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ALLAHABAD SERIES

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(2023) 1 ILRA 7
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.01.2023

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.

Arbitration & Conciliation Application U/S 11(4)
No. 109 of 2021

M.J.S. Construction & Ors. ...Applicants
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Applicants:
Sri Bharat Kishore Srivastava, Sri Vimal Dharm Yadav

Counsel for the Respondents:
Sri Prashant Mathur, Sri Prabhakar Tripathi, A.S.G.I.

A. Civil Law - Arbitration and Conciliation Act,1996-Sections 11(4), (6),(8) & (12)-Appointment of arbitrator-Clause 25(ii) of General Conditions of Contract providing for appointment of Arbitrator found to be clearly in teeth of section 12(5) of Act-As alleged authorities falling under category-1 of seventh Schedule of Act and thereby being ineligible to be appointed as Arbitrator were also ineligible to nominate Arbitrator for resolution of dispute between parties- In considered view of Court sub-clause (ii) of Clause 25 of General Conditions of Contract to the extent it provides for appointment of Arbitrator is liable to be skipped-Arbitrator for resolution of dispute between parties needed to be appointed by High Court-A retired Judge of High Court Mr. Arun Tandon was appointed as Arbitrator subject to his consent-Matter referred to Arbitrator for resolution of dispute between the parties.(Para 25 to 29)

The application is disposed of. (E-6)

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

1. The prayer made in the present application filed under Section 11(6) of the Arbitration and Conciliation Application Act, 1996 (hereinafter referred to as the "Act") is for appointment of an Arbitrator for resolution of dispute between the parties.

2. The arguments, raised by learned counsel for the applicant, are that upon participating in the tender, the applicant-firm was issued Work Order No. 15 dated August 18, 2015 for construction of 30 bedded hospital in Cantt. General Hospital, Kanpur. As per applicant-firm, when after completion of the work final bill amounting ₹3,17,98,239.70 was produced for payment, an amount of ₹53,60,466.51/- remained unpaid. The applicant kept on requesting the respondents to release the balance payment, however, when for quite long time, the payment was not made despite repeated requests made by the applicant-firm, the applicant invoked arbitration clause as contained in Clause 25 of General Conditions of Contract for Central P.W.D. Works, 2014 seeking appointment of an Arbitrator for resolution of dispute between the parties, for the purpose notice dated July 9, 2021 was issued. However, respondents vide letter dated October 8, 2021 refused to appoint Arbitrator stating that there is no need for appointment of Arbitrator as Clause-16 of the contract agreement dated December 26, 2014 excludes the dispute from the purview of arbitration and it shall be decided by the Board which shall be conclusive and binding on the contractor.

3. He further submitted that rejection of request of the applicant for appointment of Arbitrator placing reliance on Clause 16 of agreement is totally illegal as in terms of the Clause-16 of the agreement, the

decision taken by the respondent is final and thus no remedy is left with the applicant. Any such condition would be in violation of Section 28 of the Contract Act, as the applicant cannot be made remediless for resolution of his grievance.

4. On the other hand, learned counsel for the respondent submitted that entire amount due to the applicant has already been paid, hence there is no dispute pending for which Arbitrator need be appointed.

5. He further submitted that there was no sanction granted for the additional work allegedly executed by the applicant, hence, no payment could be made. Regarding application of Clause-16 of the agreement dated December 26, 2014, he submitted that 25 of General Conditions of Contract provides that the same shall be applicable except where otherwise provided in the contract. In the case in hand, Clause-16 of the agreement dated December 26, 2014 clearly provides that the decision on the issue by the Board/CEO will be final and thus no arbitrator can be appointed.

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

7. Clause 25 of General Conditions of Contract provides for an arbitration clause. It reads as under:

Clause 25

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

(i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal.

If the contractor is dissatisfied with the decision of the Chief Engineer, the contractor may within 30 days from the receipt of the Chief Engineer decision, appeal before the Dispute Redressal Committee (DRC) along with a list of disputes with amounts claimed in respect of

each such dispute and giving reference to the rejection of his disputes by the Chief Engineer. The Dispute Redressal Committee (DRC) shall give his decision within a period of 90 days from the receipt of Contractor's appeal. The constitution of Dispute Redressal Committee (DRC) shall be as indicated in Schedule "F'.

If the Dispute Redressal Committee (DRC) fails to give his decision within the aforesaid period or any party is dissatisfied with the decision of Dispute Redressal Committee (DRC), then either party may within a period of 30 days from the receipt of the decision of Dispute Redressal Committee (DRC), give notice to the Chief Engineer for appointment of arbitrator on prescribed proforma as per Appendix XV, failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

(ii) Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, CPWD, in charge of the work or if there be no Chief Engineer, the Additional Director General of the concerned region of CPWD or if there be no Additional Director General, the Director General of Works, CPWD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person, other than a person appointed by such Chief Engineer CPWD or Additional Director General or Director General, CPWD, as aforesaid, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs. 1,00,000/-, the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he

issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid."

8. The fact that the aforesaid clause is applicable to the contract in question was not a matter of dispute as the same was neither denied by the respondent in reply to the notice issued by the applicant seeking appointment of Arbitrator referring to that clause nor even in the counter affidavit filed to the application. The only ground raised for rejection of the prayer of the applicant for appointment of arbitrator was Clause 16 of the agreement dated December 26, 2014 in terms whereof for specification and the quality of materials, the decision of the Board/CEO shall be final. The same reads as under:

"16. If and whenever any dispute hereinafter arise relating to the meaning of specification and the quality of materials of the work or any other matter relating to the contractor, the decision of the Board/CEO shall be conclusive, and, binding on the contractor."

9. In **Bharat Sanchar Nigam Ltd. and others Vs. Motorola India Pvt. Ltd. (2009) 2 SCC 337,** the judgment of the Kerala High Court appointing the Arbitrator was challenged before Hon'ble the Supreme Court in appeal by BSNL. While upholding the appointment of the Arbitrator by the High Court, the appeal preferred by the BSNL was dismissed.

10. In the aforesaid case, the contract between the parties was executed in respect of turn key solution of supply, installation and commissioning of Indian Mobile Communications System. Clause 16.2 of the contract provided that in case the delayed portion of the delivery materially hampers effective user of the system, liquidated damages shall be levied on the total value of concerned package of the purchase order. It further provided that the quantum of liquidated damages assessed and levied by the purchaser shall be final and not challengeable by the supplier. The said clause 16.2 reads as under:

"16.2. Should the tenderer fail to deliver the goods and services on turn key basis within the period prescribed, the purchaser shall be entitled to recover 0.5% of the value of the delayed quantity of the goods & services, for each week of delay or part thereof, for a period upto 10 weeks and thereafter at the rate of 0.7% of the value of the delayed quantity of the goods and services for each week of delay or part thereof for another 10 weeks of delay. In the present case of turn key solution of supply, installation and commissioning, where the delayed portion of the delivery and provisioning of services materially hampers effective user of the systems, Liquidated Damages charged shall be levied as above on the total value of the concerned package of the purchase order. Quantum of liquidated damages assessed and levied by the purchaser shall be final and not challengeable by the supplier."

11. The arbitration clause in the agreement provided that any question, dispute or difference arising under the agreement or in connection therewith (except as to the matters, the decision to which is specifically provided under this agreement), shall be referred to the sole arbitrator. The said clause 20.1 is reproduced hereinunder:

"20.1 In the event of any question, dispute or difference arising under this agreement or in connection there-with (except as to the matters, the decision to which is specifically provided under this agreement), the same shall be referred to the sole arbitration of the CGM, Kerala Telecom Circle, BSNL or in case his designation is changed or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted (whether in addition to his own duties or otherwise) with the functions of the CGM, Kerala Telecom Circle, BSNL or by whatever designation such an officer may be called (hereinafter referred to as the said officer), and if the CGM Kerala Telecom Circle or the said officer is unable or unwilling to act as such, then to the sole arbitration of some other person appointed by the CGM, Kerala Telecom Circle or the said officer. The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act, 1996.

There will be no objection to any such appointment on the ground that the arbitrator is a Government Servant or that he has to deal with the matter to which the agreement relates or that in the course of his duties as a government servant he has expressed his views on all or any of the matters in dispute. The award of the arbitrator shall be final and binding on both the parties to the agreement. In the event of such an arbitrator to whom the matter is originally referred, being transferred or vacating his office or being unable to act for any reason whatsoever, the CGM, Kerala Telecom Circle, BSNL or the said officer shall appoint another person to act as an arbitrator in accordance with the terms of the agreement and the person so appointed shall be entitled to proceed from the stage at which it was left out by his predecessors....."

12. The Supreme Court held that the clause with respect to quantification of liquidated damages being final and not amenable to judicial scrutiny is clearly in restraint of legal proceedings under Section 28 of the Indian Contract Act, 1872 (hereinafter referred to as the "Contract Act"). Accordingly, the Court held the clause to be bad in the eyes of law. Relevant para-17 is extracted below:

"38. The provision under clause 16.2 that quantification of the Liquidated Damages shall be final and cannot be challenged by the supplier Motorolla is clearly in restraint of legal proceedings under section 28 of the Indian Contracts Act. So the provision to this effect has to be held bad."

13. In **ICOMM Tele Ltd. Vs. Punjab State Water Supply Sewerage Board and others (2019) 4 SCC 401,** the Punjab State Water Supply and Sewerage Board, Bhatinda issued notice inviting tender for extension and augmentation of water supply, sewerage scheme etc. for various towns on a turn key basis. The appellant-company was awarded tender and a formal contract was executed between the parties. Clause -25 (viii) of the contract is set out as follows:

"viii. It shall be an essential term of this contract that in order to avoid frivolous claims the party invoking

arbitration shall specify the dispute based on facts and calculations stating the amount claimed under each claim and shall furnish a "deposit-at-call" for ten percent of the amount claimed, on a schedule bank in the name of the Arbitrator by his official designation who shall keep the amount in deposit till the announcement of the award. In the event of an award in favour of the claimant, the deposit shall be refunded to him in proportion to the amount awarded w.r.t the amount claimed and the balance, if any, shall be forfeited and paid to the other party."

14. The Supreme Court, while striking out the aforesaid condition holding it to be arbitrary, observed as under:

"24. Further, it is also settled law that arbitration is an important alternative dispute resolution process which is to be encouraged because of high pendency of cases in courts and cost of litigation. Any requirement as to deposit would certainly amount to a clog on this process. Also, it is easy to visualize that often a deposit of 10% of a huge claim would be even greater than court fees that may be charged for filing a suit in a civil court.

X X X X

27. Deterring a party to an arbitration from invoking this alternative dispute resolution process by a pre-deposit of 10% would discourage arbitration, contrary to the object of de-clogging the Court system, and would render the arbitral process ineffective and expensive."

15. In **Bharat Sanchar Nigam Ltd.'s (supra)**, a clause in the agreement, in terms whereof liquidated damages levied was to be final and not challengeable by the supplier, was held to be in violation of Section 28 of the Contract Act. It was also held that it would also defeat the notions laid down under the principles of natural justice wherein it has been recognized that a party cannot be a judge of its own cause ("nemo judex in causa sua'). Any decision unilaterally taken by the Board or CEO would fall in the same category. Instead of promoting the alternative dispute resolution mechanism, the respondent-Board herein became judge of his own cause.

16. In **ICOMM Tele Ltd.'s case (supra)**, even a clause in the agreement providing that before invoking the arbitration clause, a pre-deposit of ten per cent is required, was held to be arbitrary.

17. For the reasons mentioned above, in my opinion, Clause-16 of the agreement in question providing for decision of the Board/CEO on certain issues to be final is clearly violative of Section 28 of Contract Act. If that clause is taken out of the agreement executed between the parties, Clause-25 of General Conditions of Contract comes into picture.

18. In Clause 25 of General Conditions of Contract, a detailed procedure has been provided for resolution of dispute. Initially a request is to be made to the Superintending Engineer. On his failure to give decision, an appeal is maintainable to the Chief Engineer whereafter the matter can be considered by Dispute Redressal Committee. Any of the party dissatisfied with the order of Dispute Redressal Committee can give notice to the Chief Engineer for appointment of Arbitrator. The matter is required to be referred to sole Arbitrator to be appointed by Chief Engineer.

19. However, in the case in hand, the applicant, in the notice dated July 9, 2021,

while invoking the arbitration clause, has clearly stated therein absence of the aforesaid authorities and the Dispute Redressal Committee in the respondent-Department. This fact having not been controverted by the respondent, in my view, the applicant has rightly invoked the arbitration clause directly seeking appointment of Arbitrator for resolution of dispute between the parties.

20. Now I come to the aspect regarding appointment of Arbitrator by Chief Engineer, as provided under Clause 25, or any other authority of the respondent. The Supreme Court in **Perkins Eastman Architects DPC and another Vs. HSCC (India) Limited AIR 2020 SC 59**, considering the issue as to whether an ineligible persons can nominate an arbitrator, quoted the following from **TRF Ltd. vs. Energo Engineering Projects Ltd (2017) 8 SCC 377:**

"By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act."

21. Referring to and relying on the above authority on the issue in **TRF Ltd.' case (supra)** The Court in **Perkins Eastman Architects' case (supra)** held:

"But, in our view that has to be the logical deduction from TRF Limited (2017) 8 SCC 377. Paragraph 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator."

(emphasis supplied)

22. In order to examine the application of the above exposition of law to the case in hand, it would be appropriate to go through the relevant provision of the Act.

23. Section 12(5) of the Act is quoted below:

"12.(5) 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 shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

24. The Seventh Schedule of the Act is quoted below:

"Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

X X X X

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

X X X X

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties."

25. In the case in hand, Clause 25(ii) of the General Conditions of Contract providing for appointment of an Arbitrator Chief Engineer, CPWD, in charge of the work or if there be no Chief Engineer, the Additional Director General of the concerned region of CPWD or if there be no Additional Director General, the Director General of Works is clearly in the teeth of Section 12(5) of the Act, as I am clearly of the view that the above authorities, falling under category-1 of the Seventh Schedule of the Act and thereby being ineligible to be appointed as Arbitrator, are also ineligible to nominate an Arbitrator for resolution of dispute between the parties.

26. Therefore, in my considered view, Sub-clause (ii) of Clause 25 of General Conditions of Contract, to the extent it provides for appointment of an Arbitrator by the Chief Engineer, or Additional Director General or Director General is liable to skipped. If the aforesaid provision, to the above extent, is taken out of the general conditions of contract, in my view, the Arbitrator for resolution of dispute between the parties needs to be appointed by this Court.

27. Accordingly, this Court appoints Hon'ble Mr. Justice Arun Tandon, a retired Judge of this Court as Arbitrator, subject to His Lordship's consent in terms of provisions contained in Section 11(8) read with Section 12(1) of the Act by sending a request letter to him. His Lordship's address is 3, Patrika Marg, Civil Lines, Allahabad, mobile number is 9415214462 and e-mail is "tandonarun30@gmail.com".

28. The matter is referred to the Arbitrator for resolution of the dispute between the parties. The Arbitrator shall be paid fees as per the schedule attached to the Act.

29. The present application is disposed of.

30. In case, the Arbitrator recuses, the matter shall be listed before the Court itself for further orders.

(2023) 1 ILRA 14
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.10.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE SYED WAIZ MIAN, J.

Criminal Misc. Writ Petition No. 3487 of 2019

Flipkart Internet Pvt. Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Kartikeya Saran, Ms. Suchita Mehrotra, Sri Anurag Khanna (Senior Adv.)

Counsel for the Respondents:
G.A., Sri Samarth Sinha

A. Criminal Law - Constitution of India, 1950 - Article 226 - Indian Penal Code, 1860-Sections 406, 420, 467, 468, 471,474 & 474-A-Quashing of FIR-Fourth respondent/ a practicing lawyer lodged a criminal complaint against the petitioner-Company-fourth respondent bought a laptop from the Company which was not as per the specification for which the order was placed-Petitioner states it only provides access to Buyers and Sellers through their websites-Petitioner-Company is exempted from any liability u/s 79 of the I.T. Act,2000, no violation can ever be attributed or made out against the directors or officers of the intermediary –petitioner company is an intermediary providing merely access to Sellers/Buyers is not under challenge nor disputed-Hence, the impugned FIR and the consequent police report is set aside and quashed.(Para 1 to 39)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Avnish Bajaj Vs St. (NCT of Delhi) (2004) SCC Online Del 1160

2. St. of Haryana & ors.. Vs Bhajan Lal & ors. (2006) 6 SCC 736

3. St. of Karnataka Vs L. Muniswamy & ors. (1977) 2 SCC 699

4. Anand Kumar Mohatta & anr. Vs St. (NCT of Delhi), Deptt. of Home & anr. (2019) 11 SCC 706

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

1. Heard Sri Anurag Khanna, learned Senior Advocate, assisted by Sri Kartikeya Saran and Ms. Suchita Mehrotra, learned counsels appearing for the petitioner and Mrs. Manju Thakur, learned A.G.A. for the State.

2. By the instant writ petition, petitioner is seeking quashing of the First Information Report1 dated 26 January 2019, bearing Case Crime No. 0208 under Sections 406, 420, 467, 468, 471, 474 and 474-A IPC, registered at Police Station Kavi Nagar, District Ghaziabad.

3. Petitioner is a Company incorporated under the Companies Act, 19562, having its registered office at Bengaluru (hereinafter referred to as "Company").

4. The fourth respondent, claims to be a practising lawyer at Ghaziabad, filed an application under Section 156(3) Code of Criminal Procedure, 19733 on which the learned Magistrate vide order dated 14 January 2019, directed the concerned police station to register a case in terms of the application and investigate into it, wherein, it is alleged that complainant regularly purchases products from the sellers on the website of the petitioner-Company knowing to be of quality goods provided by the Company. The fourth respondent on 12 October 2018, placed an order for purchase of a Laptop being H.P. 15 A.P.U., Dual Core, A-6 (4GB/I TB HDD/Windows 10 Home) 15" B.W. Model, accordingly, made payment at Rs. 17,990/- through online payment for the product. The booking ID generated for the said purchase being OD 113621553490664000.

5. Grievance of the fourth respondent is that the Laptop delivered on 22 October 2018, was having processor of brand

"A.M.D' instead of brand "Intel', thus, according to the fourth respondent, delivery of the product was not as per the specifications for which order was placed. Aggrieved, complainant-fourth respondent registered a complaint with the petitioner-Company regarding the alleged discrepancy of the product.

6. The complaint was taken up by the Company as per their Dispute Redressal Policy, with the Seller i.e. Tech Connect Retail Private Limited, but Seller declined to replace or refund the consideration of the product, stating that the product was dispatched as per specifications purchased by the fourth respondent.

7. Thereafter, fourth respondent lodged a criminal complaint against the petitioner-Company directly with the Senior Superintendent of Police, Ghaziabad. It appears that nothing was done on the complaint, accordingly, fourth respondent filed an application under Section 156(3), Cr.P.C. before the Chief Judicial Magistrate, Ghaziabad, being Application No. 6474 of 2018. On the said complaint the Magistrate passed an order dated 14 January 2019, in terms of the application directing the concerned police station to register a case for the offence disclosed in the application.

8. In the impugned F.I.R. the fourth respondent reiterated that he is a long time user of the Company's website and had placed order on down payment for the purchase of H.P. Laptop from the market place Seller (petitioner-Company). It is alleged that the product received by the fourth respondent was not as per the specification for which the order was placed. The matter was raised by a complaint with the petitioner-Company, but, the Seller declined to replace the product and refund the consideration stating that the product is as per the specifications for which the order was placed. It is further alleged that the product delivered to the fourth respondent was having brand "A.M.D.' processor as against brand "Intel' for which order was placed as per the specification of the product displayed by the Seller on the Company's website on the date of purchase.

9. The petitioner-Company has raised challenge to the impugned F.I.R. seeking its quashing, *inter alia*, on the ground that petitioner-Company is an e-commerce Marketplace/Platform that provides access to Buyers and Sellers through their website www.flipkart.com. Buyers and Sellers meet and interact to execute purchase and sale transaction, subject to terms and condition as set out in the Buyers/Sellers Terms of Use (Flipkart Terms of Use). The relevant conditions of the Terms of Use, *inter alia*, includes:

a. The website of the petitioner-Company is a platform that users, i.e. buyers, and/or, sellers, utilize to meet and interact with one another for their transactions. As such, the Company merely provides a platform for the transactions of its users and petitioner-Company is not a party to or in control of any such transaction between its users.

b. All commercial/contractual terms (including the price, shipping costs, payment methods, payment terms, date, period and mode of delivery, warranties related to products and services and after sales services related to the products and services are offered by and agreed to between the Buyers and Sellers alone, as such, the petitioner-Company does not have any control or does not determine or

advise or in any way involve itself in the offering or acceptance of such commercial/contractual terms between the Buyers and Sellers.

c. All discounts and offers on the website are provided by the sellers/brands and not by the petitioner-Company.

d. The petitioner-Company does not make any representation or warranty as to specifics of the products or services (such as quality, value, salability) proposed to be sold or offered to be sold or purchased on the website, as such, the petitioner-Company does not explicitly or even impliedly support or endorse the sale or purchase of any products or services on the website.

e. The website is only a platform that can be utilized by users to reach a larger base to buy and sell products or services and the petitioner-Company is only providing a platform for communication; the actual contract for sale of any of the products or services is strictly between the Seller and the Buyer of such product.

f. The product offered for sale and the related content including the product description, prices, images, texts, graphics, user interfaces, visual interfaces, photographs, trademarks, logos, sounds, music and artwork on the website of the petitioner is a third party user generated content and the petitioner-Company has no control over such third party user generated content. Therefore, the website of the petitioner-Company operates as a neutral e-commerce platform which serves as a mere conduit for Buyers and Sellers to conduct their business.

10. In this backdrop, it is submitted by the learned counsel for the petitioner-Company that in terms of functionality, the petitioner-Company is an "intermediary' as defined under Section 2(1)(w) of The Information Technology Act, 20004 providing an online platform. The transactions between the Buyers and Sellers on the platform are completely independent. No criminal offence whatsoever is made out against the petitioner-Company, the fourth respondent being an aware citizen was fully aware of the marketplace model and had voluntarily signed the Buyers Terms of Use; the fourth respondent has ex-facie made contradictory averments that the Laptop was purchased from the petitioner-Company and that petitioner-Company hatched a criminal conspiracy with the marketplace Seller. It is further submitted that expressions like "conspiracy', "cheating' and "forgery' has been employed in the impugned F.I.R. but the ingredients thereof has not been asserted or detailed in the impugned F.I.R. It is further submitted that the impugned F.I.R. has been lodged maliciously to extract money from the petitioner-Company and to damage its goodwill, reputation and customer base. The Company claims protection under Section 79 of the I.T. Act, 2000. In this backdrop, it is submitted that the F.I.R. be quashed.

11. Learned State Counsel on specific query submits that the State does not intend to file counter affidavit to the writ petition. As per their instructions police report (closure) under Section 173(2) of Cr.P.C. has been filed by the Investigating Officer, hence, it is submitted that nothing remains for the State to submit.

12. Learned counsel for the fourth respondent despite putting in appearance has not filed counter affidavit to the averments made in the writ petition.

13. The petitioner-Company is governed by the provisions of the I.T. Act, 2000, petitioner-Company is an

"intermediary' and the role being that of a facilitator or a conduit. It is an e-commerce platform where Sellers and Buyers can interact and select and purchase products and items offered by the seller. The facts, inter se, parties are not in dispute that petitioner-Company is an e-commerce intermediary where the platform does not take title to the goods being sold on their marketplace platform. Intermediary stands on a different footing being only facilitator of exchange of information or sales under the I.T. Act, 2000. Intermediaries are not liable for the goods put up for sale by the Seller on the platform. Such e-commerce networks are exempted from liability under the I.T. Act, 2000, Rules or Regulations made thereunder concerning any third party. As per the impugned F.I.R. the date of alleged offence is 22 October 2018 i.e. on the date when the defective laptop purchased by the fourth respondent was received.

14. "Intermediary" is defined under Section 2(1)(w) of the I.T. Act, 2000, which reads as follows:

2(1)(w) —intermediary, with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online- auction sites, online-market places and cyber cafes.

15. In other words, the obligation of the intermediary is to observe due diligence and follow the guidelines that may be prescribed by the Government in this behalf. Therefore, reference will have to be made to the Information Technology (Intermediaries Guidelines) Rules, 20115. The I.T. Guidelines was enacted under Section 87 of I.T. Act, 2000, and came to force in 2011. What is due diligence to be observed by the intermediary has been provided under Rule 3(1), which, *inter alia*, reads as follows:

3. Due diligence to be observed by intermediary -- The intermediary shall observe following due diligence while discharging his duties, namely: --

(1) The intermediary shall publish the rules and regulations, privacy policy and user agreement for access-or usage of the intermediary's computer resource by any person.

(2) xxx xxx xxx

(d) infringes any patent, trademark, copyright or other proprietary rights;

(e) to (i) xxx xxx (3) The intermediary shall not knowingly host or publish any information or shall not initiate the transmission, select the receiver of transmission, and select or modify the information contained in the transmission as specified in sub-rule (2):

provided that the following actions by an intermediary shall not amount to hosing, publishing, editing or storing of any such information as specified in sub-rule: (2) --

(a) xxx xxx

(b) removal of access to any information, data or communication link by an intermediary after such information, data or communication link comes to the actual knowledge of a person authorised by the intermediary pursuant to any order or direction as per the provisions of the Act;

(4) The intermediary, on whose computer system information is stored or hosted or published, upon obtaining

knowledge by itself or been brought to actual knowledge by an affected person in writing or through email signed with electronic signature about any such information as mentioned in sub-rule (2) above, shall act within thirty six hours and where applicable, work with user or owner of such information to disable such information that is in contravention of sub-rule (2). Further the intermediary shall preserve such information and associated records for at least ninety days for investigation purposes;

(5) The Intermediary shall inform its users that in case of non-compliance with rules and regulations, user agreement and privacy policy for access or usage of intermediary computer resource, the Intermediary has the right to immediately terminate the access or usage lights of the users to the computer resource of Intermediary and remove non-compliant information.

(6) to (11) xxx xxx xxx‖

16. I.T. Guidelines Rules, 2011, has since been superseded by the Information Technology (Intermediaries Guidelines and Digital Media Ethics Code) Rules, 2021. The subsequent Guidelines does not apply to the facts of the instant case, having regard to the fact that the offence is alleged to have been committed on 22 October 2018 i.e. the date of purchase of the defective product.

17. Intermediary is obliged to publish the Guidelines, Rules, Regulations, Privacy Policy, and User/Buyer Agreement. However, non-compliance of these Guidelines/Rules have not been declared to be an offence under the I.T. Act, 2000. Chapter-XII of I.T. Act, 2000, provides for Offences, Penalties and Procedures.

18. The present matter relates to criminal liability and petitioner-Company claims protection under Section 79, further, it is submitted on behalf of petitioner-Company that the ingredients of the offence, taking the allegations on face value as alleged in the impugned FIR is not made out.

19. Section 79 of I.T. Act, 2000, as it earlier stood, came to be amended by the Information Technology (Amendment Act 2008), it came into force on 27 October 2009. In the given facts the amended Section 79 would be applicable and not the provisions as it stood prior to the date of amendment. Section 79 as it stands after amendment reads thus:

"79 Exemption from liability of intermediary in certain cases:

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link hosted by him.

(2) The provisions of sub-section (1) shall apply if-

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored; or

(b) the intermediary does not-

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may

prescribe in this behalf (Inserted Vide ITAA 2008)

(3) The provisions of sub-section (1) shall not apply if-

(a) the intermediary has conspired or abetted or aided or induced whether by threats or promise or otherwise in the commission of the unlawful act (ITAA 2008)

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation:- For the purpose of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary."

20. Section 79 accordingly is a safe harbour provision. Internet intermediaries give access to host, disseminate and index content, products and services originated by third parties on the internet which include e-commerce intermediaries where the platforms do not take title of the goods being sold. Examples of such intermediaries include Amazon India, Myntra, AJIO etc.

21. The I.T. Act, 2000, has an overriding effect. Section 81 of I.T. Act, 2000, is extracted:

"81. Act to have overriding effect: The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

22. Intermediaries stand on a different footing being only facilitator of the exchange of information or sales. Prior to the amendment the exemption provision under Section 79 did not exist, therefore, an intermediary would have been liable for any third party information or data made available by it. The 2008 amendment introduced Chapter XII to the I.T. Act, 2000. The amendment purportedly was in the backdrop of the decision of the Delhi High Court rendered in **Avnish Bajaj vs. State (NCT of Delhi).** After the amendment, intermediary is not liable under any Act if it satisfied certain requirements as detailed in Section 79 of I.T. Act, 2000.

23. Petitioner-Company does not follow inventory based model of e-commerce, where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly. Petitioner-Company claims, it is an intermediary between Buyer and Seller within the meaning of Section 2(1)(w) of the I.T. Act, 2000 and does not control the transaction between the two parties. It only acts as a neutral platform to allow sellers to interact with the buyers/customers, without exercising ownership over any goods or indulging in the manufacture or dealing of any goods. Petitioner-Company claims, it only receives and stores the information on behalf of the seller/ buyer and acts as a facilitator/ intermediary.

24. The question is as to whether an intermediary as defined under Section 2(1)(w) of the I.T. Act, 2000, would be liable for any action or inaction by a party or a vendor/seller making use of the

facilities provided by the intermediary in terms of Buyers/Sellers Terms of Use of the Company.

25. It is stated that petitioner-Company has established a marketplace on the World Wide Web, more popularly known as the internet, enabling a Seller to upload, sell or even 'offer for sale' any product on the Company platform. For this purpose, a Seller has to create an account with the Company and contractually agree to Company's Buyers/Seller Terms of Use, Policies, Seller Agreement, which contains the basic terms and conditions of selling products over Company marketplace which every Seller/Buyer has to agree with.

26. Company being an intermediary cannot be disputed, it comes with the meaning and definition of "intermediary' under Section 2(1)(w) of the I.T. Act, 2000, as amended by the Information Technology (Amendment) Act, 2008. Company would be entitled to the exemption from liability in terms of Section 79 I.T. Act, 2000, read with Section 81, if the requirements thereof are met.

27. Company admittedly is not the Seller, it is the Sellers registered with Company who are the sellers of products and services on its platform, it is the Sellers who are solely responsible to the purchaser/customer.

28. The Seller Agreement as per Terms of Use, details out the terms and conditions relevant to the transaction, which has been brought on record. (Flipkart Terms of Use)

29. It cannot be expected that the provider or enabler of the online marketplace is aware of all the products sold on its Website/marketplace. It is only required that such provider or enabler put in place a robust system to inform all Sellers on its platform of their responsibilities and obligations under applicable laws in order to discharge its role and obligation as an intermediary. If the same is violated by the Seller of goods or service such Seller can be proceeded against but not the intermediary.

30. The manner in which the documents (Buyer/Seller Terms of Use) have been executed, contents thereof, as also the obligation of the parties stated therein establishes the due diligence exercised by the petitioner-Company, to be in accordance with and compliance of Section 79(2)(c) of the I.T. Act, 2000, read in conjunction with the Information Technology (Intermediaries Guidelines) Rules, 2011, in ensuring that Vendors/Sellers who register on its Website conduct themselves in accordance with and in compliance with the applicable laws.

31. The Consumer Protection (E-Commerce) Rules, 2020, makes a distinction between marketplace e-commerce websites and inventory e-commerce websites. As such the petitioner-Company would come within the meaning of a marketplace e-commerce website, thereby, affording the above exemption to the Company so long as the requirements under Section 79 are followed by the petitioner-Company.

32. In the present case, as detailed above, petitioner-Company has complied with the requirements of sub-sections (2) and (3) of Section 79, as well as, the Information Technology (Intermediaries Guidelines) Rules, 2011.

33. In our considered opinion Company has exercised 'due diligence' under Section 79(2)(c) of the Information

Technology Act, 2000, read in conjunction with the Information Technology (Intermediaries Guidelines) Rules, 2011.

34. The petitioner-Company is exempted from any liability under Section 79 of the I.T. Act, 2000, no violation can ever be attributed or made out against the directors or officers of the intermediary, as the same would be only vicarious, and such proceedings as initiated against them would be unjust and bad in law.

35. The only liability of an intermediary under Section 79(3)(b) of the I.T. Act, 2000, is to take down third-party content upon receipt of either a court order or a notice by an appropriate government authority and not otherwise. As per complaint filed by the complainant indicates that the petitioner-Company, raised the grievance of the complainant with the Seller.

36. In terms of Section 79 of the I.T. Act, 2000, there does not appear to be any distinction between passive and active intermediaries in so far as the availability of the safe harbour provisions are concerned. An intermediary is not liable for any third-party (Seller) information, data or communication link made available or posted by it, as long as it complies with Sections 79(2) or (3) of the I.T. Act, 2000. The exemption under Section 79(1) from liability applies when the intermediaries fulfil the criteria laid down in either Section 79(2)(a) or Section 79(2)(b), and Section 79(2)(c). Where the intermediary merely provides access, it has to comply with Section 79(2)(a), whereas, in instances where it provides services in addition to access, it has to comply with Section 79(2)(b). The case of petitioner-Company is that they fulfil these conditions to qualify as intermediaries. The factum that the petitioner-Company is an intermediary providing merely access to Sellers/Buyers is not under challenge nor disputed. The ingredients of the offence under Section 406, 467, 468, 471, 474 and 474-A IPC, in sofar, it relates to the petitioner-Company is not made out taking the allegations made in the impugned FIR on face value.

37. In State of **Haryana and Ors. v. Bhajan Lal and Ors.,** Supreme Court has set out the categories of cases in which the inherent power can be exercised. Para 102 of the judgment reads as follows: -

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) .....

(3) .....

(4) .....

(5) .....

(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."

38. Earlier the Supreme Court in **State of Karnataka v. L. Muniswamy and others** held as follows: -

"7. .....In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice....."

(Principle reiterated in **Anand Kumar Mohatta and another vs. State (NCT of Delhi), Department of Home and another.)**

39. Having regard to the law enunciated herein above and the facts and circumstances of the case, the writ petition is liable to succeed. Accordingly, the writ petition stands allowed. The impugned FIR and the consequent police report is set aside and quashed.

(2023) 1 ILRA 23
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE SYED WAIZ MIAN, J.

Criminal Misc. Writ Petition No. 14672 of 2020

Devend Kumar @ Devendra Kumar ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Pavan Kumar Mishra

Counsel for the Respondents:
A.G.A.

A. Criminal Law - Constitution of India, 1950-Article 226- UP Police Regulation – Rule 231 - Quashing of history-sheet-Petitioner categorically pleaded that he has been acquitted in one matter and discharged in other case too-Continuing the history-sheet of the petitioner in view of Regulation 231 of the Police Regulations, has not been justified by the State as the petitioner has not indulged in any repetitive criminal activity-No other case has been lodged after 2007-the approach in not reviewing the history-sheet of the petitioner by stating that petitioner is 'of criminal mind' clearly shows the highhandedness of the state respondents-Hence, the history sheet is quashed.(Para 1 to 9)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Sanjay Karnwal Vs St. of U.P. & ors. (2010) 70 ACC 507

2. Guru Bux Singh Bakshi Vs St. of U.P. (1994) LAWS(ALL) 185

(Delivered by Hon'ble Suneet Kumar, J.
&
Hon'ble Syed Waiz Mian, J.)

1. Heard learned counsel for the petitioner and Sri Ratnendu Kumar Singh, learned A. G. A. for the State.

2. The petitioner claims to be working as Estate Manager in Modi Pon Limited Hapur Road, Modi Nagar, Ghaziabad; by means of the present writ petition he is seeking quashing of the history-sheet 31A, dated 20.8.2007, Police Station-Modi Nagar, district-Ghaziabad.

3. The petitioner has categorically pleaded that in Case Crime No. 527 of 2007, under Sections-147, 323, 342, 452, 448, 427 and 511 I. P. C., Police Station-Modi Nagar, district-Ghaziabad he has been acquitted by the court concerned vide judgement and order dated 4.9.2009. The certified copy of the order has been placed on record. In Case Crime No. 126 of 1986, under Sections-147, 148, 323, 324 and 307 I. P. C., Police Station-Bhojpur, district-Ghaziabad petitioner, after investigation came to be discharged, and police report was not filed against him.

4. In this backdrop, it is submitted that the history-sheet no. 31 A opened on 20.8.2007, has not been reviewed in view of the provisions of Regulation 231 of U. P. Police Regulations, which reads as under:

"(231) The subjects of history sheets of class A will unless they are "starred' remain under surveillance for at least two consecutive year of which they have spent no part in jail. When the subject of a history sheet of class A whose name has not been "starred' who has never been convicted of cognizable offence and has not been in jail or suspected of any offence or absented himself in suspicious circumstances for two consecutive years his surveillance will be discontinued, unless for special reasons to be recorded in the inspection book of the police station the Superintendent decides that it should continue.

When the subject of a history sheet of class A is "starred' he will remain starred for at least consecutive years during which he has not been in jail or been suspected of a cognizable offence or had any suspicious absence recorded against him. At the end of that period, if he is believed to have reformed he will cease to be "starred' but will remain subject to surveillance will be discontinued only if during that period no complaints have been recorded against him.

In closing the history sheets of any "unstarring' ex-convicts and especially ex-convicts dacoits great care should be exercised."

5. From the above, it is apparent that surveillance in respect of a person whose history sheet of Class-A has been opened, is to be continued for two consecutive years subject to his not having been in jail for any part of said two years. It is also clear from above that history sheet beyond two years cannot continue except by a special order or unless he has been found to have been convicted in any cognizable offence and has been in jail or was suspected for any offence or absented himself in suspicious

circumstances during said two consecutive years.

6. In the counter affidavit filed on behalf of the State the averments made in the writ petition have not been denied. In para 7 of the counter affidavit it is stated that since the petitioner is a criminal minded man, he may again indulge in criminal activity, therefore, history-sheet has not been reviewed. Relevant part of para 7 of the counter affidavit is extracted below:

" ..... It is further submitted that the petitioner is man of criminal mind and he may again indulge in criminal activities. All the averments to the contrary made in paragraphs under reply are wrong and denied. Photocopies of the D. C. R. C. and C. C. T. N. S. reports of the petitioner is being filed herewith and marked as Annexure No. CA 1 to this affidavit."

7. Further the case of the petitioner is that the record relating to the petitioner for review of the continuance of the history-sheet was not placed before the competent authority.

8. In view of the decisions rendered by the Division Bench of this Court in *Sanjay Karnwal Vs. State of U.P. and others, [2010 (70) ACC 507] and Guru Bux Singh Bakshi Vs. State of Uttar Pradesh, LAWS(ALL) 1994 1 85,* we hold that continuing the history-sheet of the petitioner of Class-A in view of Regulation 231 of the Police Regulations, has not been justified by the State as the petitioner thereafter has not indulged in any repetitive criminal activity. No other case has been lodged or reported against the petitioner after 2007.

9. The approach in not reviewing the history-sheet of the petitioner by stating that petitioner is 'of criminal mind' clearly shows the highhandedness of the State respondents. They have given go by to the statutory Regulations.

10. Having regard to the facts and circumstances of the case, the writ petition is allowed and history-sheet No. 31A, dated 20.8.2007 opened at Police Station-Modinagar, district-Ghaziabad is quashed.

11. The approach of the State has been casual. Further, there is dereliction of the duty on the part of the Superintendent of Police, Ghaizabad, for not reviewing the history-sheet even when no criminal case is pending against the petitioner since the year, 2007 and not following the mandate of the U. P. Police Regulations. Second respondent is saddled with a cost at Rs. 20,000/- to be deposited with the High Court Legal Services Committee, Allahabad, within eight weeks from the date of order.

12. Learned A. G. A. to communicate the order and ensure compliance.

(2023) 1 ILRA 25
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 30.11.2022

BEFORE

THE HON'BLE MOHD. ASLAM, J.

Criminal Revision No. 359 of 2008

Surendre Kumar Chaturvedi ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:

Ram Kushal Tiwari, Indra Mani Pande, Ravindra Shukla

Counsel for the Opposite Parties:
G.A., A.P. Mishra

A. Criminal Law - Criminal Procedure Code, 1973-Section 397/401 - Indian Penal Code, 1860 - Sections 147, 148, & 302/149-Challenge to-acquittal- delay in FIR-PW-1/ informant has only named four accused and two unknown persons while the two unknown persons were known to the informant-PW-2 stated that her house is away from the place of occurrence and she is more than 100 years old lady she hardly move 2 -3 steps and her house is not shown in the site plan-Both PW-1 and PW-2 has not witnessed the incident, their presence on the place of occurrence is doubtful-Hence, no conviction can be recorded on the basis of ocular testimony-In the present case revision preferred against the acquittal-revision court cannot convert acquittal to conviction in view of Section 401(3) Cr.P.C.-The judgment of the court below is based on right appreciation of evidence.(Para 1 to 27)

B. It is settled principles of law that if two views of possible, one favoring to the prosecution and other favoring to the accused, the view favoring to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. (Para 19,20)

The revision is dismissed. (E-6)

List of Cases cited:

1. Shyam Deo Pandey Vs St. of Bih. (1971) AIR SC 1606

2. Mool Chand Vs Jagdish Singh & ors. (1993) Supp(2) SCC 714

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

1. Heard Sri Sanjay Srivastava, learned A.G.A. for the State-opposite party no.1, Sri A.P. Misra, learned counsel for the accused-opposite party nos.2 to 6 and perused the record. None present for the informant-revisionist.

2. The instant revision has been preferred by informant-revisionist Surendra Kumar Chaturvedi under Section 397 read with Section 401 Cr.P.C. against the impugned judgement and order dated 26.5.2008 passed by learned Sessions Judge, Sultanpur in Sessions Trial No.218 off 1996 (State Vs. Triveni Singh and others), arising out of Crime No.63 of 1994, under Sections 147, 148, 302/149 I.P.C., P.S. Jamo, District Sultanpur, by which the accused-opposite party nos.3 to 6 were acquitted from the charges of offence punishable under Sections 147, 302/149 I.P.C. as well as accused-opposite party no.2 was acquitted from the charges of offence punishable under Sections 148, 302/149 I.P.C.

3. The brief facts necessary for disposal of this revision is that the informant-revisionist Surendra Kumar Chaturvedi son of Prayag Prasad, resident of village Pure Ganesh Chaube lodged a first information report at Police Station Jamo, District Sultanpur on 18.8.1994 at 14:30 p.m. on the basis of application addressed to Superintendent of Police, Sultanpur dated 18.3.1994, which is Ex.Ka-1 alleging therein that his brother Shashi Bhal Chaturvedi (deceased) and Vidya Shankar Shukl (not examined) had gone to see his maternal grandmother on 17.3.1994 at around 07:00 p.m. They were coming back to their home from there in the night at about 10:00 p.m. and on the way at about 20 paces from the house of his maternal grandmother, the accused Triveni Singh armed with lathi and

ballam, Ram Sahay, Virender Singh and two other unknown persons, to whom he can recognise on seeing them, armed with lathi were sitting in ambush. They have enmity with him because of election of co-operative. They attacked on his brother with deadly weapon and assaulted upon him with lathi and spade. His brother's condition became very critical. In order to save the life of his brother, he sent the information to the police station regarding the incident and got him admitted directly to the hospital at Musafirkhana. The condition of his brother was still very bad and he was referred to Sadar Hospital, Sultanpur. He was fighting for life and not yet regained consciousness. The informant-revisionist raised alarm at the place of occurrence, thereupon, Vidya Shankar Shukl and other villagers arrived there and seen the occurrence. The accused persons ran away thinking that his brother was dead.

4. The chik report Ex.Ka-9 was scribed by Head Constable Bhanu Pratap Singh (PW-6) on 18.3.1994. Constable Virendra Bahadur by making entry in GD Report No.24 (Ex.Ka-11) on 18.3.1994 at 14:30 p.m. registered the Case Crime No.Nil/1994, under Sections 147, 148, 323, 324, 308 I.P.C. at Police Station Jamo, District Sultanpur. Injured Shashi Bhal was medically examined by Dr. R.P. Pandey (PW-4) at Musafirkhana on 18.3.1994 at 02:30 a.m. (night). At the time of medical examination of injured Shashi Bhal, his age was found 49 years and the following injuries were found on his body:-

"1. Incised wound 6 cm x 0.5 cm x bone deep on left side of the skull, 7 cm above left ear. Advised x-ray of skull A/P

2. Incised wound 6 cm x 1 cm x bone deep on front of forehead left side above left eyebrow. Advised x-ray of skull.

3. Lacerated wound 4 cm x 0.5 cm x bone deep on forehead, 3 cm above right eye.

4. Lacerated wound 1 cm x 0.5 cm x bone deep on forehead above eyebrow.

5. Lacerated wound 3 cm x 0.5 cm x bone deep, 2 cm above right eye.

6. Lacerated wound 1 cm x 0.5 cm x muscle deep on right lip.

7. Contusion 7 cm x 2 cm on posterior side of hand.

8. Traumatic swelling 7 cm x 5 cm on the posterior side of the left hand.

9. Lacerated wound 1 cm x 0.5 cm x bone deep on right side of chest.

10. Lacerated wound 1.5 cm x 0.5 cm x bone deep on left foot.

11. Abraded contusion 2 cm x 1 cm on front of right foot.

12. Lacerated wound 1 cm x 0.3 cm skin deep on right ear.

Dr. R.P. Pandey (PW-4) advised x-ray for injury nos.1 to 5 and 8. He opined that injury nos.1 and 2 were caused by sharp edged weapon and rest by blunt object. The injuries were found fresh at the time of medical examination. The injured was semiconscious stage and was vomiting. He referred the injured to the district hospital. He prepared injury report Ex.Ka-4 in his own handwriting."

5. The investigation of the case was entrusted to SI R.N. Mishra. On 20.3.1994, a memo was received from KGMC at 07:20 p.m. at Police Station Jamo regarding death of Shashi Bhal Chaturvedi, which was entered in G.D. Report No.4 at 07:20 p.m. SI Naamwar Singh (PW-5) at that time was posted at Outpost Yahiaganj, Police Station Chowk, Lucknow. On obtaining copy of GD Report No.4 and memo of death of the deceased, he proceeded to mortuary KGMC, Lucknow. Constable Kunwar Naresh Singh

of outpost KGMC, who was assigned for post-mortem duty, met him at mortuary. Shravan Kumar Pathak, Surendra Kumar Chaturvedi, Gaya Prasad Chaturvedi, Hanuman Dutta and Bhagwan Dutta Tripathi were appointed as witness of the inquest. The witnesses of the inquest opined that the deceased died during treatment as a result of ante-mortem injuries, which he sustained at the place of occurrence. They have also opined that for ascertaining the actual cause of death, post-mortem is needed. He prepared inquest report Ex.Ka-5, letter to CMO Ex.Ka-6, Photo Lash Ka-7, sealed the dead body and prepared challan lash Ex.Ka-8 and handed over the dead body to the Constable Kunwar Naresh Singh for carrying out the post-mortem. The post-mortem of the dead body of the deceased Shashi Bhal Chaturvedi was conducted by Dr L.S. Sanyal (PW-3) on 20.3.1994. At the time of post-mortem, the age of the deceased was found 26 years. He died on 19.3.1994 at 03:10 hours at KGMC during treatment. The deceased was man of average height and body built. The rigor mortis was not present on the upper part of the body while the same was found on the lower part of the body. At the time of post-mortem, the following ante-mortem injuries were found on the body of the deceased:-

"1. Stitched wound with 5 stitches on the left side of skull.

2. Stitched wound 5 cm in length with 3 stitches on the mid of skull.

3. Stitched wound with 2 stitches on the right part of the skull.

4. Stitched wound 4 cm long with 3 stitches on left side of the skull 8 cm above left ear.

5. Abraded contusion 8 cm x 4.5 cm on right side of the face and skull.

6. Abraded contusion 7 cm x 1.5 cm on the back of right hand.

7. Abraded contusion in area 16 cm x 6 cm on the lower side of the stomach.

8. Abraded contusion in area 6 cm x 3 cm on front part of left foot.

9. Abraded contusion in area 8 cm x 4 cm on the front part of right foot.

On internal examination, fracture was found in skull. The membrane of the brain was found torn. 90 ml liquid substance was found in stomach. The gas and fecal matters were found in the small intestine. Doctor has opined that the deceased died due to ante-mortem head injury. He has further opined that the ante-mortem head injuries were sufficient to cause death in ordinary course of nature. He prepared the post-mortem report Ex.Ka-3 in his own handwriting."

6. The Investigating Officer SI Ravindra Nath Mishra (PW-9) copied the check report and GD registering the case and recorded the statements of scriber of GD and of informant-revisionist and inspected the place of occurrence on 20.3.1994. He has taken in possession the plain soil and blood-stained soil, blood stained bed-sheet, scarf, a pair of leather sleeper of the deceased from the place of occurrence and prepared memo of it Ex.Ka-13 & 14 and sealed it separately. He also prepared site plan Ex.Ka-15. On 22.3.1994, he arrested the accused Ram Sahai, Virendra Bahadur and recorded their statements and amended the Section 304 I.P.C. vide GD report no.12 Ex.Ka-16. Thereafter, the investigation was transferred to SI Vijayanand (PW-7) on 23.3.1994, who has recorded the statement of witness Vidya Shankar Shukl. On 31.3.1994, he recorded the statements of witnesses and copied the post-mortem report in case diary. On the same day, he has also recorded the statements of witnesses Shiv Prasad and Ishrat. On

30.4.1994, he has recorded the statement of accused Triveni Singh and sent the charge-sheet on 30.4.1994 Ex.Ka-10. Thereafter, on the application of informant, the investigation was transferred to CBCID. The charge-sheet Ex.Ka-10 was cancelled by Station Officer and the investigation was handed over to CBCID for re-investigation. Inspector Shamsher Singh CBCID was entrusted the investigation on 25.8.1994, who copied the application of Gurudev Kumar Dwivedi and tehrir of informant-revisionist Surendra Kumar Chaturvedi in the case diary. On 2.3.1995, he recorded the statement of ASI Ravindra Nath Mishra. On 13.3.1995, he recorded the statements of informant-revisionist Surendra Kumar Chaturvedi, Dr. R.P. Pandey and other witnesses. He has also recorded the statements of Smt. Lakhpati Devi and other witnesses and the statements of accused Vishambhar Prasad Mishra, Ram Abhilash Singh, Triveni Singh, Ram Sahai and Virender Singh and also recorded the statements of witnesses of inquest. On 15.3.1995, he has recorded the statement of scriber of the chik report. On 26.4.1995, he has recorded the statement of witness Vidya Shankar Shukl and has submitted the charge-sheet Ex.Ka-12 by amending Section 302 I.P.C.

7. The cognizance of offence was taken after complying the provision of Section 207 of Cr.P.C. and the case was committed to the court of session. The charges for offence punishable under Sections 147, 148, 302/149 I.P.C. were framed against accused-opposite party no.2 Triveni Singh, opposite party no.3 Ram Sahai, opposite party no.4 Virendra Singh, opposite party no.5 Ram Abhilash and opposite party no.6 Vishambhar Prasad to which they have not pleaded guilty and claimed to be tried.

8. In order to prove its case, the prosecution has examined informant-revisionist Surendra Kumar Chaturvedi as PW-1, Smt. Lakhpati as PW-2 as eyewitnesses. PW-1 has proved the written complaint Ex.Ka-1. Prosecution has also examined Dr. L.S. Sanyal as PW-3 to prove the post-mortem report of the deceased Ex.Ka-3, Dr. R.P. Pandey as PW-4 to prove injury report of the deceased Ex.Ka-4, SI Namwar Singh as PW-5 to prove panchayatnama Ex.Ka-5, letter to CMO Ex.Ka-6, photo lash Ex.Ka-7, challan lash Ex.Ka-8 and handed over the dead body to Constable Kunwar Naresh Singh for carrying out the post-mortem. Constable Bhanu Pratap Singh as PW-6 was also examined to prove chik report Ex.Ka-9 and GD registering the case Ex.Ka-11. Prosecution has also examined Investigating Officer/Sub Inspector Vijayanand Singh as PW-7 to prove the steps taken in investigation and has filed charge-sheet Ex.Ka-10 against the accused. Later on, the investigation was conducted by CBCID on the application of informant-revisionist after cancelling the charge-sheet Ex.Ka-10. Prosecution has also examined Inspector Shamsher Singh (CBCID) to prove the steps taken in investigation and after investigation he has submitted the charge-sheet Ex.Ka-12 and Sub Inspector Ravindra Nath Mishra to prove site plan Ex.Ka-15 as well as plain soil and blood-stained soil collected from the place of occurrence and sealed in separate containers and prepared the memo in this regard Ex.Ka-13 and Ex.Ka-14. He has also amended the section of the investigation into 304 I.P.C.

9. The statements of the accused were recorded under Section 313 Cr.P.C. to which they have denied their participation in occurrence and have stated that they

have been falsely implicated in the case. In defence, the accused-opposite parties have examined Ram Lakhan Shukla as DW-1, Ram Pyarey Pandey as DW-2 and Chhotey Lal as DW-3 and has closed the evidence.

10. Learned court below after hearing the learned counsel for the parties and appreciating the evidence of informant Surendra Kumar Chaturvedi (PW-1) held that the informant-revisionist has taken the name of only four accused persons in his written complaint and two unknown persons to whom he can recognize when they come before him. After four months of the occurrence, on 25.7.1994, an application has been moved from the side of informant for investigation of case by CBCID and later on the investigation was transferred to CBCID. He has not named the accused Vishambhar Prasad Mishra and Ram Abhilash Singh in his written complaint. Even in application moved for investigation by CBCID, he has not named the accused Vishambhar Prasad Mishra and Ram Abhilash Singh. Witness PW-2 has deposed that the accused Vishambhar Prasad Mishra and Ram Abhilash Singh were known to her since their childhood because they are resident of her village. The informant Surendra Kumar Chaturvedi (PW-1) has not disclosed the name of accused Vishambhar Prasad Mishra and Ram Abhilash Singh in his statement under Section 161 Cr.P.C. recorded by Investigating Officer. On appreciation of evidence, learned court below has held that the first information report was lodged after due deliberation and during investigation the name of the accused Vishambhar Prasad Mishra and Ram Abhilash Singh was deliberately added to falsely implicate them. Learned court below has also held that the alleged independent eyewitness Vidya Shankar has not been produced by the prosecution. In this case, PW-1 Surendra Kumar Chaturvedi and PW-2 Smt. Lakhpati are the alleged eyewitnesses. The eyewitness Vidya Shankar, whose name is mentioned in the first information report, has not been produced by prosecution before lower court during trial. It has also held that PW-1 Surendra Kumar Chaturvedi has admitted in his cross-examination that the accused Vishambhar Prasad Mishra and Ram Abhilash Singh are brothers of accused Triveni Singh and were known to him before lodging of the F.I.R. It has further held that PW-1 has admitted that the occurrence has taken place at the door of Fulesara and the house of the maternal grandmother of informant is not shown in the site plan. PW-2 Smt. Lakhpati in her statement has stated that her age was about hundred years at the time of examination in the court. She has also admitted that on the day of occurrence she was ill and was suffering from high fever. She has further admitted that she could not see beyond 2-3 paces. The occurrence was taken place at 10:00 p.m. in the night and her house was away from place of occurrence and she can hardly move 2 or 3 steps. Learned lower court has also held that the deposition of alleged eyewitnesses PW-1 Surendra Kumar Chaturvedi and PW-2 Smt. Lakhpati do not inspire confidence and no conviction can be recorded on the basis of their ocular testimony and has acquitted the accused-opposite party nos.2 to 6 from the charges. Feeling aggrieved by it, the informant-revisionist has preferred this revision.

11. Learned counsel for the informant-revisionist in memo of revision has stated that the impugned judgement of acquittal recorded by learned lower court is against fact and law. It is further stated that learned lower court has wrongly

disbelieved the statement of informant-revisionist PW-1 and his maternal grandmother PW-2 in the impugned judgement and has illegally acquitted the accused-opposite party nos.2 to 6. It is further stated that the four accused persons were named in the first information report and two accused were not named. It is further stated that during investigation the name of the accused not named also came into light. It is further stated that the informant-revisionist PW-1 Surendra Kumar Chaturvedi and his maternal grandmother PW-2 Smt. Lakhpati were the eyewitnesses of the occurrence and are corroborated by the first information report and the post-mortem report. It is further stated that the learned court below has not appreciated the evidence available on record in right prospective and the judgement of acquittal recorded by learned court below is perverse and illegal and is liable to be set aside. It is further stated that the charges against accused-opposite party nos.2 to 6 is proved beyond reasonable doubt and judgement of acquittal recorded by learned lower court is liable to be reversed and accused-opposite party nos.2 to 6 are liable to be convicted for offence punishable under Sections 147, 148, 302/149 I.P.C. and sentenced to undergo rigorous imprisonment for life and fine also.

12. Learned A.G.A. has supported the judgement of the court below and has submitted that all the accused-opposite party nos.2 to 6 were known to the informant-revisionist, but he has only named four accused and two unknown persons. He has further submitted that the above fact establishes that the informant-revisionist has not witnessed the incident and his presence on the place of occurrence is doubtful. He has further submitted that PW-2 Smt. Lakhpati is maternal grandmother of informant-revisionist and her house has not been shown in the site plan. She in her statement has stated that her age was about hundred years at the time of examination before the court. She has also admitted that on the day of occurrence she was ill and was suffering from high fever. She has further admitted that she could not see anything beyond 2-3 paces. The occurrences has taken place at 10:00 p.m. in the night and her house is away from the place of occurrence and she can hardly move 2-3 steps. Therefore, learned lower court has rightly held that she has not witnessed the occurrence and has rightly acquitted the accused-opposite party nos.2 to 6 from the charges.

13. I have given thoughtful consideration to the contentions raised by learned counsel for the informant-revisionist in the memo of revision as well as contention raised by learned A.G.A. for the State and have gone through the record. Now the question arises whether the revision can be heard and decided in absence of the revisionist. The procedure for hearing of the revision is analogous to hearing of the appeal with the exception as mentioned in Section 401 Cr.P.C. Section 401 Cr.P.C. speaks as follows:-

"Section 401. (1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 392.

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Nothing in this section shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

(5) Where under this Code tan appeal lies but an application for revision has been made to the High Court by any person and the High Court Is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly."

14. From perusal of Section 401 Cr.P.C., it is abundantly clear that High Court may exercise any of the power conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by section 307. It is further provided in sub-section (2) that no order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

15. Sub-section (2) of section 401 Cr.P.C. cast duty upon the revision court to hear opposite party if order is made in revision prejudiced to the accused or other person. Meaning thereby, where impugned order is liable to be set aside and prejudicial to the opposite party, the opposite party must be heard.

16. Section 386 of the Code of Criminal Procedure provides the procedure to be followed in hearing of the appeal and also provides the power of appellate court. That is also applicable in revision also in view of the Section 401 Cr.P.C. with exception that if the order to be made in revision is prejudicial to the accused or other person (opposing party), opportunity of hearing must be given to opposite party. The proviso appended with Section 386(e) provides that the sentence shall not be enhanced unless the accused has been given an opportunity of showing cause against the such enhancement. Therefore, from the perusal of provision of Section 386 Cr.P.C., it is mandatory that the accused should be heard if order is made in revision prejudicial to the accused.

17. The Hon'ble Apex Court in the case of ***"Shyam Deo Pandey Vs. State of Bihar, AIR 1971 SC 1606"*** has held that if the court decided not to dismiss the appeal summarily, it must take the step mentioned in Section 385 and proceed to hear the parties on merit. At this stage also it has the power to dismiss the appeal, if it considered that there is no sufficient ground for interfering, but such consideration must be based on the merit of the appeal. After the records are before the court and the appeal is listed for hearing [s.385 (2)], whether the appellants appear or not in response to the notice, the appellate court dispose of the appeal only after reasoning and finding of the trial court as recorded in its judgement on tested in the light of record of the case for this purpose the appellate court must- (a) peruse such record: (b) hear the appellants or his

pleader, if he appears and (c) hear the public prosecutor, if he appears. It is abundantly clear that the procedure followed in hearing of the appeal will be followed in hearing the revision with certain exceptions. Therefore, the revision can be heard in absence of the revisionist also on merit.

18. Sub-section (3) of section 401 Cr.P.C. speaks as follows:-

"Nothing in this section shall be deemed to authorize High Court to convert of finding of acquittal to conviction."

19. Even in case of appeal against acquittal the Hon'ble Apex Court in the case of ***"Mool Chand Vs. Jagdish Singh and others"*** reported in ***1993 Supp (2) Supreme Court Case 714*** has held in paragraph 18, which reads as follows:-

"....in appeal against the order of acquittal by the High Court was to be considered as whether the approach by the High Court is wrong or the view taken by the High Court is unreasonable. If that evidence is of such nature that two views are possible and one view in favour of the accused with the High Court in acquitting them, the Supreme Court will be slow to interfere with the order of acquittal. If only the High Court has committed grave error in appreciation of evidence and misread itself by ignoring legal principle and arrived at the conclusion, the decision can be characterized as perverse and illegal requiring interference by the court under Article 136."

20. Even in appeal against the acquittal if the judgement of the trial court is not perverse and is not based on misreading of the evidence and two views are possible, one favouring the accused, the acquittal is not liable to be interfered in appeal. In present case, the revision has been preferred against the acquittal and the revision court cannot convert acquittal to conviction in view of sub-section (3) of section 401 Cr.P.C. The judgement of the court below is based on right appreciation of evidence and cannot be said to be perverse, therefore, the case is not liable to remanded for pre-trial. Keeping in view the facts and circumstances of the case and reasons enumerated by court below, the instant revision is liable to be dismissed.

21. In this case, the appeal has not been preferred by the State against the acquittal recorded by trial court under the circumstances. This revision has been preferred against the acquittal by informant Surendra Kumar Chaturvedi.

22. In this case revisionist Surendra Kumar Chaturvedi as PW-1 deposed that his brother Shashi Bhal Chaturvedi and Vidya Shankar Shukl had gone to see his maternal grandmother on 17.3.1994 at around 07:00 p.m. and while they were coming back to their home in the night at about 10:00 p.m. and reached about 20 paces from the house of his maternal grandmother, the accused Triveni Singh armed with lathi and ballam, Ram Sahay, Virender Singh and two other unknown persons, to whom he can recognize on seeing them, armed with lathi were sitting in ambush. He has further deposed that they have enmity with him because of election of co-operative. He has also deposed that they attacked on his brother with deadly weapon and assaulted upon him with lathi and spade. His brother's condition became very critical. In order to save the life of his brother, he sent the information to the police station regarding

the incident and got him admitted directly to the hospital at Musafirkhana. He has next deposed that the condition of his brother was still very bad and he was referred to Sadar Hospital, Sultanpur, where he was fighting for his life and not yet regained consciousness. He has also deposed that when he raised alarm, Vidya Shankar Shukl and other villagers arrived there at the spot and saw the occurrence, then the accused persons ran away thinking that his brother was dead. Later on his brother Shashi Bhal succumbed to death.

23. In his cross-examination, the informant-revisionist Surendra Kumar Chaturvedi (PW-1) has admitted that he has only named four accused in the written complaint and two unknown persons to whom he can recognize when they come before him. He has also admitted that after four months of the occurrence, on 25.7.1994, an application was moved from his side for investigation of case by CBCID and later on the investigation was transferred to CBCID. He has not named in his written complaint the name of the accused Vishambhar Prasad Mishra and Ram Abhilash Singh. Even in application moved for investigation by CBCID he has not named the accused Vishambhar Prasad Mishra and Ram Abhilash Singh. PW-1 informant Surendra Kumar Chaturvedi has not disclosed the name of accused Vishambhar Prasad Mishra and Ram Abhilash Singh in his statement under Section 161 Cr.P.C. recorded by Investigating Officer

24. PW-2 Smt. Lakhpati has deposed that the accused Vishambhar Prasad Mishra and Ram Abhilash Singh were known to her since their childhood because they are resident of her village.

25. On appreciation of evidence, learned court below has held that the first information report was lodged after due deliberation and during investigation the name of the accused Vishambhar Prasad Mishra and Ram Abhilash Singh was deliberately added to falsely implicate them. In this case, the independent eyewitness Vidya Shankar mentioned in first information report, not produced by prosecution, which cast doubt on prosecution case. In this case PW-1 Surendra Kumar Chaturvedi and PW-2 Smt. Lakhpati are the alleged eyewitnesses. PW-1 has admitted in his cross-examination that the accused Vishambhar Prasad Mishra and Ram Abhilash Singh are brothers of accused Triveni Singh and were known to him before lodging of the F.I.R. PW-1 has admitted that the occurrence has taken place at the door of Fulesara. The house of the maternal grandmother of informant-revisionist has not been shown in the site plan. PW-2 Smt. Lakhpati in her statement has stated that her age was about hundred years at the time of examination before the court. She has also admitted that on the day of occurrence she was ill as she was suffering from high fever. She has further admitted that she could not see beyond 2-3 paces. The occurrences has taken place at 10:00 p.m. in the night and her house is away from the place of occurrence and she can hardly move 2-3 steps. Therefore, the deposition of eyewitness PW-1 Surendra Kumar Chaturvedi does not inspire confidence and is not of such quality that can be acted upon.

26. From the appreciation of evidence of PW-2 Smt. Lakhpati, it is proved that she can only see anything at the distance of 2-3 paces and her presence at the place of occurrence is not established. Her

deposition does not inspire confidence and no conviction can be recorded on the basis of ocular testimony of PW-1 and PW-2 and learned court below has rightly acquitted the accused-opposite party nos.2 to 6 from the charges of offence punishable under Sections 147, 148, 302 read with 149 I.P.C.

27. In such circumstances, the instant revision lacks merit and is, accordingly, hereby ***dismissed***.

(2023) 1 ILRA 35
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.01.2023

BEFORE

THE HON'BLE BRIJ RAJ SINGH, J.

