise. What actually is contemplated therein is that when a Conciliator has formed a particular opinion but parties did not agree

to such opinion, in order to avoid any scope of bias on the part of such conciliator, he should not be an arbitrator when such a dispute proceeds for arbitration. This is also clear from the fact that prohibition is also that such Conciliator shall not act as representative or counsel of one of the party when the matter is taken in judicial proceedings. We further find that this principle was recognized in Article 18 of United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); adopted UNCITRAL Model Law on international commercial arbitration practice. It was adopted in 1985. From the preamble of Act, 1996 we find that the aforesaid Model Law as also Conciliations Rules which were adopted by UNCITRAL in 1980, have been broadly taken into consideration in enactment of Act, 1996. What we feel is that the above prohibition recognized in Section 80 is consistent with one of the well known principle of natural justice that no person shall be Judge in his own cause, of which the element of absence of bias or prejudice is one of the integral aspects. The aforesaid principle cannot be given a pedestal so as to override a mandatory provision made by Legislature, that too, by giving it an overriding effect, and, in our view, Court must endeavour to adhere and uphold the clear and specific provision instead of finding out certain principle which has not been preserved by Legislature. Validity of Section 18(3) and (4) of MSMED Act, 2006 is not under challenge before us. Therefore the provision has to be read, interpreted and followed as it is.

61. There is one more aspect. Normally an Arbitral Tribunal consists of sole Arbitrator or two Arbitrators with or without an Umpire. In such a case, there may be an element of personal prejudice or

bias on the part of such persons constituting Arbitral Tribunal, if one of them or all of them have also acted as Conciliator. However, that is not the position in respect of a Reference made under Section 18 (1) of MSMED Act, 2006 since MASEF Council is a statutory body. Section 21 of MSMED Act, 2006 provides that such Conciliator shall have members not less than three but not more than five. The composition of Council is also given in Section 21(1) (i) to (iv) and it includes Director of Industries or any other officer not below the rank of such Director, in the Department of State Government; Office Bearer or Representatives of Association of Micro or Small Industries or Enterprises; Representatives of Banks and Financial Institutions lending to micro or small enterprises. The persons mentioned in Clause (iv) of Section 21(1) may be brought in Council in the alternative of Representative of Banks and financial institutions lending to Micro and Small Enterprises, if it is found necessary to include persons having special knowledge in the field of industry, finance, law, trade or commerce. Director is Chairperson of MASEF Council. Therefore, the statutory body like MASEF Council does not suffer the element of personal prejudice or bias as is available in the case of individual persons constituting Arbitral Tribunal. It may be that persons constituting MASEF Council at the time of conciliation may not be the same when the said Conciliator took up the matter for arbitration. Therefore, central idea beyond the embargo created by Section 80(1) available in case of individuals constituting Arbitral Tribunal is absent in the matter covered by Section 18 of MSMED Act, 2006 since here, the Council, which is permitted to act as Conciliator as well as Arbitrator is a statutory body having not less than there

persons but upto five persons and, therefore, the element of personal bias, prejudice is absent in such a case.

62. Even otherwise, as we have already discussed, Section 80 itself permits an otherwise agreement between the parties. Meaning thereby the embargo that Conciliator shall not be Arbitral Tribunal is not absolute. That being so, the mandatory and overriding effect contained in Section 18(3) and 18(4) and Section 24 of MSMED Act, 2006 cannot be whittled down by referring to a salutary principle though, in our view, no such salutary principle having force of law to the extent that a legislative provision must be read as sub-serving is recognized or available.

63. In view of above discussion, we are clearly of the view that MASEF Council having acted as Conciliator is not barred from working as Arbitral Tribunal to arbitrate the dispute under Section 18(3) and such jurisdiction of MASEF Council has been given overriding effect by virtue of Section 18(4) and Section 24 which have to be given complete swing in the area covered by same. The argument, therefore, advanced otherwise by learned counsel for petitioner is hereby rejected. The question, formulated above, is answered against petitioner and we hold that MASEF Council is not prohibited from working as Arbitrator itself for adjudication of dispute between the parties and it is not obliged to refer the matter to any other body.

27. Learned counsel appearing for Respondent No.2 has also vehemently submitted that the issue involved in this writ petition regarding applicability of prohibition contained in Section 80 of the Act of 1996 in the conciliation and arbitration proceedings before the Council under Sections 18(2) and 18(3) of the Act of 2006 has already been considered and

decided by the Hon'ble Supreme Court vide judgment and order dated 31st October, 2022 rendered in SLP (C) No.12884/2020, **Gujarat State Civil Supplies Corporation Ltd. vs. Ramkrishna Foods Pvt. Ltd. and another** along with other connected Civil Appeals, reported in **2022 SCC OnLine SC 1492**.

28. Learned counsel appearing for Respondent No.2 has invited attention of this Court that the Division Bench judgment rendered by the High Court of Bombay was also under challenge before the Hon'ble Supreme Court in the aforementioned case and the Hon'ble Supreme Court has categorically held that the prohibition contained under Section 80 of the Act of 1996 will not be applicable to the Council while exercising its jurisdiction under Sections 18(2) and 18(3) of the Act of 2006.

29. Learned counsel appearing for Respondent No.2 has drawn attention of this Court towards paragraph 4 of the aforesaid judgment of the Hon'ble Supreme Court wherein the Hon'ble Supreme Court has been pleased to formulate three issues involved in the matter. Paragraph 4 of the aforesaid judgment dated 31st October, 2022 is reproduced as under:-

“4. In the background of afore-stated spectrum of cases, following common questions of law arise for consideration:

(i) Whether the provisions of Chapter-V of the MSMED Act, 2006 would have an effect overriding the provisions of the Arbitration Act, 1996?

(ii) Whether any party to a dispute with regard to any amount due under Section 17 of the MSMED Act, 2006 would be precluded from making a reference to the Micro and Small Enterprises

Facilitation Council under sub-section (1) of Section 18 of the said Act, if an independent arbitration agreement existed between the parties as contemplated in Section 7 of the Arbitration Act, 1996.

(iii) Whether the Micro and Small Enterprises Facilitation Council, itself could take up the dispute for arbitration and act as an arbitrator, when the council itself had conducted the conciliation proceedings under sub-section (2) of the Section 18 of MSMED Act, 2006 in view of the bar contained in Section 80 of the Arbitration Act, 1996.”

30. Learned counsel appearing for Respondent No.2 has also invited attention of this Court towards relevant paragraphs of the aforesaid judgment dated 31st October, 2022 rendered by the Hon'ble Supreme Court and conclusion drawn by the Hon'ble Supreme Court contained in paragraph 34 of the aforesaid judgment. For ready reference, relevant portion of the aforesaid judgment dated 31st October, 2022 rendered by the Hon'ble Supreme Court is extracted as under:-

“25. Thus, the Arbitration Act, 1996 in general governs the law of Arbitration and Conciliation, whereas the MSMED Act, 2006 governs specific nature of disputes arising between specific categories of persons, to be resolved by following a specific process through a specific forum. Ergo, the MSMED Act, 2006 being a special law and Arbitration Act, 1996 being a general law, the provisions of MSMED Act would have precedence over or prevail over the Arbitration Act, 1996. In Silpi Industries case (supra) also, this Court had observed Bharat Sewa Sansthan Vs. U.P. Electronics Corporation; AIR 2007 SC 2961. while considering the issue with regard to the maintainability and counter

claim in arbitration proceedings initiated as per Section 18(3) of the MSMED Act, 2006 that the MSMED Act, 2006 being a special legislation to protect MSME's by setting out a statutory mechanism for the payment of interest on delayed payments, the said Act would override the provisions of the Arbitration Act, 1996 which is a general legislation. Even if the Arbitration Act, 1996 is treated as a special law, then also the MSMED Act, 2006 having been enacted subsequently in point of time i.e., in 2006, it would have an overriding effect, more particularly in view of Section 24 of the MSMED Act, 2006 which specifically gives an effect to the provisions of Section 15 to 23 of the Act over any other law for the time being in force, which would also include Arbitration Act, 1996.

26. The court also cannot lose sight of the specific non obstante clauses contained in sub-section (1) and sub-section (4) of Section 18 which have an effect overriding any other law for the time being in force. When the MSMED Act, 2006 was being enacted in 2006, the Legislature was aware of its previously enacted Arbitration Act of 1996, and therefore, it is presumed that the legislature had consciously made applicable the provisions of the Arbitration Act, 1996 to the disputes under the MSMED Act, 2006 at a stage when the Conciliation process initiated under sub-section (2) of Section 18 of the MSMED Act, 2006 fails and when the Facilitation Council itself takes up the disputes for arbitration or refers it to any institution or centre for such arbitration. It is also significant to note that a deeming legal fiction is created in the Section 18(3) by using the expression 'as if' for the purpose of treating such arbitration as if it was in pursuance of an arbitration agreement referred to in sub-section (1) of Section 7 of the Arbitration Act, 1996. As held in K.

*Prabhakaran v. P. Jayarajan*¹⁸, a legal fiction presupposes the existence of the State of facts which may not exist and then works out the consequences which flow from that state of facts. Thus, considering the overall purpose, objects and scheme of the MSMED Act, 2006 and the unambiguous expressions used therein, this court has no hesitation in holding that the provisions of Chapter-V of the MSMED Act, 2006 have an effect overriding the provisions of the Arbitration Act, 1996.

27. The submissions made on behalf of the counsel for the Buyers that a conscious omission of the word "agreement" in sub-section (1) of Section 18, which otherwise finds mention in Section 16 of the MSMED Act, 2006 implies that the arbitration agreement independently entered into between the parties as contemplated under Section 7 of the Arbitration Act, 1996 was not intended to be superseded by the provisions contained under Section 18 of the MSMED Act, 2006 also cannot be accepted. A private agreement between the parties cannot obliterate the statutory provisions. Once the statutory mechanism under sub-section (1) of Section 18 is triggered by any party, it would override any other agreement independently entered into between the parties, in view of the non obstante clauses contained in sub-section (1) and sub-section (4) of Section 18.

(2005) 1 SCC 754 The provisions of Sections 15 to 23 have also overriding effect as contemplated in Section 24 of the MSMED Act, 2006 when anything inconsistent is contained in any other law for the time being in force. It cannot be gainsaid that while interpreting a statute, if two interpretations are possible, the one which enhances the object of the Act should be preferred than the one which would frustrate the object of the Act. If submission made by the learned counsel for the buyers

that the party to a dispute covered under the MSMED Act, 2006 cannot avail the remedy available under Section 18(1) of the MSMED Act, 2006 when an independent arbitration agreement between the parties exists is accepted, the very purpose of enacting the MSMED Act, 2006 would get frustrated.

28. *There cannot be any disagreement to the proposition of law laid down in various decisions of this Court, relied upon by the learned counsel for the buyers that the Court has to read the agreement as it is and cannot rewrite or create a new one, and that the parties to an arbitration agreement have an autonomy to decide not only on the procedural law to be followed but also on the substantive law, however, it is equally settled legal position that no agreement entered into between the parties could be given primacy over the statutory provisions. When the Special Act i.e., MSMED Act, 2006 has been created for ensuring timely and smooth payment to the suppliers who are the micro and small enterprises, and to provide a legal framework for resolving the dispute with regard to the recovery of dues between the parties under the Act, also providing an overriding effect to the said law over any other law for the time being in force, any interpretation in derogation thereof would frustrate the very object of the Act. The submission therefore that an independent arbitration agreement entered into between the parties under the Arbitration Act, 1996 would prevail over the statutory provisions of MSMED Act, 2006 cannot be countenanced. As such, sub-section (1) of Section 18 of the MSMED Act, 2006 is an enabling provision which gives the party to a dispute covered under Section 17 thereof, a choice to approach the Facilitation Council, despite an arbitration agreement existing between the parties. Absence of the word 'agreement' in*

the said provision could neither be construed as casus omissus in the statute nor be construed as a preclusion against the party to a dispute covered under Section 17 to approach the Facilitation Council, on the ground that there is an arbitration agreement existing between the parties. In fact, it is a substantial right created in favour of the party under the said provision. It is therefore held that no party to a dispute covered under Section 17 of the MSMED Act, 2006 would be precluded from making a reference to the Facilitation Council under Section 18(1) thereof, merely because there is an arbitration agreement existing between the parties.

29. *The aforesaid legal position also dispels the arguments advanced on behalf of the counsel for the buyers that the Facilitation Council having acted as a Conciliator under Section 18(2) of the MSMED Act, 2006 itself cannot take up the dispute for arbitration and act as an Arbitrator. Though it is true that Section 80 of the Arbitration Act, 1996 contains a bar that the Conciliator shall not act as an Arbitrator in any arbitral proceedings in respect of a dispute that is subject of conciliation proceedings, the said bar stands superseded by the provisions contained in Section 18 read with Section 24 of the MSMED Act, 2006. As held earlier, the provisions contained in Chapter-V of the MSMED Act, 2006 have an effect overriding the provisions of the Arbitration Act, 1996. The provisions of Arbitration Act, 1996 would apply to the proceedings conducted by the Facilitation Council only after the process of conciliation initiated by the council under Section 18(2) fails and the council either itself takes up the dispute for arbitration or refers to it to any institute or centre for such arbitration as contemplated under Section 18(3) of the MSMED Act, 2006.*

30. When the Facilitation Council or the institution or the centre acts as an Arbitrator, it shall have all powers to decide the disputes referred to it as if such arbitration was in pursuance of the arbitration agreement referred to in sub-section (1) of Section 7 of the Arbitration Act, 1996 and then all the trappings of the Arbitration Act, 1996 would apply to such arbitration. It is needless to say that such Facilitation Council/institution/centre acting as an arbitral tribunal would also be competent to rule on its own jurisdiction like any other arbitral tribunal appointed under the Arbitration Act, 1996 would have, as contemplated in Section 16 thereof.

31. One of the submissions made by the Ld. Counsels for the Buyers was that if the party Supplier was not the “supplier” within the meaning of Section 2(n) of the MSMED Act, 2006 on the date of the contract entered into between the parties, it could not have made reference of dispute to Micro and Small Enterprises Facilitation Council under Section 18(1) of the MSMED Act, 2006 and in such cases, the Council would not have the jurisdiction to decide the disputes as an arbitrator.

32. At this juncture, a very pertinent observations made by this Court in *Silpi Industries case* (supra) on this issue are required to be reproduced: -

“26. In our view, to seek the benefit of provisions under MSMED Act, the seller should have registered under the provisions of the Act, as on the date of entering into the contract. In any event, for the supplies pursuant to the contract made before the registration of the unit under provisions of the MSMED Act, no benefit can be sought by such entity, as contemplated under MSMED Act. While interpreting the provisions of Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act,

1993, this Court, in the judgment in the case of *Shanti Conductors Pvt. Ltd. v. Assam State Electricity Board* has held that date of supply of goods/services can be taken as the relevant date, as opposed to date on which contract for supply was entered, for applicability of the aforesaid Act. Even applying the said ratio also, the appellant is not entitled to seek the benefit of the Act.....

....by taking recourse to filing memorandum under sub-

section (1) of Section 8 of the Act, subsequent to entering into contract and supply of goods and services, one cannot assume the legal status of being classified under MSMED Act, 2006, as an enterprise, to claim the benefit retrospectively from the date on which appellant entered into contract with the respondent. The appellant cannot become micro or small enterprise or supplier, to claim the benefits within the meaning of MSMED Act 2006, by submitting a memorandum to obtain registration subsequent to entering into the contract and supply of goods and services. If any registration is obtained, same will be prospective and applies for supply of goods and services subsequent to registration but cannot operate retrospectively. Any other interpretation of the provision would lead to absurdity and confer unwarranted benefit in favour of a party not intended by legislation.”

33. Following the above-stated ratio, it is held that a party who was not the “supplier” as per Section 2(n) of the MSMED Act, 2006 on the date of entering into the contract, could not seek any benefit as a supplier under the MSMED Act, 2006. A party cannot become a micro or small enterprise or a supplier to claim the benefit under the MSMED Act, 2006 by submitting a memorandum to obtain registration subsequent to entering into the contract

and supply of goods or rendering services. If any registration, is obtained subsequently, the same would have the effect prospectively and would apply for the supply of goods and rendering services subsequent to the registration. The same cannot operate retrospectively. However, such issue being jurisdictional issue, if raised could also be decided by the Facilitation Council/Institute/Centre acting as an arbitral tribunal under the MSMED Act, 2006.

34. The upshot of the above is that:

(i) Chapter-V of the MSMED Act, 2006 would override the provisions of the Arbitration Act, 1996.

(ii) No party to a dispute with regard to any amount due under Section 17 of the MSMED Act, 2006 would be precluded from making a reference to the Micro and Small Enterprises Facilitation Council, though an independent arbitration agreement exists between the parties.”

31. Learned counsel appearing for Respondent No.2 has also invited attention of this Court towards paragraph 35(IV) of the aforesaid judgment and order dated 31st October, 2022 passed by the Hon’ble Supreme Court wherein the Division Bench judgment of the High Court of Bombay, relied upon by the counsel appearing for the petitioners, has been set aside to the extent of the finding that the Facilitation Council itself could not have decided to initiate arbitration proceedings under Section 18(3) of the MSMED Act, 2006. Paragraph 35(IV) of the aforesaid judgment of the Hon’ble Supreme Court is extracted as under:-

“(IV) C.A. of 2022 (@ SLP (C) No. 31227 of 2018

(i) In this appeal, the appellant Gujarat State Petronet Ltd. (original

petitioner) has challenged the order dated 06.08.2018 passed by the High Court of Bombay, whereby the High Court held that the reference made to the Facilitation Council was maintainable in spite of the independent arbitration agreement. The High Court also held that the Facilitation Council having itself conducted the conciliation proceedings, it could not have decided to initiate arbitration proceedings under Section 18(3) of the MSMED Act, 2006.

(ii) In the instant case, the respondent no.1 i.e., Krunal Works (original respondent no.3) had invoked Section 18(1) of the MSMED Act, 2006 by approaching the Micro and Small Enterprises Facilitation Council. In the said reference, the appellant GSPL had raised an objection with regard to the jurisdiction of the Facilitation Council to entertain the reference in view of an arbitration agreement existing between the parties. The Facilitation Council had initiated conciliation proceedings between the parties, however the same having failed, the Council vide the Order dated 29.04.2015, decided to take up the dispute for arbitration. The said order was challenged by the GSPL before the Bombay High Court.

(iii) In our view, both the issues have been elaborately discussed and concluded hereinabove by holding that the reference to Facilitation Council by a party to a dispute with regard to any money due under Section 17 would be maintainable despite an independent arbitration agreement existing between the parties and that the Facilitation Council could also take up the dispute for arbitration and act as an arbitrator as contemplated under Section 18(3) of the MSMED Act, 2006 despite the bar contained in Section 80 of the Arbitration Act 1996.

(iv) The impugned order passed by the High Court, therefore to the extent it records the finding that the Facilitation Council could not have decided to initiate arbitration proceedings by itself under Section 18(3) of the MSMED Act, 2006 deserves to be set aside and is accordingly set aside.

(v) The arbitration proceedings before the Facilitation Council shall be proceeded further as per the Arbitration Act, 1996. The Appeal stands disposed of accordingly."

32. Learned counsel appearing for Respondent No.2 on the strength of the aforesaid judgments cited by him has concluded his arguments and has prayed that the writ petition filed by the petitioners may be dismissed by this Court.

Findings

33. We have considered the submissions advanced by learned counsels appearing for the parties.

34. We find that the legislature has enacted Micro, Small and Medium Enterprises Development Act, 2006 for a special purpose, that is to facilitate the promotion, development and to enhance the competitiveness of Micro, Small and Medium Enterprises and matters connected therewith or incidental thereto and that is why, Section 24 of the Act of 2006 provides that Sections 15 to 23 of the Act of 2006 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. The aforesaid Act of 2006 contains various provisions to deal with Micro, Small and Medium Enterprises and therefore, the Act of 2006 is a special law dealing with Micro, Small and Medium Enterprises and for that purpose, Section 24 of the Act of 2006 has

given overriding effect to Sections 15 to 23 of the Act of 2006.

35. Section 18(1) of the Act of 2006 provides that notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under Section 17, make a reference to the Micro and Small Enterprises Facilitation Council. Section 18(2) of the Act of 2006 provides that on receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 shall apply to such a dispute as if the conciliation was initiated under Part III of that Act. Section 18(3) of the Act of 2006 provides that where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer to it any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in Sub-section (1) of Section 7 of that Act.

36. We find that the provisions under 18 of the Act of 2006 have overriding effect in view of the provisions contained in Section 24 of the Act of 2006. The legislature in Section 18(2) of the Act of 2006 has categorically provided that the Council may either itself act as a

Conciliator or may refer the matter for conciliation to any institution providing alternate dispute resolution services and the procedure of conciliation proceedings will be carried out as per Sections 65 to 81 of the Act of 1996. Thereafter, the legislature under Section 18(3) of the Act of 2006 has given absolute discretion to the Council that in the event of failure of the conciliation proceedings either Council itself can proceed to arbitrate the dispute between the parties or Council may refer the arbitration to an institution providing alternate dispute resolution services and it has been further provided that during such arbitration the provisions of the Act of 1996 will be applicable.

37. We find that so far as the selection of forum of arbitration is concerned, the legislature has given absolute discretion to the Council that either Council itself can proceed to arbitrate the dispute between the parties or can refer the dispute for arbitration to an institution providing alternate dispute resolution services and in exercise of the said discretion the provisions of the Act of 1996 have not been made applicable. Rather after exercise of the said discretion in selection of forum of arbitration proceedings, the provisions of the Act of 1996 are made applicable in respect of procedure to be adopted by the Arbitrator.

38. We also find that the Act of 2006 is a special law and in view of the provisions made in Section 24 of the said Act, the discretion given to Council under Section 18(3) of the Act of 2006 for selecting the forum of arbitration between the parties has overriding effect and therefore, at the stage of selection of forum for arbitration by the Council the prohibition contained in Section 80 of the Act of 1996 will not be applicable.

39. We also find that Delhi High Court while dismissing the petition filed by the petitioners i.e. Arbitration Petition No.402 of 2019 has considered the issue regarding prohibition contained in Section 80 of the Act of 1996 and has concluded that the prohibition contained in 80 of the Act of 1996 will not be applicable in the case of Council selecting forum for arbitration in exercise of its powers under section 18(3) of the Act of 2006.

40. We further find that the Division Bench of this Court vide judgment and order dated 3.3.2020 rendered in Writ-C No.7785 of 2020 has decided the issue regarding applicability of prohibition contained in Section 80 of the Act of 1996 in the proceedings under Section 18(3) of the Act of 2006 and has held that the Act of 2006 is a special law and has been enacted for a special purpose and therefore, the discretion given to the Council for selecting forum for arbitration between the parties is an absolute discretion with the Council and hence, the prohibition contained in Section 80 of the Act of 1996 will not be applicable. Paragraph 62 and 63 of the aforesaid judgment rendered by the Division Bench of this Court are extracted as under:-

62. Even otherwise, as we have already discussed, Section 80 itself permits an otherwise agreement between the parties. Meaning thereby the embargo that Conciliator shall not be Arbitral Tribunal is not absolute. That being so, the mandatory and overriding effect contained in Section 18(3) and 18(4) and Section 24 of MSMED Act, 2006 cannot be whittled down by referring to a salutary principle though, in our view, no such salutary principle having force of law to the extent that a legislative provision must be read as sub-serving is recognized or available.

63. *In view of above discussion, we are clearly of the view that MASEF Council having acted as Conciliator is not barred from working as Arbitral Tribunal to arbitrate the dispute under Section 18(3) and such jurisdiction of MASEF Council has been given overriding effect by virtue of Section 18(4) and Section 24 which have to be given complete swing in the area covered by same. The argument, therefore, advanced otherwise by learned counsel for petitioner is hereby rejected. The question, formulated above, is answered against petitioner and we hold that MASEF Council is not prohibited from working as Arbitrator itself for adjudication of dispute between the parties and it is not obliged to refer the matter to any other body.*

41. We also find that the issue in respect of applicability of prohibition contained in Section 80 of the Act of 1996 in the proceedings under Section 18(3) of the Act of 2006 has already been considered and decided by the Hon'ble Supreme Court vide its judgment and order dated 31st October, 2022 rendered in SLP (C) No.12884/2020, **Gujarat State Civil Supplies Corporation Ltd. vs. Ramkrishna Foods Pvt. Ltd. and another** (along with other connected Civil Appeals), reported in **2022 SCC OnLine SC 1492**. The Hon'ble Supreme Court in paragraph 4 of the aforesaid judgment and order dated 31st October, 2022 has framed questions and Question No.(iii) framed by the Hon'ble Supreme Court is extracted as under:-

“4. xxxxx

(iii) *Whether the Micro and Small Enterprises Facilitation Council, itself could take up the dispute for arbitration and act as an arbitrator, when the council itself had conducted the conciliation*

proceedings under sub-section (2) of the Section 18 of MSMED Act, 2006 in view of the bar contained in Section 80 of the Arbitration Act, 1996.”

42. The Hon'ble Supreme Court after discussing the legal provisions of the Act of 2006 and the Act of 1996 has given answer to the aforesaid question in Paragraph No. 34 of the aforesaid judgment and order dated 31.10.2022, which is extracted as under:-

“34 (iii) The Facilitation Council, which had initiated the Conciliation proceedings under Section 18(2) of the MSMED Act, 2006 would be entitled to act as an arbitrator despite the bar contained in Section 80 of the Arbitration Act.

43. Learned counsel for the petitioners has based his arguments on the judgment and order dated 6.8.2018 rendered by the Division Bench of High Court of Bombay in **Writ Petition No.5459 of 2015, Gujrat State Petronet Ltd. vs. Micro and Small Enterprises Facilitation Council and others**, but we find that the Hon'ble Supreme Court in the aforementioned judgment and order dated 31st October, 2022 has set aside the judgment of High Court of Bombay to the extent it records finding that the Facilitation Council could not have decided to initiate arbitration proceedings by itself under Section 18(3) of the Act of 2006. Relevant portion of the aforesaid judgment dated 31st October, 2022 rendered by the Hon'ble Supreme Court, is extracted as under:-

“35.(IV)(iv) -The impugned order passed by the High Court, therefore to the extent it records the finding that the Facilitation Council could not have decided

to initiate arbitration proceedings by itself under Section 18 (3) of the MSMED Act, 2006 deserves to be set aside and is accordingly set aside.

44. We find that the legislature has enacted a special law in the form of Act of 2006 containing the special provisions in respect of Micro, Small and Medium Enterprises and further the legislature has given overriding effect to Sections 15 to 23 of the Act of 2006. Thus, the discretion given to Facilitation Council under Section 18(3) of the Act of 2006 in respect of selection of forum of arbitration between the parties is absolute and has overriding effect to any other law. Therefore, in the event of conciliation proceedings being carried out by the Council and on its failure the Council itself can proceed to arbitrate the dispute between the parties and the prohibition contained in Section 80 of the Act of 1996 will have no application in exercise of the said discretion by the Council.

45. The law in respect of the application of prohibition contained in Section 80 of the Act of 1996 has already been dealt by the Division Bench of this Court and by the Hon'ble Supreme Court in the aforementioned judgments and it has been categorically held that where Facilitation Council was itself Conciliator and in the event of conciliation proceedings being failed, the Council under Section 18(3) of the Act of 2006 itself can proceed to arbitrate the dispute and there the prohibition contained in Section 80 of the Act of 1996 will have no application.

46. So far as the second argument advanced by the learned counsel for the petitioners that Delhi International Arbitration Centre under the aegis of Delhi High Court is an expert body and is well

equipped to carry out the quality arbitration proceedings and therefore, the dispute in question should be referred to the said Arbitration Centre, is concerned, we find that the legislature has framed special law in the form of Act of 2006 to deal with various kinds of issues involved in the functioning of Micro, Small and Medium Enterprises and therefore, the legislature under the Act of 2006 has provided for constitution of the Facilitation Council comprising of the experts of the field of Micro, Small and Medium Enterprises and therefore, it is absolutely misconceived on the part of the petitioners to argue that the Facilitation Council is not well equipped to carry out the arbitration of the dispute between the petitioners and Respondent No.2. Thus, the said argument advanced by the learned counsel for the petitioners lacks merit and is rejected.

47. In view of the aforesaid reasons, we do not find any illegality or infirmity in the orders dated 11.6.2019 and 24.7.2019 passed by the Facilitation Council in Claim Petition No.402 of 2019.

48. Accordingly, the writ petition filed by the petitioners is **dismissed**.

(2023) 8 ILRA 1155

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 19.07.2023

BEFORE

**THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE ARUN KUMAR SINGH
DESHWAL, J.**

Writ-C No. 66462 of 2006

Jai Prakash Asso. Ltd.

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Sri Raghav Nayer, Bhavya Tewari, Sri Prashant Shukla, Sri Rohan Gupta, Sri Y. Verma, Sri Naveen Sinha, Sr. Advocate

Counsel for the Respondents:

C.S.C., Sri C.S. Singh, Sri R.P. Singh

Promissory Estoppel – Legitimate Expectation – Exemption from Stamp Duty – Retrospective Gazette Notification – Large Scale Infrastructure Project – Public Interest – Refund of Stamp Paid under Interim Orders – Effect of Clause (d) in Exemption Notification

Held -

Where the St. Government, by G.O. dated 18.02.2003, had in principle resolved to exempt stamp duty on public projects exceeding Rs.750 crores, and instruments were executed between 28.02.2003 to 21.07.2003 without payment of stamp duty, subsequent demand notices dated 13.08.2004 and G.O. dated 30.08.2003 insisting on stamp duty could not override the retrospective Gazette Notification dated 17.11.2007 issued under Section 9(1)(a) of the Indian Stamp Act, 1899, which granted remission from 13.02.2003. Petitioner, having invested over Rs.750 crores, was eligible for exemption as per communication dated 28.11.2007. Demand notices dated 13.08.2004, G.O. dated 30.08.2003, and the order dated 13.10.2006 quashed. Recovery proceedings and consequential certificates set aside. Amounts deposited under interim orders to be refunded; bank guarantees to be discharged. Writ allowed.

Citations Referred/Relevant:

1. Motilal Padampat Sugar Mills Co. Ltd. Vs St. of U.P., (1979) 2 SCC 409
2. Union of India Vs Godfrey Philips India Ltd., (1985) 4 SCC 369
3. St. of Bihar Vs Suprabhat Steel Ltd., (1999) 1 SCC 31
4. Kasinka Trading Vs U.O.I., (1995) 1 SCC 274
5. Shree Sidhballi Steels Ltd. Vs St. of U.P., (2011) 3 SCC 193

6. St. of Raj. Vs J.K. Udaipur Udyog Ltd., (2004) 7 SCC 673

7. Commissioner of Customs Vs Indian Oil Corporation Ltd., (2004) 3 SCC 488

8. Southern Petrochemical Industries Co. Ltd. Vs Electricity Inspector, (2007) 5 SCC 447

(Delivered by Hon'ble Siddhartha Varma, J. & Hon'ble Arun Kumar Singh Deshwal, J.)

1. Heard Sri Naveen Sinha, learned Senior Counsel assisted by Sri Rohan Gupta, learned counsel for the petitioner and Sri Nimai Das assisted by Sri Amit Kumar, learned Additional Chief Standing Counsel.

2. When the State of U.P. had incorporated the Taj Expressway Industrial Development Authority (hereinafter referred to as "Authority") under the U.P. Industrial Development Area Act, 1976 for the development of a project by which a six-lane 160 kms. expressway was to be laid down, the petitioner, which is a private developer, was transferred certain land, connecting NOIDA and Agra on the virgin area along the Yamuna river. When the transfer took place of the land from the Authority to the petitioner, agreements were entered into and as per the Government Order dated 27.2.2003, the agreements were executed on a stamp of Rs.100/-. The Government, to see that private enterprise was encouraged, had on 18.2.2003 issued a circular and had desired in principle that all transactions, for public projects, above the value of Rs. 750 crore were not to be stamped. In pursuance thereof when in favour of the petitioner 14 instruments were executed between 28.2.2003 and 21.7.2003, no stamp duty was paid. On 13.8.2004, however 14 separate notices for the 14 separate

instruments were issued for deficiency of stamps. These can be found at Annexure-18 of the writ petition, from Page Nos. 169 to 183. The petitioner challenged these notices along with the Government Order dated 30.8.2003 which had stated in so many words that till such time as there was a gazette notification u/s 9(1)(a) of the Indian Stamp Act, 1899, stamp duty had to be paid on all transactions. Aggrieved thereof, the petitioner filed the instant writ petition basing its claim on the principles of promissory estoppel and legitimate expectation.

3. The petitioner in the writ petition had stated that since the Government in principle had agreed that all private developers who were a part of the Taj Expressway Project were to be given the exemption from the depositing of the stamp duty, the Government Order dated 30.8.2003 could not be issued. The petitioner, therefore, had prayed that the notices dated 13.8.2004 be quashed and also prayed for the quashing of the Government Order dated 30.8.2003. In the meantime, while the writ petition was pending, the stamp authority (A.D.M. of Finance & Revenue) on 13.10.2006 passed orders upholding the demand as was made in the notices and therefore the order dated 13.10.2006 was also challenged. In the writ petition there was also a prayer for a command to the respondents that they may provide, as per the provisions of the Stamp Act, 1899, the advantages to the petitioner which were flowing out of the circulars of the Government Order dated 28.2.2003 and 10.4.2003.

4. From the record, we find that during the pendency of the writ petition by a gazette notification dated 17.11.2007 the State of U.P. issued a notification that if

there was an investment of Rs.750 crores or more and the project was in the public interest and if no remission etc. of the stamp duty had already been availed, then no stamp duty would be leviable. This Government notification which was dated 17.11.2007 was applied retrospectively and was made effective from 13.02.2003. The government notification which was gazetted on 17.11.2007 is being reproduced herein below:-

"The Governor is pleased to order the publication of the following English translation of the Government notification no.K.N.5-4513(1)/11-2007-500(22)-2003 dated November 17, 2007 for general information:

*No. K.N.S.5-4513(1)/11-2007-500(22)-2003 Lucknow,
Dated November 17, 2007*

In exercise of the powers under clause (a) of sub-section (1) of section 9 of the Indian Stamp Act, 1899 (Act no. 02 of 1899) as amended in its application to Uttar Pradesh, the Governor with a view to promoting large projects, having capital investment of Rupee 750 crores or more, is pleased to remit with effect from February 13, 2003, the stamp duty chargeable on the instruments of transfer under the said Act, executed for transfer of land in the interest of such project;

Provided that,-

(a) the above said remission in stamp duty on the concerned instruments shall be available in relation to the projects to which Cabinet or the sub-committee of the Cabinet on Economic Affairs, as the case may be has given approval on the recommendation of an authorized Committee constituted for the purpose under the Chairmanship of the Chief Secretary of the State Government. The

authorized Committee, before recommending reduction in, or remission from duty, shall examine the project on the criterion that-

(I) Investment of Rs. 750 crore or more is being made in the project.

(II) The Project is in the public interest.

(III) Any facility including remission of duty is necessary to be given by the State Government in the public interest, to make the project financially viable.

(b) The Principal Secretary/Secretary of the concerned department or his representative, specially nominated for this purpose, shall certify that the capital investment in the project to which the instrument relates is of Rupees 750 crores or more and due approval has been obtained from the competent level after following the laid down procedure. A certificate to this effect will be produced at the time of registration of the instrument.

(c) The said criterion shall come into force with immediate effect. But any project, in which remission or reduction has already been given prior to this notification, after taking the approval of the Cabinet or Sub-committee of the Cabinet on Economic Affairs on the recommendation of the authorized committee, need not be reviewed.

(d) Any stamp duty, which has been paid on any instrument, shall not be refunded.

(e) No remission of stamp duty shall be admissible to the entrepreneur or the developer of the project, on the instruments which are being executed for transfer of the land so obtained to any third party.

By order,
K. CHANDRAMOULI,
Pramukh Sachiv."

5. Basing his arguments on the Government notification dated 17.11.2007, learned counsel for the petitioner states that now since u/s 9(1)(a) of the Stamp Act, 1899 the notification for the waving off of the stamp duty had been issued, no demand of stamp duty which was made by the notices dated 13.8.2004 could be levied. Learned counsel for the petitioner further submitted that no stamp duty had till date been paid by the petitioner. It is also submitted that as per the order dated 11.12.2006 and the order dated 23.2.2007, passed by this Court in the instant writ petition, the petitioner had not deposited any stamp duty vis-a-vis instruments executed between 28.2.2003 and 21.7.2003. Any deposit, which was made by the petitioner vide order dated 23.2.2007, was in the form of bank guarantees. For convenience the order dated 11.12.2006 and 23.2.2007 are being reproduced as under:-

"11.12.2006

Steps taken within three drays.

C.A. file within three weeks.

R.A. file within one week.

List thereafter.

The respondents shall not take any coercive action against the petitioner."

"23.2.2007

Heard Shri R.N. Trivedi, learned Senior Counsel appearing for the petitioner and the learned Standing Counsel for the respondents.

In spite of the order dated 11.12.2006, counter affidavit has not been filed by the respondents nor the respondent no.5 has entered appearance. Today, an application for amendment has been moved wherein several orders passed by the authorities are also under challenge.

The learned Standing Counsel appearing for the respondents prays for further time to file counter affidavit to the main petition as well as to the amendment application. However, he has submitted that that the Court fee paid on the amendment application is not sufficient and the petitioner be directed to deposit certain amount as he has challenged the orders passed under the Act demanding a further stamp duty.

In view of the above, counter affidavit to the main petition as well as to the amendment application may be filed by the respondents within four weeks. Rejoinder affidavits to the same may be filed within two weeks thereafter.

List the petition after six weeks.

Meanwhile, learned counsel for the petitioner may make the deficiency of the court fee in the amendment application good. Petitioner undertakes to deposit 15 percent of the outstanding dues as per the demand through various orders challenged in the amendment application in cash and 10 percent thereof by bank guarantee within four weeks to the satisfaction of the authority concerned."

6. Learned counsel for the petitioner has categorically stated that the petitioner had invested much more than Rs. 750 crores and, therefore, was eligible for the remission as was being granted by the State Government as per the gazette notification dated 17.11.2007. To establish that the petitioner was entitled for the remission under the gazette notification, the petitioner has brought to the notice of the Court the communication of the Secretary, State of U.P. dated 28.11.2007 which clearly states that the petitioner had invested more than Rs.750 crores and was entitled for the waving off of the stamp duty as per the gazette notification dated 17.11.2007. The

communication dated 28.11.2007 is being reproduced herein under:-

"2. इस सम्बंध में मुझे यह कहने का निदेश हुआ है कि ताज एक्सप्रेसवे परियोजना की कुल लागत लगभग रु.3200.00 करोड़ है, जो रु०. 750.00 करोड़ से अधिक है। उक्त परियोजना लोकहित में है और परियोजना को वित्तीय रूप से जीवान्त बनाने हेतु राज्य सरकार द्वारा कोई सुविधा, जिसमें शुल्क में छूट भी सम्मिलित है, दिया जाना आवश्यक है। कर एवं निबन्धन अनुभाग-5 की अधिसूचना दिनांक 17.11.2007 (जो दिनांक 13.02.2003 से प्रभावी है) के प्रस्तर (ग) के अन्तर्गत दिये गये प्राविधानों से उक्त परियोजना आच्छादित है, जिसके अन्तर्गत परियोजना के लिये प्रथम चरण में होने वाले ट्रान्जेक्शन यथा-शासन/ ताज एक्सप्रेसवे प्राधिकरण से मै० जय प्रकाश इण्डस्ट्रीज लि० के पक्ष में सड़क एवम् विकास हेतु भूमि के लिये हस्तांतरित की जा रही भूमि (लगभग 4100 हेक्टेयर) पर स्टैम्प-शुल्क से छूट प्रदान करने के सम्बंध में निर्धारित प्रक्रिया का अनुसरण करने के पश्चात सक्षम स्तर से समुचित अनुमोदन दिनांक 27.02.2003 को प्राप्त कर लिया गया है।

उपर्युक्त के दृष्टिगत कर एवं निबन्धन की उपरोक्त अधिसूचना दिनांक 17.11.2007 में दिये गये प्राविधानों के अन्तर्गत ताज एक्सप्रेसवे परियोजना को स्टाम्प-शुल्क में छूट देय है।"

7. Sri Nimai Das, learned Additional Chief Standing Counsel, has submitted that such amounts which had been deposited by the petitioner before the gazette notification dated 17.11.2007, could not be refunded to the petitioner. In support thereof he has read out the paragraph-9 of the counter affidavit. Since learned Additional Chief Standing Counsel heavily relied upon paragraph-9 of the counter affidavit, the same is being reproduced hereinunder:-

"9. That the Government, vide notification dated 17.11.2007, remitted the stamp duty with retrospective effect, with effect from 13.2.2003 with a rider that any stamp duty which has been paid on any instrument, shall not be refunded. The petitioner, as stated above, has sought remission under the notification dated

17.11.2007 and has also paid stamp duty on the instrument in question under the direction of the Hon'ble Court during the pendency of the writ petition, the amount already paid towards the stamp duty is non-refundable in view of the specific condition of the remission of stamp duty."

8. Learned Additional Chief Standing Counsel also relied upon the proviso- (d) of the gazette notification dated 17.11.2007 and submitted that any stamp duty which had been paid on any instrument before the coming of the notification dated 17.11.2007 by the petitioner on its own, shall not be refunded.

9. Having heard learned counsel for the parties, we are of the view that after the gazette notification dated 17.11.2007 was published in the official gazette, the stamp duty had to be charged as per the gazette notification and the gazette notification very categorically states that any transaction, which had taken place after 13.02.2003 on any investment made by any private developer on any large public project of the State of U.P. having an investment of Rs. 750 crores or more, no stamp under the Stamp Act, 1899 would be chargeable.

10. The petitioner definitely had invested more than Rs. 750 crores as is clear from the communication of the State Government dated 28.11.2007 which has also been reproduced in this judgement. Under such circumstances, we are of the view that notices which were issued against the petitioner on 13.8.2004 cannot be sustained in the eye of law and, therefore, are being quashed. The Government Order which had given the State the authority to charge stamp duty dated 30.8.2003 vis-a-vis the petitioner is also quashed. The

impugned order dated 13.10.2006, which was passed in pursuance of the notices dated 13.8.2004 also stands quashed.

11. Needless to say that all consequential recovery certificates also stand quashed. All deposits, made by the petitioner in pursuance of the interim order dated 23.2.2007, shall be returned to the petitioner and the bank guarantees shall stand discharged.

12. For all the reasons stated above, the writ petition stands allowed.

(2023) 8 ILRA 1160
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.08.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Matters Under Article 227 No. 3275 of 2023

Chandra Rekha	...Petitioners
Versus	
State of U.P. & Ors.	...Respondents

Counsel for the Petitioners:

Nadeem Murtaza, Suryansh Singh
 Suryavanshi, Wali Nawaz Khan

Counsel for the Respondents:

G.A.

Civil Law - Essential Commodities Act, 1955 - Section 6A - Where a vehicle is seized under of the (U.P. Amendment), it is mandatory for the Collector to give the owner of the seized conveyance an option to pay a fine not exceeding the market value of the vehicle in lieu of confiscation. Failure to offer such an option vitiates the confiscation order. Both the confiscation order passed by the District Magistrate and the appellate order were quashed for having been passed in violation of the mandatory second proviso to Section 6A.

The petitioner was allowed to get the vehicle released on deposit of Rs. 3,00,000/- as fine, balancing equities as the vehicle was lying idle and causing hardship.

Case Law Discussed:

Deputy Commissioner, Dakshina Kannada District Vs Rudolph Fernandes, (2000) 3 SCC 306

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

1. Heard learned counsel for the petitioner and Shri Alok Tiwari, learned A.G.A. for respondent no. 1, 3 and 4 and has filed affidavit on their behalf which is taken on record.

Learned A.G.A. has also filed a personal affidavit on behalf of respondent no. 2 informant of the case which is taken on record.

2. Learned counsel for the petitioner submits that the petitioner is the sole proprietor of M/s Glorious Khushi Enterprises and the Tanker vehicle No. UP70JT8187 is registered in the name of the said firm. It is alleged in the recovery memo that on a tip received by the informant, vehicle of the petitioner i.e. tanker bearing No. UP70 JT 8187 was intercepted and driver of the tanker namely Ramesh and Azhar Ali were apprehended. They confessed their crime and further alleged that co-accused Ankit Sahu, Vakil Ahmad, Mukesh, Avinash and Rahul Kumar Rawat were also involved in the illicit sale-purchase of ATF who were coming behind in a Creta Car bearing No. UP78 GW 1792. The Creta Car was also intercepted and all the accused persons were arrested. The accused confessed that they steal ATF from airport and sell it in

the open market after filling it in tanker. On inspecting the tanker bearing No. UP70 JT 8187, it was found that 8500 liters of ATF was filled in it which is in contravention of Aviation Turbine Fuel (Regulation and Marketing) Order 2001 and is an offence under Essential Commodities Act 1955. The vehicles were taken into custody and the co-accused persons were also arrested.

The recovery memo dated 07.06.2022 was prepared and consequently after permission of District Magistrate, Lucknow, a case was registered as case crime No. 186/2022, under Section 6A of Essential Commodities Act 1955 P.S. Banthara, District Lucknow against the above seven named accused persons.

The investigating officer after recording the statement of the accused persons under Section 161 Cr.P.C. submitted charge sheet against seven named accused persons in the F.I.R. A separate charge sheet has also been submitted against the petitioner and one another namely Fakir Mohammad (owner of creta car).

The court of Additional Collector/Additional District Magistrate (Civil Supplies), Lucknow passed an order dated 04.01.2022 under Essential Commodities Act 1955 confiscating the tanker of the petitioner and also the creta car belonging to owner of creta car.

3. Learned counsel for the petitioner further submits that the petitioner being the sole proprietor of the firm M/s Glorious Khushi Enterprises is the actual owner of the vehicle. Tax invoice of the vehicle and registration details of the tanker vehicle are on record. The petitioner purchased a tanker vehicle after getting it financed from

SBI and is regularly paying the monthly installment. Bank statement of M/s Glorious Khushi Enterprises is on record. The vehicle is also insured from New India Assurance Company on 02.03.2023 at the current value of Rs. 25,20,000/-. The insurance papers of the vehicle are also on record.

4. Learned counsel for the petitioner further submits that the petitioner is not named in the F.I.R. Confessional statement of the accused in the police custody has no evidentiary value. No statement of any of the accused under Section 164 Cr.P.C. has been recorded before the magistrate. The petitioner moved an application for release of the vehicle, however, his release application has been rejected in a mechanical manner and the Appellate Court while rejecting the appeal has also overlooked the express provision of Section 6A of Essential Commodities Act, 1955 (UP Amendment) whereby it is incumbent upon the District Collector to give an option to pay a fine in lieu of confiscation not exceeding market price at the date of seizure of the essential commodity sought to be carried.

In support of his contention, learned counsel for the petitioner has relied on the judgment of the Supreme Court in **"Deputy Commissioner, Dakshina Kannada District Vs. Rudolph Fernandes**, reported in **(2000) 3 SCC 306"**.

5. Learned counsel for the petitioner further submits that the petitioner was not named in the F.I.R. The petitioner was not having any knowledge regarding the alleged offence committed by her driver. The offence was committed without the knowledge and connivance of the petitioner and in absence of any knowledge or connivance of the offence, the petitioner

cannot be deprived of her livelihood by means of confiscating tanker vehicle of the petitioner and such act is in violation of Article 19(1) (g) of the Constitution of India.

6. Learned counsel for the petitioner further submits that the petitioner has been charge sheeted only under Section 3/7 of Essential Commodities Act 1955 and no charge sheet has been filed under Section 120B IPC, therefore, prima facie it is not the case of the State that there was any connivance of the petitioner with the other accused persons for committing the offence. The charge sheet appears to have been filed against the petitioner only because of the fact that the vehicle of the petitioner was used in commission of the offence by the co-accused persons.

7. Learned A.G.A. has opposed the petition submitting that the petitioner has been charge sheeted. Separate charge sheets have been brought by the learned A.G.A. which have been perused by this Court.

Learned counsel for the State has submitted that since charge sheet has been filed, the cognizance may have been taken at the appropriate stage and therefore, it will be appropriate for the petitioner to move an application under Section 451 Cr.P.C. for custody and disposal of the assets/property which in this case is alleged tanker vehicle.

8. Learned counsel for the petitioner has submitted that vehicle has been seized under Essential Commodities Act, 1955 which is a Special Act and section 5 of the Cr.P.C. also contains a non obstante clause and therefore, there is no impediment for this Court in considering this option.

9. Having heard learned counsel for the parties, perusal of the record, so far as the issue of jurisdiction is concerned, I find force in the submission of learned counsel for the petitioner that the vehicle has been seized under the Special Act which in this case is Essential Commodity Act and in view of Section 5 of Cr.P.C., I am of the view that there is no impediment in entertaining the petition for the custody of the vehicle which has been confiscated under Essential Commodity Act, 1955. Definition of conveyance is provided under Section 6(A) of the Essential Commodities Act, 1955 (UP Amendment) which is extracted below:-

"6-A. (1) Where any essential commodity is seized in pursuance of an order made under Section 3 in relation thereto a report to this effect shall, without any unreasonable delay, be sent to the Collector of the district in which the seizure is made, and the Collector may, if he thinks it expedient so to do, inspect or cause to be inspected such essential commodity and whether or not a prosecution is Instituted for the contravention of such order. the Collector, if satisfied that there has been contravention of the order. may order confiscation of,-

(a) the essential commodity so seized:

(b) any package, covering or receptacle in which essential commodity is found: and

c) any animal, vehicle, vessel or other conveyance used in carrying such essential commodity:

Provided that, without prejudice to any action that may be taken under any

other provision of this Act. no foodgrains or edible oilseeds seized in pursuance of an order made under Section 3 In relation thereto from a producer shall, if the seized foodgrains or edible oilseeds have been produced by him, be confiscated under this section.

Provided further that where any animal, vessel or other conveyance is used for the carriage of goods or passengers for hire, the owner of such animal. vehicle, vessel or other conveyance shall be given an option to pay in lieu of its confiscation a fine not exceeding the market price at the date of seizure of the essential commodity sought to be carried

(2) Where the Collector on receiving a report or on inspection of any essential commodity under sub-section (1) is of the opinion that such essential commodity is subject to speedy and natural decay or that it is otherwise expedient in the public interest so to do, he may order the same to be sold at the controlled price, if any, fixed under any law for the time being in force, or where no such price is fixed. by auction:

Provided that, in the case of foodgrains, where there is no controlled price, the Collector may order the foodgrains seized to be sold through fair price shops at the price fixed by the Central Government, or the State Government, as the case may be. for the sale of such foodgrains to the public through these shops:

Provided also that whenever it is practicable so to do having regard to the nature of the essential commodity he shall take and preserve sample of the same before its sale or auction.

(3) *Where any essential commodity is sold as aforesaid, the sale-proceeds, thereof after deduction of the expenses of the sale or auction, as the case may be, shall,-*

(a) *where no order of confiscation is ultimately passed by the Collector: or*

(b) *where an order passed on appeal under sub-clause [1] of Section 6-C so requires: or*

(c) *in the case of prosecution being instituted for the contravention of the order in respect of which an order of confiscation has been made under this section, where the person concerned is acquired, be paid to the owner thereof or the person from whom it is seized:*

Provided that in the case of foodgrains sold through fair price shops in accordance with the first proviso to sub-section (2) the owner shall be paid for the foodgrains so sold the price fixed by the State Government, for retail sale of such foodgrains through such shops less all expenses of sale or auction under sub-section (2)."

Section 6A (1)(c) empowers the collector to confiscate the vehicle or other conveyance used in carrying essential commodity. The second proviso to Section 6A further casts a mandatory duty upon the collector to give an option to the owner of such vehicle which has been confiscated to pay a fine in lieu of its confiscation not exceeding the market price on the date of seizure of the essential commodity. The above proviso is mandatory.

Perusal of the impugned order passed by the District Magistrate reveals

that although reference of Section 6A of Essential Commodity Act, 1955 has been given in the order, however, it is admitted case of prosecution that no option under Section 6(A) of Essential Commodities Act 1955 has been given to the owner of the vehicle to pay a fine. The appellate order appears to have been passed in a mechanical manner ignoring the fact that specific ground has been taken by the appellant that in Second Proviso to Section 6(A) of Essential Commodity Act, 1955 there is an option to pay a fine. The impugned order has been passed by the District Collector by overlooking the Second Proviso to Section 6(A) of Essential Commodity Act, 1955, still the Appellate Court proceeded to decide the appeal in a mechanical and cursory manner without giving any finding to the specific ground raised by the petitioner/appellant before the Appellate Court.

The proviso is clear. It was incumbent upon the District Collector as well as to the Appellate Authority to provide/give an option to the petitioner who is the owner of the tanker vehicle No. UP70-JT-8187 in lieu of his confiscation to pay a fine below the market price of the vehicle.

The Supreme Court in the case of Deputy Commissioner (supra) inn para 9 has held that owner of the vehicle is to be given an option to pay a fine in lieu of the confiscation of the conveyance not exceeding the market price of the of the conveyance. Para 9 of the said judgment is extracted below:-

9. The Court observed that though the language of the aforesaid proviso is clear, the idea sought to be conveyed under the proviso to Section 6-A(1) of the Act appears to be the same. In

our view, the analogy drawn by the High Court is erroneous because the proviso specifically mentions that where any such conveyance is used as a means of transport in the smuggling of goods, the owner of any conveyance is to be given an option to pay in lieu of the confiscation of the conveyance, a fine not exceeding the market price of the goods which are sought to be smuggled. The explanation provides that the market price means market price at the date when the goods are seized. As against this, Section 6-A second proviso does not refer to payment of fine not exceeding the market price of the essential commodity but apparent reference is to a fine not exceeding the market price of the vehicle sought to be confiscated. This appears to be obvious because in a case where the market price of the seized essential commodity is more than the price of the conveyance then the owner of the conveyance would not come forward to take it back if he is asked to pay something more than its market price. Similarly, when the market price of the seized vehicle is much more than of the essential commodity, it cannot be said that instead of confiscation it should be released at a price which is less than its market price. Further it is required to be noted that under Section 6-B(2) no order confiscating the vehicle or other conveyance can be passed if the owner proves to the satisfaction of the competent authority that it was used in carrying the essential commodity without his knowledge or connivance.

10. In view of the above discussions, the petition is **allowed**. The impugned judgment and order dated 01.06.2023 passed by the Court of District and Sessions Judge, Lucknow as well as the impugned order dated 04.11.2022 passed by the Additional District Magistrate (Civil

Supplies), Lucknow in case No. 186/2022, under Section 6(A) of Essential Commodities Act 1955, contained in Annexure No. 1 and Annexure No. 2 to the petition are quashed.

11. So far as payment of fine is concerned, this Court has taken note of the fact that ATF 8500 liters as per FIR was approximately amounting to Rs. 10,45,000/- and as per order dated 10.05.2013, it is evident that the said seized ATF was auctioned and the amount has been deposited in the treasury. As per insurance receipt, the vehicle has been valued at Rs. 25,20,000/-, considering the amount already received by the State out of the sale of ATF oil, the vehicle is lying idle in the concerned police station since 07.06.2022; more than one year has passed and there is no earning to the petitioner from the said vehicle, coupled with the fact that the petitioner are also paying heavy installments which is evident from perusal of the statement of the firm belonging to SBI Bank which is on record as Annexure No. 8 to the petition, in order to balance the equities, it is provided that the petitioner shall deposit a sum of Rs. 3,00,000/- as fine before opposite party no. 3 under Section 6(A) of Essential Commodities Act, 1955. Upon deposit of the said amount, opposite party no. 3 shall release the vehicle of the petitioner bearing No. UP70 JT 8187 forthwith.

12. The vehicle of the petitioner shall be released subject to the undertaking given by the petitioner that as long as the trial under the Essential Commodities Act 1955 is pending, she shall not alienate the vehicle or create any third party interest and shall produce the vehicle as and when required by the Court.

2. By means of the instant application filed under Section 482 Cr.P.C, the petitioner has challenged validity of the order dated 28.05.2019 passed by the Learned Special Judge, Anti-Corruption, C.B.I (West), Lucknow in Criminal Case No. 545 of 2017, whereby the application dated 07.03.2019 filed by the petitioner challenging the prosecution sanction order

dated 26.10.2017 passed by the Vice Chancellor of the University has been rejected.

3. The petitioner was working as a Professor in the University since 25.06.2011. Sri. Ved Kumar, who was working as an Assistant Professor in the University on contractual basis, filed a Complaint dated 31.05.2017 against Vijay Kumar Dwivedi, an outsourced private staff engaged by a private firm M/s Shri Sai Nath Associates and working at the University, alleging a demand of illegal gratification of Rs.50,000/- for extension of the complainant's contract of service beyond 31.05.2017. In furtherance of the aforesaid complaint, an F.I.R. bearing R.C. No. 0062017A0012 dated 02.06.2017 was lodged under Section 7 of the Prevention of Corruption Act, 1988 in Police Station C.B.I/A.C.B/ Lucknow. The petitioner was not named in the complaint or in the F.I.R.

4. A trap was laid on 02.06.2017 and the named accused Vijay Dwivedi was caught red-handed while demanding and accepting Rs.50,000/- bribe from the complainant for extension of his contract of service. The accused Vijay Dwivedi said that he had demanded and accepted the bribe on behalf of the petitioner, who had directed him to collect Rs.50,000/- as bribe from each of the Assistant Professors working on contractual basis, who wanted to get their service tenure extended. Two telephonic conversations were arranged and recorded between the petitioner and Vijay Dwivedi, in which the petitioner acknowledged the information given by Vijay Dwivedi that he had collected the money from various teachers. A file marked Extension of Contractual Faculty was recovered from the office of the petitioner.

5. After completion of investigation, on 01.08.2017 the C.B.I. filed a charge-sheet against the petitioner and Vijay Dwivedi alleging commission of offences under Section 120-B I.P.C. and Sections 7 and 13(2) read with Section 13(1)(d) of Prevention of Corruption Act, 1988.

6. Sanction under Section 19 of the Prevention of Corruption Act, 1988 for the Prosecution of the petitioner was accorded by the Vice Chancellor of the University on 26.10.2017.

7. On 05.07.2018, the Learned Special Judge, Anti-Corruption, C.B.I. (West), Lucknow, took cognizance of commission of the offences on the basis of the Sanction Order dated 26.10.2017 and it proceeded with the trial.

8. On 08.01.2019, the trial Court started recording the examination-in-chief of PW-1 Sri. R. C. Sobati, Vice-Chancellor of the University - the person who had issued the order sanctioning prosecution of the petitioner, and his cross-examination also started on the same date, which was concluded on 21.01.2019.

9. On 07.03.2019 the petitioner filed an application before the trial Court challenging validity of the sanction order dated 26.10.2017 on the ground that sanction for prosecution can be granted only by the appointing authority of the petitioner, which is the Board of Management of the University. The Vice-Chancellor of the University is not the petitioner's appointing authority and the prosecution sanction granted by the Vice-Chancellor was without authority.

10. The petitioner's application challenging validity of the prosecution sanction order was rejected by the trial

Court vide order dated 28.05.2019, on the ground that the Vice-Chancellor had passed prosecution sanction order on behalf of the Board of Management of the University.

11. Assailing the order dated 28.05.2019, Sri Pranjali Krishna, the learned Counsel for the petitioner, has submitted that the Board of Management of the University is the authority who can appoint/remove a permanent teacher in the University and the Board alone is competent for granting sanction for prosecution. In the present case, prosecution sanction has been granted by the Vice Chancellor of the University and he is not the Competent Authority under the provision of Act and Statute of the University.

12. Per Contra, Shri Anurag Kumar Singh, the learned Counsel for the respondent no. 1 – C.B.I. and Dr. V. K. Singh, the learned Counsel for the respondent no. 2 – University, have submitted that the sanction for prosecution of the petitioner was granted by the Board of Management of the University in its 62nd meeting and the Vice-Chancellor had merely implemented the decision of the Board of Management. Subsequently the Board of Management had ratified the decision in its 63rd Meeting.

13. Dr. V. K. Singh, the learned Counsel for the University has submitted that Section 12 (3) of the Babasaheb Bhimrao Ambedkar University Act, 1994 authorizes the Vice Chancellor for taking decision on behalf of the Board Of Management, in case of urgency. The Vice Chancellor duly deliberated the issue with the Members of the Board Of Management by circulation, took their consent and proceeded to grant the permission for

initiation of the prosecution under Section 19 of the Act of 1988.

14. The learned Counsel for the petitioner relied upon the judgments of the Hon'ble Supreme Court in **R. S. Nayak Vs. A. R. Antulay**, (1984) 2 SCC 183, **Nanjappa v. State of Karnataka**, (2015) 14 SCC 186, **CBI v. Ashok Kumar Aggarwal** (2014) 14 SCC 295, **State (Inspector of Police) v. Surya Sankaram Karri**, (2006) 7 SCC 172 and **State of Goa v. Babu Thomas**, (2005) 8 SCC 130..

15. In **R. S. Nayak Vs. A. R. Antulay**, (1984) 2 SCC 183, the Hon'ble Supreme Court held that: -

“23....The Legislature advisedly conferred power on the authority competent to remove the public servant from the office to grant sanction for the obvious reason that that authority alone would be able, when facts and evidence are placed before him to judge whether a serious offence is committed or the prosecution is either frivolous or speculative. That authority alone would be competent to judge whether on the facts alleged, there has been an abuse or misuse of office held by the public servant. That authority would be in a position to know what was the power conferred on the office which the public servant holds, how that power could be abused for corrupt motive and whether prima facie it has been so done. That competent authority alone would know the nature and functions discharged by the public servant holding the office and whether the same has been abused or misused. It is the vertical hierarchy between the authority competent to remove the public servant from that office and the nature of the office held by the public servant against whom sanction is

sought which would indicate a hierarchy and which would therefore, permit inference of knowledge about the functions and duties of the office and its misuse or abuse by the public servant. That is why the Legislature clearly provided that that authority alone would be competent to grant sanction which is entitled to remove the public servant against whom sanction is sought from the office.”

16. In **Nanjappa v. State of Karnataka**, (2015) 14 SCC 186, the trial Court had held that the authority who had granted the sanction, was not competent to do so and this finding of fact was not disputed before the High Court or before the Supreme Court. However, having recorded the aforesaid finding, the trial court passed an order of acquittal on the merits of the case. The Hon’ble Supreme Court held that the trial Court having held the sanction to be invalid, it should have discharged the accused rather than acquitting him. In this factual backdrop, the Hon’ble Supreme Court held that “The question regarding validity of such sanction can be raised at any stage of the proceedings.”

17. The relevant passage of **CBI v. Ashok Kumar Aggarwal** (2014) 14 SCC 295, relied upon by the learned Counsel for the petitioner is as follows: -

“58. The most relevant issue involved herein is as at what stage the validity of sanction order can be raised. The issue is no more res integra. In Dinesh Kumar v. Airport Authority of India (2012) 1 SCC 532 this Court dealt with the issue and placing reliance upon the judgment in Parkash Singh Badal v. State of Punjab (2007) 1 SCC 1, came to the conclusion as under :

“13. In our view, having regard to the facts of the present case, now since cognizance has already been taken against the appellant by the trial Judge, the High Court cannot be said to have erred in leaving the question of validity of sanction open for consideration by the trial court and giving liberty to the appellant to raise the issue concerning validity of sanction order in the course of trial. Such course is in accord with the decision of this Court in Parkash Singh Badal”

59. Undoubtedly, the stage of examining the validity of sanction is during the trial and we do not propose to say that the validity should be examined during the stage of inquiry or at pre-trial stage.”

18. In **State (Inspector of Police) v. Surya Sankaram Karri**, (2006) 7 SCC 172, the Hon’ble Supreme Court held that “When a sanction is granted by a person not authorised in law, the same being without jurisdiction, would be a nullity.”

19. There can be no dispute regarding the aforesaid proposition of law, but this principle was reiterated by the Hon’ble Supreme Court while deciding an Appeal filed against a judgment and order passed by the High Court of Andhra Pradesh in an appeal filed against an order of conviction, in the factual backdrop that the authority who had passed the sanction order had accepted in his examination in chief that under the rules although he was not the competent authority to remove the accused from service, he had been delegated with power of removing him. However, the Supreme Court recorded in para 23 of the judgment that “The purported delegation of power had never seen the light of the day. No reliance thereupon could have been placed to arrive at a finding that the said

witness was authorised to accord sanction. The learned Special Judge did not apply his mind to these aspects of the matter at all.”

20. The learned Counsel for the petitioner has relied upon the decision of the Hon’ble Supreme Court in *State of Goa v. Babu Thomas*, (2005) 8 SCC 130, wherein undisputedly the sanction for prosecution of the respondent was granted by the Company Secretary whereas the authority competent to remove the respondent from the post he was holding was the Board of Directors. There was no order/resolution of the Board of Directors of the Company authorising the Company Secretary to convey the sanction order passed by the Board of Directors. Pursuant to the sanction order dated 02.01.1995, cognizance was taken on 29-5-1995. Another sanction order dated 07.09.1997 was issued by the Chairman and Managing Director of Goa Shipyard Company Ltd. after cognizance was taken on 29.05.1995 and it stated that in exercise of the powers vested and on behalf of the Board of Directors, sanction was accorded to prosecute the respondent retrospectively with effect from 14.09.1994. In the aforesaid factual backdrop, the Hon’ble Supreme Court held that: -

“12. As already noticed, the sanction order is not a mere irregularity, error or omission. The first sanction order dated 2-1-1995 was issued by an authority that was not a competent authority to have issued such order under the Rules. The second sanction order dated 7-9-1997 was also issued by an authority, which was not competent to issue the same under the relevant rules, apart from the fact that the same was issued retrospectively w.e.f. 14-9-1994, which is bad. The cognizance was taken by the Special Judge on 29-5-1995.

Therefore, when the Special Judge took cognizance on 29-5- 1995, there was no sanction order under the law authorising him to take cognizance. This is a fundamental error which invalidates the cognizance as without jurisdiction.”

21. A copy of the agenda and the minutes of the 62nd emergent meeting of the Board of Management of the University held on 08.09.2017 have been annexed with the counter affidavit filed on behalf of the university. The sole agenda of the meeting was “to consider the issuance of the sanction of prosecution sought for the C.B.I. in CBI Case No. RC0062017A0012 against Dr. Vipin Saxena, Professor, Deptt. Of Computer Science and Honorary Director, University Institute of Engineering and Technology, BBAU, Lucknow”. It was mentioned in the agenda that a copy of the letter dated 01.08.2017 received from the C.B.I. had been placed with the agenda and the Vice Chancellor had requested all the members of the Board of Management to send their concurrence / comments within 14 days. The response obtained from 5 members was appended to the agenda. One member, namely Prof. Raghuvendra Tanwar, had communicated that the Vice-Chancellor can take a decision in his wisdom and inform the Board of Management accordingly. Another member Prof. Ajay Kumar Jha wrote that keeping in view the gravity of the situation, the Vice-Chancellor as “... Principal executive and academic head of the University” can give permission to the C.B.I. to proceed ahead as per their opinion on this case enclosed in the given letter and thereafter report the matter to the Board of Management in its next meeting. Yet another member Prof. Vidya Sharda categorically wrote that “I give my concurrence for prosecution of Dr. Vipin Saxena”.

22. The 62nd meeting of the Board of Management held on 08.09.2017 was attended by only 6 members as against the requisite quorum of 7 members and all the members present were in favour of giving sanction for prosecution of the petitioner. The Vice-chancellor had asked for consent of the members of the Board by circulation and Prof. Vidya Sharda, who was not present in the meeting, had categorically communicated in writing her concurrence for prosecution of the petitioner. Two other members Prof. Raghuvendra Tanwar and Prof. Ajay Kumar Jha wrote that keeping in view the gravity of the situation, the Vice-Chancellor can give permission to the C.B.I. to proceed ahead as per their opinion on this case enclosed in the given letter and thereafter report the matter to the Board of Management in its next meeting.

23. Thus it appears that the sanction was accorded by the Board of Management keeping in view the opinion of majority of the members of the Board of Management, not less than the prescribed quorum of 7 members and, therefore, the sanction order is not illegal or without authority for the reason that quorum was not complete in the 62nd meeting of the Board of Management held on 08.09.2017.

24. The sanction order dated 26.10.2017 issued under the signature of the Vice-Chancellor of the University mentions that *“after carefully examining the material placed before it, including the statements recorded under Sections 161 and 164 Cr.P.C. and other relevant material regarding the allegations and taking into account the facts and circumstances of the case and on being fully satisfied, the Board of Management considers that the said Dr. Vipin Saxena, Prof. Department of Computer Sciences,*

the then Honorary Director of UIET, BBAU (U.P.) should be prosecuted in the Court of law for the said offences.

Now, therefore, the Board of Management of Babasaheb Bhimrao Ambedkar University, Lucknow, hereby accord sanction under Section 19 of the Prevention of Corruption Act, 1988 for prosecution of the said Dr. Vipin Saxena, Prof. Department of Computer Sciences, the then Honorary Director of UIET, BBAU (U.P.) for the offences under Section 120-B of I.P.C., Section 7 & 13 (2) r/w 13 (1) (d) of the Prevention of Corruption Act, 1988 and any other offence as the Hon'ble Court desired fir in respect of the aforesaid acts and for taking cognizance of the said offences by a court of competent jurisdiction”.

25. The minutes of the 62nd emergent meeting held on 08.09.2017 regarding grant of sanction for prosecution of the petitioner was confirmed by the Board of Management in its 63rd meeting. Therefore, the sanction order was approved by the Board of Management and the irregularity, if any, for the reason of want of quorum in the 62nd meeting, stood cured in the 63rd meeting held on 14.11.2017, much prior to 05.07.2018, when the trial Court took cognizance of the offence.

26. Moreover, Section 12(3) of the Babasaheb Bhimrao Ambedkar University Act, 1994, provides as follows: -

“12(3).The Vice-Chancellor may, if he is of opinion that immediate action is necessary on any matter, exercise any power conferred on any authority of the University by or under this Act and report to such authority the action taken by him on such matter

Provided that if the authority concerned is of opinion that such action ought not to have been taken, it may refer the matter to the Visitor whose decision thereon shall be final.

Provided further that any person in the service of the University who is aggrieved by the action taken by the Vice-Chancellor under this sub-section shall have the right to appeal against such action to the Board of Management within three months from the date on which decision on such action is communicated to him and thereupon the Board of Management may confirm, modify or reverse the action taken by the Vice-Chancellor."

(Emphasis Supplied)

27. The Vice Chancellor has the statutory power to exercise the powers of any authority of the University, which obviously would include the Board of Management of the University, in certain situations mentioned in Sub-section (3) of Section 12. It was open for the Board of Management to have disapproved the action of the Vice-Chancellor and in that case, the Board of Management could have referred the matter to the Visitor of the University, but the Board of Management chose not to disapprove the action of the Vice-Chancellor, rather the decision taken in the 62nd meeting of the Board of Management, in furtherance whereof the Vice-Chancellor had issued the Sanction Order dated 26.10.2017, was confirmed in the 63rd meeting held on 14.11.2017. The sanction order was issued in accordance with the statutory power conferred upon the Vice-Chancellor by Section 12(3) of the Babasaheb Bhimrao Ambedkar University Act, 1994 and it was not without jurisdiction.

28. Therefore, the facts of the present case are different from the facts of the cases cited by the learned Counsel for the petitioner and the principle of law stated in the aforesaid case would not apply to the facts of the present case.

29. Prior to enactment of the Prevention of Corruption Act, 1988, the law governing the field was the Prevention of Corruption Act, 1947 and Section 6 of the 1947 Act contained the following provision regarding requirement of sanction for prosecution: -

"6. Previous sanction necessary for prosecutions.-

(1) No Court shall take cognizance of an offence punishable under Section 161 or Section 164 or Section 165 of the Indian Penal Code or under sub-section (2) or sub-section (3A) of Section 5 of this Act, 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 the Central 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 the State 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 whether the

previous sanction as required under sub - section (1) should be given by the Central or 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.”

30. However, the 1947 Act was replaced by the 1988 Act and Section 19 of the Prevention of Corruption Act, 1988, as it applies to the State of Uttar Pradesh, contains the following provision regarding requirement of previous sanction for prosecution: -

“19. Previous sanction necessary for prosecution.—(1) No court shall take cognizance of an offence punishable under Sections 7, 11, 13 and 15] alleged to have been committed by a public servant, except with the previous sanction save as otherwise provided in the Lokpal and Lokayuktas Act, 2013,—

(a) in the case of a person who is employed, or as the case may be, was at the time of commission of the alleged offence 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, or as the case may be, was at the time of commission of the alleged offence 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.

(d) Notwithstanding anything contained in clause (c), the State Government may, where it considers necessary so to do, require the authority referred to in clause (c), to give previous sanction within the period specified in this behalf and if the said authority fails to give the previous sanction within such period, the previous sanction may be given by the State Government.

Explanation.—(1) For the purpose of this clause “authority” does not include any authority under the control of the Central Government.

(2) For removal of doubts it is hereby declared that the power of the State Government under this clause may be exercised also in a case where the authority referred to in clause (c) has earlier refused to give the previous sanction.”

Provided that no request can be made, by a person other than a police officer or an officer of an investigation agency or other law enforcement authority, to the appropriate Government or competent authority, as the case may be, for the previous sanction of such Government or authority for taking cognizance by the court of any of the offences specified in this sub-section, unless—

(i) such person has filed a complaint in a competent court about the alleged offences for which the public servant is sought to be prosecuted; and

(ii) *the court has not dismissed the complaint under Section 203 of the Code of Criminal Procedure, 1973 (2 of 1974) and directed the complainant to obtain the sanction for prosecution against the public servant for further proceeding:*

Provided further that in the case of request from the person other than a police officer or an officer of an investigation agency or other law enforcement authority, the appropriate Government or competent authority shall not accord sanction to prosecute a public servant without providing an opportunity of being heard to the concerned public servant:

Provided also that the appropriate Government or any competent authority shall, after the receipt of the proposal requiring sanction for prosecution of a public servant under this sub-section, endeavour to convey the decision on such proposal within a period of three months from the date of its receipt:

Provided also that in case where, for the purpose of grant of sanction for prosecution, legal consultation is required, such period may, for the reasons to be recorded in writing, be extended by a further period of one month:

Provided also that the Central Government may, for the purpose of sanction for prosecution of a public servant, prescribe such guidelines as it considers necessary.

Explanation.—For the purposes of sub-section (1), the expression “public servant” includes such person—

(a) who has ceased to hold the office during which the offence is alleged to have been committed; or

(b) who has ceased to hold the office during which the offence is alleged to have been committed and is holding an office other than the office during which the offence is alleged to have been committed.

(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.”

31. A bare perusal of the aforesaid two statutory provisions indicate that previously there was no need to examine whether a failure of justice has been caused by any error, omission or irregularity in the sanction order but in the 1988 Act, the Courts have been prohibited from interfering on the ground of any error, omission or irregularity in the sanction order, unless it has resulted into a failure of justice.

32. Sri. Anurag Kumar Singh, the learned Counsel for the respondent no. 1 – C.B.I., has relied upon a decision of the Hon’ble Supreme Court in **State of Bihar**

v. Rajmangal Ram, (2014) 11 SCC 388, wherein **Babu Thomas** (Supra) was distinguished. The Hon’ble Supreme quoted Section 19 of the Prevention of Corruption Act (which has already been quoted above) and Section 465 of the Cr.P.C., which is as follows: -

“465. Finding or sentence when reversible by reason of error, omission or irregularity.—(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered by a court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.”

(Emphasis supplied)

The Hon’ble Supreme Court held that: -

“6. In a situation where under both the enactments any error, omission or irregularity in the sanction, which would also include the competence of the

authority to grant sanction, does not vitiate the eventual conclusion in the trial including the conviction and sentence, unless of course a failure of justice has occurred, it is difficult to see how at the intermediary stage a criminal prosecution can be nullified or interdicted on account of any such error, omission or irregularity in the sanction order without arriving at the satisfaction that a failure of justice has also been occasioned. This is what was decided by this Court in State v. T. Venkatesh Murthy (2004) 7 SCC 763 wherein it has been inter alia observed that :

“14. ... Merely because there is any omission, error or irregularity in the matter of according sanction, that does not affect the validity of the proceeding unless the court records the satisfaction that such error, omission or irregularity has resulted in failure of justice.”

(emphasis in original)

7. The above view also found reiteration in Parkash Singh Badal v. State of Punjab (2007) 1 SCC 1 wherein it was, inter alia, held that mere omission, error or irregularity in sanction is not to be considered fatal unless it has resulted in failure of justice. In Parkash Singh Badal it was further held that Section 19(1) of the PC Act is a matter of procedure and does not go to the root of jurisdiction...”

8. There is a contrary view of this Court in State of Goa v. Babu Thomas (2005) 8 SCC 130 holding that an error in grant of sanction goes to the root of the prosecution. But the decision in Babu Thomas has to be necessarily understood in the facts thereof, namely, that the authority itself had admitted the invalidity of the

initial sanction by issuing a second sanction with retrospective effect to validate the cognizance already taken on the basis of the initial sanction order. Even otherwise, the position has been clarified by the larger Bench in State of M.P. v. Virender Kumar Tripathi(2009) 15 SCC 533.”

33. The expression “failure of justice” occurring in Section 19 of the 1988 Act has been explained by the Hon’ble Supreme Court in **CBI v. Ashok Kumar Aggarwal** (Supra), in the following words: -

“19. The court must examine whether the issue raised regarding failure of justice is actually a failure of justice in the true sense or whether it is only a camouflage argument. The expression “failure of justice” is an extremely pliable or facile an expression which can be made to fit into any case. The court must endeavour to find out the truth. There would be “failure of justice” not only by unjust conviction but also by acquittal of the guilty as a result of unjust or negligent failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and safeguarded but they should not be overemphasised to the extent of forgetting that the victims also have certain rights. It has to be shown that the accused has suffered some disability or detriment in the protections available to him under the Indian criminal jurisprudence. “Prejudice” is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial and not matters falling beyond their scope. Once the accused is able to show that there has been serious prejudice caused to him with respect to either of these aspects, and that

the same has defeated the rights available to him under legal jurisprudence, the accused can seek relief from the court.”

34. The petitioner could not point out as to what disability or detriment in the protections available to him in relation to investigation or trial has been suffered by him by the prosecution sanction order passed by the Vice-Chancellor and to satisfy that a failure of justice has been caused to him by the prosecution sanction order passed against him.

35. Sanction was accorded by the Board of Management for prosecution of the petitioner in its 62nd meeting held on 08.09.2017, keeping in view the opinion of majority of the members of the Board of Management. The minutes of the 62nd emergent meeting held on 08.09.2017 regarding grant of sanction for prosecution of the petitioner was confirmed by the Board of Management in its 63rd meeting. Therefore, the sanction order was approved by the Board of Management and the irregularity, if any, for the reason of want of quorum in the 62nd meeting, stood cured in the 63rd meeting held on 14.11.2017, much prior to 05.07.2018, when the trial Court took cognizance of the offence. Therefore, there appears to be nothing which could have caused a failure of justice in the present case.

36. Moreover, after the trial Court took cognizance of the offence on 05.07.2018, examination-in-chief of PW-1 started on 08.01.2019 and his cross-examination also started on the same date, which was concluded on 21.01.2019. The petitioner filed the application for declaring the prosecution sanction to be invalid only on 07.03.2019, which was rejected by means of an order dated 28.05.2019. The

application under Section 482 Cr.P.C. challenging the validity of the order dated 28.05.2019 was filed on 06.02.2020. The petitioner could and should have filed the objections against the sanction order immediately after passing of the sanction order and the cognizance order, but he did not do so. He decided to challenge the sanction order only after recording of the examination in chief and cross examination of PW-1. Although there is no bar against the petitioner challenging the order of sanction after recording of statement of the Sanctioning Authority, the delay in challenging the sanction order indicates that petitioner did not suffer any failure of justice from the sanction order passed by the Vice-Chancellor.

37. The learned Counsel for the petitioner has next submitted that the entire material was not placed before the members of the Board of Management and they did not have the occasion to apply their mind to the material, which vitiates the order. He has also submitted that the sanction order is a verbatim reproduction of the draft sanction order sent by the C.B.I., which indicates a non-application of mind by the authority passing the order.

38. It appears from the material on record that it was mentioned in the agenda that a copy of the letter dated 01.08.2017 received from the C.B.I. had been placed with the agenda and the Vice Chancellor had requested all the members of the Board of Management to send their concurrence / comments within 14 days. A copy of the letter dated 01.08.2017 has been annexed as Annexure No. 1 to counter affidavit filed on behalf of the University, which contains a report prepared by the C.B.I. containing the background of the case, the allegations made in the F.I.R., the result of

investigation, a summary of investigation, including relevant extracts of telephonic conversations, the statements of the accused persons and the draft sanction order.

39. Although one of the members Smt. Anju Bala had written that she needed certified copies of the documents along with their enclosures, she did not write that the enclosures of the letter were not provided to her. Another member Prof. Vidya Sharda had communicated that “After a careful perusal of the relevant documents attached with the aforementioned letter, in my capacity as a member of the Board of Management of the esteemed institution, B.B.A.U., I give my concurrence for prosecution of Dr. Vipin Saxena.”, which indicates that the relevant documents had been with the letter sent to the members of the Board. No member complained that the entire material was not provided to him.

40. Therefore, I am unable to accept the submission of the learned Counsel for the petitioner that the complete material was not placed before the members of the Board of Management. Moreover, the contents of the sanction order being similar to the contents of the draft order is also not indicative of non-application of mind, as there is no need to use different contents in the sanction order, unless the sanctioning authority is not agreeable with the contents of the draft order.

41. The learned Counsel for the petitioner lastly submitted that it is settled law that whenever a manner is prescribed for doing a thing, the thing has to be done in that manner alone and the other modes of doing the thing are necessarily forbidden. There can be no dispute regarding the aforesaid proposition of law,

but applicability of the principle has to be tested in the light of the facts of the present case. The Vice Chancellor has the statutory power to exercise the powers of any authority of the University, which obviously would include the Board of Management of the University, in certain situations mentioned in Sub-section (3) of Section 12 of the University Act. The Board of Management had the authority to disapprove the action of the Vice-Chancellor and to refer the matter to the Visitor of the University, but the Board of Management chose not to disapprove the action of the Vice-Chancellor. Rather, the Board confirmed the sanction order in its next meeting, much before the Court took cognizance of the offence. Therefore, the procedure adopted is in accordance with the provisions contained in Section 12 (3) of the University Act and I find no force in this submission also.

42. The inherent powers under Section 482 Cr.P.C. are to be exercised by this Court to prevent the abuse or the process of Court or to secure the ends of justice. There would be a “failure of justice” by refusal to prosecute a person against whom there is sufficient prima facie material warranting his prosecution for the offence of corruption and prosecution should not be scuttled at any intermediary stage by the High Court by adopting a hyper technical approach. As has already been stated above, no failure of justice has been caused to the applicant in the present case.

43. In view of the foregoing discussion, I am of the considered view that the order dated 26.10.2017 passed by the Vice-Chancellor of the University granting sanction for prosecution of the petitioner and the order dated 28.05.2019 passed by

the Learned Special Judge, Anti-Corruption, C.B.I (West), Lucknow in Criminal Case No. 545 of 2017, rejecting the petitioner's application dated 07.03.2019 challenging the validity of the prosecution sanction order dated 26.10.2017, do not amount to abuse of process of Court and do not defeat the ends of justice and those do not suffer from any illegality.

44. The application under Section 482 Cr.P.C. lacks merit and the same is, accordingly, dismissed.

(2023) 8 ILRA 1179
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.04.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application U/S 482. No. 3527 of 2021

Akhilesh Pal & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:

Sri Sujan Singh, Sri Manoj Kumar Singh, Sri Pankaj Kumar Tripathi

Counsel for the Opposite Parties:

G.A., Sri Radha Kant Singh

Criminal Law - Indian Penal Code, 1860 - Sections 363, 366 & 376 - POCSO Act, 2012 - Section 3/4 - Code of Criminal Procedure, 1973 - Sections 161 & 164 - Criminal Proceedings - Quashing of - On date of incident, informant daughter abducted on pretext of marriage by all accused persons - During investigation, victim recovered, co-accused arrested - Victim in her Statement deposed that she left her village by her own freewill, they both got married in Temple, living as

husband and wife, he did not lure her - Applicant not played role in commission of any crime, no iota of evidence that applicants were knowing plan of victim and co-accused - Not established that they both facilitated by applicants or they ever visited place where they both were living before recovery of victim, not established that applicants knowing whereabouts of victim and co-accused - No evidence that any amount for livelihood provided by applicant during relevant period - No evidence that applicant abetted or conspired in commission of alleged crime. (Para 2 to 6)

Application allowed. (E-14)

List of Cases cited:

1. Vineet Kumar & ors. Vs St. of U.P. & ors., Manu/SC/0351/2017
2. Sunder Babu & ors. Vs St. of Tamil Nadu, (2009)14 SCC 244
3. Ahmad Ali Quraishi & anr. Vs St. of U.P. & anr., (2020) 13SCC 435
4. Suresh Kumar Goel & ors. Vs St. of U.P. & anr., (2019) 14 SCC 318
5. M.N. Ojha & ors. Vs Alok Kumar Srivastava & ors., (2009) 9 SCC 682

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

1. Heard learned counsel for the applicants, Sri Pankaj Kumar Tripathi, learned A.G.A for the State and perused the record.

2. This application has been moved under Section 482 Cr.P.C.to quash the entire proceedings of Case No. 31/2020 pending before learned Special Judge POCSO Act, Azamgarh, District Azamgarh as (State Vs. Kamlesh) arising out from Case Crime No. 102 of 2019 registered under Sections 363, 366, 376 of I.P.C and

³/₄ of POCSO Act at Police Station Sidhari, District Azamgarh with regard to the applicants only.

3. In brief, facts of the case are that informant Subedar Yadav, lodged an F.I.R on 18.04.2019, regarding the incident dated 14.04.2019, under crime no. 102 of 2019, under Sections 363, 366 I.P.C, in which later on charge sheet has also been submitted under Section 376 I.P.C. The facts of the case are that on 14.09.2019 Kamlesh Pal S/o Jaggu Pal was talking to his minor daughter aged about 16 years privately, when his brother Hawaldar Yadav reached there and reprimanded both of them and chased them away and said never to meet again. In the same night about 09:00 p.m. accused Kamlesh Pal was seen by his son Rajesh Yadav walking with his brother Akhilesh Pal and Deepak Pal (applicants) in the street next to his house. In the same night his daughter had been abducted on the pretext of marriage by all the accused persons, when Akhilesh Pal provided mobile number of accused Kamlesh Pal, when he contacted on the given number, it was switched off. He tried to find a lot from his level, when he could find, he went to the Police Station and lodged the F.I.R.

4. During the course of investigation the victim was recovered and accused Kamlesh Pal was arrested and the statement of the victim had been recorded. The victim in her statement under section 161 Cr.P.C has deposed that on 14.04.2019, she left her village by her own freewill, she called Kamlesh Pal at 10:00 p.m when her parents fell as sleep, they went to the Railway station together on her own freewill. From there they both went to Ludhiyan by train. There they both got married in the Tample and started living as husband and wife.

Kamlesh started working in the same steel company, they both were living happily Kamlesh used to talk on his home by phone. One day he came to know that his mother's helth was bad, then both of them were coming back to meet her mother secretly on 18.Jan, 2020, seeing the Police at Narauli Inter Section, Kamlesh moved away and the police brought her to the Police Station. She wants to live with Kamlesh Pal.

5. The victim in her statement under Section 164 Cr.P.C has stated that she was about 18 years old less than 2-3 months. On 14.04.2019, she had gone with Kamlesh of her own free will to Ludhiyana. They both knew each other for two three years, they used to like each other, she went with him on her own free will, he did not lure her, they both got married and were living like husband and wife. She has to live with Kamlesh

6. From the above statement it is crystal clear that the applicant had not played role in the commission of any crime. There is no iota of evidence that the applicants were knowing the plan of the victim and accused Kamlesh Pal. It could not be established that they both were facilitated by the applicants or they ever visited the place where they both were living before the recovery of the victim. It could not be established that the applicants were knowing the whereabouts of the victim and accused Kamlesh Pal, at Ludhiya. There is no evidence that any amount for their livelihood had been provided by the applicant during the relevant period. From the evidence on record it transpires that, it is a matter of love affair between the a boy and a girl. There is no evidence that the applicant abetted or conspired in any way for the

commission of the alleged crime. Even then a charge-sheet had been submitted against them under the aforesaid Sections.

7. This court is of the considered view that no case is made out against the applicants on the basis of evidence available on record. Section 482 Cr.P.C has been incorporated to prevent the abuse of the process of the Court and to secure the ends of justice. This Court can exercise its inherent power under Section 482 Cr.P.C if it deems necessary to give effect to any order under this Code.

Section 482 Cr.P.C is as under.

"482. Saving of inherent powers of High Court.--Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice."

Learned counsel for the applicants placed reliance on the following judgments :-

1. In *Vineet Kumar and Ors. Vs. State of U.P. and Ors. Manu/SC/0351/2017*, the petition under Section 482 Cr.P.C was allowed considering the facts of the case and the Magistrate was directed to pass fresh order.

2. In *Sunder Babu and Ors. Vs. State of Tamil Nadu (2009)14 SCC 244* the Apex Court found that the proceeding was maliciously instituted with an ulterior motive for wrecking vengeance on the accused and with a view to spite him due to private and personal grudge, hence the complaint was quashed.

3. In *Ahmad Ali Quraishi and another vs. State of U.P. and another (2020) 13SCC 435*, the complaint was found to be mala-fide and animus in nature maliciously instituted with ulterior motives against the appellant-accused, hence the criminal proceedings were quashed.

4. In *Suresh Kumar Goel and others vs. State of U.P. and another (2019) 14 SCC 318*, the complaint was found to be a counterblast to wrack vengeance by complainant against his family for disowning him. The Complaint was held to be abuse of process of Court, hence the discharge application under Section 245 (2) Cr.P.C was allowed and complainant was also directed to pay Rs. 25,000/- to each applicant by way of costs, for initiating frivolous litigation.

5. In *M.N. Ojha and others vs. Alok Kumar Srivastava and others (2009) 9 SCC 682*, complaint was found clearly an abuse of judicial process to harass the appellants. Averments and allegations in complaint were not disclosing commission of any offence by the appellants. The case was found to be a classic illustration of non application of mind by trial court where Magistrate had not scrutinized even the contents of the complaint, leaving a site material document available on record.

All the above citations apply in favour of the appellants.

On the basis of the above discussions when no case is made out against the applicants, it is duty of this Court to quash the entire proceedings of the impugned criminal case in respect of the applicants. Hence this application deserves to be allowed.

ORDER

This application under Section 482 Cr.P.C is allowed and the entire proceeding of the aforesaid case crime number against the applicants is hereby quashed.

(2023) 8 ILRA 1182
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.07.2023

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Application U/S 482. No. 4744 of 2023

Puneet Sharan Tiwari & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
 Sri K.S. Tiwari, Sri Vivek Tiwari

Counsel for the Opposite Parties:
 G.A., Sri Surendra Kumar Chaubey

Criminal Law - Indian Penal Code, 1860 - Sections 147, 323, 504, 506 & 308 - Code of Criminal Procedure, 1973 - Section 161 - Against summoning order - Scope of - Informant, P.W.-1 lodged first information report against applicants and six other co-accused persons, alleging they were illegally constructing toilet on their land - When accused were prevented from doing so, they started abusing him and beat applicant with Lathi, Danda and fists, when his mother reached for his rescue, accused beat her causing fatal injuries - After framing of charge, Court recorded Statement of injured, P.W.-1, P.W.-2 and eye witness P.W.-3 - Considering Statements of P.W.-1 to P.W.-3 recorded in court in light of law laid down by Hon'ble Apex Court regarding summoning of persons who have not been named in charge-sheet as accused u/s 319 Cr.P.C.,

thus, no illegality in impugned order passed by trial court. (Para 2, 11, 13)

Application rejected. (E-14)

List of Cases cited:

1. Naveen Vs St. of Har., passed in SLP (Crl) No. 3446 of 2022 on 01.11.2022
2. Manjeet Singh Vs St. of Har., 2021 AIR SC 4247
3. Hardeep Singh Vs St. of Punj. & ors., (2014) 3 SCC 92, (Para 105, 106)
4. S. Mohammad Ispahani Vs Yogendra Chandak, (2017) 16 SCC 226, (Para 35)
5. Rajesh Vs St. of Har., (2019) 6 SCC 368

(Delivered by Hon'ble Surendra Singh-I, J.)

1. Heard Shri K.S. Tiwari, learned counsel for the applicants, Shri Surendra Kumar Chaubey, learned counsel for opposite party no. 2, Shri Prashant Saxena, learned A.G.A. for the State and perused the material available on record.

2. The present application under section 482 Cr.P.C. has been filed for quashing the order dated 07.01.2023 passed by the Additional Sessions Judge-Ist, Bhadohi at Gyanpur in S.T. No. 55 of 2019, State vs. Shaym Dhar Tiwari and others, arising out of Case Crime No. 192 of 2017, under Sections 147, 323, 504, 506, 308 I.P.C., Police Station Koirauna, District Bhadohi. Vide the impugned order, the Trial Court has summoned applicants under Section 319 Cr.P.C. for trial.

3. It has been submitted by the learned counsel for the applicants that the Trial Court has summoned them for trial under the aforesaid sections without any evidence. It has also been submitted that

although they were named in the FIR but the Investigating Officer during investigation did not find any evidence against them and did not file charge sheet against them. It has also been submitted that in the FIR lodged by opposite party no. 2, Abhishek Tiwari against applicants and six other accused persons, general role of abusing and beating the informant has been made against the applicants along with other co-accused persons. No specific role has been assigned to them. It is submitted that applicants have been falsely implicated due to previous enmity. It has also been submitted that in the evidence recorded under Section 161 Cr.P.C., the main role of causing injury to opposite party no. 2 and his mother, Meena Tiwari has been assigned to co-accused Kripashankar and applicants are not concerned with the offence under Section 308 I.P.C. It has also been submitted that there was no sufficient evidence on record to summon applicants for trial under Section 319 Cr.P.C. but the Trial Court wrongly summoned them.

4. The applicants have place reliance upon a judgment of the Apex Court in **Naveen vs. State of Haryana, passed in SLP (Crl) No. 3446 of 2022 on 01.11.2022.**

5. Learned counsel for opposite party no. 2 as well as the learned A.G.A. have opposed the application and submitted that applicants are named in the FIR along with six other co-accused having equally participating in the offence. They have also stated that the Investigating Officer had wrongly dropped their names while filing charge-sheet. It is submitted that after framing of the charge, the prosecution witnesses injured, P.W.-1-Abhishek Tiwari, injured P.W.-2-Smt. Meena Tiwari and eye witness P.W.-3-Jatashankar Tiwari have

supported the prosecution case and deposed against the applicants as well as other co-accused of having complicity in the offence during the course of which P.W.-1 Abhishek Tiwari and P.W.-2 Meena Tiwari have received fatal injuries.

6. Learned counsel for opposite party no. 2 have placed reliance upon the judgment of Apex Court in **Manjeet Singh vs. State of Haryana, 2021 AIR SC 4247.**

7. The scope and ambit of Section 319 Cr.P.C. has been well-settled by the pronouncement of Constitution Bench of the Hon'ble Apex Court in **Hardeep Singh Vs. State of Punjab and others, (2014) 3 SCC 92** and paras 105 and 106 which are relevant for the purpose are reproduced hereunder :

"105. Power under Section 319 Cr.P.C, 1973 is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an

extent that the evidence, if goes un rebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C., 1973. In Section 319 Cr.P.C., 1973, the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused". The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319 Cr.P.C., 1973 to form any opinion as to the guilt of the accused."

8. In **S. Mohammad Ispahani Vs. Yogendra Chandak (2017) 16 SCC 226**, this Court has observed and held as under :

"35. It needs to be highlighted that when a person is named in the FIR by the complainant, but police, after investigation, finds no role of that particular person and files the charge-sheet without implicating him, the Court is not powerless, and at the stage of summoning, if the trial court finds that a particular person should be summoned as accused, even though not named in the charge-sheet, it can do so. At that stage, chance is given to the complainant also to file a protest petition urging upon the trial court to summon other persons as well who were named in the FIR but not implicated in the charge sheet. Once that stage has gone, the Court is still not powerless by virtue of Section 319 of the Cr.P.C. However, this section gets triggered when during the trial some evidence surfaces against the proposed accused."

9. In the case of **Rajesh Vs. State of Haryana (2019) 6 SCC 368**, after

considering the observations made by this Court in **Hardeep Singh (supra)** referred to hereinabove, this Court has further observed and held that even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial court to summon other persons as well who were named in F.I.R. but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 Cr.P.c. and even those persons named in the F.I.R. but not implicated in charge-sheet can be summoned to face the trial provided during the trial some evidence surfaces against the proposed accused.

10. From the above rulings of Hon'ble Supreme Court, it can be concluded that the trial court can summon persons who have been charge-sheeted as accused on the basis of examination-in-chief of a witness. It is not necessary that the witness should be cross-examined before such person can be summoned under Section 319 Cr.P.C. The evidence required for summoning such persons under Section 319 Cr.P.C. is more than prima facie case but it is short of such evidence which if not rebutted will result in conviction of the persons summoned for trial.

11. Informant, P.W.-1 Abhishek Tiwari has lodged the first information report giving rise to case crime no. 192 of 2017 against applications, Puneet Sharan Tiwari and Amit Kumar and six other co-accused alleging that they were illegally constructing the toilet on their land. When the accused were prevented from doing so, they started abusing him and beat the applicant with Lathi, Danda and fists and on being calling for help when his mother reached for his rescue, the accused beat her also causing fatal injuries. After

investigation, charge sheet has been filed against the applicants and other co-accused persons. After framing of charge, the Court recorded statement of injured, P.W.-1-Abhishek Tiwari, injured P.W.-2-Smt. Meena Tiwari and eye witness P.W.-3-Jatashankar Tiwari.

12. From perusal of statements of P.W.-1, P.W.-2 and P.W.-3 it transpires that that on the alleged date, time and place of occurrence applicants-accused along with six other co-accused persons, in furtherance of common intention hurled abuses to the informant and his mother and when he prevented them, they started beating him and his mother with Lathi, Danda and fists causing fatal injuries. The incident was witnessed by P.W.-3 Jatashankar Tiwari.

13. Considering the impugned order in light of the statements of P.W.-1, P.W.-2 and P.W.-3 recorded in the court in the light of law laid down by the Hon'ble Apex Court regarding the summoning of persons who have not been named in the charge-sheet as accused under Section 319 Cr.P.C., I find no illegality, irregularity or jurisdictional error in the impugned order passed by the trial court.

14. The Trial Court has rightly passed the impugned order dated 07.01.2023. There is no error or illegality in the impugned order and therefore, this Court does not find any good ground to interfere in the impugned order.

15. Accordingly, the application under section 482 is **rejected**.

16. Interim order, if any, granted earlier, stands vacated.

(2023) 8 ILRA 1185
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 21.07.2023

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Application U/S 482. No. 6461 of 2019

Furhe Khan @ Fakir Mohammad Khan & Ors. ...Applicants

Versus

State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:

Mohan Singh, Rajesh Singh

Counsel for the Opposite Parties:

G.A., Suresh Chandra Srivatava

Criminal Law - U. P. Revenue Code, 2006 - Sections 116 & 207 - Code of Civil Procedure, 1908 - Sections 94 & 151 - Dispute concerning land likely to cause breach of peace - Procedure - Scope of - Land was in name of applicants and opposite party no. 5, co-sharers in property and property sold in favour of opposite party no. 4, by registered sale deed, dispute arose with apprehension that applicants will make hindrance in peaceful possession of opposite party no. 4 - Suit for partition instituted by applicants no. 1 and 3 before Sub-Divisional Officer, decided in favour of opposite party no. 4, thereafter appeal filed, decided in favour of opposite party no. 4, interim orders were in existence to effect that parties shall maintain status-quo - Second appeal pending before Board of Revenue, interim order continued - Application u/s 145 (1), Cr.P.C. instituted by opposite party no. 4, order passed by Sub-Divisional Magistrate invoking jurisdiction u/s 146 (1), Cr.P.C., property attached ignoring earlier fact - If civil dispute pending before court of civil competence, with respect to any property, no justification for initiating parallel

criminal proceeding u/s 145, Cr.P.C - In such circumstances, proceeding under said section not maintainable - Thus, impugned orders set aside. (Para 18 to 20, 24)

Application allowed. (E-14)

List of Cases cited:

1. Mahant Ram Saran Dass Vs Harish Mohan & anr. reported in (2001) 10 SCC 758, (Para 2)
2. Mahar Jahan & ors. Vs St. of Delhi & ors. reported in (2004) 13 SCC 421, (Para 7, 8)
3. Ram Sumer Puri Mahant Vs St. of U.P. & ors. reported in (1985) 1 SCC 427, (Para 2)
4. Ashok Kumar Vs St. of Uttarakhand & Ors reported in (2013) 3 SCC 366, (Para 14, 15)

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. Heard Sri Mohan Singh, learned counsel for the applicant, Sri Suresh Chandra Srivastava, learned counsel for opposite party no. 4, Sri Nirmal Kumar Pandey, learned A.G.A. for the State.

2. Instant application has been filed with prayer to quash the impugned proceedings of Computerized Case No. T201808620302227, State of U.P. Vs Akhtar & others U/s 145 Cr.P.C pending in the court of Sub-Divisional Magistrate Jamunha, P.S. Malhipur, District Shravasti as well as the impugned order dated 05.08.2019 passed by the learned Additional Sessions Judge/Fast Track Court-II, Shravasti, in Crl. Revision No.70/2018, Furhe Khan & others Vs State of U.P. & others, and impugned orders dated 11.07.2018 (U/s 145 Cr.P.C.) & 11.07.2018 (U/ss-145/146 Cr.P.C.) passed by the opposite party no. 2.

3. The factual matrix of the case is that the land Gata No. 2 measuring area 1.5830 hectares situated in Patpar Ganj, Tehsil- Jamunaha District- Shravasti was recorded in the name of the applicant and the opposite party no. 5, in the revenue record. On 22.10.2016, the opposite party no. 5 transferred his share to opposite party no. 4 by way of executing a registered sale deed and thereafter, the same was mutated in favour of opposite party no. 4. On 27.10.2016 the opposite party no. 4 on the basis of sale deed, started creating hindrance in the possession of the other tenure holders including the present applicants and the applicant no. 1 filed a suit for division of holdings, under section 116 of U. P. Revenue Code 2006 before the Sub-Divisional Officer and after institution of the aforesaid suit, the Sub-Divisional Officer passed the order while directing the parties to maintain status-quo as was existed on 20.10.2016. The opposite party nos. 4 and 5 were also the parties in the aforesaid suit. On 11.05.2018 the partition suit was decided and on 14.05.2018, the applicants no. 1 and 3 filed an appeal under section 207 of the Code, 2006 before the Divisional Commissioner Devi Patan Mandal Gonda. The appeal was admitted and interim order was passed on 22.5.2018 that the parties shall maintain status quo regarding the property in question. On 07.06.2018, the opposite party no. 4 filed writ petition namely Miscellaneous Single No. 17523 of 2018 (Smt. Shakira Khan vs State of U.P.), wherein, this Court has passed the order on 07.06.2018, which is read as under:-

"Heard Sri Alok Kumar Misra learned counsel for petitioner.

Notice for opposite party Nos. 1 to 3 has been accepted by the office of learned Chief Standing Counsel.

In view of the proposed order, notices to opposite party Nos. 4 to 9 are dispensed with.

By means of this petition, the petitioner has assailed the order dated 22.5.2018 passed by Additional Commissioner, Devipatan Mandal, Gonda whereby the appeal of the opposite party Nos. 4 and 5 has been admitted and next date was fixed for 26.6.2018 directing that the status quo in respect of the property be maintained till the next date of listing.

Learned counsel for the petitioner has submitted that he has filed a recall application seeking recall of the aforesaid order dated 22.5.2018. He has submitted that the court concerned may be directed to decide the recall application on the date fixed i.e. 26.6.2018.

Under these circumstances, it is hereby provided that if the petitioner has already provided the copy of his recall application dated 29.5.2018 to the appellants, the said application shall be disposed of by the appellate authority either on the date fixed i.e. 26.6.2018 or within a period of one month thereafter.

*In view of the aforesaid terms, the writ petition is **disposed of**."*

4. Vide the aforesaid order, it was directed that the recall application submitted by the opposite party no. 4 shall be disposed of by the appellate authority either on the date fixed i.e. 26.06.2018 or within a period of one month thereafter.

5. After the aforesaid order, the appellate court decided the recall application of the opposite party no. 4, vide order date 26.10.2018 and upheld the

earlier interim order dated 22.05.2018. The appeal was, ultimately, decided finally in favour of the opposite party no. 4 and being aggrieved the present applicant filed second appeal before the Board of Revenue, wherein, the opposite party no. 4 was also impleaded as a party and after hearing the parties, the order was passed on 05.01.2023, whereby, the parties were directed to maintain status quo over the land in question. The matter before the board of revenue is pending consideration and the interim order passed vide order dated 05.01.2023, is still operative.

6. In between the opposite party no. 4 instituted an application under section 145 of Cr.P.C., before the Sub-Divisional Magistrate and considering the said application, the Sub-Divisional Magistrate has passed the order and has attached the property vide order dated 11.07.2018. The applicants being aggrieved with the order dated 11.07.2018 filed the revision and the revisional court also upheld the order dated 11.7.2018 passed by the Sub-Divisional Magistrate.

7. Learned counsel for the applicants contends that the present applicants and the opposite party no. 5 are the co-sharers in property in question. The opposite party no. 5 sold out his share to the opposite party no. 4 by way of executing a registered sale deed and thereafter, the dispute in between the applicants and opposite party no. 4 arose. The matter goes to the Sub-Divisional Officer for partition, wherein, the interim order was passed and ultimately it was decided against the applicants and thereafter an appeal was filed which was also decided in favour of the opposite party nos. 4 and 5, ultimately, the second appeal has been instituted before the Board of Revenue, which is pending consideration

and the interim order has been passed, thereby, directing the parties to maintain status quo, which is still running.

8. He further submits that from very beginning when the suit for partition was instituted before the Sub-Divisional Officer, the interim order was passed for maintaining status quo by the parties and time and again, when the matter went up to the appellate court, the interim order was granted while directing the parties to maintain status quo. Since, in the interregnum period, an application was moved by the opposite party no. 4 for attachment of the property and admitting the same, the property in question, which is also subject matter before the court of civil competence, i.e., Board of Revenue, was attached.

9. He added that once a civil proceedings with respect to any land or property is pending before court of civil competence and there are some interim orders passed, no application under section 145 (1) of Cr.P.C. would be entertained.

10. Learned counsel appearing for the applicant supported his contention while referring the judgment rendered in **Mahant Ram Saran Dass V. Harish Mohan And Another** reported in (2001) 10 SCC 758 and has referred paragraph 2. Paragraph 2 of the aforesaid judgment is quoted hereinunder:-

"The short question that arises for consideration is whether in the facts and circumstances of the present case, a civil suit for declaration under Section 92 of the Code of Civil Procedure being pending before the competent forum, the civil court, the respondent was entitled to invoke the jurisdiction of the Magistrate

under Section 145 CrPC, and the Magistrate was entitled to initiate the proceedings and pass any interim order of appointment of receiver therein. It is not disputed that in the civil suit itself the court has passed interim order of injunction, and put certain restrictions on the parties with regard to alienation of the property in question. It is true that the applicant before the Magistrate, has not been arrayed as party-defendant in the civil suit, but that will not alter the position in any manner since in our view the civil court being in seisin of the matter, any appropriate relief could be obtained from the civil court itself and the Magistrate had no jurisdiction in the case in hand to entertain the application under Section 145, and to pass any orders thereon. In the circumstances, the impugned order of the High Court as well as the proceedings initiated before the Magistrate under Section 145 CrPC stand set aside. The appeal is disposed of accordingly. Needless to mention the status quo as of today to be maintained to enable the parties to move the civil court for appropriate orders."

11. Further he has referred the judgment rendered in **Mahar Jahan And Others v. State Of Delhi And Others** reported in (2004) 13 SCC 421 and has referred paragraph 7 and 8 of the aforesaid judgment. Paragraphs 7 and 8 of the aforesaid judgment are quoted hereinunder:-

"7. We have simply noted the contentions raised by the parties. The civil court, in our opinion, would be the most appropriate forum to take care of such grievances and pass such interim order as would reasonably protect the interests of both the parties. The civil court may issue an ad interim injunction, may appoint a

Commissioner or Receiver or may make any other interim arrangement as to possession or user of the property which is the subject-matter of proceedings in the civil court exercising the power conferred on it by Sections 94 and 151 of the Code of Civil Procedure.

8. In view of what has been stated hereinabove, the appeal is allowed. The proceedings under Section 145 CrPC are directed to be quashed. The parties may approach the civil court. We make it clear that looking to the relationship of the parties, the civil court shall feel free to make such ad interim order as it deems fit consistently with the facts and circumstances of the case without feeling embarrassed by the limited scope of the suit which is a suit for permanent injunction."

12. Placing reliance on the judgment of **Ram Sumer Puri Mahant vs State Of U.P. And Ors. reported in (1985) 1 SCC 427**, he has referred paragraph 2 of the judgment. Paragraph 2 of the aforesaid judgment is quoted hereinunder:-

"Challenge in this application is to the order of the Allahabad High Court refusing to interfere in its revisional jurisdiction against an order directing initiation of proceedings under Section 145, Code of Criminal Procedure ('Code for short), and attachment of the property at the instance of respondents 2-5. Indisputably, in respect of the very property there was a suit for possession and injunction being Title Suit No. 87 of 1975 filed in the Court of Civil Judge at Ballia wherein the question of title was gone into and by judgment dated February 28, 1981, the said suit was dismissed. The appellant was the defendant in that suit. According to the appellant close relations of respondents

2-5 were the plaintiffs and we gather from the counter-affidavit filed in this Court that an appeal has been carried from the decree of the Civil Judge and the same is still pending disposal before the appellate court. The assertion made in the petition for special leave to the effect that respondents 2 to 5 are close relations has not been seriously challenged in the counter-affidavit. When a civil litigation is pending for the property wherein the question of possession is involved and has been adjudicated, we see hardly any justification for initiating a parallel criminal proceeding under Section 145 of the Code. There is no scope to doubt or dispute the position that the decree of the civil court is binding on the criminal court in a matter like the one before us. Counsel for respondents 2-5 was not in a position to challenge the proposition that parallel proceedings should not be permitted to continue and in the event of a decree of the civil court, the criminal court should not be allowed to invoke its jurisdiction particularly when possession is being examined by the civil court and parties are in a position to approach the civil court for interim orders such as injunction or appointment of receiver for adequate protection of the property during pendency of the dispute. Multiplicity of litigation is not in the interest of the parties nor should public time be allowed to be wasted over meaningless litigation. We are, therefore, satisfied that parallel proceedings should not continue and the order of the learned Magistrate should be quashed. We accordingly allow the appeal and quash the order of the learned Magistrate by which the proceeding under Section 145 of the Code has been initiated and the property in dispute has been attached. We leave it open to either party to move the appellate Judge in the civil litigation for appropriate

interim orders, if so advised, in the event of dispute relating to possession."

13. Further relying on the judgment of **Ashok Kumar vs State Of Uttarakhand & Ors** reported in (2013) 3 SCC 366, has referred paragraphs 14 and 15. Paragraphs 14 and 15 of the abovesaid judgment are quoted hereinunder:-

"14. We find from this case there is nothing to show that an emergency exists so as to invoke Section 146(1) and to attach the property in question. A case of emergency, as per Section 146 of the Code has to be distinguished from a mere case of apprehension of breach of peace. When the reports indicate that one of the parties is in possession, rightly or wrongly, the Magistrate cannot pass an order of attachment on the ground of emergency. The order acknowledges the fact that Ashok Kumar has started construction in the property in question, therefore, possession of property is with the appellant - Ashok Kumar, whether it is legal or not, is not for the SDM to decide.

15. We also notice that the respondent herein has filed a civil suit for injunction before Civil Judge (J.D.) Haridwar on 02.09.2009 and an application for interim injunction is also pending, on which the civil court has issued only a notice. An Amin report was called for and Amin submitted its report on 21.11.2009. Civil suit was filed prior in point of time, it is for the civil court to decide as to who was in possession on the date of the filing of the suit. In any view, there is nothing to show that there was an emergency so as to invoke the powers under Section 146(1) to attach the property, specially, when the civil court is seized of the matter. Under such

circumstances, we are inclined to set aside the order passed by the SDM dated 25.11.2009 and the order of the High court dated 27.03.2012. "

14. Referring the above said judgments, he submits that the case of the present applicants is squarely covered with the ratio of judgments aforesaid. Therefore, submission is that proceedings initiated under section 145 (1) of Cr.P.C. and the order passed while invoking the jurisdiction under section 146 of Cr.P.C., vitiate in the eyes of law and, thus, the orders passed by the Sub-Divisional Magistrate and by the revisional court, are unsustainable.

15. Learned counsel appearing for the opposite party no. 4 has vehemently opposed the contentions of learned counsel for the applicants. He submits that after the registered sale deed executed in favour of the opposite party no. 4, she inherits certain civil rights and once the applicants were started making disturbance in peaceful possession and there being apprehension of breach of peace, the opposite party no. 4 moved an application under section 145 (1) of Cr.P.C. He also added that the case of the applicants which were instituted before the Sub-Divisional Officer as well as the appellate authority were decided in favour of the opposite party no. 4 and 5, and now the matter is pending before the learned Board of Revenue and therefore, in case of apprehension of breach of peace, the Sub-Divisional Magistrate has rightly passed the order and revisional court has rightly upheld the order passed by the Sub-Divisional Magistrate.

16. After the aforesaid arguments, he submits that the first and foremost grievance of the opposite party no. 4 is that no one should alienate the property and

make hindrance in a peaceful possession of the land in question or use thereof as was traditionally being done by the parties. He admitted that the Board of Revenue has passed the order while directing the parties on 05.01.2023, to maintain status-quo over the land in question and thus, his submission is that the parties may be directed to abide by the orders passed by the Board of revenue.

17. Learned counsel appearing for the State has also supported the version of learned counsel for the opposite party no. 4 and contended that once an application was moved by opposite party no. 4 and the facts which were brought by her, that there is apprehension of breach of peace then, following the mandate of procedure, the report was called from the police and after receiving the report, the order was rightly passed by the Sub-Divisional Magistrate. He added that once the matter went up to the revisional court, the revisional court in a very exhaustive manner decided the issue and has upheld the order passed by Sub-Divisional Magistrate. Thus, submission is that there is no erroneousness or perversity in the orders passed by the Sub-Divisional Magistrate and the revisional court.

18. Having heard learned counsels for the parties and after perusal of material placed on record, it emerges that at the very inception, the land in question was in the name of applicants and opposite party no. 5 and they were co-sharers in the property and once the property was sold out in favour of opposite party no. 4, by way of registered sale deed, the dispute arose with the apprehension that the applicants will make hindrance in the peaceful possession of opposite party no. 4. It is also a fact that suit for partition under section 116 of the U.P. Revenue Code, 2006 (hereinafter

referred to as 'the Code') was initially instituted by the applicants no. 1 and 3 before the Sub-Divisional Officer and the same decided in favour of the opposite party no. 4 and thereafter, the appeal was filed, that too was decided in favour of opposite party no. 4, though, the interim orders always were in existence to the effect that the parties shall maintain status-quo over the land in question. Now the matter is up to the stage of second appeal and is pending consideration before the Board of Revenue for hearing, wherein also, the interim order is continuing with the direction that the parties shall maintain status-quo.

19. It is borne out from the arguments of learned counsel for the applicants that an application under section 145 (1) of Cr.P.C. was instituted and thereafter, the order was passed by Sub-Divisional Magistrate invoking the jurisdiction under section 146 (1) of Cr.P.C. and the property in question was attached ignoring the fact that the case of partition suit and appeal was pending before the court of civil competence, the interim orders were running, whereby, the parties were directed to maintain status-quo, thus, moot question is that whether, while pendency of civil case and in existence of an interim order passed by the court of civil competence, the Sub-Divisional Magistrate was empowered to pass any order, invoking its jurisdiction under section 145 (1) and 146 (1) of Cr.P.C.?

20. It is trite law that if a civil dispute is pending before court of civil competence, with respect to any property, then there is no justification for initiating a parallel criminal proceeding under section 145 of Cr.P.C. There is no doubt and dispute that the decree of the civil court is

23. So far as the present case is concerned, the proceedings under section 145 (1) of Cr.P.C. was instituted during the pendency of the suit for division of holdings of the property in question, before the Sub-Divisional Officer and an interim order was passed with the direction to the parties to maintain status-quo over there. Further, the order for maintaining status quo was continuing in all the proceedings, pending before the trial court and the appellate court and now is also running in the second appeal pending before Board of

Criminal Law - Drugs and Cosmetics Act, 1940 - Sections 17B, 17A(e), 18A & 27 - Drugs and Cosmetics Rules, 1945 - Rule 123, Schedule K - Against summoning order - Applicant is registered medical practitioner - After taking sample of medicine, sent to Lab, examined, found against norms, notice issued and after receiving reply, complaint filed by

departmental authorities, for taking decision, authorities taken four years - For justifying delay, again notice served, prima facie, insufficient to explain inordinate delay - Sample which was taken, comes under Schedule 'K' of Rule 123 of Rules, 1945 but authorities ignored provisions of exemption clause - From bare perusal of impugned order, it transpires that reasons has not recorded, only mentioned that Court looked into complaint and available record - Compliance of provisions of Section 33M of Act 1940 not done by authorities, mandate of due procedure violated - Matter remitted back. (Para 2, 16 to 18, 20)

Application allowed. (E-14)

List of Cases cited:

1. Anil Kumar & ors. Vs M.K.Aiyappa & anr., reported in (2013)10 Supreme Court Cases,705, (Para 11)
2. Maksud Saiyed Vs St. of Guj. & ors., reported in (2008) 5 Supreme Court Cases 668, (Para 13)
3. Priyanka Srivastava & anr. Vs St. of Uttar Pradesh & ors., reported in (2015) 6 Supreme Court Cases 287, (Para 20 to 22, 26 to 28)
4. S. Athilakshmi Vs St. Rep. by the Drugs Inspector, 2023 SCC OnLine SC 269, (Para 21)

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. Heard Sri Shiv P. Shukla, learned counsel for the applicant and Sri Aniruddh Kumar Singh, learned AGA-I and Mrs. Nusrat Jahan learned AGA for the State.

2. By means of the instant application a prayer is made to quash the criminal proceedings of criminal case no 1437 of 2022 (state of U.P. versus Shail Kumar Jain) under section 17B/17A(e)/18A/27 Drugs & Cosmetics Act, 1940 against the

applicant registered for an offence punishable under Section 27 (d) of the Drugs and Cosmetics Act, 1940 ('the Act' for short) as well as summoning order dated 19-07-2023.

3. The learned counsel appearing for the applicant submits that in fact, the present applicant is a lawful degree holder of BAMS course from Lucknow University and it is not disputed even by the complainant, but a complaint has been instituted under section 17B /17A(e)/18A/27 Drugs & Cosmetics Act 1940 (Hereinafter referred as 'the Act 1940') before the Additional District and Sessions, Judge NDPS Act, Lucknow. He submits that once the samples were taken and notice was issued, the present applicant has replied though the same was kept for a long period of time for deciding, i.e., for about four years and thereafter again a notice was served which was immediately replied by the present applicant but ignoring all this, complaint has been filed against the applicant on nonest grounds. Adding his arguments, he submits that so far as the provision of Section 33M of the 'Act 1940' is concerned, it says that no prosecution under this chapter shall be instituted except by an Inspector (with the previous sanction of the authority specified under sub-section (4) of Section 33G which is missing in the instant matter and this fact has been ignored by the learned trial Court while summoning the applicant.

4. He next contended that the Rule 123 of the Drug Rules, 1945 (hereinafter referred to as 'Rules 1945') is with respect to exemption clause and the same is quoted hereinunder:-

"123. The drugs specified in Schedule K shall be exempted from the

provisions of Chapter IV of the Act and the rules made thereunder to the extent and subject to the conditions specified in that Schedule."

5. Referring to aforesaid, he submits that it provides that the drugs specified in 'Schedule K' shall be exempted from the provisions of Chapter IV of the Act and rules made thereunder to the extent of subject and condition specified in the Schedule. He submits that the drug for which the sample was taken, comes under the purview of the scheduled drugs which is in 'Schedule K' of the 'Rules, 1945' and the same comes under the exemption clause and therefore no complaint can be lodged for the said offence.

6. Further contention of the learned counsel for the applicant is that the summoning order, which is impugned in this complaint itself is erroneous and is against the settled proposition of law, as no reason has been recorded while summoning the accused/present applicant. He submits that the Hon. Apex Court in catena of judgements, has held that once the Magistrate summons an accused, while passing the summoning order, the detailed reason is to be recorded but so far as the present matter is concerned, the reasons have not been recorded by the trial court.

7. In support of his contentions, he has placed reliance on the Judgment of the Apex Court rendered in the case of **Anil Kumar and Others Versus M.K.Aiyappa and Another, reported in (2013)10 Supreme Court Cases,705** and has placed reliance on paragraph no. 11 of the said Judgment, which is quoted hereinunder :-

"11. The scope of Section 156(3) CrPC came up for consideration before

this Court in several cases. This Court in Maksud Saiyed case examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and held that where jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 CrPC, the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) CrPC, should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation".

8. Referring the aforesaid, he submits that the Apex Court while dealing with the matter in terms of section 156(3) of Cr.P.C. or Section 200 Cr.P.C. has held that the Magistrate is required to apply it's mind and the application of mind by the Magistrate must be reflected in the order and the mere statement that he has gone through the complaint, documents and heard the complainant, will not be sufficient.

9. He has further placed reliance on the Judgment of the Apex Court in the case of **Maksud Saiyed Versus State of Gujarat and Others, reported in (2008)5**

Supreme Court Cases 668 and has referred paragraph no. 13 of the said Judgment, which is quoted hereinunder :-

"13. Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability."

10. Placing reliance on the abovesaid Judgment, he submits that the Apex Court has also reiterated the analogy that the application of mind is essential while dealing with the application under section 156(3) of Cr.P.C.

11. Again, he has placed reliance on the Judgment of the Apex Court in the Case of **Priyanka Srivastava And Another Vs State of Uttar Pradesh and Others**, reported in (2015) 6 Supreme Court Cases 287 and has referred paragraph nos.

20,21,22,26,27 & 28, which are quoted hereinunder :-

"20. The learned Magistrate, as we find, while exercising the power under Section 156(3) CrPC has narrated the allegations and, thereafter, without any application of mind, has passed an order to register an FIR for the offences mentioned in the application. The duty cast on the learned Magistrate, while exercising power under Section 156(3) CrPC, cannot be marginalised. To understand the real purport of the same, we think it apt to reproduce the said provision:

"156. Police officer's power to investigate cognizable case.—(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under Section 190 may order such an investigation as abovementioned."

21. Dealing with the nature of power exercised by the Magistrate under Section 156(3) CrPC, a three-Judge Bench in Devarapalli Lakshminarayana Reddy v. V. Narayana Reddy [(1976) 3 SCC 252 : 1976 SCC (Cri) 380], had to express thus : (SCC p. 258, para 17)

"17. ... It may be noted further that an order made under sub-section (3) of Section 156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with a report or charge-sheet under Section 173."

22. In *Anil Kumar v. M.K. Aiyappa*, the two-Judge Bench had to say this : (SCC p. 711, para 11)

"11. The scope of Section 156(3) CrPC came up for consideration before this Court in several cases. This Court in *Maksud Saiyed [Maksud Saiyed v. State of Gujarat, (2008) 5 SCC 668 : (2008) 2 SCC (Cri) 692]* examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and held that where jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 CrPC, the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) CrPC, should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned

Special Judge which, in our view, has stated no reasons for ordering investigation."

26. At this stage, we may usefully refer to what the Constitution Bench has to say in *Lalita Kumari v. State of U.P. [(2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524]* in this regard. The larger Bench had posed the following two questions : (SCC p. 28, para 30)

"(i) Whether the immediate non-registration of FIR leads to scope for manipulation by the police which affects the right of the victim/complainant to have a complaint immediately investigated upon allegations being made; and

(ii) Whether in cases where the complaint/information does not clearly disclose the commission of a cognizable offence but the FIR is compulsorily registered then does it infringe the rights of an accused."

Answering the questions posed, the larger Bench opined thus : (*Lalita Kumari case [(2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524]* *Lalita Kumari v. State of U.P.*, SCC pp. 35-36, 41 & 58-59, paras 49, 72, 111 & 115)

"49. Consequently, the condition that is sine qua non for recording an FIR under Section 154 of the Code is that there must be information and that information must disclose a cognizable offence. If any information disclosing a cognizable offence is led before an officer in charge of the police station satisfying the requirement of Section 154(1), the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis

of such information. The provision of Section 154 of the Code is mandatory and the officer concerned is duty-bound to register the case on the basis of information disclosing a cognizable offence. Thus, the plain words of Section 154(1) of the Code have to be given their literal meaning.

72. It is thus unequivocally clear that registration of FIR is mandatory and also that it is to be recorded in the FIR book by giving a unique annual number to each FIR to enable strict tracking of each and every registered FIR by the superior police officers as well as by the competent court to which copies of each FIR are required to be sent.