Criminal Revision No. 604 of 2019

Melvin Saldanha & Anr. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Anurag Shukla

Counsel for the Opposite Parties:
Govt. Advocate, Devika Singh, Harish Pandey, Rajendra Kumar Dwivedi, Sarvajeet Dubey, Suyash Bajpai

A. Criminal Law - Code of Criminal Procedure, 1973-Section 397/401 - Indian Penal Code, 1860-Sections 305 & 306-In the present case, the Investigating Agency failed to establish mens rea on the part of the revisionists leading to commission of suicide by the deceased-the deceased was only scolded by the revisionists for getting into road accident-In fact the deceased was not hit or slapped by the revisionists-no eye witness that the deceased was beaten by revisionists-FIR has been lodged with a motion of vengeance-The Court below has not discussed the material and no finding has been recorded, the operative portion of the Court is non-speaking and no reason has been assigned-The decision is taken in mechanical manner-Thus, the matter is remanded back to the Court below with a direction to take a fresh decision.(Para 1 to 89)

B. To prove the offence of abetment, as specified under section 107 IPC, the state of mind to commit a particular crime must be visible, to determine the culpability. In order to prove mens rea, there has to be something on record to establish or show that the appellant herein had a guilty mind and in furtherance of that state of mind, abetted the suicide of the deceased. (Para 51)

The revision is allowed. (E-6)

List of Cases cited:

1. Geo Varghese Vs St. of Raj. (2021) SCC Online SC 873

2. St. of Karnataka Lokayukta Vs M.R Hiremath (2019) 7 SCC 515

3. Sunil Kumar Sen Vs St. of M.P. in Petition No. 11763/2018 (MP HC)

4. P.Rajmohan Vs St.,(2018) 0 Supreme (Mad) 3697

5. Raj Shekhar Paliwal Vs St. of Chhattisgarh & anr. (2020) SCC Online Chh 37,

6. Gurcharan Singh Vs St. of Punj.(2020) 10 SCC 200

7. Sanju @ Sanjay Singh Sengar Vs St. of M.P. (2002) 5 SCC 371, Pg 13

8. Roop Kishore Madan Vs St. (2001) Cri LJ 1219

9. Dr.J.P. Bhargava & anr. Vs St. of U.P. (Appl. u/s 482 No. 6195 of 2016)

10. Kanchan Kumar Vs St. of Bih. (2022) LiveLaw SC 763

11. St. of Karnataka Lokayukta Vs M.R. Hiremath (2019) 7 SCC 515

12. Ajay Singh Vs St. of Chhattisgarh & anr. (2017) 3 SCC 330

13. P.Vijayan Vs St. of Ker. & anr.(2010) 2 SCC 398

14. UOI Vs Prafulla Kumar Samal & anr. (1979) 3 SCC 4

15. Saranya. Vs Bharathi & anr. (2021) 8 SCC 583

16. K.Kala Vs Secy. Edu. Deptt. (2022) Live Law (Mad) 452

17. M.E. Shivalingamurthy. Vs CBI, Bengaluru(2020) 2 SCC 768

18. St. of Bih. Vs Ramesh Singh (2018) AIR 1977

19. UOI Vs Prafulla Kumar Samal & anr. (1979) AIR 366

20. Stree Atyachar Virodhi Prarishad Vs Dilip Nathumal Chordia & anr. (1989) SCC 1 715

21. Mahendra Prasad Tiwari Vs Amit Kumar Tiwari & anr. CRLA No 1216 of 2022

22. St. of Raj. Vs Ashok Kumar Kashyap, CRLA No. 407 of 2021

23. Mohan Ram Vs St. of Raj. & anr. CRLR No 229 of 2022

24. Rakesh Kumar Pandey & anr. Vs St. of U.P. & anr. CRLR No. 1116 of 2019

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

1. Heard Sri D.D. Chopra, learned Senior Advocate assisted by Sri Anurag Shukla, learned counsel for the revisionists. Sarvajeet Dubey learned counsel for O.P. No.2, learned AGA and perused records.

2. This criminal revision under Section 397 CrPC read with 401 CrPC has been filed by the revisionists with prayer to set aside the order dated 14.3.2019 passed by the Additional Sessions Judge-Ist, Lucknow in S.T. No.34 of 2019 (State. Vs. Father Melvin Saldanha and another) consequently, with further prayer to acquit the revisionists of the charges levelled against them under Section 305 IPC after summoning the lower Court record.

Brief facts of the case:-

3. Brief facts of the case are that FIR was lodged on 4.12.2016 in Case Crime No.1121/2016 under Section 306 IPC, PS Madiyaon, district Lucknow later on, converted under Section 305 IPC on 21.3.2017.

4. As per FIR, the deceased Lalit Yadav son of O.P. No.2 was a regular student of Class-XII in Cathedral Senior Secondary School, Hazratganj, Lucknow. It has been stated in the FIR by the father of the deceased that his son used to attend the school regularly but he was making regular complaints to father and mother regarding the harassment done by the revisionist No.1, Melvin Saldanha (Father Melvil Saldanha) and the revisionist No.2 James John (P.T. Teacher James John). On 3.12.2016 the complainant's son Lalit Yadav had gone to school and he was beaten by the revisionist No.1 and 2 andthey threatened to expel him from the school. There was call on the mobile phone of the complainant at 7.58 a.m. by the revisionist No.2 to bring his son from the school on which he made contact to his wife and asked her to bring his son from the school. When the wife of the complainant reached the school, she came to know that without waiting for her arrival, the revisionist No.2 PT Teacher had dropped his son Lalit Yadav to the home.

His wife was told by the children that after prayer assembly, the revisionist No.1 and 2 had beaten, mentally harassed the deceased and threatened him to expel from the school. The wife of the complainant was coming back to home and she was informed by the revisionist No.2 P.T. Teacher that her son was dropped by him to her home. The wife reached the house and saw that her son had committed suicide by licensed revolver which was kept in almirah. She brought the son to Trauma Centre with the help of neighbours but her son died during medical treatment. The revisionists have challenged the FIR in the High Court by filing Writ Petition No.5269 (M/B) of 2018 and this Court vide order dated 20.2.2018, dismissed the writ petition on the ground that investigation was completed and chargesheet was likely to be filed.

5. The revisionists again challenged the sanctity of investigation by filing Writ Petition No.17509 (M/B) of 2018 requesting for free, fair, truth and logical investigation and to transfer the case to some other investigating agency in which notices were issued on 20.4.2018.

6. Chargesheet was filed in the case on 14.3.2018 under Section 305 IPC. The same was challenged by filing Application U/S 482 being Case U/S 482/378/407 No. - 2653 of 2018 renumbered as Application U/S 482 No.2653 of 2018 (Melvin Saldanha & another Vs. State of U.P. & Another) which was disposed of on 22.5.2018 and liberty was granted to revisionists to move application for discharge.

7. The revisionists approached the Supreme Court in Special Leave Petition (Crl.) No.5071 of 2018 (Melvin Saldanha & another. Vs. State of U.P. and others.) wherein Supreme Court, vide order dated 19.8.2018 was pleased to issue notice and directed that the revisionists shall not be arrested.

8. In the meantime, the revisionists preferred application for discharge under Section 227 CrPC before the learned District and Sessions Judge, Lucknow. The District and Sessi9ons Judge, Lucknow dismissed the application on 14.3.2019 for discharge moved by the revisionists. The order dated 14.3.2019 has been challenged before this Court in the present revision.

9. In the meantime, the SLP (Crl.) No.5071 of 2018 preferred by the revisionists against the order of High Court was disposed of vide order dated 28.4.2022. Supreme Court observed and has taken note of the fact that application for discharge filed by the revisionists before the Court below was rejected and the same was under challenge in the High Court in the present revision. The Supreme Court has lastly observed that the interim order dated 6.1.2020 passed in SLP will operate and the same will continue for a period of six months and the order of High Court will be final. Further direction is issued that contention raised by the parties are left open to be decided in accordance with law.

Submissions of the Revisionists:-

The revisionists have made their following submissions before this Court:-

10. Learned counsel for the revisionists has submitted that on the basis of FIR bearing case no.1121 of 2016 under section 306 IPC (converted to section 305 by Additional Sessions Judge) filed by the

Opposite Party No.2, who is the father deceased Late Lalit Yadav the Investigating Agency Police has filed its completion of Investigation Report (Chargesheet) under Section 173 of the CrPC before Additional Sessions Judge-I, Lucknow.

11. In accordance with liberty given to the Revisionists by Hon'ble High Court, Lucknow vide order dated 22.05.2018 in Case under Section 482/378/407 No.2653 of 2018, the present Revisionists had filed Discharge Application under Section 227 of CrPC bearing No.34/2019, State. Vs. Father Melvin Saldanha & another before Additional Sessions Judge-I and the same has been dismissed vide order dated 14.03.2019 by the Additional Sessions Judge-I, Lucknow.

12. That the Revisionists have filed the present Criminal Revision against above order dated 14.3.2019 passed by the Additional Sessions Judge-I dismissing the Discharge Application filed by the present Revisionist.

13. That the case of the Investigating Agency (Prosecution) proceeds on the premise that the Revisionists Melvin Saldahna and James John are responsible for the commissioning of suicide by Lalit Yadav as they had humiliated the deceased after mercilessly thrashing him alongwith Anshul Gupta in consequence of road accident caused by the deceased Lalit Yadav while Anshul Gupta was the pillion rider of the motorcycle driven by deceased.

14. For better understanding, Section 305 of IPC is reproduced hereinbelow:-

305. Abetment of suicide of child or insane person.--If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication, commits suicide, whoever abets the commission of such suicide, shall be punished with death or [imprisonment for life], or imprisonment for a term not exceeding ten years, and shall also be liable to fine.

From the perusal of the above it is apparent that the person abetting the commission of suicide would be prosecuted and punished as per provision of section 305 of Indian Penal Code, meaning thereby that the person who abets any other person under 18 years of age in the commissioning of suicide by such person shall be held responsible for the commissioning of suicide and shall be punished accordingly. The essential condition to charge and prosecute a person is abetment by such person to the commission of suicide.

15. The provision of abetment as contained under Section 107 of Indian Penal Code and for better understanding same is reproduced hereinbelow:

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.

16. That from the conjoint reading of above two sections it is evident that abetment under section 107 is sine qua non before prosecuting a person under section 305 and in the absence of the necessary ingredients of abetment as provided under section 107 IPC, the accused cannot be charged under section 305 IPC. The Investigating Agency is therefore, under obligation to investigate and establish that the persons against whom FIR has been lodged under section 305 IPC is responsible for the commissioning of suicide by abating the person to do so.

17. That the essential three conditions that are necessarily required to be present individually in the sequence leading to the commissioning of suicide by a person are as below:

i. Instigation to commit suicide.
ii. Conspiracy leading to person committing suicide
iii. Intentionally aiding by an act or omission to commit suicide.

18. That if any of the condition is found present against the person sought to be prosecuted under Section 305 IPC, such person shall be held responsible for abetting commissioning of suicide. Per contra in the absence of the any of the above 3 conditions, a person cannot be held responsible for committing crime under section 305 IPC.

19. That in all three cases of institution, conspiracy or aid, direct and active involvement of the accused is essential to convict him for abetment of suicide. The term "instigation' is not defined in IPC. The instigation on the part of the accused should be active and proximate to the incident. It has been held in number of cases that to constitute "instigation", the person who instigates another person has to provoke, incite, urge or encourage doing of an act by the other by "goading" or "urging forward". A mere statement of suggesting the deceased to end his life without any *mens rea* would not come under the purview of abetment to suicide. *Mens rea* is a necessary ingredient of instigation and the abetmentn to suicide would be constituted only when such abetment is found intentional.

20. That Supreme Court in **Geo Varghese v. State of Rajasthan, 2021 SCC Online SC 873,** while dealing with the matter wherein a 9th standard student committed suicide and left a note alleging that his PTI teacher harassed and insulted him in front of everyone. The court emphasised two essentials for conviction under Sec. 306. Firstly, there should be a direct or indirect act of incitement. A mere allegation of harassment of the deceased by another would not be sufficient. Secondly, there must be reasonableness. If the deceased was hypersensitive and if the allegations imposed upon the accused are not otherwise sufficient to induce another person in similar circumstances to commit suicide, it would not be fair to hold the accused guilty for abetment of suicide. Thus, Supreme Court quashed the FIR in the lack of any specific allegation and material on record as the essentials to prove the allegation under Section 306 were not satisfied.

21. That in the case of Sanju alias Sanjai Singh Sengar vs. State of M.P. 2002 AIR SC 1998, the Hon'ble Apex Court has acquitted the person and quashed the

chargesheet filed under section 306 of IPC inter alia holding therein that mere say of the prosecution version will not subserve the purpose for slapping the charges under section 306 of IPC. The presence of *mens rea* is vital and indefeasible ingredient for to swing the criminal proceeding into the motion. It is a common knowledge that some of the words uttered during the altercation or scuffle cannot be assumed to have been uttered with with *mens rea*.

22. That the Delhi High court has quashed FIR filed under Section 306 IPC in Roop Kishore Madan v. State, while mentioning that even though the suicide note clearly mentions that the deceased committed suicide because of the accused but there is no material on record to show that the ingredients of the offence of abetment had been satisfied and, therefore the offence under Section 306 IPC cannot be said to have been committed. The instigation when not direct has to be gathered from the circumstances of the case.

23. That in the present case, it is most respectfully submitted that the Investigating Agency has failed to establish *mens rea* on the part of the Revisionists leading to the commissioning of suicide by the deceased Lalit Yadav.

24. That in the present case deceased was only scolded by the Revisionists for getting into road accident while riding bike that too without helmet and valid driving license, which was against the Code of Conduct of the Cathedral Sr. Secondary School where Revisionists are posted as Principal and P.T. Teacher. It is bounded duty of the revisionist to ensure proper discipline of students in and outside the school premises.

25. That Code of Conduct of the Cathedral Sr. Secondary School provides that students who misconducts and breaks the rules will be suspended from attending classed/school and may be expelled/rusticated from the school.

26. The above fact is also evident from the Statement Anshul Gupta who was the pillion rider on the bike of the deceased when the deceased got into accident and eye witness of the same. In fact Anshul Gupta I his Statement recorded u/s 161 CrPC had categorically stated that on the fateful day he was slapped by the Principal viz. Melvin Saldahna, the Revisionist after he tried to explain the reasons and the aftermath incidents of the

27. That from the reading of the statement of Anshul Gupta it is also clear that deceased was afraid of his father and was assuming that he would be scolded once his father gets to know that he has been suspended from the School. It is further clarified from the statement of Anshul Gupta that the deceased was further afraid that due to the above incident he may get expelled from the school or may be barred from writing the exams which further indicated that the deceased was hypersensitive.

28. That in the present case FIR has been filed by the complainant who happens to be the father of the deceased and is serving as Sub-Inspector in U.P. Police and is in a position to influence the investigation against the Revisionists. The trial court while considering the discharge application has completely overlooked this particular fact.

29. That in the present case there is no eye witness corroborating that the deceased

was mercilessly beaten by the Revisionists. Simultaneous consideration of the First Information Report as well as the statement of the Father of deceased Amar Nath Yadav made under section 161 of the CrPC shows that FIR has been lodged with a motion of vengeance.

30. That an unsuccessful attempt has been made to create a fictitious grievance about the harsh behaviour of revisionist towards the deceased however not even a single complaint was ever made not even a personal approach was made nor even any letter was sent to the authorities in this regard. Therefore, the alleged allegations are nothing but reveals the vengeant behaviour of the father of deceased against the Revisionists.

31. That Burden of proof always lies on the prosecution and it never shifts. In view of the crux of the judgments of Hn'ble the Apex court as well as various High Courts if in the present matter the prosecution version even if accepted for a while (though not conceded) does not whisper any component of mental intention of crime pertaining to abetment to commit suicide by the deceased. Nor there happens to be any active or passive motive for the Revisionists for doing so because they are the Principal and Teacher and every teacher wants to see his pupil to reach peak of success.

32. That Section 227 of CrPC provides that the Court should be satisfied that the accusation made against the accused person is not frivolous and there is some material for proceeding against him. Section 227 statutorily binds the trial Judge to discharge an accused in cases exclusively triable by Court of Sessions after making compliance of under-mentioned four mandatory requirements;

(1)Consideration of the record of the case and the documents submitted therewith;

(2) Hearing the submissions of the accused and the prosecution in that behalf;

(3) Consideration that there is no ground for proceeding against the accused;

(4) Recording reasons for discharge

For better understanding Section 227 of CrPC is reproduced hereinbelow:

227. Discharge. If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

33. That the parameters that govern the exercise of this jurisdiction (Discharge Application) have found expression in several decisions of the Supreme Court. The Hon'ble Supreme Court in **(State of Karnataka Lokayukta Vs. M.R. Hiremath, 2019 (7) SCC 515,** have observed that at the stage of considering an application for discharge, the Court must proceed on the assumption that the material which has been brought on record by the prosecution should be true and the Court should evaluate the material in order to determine whether the facts emerging from the material taken on its face value discloses the existence of the ingredients necessary to constitute the offence.

34. That Free, Fair and Transparent justice is inevitable & happens to be a fundamental right of every citizen guaranteed under Article 21 of the Constitution of India. This issue is well

settled that free and fair investigation happens to be the integral part of free trial. Here I n the present matter the investigating officer has not been able to collect or demonstrate an iota of evidence which may even prima facie show that there was any mental intention of either of the revisionists in commissioning of the offence.

Learned counsel for the revisionists has relied on various judgments. They are:-

35. That Hon'ble High Court of Madhya Pradesh at Jabalpur in the case of **Sunil Kumar Sen. Vs. State of Madhya Pradesh in Writ Petition No.11763/2018 (MP HC)** has held that:

"10. From the narrative in the petition, it appears that the deceased was leaving school before the end of school hours and upon being so discovered in the act by the Respondent No.4, was allegedly slapped and admonished by the Respondent No.4. However, to hold that there must be an investigation against the Respondent No.4 for an offence u/s. 306 IPC based upon the above allegations is uncalled for. Such an investigation would expose the Respondent No.4 to an arrest and would send a loud message to all those involved in the imparting of education that there are perils of personal inconvenience and legal proceedings to be faced if students are admonished and chastised.

11. Thus, looking at the nature of the allegations, where there is a subsequent improvisation that the deceased was taken back to the school, in a van by the respondent No. 4, where she was again beaten is of suspicious authenticity and credence on account of the fact, that the first complaint that 10 was preferred by the same petitioner to the police authority, this fact is conspicuous by its absence. Therefore, this court is of the opinion that it would be a travesty of justice to hang the proverbial sword of Damocles over the Respondent No. 4, who is the Principal of Government Higher Secondary School and imperil him with police investigation, where even the allegations levelled by the petitioner herein, do not disclose the commission of a cognizable offence much less one under Section 306 of the IPC. Under the circumstances, the petition is dismissed."

36. That Hon'ble Madras High Court in **P. Rajamohan Versus State & others in Cri. O.P.(MD) No.19293/2014** vide order dated 28.09.2018 while dealing with similar issue related to section 306 IPC has held that:

"13. The word "instigate" denotes incitement or urging to do some drastic or inadvisable action or to stimulate or incite. The presence of mens rea, therefore, is the necessary concomitant of instigation. It is common knowledge that the words uttered in a quarrel or in a spur of the moment cannot be taken to be uttered with mens rea. Secondly, the said abusive words is said to have been uttered to the deceased by the Petitioners, when they had come to know that the deceased had stolen the money from the bag of the Anganvadi Teacher and money was also recovered from her. Thirdly, the deceased had her lunch in the School and attended the post lunch session classes and left the School only after it was over and she had committed suicide only after reaching the home. All these factors would clearly point out that it could not be a direct result of the utterances made by the Petitioners.

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15. One important thing to be noted in this case is that the Petitioners being the Teachers of the Government School in the interest of the Institution

correct any mistake done by the student in order to cultivate good habits and get rid of bad habits, such as stealing money. In fact, the father of the deceased girl had been summoned and it is stated that he gave a letter of apology for the conduct of his daughter and also undertook that the same would not recur again. In such view of the matter, the act of the petitioners cannot be said that it would amount to abetment of suicide.

16. In the case of Sashi Prabha Devi Vs. State of Assam [2006-Cri.LJ-1762], the allegation is that the accused, a Head Mistress of a School wrongly struck off the name of the deceased from the Register of the Students in Class X, which induced the deceased to commit suicide and the High Court of Gujarat has held that there was no evidence showing that the accused had acted at any point of time, suggested or hinted for commission of suicide and when the accused was entitled to correct any wrong order, as in fact deceased had not passed her class IX examination, no case of instigation or abetment of suicide was made out against the accused.

17. In the case of Nettai Dutta Vs. State of will be [2005-2-SCC-659], the Honourable Supreme Court upholding the order of the High Court, quashed the charge sheet filed under Section 306 of IPC on the ground that the offence under Section would stand only if there is an abetment for the commission of crime.

18. In a very recent decision rendered in the case of Sonti Ramakrishna Vs. Sonti Shanthi Shree and another [2009-1- SCC-554], the Honourable Supreme Court has held that though normally threshold interference should not be made under Section 482 Code of Criminal Procedure, quashing of the complaint on facts was just and necessary. It has also held that words uttered in a fit of anger or emotion without any intention cannot be termed as instigation.

12.By applying the above said well settled principles guided by the Hon'ble Supreme Court of India, in a catena of decisions cited supra to the present case, on looking into the words uttered by the petitioner http://www.judis.nic.in cannot be said to be instigation. In the said circumstances, certainly it cannot be said that the petitioner had in any way instigated the deceased to commit suicide or was responsible for the commission of suicide by the deceased boy.

13.Taking into consideration of the totality of the materials on record and facts and circumstances of the case, this Court is of the view that the petitioner cannot be held responsible for the commission of suicide committed by the deceased boy as there was no instigation or abetment on the part of the petitioner in the commission of suicide by the deceased boy.

37. That Hon'ble High Court of Chhattisgarh at Bilaspur in the case of **Raj Shekhar Paliwal Vs. State of Chhattisgarh & another,** reported in **2020 SCC Online CHH 37** while dealing with similar issue related to Section 306 IPC has held that:-

"14. On perusal of the statement of witnesses under Section 161 of Cr.P.C., it is found that there had been occasions and reasons for which the deceased was taken to task by the applicants, it does not appear that the applicants had acted on any false pretext, there had been reasons for their acting or reacting with respect to the activity or any failure on the part of the deceased which is mentioned in the statements of the witnesses- Karambir

Shashtri and Sukanti Shashtri. It appears that the deceased was very much sensitive and she used to become upset after such occasions when she taken to task by the applicants. By taking into consideration, the whole circumstances that occurred before the deceased committed suicide, it can be said that the applicants have acted when they found some kind of fault on the part of the deceased. Being Principal and teacher of the school, the applicants have authority to keep their students under discipline. Imparting education is a serious business and the Principal and the teachers cannot overlook the mistakes or lapses committed by any student and they have to be straight forward and show strictness so that the students takes care to remain in discipline and obey the command of the Principal and teacher. I am of this view that the applicants have not done anything otherwise than what was required to be done.

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18. In this particular case, this applicant have acted when they had reasons to do so. The deceased used to become upset because of these incidents, there is nothing to suggest that the applicants had intended that the deceased would go and commit suicide, hence, it cannot be said that there had been any mens-rea on their part, neither it can be said that the applicants had created any circumstance from which the deceased could not come out and she was compelled to commit suicide.

19. Apart from that, the other things that are present in the evidence of this case are these, that the date written on the suicide note is 10.02.2018 and the suicide has been committed by the deceased on 20.02.2018. The acts alleged against the applicants are of previous dates and the last date mentioned is of 16.01.2018, which is about one month prior to the date of incident. Therefore, there appears to be difficulty in connecting all the incidents that have taken place between the applicants and the deceased with the incident of commission of suicide. Hence, I am of this view that in this case, the allegations are though against the applicants but there is nothing to suggest that these applicants have given any kind of abetment to the deceased to commit suicide. Hence, the framing of charge against these applicants under Section 306 read with Section 34 of I.P.C. is erroneous which is liable to be set aside. Hence, the revision petition is allowed and the impugned order framing charge against the applicant is set aside. The applicants are discharged."

38. That the Hon'ble Supreme Court vide order dated 01.10.2020 in the case of **Gurcharan Singh. Vs. The State of Punjab (Criminal Appeal No.40 of 2011)** while dealing with the issue related to section 306 IPC has held that:

13. Section 107 IPC defines "abetment" and in this case, the following part of the section will bear consideration: -

*"107. Abetment of a thing - A person abets the doing of a thing, who - First-Instigates any person to do that thing; or **** **** **** **** **** Thirdly - Intentionally aids, by any act or illegal omission, the doing of that thing."*

14. The definition quoted above makes it clear that whenever a person instigates or intentionally aids by any act or illegal omission, the doing of a thing, a person can be said to have abetted in doing that thing.

15. As in all crimes, mens rea has to be established. To prove the offence of abetment, as specified under Sec 107 of the IPC the state of mind to commit a particular crime must be visible, to determine the culpability. In order to prove mens rea, there has to be something on record to establish or show that the appellant herein had a guilty mind and in furtherance of that state of mind, abetted the suicide of the deceased. The ingredient of mens rea cannot be assumed to be ostensibly present but has to be visible and conspicuous. However, what transpires in the present matter is that both the Trial Court as well as the High Court never examined whether appellant had the mens rea for the crime, he is held to have committed. The conviction of Appellant by the Trial Court as well as the High Court on the theory that the woman with two young kids might have committed suicide, possibly because of the harassment faced by her in the matrimonial house, is not at all borne out by the evidence in the case. Testimonies of the PWs do not show that the wife was unhappy because of the appellant and she was forced to take such a step on his account.

16. The necessary ingredients for the offence under section 306 IPC was considered in the case SS Chheena Vs. Vijay Kumar Mahajan1 where explaining the concept of abetment, Justice Dalveer Bhandari wrote as under:-

"25. Abetment involves a mental process of instigating a person or intentionally aiding a 1 (2010) 12 SCC 190 person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. The intention of the legislature and the ratio of the cases decided by this Court is clear that in order to convict a person under Section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and that act must have been intended to push the deceased into such a position that he committed suicide."

17. While dealing with a case of abetment of suicide in Amalendu Pal alias Jhantu vs. State of West Bengal2, Dr. Justice M.K. Sharma writing for the Division Bench explained the parameters of Section 306 IPC in the following terms:

"12. Thus, this Court has consistently taken the view that before holding an accused guilty of an offence under Section 306 IPC, the court must scrupulously examine the facts and circumstances of the case and also assess the evidence adduced before it in order to find out whether the cruelty and harassment meted out to the victim had left the victim with no other alternative but to put an end to her life. It is also to be borne in mind that in cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide."

39. That Allahabad High Court at Lucknow Bench in the case of **Dr. J.P. Bhargava and anr. Vs. State of U.P. (Application u/s 482 No.6195 of 2016)** vide order dated 06.07.2022, while dealing with the abetment to suicide under Section 306 IPC has held that:

"18. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. There has to be a positive act on the part of the accused to instigate or aid in committing suicide. If there is no positive act on behalf of the accused to instigate or aid in committing suicide, offence under

Section 306 cannot be said to be made out. In order to convict a person under Section 306 IPC, there has to be a clear *mens rea* to commit the offence. There should be an active act or direct act, which led the deceased to commit suicide. The overt act must be such a nature that the deceased must find himself having no option but to an end to his life. That act must have been intended to push the deceased into such a position that he/she commit suicide. In the suicide-note, only allegation is that the deceased was being frequently transferred and he was being harassed by the applicants. For demanding bribe, the deceased never made any complaint to any authority and the same could not be believed. The facts disclose that the deceased himself was not handing over the charge despite numerous reminders and he was not joining the place of his transfer. The deceased himself was guilty of dereliction of duty. For performing official acts, without there being any intention to push the deceased to commit suicide, the offence under Section 306 IPC against the applicants cannot be said to be attracted. On a plain reading of the suicide-note itself reflects that there was no abetment on the part of the applicants for committing suicide by the deceased.

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23. From the aforesaid discussions, it is evident that the deceased perceived harassment by the applicants as he was transferred in frequent successions on administrative grounds. There is nothing on record to suggest any mens-rea for instigating or abetting the suicide by the applicants. The suicide-note, as has been extracted herein above even does not remotely suggest that the accused-applicants had any intention to aid, instigate or abet the deceased to commit suicide. Transferring the deceased, asking him to handover the charge and not sanctioning earned leave by itself would not constitute the offence of abetment to commit suicide. There is no evidence collected by the CBI to suggest that the applicants intended by such act to instigate the deceased to commit suicide. This Court is of the view that all ingredients of instigation of abetment to commit suicide are completely absent in the material collected during the course of investigation and, therefore, it cannot be said that the accused-applicants have committed any offence under Section 306 IPC. There is no offending action proximate to the time of occurrence on the part of the applicants, which would have led or compelled the deceased to commit suicide. Perceived of harassment by the deceased in the hands of the accused-applicants cannot be a ground for invoking the offence under Section 306 IPC as it cannot be said that the accused-applicants have abetted the commission of suicide by playing any active role or by an act of instigation or doing certain acts to facilitate commission of suicide."

40. That Hon'ble Supreme Court in the case of **Kanchan Kumar. Vs. State of Bihar in Criminal Appeal No.1562 of 2022 vide order dated 14.09.2022** has held that:

"13. The threshold of scrutiny required to adjudicate an application under Section 227 of the Cr.P.C., is to consider the broad probabilities of the case and the total effect of the material on record, including examination of any infirmities appearing in the case. In Prafulla Kumar Samal (supra), it was noted that: (1) That the Judge while considering the question of

framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a Post Office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

"10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(emphasis supplied)

14. In Sajan Kumar v. Central Bureau of Investigation, the Court cautioned against accepting every document produced by the prosecution on face value, and noted that it was important to sift the evidence produced before the Court. It observed that:

i. At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

ii. At the stage of Section 227 and 228, the court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case..."

"21. On consideration of the authorities about the scope of Section 227 and 228 of the Code, the following principles emerge:

(emphasis supplied)

15. Summarising the principles on discharge underSection 227 of the Cr.P.C, in Dipakbhai Jagdishchandra Patel v. State of Gujarat, this Court recapitulated:

"23. At the stage of framing the charge in accordance with the principles which have been laid down by this Court, what the court is expected to do is, it does not act as a mere post office. The court must indeed sift the material before it. The material to be sifted would be the material which is produced and relied upon by the prosecution. The sifting is not to be meticulous in the sense that the court dons the mantle of the trial Judge hearing

arguments after the entire evidence has been adduced after a fullfledged trial and the question is not whether the prosecution has made out the case for the conviction of the accused. All that is required is, the court must be satisfied that with the materials available, a case is made out for the accused to stand trial. A strong suspicion suffices. However, a strong suspicion must be founded on some material. The material must be such as can be translated into evidence at the stage of trial. The strong suspicion cannot be the pure subjective satisfaction based on the moral notions of the Judge that here is a case where it is possible that the accused has committed the offence. Strong suspicion must be the suspicion which is premised on some material which commends itself to the court as sufficient to entertain the prima facie view that the accused has committed the offence."

(emphasis supplied)

16.....

17.....

18. The conclusions that we have drawn are based on materials placed before us, which are part of the case record. This is the same record that was available with the Special Judge (Vigilance) when the application under Section 227 of the Cr.P.C. was taken up. Despite that, the Special Judge (Vigilance) dismissed the discharge application on the simple ground that a roving inquiry is not permitted at the stage of discharge. What we have undertaken is not a roving inquiry, but a simple and necessary inquiry for a proper adjudication of an application for discharge. The Special Judge (Vigilance) was bound to conduct a similar inquiry for coming to a conclusion that a prima facie case is made out for the Appellant to stand trial. Unfortunately, the High Court committed the same mistake as that of the Special Judge (Vigilance)."

41. That the parameters that govern the exercise of this jurisdiction (Discharge Application) have found expression in several decisions of the Supreme Court. The Hon'ble Supreme Court in **State of Karnataka Lokayukta Vs. M.R. Hiremath, 2019 (7) SCC 515,** have observed that at the state of considering an application for discharge, the Court must proceed on the assumption that the material which has been brought on record by the provision should be true and the Court should evaluate the material in order to determine whether the facts emerging from the material taken on its face value discloses the existence of the ingredients necessary to constitute the offence.

42. That the Hon'ble Supreme Court in the case of **Ajay Singh Vs. State of Chhattisgarh in Criminal Appeal no.32-33 of 2017** vide **order dated 06.01.2017** has held that:

"9. Chapter XVIII of CrPC provides for trial before a court of session. Section 227 empowers the trial judge to discharge the accused after hearing the submissions of the accused and the prosecution and on being satisfied that there is no sufficient ground for proceeding against the accused. The key words of the Section are "not sufficient ground for proceeding against the accused". Interpreting the said provision, the Court in P Vijayan v. State of Kerala and another has held that the Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the

function of the court, after the trial starts. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. In other words, the sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him."

43. Sri Anurag Shukla, learned counsel for the revisionists has further relied on the judgment in the case of **Harish Dahiya @ Harish & anr. Vs. The State of Punjab & others, (2019 18 SCC 69; Criminal Appeal No.472 of 2021 (Sanjay Kumar Rai.Vs. State of Uttar Pradesh & anr.; Prasanta Kumar Dey. Vs. State of W.B. and another, (2002) 9 SCC 630;** and judgment dated 16.3.2022 passed by this Court in **Application U/S 482 No.16386 of 2021 (Smt. Shila Devi. Vs. State of U.P. and another.).**

44. Learned counsel for the revisionists has submitted that while deciding the discharge application, the Court below has not applied its mind and the question of abetment has not been dealt with because in the present case, the revisionists have not committed any offence and in any manner, they have not abetted or instigated the deceased to commit suicide. As a Principal and Teacher, after the incident, they had taken the necessary measures to send Lalit Yadav to his house but he committed suicide for which they were not responsible in any manner.

45. Learned counsel for the respondent No.2 Sri Sarvjeet Dubey has submitted that this Court has limited scope in revisional jurisdiction and once the material evidence has been collected against the revisionists, the Court cannot do mini-trial and, the pros and cons cannot be looked into, therefore, the revision is liable to be dismissed.

46. It has been further submitted by Sri D.D. Chopra, learned Senior Advocate for the revisionists that the application for discharge under section 227 CrPC was submitted before the Court with several decisions of Supreme Court but while taking the decisions of the case, the Court below did not consider the various aspects and pronouncements of Supreme Court and the order has been passed mechanically. It is argued that the impugned order indicates that the Court has noted the facts of the chargesheet, the arguments of the revisionists and the arguments of the opposite parties but while passing the impugned order, the Court below has not discussed the issues in facts in light of judgments of Supreme Court.

47. Learned counsel for the revisionists has relied on the judgment in the case of Geo Varghese (supra). In the said judgment Supreme Court has postulated that if a student is simply reprimanded by a teacher in the act of indiscipline and the student in emotional state, commits suicide, a teacher cannot be held responsible for abeting the charge. The relevant paragraph-31, 32 and 33 of the said judgment is reproduced hereinbelow:-

"30. Thus, the appellant having found the deceased boy regularly bunking classes, first reprimanded him but on account of repeated acts, brought this fact to the knowledge of the Principal, who called the parents on telephone to come to

the school. No further overt act has been attributed to the appellant either in the First Information Report or in the statement of the complainant, nor anything in this regard has been stated in the alleged suicide note. The alleged suicide note only records insofar as, the appellant is concerned, "THANKS GEO (PTI) OF MY SCHOOL'. Thus, even the suicide note does not attribute any act or instigation on the part of the appellant to connect him with the offence for which he is being charged.

31. If, a student is simply reprimanded by a teacher for an act of indiscipline and bringing the continued act of indiscipline to the notice of Principal of the institution who conveyed to the parents of the student for the purposes of school discipline and correcting a child, any student who is very emotional or sentimental commits suicide, can the said teacher be held liable for the same and charged and tried for the offence of abetment of suicide under Section 306 IPC.

31. Our answer to the said question is 'No'."

48. Learned counsel for the revisionists has further relied on the judgment of Madhya Pradesh High Court at Jabalpur in Writ PetitionNo.11763 of 2018 decided on 20.6.2018. Paragraph-8 of the said judgment is quoted below:-

"8. Nowhere in this petition, has it been alleged, either directly or by necessary implication, that the Respondent No. 4 ever asked the deceased to commit suicide. It has also not been alleged that the Respondent No.4 has such knowledge, that his act would in all probability than not, compel the deceased to commit suicide. The allegation that the Respondent No.4 slapped the deceased, if at all true, only constitutes an offence Section 323 of IPC, which is a non-cognizable offence, where cognizance can only a taken on the basis of a complaint made under Section 200 Cr.P.C."

49. Learned counsel for revisionists has further relied o the judgment of Madras High Court, Madurai Bench, **P. Rajmohan. Vs. State, 2018 0 Supreme (Mad) 3697**, and paragraph-15 of the said judgment clearly points out that father of the deceased girl was summoned by the teacher and he was asked to give apology for the conduct of his daughter; thus, for the abetment of girl deceased, teacher could not be held responsible. For convenience, paragraph-15 of the said judgment is reproduced hereinbelow:-

"15. One important thing to be noted in this case is that the Petitioners being the Teachers of the Government School in the interest of the Institution correct any mistake done by the student in order to cultivate good habits and get rid of bad habits, such as stealing money. In fact, the father of the deceased girl had been summoned and it is stated that he gave a letter of apology for the conduct of his daughter and also undertook that the same would not recur again. In such view of the matter, the act of the petitioners cannot be said that it would amount to abetment of suicide."

50. Similarly, the judgment of Chhattisgarh High Court in the case of Raj **Shekhar Paliwal and another. Vs. State of Chhattisgarh and another, 2020 SCC OnLine Chh 37,** has been relied on by the learned counsel for the revisionists wherein, it has been held that the deceased student was sensitive and she committed suicide. The relevant paragraph-14 of the said judgment is quoted below for convenience:-

"14. On perusal of the statement of witnesses under Section 161 of Cr.P.C., it is found that there had been occasions and reasons for which the deceased was taken to task by the applicants, it does not appear that the applicants had acted on any false pretext, there had been reasons for their acting or reacting with respect to the activity or any failure on the part of the deceased which is mentioned in the statements of the witnesses- Karambir Shashtri and Sukanti Shashtri. It appears that the deceased was very much sensitive and she used to become upset after such occasions when she taken to task by the applicants. By taking into consideration, the whole circumstances that occurred before the deceased committed suicide, it can be said that the applicants have acted when they found some kind of fault on the part of the deceased. Being Principal and teacher of the school, the applicants have authority to keep their students under discipline. Imparting education is a serious business and the Principal and the teachers cannot overlook the mistakes or lapses committed by any student and they have to be straight forward and show strictness so that the students takes care to remain in discipline and obey the command of the Principal and teacher. I am of this view that the applicants have not done anything otherwise than what was required to be done."

51. Learned counsel for the revisionists has further relied on the judgment in the case of **Gurcharan Singh. Vs. State of Punjab, (2020) 10 SCC 200,** and in paragraph-15 thereof, Supreme Court has dealt with the issue of *mens rea* and held that there was no evidence regarding persistent guilt or harassment from the husband. Therefore, the requirement of Section 107 IPC for abetment is not fulfilled. For convenience, paragraph-15 of the said judgment is quoted below:-

"15. As in all crimes, *mens rea* has to be established. To prove the offence of abetment, as specified under Sec 107 of the IPC, the state of mind to commit a particular crime must be visible, to determine the culpability. In order to prove *mens rea*, there has to be something on record to establish or show that the appellant herein had a guilty mind and in furtherance of that state of mind, abetted the suicide of the deceased. The ingredient of *mens rea* cannot be assumed to be ostensibly present but has to be visible and conspicuous. However, what transpires in the present matter is that both the Trial Court as well as the High Court never examined whether appellant had the *mens rea* for the crime, he is held to have committed. The conviction of Appellant by the Trial Court as well as the High Court on the theory that the woman with two young kids might have committed suicide, possibly because of the harassment faced by her in the matrimonial house, is not at all borne out by the evidence in the case. Testimonies of the PWs do not show that the wife was unhappy because of the appellant and she was forced to take such a step on his account."

52. Learned counsel for revisionists has further relied on the judgment in the case of **Sanju @ Sanjay Singh Sengar. Vs. State of Madhya Pradesh, (2002) 5 SCC 371, paragraph-13,** which is quoted below:-

"A plain reading of the suicide note would clearly show that the deceased was in great stress and depressed. One plausible reason could be that the deceased was without any work

or avocation and at the same time indulged in drinking as revealed from the statement of the wife Smt. Neelam Sengar. He was a frustrated man. Reading of the suicide note will clearly suggest that such a note is not a handy work of a man with sound mind and sense. Smt. Neelam Sengar, wife of the deceased, made a statement under Section 161 Cr.P.C. before the Investigation Officer. She stated that the deceased always indulged in drinking wine and was not doing any work. She also stated that on 26th July, 1998 her husband came to them in an inebriated condition and was abusing her and other members of the family. The prosecution story, if believed, shows that the quarrel between the deceased and the appellant had taken place on 25th July, 1998 and if the deceased came back to the house again on 26th July, 1998, it cannot be said that the suicide by the deceased was the direct result of the quarrel that had taken pace on 25th July, 1998. Viewed from the aforesaid circumstances independently, we are clearly of the view that the ingredients of 'abetment' are totally absent in the instant case for an offence under Section 306 I.P.C. It is in the statement of the wife that the deceased always remained in a drunkened condition. It is a common knowledge that excessive drinking leads one to debauchery. It clearly appeared, therefore, that the deceased was a victim of his own conduct unconnected with the quarrel that had ensued on 25th July, 1998 where the appellant is stated to have used abusive language. Taking the totality of materials on record and facts and circumstances of the case into consideration, it will lead to irresistible conclusion that it is the deceased and he alone, and none else, is responsible for his death."

53. He further relied on the judgment Delhi High Court in the case of **Roop Kishore Madan. Vs. State,** reported in **2001 CriLJ 1219,** paragraph-17 of which reads as under:-

"17. The law on the subject has been discussed at length in various judgments of the High Courts and the Supreme Court in Hira Lal Jain. v. State, 2000 III AD (Crl.) DHC 121. It was held that on reading of clause 'First' of Section 107 IPC, it is clear that a person who instigates other to do a thing, abets him to do that thing. A person is said to instigate another when he incites or otherwise encourages another to commit a crime. In the present case, a reading of the so-called, suicide note does not remotely suggest that the petitioner had incited the deceased to commit suicide. There is no material on record to show that the ingredients of offence of abetment had been satisfied and, therefore the offence under Section 306 IPC cannot be said to have been committed. In Taposi Chakervarti v. State, 2000 III AD (Cr.) DHC 233, this Court has elaborately gone into what are the ingredients necessary to satisfy an offence under Section 304 IPC."

54. Learned counsel for the revisionists has further relied on the Allahabad High Court Lucknow Bench judgment in the case of **Dr. J.P. Bhargav and another. Vs. State of U.P. (Application U/S 482 No.6195 of 2016)** with other connected matters, decided on 6.7.2022, paragraph-18 and 23. He has submitted that abetment involves a mental process in which it has come out that abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. There has to be a clear *mens rea* to commit the offence and it has been held that all ingredients of instigation of abetment to commit suicide are completely absent in the material collected during investigation and

55. Learned counsel for the revisionists further relied upon the judgment in the case of **Kanchan Kumar.**

Vs. The State of Bihar, 2022 LiveLaw (SC) 763, wherein Supreme Court has laid down thelaw that roving inquiry is not permitted at the stage of discharge. What has to be seen is that a simple and necessary inquiry for proper adjudication of application for discharge is required. The relevantn paragraph-18 of the said judgment is quoted below:-

"18. The conclusions that we have drawn are based on materials placed before us, which are part of the case record. This is the same record that was available with the Special Judge (Vigilance) when the application under Section 227 of the Cr.P.C. was taken up. Despite that, the Special Judge (Vigilance) dismissed the discharge application on the simple ground that a roving inquiry is not permitted at the stage of discharge. What we have undertaken is not a roving inquiry, but a simple and necessary inquiry for a proper adjudication of an application for discharge. The Special Judge (Vigilance) was bound to conduct a similar inquiry for coming to a conclusion that a prima facie case is made out for the Appellant to stand trial. Unfortunately, the High Court committed the same mistake as that of the Special Judge (Vigilance)."

56. Similarly, another judgment on the post of discharge, has been cited by the learned counsel for the revisionists in the case of **State of Karnataka Lokayukta, Police Station, Bengaluru. Vs. M.R. Hiremath, (2019) 7 SCC 515**, where Supreme Court has given dictum that while taking decision in discharge proceedings, the Court must proceed on the assumption that material which has been brought on record by the prosecution is true and evaluate the material in order to determine whether the facts emerging from the material, taken on the face value, discloses the existence of ingredients necessary to commit the offence. Relevant paragraph-24 and 25 of the said judgment are quoted below:-

"24. The High Court has in the present case erred on all the above counts. The High Court has erred in coming to the conclusion that in the absence of a certificate under Section 65B when the charge sheet was submitted, the prosecution was liable to fail and that the proceeding was required to be quashed at that stage. The High Court has evidently lost sight of the other material on which the prosecution sought to place reliance. Finally, no investigation as such commenced before the lodging of the first information report. The investigating officer had taken recourse to a preliminary inquiry. This was consistent with the decision in Lalita Kumari.

25. The High Court ought to have been cognizant of the fact that the trial court was dealing with an application for discharge under the provisions of Section 239 of the CrPC. The parameters which govern the exercise of this jurisdiction have found expression in several decisions of this Court. It is a settled principle of law that at the stage of considering an application for discharge the court must proceed on the assumption that the material which has been brought on the record by the prosecution is true and evaluate the material in order to determine whether the facts emerging from the material, taken on its face value, disclose the existence of the ingredients necessary to constitute the offence. In the *State of Tamil Nadu v N Suresh Rajan, (2014) 11 SCC 709* adverting to the earlier decisions on the subject; this Court held : (SCC pp 721-22, para 29)

"29...At this stage, probative value of the materials has to be gone into

and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage."

57. Similarly, to support his arguments, learned counsel for revisionists has relied on the judgment in the case of **Ajay Singh and another. Etc. Vs. State of Chhattisgarh and another, (2017) 3 SCC 330**, paragraph-9 which reads as under:-

"9. Chapter XVIII of CrPC provides for trial before a court of session. Section 227 empowers the trial judge to discharge the accused after hearing the submissions of the accused and the prosecution and on being satisfied that there is no sufficient ground for proceeding against the accused. The key words of the Section are "not sufficient ground for proceeding against the accused". Interpreting the said provision, the Court in **P. Vijayan Vs.State of Kerala and another (2010) 2 SCC 398** has held that the Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the court, after the trial starts. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. In other words, the sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him."

58. Learned counsel for revisionists has also cited various judgments to make his submissions that while considering the question of framing charge under Section 227 CrPC, the Judge has any doubt due to sift and waive evidence for limited purpose of finding out whether or a prima facie case against the accused has been made out, whether, material placed before the Court discloses grave suspicion against the accused which has not been properly explained.

He has also relied judgment in the case of **Union of India. Vs. Prafulla Kumar Samal and another, (1979) 3 SCC 4; Saranya. Vs. Bharathi and another, (2921) 8 SCC 583; K. Kala Vs. Secretary, Educational Department, 2022 LiveLaw (Mad) 452; M. E. Shivalingamurthy. Vs. Central Bureau of Investigation, Bengaluru, (2020) 2 SCC 768.**

59. He has further relied upon various judgments and has submitted that this Court in exercise of its inherent jurisdiction, can prevent the abuse of process to secure the ends of justice. The discharge application of the revisionists should be decided with compliance of

mandatory statutory provisions of Section 226, 227 and 228 CrPC. He referred to the judgments of *Harish Dahiya* (supra) and *Sanjay Kumar Rai* (supra), *Prashanta Kumar Dey* (supra) and *Smt. Shila Devi* (supra) whicih have been annexed with the application for taking rejoinder affidavit on record dated 16.11.2022.

Submissions of learned counsel for the O.P. No.2 Complainant.

60. That the revisionists upon coming to know about lodging of FIR, approached the High Court by filing Writ Petition No.5269 (M/B) of 2018, which was dismissed on 20.2.2018 on the basis of the statement given by AGA that the investigation has been completed. Later on the revisionists came to know that the investigation was still going on. They preferred another Writ Petition No.1150 (M/B) of 2018 invoking their fundamental right of fair investigation, upon which notice was issued to the I.O.

61. That the revisionists also prayed for quashing of the charge sheet on the extraneous ground that the opposite party No.2 who is the father of the deceased, manipulated the police investigation and using his influence, got the investigation transferred to crime branch since opposite party No.2 is serving in the police department and is posted in the office of S.P. Lakhimpur Kheri thereby insinuating that the investigation was conducted under the influence of opposite party No.2.

62. That on the date of incident i.e., on 3.12.2016 when the deceased went to the school, he was mercilessly and unreasonably, physically assaulted by the revisionists and was also threatened to be ousted from the school for a mere accident which neither resulted in any injury nor was substantial enough for any complaint to be made as verified by the eye-witnesses yet the revisionists made it grave enough to justify their ill-treatment towards the deceased child. Thereafter, the child was forcibly sent to his home alongwith the revisionist No.2 despite knowing that the former's mother is coming to fetch him. Moreover, in spite of the child's mother requesting the revisionist No.2 to stay with the child until she returns home, the revisionist No.2 left him unaccompanied and went back. When Lalit's mother returned home, she found that he had shot himself with the licensed revolver of his father, putting an end to his life.

63. The fact that the revisionists have harassed the deceased in the name of disciplinary action is well-settled by their harsh conduct and hasty steps taken and it was the consequence of their actions which ultimately culminated into the suicide of the child, a plot cleverly crafted on the ground of a mishap, to induce an innocent child to the ill-thought of suicide and commit so, unfailingly. Moreover, it is pertinent to reiterate the statements made by the classmates of deceased Lalit Yadav, duly filed in the chargesheet, that the revisionists have always had an insensitive attitude towards the children, reprimanding the students frequently and unnecessarily. It is undisputable that in order to regulate a child, rebukes by teacher, parents or any elder are must, for instead of being a harsh word to the child, they are strict moral instructions which psychologically leaves a better mark on the child's mind and in turn, encourages the child to be obedient and upright. But, if such a rebuke is made with an intention to lower the self-esteem of a child, to frighten him/her so as not to go against the person chastising, the same

rebuke can mentally paralyze a child thereby making him/her oblivion of rationality.

64. That after the unfortunate incident of Lalit's suicide, around 100-150 students of the said school protested against the revisionists, demanding justice for Lalit and strict action against revisionist No.2. However, the students were suppressed by bouncers and police deployed by revisionist No.1. Such steps indicate and make it undeniable that the revisionists were ruthless and merciless and it was this conduct which created such a mental condition that was enough to abet the suicide of an innocent child that day.

65. That the counsel for revisionists have relied on the judgment of Supreme Court in **Geo Varghese. Vs. State of Rajasthan** (supra in paragraph-4.11) where the appellant Geo Varghese was a PT Teacher I n St. Xavier's School, Nevta, Jaipur. He was also a member of the Disciplinary Committee for maintaining overall discipline by the students of the School. One student of Class 9th of the institution, unfortunately, committed suicide in the morning at about 04.00 a.m. on 26.2.2018. The mother of the deceased-student lodged the FIR on 02.05.2018 before the concerned Police Station under Section 306 IPC after about 7 days of the suicide, alleging that her son committed suicide due to mental harassment meted out by the appellant. The Hon'ble Court in the aforesaid judgment pronounced the acquittal of the appellant. The counsel for revisionists have tried to equate both the cases although there are significant dissimilarities. The respondent in the case cited was habitually disobedient towards the rules and code of conduct of the school, bunking classes frequently and disregarding the warnings given by the appellant. The son of opposite party No.2 in this case had never shown any instance of defiance or disrespect for the code of conduct prescribed by the school and was rather a child of calm and obedient demeanour as affirmed by revisionist No.1 himself. The reprimand given to the child in the case cited was verbal and more of a moralizing nature against the wrongs done unlike the corporal punishment and mental trauma meted out to the child Lalit Yadav I n this case for a mere accident which took place outside the premises of the school and for which no formal complaint, of any kind, was ever made by anybody. The child in the case cited was at home along with his parents when the unfortunate incident of suicide took place while Lalit Yadav was left alone by the revisionist No.2 totally ignoring the request of Lalit's mother to stay with him. The school authorities in the case cited had informed the parents to meet the Principal afraid of which the child committed suicide. In the present case, the revisionists despite calling Lalit's mother to the school had refused to meet her. Moverover, Lalit Yadav had himself informed about the accident to his father before the revisionist No.2 called and re-apprised about the same. Thus the case of Geo Varghese Vs. State of Rajasthan is in no way parallel to the case in hand.

66. That besides the case of Geo Verghese Vs. State of Rajasthan, the counsel for revisionists have cited a whole array of cases equating them with the present case. However, there are marked dissimilarities which do not set a precedent for the case in hand.

i. That in the case of **Sunil Kumar Sen. Vs. State of Madhya Pradesh,** for instance, the deceased

violated the rule of school by sneaking out of the premises before school hours for which she was justifiably admonished.

ii. That in the case of **N. Anjali Devi Vs. The Superintendent of Police,** the deceased was scolded by the Anganwadi teacher who in a fit of rage uttered "go and die" after discovering the stolen money from the bag of deceased; here the Hon'ble Court has highlighted that words uttered in a fit of rage do not amount nto abetment of suicide. Moreover, the deceased was reprimanded for her conduct which itself was immoral. However, in the present case the reprimand meted out to the deceased Lalit Yadav was unnecessary in the light of a minor accident for which the revisionists, in particular, had no authority to admonish since the accident neither took place in the premises nor was it formally reported by anyone.

iii. That in the case of **Sashi Prabha Devi.Vs. State of Assam,** the accused was alleged of having wrongfully struck down the name of the deceased from the student register of Class Xth, owing to which the deceased committed suicide. However, the action was justified against the deceased since she hadn't passed her class Ixth examination and so no case of abetment to suicide could be established.

iv That in the case of **P.Rajamohan Vs. State of Madras,** the deceased was asked to stand outside the class for not bringing the maths testbook and later meet the Headmaster regarding that. There was no evidence of physical assault or mental agony meted out to the deceased, which, it must be reaffirmed, is quite perceptible in the case in hand.

v. That in the case of **Gurucharan Singh Vs. State of Punjab,** it is to be noted that the Apex Court has strongly mentioned that "contignuity, continuity, culpability and complicity of the indictable acts or omissions are the concomitant indices of abetment", and all the key elements are overtly present in this case. The child was neither hypersensitive to get perturbed enough to commit suicide on the spur of the moment nor was dealing with any past distress which could have moved him to such a drastic step. On the day of the unfortunate incident, the child was constantly in the custody of either of the revisionists, who mistreated him firstly in the school premises and later took him back home and left him adequately alarmed about the future damage. Thus the proximity, connection, liability and involvement of the revisionists cannot be repudiated.

67. That the essential ingredient of *mens rea* which the counsel for revisionists argue to be absent, is very well present and is starkly evident from the misconduct of the revisionists towards the deceased Lalit Yadav. The eye-witnesses of the said mishap outside the school has confirmed the maltreatment of revisionist No.2 with the deceased Lalit Yadav and his fried Anshul Gupta, on the road itself. Further, instead of bringing the said matter before the disciplinary committee to decide the further course of action, the revisionists chose to punish the deceased and his fried on their own accord. After sufficiently harassing the students. Anshul was sent back home with a lab assistant whereas the deceased, Lality Yadav was taken home by revisionist No.2 who did not wait back either to inform Lalit's mother as instructed by revisionist No.1 or to consider the request of Lalit's mother to stay with him till she returns. It is therefore clear that the revisionists actively instigated the deceased to commit suicide by instilling a feat of spoiling his career through "disciplinary actions' and "future harm'. And the

argument of the revisionists that the child committed suicide under the apprehension of his father, is thus absolutely baseless and a mere attempt to shift the blame for had it been so the deceased would not have informed about the said accident to his father himself, in the first place.

68. That the revisionists' plea for discharge under Section 227 CrPC is wholly irrelevant in the light of the presence of strong evidence of abetment on their part.

69. That there is the presence of ample evidence against the revisionists which has been duly considered by the learned Court below and thus, the revisionists are liable to be tried.

70. That since the outset, the revisionists have shrewdly concealed the facts and have abused the due process of law seemingly to their advantage. The case has been maliciously prolonged by the revisionists as an attempt to evade from the proceedings by approaching the Hon'ble Supreme Court seeking EX-PARTE STAY on arrest, dated 19.06.2018 and later a stay on trial, dated 06.01.2020, instead of complying with the order dated 22.05.2018 which explicitly mentioned filing of a discharge application, if decisions, within two weeks. The present criminal revision was also filed only with a prospect to extent the case furthermore.

71. Taking into account the arbitrary handling of the accident done by the revisionists, by unreasonably admonishing and physically assaulting the deceased Lality Yadav and giving an added mental pressure of rusticating from the school, and haphazard series of actions from calling the child's mother to school to sending him home with revisionist No.2 without informing the mother beforehand and thereafter leaving him alone, all without any just and fair reason, not to mention the tactics employed by the revisionists since the initiation of this case to protract it for 6 long years simply to deny justice to opposite party, unambiguously sum up the mala fide intent of the revisionists which should be heavily dealt with. Besides, the charges having been framed against the revisionists at this stage call for a fair trial without any further ado since there is prima facie enough evidence to proceed against them and interference of any nature, which defers the proceedings any longer, must not be entertained.

72. That Hon'ble Supreme Court in the case of **State of Bihar Vs. Ramesh Singh (1977 AIR 2018)** which explaining the scope of the sections 227 and 228 CrPC observed:

"Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the Court is not to 'see whether

there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused."

73. That the essential principles of Section 227 CrPC were duly summarized by the Hon'ble Supreme Court in the case of **Union of India Vs. Prafulla Kumar Samal & another, 1979 AIR 366,:**

"(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out:

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be, fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused."

74. That the Hon'ble Supreme Court has elaborated the scope of enquiry under Section 227 CrPC in the case of **Stree Atyachar Virodhi Parishad.Vs. Dilip Nathumal Chordia & anr., 1989 SCC (1) 715,** which says:-

"Sec. 227 itself contains enough guidelines as to the scope of enquiry for the purpose of discharging an accused. It provides that "the Judge shall discharge when he considers that there is no sufficient ground for proceeding against the accused". The 'ground' in the context is not a ground for conviction, but a ground for putting the accused on trial. It is in the trial, the guilt or the innocence of the accused will be determined and not at the time of framing of charge. The Court, therefore, need not undertake an elaborate enquiry in sifting and weighing the material. Nor it is necessary to delve deep into various aspects. All that the Court has to consider is whether the evidenciary material on record if generally accepted, would reasonably connect the accused with the crime. No more need be enquired into."

75. That the Hon'ble Supreme Court in the aforementioned case further says:

"We wish to add a word regarding interference by the High court against a charge framed by the Sessions Court. Section 227 which confers power to discharge an accused was designed to prevent harassment to an innocent person by the arduous trial or the ordeal of prosecution. How that intention is to be achieved is reasonably clear in the section itself. The power has been entrusted to the Sessions Judge who brings to bear his knowledge and experience in criminal trials. Be- sides, he has the assistance of counsel for the accused and Public

Prosecutor. He is required to hear both sides before framing any charge against the accused or for discharging him. If the Sessions Judge after hearing the parties frames a charge and also makes an order in support thereof, the law must be allowed to take its own course. Self restraint on the part of the High Court should be the rule unless there is a glaring injustice stares the Court in the face. The opinion on any matter may differ depending upon the person who views it. There may be as many opinions on a particular matter as there are courts but it is no ground for the High Court to interdict the trial. It would be better for the High Court to allow the trial to proceed."

76. On the other hand, Sri Sarvajeet Dubey, learned counsel for respondent No.2 has relied on the judgment of Supreme Court in the case of **Mahendra Prasad Tiwari. Vs. Amit Kumar Tiwari and another, Criminal Appeal No.1216 of 2022.** According to his submission in application under Section 482 CrPC or revision under Section 397 CrPC while passing the order on the application for discharge, the correctness and sufficiency of evidence cannot be gone into by this Court and this Court should apply the principle if the entire evidence produced by the prosecution is to be believed, would it constitute an offence or not. Relevant paragraph-21, 22, 24, 25 and 26 of the said judgment are reproduced hereinbelow:-

"21. The law is well settled that although it is open to a High Court entertaining a petition under Section 482 of the CrPC or a revision application under Section 397 of the CrPC to quash the charges framed by the trial court, yet the same cannot be done by weighing the correctness or sufficiency of the evidence. In a case praying for quashing of the charge, the principle to be adopted by the High Court should be that if the entire evidence produced by the prosecution is to be believed, would it constitute an offence or not. The truthfulness, the sufficiency and acceptability of the material produced at the time of framing of a charge can be done only at the stage of trial. To put it more succinctly, at the stage of charge the Court is to examine the materials only with a view to be satisfied that prima facie case of commission of offence alleged has been made out against the accused person. It is also well settled that when the petition is filed by the accused under Section 482 CrPC or a revision Petition under Section 397 read with Section 401 of the CrPC seeking for the quashing of charge framed against him, the Court should not interfere with the order unless there are strong reasons to hold that in the interest of justice and to avoid abuse of the process of the Court a charge framed against the accused needs to be quashed. Such an order can be passed only in exceptional cases and on rare occasions. It is to be kept in mind that once the trial court has framed a charge against an accused the trial must proceed without unnecessary interference by a superior court and the entire evidence from the prosecution side should be placed on record. Any attempt by an accused for quashing of a charge before the entire prosecution evidence has come on record should not be entertained sans exceptional cases. [see State of Delhi Vs. Gyan Devi, (2000) 8 SCC 239].

22. The scope of interference and exercise of jurisdiction under Section 397 of CrPC has been time and again explained by this Court. Further, the scope of interference under Section 397 CrPC at a stage, when charge had been framed, is also well settled. At the stage of framing of a

charge, the court is concerned not with the proof of the allegation rather it has to focus on the material and form an opinion whether there is strong suspicion that the accused has committed an offence, which if put to trial, could prove his guilt. The framing of charge is not a stage, at which stage the final test of guilt is to be applied. Thus, to hold that at the stage of framing the charge, the court should form an opinion that the accused is certainly guilty of committing an offence, is to hold something which is neither permissible nor is in consonance with the scheme of Code of Criminal Procedure.

24. It is useful to refer to judgment of this Court in Amit Kapoor and Ramesh Chander, (2012) 9 SCC 460, where the scope of Section 397 CrPC has been succinctly considered and explained. Para 12 and 13 resply are as follows:

"12. Section 397 of the Code vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the court to scrutinize the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law. If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but are merely indicative. Each case would have to be determined on its own merits.

"13. Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex facie. Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the categories aforestated. Even framing of charge is a much advanced stage in the proceedings under the CrPC."

25. The Court in para 27 has recorded its conclusion and laid down the principles to be considered for the exercise of jurisdiction under Section 397 particularly in the context of quashing of charge framed under Section 228 CrPC. Paras 27, 27(1), (2), (3), (9), (13) resply are extracted as follows:

"27. Having discussed the scope of jurisdiction under these two provisions, i.e., Section 397 and Section 482 of the Code and the fine line of jurisdictional distinction, now it will be appropriate for us to enlist the principles with reference to which the courts should exercise such jurisdiction. However, it is not only difficult but is inherently impossible to state with precision such principles. At best and upon objective analysis of various judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be:

27.1. Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

27.2. The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

27.3. The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

X X X 27.9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction; the Court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

X X X 27.13. Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie...."

26. This Court in the case of Chitresh Kumar Chopra v. State (Government of NCT of Delhi), reported in (2009) 16 SCC 605, observed in para 25 as under:-

"25. It is trite that at the stage of framing of charge, the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclose the existence of all the ingredients constituting the alleged offence or offences. For this limited purpose, the court may sift the evidence as it cannot be expected even at the initial stage to accept as gospel truth all that the prosecution states. At this stage, the court has to consider the material only with a view to find out if there is ground for "presuming" that the accused has committed an offence and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction. (See: Niranjan Singh Karam Singh Punjabi & Ors. Vs. Jitendra Bhimraj Bijja & Ors, (1990) 4 SCC 76)."

77. Learned counsel for respondent No.2 has further relied on the judgment of Supreme Court in the case of **State of Rajasthan. Vs. Ashok Kumar Kashyap, Criminal appeal No.407 of 2021, para 9.1, 9.2 and 13.** He has submitted that probative value of evidence cannot be waived by the Court and once, the material has been collected, it should be presumed that the offence has been committed and the Court cannot become trial Court while exercising the power under Section 227 CrPC. Paragraph 9.1, 9.2 and 11 of the said judgment are quoted below:-

"9.1 In the case of P. Vijayan (supra), this Court had an occasion to consider Section 227 of the Cr.P.C. What is

required to be considered at the time of framing of the charge and/or considering the discharge application has been considered elaborately in the said decision. It is observed and held that at the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. It is observed that in other words, the sufficiency of grounds would take within its fold the nature of the evidence recorded by the police or the documents produced before the Court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him. It is further observed that if the Judge comes to a conclusion that there is sufficient ground to proceed, he will frame a charge under Section 228 Cr.P.C., if not, he will discharge the accused. It is further observed that while exercising its judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the court, after the trial starts.

9.2 In the recent decision of this Court in the case of M.R. Hiremath (supra), one of us (Justice D.Y. Chandrachud) speaking for the Bench has observed and held in paragraph 25 as under:

"25. The High Court ought to have been cognizant of the fact that the trial court was dealing with an application for discharge under the provisions of Section 239 CrPC. The parameters which govern the exercise of this jurisdiction have found expression in several decisions of this Court. It is a settled principle of law that at the stage of considering an application for discharge the court must proceed on the assumption that the material which has been brought on the record by the prosecution is true and evaluate the material in order to determine whether the facts emerging from the material, taken on its face value, disclose the existence of the ingredients necessary to constitute the offence. In State of T.N. Vs. N. Suresh Rajan [State of T.N. v. N. Suresh Rajan, (2014) 11 SCC 709, adverting to the earlier decisions on the subject, this Court held: (SCC pp. 721-22, para 29)

"29. ... At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage."