111. ... the Code gives power to the police to close a matter both before and after investigation. A police officer can foreclose an FIR before an investigation under Section 157 of the Code, if it appears to him that there is no sufficient ground to investigate the same. The section itself states that a police officer can start investigation when he has 'reason to suspect the commission of an offence'. Therefore, the requirements of launching an investigation under Section 157 of the Code are higher than the requirement under Section 154 of the Code. The police officer can also, in a given case, investigate the matter and then file a final report under Section 173 of the Code seeking closure of the matter. Therefore, the police is not liable to launch an investigation in every FIR which is mandatorily registered on receiving information relating to commission of a cognizable offence.

115. Although, we, in unequivocal terms, hold that Section 154 of

the Code postulates the mandatory registration of FIRs on receipt of all cognizable offences, yet, there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of crimes with the passage of time. One such instance is in the case of allegations relating to medical negligence on the part of doctors. It will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint."

emphasis in original)

After so stating the Constitution Bench [(2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] proceeded to state that where a preliminary enquiry is necessary, it is not for the purpose for verification or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence. After laying down so, the larger Bench proceeded to state : (Lalita Kumari case [(2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] , SCC p. 61, para 120)

"120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/family disputes\

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating

criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7. While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the general diary entry."

We have referred to the aforesaid pronouncement for the purpose that in certain circumstances the police is also required to hold a preliminary enquiry whether any cognizable offence is made out or not.

27. Regard being had to the aforesaid enunciation of law, it needs to be reiterated that the learned Magistrate has to remain vigilant with regard to the allegations made and the nature of allegations and not to issue directions without proper application of mind. He has also to bear in mind that sending the matter would be conducive to justice and then he may pass the requisite order. The present is a case where the accused persons are serving in high positions in the Bank. We are absolutely conscious that the position does not matter, for nobody is above the law. But, the learned Magistrate should take note of the allegations in entirety, the date of incident and whether any cognizable case is remotely made out. It is also to be noted that when a borrower of the financial institution covered under the

Sarfaesi Act, invokes the jurisdiction under Section 156(3) CrPC and also there is a separate procedure under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, an attitude of more care, caution and circumspection has to be adhered to.

28. Issuing a direction stating "as per the application" to lodge an FIR creates a very unhealthy situation in society and also reflects the erroneous approach of the learned Magistrate. It also encourages unscrupulous and unprincipled litigants, like Respondent 3, namely, Prakash Kumar Bajaj, to take adventurous steps with courts to bring the financial institutions on their knees. As the factual exposition would reveal, Respondent 3 had prosecuted the earlier authorities and after the matter is dealt with by the High Court in a writ petition recording a settlement, he does not withdraw the criminal case and waits for some kind of situation where he can take vengeance as if he is the emperor of all he surveys. It is interesting to note that during the tenure of Appellant 1, who is presently occupying the position of Vice-President, neither was the loan taken, nor was the default made, nor was any action under the Sarfaesi Act taken. However, the action under the Sarfaesi Act was taken on the second time at the instance of the present Appellant 1. We are only stating about the devilish design of Respondent 3 to harass the appellants with the sole intent to avoid the payment of loan. When a citizen avails a loan from a financial institution, it is his obligation to pay back and not play truant or for that matter play possum. As we have noticed, he has been able to do such adventurous acts as he has the embedded conviction that he will not be taken to task because an application under Section 156(3) CrPC is a simple

application to the court for issue of a direction to the investigating agency. We have been apprised that a carbon copy of a document is filed to show the compliance with Section 154(3), indicating it has been sent to the Superintendent of Police concerned."

12. During the course of his argument he has further placed reliance on the judgement reported in **2023 SCC OnLine SC 269, S. Athilakshmi Vs. State Rep. by the Drugs Inspector** and has referred paragraph 21 of the above said judgement. Paragraph 21 of the aforesaid judgement is quoted hereinunder:-

"21. The sanctioning authority had not examined at all whether a practising doctor could be prosecuted under the facts of the case, considering the small quantity of the drugs and the exception created in favour of medical practitioner under Rule 123, read with the Schedule "K". All these factors ought to have been considered by the sanctioning authority. Under these circumstances we allow this appeal and set aside the order of the learned Single Judge of the Madras High Court and quash the criminal proceedings in Criminal Case No. 7315 of 2018 on the file of X Metropolitan Magistrate, Egmore, Chennai."

13. Placing reliance on the abovesaid Judgment, he submits that the factual matrix of the present case is identical to the case of S. Athilakshmi (supra) as in that case also, the prosecution was initiated against a practising doctor considering the small quantity of drugs and the same was held by the Apex Court as exempted under Rule 123 read with the Schedule 'K' of the Rules 1945. Likewise, in the present case also, the sanctioning authority has not taken

care of provisions of exemption clause and the Schedule 'K' of the Rules 1945, which is a clear cut violation of mandate of law and, therefore, the whole criminal proceedings initiated against the present applicant vitiates in the eyes of law.

14. Concluding his arguments, learned counsel for the applicant submits that the summoning order dated 19.7.2023 is not only erroneous and unlawful but it is against the settled proposition of law rendered in plethora of Judgements of the Apex Court and, therefore, the same is not sustainable.

15. On the other hand, the learned counsel appearing for the State has opposed the contention aforesaid and submits that the complaint is in very detailed and after giving opportunity to the applicant, when the authorities came to the conclusion that there is a case, the complaint was lodged. He added that the complaint is appended with the material evidences, which reveals that the present applicant has committed an offence under Section 17B/17A(e)/18A/27 of 'the Act 1940', therefore the learned trial Court has rightly passed the order, whereby the present applicant has been summoned and thus no interference is warranted.

16. Considering the submissions of the learned counsels for the parties and after perusal of the material placed on record, it transpires that the present applicant is an Ayurvedic Doctor, having degree of BAMS from Lucknow University and is a registered medical practitioner, which is an admitted fact between the parties. After taking sample of medicine, the same was sent to Lab and was examined and once it is said to be found against the norms, the notice was issued and after receiving the reply and reaching

except by an Inspector with a previous sanction of the authority specified under Sub Section (4) of Section 33 (g) and while examining aforesaid, this Court finds that the compliance of the abovesaid provisions has not been done by the authorities and the mandate of due procedure has been violated.

21. In view of the abovesaid submissions and discussions, there is merit in this case, consequently, the order dated 19.07.2022 passed in Complaint Case No. 1437 of 2022, is hereby set-aside.

18. I have also considered the contentions of the learned counsel for the applicant that no reason has been recorded while passing the order dated 19.07.2022, whereby the present applicant has been summoned. From bare perusal of the impugned order, it transpires that the reasons has not been recorded and it has only been mentioned that the Court has looked into the complaint as well as the record available before the same.

23. The instant application is hereby **allowed**.

BEFORE

Application U/S 482. No. 8378 of 2023

Counsel for the Applicant:
Sri Narendra Kumar Singh

Criminal Law - Negotiable Instruments Act, 1881 - Section 138 - Against dismissal of complaint by Magistrate - Applicant

instituted complaint, alleged dishonour of cheque which was issued by opposite party no. 2 - Opposite party was summoned to face trial - Later on, complaint was dismissed in absence of complainant u/s 256 Cr.PC - Applicant contended that said order was passed without recording reasons for not adjourning proceedings in complainant's absence - Thus, impugned order was appealable u/s 378 (4) Cr.PC, subject to all requirements of law as to leave, limitation etc, therefore, application u/s 482 of Code would not lie against that order - In the circumstances, preliminary objection raised by opposite party no. 2 regarding maintainability is upheld. (Para 2 to 6, 9, 18, 20)

Application rejected. (E-14)

List of Cases cited:

1. H.P. Agro Industries Corporation Ltd. Vs M.P.S. Chawla, 1996 SCC OnLine HP 54, (Para 11)
2. Sunil Mishra Vs St. of U.P. & anr., 2015 (90) ACC 169
3. Ruksar Khan Vs St. of U.P. & ors., 2020 (7) ADJ 525, (Para 41, 42)
4. Dinesh Chander Sharma Vs Deputy Commissioner Office Employees' Union & anr., 2020 SCC OnLine HP 1677, (Para 27 to 29, 32, 33, 35)
5. Om Gayatri & Co. & ors. Vs St. of Mah. & another, 2005 SCC OnLine Bom 1622, (Para 11 to 14)
6. K.L. Venkateswar Rao Vs The St. of A.P. & Another, 2003 (3) A.P.L.J. 398 (HC)

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

Heard Mr. Narendra Kumar Singh, learned Counsel for the applicant, Ms. Fatima Anjum, Advocate holding brief of Mr. Syed Ahmed Faizan and Mr. D.K. Srivastava, learned A.G.A. for the State.

2. This application under Section 482 of the Code of Criminal Procedure, 1973 ('Code' for short) is directed against an order of the Judicial Magistrate, Court No. 5, Farrukhabad dated 10.11.2022 passed in Complaint Case No 59 of 2022, under Section 138 of the Negotiable Instruments Act, 1881, dismissing the complaint under Section 256 of the Code.

3. A preliminary objection has been raised by Ms. Fatima Anjum that this application under Section 482 of the Code is not maintainable, because the impugned order has been passed by the Magistrate under Section 256 of the Code, which amounts to a judgment of acquittal, the remedy whereagainst is an appeal under Section 378(4) of the Code by special leave of this Court. She submits, therefore, that this application under Section 482 of the Code is not maintainable.

4. Shorn of unnecessary detail, the facts giving rise to this application under Section 482 of the Code are that the applicant instituted a complaint in the Court of the Chief Judicial Magistrate, Farrukhabad on 15.03.2018, giving rise to the Complaint Case No. 59 of 2022, under Section 138 of the Negotiable Instruments Act, 1881.

5. The complaint was about the dishonour of a cheque dated 20.01.2018 worth Rs. 2,00,000/-, bearing no. 183239, issued by the opposite party no. 2, drawn on the Axis Bank, Hewett Road, Lucknow dated 20.01.2016. The cheque when presented by the applicant was allegedly dishonoured. After service of the necessary statutory notice which remained uncomplished with for the period of time specified by law, the impugned complaint was instituted.

6. The second opposite party was summoned to stand his trial by the learned Magistrate vide order dated 04.05.2022. There is an averment to this effect in paragraph no. 9 of the affidavit. Later on, by the order impugned dated 10.11.2022, the complaint was dismissed in the absence of the complainant under Section 256 of the Code.

7. It is urged by learned Counsel for the second opposite party in support of the preliminary objection that this petition under Section 482 of the Code is not maintainable because an order dismissing a complaint under Section 256 of the Code is a judgment of acquittal against which the remedy of an appeal is envisaged under Section 378 of the Code.

8. In support of her submissions, Ms. Fatima Anjum, learned Counsel for opposite party no. 2 has placed reliance upon a decision of the Himachal Pradesh High Court in **H.P. Agro Industries Corporation Ltd. v. M.P.S. Chawla, 1996 SCC OnLine HP 54**. In **H.P. Agro Industries Corporation Ltd. (supra)** it has been held:

11. There is no denying that the dismissal of the complaint in default under section 256 of the Criminal Procedure Code, entails the acquittal of the accused. Once an accused has been acquitted of the offence, the law provides a remedy by way of an appeal against the order of acquittal. Once a remedy by way of appeal is available to the petitioner under section 378(4) of the Criminal Procedure Code, on the failure of the petitioner to avail of such a remedy, this court is not to exercise the inherent powers for interfering with the impugned order.

9. Mr. Narendra Kumar Singh, learned Counsel for the applicant in rebuttal of the preliminary objections has placed reliance upon a decision of this Court in **Sunil Mishra v. State of U.P. and another, 2015 (90) ACC 169** to submit that an application under Section 482 of the Code is maintainable, where the order dismissing the complaint under Section 256(1) of the Code is passed without recording reasons for not adjourning proceedings in the complainant's absence.

10. Mr. Narendra Kumar Singh, Advocate has emphasized that the decision of this Court in **Sunil Mishra (supra)** is a binding precedent whereas the Himachal Pradesh High Court's decision is nothing more than persuasive.

11. A perusal of the decision of this Court in **Sunil Mishra** shows that no doubt the case was one, where a complaint under Section 138 of the Negotiable Instruments Act, 1881 had been dismissed for non-appearance of the complainant on 19.02.2014 in exercise of powers under Section 256(1) of the Code and the manner of exercise of the power to dismiss under Section 256 of the Code was disapproved by this Court in an application under Section 482, which was allowed and the order dismissing the complaint quashed, but, this Court is of opinion that the decision in **Sunil Mishra** is no precedent. The reason is that though the point whether an order under Section 256(1) of the Code can be assailed in an application under Section 482 in the face of a clear remedy of appeal under Section 378(4) of the Code was involved, it is evident from a reading of the judgment of Pratyush Kumar, J., that it was “not perceived by the Court or present to its mind” to borrow the classical words employed by Salmond in Salmond

on Jurisprudence, 12th Edn., p. 153. The decision of Pratyush Kumar, J. in **Sunil Mishra**, so far as the point in hand is involved, is not a binding precedent and must be held to pass sub silentio.

12. I had occasion to consider the principle of sub silentio and that earlier decisions would not be binding precedent on account of the principle of sub silentio in **Ruksar Khan v. State of U.P. and others, 2020 (7) ADJ 525**, where it was held:

41. It must be said, about the various decisions relied upon by the learned Counsel for the petitioners, where after a short statement of facts giving rise to the cause, directions have been issued, that these decisions do not carry the force of precedent. A decision has the value of precedent, where it lays down a principle governing a point that arises for consideration in a subsequent decision. A fortiori a decision that does not enunciate a principle of law in the context of facts involved after consideration of arguments must be regarded not binding on a Court before which the relevant point subsequently arises. The decision is regarded to pass sub silentio. The principle of sub silentio is a well acknowledged principle that relieves a Court of the obligation of precedent, where the decision relied does not indicate a consideration of the kind. A classical statement about the law relating to the principle of sub silentio is to be found in the decision of the Supreme Court in *State of U.P. and another v. Synthetics and Chemicals Limited and another*, (1991) 4 SCC 139. In *State of U.P. v. Synthetics and Chemicals Ltd.* (supra), the principle is enunciated in the concurring judgment of R.M. Sahai, J. thus:

"41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English Courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. "A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind." (Salmond on Jurisprudence 12th Edn., p. 153). In *Lancaster Motor Company (London) Ltd. v. Bremith Ltd.* [(1941) 1 KB 675, 677 : (1941) 2 All ER 11] the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in *Municipal Corporation of Delhi v. Gurnam Kaur*. [(1989) 1 SCC 101] The bench held that, 'precedents sub-silentio and without argument are of no moment'. The Courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi. In *B. Shama Rao v. Union Territory of Pondicherry* [AIR 1967 SC 1480 : (1967) 2 SCR 650 : 20 STC 215] it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion

arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

42. The principle was again explained by the Supreme Court in *Divisional Controller, KSRTC v. Mahadeva Shetty and another*, (2003) 7 SCC 197. It was held in *Divisional Controller, KSRTC* (supra):

"23. So far as Nagesha case [(1997) 8 SCC 349] relied upon by the claimant is concerned, it is only to be noted that the decision does not indicate the basis for fixing of the quantum as a lump sum was fixed by the Court. The decision ordinarily is a decision on the case before the Court, while the principle underlying the decision would be binding as a precedent in a case which comes up for decision subsequently. Therefore, while applying the decision to a later case, the Court dealing with it should carefully try to ascertain the principle laid down by the previous decision. A decision often takes its colour from the question involved in the case in which it is rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. The only thing binding as an authority upon a subsequent Judge is the principle upon which the case was decided. Statements which are not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative. The task of finding the principle is fraught with difficulty as without an investigation into the facts, it cannot be assumed whether a similar direction must or ought to be made

as a measure of social justice. Precedents sub silentio and without argument are of no moment. Mere casual expressions carry no weight at all, nor every passing expression of a Judge, however eminent, can be treated as an ex cathedra statement having the weight of authority." "

13. The issue whether an order passed under Section 256 (1) of the Code can be challenged in an application under Section 482 of the Code, or for that matter, a revision under Section 401 of the Code fell for consideration before the Himachal Pradesh High Court in **Dinesh Chander Sharma v. Deputy Commissioner Office Employees' Union and another**, 2020 SCC OnLine HP 1677. In *Dinesh Chander Sharma* (supra) it was held:

27. The appeal against an order of acquittal lies under Section 378(4) of the Cr.P.C., to the High Court, by seeking special leave to appeal from the order of acquittal. Instead of filing the petition under Section 378(4) of the Cr.P.C., in the High Court of HP, the petitioner preferred to present the revision petition under Section 397 of the CrPC before Sessions Court, Una, HP.

28. Learned Additional Sessions Judge, dismissed the revision petition, by holding that when the remedy to challenge the order of dismissal of complaint was by filing an appeal under Section 401 of the Cr.P.C., in the High Court, then he had no jurisdiction to entertain a revision petition by invoking revisionary jurisdiction under Section 397 of the Cr.P.C.

378. Appeal in case of acquittal.-

(4) If such an order of acquittal is passed in any case instituted upon

complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of the acquittal, the complainant may present such an appeal to the High Court.

29. An appeal is a continuation of a trial and is a statutory right to get the judgment tested by a superior Court, for its correctness, legality and appreciation of evidence. An Appeal, being a creature of statute, only exists where expressly provided.

32. In H.P. Financial Corporation v. Ms. Continental Spinners Ltd., ILR (2016) 2 HP 442, a single bench of this Court holds:—

7. Since the case was instituted on a complaint and the dismissal of the complaint has the effect of acquittal, therefore, in view of the provisions of sub-section (4) of Section 378 of the Code, the remedy of the complainant was to make an application seeking special leave to appeal against the impugned order and present an appeal, which course the complaint had not adopted.

33. In my considered view, this approach of the Sessions Judge was legally correct and justified. Therefore, I do not find any error in the impugned order dated Oct 17, 2017, passed by learned Sessions Judge, Una, and affirm it. However, the order passed by Ld. Judicial Magistrate does not pass the test of law, but the remedy to seek its reversal, is not this petition.

35. The remedy available to the complainant was by filing an appeal under Section 378(4) Cr.P.C., by seeking leave of

this Court. Instead, the complainant filed a Criminal Revision, that too before Sessions Court. He chose a wrong remedy, and he has all the right to rectify the mistake by filing an appeal, as stated above, if he so feels and desires.”

(emphasis by Court)

14. The issue also engaged the attention of the Bombay High Court in **Om Gayatri & Co. & others v. State of Maharashtra & another, 2005 SCC OnLine Bom 1622**, where it was observed:

11. Section 256(1) mandates that if the absence of the complainant is not justified, the Magistrate shall acquit the accused. In a summons case, instituted on a complaint, if the complainant is absent on the date of hearing, the Magistrate has to follow either of the three courses, namely. 1) Acquit the accused; 2) to adjourn the case and 3) to dispense with the attendance of the complainant and to proceed with the case. In the present case, the Magistrate found that the complainant was avoiding to lead evidence, therefore, relying on the ruling of this Court reported in 1998 Mah LJ 576 : (1998 Cri LJ 3754) the Magistrate proceeded to pass an order acquitting the accused. Once this order has been passed, the remedy of the complainant is to prefer an appeal under Section 378 of the Code of Criminal Procedure after obtaining leave of the Court as required by Section 378(4) of Cr. P.C. This view is consistently taken by this Court. The earliest decision is that of Justice Vaidya, reported in AIR 1959 Bombay 94. This point then, arose in the matter of Dharamaji Gangaram Gholam v. Vithoba Soma Khade, reported in 1992 Mah LJ 118 : (1992 Cri LJ 870). In that case, the accused came to be acquitted in a complaint case by the learned Magistrate

for the offences punishable under Sections 417 and 420 read with 34 of the Penal Code, 1860, The point whether an appeal lies against the order of acquittal or whether a revision can be maintained arose for the consideration of the Court. Referring to earlier decision of this Court and to the provisions of Section 401(4) which provides that where an appeal lies under the provisions of the Code of Criminal Procedure, and no appeal is brought, no proceeding by way of a revision shall be entertained at the instance of the party who could have appealed. Daud, J. came to the conclusion that only an appeal can be preferred against the order of acquittal in consonance with provisions of Section 378, Cr. P.C. In this behalf, reference can also be made to another judgment of this Court, reported in 1999 (3) Mah LJ 397 in the matter of Raja s/o Dr. S.P. Upadhyay v. State of Maharashtra. In that case also prosecution was for offence punishable under Section 138 of N.I. Act. In the absence of complainant, the learned Magistrate passed an order of discharge. A revision was filed against that order. It was entertained by the Sessions Judge. The order of Sessions Judge was appealed against. In this context, Patel, J. observed in para 9 of the report that: "It can not be gainsaid that merely because the Magistrate committed an error in recording the order of discharge, that would invest the complainant with a right to prefer a revision and he was justified in doing so. As the order itself is very clear that it has been passed under Section 256(1) of Cr. P.C., 1973, it will necessarily have to be construed an order of acquittal under section 256(1) and not that of discharge. There is one more distinction which will have to be kept in mind and that is, that once an order of acquittal under section 256(1) of the Criminal Procedure Code,

1973 is passed, then the complainant is debarred from filing a second complaint on the same facts so long as the order of acquittal is not set aside. Therefore, the only course open to the complainant was to prefer an appeal in the High Court against the said order of the learned Magistrate by special leave of the Court under section 378(5) of the Criminal Procedure Code, 1973."

12. It may also be worthwhile to refer to the views of other High Courts on the point. In the matter of Krishna Kumar Gupta v. Mohammed Jaros, reported in 2003 Cri LJ 149, while dealing with this point, Mahmood Ali, J. referred to the submissions made on behalf of appellant in para 4 of the report. It observed: "He had cited Guest Kleen Williams Ltd. v. Murarilal, 1984 Rajdhani LR 32 (1983 Cri LJ 554), where a Division Bench of this Court held that against an order of dismissal of a complaint under section 256 of the Cr. P.C. only an appeal lies. He also referred to the judgment of Shri M.M.S. Bedi v. Union Territory of Chandigarh, (1986) 89 Pun LR 687; Vinod Kumar v. State of Punjab, (1999) 4 Rec Cri Refers 469 and a judgment of Himachal High Court in H.P. Agro Industries Corporation Ltd. v. M.P.S. Chawla, (1997) 2 Crimes 591 in support of his argument that the dismissal of the complaint under section 256 of the Cr. P.C. resulted in acquittal of the accused and an appeal and not the revision will be the remedy to challenge it." This submissions were accepted by the learned Judge. Dealing with these arguments, the learned Judge observed in para 5: "Counsel for respondent initially justified the order of the Additional Sessions Judge impugned in this petition on the ground that it was not in accordance with the law laid down by the Supreme

Court in *Associated Cement Co. Ltd. v. Keshavanand*, (1998) 1 SCC 687 : AIR 1998 SC 596 : (1998 Cr LJ 856) and a judgment of the Division Bench of this Court in *Shiv Kumar v. Mond, Saghir*, 1997 JCC 149 : (1997 Cri LJ 1264) but finally conceded that technically speaking revision did not lie against the order of dismissal of a complaint under Section 256, Cr. P.C. in view of the consistence view held by the courts that dismissal resulted in acquittal of the accused and against the acquittal only an appeal would be the appropriate legal remedy to challenge it, "In *H.P. Agro Industries Corporation Ltd. v. M.P.S. Chawla*, reported in 1997 (2) Crimes 591, petition under Section 482 of Cr. P.C. was filed challenging the order of dismissal passed under section 256 of Cr. P.C. After referring to the decisions of the Supreme Court in *Bindeshwari Prasad Singh v. Kali Singh*, and *Maj. Genl. A.S. Gauraya v. S.N. Thakur*. Learned Judge observed in para 12 of the report: "There is no denying that the dismissal of the complaint in default under Section 256 of the Code of Criminal Procedure entails the acquittal of the accused. Once an accused has been acquitted of the offence, the law provides a remedy by way of an appeal against the order of acquittal. Once a remedy by way of appeal is available to the petitioner under Section 378(4) of the Code of Criminal Procedure, on the failure of the petitioner to avail such a remedy, this Court is not to exercise the inherent powers for interfering with the impugned order.

13. It can be seen that earlier decisions of this Court and other High Courts have consistently laid down law that only an appeal lies against order of dismissal of the complaint which amounts to acquittal of the accused and in case of acquittal remedy of revision is not available

to the aggrieved party. Not only that under Section 401 of Cr. P.C. there is express bar for entertaining a revision at the instance of the party who could have appealed.

14. The point whether an appeal or revision lies against the order of acquittal passed under Section 256(1) Cr. P.C. was not before the Court and was not decided by the Court in this ruling. This judgment therefore is not an authority on the point whether a revision or appeal lies against an order of acquittal passed under Section 256(1) of the Code of Criminal Procedure. Be that, as it may, similar situation arose in the past before this Court in the matter of *Dharamji Gangaram v. Vithoba Khade*, where, Baud, J. was faced similar dilemma. In that case also, reference was made to the judgment of *Sharad Manohar J. in Kokilabai Ramchandre Mahajan v. Gangadhar Shivram Mahajan*, reported in 1986 (2) Bom CR 289, wherein it was held that the revision against the order of acquittal is maintainable. After referring to the relevant observations and the legal provisions, Daud J., distinguished the judgment on facts and observed in para 5 page 1217 that: "Had his attention been drawn to *Badakas* is decision, perhaps learned Judge may not have chosen to express himself in the broad terms he has done. In the present case, we are also faced with the similar situation. However, in view of the judgments of the Apex Court that the long standing precedents are to be followed, and in view of the fact that while deciding the controversy in the matter of *Mahendra Indermal Borana v. Anil Shankar Joshi*, (supra) the attention of the Court was not drawn to the earlier decisions of this Court as well as of other High Courts holding that in case of order being passed under Section 256(1), Cr. P.C. acquitting the accused, the

only remedy is to file an appeal and not a revision.....”

15. The question that is involved here also arose before the Andhra Pradesh High Court in **K.L. Venkateswar Rao v. The State of A.P. & Another, 2003 (3) A.P.L.J. 398 (HC)**, in the context of challenging an order of acquittal under Section 256 (1) of the Code, where the limitation to file an appeal under Section 378 (4) of the Code had expired.

16. Apart from the question that was involved regarding the maintainability of an application before the Magistrate to recall his order under Section 256 (1) of the Code, the other question was formulated by the Court in the following words :

“(ii) When once the appeal lies to the High Court against the order of acquittal with special leave, petition filed under Sec. 482 Cr. P.C., to set-aside the dismissal order acquitting the accused can be entertained even after 4 years 3 months?”

17. The question was answered by the Court speaking through A. Gopal Reddy, J. thus:

13. Point No. 2: Learned Senior Counsel Sri C. Padmanabha Reddy contends that if the dismissal order allowed to stand would result injustice to the complainant and will yield no remedy and this court can convert the petition as appeal and can set-aside the order passed by the Magistrate dt. 21-8-1997 to meet the ends of Justice.

14. It is not in dispute that against any order passed by the Magistrate acquitting the accused, the complainant can

file an appeal with special leave to file an appeal from the order of acquittal. Sub-section (5) of section 378 clearly mandates that no such application under sub-section (4) for grant of special leave to appeal against order of acquittal shall be entertained by the High Court after expiry of six months where the complainant is a public servant and 60 days in every other case, computed from the date of that order of acquittal. Since the present petitions filed by the complainant nearly after 4 years 3 months if entertained and converted into appeals on acquittal in exercise of inherent jurisdiction under Sec. 482 Cr. P.C., the same will result in taking away the valuable right accrued to the accused.

15. It is fairly well settled that the main factor which would influence the court in extending the benefit of Sec. 14 of the Limitation Act, 1963 to a litigant is whether the prior proceeding had been prosecuted with due diligence and ‘good faith’. The expression ‘good faith’ as used in Section 14 means ‘exercise of due care and attention’. In the context of Section 14, the expression ‘good faith’ qualifies prosecuting the proceedings in the court which ultimately found to have no jurisdiction.

16. In view of the above, the present criminal petitions filed by the complainant beyond the period prescribed for filing the appeals, i.e., nearly after 4 years 3 months, if treated as appeals, a question may arise his filing of criminal petitions for restoring the CCs by setting aside the dismissal order are with due diligence and ‘good faith’. Even if the answer is in the affirmative, further question may arise, once the order passed by the Magistrate is challenged as nullity in Crl. P. Nos. 821 and 822 of 1999 what

made the petitioner to wait for nearly 2 years 5 months in challenging the dismissal order under Sec. 482 Cr. P.C., after his entering appearance in the above petitions is not forthcoming. The complainant did not choose to act promptly to exercise his right of appeal, thereby abandoned that right. In such view of the matter, this court is of the considered view the right accrued to the accused on extinguishment of complainant's right cannot be taken away by converting the criminal petitions into appeals.

18. The authority, therefore, is preponderant, may be of persuasive, that an order under Section 256(1) of the Code is appealable under Section 378 (4) of the Code, and, therefore, an application under Section 482 of the Code would not lie against that order. It has to be challenged by way of an appeal against acquittal subject to all requirements of the law as to leave, limitation et cetera.

19. This Court is of opinion that where a specific remedy of appeal is provided by the Code against a particular kind of order, fair and square, it would be a most anomalous exercise of the inherent powers of the Court to permit the litigant to forsake his statutory remedy envisaged under the law and fall back upon Section 482 of the Code to seek relief.

20. In the circumstances, the preliminary objection raised on behalf of opposite party no. 2 by learned Counsel is upheld and this application under Section 482 of the Code is **rejected** on the ground of maintainability.

21. The applicant will have liberty to prefer an appeal under Section 378(4) of the Code, if so advised.

(2023) 8 ILRA 1209
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.04.2023

BEFORE

THE HON'BLE MRS. SADHNA RANI
(THAKUR), J.

Application U/S 482. No.11738 of 2018

Prashant Tyagi & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:

Sri Amrendra Nath Rai, Sri Prabhat Kumar,
 Sri Sanjay Singh

Counsel for the Opposite Parties:

G.A., Sri Abhinav Gaur, Sri Anoop Trivedi,
 Sri Vibhu Rai

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Negotiable Instruments Act 1881 - Section 138, 141 - liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company - Liability depends on the role one plays in the affairs of a Company and not on designation or status - If the accused's documents are beyond suspicion or doubt, relegating them to trial would be travesty of justice - court may examine significant materials at the prima facie stage to promote justice.(Para -16)

Applicant no.1 resigned from company before the issuance of a cheque - cheque did not bear signatures of any of the applicants - applicants were merely shareholders on the date of issuance - no active participation in the company's day-to-day business - complaint does not specify how the applicants were in-charge

or responsible for the company's business conduct. **(Para-23)**

HELD:-Participation of applicants not found in the day to day functioning of the Company. On the basis of the version that the defence would be seen at the time of evidence, it would be travesty of justice to drag the persons to face the prosecution who are no way connected with the issuance of the cheque or its being dishonour thereof. Summoning of applicants to face trial under Section 138 of Negotiable Instruments Act found to be against the mandate of law laid down by Apex Court. Summoning order and judgment passed in criminal revision quashed. **(Para-23,24,25)**

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:-

1. Smt. B Devi (Basanti Devi) Vs St. of U.P., 2016 (94) ACC 90
2. Sunita Palita & ors. Vs M/S Panchami Stone Qaurry, Criminal Appeal No. of 2022 [Arising out of SLP (Crl.) No.10396 of 2019]
3. S.M.S. Pharmaceuticals Ltd. Vs Neeta Bhalla, (2005) 8 SCC 89
4. Harshendra Kumar D. Vs Rebatilata Koley & ors., (2011) 3 SCC 351
5. Pooja Ravinder Devidasani Vs St. of Maha. & anr., (2014) 16 SCC 1

(Delivered by Hon'ble Mrs. Sadhna Rani
(Thakur), J.)

1. Heard learned counsel for the applicants, learned counsel for opposite party no.2 and perused the record.

2. By moving this application under Section 482 Cr.P.C., the prayer is made to quash summoning order dated 25.11.2016 passed by the Upper Nyayalaya Pratham, Ghaziabad in C.C. No.71/2016 under Section 138 Negotiable Instruments Act

and also to set aside order dated 22.02.2018 passed by the Additional Session Judge, Court No.15, Ghaziabad in Criminal Revision No.30 of 2017.

3. As per facts of the case, a complaint was filed by opposite party no.2 on 13.10.2016 against the applicants and six other persons with the version that opposite party no.2 was a limited Company registered under Companies Act and Vijay Kumar son of late Sri Satpal was authorized to filed complaint on behalf of the Company. The opposite party no.2 was indulged in the business of purchasing, selling and the construction of properties. Opposite party no.1 (in the complaint) M/S C.S.K. Infrastructure Pvt. Ltd. was a registered Company. Opposite parties no.2 to 6 were its Directors and officers and opposite parties no.7 to 9 were the Company's authorized representatives. Opposite party nos.2 to 9 were responsible for all the day to day business and transactions of opposite party no.1, M/S C.S.K. Infrastructure Pvt. Ltd.

4. The opposite parties (in the complaint) had assured the complainant/opposite party no.2 herein that they would make available a land to the complainant/opposite party no.2 at a reasonable price. Having faith in the opposite parties the complainant/ opposite party no.2 on 16.08.2014 paid Rs. 5,00,00,000/- to the opposite parties, which were received by the opposite parties. When as per their assurance the opposite parties could not arrange the land for the complainant/opposite party no.2 and the complainant gave them a threat of lodging FIR, then opposite parties promised to pay Rs. 7,00,00,000/- in pursuance of the principal amount of Rs. 5,00,00,000/- with interest. Opposite parties issued a cheque of

Rs.1,00,00,000/- in favour of the complainant/ opposite party no.2. This Cheque No.000286 valued Rs.1,00,00,000/- dated 14.07.2016 got dishonoured despite of the assurance of opposite parties that it would get encashed. The information of which was received by the complainant/opposite party no.2 on 29.08.2016 and after due procedure, a complaint under Section 420 I.P.C. was filed by the complainant/opposite party no.2 against the nine accused persons including the Company itself.

5. After the statements under Sections 200 Cr.P.C. and 202 Cr.P.C., the trial court vide order dated 25.11.2016 summoned all the nine accused persons to face trial under Section 138 of Negotiable Instruments Act 1881. Against this order dated 25.11.2016, three of the opposite parties/ present applicants named Prashant Tyagi, Smt. Neeta Tyagi and Smt. Shweta Tyagi, filed a revision before the Sessions Court, which was rejected vide order dated 22.02.2018.

6. Feeling aggrieved by the summoning order dated 25.11.2016 and revisional court's order dated 22.02.2018, the present application has been moved by the applicants Prashant Tyagi, Smt. Neeta Tyagi and Smt. Shweta Tyagi only with the version that the applicant no.1, who was earlier the Director of M/S C.S.K. Infrastructure Pvt. Ltd. had resigned from his post on 26.09.2014, much prior to the issuance of the cheque no.000286 dated 14.07.2016 to the opposite party no.2. He has filed a certified copy of the form DIR-12 (earlier known as Form 32) to this effect. He had neither signed the cheque nor the amount was received in his bank account, thus, applicant no.1 is the ex-director in the accused Company. Applicant nos.2 and 3 are the mother and

sister of the applicant no.1. They had no relation with the functioning of the accused company in any manner. They could not be the in-charge and responsible for the conduct and the business of the Company. Without any specific averment that what role they have played in the functioning and the business of the accused Company they can not be implicated for the offence under Section 138 N.I. Act. The summoning order has been passed without considering section 141 of N.I. Act, hence, the prayer is made accordingly.

7. Counter affidavit has been filed on behalf of the opposite party no.2, wherein it has been mentioned that all the applicants alongwith co-accused persons are the shareholders of the Company and belong to the one and the same family. The present applicant Prashant Tyagi is the son of Ram Sevak Tyagi, applicant no.2 Smt. Neeta Tyagi is the wife of Ram Sevak Tyagi and applicant no.3 Smt. Shweta Tyagi, is the wife of Gaurav/ daughter of Ram Sevak Tyagi and Ram Sevak, is the person who is the authorized representative of the accused company and had issued the cheque in favour of the complainant/ opposite party no.2 on 14.07.2016. When an annual general meeting was called on 30.08.2013 the shares of all the shareholders in the disputed Company were as under:-

8. Ram Sewak Tyagi was having 20000 shares, Prashant Tyagi applicant no.1 was having 25000, Smt. Neeta Tyagi was having 20000 and Smt. Shweta Tyagi was having 10000 and Ram Kishan is said to have 5000 shares, thus, all the applicants here are the shareholders of the accused Company.

9. All the applicants are the blood relatives of Ram Sevak Tyagi and Ram

Kishan, is the brother-in-law of Ram Sevak, who is the master mind of the aforesaid fraud. Ram Sevak was handling the financial as well as accounts affairs of the Company alongwith other Directors and the shareholders of the Company and was acting as authorized signatory of the Company on behalf of the Directors, authorized representatives as well as other shareholders of the Company. All the applicants are the over all incharge of the day to day business of the Company. A revision of the applicants was also rejected by the trial court. Applicant no.1 is a Joint Director of the Company and still a Director of the Company and for a very short time he was not there on the Board of Directors. All the applicants looking after the day to day business/ functions of the Company and being the authorized representatives of the Company are liable for the offence, hence, cognizance has been rightly taken by the court.

10. The applicants filed a rejoinder affidavit wherein the version of the counter affidavit was denied and the version of the complaint was reiterated.

11. Learned counsel for the applicants has argued that the trial court has not gone through the Section 141 of N.I. Act, which deals with the offences by the companies. Without going through this section the impugned order cannot be said to be a complete and affective order.

12. It is further submitted that the applicant no.1 had resigned on 26.09.2014, while impugned cheque is said to have been issued on 14.07.2016. Regarding his resignation Form DIR-12 has been filed, which is a public document. Applicant nos.2 and 3 are the mere shareholders in the Company and are the ladies. Their

participation cannot be said to be active in the Company and in the complaint there is bald averment that the accused nos.2 to 6 being the Directors and shareholders of the Company are responsible for the day to day business of the accused Company. Accused No.7 to 9 including applicant no.2 and 3 are the authorized representatives of the Company and thus all the accused persons including all the three applicants are responsible for all the transactions and overall business of the Company. But no particulars or the specific role of the persons, which must be explained in the complaint, has been explained. Admittedly the cheque was not issued by any of the applicants. The applicant no.2, the mother of the applicant no.1 is a senior citizen. Hence, the prayer is made accordingly.

13. While, learned counsel for the opposite party no.2 opposed the version of the learned counsel for the applicants and submitted that the applicants are the shareholders in the Company and family members of Ram Sevak, who is said to have issued the impugned cheque and being the wife, son and daughter of the person issuing cheque all the applicants must have knowledge of the works done by Ram Sevak Tyagi, accused no.7 in the complaint. As the whole fraud/ cheating has been done with the consent and connivance of the applicants, so with the help of section 141 of the N.I. Act all the applicants would be liable for the acts done by the Company. The defence of the applicants cannot be adjudicated at this stage of summoning. Liability of the applicants can only be decided after the evidence, because as per sub-section 2 of Section 141 of the Act if the offence is found to be proved committed with the consent or connivance of the applicants they shall also be liable for the same and punished

accordingly. Thus for proving the offence of the applicants evidence of the parties is to be adduced and at this nascent stage the liability of the applicants cannot be fixed.

14. Placing reliance over the judgment of this Court in ***Smt. B Devi (Basanti Devi) Versus State of U.P., 2016 (94) ACC 90***, it is argued by the learned counsel for opposite party no.2 that at the stage of summoning, defence of the accused which they may adduce subsequently cannot be seen since there was no occasion to look into such probable defence, which may come when the accused would appear and place their case before the magistrate. At the stage of issuing summons Court has to see whether a prima facie commission of offence has been shown and appropriate material has come justifying summoning of the accused persons against whom complaint has been made. The role assigned to the applicants in clear and specific words is referred in paragraph 4 of the complaint, that all the accused persons are responsible for the day to day business and functioning of the Company.

15. On the basis of this judgment, it is further argued that all the officers of the Company are responsible for the acts done in the name of Company and are sought to be made personally liable for the acts which resulted in criminal action being taken against the Company. Thus, it is claimed that all the applicants are liable to face trial under the aforesaid sections.

16. Learned counsel for the applicants drew the attention of the Court towards the judgment in ***Sunita Palita & Others Versus M/S Panchami Stone Quarry, Criminal Appeal No. of 2022 [Arising out of SLP (Crl.) No.10396 of 2019]***, decided

on 01.08.2022 and the judgment in S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, (2005) 8 SCC 89, mentioned therein wherein para-10 the Apex Court held that-

"every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a Company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a Company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status."

17. The attention of the Court is further drawn towards judgment in ***Harshendra Kumar D. Versus Rebatilata Koley & Others, (2011) 3 Supreme Court Cases 351*** wherein it was held by the Apex Court that as dishonour of the cheques through the complainant banker was subsequent to his resignation so the applicant no.1 could not be said to have any concern with the Company at that time.

18. It is further argued by the learned counsel for the applicants that mere bald

avermment in the complaint that the "applicants are looking after the day to day business of the Company, hence, they are liable for the offence committed" is not enough to prove the offence. This averment is devoid of any particulars.

19. In judgment *Pooja Ravinder Devidasani Versus State of Maharashtra & Anr.*, (2014) 16 SCC 1, the Apex Court held that to fasten vicarious liability under Section 141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the Company, one who actively looks after the day-to-day activities of the Company and particularly responsible for the conduct of its business. Simply because a person is a Director of a Company.....Every person connected with the Company will not fall into the ambit of the provision.

20. Thus, it is argued that the applicant no.1 was not a Director of the Company on the date when the cheque was issued and regarding his resignation Form DIR-12 has been placed on record. Applicant nos.2 and 3 are admittedly mere shareholders in the Company. They cannot be said to actively participate in the working of the Company.

21. So far as the argument of the learned counsel for the opposite party no.2 that a defence of the applicants shall be seen at the time of arguments is concerned in this regard, the Apex Court opined in judgment *Harshendra Kumar D. Versus Rebatilata Koley & Others (supra)* that if on the face of the documents which are beyond suspicion or doubt - placed by the accused, the accusations against him cannot stand, it would be travesty of justice if accused is relegated to trial and he is asked to prove his defence before the trial court.

In such a matter, for promotion of justice or to prevent injustice or abuse of process, the Court may look into the materials which have significant bearing on the matter at prima facie stage.

22. If we go through the judgment in *Smt. B Devi (Basanti Devi) Versus State of U.P. (supra)* placed by the learned counsel for opposite party no.2, the facts of that case are different from the facts of the present case, wherein as per facts of that case the cheques were issued in the presence of the petitioner and other Directors, while in the present case cheques were never issued in the presence of the complainant rather till then applicant no.1 had resigned from the Company. While as per facts of the case of *Smt. B Devi (Basanti Devi) Versus State of U.P. (supra)* the resignation and the documents with regard to the resignation were alleged to be the forged documents, but in the case in hand resignation of applicant no.1 has not been challenged, hence, the counsel for the opposite party no.2 cannot take benefit of the judgment of this Court, in the presence of various Apex Court judgments placed above by the counsel for the applicants.

23. Thus on the basis of the discussion and the judgments placed above, it is found that applicant no.1 had resigned from the Company much prior to the issuance of the cheque in question. Admittedly, the cheque did not bear the signatures of any of the applicants. On the date of issuance of the cheque the applicants were mere the shareholders of the Company. There was no active participation of the applicants in the day to day business and transactions of the Company and in the complaint itself, it is not mentioned that as to how and in what

manner the applicants were in-charge or were responsible to the accused Company for the conduct of its business. Thus, in the opinion of the Court, as on the face of the record, participation of the applicants is not found in the day to day functioning of the Company, hence, on the basis of the version that the defence would be seen at the time of evidence, it would be travesty of justice to drag the persons to face the prosecution who are no way connected with the issuance of the cheque or its being dishonour thereof.

24. On the basis of above discussion, the summoning of the applicants to face trial under Section 138 of Negotiable Instruments Act is found to be against the mandate of law laid down by the Apex Court in above mentioned judgments.

25. The summoning order dated 25.11.2016 passed by the Upper Nyayalaya Pratham, Ghaziabad and the judgment dated 22.02.2018 passed by the Additional Session Judge, Court No.15, Ghaziabad in criminal revision are quashed.

26. The application under Section 482 Cr.P.C. is, hereby, **allowed**.

(2023) 8 ILRA 1215
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.04.2023

BEFORE

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

Application U/S 482. No. 12016 of 2023

Jaypal & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:

Sri Rajat Kumar Shukla

Counsel for the Opposite Parties:

G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections 302, 120B , fundamental foundations of criminal justice system in India - accused of an offence has to be present during the entire process of the criminal trial - ex-parte trial is alien to the Indian legal system - fair trial enshrined in Article 21 of the Constitution of India - presence of the accused is necessary both for the framing of the charge and for recording of evidence during the trial - issuance of non-bailable warrants interferes with personal liberty and the Courts should be extremely careful before issuing non-bailable warrants - warrants, either bailable or non-bailable, should never be issued without proper scrutiny of facts and complete application of mind.(Para - 11,16)

Summoning order was passed - applicants filed a criminal revision - rejected by an order - applicants filed a writ petition under Article 227 challenging revisional order – contention – no knowledge of summoning order and date for their appearance - Magistrate has no right to issue bailable or non-bailable warrants without sufficient service. **(Para -19)**

HELD:- Applicants were aware of the summoning order and non-bailable warrant, and were dishonestly or fraudulently avoiding court appearance. Court issued non-bailable warrants, indicating no illegality or infirmity in the orders impugned. **(Para-20,21)**

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:-

1. Inder Mohan Goswami & anr. Vs St. of Uttaranchal & ors., 2007 AIR SCW 6679

2. Purushottam Chaudhary Vs C.B.I. Thru. The Superintendent of Police CBI/ACB Lko , Application U/S 482 No. - 1974 of 2023

3. Inder Mohan Goswami Vs St. of Uttaranchal, (2007) 12 SCC 1

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

1. Heard Mr. Rajak Kumar Shukla, learned counsel for the applicants and Mr. K.P. Pathak, learned AGA for the State.

2. This application under Section 482 Cr.P.C. has been filed with the prayer to quash the impugned orders dated 15.03.2023, 16.02.2023, 16.01.2023, 14.10.2022, 05.09.2022, 25.08.2022, 15.07.2022, 09.06.2022 passed by learned Chief Judicial Magistrate, Firozabad in Criminal Case No.2685 of 2019 (State vs. Jaypal Singh and others), arising out of Case Crime No.528 of 2017, under Sections 302, 120B IPC, Police Station-Shikohabad, District-Firozabad, pending before the Court of Chief Judicial Magistrate, Firozabad.

3. The factual matrix of the case is that:-

(i) An FIR was lodged by the opposite party no.2 on 16.07.2017 at about 13:10 hrs. against the applicants and 5 other accused persons under Section 302 IPC, which came to be registered as Case Crime No.0528 of 2017 with the allegations that the opposite party no.2, Geetam Singh was presently residing in the house of K.K. Yadav alongwith his son Raghvendra Singh. His son was having some dispute with his wife Kavita. On 04.06.2017 at about 08:00 a.m., the informant went to his office and his son Raghvendra was alone in the house, the

landlord and others had gone to take bath, at about 11:50 hrs., on the occasion of Ganga Dussehra, the informant received a phone call from Kavita (his daughter-in-law), who inquired whereabouts of Raghvendra. She also stated that despite repeated calls, her phone call was not being received by Raghvendra. She also requested the informant to go there and find out about the same. On receiving such information, the informant tried to call Raghvendra, but his phone call was not picked up and, thereafter, he with his government vehicle and other police personnels, i.e. Constables Anil Kumar, Virendra Singh and driver Anand went at his rented house and saw that his son was lying on his knees on the ground having a plastic rope around his neck. The informant and others immediately opened the noose and he took his son to the government hospital, Shikohabad, where he was declared dead by the doctors. The informant was in a state of shock, filled the Panchayatnama and the postmortem of the deceased Raghvendra was conducted. In the postmortem report, the cause of death was due to strangulation. Thereafter, the dead body of the deceased was brought by the informant to Mathura and after last rites and other ceremonies were performed, Jeetu s/o Bachchoo Singh, resident of Vill-Navali, Mathura told the informant that on 13.04.2017, Jaypal and Naresh came on motorcycle and took him alongwith them to in-laws house of Raghvendra. There Raghvendra's wife, Kavita and his father; Deshraj, his brother; Monu and Kavita's brother-in-law; Jeetendra, sister; Meena were present. Thereafter, Kavita said that she wants to teach a lesson to Raghvendra and taking assistance of Jaypal and Naresh, she will finally succeed in doing so. They accordingly, planned for the same. Jeetu requested the aforesaid persons not to do

any such thing as Raghvendra was his brother-in-law (sala). Jeetu was threatened for life by Jaypal stating that in case he informs the aforesaid plan to someone, he be ready to face dire consequences.

(ii) On 02.06.2017, Jaypal alongwith Pushplata (informant's daughter) came to village Pali Kheda and on 04.06.2017, Jaypal and Naresh left their house at 07:00 a.m. in the morning, stating that they were going to the market for some work and will come back at 04:00 p.m. When they came, their face was covered with clothes and they were terrified. They told the informant's daughter that his brother; Raghvendra wants to meet her. The aforesaid facts were told by Pushplata to the informant and on the basis of the aforesaid information, he was fully confident that his son Raghvendra has been murdered by Jaypal, Naresh, Kavita, Monu, Deshraj, Jeetendra and Meena. Hence, the present F.I.R. was lodged.

(iii) During investigation, as no evidence could be collected against the accused persons including the applicants, therefore, the Investigating Officer submitted final report on 29.10.2017, but the final report was not forwarded to the court as the Circle Officer directed for further investigation in the matter. During further investigation on 8.10.2018 respondent no. 2 moved an application to the investigating officer that the case lodged by him may be dropped. Thereafter, the investigating officer investigated the matter further and approved the final report dated 29.10.2017 and forwarded the same to the court concerned.

(iv) Against the aforesaid final report dated 29.10.2017, the opposite party no.2 filed a protest petition on 21.10.2019

before the court below. Thereafter, on 07.11.2019 the Chief Judicial Magistrate concerned rejected the said final report and summoned the applicants and others, under Section 302, 120-B I.P.C.

(v) Aggrieved by the aforesaid summoning order dated 07.11.2019, the applicants preferred a criminal revision before the court concerned, which was dismissed on 10.05.2022. Against the aforesaid order dated 10.05.2022, the applicant no.1-Jaypal Singh approached before this Court by means of filing a petition under Article 227 of the Constitution of India bearing No.7505 of 2022, wherein the Co-ordinate Bench of this Court was pleased to grant interim protection to the applicant therein. However, the applicant no.2; Naresh Kumar and others have filed a petition bearing Matters Under Article 227 No.4722 of 2022, challenging the aforesaid revisional order dated 10.05.2022, which was dismissed by the Co-ordinate Bench of this Court vide order dated 29.08.2022 mentioning therein that as there is an eye witness account, therefore, the court did not find any illegality in the impugned orders dated 07.11.2019 and 10.05.2022.

(vi) Subsequently, the applicant no.1; Jaypal Singh has filed anticipatory bail application No.7343 of 2022, whereas applicant no.2; Naresh Kumar and others have filed anticipatory bail application no.7503 of 2022, which were dismissed by the Co-ordinate Bench of this Court vide order dated 01.11.2022.

(vii) The other accused persons, namely, Smt. Kavita, Monu @ Rishi, Deshraj and Meena have filed anticipatory bail application nos.7287 of 2022, 7304 of 2022, 7286 of 2022 and 7701 of 2022

respectively, which were granted by the co-ordinate Bench of this Court vide orders dated 01.11.2022 on the ground that eye witnesses have not taken their names.

(v) As the anticipatory bail applications of the applicants; Jaypal Singh and Naresh were rejected on 01.11.2022, prior to which they have already been summoned by the court concerned vide order dated 07.11.2019 and the revision, filed against the aforesaid summoning order, has also been dismissed way back in 10.05.2022, therefore, the applicants, despite having knowledge of the case, are avoiding appearance before the court concerned. Hence, the applicants were again summoned vide order dated 09.06.2022.

(vi) Subsequently, an application was moved by the informant on 15.07.2022 for issuing Non-bailable Warrants against the applicants. Pursuant to the aforesaid application, the concerned Magistrate has issued non-bailable warrants against the applicants vide order dated 15.07.2022. Thereafter, vide order dated 25.08.2022, proceedings under Section 82 Cr.P.C. were initiated against the applicants. The applicants preferred an application before the court concerned alongwith affidavit and status of the case pending before this Court, which was rejected by the court below vide order dated 14.10.2022 issuing process under Section 82 & 83 Cr.P.C. against the applicants. Again on 15.03.2023, as the accused persons including the applicants were not appearing before the court concerned, proceedings U/s 82&83 Cr.P.C. were initiated. Thus, the present case has been filed challenging the aforesaid orders dated 15.03.2023, 16.02.2023, 16.01.2023, 14.10.2022, 05.09.2022, 25.08.2022, 15.07.2022 and 09.06.2022.

SUBMISSIONS BY THE APPLICANTS:-

4. Learned counsel for the applicants submits that by the order dated 17.05.2022, the concerned Magistrate has summoned the applicants. However, summon has not been served on the applicants in terms of section 66 Cr.P.C. which provides that where the persons summoned are in active service of the Government, the Court issuing the summons shall ordinarily send it in duplicate to the head of the office in which such person is employed; and such head shall thereupon cause the summons to be served in the manner provided by Section 62, and shall return it to the Court under his signature with the endorsement required by that section.

5. He further submits that the concerned court has fixed the next date i.e. 09.06.2022. On that date, straightaway Non-Bailable Warrant has been issued on the application moved by the informant, without verifying the fact as to whether the applicants have been informed about the date fixed i.e. 09.06.2022. Thereafter, on third date 15.07.2022, the learned trial court again issued N.B.W. against the applicants through S.P., Badaun. Subsequently, on 25.08.2022, the learned trial court straightaway issued N.B.W. and proclamation of Section 82 Cr.P.C. again, without verifying the fact as to whether the applicant is aware about the N.B.W. being issued on 15.07.2022.

6. He further submits that the Magistrate has no right to issue bailable warrant or non-bailable warrant or proclamation and attachment U/s 83&83 Cr.P.C., without sufficient service of summon. In support of his contention, he has relied upon the judgment of Apex

Court in the case of *Inder Mohan Goswami and Anr. vs. State of Uttaranchal and Ors.*, 2007 AIR SCW 6679, wherein the Hon'ble Apex Court has deprecated such exercise being adopted by the learned trial court. He has also relied upon the judgment of this Court in the case of *Purushottam Chaudhary vs. Central Bureau of Investigation Thru. The Superintendent of Police CBI/ACB Lko*; decided on 27.02.2023 passed in Application U/S 482 No. - 1974 of 2023.

7. Learned counsel for the applicants, therefore, submitted that the aforesaid impugned orders have been passed by the concerned Magistrate in illegal and arbitrary manner. Therefore, the same are liable to be set aside by this Court.

**SUBMISSIONS OF THE LEARNED
A.G.A. FOR THE STATE:-**

8. Per contra, learned AGA for the State submits that there is no illegality or infirmity in the orders impugned as the applicants have sufficient knowledge about the summoning order dated 07.11.2019 against which revision has been filed, which was also rejected, despite the aforesaid, the applicants are avoiding appearance before the court below. Therefore, the court concerned had no other option but to issue Non-bailable warrants and proclamation U/s 82 & 83 Cr.P.C.

9. On the cumulative strength of the aforesaid submissions, learned A.G.A. states that this Court may not exercise its inherent power under Section 482 Cr.P.C. in the present case, and hence the present application is liable to be rejected.

**ANALYSIS, REASONING AND
CONCLUSION:-**

10. I have considered the submissions made by the learned counsel for the parties and gone through the records of the present application.

11. One of the fundamental foundations of criminal justice system in India is that the accused of an offence has to be present during the entire process of the criminal trial. The concept of ex-parte trial is alien to the Indian legal system as well as the fundamentals of a fair trial enshrined in Article 21 of the Constitution of India. The presence of the accused is necessary both for the framing of the charge and for recording of evidence during the trial. It is imperative, therefore that the court issues guidelines to ensure that a proper procedure is put in place with the use of modern technology to achieve the above.

12. Chapter VI of the Code of Criminal Procedure provides for “processes to compel appearance”. Chapter VI of the Code is divided into four parts:-

“Part A - Summons (Sections 60 – 69), Part B - Warrant of Arrest (Sections 70-81), Part C - Proclamation & Attachment (Sections 82-86), Part D - Other rules regarding processes (Sections 87 – 90)”.

13. The issuance of Non-bailable Warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants.

14. The Court feels that Non-bailable Warrant should be issued to bring a person to court when summons or bailable

warrants would be unlikely to have the desired result. This could be when: (a) it is reasonable to believe that the person will not voluntarily appear in court; or (b) the police authorities are unable to find the person to serve him with a summon; or (c) it is considered that the person could harm someone if not placed into custody immediately.

15. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrants should be preferred. The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the criminal complaint or FIR has not been filed with an oblique motive.

16. In the judgement of Apex court in the case of ***Inder Mohan Goswami v. State of Uttaranchal, reported in (2007) 12 SCC I***, it has been held that issuance of non-bailable warrants interferes with personal liberty and the Courts should be extremely careful before issuing non-bailable warrants. The Apex Court further held that warrants, either bailable or non-bailable, should never be issued without proper scrutiny of facts and complete application of mind. What has to be ensured is that the concerned person was made aware about the legal process pending against him. The relevant portion of the judgment in ***Inder Mohan Goswami (supra)*** is reproduced hereinbelow:-

—*Personal liberty and the interest of the State*

"50. Civilized countries have recognized that liberty is the most precious of all the human rights. The American Declaration of Independence, 1776, French Declaration of the Rights of Men and the Citizen, 1789, Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights, 1966 all speak with one voice--liberty is the natural and inalienable right of every human being. Similarly, Article 21 of our Constitution proclaims that no one shall be deprived of his liberty except in accordance with procedure prescribed by law.

51. The issuance of non-bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants.

52. Just as liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilised society. Sometimes in the larger interest of the public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period, only then the non-bailable warrants should be issued."

17. For issuance of a proclamation under Section 82 of the Code, it is necessary that the Court has to be satisfied on the basis of material that a person, despite having knowledge of proceeding, is avoiding the process issued.

18. The court is empowered under Section 83 of the Code to order attachment of the movable and/or immovable properties of the Proclaimed person at any

8 All. M/S Bansal Construction, Muzaffarnagar Vs. Yamuna Expressway Industrial Development1221
Authority, G.B. Nagar & Ors.
time after the issuance of the proclamation
under Section 82 of the Code.

19. So far as the submission made by the learned counsel for the applicants regarding the Magistrate having no right to issue bailable warrants or non-bailable warrants or proclamation/attachment U/s 82&83 Cr.P.C. without sufficient service, the Court finds that initially, the summoning order was passed on 07.11.2019 against which criminal revision has been filed by the applicants, which has been rejected vide order dated 10.5.2022 and, thereafter, the applicants had approached this Court by filing the writ petition under Article 227 challenging the revisional order dated 10.5.2022, therefore, it cannot be said that the applicants have no knowledge about the summoning order or date fixed for appearance before the court below.

20. In the present case, the applicants were well aware of the summoning order and non-bailable warrant issued against them, and clearly, the applicants were dishonestly or fraudulently avoiding appearance before the court below. Therefore, the court concerned has no other option but to issue non-bailable warrants along with the proceedings under sections 82&83 Cr.P.C. Hence, there is no illegality or infirmity in the orders impugned.

21. For the reasons stated above, this Court is of the opinion that this is not a fit case to exercise jurisdiction of this Court under Section 482 Cr.P.C., therefore, prayer so made is refused.

22. With the aforesaid observations, the present application under Section 482 Cr.P.C. is, accordingly, **dismissed**.

(2023) 8 ILRA 1221
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2023

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

Arbitration & Concili. Appl. U/S 11(4) No. 142 of
2019

M/S Bansal Construction, Muzaffarnagar
...Applicant

Versus

Yamuna Expressway Industrial
Development Authority, G.B. Nagar & Ors.
...Opposite Parties

Counsel for the Applicant:

Sri J.P. Pandey

Counsel for the Opposite Parties:

Sri Aditya Bhushan Singhal, Sri Priyansh
Shukla

Civil Law - Arbitration and Conciliation Act, 1996 - Sections 11(6) & 12(5) r/w Seventh Schedule - Request for appointment of arbitrator - Clause 33 of agreement restricting arbitration to CEO/nominee of YEIDA - Such clause in conflict with Section 12(5) rendering CEO ineligible - Whether arbitration clause survives? - Held, yes. Core intent to refer dispute to arbitration remains - Procedural invalidity of appointing authority (i.e. CEO) can be severed - Neutrality of arbitrator is the statutory mandate - Court empowered to appoint independent arbitrator - Clause ousting arbitration in absence of departmental nominee violative of public policy and not enforceable.

Held:

Clause in agreement restricting arbitration to CEO of YEIDA or his nominee, and ousting arbitration if such appointment is not possible, cannot override statutory requirement under

Section 12(5) ensuring independence of arbitrator. Arbitration agreement remains valid despite procedural portion becoming unenforceable. Court, under Section 11(6), can appoint arbitrator to uphold legislative intent of promoting neutral arbitration.

Objections regarding non - maintainability based on Clause 33 and alleged waiver affidavit are questions of fact - can be raised before arbitrator.

Justice P.K.S. Baghel (Former Judge) appointed as arbitrator.

Application allowed.

Case Law discussed:

1. Ellora Paper Mills Ltd. Vs St. of M.P., (2022) 3 SCC 1
2. Voestalpine Schienen GmbH Vs DMRC, (2017) 4 SCC 665
3. Bharat Broadband Network Ltd. Vs United Telecoms Ltd., (2019) 5 SCC 755
4. TRF Ltd. Vs Energo Engg. Projects Ltd., (2017) 8 SCC 377
5. Chloro Controls India (P) Ltd. Vs Severn Trent Water Purification Inc., (2013) 1 SCC 641
6. Ram Kripal Singh Construction Pvt. Ltd. Vs NTPC, ARB.P 582/2020, Delhi High Court
7. M.J.S. Construction Vs U.O.I., 2023 (1) ADJ 497

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. This petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act of 1996') for appointment of arbitrator, consequent upon accrual of dispute between the parties to the arbitration agreement. Clause 33 of the agreement, which contains the arbitration clause is reproduced hereinafter:-

“Clause 33: ARBITRATOR

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and to the quality of workmanship or materials used on the work or as to any other question claim right or rates for extra items sanctioned and decided are not by the competent authority under the conditions of this contract, designs, drawings, specifications, estimates instructions or order on these conditions or otherwise concerning the work or the executive or failure to execute the same whether arising during the progress of the work or after the person or person appointed by the Chief Executive Officer, YEIDA. It will be no objection to any such appointment that the matter to which contract relates and that in the course of his duties as YEIDA servant, he had expressed views on all or any of the matters in dispute or differences. The arbitrator to whom the matter is originally or subsequently referred being incapacitated to act. The Chief Executive Officer of the YEIDA shall appoint another person to act as arbitrator in accordance with the term of contract. It is also a term of his contract that no person other than a person appointed by the Chief-Executed Officer of the YEIDA as aforesaid/shall act as arbitrator and if for any reason, that is not possible, the matter is not to be referred to the arbitration at all. The arbitrator(s) may from time to time with consent of the parties enlarge the time for making and publishing the award.

Subject as aforesaid the provisions of the Arbitration Act 1940 or any statutory modification or re-enactment thereafter and the rules made thereunder

and for the time being in force shall apply to the arbitration proceeding under this clause.”

2. Records reveal that the applicant was awarded contract for construction of 12 meter and 24 meter roads in Sector-18 near village Usmanpur. The contracted work was completed on 30.6.2017. Payments were released by the authority against running bills from time to time. Fourth and final bill was paid in March, 2019 wherein various deductions were made. Dispute thus arose between the parties. The applicant requested for reference of dispute to the arbitrator vide his letter dated 26.6.2019. Reminders were also sent whereafter this application has been filed.

3. Request for reference of dispute to arbitration has since been declined on the ground that Chief Executive Officer of the Authority alone is competent to arbitrate in the matter as per Clause 33 and as he has now become ineligible by virtue of Section 12(5) of the Act of 1996, therefore, the arbitration clause itself would cease to exist.

4. A counter affidavit has been filed by the opposite party stating that the applicant has submitted an affidavit before the authority stating that additional works were conducted by it on the spot on account of various hindrances and demand of additional compensation and for such variation no claim would be raised before the authority. This notarial affidavit is on a Rs. 100/- stamp paper. This affidavit is on a printed proforma and details are filled by hand which contains no date. The affidavit is referred to in para 16 of the counter affidavit. A rejoinder affidavit has been filed denying the averments made in para

16 of the counter affidavit stating that the affidavit does not bear the signature of the proprietor of the firm or its authorised agent/signatory.

5. The respondents also contend that the arbitration clause specifically contemplates that arbitrator could either be the Chief Executive Officer or by the person appointed by him and if for any reason, it is not so possible, the dispute is not to be referred to the arbitration, at all.

6. When the matter was heard yesterday, an objection was raised to the maintainability of the petition by Sri A.B. Singhal, relying upon a judgment of this Court in Arbitration Application No. 54 of 2017. This Court while examining a similar provision contained in the arbitration agreement to held as under:-

"The Arbitration Clause quoted in the earlier part of the judgment contains a recital to the effect "it is also a term of this contract that no person other than a person appointed as aforesaid should act as Arbitrator. ..." This recital in the Arbitration Clause clearly evinces the agreed intent of the parties that no person other than the Chief Engineer or any person nominated by him should act as Arbitrator. Now, this by itself would be hit by section 12(5) of the Act 1996 as amended in 2015 and would not come to the rescue of the opposite parties, however, these words are followed by the stipulation - **"and if for any reason this is not possible, the matter is not to be referred to Arbitration at all."** These words clearly evince the agreed intent of the parties not to refer the dispute to Arbitration if such Arbitration cannot be held by the Chief Engineer or any person nominated by him. The agreed intent not to refer the matter to

arbitration in such an eventuality is evident from the arbitration clause. This stipulation in the Agreement is binding upon the parties including the applicant. Under sub-Section 6-A of section 11 of the Act 1996 all that this Court is required to see is the existence of an Arbitration Clause. I am of the considered opinion that in view of the aforesaid recital this application for appointment of an Arbitrator other than the Chief Engineer or any person nominated by him is not maintainable in view of the Agreement arrived at between the parties that in such an eventuality when the aforesaid Authorities cannot be appointed as Arbitrator, the matter would not be referred to Arbitration at all. In view of this stipulation neither the Amending Act 2015 nor the un-amended Act 1996 come to the rescue of the applicant. The application for appointment of the Arbitrator is accordingly rejected."

7. This Court has observed that where it is not possible to act in terms of arbitration agreement since the named arbitrator is ineligible to act by virtue of Section 12(5) of the Act, the arbitration itself would not be available for resolution of dispute as the terms of the agreement has to be given effect to. Sri A.B. Singhal for the respondent, therefore, submits that by virtue of statutory interdict introduced vide Section 12(5) of the Act, the arbitrator cannot function and in view of the specific clause in contract the consent of parties for arbitration would cease to exist.

8. Counsel for the applicant has placed reliance upon the Judgments delivered by the Supreme Court and High Courts to contend that arbitrator is liable to be appointed by this Court in the facts of the present case. Reference is made to the judgments of Supreme Court in Ellora

Paper Mills Limited Vs. The State of Madhya Pradesh, Civil Appeal No. 7697 of 2021, dated 4.1.2022; Durga Charan Rautray Vs. State of Orissa and another, 2012 (1) AWC 404; United India Insurance Company Limited Vs. Antique Art Exports Private Limited, (2019) 5 SCC 362; Indian Oil Corporation Limited Vs. NCC Limited, (2023) 2 SCC 539; and the judgment of this Court in M.J.S. Construction and others Vs. Union of India and others, 2023 (1)ADJ 497; and the judgment of Delhi High Court in Ram Kripal Singh Construction Pvt. Ltd. Vs. NTPC, ARB.P 582/2020, dated 9.11.2022 (Delhi), in order to submit that the arbitration agreement is broadly in two parts, firstly, agreement for reference of dispute to arbitrator and secondly the procedure to be followed in the matter on such reference. It is urged that the procedure part contemplating party autonomy is always subservient to the statutory interdict contained in Section 12(5) of the Act of 1996 and cannot be construed as obliterating the first part of the agreement for reference of dispute to arbitrator.

9. It is submitted that the authority of the Chief Executive Officer to act as arbitrator or to appoint an arbitrator forms part of the procedure for appointment and even if such authority ceases to exist by virtue of Section 12(5) of the Act, the core clause contemplating adjudication of dispute by arbitrator would continue to subsist.

10. I have heard learned counsel for the parties and have perused the materials on record. It is no doubt true that the arbitration clause in this case is couched in such a manner that the arbitration itself would not be possible in terms of Clause 33 as the Chief Executive Officer of the

Authority, being an officer would clearly be denuded of jurisdiction to act as arbitrator or to appoint an arbitrator by virtue of 7th Schedule read with Section 12(5) of the Act. The clause, however, has to be interpreted so as to cull-out the real intent of the parties. The agreement between the parties to refer all disputes arising out of contract to arbitrator is the core part of the agreement. The manner to appoint the arbitrator would, at best, fall in the realm of procedure. Merely because the person, who could act as an arbitrator in terms of arbitration clause becomes ineligible to act as arbitrator by virtue of Section 12(5) of the Act read with 7th Schedule, it would not mean that the core part of the agreement for referring the dispute for adjudication to arbitrator would be rendered nugatory. The interpretation, which is sought to be culled out by the respondents, would clearly defeat the object of neutrality of arbitrator or reference of dispute to arbitration. Section 12(5) of the Act read with 7th Schedule has been introduced so as to lend greater legitimacy to the process of arbitration by providing for an independent person to act as arbitrator and exclude the other party from becoming a judge in their own cause. This Court, therefore, would be inclined to lean in favour of an interpretation which effectuates the remedy of arbitration consistent with the legislative intent i.e. Section 12(5) of the Act of 1996 read with the 7th Schedule.

11. This Court is also cognizant of the observations made by the Supreme Court in Para 96 of the judgment in *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641, which is reproduced hereinafter:

“Examined from the point of view of the legislative object and the intent

of the framers of the statute i.e. the necessity to encourage arbitration, the court is required to exercise its jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their bargain of arbitration by bringing civil action involving multifarious causes of action, parties and prayers.”

12. The object of introducing sub-section (5) of Section 12 read with Seventh Schedule came to be examined by the Supreme Court in *Ellora Paper Mills Ltd. v. State of M.P.*, (2022) 3 SCC 1. Relying upon earlier judgments of the Court it was observed as under in para 8 of the report:-

“8. An identical question came to be considered by this Court in *Jaipur Zila Dugdh Utpadak Sahkari Sangh [Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers]*, (2021) 17 SCC 248 : 2021 SCC OnLine SC 730], and after considering the decisions of this Court in *TRF [TRF Ltd. v. Energo Engg. Projects Ltd.]*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] and other decisions on the point, it is observed and held as under : (*Ajay Sales & Suppliers case [Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers]*, (2021) 17 SCC 248 : 2021 SCC OnLine SC 730] , SCC paras 8.3 to 12)

"8.3. So far as the submission on behalf of the petitioners that the agreement was prior to the insertion of sub-section (5) of Section 12 read with Seventh Schedule to the Act and therefore the disqualification under sub-section (5) of Section 12 read with Seventh Schedule to the Act shall not be applicable and that once an arbitrator — Chairman started the arbitration proceedings thereafter the High Court is not justified in appointing an arbitrator are

concerned the aforesaid has no substance and can to be accepted in view of the decision of this Court in *TRF Ltd. v. Energo Engg. Projects Ltd.* [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] ; *Bharat Broadband Network Ltd. v. United Telecoms Ltd.* [Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1] ; *Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd.* [Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd., (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] In the aforesaid decisions, this Court had an occasion to consider in detail the object and purpose of insertion of sub-section (5) of Section 12 read with Seventh Schedule to the Act.

9. In *Voestalpine Schienen GmbH* [Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd., (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] it is observed and held by this Court that the main purpose for amending the provision was to provide for "neutrality of arbitrators". It is further observed that in order to achieve this, sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject-matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. It is further observed that in such an eventuality i.e. when the arbitration clause finds foul with the amended provisions [sub-section (5) of Section 12 read with Seventh Schedule] the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator as may be permissible. It is further observed that, that would be the

effect of non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of the arbitration agreement.

10. It is further observed and held by this Court in *Voestalpine Schienen GmbH* [Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd., (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] that independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which apply to all judicial and quasi-judicial proceedings. It is further observed that it is for this reason that notwithstanding the fact that relationship between the parties, to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator would render him ineligible to conduct the arbitration. It is further observed that the genesis behind this rationale is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties.

11. In paras 16 to 18 it is observed and held as under : (*Voestalpine Schienen GmbH case* [Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd., (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] , SCC pp. 679-83)

'16. Apart from other amendments, Section 12 was also amended and the amended provision has already been reproduced above. This amendment is

also based on the recommendation of the Law Commission which specifically dealt with the issue of "neutrality of arbitrators" and a discussion in this behalf is contained in paras 53 to 60 and we would like to reproduce the entire discussion hereinbelow:

"Neutrality of arbitrators

53. It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. In the context of *arbitration, neutrality of arbitrators viz. their independence and impartiality, is critical to the entire process.*

54. In the Act, the test for neutrality is set out in Section 12(3) which provides—

'12. (3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality....'

55. The Act does not lay down any other conditions to identify the "circumstances" which give rise to "justifiable doubts", and it is clear that there can be many such circumstances and situations. The test is not whether, given the circumstances, there is any actual bias for that is setting the bar too high; but, whether the circumstances in question give rise to any *justifiable apprehensions of bias.*

56. The limits of this provision have been tested in the Indian Supreme Court in the context of contracts with State

entities naming particular persons/designations (associated with that entity) as a potential arbitrator. It appears to be settled by a series of decisions of the Supreme Court [see *Executive Engineer, Irrigation Division v. Gangaram Chhapolia* [*Executive Engineer, Irrigation Division v. Gangaram Chhapolia*, (1984) 3 SCC 627] ; *State of T.N. v. Munuswamy Mudaliar* [*State of T.N. v. Munuswamy Mudaliar*, 1988 Supp SCC 651] ; *International Airports Authority v. K.D. Bali* [*International Airports Authority v. K.D. Bali*, (1988) 2 SCC 360] ; *S. Rajan v. State of Kerala* [*S. Rajan v. State of Kerala*, (1992) 3 SCC 608] ; *Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co.Ltd.* [*Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd.*, (1996) 1 SCC 54] ; *Union of India v. M.P. Gupta* [*Union of India v. M.P. Gupta*, (2004) 10 SCC 504] ; *ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.* [*ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.*, (2007) 5 SCC 304]] that arbitration agreements in government contracts which provide for arbitration by a serving employee of the department, are valid and enforceable. While the Supreme Court, in *Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd.* [*Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd.*, (2009) 8 SCC 520 : (2009) 3 SCC (Civ) 460] carved out a minor exception in situations when the arbitrator

"was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject-matter of the dispute" (SCC p. 533, para 34)

and this exception was used by the Supreme Court in *Denel (Pty) Ltd. v. Ministry of Defence* [Denel (Pty) Ltd. v. Ministry of Defence, (2012) 2 SCC 759 : (2012) 2 SCC (Civ) 37] and *Bipromasz Bipron Trading Sa v. Bharat Electronics Ltd.* [Bipromasz Bipron Trading Sa v. Bharat Electronics Ltd., (2012) 6 SCC 384 : (2012) 3 SCC (Civ) 702], to appoint an independent arbitrator under Section 11, this is not enough.

57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the Arbitral Tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles — even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed. The Commission hastens to add that Mr P.K. Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non-State parties. The

concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous — and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes.

58. Large-scale amendments have been suggested to address this fundamental issue of neutrality of arbitrators, which the Commission believes is critical to the functioning of the arbitration process in India. In particular, amendments have been proposed to Sections 11, 12 and 14 of the Act.

59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his possible appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. *The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the red and orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a "guide" to determine whether circumstances exist which give rise to such justifiable doubts.* On the other hand, in terms of the proposed Section 12(5) of the Act and the *Fifth Schedule which incorporates the categories from the red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be ineligible to be so appointed, notwithstanding any prior*

agreement to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed Explanation to Section 14. Therefore, while the *disclosure* is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the red and orange lists of the IBA Guidelines), the *ineligibility* to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious subset of situations (as set out in the Fifth Schedule, and as based on the red list of the IBA Guidelines).

60. The Commission, however, feels that *real* and *genuine* party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective "justifiable doubts" regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to Section 12(5), where parties may, *subsequent to disputes having arisen between them*, waive the applicability of the proposed Section 12(5) by an express agreement in writing. In all other cases, the general rule in the proposed Section 12(5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of Section 12(1) and in which context the High Court or the designate is to have "due regard" to the contents of such disclosure in appointing the arbitrator."

17. We may put a note of clarification here. Though, the Law Commission discussed the aforesaid aspect under the heading "Neutrality of Arbitrators", the focus of discussion was on impartiality and independence of the arbitrators which has relation to or bias towards one of the parties. In the field of international arbitration, neutrality is generally related to the nationality of the arbitrator. In international sphere, the "appearance of neutrality" is considered equally important, which means that an arbitrator is neutral if his nationality is different from that of the parties. However, that is not the aspect which is being considered and the term "neutrality" used is relatable to impartiality and independence of the arbitrators, without any bias towards any of the parties. In fact, the term "neutrality of arbitrators" is commonly used in this context as well.

18. Keeping in mind the aforequoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject-matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. In such an eventuality i.e. when the arbitration clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That

would be the effect of non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of arbitration agreement.'

12. In *Bharat Broadband Network [Bharat Broadband Network Ltd. v. United Telecoms Ltd.]*, (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1], it is observed that sub-section (5) of Section 12 read with Seventh Schedule made it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as an arbitrator. It is further observed that once he becomes "ineligible", it is clear that he then become de jure unable to perform his functions inasmuch as in law, he is regarded as "ineligible". It further is observed in the said decision that where a person becomes ineligible to be appointed as an arbitrator there is no question of challenge to such arbitrator before such arbitrator in such a case i.e. a case which falls under Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e. de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator and this being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator."

13. Clause 33 in the present agreement while contemplating reference of dispute to arbitration essentially restricts its applicability to an adjudication by the departmental officer i.e. Chief Executive Officer or his nominee. The further stipulation in Clause 33 that where reference to such officer is not possible the arbitration itself would not be available. This stipulation clearly manifests the intent of employer i.e. YEIDA to retain the power

of adjudication, which goes against the spirit of neutrality of arbitrator for which alone Section 12(5) of the Act of 1996 is introduced. The observation of the Supreme Court in *Ellora Paper Mills* (supra) while referring to the discussions made by the Law Commission assumes significance. Principles of impartiality or independence has to be respected in the matter of appointment of arbitrator and it would be incongruous to hold that party autonomy can be exercised in complete disregard of these principles.

14. Once the statute has stepped in to enforce neutrality of arbitrator in an arbitration agreement, by virtue of Section 12(5) of the Act, the Court would not be justified in literally interpreting the clause in the agreement to keep the power of adjudication or the party autonomy with the employer at the cost of abandoning the arbitration itself. Clause 33 of the agreement ousting arbitration in case of neutrality of arbitrator has thus to be necessarily construed as being subservient to Section 12(5) of the Act of 1996. In any case, the intent of parties to refer their dispute to arbitration cannot be nullified in the anxiety to retain power of adjudication by the employer i.e. YEIDA.

15. This Court is in respectful agreement with the view expressed by Delhi High Court in *Ram Kripal Singh* (supra), wherein the Court observed as under:-

"17.4. The procedure for appointment of an arbitrator is clearly distinct and separable from the agreement to refer disputes to arbitration, even if these are contained in the same arbitration clause. If therefore, by reason of amendment, re-statement or re- interpretation of the law, as

Criminal Law - Criminal Procedure Code, 1973 – Sections 156(3), 482 & 438 - Indian Penal Code, 1860 – Sections 120B, 323, 504, 506, 406, 420, 467, 468 & 471- Anticipatory Bail Application - FIR – allegations against accused of being part of a scheme involving fraudulent activities related to sand mining tenders - The applicant, along with others, allegedly used forged documents to deceive the informant and secured a transfer of ₹1.6 crore through misrepresentation – court finds that, the charges include serious sections of the IPC, such as fraud, forgery, and criminal intimidation – Held, Court of view that application for grant of anticipatory bail to applicant cannot be rejected on this ground that co-accused had asked informant to put his signature on some documents which documents had been prepared by applicant – therefore, aforesaid allegation would not lead to an inference that applicant had forged letter – and F.I.R. contains no allegation that letter had been forged or fabricated by applicant – Application allowed. (Para – 22, 23, 25)

Application Allowed. (E-11)

List of Cases cited:

1. Kamlesh & anr. Vs St. of Raj. & anr., 2019 SCC OnLine SC 1822
2. Rajiv Lochan Paliwal Vs St. of U.P. & ors., Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 1750/2022
3. Navneet Bhadauria Vs St. of U.P. & ors., Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 1841/2022

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

1. Heard Sri Purnendu Chakravarty Advocate, the learned counsel for the applicant, Sri Arvind Kumar Pandey, the learned AGA for the State and Sri Digvijay Nath Dubey, the learned counsel for the informant.

2. By means of the present application, the applicant is seeking

anticipatory bail in case crime No. 363/2021, under Sections 323/504/506/406/420/467/468/471 I.P.C., P.S. Vibhuti Khand, District Lucknow.

3. The aforesaid case has been registered on the basis of an FIR lodged by the informant Deepak Sharma on 23.07.2021 against four named persons, including the applicant, and an unknown person, alleging that in December, 2018, co-accused Anand Kumar Singh alias Baba Trikaldarshi met the informant at Mumbai and projected that he had a good understanding of mining of sand and had a sound grip on the market in Banda. The informant visited Lucknow thrice in December, 2018, January, 2019 and February, 2019 where the co-accused Anand Kumar Singh met him in a hospital and at the residence of co-accused Rajiv Porwal and the applicant and the co-accused Navneet Singh Bhadauria also used to sit in the meetings and they claimed themselves to be established businessmen of Morang (a minor mineral used in construction activities). Co-accused Anand Kumar Singh demanded Rs. 1 crore from the informant for a government tender and he asked the informant to sign some documents which had been prepared by the applicant. The applicant had shown some documents purportedly relating to registration of the company in the tender process but the documents turned out to be forged. On 11.02.2019, a notice inviting tenders for excavation of sand was published wherein the applicant had made a bid without knowledge of the informant and co-accused Anand Kumar Singh had told the informant that only the applicant's name will be used and the actual control of the work will be given to the informant. The informant alleged that he had transferred a sum of Rs. 1,60,00,000/- in

the account of M/s V. P. Constructions towards earnest money for the tender. On 08.03.2019, another contract was allotted to M/s V. P. Constructions, which is a firm of the applicant. The informant claims that it was mutually settled between him and the accused persons that the investments and profit in the tender allotted to M/s V. P. Constructions will be distributed amongst all the persons and on 05.12.2020, a joint venture agreement was executed between the informant, the applicant and one Pramod Tiwari. On the same day, another agreement for sale and marketing was executed between the informant and the applicant but after sometime, the accused persons started sale and marketing of excavated sand through M/s V. P. Constructions and they committed a breach of the agreement dated 05.12.2020. The informant alleged that when he objected against it, the accused persons abused and threatened him.

4. The applicant was granted interim anticipatory bail by means of an order dated 16.01.2023, after taking into consideration the fact that co-accused namely Rajiv Lochan Paliwal has been granted interim protection vide order dated 20.10.2022 passed in Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 1750/2022 "Rajiv Lochan Paliwal Vs. State of U.P. and others". Another co-accused Navneet Bhadauria has also been granted bail by the coordinate Bench of this Court passed in Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 1841/2022 "Navneet Bhadauria Vs. State of U.P. and others".

5. The State and the informant have filed counter affidavits opposing the anticipatory bail application.

6. The learned counsel for the informant has vehemently opposed the application and he has submitted that while granting anticipatory bail to the co-accused Navneet Bhadauria, it was specifically recorded in the order dated 18.11.2022 passed by this Court in Anticipatory Bail Application No. 1841 of 2022 that the case of the aforesaid co-accused is distinguishable from the case of Anand Kumar Singh @ Baba Trikaladarshi and Vijay Pal Prajapati (the applicant) and he has submitted that the applicant is not entitled to be granted anticipatory bail on the ground of parity.

7. The learned counsel for the informant has next submitted that the applicant had earlier filed an application under Section 482 Cr.P.C. No. 6044 of 2022 and in the order passed on 06.09.2022, this Court had noted the submission of the learned counsel for the applicant that the applicant intended to pay the entire amount to the informant to show his bona fide and it was recorded in the order that the learned counsel for the applicant would bring a bank draft of Rs. 2 crores on the next date. In the order passed in the aforesaid case on 14.09.2022, it was recorded that the applicant made excuses from which the Court gathered that the applicant had no intention to pay any amount to the respondent no. 2 whose money was admittedly taken. In view of the aforesaid conduct of the applicant, the application under Section 482 Cr.P.C. was dismissed. Sri. Dubey has submitted that the aforesaid conduct of the applicant disentitles him to be granted anticipatory bail.

8. Replying to the aforesaid submission, Sri. Purnendu Chakravarty, the learned Counsel for the applicant submitted

that the applicant had challenged the order dated 14.09.2022 dismissing the application under Section 482 Cr.P.C. by filing Special Leave Petition (Crl.) No. 9397 of 2022, which was dismissed as withdrawn by means of an order dated 10.10.2022, but the Hon'ble Supreme Court had clarified that the trial court may not be influenced by the observations made by the High Court while dismissing the application under Section 482 Cr.P.C.

9. Therefore, it is clear that the application under Section 482 Cr.P.C. was not dismissed on merits and it was dismissed for the mere reason that the applicant had not returned the money to the informant. The complaint of the informant is that non-payment of money is in breach of an agreement. The learned counsel for the applicant has pointed out that the informant has already initiated proceedings before the Commercial Court, Gwalior for recovery of the money, which proceedings are pending. Therefore, the issue of payment of money to the applicant and the informant's entitlement for recovery thereof will be decided in those proceedings and it will not be appropriate for this Court to make any observation in this regard. However, mere non-payment of money cannot be a ground for initiation of criminal proceedings and it certainly cannot be a ground for rejection of the application for grant of anticipatory bail.

10. In **Kamlesh and another versus State of Rajasthan and another**, 2019 SCC OnLine SC 1822, the Hon'ble Supreme Court was deciding a Criminal Appeal filed against an order passed by Rajasthan High Court whereby an application for grant of anticipatory bail was rejected by the High Court only on the ground that petition under Section 482

Cr.P.C. praying for quashing of FIR, has already been rejected. The Hon'ble Supreme Court held that: -

“5. We are of the view that the order of the High Court cannot be sustained. High Court ought to have considered the application on merits. The fact that petition under Section 482 Cr.P.C. was dismissed for quashing was not conclusive and could not be the reason for rejecting the application.”

11. Therefore, the law is clear that the dismissal of the applicant's application under Section 482 Cr.P.C. would not be a bar against consideration of the merits of his application for anticipatory bail.

12. The learned counsel for the applicant has submitted that the FIR alleges that the informant was induced into entering into a joint venture agreement on the basis of a letter of intent dated 08.03.2019 purportedly issued by the Additional District Magistrate (Finance & Revenue), on behalf of the District Magistrate, Banda, which letter was forged. However, there is no categorical assertion as to who had forged the letter and, in any case, there is no allegation that the letter had been forged by the applicant.

13. The Investigating Officer has already submitted a charge-sheet and besides the informant, all the witnesses mentioned in the charge sheet are police personnel. No officer or official from the office of the District Magistrate, Banda has been mentioned to be a witness in the charge-sheet.

14. The learned counsel for the applicant has submitted that even the specimen of the applicant's handwriting has not been taken for comparing the same

with the signatures made on the letter in question, which could have been used as an evidence to prove commission of forgery by the applicant.

15. Sri Digvijay Nath Dubey, the learned counsel for the informant has next submitted that the money has admittedly been transferred to the applicant's bank account and he is the beneficiary of the offence committed.

16. In this regard, firstly it is to be seen that the applicant has not been charged with commission of offence under Section 120 B I.P.C. and merely because the applicant is the beneficiary of an offence will not ipso facto make the applicant guilty of the offence of forgery, when there is no allegation of commission of the offence by him.

17. Secondly, the money was transferred to the applicant in furtherance of an agreement to carry out business of mining of minor minerals and the informant claims that the accused persons have committed a breach of the agreement, which dispute prima facie appears to be a dispute which is inherently of the civil nature.

18. Nowadays it is becoming a general practice to set the criminal law into motion for putting pressure on the parties to commercial transactions. Instead of initiating civil proceedings for specific performance of contracts, accounting or recovery of money, where the plaintiff / claimant has to pay Court fee and where the decision of the dispute consumes a very long time, F.I.Rs. are filed with the object of getting the other party incarcerated to put pressure on him so as to make him redress the grievances

of the informant. However, the Courts cannot shut their eyes in such matters so as not to ascertain whether there is sufficient material to warrant incarceration of the accused person and to examine whether the criminal proceedings are being used for prosecution of a person who has committed an offence or the same are being misused for persecution of a person who has committed a breach of an agreement by giving the disputes a color of criminality.

19. As proceedings between the parties for recovery of the money paid under the agreement are pending before the Commercial Court, Gwalior, the issue of the informant's entitlement for recovery thereof will be decided in those proceedings and it will not be appropriate for this Court to make any observation in this regard.

20. The learned counsel for the informant has next submitted that the bail application of co-accused Anand Kumar Singh Alias Baba Trikaladarshi has been rejected by means of an order dated 03.03.2023 passed by this Court. In this regard, suffice it to say that parity is a relevant consideration while granting bail to persons accused of similar charges but the principle of parity is not attracted to rejection of bail applications.

21. Moreover, the order dated 03.03.2023 rejecting the bail application of co-accused Anand Kumar Singh merely mentions that the bail application was being rejected keeping in view the submission of the learned counsel for the informant that a complaint was made to the District Magistrate as well as the Mining Officer where the accused persons had

assured that they would refund the money to the informant but still they have not refunded the same.

22. As has already been stated in the preceding paragraphs, mere non-payment of money paid under a contract cannot be a ground for criminal prosecution of a party to the agreement and, in any case, that cannot be a ground for rejection of the anticipatory bail application of the accused person. Therefore, I am of the view that the application for grant of anticipatory bail to the applicant cannot be rejected on this ground.

23. Regarding the applicant, it is mentioned in the F.I.R. that co-accused Anand Kumar Singh alias Baba Trikaldarshi had asked the informant to put his signature on some documents which documents had been prepared by the applicant. Obviously, the informant would not be required to sign the letter dated 08.03.2019 issued by the Additional District Magistrate on behalf of the District Magistrate and, therefore, the aforesaid allegation would not lead to an inference that the applicant had forged the letter dated 08.03.2019. The F.I.R. contains no allegation that the letter dated 08.03.2019 had been forged or fabricated by the applicant.

24. The learned Counsel for the applicant has informed that the applicant has submitted bail bonds in terms of the order dated 16.01.2023 passed by this Court. The learned A.G.A. could not point out any violation of the conditions of anticipatory bail or misuse thereof by the applicant.

25. In the aforesaid circumstances, I find no good ground to take a view different from the view taken by this Court

while passing the order dated 16.01.2023. Therefore, the order dated 16.01.2023 is made absolute and the application is **allowed** in terms of the aforesaid order.

(2023) 8 ILRA 1236
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.07.2023

BEFORE

THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

CrI. Misc. Anticipatory Bail Application (U/S 438
Cr.P.C.) No. 5408 of 2023

Riyazuddin

...Applicant

Versus

State of U.P. & Anr.

...Opposite Parties

Counsel for the Applicant:

Sri Vinod Singh

Counsel for the Opposite Parties:

G.A.

Criminal Law-The Code of Criminal Procedure, 1973-Section 438 -The Indian Penal Code, 1860-Sections 376, 504 & 506-

The physical relations between the prosecutrix and the accused developed on the basis of a promise to marry on the part of the accused applicant, which continued for about one year, but significantly, in the present case, this is not the accused applicant, who refused to marry with the prosecutrix, though alleged so in the F.I.R. The supplementary affidavit consists of a specific averment that this is the prosecutrix, who had already performed her marriage with one Rizwan whereas the present applicant is still a bachelor and hence it cannot be said at this stage that the promise to marry was broken by the applicant himself-Fit case for anticipatory bail to the applicant till end of the trial. (E-15)

List of Cases cited:

1. Pramod Suryabhan Pawar Vs The St. of Mah. & anr., 2019 (9) SCC 608

2. Sonu @ Subhash Kumar Vs St. of U.P. & anr., 2021 0 Supreme (SC) 182

3. Criminal Appeal No.257 of 2023, Naim Ahamed Vs St. (NCT of Delhi), 2023 LiveLaw (SC) 66

4. Sushila Aggarwal & ors. Vs St. (NCT of Delhi) & anr., (2020) 5 SCC 1

5. Aman Preet Singh Vs C.B.I. Through Director, 2021 SCC OnLine SC 941

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

1. Supplementary affidavit filed today is taken on record.

2. Heard learned counsel for the applicant, learned A.G.A. for the State and perused the material available on record.

3. Apprehending his arrest in Case Crime No.551 of 2019, under Sections 376, 504, 506 IPC, Police Station Tanda, District Rampur, the applicant - **Riyazuddin** has filed this anticipatory bail application seeking anticipatory bail in the aforesaid crime number.

4. It is alleged in the F.I.R. that on the false pretext of marriage, the accused applicant made physical relations with the prosecutrix for about one year and subsequently refused to marry her and threatened her to kill. F.I.R. was lodged on 16.11.2019 and investigation started and now charge-sheet has been submitted.

5. It is submitted by the learned counsel for the applicant that the applicant is innocent and he has apprehension of his arrest in the above-mentioned case, whereas there is no credible evidence against her. He has been falsely implicated into this matter. Allegations levelled

against the applicant are false. The investigation of the case has been completed and charge-sheet has been filed. It is further submitted that the applicant never made any promise to marry with the prosecutrix. It is further submitted that it is a case of consensual relationship and the prosecutrix is a major lady and she was living with the applicant on her own free will and consent and the applicant never made physical relations with the prosecutrix forcibly or against her will. It is further submitted that in her statement recorded u/s 164 Cr.P.C., the prosecutrix has stated that she was in love with the applicant and she made physical relations with the applicant out of her own free will. It is further submitted that protection was granted to the applicant by this Court till filing of police report u/s 173 (2) Cr.P.C. in Crl. Misc. Writ Petition No. - 24816 of 2019 vide order dated 5.12.2019 and the applicant has not misused the liberty granted to him. It is further submitted that the applicant has been cooperative during the course of investigation. He has no criminal history to his credit. No coercive process has been issued against the applicant. It is further submitted that no custodial interrogation is required in this matter from the applicant. Now after submission of the charge-sheet, the applicant is entitled for anticipatory bail till the end of trial.

6. Learned A.G.A. opposed the prayer for anticipatory bail and it has been submitted that after collecting ample evidence, charge-sheet has been submitted in this matter. Medical report supports the prosecution version.

7. By way of supplementary affidavit filed today, the applicant has brought this fact to the notice of this Court that he is

still a bachelor whereas the prosecutrix performed marriage with one Rizwan s/o Kaluwa r/o Mohalla Vijay Nagar, Police Station Kashipur, District Udham Singh Nagar (Uttarakhand).

8. Now a days the Courts are over-flooded with the matters wherein it is alleged that the male accused, on the false promise of marriage, only to fulfill his lust, made physical relations with the victim and subsequently did not keep his promise and left her abandoned. In such matters, what the Court should actually look into is the intention of the accused from very inception of the relation.

9. Hon'ble Apex Court in **Pramod Suryabhan Pawar Vs. The State of Maharashtra & Anr., 2019 (9) SCC 608** has categorically held that there is a distinction between a false promise given on understanding by maker that it will be broken and breach of a promise which is made in good faith but subsequently not fulfilled.

In paragraph 14 of the aforesaid judgment, the Hon'ble Apex Court held that :

"14. ... In the present case, the "misconception of fact" alleged by the complainant is the appellant's promise to marry her. Specifically in the context of a promise to marry, this Court has observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled. In *Anurag Soni v State of Chhattisgarh*, (2019) SCC OnLine SC 509, this Court held:

"37. The sum and substance of the aforesaid decisions would be that if it is

established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 of the IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Section 375 of the IPC and can be convicted for the offence under Section 376 of the IPC."

Similar observations were made by this Court in *Deepak Gulati v State of Haryana*, (2013) 7 SCC 675 ("*Deepak Gulati*"):

"21. ? There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused?"

Further, in paragraph 16 of the aforesaid judgment explaining the terms - misconception of fact, consent and breach of promise, the Hon'ble Supreme Court observed that :

"16. ... Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates the woman's "consent". On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the

promise should have had no intention of upholding his word at the time of giving it. The "consent" of a woman under Section 375 is vitiated on the ground of a "misconception of fact" where such misconception was the basis for her choosing to engage in the said act. In Deepak Gulati this Court observed:

"21. ? There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and **whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused**, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently.

...

24. Hence, it is evident that there must be adequate evidence to show that at the relevant time i.e. at the initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The "failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available,

does not always amount to misconception of fact. **In order to come within the meaning of the term "misconception of fact", the fact must have an immediate relevance"**. Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her." (Emphasis supplied)

10. In the present case, it reflects from the factual matrix of the matter that the physical relations between the prosecutrix and the accused developed on the basis of a promise to marry on the part of the accused applicant, which continued for about one year, but significantly, in the present case, this is not the accused applicant, who refused to marry with the prosecutrix, though alleged so in the F.I.R. The supplementary affidavit filed today consists of a specific averment that this is the prosecutrix, who had already performed her marriage with one Rizwan whereas the present applicant is still a bachelor and hence it cannot be said at this stage that the promise to marry was broken by the applicant himself.

11. In **Sonu @ Subhash Kumar Vs. State of U.P. & Anr., 2021 0 Supreme (SC) 182**, in almost similar circumstances where the parties, who were adult and had been in consensual relationship for about a period of one and a half years, it was found that there was no allegation to the effect that promise to marry given to the victim was false at inception, benefit was given to the main accused.

12. In **Criminal Appeal No.257 of 2023, Naim Ahamed Vs. State (NCT of**

Delhi), 2023 LiveLaw (SC) 66 filed against conviction under Section 376 IPC, the Hon'ble Apex Court, reiterating the same principle, categorically observed that :

"20. ... The bone of contention raised on behalf of the respondents is that the prosecutrix had given her consent for sexual relationship under the misconception of fact, as the accused had given a false promise to marry her and subsequently he did not marry, and therefore such consent was no consent in the eye of law and the case fell under the Clause ? Secondly of Section 375 IPC. In this regard, it is pertinent to note that there is a difference between giving a false promise and committing breach of promise by the accused. In case of false promise, the accused right from the beginning would not have any intention to marry the prosecutrix and would have cheated or deceived the prosecutrix by giving a false promise to marry her only with a view to satisfy his lust, whereas in case of breach of promise, one cannot deny a possibility that the accused might have given a promise with all seriousness to marry her, and subsequently might have encountered certain circumstances unforeseen by him or the circumstances beyond his control, which prevented him to fulfill his promise. So, it would be a folly to treat each breach of promise to marry as a false promise and to prosecute a person for the offence under Section 376. As stated earlier, each case would depend upon its proved facts before the court."

13. In the present case, the fact of submission of charge sheet into the court, does not certainly precludes the applicant to approach this Court for a protection by way of anticipatory bail.

14. In **Sushila Aggarwal and others vs. State (NCT of Delhi) and another, (2020) 5 SCC 1**, the Hon'ble Apex Court has settled the controversy finally by holding the anticipatory bail need not be of limited duration invariably. In appropriate case, it can continue upto conclusion of trial.

It has been further held therein that anticipatory bail granted can, depending on the conduct and behavior of the accused, continue after filing of the charge sheet till end of trial.

It has been further held by the Hon'ble Apex Court that while considering an application for grant of anticipatory bail, the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence including intimidating witnesses, likelihood of fleeing justice, such as leaving the country, etc. It has further been held that Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion.

15. Reiterating the principle above-mentioned, the Hon'ble Apex Court in **Aman Preet Singh Vs. C.B.I. Through Director, 2021 SCC OnLine SC 941**, while referring to a judgment of Delhi High Court in Court on its own Motion Vs. Central Bureau of Investigation, (2004) 72 DRJ 629, held so in paragraph 11 of the aforesaid judgment.

"11. ... Insofar as the present case is concerned and the general principles

under Section 170 Cr.P.C., the most apposite observations are in sub-para (v) of the High Court judgment in the context of an accused in a non-bailable offence whose custody was not required during the period of investigation. In such a scenario, it is appropriate that the accused is released on bail as the circumstances of his having not been arrested during investigation or not being produced in custody is itself sufficient to entitle him to be released on bail. The rationale has been succinctly set out that if a person has been enlarged and free for many years and has not even been arrested during investigation, to suddenly direct his arrest and to be incarcerated merely because charge sheet has been filed would be contrary to the governing principles for grant of bail. We could not agree more with this."

16. Undoubtedly, it is a case of consensual relationship between two major persons. The applicant was not arrested during the course of investigation nor required to be taken into custody by the Investigating Officer and now after submission of charge sheet, no custodial interrogation is required. Hence, in the light of the aforesaid legal pronouncements and considering the facts and circumstances of the case, submissions of the learned counsel for the parties, nature of accusation, role of applicant, without expressing any opinion of the merits of the case, in my view, it is a fit case for anticipatory bail to the applicant till end of the trial in the matter.

17. The anticipatory bail application is **allowed**.

18. In the event of arrest of the applicant in the aforesaid case crime, he shall be released on anticipatory bail till

end of the trial on his furnishing a personal bond of Rs. 50,000/- with two sureties each in the like amount to the satisfaction of the Court concerned with the following conditions :-

(i) The applicant shall make himself available before the court concerned on the date fixed in the matter;

(ii) The applicant shall not directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him / her from disclosing such facts to the Court or to any police officer;

(iii) The applicant shall not leave India without the previous permission of the Court and if he has passport, the same shall be deposited by him before the S.S.P./S.P. Concerned.

19. In case of default of any of the conditions, same may be a ground for cancellation of protection granted to the applicant.

(2023) 8 ILRA 1241

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 13.07.2023

BEFORE

THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Crl. Misc. Anticipatory Bail Application (U/S 438
Cr.P.C.) No.7762 of 2023

Raj Kapoor

...Applicant

Versus

State of U.P. & Ors.

...Opposite Parties

Counsel for the Applicant:

Sri Brij Bhushan Upadhyay

Counsel for the Opposite Parties:

G.A.

Criminal Law-The Code of Criminal Procedure,1973-Section 438 - The Indian Penal Code-1860-Sections 406,420,467 & 468-

If the word 'normally' be replaced by the word 'invariably' it means that if an accused is absconding and has been declared proclaimed offender, he has no occasion to say anything to defend himself as to in what compelling circumstances he could not appear before the Court and was declared as proclaimed offender and that is why there is no bar to move anticipatory bail application in case the accused has been declared as proclaimed offender but, however, if he is unable to satisfy the Court regarding his bonafide, the law on the point will be applicable to him and anticipatory bail cannot be granted to him, as he is a proclaimed offender. So far as the present case is concerned, from the perusal of the record it appears that to avoid summons of the Court and to appear before the Court in compliance thereof, was a wilful default on the part of the applicant and, therefore, even if the present applicant is supposed to be entitled to move anticipatory bail application, he is not entitled to the relief of anticipatory bail. (E-15)

List of Cases cited:

1. Sushila Aggarwal & ors. Vs St. (NCT of Delhi) & anr., (2020) 5 SCC 1
2. Prem Shankar Prasad Vs St. of Bihar & anr., 2021 SCC OnLine Supreme Court 955.
3. Lavesh Vs St. (NCT of Delhi), (2012) 8 Supreme Court Cases 730
4. Sovran Singh Adhiti and 5 others Vs St. of U.P Criminal Misc. Anticipatory Bail Application U/S 438 CrPC No. 3037 of 2023 decided on 5.4.2023
5. St. of M.P.Vs Pradeep Sharma, (2014) 2 Supreme Court Cases 171

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

1. This application has been moved on behalf of the applicant Raj Kapoor seeking anticipatory bail in Case Crime No. 396 of 2014, under Sections 406, 420, 467, 468 IPC, Police Station Tajganj, District Agra.

2. Heard learned counsel for the applicant, learned A.G.A. for the State and perused the record.

3. It has been submitted by the learned counsel for the applicant that applicant is innocent and he has apprehension of his arrest in the above-mentioned case, whereas there is no credible evidence against him. Allegations levelled against the applicant are false. It is further submitted that the applicant had approached this Court by way of Criminal Misc. Writ Petition No. 15335 of 2014 in which this Court vide order dated 5.9.2014 granted protection to the applicant till submission of police report under Section 173(2) CrPC. It is further submitted that the Investigating Officer submitted final report in the matter. Thereafter, as per the order of the Circle Officer concerned, matter was re-investigated and charge sheet was submitted and cognizance was also taken thereon by the Court concerned. It is also submitted that the informant Babulal had executed a valid power of attorney in favour of the applicant on the basis of which transaction in question took place. It is further submitted that in the aforesaid transaction both sons of informant Babulal appeared as attesting witnesses of the document in question. It is also submitted that applicant is an old, infirm and ailing person and is also a heart patient. Dispute is purely of civil nature. Process under Sections 82 CrPC has also been issued against the applicant. It has been submitted that in case applicant is granted

anticipatory bail, he shall not misuse the liberty of bail and would obey all conditions of bail. In support of his submissions, learned counsel for the applicant has placed reliance upon a decision of the Hon'ble Apex Court in **Lavesh vs. State (NCT of Delhi), (2012) 8 Supreme Court Cases 730**.

4. Per contra, learned A.G.A. opposed the prayer for anticipatory bail and submitted that in this matter after investigation charge sheet has been submitted against the applicant and during course of investigation ample evidence has been collected against him and now he has been declared as a proclaimed offender.

5. I have considered the rival submissions made by the learned counsel for the parties and have gone through the entire record carefully.

6. In this matter, from the perusal of the record it reveals that informant has executed a power of attorney in favour of the applicant in respect of the land acquired by Agra Vikash Pradhikaran but some portion of land of the informant was sold by the applicant claiming himself to be the owner of the said property in favour of vendee Chandrapal on 10.12.2013, which resulted into a huge monetary loss to the informant. The said land was further sold by Chandrapal to some other person on 3.1.2014 and thereafter present F.I.R. was lodged on 17.5.2014. The said F.I.R. was challenged by way of Criminal Misc. Writ Petition No. 15335 of 2014 wherein protection from arrest till submission of police report under Section 173(2) CrPC was granted to the applicant by the Division Bench of this Court vide order dated 5.9.2014. The investigation continued and finding no evidence against the

applicant a final report was submitted by the police. However, after completion of re-investigation, charge sheet was submitted and cognizance was also taken by the Court concerned on 11.7.2017. Summons were issued to the applicant. Since the applicant did not appear before the Court concerned, coercive processes have been issued against him and a process under Section 82 CrPC is still operative.

7. As regards the maintainability of an application for anticipatory bail after submission of charge sheet, in **Sushila Aggarwal and others vs. State (NCT of Delhi) and another, (2020) 5 SCC 1**, the Hon'ble Apex Court has settled the controversy finally by holding that the anticipatory bail need not be of limited duration invariably. In appropriate case, it can continue upto conclusion of trial.

It has been further held therein that anticipatory bail granted can, depending on the conduct and behavior of the accused, continue after filing of the charge sheet till end of trial.

It has been further held by the Hon'ble Apex Court that while considering an application for grant of anticipatory bail, the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence including intimidating witnesses, likelihood of fleeing justice, such as leaving the country, etc. It has further been held that Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion.

8. It reveals from the perusal of the record that after submission of charge sheet, on 11.7.2017 the Magistrate Court took cognizance into the matter and summons were issued against the applicant; on 20.5.2019 bailable warrant was issued and subsequently on 10.12.2021 non-bailable warrant was issued by the Court to procure the presence of the accused - applicant and thereafter on 17.2.2023 process under Section 82 CrPC was issued against him. On 8.6.2023 anticipatory bail application was moved in the Sessions Court, Agra which was rejected by the Sessions Court vide order dated 13.6.2023 wherein observations regarding issuance of process under Section 82 CrPC against the applicant were made.

9. The conduct of the applicant falls within the ambit of the law promulgated by Hon'ble Apex Court in **Prem Shankar Prasad Versus State of Bihar and Another, 2021 SCC OnLine Supreme Court 955**. In the facts of this case, charge-sheet was filed under Sections 406, 420 IPC against the accused and thus it was explicit that a prima facie case against the accused was found. From the record, it reveals that the arrest warrant was issued by the Magistrate against the accused and thereafter proceedings under Sections 82, 83 Cr.P.C. had been initiated pursuant to the order passed by the Magistrate. Only thereafter the accused moved an application before the trial court for anticipatory bail, which was rejected by the Sessions Court. However, subsequently anticipatory bail was granted to the aforesaid accused by the High Court and when the matter came before the Hon'ble Apex Court, it was observed like this.

"19. Despite the above observations on merits and despite the fact

that it was brought to the notice of the High Court that respondent No. 2 - accused is absconding and even the proceedings under sections 82-83 of Cr. P.C. have been initiated as far as back on 10.01.2019, the High Court has just ignored the aforesaid relevant aspects and has granted anticipatory bail to respondent No. 2 - accused by observing that the nature of accusation is arising out of a business transaction. The specific allegations of cheating, etc., which came to be considered by learned Additional Sessions Judge has not at all been considered by the High Court. Even the High Court has just ignored the factum of initiation of proceedings under sections 82-83 of Cr. P.C. by simply observing that "be that as it may". The aforesaid relevant aspect on grant of anticipatory bail ought not to have been ignored by the High Court and ought to have been considered by the High Court very seriously and not casually.

20. In the case of State of Madhya Pradesh v. Pradeep Sharma (Supra), it is observed and held by this court that if anyone is declared as an absconder/proclaimed offender in terms of section 82 of Cr. P.C., he is not entitled to relief of anticipatory bail."

10. So far as the law laid down by the Hon'ble Apex Court in the case of **Lavesh vs. State (NCT of Delhi), (2012) 8 Supreme Court Cases 730**, referred in **Prem Shankar Prasad case** (supra) and relied upon by the learned counsel for the applicant is concerned, paragraph 12 of the said decision is as under :

"12. From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and

declared as "absconder". Normally, when the accused is "absconding" and declared as a "proclaimed offender", there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code is not entitled to the relief of anticipatory bail."

11. From the aforesaid dictum of law, it can safely be held that it is a normal rule that when an accused is absconding and declared as proclaimed offender, there is no question of granting anticipatory bail to him. A point has been raised by the learned counsel for the applicant that the word 'normally' has been used by the Hon'ble Apex Court in above-quoted paragraph 12 of the said decision of **Lavesh** (supra) which emphasises that there is no general law that a proclaimed offender cannot be granted anticipatory bail invariably and normally it should be granted to an accused absconding or concealing himself in order to avoid the execution of warrant.

12. In the light of the aforesaid submission, if the word 'normally' be replaced by the word 'invariably' it means that if an accused is absconding and has been declared proclaimed offender, he has no occasion to say anything to defend himself as to in what compelling circumstances he could not appear before the Court and was declared as proclaimed offender and that is why there is no bar to move anticipatory bail application in case the accused has been declared as proclaimed offender but, however, if he is unable to satisfy the Court regarding his bonafide, the law on the point will be applicable to him and anticipatory bail

cannot be granted to him, as he is a proclaimed offender. So far as the present case is concerned, from the perusal of the record it appears that to avoid summons of the Court and to appear before the Court in compliance thereof, was a wilful default on the part of the applicant and, therefore, even if the present applicant is supposed to be entitled to move anticipatory bail application, he is not entitled to the relief of anticipatory bail. Hence, the submission made by the learned counsel for the applicant is a complete misinterpretation of the law promulgated in **Lavesh** (supra).

13. In almost similar matter, this Court has dealt with the relevant laws wherein to ensure the respect for personal liberty on one hand and at the same time effect of wilful default in obeying the process of the Court on the other hand, have been impressed upon and it was held by this Court in **Criminal Misc. Anticipatory Bail Application U/S 438 CrPC No. 3037 of 2023, Sovran Singh Adhiti and 5 others vs. State of U.P.**, decided on 5.4.2023 as under (paragraphs 13,14,15 and 16 of the said judgment) :

*"13. At the same time, when we enter into the sphere of 'anticipatory bail' we find that the said term is not used under Section 438 Cr.P.C. which embodies the enabling provision. It can be taken as an anticipation of being arrested. In the landmark judgement of the Constitution Bench of Hon'ble Apex Court in **Gurbaksh Singh Sibbia Vs. State of Punjab (1980) 2 SCC 565**, it was that "a person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints and conditions on his freedom, by the acceptance of conditions which the court may deem fit to impose, in consideration of*

the assurance that if arrested, he shall be enlarged on bail".

14. In the Case of **Siddharam Satlingappa Mhetre Vs. State of Maharashtra (2011) 1 SCC 694** It was held as under:

"14. It is clear from the Statement of Objects and Reasons that the purpose of incorporating Section 438 Cr.P.C. in Cr.P.C. was to recognize the importance of personal liberty and freedom in a free and democratic country. When we carefully analyze this section, the wisdom of the legislature becomes quite evident and clear that the legislature was keen to ensure respect for the personal liberty and also pressed in service the age-old principle that an individual is presumed to be innocent till he is found guilty by the court".

15. In the **Sibbia case** (supra) where the Hon'ble Apex Court had an occasion to comprehensively deal with the scope and ambit of the concept of anticipatory bail, it was observed that Section 438 CrPC is an extraordinary provision where the accused who apprehends his/her arrest on accusation of having committed a non-bailable offence can be granted bail in anticipation of arrest which, indubitably depends upon the discretion of the Court but such discretion should be exercised with due care, caution and prudence on the facts and circumstances of the case. It can no doubt be continued after filing of charge sheet till end of trial.

16. The idea of anticipatory bail strengthen the theory of personal liberty of a person but if it is explicit before the Court that such person is likely to otherwise

misuse or has misused his liberty, the negation to grant of anticipatory bail to such a person is never violation of the provisions of personal liberty. Absconding in violation of the order of the Court is a grave misuse of personal liberty and that is why, " if any one is declared as an absconder/ proclaimed offender in terms of Section 82 Cr.P.C.", as held in State of M.P. Vs. Pradeep Sharma (2014) 2 SCC 171, " he is not entitled to grant of anticipatory bail."

14. Further more, the judgment passed in **Lavesh** (supra) was referred by the Hon'ble Apex Court in **State of Madhya Pradesh vs. Pradeep Sharma, (2014) 2 Supreme Court Cases 171** and referring to paragraph 12 of the judgment of **Lavesh** (supra), in paragraph 16 of the said judgment, it was observed, relevant portion of which is as under :

"16.....It is clear from the above decision that if anyone is declared as an absconder / proclaimed offender in terms of Section 82 of the Code, he is not entitled to the relief of anticipatory bail."

15. In view of the above discussions and the law laid down by the Hon'ble Apex Court and keeping in view the conduct of the applicant, I deem it not a fit case to grant anticipatory bail to the present applicant. Such a person, who does not cooperate with the Court / investigating agency and is a wilful defaulter of the process of the Court, debars himself from any entitlement to get a relief by way of anticipatory bail from this Court. Prayer made in the application deserves to be refused.

16. The anticipatory bail application is **rejected**.

(2023) 8 ILRA 1247
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.07.2023

BEFORE

THE HON'BLE SIDDHARTH, J.

Crl. Misc. Ist Bail Application No. 23551 of 2023

Vivek Kumar Maurya **...Applicant**
Versus
State of U.P. & Ors. **...Opposite Parties**

Counsel for Applicant:
Om Narayan Pandey

Counsel for the Opposite Parties:
G.A., Sri Lakshman Tripathi

Criminal Law-The Code of Criminal Procedure, 1973-Section-439 - The Indian Penal Code-1860-Sections 90, 323 & 375- Conduct of the prosecutrix of repeatedly eloping from her parental home with applicant and going to Delhi, Lucknow, Mughalsarai and to the places of relatives of the applicant shows that she was a consenting party all through- All the places where the applicant took the prosecutrix she admits entering into physical relationship with the applicant without any element of coercion before and after her court marriage, therefore her consent was not covered under Section 90 of IPC, nor physical relationship made by applicant with prosecutrix will come under the definition of rape as per Section 375 IPC- Allegations of her physical torture are not supported by any medical report. In the FIR it is alleged that the injuries of prosecutrix were treated by her mother at home. This also proves the meticulous drafting of FIR by an expert. There cannot be any evidence of treatment of home, but to justify implication under Section 323 IPC such an allegation was made.

Bail application is allowed. (E-15)

List of Cases cited:

Satendra Kumar Antil Vs C.B.I., passed in S.L.P (Crl.) No. 5191 of 2021

(Delivered by Hon'ble Siddharth, J.)

1. Heard learned counsel for the applicant; Shri Lakshman Tripathi, learned counsel for the informant and learned A.G.A.

2. The instant bail application has been filed on behalf of the applicant, **Vivek Kumar Maurya**, with a prayer to release him on bail in Case Crime No. 143 of 2020, under Sections 363, 366, 376, 323, 504, 506, 354, 354-A IPC and 3/4 POCSO Act Police Station Sarnath, District-Varanasi, during pendency of trial.

3. There are allegations of abduction of minor girl with intent to marry, commission of offence of rape, beating, threatening, outraging her modesty, sexual harassment and penetrative sexual assault against the applicant.

4. There is allegation in the First Information Report that prosecutrix, resident of Varanasi, was made to enter into physical relationship with applicant for about one year on false promise of marriage, when she was student of B.SC., Part-1. Whenever prosecutrix talked to applicant about their marriage he used to avoid her request. On 3.5.2019, when prosecutrix was going to college, applicant enticed her from the way at 7 a.m in the morning and took her to Delhi at his aunt's place where he made physical relationship with her. Father of the prosecutrix gave an application at the police station on 4.5.2019 about her abduction by applicant. Thereafter the father and mother of the applicant pressurised the father and mother of prosecutrix and they threatened them of

life in case they made any statement before the police against their son, the applicant. Therefore, father of prosecutrix withdrew the complaint made to the police on 7.5.2019 and prosecutrix was dropped back to her house by the applicant and co-accused persons, but the activities of the applicant did not change. Again whenever there was no one in the house of the prosecutrix applicant used to come and make physical relationship with prosecutrix by extending false promise of marriage. On 27.8.2019 at 8 a.m applicant took the prosecutrix to the registrar and got their marriage registered. Thereafter he took the prosecutrix to Lucknow where he made physical relationship with her. After four days he again made physical relationship with prosecutrix and brought her to a dharamshala in Mugalsarai and repeated the same act. Next day he took her to a room situated in Lanka, Varanasi; then to house of his Mama at Maduwadeeh where he repeated the same offence against her. At her Mama's place he compelled her to make physical relationship with his cousin (Mama's son) also. When the aforesaid son of his Mama touched her inappropriately she raised alarm, thereafter applicant and son of his mama abused and beat her. Applicant stated that he has married her only to physical enjoyment. Thereafter applicant asked her to go away otherwise she will be killed by giving her poison. Applicant called his father, uncle and brother, who are co-accused, and all of them abused her and sexually molested her. They beat her and dropped her in injured condition on the road at 11 p.m on 5.9.2019. The passers-by helped her and she called her mother and she took her to her house. Thereafter she was treated at home by her mother by home made medicines. On 6.9.2019 accused persons came again to her house and threatened the

prosecutrix and her family of life, if she makes any complaint to the police. On 18.2.2020 again co-accused persons came to her house and abused her and asked her family to leave their village and go away. Thereafter the First Information Report was lodged on 9.3.2020 with regard to the incident dated 3.5.2019 by the prosecutrix herself.

5. Learned counsel for the applicant has submitted that in the statement of the prosecutrix recorded under section 164 Cr.P.C., she herself has claimed that she is aged about 19 years and student of B.Sc. Part-I. Therefore implication of the applicant under section 34 POCSO Act was falsely made by the police. She admitted that she had affair with applicant for the last one year. Applicant asked her to leave her house to marry him. She left her house and went to Delhi and then went to the house of applicant's aunt where she entered into physical relationship with applicant with consent. Thereafter her family members came and took her back. Applicant called her to Kutchery for the purpose of marriage. Thereafter, applicant took her to Lucknow and then to Mugalsari and then they returned to Varanasi. She was confined by her parents against her wishes. Thereafter dispute took place between family members of both and the prosecutrix parted ways with the applicant and First Information Report was lodged.

6. Learned counsel for the applicant has pointed out to the marriage registration certificate of the applicant and prosecutrix which shows that their court marriage was solemnized on 11.8.2019. The prosecutrix has lodged First Information Report against the applicant only to falsely implicate him. She is wife of applicant and without

seeking divorce, she has indulged in filing of First Information Report on false allegations concealing correct facts. Applicant has filed application under section 9 of the Hindu Marriage Act in the year 2019 for reinstitution of conjugal rights against the prosecutrix. He is in jail since 16.1.2023 and has no criminal history.

7. Learned counsel for the informant has submitted that prosecutrix was minor at the time of incident. Her date of birth is 10.7.2001, the incident initially took place on 3.5.2019. The seriousness of allegations and repeated commission of offences of rape on false promise of marriage does not entitles the applicant for grant of bail. He has ruined the life of an innocent and helpless girl.

8. Learned A.G.A. too has opposed the prayer of the applicant for grant of bail but could not dispute the aforesaid facts.

9. After hearing the submissions of learned counsel for the parties, it appears that First Information Report has been lodged on the basis of false allegations and incorrect facts. The prosecutrix has not fully supported the allegations made in the First Information Report in her statement recorded under section 164 Cr.P.C. The allegation regarding the offences committed by cousin of applicant (Mama's son) is missing in her statement. New allegation has been made that the co-accused family members of applicant compelled her to make signatures on blank paper. The marriage of the prosecutrix and applicant was registered. No divorce, dissolution of marriage or judicial separation of couple through court has taken place.

10. This court finds that large number of cases are coming in courts wherein girls and women take undue advantage by lodging First Information Report on false allegations after indulging in long physical relationship with the accused. The time has come that courts should be very cautious in considering such bail applications. The law is heavily biased against males. It is very easy to make any wild allegations in First Information Report and implicate anyone on such allegations as in the present case.

11. First Information Reports are lodged invariably after due consultation with expert incorporating all the necessary ingredients required for making out a clear case for implication under different provisions of law. First Information Reports are not being lodged under section 154(1) Cr.P.C., by directly giving information to officer incharge of police station orally. Section goes as under -

“154. Information in cognizable cases.

(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read Over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under sub- section (1) shall be given forthwith, free of cost, to the informant.

(3)
“

12. The lodging of the FIR is being done invariably by giving a written application at the police station which is always fraught with danger of the false implication like in the present case. Such applications are drafted by experts in courts or the *Munshi*/Head clerk in police station. The experts are aware of the ingredients of each and every provisions of penal law. They incorporate the allegations in such a way so that accused may not be able to get even bail easily and early. Just a cursory glance at allegations made in the First Information Report is sufficient for the court to throw the file, without any application of mind further. The State of affairs has gained alarming proportion. An honestly written First Information Report is very short and is shorn of any unnecessary and false allegation. This is the test, but it is seldom realised.

13. The culture of openness being spread by social media, movies, T.V. shows, etc., is being imitated by adolescent/young boys and girls but when their conduct comes in conflict with Indian social and family norms and it comes to protecting the honour of the family of the girl and the honour of girl, such maliciously false First Information Reports are lodged. Such First Information Reports are also lodged when after living in live-in-relationship for sometime/long time, dispute takes place between the boy and girl on any issue. Nature of partner unfolds before the other partner with time and then whey they realize that their relationship cannot continue for life, trouble starts. Since girls/women have upper hand when it comes to protection of law, they succeed easily in implicating a boy or man in the

case like of the present nature. The traditional perception of such crimes has become irrelevant. The effect of social media, movies, etc., in raising the awareness level of adolescents and loss of innocence at comparatively younger age is clearly discernible. The traditional presumption of innocence has given way to an untimely loss of innocence resulting in unforeseen deviant behaviour of adolescents which the law never contemplated earlier. Law is dynamic concept and it requires a re-look in such matters very drastically.

14. This court is finding that genuine cases of such sexual offences are now exception. The general rule is of false implication in cases of sexual offences. Implication in case of sexual offence is a sure shot way of punishment before trial. Bails are normally not granted easily and early. In cases where implication is made under POCSO Act situation become worse. Incarceration of accused in jail for few months or for years is certain. Training of judicial officers in their training institute is still in line with the old concept of bail in cases of sexual offences. The treating of all the wild allegation in F.I.R as gospel truth without keeping eye on the ground realities is causing lots of injustice.