"11. Having considered the reasoning given by the High Court and the grounds which are weighed with the High Court while discharging the accused, we are of the opinion that the High Court has exceeded in its jurisdiction in exercise of the revisional jurisdiction and has acted beyond the scope of Section 227/239 Cr.P.C. While discharging the accused, the High Court has gone into the merits of the case and has considered whether on the basis of the material on record, the accused is likely to be convicted or not. For the aforesaid, the High Court has considered in detail the transcript of the conversation

between the complainant and the accused which exercise at this stage to consider the discharge application and/or framing of the charge is not permissible at all. As rightly observed and held by the learned Special Judge at the stage of framing of the charge, it has to be seen whether or not a prima facie case is made out and the defence of the accused is not to be considered. After considering the material on record including the transcript of the conversation between the complainant and the accused, the learned Special Judge having found that there is a prima facie case of the alleged offence under Section 7 of the PC Act, framed the charge against the accused for the said offence. The High Court materially erred in negating the exercise of considering the transcript in detail and in considering whether on the basis of the material on record the accused is likely to be convicted for the offence under Section 7 of the PC Act or not. As observed hereinabove, the High Court was required to consider whether a prima facie case has been made out or not and whether the accused is required to be further tried or not. At the stage of framing of the charge and/or considering the discharge application, the mini trial is not permissible. At this stage, it is to be noted that even as per Section 7 of the PC Act, even an attempt constitutes an offence. Therefore, the High Court has erred and/or exceeded in virtually holding a mini trial at the stage of discharge application."

78. He has also relied on the judgment of Rajasthan High Court at Jabalpur Bench in the case of **Mohan Ram. Vs. State of Rajasthan and another. Criminal Revision Petition No.229 of 2022, dated on 1.4.2022.** The issue of framing of charge is mentioned in para 11.8 of the judgment, the relevant portion of which is quoted below:-

"11.8 .... The above-stated principles clearly show that inherent as well as revisional jurisdiction should be exercised cautiously. If the jurisdiction under Section 482 of the Code in relation to quashing of an FIR is circumscribed by the factum and caution afore-noticed, in that event, the revisional jurisdiction, particularly while dealing with framing of a charge, has to be even more limited. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228of 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 (27 of 32) [CRLR-229/2022] 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 Section 227 and 228 228 of the Code. Section 227 is 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. It may also be

noticed that the revisional jurisdiction exercised by the High Court is in a way final and no inter court remedy is available in such cases. of course, it may be subject to jurisdiction of this Court under Article 136 of the Constitution of India. Normally, a revisional jurisdiction should be exercised on a question of law. However, when factual appreciation is involved, then it must find place in the class of cases resulting in a perverse finding. Basically, the power is required to be exercised so that justice is done and there is no abuse of power by the court. Merely an apprehension or suspicion of the same would not be a sufficient ground for interference in such cases."

To support his argument, learned counsel for respondent No.2 has further relied on the judgment of Allahabad High Court, Lucknow Bench in **Criminal Revision No.1116 of 2019, Rakesh Kumar Pandey and another. Vs. State of U.P. and another,** decided on 15.2.2022. In the said judgment, the cases of Sanjay Kumar Rai (supra) and Ashok Kumar Kashyap (supra) have been dealt with which have already been discussed in the foregoing paragraphs of this judgment.

Facts and Evidence for consideration:-

79. After lodging FIR, the Investigating Officer has recorded statement of witnesses under Section 161 CrPC. Statement of revisionist No.1 was recorded under Section 161 CrPC by the Investigating Officer and he stated before the Investigating Officer that he had instructed PT Teacher revisionist No.2 to inform the occurrence to the parents and he also asked him to call his parents so that the deceased Lalit Yadav could have been given handed over to parents. He was informed by the PT Teacher about the incident which had taken place. The Principal revisionist No.1 had stated that he did not make any physical assault against the deceased Lalit Yadav. The friend of deceased Lalit Yadav was slapped by him because he became rash when he was asked to come inside the Office. It was further stated by the revisionist No.1 under Section 161 CrPC that the motorcycle of Anshul andn Lalit Yadav was collided with rickshaw and people were beating Lalit; therefore, he was called by him in the School. He further informed the parents after prayer assembly was over. He asked certain questions from Anshul Gupta who was talking in an exciting manner, therefore, he slapped him. On the same time he told both of them i.e., Anshul Gupta and Lalit Yadav that he would call their parents. He further instructed PT Teacher James John to send Lalit Yadav to his house and Anshul Gupta along with Teacher Luis James. He further told they they would inform their parents that they would be suspended. They were suspended till Monday.

80. Similarly, revisionist No.2 James John also got recorded his statement under Section 161 CrPC and he admitted that Lalit Yadav was dropped by him to his house and parents of Lalit Yadav were informed regarding the occurrence which had taken place. He narrated the facts that how the motorcycle driven by Anshul Gupta and Lalit Yadav collided with rickshaw and he had also come to the place of occurrence and took them inside the School.

81. Statement of Amar Nath Yadav father of deceased Lalit Yadav was recorded under Section 161 CrPC He stated that his son Lalit Yadav was studying in

Class-XII-A in Cathedral School, Hazratganj, Lucknow. He had gone to school on 3.12.2016 at about 7.45 a.m. He received call on 7.58 in the morning from PT Teacher that the revisionist No.2 who told him that the motorcycle of his son was collided with rickshaw due to which the wheel of the rickshaw was damaged. The PT Teacher told him that he would present his son to the Father (Principal). He told the PT Teacher that he was posted in Lakhimpur Kheri, therefore, he was unable to come and asked him not to harass him. His son Lalit Yadav informed him that his motorcycle had collided with rickshaw and he provided Rs.150/- to the rickshaw puller. In the meantime, the PT Teacher revisionist No.2 snatched his phone and he could not talk further. He informed his wife on her cell phone and asked her to bring her son to home. His wife asked him to send his cousin brother along with vehicle so that Lalit Yadav could be brought to home. The wife proceeded to school and she was told that motorcycle and mobile of his son were deposited in the school and after rustication, his son was sent to home along with PT Teacher revisionist No.2. His wife was returning to the house from the school and in the meantime, she was informed by the PT Teacher that his son was brought to her home by himself (PT Teacher). His wife asked him not to leave his son alone but the PT Teacher after dropping his son, came back to the school. His wife reached the house and also contacted the PT Teacher on phone as to where her son was and he told her that he had already dropped him on the gate. His wife knocked the door but no one replied. Ajay Yadav the cousin brother anyhow came inside the house through balcony and when his wife went in the upper room of the son, she saw that he had committed suicide by licensed revolver. The deceased son was brought to the trauma centre where he died during medical treatment. It has been further stated by the father of the deceased that PT Teacher and Father the revisionist No.1 and 2 had beaten and harassed mentally and physically and had threatened to rusticate him that is why, his son committed suicide.

82. Smt. Shiv Devi wife of Amar Nath Yadav mother of the deceased was also examined by the Police and her statement was recorded under Section 161 CrPC. She narrated almost the same facts as stated by her husband Amar Nath Yadav. She stated that when the motorcycle of Lalit Yadav was collided with rickshaw his son was called by the Father of the School and the PT Teacher, and he was asked not to leave the school unless his parents could come to the School. She was informed that she should take away her son from the School and she reached the School but she was told that her son was taken away by the PT Teacher to her house and he was rusticated. The Father of the School revisionist No.1 refused to meet her; therefore, she returned back to her home and when she was coming to house, the PT Teacher revisionist No.2 informed her that he had brought her son to her house. She asked him not to leave his son. When she reached the house, the house was locked and anyhow, Ajay Yadav cousin brother of her husband went inside the house through window and the gate was opened and she saw that her son had shot fire by licensed revolver. Her son was breathing, therefore, he was brought to trauma centre along with help of neighbours but lastly her son succumbed during treatment.

83. Anshul Gupta, friend of deceased Lalit Yadav, who was present with the deceased at the time of occurrence in the school, was also examined by Police. He

stated before the Investigating Officer that on 2.1.2016, he was called by the deceased Lalit Yadav in the night and asked him that they would take tea tomorrow. ON the next day, they met in front of the parking of the school. Deceased Lalit Yadav asked him to park his vehicle inside the school and asked him to come along with his motorcycle and he desired to take tea. After taking tea, they were coming back to School. It was delay, therefore, the prayer assembly could not be attended by them and they were standing outside the gate. While coming towards the gate, his motorcycle was collided with rickshaw due to which an old lady passenger sitting in the rickshaw, fell down. Many parents/guardians already standing there and passersby came to the place of incident and they had scolded Lalit and Anshul Gupta. Some one slapped him. In the meantime, the PT Teacher revisionist No.2 came to the place of incident. He asked about the incident which was told by him. Rs.150/0 was given to the rickshaw puller. PT Teacher brought them inside the School and the prayer was already over. In the meantime, deceased Lalit Yadav had taken out his cell phone and told entire incident to his father but the PT Teacher, revisionist No.2 snatched the phone and switched it off and it was handed over to the Father. The PT Teacher narrated all the facts to the Father which took place outside the School. Father asked him to control the crowd outside the School and they were taken to School. The Father stated that they will be suspended and their parents will be informed. They also expressed their sorry before the Father. The Father had slapped Anshul Gupta. Again Anshul Gupta stated before the Father that it was not so big incident; therefore, they should be pardoned. Again, the Father slapped Anshul Gupta. He further stated that Lalit Yadav was very much perturbed and he was saying that his career was finished. He will not be allowed to attend the examination and his parents would definitely scold him. On such statement made by Lalit Yadav, Anshul Gupta told him that everything will be alright. Lalit Yadav was sent to his house by the PT Teacher.

Finding of the Court

84. The argument advanced by the learned counsel for the respondent o.2 is that at the stage of framing of charge, the Court has to consider the material only with a view to find out if there is a ground for presuming that the accused has committed the offence. The Court has to evaluate the material and documents on record with a view to find out the facts emerging therefrom at their face value, disclose the existence of all the ingredients constituting the alleged offence or offences. If the Court finds that the order passed by the Court below is without application of mind and the issue in fact and law is not decided, certainly the Court has power under Section 397/401 CrPC to interfere in the matter. The Court has to exercise its power to prevent the abuse of process or to secure the ends of justice. The argument of learned counsel for the respondent NO.2 has no force so far as the power to secure the ends of justice and power of interference of this Court under Section 397 CrPC is concerned. I have to see the legality in the order passed by the Court below. In case it is found that the order passed by the Magistrate is not within the parameters of Section 227 CrPC, then certainly this Court can direct the Court concerned to take decision or set aside the order to mete out the ends of justice.

85. The impugned order has to be seen and a decision is required to be

taken in consonance with the scheme of Section 107 and 305 IPC read with scope of Section 227 CrPC. The Court below has recorded the facts of the case under Section 161 CrPC of mother and father of deceased and thereafter, statement of Anshul Guupta who is companion of deceased. Many judgments of Supreme Court has been mentioned, but no discussion of the judgment has been done. In the last portion of the impugned order, the Court has recorded the finding by giving reason that the revisionists have not adopted the procedure for disciplinary proceedings against the deceased student and since no disciplinary proceedings were adopted against the deceased by competent authority, therefore, the suicide committed by the deceased goes to show that the revisionists are responsible in abetment. The Court has not examined the facts of the case coupled with the requirement of Section 107, 305 IPC and Section 227 CrPC. The Court has to look into whether the entire material collected against the revisionists discloses the offence. The Court has not discussed the material and no finding has been recorded, even various judgments cited by the learned counsel for the revisionists have been mentioned but what law has been pronounced and how those cases are applicable or not applicable, has not been considered and decided. Once the Court has stated the facts of the case, then while passing the judgment, it has to discuss the evidence on record and open its mind whether the evidence and material discloses offence against the revisionists but I find that no such exercise has been done by the Court. The operative portion of the Court is non-speaking and no reason has been assigned. The ratio of the judgments have also not been discussed and the decision is taken in mechanical manner.

86. The Court has to see in the present matter as to how the offence for abetment of suicide under Section 305 IPC is made out and how direct and indirect evidence are there for incitement to commission of offence. Whether the accused had instigated the deceased to commit suicide and whether they are involved in any manner so that the deceased committed suicide. The Court has to see that if any indiscipline had taken place by the deceased, whether the revisionists being Principal and Teacher, were under the duty to take appropriate action to maintain the discipline in the School.

87. In view of aforesaid discussion, the factual aspect of the case as well as various pronouncements of Supreme Court, I am of the view that the matter requires reconsideration.

88. Accordingly, the matter is remanded back to the Court below with direction to take a fresh decision in the light of observations made above in accordance with law within a period of three months from today. The Court below will not be influenced by the observations made by this Court hereinabove and will take decision after applying its mind in accordance with law.

89. The revision is allowed. The order dated 14.3.2019 passed by the Additional Sessions Judge-1st, Lucknow in S.T. No.34 of 2019 (State. Vs. Father Melvin Saldanha and another.) is set aside.

(2023) 1 ILRA 69
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.11.2022

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Revision No. 1399 of 2022

Girish Kumar ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sushil Kumar, Mukul Yadav

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 397/401 - Indian Penal Code, 1860-Sections 363, 366 & 376 - POCSO Act-Legality of-Juvenile was found to be aged about 16 years and 3 months at the time of occurrence-She got pregnant because of rape committed on her by her jeeja and she was unwilling to go with her husband-Child Welfare committee passed the impugned order detaining her in Rajkiya Balgrih-Her institutional custody seems better than family custody-The Act, 2015 provides vast powers to CWC on the principles of best interest of a child-juvenile delivered a child , who too is staying in shelter home-she is a mother with an infant to take care and she might be in need of a family support-Hence, the matter is remanded back to the appellate court to decide the matter afresh.(Para 1 to 17)

B. When an order is passed of the nature as is under challenge before this Court, the appeal shall be entertainable by the Children's Court and not by the District Magistrate; the District Magistrate is empowered to hear appeals only against the decisions of the Committee relating to foster care and sponsorship after care. The order in question does not fall under this category. The appellate court was wrong in holding that appeal did not lie before it.(Para 11)

The revision is disposed of. (E-6)

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

1. Heard Sri Mukul Yadav, learned counsel for the revisionist and learned A.G.A. for the State.

2. This revision has been filed challenging the order dated 11.01.2022 passed by the Child Welfare Committee, Kasganj and further challenging the order dated 26.10.2022 passed by the Special Judge (POCSO Act) in Criminal Appeal No.7 of 2022 in a matter arising out of Case Crime No.140 of 2022, under sections- 363, 366, 376 I.P.C., Police Station- Sunngarh, District- Kasganj.

3. The relevant facts giving rise to this revision are as below:-

An F.I.R. was lodged by father of the victim alleging abduction of his daughter; the victim was recovered and was directed to be produced before the Child Welfare Committee; the Child Welfare Committee passed an order dated 11.01.2022 simultaneously rejecting four applications, one moved on behalf of mother of the victim and second moved on behalf of the married sister of the victim namely Islanti and two applications moved by the victim herself. The facts and circumstances of the case as put before the Child Welfare Committee indicated that the victim became pregnant with the child of her jeeja Om Pal, husband of her real sister Islanti. It may be noted that one of the

applicant was Islanti, wife of Om Pal; the girl was married of to one Ghanshyam by her parents; she did not stay with her husband; instead went with her jeeja and her real sister where she got pregnant; the Child Welfare Committee observed that there were two applications from the side of victim herself, one expressing willingness to go with her parents and the other expressing willingness to go with her sister and jeeja. Taking all the circumstances into consideration, the Child Welfare Committee, found it fit to detain her in the Rajkiya Balgrih Swaroopnagar, Kanpur by order dated 11.01.2022.

4. The appeal preferred by her father against the above order was dismissed, inter-alia on the assumption that legally appeal could have been filed before the District Magistrate only and that the children court had no jurisdiction to hear the appeal.

5. Section- 101 of the Juvenile Justice Act, 2015 is as below:-

"(1) Subject to the provisions of this Act, any person aggrieved by an order made by the Committee or the Board under this Act may, within thirty days from the date of such order, prefer an appeal to the "Children's Court", except for decisions by the Committee related to Foster Care and Sponsorship After Care for which the appeal shall lie with the District Magistrate."

6. It is quite clear from this provision of law that appeal shall lie to the District Magistrate with respect to decisions by the Child Welfare Committee relating to foster care and sponsorship after care only. The appeal in respect of other orders passed by the Child Welfare Committee shall lie to the 'Children's Court' within 30 days from the date of order. Before analysing this provision, it will be appropriate to peruse the order passed by the Child Welfare Committee to decide upon whether this order falls in the category where the appeal may lie to Children's Court or in the category where appeal shall lie to District Magistrate.

7. Following facts are not disputed that the victim girl was produced before the Child Welfare Committee in pursuance of an order passed by Judicial Magistrate, Kasganj in a case arising out of a matter in Case Crime No.140 of 2021, under sections- 363, 366, 376 I.P.C., Police Station- Sunngarh, District- Kasganj.

8. From perusal of the impugned order, it seems that the victim was put to counselling by the Child Welfare Committee and she gave a statement that she was married of to one Ghanshyam against her wishes by her father in July, 2021; she did not like him therefore, she returned to her parents place; meanwhile, she developed illicit relations with her jeeja Om Pal and eloped with him to a place in Punjab where she stayed with him for 15 days and also called her sister and all the three lived together peacefully; she became pregnant with the child of her jeeja and now she wanted to stay with him only; the Child Welfare Committee noted that her natural mother Meera Devi moved an application for releasing the victim in her custody wherein she alleged that her (victim's) jeeja enticed her away though he already had four kids from her elder sister and that the victim is minor, not able to understand the consequences of her act; the Child Welfare Committee also noted that her real sister, Islanti wife of Om Pal also moved an application to get her released

into her custody; in her application, Islanti imputed certain allegations against her own father stating that her father got the victim married of to a person after getting some money in return; victim took shelter in her house and was staying with them out of her own free will and desire at Punjab and that a false F.I.R. had been lodged by her father; it was also alleged therein that she was not a minor and that she wanted to go with her sister and jeeja only. The Child Welfare Committee came to conclusion that the victim is a minor aged about 16 years and 3 months and that she got pregnant because of rape committed on her by her jeeja and she was unwilling to go with her husband Ghanshyam; in these circumstances, the impugned order detaining her in a Rajkiya Balgrih was passed.

9. This revision has been filed on behalf of the father of the victim on the ground that because she is minor she should have been released in custody of her parents/revisionist.

10. I went through the material on record in the light of submissions before this Court. As per scheme of the Juvenile Justice Act, the Child Welfare Committee, irrespective of any other law, has power to deal exclusively with all proceedings relating to 'children in need of care and protection' under **Section-29** of the Juvenile Justice Act, 2015. The functions and responsibilities of Committee include taking cognizance of and receiving the child produced beformca prospectuse it, conducting inquiry on all issues relating to safety and well being of a child as well as ensuring care, protection, appropriate rehabilitation and most importantly restoration of 'children in need of care and protection' **(Section-30** of the Juvenile Justice Act, 2015). **Section-37** of the Juvenile Justice Act, 2015 empowers the Committee, after being satisfied through an inquiry, consideration of social investigation report submitted by Child Welfare Officer and taking into account the child's wishes, in case the child is sufficiently matured, to take a view and pass one or more of following order, namely:-

(a) declaration that a child is in need of care and protection;

(b) restoration of the child to parents or guardian or family with or without supervision of Child Welfare Officer or designated social worker;

(c) placement of the child in Children's Home or fit facility or Specialised Adoption Agency for the purpose of adoption for long term or temporary care, keeping in mind the capacity of the institution for housing such children, either after reaching the conclusion that the family of the child cannot be traced or even if traced, restoration of the child to the family is not in the best interest of the child;

(d) placement of the child with fit person for long term or temporary care;

(e) foster care orders under section 44;

(f) sponsorship orders under section 45;

(g) .....;

(h) .....

10. On perusal of the above provisions of Juvenile Justice Act, 2015, it is demonstrated that Child Welfare Committee is given vast powers on the principles of best interest of a child, a thread which goes through the whole of the scheme of the Juvenile Justice Act, 2015. It has been specifically provided by the section-3 of the Juvenile Justice Act, 2015

that Central Government, State Governments, the Board and other agencies, as the case may be, while implementing the provisions of the Act, shall be guided by the fundamental principles which include principles of best interest, principle of family responsibilities, the principle of safety, the principles of repatriation and restoration and several others.

11. The provisions of law as aforesaid are being reproduced here with the twin object; **firstly,** that when an order is passed of the nature as is under challenge before this Court, the appeal shall be entertainable by the Children's Court and not by the District Magistrate; the District Magistrate is empowered to hear appeals only against the decisions of the Committee relating to foster care and sponsorship after care. The order in question does not fall in this category. The appellate court was thus wrong in holding that appeal did not lie before it. Therefore, the impugned order is liable to be set-aside; secondly, it may be noted that when a child in need of care and protection is lodged in any shelter home, it is a measure of temporary nature; the Child Welfare Committee is fully empowered to take a decision where it is found no more necessary to detain her. It may be noted that legally a child in need of care and protection may be detained for a further period even if he/she has attained majority if it is found that it will not be in his/her best interest to release him/her immediately.

12. It is brought to notice of this Court that in the meanwhile, the revisionist has delivered a child, who too is staying with her in the shelter home.

13. Legally the Child Welfare Committee is fully empowered to take a fresh decision in respect of her detention/release in view of new development that now she is a mother with an infant to take care and that she might be in need of a family support. Since this case is being remanded to appellate court for deciding the matter afresh, hence before any decision as to her continued detention or release is taken by the appellate court, extreme care shall be taken with regard to her and her child's safety, welfare, protection and rehabilitation. The Child Welfare Committee has a very significant role to play in such matters and is entrusted with a responsibility to take measures to achieve the aim and object of the Juvenile Justice Act, 2015. Hence, the appellate court may, in its wisdom call for a detailed report from the Child Welfare Committee before deciding the appeal. No doubt the Court is faced with peculiar facts and circumstances in this case. It may fruitfully be noted that the Court while functioning as an appellate court under section- 101 of the Juvenile Justice Act, 2015 is not so much concerned with legal rights of the parties. Instead the decision is to be taken in best interest of the child after anticipating and weighing all pros and cons. With the above observations, the matter is remanded to the appellate court to hear the matter afresh and pass order after hearing both the sides.

15. The impugned order dated 26.10.2022 is set-aside and the matter is remanded back. The court concerned is directed to decide the matter afresh in the light of observations of this Court as above.

16. Before parting with the matter, a legal point of general importance needs to be pointed out. Section- 2(20) of the Juvenile Justice (Care and Protection of Children) Act, 2015 defines:- ***"Children's Court" means a court established under the Commissions for Protection of Child***

Rights Act, 2005 or a Special Court under the Protection of Children from Sexual Offences Act, 2012, wherever existing and where such courts have not been designated, the Court of Sessions having jurisdiction to try offences under the Act."

17. It is apparent that wherever a Special Court under the Protection of Children from Sexual Offences Act, 2012 is in existence, such court shall function as **"Children's Court"** under the provisions of Juvenile Justice (Care and Protection of Children) Act, 2015. This may not be taken to mean that the jurisdiction under the Juvenile Justice (Care and Protection of Children) Act, 2015 lies in Special POCSO Court. To say in plain words, whenever a matter relating to a "child in conflict with law" or a 'child in need of care and protection' is taken up or decided by a competent court that court shall be referred to as Children's Court. It has come in my observation that Judges of Special POCSO Courts functioning as appellate court in respect to 'child in need of care and protection' or "child in conflict with law" wrongly refer themselves as Special Judge, POCSO Court or even as Additional Sessions Judge. Its proper designation is **"Children's Court"**. It is necessary to point out this error which is being committed by the concerned courts almost all over the State of Uttar Pradesh.

18. Registry is directed to circulate this judgement to all the District Judges of State of U.P.

(2023) 1 ILRA 73
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.12.2022

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Revision No. 1793 of 2018

Ishwar ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Madan Singh, Sri Abhinav Tripathi

Counsel for the Opposite Parties:
G.A., Sri Ronak Chaturvedi

A. Criminal Law - Code of Criminal Procedure, 1973-Section 397/401-Indian Penal Code, 1860-Sections 323/34, 304/34,504 & 506-challenge to-summoning order u/s 319 Cr.P.C.-revisionist was named in the FIR showing his complicity in the incident-During investigation revisionist was exonerated on the basis of plea of alibi which was confirmed by the statement recorded of the witnesses-But the injured/complainant statement u/s 161 Cr.P.C. and the statement in her examination in chief, injured again corroborated the allegations of FIR-It is settled law that the testimony of injured witness is of higher value and cannot be ignored-Apex Court held that power u/s 319 Cr.P.C. can be exercised at the stage of completion of examination in chief and court does not need to wait till the said evidence is tested on cross examination for, it is the satisfaction of the court which can be gathered from the reasons recorded by the court, in respect of complicity of some other persons, not facing the trial in the offence-Learned trial court rightly recorded its satisfaction about the complicity of the revisionist and therefore, summoned him-Hence, no illegality or infirmity in the impugned order.(Para 1 to 9)

B. The Apex Court while dealing the question "what is the degree of satisfaction required for invoking the power u/s 319 Cr.P.C." held that though only a prima facie case is to be established from evidence led before the court not necessarily tested on the anvil of cross

examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power u/s 319 Cr.P.C.(Para 6)

The revision is dismissed. (E-6)

List of Cases cited:

1. Hardeep Singh Vs St. of Punj. & ors. (2014) AIR SC 1400 SC

2. Brijendra Singh & ors. Vs St. of Raj. (2017) 7 SCC 706

3. Manjeet Singh Vs St. of Har. & ors. (2021) SCC On Line SC 632

4. Rajesh & ors. Vs St. of Har.(2019) 6 SCC 368

5. Bijendra Singh Vs State of Raj. (2017) 7 SCC 706

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard learned counsel for the revisionist, learned counsel for opposite party no.2 as well as learned AGA for the State.

2. This criminal revision is filed to set aside the order dated 8.03.2018 passed by Additional Sessions Judge, court no.6, Bijnor in S.T. No.192 of 2017 (State vs. Nand Lal and ors) in case crime no.446 of 2016, U/s 323/34, 304/34, 504, 506 IPC, P.S. Dhampur, District Bijnor.

3. In brief the facts are that an FIR crime no. 446 of 2016 was lodged on 08.07.2016 naming the applicants Ishwar, Nand Lal, Keshav and Ghanshyam. The allegations of the FIR is that on 08.07.2016 at 10:30-11:00 am, applicant- Ishwar, Nand Lal, Ghanshyam and Keshav started construction over the disputed land. The complainant and her husband and daughter Tannu prevented them from doing so, then all the four accused persons assaulted the complainant, putting him on earth, they assaulted him with bricks. Her husband received injuries in the stomach and became unconscious. The complainant and her daughter tried to save him then accused-persons assaulted them. They went away from there abusing and extending threats with death. The complainant took her husband to the hospital where he is under treatment. Initially the case was registered under section 323, 504, 506 IPC. Due to the death of injured, Section 304 IPC was added. After investigation, charge-sheet was submitted only against three accused namely Nand Lal, Ghanshyam and Keshav. The Investigating Officer exonerated the other named accused Ishwar. During the course of trial, after examination in chief of P.W.-1 Savita Devi (complainant/ injured) an application U/s 319 Cr.P.C. was moved by the complainant/ prosecution alleging therein that accused Ishwar is named in the FIR and complainant Savita in her statement under section 161 Cr.P.C has assigned the same role to him as the remaining accused. The examination in chief of Savita has been recorded in the court, she is one of the injured witness. The complicity of the accused Ishwar is like other co-accuse persons, hence accused Ishwar be also summoned U/s 319 Cr.P.C. for trial. The learned trial court by the impugned order dated 08.03.2018 has allowed the aforesaid application and has summoned the revisionist accused Ishwar to face trial for offence U/s 304/34, 323/34, 504 & 506 IPC.

4. It is contended by learned counsel for the revisionist that learned trial court has summoned the revisionist only on the basis of statement recorded under section 161 Cr.P.C. as well as examination in chief of the complainant. Without considering the entire facts and circumstances of the case, the statement U/s 161 Cr.P.C. has been relied. Hence the summoning order is illegal and arbitrary on the face of record and is not sustainable in the eyes of law. It is submitted by learned counsel for the revisionist that general allegations have been levelled against all the accused persons. No specific allegations has been levelled against any accused persons during the course of investigation. The Investigating Officer has collected the evidence to the effect that on the date of incident, the location of mobile number of the revisionist was not near the place of incident. The revisionist having two mobile numbers bearing nos. 8273535308 and 9568363773 and the location of these mobile numbers shown at Moradabad. After verification of call detail records, it was found that he was not present at the place of occurrence. The Investigating Officer has recorded the statement of Munesh Kumar (principal of coaching centre) where the revisionist was studying and other independent witnesses namely Monu Kumar, Manjul Kumar, Ranjeet Singh, Munendra Singh, Krishna Kumar, Jitendra etc. under section 161 Cr.P.C. and they have stated that on 08.07.2016 the revisionist was present in the coaching institute from 9:30 am to 12 noon. During the course of investigation, evidence to this effect has come that on the date of incident, the revisionist was not present at the spot and accordingly the Investigating Officer deleted his name. It is further contended that power U/s 319 Cr.P.C. is to be exercised sparingly only when strong and cogent evidence occurs. The test that has to be applied is one which is more than prima-facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would led to conviction. In the absence of such satisfaction, the court should refrain from exercising power under section 319 Cr.P.C. Learned counsel further contended that P.W.-1 in her statement illegally and falsely given the name of the revisionist as well as the entire family. The learned trial court without any evidence & reasons and without recording the satisfaction has illegally summoned the revisionist. The order is not sustainable in the eye of law. It is also contended that the learned trial court without considering the legal aspect of the matter and without considering the facts and circumstances of the case, has illegally summoned the revisionist to face the trial. Learned counsel placed reliance on the constitutional bench case of Apex Court ***Hardeep Singh vs. State of Punjab and ors AIR 2014 Supreme Court 1400 SC,*** the relevant paragraphs are quoted below:

*"**98.** Power under Section 319, Cr.P.C. is a discretionary and an extra-ordinary 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.*

***99.** Thus, we hold that though only a prima-facie case is to be established from the evidence led before the court not necessarily tested on the anvil of cross*

examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under section 319 Cr.P.C. In section 319 Cr.P.C., the purpose of providing if it appears from the evidence that any person not being the accused has committed any offence is clear from the words " for which such person could be tried together with the accused." The words used are not for which such person could be convicted'. There is, therefore, no scope for the Court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused."

Learned counsel also placed reliance on the case law of ***Brijendra Singh and ors vs. State of Rajasthan (2017) 7 SCC 706.*** The relevant paragraphs are quoted below:

" 14. When we translate the aforesaid principles with their application to the facts of this case, we gather an impression that the trial court acted in a casual and cavalier manner in passing the summoning order against the appellants.The appellants were named in the FIR. Investigation was carried out by the police. On the basis of material collected during investigation, which has been referred to by us above, the IO found that these appellants were in Jaipur city when the incident took place in Kanaur, at a distance of 175 km. The complainant and others who supported the version in the FIR regarding alleged presence of the appellants at the place of incident had also made statements under Section 161 CrPC to the same effect. Notwithstanding the same, the police investigation revealed that the statements of these persons regarding the presence of the appellants at the place of occurrence was doubtful and did not inspire confidence, in view of the documentary and other evidence collected during the investigation, which depicted another story and clinchingly showed that the appellants' plea of alibi was correct.

15. This record was before the trial court. Notwithstanding the same, the trial court went by the depositions of the 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 were already there under Section 161 CrPC 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 a plethora of evidence was collected by the IO during investigation which suggested otherwise, the trial court was at least duty-bourd 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 the agreement therewith, nothing more has been done. Such orders cannot stand judicial scrutiny."

On the aforesaid ground, learned counsel submitted that the impugned order is arbitrary and illegal and is liable to be set aside.

5. Learned AGA and learned counsel appearing for opposite party no.2 submitted that the Investigating Officer in collusion with the accused has wrongly exonerated the revisionist whereas the injured of the present case had specifically named the revisionist as one of the accused who not only participated in causing death of her husband but also caused injuries to her. The Investigating Officer has referred to two mobile numbers 8273535308 and 9568363773. The location of mobile number 8273535308 has been shown at Moradabad, however, as per the verification report of the user of this number, it was informed to the Investigating Officer that this number is registered in the name of Keshav Kumar, the uncle of the revisionist. Thus, even the so called mobile detail record does not establish that the revisionist was at a different location inasmuch as the mobile number on the basis of which the Investigating Officer has come to this conclusion, belongs to Keshav Kumar and not to the revisionist. The entire case diary does not contain any call detail record and only a passing reference has been made by the Investigating Officer with respect to the two mobile numbers. It is further contended that the complicity of the revisionist is consistently established right from the FIR from the statement recorded U/s 161 Cr.P.C. as well as from the statement of injured witness recorded on oath before the trial court. The revisionist has not filed any document in order to substantiate his alleged plea of alibi. Further it is a settled law that plea of alibi can be considered at the state of trial. Learned counsel further contended that the revisionist has equally participated in the commission of the offence, the presence of the revisionist at the place of time and occurrence is clearly established from the statement of the injured witness during the course of trial. Learned counsel contended that P.W.-1 being injured witness, her testimony is on a high pedestal and cannot be taken lightly and ignored. For summoning the accused under section 319 Cr.P.C. the examination in chief of the witness is sufficient and the witness being injured, her testimony cannot be discarded. The learned trial court considering the evidence, on record has rightly summoned the revisionist U/s 319 Cr.P.C. and as such there is no illegality or infirmity in the impugned order. More than, prima-facie evidence is available against the revisionist. The revision lacks merit and deserves to be dismissed. Learned counsel placed reliance on the case law of ***Manjeet Singh vs. State of Haryana and ors 2021 SCC On Line SC 632.*** The relevant paragraphs are quoted below:

"35. Applying the law laid down in the aforesaid decisions to the facts of the case on hand we are of the opinion that the Learned trial Court as well as the High Court have materially erred in dismissing the application under Section 319 Cr.P.C. and refusing to summon the private respondents herein to face the trial in exercising the powers under Section 319 Cr.P.C. It is required to be noted that in the FIR No.477 all the private respondents herein who are sought to be arraigned as additional accused were specifically named with specific role attributed to them. It is specifically mentioned that while they were returning back, Mahendra XUV bearing no.

HR-40A-4352 was standing on the road which belongs to Sartaj Singh and Sukhpal. Tejpal, Parab Saran Singh, Preet Samrat and Sartaj were standing. Parab Sharan was having lathi in his hand, Tejpal was having a gandsi, Sukhpal was having a danda, Sartaj was having a revolver and Preet Singh was sitting in the jeep. It is specifically mentioned in the FIR that all the aforesaid persons with common intention parked the Mahendra XUV HR-40A-4352 in a manner which blocks the entire road and they were armed with the weapons. Despite the above specific allegations, when the charge-sheet/final report came to be filled only two persons came to be charge-sheeted and the private respondents herein though named in the FIR were put/kept in column no. 2. It is the case on behalf of the private respondents herein that four different DSPs inquired into the matter and thereafter when no evidence was found against them the private respondents herein were put in column no. 2 and therefore the same is to be given much weightage rather than considering/believing the examination-In-chief of the appellant herein. Heavy reliance is placed on the case of Brijendra Singh (Supra). However none of DSPs and/or their reports, if any, are part of the charge-sheet. None of the DSPs are shown as witnesses. None of the DSPs are Investigating Officer. Even on considering the final report/charge-sheet as a whole there does not appear to be any consideration on the specific allegations qua the accused the private respondents herein who are kept in column no. 2. Entire discussion in the charge-sheet/final report is against Sartaj Singh only.

36. So far as the private respondents are concerned only thing which is stated is "During the investigation of the present case, Shri Baljinder Singh, HPS, D.SP Assandh and Shri Kushalpal, HPS, DSP Indri found accused Tejpal Singh, Sukhpal Singh, sons of Gurdev Singh, Parab Sharan Singh and Preet Samrat Singh sons of Mohan Sarup Singh cast Jat Sikh, residents of Bandrala innocent and accordingly Sections 148, 149 and 341 of the IPC were deleted in the case and they were kept in column no. 2, whereas challan against accused Sartaj has been presented in the court."

37. Now thereafter when in the examination-in-chief the appellant herein - victim - injured eye witness has specifically named the private respondents herein with specific role attributed to them, the Learned trial Court as well as the High Court ought to have summoned the private respondents herein to face the trial. At this stage it is required to be noted that so far as the appellant herein is concerned he is an injured eye-witness. As observed by this Court in the cases of State of MP v. Mansingh (2003) 10 SCC 414 (para 9); Abdul Sayeed v. State of MP (2010) 10 SCC 259; State of Uttar Pradesh v. Naresh (2011) 4 SCC 324, the evidence of an injured eye witness has greater evidential value and unless compelling reasons exist, their statements are not to be discarded lightly. As observed hereinabove while exercising the powers under Section 319 Cr.P.C. the Court has not to wait till the cross-examination and on the basis of the examination-in-chief of a witness if a case is made out, a person can be summoned to face the trial under Section 319 Cr.P.C.

38. Now so far as the reasoning given by the High Court while dismissing the revision application and confirming the order passed by the Learned trial Court dismissing the application under Section 319 Cr.P.C. is concerned, the High Court itself has observed that P.W.-1 Manjeet Singh is the injured witness and therefore

his presence cannot be doubted as he has received fire arm injuries along with the deceased. However, thereafter the High Court has observed that the statement of Manjeet Singh indicates over implication and that no injury has been attributed to either of the respondents except they were armed with weapons and the concerned injuries are attributed only to Sartaj Singh even for the sake of arguments someone was present with Sartaj Singh it cannot be said that they had any common intention or there was meeting of mind or knew that Sartaj would be firing. The aforesaid reasonings are not sustainable at all. At the stage of exercising the powers under Section 319 Cr.P.C., the Court is not required to appreciate and/or enter on the merits of the allegations of the case. The High Court has lost sight of the fact that the allegations against all the accused persons right from the very beginning were for the offences under Sections 302, 307, 341, 148 & 149 IPC. The High Court has failed to appreciate the fact that for attracting the offence under Section 149 IPC only forming part of unlawful assembly is sufficient and the individual role and/or overt act is immaterial. Therefore, the reasoning given by the High Court that no injury has been attributed to either of the respondents except that they were armed with weapons and therefore, they cannot be added as accused is unsustainable. The Learned trial Court and the High Court have failed to exercise the jurisdiction and/or powers while exercising the powers under Section 319 Cr.P.C.."

He also placed reliance on the case law of ***Rajesh and ors vs.State of Haryana, (2019) 6 SCC 368*** *wherein informant named 10 persons for attempt to murder of his son and another with specific allegations against all the accused. The Investigating Officer submitted his report U/s 173 (2) Cr.P.C. against four accused only, no challan filed against six accused (appellants). The trial proceeded against four accused only. During trial, P.W.-1 (complainant) and P.W.-2 (injured witness) specifically stated that overacts by the accused appellants and role played by them. An application for proceeding against them under section 319 Cr.P.C. was allowed by the trial court. The High Court dismissed the revision. The Apex Court held that the appellants herein had also named in the FIR. In the deposition before court, P.W. 1 & 2 have specifically stated against appellants and specific roles attributed to them. On the basis of the same, the persons against whom, no charge-sheet is filed can be summoned to face the trial. No error has been committed by the courts below to summon the appellants therein to face the trial in exercise of power U/s 319 Cr.P.C.*

6. It is undisputed that the revisionist was named in the FIR showing his complicity in the incident, one person has died in the incident while the another (complainant) has received injuries. The Investigating Officer has exonerated the revisionist during the investigation, on the basis of evidence that at the relevant time, his presence is not established to be at the place of occurrence as he was present at Moradabad in his coaching institute. The Investigating Officer has recorded the statement of the Manager of the coaching institute and some other witnesses. This fact is un-controverted that the mobile No. 8273535308, the location of which is shown to be at Moradabad is registered in the name of Keshav Kumar and further that the entire case diary does not contain any CDR and only passing reference has been made by the Investigating Officer with respect to the two mobile numbers.

The FIR of this case has been lodged by the complainant who has also received injuries in the incident naming the revisionist and attributing the role of taking participation in the incident. In her statement recorded U/s 161 Cr.P.C., she has reiterated the allegations of the FIR but the Investigating Officer on the basis of the material collected during the course of investigation as discussed above has exonerated the revisionist. During the course of trial, complainant has been examined as P.W.-1. Her examination in chief, was recorded in which she has again corroborated the allegations of the FIR showing the complicity of the revisionist in the incident. It is settled law that the testimony of injured witness is of higher value and cannot be ignored. In the case of Hardeep Singh (Supra), the Apex Court held that the power U/s 319 Cr.P.C. can be exercised at the stage of completion of examination in chief and court does not need to wait till the said evidence is tested on cross examination for, it is the satisfaction of the court which can be gathered from the reasons recorded by the court, in respect of complicity of some other person(s), not facing the trial in the offence. The Apex Court while dealing the question *"what is the degree of satisfaction required for invoking the power U/s 319 Cr.P.C." has answered it "we hold that though only a prima-facie case is to be established from the evidence led before the court not necessarily tested on the anvil of cross examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under section 319 Cr.P.C. In section 319 Cr.P.C., the purpose of providing if it appears from the evidence that any person not being the accused has committed any offence is clear from the words " for which such person could be tried together with the accused." The words used are not for which such person could be convicted". There is, therefore, no scope for the Court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused."*

7. So applying the test laid down by the Apex Court on the present set of facts, it is clear that there is strong evidence, than mere probability of the complicity of the accused in the form of testimony of injured witness and it pass the test as laid down by the Apex Court which is more than prima-facie case as exercised at the time of framing of charge but short of satisfaction to an extent that the evidence if goes unrebutted would led to conviction. Further the material on the basis of which the revisionist was exonerated by the Investigating Officer is not conclusive in nature and this fact distinguish this case from the case law of **Bijendra Singh vs. State of Rajasthan (2017) 7 SCC 706** relied on by the learned counsel for the revisionist. The case law cited by learned counsel for opposite party no.2 fully supports his arguments and applicable in the present set of facts.

8. In the impugned order, the learned trial court has narrated the entire facts and material on record and has critically analyzed all these materials. Learned trial court has recorded its satisfaction about the complicity of the revisionist and, therefore, has summoned him. The order is a detailed and reasoned one which is just and proper.

There is no illegality or infirmity in the impugned and it need no interference.

9. Accordingly, the revision is devoid of merits and is hereby **dismissed.**

(2023) 1 ILRA 81
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.01.2023

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Revision No. 2194 of 2015

Kaushlesh Mishra & Ors. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Mohammad Mustafa Khan, Miss Afshan Shafaut, Sri Byas Kumar Prasad

Counsel for the Opposite Parties:
G.A., Sri Santosh Kuamar Pandey, Sri Saurabh Tripathi

A. Criminal Law - Criminal Procedure Code,1973 - Section 245(2)-rejection-discharge application-application rejected by Magistrate without evaluating allegations of complaint and considered police report submitted u/s 202 Cr.P.C.-Magistrate failed to apply his mind to grounds of discharge and did not consider relevant contention raised in this respect-Thus, Magistrate proceeded on assumption that he has no power to evaluate the material on record and at that stage prayer of discharge could not be entertained-This is a violation of the legal provision which requires a finding by Magistrate with regard to charges against accused being groundless or that there is ground for presuming that the accused have committed offence-Hence, the matter is remanded back to lower court to pass a fresh order on the discharge application.(Para 1 to 10)

B. Section 245(2) Cr.P.C. provides that the Magistrate is empowered to discharge the accused at any previous stage of the case i.e. before evidence u/s 244 Cr.P.C., if he considers the charge to be groundless. (Para 6)

The revision is allowed. (E-6)

List of Cases cited:

Manoj Mahabeer Prasad Khaitan Vs Ram Gopal Poddar & anr. in CRLA No 1973 of 2010 (SLP (Crl) No 2274 of 2008)

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard Sri Byas Kumar Prasad, learned counsel for the revisionists and learned A.G.A. for the State. However, none appeared on behalf of opposite party no.2.

2. This criminal revision has been filed with the prayer to set aside judgement and order dated 18.04.2015 passed by learned Chief Judicial Magistrate, Siddharthnagar in Criminal Complaint Case No.277 of 2013 (Ripusudan Mishra Versus Kaushlesh Mishra and others) under Sections 506 and 427 I.P.C. , Police Station Siddharthnagar, District Siddharthnagar, pending the court of Chief Judicial Magistrate, Siddharthnagar.

3. In brief, the facts of the case are that opposite party no.2 moved an application under Section 156(3) Cr.P.C. against revisionists and Sub Inspector Santraj Yadav, Constable Rauf Khan and five unknown constables, alleging therein that the father of the opposite party no.2 paid *Nazrana* of Rs.20/- to ex-Zamindar on

30.09.1951 and obtained 00.3.10 area of previous no.362, present no.56 of Village Rehra. The applicant got constructed foundation and boundary wall over the same. On 20.09.2012 at about 5.00 p.m. Kaushlesh Mishra pretending himself to be a journalist moved an application with forged signature of his uncle at Tehsil Naugarh. On this application the accused persons came on the spot with JCB machine and got the foundation and boundary wall dismantled causing loss of Rs.24,000/-. The incident was seen by co-villagers Bechu, Vyas Muni, Arun Kumar Mishra and others. Learned Magistrate treated this application as complaint. Thereafter the complainant examined himself under Section 200 Cr.P.C. and two witnesses Bechu and Arun Kumar under Section 202 Cr.P.C. The complainant in his statement stated that Guru Charan, Naib Tehsildar, Rudramani, Junior Engineer and Santraj Yadav, Sub Inspector and six policemen reached on the spot with JCB machine of Nawab Ali and they dismantled foundation and boundary wall. The witnesses also reiterated the aforesaid facts. Learned Magistrate vide order dated 01.05.2014 summoned only one accused Kaushlesh Mishra for the offence under Section 506 I.P.C. Aggrieved with aforesaid order, the opposite party no.2 filed Criminal Revision No. 96 of 2014 and Sessions Judge, Siddharth Nagar vide order dated 24.07.2014 allowed the revision and set aside the impugned order dated 01.05.2014 and directed the court below to pass fresh orders in the light of observations made in the body of the judgement after affording opportunity of oral hearing to the complainant. Thereafter, learned Magistrate in compliance of order of the revisional court passed fresh order on 02.12.2014 and summoned the revisionists for the offence punishable under Sections 427 and 506 I.P.C. An application bearing Criminal Misc. Application (U/S 482 Cr.P.C.) No.500 of 2015 was filed by the revisionists-accused and in terms of the order dated 17.01.2015 passed by this Court in the aforesaid application, the revisionists moved an application under Section 245(2) Cr.P.C. for discharge on the grounds that the revisionists are innocent and they have been falsely implicated due to enmity and for harassment, there is no justification or evidence to file the complaint, the allegations of the complaint clearly establish that the nature of the dispute is revenue and civil and there is no ground to lodge a complaint, on the complaint dated 07.05.2012 of Lalllan Prasad Mishra, who is not a party in the case, while taking cognizance, Sub Divisional Magistrate vide letter dated 12.09.2012 passed the order against the complainant to remove his illegal encroachment by constructing boundary wall on the *banjar* land of Gram Sabha, in compliance of the aforesaid direction, in presence of Circle Officer (Police), the government employees in discharge of their official duty removed illegal construction, remaining applicants have no concern with it, the complainant intentionally concealing the facts and without impleading Sub Division Magistrate, Naugarh and Lallan Prasad Mishra, has moved application against the revisionists under Section 156(3) Cr.P.C., there is no allegation in the complaint which constitute an offence under Section 506 I.P.C., despite this court below in a casual manner summoned Kaushlesh Mishra for the offence under Section 506 I.P.C., while remaining accused persons were not summoned as no evidence was found against them, the complainant filed Criminal Revision No.96 of 2014 in which he himself has alleged that Kaushlesh Mishra has been summoned

by the court only on the basis of surmises, the revisional court has allowed the revision only on the ground that on the same evidence only one accused has been summoned while others have not been summoned and learned Magistrate has not made any analysis of this. It is further alleged that the revisionists are not party in Original Suit No.387 of 1994, hence it is not binding on the applicants, this original suit has been filed by the complainant in collusion with his real brother Janardan to grab *banjar* land of Gram Sabha and they have entered into a compromise and the Gram Sabha is not a party in that suit. Further grounds taken in the application are that without taking any new and additional evidence the revisionists have been summoned, the complainant himself in para-2 of memo of revision has alleged that no offence under Section 506 I.P.C. has been committed, no active role has been assigned to the revisionists, from the statement under Section 200 Cr.P.C. itself it is established that complaint is not an eye-witness of the incident, witnesses Bechu and Arun Kumar have not made any allegations of the offence under Sections 427 and 506 I.P.C. against the revisionists, they have also not stated that they are eye-witnesses of the incident, and no reason has been assigned how they identified applicant nos.4, 5 and 6, an order to recover damages and to dispossess the complainant from Arazi No.56M has been passed on 15.04.2014 by Tehsildar Naugarh in Case No.102 of 2012 (Gram Sabha Versus Ripusudan) under Section 122-B and Rule 115-C of U.P. Zamindari Abolition and Land Reforms Act, the complainant filed Revision No.7/15 of 2014 in the court of District Magistrate, Siddharthnagar against the order dated 15.04.2014, it has also been dismissed on 06.12.2014, the complainant with mala fide intention concealing real facts just to grab the *banjar* land of Gram Sabha has misused the process of the court, there is no sufficient ground to proceed against the revisionists and they are liable to discharged under Section 245(2) Cr.P.C. in pursuance of order of High Court dated 17.01.2015 passed in Criminal Misc. Application (U/S 482 Cr.P.C.) No.500 of 2015. Learned Magistrate after hearing both the parties vide impugned order dated 18.04.2015 rejected the discharge application.

4 It is submitted by learned counsel for the revisionists that revisionist nos. 1 to 3 and opposite party no.2 live in the same village and civil dispute is pending between them. Opposite party no.2 always threatened the revisionists to falsely implicate them in criminal case. The opposite party no.2 has encroached the land of Gram Sabha and was making construction on Gata No.56M. Proceeding under Rule 115-C of U.P. Zamindari Abolition and Land Reforms Act was initiated against him, but he continued to make constructions on the Gram Sabha land. Therefore, Sub-Divisional Magistrate on 12.09.2012 has directed revisionist no.4 to remove illegal construction. In compliance of this order, illegal constructions have been removed by the concerned authority. Opposite party no.2 wanted to take illegal possession of land of Gram Sabha. The applicant nos. 4 and 5 are government servants and they were acting in discharge of their official duty, but without obtaining any sanction under Section 197 Cr.P.C. criminal proceedings have been initiated against them. Further revisionist no.6 is the owner of JCB machine and no role has been assigned to the revisionist nos. 1 to 3 and 6. It is also contended that under Section 202 Cr.P.C. the matter was investigated by the police

under the order of the Magistrate. In police report, it has been clearly stated that due to mala fide intention opposite party no.2 has filed complaint. Lastly, it is contended that no offence is made out against the revisionists. They have not committed any offence and have been falsely implicated due to civil dispute. The earned Magistrate without considering the entire facts and circumstances of the case has rejected the discharge application vide order dated 18.04.2015 which is illegal and bad in law and as such liable to be quashed. Learned Magistrate has committed gross illegality in not following procedure laid down by the law. The criminal case filed against the revisionists is attended with mala fide intention and proceedings are maliciously instituted with ulterior motive for wrecking vengeance due to personal grudge. Reliance has been placed on the judgement of Hon'ble Apex Court rendered in ***Manoj Mahabeer Prasad Khaitan Versus Ram Gopal Poddar and another in Criminal Appeal No.1973 of 2010 (arising out of Special Leave Petition (Crl.) No.2274 of 2008)*** decided on 8 October, 2010. Learned counsel contended that it has been held by the Hon'ble Apex Court that if criminal proceeding is initiated with mala fide intention, then it is liable to be quashed because such proceeding is an abuse of process of law and court.

5. Learned A.G.A. opposed the prayer and submitted that at this stage only prima facie case is to be seen and there is sufficient material on record which establishes that prima facie offfence under Sections 427 and 506 I.P.C. is made out against the revisionists. There is no sufficient ground to discharge the accused under Section 245(2) Cr.P.C. Learned Magistrate has rightly rejected the application and there is no illegality or infirmity in the impugned order.

6. Section 245(2) Cr.P.C. provides as follows:

"245. ***When accused shall be discharged. (1).....***

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

Aforesaid provision empowers Magistrate to discharge the accused at any previous stage of the case i.e. before evidence under Section 244 Cr.P.C., if he considers the charge to be groundless.

7. The material on record transpires that a complaint was made with the allegation that opposite party no.2 has made encroachment on Gata No.56M which is *banjar* land of Gram Sabha. Proceeding under provision of U.P. Z.A. & L.R. Act was initiated. Revenue Inspector inspected the site and found the complaint to be true i.e. the complainant has made encroachment on the *banjar* land of Gram Sabha by raising boundary wall on it. On the basis of the report of Revenue Inspector, the Sub-Divisional Magistrate directed for removal of the illegal encroachment on 12.09.2012. In pursuance of aforesaid order, Guru Charan, Naib Tehsildar, Naugarh revisionist no.4 with the aid of local police force got the encroachment removed. So it is established that illegal encroachment made by the opposite party no.2 has been removed in due process of law by the public servants in discharge of their official duty. Revisionist nos. 2 and 3 have no role in the entire matter, JCB machine of revisionist no.6 has been used for removal of illegal encroachment by the public authorities, respondent no.1 has only made complaint

regarding illegal encroachment by opposite party no.2, so, it appears that application under Section 156 (3) Cr.P.C. was filed with coloured version of incident. It also transpires that after treating the application as complaint learned Magistrate has directed for inquiry under Section 202 (2) Cr.P.C. by local police. The inquiry reports are Annexure nos. 6 and 7 to the affidavit filed in support of the criminal revision. It also confirms that real incident is that illegal encroachment of opposite party no.2 has been removed by the public authorities in discharge of their official duty and no offence has been committed.

8. Learned Magistrate has rejected the discharge application observing that grounds on which discharge application has been moved are all factual, after appearance of the accused, the complainant will be provided an opportunity to produce evidence and accused will have opportunity of defence. It is also observed that the facts alleged in the complaint are supported by statements under Sections 200 and 202 Cr.P.C. and on its basis summoning order has been passed.

9. From the above it appears that the learned Magistrate proceeded on the assumption that he has no power to evaluate the material on record and at that stage prayer of discharge could not be entertained. This is in the violation of the legal provision which requires a finding by the Magistrate with regard to the charges against the accused being groundless or that there is ground for presuming that the accused have committed the offence. The finding was to be recorded upon considering the entire material on record. The Magistrate has failed to evaluate the allegations of the complaint and consider the police report submitted under Section 202 Cr.P.C. The learned Magistrate has not applied his mind to the grounds of discharge and contention raised in this respect. The learned Magistrate must have considered the pleas taken in discharge application and addressed the same by a speaking and reasoned order. While disposing of the discharge application the learned Magistrate has not considered relevant contention and rejected the same in a cursory manner. So, a fresh order is required to be passed on the discharge application.

10. Accordingly, the revision is allowed. The impugned order dated 18.04.2015 is set aside. The learned Magistrate is directed to pass a fresh order on the discharge application in accordance with law, after affording opportunity of hearing to the parties.

(2023) 1 ILRA 85
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.12.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE RAHUL CHATURVEDI, J.

Government Appeal No. 22 of 1984

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

Counsel for the Appellant:
A.G.A., Sri Satish Trivedi

Counsel for the Opposite Parties:
Sri Prashant Vyas, Sri Santosh Kumar Tiwari

A. Criminal Law-Criminal Procedure Code, 1973-Section 378 - Indian Penal Code, 1860-Sections 302, 307 & 34-Challenge to

–acquittal-land dispute between the accused and the father of deceased-broad day light incident-FIR was prompt-names of three eye-witnesses were mentioned in the FIR but they are not produced before the trial court-explanation for their non production is not satisfactory-no recovery was made from the sole surviving accused and his shot had not caused any injury to anyone-As per postmortem report shows that only single firearm injury, injuries caused by the Rifle is false- two accused who took Rifle and gun are dead-Cloth in which the recovered gun was packed was torn-PW-12 admitted the fact that he has changed the cloth and resealed the recovered gun-prosecution case is full of contradictions and lapses on the part of prosecution-therefore recovery of gun and cartridges from the surviving accused is doubtful-Hence, no interference requires. (Para 1 to 33)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Bannareddy & ors. Vs St. of Karn. & ors. (2018) 5 SCC 790

2. Jayamma Vs St. of Karn. (2021) 6 SCC 213

3. Virendra Singh Vs St. of U.P. & ors. (2022) 3 ADJ 354 DB

4. Rajesh Prasad Vs St. of Bih. & anr. (2022) 3 SCC 471

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Rahul Chaturvedi, J.)

1. Heard Sri Kailash Prakash Pathak, learned AGA appearing for the appellant State of U.P. as well as Sri Santosh Kumar Tiwari, learned counsel appearing for the sole surviving accused/respondent no.4-Man Singh.

2. In the present case out of four accused respondents persons, namely, (i) Pooran Singh, (ii) Kashmir Singh, (iii) Jaswant Singh and (iv) Man Singh, three accused persons being (i) Pooran Singh, (ii) Kashmir Singh and (iii) Jaswant Singh died and appeal in so far as the said accused persons has already been abated. Now, the only accused Man Singh is alive. Therefore, we proceed to hear the matter on merits in respect of accused Man Singh alone.

3. Present government appeal has been preferred against the judgement and order dated 07.09.1983, passed by the Vith Additional District and Sessions Judge, Bareilly in Session Trial No. 610 of 1982 (State vs. Pooran Singh and Others), arising out of Case Crime No.197/1982, under Section 302/34 and 307/34 IPC, Police Station Baheri, District Bareilly, whereby the accused persons have been acquitted by the learned Trial Court.

STORY AS PER FIR

4. Prosecution story, in brief, is that Dayal Singh- complainant, who is the resident of village Pandra, Police Station-Baheri, Bareilly has given a written report before the Station House Officer, Police Station Baheri, District Bareilly, stating therein, that he had some land dispute with the deceased- Pooran Singh and Others. A week prior to the incident, a panchayat was convened and that panchayat decided the dispute regarding the land but the accused Pooran Singh has not accepted the award of the panchayat. Pooran Singh thereafter, had threatened the complainant to regain the land in dispute by whatever means. On this very ground, Pooran Singh nursing grudge against Dayal Singh. For this very reason on 22.06.1982 at 8.00 am. accused Pooran Singh armed with Rifle, Kashmir Singh armed with D.B.B.L. gun, accused Jaswant

Singh and Man Singh both armed with their S.B.B.L. guns came towards the house of P.W.2-Dayal Singh and have hurling abuses. On seeing the accused coming towards them, Dayal Singh with his son Randhir Singh (deceased) and his brother-in-law, Balbindra Singh (injured) ran towards the house of Jugendra Singh, who is Sadhu of P.W.2, raising alarm. Randhir Singh and Balbindra Singh climbed up on the roof top and Dayal Singh remained on the ground floor. On hearing the alarm of the aforesaid person, Jugendra Singh, Dalip Singh and Nishan Singh arrived at the scene of occurrence. The accused Pooran Singh, with intention to kill Randhir Singh (deceased), son of the complainant, fired shot from his rifle at Randhir Singh, which hit on his left leg causing wound. Kashmir Singh, accused also fired from his D.B.B.L. gun causing gun shot injuries to Balbindra Singh. The accused- Jaswant Singh and Man Singh have also fired from their respective guns. On being challenged by the witnesses, the accused escaped towards the Eastern side. Thereafter the complainant Dayal Singh went to the roof where his son Randhir Singh was lying injured with gun shot wound. The complainant wrapped his leg from cloth and get him down. Dayal Singh thereafter went to the police station with written report Exhibit Ka.1 which was written by Jasbir Singh on the dictation of Dayal Singh. The complainant left Balbindra Sigh at the house. He had submitted the written report Exhibit Ka.1 to the police station and on the basis of that written report, a chik report Exhibit Ka.10 was prepared. On the basis of that report, a case under section 307 IPC was registered against the accused persons. The complainant took the injured Randhir Singh in a trolley to Budia Farm. Injured Balbindra Singh did not accompany the complainant -Dayal Singh from the village. At Budia Farm the injured Randhir Singh (deceased) was put in a car belonging to Lala Bisambhar Nath and was thus carried to Police Station Baheri. The report was lodged to the police station at 1.10 am. The distance of police station from the place of occurrence is 9 miles. Randhir Singh was initially examined by the doctor at Baheri and thereafter the doctor has advised that his injuries are serious so he should be shifted to the District Hospital, Bareilly. On the advise of the doctor, Baheri, Randhir Singh was brought to the District Hospital, Bareilly for his treatment, where he died on the same day. The post mortem of his body was conducted on 22.06.1982 at 4.30 pm. by Dr. Balbir Singh of the District Hospital, Bareilly. Later on, the case under Section 307 IPC was converted into 302 IPC vide G.D. entry Exhibit Ka.10.

5. The investigation of this case was initially entrusted to PW.7-Indrajit Singh, Sub Inspector, who has proved the Chik Exhibit Ka.10. He further stated that as soon as the case was registered at Police Station he started the investigation of the case and tried to record the statement of deceased Randhir Singh at the police station, who was lying in the car, but Randhir Singh did not give his statement because he was in grim and somber mental condition. Immediately, he was sent to Baheri Hospital for his medical examination. Thereafter PW-4 recorded the statement of Dayal Singh, who is the father of Randhir Singh and Nishan Singh and went to the spot where he recorded the statement of Balbindra Singh, Jugendra Singh and Dalip Singh. He inspected the place of occurrence and prepared the site plan. He has collected bloodstained soil along with piece of broken bones and plain soil and kept them into separate containers.

These are Exhibit 3 and Exhibit 4. A Fard to this effect Exhibit Ka.13 was prepared. He has collected two empty cartridges from the Rasta and both of them were kept under seal and a Fard Exhibit Ka.13 was prepared by him. These cartridges were sent for ballistic examination. Thereafter he has recorded the statement of other witnesses. He has also searched the accused for recovery of arms but no arms were recovered from them. Fard Talasi in respect of the house of the accused Kashmir Singh, Jasbir Singh, Pooran Singh was prepared by the PW-7. These Fards are Exhibit Ka.15, Ka.16 and Ka.17. On 23.06.1982, PW-7 received the injuries report of Balbindra Singh and Randhir Singh (deceased). He has further received an inquest report of the dead body of Randhir Singh and post mortem report and copy of the G.D. Thereafter, the case was altered to under Section 302 IPC. PW.7 Sub Inspector Indrajeet Singh investigated the case upto 23.06.1982 thereafter the investigation of this case was handed over to Station House Officer Sri Pal Singh, PW.8. from 26.06.1982.

6. During the course of investigation accused Kashmir Singh was arrested by the Station House Officer-V.R.Goyal and PW.13-Constable Jia Lal. A D.B.B.L gun and five live cartridges were recovered from his possession and sealed on the spot. Accused Kashmir Singh was brought to the police station Kitcha, Nainital where G.D. Entry No.13 was made by Constable Hari Nandan, PW.12. On 21.04.1983 the recovered gun and cartridges were brought from police station Kitcha to police station Baheri, District Bareilly by Constable Prem Pal Sharma, PW.14 where entry was made in the G.D. by Constable Ashiq Hussain, PW.11. Constable Sharafat Ali-PW.10 took the D.B.B.L. gun and cartridges to the Ballistic expert Lucknow on 03.04.1983 and submitted the same on 06.04.1983.

7. After completing the investigation of the case, Investigating Officer, Sri Pal Singh, PW.8 submitted a charge sheet against the accused Pooran Singh, Kashmir Singh Jasbir Singh and Man Singh on 26.06.1982. After inquiry, they were committed to the court of trial.

8. At the trial accused persons pleaded not guilty and attributed their false implication on account of enmity.

9. In support of prosecution case, PW1-Balkar Singh, PW2-Dayal Singh (first informant), PW3-Balvindra Singh (injured), PW4-Ram Chandar (Sub Inspector), PW5-Dr. Balbir Singh, PW-6-Dr. Janki Prasad Gangwar, PW-7-Indrajeet Singh (Investigating Officer.), PW8-Shree Pal Singh (Station House Officer) PW-9-Harpal Singh (Constable), PW-10 Sharafat Ali (Constable), PW-11-Ashiq Hussain (Head Moharrir), PW-12 Hari Nandan Murari (Constable), PW-13 Jiya Lal (Constable), PW-14 Prem Pal (Constable) were produced and examined before the Court below.

10. PW-1-Balkar Singh has stated that Randhir Singh was killed in our village about 9 months back. He stated that a panchayat was held in his village wherein many people were present. He was also present there. That panchayat was held to settle the land dispute between Pooran Singh and Dayal Singh. Pooran Singh is the accused in the present case and Dayal Singh is the father of the deceased Randhir Singh. He further stated that Pooran Singh wanted to take the land in the village abadi and the panchayat decided in his favour. Some land of Pooran Singh was outside the

village in lieu of the said land, he got the land in abadi near his land. At that point of time, both the parties had agreed with the decision of the panchayat, later they fought because the decision of the panchayat was not accepted by Pooran Singh. In his cross-examination he stated that he was not a panch in this panchayat. This panchayat is common, therefore, he was also present there. At other place he stated that the people who were coming there told him that a panchayat was held in the village, therefore, he also went there. There were total 15-16 people in that panchayat. He did not see the land of Pooran Singh, in lieu of which, he got the land in abadi by the panchayat, he also did not know as to how much land was given to him. He was not given any land by the accused persons. Alongwith him Gurbaksh Singh also got the land automatically. An agreement to sell was also done. Pooran Singh s/o Ishwar Singh was one of the witness in that agreement to sell. The said Pooran Singh s/o Ishwar Singh was the brother-in-law of the accused Pooran Singh. It is wrong to say that in order to get this land, he had to negotiate with the accused persons as Hakim Singh got more land and he got less. It is also wrong to say that he was not present in this Panchayat and because of this he was given false testimony. He had purchased a Tractor and accused- Pooran Singh was the guarantor. One of the installment was due on him, which he has to pay and it is wrong to say that Pooran Singh was asking him for this installment, therefore, he give false testimony.

11. PW-2-Dayal Singh (father of the deceased)-informant has stated on oath that he know the accused Pooran Singh, Kashmir Singh, Jaswant Singh and Man Singh. We had a land dispute with Pooran Singh. Some of his land was in the village and some of the land was outside the village. A week before the death of Randhir Singh, a panchayat was held to settle their land dispute. Two Biswa of land, which we had more in the village, the Panchayat decided to give it to Pooran Singh by reducing his land which was outside the village. Pooran Singh was given about two and a half biswas less land in the village and he was given more than two and a half biswas of land outside the village. He then stated that Pooran Singh was given two biswa land more in the villages and he was given two biswa less land outside the village. Pooran Singh did not accept the decision of Panchayat. He further stated that Kashmir Singh and Jaswant Singh are brothers of accused Pooran Singh and Man Singh is the son of Pooran Singh. They all are present in the court. After the decision of the panchayat, Pooran Singh started saying and we will take more land. He further stated that on 22.06.1982 at 8.00 am all four accused persons, namely, Jaswant Singh, Kashmir Singh, Man Singh and Pooran Singh armed with weapons came towards his house hurling abuses. Pooran Singh armed with Rifle, accused Kashmir Singh armed with D.B.B.L. gun, accused Jaswant Singh and Man Singh both armed with their S.B.B.L. guns. On seeing the accused coming towards them, he, after raising alarm, ran towards the house of Jugendra Singh. At that point of time alongwith him Randhir Singh and Balbindra Singh were also there. Randhir Singh (deceased) is his son. Balbindra Singh is his brother-in-law. On hearing the alarm of the aforesaid person, Jugendra Singh, Dalip Singh and Nishan Singh arrived at the scene of occurrence. Randhir Singh and Balbindra Singh climbed up on the roof of Jagendra Singh. Dayal Singh, outside the house of Jagendra Singh, where there is a place to make bread, he stood

leaning against the wall. Accused Pooran Singh fired from his rifle at Randhir Singh (deceased). Kashmir Singh, accused also fired from his D.B.B.L. gun at Balbindra Singh. The accused- Jaswant Singh and Man Singh have also fired from their respective guns. Accused Pooran Singh fired many times. On being challenged by Jugendra Singh, Nishan Singh and Dalip Singh, the accused escaped. Thereafter complainant- Dayal Singh went on the roof his son Randhir Singh lying injured with gun shot injury. The complainant wrapped his leg wound with cloth and get him down. He thereafter went to the police station with written report Exhibit Ka-1 which was written by Jasbir Singh on the dictation of Dayal Singh. The complainant had left Balbindra Singh at home. Thereafter complainant took the injured Randhir Singh in a car and went to Police Station Baheri. The complainant submitted the written report to the police station on the basis of that written report a chik report Exhibit Ka-10 was prepared. Thereafter, Police Inspector advised him to take Randhir Singh to Baheri Hospital in a car and sent a Constable alongwith him, after reaching the hospital the doctor put a vaccine and advised him that his injuries are serious so he should be shifted to District Hospital, Bareilly. On the advised of the doctor, Randhir was brought to the District Hospital Bareilly for his treatment, where he died on the same day. PW.2 in his cross examination has stated that the dispute was only that the two biswa land, situated outside the village, which was less, Pooran Singh wanted to take it in abadi.

12. PW-3-Balbindra Singh has stated on oath that about 9 months ago at 8.00 am in the morning he was standing outside his house. Dayal Singh and Randhir Singh (deceased) were also there. They saw that all four accused persons, namely, Jaswant Singh, Kashmir Singh, Man Singh and Pooran Singh armed with weapons came towards his house hurling abuses and saying that don't leave them, kill them. Pooran Singh armed with Rifle, accused Kashmir Singh armed with D.B.B.L. gun, accused Jaswant Singh and Man Singh both armed with their S.B.B.L. guns. On seeing them, they after raising alarm ran towards the house of Jugendra Singh. On hearing the alarm Jugendra Singh and Nishan Singh arrived at the scene of occurrence. He and Randhir Singh climbed up on the roof of Jugendra Singh. Dayal Singh remained down. Accused Pooran Singh fired from his rifle at Randhir Singh (deceased), which hit his leg. After receiving gun shot injury, Randhir Singh fell down. Thereafter, Kashmir Singh, accused also fired from his D.B.B.L. gun at him, he also fell on the ground. The accused- Jaswant Singh and Man Singh have also fired from their respective guns. Accused Pooran Singh fired many times. Thereafter Jugendra Singh, Nishan Singh, Dayal Singh and Dalip Singh went on the roof where his son Randhir Singh lying injured with gun shot injury. They wrapped his leg wound with cloth and get him down. Thereafter a report was written by Jasbir Singh and then they took Randhir Singh in a tractor trolly. Randhir Singh thereafter died. His injuries also got medically examined. He further stated that on the same day, police inspector came in his village. Before the police inspector he stated that his injuries were minor in nature that's why he was not ready to go with Randhir Singh. Randhir Singh received serious injuries.

13. PW-4-Sub Inspector Ram Chandar, who is the formal witness has stated on oath that on 22.06.1982 he was posted as Sub Inspector in Police Station -

Baheri. A memo Exhibit-A came from the Hospital at around 11.30 am., in which it is informed that Randhir Singh s/o Dayal Singh died in the hospital. He reached the hospital at about 14.30 hours and inspected the dead body of Randhir. The dead body was sealed and the possession of necessary documents were handed over to constables Harpal Singh and Shankar Prasad. Panchayatnama was prepared.

14. PW-5-Dr. Balbir Singh, District Hospital, Bareilly, who has conducted the post mortem of the dead body, has stated that he was posted as Medical Officer in the District Hospital, Bareilly on 23.06.1982. He has conducted post-mortem of the dead body of the deceased Randhir Singh at 4.30 pm. On 23.06.1982 the dead body was presented before him by Constable Har Pal and Constable Shankar Prashad. At that time the dead body was under seal. The age of the deceased was about 16 years and died about a day before. On 22.06.1982 the deceased was brought in the District Hospital, Bareilly at about 1.20 pm. He further stated that rigour mortis was present in the upper and lower part of the body. As per his examination, following ante mortem injuries were present on the body of the deceased:-

(i). Gun shot wound of entry 7cm x 6cm through & through with inverted and lacerated margin on the back of the left leg, 2cm below the left knee joint, in the middle. No blackening and tattooing present. Both bones fractured in multiple pieces. Large Vessel lacerated.

(ii). Gun shot wound of exit 12cm x 11cm through & through, connecting injury no.1 on the front of the left leg in middle 1 cm. Below the knee joint margin averted.

15. PW-6 Dr. Janki Pradad Gangwar, who was also posted as Superintendent of Combined Hospital, Baheri on 22.06.1982. He has examined the deceased Randhir Singh at 10:43 pm. In the night. The deceased was brought before him by Constable Suraj Pal Singh. The following injuries were found on the body of Randhir Singh:-

(a). Gun shot wound of entrance 9cm x 6.5 cm through & through to the past side on left leg, 2 cm below left knee joint margins are lacerated, and inverted. No tattooing, no scratching, no injury under lying tissues.

(b). Gun shot wound of exit 15 cm x 13.5 cm. connecting to the would of entrance (through and through) 2 cm below the left knee joint on the out side of left leg, margins were averted and lacerated, no tattooing no scartching, no injury (under) soft lying soft tissue and bones are broken and lacerated.

(c). Lacerated wound 1.5 cm x .25 cm x skin deep 2 cm below the injury no.1. Injury no.1 is a grievous caused by gun shot from a fire arm. As a result, of exit of shots no.2 is caused by blunt object and is simple. Duration of all injures is fresh.

16. PW.7-Indrajeet Singh, Sub Inspector, has stated that the present case was registered in his presence at the police station Baheri. He has further stated that as soon as the case was registered at Police Station he started the investigation of the case and tried to record the statement of deceased Randhir Singh at the police station, who was lying in the car, but Randhir Singh did not give his statement because his condition was not good. Immediately, he was sent to Baheri Hospital for his medical examination. Thereafter PW-7 recorded the statement of Dayal Singh, who is the father of Randhir Singh, and Nishan Singh and went to the

spot where he recorded the statements of Balbindra Singh, Jugendra Singh and Dalip Singh. He inspected the place of occurrence and prepared the site plan. He has collected bloodstained soil along with piece of broken bones and plain soil and kept them into separate containers. These are Exhibit 3 and Exhibit 4. A Fard to this effect Exhibit Ka.13 was prepared. He has collected two empty cartridges from the Rasta and both of them were kept under seal and a Fard Exhibit Ka.13 was prepared by him. These cartridges were sent for ballistic examination. Thereafter, he has recorded the statements of other witnesses. He has also searched the accused for recovery of arms but no arms were recovered from them. Fard Talasi in respect of the house of the accused Kashmir Singh, Jasbir Singh, Pooran Singh was prepared by the PW-7. These Fards are Exhibit Ka.15, Ka.16 and Ka.17. On 23.06.1982, PW-7 received the injuries report of Balbindra Singh and Randhir Singh (deceased). He has further received an inquest report of the dead body of Randhir Singh and post mortem report and copy of the G.D. in which case was amended. This amended report was prepared by Charan Singh. It is Exhibit Ka.18. Thereafter, the investigation of this case was taken by Sri S.R. Shukla, Station House Officer, Incharge of the Police Station Baheri. On 26.06.1982 the accused Jaswant Singh, Pooran Singh and Man Singh has surrendered themselves in the court of Judicial Magistrate, Baheri.

17. PW-8-Shripal Singh, Station House Officer, has stated that he was posted as Inspector Incharge at the police station Baheri on 07.07.1982. The investigation of this case was taken by him on 07.07.1982 from S.I. Sri S.R. Shukla. He has recorded the additional statements of Dayal Singh, Guru Charan Singh Barja Singh, Ishwar Singh and Balkar Singh. He has submitted the chargesheet Exhibit Ka.19 against the accused persons after completing the investigation.

18. PW.9-Constable Har Pal Singh has stated on oath that he received the dead body of Randhir Singh under seal alongwith necessary documents.

19. PW-10-Constable Sharafat Ali, has stated that he took one sealed bundle in which gun and cartridges were kept and he has submitted them to the Malkhana Police Station, Baheri.

20. PW-11- Head Mohrir, Ashiq Hussain has stated that one gun was received at the police station from Constable Prem Pal. This gun alongwith the bundle of cartridges were sent for chemical examination at Lucknow.

21. PW.12-Constable Hari Nandan Murari has stated that he was posted as Head Moharrir at the police station Kitcha on 23.06.1982 at about 2.55 pm Station House Officer, Sri V.R. Goyal, Sub Inspector Jagdish Pal and Constable no.345 Ragunath Singh and others brought the accused Kashmir Singh to the police station alongwith one gun and 5 live cartridges. Gun and cartridges were deposited in the Malkhana of police station-Baheri. They were kept under seal. These are Exhibit 9 to 14, entry to this effect was made in the G.D. no.23, copy thereof is Exhibit Ka.26. He has further stated that he had re-sealed the aforesaid articles and thereafter handed over to the Constable Prempal. The entry to this effect was made in the G.D. No.24,copy thereof is Exhibit Ka.27

22. P.W.13- Jiya Lal has stated that he was posted as Constable at police station Kitcha in the month of June, 1982. He has

stated that he alongwith Station House Officer, Sri V.R. Goyal and other police personnel were busy in patrolling and they were informed by the reliable informer that accused Kashmir Singh is coming from the side of Kitcha and is going towards the police station-Baheri. On getting this information, police party had taken position and arrested him and made a search. One D.B.B.L. gun, Exhibit Ka.9 and 5 live cartridges, Exhibit Ka.10, were recovered from the possession of accused Kashmir Singh. They were sealed on the spot and a fard in respect of these recoveries were prepared Sri V.R. Goyal. The recovered articles and accused Kashmir Singh were brought to the police station Kitcha.

23. PW.14 Prem Pal Sharma has filed his affidavit which is on record.

24. In support of defence case, DW1-Ishwar Singh and DW2-Jagga Singh were produced and examined.

25. DW-1-Ishwar Singh has stated that a panchayat had taken place in the village Pandra, two months ago from the date of the murder of the deceased Randhir Singh. This panchayat was held in connection with the land of Jangali village. He was the panch in that panchayat. Gurucharan Singh, Amar Singh and Baja Singh were also present in that panchayat. In that panchayat, Pooran Singh was one party and Dayal Singh was another party. There was no fighting on the point of any land situated in the village. The panchayat decided accordingly. The terms and conditions of panchayat were reduced into writing. He also made his thumb impression over the paper. He has proved Exhibit Kha.1

26. DW-2-Jagga Singh has stated that about one year ago the guest of Jugendra Singh gathered on the roof of the house of Jugendra Singh and they took their meal and thereafter they made some fire from their guns. This witness had stated that his buffalo was hit by one fire and Balbindra Singh and Randhir Singh were also injured from those fires. According to this witness the fire injuries were caused by those persons who gather at the house of Jugendra Singh.

27. The judgement of acquittal has been passed on the ground that there was no motive for the accused persons, namely, Pooran Singh, Kashmir Singh, Jaswant Singh and Man Singh to commit the murder of Randhir Singh. The testimony of PW-2-Dayal Singh and PW-3-Balvindra Singh does not inspire confidence inasmuch as their presence on the spot appeared doubtful and their testimony was in conflict with the medical evidence. The scribe of the first information report, namely, Jasvir Singh and other eye witnesses of the incident, namely Jugendra Singh, Dalip Singh and Nishan Singh were not examined at the trial. The D.B.B.L. gun recovered from the possession of accused Kashmir Singh on 23.06.1982 was sent from police station-Kitcha Nainital to police station-Baheri, District Bareilly as late as on 24.01.1983 and from the police station Baheri to the Ballistic Expert as late as on 03.04.1983.

28. Challenging the impugned judgment, Sri Kailash Prakash Pathak, learned AGA submits that there was cogent evidence to convict the accused persons herein. He submits that it is broad day light incident and in this incident one young boy lost his life and one young boy recevied gun shot injuries. The first information report was prompt. He further stated that presence of the witnesses are not doubtful,

PW-2-Dayal Singh and PW-3-Balvindra Singh consistent by supported the prosecution case and their testimony finds material corporation from the prompt first information report and the medical evidence. He further submits that the court below has erred in holding that there was no motive for the accused persons to commit the murder of Randhir Singh as the motive is clear that there was a land dispute between the accused and the father of deaceased. He further submits that PW-3-Balvindra Singh received injuries during course of the incident and his presence could not be doubted. The learned Sessions judge also erred in holding that the evidence of eye witnesses Dayal Singh and Balvindra Singh was in conflict with the medical evidence and the incident took place in some other manner. Learned AGA further stated that learned Sessions Judge erred in not relying on the evidence of the recovery of D.B.B.L. gun from the possession of Kashmir Singh, accused, the gun having been used in the commission of the incident, there was no contradiction regarding weapons in hand of the accused, place of occurrence and manner of assault, and there is no motive for false implication therefore, the judgment of acquittal passed by the Trial Court is perverse in nature and is liable to be reversed.

29. Sri Santosh Kumar Tiwari, learned counsel appearing for the sole surviving accused respondent-Man Singh submits that there was no recovery of any weapon from Man Singh and there was no allegation that his fire caused any injury or damage to the anyone, hence involvement of Man Singh was not proved beyond reasonable doubt. He further submits that there was no motive for the accused persons, namely, Pooran Singh, Kashmir Singh, Jaswant Singh and Man Singh to commit the murder of Randhir Singh. He further submitted that the statement under Section 161 Cr.P.C. of PW-1 Balkar Singh was recorded after a long gap, therefore, his testimony was not reliable. He further submits that the testimony of PW-2-Dayal Singh and PW-3-Balvindra Singh does not inspire confidence inasmuch as their presence on the spot appeared doubtful and their testimony was in conflict with the medical evidence. He further submits that the scribe of the first information report, namely, Jasvir Singh and other eye witnesses of the incident, namely Jugendra Singh, Dalip Singh and Nishan Singh were not examined at the trial. He further submitted that the oral and medical evidence are contradictory. He next submitted that D.B.B.L. gun recovered from the possession of accused Kashmir Singh on 23.06.1982 was sent from police station- Kitcha Nainital to police station-Baheri, District Bareilly as late as on 24.01.1983 and from the police station Baheri to the Ballistic Expert as late as on 03.04.1983, therefore, recovery of gun and cartridges from Kashmir Singh is doubtful.

30. We have considered the submissions of the learned counsel for the parties and have perused the record.

31. Before proceeding further, it would be appropriate to take note of law on the appeal against acquittal.

32. In the case of ***Bannareddy and others vs. State of Karnataka and others,*** (2018) 5 SCC 790, in paragraph 10, the Hon'ble Apex Court has considered the power and jurisdiction of the High Court while interfering in an appeal against acquittal and in paragraph 26 it has been held that *"the High Court should not have reappreciated the evidence in its entirety,*

especially when there existed no grave infirmity in the findings of the trial Court. There exists no justification behind setting aside the order of acquittal passed by the trial Court, especially when the prosecution case suffers from several contradictions and infirmities"

33. In **Jayamma vs. State of Karnataka,** 2021 (6) SCC 213, the Hon'ble Supreme Court has been pleased to explain the limitations of exercise of power of scrutiny by the High Court in an appeal against an order of acquittal passed by a Trial Court.

34. In a recent judgement of this Court in **Virendra Singh vs. State of UP and others,** 2022 (3) ADJ 354 DB, the law on the issue involved has been considered.

35. Similar view has been reiterated by Hon'ble Apex Court in **Rajesh Prasad vs. State of Bihar and another,** (2022) 3 SCC 471.

36. We have considered the rival arguments and the evidence in detail.

37. From perusal of record, we find that the names of three eye-witnesses were mentioned in the first information report but they are not produced before the trial court though they are closely related and explanation for their non production is not satisfactory. There was only one entry and exit wound and recovery of weapon was from Kasmira Singh, although was disbelieved by the trial court, and the empty cartridge as per balletic report was fired from the gun recovered from Kasmira Singh only hence, the involvement of the sole surviving accused Man Singh is not proved beyond shadow of doubt. As already noticed that there was no recovery of firearm from Man Singh. There was no allegation that his fire caused any injury to anyone or even caused damage to any property. We find that PW-1-Balkar Singh has narrated the motive behind the crime and had stated that in the panchayat where the land dispute between Pooran Singh and Dayal Singh was settled he was also present although he was not called for such panchayat. PW-2-Dayal Singh, father of the deceased, who is the informant has narrated the motive and manner of crime. He had taken Randhir Singh to the hospital in a car and Balbindra Singh was present in the house. PW-3-Balbindra Singh has also narrated the manner of incident. Both the witnesses have stated that Man Singh was carrying SBBL Gun and had also fired, from his gun, however, as already recorded, no recovery was made from the sole surviving accused Man Singh and his shot had not caused any injury to anyone. PW-4 is the formal witness. PW.5 Dr. Balbir Singh had conducted the post mortem and had certified that there was only one gun shot entry wound of 7cm x 6cm and one gun shot exit wound of 12cm x 11 cm. P.W.6, Dr. Janki Prasad Gangwar had also certified that there was one gun shot entry wound and one gun shot exit wound and one lacerated wound 1.5 cm x .25 cm x skin deep 2 cm. This clearly reflect that there was only one gun shot entry wound and one gun shot exit wound meaning thereby there was only single firearm injury caused to the deceased whereas as per the prosecution case, accused Pooran Singh armed with Rifle, accused Kashmir Singh armed with D.B.B.L. gun, accused Jaswant Singh and Man Singh both armed with their S.B.B.L. guns. The post mortem report clearly reflect that the injuries was caused by a .12 bore gun and not by the Rifle. Therefore, the prosecution story that the injuries caused by the Rifle is false has

rightly been held by the trial court. It is also noticeable that as per prosecution case DBBL gun was recovered from the possession of accused Kashmir Singh on 23.06.1982. The recovered gun and cartridges were brought from police station Kitcha to police station Baheri, District Bareilly by Constable Prem Pal Sharma as late on 24.01.1983 and there was no explanation for such lapse. Thereafter the same was sent from the police Station Baheri to ballistic expert, Lucknow as late on 03.04.1983. This is a clear lacuna on the part of the Investigating Agency though by itself may not be a ground of acquittal, however, coupled with the fact that PW-12 in his examination in chief has admitted that the cloth in which the recovered gun was packed was torn therefore, he has changed the same and resealed the aforesaid articles and thereafter handed over to the Constable Prem Pal. This creates doubt in the prosecution story connecting the weapon recovered with the crime. Therefore, the prosecution case is full of contradictions and lapses on part of the prosecution. There has also been lapse on the part of investigating agency in preparation of site plan as well as explanation offered for non production of the eye witnesses mentioned in the first information report. The explanation that eye witness Nishan Singh had left the place immediately after the incident and had gone to Punjab and his whereabouts are not known is not convincing at all. PW-2-Dayal Singh and Nishan Singh are closely related and are first degree relation, therefore, the explanation for their non production is not satisfactory. Other eye witness Jogendra Singh, explanation for non production given was that he fell seriously ill, however, no medical documents were produced in respect of such serious illness, which may suggest that he was not in position to appear in the witness box.

38. In the totality of circumstances, we find that prosecution has failed to prove its story beyond doubt.

39. It is the settled law that after acquittal by the trial court there is a double presumption of innocence in favour of the accused which, in our opinion, cannot be overlooked in the present case.

40. Accordingly, the present government appeal stands dismissed.

(2023) 1 ILRA 96
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.12.2022

BEFORE

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

Government Appeal No. 2099 of 1984

State of U.P. ...Appellant
Versus
Krishnadeo @ Jhala & Ors. ...Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondent:
Sri H.N. Singh, Sri N.N. Singh, Sri Satya Prakash Shukla, Sri Udai Prakash Deo Pandey, Sri V.B. Singh

A. Criminal Law - Criminal Procedure Code, 1973-Section 378 - Indian Penal Code, 1860-Section 302-Challenge to – acquittal-false implication- presence of surviving accused is found doubtful-As per postmortem report, there is no injury of bomb and lathi but several wounds of pellets of gunshot is found-Trial Court rightly appreciated the evidence-It is well settled that the Appellate Court hearing the appeal filed against the judgment and

order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so.(Para 1 to 28)

B. It is settled principles of law that if two views of possible, one favoring to the prosecution and other favoring to the accused, the view favoring to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent.(Para 19)

The appeal is dismissed. (E-6)

List of cases cited:

1. M.S. Narayan Menon @ Mani Vs St. of Ker. & anr. (2006) 6 SCC 39

2. Chandrappa Vs St. of Karn. (2007) 4 SCC 415

3. St. of Goa Vs Sanjay Thakran & anr. (2007) 3 SCC 75

4. St. of U.P. Vs Ram Veer Singh & ors. (2007) AIR SCW 5553 Girja Prasad (dead) by LRs Vs St. of MP (2007) AIR SCW 5589

5. Luna Ram Vs Bhupat Singh & ors. (2009) SCC 749

6. Mookkiah & anr. Vs St., Rep. by the Insp. of T.N. (2013) AIR SC 321

7. St. of Karn. Vs HemaReddy (1981) AIR SC 1417

8. Shivasharanappa & ors. Vs St. of Karn. (2013) 7 JT SC 66

9. St. of Punj. Vs Madan Mohan Lal Verma (2013) 14 SCC 153

10. Jayaswamy Vs St. of Karn. (2018) 7 SCC 219

11. Shailendra Rajdev Pasvan Vs St. of Guj. (2020) 14 SC 750

12. Samsul Haque Vs St. of Assam (2019) 18 SCC 161

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

1. Heard Sri Patanjali Shukla, learned A.G.A. for the State and Sri Satya Prakash Shukla, learned counsel for respondents perused the record.

2. This appeal under Section 378 of Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.'), at the behest of the State, has been preferred against the judgment and order dated 28.4.1984 passed by Sessions Judge, Mirzapur acquitting accused-respondents who have been tried for commission of offence under Section 302 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') read with Section149 in Sessions Trial No.66 of 1983.

3. Brief facts as culled out from the record are that the evidence of Ramakant (PW-1) brother of the deceased, is that while his brother, Nageshwar Chaubey, was coming from Semariya to Charkonava and had reached near the road culvert, Krishnadeo alias Jhala, accused, who was lying in ambush alongwith other accused on the northern side of the road, fired a shot on Nageshwar Chaubey, which struck him (Nageshwar Chaubey) in his leg. Rama Kant, Vishwanath, Baggar, Ram Subhag, Ram Prasad and Alagudeo alias Raj Narain were accompanying Nageshwar Chaubey at that time, having lathis in their hands. They started running towards west and stationed themselves after crossing the road culvert. As Nageshwar Chaubey had suffered gun shot injury in his leg, he could not run fast.

Krishna Deo, Kailash Deo, Harish Chandra Deo and Bachchan, accused, were seen chasing Nageshwar Chaubey firing shots from their guns. The other accused were also giving a chase to Nageshwar Chaubey, who fell down at a distance of about 80 paces from the culvert towards west as a result of the injuries suffered by him. Thereupon, Dukhran accused, hit him with *gandasi* a sharp cutting weapon, and Budhiram, accused, took out a hand bomb from his *jhola* and hurled it towards the persons, who had moved ahead and had kept themselves cancelled in the forest. The bomb exploded and produced a loud sound and smoke. Budhiram, accused, then took the rifle of the deceased and thereafter, all the accused fled away in the jungle. Ram Kant and others then came to the place where Nageshwar was lying in pool of blood. It was found that the life had ebbed out as a result of the injuries caused on his person. Long standing enmity is said to be the motive for ending the life of Nageshwar Chaubey .

4. On F.I.R. the investigation was moved into motion. Investigation Officer took up the investigation, visited the spot and prepared the site plan. Investigation Officer collected the blood stained and plain earth from the place of occurrence and live as well as empty cartridge were also recovered. Search memos were prepared. The body of the deceased was sent for postmortem where the postmortem was conducted and the postmortem report was prepared by Doctor.

5. After the completion of investigation, charge sheet was submitted by the Investigation Officer. The case being exclusively triable by the Court of Sessions was committed to the Court of Sessions. The learned Trial Court framed charges under Sections 302, 148, 149 and 379 of IPC. The accused persons denied the charges and claimed to be tried.

6. Prosecution examined oral witnesses and filed doucmentary evidence. After prosecution evidence, statement of accused persons were recorded under Section 313 Cr.P.C., accused examined one witness in their defence.

7. Learned A.G.A. has submitted that the learned Judge below has misread the evidence and that the judgment is based on surmises and conjectures. It is further submitted by learned A.G.A. that First Information Report offence under Section 302 read with Section 149 of I.P.C. was committed and that the judgment of the court below is erroneous..

8. Before we embark on testimony and the judgment of the Court below, the contours for interfering in Criminal Appeals where accused has been held to be non guilty would require to be discussed.

9. The principles which would govern and regulate the hearing of an appeal by this Court, against an order of acquittal passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of **"M.S. NARAYANA MENON @ MANI VS. STATE OF KERALA & ANR", (2006) 6 S.C.C. 39,** the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even

while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

10. Further, in the case of **"CHANDRAPPA Vs. STATE OF KARNATAKA",** reported in **(2007) 4 S.C.C. 415**, the Apex Court laid down the following principles;

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

11. Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

12. Even in the case of **STATE OF GOA Vs. SANJAY THAKRAN & ANR** reported in **(2007) 3 S.C.C. 75,** the Apex Court has reiterated the powers of the High Court in such cases. In para 16 of the said decision, the Court has observed as under:

"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view

which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

13. Similar principle has been laid down by the Apex Court in cases of **"STATE OF UTTAR PRADESH VS. RAM VEER SINGH & ORS.", 2007 A.I.R. S.C.W. 5553** and in **"GIRJA PRASAD (DEAD) BY L.R.s VS. STATE OF MP", 2007 A.I.R. S.C.W. 5589.** Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

14. In the case of **"LUNA RAM VS. BHUPAT SINGH AND ORS.",** reported in **(2009) SCC 749,** the Apex Court in para 10 and 11 has held as under:

"10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

15. Even in a recent decision of the Apex Court in the case of **"MOOKKIAH AND ANR. VS. STATE, REP. BY THE INSPECTOR OF POLICE, TAMIL NADU"**, reported in AIR 2013 SC 321, the Apex Court in para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while hoosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or

differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"

16. It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of **"STATE OF KARNATAKA VS. HEMAREDDY"**, AIR 1981, SC 1417, wherein it is held as under:

"...This Court has observed in Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93:(AIR 1967 SC 1124) that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

17. In a recent decision, the Hon'ble Apex Court in **"SHIVASHARANAPPA & ORS. VS. STATE OF KARNATAKA",** JT 2013 (7) SC 66 has held as under:

"That appellate Court is empowered to reappreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."

18. Further, in the case of **"STATE OF PUNJAB VS. MADAN MOHAN LAL VERMA",** (2013) 14 SCC 153, the Apex Court has held as under:

"The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convincing the accused person."

19. The Apex Court recently in ***Jayaswamy vs. State of Karnataka, (2018) 7 SCC 219,*** has laid down the principles for laying down the powers of appellate court

in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"10.It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

.....It is relevant to note the observations of this Court in the case of Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

20. The Apex Court recently in ***Shailendra Rajdev Pasvan v. State of Gujarat, (2020) 14 SC 750***, has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court and in ***Samsul Haque v. State of Assam, (2019) 18 SCC 161*** held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference

21. At present, it is submitted by learned AGA that in all, there were eight accused persons. In this case and now out of them, six accused persons have died. Hence, now this appeal survives only with regard to two surviving accused persons, namely, Budhiram and Kamla Lohar. So, we are concerned only with regard to the matter of accused-Budhiram and Kamla Lohar.

22. It is further submitted by learned AGA that on 10.10.1982 at 12:00 noon, all the eight accused persons came on the spot and

committed the murder of Nageshwar Chaubey. Accused persons were armed with deadly weapons. It is further submitted that surviving accused, Budhiram took out of bomb from his bag and threw towards the deceased at the time of occurrence which created a lot of noise and smoke after that the accused-Budhiram picked up the rifle of the deceased and fled away. Another surviving accused- Kamla Lohar was armed with Lathi and he also attacked on the deceased.

23. It is next submitted by learned AGA that both the surviving accused persons played active role in the commission of offence but the learned Trial Court did not appreciate the evidence in right perspective and mainly held that at the time of occurrence, co-accused-Krishnadeo alias Jhala was sitting in the chamber of District Government Counsel for preparation of his another case. The District Government Counsel is examined before the Trial Court and on the basis of the aforesaid plea of alibi, all the accused persons were convicted by Trial Court. While the plea of alibi was taken only in respect of co-accused Krishnadeo alias Jhala, hence, there is inherent error in the impugned judgment, the appeal is liable to be allowed.

24. Learned counsel for the accused-Budhiram and Kamla Lohar submitted that in the antimortem injuries and in the postmortem report, there is no injury of bomb and lathi. It goes to show that Budhiram and Kamla Lohar were not present at the time of occurrence and they were falsely implicated in this case on the basis of village party and enmity.

25. This is the occurrence of the year 1982. Perusal of postmortem report goes to show that there are several ante-mortem of punchered wound which were caused by the pellets of gunshot. Hence, mainly there are injury of gunshot wound and there is no injuries which could be caused either by the throwing of bomb or by lathi danda.

26. Hence, the presence of surviving accused persons is found doubtful by the learned trial court and it is the settled principles of law that if the two views of possible, one favouring to the prosecution and other favouring to the accused, the view favouring to the accused should be adopted.

27. The place of occurrence, the testimony of the witnesses and the ultimate analysis will not permit us to take a different view than that taken by the learned Judge.

28. Hence, in view of the matter & on the contours of the judgment of the Apex Court, we concur with the learned Sessions Judge. The appeal sans merits and is dismissed. The record and proceedings be sent back to the Court below. The bail and bail bonds are cancelled.

(2023) 1 ILRA 103
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.12.2022

BEFORE

THE HON'BLE ABDUL MOIN, J.

Matters Under Article 227 No. 31424 of 2021

Parshuram ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Amrendra Nath Tripathi, Alok Kumar, Raj Kumar Vishwakarma

Counsel for the Respondents:
C.S.C., Anurag Kumar Singh, Rakesh Kumar Chaudhary, Sanjay Kumar Yadav

A. Civil Law - Constitution of India, 1950-Article 243-O & 227-U.P. Panchayat Act, 1947-Section 12-C-U.P. Panchayat Raj (Settlement of Election Disputes) Rules, 1994-Rule 3(1)- Election petition-Order for recounting of votes-Petitioner is an elected Gram Pradhan-Order for recounting of votes directed by respondent no. 2-Once election petition has been finally decided, consequently the Prescribed Authority became 'functus officio'-Impugned order as passed by Prescribed Authority would not be in consonance with Article 243-O and Section 12-C of Act of 1947- As such Prescribed Authority cannot pass any order subsequent to disposal of election petition-Matter remitted back to Prescribed Authority for passing order afresh-Impugned order set aside.(Para 1 to 42)

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

List of Cases cited:

1. Smt. Ram Kanti Vs DM & ors. (1995) AWC 1465

2. Shambhu Singh Vs St. E.C, U.P & ors. (2000) 4 AWC 2777

3. N.P. Ponnuswami Vs R.O., Namakkal Constituency (1952) AIR SC 64

4. Krishnamoorthy Vs Sivakumar & ors. (2015) AIR Vol. 3 SCC 467

5. Mohd. Mustafa Vs U.P. Ziladhikari (2007) SCC OnLine All 1564

6. Abrar Vs St. of U.P.(2004) 5 AWC 4088

7. Hari Vishnu Kamath Vs Syed Ahmad Ishaque & ors. (1955) SC 233

8. P.C Basappa Vs T.Nagappa-AIR 1954 SC 440,

9. Sundeep Kumar Bafna Vs St. of Mah. (2014) 16 SCC 623

10. Punjab Land Development & Reclamation Corp. Ltd Vs Labour Court (1990) 3 SCC 682

11. Waryam Singh & anr. Vs Amarnath & anr. (1954) AIR SC 215

12. Shalini Shyam Shetti Vs Rajendra Shankar Patil (2010) 8 SCC 329

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

1. Heard Sri Anas Shervani holding brief of Sri Amrendra Nath Tripathi learned counsel appearing for the petitioner, Sri Vikram Soni learned Standing Counsel appearing for the respondents No.1 and 2, Sri Maninder Singh holding brief of Sri Anurag Kumar Singh learned counsel appearing for respondents No.3, 4, 5 and 9, Sri Rakesh Chaudhary assisted by Sri Ayush Chaudhary learned counsel appearing for respondent No.6 and Sri Sanjay Kumar Yadav learned counsel appearing for the respondent No.7 and 8.

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

(i) To set aside the impugned order passed by the Respondent No.2 in Case No.01473 of 2021 (Computerized Case No.T202110640501473) dated 21.12.2021 (Annexure No.1) whereby Respondent No.2 direct for recounting of the votes and further prayed to dismiss the election petition.

(ii) To, issue direction the Respondents not to interfere in functioning of the Petitioner as validity elected Gram Pradhan of Gram Panchayat Murhadeeh, Block-Sidhauli, District-Sitapur."

3. The case as set forth by the petitioner is that the State Government had notified the Panchayat Elections in the year 2020-2021. So far as the instant case is concerned, the notification was issued for election to the post of Gram Pradhan, Gram

Panchayat Murhadeeh, Block Sidhauli, district Sitapur.

4. It is contended that in the election the petitioner was declared successful and a returned candidate on 30.5.2021. It is submitted that the respondent No.6 namely, Raj Kishor, filed an election petition bearing Case No.01473 of 2021 in re Raj Kishore Vs. Parashuram and others under Section 12-C of the U. P. Panchayat Act, 1947 (hereinafter referred to as the "Act, 1947") before the Prescribed Authority/Sub-Divisional Magistrate, Tehsil Sidhauli, district Sitapur, challenging the election of the petitioner. It is contended that the petitioner was arrayed as respondents No.1 in the election petition. The petitioner filed written statement and after consideration of the material on record, the Prescribed Authority, vide impugned order dated 21.12.2021 a copy of which is Annexure No.1 to the petition, allowed the petition and directed for recounting of votes. Being aggrieved, instant petition has been filed.

5. Various grounds have been taken by the petitioner to challenge the order impugned in the petition. However, the legal question which arose on hearing all the learned counsel for the parties, with the consent of the parties, is being decided first.

6. The legal question which has arisen in the instant petition is whether the Prescribed Authority has erred in law in directing for re-counting of votes while finally deciding the election petition inasmuch as to whether the Prescribed Authority could pass any further order on receipt of the result of the re-counting of votes once the election petition had been finally decided and consequently the Prescribed Authority became *"functus officio'?*

7. From the admitted facts, it emerges that after the petitioner had been declared elected as Gram Pradhan, an election petition was filed under Section 12-C of the Act, 1947 by the respondent No.6 which has resulted in the impugned order dated 21.12.2021 by which the petition has been allowed and a re-counting of votes has been directed.

8. The Act, 1947 is a complete act pertaining to the Panchayat Raj. Section 12-C of the Act, 1947 deals with the procedure for questioning the elections.

For the sake of convenience, Section 12-C of the Act, 1947 is reproduced as under:-

"12-C. Application for questioning the elections *- (1) The election of a person as Pradhan [* * *] or as member of a Gram Panchayat including the election of a person appointed as the Panch of the Nyaya Panchayat under Section 43 shall not be called in question* ***except*** *by an application presented to such authority within such time and in such manner as may be prescribed on the ground that -*

(a) the election has not been a free election by reason that the corrupt practice of bribery or undue influence has extensively prevailed at the election, or

(b) that the result of the election has been materially affected -

i- by the improper acceptance or rejection of any nomination or;

ii- by gross failure to comply with the provisions of this Act or the rules framed thereunder.

(2) The following shall be deemed to be corrupt practices of bribery or undue influence for the purposes of this Act.

(A) Bribery, that is to say, any gift, offer or promise by a candidate or by

any other person with the connivance of a candidate of any gratification of any person whomsoever, with the object, directly, or indirectly of including -

(a) a person to stand or not to stand as, or withdraw from being, a candidate at any election; or

(b) an elector to vote or refrain from voting at an election; or as a reward to -

i- a person for having so stood or not stood or having withdrawn his candidature; or

ii- an elector for having voted or refrained from voting.

(B) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of a candidate or of any other person with the connivance of the candidate with the free exercise of any electoral right;

Provided that without prejudice to the generality of the provisions of this clause any such person as is referred to therein who -

i- threatens any candidate, or any elector, or any person in whom a candidate or any elector is interested, with injury of any kind including social ostracism and ex-communication or expulsion from any caste or community; or

ii- induces or attempts to induce a candidate or an elector to believe that he or any person in whom he is interested will become or will be rendered an object of divine displeasure or spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause.

(3) This application under sub-section (1) may be presented by any candidate at the election or any elector and shall contain such particulars as may be prescribed.

Explanation - Any person who filed a nomination paper at the election whether such nomination paper was accepted or rejected, shall be deemed to be a candidates at the election.

(4) The authority to whom the application under sub-section (1) is made shall in the matter of -

i- hearing of the application and the procedure to be followed at such hearing;

ii- setting aside the election, or declaring the election to be void or declaring the applicant to be duly elected or any other relief that may be granted to the petitioner,

have such powers and authority as may be prescribed.

(5) Without prejudice to generality of the powers to be prescribed under subsection (4) the rules may provide for su''functus officio'''functus officio'''functus officio'mmary hearing and disposal of an application under sub-section (1).

[(6) Any party aggrieved by an order of the prescribed authority upon an application under sub-section (1) may, within thirty days from the date of the order, apply to the District Judge for revision of such order on any one or more the following grounds, namely -

(a) that the prescribed authority has exercised a jurisdiction not vested in it by law;

(b) that the prescribed authority has failed to exercise a jurisdiction so vested;

(c) that the prescribed authority has acted in the exercise of its jurisdiction illegally or with material irregularity.

(7) The District Judge may dispose of the application for revision himself or may assign it for disposal to any Additional District Judge, Civil Judge or

Additional Civil Judge under his administrative control and may recall it from any such officer or transfer it to any other such officer.

(8) The revising authority mentioned in sub-section (7) shall follow such procedure as may be prescribed, and may confirm, vary or rescind the order of the prescribed authority or remand the case to the prescribed authority for re-hearing and pending its decision pass such interim orders as may appear to it to be just and convenient.

(9) The decision of the prescribed authority, subject to any order passed by the revising authority under this section, and every decision of the revising authority passed under this section, shall be final.]"

9. From the perusal of the aforesaid provision of Section 12-C of Act, 1947 it is apparent that an application for questioning the election of a person elected as Gram Pradhan (as it pertains to the instant case) **shall not be called in question except by an application presented to such an Authority within such time and such manner as has been prescribed.** The grounds on which the election of the elected Pradhan can be challenged have also been set forth in Section 12-C of the Act, 1947. The relief which can be granted in the election petition has been set forth in Section 12-C (4) of the Act 1947 a perusal of which indicates that the authority to whom the application under Sub-section (1) is made shall, in the matter of hearing of an application and the procedure to be followed at such hearing, **set aside the election, or declare the election to be void or declare the applicant to be duly elected or any other relief that may be granted to the petitioner.**

Thus, from a perusal of sub-section (4) (ii) of Section 12-C of the Act, 1947 it emerges that the reliefs the Prescribed Authority can grant in any election petition is either to set aside the election or declare an election to be void or declare the applicant to be duly elected or any other relief may be granted to the petitioner.

10. When sub-section (4) (ii) of Section 12-C of the Act, 1947 is read in consonance with sub-section (1) of Section 12-C of the Act, 1947, it clearly emerges that it is only by means of an application filed under Section 12-C of the Act, 1947, that the election of a person, as a Pradhan (so far as the present case is concerned), can be set aside by the Prescribed Authority and by no other mode.

11. Needless to mention that as per sub-rule (1) of Rule 3 of U.P. Panchayat Raj (Settlement of Election Disputes) Rules, 1994 (hereinafter referred to as the "Rules 1994") the Sub-divisional Officer within whose jurisdiction the concerned Gram Panchayat lies is the Authority before whom an application under sub-section (1) of Section 12-C of the Act, 1947 has to be presented.

12. A perusal of the order impugned dated 21.12.2021 would indicate that the Prescribed Authority, while passing the order has not set aside the election of the petitioner or declared the election to be void or declared the respondent No.6 to be duly elected rather has directed for re-counting of votes and the election petition has been allowed.

13. If for the sake of argument the re-counting of votes that has been directed by the Prescribed Authority can be said to be an order that can validly be passed by the Prescribed Authority under the provisions

of sub-section (4) (ii) of Section 12-C of the Act, 1947, then too, considering that the election petition had itself been allowed and the aforesaid order of re-counting of votes has been passed then nothing further survives before the Prescribed Authority in the election petition and even if after the re-counting of votes a situation emerges in which either the petitioner herein or the applicant who filed the Election Petition, i.e. respondent No.6 herein are to get more votes then considering that the election petition has been decided, it would not lie within the domain or power of the Recounting Officer to set aside the election of the petitioner or declare the respondent No.6 herein as elected inasmuch as, the powers under the Act, 1947 have only been conferred upon the Prescribed Authority and no one else.

14. In this regard it would be apt to refer to Article 243-O of the Constitution of India which reads as under:-

***"243-O. Bar to interference by courts in electoral matter**--Notwithstanding anything in this Constitution, --*

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 243-K, shall not be called in question in any court;

*(b) no election to any Panchayat shall be called in question **except** by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State."*

15. From a perusal of Article 243-O of the Constitution it emerges that the said constitutional provision categorically provides that notwithstanding anything contained in the Constitution, no election to any Panchayat shall be called in question **except** by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of the State.

16. When the aforesaid constitutional provision is seen in the context of the action impugned, it emerges that the respondent No.6 had filed the election petition for setting aside the election of the petitioner. The Prescribed Authority, instead of passing an order in terms of powers conferred upon him in terms of sub-section (4) (ii) of Section 12-C of the Act, 1947, has passed-on the mantle, after **allowing** the election petition, for re-counting of votes. Once the election petition has itself been decided the Prescribed Authority becomes *"functus officio'* and even if after re-counting of votes either the petitioner or the respondent No.6 herein receive more or less votes, the same would be meaningless as the Authority who has carried out the re-counting of votes would be powerless to set aside the election of the petitioner or to declare the respondent No.6 as elected considering that the said power can only be flow out from the order passed by an authority in an election petition, who is no longer having the election petition before it, the same having been allowed and thus having become *"functus officio'*.

17. When the impugned action of the Prescribed Authority in terms of the order dated 21.12.2021 is seen in the context of Article 243-O of the Constitution of India read with Section 12-C of the Act, 1947, it is apparent that the order impugned as passed by the Prescribed Authority would not be in consonance to the provisions of

the Constitution as well as the provisions of the Act, 1947.

18. It would be apt to reproduce the Division Bench judgment of this Court in the case of **Smt. Ram Kanti. Vs. District Magistrate and others**, reported in **1995 AWC 1465**, wherein it has been held as under:-

"From the above provisions, it is thus, apparent that the State Election Commissioner, District Magistrate and the Election Officer are empowered to supervise, control and conduct the election. ***After the election is over, they lose all jurisdiction over the matter and it is the Election Tribunal alone, which is competent to deal with the dispute arising out of or in connection with the election.*** *The meaning of the word election and when does the election process comes to an end has been considered by the Supreme Court from time to time while deciding the cases under the R.P. Act, leading case being N.P. Punnuswami v. Returning Officer AIR 1952 SC 64, wherein the election was given the wide meaning so as to connote the entire process culminating in a candidate being declared elected. It, thus, includes the entire procedure to be gone through to return a candidate to the Legislature. Same rule was reiterated in Mohinder Singh Gill v. Chief Election Commissioner AIR 1978 SC 851, wherein it was laid down that the election commences from the initial notification and culminates in the declaration of the return of a candidate. Election process, thus, comes to an end on the final declaration of returned candidates. As the pattern and the procedure for holding the election under the Act and the Rules is similar to that contained in the R.P. Act, the same definition of election has to be applied to the election held under the Act and the Rules.* ***After the election process has come to an end, the State Election Commissioner, District Magistrate and the Election Officer lose all their jurisdiction and the only authority, which can deal with and decide any complaint regarding the election is the Election Tribunal..."***

(emphasis by Court)

19. Likewise, a Division Bench of this Court in the case of **Shambhu Singh Vs. State Election Commission, U.P and Ors** reported in **2000 (4) AWC 2777** has held as under:-

".....In our view, on proper interpretation of the Statute, after the election process has come to an end, the State Election Commissioner, District Magistrate and the Election Officer cease to have any jurisdiction and the only authority which can deal with and decide any complaint regarding the election is the Election Tribunal..."

20. The Apex Court in the cases of **N.P. Ponnuswami v. Returning Officer, Namakkal Constituency; AIR 1952 SC 64 and Krishnamoorthy Vs. Sivakumar and others; (AIR 2015 Vol-3 SCC 467)** have also held likewise.

21. Consequently, when the impugned order as passed by the Prescribed Authority is seen in the light of the judgments of the Apex Court in the case of **N.P. Ponnuswami** (supra) and **Krishnamoorthy (supra)**, the Division Bench judgment of this Court and in the case of **Smt. Ram Kanti** (supra) as well as the judgment of this Court in the case of **Shambhu Singh** (supra), it clearly emerges that the order impugned does not stand the vigours and rigours as prescribed under

Section 12-C of the Act, 1947 read with Article 247-O (b) of the Constitution of India.

22. At this stage, all learned counsels appearing for the respective parties contend that the order impugned dated 21.12.2021 cannot be considered to be a final order rather it would only be an interlocutory order for the purpose of recounting of votes and consequently, after recounting of votes takes place in terms of the impugned order, it is the Prescribed Authority who shall declare the election petition to have finally succeeded in favour of respondent no.6 herein or to be dismissed on the basis of the result of the votes. In this regard, reliance has been placed on a Division Bench judgment of this Court in the case of **Mohd. Mustafa vs. U.P. Ziladhikari - 2007 SCC OnLine All.1564.**

23. Placing reliance on the aforesaid judgment the argument is that on a reference being made arising out of a writ petition, the Division Bench of this Court has held as under:-

"22. We have carefully examined the reasoning given by a learned single Judge in Abrar's case (supra) wherein the learned single Judge opined that the disposal of an application for recount would amount to be a final order as it disposes of the application for recount finally. As explained by us, herein above, a mere order for recount does not finally alter the status of the contesting parties and it does not, in any way, finally determine the status of an elected candidate. The finality comes only after the disposal of the election application as the relief of setting aside an election or dismissing an election application comes at the final stage and not by mere disposal of an application of recount or ordering recount on deciding the issue framed for this purpose.

23. The order impugned in the writ petition cannot be held to have disposed of the election application for the reason that the Election Tribunal framed following three issues:--

(1) Whether the counting in the election on the post of Pradhan of village Handia was

(2) Whether the agents of the applicant in election application, were forcibly removed from the place of counting and the votes cast in favour of the election applicant had been mixed up with the votes of the returned candidate (present petitioner) and on the basis of which opposite party No. 1 (present petitioner) was declared elected? And

(3) Whether on the facts and circumstances of the case, the recounting of votes is permissible and the election had been held in accordance with law?

24. It is evident from the order impugned that only the order of recount has been passed. However, the other issues are yet to be decided after recount of ballot papers as to whether the election had been held in accordance with law and as to whether the votes cast in favour of the contesting respondent have been mixed up with the votes of the returned candidate and on the basis of which the petitioner has been declared elected. It is further to be decided as to whether the election application is to be allowed or dismissed. Therefore, by no stretch of imagination, it can be held that the order of recount of votes has finally disposed of the election application.

25. We are, therefore, with the utmost respect, not able to circumscribe to the view taken by the learned single Judge in the Abrar's case (supra) for the reasons aforesaid and, therefore, we have no

hesitation on in holding that the said decision does not lay down the law correctly on the question of the maintainability of revision under Section 12-C(6) of the Act in respect of an application disposed of by the Prescribed Authority for recount. We further approve the law laid down the cases relied upon by the learned counsel for the petitioner. We answer the questions referred to by the learned single Judge as follows:--

(I) A revision under Section 12-C(6) of the Act shall lie only against a final order passed by the Prescribed Authority deciding the election application preferred under Section 12-C(1) and not against any interlocutory order or order of recount of votes by the Prescribed Authority.

(II) The judgment of, the learned single Judge in the case of Abrar v. State of U.P., (2004) 5 AWC 4088 : (2004 All LJ 2384) does not lay down the law correctly and is, therefore, overruled to the extent of the question of maintainability of a revision petition, as indicated hereinabove.

(III) As a natural corollary to the above, we also hold that a writ petition would be maintainable against an order of recount passed by the Prescribed Authority while proceeding in an election application under Section 12-C of the U.P. Panchayat Raj Act, 1947."

24. From perusal of the aforesaid judgment it emerges that the Division Bench, upon a reference, did not agree with the view of the Single Judge of this Court in the case of **Abrar v. State of U.P. - (2004) 5 AWC 4088** wherein it had been held that as an election petition had been finally decided as such a revision would lie under sub-section (6) of Section 12-C of the Act, 1947. The Division Bench, after considering the judgment in the case of **Abrar (supra)** was of the view that a mere order for recount does not finally alter the status of the contesting parties and it does not in any way finally determine the status of an elected candidate inasmuch as the finality would only come after the disposal of the election application as the relief of setting aside an election or dismissing an election application comes at a final stage and not by mere disposal of an application of recount or ordering recount on deciding the issue framed for this purpose.

25. However, the legal issue which arises in the instant case is that when the Prescribed Authority has finally **allowed** the election petition by means of impugned order dated 21.12.2021 and has directed for recounting then after disposal of the election petition, the Election Tribunal would become *'functus officio'* and no subsequent order can be passed in this regard by the Election Tribunal.

26. This aspect of the matter has been considered by a seven Judges Constitution Bench of Hon'ble Supreme Court in the case of **Hari Vishnu Kamath vs. Syed Ahmad Ishaque and others - AIR 1955 SC 233** wherein the Constitution Bench has held as under:-

*"19. Looking at the substance of the matter, when once, it is held that the intention of the Constitution was to vest in the High Court a power to supervise decisions of Tribunals by the issue of appropriate writ and directions, the exercise of that power cannot be defeated by technical -considerations of form and procedure. In **P. C. Basappa v. T. Nagappa -AIR 1954 SC 440**, this Court observed:*

"In view of the express provisions in our Constitution we need not now look back to the early history or the procedural

technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges. We can make an order or issue a writ in the nature of 'certiorari' in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law"

It will be in consonance with these principles to hold that the High Courts have power under article 226 to issue writs of certiorari for quashing the decisions of Election Tribunals, ***notwithstanding that they become functus officio after pronouncing the decisions."***

(emphasis by the Court)

27. From a perusal of the aforesaid judgment, it is apparent that after the Election Tribunal pronounces its decision, it becomes *'functus officio'*.

28. Further, the Constitution Bench has also laid down the law with respect to the powers of the High Court under Articles 226 and 227 of the Constitution of India. For the sake of convenience, the relevant observations of the Constitution Bench are reproduced below:-

"We are also of opinion that the Election Tribunals are subject to the superintendence of the High Courts under article 227 of the Constitution, and that superintendence is both judicial and administrative*. That was held by this Court in Waryam Singh and another v. Amarnath and another(2), where it was observed that in this respect article 227 went further than section 224 of the Government of India Act, 1935, under which the superintendence was purely administrative, and that it restored the position under section 107 of the Government of India Act, 1915.* ***It may also be noted that while in a certiorari under article 226 the High Court can only annul the decision of the Tribunal, it can, under article 227, do that, and also issue further directions in the matter. We must accordingly hold that the application of the appellant for a writ of certiorari and for other reliefs was maintainable under articles 226 and 227 of the Constitution."***

(emphasis by the Court)

29. From a perusal of the aforesaid, it is apparent that the Constitution Bench has held that the High Court under Article 226 can not only annul the decision of the Tribunal but the High Court under Article 227 can also do that and also issue further directions in the matter.

30. Accordingly, when the Division Bench judgment in the case of **Mohd. Mustafa (supra)** is seen in the light of the Constitution Bench judgment in the case of **Hari Vishnu Kamath (supra)** it emerges that the Division Bench of this Court has not considered the aforesaid Constitution Bench judgment wherein it has been held that the Election Tribunal after pronouncing its decision becomes *'functus officio'* and consequently this Court while exercising power under Articles 226 and 227 of the Constitution of India can not only annul the decision of the Tribunal but can also issue further directions in the matter.

31. At this stage, it would also be relevant to deal with issue as to whether the law laid down by the Division Bench of this Court in the case of **Mohd. Mustafa (supra)** would be a binding precedent

when the Division Bench has not considered the judgment of the Apex Court in the case of **Hari Vishnu Kamath (supra)**.

32. In this regard, this Court may need not look further than the judgment of the Supreme Court in the case of **Sundeep Kumar Bafna vs. State of Maharashtra - (2014) 16 SCC 623**, wherein the Apex Court has held as under:-

"19. It cannot be over-emphasised that the discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of Courts would become a costly casualty. ***A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the Court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a Co-equal or Larger Bench; or if the decision of a High Court is not in consonance with the views of this Court.*** *It must immediately be clarified that the per incuriam rule is strictly and correctly applicable to the ratio decidendi and not to obiter dicta. It is often encountered in High Courts that two or more mutually irreconcilable decisions of the Supreme Court are cited at the Bar. We think that the inviolable recourse is to apply the earliest view as the succeeding ones would fall in the category of per incuriam."*

(Emphasis by the Court)

33. Likewise, the Apex Court in the case of **Punjab Land Development and Reclamation Corporation Limited vs. Labour Court - (1990) 3 SCC 682** has held as under:-

"40. We now deal with the question of per incuriam by reason of allegedly not following the Constitution Bench decisions. The Latin expression per incuriam means through inadvertence. ***A decision can be said generally to be given per incuriam when this Court has acted in ignorance of a previous decision of its own or when a High Court has acted in ignorance of a decision of this Court.*** *It can not be doubted that Art. 141 embodies, as a rule of law, the doctrine of precedents on which our judicial system is based. In Bengal Immunity Company Ltd. v. State of Bihar, [1955] 2 SCR 603, it was held that the words of Art. 141, "binding on all courts within the territory of India", though wide enough to include the Supreme Court, do not include the Supreme Court itself, and it is not bound by its own judgments but is free to reconsider them in appropriate cases. This is necessary for proper development of law and justice. May be for the same reasons before judgments were given in the House of Lords in Re-Dawson's Settlement Lloyds Bank Ltd. v. Dawson and Ors., [1966] 1 WLR 1234, on July 26, 1966 Lord Gardiner, L.C. made the following statement on behalf of himself and the Lords of Appeal in Ordinary:*

"Their Lordships regard the use of precedent as an indis- pensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules. Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the

proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law."

34. From the aforesaid judgments in the case of **Sundeep Kumar Bafna (supra) and Punjab L**and **Development and Reclamation Corporation Limited (supra),** it emerges that the Apex Court has categorically held that discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of Courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation which was not brought to the notice of the Court or **a decision or judgment can also be per incuriam if the decision of a High Court is not in consonance with the view of the Apex Court.**

35. Accordingly, keeping in view the aforesaid judgments, the Division Bench judgment of this Court in the case of **Mohd. Mustafa (supra)** would run against the law laid down by the Constitution Bench judgment of the Apex Court in the case of **Hari Vishnu Kamath (supra)** the Division Bench having not considered that the Election Tribunal becomes *functus officio* after finally deciding the election petition and thus it is the judgment of the Constitution Bench which would have to be followed by this Court.

36. As already indicated above, the Apex Court in the case of **Hari Vishnu Kamath (supra)** has held that after the Election Tribunal finally pronounces its decision, it becomes *'functus officio'* meaning thereby that it would not have any power to pass any order in the election petition after it pronounces its order. In the instant case what the Election Tribunal headed by the Prescribed Authority has done is that it has finally allowed the election petition and has directed for a recounting. Even if the result of recounting of the votes is to be either way, the Election Tribunal having become *'functus officio'* after pronouncement of its decision/allowing the petition, it would not be able to pass any further orders. As such keeping in view the settled proposition of law, Article 243-O of the Constitution of India categorically providing that only by means of an election petition the election to the Panchayat can be called in question and the election petition having been finally decided, the Prescribed Authority/Election Tribunal, thus became *functus officio* and cannot pass any further orders in the matter. As such, the impugned order has to be treated as a final order in all respects and accordingly it is apparent that the Prescribed Authority has passed a patently perverse order and has failed to exercise jurisdiction vested in him i.e. of finally deciding an election petition either way.

37 Keeping in view the aforesaid discussion, the legal question which has arisen in the instant petition is answered below:-

The Prescribed Authority on finally deciding an election petition

becomes *functus officio* and can not pass any order subsequent thereto even if the election petition has been decided finally calling for the re-counting of votes.

38. With the legal question now stands answered, the next question would be as to whether this Court while exercising jurisdiction under Article 227 of the Constitution of India can interfere with the order impugned?

39. Though it has been argued that the petitioner has a remedy of filing of a revision against the order impugned before the learned District Judge under sub-section (6) of Section 12-C of the Act, 1947 and as such he should be relegated to filing of a revision but considering that the petition had been entertained about a year back and an interim order had already been passed and the fact that the law in this regard was not settled as to whether the order impugned would be considered to be a final order or an interim order consequently this Court is exercising its powers as vested under Article 227 of the Constitution of India.

40. Even though the powers of this Court under Article 227 of the Constitution of India have been indicated by the Apex Court in the case of **Hari Vishnu Kamath (supra)** yet it would also be apt to indicate what the Hon'ble Apex Court in the case of ***Waryam Singh and another vs Amarnath and another*** reported in **AIR 1954 SC 215** as reiterated by Hon'ble the Apex Court in the case of **Shalini Shyam Shetti vs Rajendra Shankar Patil** reported in **(2010) 8 SCC 329** has held, which for the sake of convenience is reproduced below:-

"(e) According to the ratio in Waryam Singh (supra), followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and Courts subordinate to it,`within the bounds of their authority'.

(f) In order to ensure that law is followed by such tribunals and Courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or Courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised."

41. Accordingly, keeping in view the aforesaid discussion while exercising power under Article 227 of the Constitution of India the Court holds that the impugned order dated 21.12.2021 is patently perverse to the provisions of the Act, 1947 and the Prescribed Authority has failed to exercise jurisdiction vested upon the Election Tribunal under the provisions of the Act, 1947. Consequently the order impugned dated 21.12.2021 is set aside. The matter is remitted to the Prescribed Authority for passing a fresh order in accordance with law keeping in view the powers under sub-section (4)(ii) of Section 12-C of the Act, 1947. Let a fresh order in this regard be

passed expeditiously after hearing all the parties concerned in accordance with law.

42. The petition stands disposed of.

(2023) 1 ILRA 116
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.12.2022

BEFORE

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

SCC Revision No. 181 of 2022

Shri Gandhi Ashram Khadi Bhandar, Jaitpur District Mahoba Camp Office & Anr. ...Revisionists
Versus
Vijay Kumar Sharma & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Shailendra

Counsel for the Opposite Parties:
Sri Gulrez Khan

A. Civil Law - Provincial Small Cause Courts Act, 1887-Sections 15(2), 15(3) - Code of Civil Procedure, 1908 - Section 21, Order XV, Rule 5-Eviction-Objection against pecuniary jurisdiction-Suit was instituted by plaintiff-respondents before the Judge, Small Cause Court, whose pecuniary jurisdiction is upto Rs. 25000/- However suit was valued at Rs. 57060- Defendants' application whereby objecting to the Court's pecuniary jurisdiction, was rejected-Post amendment to Act of 1887 brought about by the U.P. Civil Laws (Amendment) Act, 2015, the pecuniary jurisdiction of Small Cause Court to try a small cause suit, including a eviction suit has been raised from Rs. 25000 to Rs. 1,00,000-Ipso facto, tenant has allowed the trial to proceed through all stages and taken the objection about lack of pecuniary jurisdiction at a stage when, post remand, trial has been concluded and judgment already on the anvil of delivery. (Paras 1 to 18)

The revision is dismissed. (E-6)

List of Cases cited:

1. Om Prakash Agarwal Since deceased thru legal Lrs & ors. Vs Vishan Dayal Rajpoot & anr. (2019) 14 SCC 526

2. Bharat Sanchar Nigam Ltd & ors. Vs Motorola India Pvt. L.t.d (2009) 2 SCC 337,

3. ICOMM Tele Ltd. Vs Punjab State Water Supply Sewerage Board & ors. (2019) 4 SCC 401

4. Parkins Eastman Architects DPC & anr. Vs HSCC (India) Ltd. AIR 2020 SC 59

5. TRF Ltd Vs Energo Engineering Projects Ltd. (2017) 8 SCC 377

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

This revision under Section 25 of the Provincial Small Cause Courts Act, 1887 (for short, 'the Act of 1887'), is directed against an order of the Additional District Judge/ Special Judge (SC/ST Act), Banda dated 17.11.2022 made in S.C.C. Suit No. 2 of 2008, rejecting the defendants' application, objecting to the Court's pecuniary jurisdiction.

2. Shorn of unnecessary details, the facts giving rise to this revision are that S.C.C. Suit No. 2 of 2008 was instituted by the plaintiff-respondents before the District Judge, Banda, sitting as the Judge, Small Cause Court. This was done, because at the time of institution of the suit, the pecuniary jurisdiction to try a small cause suit with the Judge, Small Cause Court, that is to say, the Civil Judge (Sr. Div.) in the State of Uttar Pradesh, was up to the valuation of

Rs. 25,000/-. The suit here was valued at Rs. 57,060/-

3. The suit was, therefore, instituted before the District Judge and tried by the Additional District Judge/ Special Judge (SC/ST Act), Banda, who decreed it *vide* his judgment and decree dated 25.07.2016. A revision against the said decree was carried to this Court by the tenant-revisionist, being S.C.C. Revision No. 50 of 2019. This Court *vide* judgment and order dated 13.09.2022 set aside the decree and remanded the suit for trial afresh, except Issue No. 4, the finding whereon was upheld. That issue related to the defence of the tenant being struck off under Order XV Rule 5 CPC.

4. Post remand, the tenant-revisionist raised an objection through an application dated 17.11.2022 before the Trial Judge that on account of change in pecuniary jurisdiction of the Judge, Small Cause Court *vide* U.P. Civil Laws (Amendment) Act, 2015 w.e.f. 07.12.2015, it was the Judge, Small Cause Court, who was competent to try the suit and not the Additional District Judge, exercising those powers in case of a suit beyond the pecuniary jurisdiction of the Judge, Small Cause Court. This application has been rejected by the learned Additional District Judge, trying the suit *vide* the order impugned dated 17.11.2022.

5. Aggrieved, this revision has been preferred by the tenant-revisionist.

6. Heard Mr. Shailendra, learned Counsel for the revisionists and Mr. Gulrez Khan, learned Counsel for the plaintiff-respondent No. 1.

7. It is submitted by the learned Counsel for the revisionists that once the pecuniary jurisdiction was altered by virtue of the U.P. Civil Laws (Amendment) Act, 2015, the suit that was up for trial before the Additional District Judge in consequence of the order of remand, obliged the learned Judge to direct a return of the plaint for presentation to the Court of competent jurisdiction. By rejecting the application questioning his pecuniary jurisdiction, the Trial Judge has assumed jurisdiction not vested in him. The order impugned is, therefore, patently illegal. It is pointed out that when the suit was instituted, going by the valuation thereof, which is Rs. 57,060/-, it was certainly beyond the jurisdiction of the Judge, Small Cause Court. But, after remand, in view of the supervening amendments *vide* U.P. Civil Laws (Amendment) Act, 2015, that has come into effect from 07.12.2015, the suit is not cognizable by the Additional District Judge, but by the Judge, Small Cause Court. The trial before the Additional District Judge, therefore, is without jurisdiction.