15. The courts and judges are part of the society. What is happening in society should always be kept in mind while applying law. Wherever an offence takes place, the expert (mostly lawyer in district court or munshi / head clerk of police station) is consulted. He enquires about the family members of an accused, his influential friends and well-wishers, local and also stationed outside. He also enquires whether the informant side has enmity with someone or with whom it wants to settle score. Then the expert implicates all those

with whom the informant/complainant has other grievances, not connected the offence being complained whatsoever, since the lodging of complaint / F.I.R against all enemies in one stroke is encashed as an opportunity. Their roles are so meticulously shown in the F.I.R that even the most experienced of the judges falter. For the courts at district level, it is quite hazardous to grant bail in matters of such serious and meticulously made allegations because of fear of disciplinary proceedings by the higher courts. This is one of the reasons why the district courts refuse to grant even bail, not to say about granting of acquittal in most of the cases only because of the seriousness of allegations. Whether allegations are prima facie credible or are proved or not is not very relevant at their level. They just get rid themselves of such cases by refusing to grant relief, which is also part of their training at the very threshold of joining of their service in their training institute. This is how the injustice gets perpetrated because of the role of expert who drafts the F.I.R / complaint. In case the honest statement of complainant / informant is recorded in writing by the officer-in-charge of the police station soon after the incident and the role of expert get excluded in lodging of report, cases of false implication will come down.

16. Now coming back to the present case this court finds that main allegation in the opening part of the First Information Report is regrading entering of applicant in physical relationship with prosecutrix on false promise of marriage. This allegation stands falsified when in the later part of the FIR the prosecutrix admitted that the applicant entered into court marriage with her.

17. Thereafter fresh allegation levelled by prosecutrix in First Information

Report is that when the applicant took her to his *Mama's* house he asked the prosecutrix to enter into physical relationship with his mama's son also. He stated that he has married her only for physical enjoyment, but this allegation is missing in the statement of prosecutrix recorded as under Section 164 Cr.P.C.

18. The conduct of the prosecutrix of repeatedly eloping from her parental home with applicant and going to Delhi, Lucknow, Mughalsarai and to the places of relatives of the applicant shows that she was a consenting party all through. After court marriage the applicant took her to the places of his relatives for social acceptance of their marriage but thereafter something went wrong between them which led to the implication of applicant in this case.

19. At all the places where the applicant took the prosecutrix she admits entering into physical relationship with the applicant without any element of coercion before and after her court marriage, therefore her consent was not covered under Section 90 of IPC, nor physical relationship made by applicant with prosecutrix will come under the definition of rape as per Section 375 IPC. Here, the promise of marriage forming basis of physical relationship between couple was honoured by applicant, which is admitted in FIR itself.

20. The allegations of her physical torture are not supported by any medical report. In the FIR it is alleged that the injuries of prosecutrix were treated by her mother at home. This also proves the meticulous drafting of FIR by an expert. There cannot be any evidence of treatment of home, but to justify implication under Section 323 IPC such an allegation was made.

21. Keeping in view the nature of the offence, evidence, complicity of the accused; submissions of the learned counsel for the parties noted above; finding force in the submissions made by the learned counsel for the applicant; keeping view the uncertainty regarding conclusion of trial; one sided investigation by police, ignoring the case of accused side; applicant being under-trial having fundamental right to speedy trial; larger mandate of the Article 21 of the Constitution of India; considering the dictum of Apex Court in the 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*; considering 5-6 times overcrowding in jails over and above their capacity by the under trials and without expressing any opinion on the merits of the case, the Court is of the view that the applicant has made out a case for bail. The bail application is allowed

21. Let the applicant 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.

1. The applicant shall not tamper with the prosecution evidence by intimidating/ pressurizing the witnesses, during the investigation or trial.

2. The applicant shall cooperate in the trial sincerely without seeking any adjournment.

3. The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

4. That the applicant shall not, directly or indirectly, make any

inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

5. The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence and 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 to ensure presence of the applicant.

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.

22. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

(2023) 8 ILRA 1252
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.07.2023

BEFORE

**THE HON'BLE RAM MANOHAR NARAYAN
MISHRA, J.**

Criminal Misc. Writ Petition No. 7436 of 2023

Guddu Chauhan	...Petitioner
Versus	
State of U.P. & Ors.	...Respondents

Counsel for the Petitioner:

Sri Zeeshan Mazhar, Sri Abhishek Chandra

2. Bhim Sain Tyagi Tyagi Vs St. of U.P. 1999
(39) ACC 321**Counsel for the Respondents:**

G.A.

(Delivered by Hon'ble Ram Manohar
Narayan Mishra, J.)

A. Criminal Law-Constitution of India, 1950-Article 226- U.P. Control of Gundas Act, 1970-Section 3- Quashing of -notice issued to petitioner under Section 3 of U.P. Control of Goodnas Act, 1970 and passed an externment order for six months against the petitioner- Feeling aggrieved by the impugned order passed by learned Additional District Magistrate, the petitioner filed a criminal appeal under Section 3(1) of U.P. Control of Goondas Act before Commissioner who denied to interfere in impugned order and found the appeal without any force and dismissed the appeal-Held, Since the notice was issued to the petitioner on the basis of single case registered under Section 3/5A/8 of U.P. Prevention of Cow Slaughter Act, in the year 2019 and such notice falls short of legal requirement of section 2(b) of the Act 1970-Hence, the impugned order is set aside.(Para 1 to 14)

B. As per definition and the law settled by this Court as well by the Apex Court, one cannot be treated to be a habitual offender unless and until there is recurrence of the offence and at the most the general reputation of the person is that he is desperate and dangerous to the community. Since in this case against the petitioner there is reference of one extreme instance only the petitioner could not be deemed to be a habitual offender on the basis of that single incident only, so the notice falls short of legal requirement as provided in Clause (1) of Section 2 (b) of the 1970 Act.(Para 12)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Vijay Narain Singh Vs St. of Bihar & ors.,
(1984) 3 SCC 14 ob

1. Instant writ petition has been filed praying for the following reliefs:

"(i) Issue a writ, order or direction in the nature of certiorari setting aside the order dated 31.3.2022 passed by the Commissioner Vindhyachal Division at Mirzapur in Case No.249 of 2022 (Guddu Chauhan vs. Additional District Magistrate and Another) under Section 6 of U.P. Control of Goondas Act, alongwith order dated 3.1.2022 passed by Additional District Magistrate (Finance and Revenue), Bhadohi in Case No.0321 of 2020 (State vs. Guddu Chauhan), under Section 3(1) of U.P. Control of Goodnas Act and notice dated 22.6.2020, passed by Additional District Magistrate, Bhadohi, under Section 3 of U.P. Control of Goodnas Act."

2. By means of order dated 3.1.2022, Additional District Magistrate, Bhadohi, made the notice issued to petitioner under Section 3 of U.P. Control of Goodnas Act, 1970 absolute and passed an externment order for six months against the petitioners from District Bhadohi. Feeling aggrieved by the impugned order passed by learned Additional District Magistrate, Bhadohi, the petitioner filed a criminal appeal under Section 3(1) of U.P. Control of Goondas Act before Commissioner Vindhyachal Division at Mirzapur. Learned Commissioner examined the legality and correctness of impugned order passed by learned ADM, denied to interfere in impugned order and found the appeal without any force and dismissed the appeal. Impugned order was affirmed in appeal.

3. Heard learned counsel for the petitioner, learned AGA for the State and perused the material placed on record.

4. Learned counsel for the petitioner submitted that the proceeding under Section 3 of U.P. Control of Goondas Act was instituted against the petitioner after issuance of notice under Section 3 (1) of U.P. Control of Goondas Act, wherein, it was stated that S.H.O. Gopiganj/S.P. Bhadohi informed him that Guddu Chauhan, son of Lallu Chauhan, resident of Village Mahuari, Police Station Gopiganj, District Bhadohi, is a goonda who either himself or as a member or leader of a gang habitually commits or attempt to commit or abets the commission of offence punishable under Chapter XVI, Chapter XXII of Indian Penal Code. He is generally reputed to be a person who is desperate and danger to the community. His activities are dangerous to the person and property of the people of the locality. The witnesses are not willing to come forward to give evidence against him for the reason of apprehension on their part as regards the safety of their person and property. A case is registered vide Crime No.194 of 2019, under Section 3/5A/8 of Cow Slaughter Act and Section 11 of Animal Cruelty Act on 24.8.2019, when a Sub-Inspector recovered four number of progeny of cow from him, which were loaded on a vehicle bearing registration No.UP-66-T-88-72 in inhumane and cruel manner. The petitioner was directed to appear on 2.7.2020, at 10:00 A.M. before Additional District Magistrate pursuant to said notice and submit his explanation. He was also given opportunity to examine himself or any other witness in support of his stand. The Additional District Magistrate observed in impugned order that even after sufficient service of notice, the

opposite party failed to appear before him either personally or through counsel and after perusing the report of Superintendent of Police, he was satisfied that the opposite party is a person, who is desperate to the community and his act comes within the purview of U.P. Control of Goondas Act and on this finding, he was directed to be externed from limits of District Bhadohi for a period of six months. He next submitted that the petitioner assailed the externment order passed by the ADM before learned Commissioner Vindhyachal Division at Mirzapur, who after hearing submissions of petitioner and State counsel dismissed the appeal and affirmed the impugned order passed by learned ADM. He further submitted that the accused appellant already enlarged on bail in said case under Section 3/5A/8 of Cow Slaughter Act by order dated 13.9.2019, passed by learned Incharge Session Judge, Bhadohi at Gyanpur. The externment order passed by ADM was ex-parte and without giving opportunity of hearing to the petitioner, as he was unaware of the aforesaid fact, he did not leave the district due to which he was arrested by the police and an FIR was lodged on 16.1.2022, bearing Case Crime No.19 of 2022, under Section 10 of U.P. Control of Goondas Act, in which the petitioner applied for bail and he was enlarged on bail by orders of CJM vide order dated 20.1.2022, a certified copy of said bail order has been annexed as Annexure No.6 to the writ petition. The notice under Section 3(1) of U.P. Control of Goondas Act was issued to the petitioner with malafide intention, solely with a purpose to harass the petitioner and to got him expelled from the district where he is residing since birth. The petitioner was never served the copy of impugned notice issued by learned ADM. Even the Divisional Commissioner i.e. respondent

No.2 failed to appreciate the true facts of the case and dismissed the appeal without application of judicial mind. The single case under Section 3/5A/8 of Cow Slaughter Act was falsely registered against the petitioner merely on the basis of presumption. The period of externment granted in impugned order has already expired yet the penal consequences of the same continues to haunt the petitioner, as the social stigma is attached with him that he has been proceeded under Section 3 of the U.P. Control of Goondas Act and directed to be externed from District Bhadohi. As a consequence of impugned order dated 3.1.2022, the petitioner and his family members are still being subjected to the rigorous harassment at the hands of the police personnel, who used to raid his house for one and other reason. The petitioner is not having any prior criminal history except the case mentioned in writ petition.

5. Learned counsel for the petitioner lastly submitted that a writ, order or direction in the nature of certiorari is prayed for setting aside the order dated 31.3.2022 passed by learned Commissioner Vindhyachal, Division at Mirzapur as well as externment order passed by learned ADM dated 22.6.2020. No beet information is mentioned in impugned order with regard to the petitioner.

6. Per contra, learned AGA countenanced the impugned orders in his submissions and stated that there is no illegality or irregularity in impugned orders passed by respondent Nos.2 and 3. The impugned orders are based on proper material even the petitioner failed to obey the externment order and he was arrested by police and a case under Section 10 of the Act was registered against him, in which he was subsequently bailed out.

7. The notice was issued to the petitioner on the basis of single case registered under Section 3/5A/8 of U.P. Prevention of Cow Slaughter Act, in the year 2019 and accused was allegedly arrested by the police while transporting four number of progeny of cow in a Tata Magic Vehicle, which was heading towards Gopiganj from Seekhapur. Thus, the arrest and seizure was effected within state limit. The petitioner has denied service of notice under Section 3(1) of the Act personally on him. Mode and manner of service of notice upon the petitioner is not mentioned in order passed by ADM. The petitioner has feigned ignorance of the proceeding before learned ADM and stated that he could not appear before him due to non service of notice.

8. So far as the allegations against the petitioner being goonda element is concenred, the word 'goonda' is described in Section 2(b) of the Goonda Act as under:-

"2(b) "Goonda" means a person who-

(i) either by himself or as a member or leader of a gang, habitually commits or attempts to commit, or abets the commission of an offence punishable under Section 153 or Section 153-B or Section 294 of the Indian Penal Code or Chapter XV., Chapter, Chapter XVI, Chapter XVII or Chapter XXII of the said code: or

(ii) has been convicted not less than thrice for an offence punishable under the Supression of Immoral Traffic in Women and Girls Act 1956, or

(iii) has been convicted not less than thrice for an offence punishable under the U.P. Excise Act, 1910 or the Pub

(iv) is generally reputed to be a person who is desperate and dangerous to the community

(v) has been habitually passing indecent remarks or teasing women or girls: or

(vi) is a tout.

Regarding externment of goondas, Section 3 of the Goonda Act is being reproduced as under:-

3. Externment, etc. of Goondas. - Where it appears to the District Magistrate.-

(a) that any person is a Goonda; and

(b) (i) that his movements or acts in the district or any part hereof are causing, or are calculated to cause alarm, danger or harm to persons or property; or

(ii) that there are reasonable grounds for believing that he is engaged or about to engage, in the district or any part thereof, in the commission of an offence referred to in subclauses (i) to (iii) of clause (b) of Section 2, or in the abetment of any such offence; and]

(c) that witnesses are not willing to come forward to give evidence against him by reason of apprehension on their part as regards the safety of their person or property-

the District Magistrate shall by notice in writing inform him of the general nature of the material allegations against him in respect of clauses (a), (b) and (c)

and give him a reasonable opportunity of tendering an explanation regarding them.

(2) The person against whom an order under this section is proposed to be made shall have the right to consult and be defended by a counsel of his choice and shall be given a reasonable opportunity of examining himself, if he so desires, and also of examining any other witnesses that he may wish to produce in support of his explanation, unless for reasons to be recorded in writing the District Magistrate is of opinion that the request is made for the purpose of vexation or delay.

(3) Thereupon the District Magistrate on being satisfied that the conditions specified in clauses (a), (b) and (c) of sub-section (1) exist may by order in writing-

[(a) direct him to remove himself outside the area within the limits of his local jurisdiction or such area and any district or districts or any part thereof, contiguous thereto, by such route, if any, and within such time as may be specified in the order and to desist from entering the said area or the area and such contiguous district or districts or part thereof, as the case may be from which he was directed to remove himself until the expiry of such period not exceeding six months as may be specified in the said order;] (b)(i) require such person to notify his movements or to report himself, or to do both, in such manner, at such time and to such authority or person as may be specified in the order;

(ii) prohibit or restrict possession or use by him of any such article as may be specified in the order;

(iii) *direct him otherwise to conduct himself in such manner as may be specified in the order, until the expiry of such period, not exceeding six months as may be specified in the order."*

9. The Apex Court in the case **Vijay Narain Singh versus State of Bihar and others, (1984) 3 SCC 14** observed 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 1970 Act.

10. Since there is reference of one incident only in the notice in hand, it falls short of the legal requirement as provided in Clause (i) of section 2(b) of the 1970 Act.

11. Again, a Division Bench of this Court in *Suresh Tewari Vs. State of U.P. and others* decided on 23.5.2018, after considering the Apex Court judgement in *Vijay Narain Singh Vs. State of Bihar, 1984 (3) SCC 14* and Full Bench judgement of this Court in *Bhim Sain Tyagi Vs. State of U.P. 1999 (39) ACC 321*, while considering the issue relating to slapping of the penal provisions of the Act against an individual on basis of a solitary case, has observed as follows:-

"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. If there had been reference of two or more incidents in the impugned notice, then the minimum legal requirement of section, 2(b) Clause (i) would have been satisfied, and then in that case sufficiency of the material on merits could not be challenged before this Court, but before the authority concerned as laid down in the Division Bench ruling in the case of Jaindendra @ Chhotu Singh Versus State of U.P. (supra). But since the impugned notice in the present case is short of the legal requirement, it could be challenged in this Court. The observations in para 12 of the ruling in the case of Jaindendra (supra) which have been quoted above, also support this conclusion."

12. As per definition and the law settled by this Court as well by the Apex Court, one cannot be treated to be a habitual offender unless and until there is recurrence of the offence and at the most the general reputation of the person is that he is desperate and dangerous to the community. Since in this case against the petitioner there is reference of one extreme instance only the petitioner could not be deemed to be a habitual offender on the basis of that single incident only, so the notice falls short of legal requirement as provided in Clause (1) of Section 2 (b) of the 1970 Act.

13. In view of above, the impugned order dated 22.6.2020 lacks merit and consequently, the order of appellate court dated 31.3.2022 also cannot be sustained, hence, both the orders are liable to be quashed.

14. The writ petition is **allowed**. The impugned order dated 22.6.2020 passed by

the respondent no. 3 - Additional District Magistrate (Finance & Revenue) Bhadohi and the appellate court order dated 31.3.2022 passed by the respondent no. 2 - Commissioner, Vindhyachal Division at Mirzapur, are hereby quashed.

15. Let a copy of this order be forwarded to District Magistrate, Bhadohi for necessary actions

(2023) 8 ILRA 1258
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.07.2023

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE SURENDRA SINGH-I, J.

Criminal Misc. Writ Petition No. 7581 of 2023

Arvind Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
 Sri Brajesh Kumar Dwivedi

Counsel for the Respondents:
 G.A., Sri Alok Krishna Tripathi, Sri Utpal Singh

A. Criminal Law-Constitution of India, 1950-Article 226- Indian Penal Code, 1860-Sections 366, 120-B-Quashing of first information report- The informant had lodged second F.I.R. for harassing the petitioners after 3 months of the lodging of the previous first information report in which final report was submitted by the Investigating Officer in the investigation- The informant did not pursue the legal remedy available to him under law against submission of final report in a case registered by him-He did submit application u/s 156 (3) Cr.P.C regarding the same incident before the

Magistrate concerned and got the second F.I.R. registered-The second F.I.R. regarding the same incident is barred by the law propounded by the Hon'ble Apex Court-The second F.I.R. was also not maintainable on the ground that the informant had adequate remedy under the law against the final report submitted by the Investigating Officer in the first F.I.R. lodged by him.(Para 1 to 14)

The petition is allowed. (E-6)

List of Cases cited:

1. Kari Choudhary Vs Mst. Sita Devi & Ors (2002) 1 SCC 714
2. T.T. Antony Vs St. of Ker. & ors. CRLA No. 689 of 2001, Special Leave Petition (Crl.) 1522 of 2000
3. St. of Har. Vs Bhajan Lal & ors. (1992) Suppl. 1 SCC 335

(Delivered by Hon'ble Surendra Singh-I, J.)

Heard Sri Brajesh Kumar Dwivedi, learned counsel for the petitioners, Sri Alok Krishan Tripathi, learned counsel for the informant and Smt. Manju Thakur, learned A.G.A. appearing for the State-respondents.

2. The present writ petition has been preferred with the prayer to quash the impugned first information report dated 06.04.2023 registered as Case Crime No. 216 of 2023 under Sections 366, 120-B I.P.C., Police Station- Jeanpur, District-Azamgarh, and for a direction to the respondents not to arrest the petitioners pursuant to impugned first information report.

3. It has been submitted by learned counsel for the petitioners that the informant/respondent no. 4, Ram Bilas

Rajbhar had given an application u/s 156 (3) Cr.P.C. regarding alleged incident dated 28.12.2022 at 11.30 hours on which Judicial Magistrate, Azamgarh, passed an order dated 03.04.2023 whereby first information report against the petitioners was lodged on 06.04.2023 as Case Crime No. 216 of 2023 u/s 366, 120-B I.P.C., P.S.- Jeanpur, District- Azamgarh.

4. It has been stated in the first information report that petitioner no. 1, Arvind Singh, is the ex-Gram Pradhan of village- Rasoolpur, District- Azamgarh. His bonded labour, Ram Nayan Ram's mother, Dulari Devi is the present Gram Pradhan of his village. The whole work of Gram Pradhan is looked after by accused/petitioner no. 1, Arvind Singh. The informant has submitted complaint to the higher authorities against the previous Gram Pradhan for enquiry regarding development works carried on during the period of aforesaid Gram Pradhan. Due to this enmity, accused persons, Arvind Singh, Ajeet Singh, Ram Nayan Ram, Ram Bachan Rajbhar and Naitik, hatched conspiracy to humiliate the informant and cause damage to his social reputation. In furtherance of this, accused persons on 28.12.2022 at 11.30 o'clock forcibly kidnapped informant's daughter, Annu from Banaura Road and carried her in Scorpio vehicle while she was returning home after appearing in B.Sc. 1st year examination in Badrinath Degree College, Kanjra Dilshapur. The incident was witnessed by Jitendra Singh and Lal Bahadur Yadav of his village. The informant has expressed his apprehension that the accused persons may sell or murder his daughter after her abduction. The same informant, Ram Bilas Rajbhar had lodged a first information report dated 28.12.2022 at 22.02 hours on the very same day of the

incident which was registered as Case Crime No. 764 of 2022 u/s 366 I.P.C. at P.S.- Jeanpur, District- Azamgarh against petitioner no. 5, Naitik.

5. Learned counsel for the petitioners has submitted that the victim, namely, Annu was a major aged about 18 years 6 months at the time of the incident. Her date of birth being 02.07.2004. The petitioners have filed High School Marksheet of the victim which is annexed as Annexure No. 4 to the writ petition. It has also been submitted that after lodging of the previous first information report, the victim, Annu Rajbhar along with accused, Naitik, appeared before Station House Officer, Police Station- Jeanpur, District- Azamgarh and gave an application on 11.01.2023 admitting that the alleged incident dated 28.12.2022 took place with the free consent of the victim, Annu Rajbhar and that they were living together. The victim, Annu Rajbhar, in her statement u/s 161 Cr.P.C. before the Investigating Officer and in her statement dated 28.01.2023 u/s 164 Cr.P.C. which was recorded by the Magistrate concerned has stated that she left her home with her own sweet will and had gone with accused, Naitik to Gujarat for performing marriage with him.

6. After investigation, on the basis of statements of victim u/s 161 and 164 Cr.P.C. and that of independent witness, Sanjay Rajbhar and finding that the victim Annu was major and had left her house on her own sweet will and had married with accused, Naitik, the Investigating Officer submitted final report in Case Crime No. 764 of 2022 u/s 366 I.P.C. at P.S.- Jeanpur, District- Azamgarh on 19.01.2023. The petitioners have filed the statements u/s 161 and 164 Cr.P.C. of the victim and independent witness, Sanjay Rajbhar and

the final report as Annexure Nos. 6, 8, 9 and 10 to the writ petition.

7. Without disclosing the fact that informant had lodged first information report on 28.12.2022 regarding the same incident in which after investigation, the Investigating Officer had submitted final report on 19.01.2023, submitted application u/s 156(3) Cr.P.C. regarding the incident dated 28.12.2022 and got a F.I.R. lodged on 06.04.2023 adding 4 other accused persons, apart from previous co-accused, Naitik, two first information reports cannot be lodged for the same incident dated 28.12.2022. The informant had lodged second F.I.R. dated 06.04.2023 for harassing the petitioners after 3 months of the lodging of the previous first information report in which final report was submitted by the Investigating Officer in the investigation.

8. It has also been submitted by learned counsel for the petitioners that considering the final report submitted in the previous first information report, no offence u/s 366, 120-B I.P.C. is made out against the petitioners. He has also placed reliance on the following judgements of the Hon'ble Apex Court :-

(i) Kari Choudhary Vs. Mst. Sita Devi and Others, (2002) 1 SCC 714

(ii) T.T. Antony Vs. State of Kerala & Ors., Appeal (Crl.) 689 of 2001, Special Leave Petition (Crl.) 1522 of 2000

9. In the first information report dated 28.12.2022 registered as Case Crime No. 764 of 2022 lodged in P.S.- Jeanpur, the informant, Ram Bilas Rajbhar has stated that her daughter, Annu Rajbhar aged about 18 years 6

months who was studying in B.Sc. - I in Badrinath Degree College had gone to college on 28.12.2022 for giving examination but she did not return back home in the evening. The informant had firm belief that accused, Naitik S/o Ram Bachan, resident of village-Rasoolpur has taken and enticed her daughter away.

10. In the case of **Kari Choudhary (supra)**, the Apex Court has held that there cannot be two F.I.R.s against the same accused in respect of the same case. But when there are two rival versions in respect of same episode, they would normally take the shape of two different F.I.R.s and investigation can be carried on under both of them by the same investigating agency. Even that apart, the report submitted to the court by way of the subsequent F.I.R. need be considered as an information submitted to the court regarding the new discovery made by the police during investigation that persons not named in the first F.I.R. are the real culprits. To quash the said proceedings merely on the ground that final report had been laid in the first F.I.R. is, to say the least, too technical. Even otherwise, the investigating agency is not precluded from further investigation in respect of an offence in spite of forwarding a report under sub-section (2) of Section 173 on a previous occasion. This is clear from Section 173(8) of the Code.

11. In the case of **T.T. Antony (supra)**, the Apex Court has discussed the law relating to lodging of F.I.R. and registration of the F.I.R. and the subsequent steps to be taken by the investigating agency in pursuance thereof as well as the status of second F.I.R. lodged regarding the same incident as follows :-

“Inasmuch as the germane question relates to registration of an F.I.R., we may usefully refer to Section

154 of the Code of Criminal Procedure, 1973 (Cr.P.C.) which reads as under : "154. Information in cognizable cases. -

(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant;

and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-

section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

Sub-section (1) of Section 154 of Cr.P.C. contains four mandates to an

officer in-charge of a police station. The first enjoins that every information relating to commission of a cognizable offence if given orally shall be reduced to writing and the second directs that it be read over to the informant; the third requires that every such information whether given in writing or reduced to writing shall be signed by the informant and the fourth is that the substance of such information shall be entered in the station house diary. It will be apt to note here a further directive contained in sub-section (1) of Section 157 of Cr.P.C. which provides that immediately on receipt of the information the officer in charge of the Police Station shall send a report of every cognizable offence to a Magistrate empowered to take cognizance of the offence and then proceed to investigate or depute his subordinate officer to investigate the facts and circumstances of the case. Sub-section (2) entitles the informant to receive a copy of the information, as recorded under sub-section (1), free of cost. Sub-section (3) says that in the event of an officer in charge of a police station refusing to record the information as postulated under sub-section (1), a person aggrieved thereby may send the substance of such information in writing and by post to the Superintendent of Police concerned who is given an option either to investigate the case himself or direct the investigation to be made by a police officer subordinate to him, in the manner provided by Cr.P.C., if he is satisfied that the information discloses the commission of a cognizable offence. The police officer to whom investigation is entrusted by the Superintendent of Police has all the powers of an officer in charge of the police station in relation to that offence. An information given under sub-section

(1) of Section 154 of Cr.P.C. is commonly known as First Information Report (F.I.R.) though this term is not used in the Code. It is a very important document. And as its nick name suggests it is the earliest and the first information of a cognizable offence recorded by an officer in charge of a police station. It sets the criminal law into motion and marks the commencement of the investigation which ends up with the formation of opinion under Section 169 or 170 of Cr.P.C., as the case may be, and forwarding of a police report under Section 173 of Cr.P.C. It is quite possible and it happens not infrequently that more informations than one are given to a police officer in charge of a police station in respect of the same incident involving one or more than one cognizable offences. In such a case he need not enter every one of them in the station house diary and this is implied in Section 154 of Cr.P.C. Apart from a vague information by a phone call or a cryptic telegram, the information first entered in the station house diary, kept for this purpose, by a police officer in charge of a police station is the First Information Report - F.I.R. postulated by Section 154 of Cr.P.C. All other informations made orally or in writing after the commencement of the investigation into the cognizable offence disclosed from the facts mentioned in the First Information Report and entered in the station house diary by the police officer or such other cognizable offences as may come to his notice during the investigation, will be statements falling under Section 162 of Cr.P.C. No such information/statement can properly be treated as an F.I.R. and entered in the station house diary again, as it would in effect be a second FIR and the same cannot be in conformity with the scheme of the Cr.P.C. Take a case where

an FIR mentions cognizable offence under Section 307 or 326 I.P.C. and the investigating agency learns during the investigation or receives a fresh information that the victim died, no fresh FIR under Section 302 I.P.C. need be registered which will be irregular; in such a case alteration of the provision of law in the first FIR is the proper course to adopt. Let us consider a different situation in which H having killed W, his wife, informs the police that she is killed by an unknown person or knowing that W is killed by his mother or sister, H owns up the responsibility and during investigation the truth is detected; it does not require filing of fresh FIR against H - the real offender-who can be arraigned in the report under Section 173(2) or 173(8) of Cr.P.C., as the case may be. It is of course permissible for the investigating officer to send up a report to the concerned Magistrate even earlier that investigation is being directed against the person suspected to be the accused. The scheme of the Cr.P.C. is that an officer in charge of a Police Station has to commence investigation as provided in Section 156 or 157 of Cr.P.C. on the basis of entry of the First Information Report, on coming to know of the commission of a cognizable offence. On completion of investigation and on the basis of evidence collected he has to form opinion under Section 169 or 170 of Cr.P.C., as the case may be, and forward his report to the concerned Magistrate under Section 173(2) of Cr.P.C. However, even after filing such a report if he comes into possession of further information or material, he need not register a fresh FIR, he is empowered to make further investigation, normally with the leave of the court, and where during further investigation he collects

further evidence, oral or documentary, he is obliged to forward the same with one or more further reports; this is the import of sub-section (8) of Section 173 Cr.P.C. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 of Cr.P.C. only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 Cr.P.C. Thus there can be no second F.I.R. and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the F.I.R. in the station house diary, the officer in charge of a Police Station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 of the Cr.P.C.”

12. Considering the facts of the present case in the light of the law propounded by the Apex Court in **T.T. Antony (supra)**, we find that the informant, Ram Bilas Rajbhar had got first information report dated 28.12.2022 registered at 22.02 hours in P.S.- Jeanpur as Case Crime No. 764 of 2022 u/s 366 I.P.C. regarding the abduction of his daughter, Annu against Naitik. After investigation, the Investigating Officer did not find any evidence regarding commission of offence against accused, Naitik and submitted final report. The informant did not pursue the legal

remedy available to him under law against submission of final report in a case registered by him. He did submit application u/s 156 (3) Cr.P.C. on 21.03.2023 regarding the same incident before the Magistrate concerned and got the second F.I.R. registered as Case Crime No. 216 of 2023 under Sections 366, 120-B I.P.C. in Police Station- Jeanpur, on 06.04.2023 against the petitioners who included the accused of the previous F.I.R., Naitik and 4 other accused persons. The second F.I.R. regarding the occurrence was not maintainable under the law. The second F.I.R. regarding the same incident is barred by the law propounded by the Hon'ble Apex Court. The second F.I.R. was also not maintainable on the ground that the informant had adequate remedy under the law against the final report submitted by the Investigating Officer in the first F.I.R. lodged by him. In **State of Haryana Vs. Bhajan Lal & Ors., (1992) Suppl. (1) SCC 335**, the Apex Court has held as sixth ground for quashing of the F.I.R. as :

(6) Where there is an express legal bare 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.

13. Applying the aforesaid principles propounded by the Apex Court in **Bhajan Lal (supra)**, the second F.I.R. lodged by the informant, Ram Bilas Rajbhar as Case Crime No. 216 of 2023 under Sections 366, 120-B I.P.C., Police Station- Jeanpur, District- Azamgarh, is not maintainable and is liable to be quashed.

14. In view of the above, the writ petition succeeds and is allowed. The First Information Report dated 06.04.2023 registered as Case Crime No. 216 of 2023, under Section 366, 120-B I.P.C., P.S.- Jeanpur, District- Azamgarh, as well as all consequential proceedings are hereby quashed.

(2023) 8 ILRA 1264
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.07.2023

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE SURENDRA SINGH-I, J.

Criminal Misc. Writ Petition No. 7644 of 2023

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

Counsel for the Petitioners:
Sri Udayveer Singh

Counsel for the Respondents:
G.A., Sri Anil Kumar

A. Criminal Law-Constitution of India, 1950-Article 226 - Indian Penal Code, 1860-Section 366-Quashing of FIR-the petitioners no. 1 & 2 are major and they have married on their sweet will-mere finding that a woman was abducted is not enough, it must further be proved that the accused abducted the woman with the intent that she may be compelled, or knowing it to be likely that she will be compelled to marry any person or in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse-Unless the prosecution proves that the abduction is for the purposes mentioned in Section 366 IPC, the Court cannot hold the accused

guilty and punish him under Section 366 IPC. (Para 1 to 10)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Smt. Juli Kumari & anr. Vs St. of UP & ors. CMWP No. 17046 of 2022
2. Kavita Chandrakant Lakhani Vs St. of Mah. & (2018) AIR SC 2099
3. Gabbu Vs St. of M.P. (2006) AIR SC 2461
4. Shahjahan Vs St. (2011) Cr.L.J. 573

(Delivered by Hon'ble Surendra Singh-I, J.)

Heard Sri Udayveer Singh, learned counsel for the petitioners, Sri Anil Kumar, learned counsel for the informant and Sri Rajesh Kumar Sacchan, learned State Law Officer appearing for the State-respondents.

2. The present writ petition has been preferred with the prayer to quash the impugned First Information Report dated 04.05.2023 registered as Case Crime No. 214 of 2023, under Section 366 I.P.C., P.S.- Rath, District- Hamirpur, and for a direction to the respondents not to arrest the petitioners in pursuance of impugned First Information Report.

3. Submission of learned counsel for the petitioners is that as per Junior High School Marksheet, the date of birth of petitioner no. 1, Smt. Malti Devi is 10.07.2001 and as per the Aadhar card and PAN Card, the date of birth of petitioner no. 2, Rajkumar is 01.01.1992 and as such, the petitioners no. 1 and 2 are major and they have married on their sweet will, therefore, no offence has been committed. By drawing attention to Annexure-4 to the petition, it is submitted that online

application for registration of marriage has also been submitted. The present petition is also supported by a joint affidavit of the petitioners nos. 1 and 2. Reliance has been placed on a judgement and order dated 5.12.2022 passed by this Court in **Criminal Misc. Writ Petition No. 17046 of 2022 (Smt. Juli Kumari and another vs. State of UP and 2 others)** to submit that under identical circumstances the petition was allowed and FIR therein was quashed.

4. The aforesaid order dated 5.12.2022 passed in Criminal Misc. Writ Petition No. 17046 of 2022 (**Smt. Juli Kumari and another vs. State of UP and 2 others**) is quoted as under :

"Heard learned counsel for the petitioners and learned AGA.

Present writ petition has been preferred for quashing the FIR dated 25.10.2022 being Case Crime No.0475 of 2022 under Section 366 IPC, P.S. Saurikh, Distt. Kannauj and for a direction to respondents not to arrest the petitioners pursuant to aforesaid FIR.

Placing reliance on the Aadhar Card of the victim girl showing her date of birth as 1.1.2004, it is submitted by the learned counsel for the petitioners that the petitioner no.1 is a major girl aged about more than 18 years on the date of incident.

The present petition has been filed with the declaration, jointly by both the petitioners no.1 & 2 that the petitioner no.1 had left her paternal home out of her own sweet will and being a major girl, she is free to take her choice to perform marriage with the petitioner no.2.

The present petition, however, has been filed on the assertion that no offence under Section 366 IPC is made out as the petitioner no.1 is a major girl. The entire criminal case lodged by the respondent no.3 is nothing but an abuse of the process of the law.

Learned counsel for the petitioners has further contended that in view of the aforesaid facts and circumstances, the impugned FIR is liable to be quashed in view of the Supreme Court's judgment in Kavita Chandrakant Lakhani vs. State of Maharashtra & Anr reported in AIR 2018 SC 2099, wherein it was held that to constitute an offence under Section 366 IPC, it is necessary for the prosecution to prove that the accused induced the complainant woman or compelled by force to go from any place, that such inducement was by deceitful means, that such abduction took place with the intent that the complainant may be seduced to illicit intercourse and/or that the accused knew it to be likely that the complainant may be seduced to illicit intercourse as a result of her abduction. Mere abduction does not bring an accused under the ambit of this penal section. So far as charge under Section 366 IPC is concerned, mere finding that a woman was abducted is not enough, it must further be proved that the accused abducted the woman with the intent that she may be compelled, or knowing it to be likely that she will be compelled to marry any person or in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse. Unless the prosecution proves that the abduction is for the purposes mentioned in Section 366 IPC, the Court cannot hold

the accused guilty and punish him under Section 366 IPC.

As regards the age of the victim girl, as indicated in the Aadhar Card appended as Annexure No.2 to the writ petition, no dispute has been raised by learned AGA. It is, thus, clear that both the petitioners are major. The fact that the present writ petition has been filed with the declaration by the victim girl and that she is living voluntarily in the company of the petitioner no.2, is supported with the signature of the victim girl on the Vakalatnama. Once the age of the victim girl is not in dispute, the petitioners no.1 & 2 cannot be made accused for committing offence under Section 366 IPC as victim had left her home in order to live with the petitioner no.2.

We make it clear that the question in the present petition is not about the validity of marriage of two individuals i.e. petitioners no.1 & 2. Rather, the issue is about the life and liberty of two individuals in choosing a partner or their right to freedom of choice as to with whom they would like to live.

In view of the above discussion, we are of the considered view that from the first information report no offence under Section 366 IPC is made out, inasmuch as, both the petitioners are major and the petitioner no.1 has come up with the categorical stand that she had left her home with the petitioner no.2 willingly and is living with him as a married woman.

In view of the above, the writ petition succeeds and is allowed. The FIR dated 25.10.2022 being Case Crime No.0475 of 2022 under Section 366 IPC, P.S.

Saurikh, Distt. Kannauj as well as all consequential proceedings are hereby quashed.

We, however, clarify that while deciding the present petition, we have not looked into the validity of marriage of the petitioners."

5. Per contra, learned counsel for the informant and learned State Law Officer sought to oppose the prayer. They have stated that petitioner no. 1, Smt. Malti Devi was earlier married to Mangal Singh on 17.02.2023. The first information report relating to this writ petition is registered only u/s 366 I.P.C. The Court has to consider whether the offence u/s 366 I.P.C. has been committed against accused/petitioner no. 2, Rajkumar. No complaint case regarding bigamy has been registered against petitioner no. 2.

6. For an offence of bigamy is punishable u/s 494 I.P.C. or Section 495 I.P.C. As per the provisions given in Section 198(1)(c) Cr.P.C., offence is non-cognizable and only a complaint case can be filed by the aggrieved person i.e. husband or wife or in case of wife by her father, mother, brother, sister, son or daughter or by her father's or mother's, brother or sister or with the leave of the court by any other person related to her by blood, marriage or adoption.

7. No averments has been made on behalf of learned counsel for the informant or the State Law Officer that any of the relatives of petitioner no.1, Smt. Malti Devi has filed complaint case regarding alleged bigamy by petitioner no. 2, Rajkumar in any court.

8. To ascertain whether prima facie, offence u/s 366 I.P.C. is made out, it is

necessary to peruse Sections 362 and 366 I.P.C. which are quoted hereunder :-

362. Abduction.—Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.

Ingredients :- This section requires two things :-

(1) forceful compulsion or inducement by deceitful means;

(2) the object of such compulsion or inducement must be the going of a person from any place.

The expression "deceitful means" includes a misleading statement. It is, really speaking, a matter of intention. The intention of the accused is the basis and gravamen of the charge. If the consent of the person is freely and voluntarily given, there will be no abduction. Unlike kidnapping, abduction as defined u/s 362 I.P.C. is not an substantive offence under the Code but abduction is an auxilliary act and is made criminal and punishable only when it is done with one or other intention specified in Section 366 I.P.C.

366. Kidnapping, abducting or inducing woman to compel her marriage, etc.—Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable

to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid.

Ingredients :- This section requires :-

(1) kidnapping or abducting of a woman;

(2) such kidnapping or abduction must be -

(i) with intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will; or

(ii) in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse; or

(iii) by means or criminal intimidation or otherwise by inducing any woman to go from any place with intent that she may be, or knowing that she will be forced or seduced to illicit intercourse.

Section 366 I.P.C. only applies when the woman abducted has no intention of marriage or lawful intercourse when abducted. Mere abduction does not bring the accused under the ambit of this penal section.

In **Gabbu Vs. State of M.P., AIR 2006 SC 2461**, the Apex Court has held that so far as the charge u/s 366 I.P.C.

is concerned, mere finding that a woman was abducted is not enough. It must further be proved that the abduction is for the purposes mentioned in Section 366 I.P.C.

In **Shahjahan Vs. State, 2011 Cr.L.J. 573**, the Apex Court has held :-

"In order to establish an offence u/s 366 I.P.C., it must first be established that the offence of kidnapping under Section 361 I.P.C. or abduction under Section 362 I.P.C. has been proved. It must then be shown that such kidnapping or abduction was with the contumacious intent referred to under Section 366 I.P.C."

9. The essential condition for the application of Section 366 I.P.C. is that there is kidnapping or abduction of a woman with the intention to compel her or knowing it to be likely that she will be compelled to marry any person against her will or will be forced or seduced to illicit intercourse.

10. In such view of the matter, we find that the essential ingredients of Section 362 I.P.C. or even Section 366 I.P.C. are not fulfilled against the petitioner no. 2, Rajkumar.

11. Under these facts and circumstances of the case, we are inclined to allow the writ petition.

12. Accordingly, the writ petition stands allowed. The First Information Report dated 04.05.2023 registered as Case Crime No. 214 of 2023, under Section 366 I.P.C., P.S.- Rath, District- Hamirpur, as well as all consequential proceedings are hereby quashed.

13. We, however, clarify that while deciding the present petition, we have not

looked into the validity of marriage of the petitioners.

(2023) 8 ILRA 1268
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.07.2023

BEFORE

THE HON'BLE IRSHAD ALI, J.

Contempt Application (Civil) 695 of 2013

Mahesh Chandra Shukla ...Appellant
Versus
Achal Mishra Basic Shiksha Adhikari
Lakhimpur Kheri & Anr. ...Respondents

Counsel for the Appellant:

Sri Nirmal Singh, Sri Pawan Kumar Pandey, Sri Sharad Pathak, Sri Tej Pal Singh

Counsel for the Respondents:

Sri Jyotinjai Verma, Sri Ram Kumar Singh, Sri Sandip Kr Yadav

Criminal Law - Indian Penal Code, 1860 – Section 506 – Constitution of India, 1950 - Article 215 - Contempt of Court – Violation of Court Order – Fraud on Court– Quashing of Proceedings – Applicant sought declaration of actions taken post 10.05.2013 as void for violating High Court's order, alleging fraud by Krishna Kumar Pandey, a Finance and Accounts Officer, to suppress financial irregularities and harass government officials – FIR lodged with ulterior motive, omitting court's order and Senior Registrar's letter from case diary – Investigation conducted by officer below prescribed rank, and report not submitted to High Court as directed – Chargesheet under Section 506 IPC filed with manipulated investigation – Court found Public Prosecutor's independent assessment confirmed no offence by Special Counsel – Held: High Court, as a court of record under Article 215, has inherent power to undo judgments obtained by fraud – All actions post 10.05.2013 declared void – Proceedings under Section 506 IPC quashed – Notice issued to police officers for non-

compliance with court's order for potential contempt proceedings.

Case Law Referred:

1. ABCD Vs U.O.I., (2020) 2 SCC 52
2. Vidya Devi Vs St. of H.P., (2020) 2 SCC 569
3. Smt. Sarita Singh Vs St. of U.P., 2022 (40) LCD 871
4. Dr. J.S. Yadav Vs Dr. Anil Kumar Upadhyay, 2022 (40) LCD 1415
5. Barangore Jute Factory PLC. Mazdoor Sangh Vs Baranagore Jute Factory PLC., (2017) 5 SCC 506
6. Delhi Development Authority Vs Skipper Construction Co. (P) Ltd., (1996) 4 SCC 622
7. A.VS Papyya Sastry Vs Govt. of A.P., (2007) 4 SCC 221
8. Hamza Haji Vs St. of Kerala, (2006) 7 SCC 416

(Delivered by Hon'ble Irshad Ali, J.)

C.M. Application No.11 of 2022

1. Heard learned counsel for the parties.

2. This is an application filed under Article 215 of the Constitution for the following directions:

"(1) to direct all the actions taken after 10.5.2013 being in violation of the order dated 10.05.2013 of the Hon'ble High Court in above contempt petition and based on fraud upon the Hon'ble High Court be declared void and entire proceedings relating to Section 506 I.P.C. in Case Crime no.207/2013, Case no.3922 of 2013, P.S. Wazirganj, District Lucknow be dropped/ closed and be set aside.

(2) to direct initiation of legal proceedings including criminal proceedings against those responsible for initiation and continuance of false case under Section 506 I.P.C.

(3) issue such other order or direction, which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case, may also be passed in the interest of justice and equity."

3. Factual matrix of the case is that one person Mr. Krishna Kumar Pandey, who was holding the post of Accounts Officer at District Ambedkar Nagar at relevant point of time in the year 2013 and who was facing grave charges of financial embezzlement and against him, serious criminal cases are registered, has apparently succeeded in using Hon'ble High Court order passed on 10.05.2013 as a tool not only to protect him from effective enquiry against him, but also to affect the pairvi of the cases and to wreck vengeance against the then Basic Education Officer, the deponent who was making pairvi of cases and the then APP I/ Special Counsel/ respected and renowned member of the Awadh Bar at Hon'ble High Court, Lucknow who was appearing for the government servant in the above contempt petition at the relevant time on 10.05.2013 and affidavit was also filed by the government through him.

Since the order dated 10.5.2013 passed by this court in this contempt petition has been used as a tool against the deponent and two other innocent persons, the deponent is having no other alternative remedy except to file this application before this Court so that the actions taken in violation of the order dated 10.05.2013 may be declared void. It is well settled that

no person can be allowed to suffer because of the action of Hon'ble court and the proceedings/ order, the basis of which is fraud, is to be set at naught/ nullified.

4. Learned counsel for the applicant submitted that order dated 10.5.2023 in the above contempt petition was passed on asking of Krishna Kumar Pandey and the same was affirmed on 18.02.2020. The order dated 10.05.2023 was against the then Senior Registrar (Sri Alok Mukherjee). The then Senior Registrar (Sri Alok Mukherjee) wrote letter dated 10.05.2013 to the S.S.P., Lucknow. The S.S.P., Lucknow wrote letter dated 10.5.2013 to the Station House Officer, Wazirganj, Lucknow. Though the order dated 10.5.2013 of the High Court and letter dated 10.5.2013 of the Senior Registrar finds mention in letter of S.S.P. dated 10.05.2013 but it is ensured with ulterior motive that the FIR be not lodged as per direction contained In the order dated 10.5.2013 of the Hon'ble High Court and the order dated 10.05.2013 of the Court and letter dated 10.5.2013 of the Senior Registrar be not made part of the case-diary.

5. Learned counsel for the applicant next submitted that Krishna Kumar Pandey, a man of bad incident, managed to lodge FIR dated 10.05.2013 with ulterior motive and ensure that the order of the Hon'ble High Court as well as letter of Registrar dated 10.05.2013 be not made part of the case diary.

6. Learned counsel for the applicant next submitted that deponent has inspected the file of Hon'ble High Court on 24.11.2022 and from perusal of the same which finds place at page no.3 of the record, makes it clear that Mr. Krishna Kumar Pandey initially

did not name any person and his version of FIR is totally absent in original application given to Senior Registrar Sri Alok Mukherjee.

7. Learned counsel for the applicant next submitted that from perusal of the aforesaid, it is apparent that initially, there was no name mentioned and his version of FIR is totally absent in the application, but later on with ulterior motive to cover up serious financial and other irregularities to prevent their reporting to the government and to compel pairokar, government servant, special counsel to loose cases of State Government involving fraud and loot of State Exchequer by Sri Kirshna Kumar Pandey, Finance & Account Officer against whom affidavits in the petitions in Hon'ble High Court were filed and his conduct was also brought to the notice of Higher Authorities prior to 10.5.2013 and against whom serious criminal cases are registered, he manages to lodge F.I.R.

8. Learned counsel for the applicant next submitted that actually, this change of story has occurred because one Mr. Dharendra Kumar singh, who was also Finance & Accounts Officer, Lakhimpur Khiri, who was in attendance before the Hon'ble High Court in the above contempt, against whom affidavit dated 10.5.2013 was filed by the government servant through APP I, against whom also the complaints were forwarded to the State government and enquiry was going on and against him serious criminal cases are registered connived with mr. Krishna Kumar Pandey. They wanted to encash the opportunity to build pressure upon those persons doing parivi of cases in which enquiry was going on.

9. Learned counsel for the applicant next submitted that Mr. Krishna Kumar

Pandey after giving his first application to the Senior Registrar which has been quoted hereinabove, in which there is no name of any person including the deponent and his version of FIR is totally absent, after being provided security left the premises of Hon'ble High Court along with Mr. Dharendra Kumar Singh on his Motorcycle bearing No.UP-32 XV3674 and he has given hand written note to the Senior Registrar.

10. Learned counsel for the applicant next submitted that the first report given by Mr. Krishna Kumar Pandey and hand written note given by Mr. Krishna Kumar Pandey have never been made part of case-diary nor has ever surfaced in any proceedings and it has come to the knowledge of deponent only after inspection of record of the Hon'ble High Court on 24.11.2022.

It is worthwhile to mention that handwritten note given by Mr. Krishna Kumar Pandey are exactly same as the story was narrated to the Hon'ble High Court and the Hon'ble High Court passed the order on 10.5.2013 and therefore, in none of 4 documents i.e. order dated 10.5.2013, handwritten note dated 10.5.2013 by Shri Krishna Kumar Pandey, letter dated 10.5.2013 by the Senior Registrar and letter dated 10.5.2013 by the S.S.P., Lucknow there is no name of any person and his version of FIR is totally absent.

The story has been changed by Mr. Krishna Kumar Pandey in collusion with Mr. Dharendra Kumar Singh at police station and they have almost succeeded in using order of Hon'ble High Court as a tool against the deponent and two other innocent persons and, therefore, the

application under Article 226 of the Constitution of India is being filed.

11. Learned counsel for the applicant next submitted that FIR with ulterior motive to cover up serious financial and other irregularities to prevent their reporting to the government and to compel pairakar, Government servant, Special Counsel to loose cases of State Government involving fraud and loot of State Exchequer by Sri Krishna Kumar Pandey, a Finance & Accounts Officer against whom affidavits in the petitions in Hon'ble High Court were filed and his conduct was also brought to the notice of higher authorities prior to 10.5.2013 and against whom, serious criminal cases are registered, comes into existence thanks to Shri Alok Kumar Mukherjee.

12. Learned counsel for the applicant next submitted that the then Senior Registrar wrote another letter dated 14.5.2013 to the then S.S.P., Lucknow. The letter dated 10.5.2013 of Senior Registrar is made part of the case diary. He next submitted that on 15.5.2015 Investigating Officer is changed and Circle Officer who is below the rank of Additional Superintendent of Police was made Investigating Officer.

13. Learned counsel for the applicant next submitted that tainted and manipulated investigation results in filing of chargesheet allegedly on 20.6.2013 under Section 506 IPC by backdating the same which is evident from perusal of case diary itself. He next submitted that tainted and manipulated investigation and tainted and manipulated further investigation resulting in charge sheet under Section 506 IPC lasted till March, 2015.

14. Learned counsel for the applicant next submitted that specific request was

made vide letter Pfrank: Vad/9837-41/2013-14 dated 31.01.2014 copy of which was to higher authorities for insuring bringing of case diary along with report to the Hon'ble Court in compliance of Hon'ble Court's order dated 10.05.2013, but this letter is neither part of the case diary nor is known as to what has been done with it by Sri Alok Kumar Mukherjee the then Senior Registrar.

15. Learned counsel for the applicant next submitted that to affect the pairvi of the cases Sri Krishna Kumar Pandey stopped salary of the Pairokar of the department. The department came down heavily upon him. Writ Petition No.415 (MB) of 2014 (Krishna Kumar Pandey v. State of U.P. and others) was filed by him. He narrated the events of 10.5.2013 in his own ways and chargesheet under Section 506 IPC was made annexure. The Hon'ble High Court got an inquiry conducted against him in his writ petition and on receiving adverse report against him the Hon'ble High Court referred the matter to the Government. In respect of aforesaid averments letter dated 26.11.2014 written by Special Secretary to Finance Secretary for action against him is relevant.

16. Learned counsel for the applicant next submitted that the then District Magistrate, Ambedkar Nagar wrote letter dated 1.6.2014 to the Director Treasury, U.P., Lucknow copy of which was forwarded to Principal Secretary, Basic Education and Principal Secretary, Finance, narrating the conduct of the Mr. Krishna Kumar Pandey is not part of the case diary though brought to the notice of I.O.

17. Learned counsel for the applicant next submitted that letter dated 11.11.2013 containing statement of the deponent under

Section 161 Cr.P.C. is part of the above contempt petition, but not part of the case diary. He next submitted that preparation of fake letters/ documents causing disappearance of documents including order of Hon'ble High Court, record pertaining to contempt petition no.688/2013 by not making them part of the case diary changing pages of case diary was done due to extraneous considerations.

18. Learned counsel for the applicant next submitted that in the case diary dates on which supervisory officer has seen the case diary went missing since 16.5.2013. The pages of the case diary have been changed. It is not in running pages. He next submitted that the case is not in running page since CD-XI dated 24.5.2013. Case diary is again in running pages since CD-XVI dated 18.6.2013. SCD is not in running pages what is written by Investigating Officer is different from annexures of the SCD (SCD was written by investigating officer Hirdesh Katheriya and it was supervised by Sri Ajay Kumar). Sri Ajay Kumar remained associated with tainted investigation till end.

19. Learned counsel for the applicant next submitted that neither any report under Section 173(2) Cr.P.C. along with case diary was any further report under Section 173(8) Cr.P.C. along with case diary was brought to the Hon'ble High Court till 29.1.2018. The Cr.P.C. contemplates only report under Section 173(2) along with case diary or any further report under Section 173(8) along with case diary.

20. Learned counsel for the applicant next submitted that though there was sufficient material/ papers in the case diary indicating that the Hon'ble High Court is seized with the matter. The Cr.P.C.

contemplates only one report under Section 173(2) Cr.P.C. with case diary or further report under Section 173(8) Cr.P.C. with the case diary.

21. Learned counsel for the applicant next submitted that the cognizance is taken in violation of Hon'ble High Court's order dated 10.5.2013 passed in the above contempt petition. He next submitted that the order of Hon'ble High Court dated 10.5.2013 was violated by the then Senior Registrar Sri Alok Mukherjee, investigating officers and supervisory officers and court below.

22. Learned counsel for the applicant next submitted that the Hon'ble High Court noted breach of its order dated 10.5.2013 vide order dated 19.1.2018. He next submitted that there is complete violation of order dated 10.5.2013. Every act after 10.5.2013 was done in its violation. No one except the Hon'ble High Court or Superior court is permitted to modify the order of the Hon'ble High Court.

23. Learned counsel for the applicant next submitted that in respect of Special Counsel/ APP I, who was appearing in above contempt petition at the relevant time on 10.5.2013 and in whose presence order dated 10.5.2013 was passed by the Hon'ble High Court, Government takes decision to withdraw from prosecution under Section 506 I.P.C.

24. Learned counsel for the applicant next submitted that the Court below rejected the application for withdrawal from prosecution. The rejection order was challenged in Criminal Revision No.1290/2017. The Hon'ble High Court examined government order in respect of withdrawal of prosecution under Section

506 IPC as well as application of the State for withdrawal and took suo motor cognizance of the matters, records finding that Public Prosecution had applied independent mind and rightly came to the conclusion that revisionist was neither on spot nor committed any offence. Criminal Revision No.1290/2017 became Revision of the Hon'ble High Court. The relevant portion of the order of Hon'ble High Court is being reproduced as under.

"Certified copy of the withdrawal application moved under Section 321, Cr.P.C. and the Government Order dated 14th March, 2017 shown to the court are taken on record.

.... This is an application having five grounds which reflects that the Public Prosecutor has independently applied his mind and had gone through the material available on record and came to the opinion that the revisionist had not committed any offence, he was not on the spot, by observing that too on the basis of presumption that the revisionist has acted adversely affecting to the dignity of this court appears to be uncalled for."

25. Learned counsel for the applicant next submitted that in violation of order passed in Criminal Revision No.1290/2017 the application for withdrawal from prosecution was again rejected by the Court Below. The rejection order was challenged by the State in Criminal Revision No.711 of 2019 (State of U.P. v. Sudhir Kumar Srivastava) in which the informant was heard at the stage of delay, admission and final hearing, thereafter criminal revision was allowed by order dated 14.9.2020.

26. Learned counsel for the applicant next submitted that ignoring the orders of

the two revisional court's order in criminal revision nos.1290/2017 and 711 of 2019, two separate orders one on application of the State for withdrawal from prosecution examined and upheld by the two Revisional Courts in the said criminal revisions but disowned by the State and other on State's Application dated 3.3.2021 pertaining to State's fresh application dated 23.9.2020 in respect of it's withdrawal were passed. The two orders led to filing of two separate criminal revisions i.e. Criminal Revision No.85/2021 (State of U.P. v. Krishna Kumar Pandey and Criminal Revision No.86 of 2021 (State of U.P. v. Krishna Kumar Pandey) by the State. The criminal revisions of the State were allowed on 30.4.2022.

27. Learned counsel for the applicant next submitted that as there was non-compliance of the order dated 14.9.2020 passed in Criminal Revision No.711 of 2019, Contempt Petition No.398 of 2022 was filed. During the pendency of this contempt petition, State's criminal revisions bearing Nos.85/21 and 85/21 were allowed, therefore for violation of order passed in Criminal Revision No.86/2021, contempt petition no.1337 of 2022 was filed.

28. Learned counsel for the applicant next submitted that it is pertinent to bring to the notice of Hon'ble High court and transfer application bearing C.M.C. No.646 of 2022 was filed before the learned District Judge. The C.M.C. No.646/2022 was allowed vide order dated 13.7.2022

29. Learned counsel for the applicant next submitted that the applicant again filed application dated 30.7.2022 for closure of the case under Section 506 IPC and State filed written submissions dated 30.7.2022

in support of it's order of the court below on application dated 30.7.2022 filed by the applicant. He next submitted that the Court Below i.e. Special A.C.J.M., C.B.I./ Ayodhya Prakaran, Lucknow again became aware of the above conclusive conclusion regarding alleged offence under Section 506 IPC through paras of the contempt petition nos.398 of 2022 and contempt petition no.1337 of 2022 and impleadment application dated 14.9.2022 containing application dated 30.7.2022 of the applicant as well as written submissions dated 30.7.2022 filed by the State.

30. Learned counsel for the applicant next submitted that after continuous orders of the Hon'ble High Court the Court Below filed affidavit of compliance in both the contempt petitions i.e. in contempt petition no.398/22 and in contempt petition no.1337/2022 on 17.10.2022. The Court Below has brought on record order dated 26.9.2022 said to have been passed in compliance of the order of Criminal Revision No.86 of 2021. The orders dated 17.10.2022 in contempt petition no.398/22 and in contempt petition no.1337/22 were passed.

31. Learned counsel for the applicant next submitted that in respect of orders dated 17.10.2022 in contempt petition no.398/2022 and in contempt petition no.13337/2022 recall application was filed and was not pressed. He next submitted that the order dated 26.9.2022 of the Court Below i.e. Special A.C.J.M., C.B.I./ Ayodhya Prakaran, Lucknow does not contain written submissions of the State filed on 30.7.2022. He next submitted that the order dated 26.09.2022 of the Court Below i.e. Special A.C.J.M., C.B.I./ Ayodhya Prakaran, Lucknow wrongly mentions submissions of State/ mentions

submissions of State never made by State as is evident from written submissions of the State filed on 30.7.2022.

32. Learned counsel for the applicant next submitted that order dated 26.9.2022 of the Court Below i.e. Special A.C.J.M., C.B.I./ Ayodhya Prakaran, Lucknow which does not contain submissions of State, as is evident from written submissions of the State filed on 30.7.2022 would not qualify as legal order.

33. Learned counsel for the applicant next submitted that order dated 26.9.2022 by the Court Below i.e. Special A.C.J.M., C.B.I./ Ayodhya Prakaran, Lucknow is not confined to State's application dated 23.9.2020 for withdrawal and application's dated 21.12.2022 and 30.01.2021 filed in it's support. No objection was filed by the informant to these applications.

34. Learned counsel for the applicant next submitted that the order dated 26.9.2022 by the Court below i.e. Special A.C.J.M., C.B.I./ Ayodhya Prakaran, Lucknow is on State's application dated 9.6.2017 upheld in Criminal Revision No.1290 of 2017 by Hon'ble High Court and in Criminal Revision No.711/2019 by learned Sessions Court and never pressed by the State after the judgment and order dated 14.9.2020 in Criminal Revision No.711 of 2019 as is evident from the stand of the State indicated in para 1 of the written submissions of the State filed on 30.7.2022. After the judgment and order dated 14.9.220 in Criminal Revision No.711/ 2019 State's application dated 23.9.2020 for withdrawal was filed under changed circumstances. State's application dated 23.9.2020 is based on conclusive conclusion regarding alleged offence under Section 506 I.P.C. recorded in Criminal

Revision No.711 of 2019 by learned Sessions court. The State confined only to it's application dated 23.9.2020 for withdrawal and applications dated 21.12.2020 and 30.01.2021 filed in it's support. No objection was filed by the informant in these applications.

35. Learned counsel for the applicant next submitted that order dated 26.9.2022 of the Court Below i.e. Special A.C.J.M., C.B.I./ Ayodhya Prakaran, Lucknow in sum and substance repetition in English of earlier set aside order dated 10.2.2021. He next submitted that above conclusive conclusion regarding alleged offence under Section 506 I.P.C. is not found mentioned in any order of any Magistrate including Special A.C.J.M., C.B.I./ Ayodhya Prakaran, Lucknow due to ulterior motive despite continuously bringing the same to their notice.

36. Learned counsel for the applicant next submitted that the applications filed by the applicant particularly application dated 29.11.2021 for summoning informant Krishna Kumar Pandey as accused, though pressed on each date, have been kept pending for extraneous reasons. He next submitted that the Court Below is proceeding against law due to extraneous considerations.

37. Learned counsel for the applicant next submitted that the orders in all the criminal revisions viz. Criminal Revision No.1290/2017, Criminal Revision No.711 of 2019 and Criminal Revision No.85 of 2021 as well as order dated 13.7.2022 passed in Criminal Misc. Case No.646 of 2022, Criminal Revision No.85 of 2021 and Criminal Revision No.86 of 2021 take note of the orders in Criminal Revision No.1290 of 2017, Criminal Revision No.711 of 2019.

38. Learned counsel for the applicant next submitted that there is no order of the Court below in compliance of the Criminal Revision No.85 of 2021 and on application dated 30.04.2022 filed by the State. He next submitted that a false case under Section 506 IPC has been instituted to harass and affect the parivi of the cases of the Basic Education Department.

39. Learned counsel for the applicant next submitted that after conclusive conclusion regarding alleged offence under Section 506 IPC made in Criminal Revision No.711 of 2019 the trial before the Court Below neither remains warrant trial nor summon trial nor summary trial. The proceedings before the Court below in respect of alleged offence under Section 506 IPC goes.

40. Learned counsel for the applicant next submitted that after examination of case diary including chargesheet and coming to definite conclusive conclusion regarding alleged offence under Section 506 IPC by learned Sessions Court in Criminal Revision No.711 of 2019 there was no legally valid chargesheet under Section 506 IPC to be acted upon by the court Below. Only formal order in respect of acceptance of withdrawal of the State as well as closure of the case under Section 506 IPC was required to be passed by the Court Below. He next submitted that the above conclusion regarding alleged offence under Section 506 IPC is not found mentioned in any order of Court Below despite continuously bringing the same to it's notice and the case under Section 506 IPC is being continued in violation of law.

41. Learned counsel for the applicant next submitted that despite continuous prayer for closure of case under Section 506 IPC by

the applicant and acceptance of application for withdrawal from prosecution by the State the same has not been done.

42. Learned counsel for the next submitted that it is settled law by Hon'ble Supreme Court that court has a duty to issue appropriate directions for remedying or rectifying the things done in violation of the orders. In that regard the court may even take restitutive measures at any state of proceedings. It is also settled law that all Courts are vested with inherent powers to undo a wrong which may have occurred on account of a mistake of the court causing prejudice to a party.

43. In support of his submissions, learned counsel for the applicant has placed reliance upon the following judgments:

(i) ABCD v. Union of India and others reported in (2020)2 Supreme Court Cases 52.

(ii) Vidya Devi v. State of Himachal Pradesh and others reported in (2020) 2 Supreme Court Cases 569.

(iii) Smt. Sarita Singh v. State of U.P. reported 2022(40) LCD 871

(iv) Dr. J.S. Yadav v. Dr. Anil Kumar Upadhyay and others reported in 2022(40) LCD 1415

(v) Barangore Jute Factory PLC. Mazdoor Sangh (BMS) and others v. Baranagore Jute Factory PLC. And others report (2017)5 Supreme Court Cases 506

(vi) Delhi Development Authority v. Skipper Construction

Co.(P) Ltd. and others reported (1996) 4 Supreme Court Cases 622.

(vii) A.V. Pappya Sastry and others v. Govt. of A.P. and others reported in (2007) 4 Supreme Court Cases 221

(viii) Hamza Haji v. State of Kerala and another reported in (2006) 7 Supreme Court Cases 416: 2006 SCC OnLine SC 842.

44. I have considered the submissions advanced by learned counsel for the applicant and have carefully examined the material on record in context of the controversy involved in the application that whether the procedure after order dated 10.5.2023 passed by this Court has been followed in accordance with law or not.

45. To understand the controversy from the initial stage, order dated 10.5.2013 passed by the Court is extracted hereinbelow:

"While proceedings in this case was going on, one Sri Krishna Kumar Pandey, Finance and Accounts Officer (Basic), District Ambedkar Nagar, who was present and whose matter (Criminal Misc. Case No.688 (C) of 2013) was just now decided, rushed inside the Court crying and weeping and shouted that he has been beaten outside the Court and his spectacles have also been damaged.

Registrar is directed to take appropriate steps of his safety and protection and lodge First Information Report against the erring persons. It shall be ensured that investigation in the matter shall be completed expeditiously, and, in any case within 15 days and the report shall be produced before this Court.

Since outside the Court, Advocates have created an unwanted and unruly scene, and Registrar has not made proper arrangement for smooth functioning of this Court, this Court has no opinion but to rise."

46. Perusal of the above-extracted order shows that direction was to the Senior Registrar to take appropriate steps of his safety and protection and lodge First Information Report against the erring persons and it shall be ensured that investigation in the matter shall be completed expeditiously, and, in any case within 15 days and the report shall be produced before this Court.

47. It is also pertinent to note that Sri Krishna Kumar Pandey, Finance and Accounts Officer (Basic), District Ambedkar Nagar has not named any persons before this Court who did this act.

48. Perusal of the letters dated 10.5.2013 of Sri Krishna Kumar Pandey and the Senior Registrar indicate that incident has been noted in the letters; thereafter, requested to give protection to Sri Krishna Kumar Pandey; and send Shri Kumar Pandey along with complaint dated 10.5.2013 to get an F.I.R. lodged immediately and ensure that the above matter is investigated by some officer not below the rank of Additional Superintendent of Police and take necessary action in accordance with law and submit report to this Court within 15 days so that the same may be placed before the Hon'ble court as directed.

49. At the time of lodging of F.I.R., names of certain persons have been included as named accused along with unknown advocates. On 15.5.2015,

Investigating Officer has been changed and Circle Officer who is below the rank of Additional Superintendent of Police was made Investigation Officer and after investigation, the authority instead of producing the report before this Court as directed on 10.5.2023 submitted charge-sheet under Section 506 IPC before the Magistrate concerned, upon which cognizance was taken.

50. Taking into account the aforesaid aspects of the matter, the Coordinate Bench of this Court vide order dated 29.1.2018, directed that in compliance of order dated 10.5.2013, the entire case diary be produced before this Court by some responsible officer of the Court of Additional Chief Judicial Magistrate-II, Lucknow on the next date fixed i.e. 29.1.2018.

51. In respect of Special counsel who was appearing in above contempt petition at the relevant point of time on 10.5.2013 and in whose presence order dated 10.5.2013 was passed by the Court, Government took decision to withdraw from prosecution under Section 506 I.P.C. and filed an application for withdrawal from prosecution before the Court-Below which was rejected. Aggrieved by the said decision, Criminal Revision No.1290 of 2017 was filed and after examining the Government Order in respect of withdrawal of prosecution under Section 506 IPC as well as application of the State for withdrawal and takes suo moto cognizance of the matter, has recorded finding that Public Prosecutor had applied independent mind and rightly came to the conclusion that the revisionist (Special Counsel) was neither on the spot nor committed any offence.

52. Thereafter, an application for withdrawal from prosecution was also filed

which was rejected. Aggrieved by the said rejection, Criminal Revision No.711 of 2019 (State of U.P. v. Sudhir Kumar Srivastava) was filed allowed with the following observations:

“ मात्र कह देने से हमकी के तथ्य साबित नहीं होते हैं जबतक कि स्वतन्त्र गवाहों, विद्वान अधिवक्तागण या कर्मचारी या पुलिस के कर्मचारी के बयान समर्थन न करते हों, इस सम्बन्ध में अभियोजन साक्ष्य पुरी तरह धमकी के बाबत मौन हैं।”

“ केवल हमकी के संबंध में मात्र औपचारिकता निभाने के लिए 506 आईपीसी में आरोप पत्र प्रेषित किया गया है जो केस डायरी में लिये गये स्वतंत्र गवाहों एवं अधिवक्तागण के बयानों से पुष्टि नहीं होती है।”

“माननीय उच्च न्यायालय ने यह भी निष्कर्षित किया गया था कि अभियोजन पक्ष की ओर से जो मुकदमा वापसी का प्रार्थना पत्र दिया गया था वह स्वतंत्र मन से, उत्तर प्रदेश सरकार द्वारा मुकदमा वापसी के नोटिफिकेशन पर विचार करते हुए मुकदमा वापसी का प्रार्थना पत्र दिया गया था।

इस तरह से इस न्यायालय के मत से निगरानीकर्ता/ लोक अभियोजक द्वारा प्रस्तुत मुकदमा वापसी का प्रार्थना पत्र प्रस्तुत किया गया है वह स्वतंत्र मन से पत्रावली पर उपलब्ध साक्ष्यों के आलोक्य में गर्वमेन्ट द्वारा मुकदमा वापसी किये गये नोटिफिकेशन ध्यान में रखकर प्रस्तुत किया गया है।

“ जैसा कि उपरोक्त विवेचन किया जा चुका है कि जहाँ मुकदमें में दोषसिद्धि की संभावनाएं पत्रावली पर उपलब्ध साक्ष्य से न हो तथा मुकदमा वापसी के आदेश को गर्वमेन्ट के नोटिफिकेशन को किसी सक्षम न्यायालय में चुनौती न दिया गया हो तथा वर्तमान में माननीय उच्च न्यायालय द्वारा प्रस्तुत प्रकरण में निगरानी आदेश के द्वारा निगरानीकर्ता द्वारा जयोर्तिमय वर्मा द्वारा प्रस्तुत मामले में पत्रावली पर उपलब्ध साक्ष्यों से घटनास्थल पर उपस्थित न होने के साक्ष्य हो,.....”

53. This Court has once again directed to hear the matter after providing opportunity of hearing to the first informant.

54. Learned counsel for the applicant in support of submissions cited the several judgments operative portions of the judgment is extracted herein below.

(i) ABCD (Supra):-

16. It has also been laid down by this Court in Chandra Shashi v. Anil Kumar Verma [Chandra Shashi v. Anil Kumar Verma, (1995) 1 SCC 421 : 1995 SCC (Cri) 239] 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: (SCC pp. 423-24 & 427, paras 1-2 & 14)

"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."

(ii) Vidya Devi (Supra) :-

12.13. In a case where the demand for justice is so compelling, a constitutional court would exercise its jurisdiction with a view to promote justice, and not defeat it. [P.S. Sadasivaswamy v. State of T.N., (1975) 1 SCC 152 : 1975 SCC (L&S) 22]

(iii) Smt Sarita Singh (Supra):-

For Several years, in the State of Uttar Pradesh, the game of appointing teachers by the management of the educational institutions without prior permission for creation of posts and then coming to the court for payment of salary has been going on and, several thousands crore rupees of tax payers money has been paid to such appointees on the basis of interim/final orders passed by this Court. Therefore, it is not only committee of management and such appointees, who are Culprits, but the officials in the Education

Department have equal share in the culpability.

(iv) Dr. J S Yadav (Supra):-

22. Thus, it can take note of such act and pass such orders under the contempt jurisdiction where the acts adversely affects the majesty of law or dignity of the Court. However, at the same time, it must be well remembered that the jurisdiction is not to protect the dignity of an individual judge but to protect the administration of justice from being maligned.

23. The Courts of law do not pass futile orders. However, once an order is passed, the same is binding on the parties and must be capable of being executed and complied with. It will be of no value if the Court is unable to get its orders complied with or else, the public shall lose faith and it would reflect most inappropriately on the judicial system. Thus, the orders passed by the Court have to be taken to their logical conclusion so that the faith of the public at large remains intact and the orders of the Court are not to be taken lightly by those who are bound to comply with the same.

(v) Mazdoor Sangh (supra) :-

23. As held by this Court in *DDA v. Skipper Construction Co. (P) Ltd.* [DDA v. Skipper Construction Co. (P) Ltd., (1996) 4 SCC 622], and going a step further, the Court has a duty to issue appropriate directions for remedying or rectifying the things done in violation of the orders. In that regard, the Court may even take restitutive measures at any stage of the proceedings.

(vi) Delhi Development Authority:-

The contemner should not be allowed to enjoy or retain the fruits of his contempt

17. The principle that a contemner ought not to be permitted to enjoy and/or keep the fruits of his contempt is well settled. In *Mohd. Idris v. Rustam Jehangir Babuji* [(1984) 4 SCC 216 : 1984 SCC (Cri) 587 : (1985) 1 SCR 598] this Court held clearly that undergoing the punishment for contempt does not mean that the court is not entitled to give appropriate directions for remedying and rectifying the things done in violation of its orders. The petitioners therein had given an undertaking to the Bombay High Court. They acted in breach of it. A learned Single Judge held them guilty of contempt and imposed a sentence of one month's imprisonment. In addition thereto, the learned Single Judge made appropriate directions to remedy the breach of undertaking. It was contended before this Court that the learned Judge was not justified in giving the aforesaid directions in addition to punishing the petitioners for contempt of court. The argument was rejected holding that "the Single Judge was quite right in giving appropriate directions to close the breach (of undertaking)".

18. The above principle has been applied even in the case of violation of orders of injunction issued by civil courts. In *Clarke v. Chadburn* [(1985) 1 All ER 211] Sir Robert Megarry V-C observed:

"I need not cite authority for the proposition that it is of high importance that orders of the court should be obeyed.

Wilful disobedience to an order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal. If by such disobedience the persons enjoined claim that they have validly effected some change in the rights and liabilities of others, I cannot see why it should be said that although they are liable to penalties for contempt of court for doing what they did, nevertheless those acts were validly done. Of course, if an act is done, it is not undone merely by pointing out that it was done in breach of the law. If a meeting is held in breach of an injunction, it cannot be said that the meeting has not been held. But the legal consequences of what has been done in breach of the law may plainly be very much affected by the illegality. It seems to me on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted by the illegality that produced them."

19. To the same effect are the decisions of the Madras and Calcutta High Courts in *Century Flour Mills Ltd. v. S. Suppiah* [AIR 1975 Mad 270 : (1975) 2 MLJ 54] and *Sujit Pal v. Prabir Kumar Sun* [AIR 1986 Cal 220 : (1986) 90 CWN 342] . In *Century Flour Mills Ltd.* [AIR 1975 Mad 270 : (1975) 2 MLJ 54] it was held by a Full Bench of the Madras High Court that where an act is done in violation of an order of stay or injunction, it is the duty of the court, as a policy, to set the wrong right and not allow the perpetuation of the wrongdoing. The inherent power of the court, it was held, is not only available in such a case, but it is bound to exercise it to undo the wrong in the interest of justice. That was a case where a meeting was held contrary to an order of injunction. The Court refused to recognise that the holding

of the meeting is a legal one. It put back the parties in the same position as they stood immediately prior to the service of the interim order.

20. In *Sujit Pal* [AIR 1986 Cal 220 : (1986) 90 CWN 342] a Division Bench of the Calcutta High Court has taken the same view. There, the defendant forcibly dispossessed the plaintiff in violation of the order of injunction and took possession of the property. The Court directed the restoration of possession to the plaintiff with the aid of police. The Court observed that no technicality can prevent the court from doing justice in exercise of its inherent powers. It held that the object of Rule 2-A of Order 39 will be fulfilled only where such mandatory direction is given for restoration of possession to the aggrieved party. This was necessary, it observed, to prevent the abuse of process of law.

21. There is no doubt that this salutary rule has to be applied and given effect to by this Court, if necessary, by overruling any procedural or other technical objections. Article 129 is a constitutional power and when exercised in tandem with Article 142, all such objections should give way. The court must ensure full justice between the parties before it.

(vii) A.V. Papayya Sastry (Supra) :-

21. Now, it is well-settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed:

“Fraud avoids all judicial acts, ecclesiastical or temporal.”

22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non est in the eye of the law. Such a judgment, decree or order—by the first court or by the final court—has to be treated as nullity by every court, superior or inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings.

23. In the leading case of *Lazarus Estates Ltd. v. Beasley* [(1956) 1 All ER 341 : (1956) 1 QB 702 : (1956) 2 WLR 502 (CA)] Lord Denning observed : (All ER p. 345 C)

“No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud.”

24. In *Duchess of Kingstone, Smith's Leading Cases*, 13th Edn., p. 644, explaining the nature of fraud, *de Grey, C.J.* stated that though a judgment would be *res judicata* and not impeachable from within, it might be impeachable from without. In other words, though it is not permissible to show that the court was “mistaken”, it might be shown that it was “misled”. There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely, that on the merits, the decision was one which should not have been rendered, but it can be set aside, if the court was imposed upon or tricked into giving the judgment.

25. It has been said : fraud and justice never dwell together (*fraus et jus nunquam cohabitant*); or fraud and deceit ought to benefit none (*fraus et dolus nemini patrocinari debent*).

26. Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in *rem* or in *personam*. The principle of “finality of litigation” cannot be stretched to the extent of an absurdity that it can be utilised as an engine of oppression by dishonest and fraudulent litigants.

27. In *S.P. Chengalvaraya Naidu v. Jagannath* [(1994) 1 SCC 1] this Court had an occasion to consider the doctrine of fraud and the effect thereof on the judgment obtained by a party. In that case, one A by a registered deed, relinquished all his rights in the suit property in favour of C who sold the property to B. Without disclosing that fact, A filed a suit for possession against B and obtained preliminary decree. During the pendency of an application for final decree, B came to know about the fact of release deed by A in favour of C. He, therefore, contended that the decree was obtained by playing fraud on the court and was a nullity. The trial court upheld the contention and dismissed the application. The High Court, however, set aside the order of the trial court, observing that “there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence”. B approached this Court.

28. *Allowing the appeal, setting aside the judgment of the High Court and describing the observations of the High Court as “wholly perverse”, Kuldeep Singh, J. stated : (SCC p. 5, para 5)*

“The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, whose case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.”
(emphasis supplied)

29. *The Court proceeded to state : (SCC p. 5, para 6)*

“A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party.”

30. *The Court concluded : (SCC p. 5, para 5)*

“The principle of ‘finality of litigation’ cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants.”

31. *In Indian Bank v. Satyam Fibres (India) (P) Ltd. [(1996) 5 SCC 550 :*

JT 1996 (7) SC 135] referring to Lazarus Estates [(1956) 1 All ER 341 : (1956) 1 QB 702 : (1956) 2 WLR 502 (CA)] and Smith v. East Elloe Rural Distt. Council [1956 AC 736 : (1956) 1 All ER 855 : (1956) 2 WLR 888 (HL)] this Court stated : (SCC pp. 562-63, para 22)

“22. The judiciary in India also possesses inherent power, specially under Section 151 CPC, to recall its judgment or order if it is obtained by fraud on court. In the case of fraud on a party to the suit or proceedings, the court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud. Inherent powers are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the constitution of the tribunals or courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. This power is necessary for the orderly administration of the court's business.”

32. *In United India Insurance Co. Ltd. v. Rajendra Singh [(2000) 3 SCC 581 : 2000 SCC (Cri) 726 : JT (2000) 3 SC 151] by practising fraud upon the Insurance Company, the claimant obtained an award of compensation from the Motor Accident Claims Tribunal. On coming to know of fraud, the Insurance Company applied for recalling of the award. The Tribunal, however, dismissed the petition on the ground that it had no power to review its own award. The High Court confirmed the order. The Company approached this Court.*

33. *Allowing the appeal and setting aside the orders, this Court stated : (SCC pp. 587-88, paras 15-17)*

“15. It is unrealistic to expect the appellant Company to resist a claim at the first instance on the basis of the fraud because the appellant Company had at that stage no knowledge about the fraud allegedly played by the claimants. If the Insurance Company comes to know of any dubious concoction having been made with the sinister object of extracting a claim for compensation, and if by that time the award was already passed, it would not be possible for the Company to file a statutory appeal against the award. Not only because of the bar of limitation to file the appeal but the consideration of the appeal even if the delay could be condoned, would be limited to the issues formulated from the pleadings made till then.

16. Therefore, we have no doubt that the remedy to move for recalling the order on the basis of the newly-discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim.

17. The allegation made by the appellant Insurance Company, that the claimants were not involved in the accident which they described in the claim petitions, cannot be brushed aside without further probe into the matter, for the said allegation has not been specifically denied by the claimants when they were called upon to file objections to the applications for recalling of the awards. The claimants then confined their resistance to the plea that the application for recall is not legally maintainable. Therefore, we strongly feel that the claim must be allowed to be

resisted, on the ground of fraud now alleged by the Insurance Company. If we fail to afford to the Insurance Company an opportunity to substantiate their contentions it might certainly lead to a serious miscarriage of justice.”

(viii) Hamza Haji (Supra):-

10. It is true, as observed by De Grey, C.J., in R. v. Duchess of Kingston [2 Smith LC 687] that:

“ ‘Fraud’ is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts, ecclesiastical and temporal.”

11. In Kerr on Fraud and Mistake, it is stated that:

“In applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior or by the highest court of judicature in the realm, but in all cases alike it is competent for every court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud.”

12. It is also clear as indicated in Kinch v. Walcott [1929 AC 482 : 1929 All ER Rep 720 : 141 LT 102 (PC)] that it would be in the power of a party to a decree vitiated by fraud to apply directly to the court which pronounced it to vacate it. According to Kerr:

“In order to sustain an action to impeach a judgment, actual fraud must be shown; mere constructive fraud is not, at all events after long delay, sufficient ... but

such a judgment will not be set aside upon mere proof that the judgment was obtained by perjury.”

(See 7th Edn., pp. 416-17)

13. In Corpus Juris Secundum, Vol. 49, para 265, it is acknowledged that:

“Courts of record or of general jurisdiction have inherent power to vacate or set aside their own judgments.”

In para 269, it is further stated:

“Fraud or collusion in obtaining judgment is a sufficient ground for opening or vacating it, even after the term at which it was rendered, provided the fraud was extrinsic and collateral to the matter tried and not a matter actually or potentially in issue in the action.”

It is also stated:

“Fraud practised on the court is always ground for vacating the judgment, as where the court is deceived or misled as to material circumstances, or its process is abused, resulting in the rendition of a judgment which would not have been given if the whole conduct of the case had been fair.”

14. In American Jurisprudence, 2nd Edn., Vol. 46, para 825, it is stated:

“Indeed, the connection of fraud with a judgment constitutes one of the chief causes for interference by a court of equity with the operation of a judgment. The power of courts of equity in granting such relief is inherent, and frequent applications for equitable relief against judgments on

this ground were made in equity before the practice of awarding new trials was introduced into the courts of common law.

Where fraud is involved, it has been held, in some cases, that a remedy at law by appeal, error, or certiorari does not preclude relief in equity from the judgment. Nor, it has been said, is there any reason why a judgment obtained by fraud cannot be the subject of a direct attack by an action in equity even though the judgment has been satisfied.”

15. The law in India is not different. Section 44 of the Evidence Act enables a party otherwise bound by a previous adjudication to show that it was not final or binding because it is vitiated by fraud. The provision therefore gives jurisdiction and authority to a court to consider and decide the question whether a prior adjudication is vitiated by fraud. In Paranjpe v. Kanade [ILR (1882) 6 Bom 148] it was held that: (ILR p. 148)

“It is always competent to any court to vacate any judgment or order, if it be proved that such judgment or order was obtained by manifest fraud;”

16. In Lakshmi Charan Saha v. Nur Ali [ILR (1911) 38 Cal 936 : 15 CWN 1010] it was held that: (ILR p. 936)

“[T]he jurisdiction of the Court in trying a suit [questioning the earlier decision as being vitiated by fraud,] was not limited to an investigation merely as to whether the plaintiff was prevented from placing his case properly at the prior trial by the fraud of the defendant. The Court could and must rip up the whole matter for determining whether there had been fraud in the procurement of the decree.”

17. *In Manindra Nath Mittra v. Hari Mondal* [(1919) 24 CWN 133 : AIR 1920 Cal 126] the Court explained the elements to be proved before a plea of a prior decision being vitiated by fraud could be upheld. The Court said: (AIR p. 127)

“With respect to the question as to what constitutes fraud for which a decree can be set aside, two propositions appear to be well established. The first is that although it is not permitted to show that the Court (in the former suit) was mistaken, it may be shown that it was misled, in other words, where the Court has been intentionally misled by the fraud of a party and a fraud has been committed upon the Court with the intention to procure its judgment, it will vitiate its judgment. The second is that a decree cannot be set aside merely on the ground that it has been procured by perjured evidence:”

18. The position was reiterated by the same High Court in *Esmile Uddin Biswas v. Shajoran Nessa Bewa* [132 IC 897 : AIR 1931 Cal 649 (2)] . It was held that: (AIR p. 650)

“[I]t must be shown that the fraud was practised in relation to the proceedings in Court and the decree must be shown to have been procured by practising fraud of some sort, upon the Court:”

19. *In Nemchand Tantia v. Kishinchand Chellaram (India) Ltd.* [(1959) 63 CWN 740 : AIR 1959 Cal 776] it was held that: (CWN p. 740)

“A decree can be reopened by a new action when the court passing it had been misled by fraud, but it cannot be

reopened when the court is simply mistaken; when the decree was passed by relying on perjured evidence, it cannot be said that the court was misled.”

20. It is not necessary to multiply authorities on this question since the matter has come up for consideration before this Court on earlier occasions. In *S.P. Chengalvaraya Naidu v. Jagannath* [(1994) 1 SCC 1 : 1993 Supp (3) SCR 422] this Court stated that: (SCC p. 2, para 1)

“It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eye of the law. Such a judgment/decreed—by the first court or by the highest court—has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings.”

The Court went on to observe that the High Court in that case was totally in error when it stated that there was no legal duty cast upon the plaintiff to come to the court with a true case and prove it by true evidence. Their Lordships stated: (SCC p. 5, para 5)

“The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank loan-dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, whose case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.”

21. In *Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education* [(2003) 8 SCC 311 : 2003 Supp (3) SCR 352] this Court after quoting the relevant passage from *Lazarus Estates Ltd. v. Beasley* [(1956) 1 All ER 341 : (1956) 2 WLR 502 : (1956) 1 QB 702 (CA)] and after referring to *S.P. Chengalvaraya Naidu v. Jagannath* [(1994) 1 SCC 1 : 1993 Supp (3) SCR 422] reiterated that fraud avoids all judicial acts. In *State of A.P. v. T. Suryachandra Rao* [(2005) 6 SCC 149] this Court after referring to the earlier decisions held that suppression of a material document could also amount to a fraud on the Court. It also quoted (at SCC p. 155, para 16) the observations of Lord Denning in *Lazarus Estates Ltd. v. Beasley* [(1956) 1 All ER 341 : (1956) 2 WLR 502 : (1956) 1 QB 702 (CA)] that: (All ER p. 345 C)

“No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything.”

22. According to Story's *Equity Jurisprudence*, 14th Edn., Vol. 1, para 263:

“Fraud indeed, in the sense of a Court of Equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another; or by which an undue and unconscientious advantage is taken of another.”

23. In *Patch v. Ward* [(1867) 3 Ch App 203 : 18 LT 134] Sir John Rolt, L.J. held that:

“Fraud must be actual positive fraud, a meditated and intentional

contrivance to keep the parties and the court in ignorance of the real facts of the case, and obtaining that decree by that contrivance.”

24. This Court in *Bhaurao Dagdu Paralkar v. State of Maharashtra* [(2005) 7 SCC 605] held that: (SCC p. 607)

“Suppression of a material document would also amount to a fraud on the court. Although, negligence is not fraud but it can be evidence on fraud.”

25. Thus, it appears to be clear that if the earlier order from the Forest Tribunal has been obtained by the appellant on perjured evidence, that by itself would not enable the Court in exercise of its power of certiorari or of review or under Article 215 of the Constitution of India, to set at naught the earlier order. But if the court finds that the appellant had founded his case before the Forest Tribunal on a false plea or on a claim which he knew to be false and suppressed documents or transactions which had relevance in deciding his claim, the same would amount to fraud. In this case, the appellant had purchased an extent of about 55 acres in the year 1968 under Document No. 2685 of 1968 dated 2-6-1968. He had, even according to his evidence before the Forest Tribunal, gifted 5 acres of land to his brother under a deed dated 30-1-1969. In addition, according to the State, he had sold, out of the extent of 55.25 acres, an extent of 49.93 acres by various sale deeds during the years 1971 and 1972. Though, the details of the sale deeds like the numbers of the registered documents, the dates of sale, the names of the transferees, the extents involved and the considerations received were set out by the State in its application for review before the

High Court, except for a general denial, the appellant could not and did not specifically deny the transactions. Same is the case in this Court, where in the counter-affidavit, the details of these transactions have been set out by the State and in the rejoinder filed by the appellant, there is no specific denial of these transactions or of the extents involved in those transactions. Therefore, it stands established without an iota of doubt as found by the High Court, that the appellant suppressed the fact that he had parted with almost the entire property purchased by him under the registered document through which he claimed title to the petition schedule property before the Forest Tribunal. In other words, when he claimed that he had title to 20 acres of land and the same had not vested in the State and in the alternative, he bona fide intended to cultivate the land and was cultivating that land, as a matter of fact, he did not have either title or possession over that land. The Tribunal had found that the land was a private forest and hence has vested under the Act. The Tribunal had granted relief to the appellant only based on Section 3(3) of the Act, which provided that so much extent of private forest held by an owner under a valid registered document of title executed before the appointed day and intended for cultivation by him and that does not exceed the extent of the ceiling area applicable to him under Section 82 of the Kerala Land Reforms Act, could be exempted. Therefore, unless the appellant had title to the application schedule land and proved that he intended to cultivate that land himself, he would not have been entitled to an order under Section 3(3) of the Act. It is obvious that when he made the claim, the appellant neither had title nor possession over the land. There could not have been any intention on his part to cultivate the land

with which he had already parted and of which he had no right to possession. Therefore, the appellant played a fraud on the Court by holding out that he was the title-holder of the application schedule property and he intended to cultivate the same, while procuring the order for exclusion of the application schedule lands. It was not a case of mere perjured evidence. It was suppression of the most vital fact and the founding of a claim on a non-existent fact. It was done knowingly and deliberately, with the intention to deceive. Therefore, the finding of the High Court in the judgment under appeal that the appellant had procured the earlier order from the Forest Tribunal by playing a fraud on it, stands clearly established. It was not a case of the appellant merely putting forward a false claim or obtaining a judgment based on perjured evidence. This was a case where on a fundamental fact of entitlement to relief, he had deliberately misled the Court by suppressing vital information and putting forward a false claim, false to his knowledge, and a claim which he knew had no basis either in fact or on law. It is therefore clear that the order of the Forest Tribunal was procured by the appellant by playing a fraud and the said order is vitiated by fraud. The fact that the High Court on the earlier occasion declined to interfere either on the ground of delay in approaching it or on the ground that a second review was not maintainable, cannot deter a Court moved in that behalf from declaring the earlier order as vitiated by fraud.

26. The High Court, as a court of record, has exercised its jurisdiction to set at naught the order of the Forest Tribunal thus procured by the appellant by finding that the same is vitiated by fraud. There

cannot be any doubt that the Court in exercise of its jurisdiction under Article 215 of the Constitution of India has the power to undo a decision that has been obtained by playing a fraud on the Court. The appellant has invoked our jurisdiction under Article 136 of the Constitution of India. When we find in agreement with the High Court that the order secured by him is vitiated by fraud, it is obvious that this Court should decline to come to his aid by refusing the exercise of its discretionary jurisdiction under Article 136 of the Constitution of India. We do not think that it is necessary to refer to any authority in support of this position except to notice the decision in Ashok Nagar Welfare Assn. v. R.K. Sharma [(2002) 1 SCC 749 : 2001 Supp (5) SCR 662] .

55. I have carefully examined the material available on record in the light of law-reports cited by learned counsel for the applicant.

56. Vide order dated 10.5.2013, this Court specifically directed the Senior Registrar to lodge the F.I.R. against erring persons and give protection, but FIR has not been registered as per the direction contained in the order dated 10.5.2013 as F.I.R. names certain persons including Special Counsel. Prior to filing of FIR, Sri Krishna Kumar Pandey has not stated any names before this Court nor any name has been mentioned in any of letters written in compliance of the order dated 10.5.2013. In this view of the matter, this Court is of the opinion that the name of certain persons has been implicated due to ulterior motive which is contrary to the direction contained in the order dated 10.5.2013.

57. The Senior Registrar specifically requested to the S.S.P. to ensure that the

matter is investigated by some officer not below the rank of Additional Superintendent of Police, but after some days, the investigation officer has been changed without obtaining permission from this Court.

58. In the order dated 10.5.2013, there was a specific direction that report shall be produced before this Court, but without complying with the direction of this Court the report has been submitted before the Magistrate concerned upon which cognizance was taken. In this view of this matter, this Court is of the opinion that the procedure after the order dated 10.5.2023 has been followed not in accordance with direction contained in the order of this Court.

59. In the investigation, nothing has been found against any persons who have been named in the F.I.R. as accused. Therefore, the Government took decision to withdraw the prosecution under Section 506 and filed application twice which have been rejected. The Coordinate Bench of this Court has concurrently observed that Public Prosecutor had applied independent mind and rightly came to the conclusion that the revisionist (Special Counsel) was neither on the spot nor committed any offence, but the said observation has not been taken into by the Court-Below while rejecting the application for withdrawal.

60. Perusal of the judgments relied upon by learned counsel for the applicant shows that the High Court is a court of plenary jurisdiction. The High Court being the court of record has the power to punish for contempt under Article 215 of the Constitution of India. A court of record being a court of superior jurisdiction is entitled to consider the question of its

jurisdiction raised before it. Article 215 specifically confers upon the Court of record such powers including the power to punish for contempt of itself.

61. The contempt jurisdiction of the High Court is not only to ensure the compliance of the orders passed by the Court but also to strike at such acts which tend to adversely affect the administration of justice or has a tendency to impede the course of justice which may shake public confidence in the judicial institution. Thus, it can take note of such act and pass such orders under the contempt jurisdiction where the acts adversely affects the majesty of law or dignity of the Court. However, at the same time, it must be well remembered that the jurisdiction is not to protect the dignity of an individual judge but to protect the administration of justice from being maligned.

62. It also shows that the Court has a duty to issue appropriate directions for remedying or rectifying the things done in violation of the orders. In that regard, the Court may even take restitutive measures at any stage of the proceedings. The inherent power of the court, it was held, is not only available in such a case, but it is bound to exercise it to undo the wrong in the interest of justice.

63. It is well settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non est in the eye of law. Such a judgment, decree or order by the first court or by the final court has to be treated as nullity by every court, superior or inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings.

64. There cannot be any doubt that the Court in exercise of its jurisdiction under Article 215 of the Constitution of India has the power to undo a decision that has been obtained by playing a fraud on the court. In a case where the demand for justice is so compelling, a constitutional court would exercise its jurisdiction with a view to promote justice, and not defeat it.

65. It is relevant to note that while considering the issue in regard to concealment of facts in the case of Smt. Sarita Singh (supra), the Coordinate Bench of this Court observed that for several years, in the State of Uttar Pradesh, the game of appointing teachers by the management of the educational institutions without prior permission for creation of posts and then coming to the court for payment of salary has been going on and several thousands crores of rupees of taxpayers money has been paid to such appointees on the basis of the interim/ final orders passed by this Court. Therefore, it is not only committee of management and such appointees, who are culprits, but the officials in the Education Department have equal share in the culpability.

66. Considering in totalities of facts and circumstances of the case as well as law-reports cited by learned counsel for the applicant, this application filed under Article 215 of the Constitution of India is allowed.

67. It is, however, directed that all the actions taken after 10.5.2013 being in violation of the order dated 10.05.2013 of the Hon'ble High Court in above contempt petition are hereby declared void and the entire proceedings relating to Section 506 I.P.C. in Case Crime no.207/2013, Case no.3922 of 2013, P.S. Wazirganj, District

Lucknow is quashed. Record is returned to the concerned office.

68. Needless to say that notice is issued against Police Officers who have not submitted report before this Court as directed vide order dated 10.5.2013 to show cause as to why proceeding under Contempt of Courts Act be not initiated against them.

(2023) 8 ILRA 1291
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 27.07.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Appeal No. 627 of 2004

Dilip Kumar Tiwari @ Pappu ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
 Sri Ashok Kumar Srivastava

Counsel for the Opposite Party:
 G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 498-A & 304-B - Dowry death - Code of Criminal Procedure, 1973 - Sections 107 & 313 - Rigorous Imprisonment with fine - Informant, moved written complaint against husband and other family members and alleged that they demanded dowry, when not fulfilled, they killed his daughter - Held, no mark of previous torture soon before death found on person of deceased by Doctor - No letter by deceased that she was subjected to cruelty - Two letters sent by informant proved in defence, do not contain Statement regarding demand of dowry - No evidence that deceased was not provided necessary food and cloths

etc, no evidence that sons of deceased were tortured by accused - No evidence that problem created during bidai of deceased from her in-laws house - Evidence of P.W. 1 and P.W. 2 proved deceased used to visit her parental house as per her own wish - Never forced to live in her parental house for an indefinite period. (Para 2, 6, 7, 35)

Not proved that accused persons present on place of occurrence and they did not try to prevent deceased from committing suicide - Prosecution failed to prove abatement for committing suicide - Mere not permitting deceased to go for watching cinema along is not ground to conclude that accused abated deceased to commit suicide. (Para 37, 38, 43)

Appeal allowed. (E-14)

List of Cases cited:

1. Kishori Lal Vs St. of M.P., AIR 2007 Supreme Court 2457
2. Rang Naike Vs St., (2004) 12 S.C.C 521
3. Sanju @ Sanjai Singh Sengar Vs St. of M.P., AIR 2002 Supreme Court 1998
4. Cyriac Vs S.I Police Kaduthuruthy, 2005 Cr.L.J. 4322 (Keral)
5. Sharda Bhai Jeevan Lal Vaniya Vs St. of Guj., AIR 2012 Supreme Court 925
6. Gurucharan Vs St. of Punj., (2017) 1 SCC 433

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

1. Heard Sri Ashok Kumar Srivastava, learned counsel for the appellant, Sri Anurag Singh Chauhan, learned A.G.A for the State and perused the material available on record.

2. The instant criminal appeal under Section 374 (2) Cr.P.C has been filed by

the appellant against the judgement and order dated 03.03.3004 passed by learned Sessions Judge (FTC – IV), Pratapgarh, in Sessions Trial No. 162/96, Case Crime No. 77/94, under Sections 498-A, 304-B I.P.C, Police Station Nawabganj, District Pratapgarh *State of U.P. Versus Shyam Bihari and others*, for convicting the appellant and awarding the sentence under Section 306 I.P.C for seven years Rigorous Imprisonment and 10,000/- fine and further to undergo for two years rigorous imprisonment and Rs. 2000/- fine under sections 498-A I.P.C. The sentences were to run concurrently.

3. The applicant has taken ground that the impugned judgment and order of the Court below is unjust, illegal and improper and also perverse. The prosecution has failed to prove its case beyond reasonable doubt, there is no independent witness in support of the prosecution case. The finding of the learned trial court does not find support with the oral and medical evidence on the record. The trial was proceeded against the three accused persons under Section 498-A and 304-B and the learned Trial Court has found that no case was made out against the appellant under Section 304-B I.P.C. On the same evidence the learned Trial Court has acquitted the accused – Shyam Bihari Tiwari (father-in-law), Smt. Ambo alias Chandra Kali (mother-in-law). No case is made out under Sections 498-A, 306 I.P.C against the appellant. The trial court has committed manifest error of law while integrating the provisions of law.

4. On the above grounds the appellant has prayed for quashing the order of conviction and sentenced passed as above.

5. In brief, facts of the case are that the informant – Mangala Dutt Mishra, moved a written complaint to the Superintendent of Police, Pratapgarh, that marriage of his daughter Radha Devi was solemnized with Dilip Kumar six years ago.

6. Sri Shyam Behari Tiwari, father-in-law and his son Dilip Kumar Tiwari were demanding scooter and fridge. He was unable to fulfil the said demand. Being angry, his daughter was killed on 20.09.1994 by the accused persons. After receipt of the said application dated 21.09.1994, an F.I.R under Section 498-A & 304-B I.P.C (Ex.K-13) was lodged in P.S. Nawabganj, District Pratapgarh, which was also entered into G.D (Ex.K-4) and investigation started.

7. Before registration of this F.I.R, the accused - Shyam Behari Tiwari (father-in-law) of the deceased had also moved an application in Police Station Nawabganj, stating therein that his daughter in law Radha Devi wife of Dilip Kumar Tiwari has burnt herself to death by setting her fire. This information was recorded on 20.09.1994 at 16:00 – 17:00 p.m. in G.D and a request was made to S.D.M. Kunda, Pratapgarh for inquest. Thereafter, the S.H.O. with his other police companions alongwith Additional Tehsildar Nizamuddin, P.S Kunda, reached on the spot.

8. On the direction of Tehsildar Nizamuddin, inquest report (Ex. Ka-4) was prepared by Sri R. N. Singh, (S.O) before Panchan, Roop Narain Mishra, Mangala Dutt Mishra, Vijai Bahadur, Anand Vijay Pandey and Shyam Bihari.

9. Inquest related papers i.e. Ex. Ka-5, and Ex. Ka-6 were also prepared. The dead body was sealed in a markin cloth and was sent to the Post-Mortem House, District Pratapgarh for post-mortem report. Infront of the Upper Tehsildar, Kunda, the dead body, burnt cloth, ashes, handle rod were sealed and recovery memo was prepared.

10. Dr. Dig Vijay Singh P.W. 4 conducted the Post Mortem on 21.09.1994 at 3:15 p.m. and found following facts in -

External Examination of the dead body.

11. The deceased was a lady of whitish complexion, average height, eyes were closed, mouth of the deceased was half opened, blood was also coming from the mouth and nose, stomach and chest were speared. The hand's fingers were bent and the rigour mortis was in passing stage, the upper part of the body was burnt above the stomach and the hair were scorched. At the some parts of the body blisters were present with liquid and some blisters were bursted. The bottom of the blisters were red. Line of the redness was also present.

12. There was burnt on the front side of both the thighs up to both the legs. There was burn injury on the head and neck, membranes, head, brain, chestwall and other parts were congested, the pharynx, larynx and trachea were also congested and carbon particles were present. Lungs were congested. The chambers of heart were filled with blood and dark red colour was coming out. Stomach, peritoneum were congested. There were 14/14 teeth in the mount. The stomach was empty. The kidneys were empty, uterus was normal. The cause of death was suffocation due to burn injuries sustained before the death.

The Dy. S.P. Har Bajan Singh started investigation and submitted charge-sheet. Ex. Ka-2, under Sections 498-A, 304-B of the I.P.C against the father-in-law and mother-in-law and husband of the deceased.

13. The case was committed to the Court of Sessions, where the Sessions Judge framed the charges against the accused persons under Sections 498-A, 304-B of I.P.C from which they denied and sought trial.

14. During the trial following witnesses have been examined by the prosecution :-

1. P.W. 1. Sri Mangal Dutt Mishra,

2. P.W. 2. Sri Sada Shiv Dubey.

3. P.W. 3. Sri K. K. Srivastava, the then Dy. S.P.

4. P.W. 4. Dr. Dig Vijay Singh.

5. P.W. 5. Sri Nizamuddin, S.D.M.

6. P.W. 6. Sri Har Bhajan Singh, Retired Dy. S.P.

15. After closure of the prosecution evidence the statement of accused persons were recorded under Section 313 Cr.P.C, in which they denied the allegations and stated that the marriage between the accused Dilip Kumar Tiwari and deceased - Radha Devi was solemnized on 09th May, 1987 and on 11th May, 1987 the bride had gone to her marital house.

15.(a). An information had already been given to the concerned police

station regarding death of the deceased. The charge-sheet has wrongly been submitted. P.W – 1 and P.W – 2 have given false evidence regarding demand of dowry and rest of the witnesses have also given false evidence. After marriage, the deceased used to live separately. The informant has no son except two daughters, the deceased was elder daughter, due to paralysis, her face had been crooked, but the deceased got married in the hope of getting the property. On the date of incident, Syam Behari had gone for teaching as usual to Antamau, Pre-Secondary School, which is about two kilometers away from his village. Veeru, Son of Dilip Kumar was ill, he was going to Unchahar to get some medicines for him. The deceased also wanted to go with him and had planned to watch cinema. On this Dilip rebuked him. In a fit of anger, the deceased locked her in the room and set her on fire. Pramod and Santosh Mishra informed Shyam Behari about the incident at his School at Antamau. He moved casual leave application and returned to home. His wife Amboz Kumari @ Chandra Kali had gone to field for cutting sugar-cane, on information, she returned to home.

16. In brief, statement of the witnesses are reproduced here in below:-

P.W. 1 – Mangala Dutt Mishra, informant, has deposed that the marriage between his daughter Radha Devi with Dilip Kumar Mishra @ Pappu had been solemnized on 28th April, 1990. Shyam Behari Tiwari is the father and Chandrawati is mother of the Dilip Kumar Mishra, he has given dowry in marriage as per his capacity. His daughter's farewell had been conducted in marriage.

17. On 29th April, 1990 she was bidden farewell, after 2 – 2 ½ months when his daughter came to the parental house, she informed that her husband, father-in-law and mother-in-law were demanding fridge and scooter. He stated that at present he was unable to meet the demand. After being capable he will meet the demand. Further, his daughter went to her in-laws house and lived five – six months where from she used to complain. He explained the matter to her mother-in-law. His daughter informed that for not providing fridge and scooter, her husband and father and mother in-law used to beat and torture her. She had come to her parental house 2 – 3 times before her death and whenever she came she repeated the same complaint. Whenever Shyam Behari came with the deceased, he repeated the same demand of scooter and fridge. His daughter was burnt to death by the accused persons. Two to two and a half years ago P.W 2 Sada Shiv of his village had also gone with him to the house of Shyam Behari, where he had said that keep calm he will provide the scooter and fridge very soon, on which Shyam Behari got angry and said that even after being able, he is not providing the same. He had also threatened in his inland letter, which had been provided to the I.O. his son-in-law has also sent a letter without stamp, which had also been provided to the I.O. In both the letters they had threatened him and have scolded for not providing anything in marriage. He had been informed about the incident on 20.09.1994, through the Police Station Kokhraj, on which he, Sada Shiv, Vijai Bahadur, Ram Pal and others had gone to the in-laws house of the deceased. It was apparent that she was burnt to death. When his complaint was not entertained by the Police Station, Nawabganj, he had given a letter (Ex.Ka-

1), to the Superintendent of Police, Pratapgarh, on which F.I.R was lodged.

During the course of examination, the witnesses admitted letters (Ex.Kha-1 and Ex. Kha-2) written and posted by him. He admitted that he had no son except two daughters. He had 4 – 4 ½ Bighas agricultural land and was a Teacher in a Primary School. He further deposed that Shyam Behari is also a Primary Teacher, he had only 2 ½ Bighas land. He denied to promise that he shall provide half of the property to elder daughter (deceased) and half to his younger daughter, he denied that deceased had fallen from the roof and her mouth had been crooked. According to him he had provided Rs.5,100/- at the time of marriage engagement and not only Rs.501/-. He had provided Rs.11,000/- cash and not only Rs.4,001/-in tilak ceremony. He had given Rs. 200/- at the time of Kheechadi meal and his son-in-law had taken gold ring from him. He denied the marriage of deceased had been solemnized on 11th May, 1987. He admitted that he has written in his statement that the marriage had been solemnized six years before.

18. When for the first time Radha Devi came to her parental house, she informed about the demand of scooter and fridge. He has neither written that scooter and fridge had been demanded at the time of marriage nor has stated it before the I.O. as it was not asked. He further deposed that it is true that when her daughter used to live in her in-laws house, her parents used to go to pick her up and when she used to stay at her parental house, her in-laws used to go to pick her up. There was no quarrel between her-in-laws and him about the farewell of the deceased. She has two sons Dheeru and Beeru. she had gone from her parental house ten days before her death

after staying about one month there, when she went to her in-laws house he said to keep calm, he will provide scooter and fridge, when he reached at the in-laws house of the deceased, Chaukidaar was guarding the dead-body, the inquest was not conducted before him. He and his neighbour Vijai Bahadur had signed it. He had not given any written complaint to the Magistrate or Police Officer there. After seeing the dead body he knew that her in-laws must have killed her. He did not know how the incident happened. He does not know whether accused had gone to Dr. Amar Nath at Unchahar for the treatment of his younger son, he does not know as to whether at the time of incident Shyam Behari was in his school or not. He does not know that when Dilip was going to Unchahar, a quarrel took place between him and the deceased. He does not know that due to the same quarrel, the deceased had committed suicide or not.

P.W 2 – Sada Shiv has given similar testimony as informant P.W 1.

P.W 3 – K. K. Srivastava Dy. S.P. has reported that he had conducted the investigation after the transfer of I.O. Dy. S.P. Har Bhajan Singh. He prepared Paper No. 8, recorded the statement of Upper Tehsildar Nizamuddin and submitted the charge-sheet (Ex.Ka-2). The witness has proved this charge-sheet. In cross-examination, this witness has deposed that he had relied on the evidence collected by the Ex. I.O. and has submitted the charge-sheet on the basis of collected evidences. He had not interrogated any person of the village.

P.W. 4 - Dr. Dig Vijay Singh had conducted the post-mortem of the deceased, which has already been

mentioned above. This witness has proved the post mortem report (Ex. Ka-3). During the cross examination, this witness admitted that he did not find any sign of beating, tying up or any injury inflicted by any sharp edged weapon over the dead body. He has not found smell of kerosene oil there, he could not say in what circumstanced the deceased had burnt.

P.W. 5 – Nizamuddin, S.D.M. has deposed that on 21.09.1994 he was working as Additional Tehsildar, Kunda and had conducted the inquest after appointing Panchan and on his direction related papers were prepared. The dead body was sealed before him, letter to R.I and C.M.O were prepared on his directions. This witness has proved these papers as Ex. Ka-4 to Ex. Ka-9. This witness admitted that during the course of inquest, the informant had not given any written complaint to him regarding torturing his daughter for dowry even he had not complained orally.

The witness deposed that if the informant would have made an oral complaint, he would have directed the S.O. He had inquired about the incident before writing his opinion. If the demand of dowry or torturing would have come to his knowledge, he would have mentioned his opinion in this regard or would not have mentioned. It is true he had not mentioned his opinion regarding the demand of dowry and torture. He admitted that the inquest was not in his writing but had been written on his direction.

P.W. 6 – Har Bachan Singh, I.O. / Retired Dy. S.P. has deposed that he had initiated the investigation and had copied the complaint, recorded the statement of H.M. Rajendra Singh, accused Shyam

Behari, and Dilip. He had taken the materials in possession and had mentioned in C.D. Parcha 1-A. He searched the house of the accused, inspected and prepared the map/site plan, copied the inquest, post-mortem report, recorded the statement of the informant, attached the copies of the marriage card and inland letter and attached with C.D, recorded the statement of Shyam Behari Mishra, Sada Shiv (uncle of the deceased), Vijay Bahadur Dwivedi, Ram Pal Shukla, Dinesh Chandra Mishra, Roop Narain Mishra, Anand Bhan Pandey, Constable Jitendra Kumar Singh and Chaukidar Kandhai Lal. On 10.09.1995, C.O. K.K. Srivastava started the investigation. During his investigation an offence under Sections 498-A, 304-B, I.P.C had been proved against the accused – Shyam Behari, Dilip Kumar and Smt. Amboz Kumari @ Chandrakali. This witness has proved the marriage card and inland letter and unstamped letter Ex. Ka-11. Site plan (Ex.Ka-12) and Chik F.I.R (Ex.Ka-13), Kaimi J.D. and G.D, Rapat No. 10 as Ex. Ka-14 as Ex. Ka-15. During the course of cross examination, this witness has admitted that the original letter of the Photostat letters were not before him. The Photocopies are not certified by him. He further deposed that he had recorded the statements of Ram Dular Yadav, Balram and others, none of the witnesses of the village had confirmed torturing for dowry or that the deceased was set ablaze by the accused persons. They had not given any specific mode of harassment and any incidence except general torturing and demand of dowry.

19. From the side of defense,

D.W 1 – Santosh Kumar @ Pappu deposed that he had given information to Sri Shyam Behari Mishra at

Pre-Secondary School, Antamau, at about 2:00 p.m. thereafter he had gone to the clinic of Dr. Amarnath Singh, at Unchahar to inform Dilip Kumar at about 03:00 p.m. During the course of examination, this witness had admitted that Shyam Behari is his maternal uncle, he used to go to his house. Dilip Kumar had gone to Dr. Amarnath Singh Clinic for the treatment dysentery of his son. Shyam Behari used to go to school by cycle.

D.W. 2 – Makkoo barber, had assisted in the marriage ceremony of the accused and the deceased. According to him no quarrel had taken place regarding transaction in the marriage. The deceased was never tortured about the demand of dowry. The occurrence had occurred at about 11:30 a.m. and after hearing the commotion he had gone to the house of Shyam Behari, where he saw that people were extinguishing the fire, but she died and could not survive. At the time of incident Shyam Behari had gone to the school and Dilip Kumar had gone to Unchahar for the treatment of his son, wife of Shyam Behari had gone to the field. After the incident these persons came on calls.

Smt. Radha Devi wanted to go to Unchahar with her husband but he did not allow her, being angry she committed suicide.

This witness had given the intact evidence during the course of examination in favour of the accused persons.

D.W 3 – Jai Prakash, Peon of the College had proved the Attendance Register (Ex.Kha 1/1), and the fact that on the day of occurrence accused Shyam Behari was present in the concerned school.

In the cross – examination, this witness had given similar statement.

Smt. Amboz Kumari, accused wife of accused Shyam Behari has denied the allegations in her statement under Section 313 Cr.P.C and has stated that at the time of incident her husband Shyam Behari has gone to the school for teaching as usual, which is about five kilometer away from his house. Dilip Kumar was going to Unchahar for treatment of his son, the deceased also insisted to go with him for watching cinema and when Dilip Kumar scolded, in a fit of anger she closed the door and set ablaze herself. She had gone to the field for cutting the crops and had come after getting information about the incident.

20. Shyam Behari Dwivedi has given similar statement to the statement of his wife Smt. Amboz Kumar @ Chandrakali.

21. It is noteworthy that accused Amobz Kumari and Shyam Behari had acquitted from the charges and no any appeal or revision has been preferred against the judgement and order of acquittal either by the informant or by the State. Hence, the case of these two accused persons are not in question before this Court.

22. Accused Dilip Kumar has stated under Section 313 Cr.P.C that his marriage was solemnized with Smt. Radha Devi on 09.05.1987 and the farewell (Bidai) had taken place on 29.04.1990. After four and five months of the farewell he started living separately with the deceased. The informant had no son, except two daughters. Deceased's mouth was crooked due to paralysis, but in the hope of property this marriage had been solemnized. At the

time of the incident his father had gone to school for teaching as usual and he had gone to Unchahar for the treatment of his son. His wife also wished to go with him for watching cinema, upon which he had scolded him. In a fit of anger she had closed the door and had set ablaze, his brothers Pramod and Santosh had informed his father at his School, Antamau. After endorsement his father had come back, her mother had gone to the field for cutting the crops and had come after getting the information.

23. In this case, the learned trial court has concluded that since there was no demand of dowry at the time of marriage, therefore Sections 3 and 4 of the D.P. Act would not attract. He has also concluded that since there was no evidence of torturing and cruelty soon before the death of the deceased by the accused persons, therefore no case or charge under Sections 3 and 4 of the D.P. Act is made out against the accused persons. It was also concluded that the father and mother-in-law of the deceased had gone to the school and field respectively and they were living separately soon after their son's marriage.

24. On the basis of aforesaid conclusion, the learned trial court acquitted the accused Shyam Behari Dwivedi and Smt. Amboz Kumari @ Chandrakali. From the charges under Sections 498-A, 304-B I.P.C. The learned trial court has also not found that it was a commission of crime under Section 304-B I.P.C, but has concluded that Dilip Kumar, husband of the deceased is the accused of commission of crime under Section 306 I.P.C. It is noteworthy that neither the informant Mangla Dutta Mishra nor the State have preferred any revision against the order of acquittal of these two accused persons.

Hence, this Court is confined to decide the case of accused Dilip Kumar, husband of the deceased as to whether he committed any offence under Section 306 of the I.P.C or not. In this regard the findings of the learned trial court is to be scrutinised as to whether the conclusion of the learned trial court regarding commission of crime by the accused Dilip Kumar under Section 306 I.P.C is factually and legally correct or not?

25. The learned trial court has recorded the findings in this regard, which is mentioned at page nos. 13 and 14 of the judgement. For this the learned trial court has also relied on the statement of the accused, in which the accused Dilip Kumar has stated that the mouth/face of the deceased Radha Devi was crooked due to paralysis, but in the hope of property, the marriage had been solemnized. About this fact suggestions have been given to the informant P.W – 1, who has denied this fact.

26. The learned trial court has stressed on the facts that in the statement under Section 313 Cr.P.C, accused Dilip Kumar has stated that the deceased has also wished to go and watch cinema there with them on which accused Dilip had scolded her, thereafter in a fit of anger she closed the door and set herself ablaze.

27. The learned trial court has concluded that such act of accused Dilip would be treated to be an instigation to the deceased for abetment for committing suicide. The learned trial court has also accepted this fact on the basis of site plan that accused Dilip Kumar was living with his wife separately in the same house from the portion of his parents. The learned trial court has also accepted the facts to be proved that at the time of incident all the

accused persons were out of the house as alleged above, but the learned trial court has concluded that after solemnization of marriage, accused Dilip Kumar demanded scooter and fridge and beaten her and also scolded and prevented her while she wanted to go with her. Thus, the accused created such atmosphere, which forced the deceased for committing suicide.

28. The learned counsel argued that the learned trial court has wrongly concluded that any demand of dowry had been made by the accused Dilip Kumar and he had beaten the deceased for dowry. He further argued that only scolding for not allowing the deceased for going to Unchahar along would not be an abetment to commit suicide on the part of accused Dilip Kumar Tiwari and on such a petty matter, if the deceased has committed suicide, it would not be attracted under Section 306 of the I.P.C.

29. At the outset it is necessary to look into the relevant provisions of law in this regard.

Section 107 in The Code Of Criminal Procedure, 1973 is 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. Illustration A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C. 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 facilitate the commission thereof, is said to aid the doing of that act.”

Section 306 of Indian Penal Code, 1860 is as under : -

“306. Abetment of suicide - If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

30. In view of the provision of Section 107 I.P.C. it can not be said that an accused had abetted an offence, unless the accused instigates another by way of provocation, incitement, urging or encouraging for doing an act. Abetment involves mental process of instigating or intentionally, aiding person to do certain thing. Some positive act by the accused is essential to constitute abatement. Thus, it has to be seen as to whether accused Dilip Kumar had instigated or made any conspiracy or intentionally added so that the deceased could commit suicide.

31. In *Kishori Lal Vs. State of M.P.* AIR 2007 Supreme Court 2457, the accused was convicted under Section 306 I.P.C for the offence of abetting his wife to commit suicide and was sentenced to five years imprisonment. The facts of the case were that the accused was married ten years before the incident. On the fateful day when he returned from work, he found that the door of his house was closed from inside. He called his wife, but there was no response from inside, he, therefore apprehended some mishap and immediately informed the Police. When the Police opened the door, the body of the wife of the accused was found hanging from the ceiling as she had committed suicide. On investigation, the accused was found guilty of abetting his wife to commit suicide by the trial court and was sentenced accordingly. It was also upheld by the High Court of M.P. On appeal, before the Supreme Court, it was held that there was evidence to show that the main cause of suicide was that the deceased was under heavy mental strain craving for a child. The court also noted that prosecution had failed to prove the charges against the accused as there were no injury or signs of violence found on her body. According to post-mortem report. The accused was therefore, acquitted by the Court.

The first element of abetment by instigation is that a person is said to instigate another to act, when he actually suggest or stimulates him to act directly or indirectly. The word “*instigate*” means to provoke, incite, urge or encourage someone to do an act. Mere “*advice*” does not necessarily amount to instigation unless it cannot some active support or stimulation to the commission of the act itself.

32. In *Rang Naike Vs. State, (2004) 12 S.C.C 521*, it has been held that in the

order to hold a person guilty of abetment by instigation it is necessary to prove that such instigation was with reference to the offence that was committed and the offence that was likely to be committed by the person, who was so instigated.

33. In *Sanju @ Sanjai Singh Sengar Vs. State of M.P.* AIR 2002 Supreme Court 1998, the accused (appellant) and deceased had a quarrel on July 25, 1998 during which the accused used abusive language against the deceased and in a fit of excitement told him “go and die” . The prosecution alleged that because of these in-sighting words, the deceased committed suicide on July, 27 and therefore those abusive words were proximate cause of the suicide. It was held that the words uttered in anger for incitement cannot be said to have been intended with malice and there being no mens rea, the provisions of Section 107 are not attracted, more so when the suicide was committed by the deceased two days after the incident.

34. In *Cyriac Vs. S.I Police Kaduthuruthy 2005 Cr.L.J. 4322 (Keral)*, the deceased owed a debt of Rs. 200/- to the accused. While asking on payment of his money, the accused addressed these words to the deceased in public “*Why you are remaining a burden to earth, and why don't you go and die*”, where upon the deceased committed suicide. The accused was charged of abetment by instigation under Section 107 I.P.C. The court acquitted the accused of the charges and observed that the words uttered by the accused person may be insulting or abusive but certainly not instigative to stimulate the deceased to commit suicide.

35. In this case, it has to be noted that no mark of injury or previous torture or

cruelty soon before death has been found on the person of the deceased by the Dr., who has conducted the post-mortem. There was no letter by the deceased that she was subjected to cruelty for demand of dowry or for any other reason. Two letters sent by the informant have been proved in defence, which do not contain any statement regarding demand of dowry from the side of accused persons, though two photocopy of the letters are attached with the file sent by the accused Dilip Kumar, which contain some matters regarding money transaction or wish to get some money from the informant, but there is no threatening that if it is not done, the deceased would be killed or would be forced to commit suicide. During these six years after the marriage two sons had been born out of the wedlock of the deceased and the accused Dilip Kumar. There is no evidence that the deceased was not provided necessary food and cloths etc. There is no evidence that sons of the deceased were tortured ever by the accused Dilip Kumar. There is no evidence that any problem had been created during the farewell (bidai) of the deceased from her in-laws house to her parental house or from her parental house to her in-laws house. It has been proved from the evidence of P.W. 1 and P.W. 2 that in usual course the deceased used to visit her parental house and come as per her own wish. She was never forced to live in her parental house for an indefinite period.

36. *P.W No. 1 Mangla Dutt Mishra*, has deposed in cross examination that as soon as he went for marriage, it was settled same day and the dowry was not fixed in marriage. He had not stated to the I.O that scooter and fridge was demanded in the marriage. He has admitted that there was no dispute or quarrel regarding Bidai of the deceased either from the paternal house or from the in-laws house. The witness has

expressed ignorance about the absence of all the accused persons at the time and place of occurrence. He has not deposed that accused persons were present on the spot at the time of commission of crime. Even he has also expressed ignorance regarding quarrel between the accused Dilip and deceased when the accused was going to Unchahar with his son. This witness has also not denied the suggestions that the deceased had committed suicide due to the said quarrel with the accused Dilip Kumar Tiwari.

37. So far as the second ingredient regarding abatement by conspiracy is concerned, it is very much clear that there is no iota of evidence regarding conspiracy for committing suicide by the deceased on the part of the accused persons. There is third ingredient of abatement as to whether the abatement had been done by aiding in this regard. From the perusal of the record, it is very much clear that the accused had not intentionally aided to the deceased for committing suicide neither they provided match-box nor closed the door, nor facilitated the commission of suicide in any other mode. There is no illegal omission on the part of the accused persons.

38. It has not been proved that at the time of occurrence, the accused persons were present on the place of occurrence and they did not try to prevent the deceased from committing suicide. It has also not been proved that accused persons attempted to abatement, which is punishable under Sections 109 and 110 of the I.P.C.

39. In *Sharda Bhai Jeevan Lal Vaniya Vs. State of Gujarat A.I.R 2012 Supreme Court 925*, the appellant was tried for the offence under Sections 498-A and 304-B read with Section 114 of the I.P.C, where his wife had committed suicide by setting herself to fire only two years after her marriage with the appellant. The learned A.S.J Rajkot acquitted

the appellant as there was no evidence of cruelty or harassment in connection with demand of dowry. The appeal preferred by the State was allowed by the High Court and the appellant was convicted and sentenced for five years rigorous imprisonment.