8. The learned Counsel for the revisionists has placed reliance on the decision of the Supreme Court in **Om Prakash Agarwal since deceased through legal representatives and others v. Vishan Dayal Rajpoot and another, (2019) 14 SCC 526.** Learned Counsel for the revisionists has drawn attention of the Court to the holding in **Om Prakash Agarwal** *(supra)*, which reads:

"54. As noted above, the proviso to sub-section (2) pro*vide*s that figure Rs 5000 shall be construed to Rs 25,000. By the U.P. Civil Laws (Amendment) Act, 2015, the figure of Rs 25,000 stood substituted by

Rs 1 lakh. Reading sub-section (2) read with proviso and U.P. Civil Laws (Amendment Act), 2015 clearly means that small cause suits with valuation not exceeding Rs 1 lakh shall be cognizable by the Court of Small Causes. When a small cause suit not exceeding value of Rs 1 lakh is cognizable by the Court of Small Causes, obviously, no other court can take cognizance. The Additional District Judge to whom small causes suit in question was transferred since its valuation was more than of Rs 25,000 was not competent to take cognizance of the suit after the U.P. Civil Laws (Amendment) Act, 2015 w.e.f. 7-12-2015, when the suit in question became cognizable by the Small Cause Court i.e. the Court of Civil Judge, Senior Division. To the above extent, the judgment of the learned Single Judge in Shobhit Nigam case [*Shobhit Nigam v. Batulan*, 2016 SCC OnLine All 2605 : (2016) 119 ALR 826] has to be approved and the judgment of the Single Judge in Pankaj Hotel [*Pankaj Hotel v. Bal Mukund*, 2017 SCC OnLine All 2855 : (2018) 1 All LJ 17] laying down that even after 7-12-2015, the Additional District Judge had jurisdiction to decide the suit in question cannot be approved."

9. The learned Counsel for the plaintiff-respondent has opposed the motion to admit this revision to hearing. He urges that the principle in **Om Prakash Agarwal**, otherwise well settled, is that objection, as to pecuniary jurisdiction has to be taken at the earliest point of time and not after the trial has gone through. He submits that in this case, the trial has been concluded and judgment is to be delivered. Therefore, the issue of pecuniary jurisdiction cannot be raised by the tenant at this stage, which in any case he has raised mala fide to delay judgment in the eviction suit.

10. This Court has carefully considered the submissions advanced by the learned Counsel for parties and perused the record in support of the motion.

11. In the first instance, the jurisdiction to try suits for eviction by the lessor against the lessee of a building after determination of the lease was conferred upon the Judge, Small Cause Court *vide* The Uttar Pradesh Civil Laws (Amendment) Act, 1972 (U.P. Act No. 37 of 1972) enacted by the State Legislature with Presidential assent. This was so, because under the Central Statute, the Small Cause Court does not enjoy jurisdiction by virtue of Clause (4) of the Second Schedule to the Act of 1887 to entertain a suit for possession of immovable property or for the recovery of an interest in such property.

12. Suits for eviction after the determination of lease do not involve generally questions of title and, therefore, the State Amendment was brought to entrust these suits to a Court following a summary procedure. But, while conferring jurisdiction upon the Judge, Small Cause Court, the pecuniary jurisdiction introduced *vide* U.P. Act No. 37 of 1972 was limited to a value of Rs. 5000/-. By U.P. Act No. 17 of 1991, enforced w.e.f. 15.01.1991, the pecuniary jurisdiction of the Judge, Small Cause Court was enhanced from Rs. 5000/- to Rs. 25,000/-, amending Section 15 (2) and (3) of the Central Act.

13. The Uttar Pradesh Civil Laws (Amendment) Act, 1972 also amended Section 25 of the Bengal, Agra and Assam Civil Courts Act, 1887 as applicable in the State of U.P., where by virtue of sub-Section (2) of Section 25, the State Government was empowered by

notification in the Official Gazette to confer upon any District Judge or Additional District Judge the jurisdiction of a Judge of the Court of Small Causes under the Act of 1887 for the trial of suits, irrespective of their value. Under sub-Section (3) of Section 25 of the Bengal, Agra and Assam Civil Courts Act, 1887, as amended by U.P. Act No. 37 of 1972, the State Government was empowered to delegate to the High Court by notification in the Official Gazette its powers under sub-Section (2) of Section 25. In substance, therefore, by notifications issued by the High Court, the power to try small cause suits beyond a limited pecuniary jurisdiction and of unlimited value was conferred upon the District Judges, including the Additional District Judges in the State.

14. There is no doubt that post amendment to the Act of 1887 brought about by the U.P. Civil Laws (Amendment) Act, 2015, the pecuniary jurisdiction of the Judge, Small Cause Court to try a small cause suit, including a suit for eviction, has been raised from Rs. 25,000/- to Rs. 1,00,000/-. This has been effected by the amendment made to the proviso to sub-Section (2) of Section 15 of the Act of 1887. The suit at the time it was instituted way back in the year 2008 with a valuation of Rs.57,060/- was beyond the pecuniary jurisdiction of the Judge, Small Causes Court and, therefore, instituted before the District Judge, exercising powers of the Judge, Small Causes Court in a suit beyond the pecuniary jurisdiction of the Small Causes Court. There was no occasion also to raise any objection at that time relating to the pecuniary jurisdiction. However, judgment in the suit was delivered by the Additional District Judge on 25.07.2016 and raise in the pecuniary jurisdiction of the Judge, Small Causes Court, was brought about by the U.P. Civil Laws (Amendment) Act, 2015 w.e.f. 07.12.2015. It is certainly not the revisionists' case that judgment was reserved prior to 07.12.2015 and that it was delivered on 25.07.2016 with no opportunity to him to raise an objection to the pecuniary jurisdiction, based on the supervening amendment.

15. The tenant-revisionists challenged the decree passed by the Additional District Judge before this Court *vide* S.C.C. Revision No. 50 of 2019. A perusal of the judgment in the said revision, which was allowed, setting aside the decree passed by the Additional District Judge, does not show that it was urged ever before this Court in revision that the Additional District Judge was no longer competent to try the suit, as it had been removed from his pecuniary jurisdiction, by virtue of the amendment that came in before the Trial Judge's judgment. Post remand also, it does not appear from a reading of the order impugned that the tenant has raised or at least pressed his objections about the pecuniary jurisdiction of the learned Additional District Judge at the earliest point of time. The order impugned reveals that after the remand, the whole trial has gone through and judgment alone remains to be delivered. It is at this stage that the revisionists seem to have pressed their application dated 17.11.2022, which has come to be rejected by the Trial Judge. Objection as to lack of territorial jurisdiction or pecuniary jurisdiction ought to be taken at the earliest point of time, else it would be deemed to have been waived. This is the clear purport of the provisions of Section 21 of the Code of Civil Procedure, which read:

"21. Objections to jurisdiction.-(1) No objection as to the place of suing

shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

(2) No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and, in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(3) No objection as to the competence of the executing Court with reference to the local limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the executing Court at the earliest possible opportunity, and unless there has been a consequent failure of justice."

(emphasis by Court)

16. This question was one that directly fell for consideration of their Lordships of the Supreme Court in **Om Prakash Agarwal**, where it was observed:

"57. The policy underlying Section 21 of Code of Civil Procedure is that when the case has been tried by a court on merits and the judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it has resulted in failure of justice. The provisions akin to Section 21 are also contained in Section 11 of the Suit Valuation Act, 1887 and Section 99 of the Code of Civil Procedure. This Court had the occasion to consider the principle behind Section 21, Code of Civil Procedure and Section 11 of the Suit Valuation Act, 1887 in *Kiran Singh v. Chaman Paswan [Kiran Singh v. Chaman Paswan,* AIR 1954 SC 340] . In para 7 of the judgment following was laid down: (AIR p. 342)

"7. ... The policy underlying Sections 21 and 99 of the Civil Procedure Code and Section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate court, unless there has been a prejudice on the merits. The contention of the appellants, therefore, that the decree and judgment of the District Court, Monghyr, should be treated as a nullity cannot be sustained under Section 11 of the Suits Valuation Act."

61. In *Harshad Chiman Lal Modi v. DLF Universal Ltd. [Harshad Chiman Lal Modi v. DLF Universal Ltd.,* (2005) 7 SCC 791] , this Court had again considered Section 21 and other provisions of the Code of Civil Procedure. In para 30, following has been laid down: (SCC pp. 803-04)

"30. ... The jurisdiction of a court may be classified into several categories. The important categories are (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject-matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at

a subsequent stage. Jurisdiction as to subject-matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject-matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is a nullity."

63. Now, reverting back to the facts of this case it is apparent from the judgment dated 22-10-2016 of the Additional District Judge, that no objection to the competence of the Additional District Judge to decide the case was taken by any of the parties. No objection having been taken to the pecuniary jurisdiction of the Additional District Judge, Section 21 of the Civil Procedure Code comes into play. Sub-section (2) of Section 21 pro*vide*s that no objection as to the competence of the court with reference to the pecuniary limits of the jurisdiction shall be allowed by any appellate or Revisional Court unless conditions mentioned therein are fulfilled. No objection has been raised by the respondent tenant regarding competence of the court. Sub-section (2) precludes the revisionist to raise any objection regarding competence of the court and further Revisional Court ought not to have allowed such objection regarding competence of Court of Additional District Judge to decide the suit. The respondent tenant did not raise any objection regarding competence of the court and took a chance to obtain judgments in his favour on merits, he cannot be allowed to turnaround and contend that the Court of Additional District Judge had no jurisdiction to try the small cause suit and the judgment is without jurisdiction and nullity. Section 21 has been enacted to thwart any such objection by unsuccessful party who did not raise any objection regarding competence of court and allowed the matter to be heard on merits. Further, in deciding the small cause suit by the Additional District Judge, the tenant has not proved that there has been a consequent failure of justice.

64. The High Court in the impugned judgment has not adverted to Section 21 of the Code of Civil Procedure. In the judgment of *Shobhit Nigam [Shobhit Nigam v. Batulan*, 2016 SCC OnLine All 2605 : (2016) 119 ALR 826] also, effect of Section 21 was neither considered nor raised. Section 21 contains a legislative policy which policy has an object and purpose. The object is also to avoid retrial of cases on merit on basis of technical objections.

65. There is another judgment of the Single Judge of the High Court referred to by the learned counsel for the respondent i.e. SCC Revision No. 305 of 2016, *Tejumal v. Mohd. Sarfraz [Tejumal v. Mohd. Sarfraz,* 2016 SCC OnLine All 2606 : (2017) 121 ALR 392] . In the above case, the learned Single Judge had allowed the revision under Section 25 against the judgment dated 12-8-2016 passed by the Additional District and Sessions Judge on the ground that the judgment of the Additional District Judge was without jurisdiction. In paras 7 to 9 of the judgment, the High Court had noticed the judgment of this Court in *R.S.D.V. Finance Co. (P) Ltd. v. Shree Vallabh Glass Works Ltd. [R.S.D.V. Finance Co. (P) Ltd. v. Shree Vallabh Glass Works Ltd.,* (1993) 2 SCC 130] wherein it was held that in view of Section 21(1) of the Code of Civil Procedure, objection as to the place of suing should be taken by the party concerned in the court of first instance at the earliest possible opportunity and the objection to this effect shall not be allowed by the appellate or Revisional Court but

relying on the judgment of this Court in *Kiran Singh v. Chaman Paswan [Kiran Singh v. Chaman Paswan,* AIR 1954 SC 340] , the learned Single Judge held that defect of jurisdiction whether pecuniary or territorial or to the subject-matter cannot be cured and can be set up at any stage of the proceeding.

69. We thus hold that even when the Court of Additional District Judge was not competent to decide the small causes suit in question on the ground that the pecuniary jurisdiction is vested in the Court of Small Causes i.e. Civil Judge, Senior Division w.e.f. 7-12-2015, no interference was called in the judgment of the Additional District Judge in the exercise of revisional jurisdiction by the High Court in view of the provisions of Section 21 of the Civil Procedure Code."

17. The aforesaid position of the law makes it clear that "pecuniary jurisdiction' and "territorial jurisdiction' are different from "jurisdiction relating to subject matter' or inherent lack of jurisdiction. The first two have to be raised at the earliest opportunity; else, these must be deemed to be waived. As remarked by the Supreme Court in **Om Prakash Agarwal**, the legislative policy is not to defeat a concluded trial on merits on the basis of a technical objection, like pecuniary or territorial jurisdiction. This precisely is the case here, where the tenant has allowed the trial to proceed through all stages and taken the objection about lack of pecuniary jurisdiction at a stage when, post remand, the trial has been concluded and the judgment already on the anvil of delivery.

18. In the considered opinion of this Court, there is no merit in this revision. It **fails** and is **dismissed.**

(2023) 1 ILRA 122
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.01.2023

BEFORE

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

Civil Misc. Transfer Application No. 68 of 2022
Transfer Application (Civil) No. 278 of 2016
Transfer Application (Civil) No. 394 of 2022
Transfer Application (Civil) No. 466 of 2022
Transfer Application (Civil) No. 505 of 2022
Transfer Application (Civil) No. 778 of 2022
And
Transfer Application (Civil) No. 809 of 2022

Smt. Juglesh Kumari & Ors. ...Applicants
Versus
Ifco Tokiyo General Insurance Co. Ltd., Agra ...Opposite Party

Counsel for the Applicants:
Sri Prashant Shukla

Counsel for the Respondents:

A. Civil Law - Code of Civil Procedure, 1908 - Sections 24(1)(b) & 24-Transfer application-maintainability of-Certain questions referred for consideration by Larger Bench-(1) Whether Tribunal constituted under Motor Vehicles Act, 1988 is a court subordinate to High Court for purpose of exercise of power of transfer u/s 24(1)(b) of Code-(2) Whether by extension of principle laid down by Full Bench in Kamal Yadav case a Tribunal constituted under Motor Vehicles Act,1988 is a court subordinate to High Court for purpose of Section 24(1)(b) of the Code-(3) Whether decision of single Judge in Shankar Lal Jaiswal's case correctly lays down law in holding that a Tribunal constituted under Motor Vehicles Act, 1988 is not court subordinate to High Court within meaning of section 24 of Code-Till decision of Larger Bench there shall be interim stay of further proceedings in pending petitions before Claim Tribunals.(Para 1 to 8) (E-6)

List of Cases cited:

1. Shankar Lal Jaiswal Vs Asha Devi & ors.(2018) SCC Online All 2545: (2019) 132 ALR 809

2. Kamla Yadav Vs Smt. Sushma Devi & ors.(2004) 22 LCD 40

3. Smt. Afsari Begum Vs Oriental Fire & Gen. Ins. Co. & ors.(1979) SCC Online All 191: 1979 AWC 438

4. Kamla Yadav Vs Smt. Sushma Devi ors. 2004 (22) LCD 40

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

1. The question of maintainability of these applications under Section 24 of the Code of Civil Procedure, 19081 has arisen in view of the decision of a learned Single Judge in ***Shankar Lal Jaiswal v. Asha Devi and others2. In Shankar Lal Jaiswal*** *(supra)* the learned Single Judge has held that an application under Section 24 of the Code to transfer a claim petition pending before the Motor Accident Claims Tribunal would not lie to this Court. It has been held in the said decision that a Tribunal constituted under the Motor Vehicles Act, 19883 is not a Court subordinate to the High Court, within the meaning of Section 24(1)(b) of the Code. No transfer application would lie to this Court for transferring a claim petition from one Motor Accident Claims Tribunal to another, constituted under the Act. It would be profitable to quote in extenso what was held in **Shankar Lal Jaiswal**, which is as follows :

3. A Motor Accident Claim Petition is filed before a Motor Accident Claims Tribunal, which is constituted by the State Government in accordance with the provisions contained in Section 165 of the Motor Vehicles Act, 1988 (hereinafter referred to as the Act). This section empowers the State Government to constitute by notification, one or more motor accidents Claims Tribunals for the area specified in the notification, for adjudicating claims for compensation in respect of accidents involving death or bodily injury to persons arising out of the use of a motor vehicle or for damage to any property of a third party, so arising or both.

4. This section also provides the qualification of a person for his appointment as a Member of the Claims Tribunal.

5. Sub-section 4 of Section 165 states that where two or more Claims Tribunals are constituted for one area, the State Government can, by a special or general order, regulate the distribution of business among them.

6. In accordance with Section 166(2) of the Act, a claimant can file a claim petition before a Claims Tribunal.

(i) having jurisdiction over the area in which the accident occurred

or

(ii) Claims Tribunal within whose local limits the claimant resides or carries on business

or

(iii) within the local limits of whose jurisdiction the defendant resides.

7. Section 169 provides the procedure and powers of the Claims Tribunals constituted by the State Government by notification in exercise of powers conferred by Section 165. It provides that the Claims Tribunal may follow such summary procedure as it things fit, subject to the Rules that may be made for the purpose.

8. Sub-section 2 of Section 169 provides that the Claims Tribunal shall have all powers of a Civil Court for the

purpose of taking evidence on oath, enforcing attendance of witnesses and for compelling discovery and production of documents and material objects.

9. It is also deemed to be a Civil Court for the purposes of Section 195 and Chapter 26 of the Code of Criminal Procedure, 1973.

10. Section 175 specifically bars the jurisdiction of Civil Courts for an area where a Claims Tribunal has been constituted by the State Government, under Section 165.

11. Section 176 confers the Rule making power upon the State Government. It also provides that Rules can be framed regarding the powers of a Civil Court, which may be exercised by a Claims Tribunal.

12. In exercise of the aforementioned rule making power, the U.P. Motor Vehicle Rules, 1998 have been framed. Rule 221 thereof, reads as follows:--

"221. ***Code of Civil Procedure to apply in certain cases.-*** *The following provisions of the First Schedule to the Code of Civil Procedure, 1908 shall so far as may be apply to proceedings before the Claims Tribunal, namely, Rules 9 to 13 and 15 to 30 of Order V; Order IX, Rules 3 to 10 of Order XIII, Rules 2 to 21 of Order XVI; Order XVII; and Rules 1 to 3 of Order XXIII."*

13. From a conjoint reading of the provisions noticed above, it emerges that the Motor Vehicle Act is a complete code in itself. It is also clear from a bare reading of Rule 221 that Section 24 of the Civil Procedure Code has no application to matters before the Motor Accident Claims Tribunal.

14. Section 24, Civil Procedure Code, which has been invoked in these transfer applications, confers a general power of transfer and withdrawal of a suit, appeal or proceeding upon the High Court or the District Judge, pending in any Court subordinate to them.

15. The words "subordinate to it" occurring in Section 24(1)(b) are, in my considered opinion, crucial for deciding the controversy at hand.

16. Since a Claims Tribunal is created by a notification of the State Government under the provisions of the Motor Vehicles Act, it cannot be said that such Tribunal is a Court subordinate to the High Court within the meaning of the term occurring in Section 24 CPC, despite the fact that an award of the Claims Tribunal is appealable to the High Court under Section 173.

2. This matter has come up before me sitting singly. Speaking for myself, I could not have agreed more both with the reasoning and the conclusions of the learned Single Judge in **Shankar Lal Jaiswal**. But, a difficulty is posited because, in the exercise of revisional jurisdiction of this Court, the same question had arisen before the Full Bench in **Kamla Yadav v. Smt. Sushma Devi and others4**, where the Full Bench had the following questions for consideration of their Lordships :

Whether Claims Tribunal constituted under the Motor Vehicles Act is a subordinate Civil Court within the meaning of Section 115 of the Code of Civil Procedure?

Whether in view of the provision of Section 3 of the Code of Civil Procedure for the purposes of the Civil Procedure Code only the Courts referred to in Section 3 are the Civil Courts subordinate to the High Court and the District Court as the case may be and no other i.e. the authorities

and that Tribunals such as one constituted under Motor Vehicles Act do not come within the framework of expression "Courts subordinate to High Court" for the purpose of Section 115 of the Code?

Whether the view expressed by the Division Bench in Mussamant Afsari Begum v. Oriental Fire and General Insurance Company, reported in (1979 ALJ page 1168) to the effect that Claims Tribunal constituted under Motor Vehicles Act is a Court subordinate to High Court and its orders are amenable to revisional jurisdiction of the High Court under Section 115 of the Code is in consonance with the letter and spirit of provisions of Section 115 read with Section 3 of the Code of Civil Procedure as well as provisions of Motor Vehicles Act and in particular Section 110-C(2) Motor Vehicles Act, if not, is the present revision maintainable in this Court? If not, is it open to this Court to entertain, hear and dispose of the same under Article 227 of the Constitution?

3. These questions were answered by the Full Bench thus :

Our answer to question No. 1 is in affirmative, that a revision lies against an order of the Motor Accidents Claims Tribunal. Our answer to question No. 2 is that the Courts mentioned in Section 3 CPC are not the only Civil Courts, other Courts and Tribunals can also be Civil Courts subordinate to the High Court, for the purposes of Section 115 CPC. Our answer to question No. 3 is that the judgment rendered in the case of Mussamat Afsari Begum v. Oriental Fire & General Assurance Company. 1979 ALJ 1168, has been rightly decided and is approved. Hence, the question of invoking Article 227 of the Constitution of India does not arise.

4. If the Motor Accident Claims Tribunal constituted under the 1988 Act is a Court subordinate to this Court, for the purpose of Section 115 of the Code, I do not see any reason why it would not be subordinate for the purpose of Section 24(1)(b) of the Code. The attention of the learned Single Judge in **Shankar Lal Jaiswal** was not drawn to the holding of the Full Bench in **Kamla Yadav** and no argument seems to have been addressed in this regard. Howsoever convincing the opinion of the learned Single Judge on its own reasoning might be, it is difficult to come out of the binding precedent in **Kamla Yadav**, which holds in answer to Question No. 2 that the Courts mentioned in Section 3 of the Code are not only the Civil Courts, but Tribunals can also be Civil Courts subordinate to the High Court for the purpose of Section 115 of the Code. The Full Bench also approved the holding of an earlier Division Bench in **Smt. Afsari Begum v. Oriental Fire and General Insurance Company and others5,** where the Division Bench answered the question referred by the learned Single Judge to the effect that the Claims Tribunal constituted under the Motor Vehicles Act, 1939 is a Civil Court amenable to the jurisdiction of this Court under Section 115 of the Code. In **Afsari Begum** *(supra)* it was held :

5. Section 110-D confers appellate jurisdiction on the High Court against awards made by the Claims Tribunal provided the amount in dispute in the appeal is not less than Rs. 2,000/-. It is thus apparent that the legislature has conferred appellate jurisdiction on the High Court against awards made by the Claims Tribunal. It has not been disputed that the Claims Tribunal is, in the eye of law, a Court exercising civil jurisdiction. If the tribunal is a Civil Court it cannot be

gainsaid that it was a civil Court subordinate to the High Court.

6. It has been stated by the Supreme Court that revisional jurisdiction possessed by the High Court is a part of its appellate jurisdiction (See *Shankar Ram Chandra Abhayankar v. Krishnaji Dattatraya Bapat* [(1969) 2 SCC 74 : A.I.R. 1970 S.C. 1.] . In that case, it was observed:

"Section 115 of the Code of Civil Procedure circumscribes the limits of the jurisdiction but the jurisdiction which is being exercised is a part of the general appellate jurisdiction of the High Court as a superior Court. It is only one of the modes of exercising power conferred by the Statute, basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense."

7. It is thus evident that the Claims Tribunal being a Civil Court was amenable to the revisional jurisdiction of the High Court under Section 115 of the Code of Civil Procedure because it was a Court subordinate to the High Court.

8. We, therefore, answer the question referred to us by holding that a revision under Section 115 of the Code of Civil Procedure is maintainable against the order passed by the Claims Tribunal on the ground that such a tribunal is a Court subordinate to the High Court within the meaning of Section 115 of the Code of Civil Procedure.

5. Sitting singly, it would not be appropriate for me to hold contrary to the learned Single Judge in **Shankar Lal Jaiswal**, extending the principle that Full Bench has laid down regarding exercise of this Court's jurisdiction under Section 115 of the Code to the power of transfer under Section 24(1)(b) of the Code, in relation to Tribunals constituted under the Act.

6. The following questions are, accordingly, referred for consideration by a larger Bench :

(1). Whether a Tribunal constituted under the Motor Vehicles Act, 1988 is a Court subordinate to the High Court for the purpose of exercise of power of transfer under Section 24(1)(b) of the Code of Civil Procedure, 1908?

(2). Whether by extension of the principle laid down by the Full Bench in **Kamla Yadav v. Smt. Sushma Devi and others**, **2004 (22) LCD 40** a Tribunal constituted under the Motor Vehicles Act, 1988 is a Court subordinate to the High Court for the purpose of Section 24(1)(b) of the Code of Civil Procedure, 1908?

(3). Whether the decision of the learned Single Judge in **Shankar Lal Jaiswal v. Asha Devi and others, (2018) SCC OnLine All 2545 : (2019) 132 ALR 809** correctly lays down the law in holding that a Tribunal constituted under the Motor Vehicles Act, 1988 is not a Court subordinate to the High Court within the meaning of Section 24 of the Code of Civil Procedure, 1908?

7. Till decision by the larger Bench, there shall be interim stay of further proceedings in the pending petitions before the Claim Tribunals subject matter of these applications.

8. The Registry is directed to lay the papers before His Lordship the

Hon'ble The Chief Justice for being placed before a larger Bench.

(2023) 1 ILRA 127
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.02.2023

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Special Appeal Defective No. 5 of 2023

State of U.P. & Ors. ...Appellants
Versus
C/M, Seth Jaipuriya School, Lko ...Respondent

Counsel for the Appellants:
C.S.C.

Counsel for the Respondent:
Som Kartik Shukla, Ashok Kumar Singh

A. Procedural Law – Special Appeal – Delay – Condonation – Principle of adopting liberal approach – Applicability – Held, unless there is a specific statutory provision restricting the powers of the Court to condone delay, the court should adopt a liberal approach while scrutinizing the sufficiency of the cause shown for the delay and adoption of a strict standard of proof in case of the Government, which is dependent on the actions of its officials, who often do not have any personal interest in its transactions, may lead to grave miscarriage of justice and therefore, certain amount of latitude is permissible to the St. in such cases. (Para 17)

Delay in filing Special Appeal condoned. (E-1)

List of Cases cited:

1. Indian Oil Corp. Ltd.& ors. Vs Subrata Borah Chowlek & anr., 2010 14 SCC 419

2. Esha Bhattacharjee Vs Mg. Committee of Raghunathpur Nafar, 2013 12 SCC 649

3. National Spot Exchange Ltd. Vs Anil Kohli, 2021 SCC OnLine SC 716

4. St. of M.P. Vs Bherulal, 2020 10 SCC 654

5. St. of U.P. Vs Sabha Narain, 2022 9 SCC 266

6. U.O.I. Vs Vishnu Aroma Pouching (P) Ltd.; 2022 9 SCC 263

7. National Spot Exchange Ltd. Vs Anil Kohli, Resolution Professional For Dunar Foods Ltd.; 2021 SCC OnLine SC 716

8. St. of M.P. Vs Bherulal; (2020) 10 SCC 654

9. St. of U.P. Vs Sabha Narain; (2022) 9 SCC 266

10. U.O.I. Vs Vishnu Aroma Pouching (P) Ltd.; (2022) 9 SCC 263

11. Antiyur Town Panchayat Vs G. Arumugam; (2015) 3 SCC 569

12. Indian Oil Corpn. Ltd. VsS ubrata Borah Chowlek; (2010) 14 SCC 419

13. Esha Bhattacharjee Vs Raghunathpur Nafar Academy; (2013) 12 SCC 649

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

C.M. Application No.1 of 2023 (Application for Condonation of Delay)

1. Heard Shri Amitabh Kumar Rai, learned Additional Chief Standing Counsel for State-appellant and Shri Prashant Chandra, learned Senior Advocate assisted by Shri Anshuman Singh, learned counsel for the respondent.

2. By means of the instant application, the appellant- State of U.P. is seeking

condonation of delay of 65 days in filing the special appeal.

3. In the affidavit filed in support of the application filed for condonation of delay, it has been stated that by means of the order dated 27.09.2022 passed by learned Single Judge in Writ C No.522 of 2022, the appellants were directed to grant No-Objection Certificate for admission sought by the respondent within a period of two months. A copy of the judgment and order dated 27.09.2022 passed in Writ-C No.522 of 2022 was served by Manager of the respondent/ School, along with its representation dated 12.10.2022. On 05.11.2022, a meeting of the designated Regional Committee was held and after due deliberation, it was decided to file a special appeal challenging the judgment and order dated 27.09.2022. On 05.11.2022 itself, a letter was sent to the State Government as well as to the Chief Standing Counsel of the State Government for giving his legal opinion. The Chief Standing Counsel gave his opinion by means of letter dated 18.11.2022, which was received in the Office of Joint Director, Education on 23.11.2022. Joint Director forwarded the letter on the same date to the State Government seeking permission to file special appeal.

4. The affidavit further stated that on 08.11.2022, the State Government sought details from the Director Education (Secondary), U.P. regarding the grounds and basis for challenging the judgment and order dated 27.09.2022. The Joint Director, Education replied to the aforesaid letter on the next following day, i.e., 09.12.2022. On 21.12.2022, the State Government granted permission for filing the Special Appeal and a letter was sent to the Chief Standing Counsel for preparation of the special appeal. On 23.12.2022, the file was allotted to one of the State Government Counsel for preparation of the special appeal and thereafter it was filed on 02.01.2023, that is, on the next following working day.

5. The respondents has filed a counter affidavit in response to the application for condonation of delay. Shri Prashant Chandra, learned Senior Advocate appearing for the respondents has drawn our attention to the submissions made in the paragraph nos.8 and 9 of the counter affidavit, wherein it has been stated that filing of the special appeal is not advancing the cause of substantial justice but giving vent to the personal grudge of the Joint Director, Education; that the law of limitation is to be adhered to by all and the State Government cannot claim any privilege as it is not above the law.

6. The State-appellant has relied upon the decisions in the cases of **Indian Oil Corp. Ltd. and others vs. Subrata Borah Chowlek and another,** 2010 14 SCC 419, **Esha Bhattacharjee vs. Mg. Committee of Raghunathpur Nafar,** 2013 12 SCC 649.

7. Shri Prashant Chandra, learned Senior Advocate has placed reliance on the judgments rendered in the case of **National Spot Exchange Limited vs. Anil Kohli,** 2021 SCC OnLine SC 716, **State of M.P. vs. Bherulal,** 2020 10 SCC 654, **State of U.P. vs. Sabha Narain,** 2022 9 SCC 266 and **Union of India vs. Vishnu Aroma Pouching (P) Ltd.,** 2022 9 SCC 263.

8. The appellant has filed a rejoinder affidavit giving the detailed particulars of the facts pleaded in the affidavit filed in support of the application filed for condonation of delay in filing the appeal

and copies of the relevant documents have been annexed in the rejoinder affidavit.

9. We have considered the facts, circumstances of the case, submissions made and the pleadings rendered upon by learned counsel for the parties.

10. **National Spot Exchange Limited Versus Anil Kohli, Resolution Professional For Dunar Foods Limited** 2021 SCC OnLine SC 716 was a case arising out of rejection of an application for condonation of delay in an appeal filed under the Insolvency and Bankruptcy Code, and Section 61(2) of the Code provides the limitation for filing an appeal to be 30 days and the Appellate Tribunal has been given the power to condone the delay of only 15 days over the period of 30 days, if there is a sufficient cause. Beyond the period of 15 days, over the period of 30 days, the Appellate Tribunal has no jurisdiction to condone the delay. The case was decided in this factual and legal background whereas in the present case, there is no limit on the power of this Court to condone the delay in filing the Special Appeal.

11. In **State of M.P. v. Bherulal,** (2020) 10 SCC 654, The special leave petition had been filed with a delay of 663 days and the reason for the delay was stated to be only *"due to unavailability of the documents and the process of arranging the documents" and it was also stated that "bureaucratic process works, it is inadvertent that delay occurs"*. In the aforesaid background the Hon'ble Supreme Court imposed a cost of Rs.25,000/- and ordered the same to be recovered from the officers responsible.

12. In **State of U.P. v. Sabha Narain**, (2022) 9 SCC 266, the special leave petition had been filed with a delay of 502 days and the Court found that the petitioner had acted in a casual manner, without any cogent or plausible ground for condonation of delay. The Supreme Court even observed that *"In fact, other than the lethargy and incompetence of the petitioner, there is nothing which has been put on record."* Yet the Hon'ble Supreme Court condoned the delay by imposing a cost of Rs. 25,000/-.

13. In **Union of India v. Vishnu Aroma Pouching (P) Ltd.,** (2022) 9 SCC 263 also, the Hon'ble Supreme Court found that *"there is no reason to condone the delay.* The Hon'ble Supreme Court expressed the view that *"such kind of lethargy on the part of the Revenue Department with so much computerisation having been achieved is no more acceptable."* Yet the Hon'ble Supreme Court condoned the delay after imposing a cost of Rs.25,000/-.

14. In **Antiyur Town Panchayat v. G. Arumugam,** (2015) 3 SCC 569, the High Court had condoned a delay of 1373 days in filing the appeal and this order was challenged before the Hon'ble Supreme Court. The Hon'ble Supreme Court held as follows: -

"we are satisfied that the delay occasioned only on account of the deliberate lapses on the part of the Executive Officer of the Panchayat at the relevant time. Who else are involved in the process, is not quite clear.

4. As held by this Court in State of Nagaland v. Lipok Ao (2005) 3 SCC 752, the court must always take a justice-oriented approach while considering an application for condonation of delay. If the court is convinced that there had been an attempt on the part of the government

officials or public servants to defeat justice by causing delay, the court, in view of the larger public interest, should take a lenient view in such situations, condone the delay, howsoever huge may be the delay, and have the matter decided on merits."

15. In **Indian Oil Corpn. Ltd. v. Subrata Borah Chowlek,** (2010) 14 SCC 419, the Hon'ble Supreme Court held that: -

"10. It is manifest that though Section 5 of the Limitation Act, 1963 envisages the explanation of delay to the satisfaction of the court, and makes no distinction between the State and the citizen, nonetheless adoption of a strict standard of proof in case of the Government, which is dependent on the actions of its officials, who often do not have any personal interest in its transactions, may lead to grave miscarriage of justice and therefore, certain amount of latitude is permissible in such cases."

16. In **Esha Bhattacharjee v. Raghunathpur Nafar Academy,** (2013) 12 SCC 649, after taking into consideration various earlier pronouncements on the subject, the Hon'ble Supreme Court culled the following broad principles: -

"21.1. (i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

21.2. (ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

21.3. (iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

21.4. (iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.5. (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

21.6. (vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

21.7. (vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.

21.8. (viii) There is a distinction between inordinate delay and a delay of short duration or few days, *for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.*

21.9. (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

21.10. (x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

21.11. (xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

21.12. (xii) The entire gamut of facts are to be carefully scrutinised and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

21.13. (xiii) ***The State or a public body or an entity representing a collective cause should be given some acceptable latitude.***

22. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are:

22.1. (a) An application for condonation of delay should be drafted with careful concern and not in a haphazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

22.2. (b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

22.3. (c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

22.4. (d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters."

(Emphasis supplied)

17. From a persual of the aforesaid decisions of the Hon'ble Supreme Court, the principle governing condonation of delay is that unless there is a specific statutory provision restricting the powers of the Court to condone delay, the court should adopt a liberal approach while scrutinizing the sufficiency of the cause shown for the delay and adoption of a strict standard of proof in case of the Government, which is dependent on the actions of its officials, who often do not have any personal interest in its transactions, may lead to grave miscarriage of justice and therefore, certain amount of latitude is permissible to the State in such cases.

18. Examining the facts of the present case in light of the relevant law on the point as discussed above, it appears that there is a delay of 65 days in filing the Special Appeal, which cannot be said to be an "inordindate delay'. The facts pleaded in the affidavit filed in support of the affidavit filed in support of the application for delay, which have been extracted in paras 3 and 4 of this order, make out a sufficient cause for condoning the delay in filing the Special Appeal.

19. In view of the aforesaid discussion, the delay in filing the Special Appeal is hereby condoned and the office is directed to allot a regular Number to the Special Appeal.

20. The learned counsel for the appellant has submitted that a contempt petition has been filed for disobedience of the order dated 27.09.2020 passed in Writ C No. 522 of 2022, which is under challenge in the Special Appeal.

21. As the validity of the order is being examined in this Special Appeal, to

secure the interests of justice it is provided that further proceedings of the contempt case arising out of the order dated 27.09.2020 passed in Writ C No. 522 of 2022, shall remain stayed till the pendency of the appeal.

22. Office is directed to allot regular number.

23. List the appeal for final disposal on **22.02.2023.**

(2023) 1 ILRA 132
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.01.2023

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ A No. 23384 of 2020

Dr. Priyanka Garg ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for thePetitioner:
Gaurav Mehrotra, Abhineet Jaiswal

Counsel for the Respondents:
C.S.C.

A. Service Law – Right of resignation – Petitioner, an Associate Professor, being mother claimed the child care leave and medical leave – It was neither sanctioned nor salary was paid – Resignation tendered by the petitioner was rejected on the ground of public interest – Disciplinary proceeding also initiated – Validity challenged – Held, the petitioner had a right to resign on 24.02.2020 and her resignation had to be accepted as till that date neither any departmental inquiry was initiated against her nor there was any other reason available to the respondents for not accepting the resignation – High Court directed the respondent to treat the petitioner to be in service till 24.02.2020. (Para 9 and 13)

Writ petition allowed. (E-1)

List of Cases cited:

1. Writ A No. 4813 of 2021; Dr. Sonal Sachadev Aurora Vs St. of U.P. & ors. decided on 08.03.2022

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Heard learned counsel for petitioner Sri Gaurav Mehrotra & Sri Abhinit Jaiswal and learned Standing Counsel for the State.

2. Despite the best efforts of all still, how a working woman can be harassed even in this era is reflected in the facts of the present case. Petitioner, a doctor by qualification, after getting selected by U.P. Public Service Commission, in furtherance of appointment letter dated 01.09.2010, joined as a lecturer at the Lala Lajpat Rai Memorial Medical College, Meerut & was subsequently promoted to the post of Associate Professor. On 19.09.2018, the petitioner was transferred from Meerut Medical College to Saharanpur Medical College. Though the petitioner has challenged the aforesaid transfer order, it could not succeed. Meanwhile, the State Government made an arrangement vide Office Memorandum dated 19.07.2019 whereby the petitioner along with some other Doctors were directed to render their services at Saharanpur Medical College along with the previous place of posting of petitioner i.e., Meerut Medical College.

3. The petitioner by means of several applications expressed her difficulty in rendering the services & sought child-care leave on account of medical issue of her

daughter who has a severe case of Bronchial Asthma and suffers from frequent Asthmatic attacks which requires tonsillectory plus immune therapy as well as constant care & attention.

4. The petitioner has further contended that neither her leave was sanctioned nor the salary was paid to her. The petitioner further submitted that she preferred a representation before respondent No.1 on 01.01.2020 & 08.01.2020 apprising therein that five applications had been preferred by her seeking child-care leave & medical leave, however, none of them were considered. It was also apprised that the petitioner has not even been paid her salary for the period July 2019 to September 2019 & January 2020 to 24.02.2020. The petitioner by means of representation dated 01.01.2020 & 08.01.2020 requested respondent No.1 to consider her bonafide & genuine claim else she will be left with no other choice than to resign from the service.

5. It had been further stated that when no action on the aforesaid representation was taken by respondent No.1, the petitioner ultimately tendered her resignation on 24.02.2020. Shockingly, neither the resignation tendered by the petitioner was accepted nor rejected by respondent No.1 till 23.05.2020 i.e., till 3 months notice period for accepting her resignation expired.

6. It was after a lapse of more than 7 months from the date when the petitioner tendered her resignation that the impugned order dated 25.09.2020 was issued by respondent No.1 whereby an enquiry on account of being absent from duty was initiated against the petitioner. Further by means of another impugned order dated 26.09.2020 issued by respondent No.1, the resignation tendered by the petitioner was rejected on the ground of public interest.

7. On 02.12.2020, when the present matter was taken up while staying the disciplinary proceedings initiated against the petitioner vide order dated 25.09.2020, this Court passed the following order:-

"Heard Shri Gaurav Mehrotra, learned counsel for petitioner and Shri P. K. Singh, leamed Additional Chief Standing Counsel for State.

Perused Annexure No. 8 which is, inter alia, a leave application by petitioner which was not acceded to nor was it rejected by communicating any such order. She tendered her resignation on 24.02.2020 as on account of the reasons mentioned in the said letter and other reasons pertaining to the health of her child etc. she was unable to leave Meerut permanently and work at Saharanpur where she had been working since 2017 as alleged. The notice period for resignation expired on 24.05.2020 during which no decision was communicated to her. It is said that it is only in July, 2020 that the Director General, Medical Education and Training, U.P Lucknow communicated the offer of resignation by petitioner dated 24.02.2020 to Principal Secretary who instead of taking a decision on the same initiated disciplinary proceedings against petitioner on 25.09.2020 for absence w.e.f. 21.03.2020 inspite of her letter of resignation not having been accepted in terms of Rule 4 and 5 of the Uttar Pradesh Goverment Servants Resignation Rules, 2000.

It is true that as per Rules and resignation becomes effective only on being accepted and not otherwise and Rule 5(iii) provides a ground for rejection of such

offer of resignation if an inquiry is contemplated or pending against applicant and in ordinary course the petitioner if she was unable to work for the reasons stated by her, she should have been taken leave instead of abstaining from work, but considering the over all facts and circumstances of the case, this is hardly a matter where action as impugned herein should have been taken. After initiation of disciplinary proceedings on 25.09.2020 her request for resignation has been rejected on the next date i.e. 26.09.2020

Let opposite parties justify the impugned action in the facts of the present case and as to why such a trivial matter should culminate in such action. Why should the matter not be given a quietus by accepting leave of petitioner without pay w.e.f. 21.03.2020 and allowing her to resign.

Let an affidavit be filed by the opposite parties positively within a period of 10 days.

She is permitted to apply for leave as per rule w.e.f. 21.03.2020 albeit without pay. List/ put up on 15.12.2020 as fresh.

Till the next date of listing the disciplinary proceedings against the petitioner shall remain stayed.

Let a copy of this order be given to learned counsel for parties within 48 hours on payment of usual charges."

8. By means of the aforesaid order dated 02.12.2020 passed by this Court, the opposite parties were given an opportunity to justify their impugned action. Alternatively, this Court had also indicated to the opposite parties to re-visit their orders by expressing that such a trivial matter should be given quietus by accepting leave of the petitioner without pay w.e.f. 21.03.2020 and allowing her to resign. However, in the Counter Affidavit, there is no mention of the impugned orders having been revisited by the opposite parties, as required by this Court.

9. The facts of the case clearly indicates that petitioner, a mother was facing difficulty in handling both, a child in need of care as well as her job with the State Government. In the given circumstances, initially, she applied for leave as may be granted to her under the service rules and finding that the same is not possible she even resigned on 24.02.2020. The resignation was kept pending for as good as seven months and the impugned orders dated 25.09.2020 & 26.09.2020 were passed. Any working woman, more particularly, a mother is required to be accommodated as far as possible. Presuming the worst, it was not possible for the department to grant any further leave to the petitioner, including leave without pay. suffice would have been in the given circumstances to accept the resignation of the petitioner. This Court fails to understand what purpose is achieved by the respondents by keeping the petitioner in service from 24.02.2020 i.e. from the date of resignation onwards. During the said period, they could not appoint any other person in place of the petitioner, therefore, the work of the college continued to suffer and the public at large in no manner benefited. The entire issue could have been best served by accepting her resignation. The petitioner had a right to resign on 24.02.2020 and her resignation had to be accepted as till that date neither any departmental inquiry was initiated against her nor there was any other reason available to the respondents for not accepting the resignation. Even her immediate superior administrative authority, i.e., the principal of the college,

had recommended accepting her resignation from the service.

10. Learned Counsel for the petitioner has placed reliance upon the judgment & order dated 08.03.2022 passed in ***Writ-A No. 4813 of 2021, Dr. Sonal Sachadev Aurora Vs. State of U.P. & others.***

11. Learned Standing Counsel also could not place any reason for not accepting the resignation of the petitioner.

12. This Court finds that the case of the petitioner is squarely covered by the judgment of ***Dr. Sonal Sachdeva*** (Supra). The petitioner in the given facts and circumstances is treated arbitrarily by the respondents. The respondents were bound to accept the resignation of the petitioner and, there was no necessity to conduct any inquiry against the petitioner.

13. In view of the aforesaid, the impugned orders dated 25.09.2020 & 26.09.2020 are hereby quashed. The respondents shall treat the petitioner as having resigned from her post w.e.f. 24.02.2020 and shall grant her benefit which she is entitled to by treating her to be in service till 24.02.2020. Such an exercise shall be conducted expeditiously, say in not more than two months from the date a copy of this order is placed before respondent no.2, Director, Medical Education & Training, 6th Floor, Jawahar Bhawan, Lucknow.

14. With the aforesaid, the writ petition is ***allowed.***

(2023) 1 ILRA 135
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.01.2023

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ A No. 23866 of 2019
Connected with
Writ A No. 24438 of 2019
and
Writ A No. 24805 of 2019
and
Writ A No. 28 of 2023

Ravi Prakash & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Laltaprasad Misra, Prafulla Tiwari

Counsel for the Respondents:
C.S.C., Gaurav Mehrotra, Utsav Mishra

A. Service Law – U.P. Home Guards Department Subordinate Service Rules, 1982 – R. 15 – Post of Platoon Commander and Block Organizer – Selection – Clause 2(2) of the advertisement provide for physical efficiency test – Legality challenged – Petitioner did not appear in physical efficiency test inspite of order of this Hon'ble Court – Effect – Held, after participating in the selection process, it is not open for the petitioners to challenge the same, that too, at a later stage – *Ramesh Chandra Shah's case relied upon* – Held further, once it is found that physical efficiency test is necessary and petitioners have not appeared in the same, their claim is liable to be rejected. (Para 13 and 22)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Ramjit Singh Kardam & ors. Vs Sanjeev Kumar& ors.; (2020) 20 SCC 209

2. K. Manjusree Vs St. of Andhra Pradesh & anr.; (2008) 3 SCC 512.

3. Ramesh Chandra Shah & ors. VsAnil Joshi & ors.; (2013) 11 SCC 309

4. Dhananjay Malik & ors. Vs St. of Uttaranchal& ors.; (2008) 4 SCC 171

5. Civil Appeal No. 1924 of 2010; Sankar Mondal Vs St. of W.B. & ors. decided on 15.2.2022

6. Writ A No. 2460 of 2022; Smt. Vijay Laxmi& ors. Vs St. of U.P.& ors. decided on 29.4.2022

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Heard Dr. L.P. Mishra assisted by Sri Naveen Shukla as well as Sri Birendra Pratap Singh and Sri Manish Mishra, learned counsel for the petitioners, Sri Praful Yadav, learned Standing Counsel for the State and Sri Utsav Mishra, learned counsel for the Commission.

2. The petitioners have challenged the physical efficiency test as prescribed by order dated 8.7.2019 for appearing in the physical efficiency test scheduled to be held between 9.9.2019 to 11.9.2019 for the post of Platoon Commander, Home Guards and on 12.9.2019 and 13.9.2019 for the post of Block Organizer, Home Guards at Lucknow. They claim that they may not be subjected to such physical efficiency test. In the alternative, the petitioners have sought a relief of certiorari for quashing Clause 12(2) of the Advertisement No.02-Examination/2016 so far as it prescribes for holding a physical efficiency test for selection to the post of Platoon Commander and Block Organizer in the Home Guards Department.

3. The facts of the case are that in the year 2016, Advertisement No.02-Examination/2016 was issued for combined subordinate services selection by which, large number of vacancies of different departments were advertised. Under the said advertisement, vacancy for the post of Platoon Commander and Block Organizer of the Home Guards Department was also advertised. For the said post, selection process included written and interview tests and further, physical efficiency test as well as physical measurements. The physical measurements were prescribed in the advertisement.

4. Learned counsel for the petitioners submit that appointments on the aforesaid posts are to be made under the U.P. Home Guards Department Subordinate Service Rules, 1982 (for short 'the Rules of 1982') read with U.P. Subordinate Services Selection Commission Act, 2014 (for short 'the Act of 2014') and its Regulations.

5. Challenging the said selection, learned counsel for the petitioners submit that the Rules of 1982 do not provide for a physical efficiency test and the said Rules only provide for physical measurements. It is further submitted that the physical efficiency test could not have been provided in midway of the selection process after the advertisement is made. Learned counsel further submit that even otherwise, physical efficiency test, as provided by the impugned order, is too stringent. Learned counsel for the petitioners have tried to drawn comparison with the physical efficiency test held for the post of Sub Inspector of Police and Police Constable and submit that the physical efficiency test imposed for the Home Guards is much more stringent than that of Sub Inspector of Police and Police Constables. Thus, the conditions are arbitrarily stringent.

6. Learned counsel for the petitioners further submit that the marks fixed in the physical efficiency test are competitive in nature as the same provide increasing

marks for better efficiency. Learned counsel further submit that such marking system cannot be imposed during the process of selection and the same ought to have been provided at the time of advertisement. It is further submitted that at a later stage, only a criteria for clearing the physical efficiency test could be provided and not competitive marking. For the said purpose, learned counsel for the petitioners rely upon the judgment of the Supreme Court in the cases of ***Ramjit Singh Kardam and others vs. Sanjeev Kumar and others (2020) 20 SCC 209*** and ***K. Manjusree vs. State of Andhra Pradesh and another (2008) 3 SCC 512.***

7. Opposing the contention of learned counsel for the petitioners, Sri Utsav Mishra, learned counsel for the Commission and Sri Praful Yadav, learned Standing Counsel, submit that a bare perusal of Clause 12(2) of the said advertisement shows that physical efficiency test as well as physical measurements was provided in the advertisement. They submit that the said fact is also clear from the alternative relief claimed by the petitioners in which, they are seeking for quashing of Clause 12(2) of the advertisement so far as it prescribes for holding of physical efficiency test. They further submit that since the advertisement is of the year 2016 under which the petitioners duly participated, hence, after a period of three years, they cannot challenge the condition of the advertisement. Learned counsel for the respondents for the said purposes, rely upon the following judgments:

(i) ***Ramesh Chandra Shah and others vs. Anil Joshi and others*** *(2013) 11 SCC 309;*

(ii) ***Dhananjay Malik and others vs. State of Uttaranchal and others*** (2008) 4 SCC 171;

(iii) ***Sankar Mondal vs. State of West Bengal and others:*** Civil Appeal No.1924 of 2010, decided on 15.2.2022; and

(iv) ***Smt. Vijay Laxmi and others vs. Stat of U.P. and others***: Writ-A No.2460 of 2022, decided on 29.4.2022.

8. Learned counsel for the respondents further place reliance upon Rule 15 of the Rules of 1982 and claim that the same provides for a physical efficiency test of competitive nature and also provides that the criteria of physical efficiency test may be prescribed from time to time by the Commandant General of Home Guards. The respondents' counsel submit that the Rules of 1982 are strictly followed read with the Act of 2014 and its Regulations and there is no illegality committed in the selection process.

9. I have perused the records of the case with the assistance of learned counsel for the parties and judgments relied upon by them.

10. Clause 12(1) of the Advertisement No.02-Examination/2016 provides that the selection shall be made on the basis of written examination and interview and the manner, syllabus and the date of examination shall be intimated at the relevant time. Clause 12(2) provides that for the post of Platoon Commander and Block Organizer, along with the selection procedure provided in Clause 12(1), physical efficiency test, shall also be included and along with the physical efficiency test, the required physical measurements shall also be conducted as prescribed in the advertisement.

11. Clauses 12(1) and 12(2) of the said advertisement are quoted hereinbelow:

*"12(1)– **चयन का आधार–** लिखित परीक्षा तथा साक्षात्कार है। प्रश्नगत पदों पर चयन हेतु उत्तर प्रदेश समूह 'ग' के पदों के लिए सीधी भर्ती (रीति और प्रकिया) नियमावली, 2015 अधिसूचना दिनाँक 11 मई, 2015 में विहित प्रावधानों के अंतर्गत सीधी भर्ती की प्रकिया, पाठ्यक, लिखित परीक्षा/साक्षात्कार के अंक वही होंगे, जो राज्य सरकार के अनुमोदन से आयोग द्वारा निर्धारित किए जांगे। तद्नुसार लिखित परीक्षा हेतु परीक्षा योजाना तथा पाठ्यकम एवं परीक्षा तिथि के संबंध में यथा समय सूचित किया जाएगा।*

(2)– वैतनिक प्लाटून कमांडर कम रिपोर्ट अधिकारी (पदकम संख्या–4), वैतनिक प्लाटून कमांडर (पदकम संख्या–5) तथ ब्लाक आर्गेनाइजर (पदकम संख्या–6) के पदों पर चयन हेतु बिन्दु–12(1) में उल्लिखित चयन प्रकिया के साथ–साथ शारीरिक दक्षता परीक्षा भी सम्मिलित है, अभ्यर्थियों की अर्हता के अंतर्गत शारीरिक माप भी नियमानुसार हैः–

अभ्यर्थी	*ऊँचाई*	*सीना बिना फुलाये*	*सीना फुलाये जाने पर*
पुरूष अन्य	*167.7 से0मी0*	*76.8 से0मी0*	*83.8 से0मी0*
पुरूष पर्वतीय	*162.60 से0मी0*	*76.5 से0मी0*	*81.5 से0मी0*
पुरूष अनुसूचति जाति	*160.0 से0मी0*	*76.5 से0मी0*	*78.8 से0मी0*
महिला अन्य	*152.0 से0मी0*		
महिला पर्वतीय एवं अनुसूचित जनजाति	*147.0 से0मी0*		

12. Thus, the advertisement itself provided that there shall be a physical efficiency test. The said requirement was fully in the knowledge of the petitioners and the same is also reflected from the alternative relief sought, wherein Clause 12(2) of the advertisement is sought to be quashed.

13. The petitioners had applied for the said posts in the year 2016. In case they felt that any of the condition is illegal, the same ought to have been challenged in the year 2016 only. After participating in the selection process, it is not open for the petitioners to challenge the same, that too, at a later stage. The law in this regard is well settled by the Supreme Court in case of ***Ramesh Chandra Shah*** (supra), wherein the Supreme Court in Paragraphs 17, 18 and 24 held:

"17. Those who were desirous of competing for the post of Physiotherapist, which is a Group "C' post in the State of Uttarakhand must have, after reading the advertisement, become aware of the fact that by virtue of the Office Memorandum dated 3-8-2010, the Board has been designated as the recruiting agency and the selection will be made in accordance with the provisions of the General Rules. They appeared in the written test knowing that they will have to pass the examination enumerated in Para 11 of the advertisement. If they had cleared the test, the private respondents would not have raised any objection to the selection procedure or the methodology adopted by the Board. They made a grievance only after they found that their names do not figure in the list of successful candidates. In other words, they took a chance to be selected in the test conducted by the Board on the basis of the advertisement issued in November 2011. This conduct of the private respondents clearly disentitles them from seeking relief under Article 226 of the Constitution. To put it differently, by having appeared in the written test and taken a chance to be declared successful, the private respondents will be deemed to have waived their right to challenge the advertisement and the procedure of selection.

18. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome.

.....

24. In view of the propositions laid down in the abovenoted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents."

14. Therefore, the present writ petitions are not maintainable to the extent, the challenge to Clause 12(2) of the advertisement prescribing holding of a physical efficiency test is concerned. Even otherwise, the physical efficiency test is also prescribed by Rule 15 of the Rules of 1982. The Note to Rule 15(2) provides that course and procedure of the competitive examination shall be such as is prescribed by the Commandant General, Home Guards. Rule 15(3) provides that the Selection Committee shall take written and physical efficiency test of the candidates and on the basis of marks obtained in the same, call the appropriate number of candidates for interview. The marks obtained by a candidate in interview shall be added in the marks obtained in the written and physical competitive test of the candidates.

15. Thus, the Rules of 1982 themselves provide that there shall be a written as well as physical competitive test and also an interview. The result of the selection shall be declared on the basis of combined marks obtained in the said three examinations. Therefore, no illegality is found in holding the physical efficiency test. The criteria of the physical efficiency test is to be prescribed and is duly prescribed by the Chairman of the Selection Committee and thus, there is no illegality in the same. So far as the criteria fixed in the physical efficiency test is concerned, the same is as follows:

"पुरूष अभ्यर्थियों के लिये :–

1– क्रिकेट गेंद फेंकना कम से कम 55 मीटर

2– लम्बी कूद कम से कम 13 फीट

3– बीम (चिनींग अप) कम से कम 05 बार

4– दौड़ (1500 मीटर) अधिकतम 06 मिनट में

उपरोक्त शारीरिक दक्षता परीक्षाओं में अभ्यर्थियों को निम्नानुसार अंक प्रदान किये जायेगें :–

(1) क्रिकेट गेंद फेंकना अधिकतम 10 अंक

55 मीटर	5 अंक
60 मीटर	6 अंक
65 मीटर	7 अंक
70 मीटर	8 अंक
75 मीटर	9 अंक
80 मीटर	10 अंक

(2) लम्बी कूद अधिकतम 10 अंक

13 फीट	5 अंक
14 फीट	6 अंक
15 फीट	7 अंक
16 फीट	8 अंक
17 फीट	9 अंक
18 फीट एवं उससे अधिक	10 अंक

(3) बीम (विनिंग अपर) अधिकतम 10 अंक

5 बार	5 अंक
6 बार	6 अंक
7 बार	7 अंक
8 बार	8 अंक
9 बार	9 अंक
10 बार	10 अंक

(4) दौड– 1500 मीटर अधिकतम 10 अंक

5 मिनट तक	10 अंक
5 मिनट 01 सेकेण्ड से 5 मिनट 15 सेकेण्ड तक	9 अंक

5 मिनट 16 सेकेण्ड से
5 मिनट 30 सेकेण्ड तक 7 अंक
5 मिनट 31 सेकेण्ड से
5 मिनट 45 सेकेण्ड तक 6 अंक
5 मिनट 45 सेकेण्ड से
6 मिनट तक 5 अंक

महिला अभ्यर्थियों के लिये :–

महिला अभ्यर्थियों की शारीरिक दक्षता परीक्षाओं में निम्नानुसार अंक प्रदान किये जायेगें :–

1– लम्बी कूद कम से कम 9 फीट

2– क्रिकेट गेंद फेंकना कम से कम 25 मीटर

3– स्किपिंग (रस्सी कूदना) कम से कम 55 बार

4– दौड़ 800 मीटर अधिकतम 4 मिनट 30 सेकेण्ड

(1) लम्बी कूद अधिकतम 10 अंक

9 फीट पर	5 अंक
10 फीट पर	6 अंक
11 फीट पर	7 अंक
12 फीट पर	8 अंक
13 फीट पर	9 अंक
14 फीट पर	10 अंक

(2) क्रिकेट गेंद फेंकना–अधितम 10 अंक

25 मीटर	5 अंक
27 मीटर	6 अंक
29 मीटर	7 अंक
31 मीटर	8 अंक
33 मीटर	9 अंक
35 मीटर	10 अंक

(3) स्किपिंग (रस्सी कूदना)–अधितम 10 अंक

55 बार एक मिनट में	5 अंक
60 बार एक मिनट में	6 अंक
65 बार एक मिनट में	7 अंक
70 बार एक मिनट में	8 अंक
75 बार एक मिनट में	9 अंक
80 बार एक मिनट में	10 अंक

(4) दौड– 800 मीटर अधिकतम 10 अंक

3 मिनट 30 सेकेण्ड तक तक	10 अंक
3 मिनट 31 सेकेण्ड से	
3 मिनट 45 सेकेण्ड तक	9 अंक
3 मिनट 46 सेकेण्ड से	
4 मिनट तक	7 अंक
4 मिनट 1 सेकेण्ड से	
4 मिनट 15 सेकेण्ड तक	6 अंक
4 मिनट 16 सेकेण्ड से	
4 मिनट 30 सेकेण्ड तक	5 अंक

16. For better efficiency on the said criteria, like if a cricket ball is thrown to 55 meters, a candidate is awarded 5 marks and if it is thrown to 60 meters, a candidate is awarded 6 marks, so at every five meters, a candidate gets one extra marks. Similarly, in Long Jump, Beem (Chinning up), running etc., better efficiency entitles a candidate to obtain extra marks as per the efficiency criteria.

17. Submission of learned counsel for the petitioners that such competitive efficiency marks could not have been provided for the physical efficiency test, is contrary to the Rules of 1982 as Rule 15 of the said Rules itself provides that there shall be a competitive physical examination. Rule 15 reads as under:

"15– (1) सीधी भर्ती के प्रयोजनार्थ चयन समितियों का गठन किया जायेगा जिसमें निम्नलिखित होगें :–

(क) प्लाटून कमाण्डर और ब्लाक आर्गनाइजर के पद के लिये :–

(एक) डिप्टी कमाण्डेण्ट जनरल होमगार्डस।

(दो) ज्येष्ठ स्टाफ अधिकारी, होमगार्ड्स।

(तीन) कमाण्डेण्ट, केन्द्रीय प्रशिक्षण संस्थान, होमगार्ड्स।

(ख) हवलदार इन्स्ट्रक्टर के पद के लिये :–

(एक) डिप्टी कमाण्डेण्ट जनरल होमगार्डस।

(दो) कमाण्डेण्ट, केन्द्रीय प्रशिक्षण संस्थान, होमगार्ड्स।

(तीन) एक डिविजनल कमान्डेण्ट होमगार्डस (जिसे कमाण्डेण्ट जनरल द्वारा नाम निर्दिष्ट किया जायेगा।)

(2) चयन समिति आवेदन पत्रों की संवीक्षा करेगी और पात्र अभ्यर्थियों में प्रतियोगिता परीक्षा में उपस्थित होने की अपेक्षा करेगी।

टिप्पणी :– प्रतियोगिता परीक्षा का पाठ्यक्रम और उसकी प्रकिया ऐसी होगी जैसी कमाण्डेण्ट जनरल, होमगार्ड्स द्वारा समय≤ पर विहित की जाय।

(3) चयन समिति, अभ्यर्थियों द्वारा लिखित और शारीरिक परीक्षा में प्राप्त अंको की सारणीबद्ध किये

जाने के पश्चात् नियम 6 के अनुसार अनुसूचित जातियों, अनुसूचित जन–जातियों और अन्य श्रेणियों के अभ्यर्थियों का सम्यक प्रतिनिधित्व सुनिश्चित करने की आवश्यकता को ध्यान में रखते हुए, उतने अभ्यर्थियों को साक्षात्कार के लिये बुलायेगी जितने परीक्षाओं के परिणाम के आधार पर इस सम्बन्ध में समिति द्वारा निर्धारित स्तर तक पहुंच सके हों। साक्षात्कार में प्रत्येक अभ्यर्थी को दिये गये अंक परीक्षाओं में उसको प्राप्त अंको में जोड़ दिये जायेगें।

(4) चयन समिति अभ्यर्थियों की, योग्याता कम में, जैसा कि परीक्षाओं और साक्षात्कार में उनको प्राप्त अंको के कुल योग से प्रकट हो, एक सूची तैयार करेगी। यदि दो या अधिक अभ्यर्थी बराबर–बराबर अंक प्राप्त करें तो लिखित परीक्षा में अधिक अंक पाने वाले का नाम ऊपर रखा जायेगा।

सूची में नामों की संख्या रिक्तियों की संख्या में अधिक (किन्तु 25 प्रतिशत से ज्यादा अधिक नही) होगी।"

18. Comparing the same with the physical efficiency test of Sub Inspector and Constable is concerned, the Rules of Sub Inspector and Constable provide that a candidate for the post of Sub Inspector is required to run 4.8 kilometers in 28 minutes and a candidate for the post of Constable is required to run 2.4 kilometers in 16 minutes.

19. For the post of Platoon Commander and Block Organizer, a candidate is only required to run 1500 meters in 5 minutes. The time provided for the physical efficiency test is not stringent vis-a-vis that of the Sub Inspector or Constable, but on the contrary, is much lenient as they are only required to run 1.5 kilometers vis-a-vis 4.8 and 2.4 of the Sub Inspector and Constable respectively. The other requirements i.e. Long Jump, throwing of cricket ball, Beem (chinning up) or skipping and running for the women are also not stringent, but are reasonable for any physically fit person and looking into the nature of job to be performed by the selected candidate.

20. There is another aspect of the matter also. This Court by order dated 6.9.2019, as an interim measure, provided that the petitioners may appear in the physical efficiency test scheduled to be held in the month of September, 2019, without prejudice to their rights in these writ petitions.

21. Despite the aforesaid order, the petitioners did not appear in the physical efficiency test, instead they filed an application that at present they are not in a condition to appear in the physical efficiency test. The respondents twice adjourned the said test, but again on each and every time, on the ground of Covid and on other grounds, the petitioners refused to appear in the said test.

22. This Court neither permitted the petitioners to apply for extension of time to appear in the physical efficiency test nor permitted to respondents to extend the time of the said test. The Court only directed that the petitioners may appear in the physical efficiency test to be conducted in September, 2019. The petitioners opted not to appear. This in itself is sufficient for this Court to refuse relief to the petitioners as they did not appear in the physical efficiency test, which was subject to the decision of the writ petition. Once it is found that physical efficiency test is necessary and petitioners have not appeared in the same, their claim is liable to be rejected.

23. Considering the aforesaid facts and circumstances of the case, this Court does not find any force in the submissions of learned counsel for the petitioners.

24. The writ petitions have no force and are ***dismissed.***

(2023) 1 ILRA 142
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.01.2023

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ A No. 28636 of 2019

Kuverjeet Singh ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioners:
Satish Chaturvedi, D.N. Chaturvedi, Shantanu Gupta

Counsel for the Respondents:
Suniti Chauhan, B.K. Shukla, Brijesh Kumar Shukla, K.K. Pandey, K.K. Pandey, Mahendra Kumar Misra

A. Service Law – Railway Protection Force Rules, 1987 – Rule 219.4 – Punishment – Second time enquiry was initiated by superior authority – Validity challenged – Order was passed beyond the statutory period of one years – Permissibility – Held, the superior authority cannot hold an inquiry at its own level but can only look into the order passed by the disciplinary authority – Clause-B of Rule 219.4 cannot be read so exhaustively as to permit the superior authority to hold a *de novo* inquiry totally ignoring the inquiry already conducted and the order passed by the disciplinary authority – Held further, both the orders are passed beyond the period of one year which cannot be passed as barred by the first proviso of the said Rule. (Para 9)

Writ petition allowed. (E-1)

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Heard learned counsel for the petitioner and Sri Mahendra Kumar Misra, learned counsel for the Union of India.

2. The petitioner has approached this Court challenging the order/charge sheet dated 24.09.2019.

3. The facts of the case are that the petitioner was given a charge sheet on 25.06.2018 and on the basis of the same an inquiry was conducted and the punishment order dated 2.8.2018 was passed by the Senior Commandant, Railway Protection Special Force, Lucknow. Against the said order, the petitioner had filed an appeal but he had withdrawn the same. Despite the same the superior authority; namely, the Chief Security Commissioner, Railway Protection Force, has proceeded to pass the impugned order dated 24.09.2019. A perusal of the same shows that the same is the repetition of the earlier charge sheet asking the petitioner to submit reply to the same. The same nowhere states as to whether by the same, order by the disciplinary authority is intended to be confirmed, modified or set aside or the punishment is to be enhanced, reduced or in any other manner modified or even otherwise as to what order is proposed to be passed. Rule 219.4 of the R.P.F. Rules of 1987, reads as follows:-

*"**Rule 219.4** Any authority superior to the authority making the original order may, on its own motion, or otherwise, call for the records of any inquiry and revise any order made under these rules and may:-*

(a) confirm, modify or set aside the order; or

(b) confirm, enhance, reduce or set aside the punishment imposed by the

order, or impose any punishment where no punishment has been imposed; or

(c) remit the case to the authority which made the order or to any other authority directing such authority to make such further inquiry as it may consider proper in the circumstances of the case; or

(d) pass such other orders as it may deem fit;

Provided that no action under this sub-rule shall be initiated after the expiry of one yearfrom the date of the order aforesaid:

Provided further that no proceeding for revision shall be commenced until after-

(i) the expiry of the period for making an appeal specified in subsection (2) of Section9; or

(ii) the disposal of the appeal, where any such appeal has been preferred:

Provided further that in a case in which it is proposed to enhance punishment further, the aggrieved member shall be given an opportunity to show cause either orally or in writing as to why his punishment should not be enhanced."

4. The same empowers the superior authority to pass appropriate orders for confirming, setting aside the order or enhancing, reducing or even to impose a punishment where no punishment is imposed or to remit the case or pass such other order as it may deem fit. It further provides that such an action can be taken within a period of one year only from the date of the punishment order.

5. Learned counsel for the petitioner submits that the said Rule 219.4 does not empower the superior authority to issue a charge sheet and thereafter initiate the inquiry at its own end.

6. Clause-B of Rule 219.4 has to be read in reference to the power given by Rule a to c of Rule 219.4, the same can only be in support of the aforesaid rules and cannot enhance the power of the superior authority to the extent that it may proceed to hold inquiry at its own level which is not permissible under any canon of the said rules. He further submits that since the initial punishment order was passed on 2.8.2018 and now the proposed order/charge sheet is passed after expiry of one year on 24.9.2019 on the same ground, it is liable to be set aside.

7. Learned counsel for the respondents submits that the order can be passed under Rule Clause B of the said rules. He further submits that a show cause notice was given within a period of one year and hence the order impugned can be passed.

8. I find force in the submissions of learned counsel for the petitioner.

9. The superior authority cannot hold an inquiry at its own level but can only look into the order passed by the disciplinary authority. The Clause-B of Rule 219.4 cannot be read so exhaustively as to permit the superior authority to hold a de novo inquiry totally ignoring the inquiry already conducted and the order passed by the disciplinary authority. Even otherwise, both the orders are passed beyond the period of one year which cannot be passed as barred by the first proviso of the said Rule.

10. Thus, the impugned order dated 24.09.2019, cannot stand and is hereby set aside.

11. The writ petition is ***allowed.***

(2023) 1 ILRA 144
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.01.2023

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ A No. 30915 of 2021

Dr. Surendra Pratap Yadav ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Amrendra Nath Tripathi

Counsel for the Respondents:
C.S.C.

A. Service Law – Constitution of India – Article 14 – Intelligible differentia – Age of retirement – Discrimination made between the doctors practicing homeopathy and doctors practicing allopathy in respect of their age of retirement – Permissibility – Held, merely because the doctors are using different mode of treatment, it would not qualify as an intelligible differentia – The classification was held unreasonable and discriminatory and inconsistent with Article 14 of the Constitution of India. (Para 8)

Writ petition allowed. (E-1)

List of Cases cited:

1. North Delhi Municipal Corp. VsDr. Ram Naresh Sharma & ors.; 2021 SCC Online SC 540

(Delivered by Hon'ble Vivek Chaudhary, J.)

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

2. Present writ petition is filed by the petitioner challenging the order dated 17.12.2021 passed by respondent no.2 Director, Department of Homeopathy, U.P. 8th Floor, Indira Bhawan, Lucknow. By the said order petitioner is retied w.e.f. 31.12.2021 at the age of 60 years.

3. The facts of the case are that petitioner is a homeopathic doctor working with the State Government. By notification dated 31.05.2017, the age of the medical officers of the Provincial Medical and Health Service in the State of U.P. was enhanced from 60 years to 62 years. The doctors working under the Provincial Medical and Health Service are doctors of Allopathy. The services of doctors of homeopathy belong to Homeopathic Medical Service Cadre and the benefit of the notification dated 31.05.2017 is not extended to them.

4. Learned counsel for the petitioner relies upon the judgment of the Supreme Court passed in ***'North Delhi Municipal Corporation Vs. Dr. Ram Naresh Sharma and others'*** reported in ***2021 SCC Online SC 540.*** Paragraph-23 and 24 of the said judgment reads:-

"23. The common contention of the appellants before us is that classification of AYUSH doctors and doctors under CHS in different categories is reasonable and permissible in law. This however does not appeal to us and we are inclined to agree with the findings of the Tribunal and the Delhi High Court that the classification is discriminatory and unreasonable since doctors under both segments are performing the same function of treating and healing their patients. The only difference is that AYUSH doctors are using indigenous systems of medicine like Ayurveda, Unani, etc. and CHS doctors are using Allopathy for tending to their

patients. In our understanding, the mode of treatment by itself under the prevalent scheme of things, does not qualify as an intelligible differentia. Therefore, such unreasonable classification and discrimination based on it would surely be inconsistent with Article 14 of the Constitution. The order of AYUSH Ministry dated 24.11.2017 extending the age of superannuation to 65 Years also endorses such a view. This extension is in tune with the notification of Ministry of Health and Family Welfare dated 31.05.2016.

24. The doctors, both under AYUSH and CHS, render service to patients and on this core aspect, there is nothing to distinguish them. Therefore, no rational justification is seen for having different dates for bestowing the benefit of extended age of superannuation to these two categories of doctors. Hence, the order of AYUSH Ministry (F. No. D. 14019/4/2016-E-I (AYUSH)) dated 24.11.2017 must be retrospectively applied from 31.05.2016 to all concerned respondent-doctors, in the present appeals. All consequences must follow from this conclusion."

5. On the other hand, learned Standing Counsel submits that the benefit of the aforesaid judgment could not be granted to the petitioner inasmuch as in the said case the Union of India had issued a separate order giving benefit of enhancement in age of retirement to the Ayush doctors along with Allopathic doctors.

6. I have heard learned counsels for the parties and also perused the records and the judgment placed before this Court with their assistance.

7. In case of ***Dr. Ram Naresh Sharma (supra)***, Union of India enhanced the age of retirement of Allopathic doctors working at Delhi from 60 years to 65 years. The said benefit, however, was not extended to Ayush doctors, hence, a claim petition was filed before the Central Administrative Tribunal which was allowed vide order dated 24.08.2017 holding that the Ayush doctors are also entitled to retire at the age of 65 years as the Allopathic doctors. Against the said order, a writ petition was filed before the High Court which was also dismissed by order dated 15.011.2018, affirming the order of the Tribunal. The matter reached the Supreme Court. During pendency of the writ petition, the Central Government issued notification extending the benefit of retirement age of 65 years to the Ayush doctors also, along with Allopathic doctors.

8. Be the facts as they may, the Supreme Court considered the classification created by the Central Government between the Ayush and doctors of CHS practicing Allopathy and held that the same is discriminatory and unreasonable, since doctors under both the segment are performing the same function of treating and healing their parents. Merely because they are using different mode of treatment, it would not qualify as an intelligible differentia. Thus, the classification to be unreasonable and discriminatory and inconsistent with Article 14 of the Constitution of India. The same are the circumstances of the present case. Doctors practicing Allopathy working under the Provincial Medical and Health Services are given the benefit of retirement at the age of 62 years while petitioner who belongs of Homeopathic Medical Service Cadre and treats his patients through homeopathy is not given the benefit of retirement age of 62 years. The same again is a classification hit by Article 14 of the

Constitution of India as held by Supreme Court in case of ***Dr. Ram Naresh Sharma (supra).***

9. In view thereof, the impugned order dated 17.12.2021 is hereby set aside.

10. Petitioner is permitted to continue in service till the age of 62 years and he shall be provided all consequential benefits of service in accordance with law.

11. With the aforesaid, the writ petition stands ***allowed.***

(2023) 1 ILRA 146
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ B No. 359 of 2022

Narayan Kumar Agarwal & Anr.
...Petitioners
Versus
Board of Revenue, Allahabad & Ors.
...Respondents

Counsel for the Petitioners:
Sri Manish Kumar Nigam

Counsel for the Respondents:
C.S.C., Sri Deepak Kumar Jaiswal, Sri Sanjay Maurya

A. Civil Law - Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952 - Rule 285 E - Sale of Immovable Property - The full amount of purchase money shall be paid by the purchaser on or before the fifteenth day from the date of the sale and in case of default the deposit, shall be forfeited to Government and the property shall be resold and the defaulting purchaser shall forfeit all claims to the property, or to any part of the sum for which it may be subsequently sold - provision contained under Rule 285-E of U.P.Z.A. & L.R. Rules mandatory - In the instant case auction took place on 8.10.1975 and 1/4th (Rs.4,000/-) amount was deposited by respondent on 8.10.1975 but the remaining 3/4th amount deposited on 7.11.1975 i.e. beyond period of 15 days from the date of auction - sale certificate was issued on 7.6.1995 in favour of respondent - Objection under Rule 285 I of the U.P.Z.A. & L.R. Rules was filed by the petitioners on 8 7.2.1977 which was dismissed by the Commissioner on the ground of limitation and the revision was also dismissed by the Board of Revenue - Held - Since, the 3/4th amount has been deposited after period of 15 days from the date of auction, as such, in view of provisions contained under Rule 285 E of U.P.Z.A. & L.R. Rules, the auction / sale shall deemed to be null and void and property shall be re-sold. (Para 8, 9, 10,11)

B. Civil Law - Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952, Rule 285 I, - Application to set aside sale, within 30 days - Delay - Limitation Act, 1963, S. 5 - limitation in filing the objection under Rule 285 I of U.P.Z.A. & L.R. Rules - provision of Section 5 of Limitation Act will be applicable to the proceeding under Rule 285 I of U.P.Z.A. & L.R (Para 12)

C. Constitution of India,1950 - Art. 226 - Alternative Remedy - Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952, Rule 285 E - direct writ petition is also maintainable under Article 226 of the Constitution of India if there is violation of Rule 285 E of U.P.Z.A. & L.R. Rules (Para 13)

Allowed. (E-5)

List of Cases cited:

1. Manilal Mohanlal Shah & ors. Vs Sardar Sayed Ahmad Sayed Mahmad & anr. AIR 1954 SC 349

2. Mahmood Ahmad Khan (dead) Through L.Rs. Vs Ranbir Singh & ors. 1955 AWC 896

3. St. of U.P. & ors. Vs M/s Swadeshi Polytex Ltd. & ors. 2009 (107) R.D. 22,

4. Moolchand Vs Collector, Jalaun & ors. AIR 1982 All 141

5. Babu Ram Vs The Board of Revenue, U.P., Lucknow & ors. 1989 All LJ 1238

6. Kunwar Mohan Swarup Vs St. of U.P. & ors. 1965 All LJ 277

7. Smt. Shanti Devi Vs St. of U.P. & ors. 1997 R.D. 583

8. Prithvipat Vs St. of U.P. & ors. 1998 (1) AWC 471

9. Savitri Singh Vs Board of Revenue, U.P., Lucknow & ors. 2008 (104) R.D. 728,

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

1. Heard Sri Manish Kumar Nigam, learned counsel for the petitioners, learned Standing Counsel for respondent nos.1 & 2 and Sri Deepak Kumar Jaiswal and Sri Sanjay Maurya, counsel for respondent nos.4 & 5.

2. Brief facts of the case are that there were certain sales take dues against the firm M/s Sudarshan Oil Mills Nasirabad, Padri Bazar, District- Gorakhpur for the year 1963-1964 to 1969-1970 for an amount of Rs.7764.57 + interest. Petitioners' father Manohar Lal was a partner in the aforementioned firm. Recovery proceeding for the sales tax of the aforesaid firm were initiated and an order of attachment was issued by the Collector on 22.7.1975 attaching double storied house belonging to petitioners' father. Thereafter a sale proclamation dated 2.9.1975 was issued by the Collector for the auction of the house belonging to petitioners' father fixing 7.10.1975 under Rule 282 of the U.P.Z.A. & L.R. Rules. Since 7.10.1975 was a holiday, hence auction could not take place on 7.10.1975. An auction was held on 8.10.1975 without issuing any fresh proclamation for holding auction. Six persons participated in the auction and out of six persons, Sri Durga Prasad was the highest bidder having made a bid of Rs.13,000/-. One Kanhaiya Lal S/o Mewa Lal Jaiswal (respondent no.5) moved an application on 8.10.1975 itself for purchase the house which was alleged to put on auction on 8.10.1975 for a sum of Rs.16,000/-. Durga Prasad who was the highest bidder has given "no objection certificate" to the application of respondent no.5. Petitioners who were minor at the time of auction and father of the petitioners was confined to bed, moved an application before the Collector, Gorakhpur raising his objection to the attachment / auction. A report dated 17.10.1975 in respect to the application / objection was submitted to the auction alleged to take place on 8.10.1975. 1/4th amount of the auction money i.e. Rs.4,000/- was deposited by respondent no.5 on 8.10.1975 and the remaining 3/4th amount i.e. Rs.12,000/- was not deposited by respondent no.5 within 15 days i.e. on or before 23.10.1975. Deputy Collector (Collection) Sales Tax, Gorakhpur issued a notice dated 27.10.1975 to respondent no.5 that he has not deposited Rs.12,000/-, as such, time was given to deposit the same by 28.10.1975, aforesaid application dated 27.10.1975 was received by respondent no.5 on 27.10.1975. Respondent no.5 did not deposit the remaining 3/4th amount rather moved an application on 28.10.1975 on which Deputy Collector passed an order dated 1.11.1975 mentioning that remaining amount is to be deposited within fifteen

days form the date of auction and in case the same is not deposited, the money deposited earlier is to be forfeited. On 7.11.1975, respondent no.5 moved an application to deposit Rs.12,000/- on which, Deputy Collector permitted him to deposit at his own risk. On 22.10.1975, petitioners' father- Manohar Lal moved an application requesting the Collector not to confirm the auction sale. A letter dated 1.11.1975 / 6.11.1975 issued by Deputy Collector (Collection) Sales Tax, Gorakhpur was served upon the petitioners in which it was mentioned that in pursuance of the application moved by the petitioners on 9.10.1975 and the application moved by petitioners' father- Manohar Lal, District Magistrate vide order dated 30.10.1975 passed an order for recovering the sales tax dues as per law. Petitioners' father- Manohar Lal received a letter dated 15.1.1977 through registered post to the effect that Additional Collector vide order dated 22.12.1975 has directed that sale certificate be issued in favour of respondent no.5. Petitioners' father, accordingly, filed an objection under Rule 285 I of the U.P.Z.A. & L.R. Rules on 7.2.1977 before the Commissioner, Gorakhpur Division, Gorakhpur along with the prayer for condonation of delay in filing the objection challenging the auction alleged to be held on 8.10.1975. On the objection of the petitioners' father under Rule 285 I of the U.P.Z.A. & L.R. Rules, the objections were filed by the State Government on 30.5.1977. Commissioner, Gorakhpur Division, Gorakhur vide order dated 15.6.1981 rejected the objections filed by the petitioners' father under Rule 285 I of U.P.Z.A. & L.R. Rules on the ground that the application has been filed after prescribed period of 30 days. Against the order dated 15.6.1981, a revision was filed by the petitioners before the Board of Revenue, Allahabad which was dismissed vide order dated 4.7.1981 on the ground that revision will lie before the Board of Revenue, Lucknow. Against the order dated 4.7.1981 passed by the Board of Board of Revenue, Allahabad. Petitioners' father filed writ petition No.8330 of 1981 before this Court in which interim order was passed to the effect that sale held in favour of other side shall not take effect provided petitioners deposit the entire amount. In compliance of the interim order dated 6.7.1981 passed by this Court, the petitioners deposited the entire amount. Writ Petition No.8330 of 1981 was finally heard and vide order dated 7.2.1994, writ petition was allowed, order dated 4.7.1981 was set aside and matter was remanded back before the Board of Revenue to decide the revision afresh. In the meantime, sale certificate has been issued on 7.6.1995 by the Deputy Collector (Collection) / Additional District Magistrate, Sadar, Gorakhpur in favour of respondent no.5. After remand order passed by this Court, revision has been heard afresh by the Board of Revenue and vide order dated 11.10.2021 revision was dismissed, hence this writ petition. This Court while entertaining the writ petition has passed the interim order dated 27.5.2022, which is as under:

"Heard Sri Manish Kumar Nigam, learned counsel for the petitioners and Sri Devesh Vikram, learned Standing Counsel appearing on behalf of State respondents.

The present petition has been filed seeking to raise a challenge to the order dated 15.6.1981, passed by the respondent no. 2, Commissioner, Gorakhpur Division, Gorakhpur whereby the application filed by the predecessors-in-the interest of the petitioners under Rule

285-I of Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952 was rejected and the subsequent order dated 11.10.2021 passed by the Member, Board of Revenue, U.P. at Allahabad dismissing the revision filed thereagainst by the petitioners.

Contention of counsel for the petitioners is that the auction sale having been held on 7.10.1975/8.10.1975 and the deposit of 25% of the bid amount having been made on the same day, the balance amount of the purchase money was mandatorily required to be deposited on or before 15 days from the date of sale as per Rule 285-E and, in the event of default, the sale would be held to be nullity. It is accordingly submitted that even if the application under Rule 285-I was held to be beyond the prescribed time period allowed for the purpose that would have made no difference.

Counsel for the petitioners has drawn the attention of the Court of the fact that during the pendency of the revision before the Board an interim order staying the confirmation of sale was operating.

Prima facie matter requires consideration.

Issue notice to the respondent nos. 4, 5 and 6 returnable by 16.8.2022.

Respondents are granted four weeks' week time to file counter affidavit. Petitioners shall have two weeks' thereafter to file rejoinder affidavit.

List on 16.8.2022.

Till the next date of listing, status-quo with regard to possession of the property, which is subject matter of the auction sale, shall be maintained."

3. In pursuance of the order dated 27.5.2022, respondent nos.4 & 5 has filed his counter affidavit along with an application for vacation of interim order, petitioners have filed their rejoinder affidavit also to the counter affidavit filed by respondent nos.4 & 5.

4. Learned counsel for the petitioners submitted that respondent no.5 has deposited Rs.4,000/- on 8.10.1975, the auction was confirmed for issuing sale certificate vide order dated 17.10.1975 / 18.10.1975 but the remaining 3/4th amount of Rs.12,000/- was deposited by respondent no.5 on 7.11.1975 which fully demonstrate that auction was confirmed prior to deposit of auction money by the auction purchaser. He further submitted that date of auction was 8.10.1975, as such, the 3/4th amount was to be deposited within fifteen days i.e. on or before 23.10.1975 as prescribed under Rule 285 E of U.P.Z.A. & L.R. Rules, as such, the entire auction proceeding deemed to be null and void. He further submitted that objection under Rule 285 I of U.P.Z.A. & L.R. Rules filed by the petitioners has been rejected on the ground of limitation although in view of the Division Bench decision of this Court, the Section 5 of the Limitation Act will be applicable to the objection under Rule 285 I of U.P.Z.A. & L.R. Rules also. He further submitted that revision filed by the petitioners was also dismissed arbitrarily by the Board of Revenue without considering the case of the petitioners on merit. He further submitted that entire auction proceeding were initiated in violation of Rule 285 E and 285 K of U.P.Z.A & L.R. Rules, 1952. He further submitted that alleged sale is a nullity and has to be ignored in full.

5. Learned counsel for the petitioners placed reliance upon the following judgment of the Hon'ble Apex Court as well as this Court:

(i) AIR 1954 SC 349, Manilal Mohanlal Shah and Others Vs. Sardar Sayed Ahmad Sayed Mahmad and Another.

(ii) 1955 AWC 896, Mahmood Ahmad Khan (dead) Through L.Rs. Vs. Ranbir Singh and Others

(iii) 2009 (107) R.D. 22, State of U.P. and Others Vs. M/s Swadeshi Polytex Ltd. and Others.

(iv) AIR 1982 All 141 Moolchand Vs. Collector, Jalaun and Others.

(v) 1989 All LJ 1238, Babu Ram Vs. The Board of Revenue, U.P., Lucknow and Others

(vi) 1965 All LJ 277, Kunwar Mohan Swarup Vs. State of U.P. & Others

(vii) 1997 R.D. 583, Smt. Shanti Devi Vs. State of U.P. and Others

(viii) 1998 (1) AWC 471, Prithvipat Vs. State of U.P. and Others

(ix) 2008 (104) R.D. 728, Savitri Singh Vs. Board of Revenue, U.P., Lucknow and Others.

6. On the other hand, learned counsel for respondent nos.4 & 5 submitted that the objection under Rule 285 I of U.P.Z.A. & L.R. Rules filed by the petitioners was barred by limitation as prescribed under the Rule 285 I of U.P.Z.A. & L.R. Rules, as such, the objection was rightly rejected by the Court of Commissioner and the same was rightly maintained by the Board of Revenue. He further submitted that 3/4th amount of the bid has been deposited although after fifteen days but under the permission of the Deputy Collector (Collection) as well as Tax Collector Sales Tax Gorakhpur dated 7.11.1975, as such, the deposit will be treated to be valid deposit. He further submitted that sale certificate has been issued to the auction purchaser / respondent no.5 on 7.6.1995, as such, no interference is required in the matter. Counsel for the petitioner further placed reliance upon the provisions contained under Rule 285 K of U.P.Z.A. & L.R. Rules which says that If no application under Rule 285-I is made within the time allowed, all claims on the ground of irregularity or mistake in publishing or conducting the sale shall be barred. He further placed reliance upon the judgment of this Court passed in Writ-B No.1003602 of 2010, Smt. Parvinder Kaur Vs. Board of Revenue, U.P., Lucknow and Others decided on 27.1.2002 in which it has been held that Section 5 of Limitation Act will not be applicable in respect to the objections filed under Rule 285 I of the U.P.Z.A. & L.R. Rules. He finally submitted that the writ petition filed by the petitioners has no merit and is liable to be dismissed.

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

8. There is no dispute about the fact that auction alleged to take place on 8.10.1975 and 1/4th (Rs.4,000/-) amount was deposited by respondent no.5 on 8.10.1975 but the remaining 3/4th amount deposited on 7.11.1975 i.e. beyond period of 15 days from the date of auction. Objection under Rule 285 I of the U.P.Z.A. & L.R. Rules was filed by the petitioners on 7.2.1977 which was dismissed by the Commissioner vide order dated 15.6.1981 on the ground of limitation and the revision filed by the petitioners was also dismissed by the Board of Revenue by the impugned order dated 11.10.2021. The sale certificate was issued in the matter on 7.6.1995 in favour of respondent no.5.

9. Since, the 3/4th amount has been deposited after period of 15 days from the date of auction, as such, in view of provisions contained under Rule 285 E of U.P.Z.A. & L.R. Rules, the auction / sale shall deemed to be null and void and

property shall be re-sold. Rule 285 E of U.P.Z.A. & L.R. Rules is as follows:

"285-E. The full amount of purchase money shall be paid by the purchaser on or before the fifteenth day from the date of the sale at the district treasury or any sub-treasury and in case of default the deposit, after the expenses of sale have been defrayed therefrom, shall be forfeited to Government and the property shall be resold and the defaulting purchaser shall forfeit all claims to the property, or to any part of the sum for which it may be subsequently sold."

10. Considering the mandatory provision contained under Rule 285-E of U.P.Z.A. & L.R. Rules as well as ratio of law laid down in ***Manilal Mohanlal Shah (supra), Kunwar Mohan Swarup (supra), Moolchand (supra), Babu Ram (supra) Mahmood Ahmad Khan (supra) and State of U.P. (supra)*** as cited by counsel for the petitioners impugned auction sale cannot be maintained in the eye of law.

11. The case law cited by learned counsel for the petitioners are fully applicable in the present matter as deposit of remaining 3/4th amount by respondent no.5 is beyond 15 days and fact of deposit is admitted to both parties, as such, there is no option except to hold that the auction held is nullity and property should be re-sold.

12. So far as the limitation question in filing the objection under Rule 285 I of U.P.Z.A. & L.R. Rules is concerned, the Division Bench of this Court in the case of ***Prithvipat (supra)*** has held that proceeding under Rule 285 I of U.P.Z.A. & L.R. Rules are judicial proceedings, as such, unless Section 5 of Limitation Act will be applicable to the proceeding under Section 285 I of U.P.Z.A. & L.R. Rules but this Court while deciding the case in ***Parvinder Kaur (supra)*** has not taken into consideration the Division Bench of this Court in ***Prithvipat (supra)***, as such, in view of Division Bench decision of this Court rendered in ***Prithvipat (supra)***, it will be held that provision of Section 5 of Limitation Act will be applicable to the proceeding under Rule 285 I of U.P.Z.A. & L.R. Rules but in place of remanding the matter before the courts below for deciding the objection / revision afresh, it will be appropriate to hold that the proceeding of auction is null and void as there is clear violation of Rule 285 E of U.P.Z.A. & L.R. Rules.

13. The alternative argument advanced by learned counsel for the petitioners is that even if it is found that Section 5 of Limitation Act is not applicable to the proceeding under Rule 285 I of the U.P.Z.A. & L.R. Rules, this Court in the case of ***Kunwar Mohan Swarup (supra)*** has held that direct writ petition is also maintainable under Article 226 of the Constitution of India if there is violation of Rule 285 E of U.P.Z.A. & L.R. Rules. The argument advanced by learned counsel for the petitioners has got substance and the impugned auction proceeding cannot be sustained in the eye of law due to violation of the mandatory provision contained under Rule 285 E of U.P.Z.A. & L.R. Rules.

14. Considering the entire facts and circumstances of the case as well as ratio of law laid down by the Apex Court as well as by this Court, the impugned order dated 11.10.2021 passed by the Board of Revenue and order dated 15.6.1981 passed by the Commissioner are liable to be set

aside and are hereby set aside. Sale proceeding / auction held on 8.10.1975 and its confirmation on 17.10.1975 are held to be null and void. Respondents are directed to re-sale the property in dispute in accordance with law. Sale held on 8.10.1975 and the subsequent proceeding will not confer any right on respondent no.5.

12. The writ petition stands allowed.

13. No order as to costs.

(2023) 1 ILRA 152
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.01.2023

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ C No. 30 of 2022

Hardik Trading ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Akhilesh Kumar Kalra, Avinash Chandra, Narendra Shanker Shukla, Pooja SIngh

Counsel for the Respondents:
C.S.C., Neerav Chitravanshi, Puneet Chandra, Rani Singh, Samanvya Dhar Dwivedi

Constitution of India, 1950 – Art. 226 - Writ Petition - maintainability - locus - nature of the prerogative remedy of a mandatory order to perform a public duty by the public authorities arising from law and contract are distinct - For binding the State under the obligation of performance of a contract, firstly the State ought to be a party expressly and secondly there ought not to be a situation of determination of disputed questions of facts - In the present case, the petitioner, a firm, was awarded work by the U.P. Rajya Karamchari Kalyan Nigam (respondent no. 3) - Neither the State of U.P. nor the Mission Director, National Health Mission were privy to the contract - writ petition filed by the petitioner, who is just subcontractor / agent of opposite party no.3 praying for direction to the States to make payment of amount to him for work done by it - opposite party no. 3 for meeting the obligation of making payment to the petitioner chose not to institute any proceeding against the State/Center - Held - petitioner for the purpose of excecuting the work of opposite party no. 3 was not more than a selective choice & that too without following any tender process - real contract remains enforceable at the instance of opposite party no. 3 who has chosen to remain dormant against the State - writ petition dismissed (Para 14, 15)

Dismissed. (E-5)

List of Cases cited:

1. Joshi Technologies International Inc. Vs U.O.I. & ors. (2015) 7 Supreme Court Cases 728

2. Bio Tech System Vs St. of U.P. & ors. 2021(1) AWC 92

3. Lalloo Ji Rajiv Chandra and Sons Vs Meladhikari Prayagraj, Mela Authority & ors. 2019(2) AWC 1750

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

1. This is a writ petition instituted by the sub-contractor or agent of opposite party no.3 praying for the relief as under :-

"(i) Issue an appropriate writ, order or direction in the nature of mandamus directing the respondents to make payment of the admitted amount to the petitioner for work done by it, which

stand admitted by the respondent in their various correspondences, particularly in annexure nos. 22 & 23 of the writ petition.

(ii) Issue an appropriate writ, order or direction in the nature of mandamus directing the respondents to make payment of 18% interest over the said amount for a period of two and a half years."

2. Briefly stated facts of the case are that the central government for reducing the consumption of tobacco launched a scheme in the year 2019 to commemorate "No Tobacco Day' on "World No Tobacco Day' by taking appropriate steps as mentioned in D.O. letter dated 03.05.2019. The drive of no-tobacco movement under the scheme was to be implemented by each State/U.T. as per the guidance of the central government in the letter dated 03.05.2019 which for ready reference is reproduced below :

"Respected Madam/Sir,

As you are aware that every year, 31st May is observed as World No Tobacco Day(WNTD), highlighting the health and other risks associated with tobacco use, and advocating for effective policies to reduce tobacco consumption. This year, the theme of 'World No Tobacco Day 2019 is "Tobacco and lung health". World No Tobacco Day 2019 will focus on the multiple ways the exposure to tobacco affects the health of people's lungs worldwide, which includes Lung cancer, chronic respiratory disease, maternal smoking or matenral exposure to second-hand smoke, onset and exacerbation of asthma, pneumonia and bronchitis, and frequent lower respiratory infection among young children and Tuberculosis. A soft copy of the poster developed for WNTD will also be sent to you in a short while for further dissemination.

2. In order to raise awareness on risks posed by tobacco smsoking and second hand smoke exposure, especially awareness on the particular dangers of tobacco smoking to lung helath and emerging evidence on the link between tobacco smoking and tuberculosis deaths, State/UT is requested to commemorate this year's World No Tobacco Day. An enforcemnt drive on tobacco control laws for at least 15 days conversion and declaration of all Government building as Tobacco Free Pemise/Building;awareness activities like road shows, street plays etc; training of health staff in NCD clinics and starting Tobacco Cesation Services in the NCD clinics;integration of Tobacco Cessation Services with NCD clinics, are some of the suggested actities that may be carried out during this time.

3. I solicit your intervention and support to project together to the World our strong commitement towards tobacco control.

With Warm regards"

3. The State of U.P. in the light of aforesaid letter held a meeting on 09.05.2019 under the aegis(Chairmanship) of the department of medical health & family welfare and it was decided that the work of information, communication and education of "No Tobacco Day' be carried out by U.P. State Employees Welfare Corporation which shall provide brochures, posters, banners, pamphlets, community awareness and leaflet etc at the level of each district to the health department. The corporation i.e. opposite party no.3 for providing the printed material is stated to have been chosen in the meeting held on 09.05.2019 to which the petitioner was not a party. Looking to the paucity of time due to the ongoing election process, the corporation as understood to have a

mechanism of receiving e-tenders was thus chosen by the State to provide printed material at the respective districts without following any tender process. It is in this background that the U.P. State Employees Corporation stepped into the implementation of the "No Tobacco Day' project floated by the Central Government in the year 2019. Undisputedly the U.P. State Employee Corporation is an instrumentality of the State within the meaning of Article 12 of the Constitution of India and this position is well settled in the judgment reported in (2005)1 SCC 149(Virendra Kumar Srivastava versus U.P. Rajya Karamchari Kalyan Nigam and Another). The petitioner, however, is merely a firm registered with the U.P. State Employees Corporation under the terms and conditions set out in the office memorandum dated 8.10.2015. Likewise other firms are also registered with the Corporation on the like terms.

4. The petitioner was awarded work by the U.P. Rajya Karamchari Kalyan Nigam and there is no document on record to show that the State of U.P. or Mission Director, National Health Mission were in any manner privy to the contract awarded to the petitioner through work orders. It is also not the case of the petitioner that the opposite party no. 3 before issuance of the work orders to the petitioner had obtained prior approval of the State as regards his engagement to perform the contract. The averments made in the writ petition also do not show that the opposite party no. 3 before issuing the work order to the petitioner has adopted any tender process and undertaken any competitive exercise for the award of contract. The sole premise upon which the claim rests is a simple averment that the petitioner was issued work orders by opposite party no. 3 which on its implementation deserve to be honored by all other opposite parties including the State government and Director National Health Mission U.P. being a representative of the Central Government.

5. Parties were heard. The petitioner reiterated the contention that once the work orders were issued to him and the same have been carried out successfully, therefore, there is no reason as to why the payment payable may not be released by the opposite parties.

6. The opposite party no. 3 while disputing the liability has laid emphasis on the point that the very registration of the petitioner with the opposite party no. 3 is subject to the condition that unless the fund is released by the State, there is no question of releasing the payment as has been claimed by the petitioner. Clause 7 of the office memorandum dated 8.10.2015 stipulating conditions of registration has specifically been referred to and the same reads as under :-

"7. सामग्रियों की आपूर्ति किये जाने वाले विभाग से निगम को भुगतान प्राप्त होने के पश्चात संबंधित आपूर्तिकर्ता फर्म/ट्रेडर्स के पक्ष में नियमानुसार भुगतान किया जायेगा।"

7. This Court may note that the petitioner apart from its registration with the opposite party no. 3 has not placed any material or document according to which a legitimate right of contractual liability viz a viz the opposite party no. 3 was created. There is a difference between choosing a person selectively and through a legitimate process. The petitioner for the purpose of excecuting the work of opposite party no. 3 was not more than a selective choice that

too without following any tender process, therefore, whether the work order issued to the petitioner constitutes a valid contract or not is by itself too doubtful. To classify the relationship between the petitioner and opposite party no. 3 as that of master and agent would not be legally wrong and this alone would not enable the petitioner to sue against the State even if the services have been utilized. The observation is made as there is no written document binding the petitioner and opposite party no. 3 for the performance of any project.

8. Interestingly, the opposite party no. 3 does not dispute the issuance of work order in favour of the petitioner but what is disputed is the release of payment. In order to defend the liability, the opposite party no. 3 has heavily relied upon clause-7 of the memorandum of registration dated 8.10.2015 reproduced above. The opposite party no. 3 for meeting the obligation of making payment to the petitioner has however not chosen to institute any proceeding whatsoever against the State/Center. The petitioner not being a participant in the meeting held on 9.5.2019 can not take any such recourse unless the work awarded to him was based on a legitimate procedure of tender. Even if there was any contract, it was confined between the petitioner and opposite party no. 3 of which there is no disclosure. The business is for profit, therefore, disclosures must be neat and clean between the parties. It is in these circumstances that the matter has come up before us. The question that crops up is as to whether the petitioner who was engaged by opposite party no. 3 for execution of work at its sole discretion has a right to pray for the release of money against the State (Opposite party nos. 1 and 2 & 5) as well as the Director National Health Mission U.P. i.e. opposite party no. 4.

9. The Court called upon all the opposite parties for filing a counter affidavit as well as written submissions. Two specific arguments in the light of pleas taken in the counter affidavits have been advanced by learned counsel for the State as well as by opposite party no. 4. Firstly, that the case involves determination of disputed questions of facts, therefore, the lis between the parties is not amenable to writ jurisdiction. The argument putforth is substantiated on the strength of case law reported as under :-

1. (2015) 7 Supreme Court Cases 728; Joshi Technologies International Inc. versus Union of India and others

2. 2021(1) AWC 92; Bio Tech System versus State of U.P. and others

3. 2019(2) AWC 1750; Lalloo Ji Rajiv Chandra and Sons versus Meladhikari Prayagraj, Mela Authority and others

10. The second submission putforth by both the respondents i.e. State and Director National Health Mission, U.P. is to the effect that none of these two parties are privy to the contract entered into between the petitioner and opposite party no. 3. The specific argument putforth in para 9 of the written submissions filed by the State (opposite party nos.1, 2 & 5) reads as under :-

"9. That in the present case the claim sought to be set up by the petitioner has strongly disputed, and the petitioner has not been able to place on record any material to demonstrate that it was a party to any agreement in terms of which it

would be entitled to raise any claim against the respondents."

11. The issue before us does not substantially hinge on the first argument rather it is the second argument that requires consideration for setting the controversy at rest.

12. In order to appreciate the argument putforth, it is to be noted that on raising every demand for the realization of bills by opposite party no. 3, the State had required the opposite party no. 3 to discose the name of the firm and its Bank account for the purposes of release of amount to the opposite party no. 3. The disclosure to the above extent, in our humble consideration, does not qualify the relationship of the State qua the petitioner to be a party to the work contract awarded to opposite party no. 3. Therefore, institution of the present petition in the pursuit of exclusive rights against the State and Director National Health Mission is wholly misconceived and suffers from mis-joinder of parties. The impleadment of opposite party no. 3 in the writ petition is nothing but an attempt on the part of the petitioner to institute a proxy or collusive proceeding. The opposite party no. 3 may have engaged the petitioners as an agent but any such deal would not entitle the petitioner to bring about a legal proceeding against the State government or the Central government so long as the obligation of performance of contract or indemnity offered, if any, to make up the deficiency was direct. The disclosures made by the opposite party no. 3 as regards the name of the firm or its account were merely to streamline its independent relationship between the Corporation and the State for its own interest and a tripartite agreement in the circumstances of the case was never arrived at expressly or by implication, the mere acknowledgment of the name of the firm and its Bank account would not bind the State for performance of financial obligations towards the petitioner directly and exclusively.

13. In a situation where the performance of public duty is interwoven between the two parties for its implementation, the entry of a third party in absence of a privity of contract is unrecognized under law, the scope whereof, remains undefined. Any interpretation in the light of the conduct of parties that too for consuming public money would be a dangerous preposition. It is this reason for which the rule of privity of contract was rigidly propounded in the case of Tweddle versus Atkinson reported in [1861] EWHC J57(QB).

14. The nature of the prerogative remedy of a mandatory order to perform a public duty by the public authorities arising from law and contract are distinct. For binding the State under the obligation of performance of a contract, firstly the State ought to be a party expressly and secondly there ought not to be a situation of determination of disputed questions of facts. In the present case, however, the petitioner does not appear to have assumed any better position except to remain an agent for the opposite party no. 3. The locus and identity of the petitioner has remained merged with the opposite party no. 3 for any claim whatsoever. The opposite party no. 3 has not putforth any claim before this Court, therefore, the legal hurdles in the way of the petitioner to lay a claim independently besides other legal obstacles coming in the way of locus do not enable this Court to step in, the reason being, that the real contract remains enforceable at the instance of opposite

party no. 3 who has chosen to remain dormant against the State.

15. In the circumstances stated above, we are not convinced that the writ petition for the relief prayed herein can be entertained and it is open to opposite party no. 3 to lay his claim as may be permissible under law. The writ petition is accordingly dismissed with no order as to cost.

(2023) 1 ILRA 157
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2022

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE AJIT SINGH, J.

Writ C No. 3298 of 2022

C/M, Azad Cooperative Housing Society Ltd., Bareilly & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Prabhakar Awasthi, Sri Dhiresh Kumar, Sri Hiresh Tiwari, Sri K.M. Mishra, Sri H.R. Mishra (Senior Counsel)

Counsel for the Respondents:
C.S.C., Sri Lal Chandra Sahu, Sri Narendra Kumar Giri, Sri Nirankar Singh, Sri Sunil Kumar Misra

A. Civil Law - U.P. Cooperative Societies Act, 1965 - Sections 29 (4-B), 35 & 38 - U.P. Co-operative Societies Rules, 1968 - Rules 437 & 438 - Term of interim committee appointed by Registrar - six months - Under section 29 (4-D), the interim Committee appointed under sub-section 29(4-B) shall cease to exist after the expiry of six months from the date of its appointment or reconstitution of the Management Committee after election thereof whichever is earlier - Reconstitution - mere change of any member of the interim Committee of Management, would not mean that the term of the Committee of Management would commence from that date (Para 11, 12)

B. Civil Law - U.P. Cooperative Societies Act, 1965 - U.P. Co-operative Societies Rules, 1968 - Removal of secretary - by interim committee appointed by Registrar, after expiry of its term - Effect - the election of the C/m of the Society was held on 15.10.2016, for a period of 5 yrs, term was to expire on 14.10.2021 - However, before the term expired, on 17.6.2021, the Additional Housing Commissioner superseded the elected C/m & appointed a four member interim Committee - on 13.8.2021, the A.C.M. -II was transferred and the ACM, was substituted in his place - On 2.1.2022, under the orders of the Chairman of the interim C/m, the ACM-1, on the basis of the resolution dated 20.12.2021, removed the Secretary - Held - term of the interim Committee of Management which was constituted on 17.6.2021 expired on 17.12.2021, on the expiry of the six months, from the date from its appointment - On the date when the ACM II was replaced by the ACM, there was no fresh reconstitution of the interim Committee of Management but it was only a change which had been brought in to make the interim Committee of Management functional - therefore the resolution dated 20.12.2021 and 1.1.2022, passed by the interim committee, after expiry of its term, were without jurisdiction & the order of removal of secretary passed on 2.1.2022 was also without any jurisdiction - resolutions dated 20.12.2021 and 1.1.2022 and the order dated 2.1.2022 quashed & set-aside - Court directed to hold election forthwith in accordance with law (12, 13, 15)

Allowed. (E-5)

(Delivered by Hon'ble Siddhartha Varma, J.

&
Hon'ble Ajit Singh, J.)

1. The petitioner C/M Azad Cooperative Housing Society Limited (hereinafter referred to as the "Society") is a duly registered cooperative society under the U.P. Cooperative Societies Act, 1965 (hereinafter referred to as the "Act").

2. The last admitted election of the Committee of Management of the Society was held on 15.10.2016, as per its bye-laws for a period of five years. The term therefore was to expire on 14.10.2021. It appears that on 17.6.2021, the Additional Housing Commissioner exercising his powers under Section 35 read with Section 38 of the Act held that all the members of the Committee of Management had forfeited their rights to continue and, therefore, superseded the elected Committee of Management. Exercising his powers under Sections 29 (4-B) of the Act and under Rule 438 of the U.P. Co-operative Societies Rules, 1968, (hereinafter referred to as the "Rules"), he further appointed a four member interim Committee consisting of various State officials.

3. On 2.1.2022, under the orders of the Chairman of the interim Committee of Management of the Society, Sri Pradeep Kumar Raman, ACM-1, Bareilly, on the basis of the resolution dated 20.12.2021(resolution no. 2) removed the Secretary Smt. Pushpa Singh, the petitioner no. 2. Also by the same order Sri Prempal Singh, son of Sri Mahendra Pal Singh (Sugarcane Observor, Godown Incharge), Cane Development Board, Chandpur was appointed as the Secretary of the Society. Aggrieved thereof, the petitioners have filed the instant writ petition.

4. Learned counsel for the petitioners Sri H.R. Mishra assisted by Sri K.M. Mishra submitted that the order dated 17.6.2021 passed under Section 38 of the Act was in breach of Rules 437 & 438 of the Rules read with Section 35 of the Act.

5. Learned counsel for the petitioners has submitted that after the passage of five years from the last admitted election dated 15.10.2016, the term of the Committee of Management expired on 14.10.2021. In between, he submits that when the order dated 17.6.2021 was passed the same was passed without affording any opportunity of hearing and without adhering to the provisions of Section 38 of the Act.

6. Thereafter, it has been argued by the learned counsel for the petitioners that when the interim Committee of Management of the Society was appointed on 17.6.2021 then, thereafter, its term expired after the passage of six months from the date of the appointment and he, therefore, submitted that the order which was passed on 2.1.2022 basing on the resolution dated 20.12.2021 was against the provisions of Section 29(4-D) as the interim Committee of Management which was constituted on 17.6.2021 lived its term till 17.12.2021 i.e. after the six months had expired from the date of the constitution of the interim Committee of Management. Since the learned counsel for the petitioners relied upon Section 29 (4-D) of the Act, the same is being reproduced here as under:-

"29(4-D). The interim Committee appointed under sub-section (4-B) shall cease to exist after the expiry of six months from the date of its appointment or reconstitution of the Management Committee after election thereof whichever is earlier."

7. Learned counsel for the petitioners submitted that a bare perusal of Section 29 (4-D) shows that the interim Committee of Management had ceased to exit after the expiry of six months from the date of its appointment and, therefore, even the resolution which was passed before the passing of the order dated 2.1.2022 on 20.12.2021 was without any jurisdiction.

8. Sri Nirankar Singh learned counsel for the respondent no. 6 filed a counter affidavit and questioned the authority of the petitioners to file the writ petition. He also submitted that if the resolution dated 20.12.2021 was being questioned then the petitioners had an alternative remedy of approaching the Registrar under Section 128 of the Act and under Section 128 the Registrar had power to annul any resolution of a cooperative society.

9. Learned counsel has submitted that the office bearers of the petitioners were removed on 17.6.2021 after due notice. He had submitted that for quite some time in the month preceding 17.6.2021 the Managing Committee of the Society had not been able to convene any meeting and the office bearers were neck deep in various embezzlements. He submits that with regard to functioning of the Committee, videography and photography was also done on 5.11.2020, 6.2.2021 and 9.4.2021 and, he, therefore, submits that when the members of the Committee of Management were deliberately absenting themselves then resorting to the powers of under Section 38 of the Act, the order dated 17.6.2021 was passed.

10. With regard to the argument of the petitioner that the interim Management Committee which was appointed on 17.6.2021 had outlived its life, learned counsel for the private respondent submitted that on 13.8.2021, the A.C.M. -II was transferred and the ACM, therefore, was substituted in his place and, therefore, it was a re-constituted Committee of Management and, therefore, the six months would be counted from the date of its reconstitution. He, therefore, submits that the resolution dated 20.12.2021 and the subsequent resolution dated 1.1.2022 were passed by a Committee of Management which had full authority to pass those resolutions. He also submits that the order dated 2.2.2022 which was passed by the Chairman of the interim Committee of Management on the basis of the resolution dated 20.12.2021 was absolutely in order and no interference was required. He still further submitted that even for the removal of the office bearers, specially, the Secretary, the petitioner had an effective alternative remedy by way of filing an Appeal under Section 98 of the Act.

11. Having heard the learned counsel for the petitioners; the counsel for the private respondents Sri Nirankar Singh; Sri Narendra Kumar Giri for the Election Commission and Sri Sunil Kumar Mishra for the Additional Housing Commissioner/Additional Registrar, Uttar Pradesh Awas & Vikas Parishad (Cooperative Department), the Court is of the view that at this stage when the term of the Committee of Management had expired on 14.10.2021, no useful purpose would be served by adjudicating upon the fact as to whether the order dated 17.6.2021 was passed in accordance with law or not. The Court is of view that even after the passing of the order dated 17.6.2021, six months had expired on 16.12.2021. Definitely as per the provisions of Sections 29(4), 29(4-A), 29(4-B) and 29(4-C) of the Act, the election ought to have been held after the

expiry of the term of the Committee of Management. If, however, an interim Committee of Management had been appointed by the Registrar for the management of the Society then the term of the interim Committee of Management had also to come to an end on the expiry of the six months, from the date from such appointment. The Court, therefore, is of the view that the resolution dated 20.12.2021 and 1.1.2022 were without jurisdiction. The Court is also of the view that the order which was passed on 2.1.2022 was absolutely without any jurisdiction as the resolution dated 20.12.2021 itself on the basis of which the order dated 2.1.2022 was passed was a resolution which could not have been passed. For ready reference, we are reproducing Sections 29 (4) to 29(4-D) of the Act here as under:-

"29(4). It shall be the duty of the Secretary or the Managing Director of the cooperative society as the case may be, to send to the Election Commission four months before the expiry of the term of the Committee of Management, a requisition for conducting the election and to furnish all such information as may be required by the election commission within such period of as may be fixed by it.

(4-A) Due to any reason, whatsoever, if members of the Management Committee are not elected or could not get elected before expiry of its tenure then the Management Committee shall cease to exist after expiry of its term notwithstanding anything to the contrary in any other provision of this Act, or the rules made thereunder or the bye-laws of the society.

(4-B) After the Management Committee ceases to exist under sub-section (4-A) an interim Management Committee shall as soon as possible be appointed by the Registrar for the Management of the Cooperative society in accordance with the provisions of this Act, the rules and the bye-laws of the society. The Registrar shall have power to change the members of the interim Management Committee or appoint a new interim Management Committee in place thereof.

(4-C) The interim Management Committee appointed under sub-section (4-B) shall exercise the powers and perform the functions of the Management Committee under this Act subject to the directions given by the Registrar from time to time.

(4-D) The interim Committee appointed under sub-section (4-B) shall cease to exist after the expiry of six months from the date of its appointment or reconstitution of the Management Committee after election thereof whichever is earlier.

12. Nowhere from the above provisions which have been quoted above can it be gleaned out that upon the change of any member of the interim Committee of Management would the term of the Committee of Management commence from that date. Under such circumstances, the following facts become clear:

I. The term of the interim Committee of Management which was constituted on 17.6.2021 expired on 17.12.2021.

II. On the date when the ACM II was replaced by the ACM, there was no fresh reconstitution of the interim Committee of Management but it was only a change which had been brought in to make the interim Committee of Management functional.

13. Under such circumstances, we hold that the resolutions dated 20.12.2021

and 1.1.2022 passed by the respondent no. 4 were passed without any jurisdiction. Since the Court holds that the resolutions were passed without any authority of law, we do not consider it appropriate to suggest that the petitioners ought to have approached the alternative forum. Since now, we have held that the resolutions were passed without any authority of law, we also hold that the order dated 2.1.2022 passed by the respondent no.6 was passed without any authority of law. The resolutions dated 20.12.2021 and 1.1.2022 and the order dated 2.1.2022 are quashed and are set-aside.

14. On the date, when the judgement was reserved there was a statement given by the Election Commission that no election till that date had taken place.

15. Under such circumstances, we further direct that if the elections have till date not taken place, they be held forthwith in accordance with law.

16. For the reasons stated above, the writ petition stands allowed.

(2023) 1 ILRA 161
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.12.2022

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE AJIT SINGH, J.

Writ C No. 23865 of 2022
Connected With
Writ C No. 23942 of 2022
And
Writ C No. 26680 of 2022
And
Writ C No. 25749 of 2022

Raj Mangal Gond ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Krishna Mohan Misra, Sri Swatantra Pratap Singh, Sri H.R. Misra, Sr. Advocate

Counsel for the Respondents:
C.S.C.

Constitution of India, 1950 - Article 342(2) - Scheduled Caste and Scheduled Tribe Orders (Amendment) Act, 2002 - Gond Caste - Caste Certificate - Held - authority i.e. the Tehsildar, which had earlier issued the Caste Certificate had no jurisdiction to cancel the same except when the Caste Certificate had been obtained by playing fraud or by concealing any relevant fact - In the instant case the Tehsildar cancelled the Caste Certificate issued by him, holding that the petitioner was not of the Gond Caste but was of the Kahar caste, but there was no finding in the impugned order that the earlier certificate was obtained by the petitioner by playing fraud on any authority - the impugned order quashed and set aside. (Para 7)

Allowed. (E-5)

List of Cases cited:

1. Hizwana Bano Vs St.of U.P. & ors., 2011(1) ADJ 440 (DB),

2. Praveen Kumar Vs St.of U.P. & ors. 2014(8) ADJ 690 (DB),

3. Rajesh Kumar Gond Vs St.of U.P. & ors. 2015(8)ADJ 275 (DB),

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

1. Heard learned counsel for the parties.

2. The petitioner who claimed himself to be a Gond with a permanent domicile of

Village Kasamriya, District Maharajganj had a Caste Certificate of being a Scheduled Caste which was dated 6.6.1996. However, when the parliament in the exercise of its power under Article 342(2) of the Constitution of India brought the Scheduled Caste and Scheduled Tribe Orders (Amendment) Act, 2002 and had considered Gond Caste residing in the District Maharajganj to be of the Scheduled Tribe, the petitioner again applied for a certificate holding that the petitioner was of the Scheduled Tribe. When the Tehsildar who was adjudicating the matter held that the petitioner was not of the Gond Caste but was of the Kahar caste, the petitioner challenged the matter before the District level Caste Scrutiny Committee, Maharajganj. On 04.10.2014 the District level Caste Scrutiny Committee, Maharajganj remitted the matter back to the Tehsildar for examining the evidence and directed him to reconsider the evidence and thereafter to issue the Caste Certificate in accordance with law. On 27.11.2014, the Tehsildar issued a Caste Certificate to the petitioner which indicated that the petitioner was of the Scheduled Tribe. The Caste Certificate according to the petitioner which was issued on 27.11.2014 was a certificate, which was issued by hand and since there were subsequent Government Orders which desired that a candidate had to have a Caste Certificate "On-line" the petitioner applied again for the issuing of a Caste Certificate "On-line". The petitioner alongwith certain other individuals who were also of the Scheduled Tribe applied for the issuing of the Caste Certificate On-line. The applications, however, were rejected in a mechanical manner and, therefore, the petitioner along with certain other individuals filed a writ petition being Writ-C No. 15552 of 2020 (Anoop Kumar Gond and 70 Others vs. State of U.P. and 4 Others), which was disposed of on 12.10.2020 with the following order:-

"This writ petition has been filed, inter alia, for the following relief;

"(i) Issue a writ order or direction in the nature of mandamus directing the respondents to take into consideration the Census-1891 for issuance of Scheduled Tribe certificate to the petitioners."

Learned counsel for the petitioners stated that the petitioners have filed applications before the concerned Tehsildars for issuance of Caste Certificates but till date no order has been passed.

Heard learned counsel for the parties and perused the record.

Considering the facts and circumstances of the case and without expressing any opinion on the merits of the case, we grant liberty to the the petitioners to make a comprehensive representation before the respondent-Tehsildars for passing appropriate orders on their applications filed for issuance of Caste Certificates within two weeks from today along with a copy of this order enclosing therewith a copy of the writ petition and its annexures and, if any such representation is made, the said authority shall make all endeavour to consider and pass appropriate orders on the same in accordance with law expeditiously preferably within 60 days from the date of receipt of the said representation.

The writ petition stands disposed of. "

3. Thereafter, in pursuance of the High Court's order, the impugned order dated 26.2.2021 was passed by the Tehsildar- Sadar, District Maharajganj. His order has been based on a certain enquiry

report of the revenue authorities. Since the orders of the Tehsildar had rejected the claim of the petitioner to be declared as a Gond, which was Scheduled Tribe and he had in fact considered him as "Kahar", the petitioner has filed the instant writ petition. Learned counsel for the petitioner states that when earlier the Tehsildar on 27.11.2014 had already passed an order to the effect that the petitioner was to be considered a member of the Scheduled Tribe and a certificate was also issued to that effect then the Tehsildar, who did not have the authority or jurisdiction to hold a fresh enquiry in support of the claim of the petitioner while considering the claim of the petitioner to issue On-line Caste Certificate, could not pass the order impugned. Learned Counsel for the petitioner submits that the matter ought to have been referred by the Tehsildar, if he was doubting whether the petitioner was of the Scheduled Tribe, to the District Level Caste Scrutiny Committee, Maharajganj.

4. Learned counsel for the petitioner submits that the Caste Scrutiny Committee was formed by the State Government, as per the Government Order dated 28.02.2011. Learned counsel for the petitioner relied upon the paragraphs no. 3 and 4 of the Government Order which are being reproduced here asunder:-

" 3. इसी संदर्भ में दायर रिट याचिका संख्या– 1396 /2011 (पी0आई0एल0) थारू शक्ति समिति महराजगंज व अन्य बनाम उ0प्र0 राज्य व अन्य में जाति प्रमाणपत्रों के सत्यापन के संबंध में मा0 उच्च न्यायालय के आदेश दिनांक 12.1.2011 में दिये गये संवीक्षण के परिप्रेक्ष्य में जाति प्रमाण पत्रों के सत्यापन की व्यवस्था को और अधिक पारदर्शी तथा सुगम बनाये जाने हेतु जनपद स्तर पर भी निम्नानुसार समिति गठित की जाती है:–

1. जिलाधिकारी अध्यक्ष
2. जिलाधिकारी द्वारा नामित सदस्य एक अपर जिलाधिकारी स्तर का अधिकारी
3. जिलाधिकारी द्वारा नामित एक उप जिलाधिकारी सदस्य
4. जिला समाज कल्याण अधिकारी सदस्य सचिव

(अन0 जाति/अनु0 जनजाति हेतु) एवं जिला पिछड़ा वर्ग कल्याण अधिकारी

(अन्य पिछड़ा वर्ग हेतु)

उपरोक्त समिति के समक्ष यथास्थिति अभ्यर्थी के द्वारा स्वयं, उसके माता–पिता या अभिभावक द्वारा किसी शैक्षिक संस्था में प्रवेश हेतु अथवा किसी सेवा में नियुक्ति के लिए जाति प्रमाण पत्रों के सत्यापन हेतु आवेदन प्रस्तुत किया जायेगा, जिस पर समिति द्वारा सत्यापन की पुष्टि विलम्बतम 15 दिन में कर दी जायेगी।

4– इसके अतिरिक्त उक्त समिति द्वारा जाति प्रमाणपत्रों के संबंध में निम्न प्रकार के मामलों का भी निस्तारण किया जायेगा :–

1. किसी नियुक्ति के पश्चात सेवायोजन द्वारा सेवक के जाति प्रमाण पत्र के सत्यापन /पुष्टि हेतु प्रस्तुत किये गये मामले ।
2. किसी व्यक्ति अथवा व्यक्तियों के समूह के संबध में जाति प्रमाण पत्रों के न बनाये जाने संबंधी शिकायतों के मामले।
3. जाति प्रमाणपत्रों के फर्जी होने अथवा त्रृटिपूर्ण जाति प्रमाण पत्र बनाये जाने संबंधी मामले।
4. जाति प्रमाणपत्रों के संबंध में किसी अन्य विसंगति के मामले। "

5. Learned counsel for the petitioner in this regard also relied upon the judgements reported in ***2011(1) ADJ 440 (DB), Hizwana Bano vs. State of U.P. and Others, 2014(8) ADJ 690 (DB), Praveen Kumar vs. State of U.P. and Others and 2015(8)ADJ 275 (DB), Rajesh Kumar Gond vs. State of U.P. and others.***

6. Learned Standing Counsel, however, in opposition to the writ petition has submitted that the Tehsildar was the issuing authority of the Caste Certificate and if the petitioner was aggrieved by the decision arrived at by the Tehsildar then he should have filed an Appeal under the provisions of Uttar Pradesh Public Interest Guarantee Act, 2011 before the Sub-Divisional Magistrate.

7. Having heard the learned counsel for the petitioner, Sri H.R. Misra, learned Senior Advocate assisted by Sri K.M. Misra and Sri Swatantra Pratap Singh, learned counsel for the petitioners and the learned Standing Counsel, the Court is definitely of the view that when the Tehsildar had already earlier issued a certificate and was only issuing a fresh certificate "On-line" then he could not enter into the merits of the matter. The jurisdiction to verify the Caste Certificate and as to whether it should be validated or in-validated lay with the Caste Scrutiny Committee under the Government Order dated 28.02.2011. The authority i.e. the Tehsildar, which had earlier issued the Caste Certificate had no jurisdiction to cancel the same except when the Caste Certificate had been obtained by playing fraud or by concealing any relevant fact. In the instant case when the Tehsildar had cancelled the Caste Certificate issued by him on 27.11.2014, there was no finding in the impugned order that the earlier certificate was obtained by the petitioner by playing fraud on any authority. As a result, the impugned order dated 26.02.2021, so far as its relates to the petitioner is quashed and is set aside.

8. With these observations the writ petition stands allowed.

9. The Tehsildar shall issue the "Online" Certificate forthwith. If, however, the Tehsildar doubts the caste or the tribe of the petitioner he may refer the matter to the District Level Caste Scrutiny Committee, Maharajganj.

(2023) 1 ILRA 164
ORIGINAL JURISDICTION
CIVIL SIDE

DATED: LUCKNOW 13.01.2023

BEFORE

THE HON'BLE MANISH MATHUR, J.

Writ C No. 1003201 of 2011

Ramesh Chandra Verma ...Petitioner
Versus
Collector Barabanki & Ors. ...Respondents

Counsel for the Petitioner:
Adnan Ahmad

Counsel for the Respondents:
C.S.C.

A. Civil Law - Indian Stamp Act, 1899 - Instrument Not Duly Stamped - Limitation, S. 33 (5) Proviso - as per proviso to Section 33 (5) of the Act, no action under sub section (4) or sub section (5) can be taken by the authorities after a period of four years from the date of execution of the instrument - only saving in the second proviso to section 33(5) (Para 8)

B. Civil Law - Indian Stamp Act, 1899 - Lease executed on 26.09.2002 - notice dated 01.01.2010 issued in terms of S. 47-A r/w Ss 33/40 of Indian Stamp Act - objections taken by petitioner pertaining to limitation - objections pertaining to limitation rejected primarily on the ground that the document in question being a lease under Section 2(16) would amount to an instrument as defined under Section 2(14) of the Act and would therefore be chargeable to duty in terms of section 2(6) and section 3 of the Act particularly since instrument was executed in India in terms of section 17 of the Act - Held - notice has been issued after a period of ten years from the date of execution of instrument of transfer and would be barred under aforesaid provisions - opposite parties have not taken any such ground that any prior permission from the State Government has been taken before

issuance of the notice dated Ist January, 2010 in terms of 2nd proviso to Section 33(5) of the Act - since initial notice itself was incompetent, no other issue is required to be adjudicated (Para 9, 10)

Allowed. (E-5)

List of Cases cited:

Som Dutt Builders Ltd. Vs St.of U.P. & ors. reported in 2005(23) Lucknow Civil Decisions 1030

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

1. Heard learned counsel for petitioner and learned State Counsel appearing on behalf of opposite parties.

2. Petition has been filed assailing notice dated Ist January, 2010 issued under Sections 33/40 of the Indian Stamp Act 1899, order dated 31st August, 2010 passed under section 47-A/33 and order dated 30th April, 2011 passed in appeal under Section 56 of the Act.

3. Learned counsel for petitioner submits that petitioner was lessee of a shop No.2, the lessor of which was Zila Panchayat, Barabanki on monthly rent of Rs. 187.50 per month for a period of three years. It is submitted that lease agreement was executed between the parties on 26th September, 2002 and quite belatedly thereafter notice dated Ist January, 2010 was issued to the petitioner under Section 47-A read with sections 33/40 of the Act requiring petitioner to show cause why proceedings may not initiated against him for evading stamp duty.

4. Learned counsel for petitioner submits that upon receipt of notice, objection thereto was filed by petitioner specifically taking a plea that proceedings were barred by limitation and further that even if stamp duty was applicable, the same could have been determined only on the basis of annual rental value of the property and not the area of property in question. It has been submitted that aforesaid objections are clearly indicated in the order passed under Section 47-A and while the second objection has been clearly ignored by the assessing authority, the first issue has also been decided against petitioner on the ground that instrument in question being an instrument as envisaged under Section 2(14) of the Act would be chargeable in terms of Section 2(6) of the Act since it is a document of lease in terms of section 2(16) of the Act and therefore no time frame has been indicated in the Act for initiating the proceedings.

5. Learned counsel for petitioner submits that orders impugned have been passed on a wrong appreciation of the provisions of Act particularly in view of proviso to section 33(5) of the Act which specifically provides that no action under Sub Section (4) or sub Section (5) of Section 33 can be taken after a period of four years from the date of execution of instrument. It is submitted that only saving clause is under the second proviso where action is permissible after prior permission of the State Government after a period of four years but the said proceedings are also required to be initiated before a period of eight years from the date of execution of instrument. It is thus submitted that the authorities have completely ignored the provisions of Section 33(4) and (5) of the Act and the proviso thereunder to hold that proceedings were within limitation.

6. Learned State Counsel has refuted submissions advanced by learned counsel for petitioner with submission that

document in question amounted to an instrument of lease as defined under Section 2(16) of the Act and would therefore be an instrument which is chargeable to duty in terms of Sections 2(14) and (6) of the Act. It is further submitted that since there is nothing to the contrary in the instrument of lease, stamp duty has been rightly imposed upon the petitioner being a lessee in terms of section 29(C) of the Act.

7. Upon consideration of submissions advanced by learned counsel for parties and perusal of material on record, it is admitted fact that instrument in question is that of lease executed on 26th September, 2002 on the basis of which notice dated Ist January, 2010 was issued in terms of section 47-A read with sections 33/40 of Indian Stamp Act. The order impugned under Section 47-A also records the objections taken by petitioner before the authority concerned in which objection pertaining to limitation also finds a mention. By means of impugned order dated 31st August, 2010, the objections pertaining to limitation have been rejected primarily on the ground that the document in question being a lease under Section 2(16) would amount to an instrument as defined under Section 2(14) of the Act and would therefore be chargeable to duty in terms of section 2(6) and section 3 of the Act particularly since instrument was executed in India in terms of section 17 of the Act. It is evident from a perusal impugned order that it has not at all adverted to section 33(4) and (5) of the Act as inserted by U.P. amendment vide U.P.Act No.6 of 1980 (with effect from 21st November, 1979). The aforesaid provisions are as follows:-

"33 (4) Where deficiency in stamp duty paid is noticed from the copy of any instrument, the Collector may suo motu or on a reference from any court or from the Commissioner of Stamps or an Additional Commissioner of Stamps or a Deputy Commissioner of Stamps or an Assistant Commissioner of Stamps or any officer authorized by the Board of Revenue in that behalf, call for the original instrument for the purpose of satisfying himself as to the adequacy of the duty paid thereon, and the instrument so produced before the Collector shall be deemed to have been produced or come before him in the performance of his functions.