40. On appeal the Apex Court found that the letters written by the deceased to her sister-in-law regarding beating her and for forcing her to take a divorce had not been proved. Hence, the benefit of doubt was given to the accused and order of acquittal was passed.

41. In *Gurucharan Vs. State of Punjab (2017) 1 SCC 433*, the Apex Court held that essential ingredients for constituting the offence of abatement of suicidal death under Section 306 of the I.P.C are intention and involvement of accused to aid and instigate commission of suicide.

42. Any severance or absence of any of these constituents would mitigate against the said indictment remoteness of culpable life or omissions rooted in intention of accused or actualizing the suicide would fall short of offence of abatement of suicide essential to attract Section 306 of the I.P.C. Contiguity, continuity, culpability and complicity of indictable acts or omissions or concomitant indices of abatement under Section 306 I.P.C. In the instant case, the family members of the husband were convicted for the offence under Section 306 I.P.C in commission of suicide by wife together with two daughters, but these ingredient remained unproved. Therefore the appellants were acquitted.

43. On the basis of above discussions, this Court is of the considered view that the prosecution has not been able in proving the essential ingredients of abatement for committing suicide by the deceased on the part of the appellant accused Dilip Kumar Tiwari.

Mere not permitting the deceased to go to Unchahar for watching the cinema along is not a ground to conclude that the accused had abated the deceased to commit suicide.

44. On the basis of above discussions, this Court is of the considered view that the judgement and order of conviction, sentencing passed by the learned trial court is bad in the eyes law and is not liable to sustained.

ORDER

45. The appeal is **allowed**. The judgement and order of conviction and sentencing of the appellant dated 03.03.2004 passed by learned Sessions Judge (FTC – IV), Pratapgarh, in Sessions Trial No. 162/96, Case Crime No. 77/94, under Sections 498-A, 304-B I.P.C, Police Station Nawabganj, District Pratapgarh, State of U.P. Versus Shyam Bihari and others, is set aside.

46. The accused is set free, bail bonds and personal bond are cancelled. Sureties are discharged.

47. A certified copy of this judgement and order be sent to the trial court alongwith original lower courts record for consignment.

(2023) 8 ILRA 1302
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 03.08.2023

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Criminal Appeal No. 1129 of 2023

Okansh Kumar Singh ...Appellant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Appellant:

Umesh Chandra Tripathi, Chandra Bhushan Pandey, Shambhunath Mishra

Counsel for the Opposite Parties:

G.A., Chandan Srivastava, Yogesh Somvanshi

Criminal Law - Indian Penal Code, 1860 - Sections 376D, 342 & 506 - Gang rape - Life imprisonment with fine - Against summoning order, bailable warrant - Inconsistency in Statement of prosecutrix - Relevancy - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3(2)(v) - Initially F.I.R lodged against appellant, Investigating Officer submitted Final Report and thereafter protest application filed, entertained by trial Court and after considering Statement u/s 161 and 164 of Cr.P.C., of prosecutrix and other evidences on record, impugned order dated 04.10.2019 passed, whereby, appellant has been summoned - There might be certain contradiction in Statement of victim/prosecutrix that can be examined at trial proceedings - 'Plea of alibi' can be examined in trial proceedings by trial Court, requires appreciation of evidences and factual contradictions - By plethora of judgments of Apex Court, only Statement of prosecutrix u/s 164, is sufficient to lead conviction. (Para 28, 29, 31, 32)

Appeal dismissed. (E-14)

List of Cases cited:

1. Prashant Bharti Vs St. (NCT of Delhi), (2013) 9 SCC 293, (Para 24, 25)
2. Popular Muthiah Vs St., (2006) 7 SCC 296, (Para 29, 30)
3. Rajendra Singh Vs St. of U.P. & anr., (2007) 7 SCC 378, (Para 11)
4. St. of U.P. & anr.s Vs Akhil Sharda & ors., Criminal Appeal No. 840 of 2022, (Para 7)

5. Mohd. Allauddin Khan Vs St. of Bihar & ors., (2019) 6 SCC 107, (Para 14)

6. Hazrat Deen Vs The St. of Uttar Pradesh & anr. Special Appeal No. 9552 of 2021

7. St. of T.N. Vs Ravi @ Nehru, (2006) 10 SCC 534, (Para 20)

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. Heard Sri Chandra Bhushan Pandey, Advocate assisted by Sri Shambhu Nath Mishra, learned counsel for the appellant, Sri Aniruddh Kumar Singh, learned AGA for the State and Sri Chandan Srivastava, learned counsel for opposite party no. 2.

2. By means of the instant appeal, the appellant has assailed the summoning order dated 04.10.2019 and the order of bailable warrant dated 15.11.2019, passed by the Court of Special Judge (SC/ST Act), Barabanki.

3. Brief facts of the case are that the informant lodged a First Information Report against the present appellant and other accused persons on 27.07.2017, alleging therein, the incident dated 16.05.2017, under Sections 376D, 342, 506 of IPC and 3(2)(v) of the SC/ST (P.A.) Act, which was registered as Case Crime No. 224 of 2017, at P.S. Jaidpur, District Barabanki. After lodging the First Information Report, the Investigating Officer recorded the statement of the complainant/prosecutrix on 16.08.2017, wherein, the prosecutrix stated that the appellant along with another co-accused, namely, Anjani Verma committed rape upon her. The medical examination of the complainant/prosecutrix was also got done in District Women Hospital, Barabanki, on

17.08.2017 and as per the medical examination report, the evidence of rape was found. Thereafter, on 29.08.2017, the statement of the prosecutrix under section 164 Cr.P.C. was also recorded, before the learned Trial Court, in which the statement given under Section 161 Cr.P.C., was reiterated and further, in her subsequent statement (Majeed Bayan) dated 08.12.2017, the prosecutrix stated that she has been used as a tool by Digvijay Verma as she was asked to lodge a false and fabricated case so as to mount pressure over the appellant, who is the witness in the Case Crime No. 456 of 2017. Further plea is that the appellant was on duty as Lecturer of Physics in an aided Government Inter-College, namely, Shri Deshraj Narang Dayanand Inter College, Govind Nagar, Walterganj, District Basti and he was present over there, in between 7:00 A.M. to 12:30 P.M. on 15th and 16th of May, 2017, i.e., the date, when the incident is said to have taken place.

4. Contention of the learned counsel for the appellant is that the summoning order dated 04.10.2019 and the bailable warrant dated 15.11.2019, are not sustainable in the eyes of law as the learned Court below has failed to appreciate the evidences, which were available on record. He submits that after lodging of the First Information Report, the Investigating Officer, when found no cogent piece of evidence to substantiate the incident, submitted the Final Report and after delay of 20 months, the protest application of the appellant has been accepted.

5. Further submission is that as per the medical examination of the prosecutrix, there is no evidence of rape and that also does not support the version of the prosecutrix. He added that no proper reasons have been

recorded while accepting the protest application and the same is based on conjecture and surmises.

6. Adding his arguments, he submits that the learned trial Court has failed to appreciate the facts and evidences that the appellant was working as Lecturer in a Government-Aided College, namely, Shri Deshraj Narang Dayanand Inter College, Govind Nagar, Walterganj, District Basti and on the date and time of the said incident, he was on duty and furthermore, there is a clear cut evidence emerging out from the statement of the prosecutrix, that the First Information Report was lodged by the prosecutrix as a counter blast to the First Information Report lodged by one Akash Kumar Verma, the informant in the FIR No. 456 of 2017, against Digvijay Verma and Himanshu Verma under Sections 376, 516, 506 of IPC and the prosecutrix was used as an instrument by Digvijay Verma to pressurize the appellant, not to stick on the statement as witness and to turn hostile in Case Crime No. 456 of 2017.

7. Further contention is that the prosecution story as narrated by the prosecutrix is highly improbable and doubtful as she stated herself to be suffering from Jaundice and stated to be travelled, without any attendant from Lucknow to Barabanki, in early hours of morning at 5:00 A.M. He submits that the prosecutrix has changed the story at every stage for filling up the lacuna of prosecution and if the statement of the prosecutrix are gone through, it shows that only the statement under Section 164 Cr.P.C. remains in existence, though the same is also in contradiction to the statement under Section 161 as well as the subsequent statement which was recorded as a 'Majeed Bayan' by the Police.

8. It has also been argued that the learned trial Court has erroneously taken cognizance and summoned the accused under Section 3(2)(v) of the SC/ST Act, though there is no independent witness to support the story that the appellant hurled any abuse, naming the caste of the prosecutrix, in public view.

9. In support of his contention, the learned counsel appearing for the appellant has placed reliance on a case reported in **(2013) 9 SCC 293, Prashant Bharti Vs. State (NCT of Delhi)** and has referred paragraphs 24 and 25 of the judgement, which reads as under :-

“24. Most importantly, as against the aforesaid allegations, no pleadings whatsoever have been filed by the complainant. Even during the course of hearing, the material relied upon by the accused was not refuted. As a matter of fact, the complainant/prosecutrix had herself approached the High Court, with the prayer that the first information lodged by her, be quashed. It would therefore be legitimate to conclude, in the facts and circumstances of this case, that the material relied upon by the accused has not been refuted by the complainant/prosecutrix. Even in the charge sheet dated 28.6.2007, (extracted above) the investigating officer has acknowledged, that he could not find any proof to substantiate the charges. The charge-sheet had been filed only on the basis of the statement of the complainant/prosecutrix under Section 164 of the Cr.P.C.

25. Based on the holistic consideration of the facts and circumstances summarized in the foregoing two paragraphs; we are satisfied, that all the

steps delineated by this Court in Rajiv Thapar’s case (supra) stand - satisfied. All the steps can only be answered in the affirmative. We therefore have no hesitation whatsoever in concluding, that judicial conscience of the High Court ought to have persuaded it, on the basis of the material available before it, while passing the impugned order, to quash the criminal proceedings initiated against the accused-appellant, in exercise of the inherent powers vested with it under Section 482 of the Cr.P.C. Accordingly, based on the conclusions drawn hereinabove, we are satisfied, that the first information report registered under Section 328, 354 and 376 of the Indian Penal Code against the appellant-accused, and the consequential chargesheet dated 28.6.2007, as also the framing of charges by the Additional Sessions Judge, New Delhi on 1.12.2008, deserves to be quashed. The same are accordingly quashed”

10. Referring the aforesaid judgement, he submits that in the abovesaid case the charge-sheet under section 164 of Cr.P.C. was filed, only on the basis of the statement of prosecutrix and there were no proof to substantiate the charges and therefore the Hon. Apex Court while categorically giving it’s findings, quashed the criminal proceeding and also held that while invoking the inherent powers vested under Section 482 Cr.P.C., such issues can be dealt with..

11. He has further placed reliance on a judgement reported in **(2006) 7 SCC 296, Popular Muthiah Vs. State** and has referred paragraphs 29 and 30 of the above said judgement. Paragraphs 29 and 30 are quoted hereinunder:-

“29. The High Court while, thus, exercising its revisional or appellate

power, may exercise its inherent powers. Inherent power of the High Court can be exercised, it is trite, both in relation to substantive as also procedural matters.

30. In respect of the incidental or supplemental power, evidently, the High Court can exercise its inherent jurisdiction irrespective of the nature of the proceedings. It is not trammelled by procedural restrictions in that

(i) power can be exercised suo motu in the interest of justice. If such a power is not conceded, it may even lead to injustice to an accused.

(ii) Such a power can be exercised concurrently with the appellate or revisional jurisdiction and no formal application is required to be filed therefor.

(iii) It is, however, beyond any doubt that the power under Section 482 of the Code of Criminal Procedure is not unlimited. It can inter alia be exercised where the Code is silent where the power of the court is not treated as exhaustive, or there is a specific provision in the Code ; or the statute does not fall within the purview of the Code because it involves application of a special law. It acts ex debito justitiae. It can, thus, do real and substantial justice for which alone it exists."

12. While referring the aforesaid, he submits that it has categorically been held by the Apex Court that the High Courts while exercising its revisional or appellate powers, may exercise its inherent powers, both in relation to substantive and also procedural matters and even this can be stretched to be exercised Suo Moto, in the interest of justice.

13. Concluding his arguments, he submits that in fact, the trial Court has not only skipped material facts and evidences to discuss while passing the summoning order but has also ignored the settled proposition of law and therefore it is submitted that the proceeding of Sessions Trial No. 346 of 2019 arising out of Case Crime No. 0224 of 2017, may be quashed.

14. On the other hand, learned counsel appearing for the State has vehemently opposed the contentions aforesaid and submits that the First Information Report has been lodged against the present appellant under Sections 376 D, 342, 506 of IPC and Section 3(2)(v) of the SC/ST Act and those are heinous in nature and badly impacts the society. He added that initially, after investigation, the Final Report was submitted but after filing of the protest application, the learned trial Court while recording detailed discussions and reasoning thereof, has passed the order on 04.10.2019. Further, from the statement of the prosecutrix, recorded under Section 164 CrPC, it is quite clear that the rape has been committed upon the complainant/prosecutrix by the present appellant and another co-accused and the medical examination report also supports the same..

15. Next contention is that, so far as the submission of the learned counsel for the appellant, regarding the 'plea of alibi' is concerned, that is not considerable at this stage, as plea of alibi cannot be gone into at this stage as this would amount to a mini trial, which is not permissible under the law. In support of his contention, he has placed reliance on a judgement reported in **(2007) 7 SCC 378, Rajendra Singh Vs. State of U.P. and Another** and has

referred paragraph 11 of the judgement, which is quoted hereinunder:-

"11. Having considered the submissions made by learned counsel for the parties, we are of the opinion that the statements of the witnesses under Section 161Cr.P.C. being wholly inadmissible in evidence could not at all be taken into consideration. The High Court relied upon wholly inadmissible evidence to set aside the order passed by the learned Sessions Judge. That apart, no finding on a plea of alibi can be recorded by the High Court for the first time in a petition under Section 482Cr.P.C. As mentioned above, the burden to prove the plea of alibi lay upon the accused which he could do by leading evidence in the trial and not by filing some affidavits or statements purported to have been recorded under Section 161 Cr.P.C. The whole procedure adopted by the High Court is clearly illegal and cannot be sustained. The other argument based upon the acquittal of co-accused Daya Singh has also no merits. The question as to whether an order passed under Section 319 Cr.P.C. would cease to be operative if the trial of the co-accused has been concluded, has been considered in Shashikant Singh v. Tarkeshwar Singh and it was held as under in para 9 of the report :

"9. The intention of the provision here is that where in the course of any enquiry into, or trial of, an offence, it appears to the court from the evidence that any person not being the accused has committed any offence, the court may proceed against him for the offence which he appears to have committed. At the stage, the court would consider that such a person could be tried together with the accused who is already before the Court facing the trial. The safeguard provided in respect of

such person is that, the proceedings right from the beginning have mandatorily to be commenced afresh and the witnesses reheard. In short, there has to be a de novo trial against him. The provision of de novo trial is mandatory. It vitally affects the rights of a person so brought before the Court. It would not be sufficient to only tender the witnesses for the cross-examination of such a person. They have to be examined afresh. Fresh examination in chief and not only their presentation for the purpose of the cross-examination of the newly added accused is the mandate of Section 319(4). The words 'could be tried together with the accused' in Section 319(1), appear to be only directory. 'Could be' cannot under these circumstances be held to be 'must be'. The provision cannot be interpreted to mean that since the trial in respect of a person who was before the Court has concluded with the result that the newly added person cannot be tried together with the accused who was before the Court when order under Section 319(1) was passed, the order would become ineffective and inoperative, nullifying the opinion earlier formed by the Court on the basis of evidence before it that the newly added person appears to have committed the offence resulting in an order for his being brought before the Court."

Therefore the mere fact that trial of co-accused Daya Singh has concluded cannot have the effect of nullifying or making the order passed by the learned Sessions Judge on 26.5.2005 as infructuous."

16. While placing reliance on abovesaid Judgment, he submits that the Hon. Apex Court has held that no finding of 'plea of alibi' can be recorded by High Court in petition under Section 482 Cr.P.C.

and the burden to prove the 'plea of alibi' is upon the accused, which he could do by way of adducing evidence in the trial proceedings and not by filing some affidavits or statement purported to have been recorded under Section 161 of Cr.P.C.

17. Vehemently opposing, another contention of the learned counsel for the appellant, the learned AGA has submitted that it has been held in the catena of judgements of the Hon'ble Supreme Court that the High Courts, while invoking the jurisdiction under Section 482 Cr.P.C., cannot conduct 'mini trial', while appreciating the evidences and the same can be done in trial proceedings. He added that so far as the plea taken by the appellant that there is contradiction in the statements of the prosecutrix under Sections 161 and 164 of Cr.P.C. and in the supplementary statement given before the Police authority are concerned, that cannot be examined or testified in this appeal.

18. Again, in support of his contention, he has placed reliance on a judgement rendered in **Criminal Appeal No. 840 of 2022, State of U.P. and another Vs. Akhil Sharda and others** and has referred paragraph 7 of the aforesaid judgement. Paragraph 7 of the judgement is quoted hereinunder:-

"7. Having gone through the impugned judgment and order passed by the High Court by which the High Court has set aside the criminal proceedings in exercise of powers under Section 482 Cr.P.C., it appears that the High Court has virtually conducted a mini trial, which as such is not permissible at this stage and while deciding the application under Section 482 Cr.P.C. As observed and held by this Court in a catena of decisions no mini trial can be conducted by the High

Court in exercise of powers under Section 482 Cr.P.C. jurisdiction and at the stage of deciding the application under Section 482 Cr.P.C., the High Court cannot get into appreciation of evidence of the particular case being considered."

19. He submits that in the abovesaid Judgment, the Apex Court in so many words, has held that virtually conducting mini trial is not permissible.

20. Further placing reliance on a judgement, reported in **(2019) 6 SCC 107 Mohd. Allauddin Khan Vs. State of Bihar and Others**, has referred paragraph 14. Paragraph 14 of the judgement is quoted hereinunder:-

"14. In our view, the High Court had no jurisdiction to appreciate the evidence of the proceedings under Section 482 of the Code Of Criminal Procedure, 1973 (for short "Cr.P.C.") because whether there are contradictions or/and inconsistencies in the statements of the witnesses is essentially an issue relating to appreciation of evidence and the same can be gone into by the Judicial Magistrate during trial when the entire evidence is adduced by the parties. That stage is yet to come in this case."

21. Referring the aforesaid, he submits that the Apex Court is of the view that the High Court has no jurisdiction to examine the evidences in proceedings under Section 482 of Cr.P.C., because of contradiction and inconsistency in the statement of the witnesses, which essentially is an issue of appreciation of evidences.

22. Again controverting the contention of the learned counsel for the appellant regarding the legal question that

the statement of prosecutrix under Section 164 is not sufficient to substantiate charges so as to lead the case to its logical end for convicting the accused, it has been submitted that a statement made under Section 164 Cr.P.C., disclosing the offence of rape, would be sufficient to frame charges under Section 376 of IPC and to proceed with the trial and the fact that there are certain contradiction in the statements of the prosecutrix under Section 161 and 164 of Cr.P.C., would have no bearing at all.

23. In support of his contentions, the State counsel has placed reliance on a judgement rendered in **Special Appeal No. 9552 of 2021 Hazrat Deen Vs. The State of Uttar Pradesh and Anr** and has referred the following paragraphs :-

“The FIR is the initial document. In her statement given by the prosecutrix under Section 164 of the Code of Criminal Procedure (CrPC) after the prosecutrix attained majority, she categorically made statements which tantamount to offence under Section 376 of the IPC. Discrepancies between the FIR and any subsequent statement under Section 164 of the CrPC may be a defence. However, the discrepancies cannot be a ground for discharge without initiation of trial.”

24. Referring the aforesaid, he submits that it has very clearly been held by the Apex Court that in case of any contradiction between the version of First Information Report and subsequent statement under Section 164 of Cr.P.C., it can be taken as defence during trial but cannot be a ground for discharge.

25. He has also referred a case reported in **(2006) 10 SCC 534, State of**

Tamil Nadu Vs. Ravi @ Nehru and has referred paragraphs 20 which is quoted hereinunder:-

“The evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex-offender is entitled to great weight, absence of corroboration notwithstanding.”

26. Referring the aforesaid, he added that the Hon’ble Apex Court has categorically held that the statement of the injured witness is at par with the statement of the victim of sexual assault and in all senses, the prosecutrix of sexual assault is the best witness and that is of great weight.

27. Further contention of the learned counsel for the appellant is that since there is specific allegation of committing rape by the present appellant with the prosecutrix and that is intact and therefore, the trial cannot be interfered at this stage, as the same would be in contravention to the ratio of the judgement of the Hon’ble Apex Court which are rendered, time and again. Therefore, the submission is that the present appellant is not entitled for any relief.

28. Considering the submissions of the learned counsel for the parties and after perusal of the material placed on record, it emerges that initially the First Information Report was lodged against the present appellant, wherein, the Investigating Officer submitted Final Report and thereafter protest application was filed, which was entertained by the trial Court and after thoroughly considering the

statement under Section 161 and 164 of Cr.P.C., of the prosecutrix and the other evidences on record, the order dated 04.10.2019 has been passed, whereby, the appellant has been summoned.

29. The first plea is taken by the appellant, regarding the inconsistency in the statements of the prosecutrix under Sections 161 and 164 of Cr.P.C. This Court finds that there might be certain contradiction in the statement of the victim/prosecutrix, but, whether the same can be examined at this stage, is the first and foremost question. The Hon'ble Apex Court in catena of judgements has held that there can be discrepancies in the statements of an accused under Sections 161 and 164 of Cr.P.C. but that cannot be examined/appreciated except apart the trial proceedings as the same would amount to mini trial.

30. Further, this Court is of considered opinion that the statement of the prosecutrix under Section 164 Cr.P.C. is having at par evidenciary value as the injured witness in a criminal case. Therefore, the first contention of the learned counsel for the appellant is against the settled proposition of law and thus, have no force.

31. Considering the second set of argument of learned counsel for the appellant and the reply of the counsel for the other side including the State, that the present appellant was working as a Lecturer in a College on 15th and 16th of May, 2017, in between 7:00 A.M. to 12:30 P.M., the issue with respect to his non-presence, while saying that he was present at the College, namely, Sri Deshraj Narang Dayanand Inter College, Govind Nagar, Walterganj, District Basti, is an issue of 'plea of alibi' which has already been decided by the Hon'ble Apex Court in catena of Judgments, wherein, it has been held that the 'plea of alibi' can be examined in the trial proceedings by the

trial Court, as the same requires appreciation of evidences and factual contradictions. In the present matter, it has been said that there is evidence that the appellant was in the College at Basti at the time of the alleged incident, but the question that whether the same can be appreciated at this stage, is answered in negative, as per the settled law.

32. So far as the contention of learned counsel for the appellant is with respect to the question that the statement of the prosecutrix of a rape case under Section 164 Cr.P.C. is not sufficient to lead the conviction of an accused is concerned, the same has also been answered in plethora of judgements of the Apex Court, wherein, it has been held that only statement of prosecutrix under Section 164, is sufficient to lead the conviction.

33. In view of the above submissions and discussions it is apparent that there is no merit in the instant appeal. Resultantly, the appeal is hereby **dismissed**.

34. It is further made clear that any observation made hereinabove would not affect the merit of the trial.

(2023) 8 ILRA 1310

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: LUCKNOW 14.07.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Appeal No. 2067 of 2006

Surendra Yadav

...Appellant

Versus

State of U.P.

...Opposite Party

Counsel for the Appellant:

Balak Ram Verma, Atul Verma, Hari Krishna Verma, Sanjeet Kumar Patel

Counsel for the Opposite Party:

G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 363, 366 & 376 - Punishment for rape - Statement of PW-2 shows that victim went away with appellant, informed by PW-2 on same day in evening, no information given to police - Both PW-1 and PW-2 in their Statements St.d age of victim 14 years, as per high school mark-sheet, her age was 17 years and as per radiological examination, she was major - Admitted fact that prosecutrix went away with her own free will as per her own Statement- She remained with appellant for period of 40 days without raising any alarm, consenting party - Statement of unknown person not recorded u/s 161 Cr.P.C. by I.O who used to keep watch on victim, not made part of investigation - Merely on sole testimony of prosecutrix without corroborative material in which improvement made, accused can't be guilty of offence - Photocopy of high school marksheet produced before trial court, not proved by prosecution - Certificate of CMO according to which prosecutrix is major proved by PW-4 - Testimony of PW-1 and PW-2 are contradictory regarding her age - Thus, impugned order set aside, acquitted. (Para 21 to 25, 28)

Appeal allowed. (E-14)**List of Cases cited:**

1. Mohd. Ali Vs St. of U.P. reported in (2015) 7 SCC 272
2. Kuldeep K. Mahato Vs St. of Bihar reported in (1998) 6 SCC 420
3. Narendra Kumar Vs St. (NCT of Delhi), (2012) 7 SCC 171
4. Jai Krishna Mandal Vs St. of Jharkhand, (2010) 14 SCC 534
5. Raju Vs St. of M.P, (2008) 15 SCC 133

6. Tameezuddin Vs St. (NCT of Delhi), (2009) 15 SCC 566

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

1. On the last date, status of the appellant was summoned vide order dated 14.12.2022.

Shri Atul Kumar Verma, learned Advocate submits that he has already filed his vakalatnama on behalf of the appellant and confirms that the appellant is alive and therefore, no further report is required.

2. Heard Shri Atul Verma, learned counsel for the appellant and Shri Anant Pratap Singh, learned A.G.A. for the State.

3. The present appeal under Section 374 (2) Cr.P.C. has been filed against the judgment and order dated 19.09.2006 passed by the Additional District and Sessions Judge, Ambedkar nagar, in case crime No. 30/2004, S.T. No. 56/2005, under Sections 363/366/376 IPC, P.S. Hanswar, District Ambedkar Nagar "State of U.P. Vs. Surendra Yadav and others", whereby the appellant has been convicted under Section 363/366/376 IPC I.P.C. and under Section 366 he has been sentenced to undergo for a period of 4 years rigorous imprisonment along with a fine of Rs. 2000/-, under Section 366 IPC, he has been sentenced to undergo for a period of 6 years rigorous imprisonment along with a fine of Rs. 2000/- and under Section 376 IPC, he has been sentenced to undergo for a period of 7 years rigorous imprisonment along with a fine of Rs. 2000/-, with default provisions in each of the offences. All the punishment to run concurrently.

4. As per the written report, complainant's daughter Pratima Srivastava

aged about 14 years has been enticed away by one Surendra in collusion of his parents on 28.05.2004 at about 12 hours in the day. On that day, the complainant and his wife were not present at home, only minor children were present. The prosecutrix on the pretext of going to the house of maternal uncle, went away with the accused persons. The complainant searched his daughter a lot, however, when she was not found, he lodged an F.I.R. on 05.06.2004 which was registered as case crime No. 30/2004, under Sections 363/366/376 IPC at P.S. Hanswar, District Ambedkar Nagar against the accused Surendra, his mother and father. In the F.I.R. he has alleged that when he has inquired at the house of the accused Surendra with his parents, then they started indulging into maar-peet.

5. The investigation was started by Sub Inspector Rameshchandra. The prosecutrix was recovered on 07.07.2004. The investigating officer after recording statement of the prosecution witnesses and preparing site plan has filed charge sheet against the accused persons. Against all the accused persons, charges were framed under Section 363/366 IPC and against Surender charges were framed under Section 376 IPC.

6. Prosecution to prove its case has produced following seven witnesses:-

- (i) PW-1 Harikrishan Shrivastava (father of the victim)
- (ii) PW-2 Jaykishun Lal (brother of PW-1)
- (iii) PW-3 Victim
- (iv) PW-4 Dr. Meera Verma

(v) PW-5 Head Constable Ashok Kumar (subscriber of the F.I.R.)

(vi) S.I. R.V. Gautam

(vii) Head Constable Ashok Kumar

7. Statements of the accused under Section 313 Cr.P.C. were recorded where their case was of denial and stated that due to enmity, they have been falsely implicated.

8. PW-1 Harikrishan Lal Srivastava is the father of the victim. He has stated that on 28.05.2004, he and his wife were not home, they went to see his father-in-law two days ago. On 28.05.2004 at about 2:30 PM when they returned, minor children Ritesh Kumar and Brijesh Kumar who were about 9 years and ten years old, told that victim has gone with Surendra somewhere. When he went to the house of Surendra, then his mother shown sheer ignorance regarding the incident. Thereafter his brother Jai Krishan Lal told him that he saw victim with Surendra around 1:00 PM. He kept on searching victim till evening and also inquired in his relations for one or two days and when he failed in searching his daughter, finally on 05.06.2004, he informed the police station and F.I.R. was lodged which has been exhibited as Ex. Ka-1 and has been proved by PW-1.

9. PW-1 further stated that the victim was recovered after 10-12 days in Baskhari while getting down from a bus. He has also stated that the victim was enticed away by Surendra and his parents.

10. PW-2 Jaykishun Lal is the real younger brother of PW-1. He has stated

that the victim is his niece. On 28.05.2004 at about 12 PM, he and his wife Vijay Laxmi saw the victim with the appellant Surendra. At that time her age was 14 years. He has not objected when he saw the victim with Surendra as he was not in talking terms with his brother PW-1. The appellant used to come to his house in the evening. When his brother came searching the victim, he told him regarding this. Both PW-1 and PW-2 searched the victim for 6-7 days and when she was not found, the report was lodged.

11. PW-3 is the victim. In her statement, she has stated that the appellant is known to the victim prior to the incident. He used to come in her house. On 28.05.2004, she asked the appellant Surendra to bring her at her uncle's house in Sultanpur, at that time her parents were not at home. At around 12 'o clock, she went away with Surendra, on the way his father Shivdas, mother Indravati and aunt Shyama Devi met and these people accompanied her till Baskhari and there these people had board her on the bus which was going to Varanasi. In the bus along with her, Surendra was also sitting. After going at some distance, one person having with face covered with gamcha was also there. She stayed at Varanasi for 2-3 days along with the appellant. She stated that when she objected while going to Varanasi, she was scolded by another person who was with Surendra and she was also threatened to keep quite. Thereafter, she was taken to Chennai from Varanasi. In Chennai she was locked in a room and was kept for a month in the room wherein Surendra used to rape her. She objected. After one month, the appellant Surendra took her from Chennai to Varanasi and from Varanasi to Baskhari by bus. The appellant came down from the bus at the

block and told her that to get down on the next crossing. While she was getting down from the bus, police caught her, along with the police, her father was also there.

12. PW-4 Dr. Meera Verma has proved the medical report which was exhibited as Ex. Ka-2. She in his statement has stated that the victim was habitual of sexual intercourse. She conducted the external and internal examination of the victim. In her external examination, it was found that there was no injury in her private part, neither on any part of the body. The organs of the victim were fully developed. In the internal examination, no mark of injury was found. Two fingers could have crossed in private part easily. She quoted that she has not found any sign to suggest that she was raped. She has also proved certificate given by CMO where her age was assessed as 18 years. All the organs of the victim were fully developed and she was major.

13. PW-5 is Head Constable Ashok Kumar who is scribe of the F.I.R. as well as GD nakal.

14. PW-6 is the investigating officer who has proved fard recovery exhibited as Ka-5 and the site plan exhibited as Ka-6. He has also proved the charge sheet.

15. PW-7 Head Constable Ashok Kumar as second witness has proved the signatures of R.B. Gautam who has prepared the naksha nazri (exhibit Ka-8) as well as charge sheet (exhibit Ka-9).

16. Submission of learned counsel for the appellant is that occurrence has taken place on 28.05.2004 and the F.I.R. was lodged after a delay of 6-7 days. He also submits that PW-1 and PW-2 in their statements have stated age of the victim to

be 14 years, whereas, the victim was major as per the radiological examination and as per own admission of PW-3 victim, her age was 17 years. Thus, right from the beginning, from this aspect, it can be presumed that the complainant wanted to falsely implicate the appellant.

17. It has been further submitted on behalf of the appellant that the victim was recovered on 07.07.2004 i.e. after 40 days of the incident. Out of those 40 days, three days she stayed with the accused at the Varanasi Station, three days she stayed with him in the train from Varanasi to Chennai and more than 30 days she stayed in Chennai. It is admitted fact that the victim was traveling by a public transport i.e. bus from Baskhari to Varanasi, train from Varanasi to Chennai and she stayed at Varanasi Station i.e. also a public place and as per the statement of the victim shows that there were plenty of persons, however, she never tried to raise any alarm and she never told anybody regarding her staying with the appellant. It is further submitted that the prosecutrix is a consenting party and the trial court erred in convicting the appellant, ignoring the relevant and material fact that she never raised any alarm during her travel from Baskhari to Varanasi and from Varanasi to Chennai and stay at Varanasi for three days and Chennai for approximately one month with the appellant.

18. It is further submitted that though as per school record, age of the victim is seventeen and half years, however, only photocopy of the high school marksheet has been filed, which too has not been exhibited and therefore, the trial court wrongly relied on the same while convicting the appellant.

19. It has been further submitted by learned counsel for the appellant that prior to amendment by virtue of Act 13 of 2013

with effect from 03.02.2013, age of consent for the purposes of Section 375 IPC was 16 years and admittedly in this case, the prosecutrix is more than 16 years as per the radiological examination where her age has been found to be 18 years or as per the own admission of the prosecution where she has stated that she is 17 years old and therefore, age could not have been a ground in this case for conviction.

20. Learned A.G.A. has opposed the appeal submitting that age of the prosecutrix as per the her high school marksheet is less than 18 years and there is no illegality in the judgment of the trial court.

21. Perusal of the statement of PW-2 shows that the victim went away with the appellant on 28.05.2004 and this fact was informed by PW-2 who is real brother of the victim on the same day in the evening, still no information was given to the police till 05.06.2004. Both PW-1 and PW-2 in their statements before the Court have stated age of the victim 14 years whereas as per high school mark-sheet, her age was 17 years and as per radiological examination, she was major. The argument of learned counsel for the appellant on this aspect carries weight that right from the inception, the complainant wanted to falsely implicate the appellant and by reducing the age, the complainant just wanted to enhance the gravity of the offence.

22. It is admitted fact that the prosecutrix all along went away with the appellant with her own accord and free will as per her own statement, hence, no case under Section 363/366 IPC is made out against the appellant. Another admitted fact that the prosecutrix remained with the appellant for a period of 40 days without raising any alarm which shows that she was

a consenting party. In the last part of the statement of the victim under Section 161 Cr.P.C., this much has come that one boy used to sit with the appellant Surendra in gamcha/chunni who used to keep a watch on the victim, however, he has not been examined before the trial court.

23. The Court has further noted that the prosecutrix on her own accord went away with the appellant from her home in absence of the complainant leaving away two minor children. The fact that she stayed with the appellant at Varanasi Station for three days, three days in train from Varanasi to Chennai and more than 30 days in Chennai in one room, however, at no point of time any alarm was raised by her. In the cross-examination PW-3 victim has admitted that she went along with the appellant at cycle to Trimhani and from there to Baskhari and from Baskhari to Varanasi by bus. While traveling from Baskhari to Varanasi and Varanasi to Chennai, as per the statements of the prosecutrix, though several persons were there, she has not told anybody regarding her staying with the appellant. A total six days while going to Chennai were spent by the victim on public transport and at the public place like Varanasi Station, however, at no point of time, any alarm was raised by her.

24. The Court has further noticed the fact that as to why the statement of unknown person has not been recorded under Section 161 Cr.P.C. by the I.O who was all along with the victim while she was going from Baskhari to Varanasi and Varanasi to Chennai and in Chennai. In fact, he has not been made part of the investigation. It is clear from the statement of the prosecutrix before the Court that she has tried to make ample improvement in her case.

25. Merely on the sole testimony of the prosecutrix without any corroborative material and on such kind of shaky and inconsistent testimony of the prosecutrix in which improvement has been made and the fact that the prosecutrix was consenting party, the accused can not be held guilty of the offence. It will not be appropriate to convict the appellant on such testimony of the prosecutrix.

In the case of *Mohd. Ali Vs. State of U.P. Reported in (2015) 7 SCC 272*, the Supreme Court has held as under:-

'29. Be it noted, there can be no iota of doubt that on the basis of the sole testimony of the prosecutrix, if it is unimpeachable and beyond reproach, a conviction can be based. In the case at hand, the learned trial Judge as well as the High Court have persuaded themselves away with this principle without appreciating the acceptability and reliability of the testimony of the witness. In fact, it would not be inappropriate to say that whatever the analysis in the impugned judgment, it would only indicate an impropriety of approach. The prosecutrix has deposed that she was taken from one place to the other and remained at various houses for almost two months. The only explanation given by her is that she was threatened by the accused persons. It is not in her testimony that she was confined to one place. In fact, it has been borne out from the material on record that she had travelled from place to place and she was ravished a number of times. Under these circumstances, the medical evidence gains significance, for the examining doctor has categorically deposed that there are no injuries on the private parts. The delay in FIR, the non-examination of the witnesses, the testimony of the prosecutrix,

the associated circumstances and the medical evidence, leave a mark of doubt to treat the testimony of the prosecutrix as so natural and truthful to inspire confidence. It can be stated with certitude that the evidence of the prosecutrix is not of such quality which can be placed reliance upon.

(emphasised by me)

26. The Supreme Court in "**Kuldeep K. Mahato Vs. State of Bihar** reported in (1998) 6 SCC 420" in paragraph 11 (relevant part) has held as under:-

"The prosecutrix had sufficient opportunity not only to run away from the house at Ramgarh but she could have also taken the help of the neighbours from the said village. The medical evidence of Dr Maya Shankar Thakur, PW 5 also indicates that there were no injuries on the person of the prosecutrix including her private parts. Her entire conduct clearly shows that she was a consenting party to the sexual intercourse and if this be so, the conviction of the appellant under Section 376 IPC cannot be sustained. There is one more additional factor which we must mention that it is not the case of the prosecutrix that she was put in physical restraint in the house at Ramgarh, with the result that her movements were restricted. This circumstance also goes to negative the case of forcible intercourse with the prosecutrix by the appellant."

Supreme Court in (2012)7 SCC 171 **Narendra Kumar versus State (NCT of Delhi)** held that where the evidence of the prosecutrix is found suffering from inconsistencies and infirmities with other material, no reliance can be placed thereon. The relevant para 22 is reproduced as under :

"Where evidence of the prosecutrix is found suffering from serious infirmities and inconsistencies with other material, prosecutrix making deliberate improvements on material point with a view to rule out consent on her part and there being no injury on her person even though her version may be otherwise, no reliance can be placed upon her evidence. (Vide Suresh N. Bhusare v. State of Maharashtra (1999) 1 SCC 220)"

In (2010)14 SCC 534 **Jai Krishna Mandal versus State of Jharkhand**, Supreme Court reiterated that the improbable statement of the prosecutrix cannot be believed. Relevant portion of para 4 is reproduced as under :

"4.....The only evidence of rape was the statement of the prosecutrix herself and when this evidence was read in its totality, the story projected by the prosecutrix was so improbable that it could not be believed."

In **Raju versus State of M.P (2008) 15 SCC 133**, Hon'ble Supreme Court held that no doubt, a false allegation of rape can cause equal distress, humiliation and damage to the accused as well and interest of the accused must also be protected. Relevant portion of paras 10 and 11 are reproduced as under :

"10..... that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on par with that of an injured witness and if the evidence is reliable, no corroboration is necessary."

"11.....It cannot be lost sight of that rape causes the greatest distress and

humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication..... there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

Similar view has been taken by Hon'ble Supreme Court in ***Tameezuddin versus State (NCT of Delhi (2009)15 SCC 566.***"

27. There are latches in the prosecution case. First, the prosecutrix on her own accord went away with the appellant in absence of her parents leaving minor children. Secondly, she traveled with the appellant to Chennai through public transport and at no point of time, she raised any alarm which shows that she was a consenting party. Even in Chennai she stayed for a period of 30 days, however, she never made any effort to raise alarm which shows that she went with the appellant with her consent.

28. So far as the photocopy of the high school marksheet which has been produced before the trial court is concerned, it has not been proved by the prosecution, thus, no reliance could be placed upon it by the trial court while convicting the appellant. Certificate of CMO according to which the prosecutrix is major has been proved by PW-4. No corroborative material has been found by PW-4 while examining the prosecutrix. The testimony of PW-1 and PW-2 are contradictory to that of the prosecutrix so far as her age is concerned.

29. Thus, it appears to be a case of false implication. The prosecutrix was more than 17 years at the time of the

offence and prior to the amendment by virtue of Act 13 of 2013 with effect from 03.02.2013, age of consent for the purposes of Section 375 IPC was 16 years, hence, no offence under Section 376 IPC could have been said to be made out.

30. In view of the above, the judgment impugned dated 19.09.2006 (supra) is set aside. The appeal is allowed. The accused-appellant is acquitted. If he is on bail, his bail bonds are cancelled and the sureties discharged.

31. Let the lower court record be sent back to the trial court along with a copy of this judgment.

(2023) 8 ILRA 1317
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.07.2023

BEFORE

THE HON'BLE MRS. RENU AGARWAL, J.

Criminal Appeal No. 2184 of 2023

Sahab Lal **...Appellant**
Versus
State of U.P. & Anr. **...Opposite Parties**

Counsel for the Appellant:
Vineet Kumar Mishra, Malti Mishra

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Sections 154 (1) & 156(3) - Against rejection of application - Maintainability - As per FIR, son of informant was beaten cruelly by opposite party no.2 - He refused to go to school - When he again attended school on 21.9.2022, he was again beaten - Thereafter, he fell ill, became incapable of

movement and performing his normal life - Referred to Medical College by district hospital where he expired after four days - Appellant filed application u/s 156(3) CrPC, report was called - As per report he did not attend school on 20.9.2022 - The injured was medically examined in Hospital on 19.10.2022, wherein three injuries of simple nature found - The injured was suffering from kidney disease, advised for dialysis and during his treatment, died on 28.10.2022 - Held, all injuries are simple in nature, does not disclose any cognizable offence - Regarding SC/ST Act, should be read in light of substantive offence - Informant has equally efficacious remedy to file complaint before magistrate having jurisdiction - Hence, impugned order suffers with no illegality and to file appeal without adopting due procedure is misuse of process of law. (Para 5, 11, 15)

Appeal dismissed. (E-14)

List of Cases cited:

1. Lalita Kumari Vs St. of U.P. & ors., AIR 2014 SC 187
2. Hari Singh Vs St. of U.P., (2006) 5 SCC 733
3. Mohd Yousuf Vs Smt. Afaq Jahan & anr. 2006 (1) SCC 10
4. Dilawar Singh Vs St. of Delhi, 2007 (10) SCC 585
5. M. Subramaniam & ors. Vs S. Janaki & ors., AIR 2020 SC 387
6. Sudhir Bhaskarrao Tambe Vs Hemant Yashwant Dhage & ors., 2016 (6) SCC 277

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

1. Heard learned counsel for the appellant, learned AGA for the State and perused the record.

2. The present criminal appeal U/s 14(A)-1 of the Scheduled Castes and the

Scheduled Tribes (Prevention of Atrocities) Act, 1989 has been filed with the prayer to set aside the order dated 20.4.2023 passed by learned Special Judge, SC/ST (P.A.) Act, Hardoi arising out of Misc. Case No. 721 of 2022 U/s 156(3) CrPC by which the application of the appellant was rejected.

3. It is submitted by learned counsel for the appellant that learned trial court did not consider the statement of the witnesses available on record. Learned trial court has wrongly appreciated the evidence available on record ignoring the material of the case. Hence, the impugned order is erroneous and suffers from manifest error of law and is liable to be set aside.

4. At the very outset, learned AGA submitted that the present appeal is not maintainable as the appellant has equally efficacious remedy available with him to file complaint on the basis of the facts and circumstances of the case. The injuries are simple in nature. It is also submitted that the report was called for by the magistrate on the application U/s 156(3) CrPC and on inquiry, the incident was found false. Hence the application U/s 156(3) CrPC has been rightly rejected and the appeal is liable to be dismissed.

5. Briefly the contents of the FIR are that the complainant belong to the scheduled caste and opposite party is Brahmin by caste. The son of the informant namely, Anoop Kumar was studying in Class VII in Shail Kumari Bateshwar Dayal Public Inter College, Sahijna, Hardoi. Opposite party no.2, Pradeep Kumar Dwivedi has beaten the son of the informant cruelly and traumatised him. Therefore his son refused to go to school. When the son of the informant again attended to school on 21.9.2022, he was

again beaten by fist, kicks and danda. Thereafter his son fell ill and he became incapable of movement and performing his normal life. He was referred to King George Medical College, Lucknow by district hospital where his son expired after four days. On the basis of the application moved U/s 156(3) CrPC, a report was called from the police station concerned. As per report sent by the police station concerned, the son of the informant did not attend the school on 20.9.2022. The injured was medically examined in Balrampur Hospital at Lucknow on 19.10.2022 wherein three injuries of simple nature were found. The injured was suffering from kidney disease, therefore he was advised for dialysis and during his treatment, he died on 28.10.2022. According to the post mortem report, the cause of death was shown septicemia due to illness. As per medical report, the cause of death is septicemia and shock. The appellant had stated in application that he applied for post mortem of his son by Panel, but the same is not disposed off.

6. According to the facts and circumstances of the application U/s 156(3) CrPC, the date of incident is shown as 20.9.2022 and 21.9.2022. However, as per primary inquiry conducted by the police station, the injured was medically examined in KGMC, Lucknow on 19.10.2022 and three minor injuries were found on his body which was found 2-4 days prior to the medical examination. Thereafter, the injured was medically treated in Rajdhani Hospital, Dubagga Road, Lucknow where he was advised for dialysis and during the course of treatment, the injured expired.

7. Learned counsel for the appellant further submitted that police report is not

reliable to the intent that the injured did not attend the school on 20.9.2022. However, as per Annexure-4 annexed with the appeal, he was given home work in his diary. Prima facie, it appears that the injured attended the school on 20.9.2022 and 21.9.2022 both.

Section 156 CrPC reads as under:

"156. Police officer' s power to investigate cognizable case.

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned."

8. A magistrate may use his authority U/s 156(3) CrPC on pre and post cognizance. The power may include the police officers incharge on recording the case and concluding an investigation. Anyone can begin the legal procedure by reporting a cognizable offence to the police. The police are required by law to open an investigation and record a case after receiving such information.

9. According to the section 154(1) of the CrPC, any information relating to the

commission of cognizable offence provided to an in-charge of the police station whether verbally or in writing must be reduced to writing and signed by them. FIR is an essential document in our nations criminal justice system.

10. The Hon'ble Apex Court has already made it clear that the police authorities must register an FIR upon receiving complaint in *Lalita Kumari vs. State of U.P. and others*. The police authorities are required to carry out such application moved U/s 156(3) CrPC. The magistrate is not merely a simple office just to register the case without applying his judicial mind. He must believe that there is justification for the police to register the case and conduct an investigation. The police as well as magistrate is permitted to look into the offence without FIR whether any cognizable offence is made out or not. Before passing an order for registering the FIR, the court has to see at the very outset whether a cognizable offence is made out.

11. From the perusal of the application U/s 156(3) CrPC, however, it is said that the injured was beaten badly by opposite party no.2, but the medico legal examination available on record reveals that the three injuries were found on the body of the injured, which are as follows:

"(i) Contusion swelling of 3.0 cmx2.0 cm on right side of the head 3 cm above from the right ear;

(ii) Contusion of 4.0 cm x 3.0 cm on left side of lower abdomen 1 cm away from umbilicus;

(iii) Scabbed abrasion 3cm x 2cm on left side of buttock."

12. All the injuries are simple in nature. It does not disclose any cognizable offence in the Indian Penal Code. So far as the provisions of SC/ST Act are concerned, it is to be read in the light of substantive offence.

13. In *Hari Singh vs. State of U.P. (2006) SCC*, it was decided that the complainant may move a complaint before the magistrate having jurisdiction to take cognizance, if the police fails to investigate the incident. The law does not allow the magistrate to order an investigation U/s 156(3) CrPC, magistrate is required to enquiry in the complaint as provided in Chapter XIV of the Code before taking cognizance U/s 190, 200 and 204 CrPC. During the pre-cognizance phase, if a person is aggrieved that his FIR is not registered U/s 154 CrPC and a proper investigation has not been made by the officer-in-charge of the concerned police station, such aggrieved person can approach the Superintendent of Police or other police officer superior in rank to the officer-in-charge of the police station U/s 154(3) CrPC by an application in writing. Even if that does not find any satisfactory result in the same, the FIR is not registered or even after it registering the FIR, proper investigation is not made, it is open for aggrieved person to file an application under Section 156(3) CrPC before magistrate. If such application is filed, then magistrate may order for registration of FIR and proper investigation. In *Mohd Yousuf vs. Smt. Afaq Jahan and Anr* 2006 (1) SCC 10 and *Dilawar Singh vs. State of Delhi* 2007 (10) SCC 585, the Hon'ble Apex Court took similar view.

14. The Hon'ble Apex Court affirmed the Sakiri Vasu ruling in case of *M. Subramaniam and Others v. S. Janaki*

and Others (2020) SCC, citing an earlier decision in *Sudhir Bhaskarrao Tambe v. Hemant Yashwant Dhage and Others (2010) SCC*. The remedy for aggrieved party is to approach the concerned Magistrate U/s 156(3) CrPC, if they have grievance with the police have not registered the FIR U/s 154 of the CrPC and envisages that if the police refused to register the FIR and after registering the FIR did not conduct the investigation properly, the informant has a right to move an application before the S.P.. when the victim requested U/s 156(3) CrPC, they must follow all the steps provided in Section 154(1) and 154(2) of the CrPC.

15. From the above discussion, it is evident that no cognizance offence is made out on the basis of the contents disclosed in application moved U/s 156(3) CrPC and medical report. The contents regarding SC/ST Act are to be read in the light of substantive offence. The informant has equally efficacious remedy to file a complaint before the magistrate having jurisdiction to try the case. The Supreme Court discussed the above mentioned provisions of law in its judgements very well. Hence, the order of the trial court suffers with no illegality, irregularity or perversity. To file an appeal without adopting due procedure is the misuse of process of law.

16. In the light of the above discussions, the appeal is hereby *dismissed*.

(2023) 8 ILRA 1321

**REVISIONAL JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 07.07.2023

BEFORE

**THE HON'BLE RAM MANOHAR NARAYAN
MISHRA, J.**

Criminal Revision No. 412 of 2023

Surendra Prajapati ...Revisionist
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Revisionist:
Sri Anil Kumar Prajapati

Counsel for the Respondents:
G.A.

(A) Criminal Law - Revision - The Code of Criminal Procedure, 1973 - Section 125 - maintenance - amount of permanent alimony awarded to the wife must be befitting the status of the parties and the capacity of the spouse to pay maintenance - Maintenance is always dependent on the factual situation of the case - court would be justified in moulding the claim for maintenance passed on various factors. (Para -8)

Court awarded Rs. 4,000/- pm for maintenance - to wife of revisionist - based on reasonable cause - no evidence of an independent source of earning of wife - finding of court below based on record and factual evidence - wife of revisionist residing separately from her husband due to reasonable cause - divorce petition filed by wife (respondent no. 4) against her husband (revisionist) - cannot be considered a presumption of alleged separation without sufficient cause. **(Para -10)**

HELD:- No significant legal or factual error in the order passed . Due to revisionist's unproven income as a white washer and painter, and his responsibility to maintain himself and care for family members, there is a need to reduce the maintenance liable amount. Court placed revisionist's reliance on daily-wage labor at Rs. 200/- to 250/- per day. Family court's judgment modified from Rs. 4,000/- to Rs. 3,000/- per month, with existing maintenance payments adjusted accordingly. Respondent no. 2 can apply for modified amount if they can prove they earn more monthly through private work than the revisionist's evidence. **(Para -11,12)**

Revision disposed of. (E-7)

List of Cases cited:-

1. Bheekha Ram Vs Goma Devi & ors., 1999 Cri LJ 1789
2. Kalyan Dev Chawdhury Vs Rita Dey Chowdhury Nee Nandy , Civil Appeal No. 5369 of 2017
3. Dr. Kulbhushan Kumar Vs Raj Kumari & anr., (1970) 3 SCC 129

(Delivered by Hon'ble Ram Manohar
Narayan Mishra, J.)

1. The present revision is directed against the judgement and order dated 16.9.2022 passed by Principal Judge, Family Court, Lalitpur in Misc. Case No. 10/2020 (Smt. Ramdevi @ Mohini vs. Surendra Prajapati), under Section 125 Cr.P.C., P.S. Bar, District Lalitpur whereby revisionist has been directed to pay Rs. 4,000/- per month as maintenance to his wife- respondent no. 2 from the date of judgement.

2. Notice has been served upon the respondent no. 2 as per the report of the C.J.M., concerned, but none appeared to press this revision on behalf of the respondent no. 2.

3. Heard learned counsel for the revisionist and learned AGA for the State.

4. Brief facts of the case are that respondent no. 2 filed an application for maintenance against her husband under Section 125 Cr.P.C. with averments that her marriage with opposite party was solemnized on 19.4.2014 according to Hindu rites and rituals; her parents had given cash and gifts as per their economic status but her husband and in-laws were not satisfied with the dowry given in her marriage and started demanding of Rs. 02

lakhs as an additional dowry and on non fulfillment they began practicing physical and mental cruelty against her. Before filing of petition u/s 125 Cr.P.C., she was turned out from her matrimonial home by her husband and in-laws with threatening that if she came back without dowry she will be turned out. On 1.1.2020 at 12:00 hours when the respondent no. 2- applicant was in her parental home, her husband and in-laws came to her place and stated that if she could not fulfill their demand of dowry, their marital relation would be dissolved and when she declined to fulfill their demand, they abused and gave beating to her by kicks and fits and therefore, she claimed for maintenance as the revisionist is having two acre agricultural land and he works as painter in big buildings on contract from which he earns Rs. 50,000/- per month.

5. Learned court below after considering the pleadings of the parties and evidence recorded in maintenance case, gave finding that it is admitted fact that applicant and opposite party are wife and husband; applicant is residing at her parental home for six years and in that period she never came back to her matrimonial home; divorce proceedings are underway between the parties, therefore, it is natural that probability of their re-union is bleak and thus she has been left with no other option but to live separately from her husband, therefore it was held that applicant was residing separately from opposite party due to reasonable cause, learned court below has also found that according to version of opposite party, he works as a labourer and earns Rs. 200-250/- per day and therefore he has sufficient income to maintain the applicant. After recording these findings the court below awarded Rs. 4,000/- per month as

maintenance from the date of judgement. Feeling aggrieved by the said order the present revision has been filed by the revisionist- opposite party.

6. Learned counsel for the revisionist submitted that the court below has acted in illegal manner and committed irregularity while passing the impugned order; there are manifest error of law apparent on the face of record in the judgement. On the basis of material on record it is apparent that respondent no. 2 has been residing separately from the revisionist without any reasonable cause and out of free will, therefore, the revisionist is not obliged to maintain her. He next submitted that revisionist is a person of meager economic sources and he works as a daily-wage labourer and earns a little amount therefore he is not in a position to pay Rs. 4,000/- per month as maintenance to the respondent no. 2. He also maintains his brother who remained sick for long time as well as his parents by his own meager wages and as the respondent no. 2 had also filed an application under the Domestic Violence Act against the revisionist which was dismissed in default by the court concerned and in that proceedings revisionist has given undertaking before the court to keep his wife with him and court had also directed the respondent no. 2 to accompany her husband at her matrimonial home but she did not comply with the order of the court. Inasmuch as the respondent no. 2 had filed application before the family conciliation centre wherein she stated that she is willing to seek divorce from her husband and she is not willing to reside with him; the divorce petition has been filed by the respondent no. 2 and not by the revisionist himself, therefore, conduct of the respondent no. 2 also shows that

she is not eligible to get any maintenance in the proceedings u/s 125 Cr.P.C.

7. Learned counsel for the revisionist placed reliance on the judgement of Rajasthan High Court in **Bheekha Ram vs. Goma Devi and others, 1999 Cri LJ 1789** wherein the Court observed in para 8 and 9, which is as under:-

8. The right to be maintained by the husband stems from performance of marital duty. It is only when the Court inter alia comes to the finding that the wife claiming maintenance had been prevented from performing the marital duty by the husband that she could be awarded maintenance. When it is found that the wife declines to live with husband without any just cause and there is no evidence of ill-treatment by the husband, wife is not entitled to maintenance. In the instant case, it is noticed that the husband even sent a registered notice to the wife asking her to stay with him but she refused to accept the notice.

9. As already pointed out, in the revisional jurisdiction, the Court cannot be justified in reappraising the evidence and come to its own conclusion when it is not shown that the Magistrate had omitted to consider some vital evidence or had misread the evidence. The learned Addl. Sessions Judge has, obviously exceeded his jurisdiction in reversing the finding of fact recorded by the Magistrate, without cogent reasons. Goma Devi has not been able to establish that she had been neglected by her husband. As a matter of fact she is living with her parents of her own accord. She is, therefore, not entitled for maintenance allowance for herself. However, she is

entitled to maintenance allowance for her two kids who are living with her. Bheekha Ram, has not come out with the case that he was giving maintenance allowance to Goma Devi for the children. It is no fault of the children when they are living with their mother. The father is bound to provide maintenance to them.

8. Learned counsel for the revisionist cited the judgement of Hon'ble Apex court with regard to quantum of amount of maintenance in **Kalyan Dev Chawdhury vs. Rita Dey Chowdhury Nee Nandy** in Civil Appeal No. 5369 of 2017 filed against the judgement of High Court of Calcutta on application under Section 25(2) of Hindu Marriage Act whereby amount of maintenance was reduced to Rs. 23,000/- from Rs. 20,000/-. The Hon'ble Apex Court has placed reliance on **Dr. Kulbhushan Kumar vs. Raj Kumari and another (1970) 3 SCC 129** wherein it is held 25% of the husband's net salary would be just and proper to be awarded as maintenance to the respondent wife. The amount of permanent alimony awarded to the wife must be befitting the status of the parties and the capacity of the spouse to pay maintenance. Maintenance is always dependent on the factual situation of the case and the court would be justified in moulding the claim for maintenance passed on various factors.Cr.P.C.

9. Per contra, learned AGA submitted that respondent no. 2 has stated in petition u/s 125 Cr.P.C. that she was subjected to cruelty by her husband and in-laws due to non fulfillment of additional demand of dowry and she was ultimately turned out from her matrimonial home, therefore, she has valid reason to leave her matrimonial home and lives separately from her husband. Learned AGA also submitted that

statement allegedly given by the respondent no. 2 pertains to the year 2017 before the family conciliation centre whereas in divorce petition, petitioner has stated in para-2 that she was turned out from her matrimonial home in January, 2019 after keeping her stridhan. She had declined the alleged statement given before the family conciliation centre in her evidence and said statement is not duly proved.

10. In present case, amount of maintenance awarded by learned court below is Rs. 4,000/- per month for maintenance to respondent no. 2, who is wife of revisionist. The said amount is not exorbitant or in any manner unreasonable; there is no material or evidence on record to the effect that respondent no. 2 is having independent source of earning; finding of the court below that applicant, who is respondent no. 2 in present criminal revision, is residing separately with her husband due to reasonable cause; this finding is based on material on record and finding of fact which does not call for any interference in present revision; this is admitted fact that a divorce petition has been filed by the respondent no. 2 against the revisionist even the fact that divorce petition is filed by the respondent no. 2-applicant before the court below, cannot be treated as presumption of alleged fact that she was residing separately from her husband without any sufficient cause.

11. Thus, I find no substantial legal or factual error in the impugned order passed by the learned family court in present case. However, keeping in view the fact that income of the revisionist has not been specifically proved on record and this fact has been brought on record that he works as a white washer and painter of houses and he is supposed to maintain himself and he has to take care of family members; there is

need that the amount of maintenance liable to be reduced to some extent as is stated that he earns around Rs. 200/- to 250/- per day as a daily-wage labour and reliance is placed thereby court below.

12. Consequently, the amount of maintenance awarded in the impugned judgement and order of family court is modified from Rs. 4,000/- to Rs. 3,000/- per month subject to same terms and conditions as specified in the impugned order. Any amount towards maintenance already paid, shall be adjusted in accordance with modified amount of maintenance in present judgement. However, it is open to respondent no. 2 to file an application for alteration of amount of maintenance awarded by the court below, which is modified by this order. If she finds any material in support of the fact that he earns more monthly amount through his private work that what is stated by the revisionist before court below in his evidence.

13. The present revision stands disposed of with above observations.

(2023) 8 ILRA 1325
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.07.2023

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Election Petition No. 3 of 2022

Shailendra Yadav Lalai **...Petitioner**
Versus
Ramesh & Ors. **...Respondents**

Counsel for the Petitioner:

In Person, Sri Saroj Kumar Yadav, Sri Shailendra Yadav Lalai (In Person), Sri Anil Sharma (Sr. Advocate)

Counsel for the Respondents:

Sri Dhirendra Kumar Srivastava, Sri Akhilesh Misra, Sri Amar Bahadur Singh, Sri Babu Lal Ram, Sri Dharmendra Kumar Singh, Sri Kamlesh Kumar Rajbhar, Sri Lalita Prasad, Sri Udayan Nandan, Sri Shashi Nandan (Sr. Adv.)

Civil Law- Code of Civil Procedure-1908-Order 7 - Rule 11 -The Representation of the People Act, 1951-Section 86(1)- Material facts and particulars have been pleaded in the election petition challenging the election on the ground of improper acceptance of the nomination paper of respondent no.1 disclosing a cause of action and a triable issue under Section 100 (1)(d)(i) of the R.P. Act, 1951 that the election of respondent no.1 is vitiated by improper acceptance of nomination form. Hence, there is compliance with Section 83(1)(a) & (b) of the R.P. Act, 1951, therefore, both the applications, i.e., Applications under Order 7 Rule 11 of C.P.C. & Application under Section 86(1) of the Representation of Peoples' Act are dismissed.

Application dismissed. (E-15)

List of Cases cited:

1. Azhar Hussain Vs Rajiv Gandhi, AIR 1986 SC 1253
2. Anil Vasudev Salgaonkar Vs Naresh Kushali Shigaonkar (2009) 9 SCC 310
3. Virendra Nath Gautam Vs Satpal Singh & ors. AIR 2007 SC 581
4. Harkirat Singh Vs Amrinder Singh (2005) 13 SCC 511
5. Manani Lal Mandal Vs Bishnu Deo Bhandari (2012) 3 SCC 314
6. Rajendra Kumar Meshram Vs Vanshmani Prasad Verma & anr.(2016) 10 SCC 715
7. Kisan Shankar Katohore Vs Arun Dattatray Sawant & ors. (2014) 14 SCC 162.
8. Resurgence India Vs Election Commission of India & anr.(2014) 14 SCC 189

9. Durai Muthuswami Vs N. Nachiappan & ors. (1973) 2 SCC 45

10. Madiraju Venkata Ramana Raju Vs Peddireddigari Ramchandra Reddy & ors. (2018) 14 SCC 1

11. Mairembam Prithviraj @ Prithviraj Singh Vs Pukhrem Sharatchandra Singh (2017) 2 SCC 487

12. V.Narayanaswamy Vs C.P. Thirunavukkarasu (2000) 2 SCC 294

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

**Order on Civil Misc. Application
No.6 of 2022, under Order VII Rule 11 of
C.P.C.**

&

**Order on Civil Misc. Application
No.7 of 2022, under Section 86 (1) of The
Representation of People Act, 1951)**

1. Heard Sri Shashi Nandan, learned Senior Advocate, assisted by Sri Udayan Nandan, learned counsel for the respondent no.1/applicant, and Sri Anil Kumar Sharma, learned counsel for the election-petitioner assisted by Sri Saroj Kumar Yadav, Advocate.

2. The respondent no.1-Ramesh, who is the successful candidate in the election of the Assembly Constituency No.365, Shahganj, District Jaunpur, seeks summary dismissal of the election petition instituted by the election-petitioner by filing two applications; Civil Misc. Application No.6 of 2022 under Order 7 Rule 11 of C.P.C., (ii) Civil Misc. Application No.7 of 2022 under Section 86(1) of the Representation of the People Act, 1951.

3. The Election Commission issued a Notification under Section 15 of the Representation of People Act, 1951 (in

short 'R.P. Act, 1951') on 14.01.2022 to constitute a new Legislative Assembly of Uttar Pradesh. The election of Assembly Constituency No.365, Shahganj, District Jaunpur was scheduled under the 7th phase of the election. Details of the election programme as notified are given herein-below:-

Starting day of Nomination	10.02.2022
Last date of Nomination	17.02.2022
Scrutiny of Nomination papers	18.02.2022
Last date of withdrawal of candidature	21.02.2022
Date of Polls	07.03.2022
Counting and Declaration of Result	10.03.2022

4. In the said election, the election petitioner along with twelve other candidates was in the contest for the member of the Legislative Assembly in respect to Constituency No.365, Shahganj, District Jaunpur. The election-petitioner filed his nomination paper as a candidate of Samajwadi Party (S.P.) under the symbol 'Bicycle' and respondent no.1 filed his nomination from Nirbal Indian Shoshit Hamara Aam Dal Party, popularly known as 'Nishad Party'. Respondent No. 1 was declared elected candidate by a margin of 719 votes.

5. The election of respondent no.1 has been challenged by the election petitioner primarily on the ground under Section 100 (1) (d) (i) & 100 (1) (d) (iv) of the R.P. Act, 1951. The Election Petitioner has set out the following grounds in the Election Petition to challenge the election of respondent no.1:

"(i) Because, the result of the election so far as it concern to respondent no.1 (returned candidate) has been materially affected by none compliance of provisions of Constitution of India, Representation of People Act, 1951 and Conduct of Election Rule, 1961 and order issued under Representation of People Act, 1951 and the orders, Sections and guidelines issued by Election Commission of India from time to time in exercise of its power confirmed by the Constitution.

(ii) Because, the result of election has been materially affected so far as, it concern to the respondent no.1 as Returning Officer and Assistant Returning Officer acted in contravention of Part-III of Conduct of Election Rules, 1961 and Rule 54-A of Conduct of Election Rules, 1961, and the orders, guidelines and instruction issued by Election Commission of India from time to time contained in Hand Book for the Returning Officer.

(iii) Because, the result of election has been materially affected as the respondent no. 1 illegally been allowed to participate in the election proceedings and his nomination were held valid contrary to legal preposition.

(iv) Because, the respondent no.1 has committed illegality and adopted corrupt practice by making concealment and material suppression of facts and wrongly disclosed criminal antecedent.

(v) Because, the respondent no.1 and his agents influenced the voters and bribed them by offering and providing money, sari and liquor, regarding which a voter namely Ramesh Sonker lodged a first information report no. 65 of 2022 in Police Station-Shahganj, District Jaunpur on

06.03.2022, under Sections 323, 504, 506, 188, 3 (2) (Va) of SC/ST Act, 1989 (Amendment Act, 2015).

(vi) Because, the election of returned candidate Ramesh from Constituency No.365 Shahganj is illegal and void due to committing corrupt practice, bribing the voters, influencing the electoral machinery and committing fraud while disclosing the criminal antecedent and financial strength as well as movable and immovable assets."

6. In respect of the aforesaid grounds, the material facts have been stated in the election petition from paragraph no.16 onwards.

7. Respondent no.1 has filed an application under Section 86(1) of the R.P. Act, 1951 urging that the election petitioner has not provided a concise statement of material facts on which he relies, therefore, the election petition does not comply with the provision of Section 83 of R.P. Act, 1951. It further stated that the election of respondent no.1 has been challenged by the election petitioner on the ground of corrupt practices alleged to have been committed by respondent no.1, and his agents during the election. However, the election petition does not contain a concise statement of material facts containing full particulars of any corrupt practices alleged to have been committed during the election. It is further stated that the election petition does not contain a full statement regarding names of persons alleged to have committed corrupt practices and the date and place of commission of each corrupt practice in accordance with the provisions of Section 83 (1)(a) & (b) of the R.P. Act, 1951. It is also stated that the election petitioner failed to file an affidavit in the prescribed format

in support of the allegation of such corrupt practices and particulars thereof, and thus, has failed to comply with the proviso to Section 83(1) of the R.P. Act, 1951.

8. It is further stated that the election of respondent no.1 has been assailed on the ground of improper acceptance of the nomination form of respondent no.1, but the election petition lacks any detail demonstrating the effect on the result of the election by improper acceptance of nomination form of the respondent no.1 nor it contains a concise statement of material fact that the improper acceptance of nomination form of respondent no.1 has materially affected the result of the election so far as it concerns the respondent no.1.

9. It is further stated that the election petitioner alleged the discrepancy in the counting of votes in paragraphs nos. 26 to 35 of the election petition, but these paragraphs do not contain a concise statement of material facts. It is also stated that there is no allegation of manipulation with the EVM and votes polled and recorded in the elections, and thus, the allegation of wrong counting of votes is not supported by any material fact. Respondent no.1 has sought summary dismissal of the election petition for non-compliance of Section 81(1), 81(3), 83(1)(a) & (b) and the proviso to Section 83(1) of the R.P. Act, 1951.

10. In the application under Order 7 Rule 11 of the C.P.C., it is alleged that since the election petition lacks material facts containing full particulars of any corrupt practice, therefore, the election petition does not disclose a cause of action and is liable to be rejected under Order 7 Rule 11(1) of C.P.C.

11. The election petitioner filed objections to both the applications

contending inter-alia that the election petition has been filed in accordance with the provision of Section 83 of the R.P. Act, 1951 and contains all material facts with full particulars which are necessary to constitute a cause of action, and as such, the applications filed by the election-petitioner are misconceived.

12. Sri Shashi Nandan, learned Senior Counsel for the respondent no.1/applicant in support of the aforesaid two applications has submitted that the election petition lacks a concise statement of material facts containing full particulars of corrupt practices including the names of persons, date, time, and place in support of allegations made in the election petition in support of grounds on which election of respondent no.1 has been assailed.

13. It is further submitted that it is evident from the pleadings in the election petition that it is bereft of the concise statement of material facts on which the election petitioner relies and also full particulars of corrupt practices including as full statement as possible of the name of the parties alleged to have committed such corrupt practice, the date and place of commission of such corrupt practice, the election petition is liable to be dismissed under Section 86(1) of the R.P. Act, 1951 for non-compliance of Section 83(1)(a) & (b) of the R.P. Act.

14. He further contends that proviso to Section 83(1) of the R.P. Act contemplates that where the petitioner alleges any corrupt practice, the election petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and particulars thereof. He submits that the affidavit as contemplated under the proviso

to Section 83(1) of the R.P. Act, 1951 is not enclosed with the election petition, therefore, the election petition deserves to be dismissed summarily for non-compliance with the proviso to Section 83(1) of the R.P. Act, 1951.

15. He submits that the petitioner in order to succeed in challenging the election of respondent no.1 on the ground of improper acceptance of the nomination form has not only to establish that the nomination form of respondent no.1 has been improperly accepted, but he has also to prove that the improper acceptance of nomination form of the respondent no.1 has materially affected the result of election insofar as it concerns the respondent no.1. He submits that the election petitioner has not pleaded as to how the result of the election insofar as it concerns the election of respondent no.1 has been materially affected by the improper acceptance of nomination form of the respondent no.1. It is further submitted that the election of the respondent no.1 has been challenged on the ground of wrong counting of votes, but the pleading in support of such ground also lack material facts and material particulars.

16. He lastly urged that the election petition lacks material facts and particulars with respect to the allegation that Form-20 has been prepared illegally. It is also urged that from perusal of the documents enclosed as Schedule 13 read with the allegations made in paragraphs nos.31 and 32 of the election petition, it is clear that the election petitioner has admitted that he has obtained 82,542 votes and the respondent no.1 has obtained 84,947 votes, therefore, on the own admission of election petitioner, he has lost the election by 2405 votes. Therefore, the margin of votes by which respondent no.1 won the election

implies that the result of the election had not been materially affected. It is submitted that as the election petition does not comply with the provision of Section 83 (1) (a) & (b) and proviso to Section 83(1) of the Act, 1951, and further it does not disclose the cause of action and being barred by the provision of Section 83 read with Section 86 of the R.P. Act, 1951, therefore, the election petition deserves to be rejected summarily.

17. Per contra, Sri Anil Sharma, learned Senior Counsel submits that there is compliance with Section 83(1)(a) & (b) of the R.P. Act, 1951. It is submitted that the pleadings in the election petition have to be read as a whole and not in piecemeal. He submits that all primary and material facts necessary to disclose a cause of action have been stated in the Election Petition. He further submits that the concise statement of material facts containing full particulars as contemplated under Section 83(1)(a) & (b) of the R.P. Act, 1951 has been stated in the election petition in support of each grounds on which the election of respondent no.1 has been assailed by the election petitioner. Thus, there is compliance with Section 83(1)(a) & (b) of the R.P. Act, 1951. He submits that the nomination paper of respondent no.1 has been improperly accepted on account of suppression of material facts inasmuch as respondent no.1 has suppressed his criminal antecedents and has also not disclosed details of the property and the income tax, and since the suppression of facts is of substantial in nature, therefore, the nomination form of the respondent no.1 has been improperly accepted by the Returning Officer. Accordingly, it is submitted that the improper acceptance of the nomination paper of respondent no.1 has obviously materially affected the result

of the election so far as it concerns respondent no.1 for the reason that if the nomination form of respondent no.1 had not been improperly accepted, he could not have contested the election. Accordingly, he submits that the two applications filed by respondent no.1 seeking summary dismissal of the election petition are liable to be rejected.

18. The judgments relied upon by both the learned counsel for the parties shall be referred to an appropriate place.

19. I have considered the rival submissions advanced by the learned counsels for the parties and perused the record.

20. The application under Section 86(1) of the R.P. Act, 1951 has been filed by respondent no.1 alleging non-compliance with Section 83(1)(a) & (b) and proviso to Section 83(1) of the R.P. Act, 1951. Section 83 of the R.P. Act, 1951 reads as under:-

"83. Contents of petition.—(1)
An election petition—

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908

(5 of 1908) for the verification of pleadings:

[Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.]

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition]. "

21. In other words, the election petition should not only contain the concise statement of material facts on which the election petitioner relies, but shall set forth full particulars of any corrupt practice alleged by the election petitioner including as full statement as possible of the names of the parties alleged to have committed such corrupt practices, and the date and place of the commission of each such corrupt practice, duly signed by the petitioner and verified in the manner prescribed under the C.P.C. in the verification of pleadings in the light of Section 83 of the R.P. Act, 1951.

22. Now, it is to be seen whether the election petition complies with the mandate of Section 83(1)(a) & (b) and proviso to Section 83(1) of the R.P. Act, 1951.

23 . In the case of **Azhar Hussain Vs. Rajiv Gandhi, AIR 1986 SC 1253**, the Apex Court has elaborated what exactly is the essence of expression 'material facts and particulars' which the election petitioner shall incorporate to meet the requirement of Section 83(1)(a) & (b) of the R.P. Act, 1951. Paragraph no.14 of the said judgment is reproduced herein-below:-

"14. Before we deal with these grounds *seriatim*, we consider it appropriate to restate the settled position of law as it emerges from the numerous decisions of this Court which have been cited before us in regard to the question as to what exactly is the content of the expression 'material facts and particulars', which the election petitioner shall incorporate in his petition by virtue of Section 83(1) of the Act.

(1) What are material facts and particulars ?

Material facts are facts which if established would give the petitioner the relief asked for. The test required to be answered is whether the Court could have given a direct verdict in favour of the election petitioner in case the returned candidate had not appeared to oppose the election petition on the basis of the facts pleaded in the petition. (1969) 3 SCR 217: (AIR 1969 SC 734) Manubhai Nandlal Amarsey v. Popatlal Manilal Joshi.

(2) In regard to the alleged corrupt practice pertaining to the assistance obtained from a Government servant, the following facts are essential to clothe the petition with a cause of action which will call for an answer from the returned candidate and must therefore be pleaded. (1972) 2 SCR 742: (AIR 1972 SC 515) Hardwari Lal v. Kanwal Singh,

a) mode of assistance;

b) measure of assistance; and

c) all various forms of facts pertaining to the assistance.

(3) In the context of an allegation as regards procuring, obtaining, abetting

or attempting to obtain or procure the assistance of Government servants in election it is absolutely essential to plead the following :

(a) kind or form of assistance obtained or procured;

(b) in what manner the assistance was obtained or procured or attempted to be obtained or procured by the election-candidate for promoting the prospects of his election (AIR 1972 SC 515).

(4) The returned candidate must be told as to what assistance he was supposed to have sought, the type of assistance, the manner of assistance, the time of assistance, the persons from whom the actual and specific assistance was procured (AIR 1972 SC 515).

(5) There must also be a statement in the election petition describing the manner in which the prospects of the election was furthered and the way in which the assistance was rendered (AIR 1972 SC 515) (*supra*).

(6) The election petitioner must state with exactness the time of assistance, the manner of assistance, the persons from whom assistance was obtained or procured, the time and date of the same, all these will have to be set out in the particulars (AIR 1972 SC 515) (*supra*)."

24. Reference may also be had to the judgment in the case of **Anil Vasudev Salgaonkar Vs. Naresh Kushali Shigaonkar (2009) 9 SCC 310**, wherein it is held that the election petition can be summarily rejected in the exercise of power under the Code of Civil Procedure if the mandatory requirement enjoined by Section

83 of the R.P. Act, 1951 to incorporate the material facts in the election petition are not complied with. In the context of the present case, paragraph nos. 57 to 59 of the said judgment is reproduced herein-below:-

"57. It is settled legal position that all "material facts" must be pleaded by the party in support of the case set up by him within the period of limitation. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact will entail dismissal of the election petition. The election petition must contain a concise statement of "material facts" on which the petitioner relies.

58. There is no definition of "material facts" either in the Representation of the People Act, 1951 nor in the Code of Civil Procedure. In a series of judgments, this Court has laid down that all facts necessary to formulate a complete cause of action should be termed as "material facts". All basic and primary facts which must be proved by a party to establish the existence of cause of action or defence are material facts. "Material facts" in other words mean the entire bundle of facts which would constitute a complete cause of action. This Court in *Harkirat Singh v. Amrinder Singh* (2005) 13 SCC 511 tried to give various meanings of "material facts". The relevant paragraph 48 of the said judgment is reproduced as under:-

" 48. The expression 'material facts' has neither been defined in the Act nor in the Code. According to the dictionary meaning, 'material' means 'fundamental', 'vital', 'basic', 'cardinal',

'central', 'crucial', 'decisive', 'essential', 'pivotal', 'indispensable', 'elementary' or 'primary'. [Burton's Legal Thesaurus, (Third Edn.),p.349]. The phrase 'material facts', therefore, may be said to be those facts upon which a party relies for its claim or defence. In other words, 'material facts' are facts upon which the plaintiff's cause of action or the defendant's defence depends. What particulars could be said to be 'material facts' would depend upon the facts of each case and no rule of universal application can be laid down. It is, however, absolutely essential that all basic and primary facts which must be proved at the trial by the party to establish the existence of a cause of action or defence are material facts and must be stated in the pleading by the party."

59. In the context of a charge of corrupt practice, "material facts" would mean all basic facts constituting the ingredients of the particular corrupt practice alleged, which the petitioner (the respondent herein) is bound to substantiate before he can succeed on that charge. It is also well-settled that if "material facts" are missing they cannot be supplied after expiry of period of limitation for filing the election petition and the pleading becomes deficient."

25. The two judgments, namely, ***Virendra Nath Gautam Vs. Satpal Singh and Others*** AIR 2007 SC 581 & ***Harkirat Singh Vs. Amrinder Singh*** (2005) 13 SCC 511 relied upon by the learned counsel for the election petitioner also reiterates what constitutes the 'material facts' and 'particulars' and the distinction between the 'material facts' and 'particulars'. Paragraph nos.33 & 34 of the judgment of **Virendra Nath Gautam (supra)** is reproduced herein below:-

"33. A distinction between 'material facts' and 'particulars', however, must not be overlooked. 'Material facts' are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence. 'Particulars', on the other hand, are details in support of material facts pleaded by the party. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. 'Particulars' thus ensure conduct of fair trial and would not take the opposite party by surprise.

34. All 'material facts' must be pleaded by the party in support of the case set up by him. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit or petition. Particulars, on the other hand, are the details of the case which is in the nature of evidence a party would be leading at the time of trial."

26. In the case of **Harkirat Singh (supra)**, the Apex Court again reiterated the distinction between the 'material facts' and 'material particulars'. Paragraph nos. 51 and 52 of the said judgment is reproduced herein-below:-

"51. A distinction between 'material facts' and 'particulars', however, must not be overlooked. 'Material facts' are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence. 'Particulars', on the other hand, are details in support of

material facts pleaded by the party. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. 'Particulars' thus ensure conduct of fair trial and would not take the opposite party by surprise.

52. All "material facts" must be pleaded by the party in support of the case set up by him. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit or petition. Particulars, on the other hand, are the details of the case which is in the nature of evidence a party would be leading at the time of trial."

27. The object of conferring the power upon the Court to summary dismissal of the election petition if it lacks material fact and does not disclose a cause of action is to ensure that litigation which is meaningless and bound to prove abortive should not consume the precious time of the Court and save the respondents from harassment and to relieve him of the psychological burden of litigation so as to be free to follow their ordinary pursuits and discharge their duties. It is obvious that if the sword of Damocles of election petition keeps hanging on an elected member of the legislature, he would not feel sufficiently free to devote his wholehearted attention to matters of public importance that need his attention for the betterment of the people of the constituency for which he has been an elected representative.

28. The aforesaid judgments have emphasized that the 'material facts' are primary or basic facts which must be

pleaded by the petitioner or by the respondent in support of the case set up by him either to prove his cause of action or defence. The particulars on the other hand are details in support of material facts pleaded by the party. All the 'material facts' must be pleaded by the party in support of the case set up by him since the object and purpose of pleading is to enable the opposite party to know the case he has to meet, failure to state even a single material fact will entail dismissal of the Election Petition. The material facts would include a positive statement of facts as also a positive averment of a negative fact.

29. It is also pertinent to note that the failure to plead material facts is fatal to the election petition, and no amendment of pleading to incorporate such material facts can be allowed after the limitation for filing the election petition expires. To reject an election petition summarily on the ground that it does not disclose a cause of action, the Court is obliged to look at the pleadings in the election petition and nothing else.

30. Now, in the light of the aforesaid principles explaining the object why the compliance of Section 83(1)(a) & (b) of the R.P. Act, 1951 is mandatory, the Court proceeds to analyse the respective arguments of the parties to find out whether the election petition complies with the requirement of Section 83(1)(a) & (b) and proviso to Section 83 and whether it discloses a cause of action or not.

31. The first ground of challenge to the election of respondent no.1 is that the election has been conducted on the basis of a revised anti-dated electoral roll dated 17.02.2022, from which the name of the number of voters had been removed whose names were in the electoral roll published

on 05.01.2022. In this respect, necessary averments have been made in paragraphs nos. 17 to 19 of the election petition.

32. It is stated in para-17 of the election petition that the Returning Officer of the constituency issued the electoral roll/voter list on 05.01.2022 which was available in the office of the Returning Officer and was also uploaded on the website of the Election Commission. It is further pleaded in para-18 of the election petition that the Returning Officer extended the opportunity to those eligible persons whose names were not incorporated in the electoral roll/voter list dated 05.01.2022 for asserting their claims for inclusion of their names in the electoral roll/voter list for the purpose of polling on 07.03.2022. It is further stated that though the opportunity for addition in the names is permitted, the names cannot be deleted from the final electoral roll published on 05.01.2022. It is further stated that the election petitioner filed the documents relating to about 25,000 residents whose names were not in the electoral roll/voter list published on 05.01.2022 for adding their names to the electoral roll. The authorities sat tight over the matter, and on 04.03.2022 ante dated revised electoral roll/voter list dated 17.02.2022 was made available to the election agents of the election-petitioner.

33. The election petitioner in para-19 of the election petition further states that Booth Level Officer known as 'BLO' distributed voter information slip (BLO parchi) to the electors/voters of the aforesaid constituency. Those voters on the date of polling on 07.03.2022 reached the polling center for casting their votes, but they were not allowed to cast their votes on the ground that their names were not on the electoral roll/voter list. The election

petitioner in this respect has given details of 113 voters in paragraph no.19 of the election petition.

34. It is submitted by Sri Shashi Nandan, learned Senior Counsel for respondent no.1 that the averments contained in paragraphs nos. 17 to 19 of the election petition are vague and do not state material facts. It is submitted that a vague statement in para-18 of the election petition has been made that the election- petitioner filed documents relating to about 25,000 residents of the constituency whose names did not find place in the electoral roll/voter list published on 05.01.2022 for adding their names in the elector list/voter list. It is submitted that neither the names of the persons nor any material supporting the fact that they were residents of the constituency have been pleaded in the election petition, and thus, the said averments are not sufficient to make out a cause of action. He further submits that it is stated in para-19 of the election petition that BLO has distributed the voter slip to the electors, but the name of the BLO who distributed the voter information slip to the voters has not been stated. He further submits that the election petitioner has stated the names of only 113 persons in para-19 of the election petition who were not allowed to cast their votes as their names did not find mentioned in the electoral roll/voter list. He submits that even if the allegation that 113 persons were not allowed to cast their votes is correct, that would not materially affect the election, since admittedly, respondent no.1 has won the election by 719 votes.

35. It is argued by Sri Anil Sharma, learned Senior Counsel for the election petitioner that once the final electoral roll is published according to Section 14(1)(b) of

the Representation of People Act, 1950, it cannot be altered without following the procedure contemplated under Section 21 of the R.P. Act, 1950, and in the instant case, the procedure under Section 21 of the R.P. Act, 1950 has not been followed in altering the electoral roll/voter list by publishing an ante dated revised electoral roll/voter list dated 17.02.2022, therefore, the election held on the basis of said voter list is vitiated. He submits that the reading of paragraphs 17 to 19 of the election petition discloses that it contains material facts and particulars, therefore, the pleadings are complete and disclose a cause of action raising a triable issue with regard to the challenge of the election on the ground that the election was conducted by an illegal and ante- dated electoral roll, and this has materially affected the result of the election so far as it concerns the respondent no.1.

36. Perusal of paragraphs 17 to 19 of the election petition in support of the allegation that the election was held on the basis of an illegal electoral roll/voter list reveals that the pleadings in this regard are completely vague and lacks necessary material fact to constitute a cause of action raising a triable issue in the election petition on the said ground.

37. It is pertinent to note that the election petitioner has stated that he had submitted the documents relating to 25,000 residents of the constituency whose names had been left out from the electoral roll published on 05.01.2022, but names of such residents are not stated nor details of such residents have been disclosed in the election petition to demonstrate that they were residents of the constituency and were entitled to vote and non-inclusion of their names have materially affected the result of

the election. The election petitioner has not stated the name of the authority to whom the election petitioner had submitted the documents for adding the names of these 25,000 residents to the electoral roll.

38. Further, basic and primary facts with regard to the allegation that an ante dated revised electoral roll dated 17.02.2022 was made available to the election agents of the petitioner on 04.03.2022 are lacking in the election petition inasmuch as there are no averments in the election petition as to what was the illegality committed in preparing the revised electoral roll/voter list dated 17.02.2022 and what is the basis to allege that voter list dt.17.02.2022 is ante- dated. Only a vague assertion in one line has been made in paragraph no.18 of the election petition that ante dated revised voter list dated 17.02.2022 was made available to the election agent of the petitioner and officials of the election. It is also relevant to point out that there is no pleading in the election petition as to how the procedure contemplated under Section 21 of the Representation of People Act, 1950 for omitting or adding the names of the voters in the electoral roll was not followed.

39. Further, the name of the BLO who distributed the information slip (BLO parchi) to the voters has not been disclosed nor details of persons whose names have been removed/deleted from the final electoral roll/voter list published on 17.01.2022 have been stated in the election petition.

40. It is also pertinent to note that the election petitioner has disclosed the name of only 113 persons, who according to the election petitioner were not allowed to cast their votes. If the said allegation is taken to

be true, then how it materially affected the result of the election of respondent no.1 is not pleaded.

41. It is settled in law that if the election is challenged on the ground mentioned under Section 100(1)(d)(iv) of the R.P. Act, 1951, it is mandatory for the election petitioner to state that the result of the election in so far as the returned candidate is concerned, has been materially affected. In this respect, it would be apt to reproduce paragraphs nos. 10 to 12 of the judgment of the Apex Court in the case of **Manani Lal Mandal Vs. Bishnu Deo Bhandari (2012) 3 SCC 314:-**

"10. A reading of the above provision with Section 83 of the 1951 Act leaves no manner of doubt that where a returned candidate is alleged to be guilty of non-compliance of the provisions of the Constitution or the 1951 Act or any rules or orders made thereunder and his election is sought to be declared void on such ground, it is essential for the election petitioner to aver by pleading material facts that the result of the election insofar as it concerned the returned candidate has been materially affected by such breach or non-observance. If the election petition goes to trial then the election petitioner has also to prove the charge of breach or non-compliance as well as establish that the result of the election has been materially affected. It is only on the basis of such pleading and proof that the Court may be in a position to form opinion and record a finding that breach or non-compliance with the provisions of the Constitution or the 1951 Act or any rules or orders made thereunder has materially affected the result of the election before the election of the returned candidate could be declared void.

11. *A mere non-compliance or breach of the Constitution or the statutory provisions noticed above, by itself, does not result in invalidating the election of a returned candidate under Section 100(1)(d)(iv). The sine qua non for declaring the election of a returned candidate to be void on the ground under clause (iv) of Section 100(1)(d) is further proof of the fact that such breach or non-observance has resulted in materially affecting the result of the returned candidate. In other words, the violation or breach or non-observation or non-compliance with the provisions of the Constitution or the 1951 Act or the rules or the orders made thereunder, by itself, does not render the election of a returned candidate void Section 100(1)(d)(iv). For the election petitioner to succeed on such ground viz., Section 100(1)(d)(iv), he has not only to plead and prove the ground but also that the result of the election insofar as it concerned the returned candidate has been materially affected. The view that we have taken finds support from the three decisions of this Court in (1) Jabar Singh Vs. Genda Lal AIR 1964 SC 1200; (2) L.R. Shivaramagowda Vs. T.M. Chandrashekhar (1999) 1 SCC 666; & (3) Uma Ballav Rath Vs. Maheshwar Mohanty (1999) 3 SCC 357.*

12. *Although the impugned judgment runs into 30 pages, but unfortunately it does not reflect any consideration on the most vital aspect as to whether the non-disclosure of the information concerning the appellant's first wife and the dependent children born from that wedlock and their assets and liabilities has materially affected the result of the election insofar as it concerned the returned candidate. As a matter of fact, in the entire election petition there is no*

pleading at all that suppression of the information by the returned candidate in the affidavit filed along with the nomination papers with regard to his first wife and dependent children from her and non-disclosure of their assets and liabilities has materially affected the result of the election. There is no issue framed in this regard nor is there any evidence let in by the election petitioner. The High Court has also not formed any opinion on this aspect."

42. Thus, in view of the aforesaid discussion, this Court finds substance in the submission of the learned counsel for respondent no.1 that the election petition lacks material fact in respect of the allegation that the election was not conducted by a valid electoral roll/voter list.

43. Now, the next ground of attack on the election of respondent no.1 is that his nomination paper has been improperly accepted by the Returning Officer. It is averred that the Returning Officer while accepting the nomination paper of respondent no.1 overlooked the suppression of material facts about the criminal history, details of income tax return, and assets which respondent no.1 was required to submit in column-4 of Form-26. It is alleged that the necessary averments in this regard have been made in paragraphs 20 to 25 of the election petition, which is reproduced herein below:-

20. *That under the undue influence of returned candidate, the officials of the election as well as polling party extended undue favour to the returned candidate and illegally worked for winning him. Nomination papers of returned candidate i.e. respondent no.1 has*

been illegally accepted by the Returning Officer, without examining and knowingly overlooked the material concealment of the criminal history, ITRs and assets of which a details are given in following paragraphs.

21. That on form-26 the respondent no.1 as per requirement of column 4, details of last 5 financial years Income Tax Return was required to show, but deliberately he mentioned only for the FY 2021-22 and rest of the last 4 financial years have been shown zero, the same tactics has been adopted while showing his wife, daughters and son's ITRs, which comes under the material concealment and suppression of material facts.

22. That it is further submitted here that the respondent no.1 Ramesh, deliberately concealed material facts while disclosing the criminal antecedent in column 5 of Form-26 and (1) the section 34, 307 I.P.C. and 7 Criminal Law Amendment Act, under which charge sheet has been filed in Case Crime No.696 of 2017, Police Station-Khuthan, District-Jaunpur and (2) In other cases in which charge sheet have been filed, Sections are not properly described and the respondent no.1 made manipulation in the criminal antecedents but which has wrongly accepted by the Returning Officer as the respondent no.1 and Returning Officer were hand in gloves.

23. That it is submitted further that respondent no.1 has made wrong disclosure and suppressed material facts while filing the 7 (kha) of Form-26, wherein he has not disclosed the area in acre of the property purchased in Karjat and Mangaon of State of Maharashtra and further he has entered Zero in the column prescribed for giving the condition and

date of purchase of self earned property. The respondent no.1 deliberately mentioned not known in the column of date of purchase and condition of self earned property.

24. That the nomination papers presented on 16.02.2022 by the respondent no.1, reflects that he has deliberately concealed the criminal antecedent and manipulated in the details of ITRs and assets (properties) while filing Form-26 A & B as such his nomination papers was illegally accepted therefore, result of the election materially effected.

25. That is it submitted further that the wife of returned candidate namely Smt. Neelam Singh contested the election for the post of Member, Zila Panchayat Jaunpur for Ward No.16 Block Khuthan in the local body election held in the month of April/May 2021, and while filed her nomination paper, disclosing the assets regarding holdings of agricultural land, mentioned (i) Gata No.69/3/20 admeasuring 1 acre 13 gunda, (ii) Gata No.33/1/A admeasuring 3 acre 11 gunda, situate at Mangaon and Karjat Maharastra. She had disclosed deposit of Rs.54,196/- in Model Cooperative Bank and Rs.65,627/- in SBI Wasi and Rs.50,000/- cash in hand along with declaration of one Scorpio and jewellerys worth Rs.5 lakhs.

Smt. Neelam Singh also declared herself owner of Flat No.202 IInd Floor Raj Apartment, Lucknow office market value is Rs.70 lakhs and further she is owner of another Flat No.1105 in Maharastra worth Rs.50 lakhs. The respondent no.1 knowingly concealed aforesaid assets and deposit and not disclosed value of property in rupees in his

affidavit and deliberately shown Zero against the column of ITR and column of assets."

44. Learned counsel for respondent no.1 submitted that the election-petitioner in order to succeed on the ground of improper acceptance of the nomination paper of respondent no.1 has not only to prove that the Returning Officer improperly accepted the nomination paper of the respondent no.1, but also has to establish that improper acceptance of the nomination paper has materially affected the result of the election in so far as it concerns the respondent no.1. He submits that the election petition lacks pleadings to the effect that the improper acceptance of nomination paper of respondent no.1 has materially affected the result of the election in so far as it concerns the respondent no.1. Accordingly, it is submitted that in such view of the fact, the election petition is bereft of material fact in respect to the aforesaid allegation, and thus, no cause of action exists in the election petition raising the triable issue in this regard.

45. Learned Senior Counsel for respondent no.1 has sought to lay distinction between Section 100(1)(c) and Section 100(1)(d)(i) of the R.P. Act, 1951 by contending that in a case falling under Section 100(1)(c), once it is established that any nomination has been improperly rejected, the election of the returned candidate shall be declared to be void and the election-petitioner is not required to establish that improper rejection of nomination paper has materially affected the result of the election so far as it concerns the returned candidate whereas in a case falling under Section 100(1)(d)(i) of the R.P. Act, 1951, the petitioner has to plead material facts and particular that the

nomination paper of the respondent no.1 has been improperly accepted and improper acceptance of nomination paper of returned candidate has materially affected the result of the election in so far as it concerns the returned candidate.

46. In support of his aforesaid contention, he has placed reliance upon paragraphs nos.10 & 11 of the judgment of the Apex Court in the case of **Rajendra Kumar Meshram Vs. Vanshmani Prasad Verma and Another (2016) 10 SCC 715**, which is reproduced herein-below:-

"10. Under Section 100(1)(d), an election is liable to be declared void on the ground of improper acceptance of a nomination if such improper acceptance of the nomination has materially affected the result of the election. This is in distinction to what is contained in Section 100(1)(c) i.e. improper rejection of a nomination which itself is a sufficient ground for invalidating the election without any further requirement of proof of material effect of such rejection on the result of the election. The above distinction must be kept in mind. Proceeding on the said basis, we find that the High Court did not endeavor to go into the further question that would be required to be determined even if it is assumed that the appellant-returned candidate had not filed the electoral roll or a certified copy thereof and, therefore, had not complied with the mandatory provisions of Section 33(5) of the 1951 Act.

11. In other words, before setting aside the election on the above ground, the High Court ought to have carried out a further exercise, namely, to find out whether the improper acceptance of the nomination had materially affected the result of the election. This has not been

done notwithstanding Issue 6 framed which is specifically to the above effect. The High Court having failed to determine the said issue i.e. Issue 6, naturally, it was not empowered to declare the election of the appellant returned candidate as void even if we are to assume that the acceptance of the nomination of the returned candidate was improper."

47. Learned counsel for the election petitioner submits that the necessary material facts in order to establish that the nomination paper of respondent no.1 has been improperly accepted by the Returning Officer have been detailed in the election petition. It is submitted that a candidate must furnish complete details in Form-26. It is submitted that Section 33-A was inserted by the Act 72 of 2002 with effect from 24.08.2002 in R.P. Act, 1951 which requires a candidate to provide additional information apart from the information required under Section 33 (1). It is submitted that the object for providing the said information has been elaborated by the Apex Court in catena of judgments that the voter has a fundamental right under Article 19(1)(a) of the Constitution of India to know criminal antecedents, income tax return, assets, etc. of the candidate to elect the right candidate and suppression of material facts in the affidavit filed along with Form-26 would result in rejection of the nomination of the candidate. Thus, in case the nomination of a returned candidate has been improperly accepted, that would materially affect the result of the election in so far as it concerns the returned candidate inasmuch as but for improper acceptance of the nomination paper of the returned candidate, he could not have contested and elected in the election.

48. Sri Anil Sharma, learned Senior Counsel has placed reliance upon the two

judgments of the Apex Court wherein the history for inserting Section 33-A in R.P. Act, 1951 has been detailed. The first judgment is **Kisan Shankar Katohore Vs. Arun Dattatray Sawant and Others (2014) 14 SCC 162**. Paragraph no.40 of the said judgment is reproduced herein-below:-

"40. We have already reproduced above the relevant portions of judgments in Union of India Vs. Association for Democratic Reforms (2002) 5 SCC 294 and People's Union for Civil Liberties Vs. Union of India (2003) 4 SCC 399 and the guidelines issued by the Election Commission pursuant thereto. A conjoint and combined reading thereof clearly establishes that the main reason for issuing directions by this Court and guidelines by the Election Commission pursuant thereto is that the citizens have fundamental right under Article 19(1)(a) of the Constitution of India to know about the candidates contesting the elections and this is the primary reason that casts a solemn obligation on these candidates to furnish information regarding the criminal antecedents, educational qualifications and assets held by the candidate, his spouse and dependent children. It is on that basis that not only Election Commission has issued guidelines, but also prepared formats in which the affidavits are to be filed. As a fortiori, it follows that if the required information as per the said format in respect of the assets of the candidate, his wife and dependent children is not given, it would amount to suppression/non-disclosure."

49. The judgment of the Apex Court in the case of **Resurgence India Vs. Election Commission of India and Another (2014) 14 SCC 189** is also relevant in the facts of the present case.

Paragraph nos.20 to 22 of the said judgment is reproduced herein-below:

"20. Thus, this Court held that a voter has the elementary right to know full particulars of a candidate who is to represent him in the Parliament and such right to get information is universally recognized natural right flowing from the concept of democracy and is an integral part of Article 19(1)(a) of the Constitution. It was further held that the voter's speech or expression in case of election would include casting of votes, that is to say, voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is a must. Thus, in unequivocal terms, it is recognized that the citizen's right to know of the candidate who represents him in the Parliament will constitute an integral part of Article 19(1)(a) of the Constitution of India and any act, which is derogative of the fundamental rights is at the very outset ultra vires.

21. With this background, Section 33-A of the RP Act was enacted by Act 72 of 2002 with effect from 24.08.2002. Thus, the purpose of the Act 72 of 2002 was to effectuate the right contemplated in Association for Democratic Reforms (supra). However, the legislators did not incorporate all the suggestions as directed by this Court in the above case but for mandating all the candidates to disclose the criminal antecedents under Section 33A by filing an affidavit as prescribed along with the nomination paper filed under Section 33(1) of the RP Act so that the citizens must be aware of the criminal antecedents of the candidate before they can exercise their freedom of choice by casting of votes as guaranteed under the Constitution of India. As a result, at

present, every candidate is obligated to file an affidavit with relevant information with regard to their criminal antecedents, assets and liabilities and educational qualifications.

22. Let us now test whether the filing of affidavit stating that the information given in the affidavit is correct but leaving the contents blank would fulfill the objective behind filing the same. The reply to this question is a clear denial. The ultimate purpose of filing of affidavit along with the nomination paper is to effectuate the fundamental right of the citizen under Article 19(1)(a) of the Constitution of India. The citizens are required to have the necessary information at the time of filing of the nomination paper in order to make a choice of their voting. When a candidate files an affidavit with blank particulars, it renders the affidavit itself nugatory."

*50. In the case of **Durai Muthuswami Vs. N. Nachiappan and Others (1973) 2 SCC 45**, it was held that in the case of election to a single member constituency if there are more than two candidates and the nomination of one of the defeated candidates had been improperly accepted, the question might arise as to whether the result of the election of the returned candidate had been materially affected by such improper reception. In such a case, the question would arise as to what would have happened to the votes which had been cast in favour of the defeated candidate whose nomination had been improperly accepted if it had not been accepted. In that case, it would be necessary for the person challenging the election not merely to allege but also to prove that the result of the election had been materially affected by the improper acceptance of the nomination of the other defeated candidate. Unless he*

succeeds in proving that if the vote cast in favour of the candidate whose nomination had been improperly accepted would have gone in the favour of the election petitioner and he would have got a majority, he cannot succeed in his election petition. Section 100 (1)(d)(i) of R.P. Act, 1951 deals with such a contingency (see SCC pg.48-49 pr.3).

51. In the case of ***Madiraju Venkata Ramana Raju Vs. Peddireddigari Ramchandra Reddy and Others (2018) 14 SCC 1***, the election of a returned candidate was challenged under Section 100 (1) (a) & (d) (i) of the R.P. Act, 1951 on the ground that he did not furnish correct details regarding the value of movable assets in the affidavit. The High Court dismissed the election petition holding that the election petition does not contain a concise statement of material facts that due to improper acceptance of the nomination paper of the returned candidate, the election of the returned candidate has been materially affected. The Apex Court set aside the judgment of the High Court by placing reliance upon the judgment of the Apex Court in the case of *Durai Muthuswami (supra)*. Paragraph nos. 52, 53, 55, 57 of the said judgement is reproduced herein below:-

"52. The only other plea of respondent no.1 that needs examination is about the absence of averment in the election petition that because of improper acceptance of nomination form of respondent no.1, it has materially affected the election results of respondent no.1. Even this contention should not detain us in light of the exposition in the recent decision of this Court in Mairembam Prithviraj Vs. Pukhremsharatchandra Singh (2017) 2 SCC 487. For, in Durai Muthuswami Vs. N.

Nachiappan (1973) 2 SCC 45, noticed in this judgment, it has been observed that in the case of election to a single member constituency, if there are more than 2 candidates and the nomination of one of the defeated candidates had been improperly accepted, a question might arise as to whether the result of the election of the returned candidate had been materially affected by such improper reception. That would not be so in the case of challenge to the election of the "returned candidate" himself on the ground of improper acceptance of his nomination.

53. In paragraph 23 of the judgment in M. Prithviraj (supra), after analysing the exposition in Durai Muthuswami (supra), the Court observed thus:

"23. It is clear from the above judgment in Durai Muthuswami that there is a difference between the improper acceptance of a nomination of a returned candidate and the improper acceptance of nomination of any other candidate. There is also a difference between cases where there are only two candidates in the fray and a situation where there are more than two candidates contesting the election. If the nomination of a candidate other than the returned candidate is found to have been improperly accepted, it is essential that the election petitioner has to plead and prove that the votes polled in favour of such candidate would have been polled in his favour. On the other hand, if the improper acceptance of nomination is of the returned candidate, there is no necessity of proof that the election has been materially affected as the returned candidate would not have been able to contest the election if his nomination was not accepted. It is not necessary for the respondent to prove that

result of the election insofar as it concerns the returned candidate has been materially affected by the improper acceptance of his nomination as there were only two candidates contesting the election and if the appellant's nomination is declared to have been improperly accepted, his election would have to be set aside without any further enquiry and the only candidate left in the fray is entitled to be declared elected."

55. In *Duni Chand Vs. State of H.P.* (2014) 16 SCC 152, this Court was called upon to consider whether the nomination paper submitted by the appellant therein was improperly accepted by the Returning Officer. It observed that if the Returning Officer had rejected the nomination paper of the appellant therein at the time of scrutiny, the order of rejection would have been valid. As a result, the appellant could not have participated in the election process and there would have been no occasion for him to be elected. It would therefore, follow that improper acceptance of his nomination by the Returning Officer has inevitably materially affected his result of the election.

57. Our attention has also been invited by the learned counsel to L.R. Shivaramagowda Vs. T.M. Chandrashekar (1999) 1 SCC 666, with particular emphasis on paragraph 10 and 11, wherein the Court observed that in order to declare an election to be void under Section 100(1)(d)(iv) it is absolutely necessary for the election petitioner to plead that the result of the election insofar as it concerns the returned candidate has been materially affected. In the present case, the election petition is in reference to the ground of improper acceptance of nomination form of respondent no.1 the returned candidate

under Section 100(1)(d)(i). Thus, if that plea is accepted and the election of respondent no.1 is declared to be void, it would necessarily follow that the election result of the returned candidate has been materially affected."

52. In this respect, it would also be relevant to refer to the judgment of the Apex Court in the case of ***Mairembam Prithviraj alias Prithviraj Singh Vs. Pukhrem Sharatchandra Singh*** (2017) 2 SCC 487. Paragraph nos. 23 & 24 of the judgement is reproduced herein-below:-

"23. It is clear from the above judgment in *Durai Muthuswami* (supra) that there is a difference between the improper acceptance of a nomination of a returned candidate and the improper acceptance of nomination of any other candidate. There is also a difference between cases where there are only two candidates in the fray and a situation where there are more than two candidates contesting the election. If the nomination of a candidate other than the returned candidate is found to have been improperly accepted, it is essential that the election petitioner has to plead and prove that the votes polled in favour of such candidate would have been polled in his favour. On the other hand, if the improper acceptance of nomination is of the returned candidate, there is no necessity of proof that the election has been materially affected as the returned candidate would not have been able to contest the election if his nomination was not accepted. It is not necessary for the respondent to prove that result of the election in so far as it concerns the returned candidate has been materially affected by the improper acceptance of his nomination as there were only two candidates contesting the election and if

the appellant's nomination is declared to have been improperly accepted, his election would have to be set aside without any further enquiry and the only candidate left in the fray is entitled to be declared elected.

24. The judgment of this Court in *Durai Muthuswami (supra)* was referred to in *Jagjit Singh v. Dharam Pal Singh*, 1995 Supp (1) SCC 422 in which it was held as follows:

“21. The trial Judge has held that since there is no averment in the petition that the result of the election was materially affected by improper rejection or acceptance of votes, it is devoid of cause of action. We are unable to agree that the absence of such an averment in the facts of this case is fatal. As pointed out by this Court, there may be cases where the obvious conclusion to be drawn from the circumstances is that the result of the election has been materially affected and that Section 100(1)(d) of the Act is not intended to provide a convenient technical plea in a case where there can be no dispute at all about the result of the election being materially affected by the alleged infirmity. (See: *Durai Muthuswami v. N. Nachiappan* [(1973) 2 SCC 45. In the present case, the appellant in the election petition has stated that he has lost by a margin of 80 votes only. From the various averments in the election petition it was evident that the number of valid votes of the appellant which are alleged to have been improperly rejected is much more than 80. From the averments contained in the election petition it is thus obvious if the appellant succeeds in establishing his case as set out in the election petition the result of this election, insofar as it concerns the returned candidate, would be materially affected.”

53. The aforesaid judgment postulates that where the election has been challenged on the ground of improper acceptance of the nomination paper of the returned candidate under Section 100 (1)(d)(i) of the R.P. Act, 1951, the election petitioner is not required to plead that the improper acceptance of nomination paper has materially affected the result of the election so far as it relates to returned candidate inasmuch as the improper acceptance of nomination paper of the returned candidate implies that the result of the election of the returned candidate had been materially affected for the reason that the returned candidate could not have contested the election and declared elected if his nomination paper had not been improperly accepted.

54. In the present case, the election petitioner has averred in the election petition that respondent no.1 has not given the details of five financial years of the income tax return as required in Column-4 of Form-26 as he has mentioned details of only Financial Year 2021-22, details of rest of the four Financial Years have been mentioned 'Zero'. It is also pleaded in paragraph 22 of the election petition that the petitioner has suppressed material fact in Form-26 that a criminal case under Sections 34, 307 I.P.C. & 7th Criminal Law Amendment Act has been lodged against him and a charge sheet has been filed in Case Crime No.696 of 2017, P.S. Khuthan, District Jaunpur.

55. If the pleadings in respect of improper acceptance of the nomination paper of the returned candidate in the election petition made in paragraphs nos.20 to 25 are read in the light of the aforesaid judgments of the Apex Court and also on consideration of the fact that the object of

enactment of Section 33-A in the R.P. Act, 1951 is to meet the requirement of the fundamental right of the voter enshrined under Article 19(1) (A) of the Constitution of India so that the voter should know about the antecedents and details of the candidate whom he is going to elect and handover the interest of the people and also the constituency for which such candidate is contesting, this Court is of the view that the material fact constituting a cause of action to adjudicate the issue raised by the election-petitioner that election of respondent no.1 is vitiated by the improper acceptance of nomination papers of respondent no.1 has been pleaded in the election petition. In such view of the fact, the submission of the learned counsel for respondent no.1 is devoid of merit.

56. It is further submitted by Sri Shashi Nandan, learned Senior Counsel that the election petitioner alleges in the election petition that respondent no.1 committed corrupt practices. He submits that the expression 'corrupt practices' has been explained in Section 123 of the R.P. Act, 1951. He submits that the election petition does not contain any specific instance of corrupt practice having been committed by respondent no.1 or any of his agents. Accordingly, he submits that the election petition is bereft of the concise statement of material fact, and therefore, the same is barred by Section 83 read with Section 86 of the R.P. Act, 1951. It is further submitted that the allegation with regard to corrupt practices is not supported by any affidavit as contemplated under proviso to Section 83 (1) of the R.P. Act, 1951, and in such view of the fact, the allegations with regard to corrupt practices cannot be read and are liable to be ignored.

57. In order to buttress the submission that if the election is challenged on the

ground of corrupt practices, the election petitioner must file an affidavit in the prescribed form as provided in the proviso to Section 83 of the R.P. Act, 1951, and in the instant case, it has not been done so, he has placed reliance upon the judgment of the Apex Court in the case of **V.Narayanaswamy Vs. C.P. Thirunavukkarasu (2000) 2 SCC 294** wherein the Apex Court in paragraph 23 of the said judgement held as under:-

"23. It will be thus seen that an election petition is based on the rights, which are purely the creature of statute, and if the statute renders any particular requirement mandatory, the court cannot exercise dispensing powers to waive non-compliance. For the purpose of considering a preliminary objection as to the maintainability of the election petition the averments in the petition should be assumed to be true and the court has to find out whether these averments disclose a cause of action or a triable issue as such. Sections 81, 83(1)(c) and 86 read with Rule 94-A of the Rules and Form 25 are to be read conjointly as an integral scheme. When so read if the court finds non-compliance it has to uphold the preliminary objection and has no option except to dismiss the petition. There is difference between "material facts" and "material particulars". While the failure to plead material facts is fatal to the election petition the absence of material particulars can be cured at a later stage by an appropriate amendment. "Material facts" mean the entire bundle of facts, which would constitute a complete cause of action and these must be concisely stated in the election petition, i.e., clause (a) of sub-section (1) of Section 83. Then under clause (b) of sub-section (1) of Section 83 the election petition must contain full

particulars of any corrupt practice. These particulars are obviously different from material facts on which the petition is founded. A petition levelling a charge of corrupt practice is required by law to be supported by an affidavit and the election petitioner is obliged to disclose his source of information in respect of the commission of corrupt practice. He must state which of the allegations are true to his knowledge and which to his belief on information received and believed by him to be true. It is not the form of the affidavit but its substance that matters. To plead corrupt practice as contemplated by law it has to be specifically alleged that the corrupt practices were committed with the consent of the candidate and that a particular electoral right of a person was affected. It cannot be left to time, chance or conjecture for the court to draw inference by adopting an involved process of reasoning. Where the alleged corrupt practice is open to two equal possible inferences the pleadings of corrupt practice must fail. Where several paragraphs of the election petition alleging corrupt practices remain unaffirmed under the verification clause as well as the affidavit, the unsworn allegation could have no legal existence and the court could not take cognizance thereof. Charge of corrupt practice being quasi-criminal in nature the court must always insist on strict compliance with the provisions of law. In such a case it is equally essential that the particulars of the charge of allegations are clearly and precisely stated in the petition. It is the violation of the provisions of Section 81 of the Act which can attract the application of the doctrine of substantial compliance. The defect of the type provided in Section 83 of the Act on the other hand can be dealt with under the doctrine of curability, on the principles contained in the Code of Civil Procedure. Non-

compliance with the provisions of Section 83 may lead to dismissal of the petition if the matter falls within the scope of Order 6, Rule 16 and Order 7, Rule 11 of the Code of Civil Procedure. Where neither the verification in the petition nor the affidavit gives any indication of the sources of information of the petitioner as to the facts stated in the petition which are not to his knowledge and the petitioner persists that the verification is correct and affidavit in the form prescribed does not suffer from any defect the allegations of corrupt practices cannot be inquired and tried at all. In such a case petition has to be rejected on the threshold for non-compliance with the mandatory provisions of law as to pleadings. It is no part of duty of the court suo moto even to direct furnishing of better particulars when objection is raised by other side. Where the petition does not disclose any cause of action it has to be rejected. Court, however, cannot dissect the pleadings into several parts and consider whether each one of them discloses a cause of action. Petition has to be considered as a whole. There cannot be a partial rejection of the petition."

58. Sri Anil Sharma, learned Senior Counsel for the election-petitioner does not dispute the aforesaid legal proposition and also concedes that there is non-compliance of the proviso to Section 83(1) of the R.P. Act, 1951. In such view of the fact, the allegations made in paragraphs 19, 20, 26, 27, & 33 of the election petition are liable to be ignored.

59. Now, coming to the last submission of Sri Shashi Nandan, learned Senior Counsel that the allegations made with regard to corrupt practices in the counting of votes in paragraphs 26 to 32 of

the election petition do not state material facts including the particulars of corrupt practices adopted by the Returning Officer in counting of votes, therefore, the election petition does not disclose a cause of action so far as the allegation with regard to corrupt practices in the counting of votes is concerned. In this respect, it would be relevant to reproduce paragraphs 26 to 32 & 34 & 35 of the election petition:-

"26. That while counting took place, the Returning Officer and its officials performing the duties of counting of vote on 10.03.2022, adopted corrupt practice and it is found more votes in EVM, than record of polled votes given under Form 17C issued by the Presiding Officer. At polling booth no. 332 (Primary School Habibpur Western Part), total number of allocated voters on the booth 731 and total 386 votes polled as recorded in 17A of Voter Register. As per EVM record 386 votes were found.

Surprisingly while counting took place, it is found 608 votes were recorded in EVM utilized at Police Booth No. 332, out of which-

386 votes were counted in favour of respondent no.1 returned candidate &

107 vote counted in favour of the petitioner,

92 vote counted in favour of Indar Dev,

4 votes counted in favour of Parvez Alam,

2 votes counted in favour of Kapil Dev,

0 vote countered in favour of Jitendra Kumar,

0 vote countered in favour of Nayab Ahmad Khan,

7 vote countered in favour of Ramanuj,

0 vote countered in favour of Ram Pratap,

1 vote countered in favour of Ram Sumer,

3 vote countered in favour of Vinod Kumar,

0 vote countered in favour of Suresh Rajbhar,

0 vote countered in favour of Vinod and

6 vote countered in favour of Nota.

27. That it is very surprising that at polling station/Booth No. 332 total votes polled are 386 and vote found and counted in EVM are 608, which is a glaring example of committing corrupt practice in the election, there is no justification given by the Returning Officer, District Election Officer and Micro and Macro Observers regarding the 222 excess votes comes where from.

28. That petitioner is also bringing on records that EVM of Shahganj, Tehsil East polling Booth No. 236 was not counted but counting of votes shown in counting chart by Returning Officer and Election Commission of India,

29. That the counting conducted of 440 Polling Booths and the result declared in favour of returned candidate Ramesh, declaring him winner by margin of 719 votes.

30. That total 1265 postal ballot votes were counted, out of which-

Petitioner obtained 781 votes

Ramesh (returned candidate) obtained 253 votes

Indradev obtained 160 votes,
 Parvez Alam obtained 6 votes,
 Kapil Dev obtained 2 votes,
 Jitendra Kumar obtained 0 vote,
 Nayab Ahmad Khan obtained 1
 votes,
 Ramanuj obtained 5 votes,
 Ram Pratap obtained 3 votes,
 Ram Sumer obtained 0 vote
 Vinod Kumar obtained 3 votes,
 Suresh Raj Bhar obtained 0 vote
 Vinod obtained 0 votes
 Total 51 votes rejected.
 Nota obtained 0 vote and no
 tender votes polled.

As per Final Result Sheet issued
 on Form-20 by Returning Officer,
 Constituency No.365 Shahganj,

the petitioner obtained 86514
 votes
 respondent no.1 obtained 87233

Indar Dev obtained 48957 votes,
 Parvez Alam obtained 1529

votes,
 Kapil Dev obtained 857 votes,
 Jitendra Kumar obtained 383

votes
 Nayab Ahmad Khan obtained
 8128 votes,

Ramanuj obtained 2551 votes,
 Ram Pratap obtained 514 votes,
 Ram Sumer obtained 775 votes,
 Vinod Kumar obtained 783 votes,
 Suresh Rajbhar obtained 626

votes,
 Vinod obtained 427 votes,
 Total valid votes 239277
 Total 51 votes rejected
 Nota 1643 votes
 Total votes counted 240971
 As per EVM counting-

Petitioner obtained 85733 votes
 respondent no. 1 obtained 86980
 votes

Indar Dev obtained 48797 votes
 Parvez Alam obtained 1523 votes
 Kapil Dev obtained 855 votes
 Jitendra Kumar obtained 383

votes
 Nayab Ahmad Khan obtained
 8127 votes

Ramanuj obtained 2546 votes
 Ram Pratap obtained 511 votes
 Ram Sumer obtained 775 votes
 Vinod Kumar obtained 780 votes
 Suresh Rajbhar obtained 626

votes
 Vinod obtained 427 votes
 rejected 0 votes.
 Nota 1643 votes
 Tender vote 0
 Total counted 239706 votes by

EVM

31. That as per counting chart,
 table wise counting held for 440 polling
 booths in 32 rounds-

The petitioner obtained total
 82542 votes

Returned candidate Ramesh
 obtained 84947 votes,

Indar Dev obtained 47995 votes
 Parvez Alam obtained 1493 votes
 Kapil Dev obtained 826 votes
 Jitendra Kumar obtained 375

votes
 Nayab Ahmad Khan obtained
 7922 votes

Ramanuj obtained 2495 votes
 Ram Pratap obtained 503 votes
 Ram Sumer obtained 756 votes
 Vinod Kumar obtained 768 votes
 Suresh Rajbhar obtained 605

votes

*Vinod obtained 414 votes
Nota obtained 1609 votes
Total counted votes- 233250*

32. That from the perusal of final result sheet issued by Returning Officer Constituency No. 365 Shahganj on Form-20, counting have been made and chart prepared for 444 polling station, whereas table wise chart made by Election Commission of India, showing the result of 440 polling booth/stations and thus votes of 4 polling stations are not counted.

33.

34. That the table wise counting chart, showing different figure of votes obtained by the candidates and the final result sheet issued by the Returning Officer is different, which vitiate the entire election proceedings, declared in favour of respondent no.1.

35. That though request was made by the petitioner for counting of VVPAT for booth no. 332, but the Returning Officer declined to count the VVPAT of Booth No. 332."

60. Perusal of paragraphs 26 & 27 of the election petition reveals that it has been stated by the election petitioner that the Returning Officer has adopted corrupt practices, but there are no averments in paragraphs 22 to 27 to the effect that corrupt practice has been committed by the Returning Officer with the consent of the returned candidate or his election agents nor does it disclose the name of the Returning Officer and officials who were on duty for counting of votes and adopted corrupt practices. If the challenge to the election under Section 100(1)(b) of the R.P. Act, 1951 is laid on the ground of corrupt

practices, the election petitioner not only has to establish that any corrupt practice has been committed by a returned candidate or his election agent or by any other person, but he also has to establish that such corrupt practice has been committed with the consent of the returned candidate or his election agent.

61. So far as the allegation in the election petition that the final result sheet in Form-20 issued by the Returning Officer reveals that the chart was prepared for 444 polling stations whereas the table-wise chart prepared by the Election Commission of India shows the result of 440 booth/polling stations, thus, votes of four polling stations are not counted. A perusal of paragraph 32 of the election petition reflects that the election-petitioner has not disclosed the name of four polling stations whose votes are not counted by the Election Commission nor there is any averment in the said paragraph that by not counting the votes of four polling stations, the election of respondent no.1 has been materially affected.

62. It is also relevant to mention that the election petition also lacks pleadings to the effect that the election petitioner or his agents challenged the counting of votes in Form-20. Thus, this Court is of the view that the election petition lacks material facts and particulars also with regard to the challenge of the election of respondent no.1 on the ground of corrupt practices adopted by the Returning Officer or his officials in counting votes and in preparing Form-20. Thus, no triable issue is made out, and pleading in regard to said allegation is also liable to be ignored.

63. This Court has held above that the material facts and particulars have been

pleaded in the election petition challenging the election on the ground of improper acceptance of the nomination paper of respondent no.1 disclosing a cause of action and a triable issue under Section 100 (1)(d)(i) of the R.P. Act, 1951 that the election of respondent no.1 is vitiated by improper acceptance of nomination form. Hence, there is compliance with Section 83(1)(a) & (b) of the R.P. Act, 1951, therefore, both the applications, i.e., Application No.6 of 2022 (under Order 7 Rule 11 of C.P.C.) & Application No.7 of 2022, (under Section 86(1) of the Representation of Peoples' Act, 1951) are **dismissed** without any order as to cost.

(2023) 8 ILRA 1350
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.07.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Habeas Corpus Writ Petition No. 229 of 2022

Master Namish Gupta @ Guddu Gupta & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Satendra Kumar (Singh), Sri Abhishek Misra

Counsel for the Respondents:

G.A., Sri Pramod Kumar Singh

Civil Law - Hindu Minority and Guardianship Act, 1956 - Constitution of India, 1950 - Art. 226 - Habeas corpus - Custody of minor child aged about 2½ years - Father, being natural guardian, sought custody from maternal grandparents - Petition allowed - Father found fit to take care of the child

emotionally and financially - Maternal grandparents failed to demonstrate superior welfare arrangements - Held: custody with grandparents amounts to illegal detention - Writ of habeas corpus maintainable - Custody handed over to father in interest of minor's welfare.

Held:

Custody of minor child shall be restored to the petitioner - father being natural guardian under Section 6(a) of the Hindu Minority and Guardianship Act. Grandparents' custody amounts to illegal detention. Visiting rights granted to respondents 3 to 5 in the interest of the child.

Case law discussed:

1. Tejaswini Gaud Vs Shekhar Jagdish Prasad Tewari (2019) 7 SCC 42;

2. Vinayak Tripathi Vs St. of U.P., Habeas Corpus W.P. No. 2583 of 2017;

3. Smt. Manju Malini Vs Vijay Thirugnanam,
W.P.H.C. No.13/2018 (Karnataka HC) - Relied
on.

4. Reshu @ Nitya Vs St. of U.P. 2021 (6) ALJ 632 - Distinguished.

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

1. The petition seeks issuance of a writ in the nature of Habeas Corpus commanding the opposite parties 3, 4 and 5, to produce the detenu Master Namish Gupta alias guddu Gupta in Court and provide his custody to his father Nitesh Gupta, the petitioner.

2. Heard Mr. Satendra Kumar (Singh), learned counsel for the petitioner, Mr. Alok Tiwari, learned Additional Government Advocate as well as Mr. Pramod Kumar Singh, learned counsel for private respondents 3 to 5.

3. Brief facts of the case are that the detenu Namish Gupta alias Guddu Gupta was aged about 1 1/2 years at the time of filing of this petition and presently, he is about 2 1/2 years. The deponent Nitesh Gupta is his father and natural guardian. The deponent was married to late Priyanka Gupta, daughter of respondents 3 and 4 and sister of respondent No.5 on 22.4.2014 according to Hindu rites and rituals. It is pleaded that the petitioner is running an industry at Kolkata. Out of their wedlock, initially, a girl, namely Kanika Gupta was born on 7.9.2015 who is presently residing with the deponent. The late Priyanka Gupta again conceived in the year 2020. At that time, the parents of late Priyanka Gupta requested to send her to Lucknow so that she may reside with her mother who can take care of her during pregnancy and delivery.