(5) In case the instrument is not produced within the period specified by the Collector, he may require payment of deficit stamp duty, if any, together with penalty under section 40 on the copy of the instrument:

Provided that no action under sub-section (4) or sub-section (5) shall be taken after a period of four years from the date of execution of the instrument.

[Provided further that with the prior permission of the State Government an action under sub-section (4) or sub-section(5) may be taken after a period of four years but before a period of eight years from the date of execution of the instrument.]"

8. From a perusal of the aforesaid provisions, it is evident that as per proviso to Section 33 (5) of the Act, no action under sub section (4) or sub section (5) can be taken by the authorities after a period of four years from the date of execution of the instrument. The only saving has been indicated in the second proviso to section 33(5) but the same would be inapplicable in the present case particularly when it is not the case of opposite parties that any prior permission of the State Government has been taken. As such it is evident that the

matter would be covered only by first proviso to Section 33(5) of the Act.

9. In the present case, it is noticeable and admitted between the parties that the instrument of lease is dated 26th September, 2002 whereas notice under section 47-A read with Sections 33/40 of the Indian Stamp Act has been issued on 31st January, 2010. Clearly the notice has been issued after a period of four years from the date of execution of instrument of transfer and would be barred under aforesaid provisions.

10. In the counter affidavit filed, the opposite parties have not taken any such ground that any prior permission from the State Government has been taken before issuance of the notice dated Ist January, 2010 in terms of 2nd proviso to Section 33(5) of the Act.

11. A co-ordinate Bench of this Court in the case of Som Dutt Builders Limited versus State of U.P. and others reported in 2005(23) Lucknow Civil Decisions 1030 has particularly adverted to the aforesaid provisions and has also come to the conclusion on the same issue.

12. In view of aforesaid, since it is evident that in terms of proviso to Section 33(5) of the Act, the initial notice itself was incompetent, no other issue is required to be adjudicated.

13. Consequently in view of discussion made herein above, the proceedings initiated vide notice dated Ist January, 2010 under Section 47-A read with Sections 33/40 of the Act being incompetent, the notice dated Ist January, 2010, order dated 31st August, 2010 passed under section 47-A and order dated 30th April, 2011 passed under section 56 of the Act are set aside.

14. Resultantly, the petition succeeds and is allowed. Parties to bear their own costs.

15. It has been submitted by learned counsel for petitioner that in pursuance of impugned orders, one third amount has already been deposited before the authority concerned. In view of fact that petition is being allowed, liberty is granted to petitioner to seek refund of the amount so deposited. In case such an application is made, the authority concerned is directed to refund the excess amount deposited within a period of three months from the date a copy of this order is produced before the authority concerned along with application.

(2023) 1 ILRA 167
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.01.2023

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ-C No. 130 of 2023

Abaad Ali ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mohammad Danish, Mohd. Mansoor, Syed Abul Kasim Zaidi

Counsel for the Respondents:
C.S.C., Gyanendra Mishra

(A) Civil Law - The Uttar Pradesh Panchayat Raj Act, 1947 - Section 12-C - Application for questioning the elections - an order for a recount touches upon the secrecy of ballot, it should not be made

lightly or as a matter of course - two broad guidelines are discernible - court would be justified in ordering a recount or permitting inspection of the ballot papers only where (i) all the material facts on which the allegations of irregularity, or illegality in counting are founded, are pleaded adequately in the election petition, and (ii) the Court/Tribunal trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute. (Para - 18)

Election for post of Gram Pradhan - petitioner elected as Gram Pradhan - election petition under Section 12-C - ground - applicant entitled for re-counting – on basis of averments made in election petition - difference in valid/invalid/cancelled votes - overwriting and cutting on counting sheet - strong suspicion of fairness of counting procedure - direction of election tribunal - to Tehsildar and Block Development Officer to recount the votes - submit records to election tribunal for passing orders. **(Para - 3,7)**

HELD:-There being cutting/overwriting without the said cutting/overwriting being countersigned. No infirmity or illegality in the order directing for recounting of the votes. **(Para - 19)**

Petition Dismissed. (E-7)

List of Cases cited:

1. Khilari Vs The IVth A.D.J., Sonbhadra & ors. , AIR 1991 ALLD 186

2. Ravindra Singh Vs St. of U.P. & ors. , (2008) 105 RD 88

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

1. Heard learned counsel for the petitioner, Dr. Udaiveer Singh, learned Additional Chief Standing counsel appearing for the State-respondents and Sri Gyanendra Mishra, learned counsel appearing for the respondent no. 5.

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

"(i) Issue a writ, order or direction in the nature of Certioari quashing the impugned order dated 30.12.2022 passed by Sub Divisional Magistrate/Prescribed Authority District-Sultanpur in Case No. T20214680607476 of 2021 (Nizam Haider Vs. Abaad Ali and Ors), as contained in Annexure No. 01 to this writ petition.

(ii) Issue a writ, order or direction in the nature of Mandamus commanding the Sub Divisional Magistrate/Prescribed Authority District Sultanpur to proceed in Case No. T20214680607476 of 2021 (Nizam Haider Vs. Abaad Ali and Ors), in fair, transparent and impartial manner strictly in accordance with law."

3. The case set forth by the petitioner is that an election for the post of Gram Pradhan had taken place. After election, the petitioner was declared elected as Gram Pradhan. The respondent no. 5 being aggrieved with the election of the petitioner filed an election petition under Section 12-C of the Uttar Pradesh Panchayat Raj Act, 1947 (hereinafter referred to as "Act, 1947"). The said case was registered as Case No. 7476 of 2021 Inre; Nizam Haider Vs. Abaad Ali. The learned election tribunal framed various issues of which issue no. 2 was as to whether the applicant is entitled for re-counting keeping in view the averments made in the election petition. The said issue has been decided vide order dated 30.12.2022, a copy of which is annexure no. 1 to the writ petition with the direction to the Tehsildar and Block Development Officer to recount the votes on 16.01.2023. Videography has also been directed to be done. A representative each

of the applicant and the petitioner herein has also been required to be present at the time of recounting. The concerned authority has been required to make available the votes polled in order to enable the recounting in police presence. The Recounting officer has been directed to make available the result of recounting to the election tribunal and the matter has been listed on 17.01.2023 for the purpose of deciding the issues no. 1, 3 & 11.

4. The grounds taken by the learned counsel for the petitioner while challenging the said order are that:-

(a) it is only the election tribunal which could have counted the votes and there has been delegation of power to the Tehsildar and Block Development Officer which could not have validly been done. In this regard, reliance has been placed on the judgment of this Court in the case of **Khilari Vs. The IVth Additional District Judge, Sonbhadra** and other reported in **AIR 1991 ALLD 186**.

(b) the aforesaid officers cannot decide the validity of the invalid/valid votes which has been considered to be done while deciding the issue no. 2.

(c) recounting had already taken place prior to filing the election petition as such, no recounting can be directed to be done by the learned election tribunal.

(d) while directing for recounting, the election tribunal has patently erred in law inasmuch as it should have called for the evidence of the returning officer and assistant returning officer with regard to allegations pertaining to form 46.

No other ground has been urged.

5. On the other hand, Dr Udaiveer Singh, learned Additional Chief Standing counsel as well as Sri Gyanendra Singh, learned counsel for the respondent no. 5 argue that the order passed by the election tribunal while deciding the issue no. 2 only directs for recounting of the votes. They contend that despite the fact that the issue no. 2 has been decided in favour of the applicant/respondent no. 5 herein wherein the issue which was as to whether the applicant is entitled for re-counting was framed and while deciding the said issue it has been indicated that the invalid and valid votes and part no. 1 & 2 of recounting slips and the appendix are to be seen yet the final order is only for directing for a recounting of the votes and as such it is always open for the election tribunal, after having the result of the recounting before it, to pass the final order in the matter. It is thus contended that the instant petition has only been filed on the basis of an apprehension on the part of the petitioner/elected Gram Pradhan apprehending that when the final recounting is done it may result in the true facts coming to the knowledge of the election tribunal of the elected Gram Pradhan having secured less votes and hence the petition has only been filed in order to avoid and delay the final outcome of the election petition.

6. Heard learned counsel appearing for the contesting parties and perused the records.

7. From a perusal of records it emerges that after the petitioner had been declared as elected Gram Pradhan, an election petition under Section 12-C of the Act, 1947 has been filed by the respondent no. 5 herein challenging the election of the petitioner on various grounds. The learned Election tribunal framed various issues of which issue no. 2 was as to whether the applicant is entitled for re-counting keeping in view the averments made in the election

petition. The learned Election tribunal has discussed issue no. 2 threadbare and was of the view that there has been over writing and cutting in the result form no. 46 pertaining to booth no. 43 which cutting/overwriting has also not been countersigned, apart from there being difference in the valid/invalid/cancelled votes and has placed reliance on the judgment of this Court in the case **Ravindra Singh Vs State of U.P and Ors** reported in **(2008) 105 RD 88** to take the view that where either on account of improper acceptance or improper rejection of votes or there are apparent mistakes in the counting which has affected the election result or where there are overwriting and cutting on the counting sheet then the same raises a strong suspicion of the fairness of the counting procedure.Thereafter, the learned Election tribunal has passed an order requiring the Tehsildar and Block Development Officer to recount the votes and to submit the result by means of the order impugned dated 30.12.2022.

8. The aforesaid order dated 30.12.2022 has been challenged on various grounds as have been indicated above and now the Court proceeds to deal with the said grounds.

9. The first and second grounds of challenge to the order impugned are being dealt together. The said grounds are that (a) it is only the election tribunal which could have counted the votes and there has been delegation of power to the Tehsildar and Block Development Officer which could not have validly been done and (b) the aforesaid officers cannot decide the validity of the invalid/valid votes which has been directed to be done while deciding the issue no. 2.

10. In this regard, reliance has been placed on a judgment of this Court in the case of **Khilari (supra)** to contend that it is only the election tribunal which could have counted the votes and not the Tehsildar and Block Development Officer.

11. A perusal of the judgment in the case of **Khilari (supra)** would indicate that the order impugned before this Court in the case of **Khilari (supra)** was that the election tribunal had delegated the power of **recounting and declaration of result** to the Tehsildar and it is in those circumstances that this Court in the case of **Khilari (supra)** has held that as the election tribunal was acting in quasi judicial capacity it had no power to delegate.

12. The facts in the instant case are entirely different inasmuch as the Tehsildar and Block Development Officer have been directed by means of the impugned order dated 30.12.2022 to count the votes and then submit the records thereof to the learned election tribunal for passing orders upon the same on 17.01.2023. Thus, it is apparent that the learned tribunal has not delegated the power of declaration of the result as was the case in the case of **Khilari (supra).** Consequently, said grounds are not found tenable and are rejected.

13. The ground (c) of challenge to the order impugned is that the recounting had already taken place prior to filing the election petition as such, no recounting can be directed to be done by the learned election tribunal.

14. Suffice it to say that even if recounting had been taken place prior to filing of the election petition yet now it is the election of the elected Gram Pradhan

which has been challenged through the election petition. For the purpose of seeing as to whether the election of the petitioner was valid it is within the power of election tribunal to order for recounting of the votes. While deciding the issue no. 2 the learned election tribunal was of the view that certain invalid votes have also been considered. Thus, even if recounting had taken place prior to filing the election petition, the same would make no difference to the learned election tribunal in directing for a recounting as it has jurisdiction to do so while deciding an election petition and has thus required a recounting of votes consequently, the said ground is not found tenable and is rejected.

15. The ground (d) of challenge to the order impugned is that while directing for recounting, the election tribunal has patently erred in law inasmuch as it should have called for the evidence of the returning officer and assistant returning officer as the allegations with regard to form 46. Suffice it to say that once the learned election tribunal, upon perusal of the records as were produced before it as finds mentioned in detail while considering the ground (2), was of the view that there is cutting and overwriting in various forms which is also not countersigned as such, it was within the power of learned election tribunal upon being satisfied, to order for recounting as has been done in the instant case. Consequently, the said ground is rejected.

16. Even otherwise, a perusal of the order passed by the learned election tribunal while discussing the issue no. 2 pertaining to recounting of votes indicates that the learned Tribunal has considered threadbare the grounds as were raised before it and also has perused the material and only after perusal of the material before it and having found cutting/overwriting not being countersigned that the learned election tribunal has directed for recounting.

17. This aspect of the matter has already been considered by this Court in the case of **Ravindra Singh (supra).** For the sake of convenience, relevant observations made in the case of **Ravindra Singh (supra)** are reproduced below:-

"4. The law with regard to recount of votes is fairly well settled. In Beli Ram Bhalaik v. Jai Behari Lal Kachi MANU/SC/0257/1974 the Supreme Court cautioned that since an order for a recount touches upon the secrecy of ballot, it should not be made lightly or as a matter of course. Although no cast iron rule of universal application can be or has been laid down, yet, from a bedroll of the decisions of this Court, two broad guidelines are discernible; that the court would be justified in ordering a recount or permitting inspection of the ballot papers only where (I) all the material facts on which the allegations of irregularity, or illegality in counting are founded, are pleaded adequately in the election petition, and (ii) the Court/Tribunal trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties. In Suresh Prasad Yadav v. Jai Prakash Mishra MANU/SC/0279/1974 , Chanda Singh v. Ch. Shiv Ram 1974MANU/SC/0260, Manphul Singh v. Surinder Singh MANU/SC/0259/1974 , same principles were upheld. These principles were reiterated in Bhabhi v. Sheo Govind MANU/SC/0281/1975 : AIR1975SC2117 as follows:

(1) That it is important to maintain the secrecy of the ballot which is acrosant 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 supported by adequate statements of material facts;

(3) That 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 the 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.

5. In S. Raghubir Singh Gill v. S. Gurucharan Singh Tohra MANU/SC/0290/1980 it was held as under:

True, re-count cannot be ordered just for the asking. A petition for re-count cannot be ordered after inspection of ballot papers must contain an adequate statement on material facts on which the petitioner relies in support of his case and secondly the Tribunal must be prima satisfied that in order to decide the dispute and to do complete justice between the parties an inspection of the ballot papers is necessary. The discretion conferred in this behalf should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fishing out materials for declaring the election void.

6. In M.R. Gopalakrishanan v. Thachady Prabhakaran MANU/SC/0991/1995, it was held that the demand of defeated candidate for re-count of votes has to be considered keeping in view that secrecy of the ballot is sacrosanct in a democracy, and therefore, unless the election petitioner is able not only to plead and disclose the material facts but also substantiate the same by means of evidence of reliable character that there existed a prima facie case for re-count, no Tribunal or Court would be justified in directing a re-count.

7. In Vadivelu v. Sundaram MANU/SC/0634/2000 same principle was reiterated with emphasis in paragraph 16 quoted as below:

The result of the analysis of the above cases would show that this Court has consistently taken the view that re-count of votes could be ordered very rarely and on specific allegation in the pleadings in the election petition that illegality irregularity was committed while counting. The petitioner who seeks recount should allege and prove that there was improper acceptance of invalid votes or improper rejection of valid votes. If only the Court is satisfied about the truthfulness of the above allegation, it can order recount of votes. Secrecy of ballot has always been considered sacrosanct in a democratic process of election and it cannot be disturbed lightly by bare allegations of illegality or irregularity in counting. But if it is proved that purity of elections has been tarnished and it has materially affected the result of the election whereby the defeated candidate is seriously prejudiced, the court can resort to recount of votes under such

circumstances to do justice between the parties.

8. In V.S. Achuthanandan v. P.J. Francics MANU/SC/0061/2001, Supreme Court went to the extent of holding that once a recount is validly ordered and the statistics revealed by the re-count are available to be used for deciding election dispute, the facts reveled by re-count cannot be relied upon by the election petitioner to support the prayer and sustain the order for re-count if the pleadings and material available on record anterior to actual recount did not justify grant of the prayer for inspection and re count.

9. In this case the Prescribed Authority has found that there were sufficient pleading with material particulars with regard to irregularities in counting of votes affecting the elections. He has set down the pleading in which it was stated by the election petitioner that after the election petitioner was declared elected with a difference of four votes, manipulations were made in the election documents. In booth No. 167 instead of 532, 464 valid and 71 invalid votes, a total of 535 votes were reported, whereas in the counting sheet only 532 votes were recorded. As against booth Nos. 169, 170 and 171 the total number of votes were not written in the counting sheet. Two votes in booth No. 169; 4 in booth No. 170 and 2 in booth No. 171 were reduced by manipulations by overwriting and that instead of 2221 votes 2216 votes namely 5 votes were not shown, and 3 votes were increased in booth No. 167. These manipulations were made to defeat the election petitioner. When he requested for recounting, the request was denied."

18. From a perusal of the judgment of this Court in the case of **Ravindra Singh (supra)** it emerges that this Court was seized of an order of the learned election tribunal which had directed for recounting of votes and had summoned entire records before it. After considering of the said order passed by the learned election tribunal, this Court was of the view that the Hon'ble Supreme Court has cautioned that since an order for a recount touches upon the secrecy of ballot, it should not be made lightly or as a matter of course yet no cast iron rule of universal application can be laid down. However, two broad guidelines are discernible; that the court would be justified in ordering a recount or permitting inspection of the ballot papers only where (i) all the material facts on which the allegations of irregularity, or illegality in counting are founded, are pleaded adequately in the election petition, and (ii) the Court/Tribunal trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute.

19. As already indicated above, the learned election tribunal while considering the issue no. 2 has arrived at a specific finding of there being cutting/overwriting without the said cutting/overwriting being countersigned. Thus, the principle of law as laid down by this Court in the case of **Ravindra Singh (supra)** would be squarely applicable. When the order impugned is seen in the context of finding given to the issue no. 2 viz-a-viz the judgment of this Court in the case of **Ravindra Singh (supra)** this Court does not find any infirmity or illegality in the order directing for recounting of the votes and the grounds taken by the petitioner in this regard. Accordingly, the writ petition is dismissed.

(2023) 1 ILRA 174
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.11.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ-C No. 1610 of 2018

U.P.S.R.T.C. Reg. Office, Meerut ...Petitioner
Versus
Presiding Officer, Labour Court, Meerut & Anr. ...Respondents

Counsel for the Petitioner:
Sri Sunil Kumar Misra, Sri Vikas Sahai

Counsel for the Respondents:
C.S.C., Sri Om Prakash Saxena, In Person, Sri Varad Nath

(A) Labour Law - The Industrial Disputes Act, 1947 - Section 11-A - Powers of Labour Courts, Tribunals and National Tribunals to give appropriate relief in case of discharge or dismissal of workmen - in case of wrongful termination of service - reinstatement with continuity of service with back wages is a normal rule - ordinarily, an employee demanding back wages, is required to either plead or at least make a statement before the adjudicating authority or at the Court of first instance that he was not gainfully employed or was employed on lessor wages.(Para - 40)

Respondent no.2 appointed as a Bus Conductor - in U.P. State Road Transport Corporation ('UPSRTC') - duty - surprise checking on Bus - corrupt practices adopted in distribution of tickets - report - disclosing corrupt practices - causing loss to UPSRTC and misbehaviour and obstruction with checking squad – termination from services – departmental appeal – rejection – industrial dispute – labour court – award against respondent – writ petition – remanded back to labour court – award – published – full back wages – not gainfully employed - hence petition.**(Para - 3 to 13)**

HELD:-Established on record by respondent no.2 that he was not gainfully employed after his termination. Labour Court has rightly given full back wages. Award of labour court affirmed. **(Para - 44,46)**

Petition Dismissed. (E-7)

List of Cases cited:

1. Kurukshetra University Vs Prithvi Singh , (2018) 4 SCC 483

2. Management of Madurantakam Coop. Sugar Mills Ltd. Vs S. Viswanathan , (2005) 3 SCC 193

3. H.M. Ltd. Vs Tapan Kumar Bhattacharya & anr., (2002) 6 SCC 41

4. Bhuvanesh Kumar Dwivedi Vs M/s. H.I.L. , 2014 (142) FLR 20 (SC)

5. Kurukshetra University Vs Prithvi Singh , (2018) 4 SCC 483

6. Deepali Gundu Surwase Vs K.J.A.M. , 2013 (139) FLR 541 (SC)

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

1. Heard Sri Vikas Sahai, learned counsel for the appellant, and Sri Om Prakash Saxena, respondent no.2, in person.

2. The petitioner through the present writ petition has assailed the impugned award dated 29.08.2017 (notified by Govt. Order No.715 dated 29.08.2017 passed by the Presiding Officer, Labour Court, U.P. Meerut in Adjudication Case No.173 of 2002.

3. Respondent no.2 Om Prakash Saxena, was appointed as a Bus Conductor in U.P. State Road Transport Corporation

(hereinafter referred to as 'UPSRTC'). Respondent no.2 on 25.08.1995 was on duty on Bus No.UHN-2741 on Meerut-Sardhana Route. It appears that while the Bus was on the way, a surprise checking on the Bus was conducted by the Regional Checking Squad, Meerut, headed by Sri Ramesh Chandra, Traffic Superintendent, who found that certain corrupt practices had been adopted by respondent no.2 in the distribution of tickets. He submitted a report to the Regional Manager, Regional Officer Meerut, disclosing the corrupt practices adopted by respondent no.2 thereby causing the loss to the UPSRTC and misbehaviour and obstruction by respondent no.2 with the checking squad.

4. The Regional Manager, Meerut, who is the Disciplinary Authority, by letter No.833, dated **14.02.1996** issued a charge sheet to respondent no.2 based on the report dated 28.08.1995. Later on, certain correction was made by letter No.2248 dated 09.05.1996 in the charge sheet dated **14.02.1996** whereby denial of the signature on the waybill was inserted in the charge sheet to remove the clerical mistake, which was served upon respondent no.2 and duly received by him on 13.05.1996.

5. There are seven charges in the charge sheet dated **14.02.1996**. The charges against the respondent no. 2 are reproduced herein-below:-

"1-दिनांक 25.08.1995 को बस संख्या यू०एच०एन०-2701 में मेरठ से सरधना मार्ग पर ड्यूटी करते हुये किराया लेने के उपरान्त 8 यात्रियों के कम दूरी के टिकट बनाना और इन टिकटों को वितरित न कर अपनी जेब में रखना।

2- टिकट संख्या 3920788 की मूल प्रति में मेरठ से नानू, यात्री प्रति में मेरठ सरधना को छः यात्रियों को दर्शाकर जालसाजी करना। इसी प्रकार टिकट संख्या 3970796 द्वितीय प्रति, कोरी रखकर यात्रियों को दो यात्री के सामूहिक टिकट देना और विभाग एवं यात्रियो को धोखा देना।

3-मार्गपत्र में सातवी पंक्ति में रू० 12/- को रू०10/- दर्शाकर रू०2/- हड़प करना। उपरोक्त प्रकरण से विभाग को हानि पहुंचाना तथा गम्भीर भ्रष्टाचार में लिप्त रहना ।

4- निरीक्षण अधिकारियों को अपना कैश न चैक करने देना तथा अभद्रता का व्यवहार व घोर अनुशासनहीनता करना।

5- निगम व्यवसाय में कपट एवं बेईमानी करना।

6- अपना कार्य निष्ठापूर्वक सम्पादित न करना।

7-उत्तर प्रदेश राज्य सड़क परिवहन निगम कर्मचारी सेवा नियमावली (अधिकारियों से भिन्न) 1981 की धारा- 61 में वर्णित आचरण के प्रति कार्य करने तथा धारा - 62 के अनुच्छेद 1,5,9,20 एवं 21 में वर्णित अवचार में लिप्त रहना।"

6. Respondent no.2 submitted an explanation on **24.02.1996** in response to the charge sheet dated **14.02.1996** denying the charges levelled against him. The disciplinary authority considered the explanation submitted by the respondent no.2 and found that an enquiry as per law is to be conducted to find out the truth in the allegations. Accordingly, he nominated Sri O.P. Karnwal as Enquiry Officer vide order dated **07.03.1996**. **Sri O.P. Karnwal** conducted the enquiry, but he did not complete the enquiry. Thereafter, one **Sri Manoj Kumar**, Assistant Regional Manager, Meerut, was appointed as Enquiry Officer. As per the record, the substantial enquiry was conducted by Sri O.P. Karnwal before Sri Manoj Kumar took over the enquiry. The Enquiry Officer after conducting the enquiry found the charges against respondent no.2 proved and submitted the enquiry report dated **10.08.1998** to the disciplinary authority.

7. The disciplinary authority, thereafter, issued a show cause notice to

respondent no.2 by letter no.3250 dated **01.12.1998** enclosing the enquiry report and asked respondent no.2 to submit his objection, if any, against the enquiry report.

8. Respondent no.2 in reply to the said show cause notice, submitted a detailed reply on **11.01.1999** in which he categorically stated that he was not afforded a reasonable opportunity of hearing by the Enquiry Officer. Besides the above plea, he has pointed out several defects in his reply in conducting the enquiry by the Enquiry Officer.

9. The disciplinary authority found the charges against respondent no.2 proved. The disciplinary authority passed an order of punishment on **11.06.1999** terminating the service of respondent no.2.

10. Respondent no.2, thereafter, preferred a departmental appeal on **25.06.1999** before the appellate authority/Divisional General Manager, UPSRTC, Meerut, who vide order dated **04.07.2000** rejected the appeal.

11. After the rejection of the appeal, respondent no.2 raised an industrial dispute, which was referred to the Labour Court and registered as Case No.173 of 2002. The Labour Court by order dated **12.08.2010** passed an award against respondent no.2, which came to be challenged by respondent no.2 before this Court by filing Writ-C No.24345 of 2011 (Om Prakash Saxena Vs. Presiding Officer, Labour Court, Meerut & others).

12. This Court by the judgement and order dated **09.02.2016** allowed the said writ petition and quashed the impugned award dated **12.08.2010** and remanded the matter to the Labour Court to consider afresh in the light of the evidence on record. The relevant extract of the judgement dated **09.02.2016** is reproduced herein-below:

"The perusal of the award reveals that the finding with regard to 8 passengers travelling to Meerut to Sardhana who were issued tickets for shorter journey from Nanu to Sardhana is without the consideration of the statement of the PW1 wherein he clearly stated that of the aforesaid 8 passengers, 6 of them had asked for ticket from Meerut to Nanu and then had requested for extending the journey from Nanu to Sardhana whereas one passenger had asked for ticket from Shantinagar to Nanu and then Nanu to Sardhana and one another from Nanu to Sardhana only. The tickets were issued to them accordingly from Meerut to Nanu, Shantinagar to Nanu and then from Nanu to Sardhana. None of them journeyed in the Bus for any distance without ticket.

Needless to say that the Bus Conductor is supposed to issue tickets to the passengers as demanded and that there is no prohibition in issuing tickets in two parts of the journey particularly when the passengers initially demands tickets for a shorter journey and then for extended journey.

The Labour Court has not dealt with the above aspect of the matter and failed to find out if these passengers were issued separate tickets in two parts of the journey from Meerut to Nanu and then from Nanu to Sardhana as contended by the petitioner. It has only gone by the fact that they were issued tickets from Nanu to Sardhana without caring to find to if the record revealed issuance of tickets to them from Meerut to Nanu or Shantinagar to

Nanu also in which case they would be having tickets for the full journey from Meerut to Sardhana.

In regard to the entry of Rs.12/- which was converted into Rs.10/- the explanation and the statement of the petitioner was that 5 passengers were shown travelling from Shantinagar to Dabatwa and were charged @ Rs.2/-a total of Rs.10/- and this was mentioned in the 7th line of column 1 and 2 of the Marg Patra whereas one another passenger was shown as travelling from Shantinagar to Dabatwa in line 8 column 1 and 2 in this way the total passengers travelling from Shantinagar to Dabatwa remained 6 and a sum of Rs.10/- plus Rs.2/- was shown to have realised. There was no manipulation of the entry of Rs.12/- to Rs.10/- so as to cause any loss to the roadways.

This statement of the petitioner was not controverted by any piece of the evidence but the Labour Court failed to take it into account and returned the finding only on the basis of the record of the enquiry.

It is well settled that any finding which is recorded without consideration of the material evidence is nothing but perverse. The statement of the petitioner recorded before the Labour Court was a material piece of evidence vis-a-vis the charges levelled against him.

The non-consideration of the said statement or the explanation given by the petitioner therein regarding the charges levelled against him vitiates the entire award.

Accordingly, the impugned award dated 12.08.2010 is hereby quashed and the Labour Court is directed to reconsider the matter afresh in the light of the evidence on record especially in relation to the above two aspects of the matter. The writ petition is allowed as above."

13. After the matter was remanded, the Labour Court passed an award dated **29.08.2017**, published on **11.10.2017**, which has been assailed by the UPSRTC in the present writ petition.

14. Challenging the award, learned counsel for the petitioner Sri Vikas Sahai, has raised threefold submissions; that the finding of the Labour Court that the punishment order has been passed in violation of the principle of natural justice is perverse and erroneous inasmuch as it is manifest from the record that ample opportunity of hearing was afforded to the respondent no.2 by the Enquiry Officer during the enquiry, and as such, the finding of the Labour Court holding the enquiry vitiated on the ground of non-compliance of the principle of natural justice is not sustainable in law. Secondly, he submits that the UPSRTC in para-16 of the written statement has categorically stated that the Labour Court has not allowed the petitioner to lead further evidence which establishes that the charges against respondent no.2 are true and correct. It is submitted that it is settled in law that if there are some shortcomings in the enquiry, the employer can demonstrate by leading cogent evidence before the Labour Court that the charges against respondent no.2 are proved. In support of the said contention, he has placed reliance upon the judgement of the Apex Court reported in ***(2018) 4 SCC 483 Kurukshetra University Vs. Prithvi Singh***.

15. Thirdly, he submits that the Labour Court is under obligation to record reasons before granting full back wages, whereas in the instant case, respondent no.2 has not demonstrated that he was not gainfully employed, thus, the Labour Court has erred in awarding full back wages. In support of this contention, he has placed

reliance upon the two judgments of the Apex Court reported in **(2005) 3 SCC 193 Management of Madurantakam Coop. Sugar Mills Ltd. Vs. S. Viswanathan & (2002) 6 SCC 41**, Hindustan Motors Ltd. Vs. Tapan Kumar Bhattacharya and Another.

16. Per contra, respondent no.2, who appeared in person, has submitted that a detailed finding has been returned by the Labour Court that enquiry is vitiated for non-compliance with the principle of natural justice. He submits that the Labour Court has recorded a categorical finding that after the change of enquiry officer, the petitioner demanded the cross-examination of the departmental witnesses and on the request of the petitioner, several dates were fixed by the Enquiry Officer, but the departmental witnesses did not appear and the Enquiry Officer had proceeded with the enquiry. It is submitted that in the facts of the case, it was incumbent upon the Enquiry Officer to ensure the presence of the departmental witnesses so that he could have cross-examined them and truth would have come out in the cross-examination of the departmental witness as regards the veracity of the charges levelled against the respondent no.2. It is submitted that in absence of proper opportunity to the respondent no.2 to cross-examine the departmental witnesses, the Enquiry Officer has acted illegally in relying upon the departmental witnesses to hold that the charges against him are proved. He submits that learned counsel for the petitioner could not demonstrate from the record any perversity in the finding of the Labour Court.

17. He submits that the Labour Court has further recorded a categorical finding that perusal of the statement of Sri Subhash Chandra, Assistant Traffic Inspector discloses that the statement given by him is based on surmises and conjectures and is not supported by any material on record and the learned counsel for the petitioner also could not demonstrate from the record that the said finding of the Labour Court is perverse.

18. He further submits that none of the passengers who were alleged to have been travelling without proper tickets were produced to prove the charge against respondent no.2 and in such view of the fact, the inquiry is vitiated. It is contended that as the learned counsel for the petitioner could not point out any perversity in the finding of the Labour Court, thus, the finding of the Labour Court being a finding of fact does not call for any interference by this Court in the exercise of its power under Article 226 of the Constitution of India.

19. Regarding the second submission of the learned counsel for the petitioner, he submits that a wrong statement has been made before the Court that an application has been submitted by the petitioner before the Labour Court to produce the documents which proved the charges against the respondent no.2. He submits that neither any application nor any document had been produced by the petitioner before the Labour Court which could prove the charge against the respondent no.2. Thus, he submits that this ground in the absence of any material on record is not sustainable.

20. In respect to the submission of learned counsel for the petitioner with respect to the back wages, he submits that in para-22 of his written statement, it has been categorically stated that despite his best efforts he could not get any employment and he is unemployed to date.

He submits that the aforesaid fact has again been reiterated by him in para-7 of his reply to the objection dated 22.10.2022 of the petitioner. He further submits that he has stated before the Labour Court in his statement on oath that despite his best effort he could not get any employment and he is not employed anywhere since the date of his termination till date.

21. He further submits that the petitioner in reply to the specific case of respondent no.2 that he has not been gainfully employed since the date of termination till date did not lead any evidence to demonstrate that he has been gainfully employed after termination. He submits that it is settled in law that once an employee has categorically stated in his written statement as well as in his statement before the Labour Court that he has not been employed from the date of termination till the date of the award, the onus is upon the employer to demonstrate that he was gainfully employed and once such onus is discharged by the employer, the burden will shift upon the employee to demonstrate that he has not been gainfully employed.

22. He further submits that the departmental witnesses in their statements before the Labour Court have not stated that respondent no.2 has been gainfully employed after termination. Thus, he submits that even if the Labour Court has not given any reason in concluding that he is entitled to full back wages, this Court may consider this aspect of the matter in the exercise of power under Article 226 of the Constitution of India since there was enough material on record which establishes that he has not been gainfully employed after termination. In support of this argument, he has placed reliance upon the judgement of the Apex Court in the case of ***Bhuvanesh Kumar Dwivedi Vs. M/s. Hindalco Industries Ltd, 2014 (142) FLR 20 (SC)***. Accordingly, it is contended that the writ petition lacks merit and deserves to be dismissed.

23. I have heard learned counsel for the petitioner, respondent no.2 in person and perused the record.

24. The facts which emerge from the record, it is evident that seven charges were leveled against respondent no.2 which have been extracted above. Respondent no.2 denied the charges levelled against him. Consequently, disciplinary authority vide order dated 07.03.1996 appointed Sri O.P. Karnwal as Enquiry Officer, who conducted the enquiry and recorded the testimony of the departmental witnesses. However, later on, he withdrew from the enquiry and Sri Manoj Kumar was nominated as the new Enquiry Officer.

25. After the nomination of the new Enquiry Officer, the petitioner submitted an application before him for further cross-examination of the departmental witnesses. On the application of the petitioner, the Enquiry Officer fixed 19.12.1996, 19.02.1997, 15.05.1997, and 24.10.1997 for cross-examination of Department Witnesses. Respondent no.2 was present on all the dates, but Departmental witnesses did not appear before the Enquiry Officer. The Enquiry Officer fixed 10.08.1998 as the last date and summoned respondent no.2 and the petitioner's Officers who submitted the report, but despite summon, the concerned Officer did not appear. Thereafter, respondent no.2 gave his statement before the Enquiry Officer

denying the charges levelled against him and requested for his reinstatement along with back wages.

26. The Labour Court considered in detail aforesaid facts and held that as respondent no.2 demanded cross-examination of the departmental witnesses, therefore, it was incumbent upon the Enquiry Officer to ensure the presence of the departmental witnesses to enable respondent no.2 to cross-examine them, so that the principle of natural justice may be complied with.

27. The Labour Court found that as the Enquiry Officer did not ensure the presence of departmental witnesses and respondent no.2 has been denied the opportunity to cross-examine them, therefore, there was a violation of the principle of natural justice and the enquiry was vitiated on this ground. The Labour Court further held that Sri Subhash Chandra, Assistant Traffic Inspector in his cross-examination made the following statement:-

" नानू पर जो यात्री उतरा होगा उससे यात्री टिकट लेकर सरधना वाले यात्री को दे दिया गया होगा। यही दशा संख्या 88 के यात्री की भी रही होगी। "

28. Similarly, Sri Vinod Kumar, Assistant Traffic Inspector made the following statement before the Labour Court, which reads:-

"आरोपी ने प्रश्न किया कि यदि टिकट संख्या 788 और 797 यात्रियों के पास पाये गये थे तो उनके टिकट धारी नानू में ही क्यों नहीं उतर गये थे? उत्तर में श्री शर्मा ने बताया कि वह यात्री मेरठ से सरधना के थे उनकी सन्तुष्टि के लिये आरोपी ने उन्हें अपने हस्तलेख में सामुहिक टिकट संख्या 788 दे रखा था जो आरोपी द्वारा पूर्व में बना हुआ टिकट था, आरोपी ने नानू में उतरने वाले किसी यात्री को सम्भवतः या तो टिकट नहीं दिया होगा अथवा यात्री द्वारा फैंका गया टिकट आरोपी ने उठाकर दूसरे यात्रियों को तसल्ली हेतु उन्हें दे दिया होगा।"

29. After considering the aforesaid statements, the Labour Court held that the statements of the investigation team reveal that the statements have been made on surmises and conjectures and there was no material on record in support of the said statement. The Labour Court further held that the investigation team did not record the name and address of any of the passengers who were said to have possessed incomplete tickets, whereas the statement taken by the investigation team from the passengers during the investigation was submitted to the concerned Officer who submitted the investigation report. Consequently, the labour Court held that in the absence of any detail of the passengers and their addresses and placing reliance on the statement of such passengers by the Enquiry Officer also vitiate the enquiry proceeding as they were not produced before the Enquiry Officer to verify as to whether they had given any statement to the spot checking squad.

30. The facts delineated above, clearly reveal that the Labour Court has given elaborate and cogent reasons based upon the appreciation of facts and evidence on record to conclude that the enquiry was vitiated for non-compliance with the principle of natural justice.

31. Learned counsel for the petitioner though vehemently tried to submit that the finding of the Labour Court is perverse and erroneous, but could not demonstrate from the record that the said finding is perverse or erroneous or against any provision of

law. In such view of the fact, since the finding with respect to the violation of the principle of natural justice returned by the labour Court is a finding of fact, therefore, this Court is not inclined to interfere with the same in the exercise of power under Article 226 of the Constitution of India.

32. In respect of the second contention advanced by the learned counsel for the petitioner, noted above, a query was put to the learned counsel for the petitioner to place the application that the department had filed before the Labour Court to produce the documents on record which could prove the charge against the respondent no.2. In response, he submits that no such application was submitted before labour court and the said statement has been made on the basis of averments made in para-16 of the written statement.

33. He submits that no document had been supplied by the Officer of UPSRTC to him which the UPSRTC wanted to file before the Labour Court to demonstrate that the charge against respondent no.2 was proved nor he could place any document from the record that was filed before the labour court by UPSRT which could establish that the charges leveled against the respondent no. 2 were correct. In such view of the fact, the second contention of the learned counsel for the petitioner is misconceived and deserves to be rejected and is hereby rejected. This court is of the view that the judgment of the Apex court in the case of ***(2018) 4 SCC 483 Kurukshetra University Vs. Prithvi Singh*** is distinguishable on facts and does not come in aid to the petitioner.

34. So far as the third submission of the learned counsel for the petitioner about back wages is concerned, this Court may note that the Labour Court while awarding full back wages has not given any reason, but in the facts of the present case, this Court is not inclined to remand the matter as a poor employee has spent his golden years of life in contesting his rightful claim. He succeeded once before this Court and the matter was remanded, thereafter, again he succeeded before the Labour Court in year 2017 and since then more than 5 years have passed, and he has not yet reaped the fruits of the award.

35. It is pertinent to mention that respondent no.2 in para-2 of the written statement has categorically stated that despite his best effort, he could not get any employment, and he is without employment since the date of his termination till date. Para-22 of the objection dated 10.09.2022 appearing on page 92 of the paper book is reproduced herein below: -

"22. यह कि संबंधित श्रमिक अपनी सेवा से पृथक होने की तिथि से आजतक बेरोजगार है और संबंधित श्रमिक ने अपनी बेरोजगारी को समाप्त करने के लिए काफी प्रयास किए, किन्तु उसे कोई नौकरी नहीं मिली।"

36. He again in para-9 (page 106 of the paper book) in his reply dated 22.10.2002 to the objection of UPSRTC has categorically stated that he has not been gainfully employed after his termination. Para-9 is reproduced herein-below:-

"यह कि धारा 16,17,18 का कथन भी गैरकानूनी एवं आधारहीन होने के कारण स्वीकार नहीं है क्योंकि सेवायोजकों ने जांच करके व संबंधित श्रमिक के विरूद्ध आरोपों को सिद्ध करके पूर्ण अवसर ले लिया है और पुनः आरोप सिद्ध करने का अवसर लिया जाना न तो न्यायोचित है और न ही माननीय श्रम न्यायालय को ऐसा कोई क्षेत्राधिकार ही

प्राप्त है। संबंधित श्रमिक सेवा समाप्ति की तिथि से आज तक बेरोजगार है और किसी भी लाभप्रद नियोजन में नहीं है तथा संबंधित श्रमिक अपनी सेवा समाप्ति तिथि से पूर्ण वेतन व अन्य देय लाभों को पाने का पूर्ण रूप से अधिकारी है।"

37. respondent no.2 in his statement before the Labour Court has categorically stated on oath that he has not been gainfully employed after his termination from service. The relevant extract of the statement of respondent no.2 from page 30 of the supplementary counter affidavit is reproduced herein below:

" --- मै सेवा समाप्ति की तिथि से आज तक बेरोजगार हूँ। मैने नौकरी की काफी कोशिश की लेकिन नौकरी कही नही मिली।"

38. Though in the written statement dated **18.10.2002** of the UPSRTC, it has been stated in para-17 that respondent no.2 has been gainfully employed but no evidence was filed by the UPSRTC to prove that respondent no.2 was gainfully employed after termination. It is settled law that once it has been pleaded and stated by the employee that he has not been gainfully employed after his termination, the onus is upon the department to prove that the employee has been gainfully employed after termination, and only then the burden will shift upon the employer to prove that he was not gainfully employed.

39. In this context, it would be apt to refer to the judgement of the Apex Court in the case of **Deepali Gundu Surwase Vs. Kranti Junion Adhyapak Mahavidyalaya, 2013 (139) FLR 541 (SC)** has held as under:

"33. The propositions which can be culled out from the aforementioned judgments are:

i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

iii) Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averments about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

iv) The cases in which the Labour Court/Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the

rules of natural justice and / or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

v) The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the concerned Court or Tribunal will be fully justified in directing payment of full back wages. In such cases, the superior Courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The Courts must always be kept in view that in the cases of wrongful / illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

vi) In a number of cases, the superior Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer, i.e., the employee or workman, who can ill afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited (supra)."

40. From the aforesaid judgement, it is evident that it is settled in law that in case of wrongful termination of service, the reinstatement with continuity of service with back wages is a normal rule. The Apex Court in the said case has further laid down that ordinarily, an employee demanding back wages, is required to either plead or at least make a statement before the adjudicating authority or at the Court of first instance that he was not gainfully employed or was employed on lessor wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the workman was gainfully employed during the period of termination and was drawing wages equal to the wages he was drawing prior to the termination of service.

41. In the instant case, as has been delineated above that a specific case has

been set up by respondent no.2 that he was not employed gainfully anywhere which fact though has been denied in the objection by the UPSRTC, none of its witnesses before the Labour Court have denied the statement of respondent no.2 before Labour Court that he was not gainfully employed and was not drawing any wage which he was getting before the termination. The UPSRTC did not lead any evidence to demonstrate that respondent no.2 was gainfully employed and was getting the same wages as he was getting before the termination.

42. It is settled in law that Court should endeavor to do substantial justice. This court has ample power under Article 226 of the Constitution of India to do substantial justice, and in doing so, it can supplement the reason in support of a finding of a subordinate court if it finds that there is enough material on record that justifies the finding of the subordinate court or tribunal though no reason has been given by the subordinate court or the tribunal ins support of said finding.

43. In the instant case as there was ample material on record that proved that respondent no.2 was not gainfully employed after his termination, therefore, this Court is not inclined to remand the matter on this technical ground before the Labour Court that no reason was assigned by the Labour Court before awarding back wages.

44. In such view of the fact, this Court finds that as it is established on record by respondent no.2 that he was not gainfully employed after his termination, the Labour Court has rightly given full back wages.

45. Thus, the judgment of Apex Court in the case of **Management of Madurantakam Coop. Sugar Mills Ltd. (supra) & Hindustan Motors Ltd. (supra)** on which reliance has been placed by the learned counsel for the petitioner on the point that since the tribunal has not given any reason while awarding back wages vitiates the award are not applicable in the facts of the present case as in those cases, it seems that there was material on record which established that the employees were gainfully employed after termination.

46. Thus, for the reasons given above, the petition lacks merit. It is accordingly **dismissed** and the award of the labour court is affirmed. There shall be no order as to costs.

(2023) 1 ILRA 184
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2023

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.

Writ-C No. 3297 of 2020

Adil Khan ...Petitioner
Versus
V.C., A.M.U., Aligarh & Ors.
...Respondents

Counsel for the Petitioner:
Sri Prabhakar Dwivedi, Sri Jitendra Kumar, Sri Mohd Zubair, Nasir Adil, Sri Prashant Rai, Sri Rakesh Pandey, Sr. Advocate

Counsel for the Respondents:
Sri Shashank Shekhar Singh

(A) Civil Law -The Aligarh Muslim University Act, 1921 - Section 13(6) - The Aligarh Muslim University (Amendment) Act, 1981 - Section 36 (B) , Aligarh Muslim University Students Conduct and

Discipline Rules, 1985 - Part VII Rule 9 - no penalty under Rule 7(x) to 7(xiv) shall be imposed without giving the student a reasonable opportunity of hearing - Indian Penal Code, 1860 - Sections 147, 148, 149, 307, 427, 323 and 504 - any decision, whether administrative or quasi-judicial, which prejudicially affects any person and is appealable has to be supported by explicit and clear reasons disclosing proper application of mind and that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations. (Para - 40)

Petitioner expelled from University for a period of five academic sessions - indulged in acts of indiscipline and misconduct - petition pending since 2020 - Order passed without giving any opportunity of hearing - without giving any opportunity to represent against findings and proposal of Disciplinary Committee - order does not record reasons for accepting findings and recommendations of Disciplinary Committee.**(Para - 41, 44)**

HELD:-The Vice-Chancellor's approval of the Disciplinary Committee's report and its proposed punishment were in violation of natural justice and Rules, 1985. The order and resolution passed by the Vice-Chancellor and Executive Council were quashed, allowing petitioner to attend classes and appear in examinations.**(Para - 40,43,45)**

Petition Allowed. (E-7)

List of Cases cited:

1. Syed Ehteshamul Haq Vs A.M.U., Aligarh & ors. , 2009 (5) ADJ 444

2. Ajay Singh Vs U.O.I. & ors. , Writ - C No. 32955 of 2019

3. St. B.O.P. & ors. Vs S.K. Sharma , 1996 (3) SCC 364

4. U.O.I. & ors. Vs Ashok Kumar & ors. , 2005 (8) SCC 760

5. K.D. Sharma Vs S.A.I.L. , 2008 (12) SCC 48

6. V.C. Guru Ghasi Das University Vs Craig Macleod , 2012 (11) SCC 27

7. Chairman, L.I.C. Vs A. Masilamani , 2013 (6) SCC 530

8. Lucknow Kshetriya Gramin Bank & anr. Vs Rajendra Singh , 2013 (12) SCC 372

9. St. of U.P. Vs Sudhir Kumar Singh & ors. , (2020) SCC OnLine SC 84

10. U.O.I. & ors. Vs Amar Singh , 2007 (12) SCC 621

11. Haryana Financial Corporation & Anr. Vs Kailash Chandra Ahuja , 2008 (9) SCC 31

12. The Inspector of Panchayats & District Collector, Salem Vs S. Arichandran & ors. Chairman

13. J & K St. Board of Edu. Vs Feyaz Ahmed Malik & ors. , 2000 (3) SCC 59

14. B.C. Chaturvedi Vs U.O.I. , 1995 (6) SCC 749

15. Kumaon Mandal Vikas Nigam Ltd. Vs Girja Shankar Pant & ors. , 2001 (1) SCC 182

16. I.C.A.I. Vs L.K. Ratna & ors. , 1986 (4) SCC 537

17. M.D., ECIL, Hyderabad & ors. Vs B. Karunakar & ors. , 1993 (4) SCC 727

18. M/s. Travancore Rayon Ltd. Vs U.O.I. , 1969 (3) SCC 868

19. Messrs. Mahabir Prasad Santosh Kumar Vs St. of U.P. & ors. , 1970 (1) SCC 764

20. The Siemens Engineering & Manufacturing Co. of India Ltd. Vs The U.O.I. & Anr. , 1976 (2) SCC 981

21. Kranti Associates Pvt. Ltd. & Anr. Vs Masood Ahmed Khan & ors. , 2010 (9) SCC 496

22. Oryx Fisheries Pvt. Ltd. Vs U.O.I. & ors. , 2010 (13) SCC 427

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

1. A student of B.A.LL.B. in the Aligarh Muslim University (hereinafter referred to as, "University') has approached this Court pleading that he has not been treated fairly by the University while passing an order expelling him from the rolls of the University for a duration of five academic sessions on the charge that he had indulged in acts of indiscipline and misconduct as defined in AMU Students' Conduct and Discipline Rules, 1985 (hereinafter referred to as, "Rules, 1985'). The petitioner pleads violation of the principles of natural justice in the disciplinary proceedings.

2. The facts of the case are that there were differences between two groups of students on the issue of inviting a political leader in the University Campus, as a result of which violent activities disrupting the academic atmosphere in the University took place on the Campus on 12.2.2019. The petitioner is alleged to have participated in the violence. By order dated 13.2.2019, the Proctor of the University suspended the petitioner and three other students including one Farhan Zubairi. The order dated 13.2.2019 notes that one Manish Kumar had filed a complaint to the Proctor stating that two students of the University had abused and physically assaulted him and blamed the petitioner and Farhan Zubairi for the chaos in the campus. The order dated 13.2.2019 also prohibited the petitioner from entering the University Campus. On 14.2.2019, two First Information Reports were registered in relation to incident dated 12.2.2019. F.I.R. No. 61 of 2019 was registered at the instance of one Azim Akhtar, an employee of the University, under Sections 147, 323 and 504 of the Indian Penal Code alleging that the accused named in the F.I.R. along with some unknown persons and political leaders had created disturbances at the administrative building of the University. The other First Information Report numbered as F.I.R. No. 62 of 2019 was registered at the instance of one Dr. Nishit Sharma under Sections 147, 148, 149, 307 and 427 of Indian Penal Code alleging that on 12.2.2019, the accused named in the F.I.R. along with certain unknown persons had physically assaulted the informant and students of the University and had also fired at the vehicle of the informant and had set on fire other vehicles. The petitioner was not named as an accused in either of the F.I.R. A charge-sheet dated 13.7.2019 has been filed in F.I.R. No. 62 of 2019. The petitioner has not been shown as an accused in the charge-sheet though Farhan Zubairi has been noted as an accused in the aforesaid charge-sheet.

3. On 28.2.2019, one Mazhar Siddiqui, an employee of the University, lodged a First Information Report numbered as F.I.R. No. 0089 of 2019 against the petitioner and one Nabil under Sections 307 and 504 of Indian Penal Code alleging that on 28.2.2019, the petitioner along with the co-accused came in the office of the informant and the co-accused fired at the informant by a country-made pistol. It has been alleged in the F.I.R. that the petitioner abused the informant and also instigated the co-accused Nabil to fire at the informant. It has been further stated in the F.I.R. that Nabil Ahmed was apprehended by the informant but the petitioner managed to escape from the spot with the fire-arm. A charge-sheet has been filed against the petitioner in the aforesaid case. The trial in the said criminal case is pending before the concerned court. It has been stated by the petitioner that the charge-sheet filed in F.I.R. No. 0089 of 2019 has been challenged before this Court

under Section 482 Cr.P.C. The proceedings under Section 482 Cr.P.C. pending before this Court are not relevant for the present writ petition and, therefore, the details of the said case are not being narrated in the present judgment.

4. An inquiry report dated 5.3.2019 was submitted by the Proctorial Board of the University stating that, on 12.2.2019, the petitioner had manhandled and abused the university security personnels and members of the Proctorial Team as well as the district officials and had also instigated the students at the administrative block. The report dated 5.3.2019 also holds other students, namely, Imran Khan, Abdul Mabood, Manish Kumar, Pavan Jadon, Aman Sharma, Ajay Singh and Farhan Zubairi responsible for the incidents of 12.2.2019. Subsequently, disciplinary proceedings were instituted against the petitioner and the other students mentioned above and the matter was referred to the Disciplinary Committee for further inquiry.

5. The Disciplinary Committee served a charge-sheet on the petitioner. Charge No. 1 was that the petitioner, along with Farhan Zubairi, had assaulted Ajay Singh, Manish Kumar, Pavan Jadon, Aman Sharma and other students and had also created chaos at the University administrative building turning the situation violent which disrupted the academic environment of the University. The other charge against the petitioner was that he, while still under suspension and campus banned, went to the Department of Computer Science Building on 28.2.2019 and was involved in criminal activities for which F.I.R. No. 0089 of 2019 under Sections 307 and 504 of Indian Penal Code had been registered against him.

6. The petitioner submitted his reply dated 20.3.2019 in which he denied the charge regarding his involvement in the incidents of 12.2.2019 and 28.2.2019. In his reply, the petitioner explained his presence at the Administrative building on 12.2.2019 stating that he had gone there to enquire about his application filed under the Right to Information Act. In his reply, the petitioner stated that there was a conspiracy against him and his family at the instance of one Khillan Sherwani, a contractor with the University, against whom complaints had been made by the father of the petitioner and other teachers residing in the University campus. In his reply, the petitioner demanded the copy of the complaint on which disciplinary proceedings were instituted against him and also video footages and other evidence in support of the charges levelled against him.

7. The documents filed by the University show that because of his illness, the petitioner did not appear before the Disciplinary Committee which submitted its recommendations proposing that Manish Kumar, Aman Sharma, Pavan Jadon, Abdul Mabood, Irshad Khan, Basim Hilal and Farhan Zubairi be fined Rs.2,000/- and be issued a strict warning to be more careful in future and Ajay Singh as well as the petitioner be expelled from the rolls of the University for five academic sessions. However, the Vice-Chancellor remitted back the matter of the petitioner to the Disciplinary Committee for further inquiry because the initial recommendations were made by the Disciplinary Committee without hearing the petitioner.

8. The petitioner subsequently appeared before the Disciplinary Committee and made his oral submissions denying the charges levelled against him.

The minutes of the Disciplinary Committee show that the petitioner pleaded to be treated leniently and at par with Farhan Zubairi. The Disciplinary Committee submitted its report holding that the petitioner was actively involved in the incident of 12.2.2019. In its report, the Disciplinary Committee further recorded that the petitioner disobeyed the order dated 13.2.2019 which had prohibited him from entering the University Campus and was also involved in the incident that happened on 28.2.2019. On the aforesaid findings, the Disciplinary Committee, being of the view that any further condonation of the extremely violent and deviant behaviour of the petitioner would put to severe risk the life and liberty of other students and staff of the University, submitted its findings proposing that the petitioner be expelled from the rolls of the University for a duration of five academic sessions commencing from Session 2018-19 and be debarred from further studies or admission or re-admission in the University for the duration of the aforesaid period and the University as well as Institutions maintained by it be placed out of bound for the petitioner for the period he remains expelled from the University.

9. The proposal of the Disciplinary Committee were approved by the Vice-Chancellor vide his order dated 2.9.2019. The documents produced by the University disclose that the Vice-Chancellor had merely noted his approval of the proposals submitted by the Disciplinary Committee. After approval by the Vice-Chancellor, an order dated 4.9.2019 was issued by the Proctor of the University informing the petitioner about the punishments imposed on him.

10. The petitioner filed an application dated 15.9.2019 before the Proctor seeking certain documents especially the inquiry report dated 5.3.2019, copy of the complaints made to the Proctor regarding the incidents dated 12.2.2019 and 28.2.2019, the video recording and CCTV footages of the incident of 12.2.2019 and also a copy of the report submitted by the Disciplinary Committee. It has been stated in the petition, that the aforesaid documents were required to file an appeal against the orders dated 2.9.2019 and 4.9.2019 but the documents were neither given nor shown to the petitioner.

11. The orders dated 2.9.2019 and 4.9.2019 were challenged by the petitioner in an appeal filed before the Executive Council under Section 36(B) of the Aligarh Muslim University (Amendment) Act, 1981. In his appeal, the petitioner pleaded that the necessary documents to enable him to defend himself were not given to him and he had been wrongly held to be involved in the incidents of 12.2.2019 and 28.2.2019. In his appeal before the Executive Council, the petitioner again requested that he be treated in the same manner as other students, e.g., Farhan Zubairi, implying that in case, the petitioner was found involved in any act of indiscipline, he may be treated leniently as had been done with other students including Farhan Zubairi.

12. The Executive Council vide its resolution dated 14.10.2019 rejected the appeal of the petitioner. The resolution dated 14.10.2019 was communicated to the petitioner by the Proctor of the University vide his letter dated 31.12.2019. The orders dated 4.9.2019 and 31.12.2019 have been challenged in the present writ petition.

13. Before proceeding further, it would be relevant to note that no prayer has

been made in the petition to quash the order dated 2.9.2019 passed by the Vice-Chancellor and the resolution dated 14.10.2019 passed by the Executive Council. However, considering that the order dated 2.9.2019 has been filed by the University and is part of the records of the present case and the resolution dated 14.10.2019 passed by the Executive Council has been *in-verbatim* incorporated in the order dated 31.12.2019 passed by the Proctor and the communications dated 4.9.2019 and 31.12.2019 are only intimations to the petitioner of the order dated 2.9.2019 and the resolution dated 14.10.2019, the Court heard the counsel for the parties on the merits of the order dated 2.9.2019 and the resolution dated 14.10.2019.

14. It was argued by the counsel for the petitioner that despite repeated applications and representations made by the petitioner to the University, the report of the preliminary inquiry, the complaints on which disciplinary action was instituted against the petitioner, the video footage of the incident as well as the statement of any student or official of the University or any other person and any other evidence showing participation of the petitioner in the incidents of 12.2.2019 was not given to the petitioner during the disciplinary proceedings. It was argued that in its report, the Disciplinary Committee has not referred to any statement of any witness having deposed against the petitioner but refers only to the CCTV footage which only shows the presence of the petitioner at the place of incident on 12.2.2019 and does not show participation of the petitioner in any violent activity that took place on 12.2.2019. It was argued that the petitioner was not named in the first information report or as an accused in the charge-sheet filed by the police in relation to the events of 12.2.2019 but many students who have been treated leniently by the University and have been given lighter punishments were named in the two F.I.R. registered in relation to the events of 12.2.2019 and have also been named as accused in the charge-sheets filed in the aforesaid cases. It was argued that the aforesaid fact was not considered either by the Disciplinary Committee or by the Vice-Chancellor and the Executive Council while deciding against the petitioner. It was further argued that the petitioner was not involved in the events of 28.2.2019 and the said charge has been held to be proved against the petitioner only on the ground that a charge-sheet had been served on the petitioner in the criminal case registered in relation to the incident of 28.2.2019. It was argued that the findings regarding the incident dated 28.2.2019 has been recorded without taking the statement of the informant and without giving any opportunity to the petitioner to cross-examine the informant. It was argued that the opinion of the Disciplinary Committee that the petitioner is a habitual offender is based on the findings of the Disciplinary Committee that the petitioner was involved in the incidents of 12.2.2019 which, for reasons stated above, is contrary to law. It was further argued that under Part VII Rule 9 of the Rules, 1985, the petitioner was entitled to an opportunity of hearing by the Vice-Chancellor before the report and recommendations of the Disciplinary Committee was approved by the Vice-Chancellor but the order dated 2.9.2019 was passed by the Vice-Chancellor without giving any opportunity of hearing to the petitioner. It was argued that the petitioner was not provided the report of the Disciplinary Committee and was not given any opportunity to make any representation

to the Vice-Chancellor against the report of the Disciplinary Committee. It was further argued that the order of the Vice-Chancellor reflects a total non-application of mind and is a non-speaking order because the order gives no reasons for approving the proposals of the Disciplinary Committee. It was further argued that in light of the fact that lighter punishment had been awarded to other students found guilty of involvement in the events of 12.2.2019, the petitioner has been treated unfairly by being expelled from the University for five academic sessions and the punishment awarded to the petitioner is disproportionate to the charges levelled against him. It was further argued that the resolution dated 14.10.2019 passed by the Executive Council rejecting the appeal filed by the petitioner also shows a total non-application of mind by the members of the Executive Council. It was further argued that the Vice-Chancellor had participated in the meeting of the Executive Council and, therefore, the decision of the Executive Council rejecting the appeal of the petitioner is vitiated due to bias. It was argued that for the aforesaid reasons, principles of natural justice were violated in the entire disciplinary proceedings held against the petitioner and the impugned order passed by the Vice-Chancellor as well as the resolution of the Executive Council have been passed wihout following the principles of natural justice and are liable to be quashed. In support of his arguments, the counsel for the petitioner has relied on the judgments of this Court reported in ***Syed Ehteshamul Haq vs. Aligarh Muslim University, Aligarh & Ors. 2009 (5) ADJ 444*** and the judgment and order dated 2.12.2019 passed by this Court in ***Writ - C No. 32955 of 2019 (Ajay Singh vs. Union of India & Ors.).***

15. Rebutting the arguments of the counsel for the petitioner, the counsel for the respondent University has argued that the petitioner was given ample opportunity of hearing by the Disciplinary Committee. It was argued that before proposing the punishment awarded to he petitioner, the Disciplinary Committee had considered the reply of the petitioner and the evidence on record. It was argued that the involvement of the petitioner in the incidents of 12.2.2019 was proved by the CCTV footage. It was also argued that the incidents of 28.2.2019 itself shows that the petitioner had violated the order dated 13.2.2019 wherein he was asked not to enter the University premises and the incident shows the indisciplined nature of the petitioner. It was argued that the petitioner had been treated fairly by the Vice-Chancellor which would be evident from the fact that the initial recommendations of the Disciplinary Committee were remitted back to the Disciplinary Committee by the Vice-Chancellor for giving one more opportunity to the petitioner to defend himself. It was argued that there was substantial compliance of the principles of natural justice before passing the impugned orders and no prejudice has been caused to the petitioner in case any aspect of natural justice has not been followed in the process. It was argued that the case of the petitioner is different from other students because the petitioner was a repeat-offender and for the same reason, the punishment awarded to the petitioner is not disproportionate or unreasonable so as to occasion interference by this Court. It was further argued that the present petition relates to disciplinary proceedings and administration of the internal affairs of the University and, therefore, the court may not interfere in the present proceedings especially in light of the fact that the petitioner was involved in criminal

activities. It was argued, in the alternative, that in case, the court finds the impugned orders passed by the Vice-Chancellor and the Executive Council to be bad in law due to violation of the principles of natural justice, it would be appropriate that the matter be remanded back to the Vice-Chancellor or the Executive Council, as the case may be, for appropriate decision in accordance with law but the petitioner may not be reinstated as a student in the University. It was argued that for all the aforesaid reasons, the writ petition lacks merit and is liable to be dismissed. In support of his arguments, the counsel for the respondent has relied on the judgments reported in ***State Bank of Patiala & Ors. vs. S.K. Sharma 1996 (3) SCC 364; Union of India & Ors. vs. Ashok Kumar & Ors. 2005 (8) SCC 760; K.D. Sharma vs SAIL 2008 (12) SCC 481; V.C. Guru Ghasi Das University vs. Craig Macleod 2012 (11) SCC 275; Chairman, LIC vs. A. Masilamani 2013 (6) SCC 530; Lucknow Kshetriya Gramin Bank & Anr. vs. Rajendra Singh 2013 (12) SCC 372; State of U.P. vs. Sudhir Kumar Singh & Ors. (2020) SCC OnLine SC 847; Union of India & Ors. Amar Singh 2007 (12) SCC 621; Haryana Financial Corporation & Anr. vs. Kailash Chandra Ahuja 2008 (9) SCC 31*** and ***the judgment and order dated 23.9.2022 passed in The Inspector of Panchayats & District Collector, Salem vs. S. Arichandran & Ors.***

16. Before proceeding further, it would be appropriate to note that in its counter affidavit, the University had raised a preliminary objection that against the decision of the Executive Council, the petitioner had a statutory remedy under Section 13(6) of the Aligarh Muslim University Act, 1921 before the Visitor of the University but during the arguments, the counsel for the respondent - University did not press the said objections in light of the fact that affidavits in the case had already been exchanged between the parties and the matter was pending before this Court since 2020.