4. Learned counsel for the petitioner submits that the petitioner has taken care of the deceased mother of the detenu as well as the detenu and extended financial help to private respondents. Photocopy of bank statement through which the money was credited into the account of private respondents has been filed as Annexure No.1 to the petition. It is submitted that the petitioner has successfully raised her elder daughter Kanika Gupta who is studying in Kolkata at G.D. Goenka School. He further submits that the petitioner has taken health insurance of a sum of Rs.5 lacs in the name of himself and his two children, i.e. baby Kanika Gupta and Master Namish Gupta. He has also opened a Sukanya Samriddhi Account to secure future financial needs of Kanika Gupta and used to deposit for future financial needs. Copy of Sukanya Samriddhi Account of Baby Kanika Gupta has been filed as Annexure No.4 to the petition. He has also purchased an

insurance policy in the name of baby Kanika Gupta. It is submitted that since the deponent has been taking care of the financial needs of the detenu as also private respondents, the respondents are using the detenu as an instrument to extract money and they do not want to hand over the custody of the child to the deponent.

Though sufficient amount was handed over to private respondents for treatment of late wife of the deponent, the private respondents instead of consulting an expert Gynecologist consulted a doctor having B.H.M.S. (Homeopathic) degree and all the time the deponent was told that Priyanka Gupta was under observation of an expert of Gynecologist. On 14.12.2020, late Priyanka Gupta gave birth to the detenu in Deep Hospital, Hardoi Road, Lucknow. Copy of birth certificate is on record and has been filed as Annexure-2. It is submitted that due to septic shock, the medical condition of late Priyanka Gupta deteriorated and as such she was referred to K.G.M.U, Lucknow on 19.12.2020 where she died on the same day.

It is submitted that the private respondents are denying even the visiting rights and also the custody of the detenu to the deponent. In June, 2021, when the petitioner went to take custody of the detenu, private respondents called police. This fact is not disputed by learned counsel for private respondents. He submits that the deponent being father and natural guardian under Hindu Minority and Guardianship Act deserves to take custody of the minor detenu considering his overall welfare. It is further submitted that the financial position of private respondents is not such that they can provide and meet educational and medical expenses etc to the detenu. Depriving the detenu of the custody of the deponent will be depriving him from the

emotional love and affection from his natural guardian as well as it shall also deprive the detenu of the same love and affection from his elder sister who is residing with the deponent. In case the custody of the detenu is provided to the deponent, he shall have company of his natural guardian, i.e. father and the company of his sister.

It is submitted that the deponent lives at Kolkata in a joint family where he lives along with his father, uncle, aunt and his daughter, thus, it is submitted that there are enough family members to take care of the detenu. In support of his contention, learned counsel has relied on judgment of Supreme Court in **Tejaswini Gaud and others** versus **Shekhar Jagdish Prasad Tewari and others** (2019)7 SCC 42, judgment dated 30.9.2022 in **Vinayak Tripathi and another** versus **State of U.P. and others** passed by a coordinate Bench of this Court in Habeas Corpus Writ Petition No.2583 of 2017 and judgment dated 19.4.2018 of Karnataka High Court in **Smt. Manju Malini Seshachalam** versus **Vijay Thirugnanam and others** passed in W.P. H.C. No.13 of 2018.

5. Per contra, Mr. Alok Tiwari, learned A.G.A. and learned counsel for private respondents have opposed the petition. Learned A.G.A. has submitted that since the detenu is residing with his maternal grand parents since birth and therefore, depriving him of the custody of the maternal grand parents may not be in overall welfare of the detenu as he may have been emotionally attached with the grand parents and the age of the detenu is not such that he may make any judgment regarding his choice as to with whom he wants to stay. In support of his contention, Mr. Tiwari has relied on judgment of a

coordinate Bench of this court in **Reshu alias Nitya and others** vs. **State of U.P. and others** 2021(6) ALJ 632.

6. Learned counsel for private respondents submits that though the deponent is a natural guardian but they are having the custody of the detenu since birth and they want to keep on having the custody of the detenu, which will be in the interest of the detenu itself.

As regards the amount received by them from the deponent, it has been submitted by learned counsel that the same was given for purchase of some articles. Attention of the court has also been invited to some bills and vouchers which have been filed along with supplementary counter affidavit. It is submitted that financial condition of private respondents is good enough to give a good education and upbringing to the detenu.

7. The petitioner's counsel while rebutting the submission raised by learned counsel for private respondents submits that private respondents have not approached the court with clean hands. It is submitted that in paras 22, 23 and 24 of the petition, a categorical pleading has been made that the deceased mother of the detenu was consulted by a Homeopathic doctor having B.H.M.S. degree, and not by an expert Gynecologist. He has relied on birth certificate issued by Deep Hospital dated 14.12.2020.

While filing counter affidavit, no reply has been given to the contents of para 24 of the writ petition which states about birth certificate of the detenu. However, while filing supplementary counter affidavit, the private respondents have filed one more birth certificate bearing the name

of the same hospital with same serial number, but this time name of the doctor has been changed and an impression is sought to be given to the court that the deceased mother of the detenu was treated by a Gynecologist.

It is submitted that not only this, while filing counter affidavit, a different story regarding the money received from the deponent was given by private respondents. However, while filing supplementary counter affidavit, story has been changed and few bills have been annexed along with supplementary counter affidavit as Annexure No.SCA-4 to show unsuccessfully that the money was transferred by the deponent to purchase some consumable product of FLP Trading Private Limited for themselves. He has also invited attention of this court to page 65, i.e. SCA-5 where some customer invoice has been filed. At page 65 and 66, the consignee name is shown as Priyanka Gupta, mother of the detenu. Page 66 is the photocopy of page 65 and from page 67 onwards, the alleged customer invoices are in no way connected with the deponent or the deceased mother of the detenu as the details of the consignee to whom the products are being shipped have not been given. It is submitted that by filing two affidavits which are in contradiction, the private respondents have tried to mislead the court.

8. This Court has noticed that the date of birth certificate issued by Deep Hospital and annexed as Annexure 2 to the writ petition bears serial No.742 and the name of the doctor is Kamla Prasad. It is noticed that no reply to para 24 of the petition has been given while filing counter affidavit. However, while filing supplementary counter affidavit, another birth certificate

has been filed which also bears the same serial No.742, however, name of the doctor has been changed as Dr. Nihan Iqbal. No satisfactory reply could be given by learned counsel for private respondents as to why no reply was given in the counter affidavit filed by them. However, this court is conscious of the fact that this is a habeas corpus petition seeking custody of the detenu filed by his father in his overall interest.

9. In Tejaswini Gaud's case (supra), the Supreme Court held that 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 and thus, in that case while affirming the judgment of the High Court dated 6.2.2019 in Shekhar Jagdish Prasad Tewari versus State of Maharashtra 2019 SCC OnLine Bom 214, the appellant was directed to hand over the custody of the child to the first respondent father with certain directions and observations. Relevant paragraphs of Tejaswini Gaud's case is reproduced herebelow :

"13.Countering this contention, the learned counsel for respondent No.1 submitted that in the given facts of the case, the High Court has the extraordinary power to exercise the jurisdiction under Article 226 of the Constitution of India and the High Court was right in allowing the habeas corpus petition. The learned counsel has placed reliance on Gohar Begum and. Manju Malini Sheshachalam. Contention of respondent No.1 is that as per Section 6 of the Hindu Minority and Guardianship Act, respondent No.1, being the father, is the natural guardian and the appellants have no authority to retain the

custody of the child and the refusal to hand over the custody amounts to illegal detention of the child and therefore, the writ of habeas corpus was the proper remedy available to him to seek redressal.

14. 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.

32. 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. As observed in Rosy Jacob earlier, the father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. The welfare of the child shall include various factors like ethical upbringing, economic well-being of the guardian, child's ordinary comfort, contentment, health, education etc. The child Shikha lost her mother when she was

just fourteen months and is now being deprived from the love of her father for no valid reason. As pointed out by the High Court, the father is a highly educated person and is working in a reputed position. His economic condition is stable."

10. In the case of Vinayak Tripathi (supra), this Court in para 43 noted that the petitioner being a natural guardian and having family assistance, can look after the nurturing of the child in better way as compared to the grand maternal parents who are considerably old age persons. Relevant paras 43 and 47 are extracted below :

"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.

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. "

11. In Smt. Manju Malini's case (supra), the detenue was detained by younger sister of the petitioner along with husband who refused to hand over custody of the minor to the petitioner who was a

natural guardian. Relevant para 24 is extracted below :

"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 S.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."

12. As regards judgment cited by learned A.G.A. in Reshu's case (supra), this Court held that in deciding the question regarding custody of the minor child, paramount consideration should be the welfare of the minor and such a question cannot be decided merely based on the competing rights of the parties under law. In that case also, the child since her infancy was living with her maternal grand father. Custody of the child was denied to the father for the reason that the father was charged as an accused for alleged murder of wife, mother of the detenu under sections 498-A, 304-B I.P.C. and sections 3/4 Dowry Prohibition Act, 1961 and therefore, in those peculiar facts, custody of the minor was refused by the court to the father.

The judgment in the case of Reshu (supra) is distinguishable on facts and cannot be applied to deny the custody of the child to the father in the instant case. In the case in hand, it is not disputed that the deponent is the father and natural guardian of the detenu. It is also not disputed that he is running an industry in

Kolkata. The facts that in order to secure appropriate medical health, the petitioner has taken a health insurance in the name of the detenu and his daughter, investment made in Sukanya Samriddhi Account as well as insurance policy purchased in the name of Kanika Guta are not disputed. It is also not disputed that under section 6 of Hindu Minority and Guardianship Act, particularly section 6-A thereof, natural guardian in case of a male child, is father.

Further, the private respondents could not demonstrate that they have sufficient financial resources to provide proper education and upbringing to the detenu, as is being provided to his elder sister at Kolkata.

This court further cannot lose sight of the fact that in the first counter affidavit filed by private respondents, they have admitted the birth certificate issued by the Deep Hospital which shows that the deceased mother of the detenu was treated by a B.H.M.S. doctor and not by a Gynecologist, and subsequent affidavit filed with contradictory version along with a different birth certificate with same serial number will not help private respondents to demonstrate that they have taken adequate care of the deceased. The detenu here is only 2 1/2 years old and obviously is not in a position to make any judgment.

13. The submission of private respondents' counsel that handing over custody of the detenu to the petitioner/deponent would adversely affect his upbringing and further would affect him emotionally has no merit as Supreme Court in the case of Tejaswini Gaud (supra) while dealing with identical issue, in para 36, held that if the custody is not granted to the father, the court would be depriving both

the child and the father of each other's love and affection to which they are entitled and with the passage of time, the child may develop more bonding with the father and if the custody is denied, then later on, the child may be reluctant to go to his/her father, in which case, the father will be completely deprived of the child's love and affection. Relevant para 36 of Tejaswini Gaud's case is extracted here-below :

"36.The appellants submit that handing over of the child to the first respondent would adversely affect her and that the custody can be handed over after a few years. The child is only 1 years old and the child was with the father for about four months after her birth. If no custody is granted to the first respondent, the court would be depriving both the child and the father of each other's love and affection to which they are entitled. As the child is in tender age i.e. 1 years, her choice cannot be ascertained at this stage. With the passage of time, she might develop more bonding with the appellants and after some time, she may be reluctant to go to her father in which case, the first respondent might be completely deprived of her child's love and affection. Keeping in view the welfare of the child and the right of the father to have her custody and after consideration of all the facts and circumstances of the case, we find that the High Court was right in holding that the welfare of the child will be best served by handing over the custody of the child to the first respondent."

14. In the present case, presently the detenu is 2 1/2 years old and his choice also cannot be ascertained at this stage. It is not disputed that baby Kanika Gupta is residing with the deponent who is nicely taking her

care. In case the custody of the detenu is denied to the deponent, the court will be depriving both the father and the elder sister the company of the detenu and vice versa. Therefore, in peculiar facts of this case, the reasoning given in para 36 of Tejaswini Gaud's case (supra) applies in this case also.

15. Hence, in view of the law settled by the Supreme Court and keeping in view the overall welfare and upbringing of the child, the petition is allowed. Respondents 3 to 5 are directed to hand over custody of the child to the deponent forthwith.

At this stage, learned counsel for respondents 3, 4 and 5 submits that they may be permitted to visit the detenu, to which, learned counsel for the petitioner has no objection.

16. Keeping in view the interest of the child as also the undertaking given on behalf of the petitioner, it is provided that respondents 3 to 5 will have visiting rights to the detenu.

17. The respondents 1 and 2 shall ensure compliance of this order.

(2023) 8 ILRA 1356
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.07.2023

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ-A No. 746 of 2023

Awadhesh Kumar Srivastava ...Petitioner
Versus

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

Counsel for the Petitioner:

Sri Pankaj Kumar Srivastava, Sri Astitva Srivastava

Counsel for the Respondents:
C.S.C.

Civil Law – Constitution of India, 1950 – Article 14 - Pension – Old Pension Scheme – Qualifying Service – Daily Wager and Work-Charged Service – U.P. Act No. 1 of 2021 — Petitioner challenged the order dated 31.05.2022 converting his pension to New Pension Scheme and sought inclusion of services rendered as daily wage and work-charged employee with regular service for Old Pension Scheme benefits – Petitioner engaged as daily wage (Gaze Reader) from 01.05.1989, appointed as work-charged employee on 25.07.1997, and regularized on 29.09.2011 – New Pension Scheme introduced w.e.f. 01.04.2005 for new entrants – Respondents argued petitioner's regularization in 2011 made him subject to New Pension Scheme and U.P. Act No. 1 of 2021 excluded daily wage/work-charged service from qualifying service – **Held:** U.P. Act No. 1 of 2021 does not satisfy tests to override *Prem Singh Vs St. of U.P.*, (2019) 10 SCC 516, as it fails to address arbitrariness in excluding daily wage/work-charged service and violates Article 14 by treating equals unequally – Service from 01.05.1989 counts as qualifying service – Petitioner not a new entrant post-01.04.2005, entitled to Old Pension Scheme – Order dated 31.05.2022 set aside – Respondents directed to place petitioner in Old Pension Scheme and calculate pension including daily wage/work-charged service – Petitioner to deposit contributory fund received. **Writ petition allowed; respondents directed to grant Old Pension Scheme benefits. Writ petition allowed.**

Case Law Discussed:

1. Prem Singh Vs St. of U.P., (2019) 10 SCC 516
2. Dakshin Haryana Bijli Vitran Nigam Vs Bachan Singh, (2009) 14 SCC 793
3. Kesar Chand Vs St. of Pun., AIR 1988 P & H 265

4. A. Manjula Bhashini Vs Managing Director, Andhra Pradesh Women's Cooperative Finance Corporation Ltd., (2009) 8 SCC 431

5. St. of Gujarat Vs Raman Lal Keshav Lal Soni, (1983) 2 SCC 33

6. Chairman, Railway Board Vs C.R. Rangadhamaiah, (1997) 6 SCC 623

7. St. of Karnataka Vs Uma Devi, (2006) 4 SCC 1

8. Board of Revenue Vs Prasidh Narain Upadhyay, 2006 (62) ALR 839

9. Rana Pratap Singh Vs St. of U.P., (1996) All LJ 301

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

1. Heard learned counsel for the petitioner and Sri Vikram Bahadur Yadav, learned Standing Counsel for the respondents.

2. The petitioner by means of the present writ petition has assailed the order dated 31.05.2022 passed by the respondent no.5-Executive Engineer, Investigation & Planning (Water Resources), Division Mirzapur (Fatehi Irrigation Colony), Mirzapur to the extent the benefit of pension to the petitioner has been converted into new pension and further prayed for a writ of mandamus directing the respondents to include the service rendered by him as daily-wage and in work-charged establishment with regular service and grant benefit of Old Pension Scheme to the petitioner.

3. The brief facts of the case are that the petitioner was initially engaged as a daily wage on the post of Gaze Reader on **01.05.1989**. Due to the promotion of employees, some posts fell vacant. The Superintending Engineer issued a letter

dated **24.07.1997**, addressed to the Executive Engineer, forwarding the names of the daily wage employees who have completed 240 days in service and were found eligible by the Selection Committee for being appointed on said vacant posts. The name of the petitioner appeared at Sl. No.1 in the list enclosed with the said letter. In compliance whereof, the Executive Engineer issued an appointment letter dated **25.07.1997** to the petitioner appointing him as a work-charge employee on the post of Gaze Reader. Later on, the service of the petitioner was regularized on the post of Gaze Reader by the order dated **29.09.2011**. The petitioner received a letter dated **31.05.2022** from the office of respondent no.5 informing him that he is retiring on **30.06.2022** and papers relating to the benefit of the New Pension Scheme in respect of the petitioner were forwarded to the concerned department.

4. The petitioner being aggrieved by the said letter, has preferred the present writ petition praying that the services rendered by him as a daily-wager and work-charged employee be counted in his regular service for pension.

5. A counter affidavit has been filed by the respondents stating that the petitioner was engaged as a daily wager due to exigency. The petitioner was engaged as Gaze Reader by the order dated **25.07.1997** in the work charge establishment. The services of the petitioner was regularised by the order dated **15.07.2011**.

6. The respondents further pleaded that the State of U.P. introduced the New Contributory Pension Scheme w.e.f. **01.04.2005** by the Government Order No.G-33-379/X-2005-301(9) 2003 dated

28.03.2005. The said Scheme as per the Government Order dated **28.03.2005** has been mandatorily made applicable to all new recruits to the service of the State Government and of all State controlled autonomous institutions and State aided private educational institutions.

7. It is further pleaded that by means of another Notification dated **07.04.2005**, the Uttar Pradesh Retirement Benefit (Amendment) Rules, 2005 was notified, whereby sub-clause (3) was added to Rule (2) of the Uttar Pradesh Retirement Benefit Rules, 1961 (hereinafter referred to as 'Rules, 1961'), which provides that nothing in the said Rules would apply to the persons entering service on or after **01.04.2005**. On **07.04.2005**, State Government issued another Notification notifying the General Provident Fund (U.P.) (Amendment) Rules, 2005. The State Government thereafter on **14.08.2008** issued an office order notifying the New Pension Scheme which applies to the persons joining service on or after 01.04.2005.

8. Further case of the respondents is that since the service of the petitioner was regularized in the year 2011, therefore, he entered into the service after 01.04.2005, and as such, the provisions of Rules, 1961 do not apply to the petitioner, hence, he is not covered by Old Pension Scheme. It is further submitted that the petitioner was allotted PRAN No.110052567014 under New Pension Scheme. The contribution of the petitioner as well as the State Government were deposited in the said PRAN number, and after the retirement of the petitioner on **30.06.2022**, all admissible benefits have already been paid.

9. Further case of the respondents is that after the judgment of the Apex Court in **Prem Singh Vs. State of U.P. and**

Others (2019) 10 SCC 516, the State of U.P. has promulgated U.P. Act No.1 of 2021 defining 'qualifying service' which means the services rendered on a temporary or permanent post in accordance with the provisions of Service Rules prescribed by the Government for the post. Section 4 of the U.P. Act No.1 of 2021 provides that the provisions of this Act shall have the effect, notwithstanding anything inconsistent therewith contained in any other law for the time in force in any instrument other than this Act. Therefore, the 'qualifying service' has to be determined in accordance with the provisions of Section 2 of Act No.1 of 2021 and not in accordance with previous judgements.

10. Learned counsel for the petitioner has contended that the service rendered by the petitioner as a daily wager and under work-charged establishment cannot be excluded from computing qualifying service for grant of the Old Pension Scheme. It is contended that the petitioner is entitled to the benefit of the judgement of the Apex Court in the case of **Prem Singh (supra)** and the right of the petitioner for adding the services rendered by him as a daily wager and in the work-charged establishment cannot be negated on the strength of the amendment. It is submitted that Section 2 of the U.P. Act No.1 of 2021 defining 'qualifying service' arbitrarily excludes from the term 'qualifying service' the service rendered as a daily wager or under work-charged establishment by an employee before regularization.

11. Learned counsel for the petitioner further contends that it is evident from Notification No.G-3-379/X-2005-301(9)-2003, dated 28.05.2005 that the New Pension Scheme as introduced by the State Government shall apply to the new entrants

to the service of the State Government and of all State controlled autonomous institutions and State aided private educational institutions. It is submitted that plain reading of the sub-rule (3) of Rule 2 introduced by the **Uttar Pradesh Retirement Benefits (Amendment) Rules, 2005** in the Uttar Pradesh Retirement Benefits Rules, 1961 implies that the New Pension Scheme shall apply to the employees entering in services on or after April 1, 2005, in connection with the affairs of the state borne on pensionable establishment whether temporary or permanent.

12. Accordingly, it is submitted that once the petitioner is entitled to the services rendered by him in the work-charged establishment along with regular service, it can by no stretch of imagination be said that the petitioner is the new entrant in the services of the State Government as the petitioner entered into the service of the State Government on the date of engagement as daily-wager on the post of Gaze Reader and continued thereafter as Gaze reader till his retirement. Thus, it is contended that the New Pension Scheme as introduced by the State Government by Notification dated **28.03.2005** does not apply to the petitioner. Accordingly, it is submitted that the petitioner is entitled to the benefit of the Old Pension Scheme

13. Per contra, learned Standing Counsel for the respondents would contend that after the judgment of the Apex Court in the case of **Prem Singh (supra)**, the State Government has promulgated **Uttar Pradesh Qualifying Service For Pension Validation Act, 2021 (U.P. Act No.1 of 2021)** defining 'qualifying service'. He submits that according to Section 2 of the U.P. Act No.1 of 2021, the 'qualifying

service' means the service rendered by an officer appointed on a temporary or permanent post in accordance with the provisions of Service Rules prescribed by the Government for the post. He further submits that the U.P. Act No.1 of 2021 has come into force with effect from 1st April 1961 which is evident from Section 3 of U.P. Act No.1 of 2021, therefore, the benefit of the judgement of the Apex Court in the case of **Prem Singh (supra)** is not available to the petitioner, consequently, the service rendered by the petitioner as daily-wager and in work charged establishment cannot be added in his regular service for determining 'qualifying service' for pension.

14. He further contends that the State of U.P. has issued a Notification dated **28.03.2005** introducing a New Contribution Pension System in place of the existing Pension Scheme for new entrants to the service of the State Government and of all State controlled autonomous institutions and State aided private educational institutions, and accordingly, it amended Rules 1961 by U.P. Retirement Benefit Rules 2005 by inserting sub-rule (3) in Rule 2 of Rule, 1961 which states that Rule 1961 shall not apply to the employees entering into service on or after 1st April, 2005 in connection with the affairs of the state borne on pensionable establishment, whether temporary or permanent.

15. On the strength of the said amendment in **Rule, 1961**, he submits that as admittedly the service of the petitioner has been regularized by order dated **29.09.2011**, therefore, his entry into the service of the State Government is after April 1, 2005, and therefore, he shall be governed by New Pension Scheme as introduced by the State Government by Notification dated **28.03.2005** and

therefore, the petitioner has rightly been placed under New Pension Scheme.

16. Learned Standing Counsel placed reliance upon the three judgements of this Court in Special Appeal No.398 of 2021 (Shri Chandra Singh Vs. State of U.P. and others), decided on 22.04.2022, Special Appeal Defective No.17 of 2023 (State of U.P. through Principal Secretary, Department of Irrigation & Others Vs. Sadananad), decided on 16.01.2023 & Special Appeal No.80 of 2019 (U.P. Avas Evam Vikas Parishad Lucknow and others Vs. Syed Jalal Haider Rizvi and others), decided on 24.01.2023.

17. I have considered the rival submissions advanced by the learned counsel for the parties and perused the record.

18. The undisputed facts as emerges from the record are that the petitioner was engaged as a daily wageer on the post of Gaze Reader on **01.05.1989**. Subsequently, the post in the department fell vacant on account of the promotion of the employees, the Superintending Engineer by a letter dated **24.07.1997** forwarded the names of the daily wage employees screened by the Selection Committee, who have completed more than 240 days as daily-wager, for being appointed as work-charged employee. In the said list, the name of the petitioner appeared at Sl. No.1. Pursuant to the letter dated **24.07.1997**, Executive Engineer issued an appointment letter to the petitioner on **25.07.1997** as Gaze Reader in the pay scale of Rs.775-12-955-
₹0 से0-14-1025.

19. Subsequently, the service of the petitioner was regularized by order of the Executive Engineer dated **29.09.2011** on

the post of Gaze Reder. The petitioner asserts that he has been engaged as Gaze Reader on **01.05.1989** and continued to work in the office of respondent No. 5 till his retirement as Gaze Reader, therefore, his past service as a daily-wager and under work-charged establishment are liable to be counted for pension.

20. Now, in light of the aforesaid facts, this Court proceeds to analyse the arguments advanced by the respective counsels.

21. The first question that arises for consideration before this Court is whether the State can negate or override the judgement of the Apex Court in the case of **Prem Singh (supra)** and deny the benefit of service spent by an employee as a daily wager and under work-charged establishment in not adding the said period with regular service for determining the qualifying service for pension by promulgating U.P. Act No.1 of 2021.

22. To appreciate the said question, it would be apposite to consider the background in which the Apex Court has given the judgment in the case of **Prem Singh (supra)**. The issue before the Apex Court in the said case was whether Rule 3 (8) of the Rules, 1961 and Regulation 370 of the Civil Services Regulation of Uttar Pradesh be declared ultra virus in view of the fact that the Apex Court in the case of **Dakshin Haryana Bijli Vitran Nigam Vs. Bachan Singh, (2009) 14 SCC 793** has upheld the Punjab and Haryana High Court's judgement in the case of **Kesar Chand Vs. State of Punjab, AIR 1988 P & H 265** declaring pari materia provision enacted in the State of Punjab which excluded the computation of the period of work charge services from the qualifying service for pension ultra-vires.

23. The Apex Court in paragraph no.16 in the case of **Prem Singh (supra)** noted paragraph 19 of **Kesar Chand's** judgement of the Punjab and Haryana High Court wherein the Punjab and Haryana High Court detailed the reasons in concluding the action of the State Government arbitrary in excluding the service rendered by an employee on the work-charged establishment from the regular service for pension. The Punjab and Haryana High Court held that *“Equal protection of laws must mean the protection of equal laws for all persons similarly situated. Article 14 strikes at arbitrariness because the provision which is arbitrary involves negation of equality. Even the temporary or officiating service under the State Government has to be reckoned for determining the qualifying service. It looks to be illogical that the period of service spent by an employee in a work-charged establishment before his regularization has not been taken into consideration for determining his qualifying service. The classification which is sought to be made among Government servants who are eligible for pension and those who started as work-charged employees and their services regularize subsequently, and the others is not based on any intelligible criteria and, therefore, is not sustainable at law. After the services of a work-charged employee have been regularized, he is a public servant like any other servant. To deprive him of the pension is not only unjust and inequitable but is hit by the vice of arbitrariness, and for these reasons, the provisions of sub-rule (ii) of Rule 3.17 of the Rules have to be struck down being violative of Article 14 of the Constitution.”*

24. The law enunciated by the Punjab and Haryana High Court in the case of

Kesar Chand (supra) was approved by the Apex Court in the case of **Bachan Singh (supra)** and also in the case of **Punjab SEB Vs. Narata Singh case** (SCC pg.530 paragraph no.18 of the judgement of Prem Singh).

25. In the context of the present case, it would be apt to reproduce paragraph no.20 of the judgement of the Apex Court in the case of **Prem Singh (supra)**, which reads as under:-

“20. This Court in *Narata Singh's case* (SCC pp. 324-25 & 328, paras 25-27 & 40) relied upon *Kesar Chand (supra)* and has observed:-

“25. In *Kesar Chand v. State of Punjab*, the Full Bench held that Rule 3.17(ii) of the Punjab Civil Services Rules was violative of Article 14 of the Constitution of India. The Full Bench decision was challenged before this Court by filing a special leave petition which was dismissed. Thus, the ratio laid down by the Full Bench judgment that any rule which excludes the counting of work-charged service of an employee whose services have been regularised subsequently, must be held to be bad in law was not disturbed by this Court. The distinction made between an employee who was in temporary or officiating service and who was in work-charged service as mentioned in Rule 3.17(ii) of the Punjab Civil Services Rules disappeared when the said Rule was struck down by the Full Bench. The effect was that an employee holding substantively a permanent post on the date of his retirement was entitled to count in full as qualifying service the periods of service in work-charged establishments.

26. In view of this settled position, there is no manner of doubt that

the work-charged service rendered by Respondent 1 under the Government of Punjab was qualified for grant of pension under the rules of the Government of Punjab and therefore, the Board was not correct in rejecting the claim of the respondent for inclusion of period of work-charged service rendered by him with the State Government for grant of pension, on the ground that service rendered by him in the work-charged capacity outside PSEB and in the Departments of the State Government was a non-pensionable service.

27. The apprehension that acceptance of the case of Respondent 1 would result into conferring a status on them as that of employees of the State of Punjab has no factual basis. It is true that the State Government has power to frame rules governing services of its employees under Article 309 of the Constitution whereas the Board has power to prescribe conditions of service by framing regulations under Section 79 (c) of the Electricity (Supply) Act, 1948. However, governance of a particular institution and issuance of instructions to fill up the gap in the fields where statutory provisions do not operate, is recognised as a valid mode of administration in modern times.

40. So far as this argument is concerned, it is true that the Division Bench of the High Court has expressed the above opinion in the impugned judgment. However, the reference to Rule 3.17(ii) of the Punjab Civil Services Rules as well as the Full Bench decision of the Punjab and Haryana High Court in **Kesar Chand v. State of Punjab (supra)** and the speaking order dated 16-11-2005 passed by the Board rejecting the claim of Respondent 1 makes it abundantly clear that the High

Court has directed the appellants to count the period of service rendered by Respondent 1 in work-charged capacity with the State Government for determining qualifying service for the purpose of pension. Further, Respondent 1 has been directed to deposit the amount of Employee's Contributory Fund which he had received from the appellants along with interest as per the directions of the Board before the pension is released to him."

26. The Apex Court in paragraph no.29 of the judgement in the case of **Prem Singh (supra)** noted the submission of the counsel for the State of Uttar Pradesh whereby the distinction between the work-charged employees and regular employees was sought to be made on the ground that the due procedure is not followed in engaging work-charged employees whereas regular employees are appointed as per rules and further work-charge employees do not have that much work pressure and their work is materially and qualitatively different from regular employees. The contention advanced by the State of Uttar Pradesh was repelled by the Apex Court in paragraphs no.30 to 34 in **Prem Singh (supra)** case.

27. Paragraph nos. 29 to 34 of the judgement is reproduced herein-below:-

"29. The submission has been urged on behalf of the State of Uttar Pradesh to differentiate the case between work-charged employees and regular employees on the ground that due procedure is not followed for appointment of work-charged employees, they do not have that much work pressure, they are unequal and cannot be treated equally, work-charged employees form a totally

different class, their work is materially and qualitatively different, there cannot be any clubbing of the services of the work-charged employees with the regular service and vice versa, if a work-charged employee is treated as in the regular service it will dilute the basic concept of giving incentive and reward to a permanent and responsible regular employee.

30. We are not impressed by the aforesaid submissions. The appointment of the work-charged employee in question had been made on monthly salary and they were required to cross the efficiency bar also. How their services are qualitatively different from regular employees? No material indicating qualitative difference has been pointed out except making bald statement. The appointment was not made for a particular project which is the basic concept of the work-charged employees. Rather, the very concept of work-charged employment has been misused by offering the employment on exploitative terms for the work which is regular and perennial in nature.....

.....

31. In the aforesaid facts and circumstances, it was unfair on the part of the State Government and its officials to take work from the employees on the work-charged basis. They ought to have resorted to an appointment on regular basis. The taking of work on the work-charged basis for long amounts to adopting the exploitative device. Later on, though their services have been regularized. However, the period spent by them in the work-charged establishment has not been counted towards the qualifying service. Thus, they have not only been deprived of their due emoluments during the period

they served on less salary in work-charged establishment but have also been deprived of counting of the period for pensionary benefits as if no services had been rendered by them. The State has been benefitted by the services rendered by them in the heydays of their life on less salary in work-charged establishment.

32. In view of the note appended to Rule 3 (8) of the 1961 Rules, there is a provision to count service spent on work-charged, contingencies or non-pensionable service, in case, a person has rendered such service in a given between period of two temporary appointments in the pensionable establishment or has rendered such service in the interregnum two periods of temporary and permanent employment. The work-charged service can be counted as qualifying service for pension in the aforesaid exigencies.

33. The question arises whether the imposition of rider that such service to be counted has to be rendered in-between two spells of temporary or temporary and permanent service is legal and proper. We find that once regularization had been made on vacant posts, though the employee had not served prior to that on temporary basis, considering the nature of appointment, though it was not a regular appointment it was made on monthly salary and thereafter in the pay scale of work-charged establishment the efficiency bar was permitted to be crossed. It would be highly discriminatory and irrational because of the rider contained in Note to Rule 3 (8) of 1961 Rules, not to count such service particularly, when it can be counted, in case such service is sandwiched between two temporary or in-between temporary and permanent services. There is no rhyme or reason not to count the

service of work-charged period in case it has been rendered before regularisation. In our opinion, an impermissible classification has been made under Rule 3 (8). It would be highly unjust, impermissible and irrational to deprive such employees benefit of the qualifying service. Service of work-charged period remains the same for all the employees, once it is to be counted for one class, it has to be counted for all to prevent discrimination. The classification cannot be done on the irrational basis and when respondents are themselves counting period spent in such service, it would be highly discriminatory not to count the service on the basis of flimsy classification. The rider put on that work-charged service should have preceded by temporary capacity is discriminatory and irrational and creates an impermissible classification.

34. As it would be unjust, illegal and impermissible to make aforesaid classification to make the Rule 3(8) valid and non-discriminatory, we have to read down the provisions of Rule 3 (8) and hold that services rendered even prior to regularisation in the capacity of work-charged employees, contingency paid fund employees or non-pensionable establishment shall also be counted towards the qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment."

28. The Apex Court read down the provisions of Rule 3(8) of Rule 1961 in the case of **Prem Singh (supra)**. Consequently, it struck down the provisions contained in Regulation 370 of the Civil Service Regulations and Paragraph 669 of the Financial Hand Book on **two counts**; the action of the State in

excluding the service spent by an employee in the work-charged establishment before his regularization for determining his qualifying service is not based on any intelligible criteria because he becomes a public servant after his service is regularized, therefore, to deprive him of pension is not only unjust and inequitable but is hit by Article 14 of the Constitution of India because such a provision involves negation of equality; **secondly**, the Apex Court noted in paragraph nos. 30 & 31 of the judgement that the work-charged employees were allowed to continue for years, and the State had misused the very concept of work-charged establishment on exploitative terms by taking work which in fact was regular and perennial in nature from such employee. It further noted that the State had acted arbitrarily and employed unfair labour practice in taking work of permanent and perpetual nature from these work-charged employees for years on low wages.

29. It also observed that the State has been benefited by the service rendered by the work-charged employee on low wages, therefore, it would be unjust to deny the inclusion of service rendered as the work-charged employee with regular service for determining the qualifying service for pension.

30. At this point, It would be apt to refer few judgements of the Apex Court laying down the principle that the validating Act has to comply to overrule a judicial decision.

31. In the case of **A. Manjula Bhashini & others Vs. Managing Director, Andhra Pradesh Women's Cooperative Finance Corporation Ltd. and Another**, (2009) 8 SCC 431, it has

been succinctly explained when the legislature can directly overrule, reverse and override the judicial decision. Paragraphs No. 67,68 and 72 of the judgement are reproduced herein below:

67. *The distinction between legislative and judicial functions is well known. Within the scope of its legislative competence and subject to other constitutional limitations, the power of the legislature to enact laws is plenary. In exercise of that power, the legislature can enact law prospectively as well retrospectively. The adjudication of the rights of the parties according to law enacted by the legislature is a judicial function. In the performance of that function, the court interprets and gives effect to the intent and mandate of the legislature as embodied in the statute. If the court finds that the particular statute is ultra vires the power of legislature or any provision of the Constitution, then the same can be struck down.*

68. *It is also well settled that the legislature cannot by bare declaration, without anything more, directly overrule, reverse or override a judicial decision. However it can, in exercise of the plenary powers conferred upon it by Articles 245 and 246 of the Constitution, render a judicial decision ineffective by enacting a valid law fundamentally altering or changing the conditions on which such a decision is based. Such law can also be given retrospective effect with a deeming date or with effect from a particular date. The question whether the legislature possesses the power to enact law apparently affecting pre-existing judgment or amend the existing law which has already been interpreted by the Court in a*

particular manner, has been considered in several cases.

.....

72. The Court in referred to the earlier judgments in *Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality*, *Patel Gordhandas Hargovindas v. Municipal Commr., Ahmedabad*, *Orient Paper Mills Ltd. v. State of Orissa*, *Misrilal Jain v. State of Orissa*, *Tirath Ram Rajindra Nath v. State of U.P.*, *Govt. of A.P. v. Hindustan Machine Tools Ltd*, *I.N. Saksena v. State of M.P.* and some other judgments and held: (*Indian Aluminium case*, SCC pp. 638-39)

"The validity of the validating Act is to be judged by the following tests: (i) whether the legislature enacting the validating Act has competence over the subject-matter; (ii) whether by validation, the legislature has removed the defect which the court had found in the previous law; (iii) whether the validating law is consistent with the provisions of Chapter III of the Constitution. If these tests are satisfied, the Act can validate the past transactions which were declared by the court to be unconstitutional. The legislature cannot assume power of adjudicating a case by virtue of its enactment of the law without leaving it to the judiciary to decide it with reference to the law in force. The legislature also is incompetent to overrule the decision of a court without properly removing the base on which the judgment is founded.

The court does not have the power to validate an invalid law or to legalise impost of tax illegally made and collected or to remove the norm of invalidation or provide a remedy. These

are not judicial functions but the exclusive province of the legislature. Therefore, they are not encroachment on judicial power.

In exercising legislative power, the legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decision ineffective by enacting valid law on the topic within its legislative field fundamentally altering or changing its character retrospectively. The changed or altered conditions should be such that the previous decision would not have been rendered by the court, if those conditions had existed at the time of declaring the law as invalid. It is also empowered to give effect to retrospective legislation with a deeming date or with effect from a particular date..

32. In **State of Gujarat & Another Vs. Raman Lal Keshav Lal Soni & Other**, (1983) 2 SCC 33, the Apex Court declared the Gujarat Panchayats (Third Amendment) Act, 1978 ultra vires, which was enacted to nullify the basis of the decision of the High Court, whereby the High Court has granted certain relief to the petitioners holding that the members of panchayat service belonging to the lower cadre were Government servants and issued consequential directions for the equation of posts, revision of pay scale and payment of salaries. Paragraph no.52 of the judgement is reproduced herein-below:

" 52. The legislation is pure and simple, self-deceptive, if we may use such an expression with reference to a legislature-made law. The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a

written Constitution, and have to conform to the do's and don'ts of the Constitution, neither prospective nor retrospective laws can be made so as to contravene Fundamental Rights. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say, twenty years ago the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by twenty years. We are concerned with today's rights and not yesterday's. A legislature cannot legislate today with reference to a situation that obtained twenty years ago and ignore the march of events and the constitutional rights accrued in the course of the twenty years. That would be most arbitrary, unreasonable and a negation of history. It was pointed out by a Constitution Bench of this Court in BS. Yadav. v. State of Haryana. Chandrachud, C.J., speaking for the Court held:

"Since the Governor exercises the legislative power under the proviso to Article 309 of the Constitution, it is open to him to give retrospective operation to the rules made under that provision. But the date from which the rules are made to operate must be shown to bear either from the face of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules, especially when the retrospective effect extends over a long period as in this case."

Today's equals cannot be made unequal by saying that they were unequal twenty years ago and we will restore that position by making a law today and making it retrospective. Constitutional rights, constitutional obligations and constitutional consequences cannot be

tempered with that way. A law which if made today would be plainly invalid as offending constitutional provisions in the context of the existing situation cannot become valid by being made retrospective. Past virtue (constitutional) cannot be made to wipe out present vice (constitutional) by making retrospective laws. We are, therefore, firmly of the view that the Gujarat Panchayats (Third Amendment) Act, 1978 is unconstitutional, as it offends Articles 311 and 14 and is arbitrary and unreasonable. We have considered the question whether any provision of the Gujarat Panchayats (Third Amendment) Act, 1978 might be salvaged. We are afraid that the provisions are so intertwined with one another that it is well-nigh impossible to consider any life saving surgery. The whole of the Third Amendment Act must go. In the result the Writ Petition Nos. 4266-4270 of 1978 are allowed with costs quantified at Rs. 15,000. The directions given by the High Court, which we have confirmed, should be complied with before June 30, 1983. In the meanwhile, the employees of the Panchayats covered by the appeal and the writ petitions will receive a sum of Rs. 200 per month over and above the emoluments they were receiving before February 1, 1978. This order will be effective from February 1, 1983. The interim order made on February 20, 1978 will be effective upto January 31, 1983. The amounts paid are to be adjusted later."

33. The Apex Court in the Case of **Chairman, Railway Board and Others Vs. C.R. Rangadhamaiah & Others, (1997) 6 SCC 623**, declared the notification issued by the Railway Board revising the pension of its employees with retrospective effect on the ground that by an amendment, the vested right or accrued

right cannot be taken away. Para-24 of the judgement is reproduced herein-below:-

“24. In many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc., of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution. We are unable to hold that these decisions are not in consonance with the decisions in Roshan Lal Tandon, B.S. Yadav and Raman Lal Keshav Lal Soni.”

34. The following principles have been postulated in the aforesaid case by the Apex Court which the validating Act has to satisfy to validate the past transaction declared by the Court to be unconstitutional:-

(i) *whether the legislature enacting the Validating Acts has competence over the subject matter;*

(ii) *whether by validation, the legislature has removed the defect which the Court had found in previous law;*

(iii) *whether the validating law is in consonance with Chapter III of the Constitution.*

35. This Court now proceeds to analyse in the light of the principles laid down by the Apex Court whether the U.P. Act No.1 of 2021 satisfies the parameters laid down by the Apex Court in the aforesaid case to negate the benefit of the judgement of **Prem Singh (supra)** to the petitioner.

36. As regards the competence of the State Government to legislate U.P. Act No.1 of 2021 is concerned, it is pertinent to note that the State Government has the competence to legislate U.P. Act No.1 of 2021.

37. But, whether the U.P. Act No.1 of 2021 also satisfies the other two conditions to deny the benefit of the judgement of **Prem Singh (supra)** to the petitioner is a crucial issue in the present case. This Court concludes for the reasons recorded below that the U.P. Act No.1 of 2021 does not satisfy the other two tests, namely, it does not eliminate the vice pointed out by the Apex Court in the case of **Prem Singh (supra)** nor the said Act is in consonance with part-III of the Constitution of India.

38. The Apex Court in the case of **Prem Singh (supra)** (SCC pg. 540 para 30, 31) has pointed out that the work-charged employees were allowed to continue for years and there was no qualitative difference between them and the regular employees. Further, the concept of work-charged employee has been misused and exploited by the State Government to its advantage, inasmuch as the appointment was not made for a particular project which is the basic concept of the work-charged employee, rather such employees were allowed to work on exploitative terms for the work which was regular and perennial in nature.

39. It further noted that work-charged employees have been allowed to work on low wages for long before regularization, and their services have benefited the State Government. The practice of taking work of permanent and perennial in nature from the employees engaged as daily-wager or under work-charged establishment has been deprecated by the Apex Court in the case of **Prem Singh (supra)**, consequently, it held that it would be unjust to exclude the period rendered by the work-charged employee with regular service to determine the qualifying service for pension. The respondents have not placed any material on record to demonstrate that the U.P. Act No.1 of 2021 wipes out the vice pointed out by the Apex Court in the case of **Prem Singh (supra)**.

40. In this regard, it is pertinent to note that the Coordinate Bench of this Court in a bunch of writ petitions, leading of which is Writ-A No.8968 of 2022, after noticing that the U.P. Act No.1 of 2021 does not remove the vice pointed out by the Apex Court in **Prem Singh Case** held in para 12 of the judgement as under:-

“12. In the light of aforesaid, since Section 2 of the Act of 2021 also suffers from the vice pointed out by the Supreme Court in the case of Prem Singh (supra), hence, to be brought out of arbitrariness, it is read down and services rendered on temporary or permanent post is read as services rendered by a government employee, be it of temporary or permanent nature. Therefore, it is held that the petitioners are also entitled for the benefit of the judgment of Prem Singh (supra). All the impugned orders are set aside.

Daily-wager:”

41. Now, the court proceeds to consider whether U.P. Act No.1 of 2021 is in conformity with the Part III of the Constitution of India. The Apex Court in the case of **Prem Singh (supra)** took note of its judgement in **Bachan Singh's case** which upheld the judgement of **Punjab & Haryana High Court in Kesar Chand's case** wherein **Punjab & Haryana High Court** held that any Rule which excludes the counting of work-charged service of an employee whose services have been regularized subsequently must be held to be bad in law as such distinction is not based on any intelligible criteria.

42. It also noted in para-33 of the judgement noted that it would be discriminatory and irrational in not counting the period of service spent as work charged employee with regular service though the period of such service could be counted where it had been rendered between two temporary appointments in the pensionable establishment or interregnum two periods of temporary and permanent employment. Consequently, it held that there is no rationale in not counting the service of the work-charged period rendered before regularization for determining 'qualifying service' for the purpose of pension. Consequently, it read down Rule 3(8) of Pension Rule, 1961.

43. This Court is of the view that the action of the State in excluding the service rendered by an employee on the work-charged establishment or daily wager from Section 2 of the U.P. Act No.1 of 2021 is hit by Article 14 of the Constitution of India for the reason that the Apex Court has held that the exclusion of service rendered by an employee on the work-charged establishment from the regular service

would amount to treating equals as unequal. Further, there is no rationale in excluding the service of an employee as work-charged or daily-wager from regular service for determining the qualifying service for pension whereas the period of service rendered by an employee as temporary or permanent post is liable to be counted for the purpose of qualifying service when the nature of duties performed by a person appointed as daily wager or on work-charged establishment or temporary or permanent post are similar and identical.

44. The other reason to conclude that Section 2 of the U.P. Act No.1 of 2021 is hit by Article 14 of the Constitution of India is that the State cannot by its arbitrary action put the employee working on work charge establishment or daily wager to disadvantage by taking work of perpetual nature from such employee on low wages for years and excluding the period of service rendered by such employee under work charge establishment or as daily-wager from regular service for counting qualifying service for pension when the nature of duties performed by such employees are akin and similar to the nature of duties performed by the employee appointed on a temporary and permanent post in accordance with the provisions of service rules framed by the State Government and their services are liable to be counted for determining qualifying service.

45. It is settled in law that the accrued or vested right cannot be taken away by an amendment. The law on the point that the pension is not a bounty and is earned by the employee by the dint of his long service is no more *res Integra*. The right of work charge employee or daily wager to include

their service rendered under work charge establishment or daily-wager with regular service for determining qualifying service for pension has been recognized by the Apex Court in **Prem Singh's case**, therefore, such a right of an employee cannot be taken away by enacting a law which is hit by Article 14 of the Constitution of India.

46. In such view of the fact, this Court finds that U.P. Act No.1 of 2021 does not qualify the three tests laid down by the Apex Court in the judgements referred above to negate the benefit of the judgement of the Apex Court in **Prem Singh's case (supra)**.

47. A Division Bench of this Court in Special Appeal No.152 of 2021 has affirmed the judgement of the learned Single Judge in Writ-A No.35301 of 2017 whereby the learned Single Judge has allowed the writ petition of respondent Bhanu Pratap directing the State authorities to give him the benefit of Old Pension Scheme. This Court after noticing Section 2 of U.P. Act No.1 of 2021 held as under:-

"It is clear from the perusal of Section 2 of the Act of 2021 that it would have effect notwithstanding anything contained in U.P. Retirement Benefit Rules, 1961 or Regulation 361 and 370 of the Civil Service Regulation. Careful reading thereof, however, reveals that "Qualifying Service" has been defined to mean 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.

Admittedly, the petitioner was appointed on 10.05.1989 as work charge

employee at Azamgarh. His services were however regularised on 15.6.2011. The regularisation of service was against the permanent post and it is not that his initial appointment was not in accordance to service Rules.

In light of the aforesaid, period spent in service may be on temporary basis while working as a work charge employee, proceeded with regularisation, benefit of past services cannot be denied.

The impugned order when tested on the anvil of above analysis cannot be faulted with.

In view whereof no indulgence is caused.

Consequently, appeal fails and is dismissed. No costs."

48. The State of U.P. went up in Special Leave Petition registered as Special Leave to Appeal (C) No. (s) 16381 of 2022 against the judgement in Special Appeal No.152 of 2021. The Special Leave Petition was dismissed by the Apex Court by order dated 11.07.2022. The Apex Court granted eight weeks to comply with the order passed by the High Court. The judgement of the Apex court dated 11.07.2022 is reproduced herein-below:-

"In the facts and circumstances of the case, we are not inclined to entertain the present petition.

The special leave petition is, accordingly, dismissed. Pending application (s), if any, shall stand disposed of.

Learned counsel for the petitioners seeks eight weeks' time to

comply with the order passed by the High Court and granted as payed for.

It is made clear that no further extension will be granted.

49. This Court dismissed another Special Appeal No.475 of 2020 filed by the State of U.P. challenging the order dated 2nd July 2019 in a writ petition holding that the service rendered by the petitioner as Collection Peon is liable to be counted for pensionary benefits.

50. Relevant extract of the judgement dated 12.07.2021 passed in Special Appeal No.475 of 2020 is reproduced herein-below:-

"We have considered the submissions urged by learned counsel for the appellants and learned counsel for the petitioner/non-appellant.

*It is not in dispute that petitioner/non-appellant was engaged as Seasonal Collection Peon on 20th February, 1976. He continued to work with the respondents till his regularisation on 31st July, 2010. Petitioner/non-appellant then retired from service on 31st March, 2012. Since he was regularised in service prior to retirement, he became entitled for the retiral benefits in view of the judgment of this Court in the case of **Board of Revenue and others Vs. Prasidh Narain Upadhyay, 2006 (62) ALR 839** decided the same controversy. It was held that once an employee is regularised in service his entire past services would be counted for the determination of necessary benefits. It is irrespective of initial appointment on temporary basis.*

*Taking into consideration the judgment of this Court in **Prasidh Narayan***

(supra) and relied upon by the learned Single Judge, we find no reason to cause interference in the appeal. More so, the same issue was decided by this Court in the appeal bearing **Special Appeal Defective No. 156 of 2021 (State of U.P. and 4 others Vs. Narayan Singh Sharma)** dated **19th February, 2021**.

In light of the aforesaid, this appeal fails and is dismissed.”

51. The State of U.P. again preferred Special Leave Petition numbered Special Leave to Appeal (C) No(s). 9883-9884/2022 which was dismissed by the Apex Court on 11.07.2022 by passing the following order:--

“In the facts and circumstances of the case, we are not inclined to entertain the present petitions.

The special leave petitions are, accordingly, dismissed. Pending application (s), if any, shall stand disposed of.

Learned counsel for the petitioners seeks eight weeks' time to comply with the order passed by the High Court and granted as payed for.

It is made clear that no further extension will be granted.”

52. In Special Appeal Defective No.564 of 2020, the State Government challenged the order dated 18.09.2019 passed by this Court in Writ-A No.10116 of 2018 whereby the Special Appellate Court affirmed the judgement passed in Writ-A No.10116 of 2018 granting the benefit of pension to the petitioner. The relevant extract of the judgement is reproduced herein-below:-

“A perusal of the facts averred in the counter affidavit, we find that it is an admitted fact that on being appointed a Seasonal Collection Amin, regular pay scale admissible to the post was given to the respondent-petitioner and that was also revised from time to time. The appellants-respondents also deducted the income-tax from the salary of the respondent-petitioner. The grant of regular pay scale itself is sufficient to arrive at a conclusion that the appointment of the Respondent-Petitioner was on a regular basis and as such he is entitled for post retiral benefits.”

53. Against the said judgment, State Government preferred Special Leave to Appeal (C) No(s).12588 of 2021 which was dismissed by the Apex Court on 23.08.2021 by passing the following order:-

“Heard learned counsel for the petitioners.

We do not find any ground to interfere with the impugned order, as much as the petitioner was initially appointed in the year 1978 as a Seasonal Collection Amin, and was extended regular pay scale from 1988 onwards and his pay was also revised from time to time till he attained the age of superannuation.

In that view of the matter, the Special Leave Petition is dismissed.”

54. This Court consistently in the aforesaid cases after noticing the U.P. Act No.1 of 2021 approved the law that service rendered as work-charged employee or daily-wager is liable to be counted with the regular service to determine the qualifying service for pension, and the Special Leave to Appeals preferred by the State Government in all the cases have been

dismissed with a direction to the State Government to comply with the orders of the High Court within the period stipulated in the order.

55. Now, coming to the judgements on which reliance has been placed by the respondents, this Court may note that those judgements have not considered the principles of law postulated by the Apex Court in the judgements referred above as to when the legislature can override the judgement. Further, those judgements have also not noted the judgements passed by this Court in Special Appeals, referred above, and the order of the Supreme Court dismissing the Special Leave Petitions against those judgements.

56. It is also pertinent to note that a judgment can be said to be per incuriam when it has been delivered by the Court in ignorance of the relevant statutory provisions and or the binding decision of a Court of co-ordinate jurisdiction or that of a higher Court. In this connection the Full Bench of this Court in *Rana Pratap Singh... v. State Of Uttar Pradesh...*, **(1995) 1 All CJ 200**: (1996 All LJ 301) has laid down as under (at p. 308 of All LJ):-

"This is what now brings us to what constitute the parameters of the per incuriam rule. As the Supreme Court in Punjab Land and Recreation Corporator Ltd. v. Presiding Officer Labour Court, (1990) 3 SCC 682 explained, "the Latin expression per incuriam means through inadvertance. A decision can be said generally to be given per incuriam when this Court has acted in ignorance of a precious decision of this Court". Further "in England a decision is said to be given per incuriam when the Court has acted in ignorance of a previous decision of its own

or of a Court of co-ordinate jurisdiction which covered the case before it, or when it has acted in ignorance of a decision of the House of Lords."

A similar exposition of the per incuriam rule is to be found in *State of U.P v. Synthetics and Chemicals Ltd.*, (1991) 4 SCC 139, namely, that "incuria" literally means 'carelessness'. In practice per incuriam appears to mean per ignoratum. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratum of a statute or other binding authority'. **(Young v. Bristol Aeroplane Co. Ltd.) (1944 1 KB 718)** : (1944) 2 All ER 293."

57. In the case of **Chandra Singh (supra)**, the pension of Chandra Singh was reduced by the order dated 16.05.2018. Thereafter, he approached this Court by filing Writ-A No.20874 (S/S) of 2021, and his writ petition was dismissed and Special Appeal was also dismissed by the Special Appeal Court vide order dated 22.04.2022. The Special Appeal Court has proceeded on the basis that as the Seasonal Collection Amin is appointed for a limited period only for specified duty on completion of which he is discharged, therefore, the duty performed by Seasonal Collection Amin intermittently, will not fall within the category "continuous temporary or officiating service under the Government of Uttar Pradesh" within the purview of Rule 352 (a) of the Civil Service Regulations.

58. It may be pertinent to note that this Court in the case of **Chandra Singh (supra)** did not notice the judgement of the Apex Court in Special Leave to Appeal (C) No(s). 12588 of 2021 dated 23.08.2021, extracted above, affirming the judgement

of this Court in Special Appeal No.564 of 2020.

59. So far as the judgement of this Court in the case of **Sadanand (supra)** decided on 16.01.2023 is concerned, the said judgement has also not noticed the judgement of this Court in Special Appeal No.475 of 2020 and Special Appeal No.152 of 2021, against which Special Leave Petitions have been dismissed by the Apex.

60. Further, the said judgement has not considered the issue whether the U.P. Act No.1 of 2021 satisfies the three tests laid down by the Apex Court in various pronouncements to override a judgement.

61. Similarly, the judgement of this Court in the case of **Syed Jalal Haider (supra)** passed in Special Appeal No.80 of 2019, decided on 24.01.2023 also does not come to rescue the respondents as the Court has dismissed the Special Appeal relying upon the judgement of this Court in the case of **Sadanand' case (supra)**, decided on 16.01.2023.

62. In the instant case, it is stated by the petitioner in para-5 of the writ petition that he was engaged as a daily wage employee on the post of Gaze Reader on 01.05.1989. This fact has not been denied by the respondents in the counter affidavit. It is also not disputed that the petitioner was engaged subsequently as a work-charged employee by the order of the Executive Engineer dated 24.07.1997 on a pay scale mentioned in the appointment letter dated 24.07.1997, and subsequently, the petitioner was regularized by the order dated **29.09.2011** as Gaze Reader. It is also not disputed that the petitioner since the date of engagement in the year 1989

continued on the post of Gaze Reader till his retirement.

63. The aforesaid facts establish that the nature of work which the petitioner discharged was permanent and perennial. Further, the action of the respondents in taking the work from the petitioner as a daily wager, and thereafter work-charged employee for about 21 years by paying him low wages is nothing but an arbitrary exercise of powers by the respondents and is an unfair labour practice.

64. It is also relevant to note that the petitioner was discharging the same duty as the other regular employees, and therefore, excluding the period worked by the petitioner as a daily wager and thereafter as a work-charged employee for the purpose of grant of pension would be hit by Article 14 of the Constitution of India being arbitrary and discriminatory. Therefore, this Court is of the view that the petitioner's service since the date of his engagement as daily wager i.e. on 01.05.1989 shall be counted along with regular service for the grant of pensionary benefit to the petitioner.

65. Now, coming to the second submission of learned counsel for the respondents that as the petitioner's service has been regularized by order dated **29.09.2011**, the petitioner shall be treated to have joined the service with the State Government after 01.04.2005 i.e. after the introduction of New Pension Scheme, therefore, he cannot be extended the benefit of Old Pension Scheme. In this regard, it is pertinent to note that this Court has given above elaborate reasons that the services rendered by the petitioner as daily-wager and work-charged employee are liable to be

counted for the determination of qualifying service for pension.

66. In such view of the fact, the submission that as the entry of the petitioner in the State Government service is after 01.04.2005, therefore, he is covered by the New Pension Scheme is misconceived. The plain reading of the statement of object and reasons of the Notification dated **28.03.2005** suggests that the said Scheme applies to the new entrants to the service of the State Government and of all State controlled autonomous institutions and State aided private educational Institutions where the existing Pension Scheme is patterned on the Scheme for the Government employees and is funded by the consolidated fund of the State Government.

67. Sub-rule (3) inserted in Rule 2 of the Rules 1961 by amendment Rule, 2005 provides that these Rules shall not apply to the employees entering in service and post on or after 01.04.2005 in connection with the affairs of the state borne on pensionable establishment whether temporary or permanent, meaning thereby that the Rules, 1961 do not apply to the Government Servants who have entered in the service on or after 01.04.2005.

68. In the instant case, the petitioner cannot be said to have entered into service after 01.04.2005, inasmuch as it is undisputed that he was engaged as a daily wager on the post of Gaze Reader on **01.05.1989**. Subsequently, he was appointed to the work-charged establishment on **25.07.1997**. The petitioner was paid wages from the fund of the State Government. Though the petitioner was not enjoying the benefit which was available to the regular

employees, the fact remains that he was working in the establishment of the State Government under the supervision of the State authorities and was being paid wages by the State Government since the date of his engagement as daily-wager i.e. from 01.05.1989.

69. In this respect it would be apt to refer to the judgement passed in Writ-A No.28543 of 2013 Bagheswari Prasad, wherein this Court held that the right to get absorb accrued to the petitioner not on 09.04.2005 when the appointment letters came to be issued, but on 29.04.1999 when this Court issued a positive direction in that regard. This Court held that once the State respondents are found to have delayed proceeding in entirety, they cannot be permitted to wriggle out of the consequence of the delay.

70. Even in **Prem Singh's case (supra)**, the Apex Court did not appreciate the action of the respondent State in not regularizing the services of the employees rendering service for thirty, forty years or more and they have been superannuated. The Apex Court following the dictum of the **State of Karnataka Vs. Uma Devi (2006) 4 SCC 1** issued a direction to regularize the service of those employees who have worked and completed more than 10 years or more. Para-36 of the judgement of **Prem Singh (Supra)** is reproduced herein-below:-

“36. There are some of the employees who have not been regularized in spite of having rendered the services for 30-40 or more years whereas they have been superannuated. As they have worked in the work-charged establishment, not against any particular project, their services ought to have been regularized

72. In such factual backdrop, the State cannot take shelter of the New Pension Scheme notified in the year 2005 to contend that as the service of the petitioner has been regularized after the introduction of the New Pension Scheme by Notification/ Government Order G-33-

75. The aforesaid exercise shall be completed by the respondents within three months from the date of production of a certified copy of this order.

Counsel for the Petitioners:
Dr. L.P. Mishra, V.K. Bajpai

Counsel for the Respondents:

C.S.C., Sanjay Bhasin

Civil Law - Constitution of India, 1950 – Articles 14, 16 & 21 – Uttar Pradesh Absorption of Surplus Employees of UPTRON India Limited in Government Service Rules, 2011 – Absorption of retrenched employees – Equal pay for equal work – Surplus employees of UPTRON India Limited – Denial of absorption in U.P. Civil Secretariat – Impugned order dated 11.05.2010 quashed – Petitioners entitled to absorption as Group-D employees and revised pay scale from 01.01.2006.

Held: The petitioners, surplus employees of UPTRON India Limited, appointed on contract basis in U.P. Civil Secretariat as Class-IV employees, are entitled to absorption as Group-D employees under the Uttar Pradesh Absorption of Surplus Employees of UPTRON India Limited in Government Service Rules, 2011, and the Government Order dated 20.12.2011. The impugned order dated 11.05.2010, denying absorption on the ground of 1983 Service Rules, is unsustainable as the Absorption Rules, 2011, override inconsistent provisions. Denial of absorption and revised pay scale from 01.01.2006 is arbitrary, discriminatory, and violates Articles 14, 16, and 21 of the Constitution. The principle of equal pay for equal work applies, as petitioners perform the same duties as regular Class-IV employees. The St. Government's delay in considering absorption, resulting in deprivation of benefits, is unjustifiable. The petitioners are entitled to absorption on suitable Group-D posts, continuation in service until the age of superannuation (60 years), and payment of salary as per the revised pay scale (minimum Rs.6050/- per month) from 01.01.2006, along with other admissible benefits. Impugned order dated 11.05.2010 quashed. Respondents directed to treat petitioners as absorbed Group-D employees in U.P. Civil Secretariat, allow them to join suitable posts forthwith, continue their service until superannuation at 60 years, and pay salary as per revised pay scale from 01.01.2006.

Case Law Discussed:

Brahma Nand Lavaniya & anr. Vs St. of U.P. & ors., Writ Petition No. 3316 (S/S) of 2013, dated 29.05.2014, confirmed in Special Appeal Defective No. 430 of 2014.

(Delivered by Hon'ble Irshad Ali, J.)

1 . Heard Dr. L.P. Misra, learned counsel for the petitioners and Sri Pankaj Khare, learned Standing Counsel for the State-respondent.

2. By means of the present writ petition, the petitioners have prayed as under :-

"[a] To issue a writ, order or direction in the nature of mandamus commanding the Opp-parties to frame a scheme for absorption of the petitioners as Class-IV employees in U.P. Civil Secretariat against the sanctioned and vacant posts on which they are working from the date of their initial appointment as Class-IV employees.

[b] To issue a writ, order or direction in the nature of mandamus commanding the Opp-parties to make payment of salary to the petitioners in the minimum of the basic pay as per revised pay scale w.e.f. 01.01.2006 along with other admissible benefits including arrears thereof.

[c] To award the cost of this petition in favour of the petitioners.

[d] To issue any other writ, order or direction which this Hon'ble Court deems just and proper in the circumstances of the case.

[e] issue a writ, order or direction in the nature of certiorari thereby

quashing the impugned order dated 11.5.2010. contained as (annexure no. 40)

[f] issue a writ, order or direction in the nature of mandamus commanding the opposite parties to pay salary to the petitioners as per revised pay-scale from 1.1.2006 i.e. from the date it is being paid to the regularly appointed group-D employees of U.P. Secretariat. The opposite party no. 3 may further be directed to make its contribution into the provident fund account of the petitioners.

[g] prayer deleted

[h] Issue a writ, order or direction in the nature of mandamus commanding the opposite parties to extend all the service benefits arising out from the absorption of the petitioners as Group-D employees from the date of their initial appointment including the services rendered by the petitioners as the employees of Uptron notwithstanding the absorption order dated 04.04.2012 issued pursuant to Notification dated 20.11.2011."

3. Facts in nutshell are that Uptron India Limited was established as a subsidiary company of U.P. Electronics Corporation which is directly controlled by the department of I.T. and Electronics, Government of U.P. It was engaged in the designing and manufacturing of electronics goods and up to the year 1991, the company was running into profit but all of a sudden, it received financial loss and on 20.6.1994, it was declared as a sick unit and referred to BIFR.

4. The petitioners of the present writ petition were appointed in the said company against the sanctioned and vacant posts after following the due procedure of

law in the years 1982, 1983, 1984, 1985, 1986 and 1987 after qualifying the written examination followed by interview.

5. The Cabinet took a decision to close all the units of the company except the consultancy division and on account of its closure, the petitioners as well as other employees became unemployed due to closure of work. A government order dated 11.11.1998 was issued, providing therein that the employees of the sick units may be appointed on contract basis against the available posts in the government departments/ establishments/ institutions. On 1.12.1988, a decision was taken in the Cabinet meeting in regard to closure of Uptron as well as adjustment of its employees.

6. Government order dated 22.12.1998 was issued, directing all the government departments/ establishments/ institutions for adjustment/ appointment of the Uptron employees as per the availability of vacancies. Pursuant to the aforesaid policy decision of the State Government, a memorandum of agreement was signed between the respondent Nos.3 and 4 and it was decided that the petitioners will be appointed as Group-D employees in the U.P. Civil Secretariat on contract basis.

7. A letter was issued on 23.7.2009, directing the petitioners to submit their joining report as Class-IV employees. Thereafter, the petitioners, since the dates of their respective appointments in U.P. Civil Secretariat as Class-IV employees i.e. from August, 1999 onwards, are being paid minimum of the basic pay admissible to a Class-IV employee till date although they are doing same work as is performed by the regularly appointed Class-IV employees of the U.P. Civil Secretariat.

8. Submission of learned counsel for the petitioners is that the petitioners are being paid minimum of the basic pay, which is only Rs.2,550/- per month, is also against the principle of equal pay for equal work and as such the respondents are legally bound to pay same pay scale which is being paid to the regularly appointed Class-IV employees of the U.P. Civil Secretariat.

9. The government has extended the benefit of revised pay scale pursuant to recommendations of pay committee constituted for implementing recommendation of 6th pay commission, to the employees working on contract basis in various government departments/corporations as the employees working on contract basis in U.P. State Law Commission have been given benefit of the revised pay scale.

10. The employees of the Uptron who were also appointed on contract basis in U.P. State Human Rights Commission have been given benefit of pay revision pursuant to the recommendations of the 6th pay commission vide order dated 21.5.2009.

11. Submission of learned counsel for the petitioners is that the employees of the Uptron were appointed on contract basis in the U.P. State Human Rights Commission on the same terms and conditions on which the petitioners were appointed but the employees of Uptron appointed in the Human Rights Commission have been extended the benefit of revised pay scale vide order dated 21.5.2009, whereas the petitioners have yet not been extended the said benefit and, as such, the petitioners are also entitled to be treated at par to their counterparts working in various government departments who have been

given benefit of revised pay scale which is Rs.6050/-.

12. The petitioners who are being paid Rs.2550/- per month as minimum of the basic pay of Class-IV employee since the year 1999-2000 i.e. from the date of their respective joining of U.P. Civil Secretariat and at present as per the recommendations of the 6th pay commission, the minimum of the basic pay of Class-IV employee has been fixed as Rs.6050/- per month and this pay has been given to the Class-IV employee w.e.f. 1.1.2006 and as such, in this view of the matter also, the petitioner are entitled to get Rs.6050/- per month as minimum of the basic pay scale admissible to Class-IV employees in the U.P. Civil Secretariat.

13. Since the year 2005, the petitioners are continuously moving representation before the respondent No.3 mentioning therein the entire facts and have been requesting for their absorption against the vacant posts of Group-D employees i.e. on the post on which they are working since last 10 years, but to no avail.

14. Learned counsel for the petitioners submits that the petitioners are legally entitled to be absorbed as Class-IV employees in the U.P. Civil Secretariat in view of the decisions taken in the high level meetings dated 11.12.1998, 22.12.1998, 4.1.1999, 16.12.2004 and 8.11.2005 as well as in view of the information given by the Department of Law, Finance, Karmik, Sachivalaya Prashasan Vibhag, but the inaction on the part of the respondents in this regard is illegal, arbitrary and discriminatory.

15. It is submitted that after the closure of Uptron India Ltd., all the

employees who did not opt V.R.S. and were appointed either on contract basis or on deputation in various departments/corporations establishments like the petitioners, are forming the same class and more than 250 Uptron employees have been permanently absorbed in various departments like Department of Home, U.P. Power Corporation, State Consumer Forum, State Election Commission in availability of vacancies, but the petitioners who are similarly situated persons to those who have been permanently absorbed but they are not being by the respondents, which action of the respondents is discriminatory and is in violation of Articles 14, 16 and 21 of the Constitution of India.

16. It is submitted that number of similarly situated persons have been absorbed against Group-D posts of U.P. Secretariat, vide order dated 23.2.2010, one Siya Ram, who was retrenched employee of U.P. Tyres and Tubes Ltd., a government undertaking like Uptron India Limited, has been absorbed/ appointed against Group-D posts of U.P. Secretariat and as such in this view of the matter, the reasoning assigned by the respondent No.3, while rejecting the case of the petitioners for their absorption is arbitrary and discriminatory, which is not sustainable in the eyes of law.

17. The reasoning assigned in the order dated 11.5.2010 to the effect that since the petitioners are retrenched employees of Uptron, who are working on contract basis against Group-D post of U.P. Secretariat, cannot be absorbed against the said posts in view of the prescription made in the 1983 Rules whereby service conditions of Group-D employees of U.P. Secretariat are governed is not sustainable in the eyes of law for the

reason that the State Government is competent to make necessary absorption.

18. He submits that all the petitioners of the present writ petition are aggrieved by their non absorption in the U.P. Civil Secretariat in terms of the provisions contained in Uttar Pradesh Absorption of Surplus Employees of UPTRON India Limited in Government Service Rules, 2011 (hereinafter referred to as 'Absorption Rules, 2011') notified on 20.12.2011 and the Government Order dated 20.12.2011.

After successfully functioning as a commercial venture for a considerable long period in the business of production of television sets and other electronic items, UPTRON India Limited became sick and ultimately the said successful venture of the State of U.P. was closed down.

In a meeting held under the Chairmanship of the Chief Secretary of U.P. on 11.12.1998, which was attended by higher officers of the State Government and other officers of various other State Government instrumentalities/ undertakings, a decision was taken to appoint the surplus employees of UPTRON India Limited on contract basis to various Government departments/offices and establishments.

In a similar case, this Court passed an order on 05.03.2013 in Writ Petition No. 4556 (S/S) of 2012 which runs as under:-

"Pursuant to order dated 22.02.2013, Sri Sunil Kumar, Principal Secretary, department of Basic Education, Government of U.P. and Ms. Amrita Soni, Project Director, Sarva Shiksha Abhiyan, Uttar Pradesh are present in Court.

On a query being put to him, Sri Sunil Kumar, Principal Secretary stated that Uttar Pradesh Absorption of Surplus Employees of UPTRON India Limited in Government Service Rules, 2011 were notified on 20.12.2011 as a piece of beneficial subordinate legislation to benefit those employees who before closer of UPTRON India Limited were working in the said organization. He further stated that proposal for absorption of employees of UPTRON India Limited including the petitioners has been received from the State Project Director, Sarva Shiksha Abhiyan in the State Government on 24.12.2012 and the same is under examination and consideration. He assures the Court that final decision in the matter shall be taken by the State Government within a period of eight weeks from today.

It may, however, be noticed that the aforesaid Absorption Rules were promulgated on 20.12.2011 and for the purposes of its faithful implementation, the Government Order was also issued on the same day i.e. on 20.12.2011. However, it is strange to notice that even after lapse of a period of about 15 months, so far as the case of employees of UPTRON India Limited who are working in deputation in Sarva Shiksha Abhiyan are concerned, no concrete final decision has yet been taken. True, the Rules do not provide for any time limit to take decision in respect of absorption of employees of UPTRON India Limited, however, it has to be presumed that since Rules have been framed for the purpose of giving certain benefits to the employees of UPTRON India Limited, the decision ought to have been taken within some reasonable time. Reasonable time, though cannot be defined, however, considering the facts and circumstances of the case and the situation which has all

along been faced by the employees of UPTRON India Limited after its closer, it was expected of the State Government as well as Sarva Shiksha Abhiyan to have acted promptly so as to ensure that benefit of the rights created under the Rules is actually extended to the employees for whom the Rules have been framed.

A very disturbing feature in this case, which needs to be taken notice of, is that the petitioners in both writ petitions, namely, Brahma Nand Lavaniya and Sharad Mehrotra have retired on 31.08.2012 and 31.10.2012, respectively after attaining the age of superannuation of 58 years.

It is noticeable further that the age of superannuation as per Rules prevalent in UPTRON India Limited is 58 years whereas as per provision governing the age of superannuation in respect of State Government's employees it is 60 years. Since December, 2011 till October 2012, there elapsed a long time when cases of both petitioners could have been and ought to have been considered for absorption. Had their cases been considered, they would have been able to realize the right which stood crystallized to them on promulgation of the Rules on 20.12.2011.

Sri Sunil Kumar, Principal Secretary, department of Basic Education, Government of U.P has, however, assured the Court that aforesaid aspect of the matter shall also be looked into and will be given sympathetic consideration at the time of consideration of cases of petitioners for absorption under the aforesaid Rules and Government Order. The Court expresses its complete trust and faith that the matter at hand shall be considered by the authorities

of State Government in its correct perspective.

Let this matter be listed on 13.05.2013.

Sri Sunil Kumar, Principal Secretary, department of Basic Education, Government of U.P. and Ms. Amrita Soni, Project Director, Sarva Shiksha Abhiyan, Uttar Pradesh need not appear again unless called for."

19. The Court while passing the order dated 05.03.2013 recorded the assurance given by the Principal Secretary, department of Basic Education that the matter relating to absorption of both the petitioners shall be given sympathetic consideration. The Court on the assurance given by such a higher officer of the State Government expressed its trust and faith that matter of absorption of the petitioners shall be considered by the authorities in its correct perspective.

20. The question for consideration for this Court in this matter is as to whether the petitioners have wrongly been denied the benefits of absorption in terms of the provisions contained in Absorption Rules, 2011 and the Government Order dated 20.12.2011. Another question which falls for consideration of the Court is as to whether the authorities of the State Government have unduly delayed the matter relating to consideration of the case of the petitioners for absorption in terms of the aforesaid Absorption Rules, 2011 and the Government Order dated 20.12.2011 which has resulted in denial of benefit of absorption of the petitioners in government service.

21 . A policy decision was taken by the State Government to absorb the surplus

employees of UPTRON India Limited working on deputation to other departments/organisations of the State Government, pursuant to which, Absorption Rules, 2011 were framed and the Government Order dated 20.12.2011 was issued. The Absorption Rules, 2011 notified on 20.12.2011 came into force on its notification itself as per the provisions contained in Rule 1 (2) of the said Rules. Rule 2 (e) defines 'surplus employee' to mean an employee of the Uptron India Limited (other than an employee employed on ad-hoc, casual, work-charge or contract basis) who was rendered surplus from Uptron India Limited as a result of winding up either in whole or in part of the Uptron India Limited and is working on contract basis or body shopping basis or on deputation in a Government Department.

It is also to be noticed that the petitioners are surplus employees of UPTRON India Limited and they, being regular employees of UPTRON India Limited, are covered by the term 'surplus employee' within the meaning of the said word occurring in Rule 2 (e) of Absorption Rules, 2011 and further that both the petitioners were working on deputation on the date of promulgation/notification of the Absorption Rules, 2011 i.e. on 20.12.2011.

Rule 3 of the Absorption Rules, 2011 opens with a non-abstante clause and provides that the Government may, by a notified order, require the absorption of surplus employees of Uptron India Limited in any post or service under the Government except a post or service which falls within the purview of Uttar Pradesh Public Service Commission. It further provides that the Government may prescribe the procedure for such absorption including relaxation in the conditions of

recruitment. Sub-rule (2) of Rule 3 provides that provisions contained in relevant Service rules shall be deemed to have been modified to the extent the same are inconsistent with the provisions made in the notified order as referred to in sub-rule (1).

Thus, Rule 3 of the Absorption Rules, 2011 enabled the State Government to provide for absorption of the surplus employees of UPTRON India Limited by issuing a notified order. The Rules, thus, are enabling in nature.

Exercising the powers vested in the State Government under Rule 3 (1) of the Absorption Rules, 2011, the State Government issued a notified order on 20.12.2011 itself which provides that taking into account the concept of welfare state it has been decided by the Government that the surplus employees of UPTRON India Limited working on deputation shall be absorbed in the government service. The notified order dated 20.12.2011 contains a decision that the surplus employees of UPTRON India Limited working on contract/body shopping basis in the Government Departments shall be absorbed in the same Government Departments. Another decision embodied in the said notified order dated 20.12.2011 is that the provisions of Rule 2 (e) (ii) shall also be applicable to those surplus employees of the UPTRON India who are working in a society or an authority or any other organization/body functioning under any department of the State Government.

The direction in the said notified order is that the concerned department shall adopt the Absorption Rules, 2011 for the purpose of absorbing such employees

working in the government controlled society, authority or any other organization treating them to be working in the Government Department.

Thus, the Government issued the aforesaid notified order on 20.12.2011 making a provision for absorption of surplus employees of the UPTRON India Limited working on deputation/contract/body shopping basis not only in the government departments but also for those who were working on deputation in a society or an authority or an organization functioning under a Government Department.

As stated above, both the petitioners are undisputedly surplus employees of UPTRON India Limited in terms of the meaning of said word occurring in Rule 2 (e) of the Absorption Rules, 2011. It can also not be disputed that in terms of the provisions of notified order dated 20.12.2011, since the Sarva Shiksha Abhiyan in the State of U.P. is being conducted through a Government owned and administered society, namely, "mRRkj izns'k lHkh ds fy, ifj;kstuk ifj'kn" (U.P. Education for All Project Council), as such the petitioners are also eligible to be considered for absorption in terms of notified order dated 20.12.2011. The relevant provision in the notified order which is applicable in the case of the petitioners is as follows:-

"(ख) उपर्युक्त संदर्भित आमेलन नियमावली, 2011 विषयक अधिसूचना संख्या-1477/78-1-2011-51इले0/92टीसी-5, दिनांक 20 दिसम्बर, 2011 का प्रस्तर-2ई(पप) उन कर्मचारियों पर भी लागू होगा जो शासन के किसी भी विभाग के अधीन किसी सोसायटी, प्राधिकरण अथवा किसी अन्य संस्था में कार्य कर रहे हैं। ऐसे कर्मचारियों को भी उसी विभाग में कार्यरत मानते

हुए समायोजित करने के लिए संबंधित विभाग नियमावली को अपने यहां अंगीकृत ;।कवचजद्ध कर लें।"

Thus, provisions of Rule 2 (e) (ii) of the Absorption Rules have also been made applicable to the employees working in a society functioning under the State Government and such surplus employees of UPTRON India Limited working in such a society were to be treated to be employees of the Government Department and accordingly their cases were to be considered for absorption. The relevant words occurring in the afore-quoted provision of the notified order dated 20.12.2011 are "-----ऐसे कर्मचारियों को भी उसी विभाग में कार्यरत मानते हुए]". The aforesaid phrase occurring in the notified order dated 20.12.2011 clearly means that the employees working in the societies or other organizations functioning under the State Government shall be treated to be employees of the Government Department for the purposes of absorption.

22. The ground in the impugned order dated 11.5.2010 is that since the petitioners are retrenched employees of Uptron, who are working on contract basis against Group-D post of U.P. Secretariat, cannot be absorbed against the said posts in view of the prescription made in the 1983 Rules whereby service conditions of Group-D employees of U.P. Secretariat are governed.

23. Learned counsel for the petitioners submits that in similar circumstances, co-ordinate Bench of this Court in the case of Brahma Nand Lavaniya & Another Vs. State of U.P. & Others (Writ Petition No.3316 (S/S) of 2013, vide order dated 29.5.2014, has passed the following order, which is quoted below :-

"Since the facts of these three petitions are interwoven, with the consent of learned counsel for the parties, all the three petitions are being decided by a common judgement and order.

Heard Sri Vivek Raj Singh, learned counsel for the petitioners, Sri Zafaryab Jilani, learned Additional Advocate General assisted by Sri Badrul Hasan, the Standing Counsel for the State-respondents, Sri A.M.Tripathi, learned counsel for U.P. Education for All Project Council and Sri Sanjay Bhasin, learned counsel for UPTRON India Limited/U.P. Electronics Corporation Limited.

The facts of the case as deduced from the pleadings of respective parties available on record are as under:

Both the petitioners, namely, Brahma Nand Lavaniya and Sharad Mehrotra are surplus employees of M/s UPTRON India Limited and are aggrieved by their non-absorption in the Basic Education Department in terms of the provisions contained in Uttar Pradesh Absorption of Surplus Employees of UPTRON India Limited in Government Service Rules, 2011 (hereinafter referred to as 'Absorption Rules, 2011') notified on 20.12.2011 and the Government Order dated 20.12.2011.

Sri Brahma Nand Lavaniya was initially appointed under the services of UPTRON India Limited on the post of Dispatch Assistant by means of an order dated 13.07.1982. Similarly, Sri Sharad Mehrotra was appointed as Assistant under the services of UPTRON India Limited/U.P. Electronic Corporation Limited by means of order dated 07.07.1979.

After successfully functioning as a commercial venture for a considerable long period in the business of production of television sets and other electronic items, UPTRON India Limited became sick and ultimately the said successful venture of the State of U.P. was closed down.

In a meeting held under the Chairmanship of the Chief Secretary of U.P. on 11.12.1998, which was attended by higher officers of the State Government and other officers of various other State Government instrumentalities/undertakings, a decision was taken to appoint the surplus employees of UPTRON India Limited on contract basis to various Government departments/offices and establishments.

Pursuant to the said decision, Brahma Nand Lavaniya was appointed on the post of Computer Operator on deputation in the office of specialist/Basic Education Officer, District Agra under the Education for All Project of the State of U.P. (hereinafter referred to as 'Sarva Shiksha Abhiyan') by means of an order dated 22.04.2000. Similarly, the petitioner-Sharad Mehrotra was also appointed on deputation on the post of Assistant Finance and Accounts Officer in the office of specialist/Basic Education Officer/District Basic Education Officer, Balia under the Sarva Shiksha Abhiyan by means of an order dated 24.05.2002 passed by the Project Director, Sarva Shiksha Abhiyan, U.P., Lucknow.

The age of superannuation in terms of the provisions contained in fundamental Rules in respect of State Government employees is 60 years whereas in terms of the provision of the Services Rules applicable to the employees of

UPTRON India Limited, the age of superannuation is 58 years. In the case of Brahma Nand Lavaniya, an order was passed by the Managing Director, UPTRON India Limited on 31.07.2012 observing therein that he shall be retired from the services of the company with effect from the close of office hours on 31.08.2012. Similarly, in the case of Sharad Mehrotra, an order was passed on 27.09.2012 by UPTRON India Limited stating therein that he shall be retired from the services of the company with effect from the close of office hours on 31.10.2012. The aforesaid orders dated 31.07.2012 and 27.09.2012 appear to have been passed taking into account the fact that the age of superannuation in UPTRON India Limited is 58 years and the date of birth of Brahma Nand Lavaniya is 31.08.1954 whereas that of Sharad Mehrotra is 23.10.1954.

The aforesaid orders dated 31.07.2012 and 27.09.2012 are the subject matter of challenge in Writ Petition No.4556 (S/S) of 2012 and Writ Petition No. 5600 (S/S) of 2012 filed by Brahma Nand Lavaniya and Sharad Mehrotra, respectively.

During pendency of the aforesaid two petitions, certain directions were issued by this Court on 01.02.2013 in Writ Petition No.4556 (S/S) of 2012 wherein this Court had expressed its expectation that authorities of Sarva Shiksha Abhiyan and State Government shall work together and come forth with a definite time-bound proposal of absorption of the surplus employees of UPTRON India Limited including the petitioners. The said order dated 01.02.2013 was passed by this Court keeping in view the fact that the proposal for absorption of erstwhile employees of

UPTRON India Limited who were appointed in Sarva Shiksha Abhiyan on deputation was pending consideration before the State Government. The Court thereafter passed an order on 05.03.2013 in Writ Petition No. 4556 (S/S) of 2012 which runs as under:-

"Pursuant to order dated 22.02.2013, Sri Sunil Kumar, Principal Secretary, department of Basic Education, Government of U.P. and Ms. Amrita Soni, Project Director, Sarva Shiksha Abhiyan, Uttar Pradesh are present in Court.

On a query being put to him, Sri Sunil Kumar, Principal Secretary stated that Uttar Pradesh Absorption of Surplus Employees of UPTRON India Limited in Government Service Rules, 2011 were notified on 20.12.2011 as a piece of beneficial subordinate legislation to benefit those employees who before closer of UPTRON India Limited were working in the said organization. He further stated that proposal for absorption of employees of UPTRON India Limited including the petitioners has been received from the State Project Director, Sarva Shiksha Abhiyan in the State Government on 24.12.2012 and the same is under examination and consideration. He assures the Court that final decision in the matter shall be taken by the State Government within a period of eight weeks from today.

It may, however, be noticed that the aforesaid Absorption Rules were promulgated on 20.12.2011 and for the purposes of its faithful implementation, the Government Order was also issued on the same day i.e. on 20.12.2011. However, it is strange to notice that even after lapse of a period of about 15 months, so far as the case of employees of UPTRON India

Limited who are working in deputation in Sarva Shiksha Abhiyan are concerned, no concrete final decision has yet been taken. True, the Rules do not provide for any time limit to take decision in respect of absorption of employees of UPTRON India Limited, however, it has to be presumed that since Rules have been framed for the purpose of giving certain benefits to the employees of UPTRON India Limited, the decision ought to have been taken within some reasonable time. Reasonable time, though cannot be defined, however, considering the facts and circumstances of the case and the situation which has all along been faced by the employees of UPTRON India Limited after its closer, it was expected of the State Government as well as Sarva Shiksha Abhiyan to have acted promptly so as to ensure that benefit of the rights created under the Rules is actually extended to the employees for whom the Rules have been framed.

A very disturbing feature in this case, which needs to be taken notice of, is that the petitioners in both writ petitions, namely, Brahma Nand Lavaniya and Sharad Mehrotra have retired on 31.08.2012 and 31.10.2012, respectively after attaining the age of superannuation of 58 years.

It is noticeable further that the age of superannuation as per Rules prevalent in UPTRON India Limited is 58 years whereas as per provision governing the age of superannuation in respect of State Government's employees it is 60 years. Since December, 2011 till October 2012, there elapsed a long time when cases of both petitioners could have been and ought to have been considered for absorption. Had their cases been considered, they would have been able to

realize the right which stood crystallized to them on promulgation of the Rules on 20.12.2011.

Sri Sunil Kumar, Principal Secretary, department of Basic Education, Government of U.P. has, however, assured the Court that aforesaid aspect of the matter shall also be looked into and will be given sympathetic consideration at the time of consideration of cases of petitioners for absorption under the aforesaid Rules and Government Order. The Court expresses its complete trust and faith that the matter at hand shall be considered by the authorities of State Government in its correct perspective. Let this matter be listed on 13.05.2013.

Sri Sunil Kumar, Principal Secretary, department of Basic Education, Government of U.P. and Ms. Amrita Soni, Project Director, Sarva Shiksha Abhiyan, Uttar Pradesh need not appear again unless called for."

The Court while passing the order dated 05.03.2013 recorded the assurance given by the Principal Secretary, department of Basic Education that the matter relating to absorption of both the petitioners shall be given sympathetic consideration. The Court on the assurance given by such a higher officer of the State Government expressed its trust and faith that matter of absorption of the petitioners shall be considered by the authorities in its correct perspective.

In compliance of the aforesaid order dated 05.03.2013 passed by this Court, an order dated 28.05.2013 has been passed whereby the petitioners have not been absorbed in the Education Department, rather it has only been

provided that since they have retired on 31.08.2012 and 31.10.2012 on their attaining the age of superannuation after completion of 58 years of age, they shall be entitled to be given the benefits of post-retiral dues treating them to have served till the age of superannuation on their attaining 60 years of age. Another order on the same date i.e. 28.05.2013 was also passed by the State Government whereby as many as 75 surplus employees of UPTRON India Limited who were working on deputation with Sarva Shiksha Abhiyan were directed to be absorbed in the services of Basic Education Department of the State Government. It is the aforesaid order dated 28.05.2013 by which the petitioners were not absorbed; rather they have been given the post-retiral dues treating them as retired on their completion of the age of 60 years which is under challenge in the Writ Petition No. 3316 (S/S) of 2013.

The question for consideration for this Court in this matter is as to whether the petitioners have wrongly been denied the benefits of absorption in terms of the provisions contained in Absorption Rules, 2011 and the Government Order dated 20.12.2011. Another question which falls for consideration of the Court is as to whether the authorities of the State Government and Sarva Shiksha Abhiyan have unduly delayed the matter relating to consideration of the case of the petitioners for absorption in terms of the aforesaid Absorption Rules, 2011 and the Government Order dated 20.12.2011 which has resulted in denial of benefit of absorption of the petitioners in government service.

It is not in dispute that both the petitioners are the surplus employees of

UPTRON India and that a policy decision was taken by the State Government to absorb the surplus employees of UPTRON India Limited working on deputation to other departments/organisations of the State Government, pursuant to which, Absorption Rules, 2011 were framed and the Government Order dated 20.12.2011 was issued. The Absorption Rules, 2011 notified on 20.12.2011 came into force on its notification itself as per the provisions contained in Rule 1 (2) of the said Rules. Rule 2 (e) defines 'surplus employee' to mean an employee of the Uptron India Limited (other than an employee employed on ad-hoc, casual, work-charge or contract basis) who was rendered surplus from Uptron India Limited as a result of winding up either in whole or in part of the Uptron India Limited and is working on contract basis or body shopping basis or on deputation in a Government Department.

It is also to be noticed that both the petitioners are surplus employees of UPTRON India Limited and they, being regular employees of UPTRON India Limited, are covered by the term 'surplus employee' within the meaning of the said word occurring in Rule 2 (e) of Absorption Rules, 2011 and further that both the petitioners were working on deputation on the date of promulgation/notification of the Absorption Rules, 2011 i.e. on 20.12.2011.

Rule 3 of the Absorption Rules, 2011 opens with a non-abstante clause and provides that the Government may, by a notified order, require the absorption of surplus employees of Uptron India Limited in any post or service under the Government except a post or service which falls within the purview of Uttar Pradesh Public Service Commission. It further provides that the Government may

prescribe the procedure for such absorption including relaxation in the conditions of recruitment. Sub-rule (2) of Rule 3 provides that provisions contained in relevant Service rules shall be deemed to have been modified to the extent the same are inconsistent with the provisions made in the notified order as referred to in sub-rule (1).

Thus, Rule 3 of the Absorption Rules, 2011 enabled the State Government to provide for absorption of the surplus employees of UPTRON India Limited by issuing a notified order. The Rules, thus, are enabling in nature.

Exercising the powers vested in the State Government under Rule 3 (1) of the Absorption Rules, 2011, the State Government issued a notified order on 20.12.2011 itself which provides that taking into account the concept of welfare state it has been decided by the Government that the surplus employees of UPTRON India Limited working on deputation shall be absorbed in the government service. The notified order dated 20.12.2011 contains a decision that the surplus employees of UPTRON India Limited working on contract/body shopping basis in the Government Departments shall be absorbed in the same Government Departments. Another decision embodied in the said notified order dated 20.12.2011 is that the provisions of Rule 2 (e) (ii) shall also be applicable to those surplus employees of the UPTRON India who are working in a society or an authority or any other organization/body functioning under any department of the State Government.

The direction in the said notified order is that the concerned department shall adopt the Absorption Rules, 2011 for

the purpose of absorbing such employees working in the government controlled society, authority or any other organization treating them to be working in the Government Department.

Thus, the Government issued the aforesaid notified order on 20.12.2011 making a provision for absorption of surplus employees of the UPTRON India Limited working on deputation/contract/body shopping basis not only in the government departments but also for those who were working on deputation in a society or an authority or an organization functioning under a Government Department.

As stated above, both the petitioners are undisputedly surplus employees of UPTRON India Limited in terms of the meaning of said word occurring in Rule 2 (e) of the Absorption Rules, 2011. It can also not be disputed that in terms of the provisions of notified order dated 20.12.2011, since the Sarva Shiksha Abhiyan in the State of U.P. is being conducted through a Government owned and administered society, namely, "mRRkj izns'k lHkh ds fy, ifj;kstuk ifj"kn" (U.P. Education for All Project Council), as such the petitioners are also eligible to be considered for absorption in terms of notified order dated 20.12.2011. The relevant provision in the notified order which is applicable in the case of the petitioners is as follows:-

"(ख) उपर्युक्त संदर्भित आमेलन नियमावली, 2011 विषयक अधिसूचना संख्या-1477/78-1-2011-51इले0/92टीसी-5, दिनांक 20 दिसम्बर, 2011 का प्रस्तर-2ई(पप) उन कर्मचारियों पर भी लागू होगा जो शासन के किसी भी विभाग के अधीन किसी सोसायटी, प्राधिकरण अथवा किसी अन्य संस्था में कार्य कर रहे हैं। ऐसे

कर्मचारियों को भी उसी विभाग में कार्यरत मानते हुए समायोजित करने के लिए संबंधित विभाग नियमावली को अपने यहां अंगीकृत ;।कवचजद्ध कर लें।"

Thus, provisions of Rule 2 (e) (ii) of the Absorption Rules have also been made applicable to the employees working in a society functioning under the State Government and such surplus employees of UPTRON India Limited working in such a society were to be treated to be employees of the Government Department and accordingly their cases were to be considered for absorption. The relevant words occurring in the afore quoted provision of the notified order dated 20.12.2011 are "-----ऐसे कर्मचारियों को भी उसी विभाग में कार्यरत मानते हु.]". The aforesaid phrase occurring in the notified order dated 20.12.2011 clearly means that the employees working in the societies or other organizations functioning under the State Government shall be treated to be employees of the Government Department for the purposes of absorption.

The stand taken by the State-respondents is that both the petitioners were retired by their parent department i.e. UPTRON India Limited by means of the order dated 31.07.2012 and 27.09.2012 and Sarva Shiksha Abhiyan not being the permanent department of the Government, they could not have been absorbed in Sarva Shiksha Abhiyan. It has further been stated in the counter affidavit filed by the State-respondents that accordingly a proposal by the Project Director of the Sarva Shiksha Abhiyan was submitted to the State Government containing a list of employees to be absorbed in the Education Department which included the names of the petitioners with the remark that the petitioners have already superannuated

and have been relieved from their parent department i.e. UPTRON India Limited.

2011 and the notified order dated 20.12.2012.

The sole ground taken by the State-respondents for not absorbing the petitioners in service of the Basic Education Department (which is the administrative department of the State Government controlling and supervising Sarva Shiksha Abhiyan) is that since the petitioners have already been relieved after attaining the age of superannuation by the UPTRON India Limited at the age of 58 years hence, they could not be absorbed in the regular services of the State Government.

Certain dates are necessary to be mentioned here. The Absorption Rules, 2011 were notified on 20.12.2011 and on the same date i.e. 20.12.2011, the notified order was also issued by the State Government in exercise of its powers vested in it under Rule 3(1) of the Absorption Rules. On the date of promulgation of Absorption Rules, 2011 and issuance of the notified order issued pursuant thereto, both the petitioners were working on deputation under the services of Sarva Shiksha Abhiyan Parishad, a Society working under the Basic Education Department of the State. Consideration of the cases of the petitioners for absorption was, however, made only on 28.05.2013 i.e. after a lapse of period of about one year and five months. Had the case of the petitioners for absorption in terms of the aforesaid notified order dated 20.12.2011 been done before 21.08.2012 in the case of Brahma Nand Lavaniya and before 31.10.2012 in the case of Sharad Mehrotra, both the petitioners would have been absorbed in the services of the Education Department for the reason that both of them are covered by the Absorption Rules,

Though, certain explanation has been sought to be given by the State-respondents for the delay which occurred in consideration of the case of the petitioners and other surplus employees of UPTRON India Limited working on deputation in Sarva Shiksha Abhiyan, however, explanation so given does not appeal to the Court. The Absorption Rules, 2011 have been framed under Article 309 of the Constitution of India for the purposes of providing certain benefits to the surplus employees of UPTRON India Limited. The said Rules were framed with a view to give effect to the policy decision taken by the State Government for providing certain benefits to the surplus employees taking into account the concept of welfare state. Accordingly, the notified order dated 20.12.2011 was issued by the State Government which itself mentions that the policy decision to absorb surplus employees of UPTRON India Limited was taken looking into the concept of welfare State. The said notified order dated 20.12.2011 is, thus, a piece of beneficial subordinate legislation.

It is difficult to appreciate that once the decision by the State Government was taken to extend certain benefits to the surplus employees of a Government Company which was wound up and to give effect to the decision, the Absorption Rules were framed and notified order was also issued on 20.12.2011 itself, under what circumstances, such a long period of time of about 17 months was taken by the respondent-authorities even for consideration of the case of the petitioners for their absorption in the services of the State Government department. It is true

that neither the Absorption Rules, 2011 nor the notified order dated 20.12.2011 prescribe any time period or limit to consider the cases of eligible surplus employees for absorption, however, such non-prescription of a time period will not mean that consideration in a particular case for absorption of surplus employees could be permitted to be made after such a long time which would defeat the very purpose for which the Absorption Rules, 2011 were framed and the notified order under the said Rules was also issued. The Absorption Rules, 2011 and notified order dated 20.12.2011 are only instruments to give effect to a policy decision of the State Government. If decision making process for extending the benefits flowing from the Absorption Rules, 2011 and notified order dated 20.12.2011 is prolonged so as to defeat the very purpose for which the Rules and the notified order were issued, it should be a matter of grave concern for the Government itself. The prolonged time taken in decision making process in such a matter clearly runs in opposition to the very intent of the Government for providing the benefits to a certain set of people. The very purpose of implementing the measures evolved to achieve the welfare state not only gets defeated but it withers.

In the instant case, as observed above, the time taken by the respondents in considering the case of the petitioners for their absorption in service is considerably long which has ultimately resulted in arbitrarily depriving the petitioners of the benefit of absorption in service and serving for more years.

In the considered opinion of the Court, the instant case is a glaring example of how the beneficial measures extended by the State Government by its policy decision

embodied in the Absorption Rules, 2011 and Government Order dated 20.12.2011, have been denied to the petitioners merely on account of unduly prolonged time taken in decision making process relating to considering the case of the petitioners for their absorption in service.

The Court now proceeds to examine as to whether the reason given in the order dated 28.05.2013 denying the benefits of absorption in service to the petitioners is legally tenable. The only reason given in the impugned order dated 28.05.2013 whereby the benefit of absorption in service to the petitioners has been denied is that on the date of consideration for absorption, both the petitioners had already retired on attaining the age of superannuation at 58 years of age in their parent department.

The petitioners were working on deputation in Sarva Shiksha Abhiyan on the date of notification of the Absorption Rules and issuance of notified order dated 20.12.2011. Brahma Nand Lavaniya was made to retire on his attaining the age of 58 years on 31.08.2012 and Sharad Mehrotra was retired on 31.10.2012. Between the date Brahma Nand Lavaniya retired on 31.08.2012 and the date of issuance of notified order on 20.12.2011, in my considered opinion, there was sufficient time available to the respondents to have taken decision in the matter of his absorption in service. Similarly, since Sharad Mehrotra retired on 31.10.2012, there was sufficient period for considering of his case as well.

Another aspect which needs consideration in this case is the provisions contained in the notified order dated 20.12.2011 in respect of those surplus

employees of the UPTRON India Limited who were working on deputation in a Society or an Authority or any other Organization/body functioning under a government department of the State Government. The notified order, in case of such surplus employees working on deputation, clearly provides that the provision of Rule 2(e) (ii) of the Absorption Rules shall be applicable. The notified order further provides that such employees shall be treated to be working in the Government Department. The age of superannuation in Government Departments of the State Government is 60 years. Thus, if the petitioners were to be treated to be working in the Government Department, their respective date of superannuation would be 31.08.2014 in case of Brahma Nand Lavaniya and 31.10.2014 in case of Sharad Mehrotra.

A natural corollary of the aforesaid is this: Had the petitioners been treated to be working in the Government Department in terms of the notified order dated 20.12.2011, they could not have treated to have been retired for the simple reason that the age of superannuation in case of Government employees is 60 years. It is, thus, clear that on the date of consideration of their cases for absorption in service i.e. on 28.05.2013, both the petitioners, could not have been treated to have retired on the basis of the provision contained in the notified order dated 20.12.2011, which in clear terms, provides that such surplus employees of UPTRON India Limited are to be treated to be working under the government Department.

The impugned order denying the benefit of the absorption in service to the petitioners has been passed treating the petitioners to have retired at the age of 58

years, that is to say, petitioners have been treated as retired employees of UPTRON India Limited and not the employees of the State Government Department. Such a presumption by the State Government while passing the order dated 28.05.2013 unambiguously runs contrary to the prescriptions made in the notified order dated 20.12.2011 which provides that surplus employees working even in a Society or any other Organization functioning under a department of the State Government are to be treated to be working in the Government Department itself. Since the age of superannuation in the case of the employees of Government Departments in the State Governments is 60 years, at the time of consideration for absorption in service the petitioners could not have been treated to have retired.

Thus, in view of the above, the very basic premise, on which the State Government has proceeded to take decision in the case of the petitioners while considering their cases for absorption in service, is not sustainable for the reason that the same runs contrary to the prescription available in the notified order dated 20.12.2011. The impugned order dated 28.05.2013 annexed as Annexure No.1 to the writ petition No. 3316 (S/S) of 2013, hence, is liable to be quashed.

Accordingly, for the cumulative reasons given above, the impugned office order dated 28.05.2013 which has been annexed as Annexure No.1 to the writ petition No.3316 (S/S) of 2013 whereby petitioners have been refused to be given the benefit of absorption in service is hereby quashed.

Since no other reason has been given by the State Government while

denying the benefit of absorption in service to the petitioners, except the one discussed above, it will be futile to issue direction to the State Government to reconsider the case of the petitioners for their absorption in service. In this view, while quashing the impugned office order dated 28.05.2013 (Annexure No.1 to the Writ Petition No. 3316 (S/S) of 2013), all the three writ petitions are disposed of with the direction to the State-respondents to treat the petitioners to be absorbed employees of the Basic Education Department on a suitable post in terms of the notified order dated 20.12.2011 and to pay them their salary of their respective posts from 31.08.2012 in case of Brahma Nand Lavaniya and from 31.10.2012 in case of Sharad Mehrotra. Both the petitioners shall be allowed to join on suitable posts forthwith in the Basic Education Department and they shall be allowed to continue in service till they attain the age of superannuation at the age of 60 years and be also paid salary.

The compliance of this order shall be ensured by the concerned State-respondents within a period of one month from the date of production of certified copy of this judgement and order.

Since, as noticed in the preceding paragraphs of this judgement, there has been undue considerable delay on the part of the State Government in considering the case of the petitioners for absorption in service in terms of the Absorption Rules, 2011 and the notified order dated 20.12.2011, resulting in deprivation of their right of considering for absorption in service, the Court, though is of the view that some cost should be imposed on the State Government, however, taking into account the direction given in the earlier part of the judgement for payment of salary

to the petitioners, I refrain from imposing the cost.

With the aforesaid observations and directions, all the three writ petitions stand disposed of."

24. Learned counsel for the petitioners submits that the aforesaid judgment and order dated 29.5.2014 has been challenged in Special Appeal Defective No.430 of 2014, which was dismissed and the order passed by the learned Single Judge was confirmed.

25. In the aforesaid writ petition, this Court issued direction to the State-respondents to treat the petitioners to be absorbed employees of the Basic Education Department on a suitable post in terms of the notified order dated 20.12.2011 and to pay them their salary of their respective posts w.e.f. the respective dates. It was further ordered that both the petitioners shall be allowed to join on suitable posts forthwith in the Department and they shall be allowed to continue in service till they attain the age of superannuation i.e. at the age of 60 years and be also paid salary.

26. The facts and circumstances of the aforesaid case are attracted towards that of the present case, therefore, looking to the facts and circumstances of the case and the aforesaid judgment of this Court as also for the cumulative reasons given above, the impugned order dated 11.5.2010 (Annexure-40 to the writ petition), whereby the petitioners have been refused to be given the benefit of absorption in service is hereby quashed.

Since no other reason has been given by the State Government while denying the benefit of absorption in service

to the petitioners, except the one discussed above, it will be futile to issue direction to the State Government to reconsider the case of the petitioners for their absorption in service. In this view the writ petition is **disposed of** with the direction to the State-respondents to treat the petitioners to be absorbed employees of the U.P. Civil Secretariat on a suitable post in terms of the notified order dated 20.12.2011 and to pay them their salary of their respective posts. All the petitioners shall be allowed to join on suitable posts forthwith in the Department and they shall be allowed to continue in service till they attain the age of superannuation at the age of 60 years and be also paid salary.

The compliance of this order shall be ensured by the concerned State-respondents within a period of one month from the date of production of certified copy of this judgment and order.

(2023) 8 ILRA 1394
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.07.2023

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ-A No. 1994 of 2009

Anurag Kumar Gupta **...Petitioner**
Versus
U.P. Sahkari Gramya Vikas Bank Ltd. &
Anr. **...Respondents**

Counsel for the Petitioner:
 Sri Y.S. Lohit

Counsel for the Respondents:
 Sri B.L. Verma, Sri Balram Yadav

Civil Law - Constitution of India, 1950 –
Articles 14 & 16 – U.P. Co-operative

Societies Employees Service Regulations, 1975, Regulation 104 – Compassionate Appointment – Civil Death – Disciplinary Proceedings – Impugned dismissal order dated 31.08.2004 quashed – Petitioner entitled to consideration for compassionate appointment.

Held: The petitioner, legal heir of an employee of U.P. Sahkari Gramya Vikas Bank Ltd., whose civil death was declared on 30.04.2008, is entitled to consideration for compassionate appointment under Regulation 104 of the U.P. Co-operative Societies Employees Service Regulations, 1975. The impugned dismissal order dated 31.08.2004, passed after the employee's disappearance on 27.01.1997, is a nullity as the respondents were aware of the employee's absence and failed to serve the inquiry report or show cause notice properly. The disciplinary proceedings, initiated with retrospective effect, were not in compliance with the court's earlier order dated 01.09.1995, which quashed the prior dismissal order dated 08.06.1995 and permitted a fresh inquiry from the stage of error. The respondents' delay in considering the compassionate appointment application, despite repeated representations, frustrates the policy of providing immediate financial relief to the deceased employee's family, violating principles of fairness and reasonableness under Articles 14 and 16. The petitioner's claim cannot be denied on frivolous grounds, such as the employee's alleged dismissal post-disappearance. The respondents are directed to consider the petitioner's application for compassionate appointment within eight weeks, with benefits accruing from the date of appointment.

Case Law Discussed:

1. Ashwani Kumar Singh Vs U.P. Public Service Commission & ors., (2003) 11 SCC 584
2. Malaya Nanda Sethy Vs St. of Orissa & ors., 2022 SCC OnLine SC 684
3. Fertilizers and Chemicals Travancore Ltd. & ors. Vs Anusree K.B., 2022 LiveLaw (SC) 819

Order: Impugned order dated 31.08.2004 quashed. Respondents directed to consider the

petitioner's application for compassionate appointment under Regulation 104 of the 1975 Regulations within eight weeks from the production of a certified copy of the order. Petitioner entitled to benefits from the date of appointment. No order as to costs.

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Sri Y.S. Lohit, learned counsel for the petitioner and Sri Balram Yadav, learned counsel for the respondent(s).

2. By means of present writ petition, the petitioner has prayed for issuance of a writ, order or direction in the nature of mandamus commanding the respondents to provide compassionate appointment to the petitioner as per his educational qualifications under the provisions of Regulation 104 of U.P. Co-operative Societies Employees Service Regulations, 1975 in place of his father, whose civil death has been declared on 30.04.2008 by the competent court of law with a further prayer to issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 31.08.2004 contained as Annexure-19 to the writ petition with a further prayer to issue a writ, order or direction in the nature of mandamus commanding the respondents to treat the petitioner's father as reinstated in service till the date of his civil death i.e. on 30.04.2008 as declared by competent authority of law and to issue a follow up direction to the respondents to pay the arrears of salary and allowances and other consequential benefits to his legal heirs.

3. Brief facts giving rise to the present writ petition are as under:

Sr. No.	Relevant Facts of the Case

a.	Father of the petitioner was appointed on 03.09.1971 on the post of Lekha Lipik / Ankik i.e. Account Clerk i.e. Class-III Post at Bansedeh Branch of U.P. Sahkari Gramya Vikas Bank Ltd. (for short, "the Bank"). Thereafter, he was posted as Head Accountant at 10, Mall Avenue, Lucknow Branch.
b.	He was placed under suspension vide order dated 01.03.1990 on 02.03.1990 by the District Manager of the Bank. Later on, he was dismissed from service vide order dated 08.06.1995.
c.	The said order was challenged in Writ Petition No.2891 (S/S) of 1995 before this Court, wherein aforesaid order of dismissal dated 08.06.1995 was quashed vide order dated 01.09.1995 imposing cost of Rs.1000/- upon the respondents leaving it open to pass a fresh order strictly in accordance with law.
d.	On 27.01.1997, father of the petitioner went to the Headquarter of the Bank at 10, Mall Avenue, Lucknow to receive the subsistence allowance but he did not return back to home. Cousin of father of the petitioner - i.e. Sri Vinod Kumar Gupta lodged a first information report (for short, "FIR") to the this effect in Police Station Hussainganj, District Lucknow but neither FIR was lodged nor anything

	was done in furtherance thereof. Thereafter, the FIR was lodged by competent Court of Law under Section 156(3) Cr.P.C.
e.	An advertisement to this effect was also telecasted on Doordarshan in furtherance of application on prescribed format on 29.03.1997, which was broadcasted on All India Radio in furtherance of application on prescribed format dated 09.07.1997 submitted by petitioner's father's cousin Sri Vinod Kumar Gupta.
f.	An application was sent by petitioner's mother for payment of amount payable to her husband as well as follow up payment to be made to the heirs on 13.03.2000, whereupon the General Manager (Administration) of the Bank asked for the copy of FIR, the certificate of the police and an indemnity bond.
g.	In pursuance thereof, all the documents were submitted by mother of the petitioner, which was followed by a reminder sent in the month of November, 2011.
h.	In Suit No.66/2007, the Civil Judge, (Junior Division), Muhammadabad, District Ghazipur gave a judgment on 30.04.2008 declaring the civil death of father of the petitioner by a decree dated 14.05.2008.
i.	On the basis of said judgment

	and decree, Nagar Palika Parishad, Muhammadabad, District Ghazipur issued the death certificate on 02.06.2008 mentioning civil death of petitioner's father on 30.04.2008.
j.	Thereafter, the petitioner preferred several applications requesting for appointment on compassionate ground but no heed was paid to his requests.
k.	On 07.04.2009, this Court hearing the writ petition for appointment on compassionate ground made query as to whether the entitlement for compassionate appointment may subsist on the basis of date of declaration of civil death of petitioner's father by learned Civil Judge or this entitlement will stand mitigated in view of the fact that he and other family members subsisted for a long period since disappearance of his father - Lt. Sri Jai Prakash Narain Gupta i.e. since 27.01.1997. In reply, learned counsel for the respondents passed a copy of the order dated 31.08.2004 submitting that petitioner's father was dismissed from service vide order dated 31.08.2004, therefore, there was no occasion to consider the appointment under Regulation 104 of the Regulations.
l.	The order dated 31.08.2004 states that Special Appeal No.258 (S/B) of 1995 was dismissed on 05.07.2001 with

	liberty to hold fresh inquiry from the stage of error committed in disciplinary proceedings but the headquarters started disciplinary proceedings by suspending the petitioner again pursuant to order dated 08.11.1995 and the Regional Manager, Lakhimpur Kheri was appointed as Enquiry officer to hold the disciplinary proceeding vide order dated 01.01.2002, who fixed 3 dates but Sri Jai Prakash Narain Gupta did not come and by last opportunity, he got a notification / information published in local daily news paper on 11.03.2004 requiring to submit explanation, statement and documents within 10 days and as within ten days he has not presented himself, the inquiry officer submitted the enquiry report on the basis of documents and witnesses.
m.	While serving copy of order dated 31.08.2004 on 08.05.2009, show cause notice and enquiry report was not served to the petitioner nor the same has been served to him or his family member till date.
n.	Being aggrieved by the act and action of the respondents in not grant appointment on compassionate ground, the present writ petition has been filed before this Court.

4. Submission of learned counsel for the petitioner is that there was no occasion to

suspend petitioner's father, as it was not covered under fresh inquiry from the stage of error committed in disciplinary proceeding that too with retrospective effect of about six years. He submitted that the enquiry officer's hasty action is apparent from fixing three dates within 37 days and again only 10 day's time from publication of notification in daily newspapers. It is also apparent from General Manager's letter dated 13.03.2000 that petitioner's father disappeared on 27.01.1997 and her mother claimed appointment in the vent of disappearance of her husband.

5. He further submitted that the respondents issued fabricated show cause notice dated 28.01.2004 after knowing the fact that recipient is not available. He submitted that the inquiry report was prepared mere as a paper work to justify the impugned order, which is apparently perverse in nature as it does not deal the statements of any witnesses or the findings arrived at in this regard.

6. He next submitted that the whole exercise was done by the respondents with ulterior motive to frustrate the claim of petitioner's mother.

7. He further submitted that claim of petitioner's mother was not considered even after declaration of civil death of petitioner's father by judgment dated 30.04.2008 and decree dated 14.05.2008 issued by the Civil Judge (Junior Division) and the death certificate issued by the Nagar Palika Parishad, Muhammadabad, District Ghazipur on 02.06.2008 mentioning the civil death of petitioner's father to be 30.04.2008.

8. He submitted that order of dismissal of service of petitioner's father dated 08.06.1995 was quashed by this Court in Writ Petition No.2891 (S/S) of

1995 vide order dated 01.09.1995 imposing cost of Rs.1000/- upon the respondents leaving it open to pass a fresh order strictly in accordance with law.

9. He further submitted that the order dated 01.09.1995 was subject matter of challenge in Special Appeal No.258 (S/B) of 1995, which was dismissed vide order dated 05.07.2001 with liberty to hold fresh inquiry from the stage of error committed in disciplinary proceedings but the respondents started disciplinary proceedings by suspending the petitioner again pursuant to order dated 08.11.1995.

10. He next submitted that all the exercise was done by the respondents only to satisfy the statutory requirement, which was missing while passing of judgment and order dated 01.09.1995 and to refer the matter to U.P. Co-operative Institutional Service Board, Lucknow.

11. He lastly submitted that the petitioner being legal heir of his father i.e. Lt. Sri Jai Prakash Narain Gupta is entitled for appointment on compassionate ground under Regulation 104 of U.P. Co-operative Societies Employees Service Regulations, 1975 and other consequential benefits. In support of his submissions, he placed reliance upon following judgments:

a) Ashwani Kumar Singh Vs. U.P. Public Commission and others; (2003) 11 SCC 584.

b) Malaya Nanda Sethy Vs. State of Orissa and others; 2022 SCC OnLine SC 684.

12. On the other hand, learned counsel for the respondent(s) submitted that father of the petitioner - Lt. Jai Prakash

Narayan Gupta was working in the District Office of respondents as Accountant and committed following irregularities for which he got suspended:

a) attending the office in drunken position,

b) not taking interest in functioning of the bank,

c) absenting from duties without leave,

d) not performing duties as per schedule,

e) misuse of government property,

f) embezzlement of public money.

13. He submitted that during enquiry, the aforesaid irregularities were found proved against him and as a result he was dismissed from service vide order dated 08.06.1995, against which father of the petitioner preferred Writ Petition No.2891 (S/S) of 1995 before this Court and the order dated 08.06.1995 was quashed by this Court vide order dated 01.09.1995 with a liberty to the respondents to pass a fresh order in accordance with law. Against the said order, respondents filed Special Appeal No.258 (S/B) of 1995, which was dismissed vide order dated 05.07.2001 leaving it open to hold fresh inquiry in accordance with law from the stage the fault has occurred. Thereafter, the inquiry proceeding was again started and father of the petitioner was served with inquiry report and related documents but he did not contested his case and as a result thereof, on the basis of available evidences, father

of the petitioner was dismissed from service vide order dated 31.08.2004. In the meantime, petitioner's father got missed and dead and the petitioner has filed the present writ petition for grant of appointment on compassionate ground, however, the request is not acceptable in view of the fact that his father was dismissed from service w.e.f. 31.08.2004 and the petitioner is not entitled for any relief by this Court. In support of his submissions, he placed reliance upon a judgment in the case of **Fertilizers and Chemicals Travancore Ltd. & Ors. Vs. Anusree K.B.; 2022 LiveLaw (SC) 819 : Civil Appeal No.6958 of 2022, order dated 30.09.2022.**

14. In reply to submissions advanced by learned counsel for the respondents, learned counsel for the petitioner on the basis of rejoinder affidavit submitted that as respondents were aware about missing of petitioner's father, there was no occasion to serve the inquiry report upon him and the words "but he did not contest his case", as narrated in paragraph-9 of the counter affidavit, is sufficient in itself to prove that petitioner's father was not present in the disciplinary proceeding, therefore, the impugned order dated 31.08.2004 is a nullity in the eyes of law and is not sustainable.

15. He further submitted that the special appeal preferred by the respondents was dismissed providing liberty to hold fresh inquiry from the stage of error occurred in the disciplinary proceeding, however, the said liberty was obtained by the respondents by concealment of relevant fact that father of the petitioner was missing since year 1997 and in paragraph-9 of counter affidavit, the respondents have deliberately mentioned the word "in the meantime" in lieu of "since the year 1997" i.e. the year from which the

petitioner's father was missing. As such, after dismissal of special appeal, father of the petitioner stood reinstated in service for all practical purposes and the petitioner being his legal heir, is entitled for the reliefs, as prayed in the writ petition.

16. In reply to the aforesaid submissions, learned counsel for the respondents submitted that since father of the petitioner did not appear on the dates fixed in the disciplinary proceeding, the enquiry officer submitted the enquiry report on the basis of documents present before him.

17. He further submitted that father of the petitioner was under suspension during earlier disciplinary proceeding and after quashing of said order, in continuation of the earlier enquiry, he was again continued under suspension for further fresh enquiry, therefore, there is no illegality in the impugned order and the same is just and valid.

18. He next submitted that after submission of enquiry report by the enquiry officer, a show cause notice was issued to father of the petitioner as per provisions of Regulation 84(iii) of U.P. Co-operative Societies Employees Service Regulations, 1976 as well as Rule 73(3) of U.P. Rajya Sahkar Gram Vikas Bank Employees Service Rules, 1976 and when the said notice was returned by the petitioner, a press note was issued in daily newspaper, namely, Hindustan for publication, which was published on 11.03.2004 and after publication of show cause notice, it was treated that the same has been served upon him and thereafter, the impugned order of dismissal has been passed.

19. He submitted that the impugned order dated 31.08.2004 was passed following the procedure prescribed under

regulations and rules of the respondent - Bank, as the charge against the petitioner was found fully proved against him. He also submitted that neither petitioner, nor his mother or any other family member appeared before the enquiry officer to disapprove the charges levelled against him.

20. He submitted that if the petitioner and his mother were known that Lt. Sri Jai Prakash Narayan Gupta was not alive, they failed to discharge their legal duties and obligations and thus, the writ petition being devoid of merit is liable to be dismissed and since father of the petitioner was dismissed from service, the claim of the petitioner for appointment on compassionate ground is not tenable in the eyes of law.

21. In reply to the aforesaid submissions advanced by learned counsel for the respondents, learned counsel for the petitioner submitted that though the petitioner and his mother failed to discharge their legal duty and obligations, there was no specific denial in the counter affidavit to the amended writ petition dated 21.11.2016, wherein it has been mentioned that the General Manager, U.P. Sahkari Gramya Vikas Bank Ltd., Lucknow asked petitioner's mother vide letter dated 13.03.2000 to place the F.I.R., police certificate and nominee / dependents name for the purpose of payment of applicable benefits. Meaning thereby, he was well aware about the missing and death of petitioner's father.

22. I have considered the submissions advanced by learned counsel for the parties and perused the material on record as well as the case laws cited by learned counsel for the parties and the rules applicable to this case.

23. To resolve the controversy involved in the matter, relevant rules and paragraphs of the judgments relied upon by learned counsel for the parties are being quoted below:

• **Regulation 104 of U.P. Co-operative Societies Employees Service Regulations, 1975:**

(i) *In case an employee of co-operative society, who is either permanent in his appointment or if temporary, who has been recruited in accordance with the provisions of the Uttar Pradesh Co-operative Societies Employees Service Regulations, 1975 and has been holding his post for a minimum continuous period of three years dies in harness after the commencement of these Regulations, one member of his family, who is not already employed under the Central Government or a State Government or a Corporation or an undertaking owned or controlled by the Central Government or a State Government, shall on making an application for the purpose, be given a suitable employment under the society concerned provided such member possess the minimum educational qualifications prescribed for the post and is otherwise fit for appointment thereto. Such employment shall be given to the said member without delay and as far as possible, under the same society in which the deceased servant was employed at the time of his death.*

(ii)

(iii)

(iv) *Notwithstanding anything contained in clause (i) of Regulation 15, it shall be open to the Board to whom the case shall be referred by the appointing society, to dispense with the procedural*

requirements of selection, such as written test or interview by a selection committee, and accord its approval to the appointment of the candidate after satisfying itself that the candidate will be able to maintain the minimum standard of efficiency expected of him for the post in question, and that the requirements of Regulation 9 and 14 are fulfilled.

(v) Where more than one members of the family of the deceased employee seek employment under this regulation, the Board shall decide, keeping in view the overall interest of the family of the deceased employee, particularly the widow and the minor members thereof, which of the members should be given employment under the provisions of this regulation. The decision of the Board in the matter shall be final.

Note - The family, for purposes of this regulation, shall include the wife / husband, sons and unmarried or widowed daughters of the deceased employee".

• Judgments relied upon by learned counsel for the petitioner:

a) Ashwani Kumar Singh (Supra):

10. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of statute, it may become necessary for Judges

to embark into lengthy discussions, but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton (AC at 9.761) Lord McDermott observed: (All ER p. 14 C-D)

"The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J, as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge....."

11. In Home Officer V. Dorset Yacht Co., Lord Reid said, "Lord Atkin's speech.....is not to be treated as if it was a statute definition. It will require qualification in new circumstances.(All ER p. 297 g-h). Megarry, J in Shepherd Homes Ltd. v. Sandham, (No. 2) observed: (All ER p. 1274 d-e) "One must not, of course, construe even a reserved judgment of Russell, L.J. as if it were an Act of Parliament." In Herrington v. British Railways Board, Lord Morris said : (All ER p. 761 c)

"There is always peril in treating the words of a speech or judgment as though they are words in legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."

b) Malaya Nanda Sethy (Supra):

15. In view of the above discussion and for the reasons stated

above, the impugned judgment and order passed by the High Court is hereby quashed and set aside. The respondents are directed to consider the case of the appellant for appointment on compassionate grounds under the 1990 Rules as per his original application made in July, 2010 and if he is otherwise found eligible to appoint him on the post of Junior Clerk. The aforesaid exercise shall be completed within a period of four weeks from today. However, it is observed that the appellant shall be entitled to all the benefits from the date of his appointment only. The present appeal is accordingly allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.

16. Before parting with the present order, we are constrained to observe that considering the object and purpose of appointment on compassionate grounds, i.e., 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 and the basis or policy is immediacy in rendering of financial assistance to the family of the deceased consequent upon his untimely death, the authorities must consider and decide such applications for appointment on compassionate grounds as per the policy prevalent, at the earliest, but not beyond a period of six months from the date of submission of such completed applications.

17. We are constrained to direct as above as we have found that in several cases, applications for appointment on compassionate grounds are not attended in time and are kept pending for years together. As a result, the applicants in several cases have to approach the concerned High Courts seeking a writ of Mandamus for the

consideration of their applications. Even after such a direction is issued, frivolous or vexatious reasons are given for rejecting the applications. Once again, the applicants have to challenge the order of rejection before the High Court which leads to pendency of litigation and passage of time, leaving the family of the employee who dies in harness in the lurch and in financial difficulty. Further, for reasons best known to the authorities and on irrelevant consideration, applications made for compassionate appointment are rejected. After several years or are not considered at all as in the instant case.

18. If the object and purpose of appointment on compassionate grounds as envisaged under the relevant policies or the rules have to be achieved then it is just and necessary that such applications are considered well in time and not in a tardy way. We have come across cases where for nearly two decades the controversy regarding the application made for compassionate appointment is not resolved. This consequently leads to the frustration of the very policy of granting compassionate appointment on the death of the employee while in service. We have, therefore, directed that such applications must be considered at an earliest point of time. The consideration must be fair, reasonable and based on relevant consideration. 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."

- Judgment relied upon by learned counsel for the respondent(s) :

- **Fertilizers and Chemicals Travancore Ltd. & Ors. (Supra):**

"9.

.....

9.1 Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand and considering the observations made hereinabove and the object and purpose for which the appointment on compassionate ground is provided, the respondent shall not be entitled to the appointment on compassionate ground on the death of her father, who died in the year 1995. After a period of 24 years from the death of the deceased employee, the respondent shall not be entitled to the appointment on compassionate ground. If such an appointment is made now and/or after a period of 14/24 years, the same shall be against the object and purpose for which the appointment on compassionate ground is provided.

9.2 Under the circumstances, both, the learned Single Judge as well as the Division Bench of the High Court have committed a serious error in directing the appellants to reconsider the case of the respondent for appointment on compassionate ground. The impugned judgment and order passed by the High Court is unsustainable."

24. On perusal of aforesaid judgments, in the case of Ashwani Kumar Singh (Supra), it is apparent that the appellants before the Hon'ble Apex Court appeared at Combined State Services Examination in 1987 for appointment as Treasury Officer / Accounts Officer / Assistant Accounts Officer. On the basis of requisition sent by the State Government for 40 vacancies, a merit list was prepared in 1989. In the merit list, appellant AK was placed at serial No.52 while appellant BN

was placed much below. Appellant AK was later on appointed as Assistant Accounts Officer when some of the selected candidates did not join the service.

25. In 1992, writ petitions were filed by the appellants on the ground that vacancies which arose on account of selected candidates not joining should have been filled up from the merit list and that having not been done, the appointments made subsequently were illegal. The claim was resisted by the State and the Commission who took the stand that there was no waiting list as such and the vacancies were carried forward to the subsequent period as required in law and persons had already been appointed on the basis of subsequent examination. The petitions were rejected by the High Court and hence the appeal was filed before Hon'ble Supreme Court of India. While dismissing the appeal, Hon'ble Apex Court has held that it is not a rule of universal application that whenever vacancy exists, persons who are in the merit list perforce have to be appointed. Much would depend upon the statutory provisions governing the field. Jai Narain Case, (1996) 1 SCC 332 on which reliance has been placed by the appellants was rendered in a different factual and legal background, and related to non-appointment of persons belonging to the reserved category.

(i) Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes. To interpret

words, phrases and provisions of a statute, it may become necessary for judges to embark upon lengthy discussions, but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

(ii) It is on record that a policy decision was taken to appoint candidates who had opted for Treasury Officer / Accounts Officer if their names were included in the first 40 of the merit list. Admittedly, the appellants were placed below in the merit list. Besides, the plea that there is no logic for such fixation is also without substance. If the employer fixes a cut-off position, same is not to be lightly tinkered with unless it is totally irrational or tainted with mala fides. Employer in its wisdom may consider a particular range of selection to be appropriate. It has not been shown as to how the fixation is irrational, much less mala fide. Additionally, it is noticed that the unfilled posts were carried forward to the next year and have been filled up on the basis of selection made by the Commission. Accepting the prayer of the appellants would mean that the position which has assumed a sort of finality for more than a decade would be unsettled. Persons who have been appointed on the basis of the subsequent examination have to give way to appellant AK. Though they had been impleaded but did not appear, it does not mean that something which is not permissible in law has to be done. It would not be fair to disturb the prevailing position.

(iii) AK had been subsequently promoted as Accounts Officer. But he cannot claim seniority over those who were subsequently appointed since he had been promoted later on. In the absence of any statutory prescription, persons who have been appointed to the higher posts earlier would be logically senior to him.

26. In the case of **Malaya Nanda Sethy (Supra)**, father of the appellant was working as an Assistant Sub - Inspector in Excise Department. He passed away on 02.01.2010 while in service. On the death of his father, the appellant applied for his appointment as a Junior Clerk on compassionate ground under the Orissa Civil Service (Rehabilitation Assistance) Rules, 1990 in July, 2010. It was the case on behalf of the appellant that his mother was unable to undertake a government job due to her medical condition. The said application was sent to the office of the Excise Commissioner, Orissa, Cuttack vide letter dated 03.08.2011. Thereafter, the said application was forwarded to the Additional Secretary to the Government, Excise Department on 21.09.2011. The said application was not attended to by the Excise Department for a considerable period of five years. After a period of five years, the Additional Secretary vide letter /communication dated 09.09.2016 asked the Collector, Ganjam to furnish a fresh report regarding the financial condition of the family of the deceased government servant. Simultaneously, a report was also called for from CDMO, Ganjam to place the matter of mother of the appellant before the Medical Board for proper examination to ascertain whether her inability to perform the government job continues. The CDMO, Ganjam constituted a Medical Board and examined the mother of the appellant and furnished a report to the

Additional Secretary on 01.11.2016 stating that she was unfit for government job. The CDMO, Ganjam furnished another report dated 06.02.2017 to the same effect. It appears that thereafter a report from Tehsildar, Bellaguntha, which is the native place of the appellant, was also called for to ascertain financial condition and the Tehsildar submitted its report vide letter dated 28.10.2017 stating that the family income of the appellant from all sources does not exceed ceiling of Rs.72,000/- per annum.

(i) Despite the above, the application of the appellant herein for appointment on compassionate ground was kept pending under consideration. However, before any further order appointing the appellant on compassionate ground under the 1990 Rules came to be passed, the 1990 Rules came to be replaced by the new Rules, namely, Odisha Civil Services (Rehabilitation Assistance) Rules, 2020, issued vide notification dated 17.02.2020. Under the 2020 Rules, one family member of deceased government servant would be appointed on compassionate grounds to "Group D" base level post. Therefore, the application of the appellant being sent to the Collector for taking necessary action under the 2020 Rules by the office of the Excise Commissioner, Odisha, vide communication dated 26.04.2021.

(ii) Feeling aggrieved and dissatisfied with communication dated 26.04.2021, by which case of the appellant was directed to be considered under 2020 Rules, the appellant preferred a writ petition before the High Court. Before the High Court, it was specific case of the appellant that the policy prevalent at the time when the application for

compassionate ground was made, shall be applicable and not the subsequent scheme prevalent at the time of deciding the application. A number of decisions of Hon'ble Apex Court were relied upon. However, by the impugned judgment and order and relying upon and / or considering the decision in the case of N.C. Santosh Vs. State of Karnataka; (2020) 7 SCC 617, the High Court has dismissed the said writ petition by observing that the claim should be considered as per the amended rules that were prevalent at the time of consideration of application and not the Rules that were prevalent on the death of government servant.

(iii) Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court dismissing the writ petition and holding that the case of the appellant shall be governed by the 2020 Rules, the instant appeal was filed, which was allowed quashing the impugned judgment and order and a direction was issued to the respondents to consider the case of the appellant for appointment on compassionate grounds under 1990 Rules, as per his original application made in July, 2010 and if he is otherwise found eligible to appoint him on the post of Junior Clerk. The aforesaid exercise was directed to be completed within a period of four weeks from the date of order. It was also observed that the appellant shall be entitled to all the benefits from the date of his appointment only.

27. In the case of **Fertilizers and Chemicals Travancore Ltd. & Ors. (Supra)**, father of the respondent was employed as a loading Helper with the appellant No.1 and expired while on duty on 19.04.1995. At the time of death of the

employee, wife of the deceased employee was serving and therefore, was not eligible for appointment on compassionate ground considering the scheme for employment of dependents of the employees dying in harness. After a period of 14 years, after the death of deceased employee, the respondent - daughter of deceased employee made a representation seeking appointment on compassionate basis. Her application for compassionate appointment was rejected on 12.02.2018 on the ground that her name was not in the list of dependents submitted by the deceased employee and that the policy was to give employment to widow or son or unmarried daughter of the deceased employee.

(i) The rejection of the application for compassionate appointment was the subject matter of challenge in writ petition before the learned Single Judge. Vide order dated 13.11.2019, learned Single Judge disposed of the writ petition with the direction to the appellants to reconsider the application of respondent within Clause 1 of the Scheme.

(ii) On 12.12.2019, after reconsideration, the appellant against rejected the application of the respondent for appointment on compassionate ground on the ground that it did not meet the primary test of scheme that the deceased employee should be the "sole bread winner of his family", since his wife was gainfully employed with the Kerala State Health Services Department at the time of his death and also on the ground that 24 years have lapsed since the date of death of the deceased employee.

(iii) Feeling aggrieved and dissatisfied with order dated 13.11.2019 rejecting the application of the respondent

for appointment on compassionate ground, the respondent filed a writ petition before the High Court, which was allowed vide order dated 22.01.2023 directing the appellants to reconsider the respondent's claim strictly in terms of the observations and directions passed in the order of learned Single Judge dated 13.11.2019 passed in earlier round of litigation.

(iv) The judgment and order passed by learned Single Judge was subject matter of appeal before Division Bench of High Court by way of the writ appeal, which has been dismissed vide order impugned, which has been challenged before the Court. The appeal has been allowed and the judgments and orders passed by learned Single Judge as well as Division Bench of High Court were set aside holding that both, the learned Single Judge as well as Division Bench of High Court have committed a serious error in directing the appellants to reconsider the case of respondent for appointment on compassionate ground.

28. In the case in hand, father of the petitioner was working on the post of Lekha Lipik / Ankik i.e. Account Clerk i.e. Class-III Post at Bansedeh Branch of U.P. Sahkari Gramya Vikas Bank Ltd. Thereafter, he was posted as Head Accountant at 10, Mall Avenue, Lucknow Branch. He was placed under suspension and was dismissed from service vide order dated 08.06.1995. The said order was challenged in Writ Petition No.2891 (S/S) of 1995 before this Court, wherein aforesaid order of dismissal dated 08.06.1995 was quashed vide order dated 01.09.1995 imposing cost of Rs.1000/- upon the respondents leaving it open to pass a fresh order strictly in accordance with law. On 27.01.1997, father of the

petitioner got missed and an FIR in this regard was registered by the Competent Court of law under Section 156(3) Cr.P.C. and news to this effect was also telecasted on Doordarshan and was broadcasted on All India Radio.

29. Subsequently, a request was made by petitioner's mother i.e. wife of Lt. Sri Jai Prakash Narain Gupta for payment of amount payable to her husband as well as follow up payment to be made to the heirs on 13.03.2000, whereupon the General Manager (Administration) of the Bank asked for the copy of F.I.R., the certificate of the police and indemnity bond.

30. Later on, in Suit No.66/2007, the Civil Judge, (Junior Division), Muhammadabad, District Ghazipur gave a judgment on 30.04.2008 declaring the civil death of father of the petitioner by a decree dated 14.05.2008 and on the basis of said judgment and decree, Nagar Palika Parishad, Muhammadabad, District Ghazipur issued the death certificate on 02.06.2008 mentioning civil death of petitioner's father on 30.04.2008. Thereafter, the petitioner preferred several representations to the respondents requesting for appointment on compassionate ground but no heed was paid to his requests.

31. On 07.04.2009, this Court hearing the writ petition for appointment on compassionate ground made query as to whether the entitlement for compassionate appointment may subsist on the basis of date of declaration of civil death of petitioner's father by learned Civil Judge or this entitlement will stand mitigated in view of the fact that he and other family members subsisted for a long period since disappearance of his father - Lt. Sri Jai

Prakash Narain Gupta i.e. since 27.01.1997 and in its reply, learned counsel for the respondents produced a copy of the order dated 31.08.2004 before this Court submitting that petitioner's father was dismissed from service vide order dated 31.08.2004, therefore, there was no occasion to consider the claim of appointment under Regulation 104 of U.P. Co-operative Societies Employees Service Regulations, 1975.

32. The order dated 31.08.2004 discloses that Special Appeal No.258 (S/B) of 1995 filed by the respondents was dismissed on 05.07.2001 with liberty to hold fresh inquiry from the stage of error committed in disciplinary proceedings but they started disciplinary proceedings by suspending the petitioner again pursuant to order dated 08.11.1995.

33. It is the case of the respondents that the Regional Manager, Lakhimpur Kheri was appointed as Enquiry officer to hold the disciplinary proceeding vide order dated 01.01.2002, who fixed three dates but Lt. Sri Jai Prakash Narain Gupta did not presented himself and by way of last opportunity, a notification / information was published in local daily news paper on 11.03.2004 requiring to submit explanation, statement and documents within 10 days and when aforesaid period, father of the petitioner has not presented himself, the inquiry officer submitted the enquiry report on the basis of documents and witnesses.

34. On overall consideration of material on record as well as facts and circumstances of the case, it is apparent that there was no occasion for the respondents to suspend petitioner's father again and to start the inquiry with retrospective effect, as it was not covered

under fresh inquiry which was directed to be started from the stage of error committed in disciplinary proceeding.

35. It is also clear from General Manager's letter dated 13.03.2000 that petitioner's father disappeared on 27.01.1997 and her mother claimed appointment in the vent of disappearance of her husband and copy of F.I.R., certificate of the police and indemnity bond was called for.

36. Father of the petitioner got missed on On 27.01.1997 and his civil death was declared vide judgment dated 30.04.2008 / decree dated 14.05.2008 followed by death certificate issued by the Nagar Palika Parishad mentioning the civil death of petitioner's father to be on 30.04.2008.

37. In the meantime, petitioner's mother and the petitioner have made several representations to the respondents to consider the claim for appointment on compassionate ground and for payment of dues of husband / father.

38. In regard to objections taken by learned counsel for the respondent - Bank that a show cause notice was issued to father of the petitioner as per provisions of Regulation 84(iii) of U.P. Co-operative Societies Employees Service Regulations, 1976 as well as Rule 73(3) of U.P. Rajya Sahkar Gram Vikas Bank Employees Service Rules, 1976 and when the said notice was returned by the petitioner, a press note was issued in daily newspaper, namely, Hindustan for publication, which was published on 11.03.2004 and after publication of show cause notice, it was treated that the same has been served upon him and thereafter, the impugned order of dismissal has been passed, it is

considerable that though the petitioner and his mother failed to discharge their legal duties and obligations, however, there was no specific denial that the General Manager, U.P. Sahkari Gramya Vikas Bank Ltd., Lucknow asked petitioner's mother vide letter dated 13.03.2000 to place copy of the F.I.R., police certificate and nominee / dependents name for the purpose of payment of applicable benefits. Meaning thereby, respondents were well aware about the missing and death of petitioner's father.

39. In regard to query made by this Court while hearing the writ petition for appointment on compassionate ground as to whether the entitlement for compassionate appointment may subsist on the basis of date of declaration of civil death of petitioner's father by learned Civil Judge or this entitlement will stand mitigated in view of the fact that he and other family members subsisted for a long period since disappearance of his father - Lt. Sri Jai Prakash Narain Gupta i.e. since 27.01.1997, it is clear that father of the petitioner got missed on 27.01.1997 and his civil death was declared by competent Court of law to be 30.04.2008. It is also evident from record that between aforesaid period, several communications were made by petitioner and his mother in regard to grant of appointment on compassionate ground as well as for payment of consequential benefits, however, no action has been taken by the respondents and the claim set up by the petitioner has been ignored.

40. The object and purpose of appointment on compassionate grounds, i.e., 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 and the basis or policy is

immediacy in rendering of financial assistance to the family of the deceased consequent upon his untimely death, the authorities must consider and decide such applications for

41. As has been found in several cases, the applications for appointment on compassionate grounds are not attended in time and are kept pending for years together. As a result, the applicants in several cases have to approach the concerned High Courts seeking a writ of Mandamus for the consideration of their applications. Even after such a direction is issued, frivolous or vexatious reasons are given for rejecting the applications. Once again, the applicants have to challenge the order of rejection before the High Court which leads to pendency of litigation and passage of time, leaving the family of the employee who dies in harness in the lurch and in financial difficulty. Further, for reasons best known to the authorities and on irrelevant consideration, applications made for compassionate appointment are rejected. After several years or are not considered at all as in the instant case.

42. If the object and purpose of appointment on compassionate grounds as envisaged under the relevant policies or the rules have to be achieved, then it is just and necessary that such applications are considered well in time and not in a tardy way. I have come across cases where for nearly two decades the controversy regarding the application made for compassionate appointment is not resolved. This consequently leads to the frustration of the very policy of granting compassionate appointment on the death of the employee while in service. Such applications must be considered at an earliest point of time. The consideration must be fair, reasonable and based on relevant consideration. 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.

43. In view of reasons recorded above and in view of judgment relied upon by learned counsel for the petitioner in the case of Malaya Nanda Sethy (Supra), the judgment relied upon by learned counsel for the respondent is not attracted to the present facts and circumstances of the case.

44. The writ petition deserves to be allowed and is hereby allowed.

45. The impugned order dated 31.08.2004 contained as Annexure-19 is hereby quashed.

46. The respondents are directed to consider the case of petitioner for appointment on compassionate ground, as per his original application made and if he is otherwise found eligible to appoint him on the post. The aforesaid exercise shall be completed within a period of eight weeks from the date of production of a certified copy of this order.

47. However, it is observed that the petitioner shall be entitled to all the benefits from the date of his appointment only.

48. There shall be no order as to costs.

(2023) 8 ILRA 1409
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.07.2023

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ-A No. 2472 of 2018

Smt. Tara Devi		...Petitioner
	Versus	
State of U.P. & Ors.		...Respondents

Counsel for the Petitioner:

Sri Anoop Kumar Upadhyay

Counsel for the Respondents:

C.S.C., Sri A. Misra

A. Service Law – UP Recruitment of Dependent of Government Servants Dying in Harness Rules, 1974 – Compassionate appointment – Appointment as the Seasonal Peon – Worked for the period of 24 years – Effect – Claim to treat as the regular post was rejected – Retiral benefit have not been given on the ground that she retired as a seasonal employee/clerk – Validity challenged – Held, a compassionate appointment can only be made on regular basis. When the respondents acceded to the request of the petitioner for her appointment on compassionate grounds, consequently it would be deemed that the appointment done through the appointment order dated 05.01.1994 was made on a regular basis despite it indicating it as a seasonal appointment – High Court issued mandamus to pay retiral dues treating the petitioner as regular appointed employee. (Para 9, 17 and 19)

Writ petition allowed. (E-1)**List of Cases cited:**

1. Ram Chandra Vs St. of U.P. & ors.; 2008(26) LCD 669

2. Ravi Karan Singh Vs St. of U.P.; 1999 (17) LDC 641

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

1. Heard learned counsel for the petitioner and learned State counsel for respondent no.1 and Shri Anag Mishra, learned counsel for the respondent nos.2 to 5.

2. By means of instant petition, the petitioner has prayed for following main reliefs:

"(1) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 27.12.2017 passed by the respondent no.2 contained as annexure no.1 to the petition.

(2) Issue a writ, order or direction in the nature of mandamus commanding the respondents to treat the petitioner as regular employee since the date of appointment and pay to him arrears of salary and other consequential benefits to the petitioner and also pay the regular salary by treating him as regular employee."

3. At the very outset, Shri Mishra states that this Court vide order dated 04.07.2023 had required the appearance of Deputy Cane Commissioner, Devi Patan Mandal Gonda as none had appeared on behalf of the respondents when the case was listed on the said date. He states that his non appearance on the said date was on account of the fact that his full name was not indicated in the cause list and he could not note the said case. Shri Mishra states that henceforth he will be careful in noting when the case is listed.

4. In pursuance to the order dated 04.07.2023, Shri R.V. Ram, Deputy Cane Commissioner, Devi Patan Mandal, Gonda is present.

5. The case set forth by the learned counsel for the petitioner is that the petitioner's husband was posted as Seasonal Peon in the department of Sahakari Ganna Samiti Mankapur, District Gonda i.e. respondent no.5. He claims that the petitioner's husband died in harness in the year 1993 and so the petitioner staked a claim for being appointed on compassionate ground under the provisions

of the U.P. Recruitment of Dependent of Government Servants Dying in Harness Rules, 1974 (hereinafter referred to as 'Rules, 1974'). In pursuance thereof an appointment letter dated 05.01.1994, a copy of which is annexure no.2 to the petition, was issued to the petitioner whereby the petitioner was appointed as Seasonal Peon in a regular pay scale of Rs.750-940. However, the appointment letter stated that the appointment would be on temporary basis. Subsequent thereto an order dated 16.03.2010, a copy of which is annexure no.3 to the petition, was issued by the Cane Commissioner, U.P., Lucknow. The order stated that through an order dated 26.10.1988, the posts of Seasonal Chaprasis-Jamadars have been abolished in the Samitis and that it had been directed that all working Seasonal Chaprasis should be adjusted on other posts and in case they cannot be adjusted, then they should be continued in the same capacity till their retirement. It was also indicated in the said order that as the post of Seasonal Chaprasi had come to an end as such, the petitioner should not have been appointed on the post of Seasonal Chaprasi. However, as the petitioner had been continuing for a period of approximately 16 years it was decided that her claim for appointment against the post of Chaprasi be considered against her category of SC in case a post is vacant.

6. When nothing was done in the matter, the petitioner was constrained to approach this Court by filing Writ Petition No.24513 (S/S) of 2017 in Re: Smt. Tara Devi Vs. State of U.P. and Others claiming regularization. The writ petition was decided vide judgment and order dated 12.10.2017, a copy of which is annexure no.4 to the petition, whereby this Court required the respondents to consider the representation of the petitioner.

7. In pursuance thereof the claim of the petitioner was rejected by the respondents vide order dated 27.12.2017, a copy of which is annexure no.1 to the petition, on the ground that despite the order of Cane Commissioner dated 16.03.2010 there is no vacant post of Chaprasi against her category i.e. SC.

8. Raising a challenge to the order impugned, the contention of learned counsel for the petitioner is that although the petitioner has retired on attaining the age of superannuation on 31.03.2020 yet considering that all along she has continued on the post of Chaprasi, she is entitled for her retiral dues which, as pension is not payable in the society in which the petitioner was working, are Provident Fund and Gratuity.

9. In this regard, it is argued that as admittedly the petitioner was appointed under the provisions of 1974 Rules and such appointment could only have been made against the regular post, as such for all practical purposes the working of the petitioner is to be treated as regular employee. Consequently she is entitled for her entire retired dues as admissible to her on her retirement on 31.03.2020 treating her as a regular employee.

10. In support of his argument that compassionate appointment can only be made against a regular post, learned counsel for the petitioner has placed reliance on the Division Bench judgments of this Court in the cases of **Ram Chandra vs. State of U.P. and others-2008(26)LCD 669 and Ravi Karan Singh vs. State of U.P. - 1999 (17) LDC 641.**

11. On the other hand, Shri Mishra, learned counsel appearing for respondent

nos.2 to 5 argues on the basis of the averments contained in the counter affidavit that admittedly the petitioner was appointed as Seasonal Chaprasi-Peon. Upon her claim for being given regular appointment, the Cane Commissioner has passed the order dated 16.03.2010 whereby the earlier order dated 26.10.1988 had been considered which had abolished the post of Seasonal Chaprasi. However, as the petitioner had been working for approximately 16 years as such it was decided that the claim of her appointment against a regular post of Chaprasi be considered against her category. Subsequently it was found that against four regular posts of Chaprasis, there were 5 persons who were working and as such, despite the order of writ court dated 12.10.2017 for consideration of regularization, neither a claim for regularization nor her claim for regular appointment was found tenable or feasible, and as such the representation has been rejected vide order dated 27.12.2017. Thus there is no illegality in the impugned order.

12. So far as the claim of the petitioner of her being treated as a regular employee as per the provision of Rules, 1974, the argument of Shri Mishra is that as the husband of the petitioner was also a Seasonal Chaprasi as such there was no provision in the rules of the Samiti or the cane department for giving compassionate appointment to the dependent of a seasonal employee. However, considering the plight of the petitioner that she was a widow, it was decided to appoint her on compassionate grounds and as much no illegality and infirmity has been committed by the respondents while appointing the petitioner on compassionate grounds on a seasonal post. It is also contended that as the petitioner was retired on attaining the

age of superannuation while working as Seasonal Chaprasi as such she is not entitled for retiral dues.

13. Having heard the arguments of learned counsel for the parties and having perused the records, it emerges that the husband of the petitioner was working in the Samiti i.e. under the respondent no.5 as a Seasonal Peon who died in harness on 05.01.1994. The petitioner staked her claim for appointment on compassionate grounds under the provision of Rules, 1974. The respondents acceded to the request of the petitioner and appointed her on compassionate grounds as a Seasonal Peon in a Regular Pay Scale of Rs.750-940. Admittedly the appointment of the petitioner has been made under the provision of Rules, 1974 as emerges from a perusal of the appointment order dated 05.01.1994 by use of the words "मृतक आश्रित के शासनांतर्गत" i.e. appointed in accordance with Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974. As the petitioner was only working on Seasonal basis, she staked her claim for being appointed on a regular basis which the Cane Commissioner, vide his order dated 16.07.2010, was of the view that considering the long service of the petitioner of approximately 16 years, she be considered as regular employee as Chaprasi against her category i.e. SC Category.

14. When no orders were passed, the petitioner was constrained to approach this Court by staking her claim for being regularized on the post of Chaprasi. This Court vide order dated 12.10.2017 required the respondents to consider the representation of the petitioner, which has been rejected by them vide order

dated 27.12.2017 on the ground that as there was no vacant post in her category i.e. S.C. as Chaprasi, consequently she cannot be given a regular appointment. Subsequent thereto, the petitioner continued to work as a Seasonal Chaprasi and retired on attaining the age of superannuation on 31.03.2020.

15. What appears to have escaped the attention of the respondents while initially appointing the petitioner as Seasonal Peon on compassionate ground in the year 1994 is that the Rules, 1974 have been interpreted by a Division Bench of this Court in the case of **Ravi Karan Singh (supra)** which has held as under:-

"In our opinion, an appointment under the Dying in Harness Rules has to be treated as a permanent appointment otherwise if such appointment is treated to be a temporary appointment then it will follow that soon after the appointment the service can be terminated and this will nullify the very purpose of the Dying in Harness Rules because such appointment is intended to provide immediate relief to the family on the sudden death of the bread earner. We, therefore, hold that the appointment under Dying in Harness Rule is a permanent appointment and not a temporary appointment, and hence the provisions of U.P. Temporary Government Servant (Termination of Services) Rules, 1975 will not apply to such appointments."

16. A Division Bench of this Court in the case of Ram Chandra (supra) held as under:-

"It is admitted case of the parties that father of the petitioner, late Sri Ram Dhiraj was working as Class IV employee in Rajkiya Vastukala Mahavidyalaya,

Lucknow, who expired while he was in service. The petitioner thereafter moved an application for appointment on compassionate ground under the provisions of the U.P. Recruitment of Dependants of Government Servants (Dying-in-Harness) Rules, 1974. It is admitted case of the parties that the petitioner was appointed by the order dated 19.3.1983 on a Class IV post. It is settled law that the appointments made under the provisions of the U.P. Recruitment of Dependants of Government Servants (Dying-in- Harness) Rules, 1974 are of permanent nature. Since appointment of the petitioner was of permanent nature, the provisions of U.P. Temporary Government Servants (Termination of Service) Rules, 1975 were not applicable. The impugned termination order dated 10.12.1985 is legally not sustainable."

17. From perusal of the aforesaid judgments, it emerges that this Court has repeatedly held that a compassionate appointment can only be made on regular basis. When the respondents acceded to the request of the petitioner for her appointment on compassionate grounds, consequently it would be deemed that the appointment done through the appointment order dated 05.01.1994 was made on a regular basis despite it indicating it as a seasonal appointment. Further the petitioner having continued for the period of 24 years and she having retired on attaining the age of superannuation on 31.03.2020, her retiral dues have not been given on the ground that she retired as a seasonal employee/ clerk. Once the petitioner had been appointed on compassionate grounds under the provisions of Rules, 1974 and as per Rules, 1974 compassionate appointment can only be made on a regular post, consequently

her appointment and continuous service of the petitioner should have been treated by the respondents to be made on regular basis keeping in view of the law laid down by this Court in the aforesaid judgments.

18. Keeping in view of the aforesaid discussions, the writ petition is **allowed**.

19. The order impugned dated 27.12.2017, a copy of which is annexure no.1 to the petitioner, is **quashed**. A writ of mandamus is issued to the respondents directing them to consider the payment of retiral dues of the petitioner treating her to have been appointed on a regular post under the provision of Rules, 1974 and also make payment of her retiral dues in accordance with law within a period of three months from the date of receipt of certified copy of this order.

(2023) 8 ILRA 1414
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.05.2023

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 2733 of 2023

Satya Prakash Sharma **...Petitioner**
Versus
State of U.P. & Anr. **...Respondents**

Counsel for the Petitioner:

Sri Vashishtha Tiwari

Counsel for the Respondents:

C.S.C.

A. Service Law – UP Contributory Provident Fund Insurance Pension Rules, 1964 – Rule 19(b) – Pension – Entitlement of Officiating Principal to get pension – Failure of St. in not making the officiating

post as the post on substantive basis – Effect – Held, if the St., on its own inaction, does not make appointment on substantive basis to a post, a person holding the post as officiating capacity but post being substantive in nature is drawing salary also as admissible to the said post, cannot be denied pensionary benefits – *Lakshman Veer's case* relied upon. (Para 7 and 12)

B. Interpretation of statute – Beneficial construction – The pensionary benefit rules have to be construed so as to ensure that the object with which rules are made, is achieved and the benefit reaches to the last man in queue – *D. S. Nakara's case* relied upon. (Para 10)

Writ petition allowed. (E-1)

List of Cases cited:

1. Narsingh Rai Vs Deputy Director of Education, Varanasi & ors.; 2018 (11) ADJ 135
2. Rudra Kumar Sain Vs U.O.I.; (2000) 8 SSC 25
3. Lakshman Veer Vs St. of U.P.; 2019 (4) AILLJ 116
4. Surendra Prasad Agnihotri Vs St. of U.P.; 2010 0 Supreme (All) 196
5. D.S Nakara Vs U.O.I.; 1983 AIR 130

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

1. Heard Sri Vashishtha Tiwari, learned counsel for the petitioner and learned Standing Counsel for the State respondents.

2. In compliance of my last order dated 22nd March, 2023, an affidavit of compliance has been filed, which is taken on record.

3. In the compliance affidavit State Government has come with a case that in view of the judgment in the case of Virsh Bhan Sharma v. State of U.P. and others

passed in Writ – A No.- 23690 of 2018 decided on 9th January, 2019, an officiating principal cannot be said to have held the said post in substantive capacity and, therefore, an interpretation to Rule 19(b) of U.P. Contributory Provident Fund Insurance Pension Rules, 1964 is sought to be providing that a person must be holding substantive post to hold him entitled to receive pension.

4. In Virsh Bhan's case, accordingly, the petitioner in that case was refused pension. The ratio of the judgment as contained in paragraph 9 is reproduced hereunder:

"9. According to Rule-19 (a) of the Rules, service rendered by an employee would not be counted for pension unless the employee holds a substantive post on a permanent establishment. Sub Rule (b) of Rule-19 is an exception, according to which the Continuous temporary or officiating service would also be included for the purposes of payment of pension, if such continuance is followed without any interruption by confirmation in the same or another post. The statutory scheme, therefore, clearly suggests that it is either a post held substantively by a government servant which would be the relevant criteria for determination of pension or the service on continuous, temporary or officiating basis, which is followed with the confirmation on that post or on similar post. The determination of qualifying service is essential aspect, which is dealt with by Rule 19 (b) of the Rules, while the right of pension payable would be regulated by Rule 19 (a). It is the substantive post held by an employee which, therefore, would determine his entitlement to receive pension. Since the petitioner held the post of Lecturer on

substantive basis, his pension will have to be determined with reference to his substantive appointment and the respondent, therefore, have committed no error in determining his pension accordingly."

5. Petitioner has relied upon two judgments of concurrent Bench of this Court. The first one in the case of **Narsingh Rai v. Deputy Director of Education, Varanasi and others: 2018 (11) ADJ 135**, wherein the view of the Supreme Court as expressed in the case of Isharat Jahan v. State of U.P. and others passed in Writ - A No.- 5737 of 2018 has been referred, had relied upon a judgment in the case of **Rudra Kumar Sain v. Union of India: (2000) 8 SSC 25**. Interpreting service jurisprudence his Lordship referred to the aspect of the matter that a person holding position for a long period of time having requisite qualification, would entitle him to get the pensionary benefits as the pension is to be determined on the basis of last pay drawn.

6. The word 'substantive basis' is sought to be interpreted to mean a person must be holding the post substantive in nature with requisite qualification. Thus, thin distinction is sought to be drawn between substantive post and holding the post on substantive basis. Judgement as quoted in paragraph 4 of the Narishing Rai's case is reproduced hereunder:

"4- Against the afore-quoted order, the petitioner filed Writ -A No.7439 of 2016 (Narsingh Rai v. State of U.P. and 3 others), which was allowed by this Court by order dated 21.3.2018, as under:

"Heard Shri Adarsh Singh, learned counsel for the petitioner and

learned Additional Chief Standing Counsel for State respondents.

The petitioner is before this Court assailing the order dated 15.2.2018 passed by the third respondent, Deputy Director of Education (Secondary), 5th Region, Varanasi whereby he has declined to sanction his pension and for direction to the third respondent to sanction his pension on the post of Assistant Teacher L.T. Grade and to pay the same with effect from the date of his retirement i.e. 31.3.2018.

Learned counsel for the petitioner submits that the petitioner was initially appointed as Assistant Teacher in L.T. Grade in a recognised and aided institution namely 'Gramodaya Inter College Gaura Badshahpur, District Jaunpur' on 2.7.1994. In pursuance thereof, he joined in the institution on 8.7.1994. Since then, he has been teaching in the institution in question on the said post, and has also been paid regular salary including annual increments and selection grade of LT Grade after 10 years of service. The appointment of the petitioner was also duly approved by the District Inspector of Schools, Jaunpur on 15.7.1995. Subsequently, by the order dated 25.4.2017 passed by the Joint Director of Education, Varanasi Region, Varanasi, his services have also been regularized w.e.f. 22.3.2016. After serving more than 23 years, the petitioner has retired on 31.3.2018 on the said post after attaining the age of superannuation.

Learned counsel for the petitioner apprises to the Court that the claim set up by the petitioner is squarely covered by the judgement and order passed by this Court dated 7.3.2018 in Writ A No.5737 of 2018 (Ishrat Jahan vs. State of UP and 3

others), which was allowed on 7.3.2018, with following observations:-

"17. The short question which need determination in this case is whether the petitioner who was appointed on adhoc basis and also superannuated in the same capacity without her regularisation can be held to work on a regular basis. The terms under "ad hoc" "stopgap" and "fortuitous" came to be considered by the Supreme Court in the case of Rudra Kumar Sain v. Union of India, (2000) 8 SCC 25. The Court found that a person, who has a requisite qualification and who is appointed with the approval of the appropriate authority and if he is allowed to continue on the post for a considerable long time then such appointment cannot be held to be stopgap/ fortuitous or purely adhoc appointment. The Supreme Court observed as under :-

"In service jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a fairly long period, then such an appointment cannot be held to be "stopgap or fortuitous or purely ad hoc".

18. The Supreme Court in the case of Ramesh K. Sharma v. Rajasthan Civil Services, (2001) 1 SCC 637, considered the word "substantive basis" following the judgment of Baleshwar Dass v. State of U.P. (AIR 1981 SC 41). The Supreme Court held that if an incumbent holds the post for indefinite period then it cannot be said to be adhoc appointment. The Court held as under :-

"If an incumbent is appointed after due process of selection either to a temporary post or a permanent post and such appointment, not being either stopgap or fortuitous, could be held to be on substantive basis. But if the post itself is created only for a limited period to meet a particular contingency, and appointment thereto is made not through any process of selection but on a stopgap basis then such an appointment cannot be held to be on substantive basis. The expression "substantive basis" is used in the service jurisprudence in contradistinction with ad hoc or purely stopgap or fortuitous."

19. This Court in the case of Dr. Hari Shanker Asopa v. State of U.P. And another, reported (1989) UPLBEC 501, considered the Article 361 and Clause (e) of Rule 56 of Fundamental Rules as applied in Uttar Pradesh and the Civil Service Regulations. Dr. Hari Shanker Asopa was appointed on temporary basis on the post of lecturer in the department of Surgery at S.N.Medical College, Agra on 4th August, 1964. In the year 1969, he was appointed on a substantive post of Reader in Surgery at same College that appointment too was on temporary basis. The term of the appointment was one year or till the candidate selected by the U.P.Public Service Commission was available, whichever was earlier. After three years, he was promoted to the post of Professor in Surgery in Jhansi Medical College. The said appointment was also temporary and it was for a period of one year or till the candidate regularly selected by the U.P.Public Service Commission was available or till the services of Dr. Asopa were needed, whichever was earlier. Dr. Asopa uninterruptedly continued for 18 years as a Lecturer, Reader and Professor on temporary basis. His request for

voluntary retirement was allowed by the State Government in the year 1983 with a condition that no pension would be paid to him, as he was not permanent on any post of the Government Service. Dr. Asopa feeling aggrieved by the said order dated 21.2.1983 preferred a writ petition before this Court.

20. In the case of Hans Raj Pandey v. State of U.P. and others, 2007 (3) UPLBEC 2073 (supra) this Court had occasion to consider the provisions of U.P. State Aided Educational Institution Employees Provident Fund, Insurance and Pension Rules, 1964 also. Rule 43 ,44 and 45 of the said Rule has been considered at length by this Court and also the Regulations 465 and 465 A of the U.P. Civil Service Regulations. The Court held as under :-

"In the present case, so far as the condition Nos. A and C are concerned, they are satisfied and the dispute is only with respect to condition No. B i.e., lack of permanent character of service. However, in out view, the aforesaid provisions stand obliterated after the amendment of Fundamental Rule 56 by U.P.Act No. 24 of 1975 which allows retirement of a temporary employees also and provides in clause (e) that a retiring pension is payable and other retiral benefits, if any, shall be available to every Government Servant who retires or is required or allowed to retire under this Rule. Since the aforesaid amendment Rule 56 was made by an Act of Legislature, the provisions contained otherwise under Civil Service Regulations, which are pre-constitutional, would have to give way to the provisions of Fundamental Rule 56. In other words, the provisions of Fundamental Rule 56 shall prevail over the Civil Service Regulations, if they are

inconsistent. Condition -B (supra) of Article 361 of Civil Service Regulations are clearly inconsistent with Fundamental Rule 56 and thus is in operative."

"21. The principle, which can be discerned from the above mentioned judgment, is that if adhoc/stopgap/temporary employee having essential qualification and is appointed in terms of the statutory Rules and he continues for a long time and fulfils the qualifying service, is entitled for pension and other retiral benefits.

22. Having regard to the facts and circumstances of the case, I am of the view that petitioner is entitled for the post retiral benefits as her appointment was made in terms of the statutory Rules and the same was also approved by the District Inspector of Schools by an order dated 8.5.2013. Admittedly, on account of an interim order dated 20.1.2004 passed in Writ Petition No.38769 of 2000, the petitioner continued to work in the institution and finally retired on attaining the age of superannuation on 1.7.2017 (worked under the sessions benefit upto 31.3.2018) and she worked uninterruptedly for more than 25 long years.

23. A direction is issued to the respondents to pay the post retiral benefits to the petitioner in accordance with law as expeditiously as possible preferably within three months from the date of communication of this order.

24. Consequently, the writ petition is allowed."

Learned counsel for the petitioner further states that the claim set up by the

petitioner is on the better footing, as his services have already been regularized on 22.3.2016 as per provisions contained under Section 33-C of U.P. Intermediate Education Act, 1921. The request has been made that the present writ petition is also liable to be allowed in terms of the aforesaid judgement.

Learned Additional Chief Standing Counsel does not dispute the factual and legal aspect of the matter.

The Court has proceeded to examine the record in question and finds that while passing the order impugned the Deputy Director of Education (Secondary), 5th Region, Varanasi has taken note of the regularization of the petitioner by an order dated 22.3.2016 and thus, the case of the petitioner is squarely covered by the aforesaid judgement.

In view of above, the impugned order cannot sustain and the same is accordingly set aside.

Consequently, the writ petition is allowed and the matter is remanded back to the Deputy Director of Education (Secondary) to take appropriate decision afresh in the light of the aforesaid judgement passed in Ishrat Jahan's case (supra) within a period of two months from the date of production of certified copy of this order."

(emphasis added)

*7. Another concurrent Bench of this Court in the case of **Lakshman Veer v. State of U.P. : 2019 (4) AllJ 116** specifically dealt with this issue and sought to draw in fundamental Rule 26 C and E with the amendment validation Act, 1975*

to interpret that the rules do not distinguish between a permanent and a temporary employee. The Court in this case also has been in tune with the philosophy of service jurisprudence which requires a person to possess requisite qualification under the rules to hold a position. If the State, therefore, on its own inaction does not make appointment on substantive basis to a post, a person holding the post as officiating capacity but post being substantive in nature is drawing salary also as admissible to the said post, cannot be denied pensionary benefits in view of the judgment cited above. Relevant paragraphs 28, 29, 30 31 of the judgment are reproduced hereinunder:

"28. Rules 17 provides eligibility for the pension and Rule 17(1) says that employee shall be eligible for pension after retirement on attaining the age of superannuation or on the expiry of extension granted beyond superannuation and in present case, undisputedly petitioner retired after attaining the age of superannuation. So far as Rule 19-A is concerned, it says that for pension, employee should hold substantive post on a permanent establishment. Here the facts are also not disputed that petitioner was appointed on substantive post of a permanent establishment receiving grant-in-aid from the State Government. Therefore, as provided in Rule-17 and 19-A of Rules, 1964, petitioner is entitled for pension after attaining the age of superannuation.

29. Learned counsel for the petitioner has placed reliance upon Article 361 of Civil Service Regulation and the same is also being quoted here in below:-

"361. The service of an officer does not qualify for pension unless it conforms to the following three conditions:--

First--The service must be under Government.

Second--The employment must be substantive and permanent.

Third--The service must be paid by Government.

These three conditions are fully explained in the following Section.

1. Substantive service in a permanent post qualifying for pension unless the service in a particular post is specifically declared as non-qualifying under Article 350 C.S.R. when a temporary post is made permanent or a permanent post is sanctioned, it is not necessary to state that the post in question would also be pensionable under Article 361 C.S.R.

361-A. The State Government may, however, in the case of service paid from General Revenues, even though either or both of conditions (1) and (2) are not fulfilled:--

(1) declare that any specified kind of service rendered in a non-gazetted capacity shall qualify for pension;

(2) in individual cases and subject to such conditions as it may think fit to impose in each case, allow service rendered by an officer to count for pension.

Subject to such conditions as it may think fit to impose, the State

Government may delegate its powers under this Article to the Heads of Departments.

such decision having been taken in the public interest.

30. *By the perusal of Article 361 of Civil Service Regulation, it is very much clear that the petitioner is fulfilling the first and third contingencies and so far as the second contingency is concerned, argument of counsel for the petitioner is having force as his matter of regularisation was not decided due to inaction on the part of respondent No. 5 within time after order of this Court dated 25.04.2005 and that has been decided vide order dated 03.01.2015 after retirement of petitioner, which is not sustainable as discussed hereinabove.*

(2) *Every such decision shall, unless the contrary is proved, be presumed to have been in the public interest.*

(3) *The expression 'appointing authority' means the authority which for the time being has the power to make substantive appointments to the post or service from which the Government servant is required or wants to retire; and the expression 'qualifying service' shall have the same meaning as the relevant rules relating to retiring person.*

31. *Learned counsel for the petitioner has also placed reliance upon Rules 56(C) and (E) of Act, 1975 and the same is being quoted below:-*

56(c). *Notwithstanding anything contained in Clause (a) or Clause (b), the appointing authority may, at any time, by notice to any Government servant (whether permanent or temporary), without assigning any reason, require him to retire after he attains the age of fifty years or such Government servant may by notification to the appointing authority voluntarily retire at any time after attaining the age of fifty years or after he has completed qualifying service for twenty years.*

(4) *Every order of the appointing authority requiring a Government servant to retire forthwith under the first proviso to clause(d) of this rule shall have effect from the afternoon of the date of its issue provided that if after the date of its issue, the Government servant concerned bona fide and in ignorance of that order, performs the duties of his office his acts shall be deemed to be valid notwithstanding the facts of his having earlier retired."*

56(e). *A retiring pension shall be payable and other retirement benefits, if any, shall be available in accordance with an subject to the provisions of the relevant rules to every Government servant who retires or is required or allowed to retire under this rule.*

8. The Full Bench of this Court in the case of **Surendra Prasad Agnihotri v. State of U.P.: 2010 0 Supreme (All) 196**, very categorically held that an officiating principal holding substantive post on the basis of seniority and possessing requisite qualification, if cannot be denied service benefits and in terms of salary, such person can equally be not denied pension which is also got the service benefits to which otherwise he would be entitled on the basis of last pay drawn. Vide paragraph 17 of the judgment the Court answered the reference as under:

Explanation- (1) The decision of the appointing authority under Clause (c) to retire the Government servant as specified therein shall be nothing herein contained shall be construed to require any recital, in the order, of

"17. In view of the aforesaid facts and circumstances and the legal position, we make reference for constitution of a Larger

Bench to deal with the following question of law:

“Whether a teacher of Intermediate College who has already been appointed as officiating principal of the Institution by virtue of his seniority on attaining the age of superannuation in the extended period of his service shall continue as officiating principal or simply as a teacher?”

9. Coming back to the judgment cited by and annexed as part of the personal affidavit filed by Mr. Mukesh Chandra, the Deputy Director of Education, Agra Region, Agra, with great respect, I would submit that the concurrent Bench did not notice the earlier judgment of earlier concurrent Bench in the case of **Narsingh Rai** (supra) and the reference answered by the Full Bench as quoted above in the case of **Surendra Prasad Agnihotri** (supra).

10. As far back as in 1982 the Constitution Bench of this Court in the case of **D.S Nakara v. Union of India: 1983 AIR 130** had very clearly interpreted that the pensionary benefit rules have to be construed so as to ensure that the object with which rules are made, is achieved and the benefit reaches to the last man in queue. It would be sufficient enough in my considered view and in the light of the judgments cited above, only for holding a post which is substantive in nature and not holding a post substantively would make also the one entitled to pension provided he/ she has qualifying service to his/ her credit. It has rightly been said that a Judge while interpreting the provisions must bear in mind as to whether the interpretation he is putting forth is going to benefit the last man in the queue.

11. Since the concurrent Bench in the case of Virsh Bhan Sharma (supra) has not noticed either the Narisingh Rai's case or the reference answered by the Full Bench (supra), it

can not be taken as a binding precedent and so I am not bound by the view taken in Virsh Bhan's case.

12. In the present case it is not disputed that the petitioner had held the position of officiating principal of the institution which was a substantive post and with the approval of the District Inspector of Schools he was also paid salary as his signatures were attested as such, and accordingly, I hold him to be entitled to pension as would be admissible in law otherwise, on the basis of last pay drawn by the petitioner as principal of the institution.

13. In view of the above, therefore, the writ petition succeeds and is allowed as above.

14. The Deputy Director of Education, Secondary Agra Region Agra is directed to calculate the pension of petitioner on the basis of last pay drawn as principal of the institution, and shall release the same within next three months' time.

15. In the circumstances, therefore, there will be no order as to cost.

(2023) 8 ILRA 1421
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.07.2023

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ A No.5351 of 2023

Mahendra Pal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for thePetitioner:
Vaibhav Srivatava

Counsel for the Respondents:

C.S.C., Gaurav Mehrotra

A. Service Law – Constitution of India – Article 226 – Writ – Laches – Pendency of review, how far give fresh cause of action – Impugned punishment order was passed on 23.05.2007, against which statutory appeal was rejected on 15.02.2008 on the ground of laches – Review was filed which was rejected on 18.04.2023 on the ground that it is not maintainable – Punishment order and consequential order was challenged – Held, merely because the authorities informed about the non maintainability of the review through an order dated 18.04.2023 the same would not entail revival of a stale claim as in the instant writ petition – High Court dismissed the writ petition on the ground of laches. (Para 17 and 23)

Writ petition dismissed. (E-1)

List of Cases cited:

1. M. R. Gupta Vs U.O.I. & ors.; 1995 (5) SCC 628
2. U.O.I. & anr. Vs Tarsem Singh; 2008 (8) SCC 648
3. St. of Tripura & ors. Vs Arabinda Chakraborty & ors.; (2014) 6 SCC 460
4. Naresh Kumar & ors. Vs Government (NCT of Delhi); (2019) 9 SCC 416
5. U.O.I. & ors. Vs M. K. Sarkar; (2010) 2 SCC 59
6. St. of Uttar Pradesh & ors. Vs Rajmati Singh; 2022 SCC OnLine SC 1785

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

1. Heard learned counsel for the petitioner, learned Standing Counsel for the respondent no. 1 and Shri Gaurav Mehrotra, learned counsel for the respondents no. 2 to 6.

2. The instant writ 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 18.04.2023 passed by opposite party no. 4 contained as Annexure No. 1 to the writ petition.

(ii) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 15.02.2008 passed by opposite party no. 5 contained as Annexure No. 2 to the writ petition.

(iii) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 23.05.2007 (so far as it relates to the imposition of punishments) passed by opposite party no. 3 contained as Annexure no. 3 to the writ petition.

(iv) Issue a writ, order or direction in the nature of mandamus commanding the opposite parties to remove / delete the censure entry given to the petitioner in his service book vide impugned order dated 23/05/2007 (Annexure No. 3 to the writ petition), within specified time.

(v) Issue a writ, order or direction in the nature of mandamus commanding the opposite parties to grant full arrears of salary and other allowances due during the period of suspension with interest as applicable till the date of actual payment, within specified time.

(vi) Issue a writ, order or direction in the nature of mandamus commanding the opposite parties to provide / grant one increment with all consequential benefits due to the petitioner which was held back vide impugned order

dated 23.05.2007 (Annexure No. 3 to the writ petition), within specified time."

3. The case set forth by the petitioner is that the petitioner is an employee of respondent no. 2 Bank. The petitioner had been proceeded against departmentally and a punishment order dated 23.05.2007, a copy of which is annexure 3 to the petition, had been passed whereby following punishments were awarded namely:

- (a) an adverse entry and
- (b) stoppage of one increment cumulatively.

4. Being aggrieved, the petitioner filed an appeal which was rejected vide the order dated 15.02.2008, a copy of which is annexure 2 to the petition, on the ground of the same having been filed beyond time. The petitioner claims that subsequent thereto he continued to represent to the respondents and also claims to have filed a review on 12.03.2008. After repeated representations, the said review has been decided vide the impugned order dated 18.04.2023, a copy of which is annexure 1 to the petition. The review has been rejected on the ground that there is no provision in the service rules for filing of a review after the appeal has been decided.

5. Raising a challenge to all three orders namely the order dated 18.04.2023, the order dated 15.02.2008 as well as the punishment order dated 23.05.2007, the instant writ petition has been filed.

6. A preliminary objection has been taken by Shri Gaurav Mehrotra, learned counsel appearing for the respondent Bank that the writ petition is barred by laches and delay in as much as simply because the

authorities have proceeded to pass an order dated 18.04.2023 whereby it has been indicated that there is no power of review under the service rules for entertaining of a review and the said review filed by the petitioner has been rejected, the same would not give rise to a fresh cause of action to the petitioner to challenge the stale orders of the years 2007 and 2008 and thus the writ petition deserves to be dismissed on this ground alone.

7. Replying to the aforesaid, the argument of Sri Vaibhav Srivastava, learned counsel for the petitioner is that keeping in view the law laid down by Hon'ble Supreme Court in the case of **M. R. Gupta vs Union of India and others** reported in **1995 (5) SCC 628** and the judgement of Hon'ble Supreme Court in the case of **Union of India and another vs Tarsem Singh** reported in **2008 (8) SCC 648** there is continuing cause of action to the petitioner to file the writ petition in as much as one of the punishment that has been imposed to the petitioner is stoppage of one increment cumulatively which continues to affect him even as of date and hence there being a continuing cause of action, he is perfectly entitled to file a writ petition as and when the respondents pass an order, even on the review which was not maintainable at the first instance.

8. Responding to that, the argument of Sri Gaurav Mehrotra, learned counsel for the respondents is that admittedly a punishment order was passed against the petitioner on 23.05.2007. The petitioner filed a belated appeal against the same which has been rejected vide the order dated 15.02.2008 on the ground that the same has been filed beyond time. Even though the petitioner has filed a review, which was not maintainable under the

service rules and under the rules governing the disciplinary proceedings pertaining to the respondent Bank, yet the Bank in its wisdom has proceeded to reject the review of the petitioner by means of the impugned order dated 18.04.2023 on the ground that the said review itself is not maintainable. Consequently the same would not give rise to any fresh cause of action to the petitioner in as much as once review itself was not maintainable, even if the petitioner might have filed the same and would have continued to represent to the respondents for a decision on his review application, the same would not give rise to any fresh cause of action in as much as the orders under challenge are deemed to be those orders which have been passed after disciplinary proceedings against the petitioner i.e. the punishment order dated 23.05.2007 and the appellate order dated 15.2.2008 and the writ petition having been filed after a lapse of 15 years merits to be dismissed on this ground alone.

9. In this regard reliance has been placed on the judgments of Hon'ble Supreme Court in the cases of **State of Tripura and others vs Arabinda Chakraborty and others** reported in (2014) 6 SCC 460, **Naresh Kumar and others vs Government (NCT of Delhi)** reported in (2019) 9 SCC 416, **Union of India and others vs M. K. Sarkar** reported in (2010) 2 SCC 59 and **State of Uttar Pradesh and others vs Rajmati Singh** reported in 2022 SCC OnLine SC 1785.

10. Placing reliance on the aforesaid judgments, the argument of Shri Gaurav Mehrotra is that even when an order has been passed on the basis of a representation preferred by an employee, the same would not give life to a stale claim and

consequently once the instant writ petition has been filed primarily against the punishment order and the appellate order passed way back in the years 2007 and 2008, consequently the writ petition deserves to be dismissed on this ground alone.

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

12. From perusal of record it emerge that after disciplinary proceedings were initiated against the petitioner, a punishment order dated 23.05.2007 was passed against him whereby he was awarded with an adverse entry and a punishment of withholding of one increment on cumulative basis. Initially the petitioner was not aggrieved by the said order in as much as the appeal was not filed by him within the stipulated time as per rules. He filed a belated appeal against the punishment order which was rejected by the appellate authority vide order dated 15.02.2008 on the ground of it having been filed beyond the time specified under the rules. The petitioner appears to have sat silent in the matter and did not challenge it before the competent court of law. It is contended that he filed a review against both, the punishment order and the appellate order on 12.03.2008. It is alleged that the said review remained pending with the respondents and the petitioner continued to represent for a decision to be passed on his review. An order in this regard has only been passed by the competent authority on 18.04.2023 whereby the review filed by the petitioner has been rejected by contending that there is no power in the service rules for filing of review. Now challenging all three orders i.e. punishment order, the appellate order as well as the order passed on review, which

itself was not maintainable, the instant petition has been filed.

13. In order to explain laches, reliance has been placed on judgements of Hon'ble Supreme Court in the cases of **M. R. Gupta (supra)** as well as **Tarsem Singh (supra)**.

14. The Court proceeds to consider the judgments of **Tarsem Singh (supra)** wherein the earlier judgement of **M. R. Gupta (supra)** has been considered.

15. Hon'ble Apex Court in the case of **Tarsem Singh (supra)** has held as under:"

*"5. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). **One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury.** But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the re-opening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or re-fixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion etc.,*

affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. In so far as the consequential relief of recovery of arrears for a past period, the principles relating to recurring/successive wrongs will apply. As a consequence, High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition. "

16. A perusal of judgement of Hon'ble Apex Court in the case of **Tarsem Singh (supra)** would indicate that Hon'ble Apex Court has held that a belated service claim can be rejected on the ground of delay and laches where remedy is sought by filing of writ petition or limitation where a remedy is sought by application to the administrative tribunal but one of the exception to the said rule would be relating to a continuing wrong where the service related claim is based on a continuing wrong. Relief can be granted even if there is long delay in seeking remedy with reference to the date on which continuing wrong commenced, if such continuing wrong creates a continuing source of injury. The Hon'ble Supreme Court has carved out certain exceptions to the principle of 'continuing wrong' of which one of the exception which has been argued by learned counsel for the petitioner is that if the issue relates to payment or re-fixation of pay and pension then the relief may be granted in spite of delay as it does not affect the right of third parties.

17. At the first blush, the argument of learned counsel for the petitioner appears to have some force in as much as the punishment of withholding of one increment with cumulative effect continues to have effect even after lapse of several

years, consequently he may be entitled to prefer the instant petition even after a period of 15 years. However a careful perusal of the judgement of Hon'ble Apex Court in the case of Tarsem Singh (supra) would indicate that the exemptions carved out, so far as the instant case is concerned, is where there has been wrong fixation of pay or pension on account of certain administrative decisions. In the instant case it is not on account of administrative decisions that the pay of the petitioner may have been fixed wrongly, rather it was after disciplinary proceedings that a punishment order was consciously and deliberately passed against the petitioner whereby the punishment of withholding of one increment with cumulative effect was passed. The petitioner, in his own wisdom, filed a belated appeal which was rejected way back in the year 2008 and thereafter pursued a remedy which was not permissible under the service rules i.e. the remedy of review. Even when the review was filed in the year 2008, it could have been a case that in the year 2008 the petitioner may have approached this Court praying for a decision being taken on a review (which itself was not maintainable) but the petitioner continued to sit over the matter and it is only when the authorities themselves indicated to the petitioner vide the order dated 18.04.2023 that the review itself is not maintainable as there is no provision under the Rules that the petitioner has woken up and chosen to challenge all the three orders.

18. Considering the aforesaid discussion, the principles of law laid down in **Tarsem Singh (supra)** would not be applicable.

19. So far as the judgment as cited on behalf of the respondents are concerned

namely in the case of **Arabinda Chakraborty (supra)** Hon'ble Apex Court has held as under:

*"15. In our opinion, the suit was hopelessly barred by law of limitation. **Simply by making a representation, when there is no statutory provision or there is no statutory appeal provided, the period of limitation would not get extended. The law does not permit extension of period of limitation by mere filing of a representation. A person may go on making representations for years and in such an event the period of limitation would not commence from the date on which the last representation is decided.** In the instant case, it is a fact that the respondent was given a fresh appointment order on 22.11.1967, which is on record. The said appointment order gave a fresh appointment to the respondent and therefore, there could not have been any question with regard to continuity of service with effect from the first employment of the respondent.*

*18. It is a settled legal position that the period of limitation would commence from the date on which the cause of action takes place. Had there been any statute giving right of appeal to the respondent and if the respondent had filed such a statutory appeal, the period of limitation would have commenced from the date when the statutory appeal was decided. In the instant case, there was no provision with regard to any statutory appeal. The respondent kept on making representations one after another and all the representations had been rejected. **Submission of the respondent to the effect that the period of limitation would commence from the date on which his last representation was rejected cannot be***

accepted. If accepted, it would be nothing but travesty of the law of limitation. One can go on making representations for 25 years and in that event one cannot say that the period of limitation would commence when the last representation was decided. On this legal issue, we feel that the courts below committed an error by considering the date of rejection of the last representation as the date on which the cause of action had arisen. This could not have been done."

(emphasis by Court)

20. Likewise Hon'ble Apex Court in the case of Naresh Kumar (supra) has held as under:

"13. It is settled law that the power of Review can be exercised only when the statute provides for the same. In the absence of any such provision in the concerned statute, such power of Review cannot be exercised by the authority concerned. This Court in the case of Kalabharati Advertising vs Hemant Vimalnath Narichania (2010) 9 SCC 437, has held as under:

"...12. It is settled legal proposition that unless the statute/rules so permit, the review application is not maintainable in case of judicial/quasi-judicial orders. In the absence of any provision in the Act granting an express power of review, it is manifest that a review could not be made and the order in review, if passed, is ultra vires, illegal and without jurisdiction.

(Vide Patel Chunibhai Dajibha v. Narayanrao Khanderao Jambekar [AIR 1965 SC 1457] and Haribhajan Singh v. Karam Singh [AIR 1966 SC 641] .)

13. In Patel Narshi Thakershi v. Pradyuman Singhji Arjunsinghji [(1971) 3 SCC 844 :AIR 1970 SC 1273], Major Chandra Bhan Singh v. Latafat Ullah Khan [(1979) 1 SCC 321], Kuntesh Gupta (Dr.) v. Hindu Kanya Mahavidyalaya [(1987) 4 SCC 525 : 1987 SCC (L&S) 491 : AIR 1987 SC 2186], State of Orissa v. Commr. of Land Records and Settlement [(1998) 7 SCC 162] and Sunita Jain v. Pawan Kumar Jain [(2008) 2 SCC 705 : (2008) 1 SCC (Cri) 537] this Court held that the power to review is not an inherent power. It must be conferred by law either expressly/specifically or by necessary implication and in the absence of any provision in the Act/Rules, review of an earlier order is impermissible as review is a creation of statute. Jurisdiction of review can be derived only from the statute and thus, any order of review in the absence of any statutory provision for the same is a nullity, being without jurisdiction.

14. Therefore, in view of the above, the law on the point can be summarised to the effect that in the absence of any statutory provision providing for review, entertaining an application for review or under the garb of clarification /modification/ correction is not permissible.

(emphasis supplied)"

21. Similarly Hon'ble Apex Court in the case of **M. K. Sarkar (supra)** has held as under:

"14. The order of the Tribunal allowing the first application of respondent without examining the merits, and directing appellants to consider his representation has given rise to unnecessary litigation and avoidable complications. The ill-effects of such directions have been considered by

this Court in *C. Jacob vs Director of Geology and Mining & Anr* - 2009 (10) SCC 115 :

"The courts/tribunals proceed on the assumption, that every citizen deserves a reply to his representation. Secondly they assume that a mere direction to consider and dispose of the representation does not involve any 'decision' on rights and obligations of parties. Little do they realize the consequences of such a direction to 'consider'. If the representation is considered and accepted, the ex-employee gets a relief, which he would not have got on account of the long delay, all by reason of the direction to 'consider'. If the representation is considered and rejected, the ex-employee files an application/writ petition, not with reference to the original cause of action of 1982, but by treating the rejection of the representation given in 2000, as the cause of action. A prayer is made for quashing the rejection of representation and for grant of the relief claimed in the representation. The Tribunals/High Courts routinely entertain such applications/petitions ignoring the huge delay preceding the representation, and proceed to examine the claim on merits and grant relief. In this manner, the bar of limitation or the laches gets obliterated or ignored."

15. When a belated representation in regard to a 'stale' or 'dead' issue/dispute is considered and decided, in compliance with a direction by the Court/Tribunal to do so, the date of such decision can not be considered as furnishing a fresh cause of action for reviving the 'dead' issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an

order is passed in compliance with a court's direction. Neither a court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches."

(emphasis by Court)

22. Likewise Hon'ble Apex court in the case of **Rajmati Singh (supra)** has held under:

"19. Close to the facts of this case, in "C. Jacob versus Director of Geology and Mining And Other" (2008) 10 SCC 115, this Court, having found that the employee suddenly brought up a challenge to the order of termination of his services after 20 years and claimed all consequential benefits, held that the relief sought for was inadmissible. The legal position in this regard was laid out in the following terms:

*"10. Every representation of the Government for relief, may not be applied on merits. Representations relating to matters which have become stale or barred by limitation, can be rejected on that ground alone, without examining the merits of the claim. In regard to representations unrelated to the Department, the reply may be only to inform that the matter did not concern the Department or to inform the appropriate Department. Representations with incomplete particulars may be replied by seeking relevant particulars. **The replies to such representations, cannot furnish a fresh cause of action or revive a stale or dead claim.***

11. When a decision is issued by a court/tribunal to consider or deal with the representation, usually the directee

(person directed) examines the matter on merits, being under the impression that failure to do so may amount to disobedience. When an order is passed considering and rejecting the claim or representation, in compliance with direction of the court or tribunal, such an order does not revive the stale claim, nor amount to some kind of "acknowledgement of a jural relationship" to give rise to a fresh cause of action."

23. From careful perusal of judgements of Hon'ble Apex Court as referred to above, it clearly emerges that merely because representations have been submitted by an employee which came to be decided, the decision would not entail revival of stale claim. Even otherwise, in the instant case, the petitioner, as per his own accord, has filed a review which was not itself maintainable as per the service rules in the year 2008 and it is only when the authorities informed him in the year 2023 that the review is not maintainable as per service rules that the petitioner has challenged all the orders including the punishment order of the year 2007 and the appellate order of the year 2008. Thus merely because the authorities informed about the non maintainability of the review through an order dated 18.04.2023 the same would not entail revival of a stale claim as in the instant writ petition.

24. Considering the aforesaid, the preliminary objection as raised by Shri Gaurav Mehrotra, learned counsel for the respondents is upheld and the writ petition is **dismissed** on the ground of laches.

(2023) 8 ILRA 1429
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.05.2023

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 6057 of 2023

Kulbhaskar Ashram ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
 Sri Chandan Sharma, Sri Ravi Kumar Bhatia

Counsel for the Respondents:
 C.S.C., Sri Pratik Chandra

A. Service Law – Appointment – Post of Animal Catcher in the laboratory of Zoology – Nature of post – Technical or non-technical post – Appointment to be made through outsourcing – Permissibility – GO dated 06.02.2011 require that all Class-IV posts will be filled up through outsourcing except technical post – Applicability – Held, a post of Animal Catcher is necessarily required to be a technical post as person must possess with the technical hand to catch animal safely for the purposes of research – It cannot be taken to be a general Class-IV post – The institution is entitled to make regular appointment against sanctioned post of Animal Catcher in the laboratory of Zoology of the institution. (Para 2, 10, 18 and 19)

Writ petition allowed. (E-1)

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

1. Heard Shri Chandan Sharma, learned counsel for the petitioner, learned Standing Counsel for the State-respondents and Shri Kavish Suhail, learned Advocate, holding brief of Shri Pratik Chandra, learned counsel for the State-University.

2. Petitioner before this Court is a Postgraduate, aided and recognized degree college affiliated to Prof.Rajendra Singh

(Rajju Bhaiya) University, Prayagraj. It so happen that on account of retirement of a Group-D employee, the post of Animal Catcher (Group-D Technical) fell vacant in the department of Zoology. Since the permission was required from the Director of Higher Education to fill up the post in question, the petitioner applied, but the Director of Higher Education, UP, Prayagraj, vide his order dated 1st March, 2023, refused to grant permission on the ground that the post in question is of Class-IV category, therefore, in the light of the Government Order dated 6th February, 2011, all Class-IV posts will be filled up through outsourcing except technical post.

3. The aforesaid order has been challenged before this Court in this petition on the ground that view expressed by the authority concerned is not sustainable in law because the post of Animal Catcher in the Zoology Department is a technical post and not a regular Group-D post. In this connection, petitioner has relied upon the Government Order dated 14th March, 1984, which determines norms for creation of post.

4. According to the learned counsel for the petitioner, the post created in laboratory in the faculty of Science is to be taken as technical post and not an ordinary Class-IV post. According to him, laboratory itself is indicative of a place, which is reserved for scientific or technological research, experiments, etc. and though all those hands they work in laboratory to facilitate the work of experiments and research would be taken to be technical hands only.

5. He submits that the norms that have been created in the Government Order dated 14th March, 1984, provide for

different categories of employees in different departments like general category for the college and then for library and lastly for laboratory. Thus, the argument is that the Animal Catcher is liable to be taken as technical post in the department of Zoology that runs a laboratory.

6. *Per contra*, it is argued by learned Standing Counsel that Animal Catcher has nowhere been defined as a technical post and unless and until specific qualifications are given qua particular category of posts, Class-IV post shall be taken to be general in nature and not technical. Yet another argument has been advanced by learned Standing Counsel that Court cannot put in something, which is not there to hold that a particular post would be a technical post. It is argued that Court is not a technical expert of the subject and unless and until the post is defined by the State Government to be a technical, it would not be appropriate to treat it technical.

7. Learned Advocate appearing for the University, interestingly, has adopted a neutral approach. He neither argued for the petitioner nor for the respondent.

8. Having heard learned counsel for the respective parties, I find the issue to be as to whether a post of Animal Catcher sanctioned in the laboratory of Zoology. It is first necessary to understand what the branch of Zoology is and what for the laboratory is required.

9. 'Zoology' is a branch of Biology, which specializes in the study of animals; living or extinct including their anatomy and physiology, embryology, genetics, evolution, classification, habits, behaviour and distribution. A laboratory of Zoology, therefore, provides the students with a

suitable environment to understand the animal world related researches by exploring physical, morphological and physiological characteristics of animals. The normal techniques to do research work in the laboratory is like Radioimmunoassay (RIA) development of vaccines aseptic culture techniques, bacterial growth, isolation and identification of bacteria as well as use of statistical methods. For carrying out such studies, a number of instruments are required, which are not only put to operation with technical hands, but even those who carry them and are responsible for their upkeep are also to be taken as technical hands. Normally, the studies that have been taken place in the past and that are still continuing and are related to the animals like mice, rats, hamster, guinea pigs, rabbits and monkeys.

10. The post of Animal Catcher assumes significance for the fact that animals are required to do research work and the animals have not to be caught routinely, but Animal Catcher has to be efficient enough to locate a healthy animal and a technique to be used to trap them so that the animal does not get hurt before it is trapped and ultimately caught. If an animal gets hurt in the process of it being caught for the purpose of research work, it may develop an wound to house bacteria and virus, which will ultimately render the animal to be useless on one hand and violence with the animal on the other, which will not be good for the ecology. Thus, a post of Animal Catcher is necessarily required to be a technical post as person must possess with the technical hand to catch animal safely for the purposes of research.

11. Now, looking to the Government Order dated 14th March, 1984, I find that

for the office purposes general posts in the category of Group-C, Group-B and Group-D have been created. The general category Group-D post is at the ratio of 5 posts per 100 students and for every increase of 200, an additional post is created. If the number of students reaches to 800, then 2 persons upon such post shall have to be appointed as Sweepers by the college. It is also provided that if more than 100 students are there, an additional post of Daftary will be sanctioned. Thus, in Class-IV general category, 3 posts have been prescribed; (i) Peon, (ii) Daftary and (iii) Sweeper. The Government Order thereafter proceeds to prescribe norms for library and in that category also Class-IV post as Library Peon has been created and if more than 1000 students are there, then Book Binder is an additional post should be created. The Government Order also provides that upto 300 students, there will be one post of Peon whereas on every increase of 500 students, there will be an additional post of Peon.

12. Similarly, the Government Order provides for different category of Group-C and Group-D posts for laboratory. In the laboratory of Zoology, there is a post sanctioned of Animal Catcher. Similarly for the department of Physics, a Class-IV post created is Mechanic-cum-Electrician; in the department of Chemistry, a post of Gasman has been created and so in the department of Botany, a post of Mali has been created. The post of Lab Peon is also created upto 200 students, but in the department of Chemistry, if post-graduation courses is being run and is having more than one branch, then there will be an additional post of Lab Boy.

13. Clause-2 & 3 of the Government order dated 14th March, 1984, are produced herein as under:

"(2) प्रयोगशाला परिचर- निर्धारित वेतनमान

(क) प्रत्येक स्नातक प्रयोगात्मक विषय में आरम्भ में एक पद।

(ख) दूसरा पद यदि छात्र संख्या 200 से अधिक हो।

(ग) रसायन विज्ञान, भौतिक विज्ञान, वनस्पति विज्ञान, प्राणी विज्ञान, गृह विज्ञान एवं कृषि के प्रत्येक स्नातकोत्तर विषय में एक पद परन्तु रसायन विज्ञान में यदि स्नातकोत्तर स्तर पर एक से अधिक ब्रांच हैं तो एक अतिरिक्त पद।

(3) (i) रसायन शास्त्र में एक पद गैसमैन

(ii) वनस्पति विज्ञान में एक पद माली

(iii) भौतिक विज्ञान हेतु एक पद मैकेनिक-कम-इलेक्ट्रीशियन

(iv) तथा प्राणी विज्ञान में एक पद एनिमल कैचर का अनुमन्य होगा। यदि महाविद्यालय में भौतिक विज्ञान व रसायन विज्ञान में स्नातकोत्तर कक्षाएँ हैं और शोध कार्य होता है तथा वर्कशॉप उपलब्ध है तो आवश्यकतानुसार एक पद मैकेनिक, एक पद कारपेन्टर तथा एक पद ग्लॉसब्लोअर का अनुमन्य किया जा सकता है। जिन महाविद्यालयों में विज्ञान कक्षाएँ न हों और छात्र संख्या 2000 से अधिक हो वहाँ भी महाविद्यालय के भवन व आवश्यकताओं को देखते हुए इलेक्ट्रीशियन तथा कारपेन्टर का एक-एक पद अनुमन्य होगा। "(Emphasis added)

14. Thus from the above, it is quite apparent that Lab Peon is a post separate from the technical posts provided in the laboratory. While Lab Peon will be working in the laboratory as a Peon, Gasman in the laboratory of Chemistry, Gardner (Mali) in the laboratory of Botany, Mechanic-cum-Electrician in the laboratory

of Physics and Animal Catcher in the laboratory of Zoology are all technical posts.

15. I have already discussed above about the laboratory of Zoology and what the Animal Catcher will do and, therefore, I am not able to sustain the argument of learned Standing Counsel that the post is of general category to be taken as Class-IV post and will come within the ambit of the Government Order that provides for outsourcing in respect of Class-IV posts except in case of technical post.

16. Dealing with the argument that the Court may not substitute its own view to hold that a particular post is of technical post, if government order is silent, is highly misplaced in the context of the present case. It cannot be doubted or disputed even by learned Standing Counsel that laboratory is a place where technically speaking research and experiments go on, to be specific, a technical work. The research and experiments are done with sound and expert technical hands and with the help of technology applicable to the field. A person with no knowledge of the field concerned/discipline concerned to which the laboratory belongs, cannot be of any help. Therefore, the posts like Gasman, Gardner, Mechanic-cum-Electrician and Animal Catcher are to be filled up by those, who are technically skilled persons. The Government Order, itself, provides Lab Boys and Lab Peons, which can be said to be of a general Class-IV category.

17. Under the circumstances, it cannot be said that if the Court holds the post meant for a laboratory purposes to be helping Class-IV hands as an aid to research work, would not be treated to be a technical post for the simple reason that the

word 'technical' has not been used in the Government Order. If one defines the word 'technical', it may have many sense relating to the discipline and field concerned as in the case if laboratory of Chemistry, a Gasman is a person, who carries and maintain the gasses and, therefore, he should have a knowledge to manage it and this can be only when he has the technical skill. Similarly, Gardner is a skilled person in the field of plant and saplings to maintain a botanical garden and again a Mechanic-cum-Electrician is required to be skilled in dealing with machines and electric equipment. Therefore, Animal Catcher in the laboratory of Zoology will also be required to be skilled person technically sound in the field to catch animals safely for the purposes of research.

18. In view of the above, therefore, I hold that the post of Animal Catcher meant for a laboratory of Zoology is a technical post and cannot be taken to be a general Class-IV post.

19. Under the circumstances, the Government Order that provides for outsourcing dated 6th January, 2011, the post of Animal Catcher in the laboratory of Zoology would fall in the exception clause of technical Class-IV post. Thus, the institution is entitled to make regular appointment against sanctioned post of Animal Catcher in the laboratory of Zoology of the institution.

20. Accordingly, writ petition succeeds and is **allowed**. The order dated 4th March, 2023, passed by the Joint Director of Education, Prayagraj, issued on behalf of Director of Higher Education, Uttar Pradesh, Prayagraj, is hereby quashed. The respondents are directed to grant permission to the petitioner-

Institution to fill up the post of Animal Catcher by making regular appointment/recruitment as per the procedure prescribed for. Necessary permission shall be granted within 15 days of presentation of a certified copy of this order.

21. There will be no order as to costs.

(2023) 8 ILRA 1433
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.07.2023

BEFORE

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

Writ-A No. 9704 of 2023

Bechan Giri

...Petitioner

Versus

U.O.I. & Ors.

...Respondents

Counsel for the Petitioner:

Sri Seemant Singh

Counsel for the Respondents:

A.S.G.I., Sri Salilendu Kumar Upadhyay, Sri Gyan Prakash Srivastava, Sri Ashok Khare (Sr. Adv.)

Compassionate appointment, Dying in harness, Baroda U.P. Bank, Scheme enforcement, Retrospective operation, Prospective application, Ministry of Finance Scheme, Clause 8.1 and 8.2, Financial distress, Economic dependence, Public sector bank, Circular dated 28.03.2019

Held: The writ petition challenging the order dated 20.01.2020, declining compassionate appointment for the petitioner on the ground that his father's death in harness occurred before the compassionate appointment scheme's enforcement on 15.03.2019, and the circular dated 28.03.2019 clarifying the scheme's prospective operation, is dismissed. The petitioner's father, an office assistant at Baroda U.P. Bank, died on 08.10.2018, before

the scheme's introduction. The scheme, notified by the Ministry of Finance w.e.f. 05.08.2014 and adopted by the Bank w.e.f. 15.03.2019, under Clause 8.1, allows consideration of applications within five years from the date of death, but does not apply retrospectively to deaths occurring before the scheme's enforcement in the Bank. The right to compassionate appointment is not inherent but arises from the scheme in force at the time of the employee's death. The circular dated 28.03.2019, clarifying that the scheme does not cover deaths prior to its enforcement, is upheld as consistent with the scheme's intent. No interference with the impugned order is warranted.

References:

1. Chief Manager (HR) Bangiya Gramin Vikash Bank Vs U.O.I.(2022 SCC OnLine Cal 759);
2. Central Bank of India Vs Urmila Devi (2017 LabIC 3646);
3. Gigna Devi Vs U.O.I.(2022 SCC OnLine Raj 2929);
4. Smt. Manjeet Kaur Vs St. of U.P. (Writ-A No. 2615 of 2023);
6. St. of M.P. Vs Ashish Awasthi ((2022) 2 SCC 157);
7. Secretary to Govt. Department of Education Vs Bheemesh (AIR 2022 SC 402);
8. Indian Bank Vs Promila ((2020) 2 SCC 729);
9. St. of M.P. Vs Amit Shrivastava ((2020) 10 SCC 496);
10. Canara Bank Vs M. Mahesh Kumar ((2015) 7 SCC 412);
11. Mukesh Kumar Vs U.O.I.(2019 (12) ADJ 429);
12. Moti Lal Vs U.O.I.(Writ-A No. 6628 of 2020);
13. S.B.I.Vs Raj Kumar; MGB Gramin Bank;
14. S.B.I.Vs Sheo Shankar Tewari.

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

1. This writ petition is directed against an order dated 20.01.2020, declining an application by the petitioner's mother seeking compassionate appointment for him on ground of his father's death in harness.

2. The facts giving rise to this petition are that the petitioner's father was employed as an office assistant in Baroda U.P. Bank, earlier known as the Purvanchal Bank. The said bank shall hereinafter be called 'the Bank'. The petitioner's father was last posted at Branch Kadamtar, District Ballia. He died in harness on 8th of October, 2018. The petitioner's mother moved an application seeking compassionate appointment for him, the petitioner being the eldest son of the deceased. The application was made to the General Manager of the Bank on 18.04.2019 accompanied by the deceased employee's death certificate dated 02.11.2018. The Assistant General Manager of the Bank by the order impugned dated 20.01.2020 communicated the Bank's decision declining to consider the petitioner's case on ground that the dying in harness scheme became effective in the Bank w.e.f. 15th March, 2019, whereas the petitioner's father had expired prior to 15th March, 2019.

3. The petitioner has also challenged a circular dated 28.03.2019 issued by the Head Office of the Bank, explaining the operation of the scheme for compassionate appointment in terms that the provision in the scheme that claims, 'in case of death occurring five years earlier can be considered', does not mean that the scheme would have retrospective operation. In other words, the circular issued by the

Head Office impugned, clarifies that in cases of death of employees in harness that have happened before the scheme was enforced, the right to a consideration for compassionate appointment is not there.

4. Heard Mr. Seemant Singh, learned Counsel for the petitioner, Mr. Ashok Khare, learned Senior Advocate assisted by Mr. Gyan Prakash Srivastava, learned Advocate appearing on behalf of respondent Nos.4 and 5 and Mr. Salilendu Kumar Upadhyay, learned Counsel appearing on behalf of respondent Nos.1 and 2.

5. Mr. Seemant Singh, learned Counsel for the petitioner submits that the circular dated 28.03.2019 issued by the Head Office of the Bank interpreting the dying in harness scheme to be prospective in operation is flawed and defeats the mandate of the scheme for compassionate appointment originally framed and adopted by the Bank. The scheme for compassionate appointment in Public Sector Banks, as it is called, was notified by the Ministry of Finance w.e.f. 05.08.2014. Clause 8 of the Scheme reads:

“8.1. Application for employment under the Scheme from eligible dependent should normally be considered upto five years from the date of death or retirement on medical grounds and decision to be taken on merit in each case.

8.2. However, Bank can consider request for compassionate appointment even when the death or retirement on medical grounds of the employee took place long back, even five years ago. While considering such belated requests, it should, however, be kept in view that the concept of compassionate appointment is

largely related to the need for immediate assistance to the family of the employee in order to relieve it from economic distress. The very fact that the family has been able to manage somehow all these years should normally be taken as adequate proof that the family had some dependable means of subsistence. Therefore, examination of such cases would call for a great deal of circumspection. The decision to make appointment on compassionate grounds in such cases may, therefore, be taken only at the Board level.”

6. Mr. Seemant Singh, learned Counsel for the petitioner submits that Clause 8.1 of the Scheme clearly lays down that the claim to compassionate appointment by a dependent of a deceased employee can normally be considered upto five years from the date of death. According to him, the scheme is beneficial in nature and must be construed to apply retrospectively to those cases also where death occurred before the scheme was enforced in the Bank but within five years of the death of the employee, entitling his dependent under it.

7. In support of his contention, Mr. Seemant Singh has placed reliance upon a Bench decision of the Calcutta High Court in **Chief Manager (HR) Bangiya Gramin Vikash Bank and others v. Union of India and another, 2022 SCC OnLine Cal 759**, which is strikingly similar on facts and has interpreted the provisions of the same scheme as the one here notified by the Ministry of Finance and adopted by the Bank in that case, as is the case here. In the said decision, it has been held that notwithstanding the death of the employee before the date of enforcement of the scheme in the bank, his dependent is entitled to a consideration of his case for

compassionate appointment, if the claim is laid within five years of the date of death of the employee.

8. Learned Counsel for the petitioner has further placed reliance on a decision of the Patna High Court in **Central Bank of India v. Urmila Devi, 2017 LabIC 3646**, which also holds that the scheme here applies to cases of dependents of those employees, who died before the scheme came into force, but within five years of death the claim has been made.

9. Another decision, Mr. Seemant Singh has called in aid, is that of the Rajasthan High Court in **Gigna Devi and another v. Union of India through Secretary Ministry of Finance and others, 2022 SCC OnLine Raj 2929**. In this case also, it was held that the dependent of an employee, who had died prior to adoption of the scheme by the bank, would be entitled to compassionate appointment as he had applied within five years of the employee's death in harness. The scheme was held to have retrospective operation. Mr. Seemant Singh has also placed reliance upon an unreported decision of this Court in **Smt. Manjeet Kaur v. State of U.P. and another, WRIT - A No.2615 of 2023**, decided on 05.04.2023. The attention of the Court has been invited to the following remarks of Vivek Chaudhary, J. in **Smt. Manjeet Kaur (supra)**:

“A bare perusal of the said clause shows that application can be moved within a period of five years from the date of death. There is no dispute that the death has taken place before coming into force the said scheme. Clause 8.2 specifically says that application can be filed within five years of death. Thus even when the death

has taken place earlier such cases shall also be considered. There is no bar in this regard in the scheme.

In the present case, the death has taken place hardly a year before the scheme came into force, hence there is no dispute that the application is made within a period of five years.

In view thereof, the impugned order dated 07.12.2021, cannot stand and is set aside.”

10. Mr. Ashok Khare, learned Senior Advocate appearing for the Bank in the company of Mr. Salilendu Kumar Upadhyay, learned Counsel for the Government of India, has submitted that the interpretation placed on Clauses 8.1 and 8.2 of the Scheme, on behalf of the petitioner, is absolutely flawed. Mr. Khare submits that the right to be considered for compassionate appointment is not an inherent right, but flows from the Scheme. The learned Senior Advocate submits that there would be no cause of action accruing to the dependent of an employee dying in harness if on the date of his death, there is no Scheme for compassionate appointment in force. It is urged that the five year period of limitation for the dependent of an employee dying in harness referred to in Clauses 8.1 and 8.2 postulates an existing scheme on the date of death. It has no application to a situation where on the date of death of the employee, the Scheme is not in force at all in the Bank establishment. Mr. Khare says that if after enforcement of the Scheme in the Bank, an employee dies in harness, the five year period of limitation giving two different kinds of rights under Clauses 8.1 and 8.2 would arise, but not where on the date of death the Scheme was not at all in force in the Bank.

11. In support of his contention, Mr. Khare has placed reliance upon a very recent decision of the Supreme Court in **State of Madhya Pradesh and others v. Ashish Awasthi, (2022) 2 SCC 157**. Mr. Khare has further placed reliance upon a decision of this Court in **Mukesh Kumar v. Union of India and others, 2019 (12) ADJ 429** and an unreported decision following the principle in **Mukesh Kumar (supra)** in **Moti Lal v. Union of India and others, WRIT – A No. 6628 of 2020, decided on 02.09.2021**.

12. The moot question involved in this case is: *Whether the right of a dependent of an employee dying in harness is to be governed by the Scheme or Rules in force in the employer's establishment on the date of the employee's death or on the date that the dependant's application is moved for consideration?*

13. The right to be considered for compassion appointment for one is not a right in the sense generally understood in the law. It is a kind of a concession extended to the dependents of a deceased employee, who dies in harness leaving his family behind in such financial distress that may not be overcome by a one time payment of terminal benefits or a modest family pension. It is a bi-product of the State's welfare function provided in State establishments, where the State is the employer or an establishment that is in some way a State instrumentality or a face of the State. The purpose is to save the deceased employee's family from plunging into an economic crisis by providing them a kind of stable support that may enable the surviving family to tide over the crisis that the sudden loss of the breadwinner brings. Therefore, by now, it is more or less settled that a claim for compassionate appointment

is not to be granted by a blanket formula. Many factors relating to the deceased's family, that is left behind, have to be evaluated before compassionate appointment is granted. It is often and rightly said that compassionate appointment is not a mode of recruitment to public service. Apart from the funds that the family members of the deceased receive upon his demise as terminal benefits, the ages of the dependent children, their education and future needs, all may require evaluation before a claim for compassionate appointment is accepted under the scheme or the rules applicable. It is in this sense that it is not a kind of vested right that the dependent of a deceased employee enjoys in the event of the employee dying in harness. The other very relevant factor to answer the question under consideration is that the right to a consideration for compassionate appointment is not an inherent right. Unless there are statutory rules or a scheme in force in the employer's establishment providing for compassionate appointment, no dependent of a deceased employee, who passes away in harness, can stake his claim.

14. It is in the background of the aforesaid principles, and, more than that, the nature of compassionate appointment itself that the question involved here may be answered.

15. The question indeed has led to much division of judicial opinion in the context of the scheme here, in particular. It is necessary to notice those decisions before any fruitful conclusion can be reached. In **Bangiya Gramin Vikash Bank (supra)**, which is a Bench decision of the Calcutta High Court, the facts were that the writ petitioner's father died in harness on 28th June, 2017. He was a messenger, a

Group-D employee. The petitioner's claim for compassionate appointment was rejected by a communication dated 16th November, 2019 on ground that his father had died before the scheme came into force in the bank w.e.f. 6th March, 2019. The writ petitioner applied for consideration on 8th April, 2019, i.e., after the scheme had been enforced w.e.f. 6th March, 2019. But, his claim did not find favour with the bank, as already said. The learned Single Judge allowed the writ petition and the bank appealed to the Division Bench. Speaking for the Division Bench, Subrata Talukdar, J. held:

“12. Having heard the parties and considering the materials placed, this Court finds as follows:

A) That the writ petitioner applied on the 8th of April 2019 by which time the Scheme had come into force on the 6th of March 2019. With reference to CA 8564 of 2015 (supra), which is an authority relied upon by the appellant, it is noticed that reference therein has been made to CA 2798 of 2010, reported in (2020) 2 SCC 729, wherein Paragraph 23, as pointed out by Learned Counsel for the appellant, reads as follows:

“23. We had the occasion of examining the issue of compassion appointment in a recent judgment in *Indian Bank v. Promila* 4 We may usefully refer to paras 3, 4, & 5 as under: “3. There has been some confusion as to the scheme applicable and, thus, this Court directed the scheme prevalent, on the date of the death, to be placed before this Court for consideration, as the High Court appears to have dealt with a scheme which was of a subsequent date. The need for this also arose on account of the legal position being settled by the judgment

of this Court in Canara Bank v. M. Mahesh Kumar, (2015) 7 SCC 412, qua what would be the cut-off date for application of such scheme. 4. It is trite to emphasise, based on numerous judicial pronouncements of this Court, that compassionate appointment is not an alternative to the normal course of appointment, and that 4 (2020) 2 SCC 729 13 there is no inherent right to seek compassionate appointment. The objective is only to provide solace and succour to the family in difficult times and, thus, the relevancy is at that stage of time when the employee passes away. 5. An aspect examined by this judgment is as to whether a claim for compassionate employment under a scheme of a particular year could be decided based on a subsequent scheme that came into force much after the claim. The answer to this has been emphatically in the negative. It has also been observed that the grant of family pension and payment of terminal benefits cannot be treated as a substitute for providing employment assistance. The crucial aspect is to turn to the scheme itself to consider as to what are the provisions made in the scheme for such compassionate appointment.”

B) From a reading of the authorities as cited above, it is clear that normally a claim to compassionate appointment is to be decided on the basis of the Scheme applicable and, not on a subsequent Scheme. However, the Hon'ble Apex Court was pleased to clarify that it would be crucial to examine the Scheme itself to find out whether the Scheme itself has made provisions for compassionate appointment in cases where the employee concerned had died prior to the Scheme coming into force.

C) This Court must turn for an answer to B) above to the impugned Order

of the Hon'ble Single Bench. It is noticed that the Hon'ble Single Bench has taken pains to record the terms of the said Scheme in the following manner:

“The petitioner's father died on 28th June, 2017 while he was engaged as “Messenger” in the Group-“D” Category with the Bangiya Gramin Vikash Bank. The petitioner applied on 8th April, 2019 for being considered for compassionate employment in place and stead of his deceased father.

The Board of Directors of the Bank implemented a model scheme for compassionate employment on the line of all other Regional Rural Banks under the “National Bank for Agricultural and Rural Development” (NABARD) on 9th January, 2019. A communication to that effect was issued to all Branches, Departments and Head Office on 8th March, 2019.

The petitioner's application was rejected by a communication dated 16th November, 2019, inter alia, on the ground that the petitioner's father had died before the Scheme for Compassionate Employment Regulations of 2019 came into force. In lieu thereof, however, the Bank offered to the petitioner ex-gratia. The propriety and legality of the rejection order dated 16th November, 2019 has been questioned before this Court.

Ms. Rao, learned Counsel for the Bank has argued that since the Scheme came into force on 6th March, 2019 and the petitioner's father died in the year 2017, his application is outside the scheme. The date of the petitioner's application for compassionate employment and the consideration thereof are irrelevant.

The other argument advanced by the Counsel for the Bank that the petitioner's application if allowed would throw open flood gates of claims on account of all those persons, who died from the year 2015, cannot be sustained since such other persons are not before this court.

Ms. Rao has relied upon an unreported decision of the Single Bench of the Allahabad High Court in the case of Sarvesh Pandey v. Union of India dated 25th September, 2019 being Case No. WRIT-A No. 14578 of 2019.

The arguments advanced by Learned Counsel Ms. Rao for the Bank cannot be accepted.

This Court finds that the Scheme for Compassionate Employment was adopted sometime on 9th January, 2019 and was sent for implementation to all Branches by a communication dated 6th March, 2019.

“Coverage” in the Scheme is defined in Clause (1). “1.1. To a dependent family member of permanent employee of Bangiya Gramin Vikash Bank who - a) dies while in service (including death by suicide) b) is retired on medical grounds due to incapacitation before reaching the age of 55 years, (incapacitation is to be certified by a duly appointed Medical Board in a Government Medical College/Government District Head Quarters Hospitals/Panel of Doctors nominated by the Bank for the purpose). 1.2. For the purpose of the Scheme, “employee” would mean and include only a confirmed regular employee who was serving full time or part-time on scale wages, at the time of death/retirement on

medical grounds, before reaching age of 55 years and does not include any one engaged on contract/temporary/casual or any person who is paid on commission basis.”

The time limit for consideration of application is set out in Clause 8 under 8(1). Clause 8(2) of the said Scheme may also, however, be noted. “8. Time Limit for considering applications 8.1 Application for employment under the Scheme from eligible dependent should normally be considered upto five years from the date of death or retirement on medical grounds and decision to be taken on merit in each case. 8.2 However, Bank can consider request for compassionate appointment even when the death or retirement on medical grounds of the employee took place long back, even five years ago. While considering such belated requests, it should, however, be kept in view that the concept of compassionate appointment is largely related to the need for immediate assistance to the family of the employee in order to relieve it from economic distress. The very fact that the family has been able to manage somehow, all these years should normally be taken as adequate proof that the family had some dependable means of subsistence. Therefore, examination of such cases would call for a great deal of circumspection. The decision to make appointment on compassionate grounds in such cases may, therefore, be taken only at the Board level.”

A conjoint reading of Clause 1.2 and Clause 8.2 would indicate that the petitioner is indeed covered under the aforesaid Scheme for the following reasons : (a) Clause 8(2) clearly stipulates that the Bank could consider the request of

compassionate employment in case of death or retirement on medical grounds even the employee had died ‘five years ago’. The petitioner's father died in the year 2017, i.e. within 5 years prior to the coming into force of the Scheme. (b) The petitioner had applied on 8th April, 2019 after the date of implementation of the Scheme on 6th March, 2019. As on the date of the impugned order, i.e. 16th November, 2019, the aforesaid Scheme for compassionate employment was in force.

It is now well settled that the Rules in force at the time when a prayer is made and at the time of consideration of such prayer, are the only ones that have to be applied.

It is true that the compassionate employment is an exception to the General Rule of Employment. However, following the principle of Generalia Specialibus Non Derogant, if a Scheme and/or Rules specially prescribe for such appointment, in an organization, the said rules would become the basis of appointment for claims for such employment irrespective of the General Principles of application thereof.

The facts of the Sarvesh Pandey (supra) case are substantially different from that of the instant case. In the said decision the challenge was to the 5 year cutoff date after death of the employee, to seek compassionate employment. The mother of the applicant had already received exgratia and wanted compassionate appointment by refunding the said amount to the bank. The petitioner's father in the said case died before years of the Scheme coming into force.

pective operation conceived of under the said Scheme the Allahabad High Court held that the cut-off date of 5 year

stipulated cannot be further stretched beyond. Hence the claim of the petitioner was rejected therein.

For the reasons stated hereinabove, this Court is of the view that the impugned order dated 16th November, 2019 cannot be sustained and is hereby set aside.

The respondent Bank shall consider the petitioner's claim for compassionate employment and process the same in accordance with the Scheme and the applicable Rules within a period of two months from the date of communication of a copy of this order.

The instant writ petition is allowed and disposed of. There will be no order as to costs. Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all formalities."

XXXX

13. In the light of the above findings, this Court therefore holds that the said Scheme for compassionate appointment was applicable to the claim of the writ petitioner as on the date of the application of the writ petitioner. This Court further holds that the Hon'ble Single Bench has correctly noticed that the provisions of the said Scheme extend their coverage in the facts of this case to the death of the employee, i.e. the father of the writ petitioner, which took place within a period of five years of the implementation of the said Scheme as stated in Clause 8.2 of the same.

14. Accordingly, the claim of the writ petitioner falls within the zone of

consideration as laid down In Re : CA 2798 of 2010 (supra) and noticed in CA 8564 of 2015 (supra), to the effect that if the said Scheme itself makes provisions for retrospective application extendable to five years from the death of the employee, the same shall be held to be applicable."

16. In **Urmila Devi** (supra), which again is a Bench decision of the Patna High Court, the relevant facts are that on 04.10.2012, three employees of the Central Bank had gone to the Nawada Branch of the bank for the purpose of remitting Rs.35 lacs to the Harnaut Branch. They were proceeding by an Ambassador Car provided by the bank. They were on duty. The car was waylaid on the National Highway and a robbery took place. In their attempt to force the car to stop, the robbers made it collide with a truck, leading to death of the three employees on board car. Thus, the robbery and the violence involved led to death of the three employees of the Central Bank, who were on duty. The family members of each of the three employees laid claim for compassionate appointment. It was recommended by the Regional Office, but the Head Office of the Bank rejected the claim. The disillusioned dependents of the three deceased employees instituted separate writ petitions. The learned Single Judge allowed the writ petitions directing the Bank to consider the case of the writ petitioners in accordance with the Scheme of 2007, as well as the Scheme of 2014. The Bank carried three appeals to the Bench on the ground that the dependents of the employees were not entitled to compassionate appointment. It was urged that the dependents were entitled to an ex gratia payment under the Scheme of 2007, but not compassionate appointment under the Scheme of 2014. The Scheme of 2014

is the same as the one involved in the present case. The Scheme of 2007 did not provide for compassionate appointment generally, but payment of ex gratia payment in lieu of compassionate appointment. However, by an amendment made to it on 19th July, 2007, two Clauses were added providing for compassionate appointment in the following contingencies:

“(a) dies while performing his official duty as a result of violence, terrorism, robbery or dacoity or

(b) dies within five years of his first appointment or before he reaches the age of 30 years, whichever is later, leaving a dependent spouse and/or minor children.”

17. Subsequently, the Scheme of 2014 came into force w.e.f. 05.08.2014 introducing a general right of compassionate appointment. It carried Clauses 8.1 and 8.2, that are under consideration here. In the appeal, it was the Bank's case that the death of the employees was on account of a road accident and not a robbery while performing duty or as a result of violence, terrorism or dacoity. The Division Bench accepted the Bank's case on this score to be correct, because the only evidence of the incident was an FIR, which showed that the car on official duty collided with a truck leading to the employees' death. There was no material on record to show that death was the result of violence, terrorism, robbery or dacoity. Urmila Devi's case was nevertheless accepted by their Lordships on ground that her husband died within five years of his first appointment and before he reached the age of 30 years attracting the other contingency postulated under the amendment to the Scheme of 2007.

18. Since, however, there were three different employees, whose dependents have claimed, and, one of them alone fell under Clause (b) of the amended Scheme of 2007, their Lordships examined the case of the petitioners, atleast the two others, under Clause 8.1 of the Scheme of 2007. The writ petitioners were held entitled under the Scheme of 2014, holding that Clause 8.1 would apply to cases “where death occurred within five years from the date of coming into force of the Scheme and not after 05.08.2014.” Speaking for the Division Bench in **Urmila Devi**, it was held by Rajendra Menon, C.J.:

“7. As far as all three employees were concerned, even if their cases do not fall under Clause (a) of the Scheme, 2007, we find that their cases would fall under Clause 8.1. of the Scheme of 2014, as the incident in question took place on 04.10.2012 and their cases of employment under the Scheme has to be considered up to five years from the date of death or retirement on medical ground etc. It is the contention of the Bank before us and Sri Ajay Kumar Sinha, learned counsel appearing for the Bank, vehemently argued that the Scheme in question of the year 2014 has come into force with effect from 05.08.2014 and, therefore, only if the accident occurs after 05.08.2014, then their cases can be considered five years from the date of coming into force of the Scheme. If such a contention is accepted, then clause 8.1. would be redundant. It would not cover any case where death occurred prior to 05.08.2014. It would only apply in cases where death occurs five years after 05.08.2014. This could never be the intention of the formulator of the Scheme. The clause 8.1. of the Scheme of 2014, in our view, was introduced for granting benefit of compassionate appointment in

such cases where death occurred within five years from the date of coming into force of the Scheme of 2014 and not after 05.08.2014. The learned Writ Court has also considered this aspect of the matter and has directed for considering the case of the employees under these clauses and we see no error in the same warranting reconsideration. In our considered view, the purpose of incorporating clause 8.1. in the Scheme of 2014 would only be for giving benefit of compassionate appointment in cases where death occurs five years prior to coming into force of the Scheme and if the contention advanced by the Bank is accepted, we are of the considered view that Clause 8.1. of the Scheme of 2014 need not be incorporated in the manner it has been done. Accordingly, finding no merit, we dismiss the appeals.”

19. Adopting the same line of reasoning as the one that prevailed with the Calcutta High Court and the Patna High Court, it was held by a learned Single Judge of the Rajasthan High Court in **Gigna Devi** (*supra*) with reference to Clauses 8.1 and 8.2 of the Scheme on the issue of its retrospective application:

“8. A bare perusal of the above clause makes it clear that the same provides for consideration of the eligible dependents for compassionate appointment normally upto five years from the date of death but can consider the cases even where death took place more than five years ago. The present one is a specific case where the application for compassionate appointment was moved in the year 2014 and the same was not even considered for a long period of three years. It is only in the year 2017 that the bank took a stand that there is no scheme for

*compassionate appointment which governs the respondent bank. Soon after the said communication, the present writ petition has been preferred and meanwhile, admittedly the policy of 2019 has been adopted by the respondent bank which specifically provides for consideration of cases wherein the death of an employee occurred five years ago or even prior to that. So far as the case of Ashish Awasthi (*supra*) relied upon by learned counsel for the respondents is concerned, it was a case wherein there was no dispute regarding the existence of any scheme for compassionate appointment. The dispute therein was as to the date of applicability of the policy and as to which policy would apply. The present case can be differentiated from the said matter as in the present matter there is no dispute regarding the applicability of the policy. Moreover, in Ashish Awasthi's case (*supra*) there was no clause similar to that of Clause 8 in the present scheme.*

9. In the present matter, the scheme applicable to the respondent bank itself specifically provides for consideration of cases wherein the death had occurred more than five years ago. The same naturally has been incorporated with an intention to give it a retrospective effect. The death of the employee took place in the year 2014, the application for compassionate appointment was filed in the same year, i.e., 2014 and the policy/scheme was adopted by the Bank in the year 2019. Therefore, the application for compassionate appointment filed by petitioner No. 1 in the year 2014 definitely falls within the purview of Clause 8 of the Scheme as the death had occurred five years ago from the year of adoption of the policy.”

20. The question arising here fell for consideration of the Supreme Court in **Ashish Awasthi** (*supra*). In that case, the

writ petitioner's father was a Chowkidar in the office of the Assistant Engineer, Public Health Engineer, District Tikamgarh, Madhya Pradesh. The petitioner's father died in harness on 08.10.2015. At the time of his demise, the deceased was serving in the work charged establishment and paid salary from the contingency fund. The writ petitioner was paid a compensatory sum of Rs.2 lakhs as per the policy in force at the time of his father's demise, to wit, the policy dated 29.09.2014. Later on, a policy for compassionate appointment was introduced in the employer's establishment vide amended Circular dated 31.08.2016 providing that in the event of death of an employee in the work charged establishment, one of his heirs/ dependents would be eligible for appointment on compassionate grounds.

21. The writ petitioner instituted a petition in the High Court, which came to be decided in terms of a direction to the employers to decide the writ petitioner's representation in accordance with law. To avail of the directions, the writ petitioner made an application to the employer, which was rejected by an order dated 15.03.2017 on ground that the Policy/ Circular dated 31.08.2016 was applicable prospectively, that is to say, w.e.f. 22.12.2016, whereas the employee, on account of whose death the writ petitioner claimed compassionate appointment, passed away on 08.10.2015. This led the writ petitioner to institute another writ petitioner before the High Court. It was dismissed by the learned Single Judge holding that the Policy in force at the time of demise of the employee in the work charged establishment would govern the right of his dependents to compassionate appointment and any subsequent Policy would not apply.

22. The writ petitioner carried the matter in appeal to the Division Bench. The Division Bench allowed the appeal and directed the appellant to consider the writ petitioner's case for appointment on compassionate grounds relying upon the Policy/ Circular dated 31.08.2016.

23. In Appeal by Special Leave carried by the State of Madhya Pradesh, negating the writ petitioner's contention, it was held by their Lordships:

“5. As per the settled proposition of law laid down by this Court for appointment on compassionate ground, the policy prevalent at the time of death of the deceased employee only is required to be considered and not the subsequent policy.

6. In *Indian Bank v. Promila* [*Indian Bank v. Promila*, (2020) 2 SCC 729 : (2020) 1 SCC (L&S) 312], it is observed and held that claim for compassionate appointment must be decided only on the basis of relevant scheme prevalent on date of demise of the employee and subsequent scheme cannot be looked into. Similar view has been taken by this Court in *State of M.P. v. Amit Shrivastava* [*State of M.P. v. Amit Shrivastava*, (2020) 10 SCC 496 : (2021) 1 SCC (L&S) 68]. It is required to be noted that in *Amit Shrivastava* [*State of M.P. v. Amit Shrivastava*, (2020) 10 SCC 496 : (2021) 1 SCC (L&S) 68] the very scheme applicable in the present case was under consideration and it was held that the scheme prevalent on the date of death of the deceased employee is only to be considered. In that view of the matter, the impugned judgment and order [*Ashish Awasthi v. State of M.P.*, 2018 SCC OnLine MP 1824] passed by the Division Bench is unsustainable and deserves to be quashed and set aside.”

24. The issue whether the claim of a dependent under the dying in harness rules would be considered in accordance with the Rule or the Scheme in force on the date of death of the employee in harness or at a subsequent date, like the one when a dependent makes an application, or the application comes up for consideration, was the subject matter of very elaborate guidance by their Lordships of the Supreme Court in **Secretary to Govt. Department of Education (Primary) v. Bheemesh alias Bheemappa**, AIR 2022 SC 402. The facts giving rise to what was held in **Bheemesh alias Bheemappa** (*supra*) may best be recounted in their Lordships' words, which read:

“8. Admittedly, the appointment on compassionate grounds in the State of Karnataka is governed by a set of Rules known as Karnataka Civil Services (Appointment on Compassionate grounds) Rules, 1996, issued in exercise of the powers conferred by Section 3(1) read with Section 8 of the Karnataka State Civil Services Act, 1978. The Rules as they stood, on the date on which the sister of the respondent died in harness, did not include an unmarried brother, within the definition of the expression "dependant of a deceased Government servant" under Rule 2(1)(a) of the said Rules vis-a-vis a deceased female unmarried Government servant. But it was only by way of an amendment proposed under a draft Notification dated 20.06.2012 which was given effect under the final Notification bearing No. DPAR 55 SCA 2012, Bangalore dated 11.07.2012 that an unmarried brother of a deceased female unmarried Government servant was included within the definition. There is no dispute about the fact that the sister of the respondent died as an unmarried female Government servant, but on 8.12.2010,

before the amendment was made to the Rules.”

25. In answering the issue whether the amended rules that came into force after the death of the government servant involved, would have retrospective operation to enure for the benefit of the dependent unmarried brother of the deceased unmarried female government servant in that case, or the amendment would apply prospectively with effect from the date when it came into force, it was held by their Lordships:

“9. To hold that the amendment will have retrospective application, the High Court as well as the Tribunal relied upon a Judgment of the Division Bench of the High Court of Karnataka in *State of Karnataka v. Akkamahadevamma* and others, decided on 18.11.2010 in Writ Petition Nos.20914 of 2010 etc.: (Reported in 2011 (2) AIR Kar R 118). But it should be pointed out at the outset that the Judgment of the High Court in *Akkamahadevamma* arose out of an amendment to the Karnataka Civil Services (General Recruitment) (57th Amendment) Rules, 2000. By the Amendment made on 30.03.2010 to the said Rules, grandson, unmarried granddaughter, daughter in law, widowed daughter and widowed granddaughter were included within the definition of the expression "members of the family" under Explanation-2 of Rule 9. But the amendment so made on 30.03.2010 expanding the definition of the expression "members of the family" was triggered by an Order of the Tribunal which held the unamended rule to be unconstitutional. It is in that context that the amendment made on 30.03.2010 to the Rules issued on 23.11.2000 was held by the High Court to be retrospective in nature. It must also be remembered that the expanded definition

was with respect to project displaced persons. The right conferred upon a project displaced person stands on a different footing from the entitlement of a person to seek appointment on compassionate grounds. In any case an amendment brought forth, on the basis of a Judgment of a Court or Tribunal, holding the exclusion of certain categories of persons to be violative of Articles 14 and 16 of the Constitution, may receive an interpretation such as the one proposed by the High Court in Akkamahadevamma. But the same may not be applicable to amendments of the nature that we are concerned with in this case.

10. x x x

11. Be that as it may, Sh. Jayanth Muthraj, learned senior counsel appearing for the respondent pleaded that there are two lines of Judgments of this Court, one taking the view that the Rules/Scheme in force on the date of death of the Government servant would govern the field and the other holding that the Rules/scheme in force on the date of consideration of the claim would govern the field. Unable to reconcile this conflict, a two Member Bench of this Court, by its Order dated 08.02.2019 in State Bank of India v. Sheo Shankar Tewari¹, has referred the matter for consideration by a larger Bench. Sh. Jayanth Muthraj, learned senior counsel therefore made a request that the present appeal may either be placed along with the reference or await a decision on the above reference.

12. But we do not consider it necessary to do so. It is no doubt true that there are, as contended by the learned senior Counsel for the respondent, two lines of decisions rendered by Benches of

equal strength. But the apparent conflict between those two lines of decisions, was on account of the difference between an amendment by which an existing benefit was withdrawn or diluted and an amendment by which the existing benefit was enhanced. The interpretation adopted by this Court varied depending upon the nature of the amendment. This can be seen by presenting the decisions referred to by the learned senior counsel for the respondent in a tabular column as follows:

There is an elaborate tabulated reference to six cases decided by the Supreme Court, where seemingly varying views have been expressed on the issue whether the scheme in force at the time of death of the deceased employee would apply for the purpose of consideration of the dependent's claim for compassionate appointment or the Rule/ Scheme in force subsequently enforced, after the death of the government servant, at the time when the application for compassionate appointment is made or comes up for consideration. For brevity's sake, the table set out in Paragraph No.12 of the report in **Bheemesh alias Bheemappa** is not being quoted.

26. Two other cases after the tabulated analysis have been considered in **Bheemesh alias Bheemappa**, where it is observed:

“13. Apart from the aforesaid decisions, our attention was also drawn to the decision of the three member Bench in State of Madhya Pradesh v. Amit Shrivastava². But that case arose out of a claim made by the dependant of a deceased Government servant, who was originally appointed on a work charged establishment and who later claimed to have become a permanent

employee. The Court went into the distinction between an employee with a permanent status and an employee with a regular status. Despite the claim of the dependant that his father had become a permanent employee, this Court held in that case that as per the policy prevailing on the date of death, a work charged/contingency fund employee was not entitled to compassionate appointment. While holding so, the Bench reiterated the opinion in *Indian Bank v. Promila*.

14. The aforesaid decision in *Amit Shrivastava* (supra) was followed by a two member Bench of this Court in the yet to be reported decision in the State of Madhya Pradesh v. Ashish Awasthi decided on 18.11.2021 : (Reported in AIROnline 2021 SC 1047).”

27. After noticing these seemingly divergent opinions on the issue, the Court has proceeded to observe in **Bheemesh alias Bheemappa**:

“15. Let us now come to the reference pending before the larger Bench. In *State Bank of India v. Sheo Shankar Tewari* (supra), a two member Bench of this Court noted the apparent conflict between *State Bank of India v. Raj Kumar* and *MGB Gramin Bank* on the one hand and *Canara Bank vs. M. Mahesh Kumar* on the other hand and referred the matter for the consideration of a larger Bench. The order of reference to a larger Bench was actually dated 8.02.2019.

16. It was only after the aforesaid reference to a larger Bench that this Court decided at least four cases, respectively in (i) *Indian Bank v. Promila*; (ii) *N.C. Santhosh v. State of Karnataka*; (iii) *State of Madhya Pradesh vs. Amit Shrivastava*; and

(iv) *State of Madhya Pradesh v. Ashish Awasthi*. Out of these four decisions, *N.C. Santosh* (supra) was by a three member Bench, which actually took note of the reference pending before the larger Bench.

17. Keeping the above in mind, if we critically analyse the way in which this Court has proceeded to interpret the applicability of a new or modified Scheme that comes into force after the death of the employee, we may notice an interesting feature. In cases where the benefit under the existing Scheme was taken away or substituted with a lesser benefit, this Court directed the application of the new Scheme. But in cases where the benefits under an existing Scheme were enlarged by a modified Scheme after the death of the employee, this Court applied only the Scheme that was in force on the date of death of the employee. This is fundamentally due to the fact that compassionate appointment was always considered to be an exception to the normal method of recruitment and perhaps looked down upon with lesser compassion for the individual and greater concern for the rule of law.

18. If compassionate appointment is one of the conditions of service and is made automatic upon the death of an employee in harness without any kind of scrutiny whatsoever, the same would be treated as a vested right in law. But it is not so. Appointment on compassionate grounds is not automatic, but subject to strict scrutiny of various parameters including the financial position of the family, the economic dependence of the family upon the deceased employee and the avocation of the other members of the family. Therefore, no one can claim to have a vested right for appointment on

compassionate grounds. This is why some of the decisions which we have tabulated above appear to have interpreted the applicability of revised Schemes differently, leading to conflict of opinion. Though there is a conflict as to whether the Scheme in force on the date of death of the employee would apply or the Scheme in force on the date of consideration of the application of appointment on compassionate grounds would apply, there is certainly no conflict about the underlying concern reflected in the above decisions. Wherever the modified Schemes diluted the existing benefits, this Court applied those benefits, but wherever the modified Scheme granted larger benefits, the old Scheme was made applicable.

19. The important aspect about the conflict of opinion is that it revolves around two dates, namely, (i) date of death of the employee; and (ii) date of consideration of the application of the dependant. Out of these two dates, only one, namely, the date of death alone is a fixed factor that does not change. The next date namely the date of consideration of the claim, is something that depends upon many variables such as the date of filing of application, the date of attaining of majority of the claimant and the date on which the file is put up to the competent authority. There is no principle of statutory interpretation which permits a decision on the applicability of a rule, to be based upon an indeterminate or variable factor. Let us take for instance a hypothetical case where 2 Government servants die in harness on January 01, 2020. Let us assume that the dependants of these 2 deceased Government servants make applications for appointment on 2 different dates say 29.05.2020 and 02.06.2020 and a modified Scheme comes into force on June 01, 2020.

If the date of consideration of the claim is taken to be the criteria for determining whether the modified Scheme applies or not, it will lead to two different results, one in respect of the person who made the application before June 1, 2020 and another in respect of the person who applied after June 01, 2020. In other words, if two employees die on the same date and the dependants of those employees apply on two different dates, one before the modified Scheme comes into force and another thereafter, they will come in for differential treatment if the date of application and the date of consideration of the same are taken to be the deciding factor. A rule of interpretation which produces different results, depending upon what the individuals do or do not do, is inconceivable. This is why, the managements of a few banks, in the cases tabulated above, have introduced a rule in the modified scheme itself, which provides for all pending applications to be decided under the new/modified scheme. Therefore, we are of the considered view that the interpretation as to the applicability of a modified Scheme should depend only upon a determinate and fixed criteria such as the date of death and not an indeterminate and variable factor.

20. Coming to the case on hand, the employee died on 8.12.2010 and the amendment to the Rules was proposed by way of a draft notification on 20.06.2012. The final notification was issued on 11.07.2012. Merely because the application for appointment was taken up for consideration after the issue of the amendment, the respondent could not have sought the benefit of the amendment. The Judgment of the Division Bench of the Karnataka High Court in Akkamahadevamma on which the Tribunal as well as

the High Court placed reliance, was not applicable to the case of compassionate appointments, as the amendment in Akkamahadevamma came as a result of the existing rule being declared to be ultra vires Articles 14 and 16 of the Constitution.”

28. Here, there is no issue that in the Scheme in question, there is no provision at all about consideration of pending applications for compassionate appointment made prior to the introduction of the Scheme w.e.f. 15th March, 2019. This is logically so because the present case is not one where there was apparently an older scheme granting some kind of limited right to a consideration for compassionate appointment in force or a right to an *ex-gratia* payment, whereunder an application could be made by the dependent of a deceased employee. What appears from the facts here is that prior to 15th March, 2019, there was no scheme at all in the establishment of the respondent Bank in force extending any kind of a right to compassionate appointment, howsoever limited or circumscribed. The right to compassionate appointment upon introduction of the Scheme w.e.f. 15th March, 2019 was a new found right. In the absence, therefore, of any provision in the Scheme for whatever reason to provide rights for dependents of an employee, who died prior to its introduction, asking for compassionate appointment, there could be no right to compassionate appointment. It has already been pointed out that the right to compassionate appointment is not an inherent right, but one that flows from a Rule or Scheme being in force at the time of the death of an employee in harness. There could be more reason to supply in aid of that interpretation. Once it is held that the right to compassionate appointment is not inherent, but the creature of a Rule,

the right of whatever kind it is, originates and culminates on the date of death of the employee in harness. There is no fact surviving the death of an employee in harness on the foot of which, a Scheme or Rule for compassionate appointment introduced at a later date, may afford the dependent a right to consideration. Of course, that kind of a right may arise if the Scheme provides for that right on its own terms. Here, the words employed in Clause 8.1, or for that matter Clause 8.2 of the Scheme, do not envisage cognizance of cases of dependents, where death of an employee in harness has taken place before the Scheme was enforced in the Bank. The employment of the expression in Clause 8.1 “normally be considered upto five years from the date of death” refers to the period of five years of death on a date when the Scheme was already in force in the Bank; not five years or a little short of that time antedating the introduction of the Scheme.

29. In the opinion of this Court, therefore, no case for interference with the order impugned is made out.

30. This petition **fails** and is **dismissed**.

31. There shall be no order as to costs.

(2023) 8 ILRA 1449
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2023

BEFORE

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

Writ-A No. 11930 of 2014

Vinod		...Petitioner
	Versus	
State of U.P. & Ors.		...Respondents

Counsel for the Petitioner:

Sri N.K. Maurya, Sri Rajesh Singh, Sri S.K. Maurya

Counsel for the Respondents:

C.S.C., Sri S.K. Gupta

Subject: Service Law – Dismissal from Service – Safai Karmchari – Procedural Irregularities in Disciplinary Inquiry – Violation of Principles of Natural Justice – Rein Statement – Back Wages, Disciplinary Inquiry, Natural Justice, Unauthorized Absence, Dismissal, Rein Statement, Back Wages, Proportionality of Punishment.

The petitioner, a Safai Karmchari with Nagar Nigam, Allahabad, was dismissed from service vide order dated 15.10.2005 by the Nagar Ayukt, upheld by the Commissioner on 12.03.2007, for alleged unauthorized absence and misconduct. The dismissal was challenged on grounds of procedural irregularities in the disciplinary inquiry. The inquiry was vitiated due to failure to fix and communicate the date, time, and place of inquiry to the petitioner, and the absence of oral evidence or opportunity for cross-examination of witnesses, violating principles of natural justice. The charge of unauthorized absence and alleged misconduct was trivial, and the punishment of dismissal was shockingly disproportionate. The opportunity to respond to the show cause notice post-inquiry did not cure the fundamental flaws in the inquiry process.

Writ petition allowed.**Case Law Cited:**

St. of U.P. Vs Saroj Kumar Sinha, (2010) 2 SCC 772

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

1. In this case, notice was issued on 07.01.2020, granting time to the learned Standing Counsel appearing on behalf of respondent nos. 1 and 2 and to Mr. S.K. Gupta, learned Counsel appearing on behalf of respondent nos. 3 to 8 to file

counter affidavits. No counter affidavit has been filed either on behalf of the State or on behalf of respondent nos. 3 to 8. This Court vide order dated 07.01.2020 has condoned the laches in filing the petition.

2. Admit.

3. Heard forthwith.

4. Heard Mr. Rajesh Singh, learned Counsel for the petitioner and Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel appearing on behalf of respondent nos. 1 and 2.

5. No one appears on behalf of respondent nos. 3 to 8.

6. This writ petition is directed against an order dated 15.10.2005 passed by the Nagar Ayukt, Nagar Nigam, Allahabad dismissing the petitioner, a *Safai Karmchari* from service. This order has been upheld in appeal by the Commissioner, Allahabad Division, Allahabad vide order dated 12.03.2007. Both these orders are impugned in the present writ petition.

7. The petitioner's case is that he was appointed as a Safai Karmchari with the Nagar Nigam, Allahabad by the Nagar Ayukt in the year 1992. He was later on made a permanent employee. It is the petitioner's case that there was a marriage in the family and he submitted a leave application on 04.05.2005, before the Nagar Ayukt and the Nagar Swasthya Adhikari, Nagar Nigam, seeking ten days' leave. This application was forwarded to the Nagar Ayukt on 09.05.2005. The Nagar Swasthya Adhikari appears to have submitted a report to the Apar Nagar Ayukt, saying that the petitioner is already

on medical leave, and, therefore, it is not possible to sanction ten days' leave to him. This report was communicated to the Nagar Ayukt. The petitioner was never intimated about it. The petitioner was also not intimated of the orders made on his leave application dated 04.05.2005.

8. According to the petitioner, seven months passed by, with no decision being taken on his leave application. It is the petitioner's case that on a complaint submitted by the Nagar Swasthya Adhikari, the Nagar Ayukt decided to initiate disciplinary action against the petitioner for being absent without sanction of leave. The decision to initiate disciplinary proceedings, according to the petitioner, was taken relying on the report of the Nagar Swasthya Adhikari and without calling for an explanation from the petitioner. The petitioner was placed under suspension pending inquiry vide order dated 30.06.2005. A charge-sheet dated 30.06.2005 was served upon the petitioner to which the petitioner submitted a reply dated 14.07.2005.

9. It is the petitioner's case that the Inquiry Officer did not fix any date, time or place of inquiry nor intimated the petitioner at any point of time, in any manner, about the proceedings of the inquiry. It is pleaded that in the proceedings of the inquiry, the petitioner was neither informed by the Inquiry Officer nor was he called upon to adduce oral evidence. The Inquiry Officer concluded the inquiry and made a report dated 24.09.2005. The petitioner was issued a show cause notice dated 30.09.2005. The petitioner submitted a reply to the show cause notice.

10. The Nagar Ayukt, thereafter, proceeded to pass the impugned order,

dismissing the petitioner from service. The petitioner challenged the said order before this Court vide Civil Misc. Writ Petition No. 20517 of 2006, but it was dismissed on the ground of availability of an alternative remedy vide order dated 17.04.2006. Post dismissal of the earlier writ petition, the petitioner preferred an appeal under Rule 35 of the U.P. Nagar Mahapalika Sewa Niyamawali, 1962 before the Commissioner of the Division. The Commissioner, by an order dated 12.03.2007, dismissed the appeal and affirmed the order dismissing the petitioner from service.

11. Aggrieved, this petition has been instituted.

12. The submission of the learned Counsel for the petitioner is, as already noticed, that the inquiry is a farce, given the fact that the charge was one which upon establishment could lead to a major penalty. It is urged that no date, time or place of inquiry was fixed. It is further urged that no witnesses on behalf of the establishment were examined to support the charges.

13. Since, no one appears on behalf of the Nagar Nigam, there is no stand in rebuttal. The learned Additional Chief Standing Counsel, however, says that the order is in accordance with law and has supported the same.

14. A perusal of the charge-sheet shows that the charge against the petitioner is solitary. It reads as follows:

"1- सफाई एवं खाद्य निरीक्षक की टिप्पणी 27-06-2005 से स्पष्ट है कि आप दिनांक 05-05-2005 से 15-05-2005 तक का अवकाश प्रार्थना पत्र देकर अवकाश

स्वीकृत न किए जाने के बावजूद अपनी ड्यूटी से दिनांक 26-06-05 तक बगैर किसी पूर्व सूचना के अनुपस्थित रहे और दिनांक 27-06-2005 को अपनी ड्यूटी हेतु उपस्थित होकर सफाई एवं खाद्य निरीक्षक से श्री सादिक अली व श्री राम कुमार तिवारी सफाई नायक के सामने अपना अर्जित अवकाश स्वीकृत कराने के सम्बन्ध में अभद्रता किया तथा उन्हें गालियाँ दी एवं जान से मारने की धमकी दी। इस प्रकार आप बगैर अवकाश स्वीकृति एवं बिना पूर्व सूचना के अपने कार्य से अनुपस्थित रहें जिसके कारण क्षेत्र में गन्दगी व्याप्त रही और आपके इस कृत्य से आपके क्षेत्र प्रचुर मात्रा में गन्दगी व्याप्त रही जिसके कारण नागरिकों को सफाई न होने के कारण कठिनाइयों का सामना करना पड़ा। इस प्रकार आपका यह कृत्य अपने कर्तव्यों के प्रति घोर लापरवाही, अनुशासनहीनता, स्वच्छन्द आचरण तथा कर्मचारी आचरण नियमावली के विरुद्ध एवं उदण्डता का परिचायक है जो आपकी सत्यनिष्ठा पर प्रतिकूल प्रभाव डालता है।"

15. The evidence in support of the charge cited in the charge-sheet is to the following effect:

"1 उक्त आरोपों की पुष्टि में निम्नलिखित साक्ष्य प्रस्तावित है :-

1- सफाई एवं खाद्य निरीक्षक की टिप्पणी दिनांक 27-06-2005 की छायाप्रति।

2- आपका सफाई एवं खाद्य निरीक्षक को दिया गया प्रार्थना पत्र दिनांक 4-05-05 की छायाप्रति।"

16. A perusal of the inquiry report, where the Nagar Swasthya Adhikari was the Inquiry Officer, shows that the evidence that was considered in support of the charge is a note by the Sanitary and Food Inspector dated 27.06.2005, in fact, a photostat copy of it and the other evidence, an application dated 04.05.2005, also made by the Sanitary and Food Inspector, and again, a photostat copy of the document.

17. A perusal of the inquiry report also shows that the petitioner, in his written statement, has denied the charge. The inquiry report further records that the

petitioner was called to the office of the Inquiry Officer on 30.08.2008, in order to produce evidence in defence and have his say against the charges. It is remarked that despite opportunity being given to the petitioner and the charges explained to him, all that the petitioner said was that the Sanitary and Food Inspector and the Safai Havildar had demanded bribe in the sum of Rs. 1,000/- and Rs. 500/- respectively, but no witness or written documents in support of this charge was produced.

18. The inquiry report further records that on 29.08.2005, the concerned Sanitary Inspector, Uttam Kumar was called to testify about the incident dated 27.06.2005 and the other witness Sadik Ali, Safai Nayak was also called. It is recorded that Sadik Ali testified before the Inquiry Officer on 29.08.2005 that on 27.06.2005, at 1.20 p.m., the petitioner came to the office and abused the Sanitary and Food Inspector in vulgar language and threatened him with death. With so much said, the Inquiry Officer has returned a finding that the charge is well founded.

19. A perusal of the inquiry report does not at all show that a proper inquiry was convened, wherein date, time and place of inquiry was scheduled, with intimation to both sides. It is the requirement of law that a date, time and venue of inquiry should be fixed by the Inquiry Officer, particularly, when the inquiry is about a serious charge. The date, time and venue of inquiry is to be intimated to both parties and the others concerned. This has not been done at all. The other requirement of a valid inquiry is that oral testimony on behalf of the establishment has to be recorded in support of the charge in the first instance, with opportunity to the delinquent to cross examine the witnesses produced on behalf of the establishment.

Here, something very piquant has been done, much to the prejudice of the petitioner, and, again, adopting a procedure absolutely impermissible in law.

20. On 29.08.2005, two witnesses for the establishment, which includes Sadik Ali, the star witness, were called to his office by the Inquiry Officer and their evidence, of whatever sort, was recorded behind the petitioner's back. The petitioner was asked to appear before the Inquiry Officer on the following day i.e. 30.08.2005. Therefore, oral testimony, of whatever kind, and, in whatever manner led on behalf of the establishment, was not done in the petitioner's presence, with opportunity to him to cross examine the establishment's witnesses. This flaw goes to the root of the matter and vitiates the conclusion of the Inquiry Officer. Surprisingly, on the foot of such a slipshod inquiry, the Disciplinary Authority and the Appellate Authority both have passed the orders impugned, dismissing the petitioner from service.

21. The position of law, that oral testimony has to be recorded on behalf of the establishment in support of the charges, with opportunity to the delinquent to cross examine the witnesses in order to constitute a valid inquiry in matters involving imposition of a major penalty, is evident from what has been expounded in *State of U.P. and others v. Saroj Kumar Sinha*, (2010) 2 SCC 772. In *Saroj Kumar Sinha* (supra), it has been held by their Lordships:

"28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/ disciplinary authority/ Government. His function is to examine the

evidence presented by the Department, even in the absence of the delinquent official to see as to whether the un rebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents."

22. At this stage, Mr. Girijesh Kumar Tipathi, learned Additional Chief Standing Counsel has pointed out that before the disciplinary authority, post conclusion of inquiry, he was given a second show cause, enclosing therewith a copy of the inquiry report and given an opportunity to appear before the Inquiry Officer at the specified time on a specific date to show cause against the findings of the Inquiry Officer and the proposed punishment. It is also pointed out that the petitioner did appear and showed cause. He was heard by the Disciplinary Authority.

23. The submission of the learned Additional Chief Standing Counsel, therefore, is that whatever infirmity has crept in the Inquiry Officer's report, stands cured by provision of this opportunity. This Court is afraid that the submission cannot be accepted.

24. The procedure to fix a date, time and place of inquiry and the requirement for the establishment to prove its case is imperative and that has to be observed, while the Inquiry Officer is holding inquiry to find out whether the delinquent is guilty of the charges. It is a stage where evidence has to be led by parties - by one in support of the charges, and, by the other, to dispel them. It is the establishment who have to

prove the charges by their evidence in the first instance, and once the establishment have done that, due opportunity has to be given to the delinquent to cross examine the establishment's witnesses. Thereafter, the burden to produce evidence in rebuttal lies on the delinquent's shoulders. This has not at all happened in the present case and the opportunity, of which the learned Additional chief Standing Counsel speaks in order to bail out the respondents, is an opportunity envisaged at the stage of what is popularly called the 'second show cause'. That is a stage after the inquiry and would certainly not cure the flaw that goes to the root of the matter during inquiry and vitiates the proceedings.

25. Normally, with the findings above recorded, this Court would have quashed the orders of dismissal, leaving it open to the respondents to conduct an inquiry afresh but, looking to the nature of the charge, which does appear to be trivial and the fact that a lot of time has gone by, this Court is of opinion that, that course of action is not at all warranted. Decidedly, the punishment awarded here falls into that exceptional category, which is known to law as shockingly disproportionate.

26. In the circumstances, this petition succeeds, and, is, allowed. The impugned order dated 15.08.2005 passed by the Nagar Ayukt Nagar Nigam, Allahabad and the order dated 12.03.2007 passed by the Commissioner, Allahabad Divison, Allahabad are hereby quashed.

27. A *mandamus* is issued ordering the Nagar Ayukt, Nagar Nigam, Allahabad to forthwith reinstate the petitioner in service, granting him the benefit of continuity and seniority. However, in the circumstances that the petitioner presently

is and considering the fact that he has not rendered, though not for his fault, any service to the respondents, he will be entitled to fifty percent back-wages. Costs easy.

(2023) 8 ILRA 1454
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.07.2023

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ-A No. 2001270 of 2013

Ajeet Pratap Singh ...Petitioner
Versus
U.O.I. & Ors.. ...Respondents

Counsel for the Petitioner:
 Sri Alok Mishra

Counsel for the Respondents:
 A.S.G., Sri Ajit Kumar Dwivedi, Sri Alok Kumar Tripathi, Sri Anurag Srivastava, Sri D.P. Dwivedi

A. Service Law – Absorption – Post of Customer Relationship Executive – Appointment was made for a period of two years – Circular dated 20.07.2010 laid down policy for absorption of the officers subject to having achieved minimum 60% target during the year 2009-2010 – Petitioner was not absorbed as he achieved only target 55.91%, though various persons whose target was lower than the benchmark of 60% have been absorbed by the bank – Discrimination alleged – Parity claimed – Negative parity, how far relevant – Held, the reason for absorption of other persons, as emerges, is that no target was assigned to them despite they having been appointed on contract basis and only other work was taken from them – Even if aforesaid four persons had been absorbed wrongly, the petitioner cannot claim a similar benefit

inasmuch there cannot be a negative parity or equality. (Para 22 and 23)

B. Service Law – Principle of res judicata – Application – Validity of circular dated 18.08.2010 and 20.07.2010 was challenged – Earlier also writ petition challenging the order of termination/discharge from service was filed, in which benefit of circular dated 18.08.2010 and 20.07.2010 was sought to be considered, accordingly High Court directed the authority to consider the representation – Effect – Held, once the petitioner himself was required to be given the benefit of the circulars dated 20.07.2010, 26.07.2010 and 18.08.2010 in the earlier petition consequently there cannot be any occasion for the petitioner to resile from earlier reliefs/petition and to now challenge the validity of the circulars dated 20.07.2010 and 18.08.2010 as per the reliefs prayed in the petition, as the said action of the petitioner would clearly be hit by the principles of res-judicata – *Dr. Subramanian Swamy's case* relied upon – (Para 30 and 32)

C. Service Law – Constitution of India – Article 226 – Writ – Policy decision – Scope of interference – *Gopinath Dash's case* relied upon – Held, the policy decision must be left to the Government as it alone can adopt which policy should be adopted after considering all the points from different angles. In matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown Courts will have no occasion to interfere. (Para 34 and 35)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Arup Das & ors. Vs St. of Assam & ors.; (2012) 5 SCC 559
2. Pankjeshwar Sharma & ors. Vs St. of J.& K. & ors.; (2021) 2 SCC 188

3. Dr. Subramanian Swamy Vs St. of T. N. & ors.; (2014) 5 SCC 75

4. L.P.A. No. 260 of 2015 in re: St. Bank of India & anr. Vs Dharmendra Prasad Singh & ors. decided on 30.04.2015

5. St. of Orissa & ors. Vs Gopinath Dash & ors.; (2005) 13 SCC 495

6. Col. I.V.S. Gahlot Vs U.O.I. & ors.; (2018) 17 SCC 564

7. St. of U.P Vs Raj Kumar Sharma; (2006) 3 SCC 330

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

1. Heard learned counsel for the petitioner and Sri N.K. Seth, learned Senior Advocate, assisted by Sri Anurag Srivastava, learned counsel for the respondent-Bank.

2. At the very outset, Sri Alok Mishra, learned counsel for the petitioner, states that though in pursuance to the order of this Court dated 27.04.2023, a supplementary counter affidavit dated 18.05.2023 has been filed by the Bank but he does not intend to

3. The aforesaid statement of Sri Alok Mishra, learned counsel for the petitioner, is recorded.

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

"i) to issue a writ, order or direction in the nature of certiorari quashing impugned order dated 17.5.2013 passed by the opposite party no. 6 as 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 give

effect to the impugned order dated 17.5.2013 passed by the opposite party no. 6 as contained in Annexure No.1 to the writ petition.

iii) to issue a writ, order or direction in the nature of certiorari quashing impugned Circular letter dated 20.7.2010 only to the extent provides a condition of having achieved 60% target during financial year 2009-2010 for absorption in the

iv) to issue a writ, order or direction in the nature of mandamus commanding the respondents not to give effect to the impugned Circular letter dated 20.7.2010 only to the extent same provides a condition of having achieved 60% target during financial year 2009-2010 for absorption in the services of the Bank, as contained in Annexure No. 8 to the writ petition.

v) to issue a writ, order or direction in the nature of certiorari quashing the impugned Circulars dated 18.8.2010 as well as 8.3.2011 to the extent the same provide/restrict the benefit of suitable revision of the business target only in case of OMRS and not in the matter of other contractual staff including Customer Relationship Executive (Medium Enterprises) for the purposes of permanent absorption in the services of the bank.

vi) to issue a writ, order or direction in the nature of mandamus commanding the respondents not to give effect to the impugned Circulars dated 18.8.2010 as well as 8.3.2011 to the extent the same provide/restrict the benefit of suitable revision of the business target only in case of OMRS and not in the matter of other contractual staff including Customer

Relationship Executive (Medium Enterprises) for the purposes of permanent absorption in the services of the Bank.

vii) to issue a writ, order or direction in the nature of certiorari quashing the Notice dated 30.8.2010 issued by the opposite party no. 7 as contained in Annexure No. 2 to the writ petition.

viii) to issue a writ, order or direction in the nature of mandamus commanding the opposite parties to consider the case of petitioner for absorption as Specialist Officer in Junior Management Grade Scale-I within a stipulated period ignoring the impugned condition of Circular dated 20.7.2010 and after giving benefit of revision of Budget. achievement as per Circular letter dated 18.8.2010, with all consequential benefits.

ix) to pass any other suitable order or direction which is deemed just and proper in the circumstances of the case may also be passed.

x) to allow the writ petition with costs."

5. Both learned counsels for the parties agree that the facts of the case have already been set forth in detail by this Court in the order dated 27.04.2023. For the sake of convenience, the order dated 27.04.2023 is reproduced as under:-

"1. Heard Sri Alok Mishra, learned counsel for the petitioner and Sri Anurag Srivastava, learned counsel appearing for the respondent-Bank.

2. Sri Anurag Srivastava, learned counsel for the respondent-Bank files a

supplementary counter affidavit on behalf of respondents no. 2 to 7.

3. *Sri Srivastava states that though the affidavit is dated 27.09.2018, yet a copy of the same had already been served upon the learned counsel for the petitioner in September, 2018 itself but inadvertently the same could not be filed.*

4. *Considering the aforesaid, the supplementary counter affidavit be kept on record.*

5. *Instant writ petition has been filed challenging the order dated 17.05.2013, a copy of which is annexure 1 to the writ petition whereby the representation of the petitioner has been rejected.*

6. *The case set forth by the petitioner is that the petitioner was initially appointed on 01.09.2008 for a period of two years as Customer Relationship Executive- Medium Enterprises (CRE-ME) for the period from 01.09.2008 to 30.08.2010. Copy of the appointment order is annexure 3A to the writ petition.*

7. *The respondents had issued a circular dated 20.07.2010, a copy of which is annexure 6 to the writ petition whereby a policy of Permanent Absorption of Officers Marketing and Recovery (rural), Technical Officers (Farm Sector), Micro Finance Marketing Officers, Customers Relationship Executive (PB) and Customer Relationship Executive (ME) in Junior Management Grade Scale-I (JGMS-I) as specialist officer was issued.*

8. *As per Clause 2.1 of the aforesaid circular, those officers who were in service of the Bank on 14.07.2010 were*

eligible for absorption subject to having achieved minimum 60 % target during the year 2009-2010. The performance of the officers was to be assessed as per the performance evaluation matrix advised by the concerned SBU.

9. *Through an order dated 30.08.2010, a copy of which is annexure 2 to the writ petition the petitioner was informed that his contractual period of two years of appointment is to expire on 30.08.2010 and as such, he was required to liquidate his liabilities towards the bank and surrender the laptop.*

10. *The contention of learned counsel for the petitioner is that this was the termination order that had been issued by the respondent-Bank terminating his services at the end of the contractual period.*

11. *The petitioner, upon finding that his performance was 55.91 percent of his budgeted target viz-a-viz certain other persons whose performance was simply 0 % and certain other persons whose target was lower than the petitioner yet had been absorbed in terms of the circular dated 20.07.2010 filed Writ-A No. 57034 of 2010 Inre; Yogesh Kumar and Ors Vs. Union of India and Ors and this Court disposed of the writ petition vide judgment and order dated 28.01.2013 permitting the petitioners to submit a fresh representation which was directed to be decided by the respondent-Bank in accordance with law and the relevant circular in this regard.*

12. *In pursuance thereof, the petitioner claims to have submitted a representation on 12.02.2013 which has been rejected by means of the impugned order dated 17.05.2013 and hence the writ petition.*

13. *Raising a challenge to the order impugned, the argument of learned counsel for the petitioner is that (a) various persons whose target was lower than the benchmark of 60 % have been absorbed by the bank in terms of the policy dated 20.07.2010 including one Sri A.P.S. Verma whose target was 0 % (b) while rejecting the representation of the petitioner, the respondents have indicated that the specific contention of the petitioner that his percentage could be more than 100 % has been negated by the bank as preposterous yet with respect to one Sri Manish Kumar Singh whose format has been annexed as part of annexure 10 to the writ petition, his performance and percentage terms have been indicated as 108.33% i.e more than 100 % and thus the contention of the respondents is belied from records and (c) different target have been given to persons who were working in the same region which is patently discriminatory.*

14. *Learned counsel for the petitioner has elaborated the ground of persons with 0% recovery having been absorbed in terms of the circular dated 20.07.2010 by giving the example of one Sri A.P.S. Verma.*

15. *Attention has also been invited towards an order passed in the case of a person similarly circumstanced namely Sri Ajay Kumar Sonkar in Writ Petition No. 1271 (SB) of 2013 wherein a Division Bench of this Court noticing that certain persons with lower target had been absorbed had required the respondents to file an affidavit indicating the action which has been taken with respect to one Sri A.P. S. Verma who has been absorbed despite having 0 % achievement in the year 2009-2010.*

16. *Learned counsel for the petitioner has also invited the attention to the Court towards the specific averment made in paragraph 27 of the writ petition wherein it has categorically been stated that Sri A.P.S. Verma despite having 0 % achievement has been absorbed in the services of the bank. He contends that reply to paragraph 27 of the counter affidavit has been given in paragraph 20 of the counter affidavit filed by the respondent-bank wherein it has been contended that Sri A.P.S.Verma and three other persons have been found to have been permanently absorbed erroneously in the bank service without confirming to parameters of achievement of 60 % of the targets as mentioned in the corporate center letter dated 20.07.2010 and that further steps are being initiated by the bank and show cause notice has been issued to them.*

17. *Learned counsel for the petitioner states that despite the said averment having been made in paragraph 20 of the counter affidavit, no further action has been taken against Sri A.P.S.Verma and other three persons rather the action which was sought to be initiated against the aforesaid four persons namely Sri A.P.S.Verma and three others has been held back by the bank.*

18. *Responding to the same, Sri Anurag Srivastava, learned counsel for the respondent-bank states that in terms of the circular dated 20.07.2010, those persons like the petitioner could only be absorbed in the services of the respondent-bank who met 60 % of the target. He contends that as the petitioner has only achieved 55.91 % of the budgeted target consequently, taking into consideration the provisions of the scheme, his services have not been absorbed rather he has been terminated*

vide order dated 30.08.2010 and thus there is no infirmity in the action taking by the respondent-bank.

19. Further responding to the allegations made in the writ petition of Sri A.P.S. Verma and three other persons whose target was 0 % and also lower than the target of 55.91 % as achieved by the petitioner, the contention of Sri Anurag Srivastava, Advocate is that despite the bank having initiated action against the four officers as per the specific averment made in paragraph 20 of the counter affidavit yet the said action has been held back. Sri Anurag Srivastava, Advocate, however, has placed reliance on the judgment of the Apex Court in the case of *State of U.P Vs. Raj Kumar Sharma* reported in (2006) 3 SCC 330 to contend that even if certain candidates have been granted benefit wrongly there cannot be any question of grant of negative parity to the petitioner i.e even if some appointment has been made by mistake or wrongly that would not confer any right of appointment to the petitioner as Article 14 of the Constitution of India does not envisage negative equality and if the State has committed a mistake it cannot be forced to perpetuate the said mistake.

20. Having heard the learned counsel appearing for the contesting parties and having perused the records what emerges is that the petitioner who had been appointed as Customer Relationship Executive (ME) *vide order dated 01.09.2008* for a period of two years was terminated through an order dated 30.08.2010 on the ground that as per the policy dated 20.07.2010 he has failed to meet the target of 60 %. The representation filed by the petitioner in this regard has also been rejected by the respondents *vide order dated 17.05.2013* on various grounds.

21. Without entering into the other grounds as have been raised by the petitioner what needs to be thrashed out first by the Court is the specific averment as made by the petitioner that four persons of which one is Sri A.P.S.Verma, who had only 0 % achievement to his credit along with the three others whose achieved target was much lower than the benchmark of 60 %, have been absorbed/appointed in the bank in terms of the policy dated 20.07.2010 and despite action having been initiated by the respondent-bank against the four persons, the said action has been held back. Further, as per Sri Anurag Srivastava, learned counsel for the respondent-bank, though action has been initiated against the said four persons, the action has been held back as categorically admitted by Sri Anurag Srivastava, learned counsel for the respondent-bank. However, his argument is that even if the four persons have been appointed or absorbed erroneously despite having achieved 0 % percent target, this Court cannot compel the respondent-bank to commit the same mistake.

22. In the instant case, it is not a matter of the writ Court requiring the respondent-bank to commit a mistake. The reason is not far to seek inasmuch as the initially the respondent-bank has admitted that it has committed a mistake in having absorbed persons like Sri A.P.S.Verma who are having only 0 % target and a specific averment has been made in paragraph 20 of the counter affidavit filed by the responsible officer of the bank namely the Chief Manager of the State Bank of India, Ashok Nagar, Kanpur wherein it has been indicated that necessary steps are being initiated in this regard and show cause notices have been issued to them. Later, the action has been held back. Of course, there

cannot be any negative parity meaning thereby that the respondent-bank cannot be allowed to repeat the same mistake if any, which has been committed in the absorption of persons who are having a lower target than the benchmark as specified in the circular dated 20.07.2010. However, in the instant case, the bank initially stated that it has committed a mistake but after initiation of action against the said four persons, it has held back the action meaning thereby that it has exercised some power as is vested in the bank whereby despite the persons having lower target having been absorbed yet have been retained in the service of the bank and that too despite the writ Court having been informed as per the specific averment made in paragraph 20 of the counter affidavit of the action being proposed. Thus, it would not be a case of negative parity and consequently, the judgment of the Apex Court in the case of Raj Kumar Sharma (supra) may prima facie have no applicability in the facts of the instant case.

23. Accordingly, keeping in view the aforesaid discussion and before proceeding further with the matter, this Court would require the General Manager, Network-II, Local Head Office, Moti Mahal Marg, Lucknow i.e respondent no. 6 at this stage to file his personal affidavit indicating the reasons as to why despite the writ Court having been informed in paragraph 20 of the counter affidavit filed by Sri Amit Kumar, Chief Manager, State Bank Of India, Kanpur that action is being proposed against Sri A.P.S.Verma and three others of having been absorbed in the bank despite not having met the target of 60 % rather having 0% recovery the action against the said persons has been held back. While filing the personal affidavit, the power which has been exercised while

holding back the action against the said four persons would also be indicated in the affidavit to be filed by the respondent no. 6.

24. Let the said affidavit be filed within three weeks failing which the respondent no. 6 shall appear in person along with records to assist the Court.

25. List this case on 23.05.2023."

6. From perusal of the order dated 27.04.2023, it emerges that the grounds of challenge as raised by the learned counsel for the petitioner have been set forth in paragraph 13 of the order dated 27.04.2023, which were namely (a) various persons whose target was lower than the benchmark of 60 % have been absorbed by the bank in terms of the policy dated 20.07.2010 including one Sri A.P.S. Verma whose target was 0 % (b) while rejecting the representation of the petitioner, the respondents have indicated that the specific contention of the petitioner that his percentage could be more than 100 % has been negated by the bank as preposterous yet with respect to one Sri Manish Kumar Singh whose format has been annexed as part of annexure 10 to the writ petition, his performance and percentage terms have been indicated as 108.33% i.e more than 100 % and thus the contention of the respondents is belied from records and (c) different targets have been given to persons who were working in the same region which is patently discriminatory.

7. This Court vide order dated 27.04.2023 had itself indicated that supplementary counter affidavit is required to be filed only on ground (a) as raised by learned counsel for the petitioner, which was that various persons whose target was lower than the benchmark of 60 % have

been absorbed by the bank in terms of the policy dated 20.07.2010 including one Sri A.P.S. Verma whose target was zero percent. The other grounds are still to be considered by this Court.

8. In pursuance to the order dated 27.04.2023, a supplementary counter affidavit dated 18.05.2023 has been filed by the respondent Bank.

9. So far as the ground (a) which was that various persons whose target was lower than the benchmark of 60 % have been absorbed and consequently the petitioner whose achievement was only 55.91% of the budgeted target should also be absorbed more particularly when a person with zero percent target namely one Sri A.P.S. Verma has been absorbed and as such the petitioner is also entitled for similar benefit, Sri N.K. Seth, learned Senior Advocate, explained the circumstances in which Sri A.P.S. Verma and three others whose achievement was much below the target of 60% were absorbed.

10. He states that upon discovering that four persons namely Sri Anrudh Prakash Singh Verma (A.P.S. Verma), Sri Arvind Kumar Pal, Sri Ram Anuj Singh and Sri Vijay Kushwaha have been appointed on the post of Marketing & Recovery Officer (Rural) in violation of terms of the relevant circulars, their records were scrutinized and it was found that they did not fulfill the criteria for permanent absorption as per aforesaid scheme and consequently notices dated 23.02.2013 were issued to them requiring them to show cause as to why their appointment should not be cancelled. Copies of the said show cause notices dated 23.02.2023 have been filed as Annexure SCA-1 to the

supplementary counter affidavit. Sri Seth argues that all four officers submitted their reply which have been filed as Annexure SCA-2 to the supplementary counter affidavit. Upon scrutiny of the entire records and their reply, it was found that all four persons had been appointed in December 2009 and in the relevant financial year 2009-2010, no target was assigned to them and despite having been appointed on contract basis on the post of Marketing & Recovery Officer (Rural) only other work was taken. Considering this aspect of the matter and the fact that since all the officers were working satisfactorily since absorption in the service of the bank in 2010 and in their case the question of target not being involved consequently the said officers have been continued in service.

11. So far as the other ground as raised by learned counsel for the petitioner is concerned namely that while rejecting the representation of the petitioner, the respondents have indicated that the specific contention of the petitioner that his percentage could be more than 100 % has been negated by the bank as preposterous yet with respect to one Sri Manish Kumar Singh whose format has been annexed as part of Annexure 10 to the writ petition, his performance and percentage terms have been indicated as 108.33% i.e more than 100%, Sri Seth argues that even if 108.33% as recorded against the name of Sri Manish Kumar Singh is to be ignored and re-calculation is to be done, his overall percentage of budget achieved would be approximately 62.46% which would be above the target of 60% and consequently when admittedly the percentage of the petitioner was less than 60% and even if it has been erroneously indicated that the target of Sri Manish Kumar Singh is above

100% the same would not make any difference as the percentage of budget achieved by Sri Manish Kumar Singh being more than 60% no error has been committed with his absorption. Even otherwise it is contended that even if above 100% target of the petitioner is to be considered the same would not make his budgeted target more than 60% so as to enable him to swim within the ambit of 60% target which was required to be completed by all Customer Relationship Executive (Medium Enterprises).

12. Responding to the third ground as raised by learned counsel for the petitioner i.e. different targets have been given to persons who were working in the same region, placing reliance on the averments contained in paragraph 17 of the counter affidavit dated 01.05.2015 the argument of Sri Seth is that the targets of the officers were fixed differently in different areas of operation depending upon the potentiality of business in the area.

13. Elaborating the same, the argument of Sri Seth is that targets were fixed depending upon the areas in which the officers were required to serve. As an example, it is stated that in case an officer is required to serve in an area in which the branch is having large business it would be easier to achieve the target and hence the target was fixed higher while in an area in which the bank was having a lower business, a lower target was fixed and such fixation of target cannot be said to be discriminatory.

14. Another argument of Sri Seth is that even if for the sake of arguments it is accepted that four persons to whom a show cause notice had been issued by the respondent Bank on the ground of they not

having achieved the target is taken at the face value and the said persons were wrongly absorbed even then as the petitioner has failed to meet the target of 60% consequently no mandamus can be issued for grant of parity with those who may have been wrongly absorbed as there cannot be any negative parity. In this regard, reliance has been placed on the judgments of the Apex Court in the case of **Arup Das and others vs. State of Assam and others - (2012) 5 SCC 559 and Pankjeshwar Sharma and others vs. State of Jammu and Kashmir and others - (2021) 2 SCC 188.**

15. Sri Seth also argues that the petitioner had earlier filed Writ-A No.57034 of 2010 along with Yogesh Kumar and others which writ petition was disposed of vide judgment and order dated 28.01.2023 as per order passed in Writ-A No.6084 of 2011 in re: Rajeev Kumar Pushkar vs. S.B.I. and others. Copies of the said orders have been filed as Annexure-8 to the writ petition.

16. Sri Seth argues that circulars dated 20.07.2010, 26.07.2010 and 18.08.2010 were required to be considered while deciding the representation of the petitioner. It is contended that once the petitioner has already been given the benefit by the writ Court of the circulars dated 20.07.2010, 26.07.2010 and 18.08.2010 consequently by means of the instant writ petition, the petitioner cannot be allowed to challenge the validity of the said circulars as the principles of constructive res-judicata would be applicable. In this regard, reliance has been placed on the judgment of the Apex Court in the case of **Dr. Subramanian Swamy vs. State of Tamil Nadu and others - (2014) 5 SCC 75.** Reliance has also been

placed on the judgment of Delhi High Court passed in L.P.A. No.260 of 2015 in re: **State Bank of India and another vs. Dharmendra Prasad Singh and others** decided on 30.04.2015.

17. It is also argued that the circulars are only policy decisions and the Bank being a financial entity, is perfectly empowered and entitled to issue such circulars for its own business working and in order to consider the cases of the persons who are working and there would not be any question of raising a challenge to the same as the said circulars have been issued in normal working of the Bank and the same being only a policy decision they cannot be made subject to challenge by means of writ petitions. In this regard, reliance has been placed on the judgments of the Apex Court in the case of **State of Orissa and others vs. Gopinath Dash and others - (2005) 13 SCC 495** and **Col. I.V.S. Gahlot vs. Union of India and others - (2018) 17 SCC 564**.

18. Responding to the said arguments, Sri Alok Mishra, learned counsel for the petitioner argues that despite the detailed order of this Court dated 27.04.2023 the respondents while filing the supplementary counter affidavit have failed to indicate the reasons which prevailed upon them to appoint those persons, as indicated by the learned counsel for the petitioner, whose target was zero percent. He also contends that in the show cause notice which had been issued to four persons, copies of which have been annexed along with the supplementary counter affidavit, it has been indicated that their absorption was against the policy but in the reply which has been given by all four persons it was only indicated that as they have already been absorbed in service there is no question of

any show cause notice which fact has not been considered by the respondent Bank while deciding to continue those four persons in service. It is also contended that as four persons have been absorbed without having achieved the targets set for them consequently the petitioner should also be absorbed in service on the same analogy.

19. No other ground has been raised by learned counsel for the petitioner neither any case law has been cited.

20. Having heard learned counsel for the parties and having perused the records, what emerges is that three grounds, as already indicated above, have been urged by learned counsel for the petitioner in challenging the order impugned. As such the Court proceeds to deal with the three grounds.

21. The first ground as urged by learned counsel for the petitioner is that various persons whose target was lower than the benchmark of 60%, as fixed by the Bank, have been absorbed by the bank in terms of the policy dated 20.07.2010 including one Sri A.P.S. Verma whose target was zero percent, while discriminating against the petitioner whose target was also below the benchmark and in not absorbing the petitioner.

22. From a perusal of the supplementary counter affidavit which has been filed by the respondent Bank to which learned counsel for the petitioner has waived off his right of filing a reply, it is apparent that all the four persons who failed to meet the target of 60% as specified in various circulars for the purpose of absorption, were absorbed. The reason for their absorption, as emerges, is that no target was assigned to them despite

they having been appointed on contract basis and only other work was taken from them. Accordingly, once no target was assigned to the said four persons and other work was assigned to them consequently no error is found in those persons having been absorbed and as such there would not be any occasion for treating the said persons to have zero percent performance which might entail the petitioner to claim a similar relief.

23. Needless to mention that even if aforesaid four persons had been absorbed wrongly even then the petitioner cannot claim a similar benefit inasmuch there cannot be a negative parity or equality.

24. In this regard, the Apex Court in the case of Arup Das (*supra*) has held as under:-

"This Court went on to observe further that even if in some cases appointments had been made by mistake or wrongly, that did not confer any right of appointment to another person, as Article 14 of the Constitution does not envisage negative equality and if the State had committed a mistake, it cannot be forced to perpetuate the said mistake."

(emphasis by the Court)

25. Likewise, the Apex Court in the case of **State of U.P Vs. Raj Kumar Sharma - (2006) 3 SCC 330** has held as under:-

"Even if in some cases appointments have been made by mistake or wrongly that does not confer any right on another person. Article 14 of the Constitution does not envisage negative equality, and if the State committed the

mistake it cannot be forced to perpetuate the same mistake. (See: Snehprabha v. State of U.P. & Ors. (AIR 1996 SC 540), Secretary, Jaipur Development Authority, Jaipur, v. Daulat Mal Jain & Ors. (1997 (1) SCC 35), State of Haryana and Ors. v. Ram Kumar Mann (1997 (3) SCC 321), Faridabad C.T. Scan Centre v. D.G. Health Services & Ors. (1997 (7) SCC 752), Jalandhar Improvement Trust, V. Sampuran Singh (AIR 1999 SC 1347), State of Punjab and Others v. Dr. Rajeev Sarwal (1999 (9) SCC 240), Yogesh Kumar and Ors. v. Govt. of NCT, Delhi and Ors. (2003 (3) SCC 548), Union of India and Anr. v. International Trading Co. and Anr. (2003 (5) SCC 437) and Kastha Niwarak G.S.S. Maryadit, Indore v. President, Indore Development Authority (JT 2006 (2) SC 259)."

(emphasis by the Court)

26. Likewise, the Apex Court in the case of **Pankjeshwar Sharma (supra)** has held as under:-

"This Court further held that even if in some cases appointments had been made erroneously or by mistake, that did not confer any right of appointment to another person as Article 14 of the Constitution does not envisage negative equality and if the State or its authority had committed a mistake at any given stage, it cannot be forced to perpetuate the said mistake under the writ jurisdiction of the High Court under Article 226 of the Constitution."

(emphasis by the Court)

27. When the impugned action on the part of the respondents is seen in the context of law laid down by the Apex

Court in the aforesaid judgments, it clearly emerges that even if four persons, as referred to above, did not meet the criteria specified for their absorption i.e. 60% performance and they were absorbed wrongly yet there cannot be any extension of a similar benefit to the petitioner inasmuch as there cannot be any negative parity. The Court hastens to add that the reasons indicated by the respondent Bank in its supplementary counter affidavit pertaining to absorption of those four persons is found satisfactory pertaining to they having been absorbed as no specific target had been fixed for them. Thus, the first ground is rejected.

28. So far as the second ground taken by learned counsel for the petitioner that while rejecting the representation of the petitioner, the respondents have indicated that the specific contention of the petitioner that his percentage could be more than 100% has been negated by the bank as preposterous yet with respect to one Sri Manish Kumar Singh whose format has been annexed as part of annexure 10 to the writ petition, his performance and percentage terms have been indicated as 108.33% i.e more than 100 % and thus the contention of the respondents is belied from records, the argument of Sri Seth, learned Senior Advocate that even if the said averment is to be ignored pertaining to the petitioner yet in case the achievements of Sri Manish Kumar Singh are to be seen and calculation is to be done by ignoring the percentage of 108.33% even then the percentage of Sri Manish Kumar Singh would be 62.46%. It is not the case of the petitioner that in case his performance is seen over and above 100% the same would entail he meeting the performance of 60%. Thus, keeping in view the aforesaid, the second ground taken by the petitioner is

also not found tenable in the eyes of law and accordingly rejected.

29. So far as the third ground is concerned i.e. different targets having been given to the persons who were working in the same region which gives rise to discrimination, suffice to state here that as per averments made in paragraph 17 of the counter affidavit it has been categorically stated by the respondent Bank that targets of the officers were fixed differently in different areas of operations depending upon the potentiality of the business in the area. The respondent is a Bank. It is within its powers to fix targets for the officers. It is for the officers to meet the said targets of a commercial entity like a Bank and in case the petitioner failed to meet the target or the standard fixed by the Bank, he has to thank himself for not having met the said criteria and consequently there cannot be any discrimination in fixing the targets in different areas of operations depending upon the potentiality of the business of the Bank it being a financial entity. The said ground is thus rejected.

30. So far as the challenge as raised by the petitioner to the circulars dated 18.08.2010 and 20.07.2010 as emerges from perusal of reliefs (iii) (iv) (v) (vi) and (viii) is concerned, admittedly the petitioner had earlier filed Writ-A No.57034 of 2010 in re: Yogesh Kumar and others vs. Union of India and others, which was disposed of by this Court at Allahabad vide order passed in Writ-A No.6084 of 2011. In Writ-A No.6084 of 2011, the writ Court observed that respondent Bank while passing the order of termination/discharge from service had not considered the circulars dated 20.07.2010, 26.07.2010 and 18.08.2010 and thus directed the Bank that while deciding the

representation of the petitioner the respondent Bank shall not be influenced by the order of termination/discharge from service. It is not the case of the petitioner that the said judgment has been set-aside and thus, admittedly, the judgment has attained finality between the parties. Thus, once the petitioner himself was required to be given the benefit of the circulars dated 20.07.2010, 26.07.2010 and 18.08.2010 in the earlier petition consequently there cannot be any occasion for the petitioner to resile from earlier reliefs/petition and to now challenge the validity of the circulars dated 20.07.2010 and 18.08.2010 as per the reliefs prayed in the petition as the said action of the petitioner would clearly be hit by the principles of res-judicata.

31. In this regard, it would suffice to refer to the judgment of the Apex Court in the case of **Dr. Subramanian Swamy (supra)** where it has been held as under:-

39. *The scope of application of doctrine of res judicata is in question. The literal meaning of “res” is “everything that may form an object of rights and includes an object, subject-matter or status” and “res judicata” literally means “a matter adjudged a thing judicially acted upon or decided; a thing or matter settled by judgments”. “Res judicata pro veritate accipitur” is the full maxim which has, over the years, shrunk to mere “res judicata”, which means that res judicata is accepted for truth. The doctrine contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman jurisprudence “interest reipublicae ut sit finis litium” (it concerns the State that there be an end to law suits) and partly on the maxim “nemo debet bis vexari pro uno et eadem causa” (no man should be vexed twice over for the same cause).*

40. *Even an erroneous decision on a question of law attracts the doctrine of res judicata between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as res judicata. (Vide: Shah Shivraj Gopalji v. ED-, Appakadh Ayiassa Bi & Ors., AIR 1949 PC 302; and Mohanlal Goenka v. Benoy Kishna Mukherjee & Ors., AIR 1953 SC 65)....*

42. *This Court in Satyadhyam Ghosal & Ors. v. Smt. Deorajin Debi & Anr., AIR 1960 SC 941 explained the scope of principle of res-judicata observing as under:*

“7. The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation, When a matter - whether on a question of fact or a question of law - has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in S. 11 of the Code of Civil Procedure; but even where S. 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.”

A similar view has been reiterated by this court in Daryao & Ors. v.

The State of U.P. & Ors., AIR 1961 SC 1457; Greater Cochin Development Authority v. Leelamma Valson & Ors., AIR 2002 SC 952; and Bhanu Kumar Jain v. Archana Kumar & Anr., AIR 2005 SC 626.

43. The Constitution Bench of this Court in *Amalgamated Coalfields Ltd. & Anr. v. Janapada Sabha Chhindwara & Ors., AIR 1964 SC 1013*, considered the issue of *res judicata* applicable in writ jurisdiction and held as under:

“...Therefore, there can be no doubt that the general principle of *res judicata* applies to writ petitions filed under Article 32 or Article 226. It is necessary to emphasise that the application of the doctrine of *res judicata* to the petitions filed under Art. 32 does not in any way impair or affect the content of the fundamental rights guaranteed to the citizens of India. It only seeks to regulate the manner in which the said rights could be successfully asserted and vindicated in courts of law.”

44. In *Hope Plantations Ltd. v. Taluk Land Board, Peermade & Anr., (1999) 5 SCC 590*, this Court has explained the scope of finality of the judgment of this Court observing as under:

“One important consideration of public policy is that the decision pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by the appellate authority and other principle that no one should be made to face the same kind of litigation twice ever because such a procedure should be contrary to consideration of fair play and justice.

Rule of *res judicata* prevents the parties to a judicial determination from

litigating the same question over again even though the determination may even be demonstratedly wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it.” (See also: *Burn & Co., Calcutta v. Their Employees, AIR 1957 SC 38; G.K. Dudani & Ors. v. S.D. Sharma & Ors., AIR 1986 SC 1455; and Ashok Kumar Srivastav v. National Insurance Co. Ltd. & Ors., AIR 1998 SC 2046*).

45. A three-Judge Bench of this court in *The State of Punjab v. Bua Das Kaushal, AIR 1971 SC 1676* considered the issue and came to the conclusion that if necessary facts were present in the mind of the parties and had gone into by the court, in such a fact-situation, absence of specific plea in written statement and framing of specific issue of *res judicata* by the court is immaterial.

46. A similar view has been reiterated by this court in *Union of India v. Nanak Singh, AIR 1968 SC 1370* observing as under:

“This Court in *Gulabchand Chhotalal v. State of Gujarat, AIR 1965 SC 1153* observed that the provisions of Section 11 of the Code of Civil Procedure are not exhaustive with respect to all earlier decision operating as *res judicata* between the same parties on the same matter in controversy in a subsequent regular suit, and on the general principle of *res judicata*, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as *res judicata* in a subsequent regular suit. It is not necessary that the Court deciding the

matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject-matter. There is no good reason to preclude, such decisions on matters in controversy in writ proceedings under Article 226 or Article 32 of the Constitution from operating as res judicata in subsequent regular suits on the same matters in controversy between the same parties and thus to give limited effect to the principle of the finality of decisions after full contest."

48. Even otherwise, a different view on the interpretation of the law may be possible but the same should not be accepted in case it has the effect of unsettling transactions which had been entered into on the basis of those decisions, as reopening past and closed transactions or settled titles all over would stand jeopardized and this would create a chaotic situation which may bring instability in the society.

50. In *Madan Mohan Pathak & Anr. v. Union of India & Ors.*, AIR 1978 SC 803, a seven-Judge Bench of this Court dealt with a case wherein the question arose as to whether the order passed by the Calcutta High Court issuing writ of mandamus directing the Life Insurance Corporation of India (hereinafter referred to as L.I.C.) to pay cash bonus for the year 1975-76 to its class 3 and 4 employees in terms of the settlement between the parties was allowed to become final. Immediately after the pronouncement of the judgment, the Parliament enacted the LIC (Modification of Settlement) Act, 1976. The appeal filed against the judgment of Calcutta High Court was not pressed by LIC and the said judgment was allowed to become final. This Court rejected the

contention of the LIC that in view of the intervention of legislation, it was not liable to meet the liability under the said judgment. The Court held that there was nothing in the Act which nullifies the effect of the said judgment or which could set at naught the judgment or take away the binding character of the said judgment against LIC. Thus, the LIC was liable to make the payment in accordance with the said judgment and it could not be absolved from the obligation imposed by the said judgment.

51. This Court, while considering the binding effect of the judgment of this Court, in *State of Gujarat & Anr. v. Mr. Justice R.A. Mehta (Retd.) & Ors.*, AIR 2013 SC 693, held:

"There can be no dispute with respect to the settled legal proposition that a judgment of this Court is binding,.....It is also correct to state that, even if a particular issue has not been agitated earlier, or a particular argument was advanced, but was not considered, the said judgment does not lose its binding effect, provided that the point with reference to which an argument is subsequently advanced, has actually been decided. The decision therefore, would not lose its authority, "merely because it was badly argued, inadequately considered or fallaciously reasoned". (Vide: *Smt. Somavanti & Ors. v. The State of Punjab & Ors.*, AIR 1963 SC 151; *Ballabhdas Mathuradas Lakhani & Ors. v. Municipal Committee, Malkapur*, AIR 1970 SC 1002; *Ambika Prasad Mishra v. State of U.P. & Ors.*, AIR 1980 SC 1762; and *Director of Settlements, A.P. & Ors. v. M.R. Apparao & Anr.*, AIR 2002 SC 1598)."

(emphasis by the Court)

32. Keeping in view the judgment of the Apex Court in the case of **Dr. Subramanian Swamy (supra)** what is apparent is that in the earlier round of litigation the petitioner had been given the benefit of the circulars dated 20.07.2010, 26.07.2010 and 18.08.2010 rather the Bank having been required to consider the case of the petitioner in light of those circulars. As such, in the second round of litigation, the petitioner cannot now resile from the same and challenge the said circulars as clearly the principles of res-judicata would be applicable. Thus, the challenge to the aforesaid circulars is rejected.

33. So far as a challenge raised to the circular dated 08.03.2011 is concerned, as already observed above, it is the prerogative of the Bank, it being a commercial entity, to issue circulars for the purpose of absorption and recruitment of those employees whom it deems fit so that they would be able to carry out duties and responsibilities of the Bank and garner its business. Even otherwise, no grounds have been set forth in the petition as to why the circular dated 08.03.2011 has to be quashed apart from indicating that the business target had only been set for Marketing and Recovery Officers and not for other staff. Again this is the prerogative of the Bank to fix targets for any of its staff and it being a policy decision, this Court would be loath to interfere with the prerogative of the Bank.

34. In this regard, it would be apt to refer the judgment of the Apex Court in the case of **Gopinath Dash (supra)** wherein the Apex Court has held as under:-

"The policy decision must be left to the Government as it alone can adopt which policy should be adopted after

considering all the points from different angles. In matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown Courts will have no occasion to interfere and the Court will not and should not substitute its own judgment for the judgment of the executive in such matters. In assessing the propriety of a decision of the Government the Court cannot interfere even if a second view is possible from that of the Government.

The Court should constantly remind itself of what the Supreme Court of the United States said in Metropolis Theatre Company v. City of Chicago (1912) 57 L Ed 730:

"The problems of Government are practical ones and may justify, if they do not require, rough accommodations, illogical it may be, and unscientific. But even such criticism should not be hastily expressed. What is the best is not always discernible, the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review."

(emphasis by the Court)

35. Considering the aforesaid judgment in the case of **Gopinath Dash (supra)** this Court thus does not find any reason to interfere with the policy decision of the respondent Bank.

36. Keeping in view the aforesaid discussion, no case for interference is made out. The writ petition being misconceived is dismissed.

(2023) 8 ILRA 1470
ORIGINAL JURISDICTION
CIVIL SIDE

DATED: LUCKNOW 27.07.2023

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Writ-B No. 316 of 2023

Surya Prakash ...Petitioner
Versus
Settlement Officer Consolidation, Gonda & Ors. ...Respondents

Counsel for the Petitioner:
 Sri Anand Pal Singh

Counsel for the Respondents:
 C.S.C., Sri Sarvesh Kumar Tiwari

Civil Law- Constitution of India, 1950- Article 226 - The Code of Civil Procedure- 1908- Section 151 & 153 -Order 1 - Rule 10 - Order 22 -Rule 4 - The Suit or Appeal filed against the dead person(s) in regard to whom the plaintiff(s) or appellant(s) was/were not aware before filing suit or appeal, would not be non-est- The Suit or Appeal would not be dismissed only on the ground that the same has been filed against dead person(s) and the plaintiff(s) or appellant(s) be permitted to bring on record the legal heirs of the deceased who were inadvertently impleaded.

Petition dismissed. (E-15)

List of Cases cited:

1. Gurcharan Singh Vs Surjit Singh & anr. passed in Special Leave Petition (C) No. 7735 of 2010 decided on 02.11.2012 reported in (2012) 13 SCC 530
2. Banwari Lal (Dead) by legal representative & anr. Vs Balbir Singh reported in (2016) 1 SCC 607
3. Pankajbhai Rameshbhai Zalavadiya Vs Jethabhai Kalabhai Zalavadiya (Deceased)

through Legal representative & ors. reported in (2017) 9 SCC 700

4. Bank of Commerce Ltd. Vs Protab Chandra Ghosh reported in AIR 1946 FC 13

5. Gopalakrishnanayya Vs Adivi Lakshmana Rao reported in AIR 1925 Mad 1210

6. St. of W.B. Vs Manisha Maity reported in AIR 1965 Cal 459

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard.

2. By means of the present petition, petitioner has assailed the order dated 15.03.2023 passed by opposite party no. 1- Settlement Officer Consolidation in appeal registered as Case No.1357/2020, Computerized Case No. 201854083000001357 (Surya Pal and Others Versus Shyam Narayan and Others), which was preferred under Section 11(1) of U.P. Consolidation and Holdings Act 1953 (in short Act of 1953), assailing the order dated 23.01.1965 passed in Case No. 3792 under Section 9A(2) of the Act of 1953 by the Consolidation Officer Bargaon, District Gonda.

3. The facts in brief which are relevant for disposal of the present petition, is to the effect that the appeal was filed impleading dead persons (17 persons). This appeal was preferred alongwith application for condonation of delay duly supported with the affidavit, before opposite party no.1- Settlement Officer Consolidation, Gonda.

4. After presentation of appeal the notices were issued by opposite party no.1. Upon service of notice, petitioner no.1- Surya Prakash alongwith Ram Kewal and

Ram Roop Yadav, preferred an application for dismissal of appeal on the ground that appeal has been filed against the dead persons.

5. On coming to know the defect in appeal, the appellants-opposite party nos. 2 to 6 preferred application(s) for substitution for bringing on record the legal heirs of the respondent(s) in the appeal. The opposite party no.1 after providing proper opportunity of hearing to the parties to the litigation and taking note of the facts of the case, vide order dated 15.03.2023 rejected the application for dismissal of appeal and posted the matter for hearing on application(s) for substitution.

6. As stated by learned Counsel for the parties, till date on account of interim protection granted by this Court, the application(s) for substitution have not been disposed of.

7. Today, when the case was called out, learned Counsel for the parties have placed the following judgment(s) before this Court:-

1- Gurcharan Singh Versus Surjit Singh and another passed in Special Leave Petition (C) No. 7735 of 2010 decided on 02.11.2012 reported in (2012) 13 SCC 530.

2- Banwari Lal (Dead) by legal representative and another Versus Balbir Singh reported in (2016) 1 SCC 607

3- Pankajbhai Rameshbhai Zalavadiya Versus Jethabhai Kalabhai Zalavadiya (Deceased) through Legal representative and others reported in (2017) 9 SCC 700.

8. In the case of **Gurucharan Singh (Supra)** the Hon'ble Apex Court after considering the judgment(s) passed in the

case of **Bank of Commerce Ltd. Versus Protab Chandra Ghosh** reported in **AIR 1946 FC 13, Gopalakrishanayya Versus Adivi Lakshmana Rao** reported in **AIR 1925 Mad 1210, State of W.B. Versus Manisha Maity reported in AIR 1965 Cal 459 as also Rule 8 and 9 of order 16 of Supreme Court Rules, 1966**, the Hon'ble Apex Court observed as under:-

"8. Considering the authorities discussed above, the aforesaid provisions of Order 16 Rules 8 and 9 will apply where at the time of filing of the special leave petition, the respondent was alive and after the filing of the special leave petition his legal representatives are sought to be substituted, but will not apply where the respondent was dead when the special leave petition was filed. Where the respondent was dead when the special leave petition was filed, the court can, in the interest of justice, allow an application for amendment of the special leave petition and condone the delay in filing such an application for amendment if the delay is satisfactorily explained.

9. IA No. 2 of 2011 is, therefore, treated as an application for amendment of the special leave petition and as the delay in filing the application for amendment of the special leave petition has been satisfactorily explained in IA No. 3 of 2011, the delay is condoned and in the interests of justice, IAs Nos. 2 and 3 of 2011 are allowed. The prayers in IAs Nos. 4 and 5 are for exemption from filing official translation and from filing death certificate of the deceased and are allowed. IA No. 6 of 2011 is for deletion of pro forma Respondent 2, Ajaib Singh, who appears to be the attorney of the contesting Respondent 1, and is allowed at the risk of the petitioner. The IAs stand disposed of."

9. In the case of **Pankajbhai Rameshbhai Zalavadiya (Supra)** the Hon'ble Apex Court after considering the judgment passed in the case **Banwari Lal (dead) (Supra)** and also other judgment(s) on the issue pertaining to filing of Suit or Appeal, as the case may be, against dead person(s), observed as under:-

"6. The only question which is to be decided in this appeal is, whether the legal representatives of one of the defendants can be impleaded under Order 1 Rule 10 of the Code where such defendant expired prior to the filing of the suit, particularly when the application filed by the plaintiff to bring the legal representatives of the deceased on record under Order 22 Rule 4 of the Code was dismissed earlier as not maintainable.

"7. The bare reading of Order 22 Rule 4 of the Code makes it clear that Order 22 Rule 4 of the Code applies only in the case where the death of one of the several defendants or the sole defendant occurs during the subsistence of the suit. If one of the defendants has expired prior to the filing of the suit, the legal representatives of such deceased defendant cannot be brought on record in the suit under Order 22 Rule 4 of the Code. Before proceeding further, it is relevant to note the provisions of Order 1 Rule 10 and Sections 151 and 153 of the Code, which read thus:

"10. Suit in name of wrong plaintiff.—(1) *Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of*

the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the court thinks just.

(2) Court may strike out or add parties.—*The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or 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, be added.*

(3) *No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.*

(4) Where defendant added, plaint to be amended.—*Where a defendant is added, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendant.*

(5) *Subject to the provisions of the Indian Limitation Act, 1877 (15 of 1877), Section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons."*

"151. Saving of inherent powers of court.—*Nothing in this Code shall be*

deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

153. General power to amend.—

The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.”

8. *In the matter on hand, the sale was made in favour of Defendant 7, and the validity of the sale deed was the subject-matter of the suit. The purchaser of the property i.e. Defendant 7, though dead at the time of filing the suit, was made one of the defendants erroneously. The persons who are now sought to be impleaded under Order 1 Rule 10 of the Code are the legal representatives of the deceased Defendant 7. Therefore, there cannot be any dispute that the presence of the legal representatives of the deceased is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all the questions in the suit. Their presence is necessary in the suit for the determination of the real matter in dispute. Therefore, they are needed to be brought on record, of course, subject to the law of limitation, as contended under Section 21 of the Limitation Act.*

9. *Merely because the earlier application filed by the appellant under Order 22 Rule 4 of the Code was dismissed on 9-9-2009 as not maintainable, it will not prohibit the plaintiff from filing another application, which is maintainable in law.*

There was no adjudication of the application to bring legal representatives on record on merits by virtue of the order dated 9-9-2009. On the other hand, the earlier application filed under Order 22 Rule 4 of the Code was dismissed by the trial court as not maintainable, inasmuch as Defendant 7 had died prior to the filing of the suit and that Order 22 Rule 4 of the Code comes into the picture only when a party dies during the pendency of the suit. The only course open to the appellant in law was to file an application for impleadment to bring on record the legal representatives of deceased Defendant 7 under Order 1 Rule 10 of the Code. Hence, the order passed by the trial court on the application filed under Order 22 Rule 4 of the Code, dated 9-9-2009, will not act as res judicata.

10. *Order 1 Rule 10 of the Code enables the court to add any person as a party at any stage of the proceedings, if the person whose presence in court is necessary in order to enable the court to effectively and completely adjudicate upon and settle all the questions involved in the suit. Avoidance of multiplicity of proceedings is also one of the objects of the said provision. Order 1 Rule 10 of the Code empowers the court to substitute a party in the suit who is a wrong person with a right person. If the court is satisfied that the suit has been instituted through a bona fide mistake, and also that it is necessary for the determination of the real matter in controversy to substitute a party in the suit, it may direct it to be done. When the court finds that in the absence of the persons sought to be impleaded as a party to the suit, the controversy raised in the suit cannot be effectively and completely settled, the court would do justice by impleading such persons. Order 1 Rule*

10(2) of the Code gives wide discretion to the court to deal with such a situation which may result in prejudicing the interests of the affected party if not impleaded in the suit, and where the impleadment of the said party is necessary and vital for the decision of the suit.

11. In Vijaykumar Motilal Hirakhanwala, a Bench by majority held that the legal representatives of a party can be added under Order 1 Rule 10 of the Code, but the date on which they were impleaded shall be the date on which the suit was instituted by or against them. In the said matter, this Court on facts held that the suit was barred by limitation as per Section 22 of the Limitation Act, 1908. This Court, though it concluded that the Court has got the power to join a particular person as a party under Order 1 Rule 10 of the Code, did not interfere in the matter inasmuch as this Court found that the suit was barred by limitation. It is relevant to note that the said suit was of the year 1958. Since the Limitation Act, 1963 (now in force) was at that time not in existence, this Court applied the old limitation law and held that the suit was barred by limitation. As of now, the proviso to Section 21(1) of the Limitation Act, 1963 empowers the court to direct that the suit shall be deemed to have been instituted on an earlier date, where the omission to include a new plaintiff or defendant was due to a mistake made in good faith. Therefore, it is open to the plaintiff in the matter on hand to prove "good faith" on his part in not including the legal representatives of deceased Defendant 7, during the course of trial of suit.

12. It would be relevant to note that in Bhagwan Swaroop v. Mool Chand (1983) 2 SCC 132], this Court observed thus:

"4. It is true that it was incumbent upon the appellants to implead the heirs and legal representatives of deceased Respondent 1 in time. It is equally true that the appellants were negligent in moving the proper application. We would not question the finding of the High Court that Appellants 2, 3 and 4 knew about the death of the deceased Respondent 1. This being a suit for partition of joint family property, parties are closely interrelated and it is reasonable to believe that at least some of the appellants must have attended the funeral of deceased Respondent 1, as contended on behalf of the contesting Respondent 2. There is some force in the contention that when a specific provision is made as provided in Order 22 Rule 4, a resort to the general provision like Order 1 Rule 10 may not be appropriate. But the laws of procedure are devised for advancing justice and not impeding the same. In Sangram Singh v. Election Tribunal, AIR 1955 SC 425, this Court observed that a code of procedure is designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties; not a thing designed to trip people up. This was reaffirmed in Kalipada Das v. Bimal Krishna Sen Gupta, (1983) 1 SCC 14.

5. In a suit for partition, the position of plaintiffs and defendants can be interchangeable. It is that each adopts the same position with the other parties. Other features which must be noticed are that the appeal was filed somewhere in 1972. It has not come up for hearing and the matter came on Board only upon the application of the second respondent intimating to the Court that the first respondent had died way back and as his heirs and legal representatives having not been substituted, the appeal has abated. Wheels started

moving thereafter. Appellants moved an application for substitution. The matter did not end there. Heirs of deceased Respondent 1 then moved an application for being brought on record. If the application had been granted, the appeal could have been disposed of in the presence of all the parties. The difficulty High Court experienced in granting the application disclosed with great respect, a hypertechnical approach which if carried to end may result in miscarriage of justice. Who could have made the most serious grievance about the failure of the appellants to substitute the heirs and legal representatives of deceased Respondent 1? Obviously the heirs of deceased Respondent 1 were the persons vitally interested in the outcome of the appeal. They could have contended that the appeal against them has abated and their share has become unassailable. That is not their case. They on the contrary, want to be impleaded and substituted as heirs and legal representatives of deceased Respondent 1. They had absolutely no grievance about the delay in bringing them on record. It is the second respondent who is fighting both the appellants and the first respondent who wants to derive a technical advantage by this procedural lapse. If the trend is to encourage fairplay in action in administrative law, it must all the more inhere in judicial approach. Such applications have to be approached with this view whether substantial justice is done between the parties or technical rules of procedure are given precedence over doing substantial justice in Court. Undoubtedly, justice according to law; law to be administered to advance justice.”

13. This Court
in *Karuppaswamy v. C. Ramamurthy*,
(1993) 4 SCC 41 has permitted the plaintiff

to modify the application filed by him under Order 22 Rule 4 of the Code to make it an application under the provisions of Sections 151 and 153 of the Code. In the said matter also the suit was filed against a dead person. This Court proceeded further to conclude that the plaintiff has shown good faith as contemplated under Section 21(1) of the Limitation Act and hence the impleadment of the legal representatives/heirs must date back to the date of the presentation of the plaint. In the said matter, it was observed thus : (SCC p. 45, paras 4-5)

“4. A comparative reading of the proviso to sub-section (1) shows that its addition has made all the difference. It is also clear that the proviso has appeared to permit correction of errors which have been committed due to a mistake made in good faith but only when the court permits correction of such mistake. In that event its effect is not to begin from the date on which the application for the purpose was made, or from the date of permission but from the date of the suit, deeming it to have been correctly instituted on an earlier date than the date of making the application. The proviso to sub-section (1) of Section 21 of the Act is obviously in line with the spirit and thought of some other provisions in Part III of the Act such as Section 14 providing exclusion of time of proceeding bona fide in court without jurisdiction, when computing the period of limitation for any suit, and Section 17(1) providing a different period of limitation starting when discovering a fraud or mistake instead of the commission of fraud or mistake. While invoking the beneficent proviso to sub-section (1) of Section 21 of the Act an averment that a mistake was made in good faith by impleading a dead defendant in the suit should be made and the court must on

proof be satisfied that the motion to include the right defendant by substitution or addition was just and proper, the mistake having occurred in good faith. The court's satisfaction alone breathes life in the suit.

5. It is noteworthy that the trial court did not attribute any neglect or contumacy to the conduct of the plaintiff-respondent. It was rather observed that the plaintiff could have known the date of the death of the first defendant only by the counter filed to IA No. 265 of 1975. Normally, if he had known about the date of death of the defendant, he would have filed the suit in the first instance against his heirs and legal representatives. The trial court has also opined that the plaintiff was ignorant as to such death and that is why he filed IA No. 265 of 1975 under Order 22 Rule 4 CPC. The High Court too has recorded a finding that there was nothing to show that the plaintiff was aware of the death of the first defendant and yet knowing well about it, he would persist in filing the suit against a dead person. In conclusion, the learned Single Judge held that since plaintiff-respondent had taken prompt action it clearly showed that he had acted in good faith. Thus the High Court made out a case for invoking the proviso to sub-section (1) of Section 21 of the Act in favour of the plaintiff-respondent. Sequel, the High Court found no difficulty in allowing IA No. 785 of 1975 permitting change of the provision whereunder IA No. 265 of 1975 was filed and in allowing IA No. 265 of 1975 ordering the suit against the heirs and legal representatives of Defendant 1 to be dating back to 14-11-1974, the date on which the plaint was originally presented.”

(emphasis supplied)

14. In *Banwari Lal v. Balbir Singh*, (2016) 1 SCC 607, Defendant 1

(who was Respondent 1 in the first appeal), had expired 2 years prior to the decision in the first appeal, but no steps were taken to bring his legal representatives on record. The first appellate court decided in favour of the plaintiff. When the matter came up in second appeal, the legal representatives of Defendant 1 filed an application for condonation of delay and restoration. This Court though observed that the application ought to have been filed under Order 22 Rule 4 of the Code inasmuch as the death had occurred during the subsistence of the matter before the Court and the application under Order 1 Rule 10 of the Code was not maintainable, had proceeded to allow the application on the ground that it would be unjust to non-suit the applicant on the ground of technicalities. This Court permitted the legal representatives of Defendant 1 to convert the application into one filed under Order 22 Rule 4 of the Code.

15. In the cases relied upon by the respondents viz. *Jayalaxmi Janardhan Walawalkar v. Lilachand Laxmichand Kapasi*, 1998 SCC OnLine Bom 354 : (1998) 3 Mah LJ 618 and in *Madhukar Ramchandra Keni v. Vasant Jagannath Patil*, 2013 SCC OnLine Bom 374 : (2013) 4 Mah LJ 403, the death had occurred during the pendency of the matter and consequently the suit stood abated. The case of *Arora Enterprises Ltd. v. Indubhushan Obhan*, (1997) 5 SCC 366 is also not applicable as it deals with the finality of an abatement order. In that context, the courts have concluded that the only course open to the appellant-plaintiff in case if the death occurs in a pending matter, is to file an application under Order 22 Rule 4 of the Code, and not under Order 1 Rule 10 of the Code or under Section 151 of the Code.

16. *In the matter on hand, though the trial court had rightly dismissed the application under Order 22 Rule 4 of the Code as not maintainable at an earlier point of time, in our considered opinion, it needs to be mentioned that the trial court at that point of time itself could have treated the said application filed under Order 22 Rule 4 of the Code as one filed under Order 1 Rule 10 CPC, in order to do justice between the parties. Merely because of the non-mentioning of the correct provision as Order 1 Rule 10 of the Code at the initial stage by the advocate for the plaintiff, the parties should not be made to suffer. It is by now well settled that a mere wrong mention of the provision in the application would not prohibit a party to the litigation from getting justice. Ultimately, the courts are meant to do justice and not to decide the applications based on technicalities. The provision under Order 1 Rule 10 CPC speaks about judicial discretion of the Court to strike out or add parties at any stage of the suit. It can strike out any party who is improperly joined, it can add anyone as a plaintiff or defendant if it finds that such person is a necessary or proper party. The Court under Order 1 Rule 10(2) of the Code will of course act according to reason and fair play and not according to whims and caprice.*

17. *The expression “to settle all questions involved” used in Order 1 Rule 10(2) of the Code is susceptible to a liberal and wide interpretation, so as to adjudicate all the questions pertaining to the subject-matter thereof. Parliament in its wisdom while framing this rule must be held to have thought that all material questions common to the parties to the suit and to the third parties should be tried once for all. The Court is clothed with the power to secure the aforesaid result with judicious*

discretion to add parties, including third parties. There cannot be any dispute that the party impleaded must have a direct interest in the subject-matter of litigation. In a suit seeking cancellation of sale deed, as mentioned supra, a person who has purchased the property and whose rights are likely to be affected pursuant to the judgment in the suit is a necessary party, and he has to be added. If such purchaser has expired, his legal representatives are necessary parties.

18. *In the matter on hand, since the purchaser of the suit property i.e. Defendant 7 has expired prior to the filing of the suit, his legal representatives ought to have been arrayed as parties in the suit while presenting the plaint. As such impleadment was not made at the time of filing of the plaint in view of the fact that the plaintiff did not know about the death of the purchaser, he cannot be non-suited merely because of his ignorance of the said fact. To do justice between the parties and as the legal representatives of the purchaser of the suit property are necessary parties, they have to be impleaded under Order 1 Rule 10 of the Code, inasmuch as the application under Order 22 Rule 4 of the Code was not maintainable.*

19. *As mentioned supra, it is only if a defendant dies during the pendency of the suit that the provisions of Order 22 Rule 4 of the Code can be invoked. Since one of the defendants i.e. Defendant 7 has expired prior to the filing of the suit, there is no legal impediment in impleading the legal representatives of the deceased Defendant 7 under Order 1 Rule 10 of the Code, for the simple reason that the plaintiff in any case could have instituted a fresh suit against these legal representatives on the date he moved an*

application for making them parties, subject of course to the law of limitation. Normally, if the plaintiff had known about the death of one of the defendants at the time of institution of the suit, he would have filed a suit in the first instance against his heirs or legal representatives. The difficulty that the High Court experienced in granting the application filed by the plaintiff under Order 1 Rule 10 of the Code discloses, with great respect, a hypertechnical approach which may result in the miscarriage of justice. As the heirs of the deceased Defendant 7 were the persons with vital interest in the outcome of the suit, such applications have to be approached keeping in mind that the courts are meant to do substantial justice between the parties and that technical rules or procedures should not be given precedence over doing substantial justice. Undoubtedly, justice according to the law does not merely mean technical justice but means that law is to be administered to advance justice.

20. Having regard to the totality of the narration made supra, there is no bar for filing the application under Order 1 Rule 10, even when the application under Order 22 Rule 4 of the Code was dismissed as not maintainable under the facts of the case. The legal heirs of the deceased person in such a matter can be added in the array of parties under Order 1 Rule 10 of the Code read with Section 151 of the Code subject to the plea of limitation as contemplated under Order 7 Rule 6 of the Code and Section 21 of the Limitation Act, to be decided during the course of trial.

21. In view of the above, the impugned judgment of the High Court is set aside. The appeal is allowed. The trial court is directed to implead the legal representatives of deceased Defendant 7 and bring them on record, subject to the plea of limitation as contemplated under Order 7 Rule 6 of the Code, as well as under Section 21 of the Limitation Act, 1963, to be decided during the trial."

10. Thus, in the view of above settled preposition, the Suit or Appeal, as the case may be, filed against the dead person(s) in regard to whom the plaintiff(s) or appellant(s), as the case may be, was/were not aware before filing suit or appeal, would not be non-est.

11. From the law, referred above, it is crystal clear that the Suit or Appeal would not be dismissed only on the ground that the same has been filed against dead person(s) and the plaintiff(s) or appellant(s), as the case may be, can be permitted to bring on record the legal heirs of the deceased who were inadvertently impleaded.

12. In view of the aforesaid, this Court is not inclined to entertain the present petition.

13. Accordingly, it is *dismissed*.

14. Interim order, granted earlier, shall stand discharged.

15. The opposite party no. 1 is directed to consider the application(s) for substitutions pending before it in view of the law referred hereinabove, expeditiously.

(2023) 8 ILRA 1478
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.07.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-C No. 4651 of 2002

Chief Executive Officer, U.P. Khadi & Village Industries Board, Lko & Anr.

...Petitioners

Versus

Controlling Authority Under Payment of Gratuity Act/ Asst. Labour Commissioner, Lko & Anr.
...Respondents

Counsel for the Petitioners:

Pankaj Patel, Akansha Gupta

(Delivered by Hon'ble Alok Mathur, J.)

Counsel for the Respondents:

C.S.C.

Civil Law - Payment of Gratuity Act, 1972 - Sections 2(e), 4 & 7(4) - Determination of Gratuity - Employee engaged on consolidated honorarium - Termination followed by contractual re-engagement - Continuous service from 1982 to 2013 established - Last drawn wages proven to be ₹8,500/- based on cheque evidence - Employer failed to cross-examine or rebut evidence - Delay of 9 years due to employer's non-participation - No remand warranted when evidence sufficient and parties heard - Legal maxim "*commodum ex injuria sua nemo habere debet*" applied - Employer cannot take advantage of own wrong.

Held: Where the petitioner-employer, despite due notice, failed to contest the gratuity claim diligently and refrained from cross-examining the claimant, the findings of the Controlling Authority based on oral and documentary evidence, including cheque proof of last drawn salary, cannot be said to be perverse. In such circumstances, prayer for remand is not maintainable as it would only prolong litigation and amount to rewarding a litigant for his own default. Legal maxim "no man shall take advantage of his own wrong" squarely applicable.

Petition Dismissed.

Relied on:

1. Arvind Kumar Jaiswal Vs Devendra Prasad Jaiswal Varun, 2023 SCC OnLine SC 146
2. Nadakerappa Vs Pillamma, 2022 SCC OnLine SC 387
3. Shivakumar Vs Sharanabappa, (2021) 11 SCC 277
4. Kusheshwar Prasad Singh Vs St. of Bihar, (2007) 11 SCC 447

1. Heard Sri Pankaj Patel, learned counsel for petitioners as well as learned Standing Counsel for respondents.

2. By means of the present writ petition, the petitioner has challenged the order dated 15.03.2021 passed by the Controlling Authority under the Payment of Gratuity Act, 1972 thereby allowing the claim preferred by respondent and granting gratuity of Rs. 216753/- for a period the husband of the claimant has worked with the petitioner.

3. The brief facts necessary for adjudication of the present case are that the husband of respondent No. 2 late Rama was initially appointed on the post of Master Potter in the Pottery Section in the petitioner's organization by means of order dated 03.12.1982 on consolidated salary of Rs. 325/- per month. It has been stated that services of husband of respondent No. 2 were terminated by order dated 18.08.2000. Subsequently from 26.05.2003 he was re-engaged on salary of Rs. 1500/- per month on the post of Chowkidar/Potter on contractual basis upto 05.11.2013.

4. The dispute in the present case relates to non-payment of the amount of gratuity to the husband of respondent No. 2 in regard to which a claim was filed under the Payment of Gratuity Act, 1972 before the Controlling Authority. In the claim, it was stated that the husband of respondent No. 2 was in continuous services of petitioners from 03.12.1982 till his superannuation on 05.11.2013 i.e. for a period of 31 years and during the said period he was receiving salary from the petitioner and lastly he was receiving Rs. 12000/- per month, and was therefore

entitled to gratuity which has illegally and arbitrarily withheld by the petitioner.

5. Notices were issued to the petitioner who was put in appearance and a written statement was filed by them opposing the claim of respondent No. 2. It has been fairly submitted by learned counsel for petitioner that after filing of the written statement their counsel never appeared or participated in the proceedings before the Controlling Authority.

6. In the said order, the Controlling Authority has recorded that there is no dispute with regard to appointment of husband of respondent No. 2 but the claim of respondent No. 2 has been partly accepted to the extent that the services of husband of respondent No. 2 were terminated on 18.08.2000 and subsequently he was re-engaged on contractual basis from 26.05.2003 till 05.11.2013.

7. The contention of petitioner has been accepted to the extent that husband of respondent No. 2 had rendered 28 years 01 month and 24 days of services. With regard to last salary drawn by husband of respondent No. 2, it was stated by the petitioners in the written statement that he was receiving only Rs. 4,000/- per month instead of Rs. 12,000/- per month as claimed by respondent No. 2. In this regard the Controlling Authority has relied upon the evidence adduced by respondent No. 2 where a cheque was issued by petitioner in favour of respondent No. 2 holding the same to be on account of wages paid to husband of respondent No. 2 and accepted that he was receiving Rs. 8500/- per month and consequently quantified the amount of gratuity to be paid to him on the said basis.

8. Learned counsel for petitioner in the present writ petition has disputed only the quantum of the salary on the basis of which the amount of gratuity has been granted by the Controlling Authority by means of impugned order dated 15.03.2021. He further stated that in his written statement, the petitioner has clearly stated that husband of respondent No. 2 was receiving only Rs. 4000/- per month while the Controlling Authority in most illegal and arbitrary manner has allowed the claim of husband of respondent No. 2 treating his monthly salary to be Rs. 8500/- per month. In this regard it is noticed that evidence was led by the respondent No. 2 and also documents were furnished by them including the cheque indicating that husband of respondent No. 2 was receiving Rs. 8500/- per month as salary.

9. From the order-sheet, it is clear that the statement of respondent No. 2 was recorded and repeated opportunities were given to the petitioner to cross examine him but no cross-examination was conducted by the petitioner and on the basis of material before the Controlling Authority, he concluded that husband of respondent No. 2 was receiving Rs. 8500/- per month as salary. It is noticed that the said finding is based upon material on record and it cannot be said that the same is perverse or there is any infirmity in the same. It is further noticed that it is the fault of the petitioners that they did not participate in the proceedings after filing of the written statement and the proceedings were continuing for a period of 09 years before the Controlling Authority. Merely because averment has been made in the written statement disputing claim regarding the quantum of salary would not make their stand conclusive and binding until there is documentary or oral evidence adduced in

8 All. Chief Executive Officer, U.P. Khadi & Village Industries Board, Lko & Anr. Vs. Controlling Authority Under Payment of Gratuity Act/ Asst. Labour Commissioner, Lko & Anr. 481

this regard. No documents were proved before the Controlling Authority by the petitioner in support of their averment regarding the amount of salary paid to the employee, while the employee had submitted oral and documentary evidence in this regard, and adequate reasons have been given by the Controlling Authority for returning a finding with respect to the salary drawn by the husband of respondent No. 2 to be Rs. 8500/- per month.

10. The Controlling Authority while deciding the said matter has based his order on the evidence before him and the statement recorded and the documents filed by the respective parties. The written statement of the petitioner has been duly considered and reasons for recording a finding that husband of respondent No. 2 was receiving Rs. 8500/- per month has been duly discussed and is based on cogent material which is the evidence of payment by cheque presented by respondent No. 2 in the proceedings.

11. The learned Counsel for the petitioner has vehemently submitted that the matter be remanded for fresh consideration as the petitioner was not heard before hearing of impugned order. He submitted that the counsel for the petitioner did not appear after filing the written submission and in absence of any representation on the behalf of petitioner case was decided and hence in order to afford due opportunity of hearing, in the interest of justice the matter should be remanded.

12. With regards to remand, the law is well settled by the Hon'ble Apex Court in several decisions.

13. Hon'ble the Apex Court in the case of **Arvind Kumar Jaiswal (D) Thr.**

LR. Vs. Devendra Prasad Jaiswal Varun, , 2023 SCC Online SC 146, has held as under:-

"An order of remand prolongs and delays the litigation and hence, should not be passed unless the appellate court finds that a re-trial is required, or the evidence on record is not sufficient to dispose of the matter for reasons like lack of adequate opportunity of leading evidence to a party, where there had been no real trial of the dispute or there is no complete or effectual adjudication of the proceedings, and the party complaining has suffered material prejudice on that account. Where evidence has already been adduced and a decision can be rendered on appreciation of such evidence, an order of remand should not be passed remitting the matter to the lower court, even if the lower court has omitted to frame issue(s) and/or has failed to determine any question of fact, which, in the opinion of the appellate court, is essential. The first appellate court, if required, can also direct the trial court to record evidence and finding on a particular aspect/issue in terms of Rule 25 to Order XLI, which then can be taken on record for deciding the case by the appellate court."

14. Hon'ble the Apex Court in the case of **Nadakerappa (D) Vs. Pillamma (D)**, 2022 SCC Online SC 387, has held as under:-

"It is settled law that the order of remand cannot be passed as a matter of course. An order of remand cannot also be passed for the mere purpose of remanding a proceeding to the lower court or the Tribunal. An endeavour has to be made by the Appellate Court to dispose of the case on merits. Where both the sides have led oral and documentary evidence, the

Appellate Court has to decide the appeal on merits instead of remanding the case to the lower court or the Tribunal."

14. Hon'ble the Apex Court in the case of **Shivakumr and others Vs. Sharanabappa and others, 2021 (11) SCC 277** has held as under:-

"25.2. Rule 23A came to be inserted in Order XLI CPC by way of the Code of Civil Procedure (Amendment) Act, 1976. Prior to this amendment, it was generally accepted by the Courts that although under Rule 23, an order of remand could be made only on reversal of a decree disposing of suit on a preliminary point but, the Appellate Court has the inherent power of remanding a case where it was considered necessary to do so in the interest of justice. Some of the High Courts had made similar provisions by way of their respective amendments. Insertion of Rule 23A in Order XLI by the Amending Act of 1976 makes it explicit that even when the suit has been disposed of otherwise than on a preliminary point and the decree is reversed in appeal, the Appellate Court shall have the power of remand, if a re-trial is considered necessary.

25.3. A comprehension of the scheme of the provisions for remand as contained in Rules 23 and 23A of Order XLI is not complete without reference to the provision contained in Rule 24 of Order XLI that enables the Appellate Court to dispose of a case finally without a remand if the evidence on record is sufficient; notwithstanding that the Appellate Court proceeds on a ground entirely different from that on which the Trial Court had proceeded.

25.4. A conjoint reading of Rules 23, 23A and 24 of Order XLI brings forth

the scope as also contours of the powers of remand that when the available evidence is sufficient to dispose of the matter, the proper course for an Appellate Court is to follow the mandate of Rule 24 of Order XLI CPC and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and a re-trial is considered necessary that the Appellate Court shall adopt the course of remanding the case. It remains trite that order of remand is not to be passed in a routine manner because an unwarranted order of remand merely elongates the life of the litigation without serving the cause of justice. An order of remand only on the ground that the points touching the appreciation of evidence were not dealt with by the Trial Court may not be considered proper in a given case because the First Appellate Court itself is possessed of jurisdiction to enter into facts and appreciate the evidence. There could, of course, be several eventualities which may justify an order of remand or where remand would be rather necessary depending on the facts and the given set of circumstances of a case.

25.4.1. The decision cited by the learned Counsel for the appellants in the case of Mohan Kumar (supra) is an apt illustration as to when the Appellate Court ought to exercise the power of remand. In the said case, the appellant and his mother had filed the civil suit against the Government and local body seeking declaration of title, perpetual injunction and for recovery of possession in respect of the land in question. The Trial Court partly decreed the suit while holding that the plaintiffs were the owners of the land in dispute on which trespass was committed by the respondents and they were entitled to get the encroachment removed; and it

was also held that the Government should acquire the land and pay the market value of the land to the appellant. Such part of the decree of the Trial Court was not challenged by the defendants but as against the part of the decision of the Trial Court which resulted in rejection of the claim of the appellant for allotment of an alternative land, the appellant preferred an appeal before the High Court. The High Court not only dismissed the appeal so filed by the appellant but proceeded to dismiss the entire suit with the finding that the plaintiff-appellant had failed to prove his ownership over the suit land inasmuch as he did not examine the vendor of his sale deed. In the given circumstances, this Court observed that when the High Court held that the appellant was not able to prove his title to the suit land due to nonexamination of his vendor, the proper course for the High Court was to remand the case to the Trial Court by affording an opportunity to the appellant to prove his title by adducing proper evidence in addition to what had already been adduced. Obviously, this Court found that for the conclusion reached by the High Court, a case for re-trial was made out particularly when the Trial Court had otherwise held that the appellant was owner of the land in dispute and was entitled to get the encroachment removed as also to get the market value of the land. Such cases where retrial is considered necessary because of any particular reason and more particularly for the reason that adequate opportunity of leading sufficient evidence to a party is requisite, stand at entirely different footings than the cases where evidence has already been adduced and decision is to be rendered on appreciation of evidence. It also remains trite that an order of remand is not to be passed merely for the purpose of allowing a

party to fillup the lacuna in its case. 25.5. It gets perforce reiterated that the occasion for remand would arise only when the factual findings of Trial Court are reversed and a re-trial is considered necessary by the Appellate Court."

15. It is apposite to consider the fact that in the instant case the petitioner themselves was not appearing in the proceeding before the Controlling Authority. The same is founded in the principle of law contained in the legal maxim which reads as under:

"commodum ex injuria sua nemo habere debet"; (no party can take undue advantage of his own wrong).

16. The Apex Court in **(2007) 11 SCC 447 (Kusheshwar Prasad Singh Vs. State of Bihar)** considered the said legal maxim and opined as under: -

"It is a maxim of law, recognized and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognized in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure."

17. It is settled principle of law that a man cannot be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law. It is sound principle that he who prevents a thing from being done shall not avail himself of the non- performance he has occasioned. To put it differently, "a wrongdoer ought not to be permitted to make a profit out of his own wrong." The petitioner had put in appearance and participated in the proceedings and also filed their written

statement. They did not participate thereafter. Evidence of the workman was recorded and several opportunities for cross examination were afforded but they did not take advantage of the same. No cogent reasons is forthcoming for not participating in the proceeding after filing of the written statement. This is not a case where the employer was never served with the summons or he was not aware of the proceedings initiated by the employee, but initially he appeared and participated but without any reason stopped participating thereafter.

18. In the peculiar facts of the present case and also considering the judgments of the Hon'ble Supreme Court this court is of the considered opinion that remand of a case cannot be granted on mere asking of a party unless he is able to demonstrate that in the interest of justice the matter should be remanded. The proceedings were pending before the Controlling Authority for a substantial period of time. Undisputedly the petitioner was aware of the proceedings as he had initially participated in the same and filed his written statement. He cannot in the present circumstances be permitted to justify his deliberate non-appearance, where no justifiable cogent reason of the same, either exists or could be demonstrated before this Court. In the present case remand order would be contrary to "interest of justice". The petitioner in any case cannot be permitted to take advantage of his own callousness and deliberate omission in not prosecuting the case before the Controlling Authority diligently.

19. It the opinion of this Court, the said legal principle will apply in this matter also with full force.

20. In light of the above, this Court does not find any infirmity so as to interfere with the impugned order in exercise of powers under Article 226 of the Constitution of India. Accordingly, the writ petition is **dismissed**.

21. Supplementary affidavit filed today is taken on record.

(2023) 8 ILRA 1484
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.07.2023

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.
THE HON'BLE MANISH KUMAR, J.

Writ-C No. 6190 of 2023

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

Counsel for the Petitioner:
 Rahul Srivastava

Counsel for the Respondents:
 C.S.C.

Criminal Law - Criminal Procedure Code, 1973 - Section 3(3)(a) - Rule 58 & 76 of the Rules, 2021 - read with Section 3(3)(a) Cr.P.C. - Penalty under Rule 58 can be imposed only upon conviction by Judicial Magistrate First Class - ADM (F&R) not competent authority - Order held without jurisdiction.

Held: Under the U.P. Minor Mineral (Concession) Rules, 2021, penalty under Rule 58 for contravention of Rule 3 can only be imposed by a Magistrate of the First Class as per Rule 76. The Additional District Magistrate (Finance and Revenue), who passed the impugned order imposing penalty, is not competent under the law to do so. Therefore, the impugned orders are without jurisdiction

and liable to be quashed. Liberty is, however, granted to the St. to proceed in accordance with law.

Case Law Discussed:

1. Section 3(3)(a), Cr.P.C., 1973
2. Rule 58 and Rule 76, U.P. Minor Mineral (Concession) Rules, 2021

Petition Allowed.

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

1. Heard Shri Rahul Srivastava, learned counsel for petitioner and Shri Rajesh Tiwari, learned Additional Chief Standing Counsel for the State.

2. Since the legal issue relating to jurisdiction is involved in the present case, the matter is finally decided at this stage with the consent of the parties.

3. The present writ petition has been preferred for quashing of the order dated 4.7.2023 passed by respondent no.3 under Rule 58 of the U.P. Minor Mineral (Concession) Rules, 2021 (herein referred as Rules of 2021) by which penalty of Rs.7,66,500/- has been imposed upon the petitioner and the order dated 24.6.2023 passed by the District Magistrate approving the order dated 04.07.2023 passed by respondent No.3 but the copy of the approval order has never been served upon the petitioner.

4. Learned counsel for petitioner has submitted that the petitioner, who is the president of the Mahesh Narayan Rajkumar Smiriti Society is constructing a Higher Secondary School on gata no.3286, 3290 and 3265 situated in Vikas Khand Bichhiya, Village Panchayat Korari Kala, District-Unnao. For the purpose of filling

or levelling of the land, the petitioner had used the soil either from the same land or the adjoining land. In this connection a show cause notice dated 5.6.2023 was issued which was served upon the petitioner on 23.5.2023 against which the petitioner had submitted the reply and whereafter the impugned order was passed.

5. Learned counsel for petitioner has submitted that the impugned order dated 4.7.2023 passed by the respondent no.3-Additional District Magistrate (Finance and Revenue), District Unnao is not competent to pass an order under Rule 58 of the Rules of 2021. The order is passed without jurisdiction hence, it is liable to be quashed. It is further submitted that Rule 58 under Chapter VII of the Rules of 2021 provides for 'contraventions, offences and penalties'. The order passed under Rule 58 is a penalty imposed upon the petitioner. It is further submitted that as per Rule 76 of the Rules 2021, an order of penalty/punishment can be passed by the Magistrate of the first class, whereas the respondent no.3 is not a Magistrate of the first class.

6. On the other hand, learned Additional Chief Standing Counsel has submitted that it is not a penalty but a fine imposed upon the petitioner for illegal mining of the soil but he is unable to dispute that the order has been passed under Rule 58 of Rules 2021 and has also not disputed that such orders can be passed by the Magistrate of the first class and the respondent no.3 is not a Magistrate of the first class.

7. After hearing the learned counsel for the parties and going through the record and Rules applicable to the case, it is found that the orders which are under challenge are not in consonance with Rule 58 read

with Rule 76 of Rules 2021. For the convenience the Rule 58 and Rule 76 are quoted herein below:

"Rule 58 of the 2021 Rules:

Whoever contravenes the provisions of rule 3 shall on conviction be punishable with imprisonment of either description for a term which may extend up to five years or with fine which shall not be less than of 2 lacs rupees per hectare and which may extend to five Lacs rupees per hectare of the area, or with both.

Rule 76 of the 2021 Rules: (1)

No Court shall take cognizance of any offence punishable under these rules except on a complaint in writing of the fact constituting such offence by the District Officer or by any officer authorized by him in this behalf.

(2) No court inferior to that of a Magistrate of the first class, shall try any offence under these rules."

8. As per the Rule 58 of 2021, the penalty is to be imposed for contravening the provisions of Rule 3 of 2021 Rules, which is specifically mentioned in the impugned order and Rule 76 provides that it is to be passed by the Magistrate of the first class.

9. The Magistrate of the first class has been defined under Section 3 (3)(a) Cr.P.C. The same is quoted below:

"3. Construction of references.-

.....

(3) Unless the context otherwise requires, any reference in any enactment passed before the commencement of this Code,-

(a) to a Magistrate of the first class, shall be construed as a reference to a Judicial Magistrate of the first class;"

10. In view of the above, the Magistrate of first class has been defined in the Cr.P.C. 1973. It is undisputed that the respondent no.3 is not court of the Magistrate of the first class which alone could take cognizance of the matter and hence the order passed by him under Rule 58 of 2021 Rules is without jurisdiction and liable to be quashed.

11. In view of the facts and circumstances of the present case, the writ petition is allowed and impugned orders dated 4.7.2023 and 24.6.2023 are hereby quashed.

12. At this stage, learned Additional Chief Standing Counsel submits that liberty may be given to the State to proceed against the petitioner in accordance with law. It goes without saying that liberty is always available to proceed in accordance with law.

(2023) 8 ILRA 1486

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 27.04.2023

BEFORE

THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Writ-C No. 11568 of 2023

Smt. Akeedan

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Sri Anil Kumar Aditya, Sri Diwakar Prasad Tiwari, Sri Ramesh Chandra Tiwari

Counsel for the Respondents:

C.S.C., Sri Jayant Prakash Singh, Sri H.N. Singh (Sr. Adv.)

Civil Law - U.P. Land Revenue Act, 1901 – Sections 34, 35, 210 & 223 – U.P. Revenue Code, 2006 – Sections 35(2) & 231 – Mutation Proceedings – Restoration Application – Applicability of Repealed Act – Jurisdiction of Sub Divisional Officer – Principles of Natural Justice – Substantial Justice Vs Technicalities.

Held:

1. The restoration proceedings initiated under the U.P. Land Revenue Act, 1901, for a mutation case decided in 2005, are governed by the provisions of the 1901 Act as per Section 231 of the U.P. Revenue Code, 2006, which saves pending proceedings or those revived through restoration, treating them as continuations of the original proceedings. The term “otherwise” in Section 231 includes restoration proceedings, and the Tehsildar’s order dated 19.12.2022, restoring the mutation case, was validly passed under the 1901 Act, despite citing provisions of the 2006 Code.

2. The Sub Divisional Officer (SDO) was competent to entertain the appeal under Section 35(2) of the U.P. Revenue Code, 2006, as powers of the Collector under Section 210 of the 1901 Act were delegated to the SDO vide Notification No. U.O. 877/I/(104)/75-Ra-1 dated 24.01.1976, issued under Section 223 of the 1901 Act. The writ petition challenging mutation proceedings is maintainable under Article 226 of the Constitution when issues of jurisdictional competence or violation of principles of natural justice are involved. Mutation proceedings are summary in nature and do not determine title, which must be adjudicated by a competent civil court.

Writ Petition Allowed.**Cases Discussed:**

1. Smt. Kalawati Vs Board of Revenue (2022) 4 ADJ 578

2. Madhav Pandey Vs Board of Revenue (2002) 2 AWC 1311

3. Smt. Hadisul Nisha Vs Additional Commissioner (Judicial), Faizabad (2021) 6 ADJ 176

4. M/S Godrej Sara Lee Ltd. Vs Excise and Taxation Officer (AIR Online 2023 SC 76)

5. Whirlpool Corporation Vs Registrar of Trade Marks (1998) 8 SCC 1

6. Lakshmi Prashad Vs Commissioner (Judicial), Varanasi (2016) 11 ADJ 18

7. S.K. Kashyap Vs St. of Raj. (AIR 1971 SC 1120)

8. Anand Kumar Singh Vs St. of U.P. (2017) 6 ADJ 728

9. Isha Beevi Vs Tax Recovery Officer (AIR 1975 SC 2135)

10 B.S. Sheshagiri Setty Vs St. of Karnataka (2016) 2 SCC 123

11. St. of Punjab Vs Shamlal Murari (1976) 1 SCC 719

12. Jitendra Singh Vs St. of M.P. (2021) 0 Supreme (SC) 487

13. Charan Singh Vs St. of U.P. (2019) 6 ADJ 52

(Delivered by Hon’ble Syed Qamar Hasan Rizvi, J.)

1. Heard Sri Ramesh Chandra Tiwari and Sri Diwakar Prasad Tiwari, learned counsels for the petitioner and Sri Anshul Nigam, learned Standing Counsel for the State-respondent nos. 1, 2 & 3. Sri H.N. Singh, learned Senior Advocate assisted by Sri Jayant Prakash Singh, learned counsel for the respondent nos. 4 to 8.

2. The present writ petition has been filed seeking a writ in the nature of certiorari to quash the impugned orders

dated 15.03.2023 and dated 06.02.2023, passed by the Commissioner, Moradabad Division, Moradabad (respondent no. 2) and the Sub Divisional Magistrate, Sambhal (respondent no. 3), respectively.

3. The factual matrix of the case in brief is that admittedly the properties bearing Khata No. 77, plot no.34/0.059 hectare, Khata No. 233 plot no. 173/0.146, Khata No. 235 plot no. 177/0.425 and Khata No. 236 plot no. 175A /0.032 and plot no. 176/0.016, total 0.048 from two plots and plot no. 175B/0.028, 176B/0.012 hectare total 0.040 from two plots situated at Mohalla Chaudhary Sarai, District Sambhal and Khata No. 81 plot no. 208/5/1.967 situated in Village Sher Khan Sarai and Khata No. 43 plot no. 34/0.623 situated at Bhawani Das Sarai, District Sambhal (hereinafter referred to as plots) were recorded in the name of Kallu alias Kallan, resident of Chaudhary Sarai, Sambhal, District Sambhal.

4. The petitioner is the wife of late Kallu alias Kallan and she is in continuous possession over the plots in question. While the respondent no. 4 to 7 are the nephews (sons of the brother) of late Kallu and the respondent no. 8 is the daughter of late Kallu. After the death of said Kallu alias Kallan, the respondent nos. 4 to 8 (hereinafter collectively referred to as the respondents) instituted a case under Section 34/35 of the U.P. Land Revenue Act, 1901 for mutation in respect of the plots in question and the same was registered as Case No. 849, 850 and 851 in the year 2005 before the Tehsildar Sambhal. The aforesaid applications for mutation were filed by the respondents on the strength of a registered Will Deed dated 17.08.1998 in favour of the respondents. The Tehsildar Sambhal, vide order dated 29.04.2005

allowed the aforesaid mutation cases and accordingly, the names of the respondents were entered in the revenue record replacing the name of late Kallu alias Kallan.

5. The submission of the learned counsel for the petitioner is that the petitioner is continuously in peaceful possession of the properties in question since the life time of her husband and she had no knowledge of the aforesaid order of mutation dated 29.04.2005 until the year 2022. She for the first time came to know about the said mutation order dated 29.04.2005 through her counsel from a pending proceeding instituted by the private respondents under Section 31/32 (Zaheer Ahmad vs. State). As soon as she became aware of the aforesaid order of mutation dated 29.04.2005, she immediately moved an application for restoration on 30.04.2022 on the ground that since the order dated 29.04.2005 passed by the Court of Tehsildar Sambhal, was an ex-parte order and the same was passed even without issuing any notices to the legal heirs of Kallu alias Kallan, as such, the same being an ex-parte order is liable to be recalled. On the aforesaid application dated 30.04.2022 for restoration, the Tehsildar Sambhal, issued notices to the private respondents. In pursuance to the said notices, the present respondent Nos. 4 to 8 appeared before the court of Tehsildar and filed their objection against the aforesaid restoration application.

6. On the basis of the material available on record, the Tehsildar Sambhal vide order dated 19.12.2022, allowed the said restoration application preferred by the petitioner and recalled the earlier mutation order dated 29.04.2005 and fixed

27.12.2022 for the evidence in the case and also directed for the endorsement of the said order in the revenue record.

7. Against the aforesaid order dated 19.12.2022, the present respondents preferred an Appeal under Section 35(2) of the U.P. Revenue Code, 2006 before the Sub Divisional Officer, Sambhal (respondent no. 3) which was registered as Appeal No. 15996/2022 (Zaheer Ahmad versus Akeedan), mainly on the ground that the respondents are the successors of the late Kallu alias Kallan on the basis of a registered Will, which has never been challenged by the petitioner and further that the aforesaid restoration application is highly belated as the same has been filed after a lapse of about 17 years and that the question of delay has not been taken into consideration by the Tehsildar while allowing the restoration application.

8. In exercise of the powers under Section 35(2) of the U.P. Revenue Code, 2006, the Sub Divisional Officer vide order dated 06.02.2023 allowed the said Appeal No. 15996/2022 and set aside the order dated 19.12.2022 passed by the Tehsildar, by means of which the aforesaid restoration application was allowed and further directed to maintain the entries in the revenue records that were made in pursuance of the earlier order dated 29.04.2005, passed by the learned Tehsildar Sambhal.

9. Aggrieved by the said order dated 06.02.2023 passed by the Appellate Court in Appeal No. 15996/2022, the petitioner preferred a revision under Section 210 of the U.P. Revenue Code, 2006 before the learned Commissioner, Moradabad Division primarily on the ground that the appeal filed by the respondents was not

maintainable under Section 35(2) of the U.P. Revenue Code, 2006, and moreover the Sub Divisional Officer was not competent to decide the said appeal in the light of the provisions of Section 231 of U.P. Revenue Code, 2006, as the said appeal could have only be entertained by the Collector under Section 210 of the U.P. Land Revenue Act, 1901. Learned counsel for the petitioner further contended that the learned Appellate Court has failed to appreciate that the question of delay is merely a technical aspect while the petitioner, being the widow is the lawful heir and successor of late Kallu alias Kallan and has a bona fide claim over the plots in question, as such the technicalities ought not to have come in the way of substantial justice. The petitioner also disputed the genuineness of the Will dated 17.08.1998 on the basis of which the entire proceeding of mutation was initiated.

10. The learned Commissioner, Moradabad Division (respondent no. 2) by means of the impugned order dated 15.03.2023 upheld the Appellate Court's order dated 06.02.2023 passed by the Sub Divisional Officer and dismissed the said revision at the admission stage itself. Aggrieved by the aforesaid orders dated 06.02.2023 as well as dated 15.03.2023, the petitioner has preferred the instant writ petition.

11. Learned Senior Advocate appearing on behalf of the respondents, at the very outset, raised an objection regarding the maintainability of the writ petition and submitted that the writ petition under Article 226 of the Constitution of India in the proceedings relating to the mutation is not entertainable. He relied upon the judgment and order passed by this Court, in the case of **Smt. Kalawati versus**

Board of Revenue and others 2022 (4) ADJ 578. He contended that the writ petition under Article 226 of the Constitution of India may be entertained against the order passed in the mutation proceedings only where the order or the proceedings are wholly without jurisdiction or the order suffers from some patent jurisdictional error and further where there has been a violation of principal of natural justice.

12. Sri Anshul Nigam, learned Standing Counsel, appearing for the State-respondents has also raised preliminary objection regarding the maintainability of the writ petition on the ground that since the proceedings, in the instant case, have arisen from the application being filed under Section 34 of the U.P. Revenue Code, 2006 for the mutation in the revenue records and the said proceedings being summary in nature, the instant writ petition is not maintainable.

13. Per Contra, the contention of the learned counsel for the petitioner is that the order dated 29.04.2005 passed by the Tehsildar Sambhal is an ex-parte order as the same was passed at the back of the petitioner depriving her the opportunity of hearing. He further submits that since in the present writ petition the maintainability of proceedings of the above mentioned appeal before the Sub Divisional Officer (respondent no.3), as well as the order dated 15.03.2023 passed in the revision by the Commissioner are under challenge on the ground of jurisdictional competence and as such the objections regarding the maintainability of the writ petition as raised by the respondent counsels are not sustainable.

14. In the case of **Madhav Pandey and others versus Board of Revenue and**

others; reported in 2002 (2) AWC 1311; this Court has held that the mutation proceeding is summary in nature and a writ petition against the summary proceeding is not entertainable under Article 226 of the Constitution of India. In para 26 of the said judgment, it has been very categorically held as under:

"...there is no need to consider the question as to whether the revisional court has committed any error in exercise of jurisdiction. Assuming for argument sake that there is some error in exercise of jurisdiction by the Board of Revenue, the said error will not make the order without jurisdiction. As held above, the writ petition arising out of the summary proceedings, can be entertained only when there is lack of jurisdiction. It being not a case of lack of jurisdiction, no interference is called for in the impugned order on the basis of the above submission of the counsel for the petitioners."

15. In the case of **Smt. Hadisul Nisha versus Additional Commissioner (Judicial), Faizabad and Ors.;** reported in **2021 (6) ADJ 176;** this Court has carved out certain exceptions per which the writ petition would be maintainable even against orders passed in summary proceedings despite the said order having been affirmed/ set aside by the Appellate Court and Board of Revenue. For the sake of conveyance, para 19 wherein the said proposition has been laid down, is indicated below:

"19. The Courts in the aforecited decisions have laid down a few parametres for entertaining writs arising out of mutation proceedings. The exceptions that have been carved out being very few, for example:-

i) If the order is without jurisdiction;

ii) If the rights and title of the parties have already been decided by the competent court, and that has been varied by the mutation courts;

iii) If the mutation has been directed not on the basis of possession or simply on the basis of some title deed, but after entering into a debate of entitlement to succeed the property, touching into the merits of the rival claims;

iv) If rights have been created which are against statutory provisions of any Statute, and the entry itself confers a title on the petitioner by virtue of the provisions of the U.P. Zamindari Abolition and Land Reforms Act;

v) Where the orders impugned in the writ petition have been passed on the basis of fraud or misrepresentation of facts, or by fabricating the documents by anyone of the litigants.

vi) Where the courts have not considered the matter on merits for example the courts have passed orders on restoration applications etc (Vijay Shankar v Addl Commissioner; 2015 (33) LCD 1073)"

16. A similar view has been taken by this Court in the case of **Smt. Kalawati versus Board of Revenue and others**; reported in **2022: AHC: 48201**.

17. The question of maintainability of the writ petition has been dealt with by the Hon'ble Apex Court in the case of **M/S Godrej Sara Lee Ltd. versus Excise and Taxation Officer-cum Assessing**

Authority; AIR Online 2023 SC 76 by relying upon in the case of **Whirlpool Corporation Private Ltd. Versus State of U.P. and others 1990 (8) SCC 1**, held that:

"6. At the end of the last century, this Court in paragraph 15 of its decision reported in (1998) 8 SCC 1 (Whirlpool Corporation v. registrar of Trade Marks, Mumbai) carved out the exceptions on the existence whereof a Writ Court could be justified in entertaining a writ petition despite the party approaching it not having availed the alternative remedy provided by the Statute. The same read as under:

(i) where the writ petition seeks enforcement of any of the fundamental rights;

(ii) where there is violation of principles of natural justice;

(iii) where the order or the proceedings are wholly without jurisdiction; or

(iv) where the vires of an act is challenged."

18. After taking into consideration the submissions made by the learned counsel for the parties on the maintainability of the writ petition, this Court is of the view that since in the instant case the question of violation of principles of natural justice and the jurisdictional competence of the authority passing the impugned orders are involved as such in the light of the law laid down by the Hon'ble Supreme Court as well as by this Court as mentioned above the objections raised by the learned counsel for the respondents regarding the maintainability of the writ petition are not sustainable and is accordingly turned down.

19. Now, on the merits of the case, the learned counsel for the petitioner submits that while dismissing the revision, the Commissioner did not consider the legal questions that were raised before him and has entered into the question of genuineness of the Will which was beyond the competence of Revenue Court.

20. He further submits that the legal issue as raised in revision before the learned Commissioner was, that the appeal filed before the Sub Divisional Officer, under Section 35(2) of the U.P. Revenue Code, 2006, was not at all maintainable in view of the provision of Section 231 of the U.P. Revenue Code, 2006. The Sub Divisional Officer entertained the aforesaid Appeal No. 15996/2022 filed by the respondents dehors of jurisdiction.

21. Per contra, learned Senior Advocate appearing for the respondents submitted that the learned Sub Divisional Officer has rightly entertained Hehe He kjnthe said appeal filed by the respondents as the same was against the order dated 19.12.2022 passed by the Tehsildar concerned who passed the order under Section 34/35 of the U.P. Revenue Code, 2006, and the appeal against which lies before the Sub Divisional Officer under Section 35(2) of the U.P. Revenue Code, 2006. Learned Sr. Advocate has drawn the attention of this Court to the restoration application dated 30.04.2022 filed by the petitioner as contained in annexure no.3 to the writ petition, to show that the same was filed under Section 34 of the Land Revenue Act, 1901 and the order dated 19.12.2022 passed by the Tehsildar concerned as contained in annexure no.4 to the writ petition, was passed in exercise of power under Section 34/35 of the U.P. Revenue Code, 2006. The contention of the learned

counsel for the respondents is that at the time when the restoration application was filed before the Tehsildar, no proceedings were pending and as such the provisions of Section 231 of the U.P. Revenue Code, 2006 will not be applicable as the same is applicable only in respect of the pending proceedings. He further submits that in the instant case, the mutation case was decided way back on 29.04.2005 and that order attained finality as the same was incorporated in the revenue record. He further submits that the restoration application filed by the petitioner was not at all maintainable as the same was filed under the provisions of the old Act i.e. U.P. Land Revenue Act, 1901, which was repealed after the enforcement of the U.P. Revenue Code, 2006, that came into force on 11.02.2016, and the respondents rightly filed the appeal before the Sub Divisional Officer on 23.12.2022 under the provision of the U.P. Revenue Code, 2006 and as such there is no illegality or infirmity in the order dated 06.02.2023 passed by the Sub Divisional Officer (respondent no.3).

22. Sri Anshul Nigam, learned Standing Counsel for the State has justified the orders passed by the learned Sub Divisional Officer (respondent no.3) and the learned Commissioner (respondent no.2), as the same have been passed perfectly in accordance with law.

23. In view of the aforesaid factual matrix and in the light of the provision of Section 231 of the U.P. Revenue Code, 2006, a question arises whether proceeding of restoration initiated on the application dated 30.04.2022 filed by the petitioner, were to be carried out under the provisions of the Land Revenue Act, 1901 or under the provision of U.P. Revenue Code, 2006 which came into force w.e.f. 11.02.2016?

24. The provision of Section 231 of the U.P. Revenue Code, 2006 that deals with the applicability of the said Code of 2006 to the pending proceedings. For ready reference, Section 231 of the U.P. Revenue Code, 2006 is reproduced below:

“Applicability of the Code to pending proceedings.- (1) Save as otherwise expressly provided in this Code, all cases pending before the State Government or any Revenue Court immediately before the commencement of this Code, whether in appeal, revision, review or otherwise, shall be decided in accordance with the provisions of the appropriate law, which would have been applicable to them had this Code not been passed.

(2) All cases pending in any civil court immediately before the commencement of this Code which would under this Code be exclusively triable by a revenue court, shall be disposed of by such civil court according to the law in force prior to the date of such commencement.”

25. This Court invited the assistance of Sri Pankaj Kumar Gupta, Advocate, a prominent lawyer of this Court, to address on the above mentioned legal issue.

26. Sri Gupta submitted that the intention of the legislature is very much clear from the language of Section 231 of the U.P. Revenue Code, 2006 that all cases pending before the State Government or any Revenue Court immediately before the commencement of the U.P. Revenue Code, 2006; whether any appeal, revision, review or otherwise, shall be decided in accordance with the provisions of the appropriate law, which would have been applicable had the U.P. Revenue Code,

2006 not been passed. He emphasized the word ‘otherwise’ used in the Section 231 of U.P. Revenue Code, 2006 and submits that in the instant case, after the restoration of the mutation case (Case No. 849/850/851 of 2005), by the Tehsildar vide order dated 19.12.2022, the said proceedings stood revived and restored to the position as that of 29.04.2005. He submitted that the word ‘otherwise’ as used in the Section 231 of U.P. Revenue Code, 2006 fully covers the proceedings of restoration, recall, second appeal etc. He placed before this Court the Circular No. 6101/12-L(1)/2017 dated 03.11.2020. Para 5 of the said circular is quoted below:

“.....उ० प्र० राजस्व संहिता, 2006 यथासंशोधित 2016 की धारा 231 (1) में प्राविधानित व्यवस्था के क्रम में अधीनस्थ राजस्व न्यायालयों में योजित होने वाले सभी राजस्व वादों का पंजीकरण किया जाय एवं अपील व पुनरीक्षण आदि के पंजीकरण व अन्य अग्रेतर कार्यवाही मूल वाद के सुसंगत अधिनियमों (यथा-उ०प्र० भू-राजस्व अधिनियम-1901, उ० प्र० जमीं० वि० अधि०-1950 एवं उ० प्र० राजस्व संहिता 2006 यथासंशोधित 2016 आदि) की संगत धाराओं में ही की जायें एवं समस्त आदेश बार कोड़ युक्त आदेश-पत्रक पर ही पारित किये जायें।”

27. Sri Gupta further submitted that para 5 of the above mentioned circular is nothing but a clarification of the Section 231 of the U.P. Revenue Code, 2006.

28. This Court in the case of **Lakshmi Prashad versus Commissioner (Judicial) Varanasi Region and Ors.; reported in 2016 (11) ADJ 18** has held that appeal and revision is continuation of the proceedings and therefore, any appeal or revision against an order passed under the repealed Act will be considered as proceedings in continuation of the repealed Act itself.

For ready reference para No. 8 to 11 of Lakshmi Parashad case (supra) are reproduced below:

“.....8. The question therefore, which arises for consideration is as to the provision whereunder, an order passed in proceedings under Section 34 of the U.P. Land Revenue Act can be challenged once the Revenue Code, 2006 has been enforced.

9. The contention of learned counsel for the petitioner is that after the repeal of the U.P. Land Revenue Act, by enforcement of the U.P. Revenue Code, 2006, any appeal or revision, necessarily lies in accordance with the provision contained in the Revenue Code, 2006, and not in accordance with the provisions of the repealed Act.

10. From deciding this issue, Section 231 of the U.P. Revenue Code, 2006 is relevant and the same is extracted below:

"Section 231: Applicability of the Code to pending proceedings.-(1) Save as otherwise expressly provided in this Code, all cases pending before the State Government or any revenue court immediately before the commencement of this Code, whether in appeal, revision, review or otherwise, shall be decided in accordance with the provisions of the appropriate law, which would have been applicable to them had this Code not been passed.

(2) All cases pending in any civil court immediately before the commencement of this Code which would under this Code be exclusively triable by a revenue court, shall be disposed of by such

civil court according to the law in force prior to the date of such commencement."

11. Sub-section 1 of Section 231 quoted above, is in my considered opinion absolutely categorical. Therefore, an order on an application under Section 34 of the U.P. Land Revenue Act, is appealable and revisable in accordance with the provisions of the U.P. Land Revenue Act, itself and, therefore, the provision of Section 210 as also Section 219 of the U.P. Revenue Act are attracted and can be invoked even after the enforcement of the U.P. Revenue Code, 2006."

29. Section 231 of U.P. Revenue Code, 2006 is very categorical. It begins with the word "save as otherwise expressly provided in this Code" that defines the extent of applicability of the U.P. Revenue Code, 2006 to the pending proceedings. It is evident from the language of Section 231 of the U.P. Revenue Code, 2006 that the remedies available under the entire Code of 2006 in respect of proceedings that were instituted before the Revenue Courts under the old enactment which was repealed by U.P. Revenue Code, 2006 have been saved.

30. Further, the word "pending proceeding" used in section 231 of the U.P. Revenue Code, 2006 means all the cases pending before the State Government or any revenue court immediately before the commencement of this Code and reflects the clear legislative intention to cover all the matters that have not been concluded.

31. The Supreme Court of India in the case of **S.K. Kashyap and Ors. Versus State of Rajasthan**; reported in **AIR 1971 SC 1120**, has defined the word "pending". The relevant extract of

paragraph 25 of the said judgment is reproduced as under:

“(25)- The word 'pending' will ordinarily mean that the matter is not concluded and the court which has cognizance of it can make an order on the matter in issue. The test is whether any proceedings can be taken in the cause before the court or tribunal where it is said to be pending. The answer is that until the case is concluded it is pending.....”

32. In the present case, once the Tehsildar vide order dated 19.12.2022 restored and proceeding of the mutation case, the said proceedings stood revived and assumed the position as that was of 29.04.2005.

33. The aforementioned Circular No. 6101/12-L(1)/2017 dated 03.11.2020 issued by the Government of U.P. also clarifies the legal position that all the subsequent proceedings including the Appeal or Review etc. to be carried out in accordance with the provisions of the Acts in which they were instituted.

34. Section 231 of the U.P. Revenue Code, 2006 provides that the nature of pending cases to which this provision applies are appeal, revision, review or otherwise.

35. Section 6 of the U.P. General Clauses Act, 1904 also supports the said view. For ready reference of the provision of Section 6 of the U.P. General Clauses Act, 1904 is reproduced herein-below:

“Effect of repeal- Where any (Uttar Pradesh) Act repeals any enactment hitherto made or hereafter to be made,

then, unless a different intention appears, the repeal shall not-

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any remedy or any investigation or legal proceeding commenced before the repealing Act shall have come into operation in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid.”

36. The Sub-clause (e) of Section 6 very clearly provides that the repeal of an Act shall not affect any remedy, investigation or legal proceeding commenced before the repealing Act. Any such remedy may be enforced and any such investigation or legal proceeding may be constituted and concluded and any such penalty, forfeiture or punishment imposed will be considered as if the Repealing Act had not been passed. Simply put, if any legal remedy arises out of a proceeding under the Act of 1901, then, such legal proceeding will be governed by the Act of 1901 as if the Repealing code of 2006 had not been passed.

37. This Court in the case of **Anand Kumar Singh & Ors. v. State of U.P. & Ors. 2017 (6) ADJ 728** has held as under:

“20. Thus, if Section 231 of U.P. Revenue Code, 2006 saves the pending proceedings under the previous enactments, in my considered opinion, the remedies available under the whole enactment in respect of proceedings instituted before the subordinate revenue courts under previous enactments will also be saved.

21. The language employed under sections 230 and 231 of U.P. Revenue Code, 2006 suggests that it is not only the proceedings pending under the previous enactments on the date the Code came into operation that have been saved but other provisions of the previous enactments have also been saved including the provision containing judicial remedies, such as remedies available under sections 210 and 219 of U.P. Land Revenue Act and the remedies available under sections 331 and 333 of U.P.Z.A. and L.R. Act.”

38. As such, in the light of the provisions contained in Section 231 of U.P. Revenue Code, 2006 and also taking into account the provisions contained in Section 6 of the General Clauses Act, it is clear that the remedy as provided under Section 210 of U.P. Land Revenue Act will be available to person aggrieved against the order passed by the subordinate courts under U.P. Land Revenue Act, 1901 in the proceedings instituted before enforcement of U.P. Revenue Code, 2006, even if they are concluded after enforcement of U.P. Revenue Code, 2006.

39. In view of the above, the position that emerges is that the restoration proceeding

is covered within the word ‘otherwise’ as used in Section 231 of the U.P. Revenue Code, 2006. As such, the restoration application moved by the petitioner under the provisions of the old Act i.e. U.P. Land Revenue Act, 1901 was perfectly in accordance with law and the Tehsildar concerned has rightly entertained the same and passed the order dated 19.12.2022.

40. Learned counsel for the petitioner has raised another issue that the order dated 06.02.2023 passed by the Sub Divisional Officer under Section 35(2) of the U.P. Revenue Code, 2006 is without jurisdiction as he was not competent to entertain and decide the appeal under the provisions of Section 35(2) of the U.P. Revenue Code, 2006, whereas Section 210 of the U.P. Land Revenue Act, 1901, empowers the Collector to entertain the appeal.

41. The relevant portion of Section 210 of the U.P. Land Revenue Act, 1901 is quoted below:

“Courts to which appeals lie. -
[(1) Appeal shall lie under this Act as follows :]

(a) to the Record Officer from orders passed by any Assistant Record Officer;

[(b) (i) to the Commissioner from orders passed by a Collector or an Assistant Collector first class or Assistant Collector in charge of sub-division.

(ii) to the Collector from orders passed by an Assistant Collector second class or Tahsildar.]

*(c) [* * *]*

*(2) [* * *]*

(3) [* * *]

(4) [* * *]

(5) [* * *]

[(6) No appeal shall lie against an order passed under Sections 28, 33, [* * *], 39 or 40.]”

42. Sri Anshul Nigam, learned Standing Counsel appearing for the State has vehemently opposed this contention of the petitioner and submits that as per Section 223 of the U.P. Land Revenue Act, 1901, the State Government is empowered to delegate the powers and duties of the Collector to the Assistant Collector/Sub Divisional Officer of the concerned area. For that purpose, the State Government issued a notification being Notification No. U.O. 877/I/(104)/75-Ra-1 dated 24.01.1976 by which the State Government has empowered the Sub Divisional Officers/Assistant Collectors to perform the duties and power of the Collector in concerned Tehsil/area.

43. Section 223 of the U.P. Land Revenue Act, 1901 reads as under:

“Investment of Assistant Collector with powers of Collector. - The [State Government] may confer on any Assistant Collector of the first class all or any of the powers of a Collector; and all powers so conferred shall be exercised subject to the control of the Collector of the district.”

44. The learned Standing Counsel has placed the Notification No. U.O. 877/I/(104)/75-Ra-1 dated 24.01.1976 issued by the State Government. The relevant portion of the said Notification is quoted below:

“Under Section 223 of U.P. Land Revenue Act, 1901 (U.P. Act No. III of 1901), the State Government has empowered all the Assistant Collectors of First class incharge of sub-division to discharge the functions of collector under section 210 of the Act in areas in respect of which notifications have been issued.”

45. In view of the aforesaid position, the contention of the learned counsel for the petitioner that the Sub Divisional Officer was not competent to pass the order dated 06.02.2023, is not sustainable.

46. In the case of **Charan Singh v. State of U.P. & Ors. 2019 (6) ADJ 52**, a similar yet different question has been referred by a co-ordinate bench of this Court to a larger bench. The question framed by this Court is as follows:

“Whether when Section 231 of the Code specially states that only such proceedings which were pending before the commencement of the Code would be decided in accordance with provisions of the law passed in those proceedings be governed by the previous enactment i.e. the U.P. Zamindari Abolition and Land Reforms Act, 1950 or by the provisions of the U.P. Revenue Code, 2006.”

47. However, as the controversy in the present case does not relate to either appeal or revision and is restricted to the issue of whether the restoration proceedings would be considered as a pending or a fresh proceeding. As such, the question involved in the present case is different from the question involved in the case of Charan Singh (supra).

48. The next question that has been raised by the learned counsel for the

petitioner is that the learned Appellate Court has decided the appeal without framing the issues as is provided under Para 20 of the U.P. Revenue Court Manual, which reads as under:

“Framing of issues- (1) *Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other.*

(2) *Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant, must allege in order to constitute his defence.*

(3) *Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.*

(4) *Issues are of two kinds (a) issues of fact, and (b) issues of law.*

(5) *At the first hearing of suit the court shall after reading the plaint and the written statements, if any, after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appear to depend.*

(6) *Nothing in this rule requires the court to frame and record issues where the defendant at the first hearing of the suit makes no defence.”*

49. Sri Pankaj Kumar Gupta, Advocate has drew the attention of this Court to Section 225-A of the U.P. Revenue Code, 2006 that deals with the determination of questions in summary

proceedings which provides that all the questions arising for determination in any summary proceeding under this Code shall be decided upon affidavit in the prescribed manner.

50. For ready reference, Section 225-A of U.P. Revenue Code, 2006 is reproduced as under:

“225-A Determination of questions in summary proceeding.-

Notwithstanding anything contained in other provisions of this Code, all the questions arising for determination in any summary proceeding under this Code shall be decided upon affidavits, in the manner prescribed:

Provided that if Revenue Court or Revenue Officer is satisfied that the cross examination of any witness, who has filed affidavit, is necessary, it or he may direct to produce the witness for such cross examination.”

51. The mutation proceedings are proceedings of summary nature and as such it is not necessary for the court concerned to frame questions or issues and as such by not framing the issues, the court has committed no such illegality that vitiates the order. Any mutation proceeding does not determines the title of the parties and for that purpose, it is always open for the petitioner to approach the competent court for the determination of the title as is provided under Section 40-A of the U.P. Land Revenue Act, 1901.

52. In the case of **Jitendra Singh versus State of Madhya Pradesh; reported in 2021 0 Supreme (Sc) 487;** Hon'ble the Supreme Court of India has

been pleased to hold as under. For the sake of conveyance, paragraphs 5, 6 & 6.1 are reproduced as under:

“.....5. We have heard Shri Nishesh Sharma, learned Advocate appearing for the petitioner.

It is not in dispute that the dispute is with respect to mutation entry in the revenue records. The petitioner herein submitted an application to mutate his name on the basis of the alleged will dated 20.05.1998 executed by Smt. Ananti Bai. Even, according to the petitioner also, Smt. Ananti Bai died on 27.08.2011. From the record, it emerges that the application before the Nayab Tehsildar was made on 9.8.2011, i.e., before the death of Smt. Ananti Bai. It cannot be disputed that the right on the basis of the will can be claimed only after the death of the executant of the will. Even the will itself has been disputed. Be that as it may, as per the settled proposition of law, mutation entry does not confer any right, title or interest in favour of the person and the mutation entry in the revenue record is only for the fiscal purpose. As per the settled proposition of law, if there is any dispute with respect to the title and more particularly when the mutation entry is sought to be made on the basis of the will, the party who is claiming title/right on the basis of the will has to approach the appropriate civil court/court and get his rights crystalised and only thereafter on the basis of the decision before the civil court necessary mutation entry can be made.

6. Right from 1997, the law is very clear. In the case of Balwant Singh v. Daulat Singh (D) By Lrs., reported in (1997) 7 SCC 137, this Court had an occasion to consider the effect of mutation

and it is observed and held that mutation of property in revenue records neither creates nor extinguishes title to the property nor has it any presumptive value on title. Such entries are relevant only for the purpose of collecting land revenue. Similar view has been expressed in the series of decisions thereafter.

6.1 In the case of Suraj Bhan v. Financial Commissioner, (2007) 6 SCC 186, it is observed and held by this Court that an entry in revenue records does not confer title on a person whose name appears in record-of-rights. Entries in the revenue records or jamabandi have only “fiscal purpose”, i.e., payment of land revenue, and no ownership is conferred on the basis of such entries. It is further observed that so far as the title of the property is concerned, it can only be decided by a competent civil court. Similar view has been expressed in the cases of Suman Verma v. Union of India, (2004) 12 SCC 58; Faquddin v. Tajuddin (2008) 8 SCC 12; Rajinder Singh v. State of J&K, (2008) 9 SCC 368; Municipal Corporation, Aurangabad v. State of Maharashtra, (2015) 16 SCC 689; T. Ravi v. B. Chinna Narasimha, (2017) 7 SCC 342; Bhimabai Mahadeo Kambekar v. Arthur Import & Export Co., (2019) 3 SCC 191; Prahlad Pradhan v. Sonu Kumhar, (2019) 10 SCC 259; and Ajit Kaur v. Darshan Singh, (2019) 13 SCC 70.....”

53. In view of above, it is the settled proposition of law that if there is any dispute with respect to the title and more particularly when mutation entry is sought to be made on the basis of Will, party who is claiming title/right on the basis of the Will has to approach appropriate civil court/court and get his rights crystallised and only thereafter on the basis of the decision before civil court, necessary

mutation entry can be made. Mutation of property in revenue records neither creates nor extinguishes title to property nor has it any presumptive value on title. Such entries are relevant only for the purpose of collecting land revenue.

54. Learned Senior Advocate appearing for the respondents further submitted that the Tehsildar concerned, while passing the order dated 19.12.2022 has quoted Section 34/35 of the U.P. Revenue Code, 2006 in its order and as such it shall be presumed that he has passed the order under the provisions of the new Code i.e. U.P. Revenue Code, 2006.

55. The ancillary issue raised before this court that the Tehsildar concerned, while passing the order dated 19.12.2022 has quoted Section 34/35 of the U.P. Revenue Code, 2006 and as such it shall be presumed that he has passed the order under the provisions of the U.P. Revenue Code, 2006.

56. Learned counsel for the Petitioner has refuted the aforesaid argument of the counsel of the respondent, by stating that the mentioning of a wrong section will not vitiate the order because the authority has entertained the application under the old Act and as such the mentioning of a section of the new Act will not affect the nature of the proceedings.

57. The Hon'ble Apex Court in the case of *Isha Beevi & others versus Tax Recovery Officer and others AIR (1975) SC, 2135* has categorically propounded the law that citing of a wrong provision is not enough if the order to proceed actually there under another provision. Relevant portion of the judgment is quoted below:

“.....But, in order to substantiate a right to obtain a Writ of Prohibition from a High Court or from this Court, an applicant has to demonstrate total absence of jurisdiction to proceed on the part of the officer or authority complained against. It is not enough if a wrong Section or provision of law is cited in a notice or order if the power to proceed is actually there under another provision.”

58. In view of the above, it is clear that merely wrong mentioning of a provision cannot vitiate the order passed by the authority concerned in case where the jurisdiction otherwise exists in the same authority.

59. Therefore, the fact that the Tehsildar passed the order dated 19.12.2022 under the Section 34/35 of the Revenue Code, 2006 will not vitiate his authority just because of the reason that he has entertained the application bearing the provisions of the old Act. The mentioning of a section of the Act will not affect the nature of the proceedings.

60. The learned Sub Divisional Officer has committed an error in allowing the appeal by taking the technical ground of inordinate delay which is not reasonable in view of the law laid down by the Hon'ble Apex Court in the cases of **B.S. Sheshagiri Setty & Ors. v. State of Karnataka & Ors. (2016) 2 SCC 123** and **State of Punjab & Anr. v. Shamlal Murari & Anr. (1976) 1 SCC 719** wherein it has been observed that the courts must consider and decide the case in a manner that the substantial justice may not be sacrificed on the technical grounds.

61. It is the settled principles of law that when substantial justice and technical

8 All. Gorakhpur District Eye Relief Society, Eye Hospital, Gorakhpur & Anr. Vs. Asstt. Registrar, Firms, Societies & Chits, Gorakhpur & Ors.

considerations are pitted against each other, the way should be given to substantial justice. Further, the primary function of Court of law is to adjudicate and decide the matter between the parties on merits in order to settle their grievances.

62. The learned Commissioner, Moradabad Division, Moradabad (respondent no.2) has also not considered the above mentioned aspect of the case in the light of the law laid down by the Hon'ble Apex Court as well as the settled legal position as discussed above and has passed the impugned order dated 15.03.2023 in a mechanical manner. Hence, the impugned orders dated 06.02.2023 passed by the Sub Divisional Magistrate, Sambhal (respondent no.3) and order dated 15.03.2023 passed by the Commissioner, Moradabad Division, Moradabad (respondent no.2) are not sustainable in law and are accordingly quashed.

63. In view of the facts and reasons narrated above, I am of the opinion that the order of restoration dated 19.12.2022 passed by the Tehsildar Sambhal does not suffer from any illegality. The Tehsildar concerned has very rightly allowed the application for restoration with the direction to the office to restore the case to its original number and directed the parties to adduce their evidences before the court on the date fixed.

64. The writ petition is allowed with the direction to the Tehsildar, Sambhal, District Sambhal to consider and decide the Case No. 849/850/851 of 2005 in accordance with the provisions of Section 34/35 of the U.P. Land Revenue Act, 1901, after affording the opportunity of hearing to the parties concerned within a period of three months from the date of receipt of a certified copy of this order.

65. Till the aforesaid mutation proceeding pending before the Tehsildar concerned is finally concluded, the parties are directed to maintain status-quo in respect of the plots in question.

66. No order as to cost.

67. This Court appreciates the valuable assistance provided by the Sri Pankaj Kumar Gupta, Advocate, who extended his full co-operation to this Court during the course of hearing of this case.

(2023) 8 ILRA 1501
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.07.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Writ-C No. 16844 of 2000

Gorakhpur District Eye Relief Society, Eye Hospital, Gorakhpur & Anr. ...Petitioners
Versus

Asstt. Registrar, Firms, Societies & Chits, Gorakhpur & Ors. ...Respondents

Counsel for the Petitioner:

Sri Shesh Kumar, Sri Sapan Kumar Singh, Sri Shiv Kumar Singh Rajawat, Sri Ashok Khare

Counsel for the Respondents:

C.S.C., Sri Anoop Trivedi, Sri Ashok Trivedi

Civil Law - Societies Registration Act, 1860 - Section 4-A - Amendment in bye-laws - Only requirement is intimation to Registrar - Registrar cannot adjudicate upon merits - Registrar has limited power to examine validity of meeting, notice, quorum and majority - Petitioner (ex-Joint Secretary) had no authority under bye-laws to move or effect amendment -

Termination of petitioner upheld - Petition misconceived.

Held: The Assistant Registrar has limited jurisdiction under Section 4-A of the Societies Registration Act, 1860 - to verify if the meeting for amendment was validly convened, quorum met and resolution passed by required majority. He cannot adjudicate upon the merits of the amendment itself. However, in the present case, the petitioner (ex-Joint Secretary) had no authority under the bye-laws to convene the meeting or introduce amendments. Her status as Joint Secretary ceased upon her termination, which has been upheld by this Court. Thus, she lacked locus to maintain the petition.

Case Law Discussed:

1. Adhyaksha, Committee of Management, Sri Vimal Nath Digamber Jain Teerth Kshetra Vs Dy. Registrar, 2011 (1) ADJ 37 (NOC)
2. Allahabad High School Society Vs St. of U.P., 2011 (4) ADJ 887 (DB)
3. Liyakat Marquise Khan Vs Christ Church College Society, 2010 (8) ADJ 465 (DB)
4. Managing Committee, Khalsa Middle School Vs Mohinder Kaur, (1993) 4 SCC 26 (Supp)

Petition dismissed with costs.

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

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

2. This petition has been filed for quashing the order dated 25.02.2000 annexure no.18 to the writ petition passed by Deputy Registrar, Firms, Societies and Chits, Gorakhpur and also to issue direction to respondent no.1, Assistant Registrar, Firms, Societies and Chits, Gorakhpur to accept the amendment of the bye-laws as submitted by the petitioners and to file the same in his

office and to take all action in accordance therewith.

3. In brief, facts of the case are that originally the aforesaid society was registered on 04.11.1955 with Registration No.283/1955-56 i.e. annexure no.1 to the writ petition. Petitioner no.2 was a member of the general body of the society and was also its Joint Secretary. The society has been constituted with the objective of establishing, running and managing eye hospitals and it has established an eye hospital at Gorakhpur city. The society does not receive any grant-in-aid from the State Government. The society has been established by a group of persons seeking public interest including private individuals and also persons holding different public offices at the relevant point of time. Memorandum of association dated 27.07.1955 is annexed as annexure no.2 to the writ petition. The registration of the society has been renewed from time to time and has lastly been renewed on 20.02.1996 for a period of five years from 10.10.1995. The certificate of renewal is annexed as annexure no.3. The memorandum of association and the bye-laws of the society were amended in 1996 and the same have been filed in the office of Assistant Registrar concerned which is annexed as annexure no.4 to this writ petition. Under the bye-laws several officers were ex officio to the society. Such officers had neither been participating in the meeting of the general body/committee of management of the society nor taking any interest in any work of the society and the eye hospital run by it. On account of such facts, repeated difficulties were felt in the smooth management of the society and the eye hospital run by it.

4. In view of the aforesaid facts and circumstances, a meeting of the general body of the society was convened for

05.09.1999 by means of an agenda notice dated 22.07.1999 that is annexure-5 to the writ petition. In the meeting of the general body a decision was taken at item no.4 resolving that the office bearers of the society should be elected by the general body and for amending the bye-laws of the society for effectuating such purpose. It is annexure no.6 to the writ petition.

5. In view of that decision taken by the general body, a meeting of the executive committee was convened for 22.09.1999 by means of an agenda notice dated 06.09.1999. True copy of the agenda notice is annexure-7 to this writ petition. In the meeting of the executive committee held on 22.09.1999, the executive committee considered the proposal for amendment of the bye-laws in exercise of powers conferred under bye-laws no.24(5) read with clauses 25 and 29 of the bye-laws. The executive committee considered and approved the proposed amendments to the bye-laws and authorized the petitioner no.2 Joint Secretary, to undertake further proceeding in pursuance of such decision. True copy of the proceeding of the executive committee dated 22.09.1999 is at annexure-8 to the writ petition. By means of an agenda notice dated 23.09.1999, a meeting of the general body was convened for 08.10.1999 for considering the aforesaid amendments to the bye-laws. Copy of the agenda notice dated 23.09.1999 is annexed as annexure-9 to the petition.

6. In the meeting of the general body held on 08.10.1999, the proposed amendments were considered and approved and the petitioner no.2 was authorized for convening a further meeting of the general body for getting such proceeding confirmed. True copy of the proceeding of

the general body dated 08.10.1999 is annexed as annexure-10 to the petition. In accordance with the decision of the general body a meeting of the general body was again convened and held on 28.11.1999 by means of agenda notice dated 29.10.1999. True copy of the agenda notice dated 29.10.1999 is annexed as annexure-11. In the meeting of general body held on 28.11.1999 the amendments to the bye-laws were approved and the proceeding of the general body held on 08.10.1999 was confirmed. Proceeding of the general body dated 28.11.1999 is annexed as annexure no.12. It is necessary to bring on record the amendments accorded approval by the general body on the said date. True copy of the amendments to the bye-laws, as approved by the executive committee and its general body is annexed as annexure-13.

7. All the purpose pertaining to the aforesaid were tendered by the office of the Assistant Registrar by petitioner no.2 in the month of November, 1999 itself which were not accepted by the Assistant Registrar. The papers were again submitted alongwith the covering letter dated 12.12.1999 addressed to the Assistant Registrar which is annexed as annexure-14 to the writ petition but the Assistant Registrar has declined to take any action thereon. There does not exist any justification for refusal of the Assistant Registrar regarding approval of the amendment in the bye-laws which have been approved by the executive committee and also by the general body of the society.

8. It was repeatedly felt that all ex officio office bearers like District Magistrate and CDO etc. were unable to devote any time to the affairs of the society. Consequently, the functioning of the society was severely disrupted. Therefore, a

need of changing bye-laws of the society was felt. Even the then DM has openly stated that he may be relieved of his duties as the president of the society as he was unable to devote any time due to official commitments. A copy of the minutes of the said meeting is annexed as annexure-15 to the writ petition. The problem of the ex officio officer bearers, due to final commitments preventing them to attempt to the affairs of the society, further aggravated. The objection and aim of the existence/affirmation of the society were being defeated, as a result of this system of ex officio officer bearers. Communications were sent to the DM and other ex officio officer bearers, regarding amendments with their respective parts. The said letter is annexed as annexure no.16 to the writ petition. But no reply was sent by the District Magistrate and other ex officio office bearers to the said communication.

9. The Assistant Registrar, Firms, Societies and Chits, Gorakhpur is under pressure of the District Magistrate, Gorakhpur and is unable to decide the matter in an unbiased manner. Further he has already disclosed his mind on the said controversy. On account of the inaction on the part of the Assistant Registrar, petitioners were compelled to file Civil Misc. Writ Petition No.712 of 2000 with the prayer to issue order/direction to the respondent no.1 to accept the amendments in the bye-laws as approved by the general body within a specific period and also to issue an order and direction to the respondent no.1 to take all action pertaining to the society in question on the basis of the amended bye-laws, as approved by the general body.

10. The aforesaid writ petition was finally disposed of by Hon'ble Mr. Justice

R.S. Zaidi by means of judgment dated 07.01.2000. Its true copy is annexed as annexure-17 to the writ petition.

11. Certified copy of the judgment dated 07.01.2000 was filed before the Assistant Registrar. Acting on the basis thereof the Deputy Registrar has proceeded to pass an order dated 25.02.2000 rejecting the amendment in bye-laws which is annexed as annexure-18 to the writ petition.

12. Under Section 4-A of the Societies Registration Act, 1860 (for short 'the Act') an alteration in the rules of the societies only required to be intimated to the Registrar within 30 days of the alteration. Such an intimation has already been effected with regard to the alteration effected in the rules, as detailed above. The amendment so notified to the Assistant Registrar are required to be accepted by him. The Assistant Registrar has no power under the Act to accept the amendments to the rules of the societies. Rejection order rejecting the amendment in the bye-laws is totally unauthorized and without jurisdiction. The only power conferred upon the Assistant Registrar with regard to amendments is with regard to alteration in the name of the society or in the objects of the society. Apart from the aforesaid, the Assistant Registrar has not been conferred with any other power pertaining to the amendments in the bye-laws/rules of the society.

13. The Assistant Registrar has been conferred power to see that the amendments have been made in accordance with the provisions of the Act. He cannot withhold alteration affected in accordance with the Act. Under the original bye-laws, the District Magistrate was the ex officio President and the CDO was the ex officio

Secretary of the society. Because both the officers were office bearers of the society, the Assistant Registrar was not taking any action on the basis of the amendments. Since it is a private society, the District Magistrate and CDO cannot dictate the constitution of the society. The impugned order is the result of the influence exercised by both the officers. The impugned order is misconceived. The power of the general body of the society cannot be curtailed in any manner.

14. The Deputy Registrar had committed error in holding that petitioner no.2 was not authorized to convene the meeting in which the decision for amending the bye-laws had been taken as it was the meeting convened on requisition on the request of several members of general body. The petitioner was holding the office of Joint Secretary and was duty bound to convene requisition meeting of the general body. The impugned order is violative of Article 14 of the Constitution of India. The petitioners have no other equally efficacious remedy, hence this writ petition has been preferred.

15. All the documents referred, have been annexed with the petition.

16. A counter affidavit has been filed on behalf of respondent no.1, Assistant Registrar Firms, Societies and Chits, Gorakhpur that the society runs in accordance with law without any difficulty. It is incorrect that there is difficulty in running the hospital due to the presence of *ex officio* officers. There was no justification for sending the agenda by the Joint Secretary acting as the Secretary. Therefore, the Joint Secretary acted beyond her jurisdiction. The notice dated 05.09.1999 issued by Dr. Manorama Singh

Agarwal was illegal and has been sent by her in defiance of her rights. She had no right to call for the meeting unless it is approved by the President and Secretary for which she had not been authorized. Since the proceeding was not in accordance with the regulation, therefore, it was not registered. The authority to take action under the relevant sections of the regulation is vested in *ex officio* President/Secretary. In this regard sufficient information has been given by the office of the respondent vide letter no.3518 dated 08.02.2000. In compliance of the Hon'ble Court's order dated 07.01.2000 the order no.2785/dated 25.02.2000 has been communicated to Dr. Manorama Singh Agarwal. It is nowhere prescribed that if any amendment is sent, it would be deemed to be permitted automatically within thirty days. The petitioners have no right to tamper with the arrangements of the organization. Petitioner no.2 can only maintain and operate the hospital run by the institution. The act done by petitioner no.2 was only to fulfil her vested interest so that she could dominate the hospital run by the institution. No such resolution has been passed by the office bearers/members of the society. It is wrong to say that under the influence of District Magistrate and CDO, the respondent no.1 had passed the order but since the proposed amendment was neither presented in the executive nor in general body, hence the proposed amendment was rejected. Since the petitioner no.2 was the Medical Superintendent of the Hospital and there is provision that the Hospital Superintendent would be the Joint Secretary, therefore, she can only look after the hospital arrangements. She had no right to make amendment in the arrangements of the organization by increasing unauthorized person. Hence, the petition be dismissed.

17. Sri Raees Ahmad, the then Assistant Registrar, Firms, Society and Chits, Gorakhpur filed a supplementary counter affidavit in which he has repeated the previous version of the counter affidavit and has said that the impugned order was passed in accordance with law and the meeting held by Dr. Manorama Singh had been cancelled by the District Magistrate. He has also annexed the bye-laws of the committee from which it is very much clear that the Joint Secretary has no right to make an amendment in the bye-laws of the society.

18. On behalf of respondent no.3, CDO, Gorakhpur, a counter affidavit has been filed by Sri Nand Kishor Singh by which the allegations have been denied and it has been said that petitioner no.2 is an employee on the post of Medical Superintendent, Eye Hospital, Gorakhpur. She has an arbitrary and callous manner of working. There were several complaints against her work and conduct. CMO, Gorakhpur who happens to be the Vice President of the society held an inquiry against her. All the documents were in her possession but she declined to furnish the same. A report regarding misconduct and misbehaviour of petitioner no.2 submitted by CDO/Secretary has been annexed as annexure no.CA-1. When the authorities started taking stringent action in accordance with the bye-laws of the society, she came out in open deficiency and started acting being prejudicial and against the aim, object and interest of the society. According to clause-9 of the bye-laws, the Secretary would be the Chief Executive Officer of the society to control and manage all other works and only he can institute/initiate legal action on behalf of the society. The petitioner no.2 is merely an employee and ex officio Joint Secretary

who is not authorized for instituting and conducting any legal proceeding for or on behalf of the society. The CDO, Gorakhpur/Secretary wrote a letter to District Magistrate, Gorakhpur/President regarding misconduct and irregularities committed by petitioner no.2 which is annexed as annexure no.CA-2. The executive committee had also written a letter (annexure CA-3) for taking action against petitioner no.2 to the District Magistrate/President. The President and Secretary started initiation of inquiry and SDM, Sadar, Gorakhpur was directed to hold a preliminary inquiry who happens to be a member of the executive committee which is annexed as annexure no.CA-4. The SDM concerned submitted preliminary inquiry report dated 06.11.1999 i.e. annexure no.CA-5 and recommended suspension of petitioner no.2 after finding her guilty for various irregularities and misconduct. In a meeting dated 13.12.1999, the executive committee recommended suspension of petitioner no.2 (annexure CA-6). Thereafter petitioner no.2 was suspended vide order dated 23.12.1999 which is annexure no.CA-7. The CMO, as inquiry officer, served a charge sheet on the petitioner on 16.02.2000 which is annexure no.CA-8. The report of CMO is annexure no.CA-9 in which he recommended termination of the petitioner no.2 from the service. In this regard a letter annexure no.CA-10 was written by the Secretary to District Magistrate, Gorakhpur on 23.06.2000 to convene a meeting of the executive committee to consider the recommendations of the inquiry officer which was held on 07.07.2000. The minutes of the meeting is annexure no.CA-11. In this meeting a sub-committee was constituted to consider the report of CMO who submitted its report of 11.07.2000 and gave a finding that the report of the inquiry

officer was correct and the executive committee should take proper action against the petitioner no.2. It is annexure no.CA-12. On 17.07.2000 a meeting of the executive committee was held under the presidentship of District Magistrate, Gorakhpur in which the executive committee considered the report of the inquiry officer and the sub-committee and unanimously resolved that it is not in the interest of society to allow petitioner no.2 to remain on the post of Medical Superintendent. The minutes of the meeting are annexed as annexure no.CA-13. In pursuance of the resolution dated 17.07.2000, a final notice was served upon the petitioner on 14.08.2000 which is annexure no.CA-14. It appears that the petitioners concocted and fabricated few documents purporting to have been related to some imaginary meetings and tried to change the entire basic fabrication and fundamental features of the society. She attempted that no ex officio member should remain as an office bearer in the said society so that there may not be any control over the misdeeds of petitioner no.2. Even if it is assumed that any such meeting was held, the same is not tenable in law in view of clause 25 of the bye-laws.

19. The documents referred in the counter affidavit are on record in the said affidavit.

20. Two supplementary counter affidavits have been filed stating therein that the writ petition is not maintainable as the petitioner no.2, Dr. Manorama Singh Agarwal has no authority to file the writ petition more so the status and capacity of petitioner no.2 has ceased to exist when she was dismissed from services as medical superintendent of the hospital vide order 04.12.2004 passed by District Magistrate,

Gorakhpur as *ex officio* President of the society and she has also crossed the age of superannuation on 02.07.2006 since she was born on 02.07.1946. Even then she has not vacated the official bungalow in spite of several notices. Dr. Manorama Singh Agarwal had filed this petition in the capacity of Joint Secretary of the society, hence the same has become infructuous as the society is running as usual, she has no legal authority to pursue or prosecute the present petition after her superannuation on 02.07.2006. She was the Joint Secretary of the society being the Medical Superintendent of the Hospital as per bye-laws but after dismissal from service on 04.12.2004 she has lost the status of Joint Secretary of the society. The dismissal order was challenged in Writ Petition No.28159 of 2005 in which no interim stay order was granted and the same has been dismissed on merit vide judgment dated 17.08.2016. The amendment was rejected on the ground that under the bye-laws the Joint Secretary was not empowered to bring such amendments and more so it was not approved by the District Magistrate and CDO in the capacity of ex officio President and Secretary. The aforesaid judgment, registration certificate, bye-laws, registration renewal certificate, date of birth certificate of Dr. Manorama Singh and letters issued by CDO/Secretary of the society have been annexed with the petition.

21. The petitioner no.2 has filed rejoinder affidavit, one supplementary rejoinder affidavit, and two supplementary affidavits in which she has reiterated the version of the petition. No new facts have been brought in the knowledge of the Court. The petitioner no.2 could not counter that there is any provision under which a Joint Secretary can move an

amendment and she had not been suspended and terminated from the post of Hospital Superintendent, that she has not attained the age of superannuation and that her termination has not been upheld from this Court.

22. Learned counsel for the petitioners has relied on the judgment in **Adhyaksha, Committee of Management, Sri Vimal Nath Digamber Jain, Teerth Kshetra Committee, Kampil, Farrukhabad and another Vs. Dy. Registrar, Firms Societies and Chits, Kanpur Mandal, Kanpur and another, 2011 (1) ADJ 37 (NOC)** in which the learned Single Judge of this Court held that there is no need of registration of amendment by the Registrar. It takes effect in registered bye-laws on intimation of amendment carried out in the rules of the society. If such formality is completed, no further action is necessary. If any person disputes the resolution passed for the said purpose, he has remedy to file civil suit.

23. In **Allahabad High School Society and others Vs. State of UP and others, 2011 (4) ADJ 887 (DB)** this Court has referred the judgment of **Prabha Shanker Mishra and others Vs. State of UP and others, 2009 (77) ALR 713** in which it has been held that any amendment made by the society in rules or bye-laws, the only requirement is that its intimation is given to the Registrar and the said provision did not give any power to the Registrar to adjudicate or decide the objections with regard to the said amendment in the rules or regulation of the society.

24. Further, the Court has referred the precedent of **Liyakat Marquise Khan Vs. Christ Church College Society, Kanpur**

and others, 2010 (8) ADJ 465 (DB) in which it has been held that Section 4-A of the Societies Registration Act, 1860 (for short 'the Act') does not require any adjudication on the part of the Registrar and the only requirement under the said provision was to bring to the notice of the Registrar the amendment in the rules.

25. In this regard some more judicial precedents are also relevant which propound a balanced view with regard to Section 4-A of the Act. In **Managing Committee, Khalsa Middle School Vs. Mohinder Kaur, (1993) 4 SCC 26 (Supp)** the Apex Court has held that the only power vested in the Registrar under Section 4-A of the Act was to examine the fact as to whether the meeting of the society had been validly held in accordance with the provisions of the Act and the rules of the society. Only scope of this aspect could be to make factual verification as to whether the meeting was validly convened, due notice was given, quorum was completed and it was passed by the required majority. Beyond that the Assistant Registrar could not go into the question of the merits of the amendments and adjudicate upon the same while exercising powers vested under Section 4-A of the Act.

26. In **Allahabad High School Society (supra)** the Division Bench has also held that under Section 4-A of the Act the Registrar can examine as to whether the meeting for amending the rules of the society had been validly convened or not. In **Liyakat Marquise Khan (supra)** it has been held that under Section 4-A of the Act, the Registrar will have the power to examine whether amendments of the bye-laws forwarded to him are from the list of the office bearers taken on record under Section 4 of the Act and at the time of

renewal, to examine whether the amendments are such that renewal has to be granted.

27. From the above judicial precedents, it comes out that the Registrar is not a silent spectator. At least he has to see and examine as to whether the meeting of the society had been validly held in accordance with the provisions of the Act and the rules of the Society. He shall see that the meeting was validly convened, due notice was given, quorum was completed and the amendment was passed by the required majority or not.

28. From the above discussion, it has been established that the petitioner no.2 had no right to sue. She had no right to introduce an amendment in the bye-laws. She is no longer Medical Superintendent of the Hospital and she had been suspended and terminated in accordance with law which has been confirmed by this Court. If it is accepted that she is a life member of the society even then she had no right to move the amendment in bye-laws, therefore, the proposed amendment was rightly declined by the Registrar. She has no power or right to sue, institute and maintain this petition.

29. On over all discussion, this Court is of the view that the petition is totally misconceived and is liable to be dismissed.

30. Accordingly, this writ petition is **dismissed** with costs.

(2023) 8 ILRA 1509
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.07.2023

BEFORE

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

Writ-C No. 20980 of 2023

Rookame Alam **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
 Sri Zafar Abbas, Sri Imtiaz Husain

Counsel for the Respondents:
 C.S.C., Sri Pradeep Kumar Rai, Sri Prajyot Rai, Sri Rakesh Kumar Verma

Held – Order of recount of votes passed by the Prescribed Authority/Sub-Divisional Magistrate without recording evidence or deciding framed issues - violates Rule 4 of U.P. Panchayat Raj (Settlement of Election Disputes) Rules, 1994 - Recounting cannot be ordered on vague and bald allegations - Secrecy of ballot is sacrosanct - Procedure akin to trial under CPC must be followed - Impugned order quashed with direction to decide the election petition afresh within two months.

Key Case Laws Referred:

1. Bhabhi Vs Sheo Govind AIR 1975 SC 2217
2. Ram Sewak Yadav Vs Hussain Kamil Kidwai AIR 1964 SC 1249
3. Ram Adhar Singh Vs District Judge, Ghazipur 1985 UPLBEC 317
4. Dhani Prasad Vs SDO 1974 All LJ 371
5. Mohd. Mustafa Vs U.P. Ziladhikari 2007 (7) ADJ 1
6. Abrar Vs St. of U.P. 2004 (5) AWC 4088
7. Dharmawati Vs St. of U.P. & ors. Writ-C No. 14662 of 2023
8. Smt. Maneeta Devi Vs St. of U.P. Writ-C No. 10442 of 2022

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

1. Heard Mr. Zafar Abbas and Mr. Imtiaz Husain, learned counsel for the petitioner and Mr. Pradeep Kumar Rai, learned counsel for the respondent no.3 and Mr. Aseem Mukherjee, learned Standing Counsel for the State-respondents.

2. This writ petition has been filed by the petitioner with a prayer to quash the order dated 20.06.2023 passed by the Prescribed Authority/Sub-Divisional Magistrate, Bilari in Election Petition No.T202113540205476 of 2021 (Javed vs. Rookame Alam and others), under Sections 13-C of Panchayat Raj Act, 1947 whereby it was ordered for recounting of votes in the election held in the year 2021 of Gram Panchayat in Gram Lalpur Gangwari, Block Kundarki, Tehsil-Bilari, Moradabad and further prayer to direct the respondent no.2 not to take any further step for recounting in pursuance of order dated 20.06.2023.

Brief facts:

3. Brief facts of the case are that:-

i) The petitioner and respondent no.3; Javed contested the elections for the post of Pradhan in gram panchayat Lalpur Gangwari. Polling took place on 26.04.2021 whereby after counting, the petitioner was declared as winning candidate with the margin of 04 votes from the runner up candidate; Javed.

ii) The respondent no.3, who was defeated by margin of 04 votes, preferred election petition under Section 12(c) of Uttar Pradesh Panchayat Raj Act, 1947 (hereinafter referred to as "the Act, 1947")

on 01.07.2021 stating therein that at the time of counting, Dr. Minzar s/o Abrar, Bhura s/o Yusuf and Alam s/o Nanhe colluded with the petitioner and seven ballots votes cast in favour of respondent no.3; Javed were declared invalid and one vote was kept in other category. Despite objection being raised by respondent no.3; Javed before Assistant Returning Officer/Returning Officer, nothing was done.

iii) In the aforesaid election petition, the notices were issued to the other parties and on 19.05.2023, the said election petition was dismissed by Prescribed Authority/Sub Divisional Magistrate for want of prosecution. Thereafter, on 26.05.2022, the respondent no.3 filed recall application and by order dated 01.07.2022, the order dated 19.05.2022 was recalled and the matter was fixed for 21.07.2022 directing the petitioner (respondent in election petition) to file written statement before the court below.

iv) The petitioner has filed his written statement on 14.12.2022 to which rejoinder has been filed on 06.02.2023 by respondent no.3, thereafter, date was fixed for framing of issues. On 31.05.2022, the S.D.M. Bilari has framed nine issues and closed the opportunity for producing the evidence and fixed the matter for final hearing on 07.06.2023.

v) subsequently, without providing an opportunity to the parties to appear for the statement and cross examination, the impugned order dated 20.06.2023 has been passed directing for recounting of votes. Hence the present writ petition has been filed.

Preliminary objection:

4. Learned counsel for the respondent no.3 has raised preliminary objection regarding maintainability of writ petition on the ground that against the order dated 20.06.2023 directing for recounting of votes, the petitioner had statutory remedy of filing a revision under Section 12-C (6) of the Act, 1947, therefore the writ petition is not maintainable. In support of his contention, he has relied upon the judgement of the Co-ordinate Bench of this Court in the case of **Smt. Maneeta Devi vs. State of U.P. and 8 others** decided on 13.04.2022 passed in Writ-C No.10442 of 2022.

5. Answering the aforesaid preliminary objection, learned counsel for the petitioner, placing reliance upon the judgment of this Court in the case of **Mohd. Mustafa vs. U.P. Ziladhikari, Phoolpur, Azamgarh and others** reported in 2007 (7) ADJ 1, submits that the writ petition against the interlocutory order of recount of votes passed by the Presiding Officer, is maintainable.

6. Considering the preliminary objection, this Court has carefully perused the judgements of the Division Bench of this Court in the cases of **Mohd. Mustafa vs. U.P. Ziladhikari, Phoolpur, Azamgarh and others** reported in 2007 (7) ADJ 1, and **Abrar vs. State of U.P. and others** reported in 2004 (5) AWC 4088 and found that the facts of the present case are similar, therefore, preliminary objection is refused by holding that no revision lies against an order of recount of votes passed by the Prescribed Authority, therefore, the present writ petition is maintainable.

Submission on merits;

7. Learned counsel for the petitioner submits that the impugned order for

recounting has been challenged on the ground that every election petition has to be tried by the Sub Divisional Officer following the procedure applicable under the Code of Civil Procedure, 1908 (hereinafter referred as “C.P.C.”2). The Presiding Officer proceeded in a hurried manner to decide the election petition without adopting the legal procedure, which has to be followed.

8. The Prescribed Authority has framed nine issues, however, without taking any evidence, has closed the opportunity of providing evidence and fixed the case for final hearing. Though issues have been framed, but no findings with respect to the same has been recorded and that to without providing opportunity to the parties to appear for the statements and cross-examinations, which is against the provision of the C.P.C., which has to be followed while deciding the election petition.

9. He further submits that though the respondent no.3 has taken an objection with respect to collusion of the counting agents, declaring 7 ballot votes cast in favour of the respondent no.3 as invalid, but no findings in this regard has been recorded while passing the impugned order. Only vague and false allegation have been made in the election petition, there being no evidence of either oral or documentary in support thereof.

10. The Prescribed Authority, on the basis of complaint and evidence adduced by the petitioner in the election petition (respondent no.3 herein) has recorded that there is difference of 4 votes between the petitioner and respondent no.3 and has passed the impugned order directing for recounting, which cannot be sustained in the eye of law.

11. He further submits that impugned order is ex facie illegal and arbitrary and based on non-application of mind. Sub-Divisional Magistrate has committed manifest error of law by passing order of recounting of votes particularly when no details or any particular with regard to allegations as levelled in plaint has been provided by election petitioner. The assertion made in election petition was absolutely vague, baseless, bald and scandalous and lacking material facts and particulars which are essential for seeking any relief in election petition. Placing reliance on the Full Bench judgment of this Court in the case of ***Ram Adhar Singh vs. District Judge and others***, reported in ***1985 AWC 246***, he submits that before an authority hearing election petition under Act, 1947 can be permitted to look into or to direct inspection of ballot papers except when following two conditions must co-exist:-

"(1) that the petition for setting aside an election contains the grounds on which the election of the Respondent is being questioned as also the summary of the circumstances alleged to justify the election being questioned on such ground; and

(2) the authority is, prima facie, satisfied on the basis of the materials produced before it that there is ground for believing the existence of such ground and that making of such an inspection is imperatively necessary for deciding the dispute and for doing complete justice between the parties."

12. Placing reliance upon the judgment of this Court in the case of ***Dharmawati vs. State of U.P. and 13 others*** decided on 01.05.2023 passed in

Writ-C No.14662 of 2023, learned counsel for the petitioner submits that the secrecy of ballot has to be maintained and order of recount cannot be passed as a matter of choice of the parties and it requires a very critical analysis of the material placed and in accordance with the procedure prescribed for deciding election disputes.

13. Learned counsel for the petitioner further submits that during the proceedings of election petition filed by the respondent no.3, nine issues were framed, however, the order impugned has been passed without deciding even a single issue. He further submits that only the averments contained in the election petition has been dealt with and no finding has been recorded with respect to specific averment made in para 8&9 of the election petition.

14. He further submits that there is no written complaint before the Review Officer or Assistant Review Officer regarding allegation as made against the recounting agents with respect to collusion with the petitioner.

15. On the cumulative strength of the aforesaid submissions, it is submitted by learned counsel for the petitioner that the impugned order dated 20.06.2023 for recounting of votes may be quashed by this Court.

Submission on behalf of the respondents;

16. On the other hand, learned Standing Counsel as well as learned counsel for the respondent no.3 has opposed the submission made by the learned counsel for the petitioner and submitted that nine issues have been framed and after analysing the specific

averments made in para 9 & 10 of the election petition wherein it was mentioned that 7 valid votes cast in favour of the petitioner were declared invalid in collusion with the counting agents, i.e. Dr. Minzar s/o Abrar, Bhura s/o Yusuf and Alam s/o Nanhe, the impugned order of recounting has been passed, hence there is no illegality in the aforesaid order.

17. In support of his contention, learned counsel for the respondent no.3 has relied upon the judgments of the Apex Court in the cases of *Pawan Singh vs. Presiding Officer/S.D.M., Kunda and others*; reported in *2014 SCC OnLine All 15946*, *Harmaya vs. State of U.P. and others*; reported in *2017 SCC Online All 3332*, *Athar Hussain vs. Razda Begum and others*; reported in *2017 SCC Online All 3216* and *Amar Chandra vs. State of U.P. and others*; reported in *2019 (1) ADJ 750*.

18. He further submits that the objection as raised by the respondent no.3 was not considered by the Prescribed Officer and the same was ignored. On the basis of pleadings and written statement, five issues were framed on 31.05.2023. Thus after considering the aforesaid pleadings, the impugned order has been passed. Therefore, no illegality, infirmity or perversity is found in the impugned order, hence no interference is required by this Court.

Observation of the Court;

With the consent of learned counsel for the parties, this writ petition is being finally decided at this stage without calling for a counter affidavit.

19. I have heard learned counsel for the petitioner and learned Standing Counsel and perused the records.

20. This Court finds that Rule 4 of the U.P. Panchayat Raj Act (Settlement of Election Disputes) Rules, 19943 clearly provides that subject to the provisions of the Act and these Rules, every election petition shall be tried by the Sub Divisional Officer, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 for the trial of suits.

21. In view of the above, the election petition has to be tried in the same manner as a civil suit is tried by the civil court, i.e. to say that apart from the pleadings of the parties, issues have to be framed, documentary evidence has to be laid, statements of witnesses have to be recorded, they have to be cross-examined, and only thereafter, after recording findings on all the issues, either separately or jointly, the election petition can be decided.

22. In the present case, the procedure prescribed in Rule 4 has been violated and despite the fact that 9 issues were framed during the course of the trial of election petition, none of the said issues has been decided and, directly, an order of recount of votes has been passed.

23. It is well settled in catena of decisions of this Court as well as the Apex Court that the secrecy of ballot has to be maintained and order of recount cannot be passed as a matter of choice of the parties and it requires a very critical analysis of the material placed and in accordance with the procedure prescribed for deciding election disputes.

24. In the judgment of Apex Court in the case of **Bhabhi vs. Sheo Govind** while considering the scope of Section 100 (1)(d), 101, 102, 92 and the conduct of election Rules, 1963, the Apex Court has laid down certain guidelines, which were imperative:-

(1) *That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;*

(2) *That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be Supported by adequate statements of material facts;*

(3) *The Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount ;*

(4) *That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties;*

(5) *That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void; and*

(6) *That on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a recount, and not for the purpose of fishing out materials."*

25. In the judgement of this Court in the case of **Dhani Prasad vs. Sub-Divisional Officer, reported in 1974 All LJ 371** while considering the question of inspection an election petition; under Section 12-C of the U.P. Panchayat Raj Act, held that:—

"Once a ballot paper is accepted by the Returning Officer containing the valid, vote: in favour of the returned candidate there is presumption that the ballot paper contained valid vote. The Election Tribunal is not entitled to interfere with the decision of the Returning Officer unless evidence is produced before it to show that the Returning Officer failed to comply with the provisions of Rule 21(m) of the U.P. Panchayat Raj Act, presumption of correctness of acceptance or rejection of ballot paper by the Returning Officer cannot be questioned unless evidence is produced that the Tribunal is satisfied that the Returning Officer failed to comply with, the provisions of the Act and the Rules in counting the ballot papers. The Election Tribunal has no jurisdiction to order recount or general scrutiny of the entire ballot papers on mere general allegations. An election petitioner is required to make out a prima facie case leading evidence and the Tribunal has to satisfy itself on the evidence produced before it that a prima facie case is made out for inspection or general scrutiny of the ballot papers. In the absence of any such evidence or satisfaction by the Tribunal no order for general inspection or scrutiny of the ballot paper is permissible under law."

26. The Court has relied upon the earlier decisions of the Supreme Court reported in the case of **AIR 1964 SC 1249: 1964 All LJ 569, Ram Sewak Yadav vs. Hussain Kamil Kidwai, AIR 1966 SC 773,**

Dr. Jagjit Singh vs. Giani Kartar Singh, (1969) 2 SCC 433: AIR 1970 SC 276, Jitendra Bahadur Singh vs. Krishna Bihari, and (1973) 3 SCC 330 : AIR 1973 SC 215, Sumitra Devi v. Shri Sheo Shanker Prasad Yadav.

27. This issue stands finally settled by a judgment of Full Bench of this Court in the case of ***Ram Adhar Singh vs. District Judge, Ghazipur***, reported in 1985 UPLBEC 317 : 1985 All LJ 615, wherein it has been held at page 326 of UPLBEC:—

“Before an authority hearing the election under the said Act can be permitted to look into to direct inspection of the ballot papers following two conditions must co-exist;

(1) that the petition for setting aside an election contains the ground on which the election on the respondent is being questioned as also summary of the circumstances alleged to justify the election being questioned on such ground; and

(2) the authority is, prima facie, satisfied on the basis of the materials produced before it that there is ground for believing the existence of such ground and that making of Such an inspection is imperatively necessary, for deciding the dispute for doing complete justice between the parties.”

28. It is settled that order of recounting cannot be passed only for the sake of it and on the basis of vague allegation without specifying any particular irregularity in counting as well as how it would affect election result materially. In the present case, in the body of election petition, vague assertions have been made regarding illegal rejection of valid votes

which are not substantiated either in examination of election petitioner or otherwise on the basis of record available. Parties have to take proper pleadings by adducing evidence that by particular irregularity or illegality, result of election has been materially affected. There is no dispute to the settled legal proposition that as a rule, relief not founded in pleadings should not be granted. The judgments relied upon by the learned counsel for the petitioner are clearly distinguishable in the facts of the present case.

29. To be more specific, this Court feels, it is well settled that it is important to maintain secrecy of ballot which is sacrosanct and it should not be allowed to be violated on frivolous, vague and indefinite allegations and before inspection is allowed, the allegations made against elected candidate must be clear and specific and must be supported by adequate statements of material facts (See, *Bhabhi vs. Sheo Govind and others*, AIR 1975 SC 2217 and *Ram Sewak Yadav vs. Hussain Kamil Kidwai and others*, AIR 1964 SC 1249). The discretion conferred on Courts should be not exercised in such a way so as to enable election petitioner to indulge in a roving enquiry in order to fish out materials for declaring election to be void.

30. In the present case, the Prescribed Authority/Sub-Divisional Magistrate has exercised its jurisdiction of recounting only on the basis of roving inquiry without substantial ground or evidence on record. Conclusions arrived by Sub-Divisional Magistrate are based on vague submissions and without any substantial material produced by the election petitioner (respondent no.3 herein), therefore, the order impugned suffers from illegality and liable to be set aside.

Counsel for the Respondents:
C.S.C., Sri Piyush Bhargava

Civil Law - Industrial Disputes Act, 1947 - Section 4-K & 2-A – Reference -Powers of Labour Authorities - Held, as per Notification dated 29.08.1990, only the Deputy Labour Commissioner, Agra Region was competent to make reference - Reference made by Assistant Labour Commissioner held to be without jurisdiction - Tribunal rightly dismissed reference on that ground.

Unfair Labour Practices - Claim of continuous short-term engagement intended to avoid status of permanent workman - Such plea beyond scope of reference which was confined to legality of termination - No material to show employment of multiple workmen in identical fashion to attract Entry No.10 of 5th Schedule - Appointment letters clearly stipulated automatic termination on specific date - Held, mere temporary employment or artificial breaks not sufficient to prove 'unfair labour practice' unless collective intent and continuity established. Precedents - Bombay High Court judgment in *Shankar Bhimrao Kadam & ors. Vs Tata Motors Ltd.* not applicable - Distinguished on facts - Also not binding as Supreme Court dismissed SLP keeping question of law open. Conclusion - Reference made without jurisdiction - Even on merits, claim of unfair labour practices not established - Petition dismissed.

34. Office is directed to give a copy of this order to learned Chief Standing Counsel, who shall communicate this order forthwith to the respondent no.2, i.e. Prescribed Authority/ Sub-Divisional Magistrate, Bilari for compliance.

(2023) 8 ILRA 1516
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA. J.

Writ-C No. 30049 of 2016
With
Writ C No. 30052 of 2016

Dinesh Pal Singh ...Petitioner
Versus
Presiding Officer, Industrial Tribunal, Agra
& Ors. ...Respondents

Counsel for the Petitioner:

Sri Vijay Krishna Agnihotri, Sri Shikhar Kaushal

Held : The reference made under Section 4-K of the U.P. Industrial Disputes Act, 1947 by the Assistant Labour Commissioner, who was not the competent authority as per the Notification dated 29.08.1990 (only Deputy Labour Commissioner was authorized), was without jurisdiction - Tribunal rightly refused to adjudicate the dispute. The claim that fixed-term employment was a camouflage to deny permanent status falls outside the scope of the reference, which was limited to the legality of termination. The Labour Court/Tribunal cannot travel beyond the reference. There was no sufficient material to prove that unfair labour

practices as defined in Item No. 10 of the Fifth Schedule of the Industrial Disputes Act, 1947, were adopted by the employer. Mere issuance of fixed-term appointment letters does not automatically establish unfair labour practices unless supported by collective evidence and continuity. The decision of the Bombay High Court in *Shankar Bhimrao Kadam* was factually distinguishable and not binding, especially since the Supreme Court dismissed the SLP against it keeping the question of law open. The Tribunal's award dismissing the reference was found legal and valid. The writ petition lacks merit and was accordingly dismissed.

Important Cases Referred:

1. M/S Heinz India Pvt. Ltd. Vs Presiding Officer, Industrial Tribunal & anr., Writ-C No. 52182 of 2011
2. Shankar Bhimrao Kadam Vs Tata Motors Ltd., W.P. No. 5588 of 2017 (Bom HC)
3. Bhuvnesh Kumar Dwivedi Vs Hindalco Industries Ltd. (2014) 11 SCC 85
4. Mukund Ltd. Vs Mukund Staff and Officers' Association, (2004) 10 SCC 46
5. Tata Iron and Steel Co. Ltd. Vs St. of Jharkhand, (2014) 1 SCC 536
6. Hindustan Lever Ltd. Vs Industrial Tribunal IV, New Agra, 2007 (115) FLR 76
7. Bajaj Auto Ltd. Vs R.P. Sawant, 2000 (84) FLR 524

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Arguments in Writ-C No.30049 of 2016 were heard and judgment was reserved on 16.05.2023, whereas arguments in Writ-C No.30052 of 2016 were heard on 18.05.2023 and the judgment was reserved on the same day noting the fact that the controversy involved in the writ petition heard later was identical to the writ petition heard earlier.

2. Both the learned counsel jointly agree that exactly identical questions are involved in both the writ petitions and even the notes and case law supplied by both the learned counsel, according to them, would cover controversy of both the cases. Therefore, both the writ petitions are being decided by a common judgment. For the sake of convenience, Writ-C No.30049 of 2016 is being treated as the leading case.

3. This petition has been filed challenging the impugned award dated 10.09.2015, published on the notice board on 05.05.2016 passed by the Presiding Officer, Industrial Tribunal (4), U.P., Agra with a further prayer in the nature of mandamus commanding the respondent no.3 to reinstate the petitioner on the post of Clerk Grade-III along with 50% back-wages and pay him salary according to law as and when due in future.

The Writ Petition

4. The facts of the case are that the respondent no.3 (hereinafter referred to as the Company) appointed the petitioner on the post of temporary Clerk Grade-III on 01.06.1994 and, according to the petitioner, he was permitted to work till 07.01.1995, approximately for a period of 221 days, whereafter his services were disengaged. The petitioner was further engaged on 16.06.1995 on the same post and such engagement ended on 07.01.1996 i.e. he was allowed to work for a period of 206 days. Thereafter, the petitioner kept getting rehired, relieved and again engaged on the same pattern consecutively for four years until 08.02.2000. The case of the petitioner is that artificial breaks in service were created so that he might not complete 240 days in continuous employment and the intention of the Company was to deprive

him of his statutory rights and benefits. The petitioner has given details of his engagements in the following manner:

“01.06.1994 to 07.01.1995 (221 days)
16.06.1995 to 07.01.1996 ((206 days)
14.04.1997 to 22.11.1997 (223 days)
08.07.1998 to 07.02.1999 (215 days)
08.07.1999 to 07.02.2000 (215 days)”

5. The case of the petitioner is that the Company was aware of the fact that in case the petitioner would complete 240 days in a calendar year, he would attain the deemed status of a permanent employee and the Company would be obliged to confirm him in services as per the provisions of Industrial Disputes Act, 1947 (hereinafter referred to Act, 1947).

6. The entire case of the petitioner, as per the writ petition and also as per the detailed arguments advanced by the learned counsel for the petitioner, is that the Company adopted “unfair labour practices” as defined under Section 2 (ra) which means any of the practices specified in the 5th Schedule. Learned counsel argued and in the present case Entry No.10, contained in 5th Schedule, is attracted which reads as follows:-

“10. To employ workmen as “badlies”, casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workmen.”

7. The case of the petitioner is that his services were terminated on 08.02.2000,

whereafter he represented to the authorities but having failed in his attempt to seek re-engagement/ re-employment, matter was agitated before the authorities under the U.P. Industrial Disputes Act, 1947 and, ultimately, the matter was referred to the Industrial Tribunal, 4th, Agra where it was registered as Adjudication Case No.2 of 2006. After considering the case of the parties, the Tribunal, by impugned award dated 10.09.2015, dismissed the adjudication case.

8. The petitioner contends that the Tribunal has not given any benefit to the petitioner whereas under similar circumstances, another employee, namely, Prabhat Kumar covered by Adjudication No.2 of 2000, was reinstated with back-wages and arrears under the award dated 28.02.2011.

Defence in Counter Affidavit

9. A counter affidavit has been filed on behalf of the respondent Company taking a stand that the petitioner was temporarily engaged for fixed terms and for short durations due to exigencies of work as and when his services were required by the Company and, accordingly, timely extensions were granted to the services. Further defence is that the petitioner never completed one year continuous service nor 240 days and hence he was not entitled for any relief.

10. As regards the contention based upon Prabhat Kumar’s case, the defence of the Company is that the award passed in Adjudication Case No.2 of 2000 was illegal, perverse and without jurisdiction and has already been set aside by the High Court by its judgment dated 23.01.2017 passed in Writ-C No.52182 of 2011 (M/S

Heinz India Pvt. Ltd. Vs. Presiding Officer, Industrial Tribunal and another) on the ground that the reference made was contrary to the notification dated 29.08.1990 whereunder only Deputy Labour Commissioner, Agra Region, Agra had the power and competence to make the reference, whereas in the case of Prabhat Kumar, as also in the present case, reference was made by Assistant Commissioner, Agra Region, Agra. Further defence of the respondent is that this Court, by the aforesaid order dated 23.01.2017, remanded the matter to the Tribunal to consider such objection concerning competence of the officer within stipulated period of time and pursuant to the remand order the Industrial Tribunal dismissed the reference by order dated 13.04.2017 observing that the Assistant Labour Commissioner, Agra Region, Agra had no jurisdiction to refer the matter.

Rejoinder Affidavit

11. A rejoinder affidavit has been filed by the petitioner annexing therewith various letters of appointment as well as extension letters governing the services of the petitioner and stand taken is the same that the Company had maliciously dealt with the services of the petitioner in continuously engaging and disengaging him time and again so that he might be deprived of benefits under the Act. As regards the order of this Court in Writ-C No.52182 of 2011, it has been pleaded that the said order was passed solely on the ground of jurisdictional error and the concerned workman was permitted to approach the High Court again after the outcome of the dispute. Though not pleaded, learned counsel for the petitioner during the course of hearing, argued that Prabhat Kumar has already challenged the

order dated 13.04.2017 before this Court and the writ petition to this effect is pending.

12. I have heard Sri Shikhar Kaushal, learned counsel for the petitioner, learned Standing Counsel for the State-respondent Nos. 1 and 2 and Sri Piyush Bhargawa, learned counsel representing respondent Company.

Petitioner's case and contentions

13. In sum and substance, the contention of Sri Kaushal is to the effect that the Company's action clearly falls under meaning and import of "unfair labour practices", as defined under Section 2(ra) of the Act of 1947, as temporary engagement of the petitioner for short periods of time was with the object of depriving him of the status and privileges of a permanent workman and the Tribunal has not given consideration to this aspect but has simply dismissed the adjudication case on the ground that the petitioner was temporarily engaged from time to time and did not complete 240 days so as to attract the provisions of Act of 1947.

14. Learned counsel for the petitioner has placed very strong reliance upon a judgment dated 26.02.2022 of Bombay High Court in a bunch of writ petitions connected with Writ Petition No.5588 of 2017 (Shankar Bhimrao Kadam and others Vs. Tata Motors Limited) (hereinafter referred to as Bombay High Court case) and has argued that in the said case also, short term engagements of the concerned petitioners were treated to be "unfair labour practice". Learned counsel argued that in the Bombay High Court's case also, identical appointment letters were issued to the concerned workmen which reflected

that they were employed for 225 days, 236 days, 237 days, 238 days etc. etc. and the Tata Motors Ltd did not allow any workman to complete 240 days and, therefore, after extensive analysis of the provisions of 1947 Act, the action of Tata Motors Ltd. was denounced and the concerned petitioners were granted compensation in lieu of their services. Learned counsel has referred to paragraph no.52 and 58 of the said judgment, which are reproduced as below:-

“52. I have independently assessed the entire oral and documentary evidence adduced before the Labour Court in these cases and upon analysis of the same, I have come to a firm conclusion that in hundreds of cases, the present respondent has created a farcical picture by posing that the work allotted to the temporaries was limited only to the maximum extent of 7 months. As discussed above, the dedicated department for engagement of temporary workers, apparently kept a close watch on the duration of employment of these petitioners and in a case like Balu Bapuji Shelke, who had put in 232 days in his first round and 238 days in his third round, his service was abruptly intercepted and he was disengaged. He had almost reached the figure of 240 days and was thrown out, after completing 238 days. This indicates that the respondent-management has created an eye-wash and paper-work with the intention of creating evidence that no worker had completed 240 days. Even in Sunil Pralhad Khomane (supra), the learned judge of this court, after analyzing the entire evidence before him, concluded that the company has apparently misused Section 2(oo)(bb). For the reasons assigned by me and my esteemed brother in Sunil (supra), I find that the said conclusion was justified and in all these cases in hands, Section 2(oo)(bb) will not be

applicable. To hold otherwise, would create a mockery of Section 2(oo)(bb).

58. It cannot be ignored from the various rounds of temporary employments of these temporaries that after one disengagement, they used to look forward for the next appointment order. As expected, they used to receive such appointment orders. They used to perform their duties not only till the tenure mentioned in the appointment order was completed, but even upto reaching any duration between 225 days to 238 days in one single stint of temporary employment. None of the temporaries in such cases, ever received an appointment order that a particular temporary would work for 238 days or 236 days, etc. The maximum tenure was an appointment for 7 months. This was not the pattern followed in Mahindra & Mahindra Ltd., Nagpur (supra), inasmuch, as it was noticed by this court in the said case that the workers used to work in other factories during their disengagement and had actually approached the Industrial Court after about 9 to 23 years.”

15. It has further been argued that the aforesaid decision of Bombay High Court has been upheld by the Supreme Court while dismissing Special Leave Petitions filed by Tata Motors Ltd by its order dated 11.11.2022. Further reliance has been placed by the learned counsel for the petitioner on a decision of the Supreme Court in the case of Bhuvnesh Kumar Dwivedi Vs. Hindalco Industries Ltd: (2014) 11 SCC 85, with special reference to paragraph 26.1, 28, 28.1 and 28.2 which read as follows:-

“26.1 Firstly, in the light of the legal principle laid down by this Court in the case of U.P. State Sugar Corporation Ltd. Vs. Om Prakash Upadhyay, (2002) 10

SCC 89, the provisions of the U.P. I.D. Act remain unaffected by the provision of the I.D. Act because of the provision in s. 31 of the Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956. Hence, s. 2 (oo) (bb) is not attracted in the present case.

28. The respondent, in order to mitigate its conduct towards the appellant has claimed that the appellant was appointed solely on contract basis, and his service has been terminated in the manner permissible under Section 2 (oo) (bb) of the I.D. Act. However, we shall not accept this contention of the respondent for the following reasons:-

28.1 Firstly, the respondent has not produced any material evidence on record before the Labour Court to prove that it meets all the required criteria under the Contract Labour (Regulation and Abolition) Act, 1970, to be eligible to employ employees on contractual basis which includes license number etc.

28.2 Secondly, the respondent could not produce any material evidence on record before the Labour Court to show that the appellant was employed for any particular project(s) on the completion of which his service has been terminated through non-renewal of his contract of employment.”

16. Learned counsel, at the strength of the aforesaid decision, has argued that the defence taken by the Company that the petitioner was engaged on the basis of exigency of work was also taken in the aforesaid cases, however, the same was turned down by the Bombay High Court as well as by the Supreme Court. He has further argued that the allegation of the

Company to the effect that every year the petitioner was re-hired, for his services being temporary in nature and that it was a fresh appointment, is fallacious inasmuch as employee code, badge number etc of the petitioner was never changed and, therefore, it was not a case of fresh appointment.

17. The learned counsel has also argued that the reference made by the Assistant Labour Commissioner was not bad because that powers might have been delegated upon him by the Deputy Labour Commissioner, Agar Region, Agra.

Contentions of respondent-Company

18. Sir Piyush Bhargava, learned counsel for the respondent Company has vehemently opposed the writ petition and has argued that the Tribunal has recorded finding of fact that the petitioner never completed 240 days of working and that the appointment was for fixed period of time. He has further argued that the engagement was based upon exigency of work and that the argument of “unfair labour practices” is not only factually incorrect but also beyond the scope of reference as the reference was not made on the point of “unfair labour practices” but the question to be decided by the Industrial Tribunal was to the effect as to whether termination of services of the petitioner was according to law and, if not, what relief/damages the petitioner was entitled to. He has further argued that the petitioner cannot claim any relief inasmuch as reference itself was bad for want of jurisdiction as already held by this Court in the case of Prabhat Kumar in Writ-C No. 52182 of 2011 after analysing the concerned notification and in the present case also exactly the same position exists. He has also argued that whatever period the

petitioner worked, he was paid remuneration and hence the Company has not committed any wrong. Further argument is that for “unfair labour practices” as covered by Clause-10 of the 5th Schedule relied upon by the petitioner, it has to be established that the concerned workmen were employed as Badlies, casuals or temporaries and continued as such for years with the object of depriving them of the status and privileges of permanent workmen, however, in the present case, no such circumstances exist as would stand reflected from the letters of appointment issued to the petitioner. He has further argued that every appointment was independent in nature and whenever the services automatically ceased after the expiry of terms fixed under the letter of appointment, the petitioner never agitated any alleged rights and never made any claim either before the authorities or before the court, although there was a gap of six months and more in fresh engagements.

19. As regards the argument of the petitioner on alleged delegated powers, Sri Bhargava argued that the Deputy Labour Commissioner, Agra Region, Agra was himself exercising delegated powers by the State Government and it is well settled that a delegatee cannot further delegate the power delegated upon him.

Analysis of Rival Contentions

20. There are various aspects of this matter. One is the validity of reference made by the Assistant Labour Commissioner which aspect has already been dealt with by this Court in its order dated 23.01.2017 passed in Writ-C No.52182 of 2011 in which following notification and schedule was considered:-

"[263] English translation of Shram Anubhag-2, Noti.No.2513 (III) XXXVI-2-155 (SM)-90, dated August 29, 1990, published in the U.P. Gazette, Extra, Part , Section (kha), dated 29th August, 1990, pp.2-3

In exercise of the powers under Section 11-A of the U.P. Industrial Disputes Act, 1947 (U.P. Act No.28 of 1947), the Governor is pleased to direct that the powers exercisable by the State Government under Section 4-K of the said Act, in relation to disputes regarding dismissal, retrenchment of termination of services of an individual workman as contemplated under Section 2-A of the said Act shall be exercisable also by the officers mentioned in column 2, within the area mentioned against their names in column 3 of the schedule given below:

SCHEDULE

<i>Sl. No.</i>	<i>Name of the officer</i>	<i>Area of jurisdiction</i>
<i>1.</i>	<i>Additional Labour Commissioner, at Head Quarters</i>	<i>Whole State</i>
<i>2.</i>	<i>Additional/ Deputy Labour Commissioner, Kanpur Region, Kanpur</i>	<i>Kanpur (Nagar), Kanpur (Dehat), Etawah, Farrukhabad and Unnao districts</i>
<i>3.</i>	<i>Deputy Labour Commissioner, Agra Region, Agra</i>	<i>Agra, Firozabad, Aligarh, Etah, Mainpuri and Mathura districts</i>
<i>4.</i>	<i>Deputy Labour Commissioner,</i>	<i>Allahabad, Pratapgarh</i>

	<i>Allahabad Region, Allahabad</i>	<i>and Fatehpur districts</i>
5.	<i>Deputy Labour Commissioner, Kumaun Region, Haldwani (Nainital)</i>	<i>Nainital, Almora and Pithoragarh districts</i>
6.	<i>Deputy Labour Commissioner, Garhwal Region, Dehradun</i>	<i>Dehradun, Chamoli, Garhwal (Pauri), Tehri Garhwal and Uttar Kashi districts</i>
7.	<i>Additional/ Deputy Labour Commissioner, Ghaziabad Region, Ghaziabad</i>	<i>Bulandshahar and Ghaziabad districts</i>
8.	<i>Deputy Labour Commissioner, Gorakhpur Region, Gorakhpur</i>	<i>Gorakhpur, Basti, Siddharth Nagar, Deoria, Azamgarh, Mau and Mahrajganj districts</i>
9.	<i>Deputy Labour Commissioner, Jhansi Region, Jhansi</i>	<i>Jhansi, Lalitpur, Banda, Hamirpur and Jaluan districts</i>
10.	<i>Deputy Labour Commissioner, Bareilly Region, Bareilly</i>	<i>Bareilly, Badaun, Pilibhit and Shahjahanpur districts</i>
11.	<i>Deputy Labour Commissioner, Meerut Region, Meerut</i>	<i>Meerut, Muzaffarnagar, Saharanpur and Haridwar</i>

		<i>districts</i>
12.	<i>Deputy Labour Commissioner, Moradabad Region, Moradabad</i>	<i>Moradabad, Rampur and Bijnor districts</i>
13.	<i>Deputy Labour Commissioner, Mirzapur Region, Pipri</i>	<i>Mirzapur and Sonbhadra districts</i>
14.	<i>Deputy Labour Commissioner, Faizabad Region, Faizabad</i>	<i>Faizabad, Bahraich, Barabanki, Gonda and Sultanpur districts</i>
15.	<i>Deputy Labour Commissioner, Lucknow Region, Lucknow</i>	<i>Lucknow, Hardoi, Kheri, Rae Bareilly and Sitapur districts</i>
16.	<i>Additional/ Deputy Labour Commissioner, Varanasi Region, Varanasi</i>	<i>Varanasi, Ghazipur, Ballia and Jaunpur districts.</i>

21. Therefore, it is clear that it was Deputy Labour Commissioner, Agra Region, Agra only who was competent to make a reference and, hence, reference made by the Assistant Labour Commissioner was found to be without jurisdiction and even if the matter was remanded to the Industrial Tribunal for dealing with the objection to the aforesaid effect, the Industrial Tribunal, by its order dated 13.04.2017 passed in the case of Prabhat Kumar, held that the Assistant Labour Commissioner had no jurisdiction to make a reference.

22. Though, learned counsel for the petitioner has argued that writ petition filed

by Prabhat Kumar against the order dated 13.04.2017 is still pending, mere pendency of the writ petition does not impress the Court about validity of the reference made by the Assistant Labour Commissioner and I am not inclined to take a different view what has been taken by this Court in its judgment in the case of Prabhat Kumar or by the Tribunal, after remand, as there is no other material before the court to form an opinion contrary to the aforesaid finding on the reference being without jurisdiction.

23. I also find that the Company had taken a specific plea in its written statement dated 02.01.2008 filed before the Industrial Tribunal that the reference made by Sri S.P. Shukla as Assistant Labour Commissioner, Aligarh was without jurisdiction and without any authority and, therefore, the Tribunal could not proceed with the case. For a ready reference, paragraph no.24 of the said written statement is being reproduced herein below:-

“24. That the reference has been made by Sri S.P. Shukla as D.L.C., Aligarh in exercise of powers under G.O. 2513 dated 29.08.1990 whereas the D.L.C., Aligarh is not one of them and the said exercise is without jurisdiction and without any authority and this Tribunal cannot proceed with the case.

24. Learned counsel for the petitioner has strongly opposed the submission of the learned counsel for the respondent-company with regard to jurisdictional aspect in relation to the power to make reference in the present case and he has placed reliance upon following authorities in this regard:-

(i) H.R. Sugar Factory Vs. State of Uttar Pradesh, 1996 SCC Online All 793;

(ii) Swadeshi Polytex Ltd. Labour Court, U.P., 1992 SCC OnLine All 558;

(iii) Laxmibai Vs. Bhagwantbua, (2013) 4 SCC 97;

(iv) Sardar Amarjit Singh Kalra, Vs. Pramod Gupta, (2003) 3 SCC 272.

25. Placing reliance on the aforesaid authorities, it has been argued that the Industrial Dispute Act is meant to resolve the disputes expeditiously and the practice of dragging a workman from court to court for adjudication of peripheral issues, avoiding decision on issues more vital would be a condemnable approach. It has further been argued that taking preliminary objections by the employer has become a fashion and delaying decision on the real disputes for years and sometimes for decades would be contrary to the spirit of the Act, 1947 and, hence, the submission of the respondent-company regarding alleged incompetence of reference should be turned down.

26. I have considered the aforesaid submissions of the learned counsel for the petitioner, however, I am not inclined to accept the same for the simple reason that competence of Assistant Labour Commissioner, Agra to make a reference is of significance in the present case, particularly, when it has already been agitated before this Court and dealt with in its order dated 23.01.2017 passed in Writ-C No.52182 of 2011 and, thereafter, by the Tribunal itself in its order dated 13.04.2017 holding that the aforesaid officer had no power to make a reference.

27. The judgment in this petition can end on this point alone holding that the

Assistant Labour Commissioner had no jurisdiction to refer the dispute, however, since arguments on merits have been heard at length and the court feels it necessary to deal with the same, I proceed to consider the arguments advanced by both sides on other aspects of the case also.

Scope of Reference

28. A perusal of reference shows that it was made to the effect as to whether termination of services of the petitioner was according to law and if not, what relief/damages the petitioner was entitled to. No reference was made with respect to “unfair labour practices” allegedly adopted by the respondent-company.

29. In this regard, learned counsel for the respondent-company has placed reliance upon the judgment of the Supreme Court in the case of ***Mukund Ltd. Vs. Mukund Staff and Officers’ Association, (2004) 10 SCC 46*** in which the Apex Court has held that the dispute referred to by the order of Reference is only in respect of workmen employed by the appellant-Company. It is, therefore, clear that the Tribunal, being a creature of the Reference, cannot adjudicate matters not within the purview of the dispute actually referred to it by the order of Reference. In the facts and circumstance of the present case, the Tribunal could not have adjudicated the issues of the salaries of the employees who are not workmen under the Act nor could it have covered such employees by its award.

30. Further reliance has been placed upon in the case of ***Telco Convoy Drivers Mazdoor Sangh and another Vs. State of Bihar and others, (1989) 3 SCC 271***, laying down the same ratio. Identical ratio has been laid down in the case of ***M/s Tata***

Iron and Steel Co. Ltd. Vs. State of Jharkhand and others, (2014) 1 SCC 536.

31. Similar view has been taken by the Delhi High Court while deciding ***Civil Writ No.1109 of 1995, Eagle Fashions Vs. Secretary (Labour) & others*** in which it has been held that where the factum of employment and termination itself were in dispute, the reference could not have been framed presuming employment and its termination.

32. The aforesaid decisions have been relied upon by this Court in its judgment dated 14.03.2019 passed in ***Writ-C No.14416 of 1998 (Malloys India Agra Vs. Presiding Officer Labour Court Agra and another).***

33. Further reliance has been placed upon the judgment of this Court in the case of ***Rajendra Prasad Mishra Vs. Union of India and another (Civil Misc. Writ Petition No.5714 of 2009, decided on 03.02.2009)*** in which also it has been held that the scope of reference was different from the nature of plea raised and hence it was irrelevant to the main controversy.

34. Learned counsel for the respondent-company has also relied upon the judgment of Madras High Court in the case of ***K. Manikam Vs. The Management, Tamil Nadu Electricity Board and another (Writ Petition No.21278 to 21280 of 2018 decided on 14.10.2022): 2023 LLR 66*** in which it has been held that the scope of Section 2A of the Act, 1947 is restricted to only see if the dismissal, termination or retrenchment is just and valid and the scope does not cover other aspects including regularization and permanent absorption.

35. Learned counsel for the respondent has also relied upon a decision of Apex Court in the case of *Madhyamik Shiksha Parishad, U.P. Vs. Anil Kumar Mishra and others: (2005) 5 SCC 122* in which it has been held that the completion of 240 days' work does not, under that law import the right to regularisation. It merely imposes certain obligations on the employer at the time of termination of the service. It is not appropriate to import and apply that analogy, in an extended or enlarged form here.

36. Further reliance has been placed upon a decision of this Court in the case of *B.K. Sharma Vs. State of U.P and others: 1976 Labour Industrial Tribunal 1092* in which it has been held that under the provisions of Section 2-A of the Central Act even an individual dispute is deemed to be an industrial dispute and the State Government is empowered to refer even an individual dispute for adjudication but before an individual dispute can be referred to be adjudicated upon the Labour Court the condition precedent as laid down in Section 2-A must be fulfilled. Section 2-A contemplates a dispute arising out of discharge, dismissal, retrenchment or termination of an individual workman and it further includes any dispute or difference between the workman or employer connected with or arising out of such discharge, dismissal retrenchment or termination. The section does not contemplate any dispute relating to other service conditions in relation to an individual workman. The legislature intended that any dispute arising out of dismissal, discharge or termination or any matters connected therewith of an individual workman should be treated as industrial dispute.

37. Further reliance has been placed upon another decision of this Court in the case of *Baij Nath Bhattacharya Vs. The Labour Court, Allahabad and another (Civil Misc. Writ Petition No. 16454 of 1985, decided on 02.05.1994)* in which it has been held that before a workman can be considered to have completed one year of continuous service in an Industry it must be established as a fact that he was employed for a period not less than 12 calendar months and, next that during those calendar months had actually worked for not less than 240 days. In the present case, as per his own case, the petitioner has not all been employed for a period of 12 months.

38. In so far as Entry 10 of Schedule-5 is concerned, reliance has been placed by respondent-employer upon judgment of this Court in *Hindustan Lever Limited Vs. Industrial Tribunal IV, New Agra and another: 2007 (115) FLR 76* in which it has been held that before an action can be termed as an unfair labour practice it would be necessary for the Labour Court to come to a conclusion that the badlis, casuals and temporary workmen had been continued for years as badlis, casuals or temporary workmen, with the object of depriving them of the status and privileges of permanent workmen. To this has been added the judicial gloss that artificial breaks in the service of such workmen would not allow the employer to avoid a charge of unfair labour practice. However, it is the continuity of service of workmen over a period years which is frowned upon. Besides, it needs to be emphasised that for the practice to amount to unfair labour practice it must be found that the workman had been retained on a casual or temporary basis with the object of depriving the workman of the status and privileges of a permanent workman.

39. In view of the aforesaid law, I find that "unfair labour practices" was not under consideration before the Tribunal and it was beyond the scope of reference. Even if the action of the respondent-company is analyzed from the angle of alleged "unfair labour practices", learned counsel for the respondent-company has referred to various appointment letters issued to the petitioner all of which are identical in nature. One such letter of appointment is being referred to herein below:-

"Date 31.05.1994

*D-0145
Mr. Dinesh Pal Singh
S/o Mr. Ram Singh*

Dear Sir,

We are pleased to offer you temporary employment as a Temporary Clerk III with effect from. 01.06.1994 on these terms and conditions :

1. You will be paid at the rate of Rs. 105/- p.m. plus Dearer Living Allowance at the applicable rate.

2. Your services shall stand automatically terminated on 07.07.1994. However your services are liable to termination without notice or without assigning any reason even before this date.

3. You will observe the company's Rules and Regulations for the time being in force and as varied from time to time.

If these terms and conditions of service are acceptable to you please signify your acceptance of this temporary appointment by signing and returning the copy of this letter."

40. It is also necessary to refer to one of the extension letters whereby services of the petitioner were extended and it is reproduced herein below:-

"Dated: 05/07/1994

*Extension letter
Employee No.: D0145 (13390)
MR DINESH PAL SINGH
S/O MR RAM SINGH
Aligarh*

Dear Sir,

With reference to our letter dated 31.05.1994 we take pleasure in advising you that we are extending your temporary services upto 07TH AUGUST, 1994 on which date your services will stand automatically terminated. Your services, however, may be terminated without notice even before this date."

41. A perusal of the appointment letter shows that the company had offered to the petitioner temporary employment with effect from 01.06.1994 with a clear stipulation that his services shall stand automatically terminated on 07.7.1994. The letter of appointment contained clear recital to the following effect:-

"If these terms and conditions of service are acceptable to you please signify your acceptance of this temporary appointment by signing and returning the copy of this letter."

42. There is no dispute about the fact that the petitioner accepted the terms and conditions of appointment and also extended services. Therefore, the question arises as to whether issuance of such kind of appointment letters, in itself, amounts to

“unfair labour practices” as per Clause-10 of the 5th Schedule of the Act, 1947. In this regard, learned counsel for the respondent has relied upon judgment of the Bombay High Court in the case of *Bajaj Auto Ltd, Akurdi, Pune Vs. R.P. Sawant and others: 2000 (84) FLR 524* in which it has been held that every employment need not necessarily be of permanent nature and it can be casual, badli or temporary also. None of such employments by itself is an unfair labour practice. To attract the Item 6, such employment should continue for years with the object of depriving them of the status and privileges of permanent employees.

43. The Bombay High Court in the case of *Bajaj Auto Ltd (supra)* has held that the industrial law can never be oblivious of these normal and usual occurrences in the industries. None can deny temporary seasonal increase in work would require more temporary hands to meet the situation. We also cannot be blind to the fact that at least for a temporary period unemployed people would get employment and solve their problem of bread if not butter. And furthermore, how can we force the employer to continue these temporary employees on permanent basis after his needs are completed and if there is no work available for them? Had it been so, it would have adverse effect as no employer would offer any temporary employment and he might better not accept increased orders and would remain satisfied with what he has. A kind of stagnation in the society would come to stay. Our industrial wheels would be on slow motion. Such a situation would have very serious repercussions in the long run. Besides, the legislature has not been unaware of the fact that every industry has its own season for increase or reduction in the demands

resulting in increase or reduction in the requirement of the number of employees. It is, therefore, not possible to hold that temporary employment for every seasonal increase in the industrial activities is also an unfair labour practice.

44. In view of the above discussion, this Court is of the firm view that the petitioner has failed to establish that it was a case of “unfair labour practices” as the nature of appointment offered to the petitioner and accepted by him would not be covered by Clause-10 of 5th Schedule. Moreover, the said entry speaks of appointment of collective nature and not of individual nature as is apparent from use of words “workmen” and “them”. Therefore, the intention of the legislature is that the action of the Company in relation to appointment of all the workmen has to be examined so as to invoke Clause-10 of 5th Schedule and not the case of individual workman. Even if a contrary interpretation is accepted to the effect that a single workman can allege “unfair labour practice”, this case does not involve any such aspect.

Judgment of Bombay High Court in the case of Shankar (supra) not a binding precedent

45. Reliance placed by the learned counsel for the petitioner on the judgment of the Bombay High Court in the case of *Shankar (supra)*, is found to be misplaced inasmuch as Bombay High Court was dealing with a matter in which dozens of workmen had assailed the action of Tata Motors and Bombay High Court considered the nature of appointment of all such workmen and formed the opinion which has already been discussed herein above. Further, the nature of appointment letters

issued to the workmen were quite different from the one which was issued to the petitioner in the present case. Even otherwise, specific termination orders were passed in the case before the Bombay High Court whereas the case of respondent-company is clear that services of the petitioner were co-terminus with the end of period stipulated in the appointment letters and no termination letter was issued which could fall within the definition of “retrenchment”.

46. In so far as the confirmation of the said decision of Bombay High Court by the Supreme Court is concerned, I have perused the order dated 11.11.2022 passed by the Apex Court in Special Leave Petitions filed by Tata Motors Ltd where the Supreme Court observed that **IN THE PECULIAR FACTS AND CIRCUMSTANCES** when it is reported that the petitioner’s company (Tata Motors Ltd) has made the payment as per the impugned judgment of the High Court and some of the workmen have refused to accept the amount, **KEEPING THE QUESTION OF LAW OPEN**, the special leave petitions were dismissed with a further observation that in case any of the workmen has not accepted the amount as per the impugned judgment of the High Court, the petitioners would pay the same to the concerned workmen by way of demand drafts.

47. Therefore, the Supreme Court, though did not interfere with the decision of the Bombay High Court, it **KEPT THE QUESTION OF LAW OPEN** and directed payment of compensation to the concerned workmen in terms of the order of High Court. Hence. I am not inclined to treat judgment of Bombay High Court, with due respect, as a binding precedent as decision of the Bombay High Court was on the facts before it and would be of no help

to the petitioner in the present case, particularly, in the light of observation of the Supreme Court that the question of law has been left open.

48. At this stage, reference to the definition of “retrenchment” as contained in Section 2(oo) can also be made which means termination of the services of a workman for any reasons whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include- (a) voluntary retirement of the workman; or (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or (bb) termination of the service of the workman as a result of non renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein. Therefore, once the Court has noticed that term of appointment/engagement of the petitioner was co-terminus as per the specific stipulations contained in the letter of appointment as well as letters of extensions, automatic cessation of his services would not fall within the meaning of “retrenchment”.

49. For all the aforesaid reasons, where the reference has been found to be incompetent and without jurisdiction and also the fact that the action of the respondent-company does not amount to “unfair labour practices”, I do not find any factual or legal error in the judgment of the Industrial Tribunal.

50. Accordingly, the writ petition fails and is **dismissed**.

51. In so far as connected Writ-C No.30052 of 2016 is concerned, the factual and legal points involved in the same are identical to the points involved and raised in Writ-C No.30049 of 2016. For all the reasons assigned in this judgment in connection with the leading case, Writ-C No.30052 of 2016 also fails and is accordingly **dismissed**.

52. No order as to cost.

53. Before concluding this judgment, this Court records all its appreciation for both the learned counsel for arguing the case in a most efficient manner.

(2023) 8 ILRA 1530
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.12.2023

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Writ-C No. 32955 of 2022

Chhattisgarh Railway Corp. Ltd.
...Petitioner
Versus
Micro & Small Enterprises Facilitation
Council & Anr. ...Respondents

Counsel for the Petitioner:
 Sri Kamal Krishna Roy, Sri Aagney Sail

Counsel for the Respondents:

Civil Law - Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act, 2006) -Arbitration and Conciliation Act, 1996 - Constitution of India,1950 -Where the Facilitation Council has exercised jurisdiction upon a claim raised by a supplier registered under MSMED Act, 2006, and has ruled upon its own jurisdiction, such an

award is not ex facie without jurisdiction. Challenge to such award must ordinarily be made under Section 34 of the Arbitration and Conciliation Act, 1996 read with Section 19 of the MSMED Act. Existence of alternate remedy with mandatory pre-deposit condition cannot be a ground to invoke writ jurisdiction unless the order is wholly without jurisdiction or violates fundamental rights or natural justice.

The writ petition is not maintainable in such circumstances.

Case Law Discussed:

1. Whirlpool Corporation Vs Registrar of Trademarks, Mumbai, (1998) 8 SCC 1
2. U.P. Power Transmission Corp.Ltd. Vs CG Power & Industrial Solutions Ltd., (2021) 6 SCC 15
3. Delhi Dayalbagh House Building Society Vs Registrar, Cooperative Societies, (2019) 4 SCC 429
4. Rahul Singh Vs U.O.I., 2017 SCC Online ALL 3579
5. Goodyear India Ltd. Vs Norton Intech Rubbers (P) Ltd., (2012) 6 SCC 345
6. Gujarat St. Disaster Management Authority Vs Aska Equipments Ltd., (2022) 1 SCC 61
7. Tirupati Steels Vs Shubh Industrial Component, (2022) 7 SCC 429
8. Gujarat St. Civil Supplies Corporation Ltd. Vs Mahakali Food Pvt. Ltd., 2022 SCC Online SC 1492

(Delivered by Hon'ble Manoj Misra, J.)

1. This writ petition seeks quashing of the award dated 07.06.2022 passed by the Micro and Small Enterprises Facilitation Council, Kanpur (for short Facilitation Council) in Claim Petition No. 270 of 2020 filed by the second respondent against the petitioner and to declare the entire

proceeding in Claim Petition No. 270 of 2020 as void.

2. Briefly stated the facts giving rise to the writ petition are as follows:-

3. The second respondent claiming itself to be registered with the Directorate of Industries as a Small Enterprise under the provisions of the Micro, Small and Medium Enterprises Development Act, 2006 (for short MSMED Act, 2006) with a valid registration No. UP50E0002921 filed a claim petition before the Facilitation Council for recovery of Rs. 35,03,998.03/- in respect of delayed payment of its dues claiming, inter alia, (i) that the opposite party (i.e. the writ petitioner herein) invited tenders for the work of Geotechnical Investigation in Reach 2 and Reach 3; (ii) pursuant to which, the claimants offer was accepted and both parties entered into a contract subject to the standard general terms and conditions; (iii) that the original work was to carry out Geotechnical Investigation on 25 bridges sites; (iv) that the scope of Geotechnical Investigation included drilling of soil and rock at bridge sites, collecting the soil/rock samples, testing them in the laboratory, followed by preparation and submission of detailed report to the buyer (the petitioner herein); and (v) that the work was executed as per directions and a completion certificate was also issued in which the performance of the claimants was found satisfactory. By claiming that only part payment was made and the remaining was withheld without justification, and similar work carried out by other company was fully paid off, the claim petition was filed for recovery of the balance amount with interest thereupon.

4. On the claim petition, the Facilitation Council, on 03.12.2020, gave

20 days time to the parties for conciliation and required them to submit their respective papers. The parties thereafter exchanged their objections/counter objections. A preliminary objection was also taken with regard to maintainability of the proceedings before the Facilitation Council on the ground that the contract between the parties provided for an alternate dispute redressal mechanism, vide clause 63 and 64 of the contract, including resolution of dispute through an arbitration therefore, there was no justification for the claimants to invoke the provisions of MSMED Act, 2006. It was also claimed that the provisions of section 18 of the MSMED Act, 2006 would get attracted only for recovery of the amount due in respect of any supply of goods or services rendered by the supplier but not for recovery of dues under a works contract of which breach is alleged.

5. As no conciliation could be arrived at, conciliation proceeding was terminated and the matter was taken up for arbitral proceeding.

6. In the arbitral proceeding, after hearing both sides, the impugned award was passed on 07.06.2022. Questioning the award of the Facilitation Council, this writ petition has been filed.

7. We have heard Sri Aagney Sail along with Sri K.K. Roy for the petitioner.

8. At the outset, we required the learned counsel for the petitioner to address the Court as to why this petition be not dismissed on the ground that there exists an alternative remedy, inasmuch as the petitioner could challenge the award of the Facilitation Council by taking recourse to the remedy under Section 34 of the Arbitration and Conciliation Act, 1996 in

light of the provisions of section 18(3) read with Section 19 of MSMED Act, 2006.

9. Sri Aagney Sail, learned counsel for the petitioner, submitted that existence of an alternative statutory remedy is not an absolute bar for the writ court to entertain a challenge against the award of the Facilitation Council, particularly where the Facilitation Council held no jurisdiction to enter upon the reference and decide the claim of the second respondent. According to him, the Facilitation Council held no jurisdiction to deal with the claim of the second respondent for the following reasons:-

(i) A claim under Chapter V of MSMED Act, 2006 by a supplier against the buyer is maintainable only for recovery of the dues which are payable by the buyer to the supplier for the supply of any goods or services rendered to the buyer. In the instant case, the contract between the parties from its very nature was a works contract and not a contract in respect of supply of goods or for rendering service therefore, the claim was not sustainable under the provisions of the MSMED Act, 2006;

(ii) In the objection taken by the petitioner it was specifically stated that the supplier (i.e. the second respondent herein) had employed huge machines which were not permissible therefore, it committed breach of the contract. For redressal of grievances arising therefrom, there was an alternate dispute resolution mechanism available in the contract including an arbitration clause. Consequently, the provisions of MSMED Act, 2006 could not have been invoked more so because the Facilitation Council is not empowered to decide questions arising from a breach of

contract. In support of the above submission, the learned counsel for the petitioner placed reliance on a Division Bench decision of this Court in ***Rahul Singh v. Union of India and others reported in 2017 SCC Online ALL 3579.***

10. We have considered the submissions of the learned counsel for the petitioner and have perused the record.

11. A perusal of the record would reveal that the Facilitation Council in the arbitral proceeding had examined the question of jurisdiction of the Facilitation Council while writing the award. The said issue has been addressed as Issue no.1. The Facilitation Council has also taken notice of the decision of this Court in *Rahul Singh v. Union of India* (supra) on which the petitioner has placed reliance. The Facilitation Council noticed that the contract between the supplier and the buyer was in the nature of a service contract; the claimant/supplier is a registered MSMED providing services of architecture and engineering activities, testing and analysis etc; that there was a delay in the payment, therefore it held jurisdiction. The Facilitation Council distinguished the decision of this Court in ***Rahul Singh's case (supra)*** on the ground that there was no concluded contract between the parties and that the writ petitioner in that matter was a person whose tender came to be rejected on the ground of failure on his part to deposit the tender cost as well as the earnest money.

12. Before we proceed to address the submissions made, we must make it clear that we do not propose to examine the merits of the award unless we come to the conclusion that the petition is not liable to be dismissed on the ground of alternative

remedy, which, admittedly, is available under Section 34 of the Arbitration and Conciliation Act, 1996 read with Section 19 of the MSMED Act, 2006. No doubt, it is well settled that the existence of an alternative remedy is not an absolute bar for a writ court to exercise its extraordinary jurisdiction under Article 226 of the Constitution of India, rather is a self-imposed restriction, but, ordinarily, the existence of alternative remedy in commercial matters is not to be ignored while entertaining a petition under Article 226 of the Constitution of India save in the following three contingencies:

(i) Where the writ petition has been filed for the enforcement of any of the Fundamental rights;

(ii) Where there has been a violation of the principle of natural justice; or

(iii) Where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

(Vide Whirlpool Corporation v. Registrar of Trademarks, Mumbai and others, (1998) 8 SCC 1; U.P. Power Transmission Corporation Ltd and another v. CG Power and Industrial Solutions Ltd and another (2021) 6 SCC 15; and Delhi Dayalbagh House Building Society v. Registrar, Cooperative Societies and another, 2019 (4) SCC 429).

13. In the context of the submissions made, the issue that arises for our consideration is whether the award passed by the Facilitation Council is ex facie without jurisdiction as to enable the writ petitioner to question it directly by invoking the powers of this Court available

under Article 226 of the Constitution. In **Gujarat State Civil Supplies Corporation Ltd. v. Mahakali Food Pvt. Ltd. (Unit 2) and another, 2022 SCC Online 1492**, the following questions of law came up for consideration by the Supreme Court, namely, :

(i) Whether the provisions of Chapter-V of the MSMED Act, 2006 would have an effect overriding the provisions of the Arbitration Act, 1996?

(ii) Whether any party to a dispute with regard to any amount due under Section 17 of the MSMED Act, 2006 would be precluded from making a reference to the Micro and Small Enterprises Facilitation Council under sub-section (1) of Section 18 of the said Act, if an independent arbitration agreement existed between the parties as contemplated in Section 7 of the Arbitration Act, 1996?

(iii) Whether the Micro and Small Enterprises Facilitation Council, itself could take up the dispute for arbitration and act as an arbitrator, when the council itself had conducted the conciliation proceedings under sub-section (2) of the Section 18 of the MSMED Act, 2006 in view of the bar contained in Section 80 of the Arbitration Act, 1996?

14. The Supreme Court after examining all the relevant provisions of the MSMED Act, 2006 and the Arbitration and Conciliation Act, 1996, in paragraph 34, decided the said issues as under:-

(i) Chapter-V of the MSMED Act, 2006 would override the provisions of the Arbitration Act, 1996.

(ii) No party to a dispute with regard to any amount due under Section 17

of the MSMED Act, 2006 would be precluded from making a reference to the Micro and Small Enterprises Facilitation Council, though an independent arbitration agreement exists between the parties.

(iii) The Facilitation Council, which had initiated the Conciliation proceedings under Section 18(2) of the MSMED Act, 2006 would be entitled to act as an arbitrator despite the bar contained in Section 80 of the Arbitration Act.

(iv) The proceedings before the Facilitation Council/institute/centre acting as an arbitrator/arbitration tribunal under Section 18(3) of MSMED Act, 2006 would be governed by the Arbitration Act, 1996.

(v) The Facilitation Council/institute/centre acting as an arbitral tribunal by virtue of Section 18(3) of the MSMED Act, 2006 would be competent to rule on its own jurisdiction as also the other issues in view of Section 16 of the Arbitration Act, 1996.

(vi) A party who was not the "supplier" as per the definition contained in Section 2(n) of the MSMED Act, 2006 on the date of entering into contract cannot seek any benefit as the "supplier" under the MSMED Act, 2006. If any registration is obtained subsequently, the same would have an effect prospectively and would apply to the supply of goods and rendering services subsequent to the registration.

15. From the decision of the Apex Court noticed above, it is clear that, firstly, notwithstanding existence of an arbitration clause in the contract between the supplier and the buyer, the supplier can invoke the provisions of section 18 of the MSMED Act, 2006 and, secondly, if any dispute is

raised with regard to the jurisdiction of the Facilitation Council, it would be competent to rule on its own jurisdiction as also the other issues in view of section 16 of the Arbitration Act, 1996.

16. In the instant case, there is no dispute that the petitioner had a right to challenge the award by taking recourse to the provisions of section 34 of the Arbitration and Conciliation Act, 1996, rather, the argument on behalf of the petitioner is that why should the petitioner be relegated to the alternative remedy, particularly when it carries an onerous condition of pre-deposit of 75 percent of the decretal amount as per the provisions of section 19 of the MSMED Act, 2006 and the award in question is *ex facie* without jurisdiction.

17. In so far as the requirement of deposit of 75 percent of the awarded amount under Section 19 of the MSMED Act, 2006 is concerned, that has been held to be mandatory (*vide Goodyear India Ltd. v. Norton Intech Rubbers (P) Ltd.*, (2012) 6 SCC 345; *Gujarat State Disaster Management Authority vs. Aska Equipments Limited*; (2022) 1 SCC 61; and *Tirupati Steels v. Shubh Industrial Component*, (2022) 7 SCC 429). As regards jurisdiction of the Facilitation Council, it is well settled that ordinarily the jurisdiction of a Court or Tribunal to proceed further is determined on the basis of averments made in the plaint or claim petition. In the instant case, the averments made in the claim petition, *prima facie*, make out a case for examination by the Facilitation Council. Interestingly, in the writ petition there is no specific challenge to the claim of the second respondent (the claimant/supplier) that it is registered with the Directorate of Industries as Small

defeats the character of waqf-alal-aulad. Such conduct negates the essential legal requirements of a valid waqf. Furthermore, the waqif had reserved to himself absolute rights to amend the waqf deed and made provisions for his own maintenance, which falls within the mischief of Section 12 of the ESt. Duty Act, 1953. As a result, the petitioner cannot claim exemption from eSt. duty. The writ petition is accordingly dismissed.

Case Law Discussed:

1. Chhedi Lal Misra Vs Civil Judge, Lucknow; (2007) 4 SCC 632
2. Controller of ESt. Duty Vs B.B. Nigudkar; (1988) 170 ITR 578 (Bom.)
3. Mohammad Ali Mohammad Khan Vs Mt. Bismillah Begam; AIR 1930 PC 255
4. Hamid Hussain Vs Controller of ESt. Duty; (1972) 83 ITR 309 (All.)

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. By the present writ petition, the petitioner is challenging the assessment order dated 31.01.1989, passed by respondent No. 3; order dated 16.09.1991 whereby Appellate Authority partly allowed petitioner's appeal against the assessment order and; order dated 30.11.1999, passed by the Income Tax Appellate Tribunal whereby it dismissed petitioner's appeal.

2. Brief facts of the case are that one Gulam Ahmad Khan was running a engineering workshop in the name and style M/s. General Engineering Works. On 25.08.1951, he claims to have created a waqf-alal-aulad under the provisions of the Mussalman Waqf Validating Act, 1913 (hereinafter referred to as the Act of 1913) through a registered deed and transferred his business to the waqf and became its

first mutwalli. Gulam Ahmad Khan was issueless and claims to have adopted his nephew Sardar Abdullah Khan alias Azad Ahmad Khan, the petitioner, as his son. As per the terms of the Waqf deed, an amount of Rs. 100 out of the total proceeds of the M/s. General Engineering Works was to be spent towards almighty and rest of the proceeds were to be utilised as per the wishes of the waqif Gulam Ahmad Khan during his lifetime. Gulam Ahmad Khan also reserved to himself right to effect titamma of the original waqf deed and sell off the assets entrusted to the waqf including M/s. General Engineering Works. With regard to succession of mutwalli, it provided that one Mst. Hasina Khatun would be the next mutwalli and after her demise, her children and their descendants were to succeed her as mutwalli. In case, Mst. Hasina Khatun was to die issueless, then Inam Ahmad Khan, who is the brother of waqif Gulam Ahmad Khan and after him his son Azad Ahmad Khan and his descendants would succeed as Mutwalli of the Waqf. As per clause C (jim) of the waqf-deed, after death of Gulam Ahmad Khan, Rs. 100 were to be continued to spent towards charitable purposes and with regard to rest of the proceeds from the waqf property, Rs. 400 was to be paid to Inam Ahmad Khan for helping Mst. Hasina in managing the waqf property and the remaining amount was to be divided amongst Inam Ahmad Khan, Azad Ahmad Khan and Mst. Hasina Khatun. It is an admitted fact that even after creating the waqf, Gulam Ahmad Khan continued to mention the waqf property as his personal property while filing his income tax returns. Waqif Gulam Ahmad Khan amended the original waqf-deed by a titamma dated 22.01.1980. As per the relevant amendments effected by the titamma, the waqf now excludes Inam

Ahmad Khan from ever becoming a mutwalli and he was also ousted from receiving any benefits out of the waqf property. Since, Mst. Hasina Khatun died issueless, therefore, two-third of share would now go to Azad Ahmad Khan and one-third was to be utilised for charitable purposes. It is also disclosed in the titamma that a portion of the property of the workshop was rented out and machineries lying in the workshop were sold to pay off personal debts of the waqif Gulam Ahmad Khan.

3. Gulam Ahmad Khan died issueless on 02.12.1980, and as per the terms of the amended deed, petitioner Azad Ahmad Khan, became mutwalli of the waqf. The petitioner filed returns under Estate Duty Act, 1953 (hereinafter referred to as the Act of 1953) with regard to the properties of the waqf and claimed immunity from paying estate duty on the same. However, a show cause notice was issued to the petitioner on 24.11.1988 seeking explanation for the exemption claimed by him from paying estate duty. Petitioner submitted his reply on 29.12.1988 and on the basis of the same impugned assessment order dated 31.01.1989 is passed. Petitioner challenged the assessment order before the Appellate controller of Estate Duty, which upheld the assessment order by its order dated 16.09.1991. Against the same, petitioner preferred an appeal before the Income Tax Appellate Tribunal, which was dismissed by order dated 30.11.1999.

4. Shri Pradeep Agarwal, learned counsel for the petitioner challenges the judgment and order of the Tribunal on the ground that the Tribunal was wrong in holding that the waqf created by late Gulam Ahmad Khan was not a valid waqf as he never intended to give effect to the waqf

deed. He submits that it is a settled law that once a waqf is created the waqif stands divested of his title to the waqf properties. In support of his argument learned counsel for the petitioner relies upon the judgment of the Supreme Court in the case of **'Chhedi Lal Misra v. Civil Judge, Lucknow'; (2007) 4 SCC 632**. The second ground of challenge is that the Tribunal erred in holding that section 5 and 12 of the Act of 1953 are applicable in the present case. He submits that the Tribunal has misinterpreted the explanation to Section 12(1) of the Act of 1953 and wrongly held that since waqif has reserved to himself the right to modify the deed therefore, it amounts to reservation in the property for life. Whereas as per the explanation reservation of interest must be for settler himself as well as for any of his relatives. Unless the interest is reserved for both, the waqif as well as any of his relatives, such reservation would not amount to passing of the property upon settler's death. In support of his contention counsel for the petitioner relies upon a Division Bench Judgment of the Bombay High Court in the case of "Controller of Estate Duty v. B.B. Nigudkar" reported as (1988) 170 ITR 578. Relevant paragraph of the same reads,

"...We have considered the Explanation to section 12(1) carefully. In our view, the word "and" used in the Explanation to section 12(1) cannot be read as "or" as held by the Gujarat and the Madras High Court decisions: Kikabhai Samsuddin v. CED, [1969] 73 ITR 241 (Guj) and CED v. K.A. Kader, [1974] 96 ITR 289 (Mad). It may be true that if there was any reservation of interest in favour of the settlor/deceased, the provisions of subsection (1) of section 12 would have applied. The Explanation is, however, to our mind, enacted to meet a situation

where reservation of interest is for the settlor as well as his relatives and an argument might be advanced that the reservation of interest being not for the settlor himself alone, sub-section (1) would not apply. Any decision where a contrary view may have been taken has not been brought to our notice."

5. Learned counsel for the respondent, Shri Manish Mishra opposes the submissions made by the counsel for the petitioner. He submits that there is no perversity in the judgment of the Appellate Tribunal. He further submits that Gulam Ahmad Khan created the waqf only to avoid tax liabilities. Gulam Ahmad Khan never intended to give effect to the waqf since he kept including the waqf property and income from M/s General Engineering Works in his annual income tax returns. Counsel for the respondent even questions the validity of the waqf and submits that as per the waqfnama, it was a waqf-alal-aulad, created under Section 3(a) of the Act of 1913. However, including Mst. Hasina Khatun as one of the beneficiaries, who did not have any blood or family relations with Gulam Ahmad Khan, is against the objectives of waqf-alal-aulad. He further submits that Gulam Ahmad Khan also throughout treated the waqf property as his personal and never actually delivered/dedicated it to the waqf and instead sold certain machineries without seeking any permission from a Court. Since there was no such action taken on the part of Gulam Ahmad Khan which would amount to creation of a valid waqf, therefore it has been rightly held in the impugned order that the waqf was never created and therefore this petition is liable to be dismissed.

6. I have perused the record with the assistance of counsels and considered their submissions.

7. As per the waqf-deed, a waqf-alal-aulad was created under the provisions of the Act of 1913. As per Section 3(a) of the Act of 1913, a waqf could be created for maintenance and support, wholly or partially, of waqif's family, children or descendants. Inclusion of Mst. Hasina Khatun as one of the beneficiary of the usufruct of the waqf property, without establishing waqif Gulam Ahmad Khan's relationship with her, goes against the tenets of a waqf-alal-aulad. Further, no doubt creation of a waqf divests the waqif of the waqf property and dedicates it to the almighty, but, there should be actual dedication/delivery of possession of the waqf property to constitute a valid waqf. When the waqif is himself the first mutwalli of the waqf, it becomes difficult to establish actual dedication/delivery of possession, and thus, his subsequent conduct with regard to the waqf property becomes relevant to decide whether there was an actual dedication and creation of a waqf. In the present case even after dedicating M/s General Engineering Works to almighty, waqif Gulam Ahmad Khan continued to show the same as his own property in income tax returns filed by him. He even sold off some of the waqf property to pay off his personal debts without seeking necessary permission from appropriate authority. Furthermore, there is no evidence on record to prove that Gulam Ahmad Khan ever spent Rs. 100 towards any charitable purpose. Absence of any real dedication and subsequent treatment of the property by waqif Gulam Ahmad Khan as his personal property, thus, falls into the exception to the rule, once a waqf always a waqf, carved out by their Lordships in the case of Chhedi Lal Mishra (supra) relied upon by the counsel for the petitioners. Aforesaid judgment which is relied upon by the counsel for the petitioner also reads in para 7:

"7. Having gone through and considered the judgment of the learned Single Judge of the Allahabad High Court, we see no reason to take a view different from those expressed therein. In our view, the law relating to the creation and continuation of wakfs has been correctly explained by the learned Judge in keeping with the well-established principles that once a wakf is created, the wakif stands divested of his title to the properties which after the creation of the wakf vests in the Almighty. It is no doubt true that in a given case the creation of a wakf may be questioned if it is shown that the wakif had no intention to create a wakf but had done so to avoid a liability""(emphasis added)

8. Privy Council in the case of **"Mohammad Ali Mohammad Khan v. Mt. Bismillah Begam"**; AIR 1930 PC 255 has held that when there is no intention to dedicate the waqf property to the almighty rather there were some ulterior motives, the deed can not be treated to be a valid waqf. Relevant part of the judgment reads,

"On a careful consideration of the whole evidence, their Lordships have come to the conclusion that defendant No. 2 executed the deed of wakf but without any intention of divesting himself of his ownership of the property, and that his real intention was to utilise the document should it become necessary as a shield against any claims that the appellant might have against him either then or at any future time. Their Lordships are therefore of opinion that this appeal should be allowed and the decree of the Subordinate Judge should be restored and that the appellant should have his costs in the Chief Court and of this appeal. They will humbly advise His Majesty accordingly."

9. Actions of the waqif Gulam Ahmad Khan shows that he has throughout treated the waqf property as his personal, therefore, it could rightly be held that there was no actual dedication of property and he had no intention to create a waqf and as such the deed can not be held to have constituted a valid waqf.

10. The second ground of challenge that the Appellate Tribunal has wrongly interpreted the explanation to Section 12(1) of the Act of 1953 and read the word "and" as "or" to reject petitioner's claim for exemption from paying estate duty also does not hold good as waqif Gulam Ahmad Khan had, while executing the waqf deed made provisions for maintenance of himself, his brother and the petitioner, who himself claim to have been adopted as a son by the waqif Gulam Ahmad Khan. Therefore, the conditions laid down in the case of B.B. Nigudkar (supra) as relied upon by the counsel for the petitioner is already fulfilled. Furthermore, what is required to avail the exemptions from paying estate duty as provided under Section 12 of the Act of 1953 is that there should not be any reservation of interest in the settled property for life by the settler. For reference Section 12 of Act of 1953 reads,

"12. (1) Property passing under any settlement made by the deceased by deed or any other instrument not taking effect as a will whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor or whereby the settlor may have reserved to himself the right by the exercise of any power, to restore to himself or to re-claim the absolute interest in such property shall be deemed to pass on the settlor's death:

Provided that the property shall not be deemed to pass on the settlor's death by reason only that any such interest or right was so reserved if by means of the surrender of such interest or right the property is subsequently enjoyed to the entire exclusion of the settlor and of any benefit to him by contract or otherwise, for at least two years before his death.

Explanation. "A settlor reserving an interest in the settled property for the maintenance of himself and any of his relatives (as defined in section 27) shall be deemed to reserve an interest for himself within the meaning of this section.

(2) Notwithstanding anything contained in sub-section (1), where property is settled by a person on one or more other persons for their respective lives and after their death, on the settlor for life and thereafter on other persons and the settlor dies before his interest in the property becomes an interest in possession, the property shall not be deemed to pass on the settlor's death within the meaning of this section."

11. As Gulam Ahmad Khan reserved to himself the right to modify the terms of the waqf-deed and he actually effected a titamma not less than a year before his demise goes to show that he had reserved life interests in the property while settling it through the waqf deed. This issue has already been decided by a Division Bench of this Court in a reference by Central Board Direct Taxation in the case of **"Hamid Hussain v. Controller of Estate Duty"; (1972) 83 ITR 309**, relevant paragraphs of the same reads,

"17. It is next contended on behalf of the accountable person that the

deceased had no interest in the property which could attract the provisions of section 12. It is pointed out that after vacating the office of mutawalli in 1950, he had no interest left in the wakf property. Now, section 12(1) speaks of property in which the deceased settlor has reserved to himself an interest in the property passing under the settlement for life or any other period determinable by reference to death. Upon analysing the terms and conditions of the wakf deed, as last amended, it appears that the settlor retained to himself the right to reside in certain specified house properties and the power to amend the terms of the wakf deed, the list of beneficiaries and the extent of their shares. Are these conditions sufficient to bring the property within the scope of section 12" The power to amend the terms of the settlement is couched in the following language:

"7. (e) In future also, I the wakif during my life-time, shall have the right of making amendments; alterations, cancellations and additions of conditions in this wakf deed, as warranted by the prevailing conditions, which right I enjoy at present; and during my life-time I shall specially have the power to make amendments in the rights of the grantees, to include some stranger amongst them and to exclude any body and to increase or decrease the amount of their shares."

18. The power reserved by this clause is expressed in the widest termst. While perhaps it does not extend to the power of revoking the wakf, it enables the settlor to travel over a wide field, curtailing interests presently enjoyed on the one hand, and in creating or enlarging them in other directions. In so far as the power is exercised for the purpose of including some

one not already a beneficiary, it could extend to including the settlor himself. The wide amplitude of power in the clause supports such a conclusion. If that be so, the settlor has reserved to himself the right to benefit from the wakf property for life by the simple device of including himself in the list of beneficiaries or grantees.

“..

23. In the instant case, it is true that the settlor had not included himself in the list of beneficiaries and that so long as he did not do so, he was not entitled to the benefits enjoyed by the other beneficiaries. But the power to do so vested in him absolutely. It was a power which he could exercise in his absolute discretion. We see little difference between a case where the settlor included himself among the beneficiaries and left it to the absolute discretion of the trustees to extend the benefit of the trust income to him and the instant case where the settlor had reserved to himself the right to include his name among the beneficiaries thereby automatically entitling himself to the benefit of the income of the wakf property. The power to amend the wakf deed so as to include himself among the beneficiaries is only an instance of the wide powers reserved by the settlor to himself. As we have said the powers under clause 7(e) are expressed in the widest termst. So long as the character of the wakf is maintained, it is open to the settlor to make any changes"and changes which may directly benefit him"in the terms and conditions of the deed. We are of opinion that the settlor reserved an interest in the wakf property for life and therefore the case falls within the scope of section 12. And that would mean, as was held by the Bombay High Court in Khatizabai Mohomed Ibrahim v.

Controller of Estate Duty [[1959] 37 I.T.R. (E.D.) 53 (Bom.)] , that not merely the interest so reserved but the whole of such property must be deemed to pass on the death of the settlor."

12. Since waqif Gulam Ahmad Khan reserved to himself the absolute right to amend the waqf deed and made provisions therein for his maintenance out of the waqf property therefore it is held that petitioner cannot claim exemptions from paying estate duty.

13. In light of the above, this writ petition is **dismissed** accordingly.

(2023) 8 ILRA 1541
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.07.2023

BEFORE
THE HON'BLE ALOK MATHUR, J.

Writ-C No. 1001398 of 2002

Shri Dewesh Kumar Ex- Sr. Supervisor
M/S Tata Engg. & L. Co. Ltd. ...Petitioner
Versus
M/S Tata Engineering & Locomotive Co.
Ltd. Lko. ...Respondents

Counsel for the Petitioner:

S. Banerji, Pushpila Bisht, S.P. Mishra,
Suresh Chandra Tiwari, Vivek Mishra

Counsel for the Respondents:

C.S.C., J.N. Mathur, Mudit Agarwal

Held:

Order of Dy. Labour Commissioner dated 05.12.2000 rejecting reference under Section 4(K) of U.P. Industrial Disputes Act, 1947 - Held to be illegal and arbitrary - Petitioner had invoked conciliation mechanism after being dismissed - Conciliation Officer exceeded

jurisdiction by giving finding on merits instead of submitting a failure report - No reasons assigned in impugned order rejecting reference - Violation of principles of natural justice - Requirement to record reasons applies equally to quasi-judicial administrative actions - Order quashed - Matter remanded to St. Government to decide afresh.

Petition allowed.

Key Acts/Provisions:

1. U.P. Industrial Disputes Act, 1947 - Sections 2(z), 4(K), 6(N)
2. Constitution of India - Article 14

Case Law Discussed:

1. Prem Kakkar Vs St. of Har., (1976) 3 SCC 433
2. Siemens Engineering Co. Vs U.O.I., (1976) 2 SCC 981
3. A.K. Kraipak Vs U.O.I., (1969) 2 SCC 262
4. R Vs Deputy Industrial Injuries Commissioner ex p. Moore, (1965) 1 QB 456
5. Mahon Vs Air New Zealand Ltd., [1984 AC 648]

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Sri Vivek Mishra, learned counsel for petitioner as well as Sri Mudit Agarwal, learned counsel for respondent No. 1 and learned Standing Counsel for respondent No. 2.

2. The grievance raised by the petitioner is with regard to order dated 05.12.2000 passed by Dy. Labour Commissioner, Lucknow Region, Lucknow thereby declining to refer the dispute raised by the petitioner for adjudication before the Labour Court in exercise of powers under

Section 4 (K) of U.P. Industrial disputes Act, 1947.

3. The facts in brief of the present case are that petitioner was working with respondent No. 1 on the post of Supervisor w.e.f. 1993 and claims to be covered within the definition of workman as provided under Section 2(Z) of the U.P. Industrial Disputes Act, 1947.

4. The grievance of the petitioner is that he was dismissed from service on 04.02.1998 illegally and arbitrarily and in violation of provisions of Section 6(N) of the Act of 1947. Being aggrieved by his dismissal, the petitioner had moved an application before the Prescribed Authority/Conciliation Board on 15.04.1998. On the basis of the said application, conciliation proceedings were initiated and the matter was referred to the Conciliation Officer.

5. It is submitted that no settlement was arrived at between the petitioner and respondent No. 1 in conciliation proceedings and consequently the Assistant Labour Commissioner by means of order dated 26.06.1999, it was recorded that there were several allegations against the petitioner with regard to financial misappropriation and for being negligent in discharging of his duties consequent to which disciplinary proceedings were initiated and after giving adequate opportunity of hearing he was dismissed from service and the Conciliation Officer recorded that there was no ground on which he can be reinstated in service. The said order dated 26.06.1999 has been annexed by the petitioner in supplementary rejoinder affidavit as Annexure No. 4. It seems that the said report of the Conciliation Officer was sent to the State Government for

proceedings in terms of Section 4(K) of the U.P. Industrial Disputes Act, 1947 but by means order dated 05.12.2000, the Dy. Labour Commissioner, Lucknow in a very cryptive manner has stated that the case of the petitioner has not been found to be suitable to be referred to the Dy. Labour Commissioner, Lucknow.

6. Learned counsel for petitioner has submitted that the said order is illegal and arbitrary as no reasons have been assigned for declining to refer the matter for adjudication to the Labour Court. He further submits that the petitioner being a workman and the respondent No. 1 being an industrial undertaking and the matter pertaining to the dismissal of the petitioner is squarely covered under the provisions of Section 6(N) of the Industrial Disputes Act, 1947 and consequently once it is seen that all the ingredients as stated above are fulfilled then there is no discretion with the respondents except the matter refer the dispute for adjudication before the Labour Court. Despite repeated opportunities, the State has not filed any counter affidavit. The employer, namely Tata Engineering & Locomotive Company Limited contested the matter by filing a counter affidavit.

7. It has been submitted that power under Section 4(K) of the Act of 1947 is an administrative power and is subjected to limited judicial scrutiny. It has also been submitted that the petitioner was a Supervisor and consequently his claim would not be entertainable before the Labour Court inasmuch as he does not fall in the definition of workman and hence there is no infirmity in the impugned order dated 29.08.1990 of the State Government declining to refer the matter for adjudication to the Labour Court. In support of his submissions, learned counsel

for has relied upon the judgment of **Prem Kakkar Vs. State of Haryana 1976 (3)SCC 433.**

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

9. The petitioner claiming himself to be an workman having been illegally and arbitrarily dismissed from services by the respondents on 04.02.1998. He invoked the provisions of the Act of 1947 and accordingly conciliation proceedings were commenced between the petitioner and respondent No. 1. The conciliation proceedings did not conclude in a settlement. The Conciliation Officer instead of forwarding the failure report, proceeded to pass an order dated 26.06.1999 holding that the petitioner was not entitled to any benefits. On the face of it the order dated 26.06.1999 is illegal and arbitrary and without jurisdiction.

10. The Conciliation Officer has only to make efforts to see that the dispute between the employer and the employee is amicably settled. In case he succeeds then the same result therein a settlement between the parties and in case the parties are unable to arrive at settlement then only a failure report can be prepared by him and forwarded to the State Government/Prescribed Authority.

11. A perusal of the Act of 1947, It is clear that there is no provision conferring him with any powers of adjudication to determine of the lis between the employer and the employee. In the present case he has proceeded to pass an order dated 26.06.1999 delving upon the merits of the claim made by the workman and returned a finding that no ground for granting any relief to the petitioner is made out. Such an

order cannot be passed by him, taking upon the lis between the parties.

12. Such an order is without jurisdiction and in excess of the authority vested in the Conciliation Officer and consequently nonest and cannot be relied upon in any proceedings.

13. The impugned order declining to refer the matter for adjudication by the Dy. Labour Commissioner, Lucknow on 05.12.2000 is a cryptic order. No reasons have been assigned as to why the dispute raised by the petitioner could not be referred for adjudication by the Labour Court.

14. Needless to say that the said order deprived the petitioner valuable rights for having this dispute adjudicated by the Labour Court and by declining to refer the matter the valuable rights which have been vested in the petitioner by means of the Act of 1947 he has been deprived. It was incumbent upon the respondents to give adequate reasons for not referring the matter for adjudication.

15. Reasons, when recorded by an administrative authority in an order passed by it while exercising quasi-judicial functions, would no doubt facilitate the exercise of its jurisdiction by the appellate or supervisory authority. But the other considerations, referred to above, which have also weighed with this Court in holding that an administrative authority must record reasons for its decision, are of no less significance. These considerations show that the recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision-making.

The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. In our opinion, therefore, the requirement that reasons be recorded should govern the decisions of an administrative authority exercising quasi-judicial functions irrespective of the fact whether the decision is subject to appeal, revision or judicial review. It may, however, be added that it is not required that the reasons should be as elaborate as in the decision of a court of law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage.

15. Having considered the rationale for the requirement to record the reasons for the decision of an administrative authority exercising quasi-judicial functions we may now examine the legal basis for imposing this obligation. While considering this aspect the Donoughmore Committee observed that it may well be argued that there is a third principle of natural justice, namely, that a party is entitled to know the reason for the decision, be it judicial or quasi-judicial. The Committee expressed the opinion that "there are some cases where the refusal to give grounds for a decision may be plainly unfair; and this may be so, even when the decision is final and no further proceedings are open to the disappointed party by way of appeal or otherwise" and that "where further proceedings are open to a disappointed party, it is contrary to natural justice that the silence of the Minister or

the Ministerial Tribunal should deprive them of the opportunity". (p. 80) Prof. H.W.R. Wade has also expressed the view that "natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice". (See Wade, Administrative Law, 6th edn. p. 548.) In **Siemens Engineering Co. case [(1976) 2 SCC 981 : 1976 Supp SCR 489]** Hon'ble Supreme Court has taken the same view when it observed that "the rule requiring reasons to be given in support of an order is, like the principles of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process". This decision proceeds on the basis that the two well known principles of natural justice, namely (i) that no man should be a judge in his own cause, and (ii) that no person should be judged without a hearing, are not exhaustive and that in addition to these two principles there may be rules which seek to ensure fairness in the process of decision-making and can be regarded as part of the principles of natural justice. This view is in consonance with the law laid down by Hon'ble Supreme Court in **A.K. Kraipak v. Union of India [(1969) 2 SCC 262 : (1970) 1 SCR 457]** wherein it has been held : (SCR pp. 468-69 : SCC p. 272, para 20)

"The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely :

(i) no one shall be a judge in his own cause (nemo debet esse judex propria causa), and (ii) no decision shall be given against a party without affording him a reasonable hearing (audi alteram partem). Very soon thereafter a third rule was envisaged and that is that quasi-judicial

enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice."

16. A similar trend is discernible in the decisions of English courts wherein it has been held that natural justice demands that the decision should be based on some evidence of probative value. (See : **R. v. Deputy Industrial Injuries Commissioner ex p. Moore [(1965) 1 QB 456 : (1965) 1 All ER 81]** ; **Mahon v. Air New Zealand Ltd. [1984 AC 648 : (1984) 3 All ER 201]**)

17. The object underlying the rules of natural justice "is to prevent miscarriage of justice" and secure "fair play in action". As pointed out earlier the requirement about recording of reasons for its decision by an administrative authority exercising quasi-judicial functions achieves this object by excluding chances of arbitrariness and ensuring a degree of fairness in the process of decision-making. Keeping in view the expanding horizon of the principles of natural justice, we are of the opinion, that the requirement to record reason can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities. The rules of natural justice are not embodied rules. The extent of their application depends upon the particular statutory framework whereunder jurisdiction has been conferred on the administrative authority. With regard to the exercise of a particular power by an administrative authority including exercise of judicial or quasi-judicial functions the legislature, while conferring the said power, may feel that it would not be in the larger public interest that the reasons for the order passed by the administrative

authority be recorded in the order and be communicated to the aggrieved party and it may dispense with such a requirement. It may do so by making an express provision to that effect as those contained in the Administrative Procedure Act, 1946 of U.S.A. and the Administrative Decisions (Judicial Review) Act, 1977 of Australia whereby the orders passed by certain specified authorities are excluded from the ambit of the enactment. Such an exclusion can also arise by necessary implication from the nature of the subject matter, the scheme and the provisions of the enactment. The public interest underlying such a provision would outweigh the salutary purpose served by the requirement to record the reasons. The said requirement cannot, therefore, be insisted upon in such a case.

18. It is noticed that in absence of giving any reasons the respondents have acted in most illegal and arbitrary manner and in violation of Article 14 of the Constitution of India.

19. In light of the above, the order dated 05.12.2000 is quashed. The matter is remitted to the State Government to pass a fresh order in accordance with law without being influenced by the order dated 26.06.1999 passed by the Conciliatory Authority /Assistant Labour Commissioner, Lucknow. Considering that the matter is pending for the last more than two decades, let an appropriate order be passed by the State Government within a period of four weeks from the date a certified copy of this order is produced before it.

20. With the above observations / directions, the writ petition is **allowed**.

(2023) 8 ILRA 1546

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 14.07.2023

BEFORE

**THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE ARUN KUMAR SINGH
DESHWAL, J.**

Writ-Tax No. 1265 of 2022

**M/s Abhay Traders Rajmarg Kuthaund,
Jalaun ...Petitioner**

Versus

**Commissioner Commercial Tax , Lko &
Anr. ...Respondents**

Counsel for the Petitioner:

Sri Aloke Kumar

Counsel for the Respondents:

C.S.C., Sri Ankur Agarwal, Sri Ankur
Agarwal, Sri Gopal Verma

(A) Tax Law - The Uttar Pradesh Goods And Services Tax Act, 2017 - Section 74 - Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts - principles of natural justice can only be met by a show cause notice - if it contains the necessary material and the proposed penalty, even if it's not explicitly mentioned - requirement can be met if it can be easily discerned from the reading of the notice.(Para -10)

Dispute over a purchase - notice served - goods not supplied - Enterprises was a bogus firm - petitioner was asked to respond to notice - claim - Input Tax Credit, which petitioner claimed, was wrongly claimed due to the bogus supply - court questioned why tax, penalty, and interest were not imposed on petitioner.**(Para - 2)**

HELD:-Petitioner relegated to remedy of filing a reply to the impugned show cause notice as it outlines the case's foundation, stating that there

was no actual supply of goods. Show cause notice not quashed, but allowed the petitioner to respond on the fact that goods were indeed supplied to the petitioner. **(Para -11,12)**

Writ petition disposed of. (E-7)

List of Cases cited:-

1. M/s Nkas Services Pvt. Ltd. Vs St. of Jharkhand & ors., W.P. (T) No. 2444 of 2021
2. Cera Sanitaryware Ltd. Vs St. of Guj. , 2020 (40) G.S.T.L. 439 (Guj.)
3. Gorkha Security Services Vs Govt. (NCT of Delhi) , (2014) 9 SCC 105
4. Metal Forging & anr. Vs U.O.I & ors. , 2003 (2) SCC 36
5. Commissioner of Central Excise, Chandigarh Vs Shital International , (2011) 1 SCC 109
6. Dilip N Shroff Vs J.C.I.T. , (2007) 6 SCC 329
7. Khem Chand Vs U.O.I. AIR 1958 SC 300
8. Oryx Fisheries P. Ltd. Vs U.O.I. , (2010) 13 SCC 427

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

1. Heard Sri Aloke Kumar, learned counsel for the petitioner, Sri Ankur Agarwal, learned counsel for respondent nos.1 & 2 and Sri Gopal Verma, learned counsel for respondent no.3.

2. Controversy in the present writ petition is that for the A.Y. 2018-19, a notice was served to the petitioner-M/s Abhay Traders on 22.06.2022 indicating that with regard to two purchases made from M/s Raghav Enterprises vide Invoice Detail Nos.94 and 95 on 12 June, 2018 of the value of Rs.2,64,022/- and Rs.8,00,088/-, it was found that there had been no actual supply of

goods from M/s Raghav Enterprises to the petitioner. It was also found that M/s Raghav Enterprises was a bogus firm. Under such circumstances, a notice was issued to the petitioner on 22 June, 2022 asking it to reply as to why tax, penalty and interest be not imposed upon the petitioner. It was stated that because the petitioner had made a bogus supply, the Input Tax Credit, which the petitioner had claimed, was wrongly claimed.

3. Learned counsel for the petitioner has submitted that the notice itself was vague and bad in law and, therefore, be quashed and set aside. He further submits that on the basis of the Special Investigation Branch report, it was concluded that no goods had been supplied from M/s Raghav Enterprises to the petitioner-M/s Abhay Traders and, therefore, the conclusion itself was wrong. However, the Department came to the conclusion that the report submitted by Special Investigation Branch was correct. A notice to that effect was also to have been given to the petitioner so that the petitioner could have replied that in fact, goods were purchased by the petitioner from M/s Raghav Enterprises and, therefore, the Input Tax Credit which the petitioner had claimed was in accordance with law.

4. To substantiate his point, Sri Aloke Kumar, learned counsel for the petitioner, heavily relied upon the judgement and order dated **06.10.2021** passed in **W.P. (T) No. 2444 of 2021 (M/s Nkas Services Private Limited Vs. State of Jharkhand & Others)** of the High Court of Jharkhand at Ranchi.

5. Sri Ankur Agarwal, learned counsel appearing for respondent nos.1 & 2 and Sri Gopal Verma, learned counsel for respondent no.3, essentially made their submissions relying upon Section-74 of the

Uttar Pradesh Goods And Services Tax Act, 2017 (hereinafter referred to as the 'Act, 2017'). Relying upon Section 74 (1) of the Act 2017, learned counsel for the respondents stated that the proper officer had yet to conclude to initiate the proceedings. If only it "appeared" to the proper officer that tax had not been paid or short paid or erroneously refunded or where Input Tax Credit had been wrongly availed or utilized by reason of fraud or any wilful statement or suppression of fact, the proceeding could be initiated.

6. Sri Ankur Agarwal, learned counsel for respondent nos.1 and 2 submitted that in the instant case, when it only appeared to the proper officer that the Input Tax Credit had been wrongly availed, the proceedings had been correctly initiated. He also submitted that the challenge was only to a notice under Section 74 (1) of the Act, 2017 and, therefore, it was open for the petitioner to reply to the same at the appropriate stage and before the appropriate authority, and this writ petition was therefore not maintainable. Learned counsel for respondent nos.1 and 2 heavily relied upon the judgement of the Gujarat High Court reported in **2020 (40) G.S.T.L. 439 (Guj.) Cera Sanitaryware Limited Vs. State of Gujarat**. Learned counsel appearing for respondent nos.1 and 2, upon being confronted with the notice that the notice was only to the effect that the petitioner had to reply as to what was the tax, the penalty and the interest to be imposed, he very categorically submitted that when the notice itself was based upon the fact that the petitioner had not been supplied the goods and when that eventuality had yet not been concluded by any proceeding, then it was open to the petitioner to reply also to the effect that M/s Raghav

Enterprises actually supplied the goods and that M/s Raghav Enterprises was not a bogus firm on the date of transaction i.e. 12.06.2018.

7. After hearing both the parties and on perusal of the record, it would be proper for this Court to consider the issue of whether the impugned notice can be challenged by way of this writ petition, though remedy of filing reply is available. The issue regarding the proper show cause notice was considered by the Apex Court in the cases of **Gorkha Security Services Vs. Government (NCT of Delhi) reported in (2014) 9 SCC 105; Metal Forging & Another Vs. Union of India & Others reported in 2003 (2) SCC 36** as well as in the case of **Commissioner of Central Excise, Chandigarh Vs. Shital International reported in (2011) 1 SCC 109**. In the judgement mentioned above, Apex Court observed that it is trite law that unless the foundation of the case is laid in the show cause notice, the same cannot be treated as proper show cause notice and notice issued in a format without even striking out any relevant portion and without stating clear contraventions committed by the petitioner, will not substitute the requirement of proper show cause notice. Paragraph nos.21 and 22 of the Apex Court judgement in **Gorkha Security Services Vs. Government (NCT of Delhi) (supra)** are being quoted as below:

"21. The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show cause notice is to make the noticee understand the precise case set up against him, which he has to meet. This would require the statement of imputations

detailing the alleged breaches and defaults he has committed so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained. When it comes to blacklisting, this requirement becomes all the more imperative, considering that it is harshest possible action.

22. The High Court has simply stated that the purpose of a show cause notice is primarily to enable the noticee to meet the grounds on which the action is proposed against him. No doubt, the High Court is justified to this extent. However, it is equally important to mention what would be the consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. To put it otherwise, we are of the opinion that in order to fulfill the requirements of principles of natural justice, a show cause notice should meet the following two requirements viz:

i) The material/grounds to be stated on which, according to the department necessitates an action;

ii) Particular penalty/action which is proposed to be taken. It is this second requirement that the High Court has failed to omit.

We may hasten to add that even if it is not specifically mentioned in the show cause notice, but it can be clearly and safely discerned from the reading thereof, that would be sufficient to meet this requirement."

8. Hon'ble Apex Court in ***Dilip N Shroff Vs. Joint Commissioner of Income Tax reported in (2007) 6 SCC 329***, has also observed that expression in Section 73/74 of the Act, 2017 "appears to be proper officer" is not to a casual act but should show the full application of mind by proper officer.

9. Purpose of the show cause proceeding is meant to give a person proceeded against a reasonable opportunity of making his objection against the proposed charges as indicated therein as observed by the Hon'ble Supreme Court in the case of ***Khem Chand Vs. Union of India AIR 1958 SC 300***. This judgement was also considered by the Apex Court in ***Oryx Fisheries P. Ltd. Vs. Union of India reported in (2010) 13 SCC 427***. Paragraph Nos.24 to 27 are being quoted as below:

"24. This Court finds that there is a lot of substance in the aforesaid contention. It is well settled that a quasi-judicial authority, while acting in exercise of its statutory power must act fairly and must act with an open mind while initiating a show cause proceeding. A show cause proceeding is meant to give the person proceeded against a reasonable opportunity of making his objection against the proposed charges indicated in the notice.

25. Expressions like "a reasonable opportunity of making objection" or "a reasonable opportunity of defence" have come up for consideration before this Court in the context of several statutes. A Constitution Bench of this Court in *Khem Chand v. Union of India*, of course, in the context of service jurisprudence, reiterated certain principles applicable in the present case also.

26. *S.R. Das, CJ speaking for the unanimous Constitution Bench in Khem Chand held that the concept of 'reasonable opportunity' includes various safeguards and one of them, in the words of the learned Chief Justice, is:*

"(a) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;"

27. It is no doubt true that at the stage of show cause, the person proceeded against must be told the charges against him so that he can take his defence and prove his innocence. It is obvious that at that stage, the authority issuing the charge-sheet cannot, instead of telling him the charges, confront him with definite conclusions of his alleged guilt. If that is done, as has been done in this instant case, the entire proceeding initiated by the show cause notice gets vitiated by unfairness and bias and the subsequent proceeding becomes an idle ceremony."

10. Therefore, from the law laid down by the Apex Court in the judgement mentioned above, it is clear that requirement of principles of natural justice by a show cause notice can only be met if:

(I) a show cause notice contains the material/ground which, according to the department necessitates an action;

(II) the particular penalty/action which is proposed to be taken. Even if it is not specifically mentioned in the show cause notice **but it can be clearly and safely discerned from the reading thereof that would be sufficient to meet this requirement.**

11. From the perusal of the impugned notice, it is clear that it contains necessary details and grounds, which are the basis for issuing the same. Still, at the tail end of the impugned notice, instead of seeking a reply on the allegation mentioned in the impugned show cause notice issued under Section 74 (1) of the Act, 2017, petitioner was directed to reply with regard to the tax and penalty and it was stated that if no reply was furnished then order under Section 74(9) of the Act, 2017 would be passed. Therefore, the impugned notice because of the facts mentioned in the earlier part of the notice cannot be said to be patently illegal, being without jurisdiction. Therefore, there is no ground for quashing the same under Article 226 of the Constitution of India.

12. Therefore, after considering the submission of parties, the contention made by the learned counsel for the respondents and on the perusal of the record and after taking into account all the observations made by the Apex Court, we are of the view the petitioner should be relegated to the remedy of filing a reply to the impugned show cause notice. Because the notice did contain the details about the foundation of the case, i.e. that there was no actual supply of goods on 12 June, 2018 by M/s Raghav Enterprises to petitioner, we are not quashing the show cause notice instead we are permitting the petitioner to also reply with regard to the fact that goods were in fact supplied to the petitioner from M/s Raghav Enterprises.

13. Under such circumstances, this writ petition is **disposed of**, allowing the petitioner to file his reply/objection against the impugned notice, along with relevant material, within one month. In his response, it shall be open to the petitioner to

specifically submit his explanation regarding the fact that there was an actual supply of goods from M/s Raghav Enterprises.

14. Needless to say, it was open to the petitioner to submit a reply regarding the fact that the taxation, the penalty and the charging of interest were being wrongly made.

15. Further, we direct that the report of the Special Investigation Branch shall not be considered a final report and shall be subject to the decision by the Assessing Authority. The order shall be passed after considering the petitioner's reply, the evidence it might submit and the evidence it may offer.