17. I have considered the rival submissions of the counsel for the parties.

18. In ***V.C. Guru Ghasi Das University*** (supra), the Supreme Court observed that maintenance of discipline in the University was important for a conducive academic environment, that the larger interests of the academic community are more central than the individual interests of a student and the courts should be most reluctant to interfere in matters of discipline or in administration of the internal affairs of a University. However, the Supreme Court in ***Chairman, J & K State Board of Education vs. Feyaz Ahmed Malik and Ors. 2000 (3) SCC 59,*** after observing that in matters concerning campus discipline, the duty is primarily vested in the authorities in-charge of the institutions and the court should not substitute their own views in place of the authorities concerned, held that the courts have the power to intervene to correct any error in complying with the provisions of the Rules, Regulations or Notifications and to remedy any manifest injustice being perpetrated on the candidates. Earlier, the Supreme Court had held in ***B.C. Chaturvedi vs. Union of India 1995 (6) SCC 749*** that the courts are concerned with the question as to whether an inquiry on charges of misconduct against a public servant had been held in accordance with the principles of natural justice and whether the concerned individual had received fair treatment. The Supreme Court held that the courts would interfere where the inquiry

was held in a manner inconsistent with the principles of natural justice, or was held in violation of statutory rules or where the conclusion reached by the disciplinary authority was based on no evidence. The Supreme Court further observed that the disciplinary authority was the sole judge of facts in disciplinary matters but the appellate authority had co-extensive power to re-appreciate evidence or nature of punishment. Paragraph nos. 12 and 13 of the judgment containing the observations of the Supreme Court are reproduced below : -

"12. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. ***Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court / Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with.*** *Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion.* ***But that finding must be based on some evidence.*** *Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge.* ***The Court / Tribunal in its power of judicial review does not act as appellate authority to reappreciate the evidence and to arrive at its own independent findings on the evidence. The Court / Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence.*** *If the conclusion or finding be such as no reasonable person would have ever reached, the Court / Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case.*

13. ***The disciplinary authority is the sole judge of facts. Where appeal is presented, the appellate authority has coextensive power to reappreciate the evidence or the nature of punishment.*** *In a disciplinary inquiry, the strict proof of legal evidence and findings on that evidence are not relevant. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court / Tribunal. In Union of India v. H.C. Goel, this Court held at page 728 that if the conclusion, upon consideration of the evidence, reached by the disciplinary authority, is perverse or suffers from patent error on the face of the record or based on no evidence at all, a writ of certiorari could be issued."*

(emphasis added)

19. The observations of the Supreme Court in ***B.C. Chaturvedi*** (supra) were made in a case relating to disciplinary inquiry against civil servants but the observations regarding powers of the court to interfere in disciplinary proceedings, the requirement to follow the principles of natural justice in disciplinary inquiries and that the findings of the disciplinary bodies should be supported by some evidence, applies to all disciplinary proceedings

including disciplinary proceedings in educational institutions, especially where the allegations against the student are serious and strict and extreme punishment is awarded to the student as the allegations and punishments could adversely affect the career opportunities of the student. In ***Kumaon Mandal Vikas Nigam Ltd. vs. Girja Shankar Pant & Ors. 2001 (1) SCC 182,*** the Supreme Court observed in Paragraph 20 that *''it was a fundamental requirement of law that the doctrine of natural justice be complied with and the same has, as a matter of fact, turned out to be an integral part of administrative jurisprudence of this country.'* At this stage, it would be apt to refer to the observations of the Supreme Court in ***Institute of Chartered Accountants of India vs. L.K. Ratna & Ors. 1986 (4) SCC 537*** made while considering whether a member of Institute of Chartered Accountants charged of misconduct had a right to be heard by the Council of the Institute against the findings of the Disciplinary Committee, which was a standing committee of the Council. The Supreme Court in Paragraph 14 of the judgment observed that *''it is the substance of the matter, the character of the allegations, the far-reaching consequences of a finding against the member, the vesting of responsibility in the governing body itself, all these and kindred considerations enter into the decision of the question whether the law implies a hearing ...'*

20. The allegations against the petitioner are serious. The punishment awarded to him is severe and has far-reaching consequences. The punishment not only deprives the petitioner of his educational opportunities and adversely affects his career but also casts a stigma obstructing his future career. The nature of allegations against the petitioner, the strict and extreme punishment awarded to him and the observations of the Supreme Court referred above persuade the court to reject the plea of the University that the court should decline to exercise its power of judicial review because the matter relates to discipline and administration of internal affairs of the University. The punishment given to the petitioner necessitates an examination by this Court, in exercise of its powers under Article 226, as to whether the disciplinary proceedings against the petitioner were held in a manner consistent with the principles of natural justice and whether the impugned orders passed by the Vice-Chancellor and the Executive Council comply with the relevant statutory provisions and with the general rules of administrative law.

21. At this stage, it would be appropriate to reproduce the statutory provisions relating to discipline in the University and the powers of different authorities / officers of the University to take action against students in cases of indiscipline. Statute 35 of the Statutes of the University relates to maintenance of discipline amongst students of the University. The relevant parts of Statute 35 are reproduced below : -

35. Maintenance of discipline among students of the University -

(1) All powers relating to discipline and disciplinary action in relation to students shall vest in the Vice-Chancellor.

(2) The Vice-Chancellor may delegate all or any of his powers as he deems proper to the Proctor and such other officers as he may specify in this behalf.

(3) ***Without prejudice to the generality of his powers relating to the***

maintenance of discipline and taking such action in the interest of maintaining discipline as may seem to him appropriate, *the Vice-Chancellor may, in the exercise of his powers, by order, direct that any student or students be expelled, or rusticated, for a specified period, or be not admitted to a course or courses of Study in a College, Department or Institution of the University for a stated period, or be punished with fine for an amount to be specified in the order, or debarred from taking a University or College or Departmental Examination or Examinations for one or more years, or that the results of the student or students concerned in the Examination or Examinations in which he or they have appeared be cancelled.*

(4) to (6) xxx

22. The students of the University are governed by Aligarh Muslim University Students Conduct and Discipline Rules, 1985 (Approved by the Academic Council in its meeting held on 6.10.1985)

Part - I

General

(1) to (3) xxx

Part - II

Indiscipline and Misconduct

4. Acts of Indiscipline and Misconduct

Any act of misconduct committed by a student inside or outside the campus shall be an act of violation of discipline of the University. Without prejudice to the generality of the foregoing provision, violations of the discipline shall include:

(i) Disruption of teaching, student examination, research or administrative work, curricular or extra-curricular activity or residential life of the members of the University, including any attempt to prevent any member of the University or its staff from carrying on his or her work; and any act reasonably likely to cause such disruption.

(ii) Damaging or defacing University property or the property of members of the University or any other property inside or outside the University campus.

(iii) Engaging in any attempt at wrongful confinement of teachers, offices, employees and students of the University or camping inside or creating nuisance inside the boundaries of houses of teachers, officers and other members of the University.

(iv) Use of abusive and derogatory slogans or intimidatory language or incitement of hatred and violence or any act calculated to further the same.

(v) to (vi) ...

(vii) An assault upon, or intimidation of, or insulting behaviour towards a teacher, officer, employee or student or any other person.

(viii) to (xxvii) ...

(xxviii) Any other act which may be considered by the Vice-Chancellor or the Discipline Committee to be an act of violation of discipline.

Part - III

Officers authorized to take disciplinary action

5. Without prejudice to the powers of the Vice-Chancellor as specified under Statutes 35(1), (2), (3) of the Statutes, the following persons are authorized to take disciplinary action by way of imposing penalties as specified in part IV of these Regulations;

1. Deans of the Faculties / Dean, Students' Welfare

2. Principals of the Colleges / Institutions

3. Chairmen of the Departments of Studies

4. Proctor

5. Librarian, Maulana Azad Library

6. Provosts of Halls of Residence and N.R.S.C.

7. Secretary, University Games Committee

8. Any other person employed by the University and authorized by the Vice-Chancellor for the purpose.

6. (i) Any penalty enumerated in Rule 7 may be imposed by the Vice-Chancellor upon the recommendation of the Discipline Committee constituted under Ordinances (Academic) Chapter XI.

(ii) Penalties other than those specified in Clause (ix), (x), (xi), (xii) and (xiii) of Rule 7 may also be imposed by any of the Officers enumerated in Rule 5, within their respective jurisdictions.

(iii) Penalties on the offences relating to Examination will be dealt by the relevant bodies.

Part - IV

7. Nature of Penalties:

The following penalties may, for act of indiscipline or misconduct or for sufficient reasons, be imposed on a student, namely:

(i) Written warning and information to the guardian.

(ii) Fine upon Rs. 500/- which may extent upto Rs. 2,500/-.

(iii) Suspension from the Class / Department / College / Hostel / Mess / Library / or availing of any other facility.

(iv) Suspension or cancellation of Scholarships, fellowship or any financial assistance from any source or recommendation to that effect to the sanctioning agency.

(v) Recover of pecuniary loss caused to University Property.

(vi) Debarring from participation in Sports / NCC / NSS and other such activities.

(vii) Disqualifying from holding any representative position in the Class / College / Hostel / Mess / Sports / Clubs and in similar other bodies.

(viii) Hostel shift and Hall shift.

(ix) Sent down.

(x) Expulsion from the Department / Faculty / Hostel / Mess / Library / Club for a specified period.

(xi) Debarring from an examination.

(xii) Issue of Migration Certificate.

(xiii) Expulsion from the University for a Specified Period.

(xiv) Disqualifying from further studies, or prohibition of further admission or re-admission.

8. xxx

9. No penalty, provided in Clause (x), (xi), (xii), (xiii) and (xiv) of Rule 7 shall be imposed without giving the student a reasonable opportunity of being heard.

23. Statute 35 of the Statutes of the University and the Rules, 1985 indicate that the Vice-Chancellor of the University is the final authority to decide on the action to be taken in disciplinary matters. A reading of Rule 6(i) of the Rules, 1985 shows that the power to expel a student from the University for a specified period is to be taken only by the Vice-Chancellor upon the recommendations of the Disciplinary Committee constituted under the Ordinances of the University. Further, no decision expelling a student from the University for a specified period can be imposed without giving the concerned student a reasonable opportunity of being heard.

24. The petitioner has been expelled from the University for five academic sessions on the recommendations of the Disciplinary Committee. The Committee made the recommendations on its finding that the petitioner was a repeat-offender, meaning thereby that he was involved in the events of 12.2.2019 and also 28.2.2019. In its initial recommendations, the Disciplinary Committee recommended that certain students, which included Farhan Zubairi, who incidentally was accused of participating in the events of 12.2.2019 along with the petitioner, be punished with a fine of Rs.2,000/- and be issued a strict warning to be more careful in future. The Disciplinary Committee justifies the extreme penalty for the petitioner on the ground that the petitioner had violated the prohibitory orders restraining him from entering the University Campus and had also subsequently participated in the events of 28.2.2019 and was, therefore, a repeat-offender.

25. The minutes of the Disciplinary Committee do not indicate that any evidence was taken by the Disciplinary Committee to verify the allegations made in complaints filed by any person regarding the events of 12.2.2019 and whether the petitioner was involved in the violence that took place on 12.2.2019. The report of the Disciplinary Committee does not refer to any statement of any witness regarding the participation of the petitioner in the violent incidents that took place on 12.2.2019. The CCTV footage referred by the Disciplinary Committee to support its findings regarding participation of the petitioner in the incidents of 12.2.2019 only shows that the petitioner was involved in some arguments with certain persons which could include the officers of the University or other group of students. The fact that the petitioner was involved in arguments with officials of the University would not be sufficient to conclude that the petitioner was also involved in the violence that erupted subsequently. In case, the Disciplinary Committee relied on the statement of any witness or any report by any authority implicating the petitioner in the violent incidents, such statements had to be referred in its report and had to be supplied to the petitioner to enable him to rebut the allegations regarding his involvement in the activities as contained in the statement of the witness or in the report. It is the case of the petitioner that neither the copy of the complaint nor the statement of any witness, nor even the CCTV footage was given to him at any stage. It is not the case of the University that the circumstances were such that identity of the witness could not be disclosed or the confidentiality of the reports available against the petitioner had to be maintained. In its report, the Disciplinary Committee only narrates the incidents and mechanically, without assessment of any evidence, holds the petitioner to be guilty of participating in violent activities disrupting the academic environment of the University. It is interesting to note that the report of the Disciplinary Committee does not indicate that even the statement of Manish Kumar who had filed the complaint regarding the incidents of 12.2.2019 or the statement of the informants of F.I.R. No. 61 of 2019 and F.I.R. No. 62 of 2019 were recorded by the Disciplinary Committee. The findings of the Disciplinary Committee regarding the involvement of the petitioner in the incidents of 12.2.2019 is not supported by any evidence on record.

26. Similarly, even though the petitioner has been charge-sheeted in the criminal case registered on the incident of

28.2.2019, but the Disciplinary Committee has recommended disciplinary action against the petitioner not on ground that he was charge-sheeted in the aforesaid criminal case but ostensibly on the basis of an independent inquiry having been held by the Disciplinary Committee. The report of the Disciplinary Committee does not indicate that any employee of the University had testified against the petitioner and, in case, any statement or complaint was made by any employee of the University, a copy of the same was supplied to the petitioner. The findings of the Disciplinary Committee regarding participation of the petitioner in the incident dated 28.2.2019 is also not supported by any evidence on record.

27. A reading of the report of the Disciplinary Committee gives the impression that the Committee has treated the charges against the petitioner as evidence of his misconduct and indiscipline. It appears that the nature of the incidents that took place on the University Campus on 12.2.2019 prevailed upon the members of the Disciplinary Committee to recommend a severe punishment to the petitioner. The findings of the Disciplinary Committee regarding participation of the petitioner in the violence that took place on the campus are based on no legal evidence and the report of the Committee suffers from the infirmity of non-application of mind and stands vitiated.

28. The order dated 2.9.2019 passed by the Vice-Chancellor approving the recommendations of the Disciplinary Committee merely records its approval of the recommendations submitted by the Committee. The petitioner was, admittedly, not given any opportunity of hearing by the Vice-Chancellor before passing the order dated 2.9.2019. It is also apparent from the pleadings of the parties that the report of the Disciplinary Committee was not supplied to the petitioner to enable him to rebut the findings recorded by the Disciplinary Committee.

29. As noted earlier, under the Statutes of the University and the Rules, 1985, the final authority to take disciplinary action against the students of the University vests in the Vice-Chancellor. Further, as noted earlier, any punishment expelling the student from the University for a specified period can be taken only by the Vice-Chancellor though the Vice-Chancellor would take such an action on the recommendations of the Disciplinary Committee. The disciplinary proceedings against a student do not end when the Disciplinary Committee submits its recommendations / report to the Vice-Chancellor. The Vice-Chancellor is not bound by the recommendations of the Disciplinary Committee and is expected to apply his independent mind while taking a decision on the recommendations of the Disciplinary Committee. The Vice-Chancellor may agree or disagree with the report of the Disciplinary Committee. The Vice-Chancellor may agree or disagree with both the findings and the recommendations of the Disciplinary Committee or it may agree with the findings of the Committee but may still disagree with its recommendations regarding punishment to be given to the student. The disciplinary proceedings come to an end only after the Vice-Chancellor passes an order on the recommendations of the Disciplinary Committee - either exonerating the student or awarding any punishment as specified in Rule 7 of the Rules, 1985.

30. Rule 9 of the Rules, 1985 provides that no penalty under Rule 7(x) to 7(xiv) shall be imposed without giving the student a reasonable opportunity of hearing. The punishment imposed on the petitioner is under Rule 7(xiii). A "reasonable opportunity of hearing' requires that the person who is proposed to be punished should know the materials on which the competent authority is to take a decision against him. Under the Rules, 1985, the Vice-Chancellor, as a final judge of facts and of the punishment to be awarded to the student, would take a decision on the report of the Disciplinary Committee. In the circumstances, the concerned student should have the opportunity to demonstrate the fallibility in the conclusions of the Disciplinary Committee and its recommendations against him. The said right can be availed by the student only if the report of the Disciplinary Committee and the records on which the Disciplinary Committee relies to support its findings is given to the concerned student and the student is given an opportunity to represent against the report. In this context, it would be appropriate to refer to the observations of the Supreme Court in Paragraph nos. 26 and 27 of its judgment reported in ***Managing Director, ECIL, Hyderabad & Ors. vs. B. Karunakar & Ors. 1993 (4) SCC 727 :*** -

"26. The reason why the right to receive the report of the enquiry officer is considered an essential part of the reasonable opportunity at the first stage and also a principle of natural justice is that the findings recorded by the enquiry officer form an important material before the disciplinary authority which along with the evidence is taken into consideration by it to come to its conclusions. *It is difficult to say in advance, to what extent the said findings including the punishment, if any, recommended in the report would influence the disciplinary authority while drawing its conclusions. The findings further might have been recorded without considering the relevant evidence on record, or by misconstruing it or unsupported by it.* ***If such a finding is to be one of the documents to be considered by the disciplinary authority, the principles of natural justice require that the employee should have a fair opportunity to meet, explain and controvert it before he is condemned. It is negation of the tenets of justice and a denial of fair opportunity to the employee to consider the findings recorded by a third party like the enquiry officer without giving the employee an opportunity to reply to it.*** *Although it is true that the disciplinary authority is supposed to arrive at its own findings on the basis of the evidence recorded in the inquiry, it is also equally true that the disciplinary authority takes into consideration the findings recorded by the enquiry officer along with the evidence on record. In the circumstances, the findings of the enquiry officer do constitute an important material before the disciplinary authority which is likely to influence its conclusions. If the enquiry officer were only to record the evidence and forward the same to the disciplinary authority, that would not constitute any additional material before the disciplinary authority of which the delinquent employee has no knowledge. However, when the enquiry officer goes further and records his findings, as stated above, which may or may not be based on the evidence on record or are contrary to the same or in ignorance of it, such findings are an additional material unknown to the*

employee but are taken into consideration by the disciplinary authority while arriving at its conclusions. ***Both the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, require that before the disciplinary authority comes to its own conclusions, the delinquent employee should have an opportunity to reply to the enquiry officer's findings. The disciplinary authority is then required to consider the evidence, the report of the enquiry officer and the representation of the employee against it.***

27. ***It will thus be seen that where the enquiry officer is other than the disciplinary authority, the disciplinary proceedings break into two stages. The first stage ends when the disciplinary authority arrives at its conclusions on the basis of the evidence, enquiry officer's report and the delinquent employee's reply to it.*** *The second stage begins when the disciplinary authority decides to impose penalty on the basis of its conclusions. If the disciplinary authority decides to drop the disciplinary proceedings, the second stage is not even reached.* ***The employee's right to receive the report is thus, a part of the reasonable opportunity of defending himself in the first stage of the inquiry. If this right is denied to him, he is in effect denied the right to defend himself and to prove his innocence in the disciplinary proceedings."*** (emphasis added)

31. Though the aforesaid observations of the Supreme Court were made in a case relating to departmental inquiry against civil servants but the same apply in any disciplinary proceedings as they define the contours of the principles of natural justice and "reasonable opportunity'.

32. It has been stated in the petition that the petitioner was not given any opportunity to represent either against the recommendations of the Disciplinary Committee or its findings, the report of the Committee was not supplied to the petitioner and the petitioner was not given any hearing by the Vice-Chancellor. It is not the case of the University that the petitioner was given a personal hearing by the Vice-Chancellor or any opportunity to represent against the recommendations and findings of the Disciplinary Committee or that the report and the recommendations of the Disciplinary Committee had been supplied to the petitioner before the Vice-Chancellor had approved the recommendations of the Disciplinary Committee against the petitioner.

33. In the present case, an opportunity of hearing to the petitioner by the Vice-Chancellor was also necessary to enable the petitioner to make an attempt to persuade the Vice-Chancellor not to accept the recommendations of the Disciplinary Committee, at least, regarding the punishment proposed against him, and that be treated leniently considering that other students who were also charged for indiscipline and for being involved in the incidents that occurred on 12.2.2019 were awarded lighter punishment by the University. Evidently, the order dated 2.9.2019 has been passed in violation of the principles of natural justice and Rule 9 of the Rules, 1985.

34. No reasons have been given by the Vice-Chancellor in his order dated 2.9.2019 approving the recommendations of the Disciplinary Committee. It was argued by the counsel for the University that no reasons were required to be given because the Vice-Chancellor agreed with the recommendations of the Disciplinary Committee. The said contention cannot be

accepted. As noted earlier, it is the Vice-Chancellor who is the final disciplinary authority and he is not bound by the recommendations of the Disciplinary Committee. The recommendations of the Disciplinary Committee are only in the nature of a proposal to the Vice-Chancellor. The Vice-Chancellor, whether he agrees or disagrees with the findings and recommendations of the Disciplinary Committee, is not expected to act mechanically and without any application of mind. The principle of fairness demands that every order having adverse civil consequences on the subject of the order must be supported by reasons disclosing application of mind by the decision-maker, whether such a decision is purely administrative or quasi-judicial.

35. In ***M/s. Travancore Rayon Ltd. vs. Union of India 1969 (3) SCC 868,*** the Supreme Court held that it was an unsatisfactory method of disposal of a case if the order does not disclose the points of consideration and the reasons for rejecting them. It was held by the Supreme Court that disclosure of reasons in support of any order was necessary to enable the aggrieved party to demonstrate that the reasons which persuaded the authority to reject his case were erroneous and further, the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority. The observations of the Supreme Court in Paragraphs 9, 10 and 11 of the judgment are reproduced below:-

"9. In a later judgment Bhagat Raja v. The Union of India and Others, the Constitution Bench of this Court in effect overruled the judgment of the majority in Madhya Pradesh Industries Ltd's case. The Court held that the decisions of tribunals in India are subject to the supervisory powers of the High Court under Article 227 of the Constitution and of appellate powers of this Court under Article 136. ***The High Court and this Court would be placed under a great disadvantage if no reasons are given and the revision is dismissed by the use of the single word 'rejected' or 'dismissed'.*** *The Court in that case held that the order of the Central Government in appeal, did not set out any reasons of its own and on that account set aside that order. In our view, the majority judgment of this Court in Madhya Pradesh Industries Ltd's case has been overruled by this Court in Bhagat Raja's case.*

10. In later decisions of this Court it was held that where the Central Government exercising power in revision gives no reasons, the order will be regarded as void; see State of Madhya Pradesh and Another v. Seth Narsinghdas Jankidas Mehta; The State of Gujarat v. Patel Raghav Natha and Others; and Prag Das Umar Vaishya v. The Union of India and Others.

11. In this case the communication from the Central Government gave no reasons in support of the order; the appellant Company is merely intimated thereby that the Government of India did not see any reasons to interfere "with the order in appeal". The communication does not disclose the "points" which were considered, and the reasons for rejecting them. This is a totally unsatisfactory method of disposal of a case in exercise of the judicial power vested in the Central Government. ***Necessity to give sufficient reasons which disclose proper appreciation of the problem to be solved, and the mental process by which the conclusion is reached, in cases where a non-judicial authority exercises judicial functions, is obvious. When judicial power***

is exercised by an authority normally performing executive or administrative functions, this Court would require to be satisfied that the decision has been reached after due consideration of the merits of the dispute, uninfluenced by extraneous considerations of policy or expediency. The Court insists upon disclosure of reasons in support of the order on two grounds : one, that the party aggrieved in a proceeding before the High Court or this Court has the opportunity to demonstrate that the reasons which persuaded the authority to reject his case were erroneous; the other, that the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power."

(emphasis added)

36. Subsequently, the Supreme Court in ***Messrs. Mahabir Prasad Santosh Kumar vs. State of U.P. & Others 1970 (1) SCC 764*** observed that orders which prima facie seriously prejudice the rights of the aggrieved party without giving reasons negate the rule of law. The Supreme Court observed as follows : -

"6. From the materials on the record it cannot be determined as to who considered the appeal addressed to the State Government, and what was considered by the authority exercising power on behalf of the State Government. ***The practice of the executive authority dismissing statutory appeals against orders which prima facie seriously prejudice the rights of the aggrieved party without giving reasons is a negation of the rule of law.*** *This Court had occasion to protest against this practice in several decisions : see Madhya Pradesh Industries Ltd. v. Union of India & Others (per Subba Rao, J.,); Bhagat Raja v. Union of India and Others; State of Madhya Pradesh and Another v. Seth Narsinghdas Jankidas Mehta; The State of Gujarat v. Patel Raghav Natha and Others; and Prag Das Umar Vaishya v. The Union of India and Others. The power of the District Magistrate was quasi-judicial : exercise of the power of the State Government was subject to the supervisory power of the High Court under Article 227 of the Constitution and of the appellate power of this Court under Article 136 of the Constitution.* ***The High Court and this Court would be placed under a great disadvantage if no reasons are given, and the appeal is dismissed without recording and communicating any reasons.***

7. Opportunity to a party interested in the dispute to present his case on questions of law as well as fact, ascertainment of facts from materials before the Tribunal after disclosing the materials to the party against whom it is intended to use them, and adjudication by a reasoned judgment upon a finding of the facts in controversy and application of the law to the facts found, are attributes of even a quasi-judicial determination. ***It must appear not merely that the authority entrusted with quasi-judicial authority has reached a conclusion on the problem before him : it must appear that he has reached a conclusion which is according to law and just, and for ensuring that end he must record the ultimate mental process leading from the dispute to its solution. Satisfactory decision of a disputed claim may be reached only if it be supported by the most cogent reasons that appeal to the authority. Recording of reasons in support of a decision on a disputed claim by a quasi-judicial authority ensures that the decision is reached according to law and is not the***

result of caprice, whim or fancy or reached on grounds of policy or expediency. *A party to the dispute is ordinarily entitled to know the grounds on which the authority has rejected his claim.* ***If the order is subject to appeal, the necessity to record reasons is greater, for without recorded reasons the appellate authority has no material on which it may determine whether the facts were properly ascertained, the relevant law was correctly applied and the decision was just."***

(emphasis added)

37. In ***The Siemens Engineering & Manufacturing Co. of India Ltd. vs. The Union of India & Anr. 1976 (2) SCC 981***, the Supreme Court deprecated the tendency of quasi-judicial authorities not to give reasons for their order and observed that administrative authorities should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. The observations of the Supreme Court in Paragraph 6 of the judgment reported in ***The Siemens Engineering (supra)*** are reproduced below : -

"6. Before we part with this appeal, we must express our regret at the manner in which the Assistant Collector, the Collector and the Government of India disposed of the proceedings before them. It is incontrovertible that the proceedings before the Assistant Collector arising from the notices demanding differential duty were quasi-judicial proceedings and so also were the proceedings in revision before the Collector and the Government of India. Indeed, this was not disputed by the learned counsel appearing on behalf of the respondents. ***It is now settled law that where an authority makes an order in exercise of a quasi-judicial function, it must record its reasons in support of the order it makes. Every quasi-judicial order must be supported by reasons.*** *That has been laid down by a long line of decisions of this Court ending with N.M. Desai v. Testeels Ltd. But unfortunately, the Assistant Collector did not choose to give any reasons in support of the order made by him confirming the demand for differential duty. This was in plain disregard of the requirement of law. The Collector in revision did give some sort of reason but it was hardly satisfactory. He did not deal in his order with the arguments advanced by the appellants in their representation dated December 8, 1961 which were repeated in the subsequent representation dated June 4, 1965. It is not suggested that the Collector should have made an elaborate order discussing the arguments of the appellants in the manner of a court of law. But the order of the Collector could have been a little more explicit and articulate so as to lend assurance that the case of the appellants had been properly considered by him. If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative Law, they may have to be so replaced,* ***it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. The rule requiring reasons to be given in support of an order***

is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law. *The Government of India also failed to give any reasons in support of its order rejecting the revision application. But we may presume that in rejecting the revision application, it adopted the same reason which prevailed with the Collector. The reason given by the Collector was, as already pointed out, hardly satisfactory and it would, therefore, have been better if the Government of India had given proper and adequate reasons dealing with the arguments advanced on behalf of the appellants while rejecting the revision application. We hope and trust that in future the customs authorities will be more careful in adjudicating upon the proceedings which come before them and pass properly reasoned orders, so that those who are affected by such orders are assured that their case has received proper consideration at the hands of the customs authorities and the validity of the adjudication made by the customs authorities can also be satisfactorily tested in a superior tribunal or court. In fact, it would be desirable that in cases arising under customs and excise laws an independent quasi-judicial tribunal, like the Income-tax Appellate Tribunal or the Foreign Exchange Regulation Appellate Board, is set up which would finally dispose of appeals and revision applications under these laws instead of leaving the determination of such appeals and revision applications to the Government of India. An independent quasi-judicial tribunal would definitely inspire greater confidence in the public mind."*

38. Recently, in ***Kranti Associates Private Limited & Anr. vs. Masood Ahmed Khan & Ors. 2010 (9) SCC 496,*** after referring to the previous judicial precedents on the necessity to give reasons observed that even administrative decisions should record reasons if the decision affects anyone prejudicially. The Supreme Court summarized the law in paragraph 47 of its judgment which is reproduced below :-

"47. Summarizing the above discussion, this Court holds:

(a) ***In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.***

(b) A quasi-judicial authority must record reasons in support of its conclusions.

(c) ***Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.***

(d) ***Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.***

(e) ***Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.***

(f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) ***Reasons facilitate the process of judicial review by superior courts.***

(h) The ongoing judicial trend in all countries committed to rule of law and

constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision-making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) ***Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision-making process.***

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor).

(n) ***Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence.*** *See Ruiz Torija v. Spain EHRR, at 562 para 29 and Anya v. University of Oxford, wherein the Court referred to Article 6 of the European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".*

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "Due Process"."

(emphasis added)

39. The order of the Vice-Chancellor was subject to appeal before the Executive Council and, therefore, it was incumbent on the Vice-Chancellor to give reasons for his order approving the recommendations of the Disciplinary Committee. It was observed by the Supreme Court in Paragraph 37 of ***Oryx Fisheries Private Limited vs. Union of India & Others 2010 (13) SCC 427*** as follows : -

"37. Therefore, the bias of the third respondent which was latent in the show-cause notice became patent in the order of cancellation of the registration certificate. The cancellation order quotes the show-cause notice and is a non-speaking one and is virtually no order in the eye of law. ***Since the same order is an appealable one it is incumbent on the third respondent to give adequate reasons."***

40. A reading of the judgments of the Supreme Court referred above show that any decision, whether administrative or quasi-judicial, which prejudicially affects any person and is appealable has to be supported by explicit and clear reasons disclosing proper application of mind and

that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations. The order of the Vice-Chancellor clearly fails the aforesaid tests. A mere noting of approval on the report of the Disciplinary Committee does not disclose any application of mind by the Vice-Chancellor either to the findings of the Disciplinary Committee or its proposal regarding the punishment to be imposed on the petitioner.

41. The order dated 2.9.2019 has been passed without giving any opportunity of hearing to the petitioner and without giving any opportunity to the petitioner to represent against the findings and proposal of the Disciplinary Committee. The order does not record reasons for accepting the findings and recommendations of the Disciplinary Committee. Evidently, the order dated 2.9.2019 has been passed without complying with the requirements of natural justice. The order also violates Rule 9 of the Rules, 1985.

42. Even the Executive Council in its decision dated 14.10.2019 has only mechanically reproduced the recommendations and the report of the Disciplinary Committee. The appeal filed by the petitioner against the order of the Vice-Chancellor has been dismissed by the Executive Council without recording any reasons. The resolution passed by the Executive Council of the University dismissing the appeal filed by the petitioner also reveals a total non-application of mind.

43. It is evident that the entire disciplinary proceedings against the petitioner culminating in the order of the Vice-Chancellor and the resolution of the Executive Council are in violation of the principles of natural justice and also contrary to Rules, 1985. For the said reasons, the entire disciplinary proceedings against the petitioner including the orders of the Vice-Chancellor and the Executive Council are liable to be quashed.

44. It is true, as argued by the counsel for the University, that in cases where the orders passed in departmental inquiries or disciplinary proceedings are quashed for violation of the principles of natural justice, the course normally adopted by the Courts is to remit back the matter to the concerned authority to pass fresh orders after following the principles of natural justice. In the present case, the petitioner has been expelled from the University for a period of five academic sessions starting from the academic session 2018-19. The petition was pending before this Court since 2020. The petitioner has already remained under expulsion for more than four years because of orders which, as noted earlier, have been passed without following the principles of natural justice. In the circumstances, it would not be equitable or just to remand back the matter to the University authorities to hold a fresh inquiry in accordance with the principles of natural justice or to the Vice-Chancellor to pass a reasoned order after giving an opportunity of hearing to the petitioner.

45. In view of the aforesaid, the order dated 2.9.2019 passed by the Vice-Chancellor and the resolution dated 14.10.2019 passed by the Executive Council are, hereby, quashed. Consequently, the intimations dated 4.9.2019 and 31.12.2019 to the petitioner of the order dated 2.9.2019 and resolution 14.10.2019 also stand quashed.

46. The Aligarh Muslim Univeristy, Aligarh and its officers shall allow the

petitioner to attend his classes in the University and appear in the examinations. The petitioner shall be permitted to appear in the examinations of B.A.LL.B five year course. In case, the period prescribed by the relevant Rules of the University to complete the B.A.LL.B. five year course are to expire before the petitioner gets the opportunity to appear in regular examinations, the University shall hold special examinations for the semesters in which the petitioner could not appear because of his remaining under suspension or under expulsion from the University.

47. With the aforesaid directions, the writ petition is ***allowed***.

48. Let this order be communicated to the Vice-Chancellor, Aligarh Muslim University, Aligarh by the Registrar (Compliance) within 48 hours.

(2023) 1 ILRA 206
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.12.2022

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Writ-C No. 7078 of 2004

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

Counsel for the Petitioner:
Sri C.H. Singh Gautam, Sri C.S. Gautam

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

(A) Civil Law - Arms Act, 1959 - Section 17 - Variation, suspension and revocation of licences , Section 18 - Appeal , Indian Penal Code, 1860 - Sections 147, 148, 149, 323, 342, 504, 506, - if the arm/gun is not used in the incident - no question would arise to cancel the arm licence - mere pendency of a case does not create ground to cancel the arm licence. (Para - 4,22)

Quashing of - order passed by District Magistrate (Licencing Authority) - to cancel arm licence of petitioner (arm licence holder) - confirmed by Appellate Authority/Commissioner - only one criminal case against the petitioner - petitioner neither possessed nor used his arm - at the time of the alleged incident - previous criminal antecedents. **(Para -1,4,22)**

HELD:-Crimes not generally committed by licensed arms but generally offence are committed by use of unlicensed country-made firearms, therefore, only on the basis of pendency of one case and apprehension, arm licence cannot be cancelled. Both impugned orders suffer from manifest error in the eyes of law and are liable to be quashed. **(Para - 22,24)**

Petition Allowed. (E-7)

List of Cases cited:

1. Ram Prasad Vs Commissioner & ors., 2020 0 Supreme (All) 104

2. Masiuddin Vs Commissioner, Alld. Division, Alld. & anr., 1972 ALJ 573

3. Habib Vs St. of U.P. & ors., 2002 (44) ACC 783

4. Satish Singh Vs D.M., Sultanpur , 2009 (4) ADJ (LB)

5. Chandrabali Tewari Vs the Commissioner, Faizabad, 2014 (32) LCD 1696

6. Indrajeet Singh Vs St. of U.P. & ors., Writ-C No.4947 of 2019

7. Deputy Inspector General of Police & anr. Vs S. Samuthiram, (2013) 1 SCC 598

8. Chhanga Prasad Sahu Vs St. of U.P. & ors., 1984 AWC 145 (FB)

9. Ilam Singh Vs Commissioner, Meerut Division & ors., 1987 ALJ 416

10. Jageshwar Vs St. of U.P. & ors. ,2009 (67) ACC 157

11. Surya Narain Mishra Vs St. of U.P. & ors., 2015 (7) ADJ 510

12. Raghuveer Singh Vs Commissioner & ors., 2020 SCC OnLine All 192

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

1. This writ petition has been instituted by the petitioner-arm licence holder to quash the arm licence cancellation order dated 17.02.1999 passed by the District Magistrate, Ghazipur/Licencing Authority and order dated 06.01.2004 passed by the Appellate Authority/Commissioner, Varanasi Region, Varanasi confirming the cancellation order.

2. In brief, facts of the case are that the petitioner is the resident of Village Jamuaon, Post Office Barsara, Police Station Karanda, District Ghazipur. He is a reputed person of his locality and he also possesses an arm licence of SBBL as Licence No.303/P/11 (SBBL No.15868). One Mithai Lal, active member of the naxali organization namely Bhartiya Communist Party (Male), Block Prabhari of the said organization, on 24.02.1997 lodged an FIR against the petitioner including six other persons. He wanted to spread the effect and influence of his organization in the concerned area to grab some property of the State Government with the help of other active members of the said organization, as a result, the villagers of the petitioner's village made an application before the revenue authorities as well as police authorities also and when he did not succeed in his purpose, he lodged the alleged FIR on the vexatious ground, however, there was no any specific role of the petitioner as mentioned in the alleged FIR. The FIR was lodged in Case Crime No.26 of 1997, under Sections 147, 148, 149, 323, 342, 504, 506 IPC in which SHO, Karanda submitted report dated 28.10.1997 to respondent no.3 for cancellation of the licence of the petitioner. After receiving the report dated 28.10.1997, the respondent no.3 issued a show cause notice on 05.11.1997 (annexure no.2) to the petitioner directing him to appear before him on 02.12.1997 and explain as to why his licence may not be cancelled. The petitioner appeared before the respondent no.3 and submitted his reply on 20.04.1998 mentioning therein that he neither has criminal antecedent nor has committed any such offence as alleged and only on the political pressure, the FIR has been lodged on the false and vexatious grounds. It was also mentioned in the reply that no person of his village has lodged any FIR regarding the alleged incident and no such offence took place in the village but afterthought for mounting pressure on the reputed persons of the said area, the aforesaid FIR was lodged by the active member of naxali organization. However, without applying his judicial mind and on the ground of said FIR and police report, the respondent no.3 cancelled the arm licence issued to the petitioner vide order dated 17.02.1999 (annexure no.3 to the writ petition).

3. Being aggrieved by the order dated 17.02.1999, the petitioner filed an appeal under Section 18 of the Arms Act before respondent no.2 on 15.03.1999 praying for setting aside the order dated 17.02.1999. After hearing the matter, the respondent no.2, Commissioner, Varanasi Region, Varanasi, dismissed the appeal vide

judgment and order dated 06.01.2004 (annexure no.5).

4. The dispute as alleged in the FIR is that number of persons have beaten the informant by kick and foot and also tried to burn him but neither any injury report nor any medical examination report was produced by the informant till date. Further in the FIR, the petitioner has been assigned the role of beating the informant with lathi and danda and by kick and foot but there is no mention of use of arms at all. The informant is not the resident of the same village and there is no explanation about the presence of the petitioner at the place of occurrence and neither any person of that village lodged an FIR/complaint against the petitioner nor has given any statement before the police or the Magistrate. The village of the petitioner falls within the naxali affected area and on every day unsocial elements as well as members of the naxali organization try to attack and threaten the villagers and threatening letters of the naxali organization have also been received by number of villagers. Even then the respondents without considering the relevant facts cancelled the arm license of the petitioner. The petitioner neither possessed nor used his arm at the time of the alleged incident and in number of decisions of Hon'ble Supreme Court and this Court, it is settled law that if the arm/gun is not used in the incident, no question would arise to cancel the arm licence.

5. On the aforesaid grounds, it has been contended that the both the impugned orders are wholly illegal, mala fide and not sustainable in the eyes of law, and they must be quashed.

6. No counter affidavit has been filed by the respondents. However, a supplementary affidavit has been filed by the petitioner bearing no.139886 of 2006 annexing certified copy of the Case No.959 of 1997 (State Vs. Shiv Singh and others) wherein he has reiterated the contents of the petition. Perusal of the order-sheet of aforesaid revealed that till the date of filing only one witness has been examined.

7. Section 17 of the Arms Act is as under:

"17. Variation, suspension and revocation of licences.--

(1) The licensing authority may vary the conditions subject to which a licence has been granted except such of them as have been prescribed and may for that purpose require the licence-holder by notice in writing to deliver-up the licence to it within such time as may be specified in the notice.

(2) The licensing authority may, on the application of the holder of a licence, also vary the conditions of the licence except such of them as have been prescribed.

(3) The licensing authority may by order in writing suspend a licence for such period as it thinks fit or revoke a licence--

(a) if the licensing authority is satisfied that the holder of the licence is prohibited by this Act or by any other law for the time being in force, from acquiring, having in his possession or carrying any arms or ammunition, or is of unsound mind, or is for any reason unfit for a licence under this Act; or

(b) if the licensing authority deems it necessary for the security of the public peace or for public safety to suspend or revoke the licence; or

(c) if the licence was obtained by the suppression of material information or on the basis of wrong information provided

by the holder of the licence or any other person on his behalf at the time of applying for it; or

(d) if any of the conditions of the licence has been contravened; or

(e) if the holder of the licence has failed to comply with a notice under sub-section (1) requiring him to deliver-up the licence.

(4) The licensing authority may also revoke a licence on the application of the holder thereof.

(5) Where the licensing authority makes an order varying a licence under sub-section (1) or an order suspending or revoking a licence under sub-section (3), it shall record in writing the reasons therefor and furnish to the holder of the licence on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement.

(6) The authority to whom the licensing authority is subordinate may by order in writing suspend or revoke a licence on any ground on which it may be suspended or revoked by the licensing authority; and the foregoing provisions of this section shall, as far as may be, apply in relation to the suspension or revocation of a licence by such authority.

(7) A court convicting the holder of a licence of any offence under this Act or the rules made thereunder may also suspend or revoke the licence: Provided that if the conviction is set aside on appeal or otherwise, the suspension or revocation shall become void.

(8) An order of suspension or revocation under sub-section (7) may also be made by an appellate court or by the High Court when exercising its powers of revision.

(9) The Central Government may, by order in the Official Gazette, suspend or revoke or direct any licensing authority to suspend or revoke all or any licences granted under this Act throughout India or any part thereof.

(10) On the suspension or revocation of a licence under this section the holder thereof shall without delay surrender the licence to the authority by whom it has been suspended or revoked or to such other authority as may be specified in this behalf in the order of suspension or revocation."

8. It would be proper to see the case in view of the cases decided by the Courts of Records on the point. Hence some relevant cases are referred and discussed to reach at the correct conclusion.

9. In **Ram Prasad Vs. Commissioner and others, 2020 0 Supreme (All) 104,** District Magistrate cancelled the arms license on the basis of pendency of criminal cases against the petitioner. Petitioner was later on acquitted from the criminal cases. Order of Acquittal was not showing use of fire arm of the petitioner. It was held that after acquittal the very basis of the order of cancellation vanished and mere apprehension expressed in the impugned orders that the petitioner would misuse the fire arm and would extend threat to the persons of the weaker section of the society, the arm licence could not be cancelled.

10. In **Ram Prasad** (Supra), following principles have been laid down regarding licence possession of firearms and its suspension and revocation;

(i) Right to hold fire arm licence granted by the authorities in accordance

with the provisions contained in the Arms Act, 1959 is a valuable right of an individual.

(ii) Licencing authority has the power to suspend or revoke an arm's licence only if any of the conditions mentioned in Sub-Clauses (a) to (e) of Sub Section (3) of Section 17 of the Arms Act exists.

(iii) The provisions of Section 17 of the Act cannot be invoked lightly in an arbitrary manner.

(iv) The licencing authority has to satisfy itself if it is necessary for the security of public peace or for public safety to suspend or revoke the licence.

(v) Such satisfaction of the licencing authority must be expressed in the order and must be based on relevant material.

(vi) Public peace or public safety do not mean ordinary disturbance of law and order. Public safety means safety of the public at large and not of few persons only.

(vii) Mere involvement or pendency of a criminal case does not, of its own, necessarily affect public peace or public safety. The licencing authority in each case has to record a finding as to how and under what circumstances the possession of the arm licence is detrimental to the public peace or public safety.

(viii) On mere apprehension of misuse of fire arm or that the licencee would extend threat to the persons of the weaker section, the arm licence cannot be cancelled. There must be some positive incident in which the licencee participated or used his arm, leading to breach of public peace or public security.

(ix) After acquittal of the licencee from the criminal case, the very basis of cancellation of arm licence is vanished.

11. In the light of the above principles, the impugned order does not satisfy the test.

12. In **Masiuddin Vs. Commissioner, Allahabad Division, Allahabad and another, 1972 ALJ 573,** it is held that "after a license is granted, the right to hold the license and possess a gun is a valuable individual right in a free country". Further it is held that "a license may be cancelled, *inter alia* on the ground that it is necessary for the security of the public peace or for public safety, to do so. Mere existence of enmity between the licensee and another person would not establish the necessary connection with the security of public peace or public safety".

13. In **Habib Vs. State of U.P. and others, 2002 (44) ACC 783**, it has been held that "mere involvement in a criminal case cannot in any way affect the public security or public interest and the order cancelling or revoking licence of fire arm was not justified".

14. In **Satish Singh Vs. District Magistrate, Sultanpur 2009 (4) ADJ (LB),** it has been held that "right to possess arms is statutory right but right to live and liberty is fundamental right guaranteed by Article 21 of the Constitution of India. Corollary to it, it is citizen's right to possess firearms for their personal safety to save their family from miscreants. It is often said that ordinarily in a civilised society, only civilised persons require arms licence for their safety and security and not the criminals. Of course, in case the government feels that the arms licence are abused for oblique motive or criminal activities, then appropriate measure may be adopted to check such malpractice. But arms licence should not be suspended in a

routine manner mechanically, without application of mind and keeping in view the letter and spirit of Section 17 of the Arms Act".

15. In **Chandrabali Tewari Vs. the Commissioner, Faizabad, 2014 (32) LCD 1696,** it has been held that "mere pendency of criminal case is no ground to cancel fire arm licence. It has also been held that as in that case there were no allegations that the licenced gun was ever taken out by the licensee and was used in the act, the order canceling petitioner's fire arm licence was quashed".

16. However, learned Standing Counsel has tried to support the impugned orders and placed reliance on the judgment of this Court passed **in Indrajeet Singh Vs. State of U.P. and others, Writ-C No.4947 of 2019**, decided on 22.10.2021 wherein relying upon the judgment given in the case of **Deputy Inspector General of Police and another Vs. S. Samuthiram, (2013) 1 SCC 598,** it has been held that "the expressions 'honorable acquittal', 'acquitted of blame', 'fully exonerated' are unknown to the Code of Criminal Procedure or the Penal Code, which are coined by judicial pronouncements. It is difficult to define precisely what is meant by the expression 'honorably acquitted'. When the accused is acquitted after full consideration of prosecution evidence and that the prosecution had miserably failed to prove the charges levelled against the accused, it can possibly be said that the accused was honorably acquitted".

17. In **Chhanga Prasad Sahu Vs. State of U.P. and others, 1984 AWC 145 (FB),** after noticing the provisions of Section 17(3) of the Arms Act the Full Bench in paragraphs-5 and 9 held as follows:

"5. A perusal of abovementioned provisions indicates that the licensing authority has been given the power to suspend or revoe an arms licence only if any of the conditions mentioned in sub-clauses (a) to (e) of sub-section (3) of Section 17 of Act exists." sub section (5) of Section 17 makes it obligatory upon the licensing authority to, while passing the order revoking/suspending an arms licence, record in writing the reasons therefore and to, on demand, furnish a brief statement thereof to the holder of the license unless it considers that it will not be in the public interest to do so."

"9. ...it is true that in order to revoke/suspend an arms licence, the licensing authority has necessarily to come to the conclusion that the facts justifying revocation/suspension of licence mentioned in grounds (a) to (e) of section 17 exist"

18. In **Ilam Singh Vs. Commissioner, Meerut Division and others, 1987 ALJ 416** this Court held that under Section 17(3) (b) the licencing authority may suspend or revoke a licence if it becomes necessary for the security of public peace or public safety. In this case no report was lodged against the licensee indicating that he had used the gun in the incident which led to the breach of public peace or public safety. It was held that there must be some positive incident in which the petitioner participated and used his gun which led to breach of public peace or public safety and in the absence of the use of the gun by the licencee against the security of public peace or public safety the licence of the gun could not be suspended or revoked. The relevant paragraphs-4 and 5 of the

judgment in **Ilam Singh** (supra) are being reproduced as under:

"4. Having heard the learned counsel for the petitioner I am of the view that the submissions raised by the learned counsel for the petitioner cannot be said to be without substance. Section 17(3) (b) of the Arms Act enacts that licensing authority may by order in writing suspend a licence or revoke the same if it becomes necessary for the security of public peace or the public safety. When once a person has been granted a licence and he acquires a gun, it becomes one of his properties. In the present case no incident of breach of security of the public peace or public safety at the behest of the petitioner has been pointed out. Even no report was lodged against the petitioner indicating that he used his gun in the incident which led to the breach of public peace or public safety. Even though some reports might have been lodged but that could not be said to be a sufficient reason to cancel the licence.

5. There must be some positive incident in which the petitioner participated and used his gun which led to the breach of the public peace or public safety. In the absence of the use of the gun by the petitioner against the security of public peace or public safety the licence of the gun of the petitioner was not liable either to be suspended or revoked. The licensing authority as well as the Commissioner committed errors on the face of the record in cancelling the licence of the gun held by the petitioner in utter disregard of the provisions of Section 17 (3) (b) of the Arms Act. In view of these facts the impugned orders cannot be sustained and deserves to be quashed."

19. In **Jageshwar Vs. State of U.P. and others 2009 (67) ACC 157** this court held that in view of the settled law the licence under the Arms Act cannot be suspended on the ground of mere involvement in a criminal case or criminal trial or on the basis of mere apprehension of misuse of fire arm by the licensee.

20. In **Surya Narain Mishra Vs. Stae of U.P. and others, 2015 (7) ADJ 510**, similar view has been taken by this Court relying upon subsequent decisions. Para-14 of the judgment is reproduced:

"14. In the case of Raj Kumar Verma v. State of U.P, 2013 (80) ACC 231 this court in paragraph No.3 held as under:-

"The ground for issue of show-cause notice, suspension and ultimately cancellation of the licence is that one and precisely one criminal case was registered against the petitioner. The District Magistrate has also held that the petitioner has been enlarged on bail. He has gone further to observe that if the licence remained intact, the petitioner, may disturb public peace and tranquility. The same findings have been given by the Commissioner, Unmindful of the fact that this Court is repeating the law of the land, but the deaf ears of the administrative officers do not ready to succumb the law of the land. The settled law is that mere involvement in a criminal case without any finding that involvement in such criminal case shall be detrimental to public peace and tranquility shall not create the ground for the cancellation of armed licence. In Ram Suchi v. Commissioner, Devipatan Division reported in 2004 (22) LCD 1643, it was held that this law was relied upon in Balram Singh Vs. Satate of U.P. 2006 (24) LCD 1359. Mere apprehension without substance is simply an opinion which has no legs to stand. Personal whims are not

allowed to be reflected while acting as a public servant."

21. In **Raghuveer Singh Vs. Commissioner and others, 2020 SCC OnLine All 192** following principles of law have been laid down regarding revocation of arm licence:

"(i) Right to hold fire arm licence granted by the authorities in accordance with the provisions contained in the Arms Act, 1959 is a valuable right of an individual.

(ii) Licencing authority has the power to suspend or revoke an arm's licence only if any of the conditions mentioned in Sub-Clauses (a) to (e) of Sub Section (3) of Section 17 of the Arms Act exists.

(iii) The provisions of Section 17 of the Act cannot be invoked lightly in an arbitrary manner.

(iv) The licencing authority has to satisfy itself if it is necessary for the security of public peace or for public safety to suspend or revoke the licence.

(v) Such satisfaction of the licencing authority must be expressed in the order and must be based on relevant material.

(vi) Public peace or public safety do not mean ordinary disturbance of law and order. Public safety means safety of the public at large and not of few persons only.

(vii) Mere involvement or pendency of a criminal case does not, of its own, necessarily affect public peace or public safety. The licencing authority in each case has to record a finding as to how and under what circumstances the possession of the arm licence is detrimental to the public peace or public safety.

(viii) On mere apprehension of misuse of fire arm or that the licencee would extend threat to the persons of the weaker section, the arm licence cannot be cancelled. There must be some positive incident in which the licencee participated or used his arm, leading to breach of public peace or public security.

(ix) After acquittal of the licencee from the criminal case, the very basis of cancellation of arm licence is vanished."

22. In this case there is only one criminal case against the petitioner in which it is no where mentioned that the petitioner has used the arm in commission of alleged crime. There is no counter of the fact that the village and the area of the petitioner does not fall in naxali affected area. If the petitioner is residing in a naxali affected area certainly there would be need of a licensed arm. Respondents have not produced any evidence that the petitioner is having previous criminal antecedents and is a person of criminal nature. In the aforementioned judicial precedents it is ruled that mere pendency of a case does not create ground to cancel the arm licence. It is often seen that crimes are not generally committed by licensed arms but generally offence are observed to be committed by use of unlicensed country-made firearms, therefore, only on the basis of pendency of one case and apprehension, arm licence cannot be cancelled.

23. In this case earlier on 10.11.2006 the operation of the order dated 17.02.1999 and order of Commissioner dated 06.01.2004 regarding cancellation of petitioner's Licence No.303P11SBBL Gun No.15868 was stayed and it was further directed that licence of the petitioner shall be restored to him pending disposal of the writ petition. The original order is as under:-

"In spite of the order passed by this Court to learned Standing counsel to

file counter affidavit, no counter affidavit has been filed.

Admit.

Till further orders of this Court, operation order dated 17.2.1999 passed by the District Magistrate and order dated 6.1.2004 passed by Commissioner, Varanasi Region, Varanasi in the matter of cancellation of license of petitioner's license no. 303P11SBBL Gun no. 15868 shall remain stayed and it is further directed that license of petitioner shall be restored to him pending disposal of writ petition."

24. From the aforementioned order of this Court it is concluded that the arm licence of the petitioner still survives and is continuing. Hence, there is no need to pass an order to move a fresh application for grant of revival of licence. This Court is of the considered view that both the impugned orders suffer from manifest error in the eyes of law and are liable to be quashed.

ORDER

25. The petition is allowed. The order passed by the District Magistrate, Ghazipur/Licencing Authority dated 17.02.1999 and the order of Appellate Authority/Commissioner, Varanasi Region, Varanasi dated 06.01.2004 are quashed.

26. If the arm licence is into operation, it shall be continued and shall be renewed time to time as per the existing law. If it is discontinued and has not been renewed, in that case the petitioner shall move an application before the District Magistrate, Ghazipur who shall decide the application of the petitioner in accordance with the observations made in this judgment.

(2023) 1 ILRA 214
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.01.2023

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE AJIT SINGH, J.

Writ-C No. 9616 of 2022

Dharmpur Sugar Mills Ltd. 241, New Delhi & Anr. ...Petitioners

Versus

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

Counsel for the Petitioners:
Sri Rahul Agarwal, Sri Shashi Nandan (Senior Adv.)

Counsel for the Respondents:
C.S.C., A.S.G.I., Sri Aditiya Kumar Singh, Sri Ayush Garg, Sri K.K. Rao, Sri Rakesh Pande (Senior Adv.), Sri Ravindra Singh

(A) Civil Law - The Sugarcane (Control) Order, 1966 - Order 6-A - Restriction on setting up of two sugar factories within the radius of 15 kms. , Order 6-B - Requirements for filing the Industrial Entrepreneur Memorandum - Order 6-C - Time limit as to when commercial production had to start etc. - U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 - Section 2(a) , 2(i) , 2(n) - "reserved area" - "assigned area" - "crushing season" , 'bonding policy' - 'reservation order' - "drawl percentage" - "crushing capacity" - "economic reasons", The Defence of India Rules, 1962 - Rule 125-B - Declaration of reserved area and assigned area - The U.P. Sugarcane (Regulation of Supply and Purchase) Rules, 1954 - Rule 22

(B) Reserved area and assigned area allocated to a particular sugar factory - aspects under consideration - (i) drawl capacity; (ii) crushing capacity; (iii) past performance of sugar factory. (Para -39)

Quashing of - Grant of 'No Objection Certificate' & Issuance of "Industrial Entrepreneur Memorandum" – ground - distance between the proposed sugar mill and the existing sugar mills – contravention of scheme - hectares of land allocated to petitioner – 46705 - quintals of sugarcane allocated - 401.20 lakh - actually crushed only 231.63 lakh quintals - much more sugarcane crop allocated to existing factories (petitioners) - out of allocated sugarcane only a certain portion was actually purchased by petitioners - Cane Commissioner had in mind capacity of sugar factory - accordingly allocates reserved area and assigned area - petitioners to think that availability of sugarcane would not be there upon coming up of a new sugar factory, is only an apprehension . **(Para - 1, 38, 41, 45,)**

HELD:- The Government's policy decision to set-up a fresh sugar factory does not require any interference from the Court, as every factory will have its own reserved area and raw material. **(Para - 48 ,49)**

Petition dismissed. (E-7)

List of Cases cited:

1. Ojas Industries Pvt. Ltd. Vs Oudh Sugar Mills Ltd. , (2007) 4 SCC 723

2. F.R.O.A. & ors. Vs U.O.I. , 2003) 4 SCC 289

3. BALCO Employees Union Vs U.O.I. (U.O.I.) & ors. , (2002) 2 SCC 333

4. P.T.R. Exports (Madras) Pvt. Ltd. & ors. Vs U.O.I. (UOI) & Ors. , (1996) 5 SCC 268

5. Prag Ice & Oil Mills & ors. Vs U.O.I. (U.O.I.) , (1978) 3 SCC 459

6. R.K. Garg & ors. Vs U.O.I. (U.O.I.) & Ors. , (1981) 4 SCC 675

7. Dhampur Sugar (Kashipur) Ltd. Vs St. of Uttaranchal & ors. , (2007) 8 SCC 418

8. Ugar Sugar Works Ltd. Vs Delhi Administration & ors. , (2001) 3 SCC 635

9. Shri Sitarm Sugar Co. Ltd. & anr. Vs U.O.I. & ors. , (1990) 3 SCC 223

10. T.N. Education Deptt. Ministerial & General Subordinate Services Assn. Vs St. of T. N. (1980) 3 SCC 97

11. Laker Airways Ltd. Vs Deptt. of Trade, (1977) 2 WLR 234

12. APM Terminals BV Vs U.O.I., (2011) 6 SCC 756

13. Dhampur Sugar (Kashipur) Ltd. Vs St. of Uttaranchal & Ors. , (2007) 8 SCC 418

14. Sunil Kumar Sharma & anr. Vs St. of U.P. , (2018) 9 ADJ 806 (DB)

15. Shivshakti Sugars Ltd. Vs Shree Renuka Sugar Ltd. , (2017) 7 SCC 729

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

1. This writ petition has been filed for the issuance of a writ of certiorari quashing the '**No Objection Certificate**' dated 14.9.2021 which has been issued by the Cane Commissioner to the respondent no.4 and also for the quashing of the "**Industrial Entrepreneur Memorandum**" which has been filed by the respondent no.4 on 12.10.2021 and has been acknowledged by the Department of Promotion of Industry and Internal Trade on the same date.

2. It appears that for the installation of a sugar factory when the respondent no.4-M/s. Bindal Paper Limited on 7.9.2021 had asked for an NOC, then after considering the case of respondent no.4, the Cane Commissioner, Government of Uttar Pradesh, Lucknow had on 14.9.2021 issued the NOC and had detailed in the NOC that from the proposed sugar factory, as per the Indian Survey Department, Dehradun, the nearest sugar mills were as follows :-

i. Wave Industries Pvt. Ltd., village Maleshiya Dhanaura, District Amroha (24.6 kms.)

ii. Deewan Sugar Mills Ltd., District Moradabad (31.3 kms.)

iii. Dhampur Sugar Mills Ltd., Unit Dhampur, District Bijnor (21.1 kms.)

iv. P.B.S. Foods Pvt. Ltd., Chandanpur, District Bijnor (17.5 kms.)

v. Upper Ganges Sugar and Industries Ltd., Seohara, District Bijnor (16.9 kms.).

3. Thereafter, the Commissioner had stated that NOC was being issued to M/s. Bindal Papers Ltd. for the issuing of the IEM to M/s. Bindal Papers Ltd.

4. The petitioner no.1 which is Dhampur Sugar Mills Limited, as per the survey report of the Indian Survey Department, Dehradun was 21.1 kilometers away from the proposed sugar mill and the petitioner no.2-Avadh Sugar and Energy Limited which has been mentioned as Upper Ganges Sugar and Industries Ltd., Seohara, District Bijnor in the NOC was 16.9 kilometers away from the proposed sugar mill of the respondent no.4. The establishment of sugar factories is regulated by both the Central and the State Government. The Government of India by its notification published in the Gazette of India (Extraordinary) 1966 had issued the **Sugarcane (Control) Order, 1966** and as per Order 6-A, there was a restriction of setting up of two sugar factories within the radius of fifteen kilometers.

5. For convenience, Order 6-A of the 1966 Order is being reproduced here as under :-

"**6-A. Restriction on setting up of two sugar factories within the radius of 15 kms.--** Notwithstanding anything contained in Clause 6, no new sugar factory shall be set up within the radius of 15 kms of any existing sugar factory or another new sugar factory in a State or two or more States:

Provided that the State Government may with the prior approval of the Central Government, where it considers necessary and expedient in public interest, notify such minimum distance higher than 15 kms or different minimum distances not less than 15 kms for different regions in their respective States.

Explanation 1.--An existing sugar factory shall mean a sugar factory in operation and shall also include a sugar factory that has taken all effective steps as specified in Explanation 4 to set up a sugar factory but excludes a sugar factory that has not carried out its crushing operations for last five sugar seasons.

Explanation 2.--A new sugar factory shall mean a sugar factory, which is not an existing sugar factory, but has filed the Industrial Entrepreneur Memorandum as prescribed by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry in the Central Government and has submitted a performance guarantee of rupees one crore to the Chief Director (Sugar), Department of Food and Public Distribution, Ministry of Consumer Affairs, Food and Public Distribution for implementation of the Industrial Entrepreneur Memorandum within the stipulated time or extended time as specified in Clause 6-C.

Explanation 3.--The minimum distance shall be determined as measured by the Survey of India.

Explanation 4.--The effective steps shall mean the following steps taken by the concerned person to implement the Industrial Entrepreneur Memorandum for setting up of sugar factory.--

(a) purchase of required land in the name of the factory;

(b) placement of firm order for purchase of plant and machinery for the factory and payment of requisite advance or opening of irrevocable letter of credit with suppliers;

(c) commencement of civil work and construction of building for the factory;

(d) sanction of requisite term loans from banks or financial institutions;

(e) any other step prescribed by the Central Government, in this regard through a notification."

6. As per Order 6-B of the 1966 Order, when a new unit of any sugar factory was to be established, it had to get an NOC from the Cane Commissioner or Director (Sugar) or the specified authority of the concerned State Government specifically stating that the distance between the site where the proposed factory was to be set-up and the adjacent sugar factory was not in any manner lesser than the minimum distance prescribed by the Central Government or the State Government. After the NOC was given by the concerned Cane Commissioner, the new factory had to give its IEM to the Central Government within a month of the issuance of such certificate. As and when the IEM was submitted, the industrial concern which was to open the new factory had to submit a performance guarantee of Rs.1 crore to the Chief Director (Sugar), Ministry of Consumer Affairs, Food and Public Distribution, New Delhi and Public Distribution within 30 days of the filing of the IEM which was to be a surety for the implementation of the IEM. The requirement of getting the NOC with regard to the distance and the requirement of submitting the IEM and the submission of the performance guarantee have been provided in Order 6-B of the 1966 Order.

7. For convenience, Order 6-B of the 1966 Order is being reproduced here as under :-

"6-B. Requirements for filing the Industrial Entrepreneur Memorandum.-- (1) Before filing the Industrial Entrepreneur Memorandum with the Central Government, the concerned person shall obtain a certificate from the Cane Commissioner or Director (Sugar) or Specified Authority of the concerned State Government that the distance between the site where he proposes to set up sugar factory and adjacent existing sugar factories and new sugar factories is not less than the minimum distance prescribed by the Central Government or the State Government, as the case may be, and the concerned person shall file the Industrial Entrepreneur Memorandum with the Central Government within one month of issue of such certificate failing which validity of the certificate shall expire.

(2) After filing the Industrial Entrepreneur Memorandum, the concerned person shall submit a performance guarantee of rupees one crore to Chief Director (Sugar), Department of Food and Public Distribution, Ministry of Consumer Affairs, Food and Public Distribution within thirty days of filing the Industrial Entrepreneur Memorandum as a surety for implementation of the Industrial Entrepreneur Memorandum within the stipulated time or extended time as specified in Clause 6-C failing which Industrial Entrepreneur Memorandum shall stand de-recognized as far as provisions of this Order are concerned."

8. Thereafter under Order 6-C of the 1966 Order, time limit has been provided

as to by when commercial production had to start etc.

9. In the instant case when the respondent no.4 had got the NOC as was to be obtained as per the provisions of Order 6-B of the 1966 Order and had also submitted its IEM which was acknowledged by the Central Government, the petitioners apprehending that the opening of the new factory would result in a shortage of sugarcane to their factories, filed an objection/representation jointly against the grant of the NOC and the acknowledgment of the IEM in favour of respondent no.4 before the Chief Director (Sugar), Government of India, Ministry of Consumer Affairs, Food and Public Distribution, Krishi Bhawan, New Delhi on 4.2.2022.

10. It is the case of the petitioners that the Ministry of Consumer Affairs communicated to the Cane Commissioner, State of Uttar Pradesh requiring the Cane Commissioner to furnish his comments on the representation submitted by the petitioners on 24.2.2022. The Cane Commissioner, however, when did not take any action on the representation of the petitioners, the instant writ petition was filed.

11. Learned counsel for the petitioners has assailed the granting of the NOC dated 14.9.2021 and the subsequent issuance of the IEM dated 12.10.2021 essentially on the ground that before issuing of the NOC and the IEM, the respondents, more specifically the Cane Commissioner did not look into the fact that once when the new sugar factory would be established, would there be enough sugarcane available for the running of the petitioners' sugar factory.

12. Learned counsel for the petitioners has argued that when there is a sugar factory, it has to be supplied sugarcane so that the factory may not be starved of the raw material which is sugarcane. He submits that the State has regulated the supply of sugarcane to the various sugar factories and for this purpose, learned counsel submitted that "reserved area" and "assigned area" are declared before the commencement of the "crushing season". Learned counsel informed that a 'crushing season' starts, as per the definition given in section 2(i) of **U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953,** on the 1st of October every year and ends on 15th of July of the following year. Learned counsel for the petitioners submitted that a 'reserved area' would mean, as per section 2(n) of the U.P. Act 1953, an area reserved for a factory under an order for reservation of sugarcane areas made under Rule 125-B of the Defence of India Rules, 1962 and when no such order is in force, the area specified in an order made under section 15 of the U.P. Act 1953 and an 'assigned area' means, as per definition clause of section 2(a) of the U.P. Act 1953, an area assigned to a factory under section 15 of the U.P. Act 1953.

13. Learned counsel for the petitioners submitted that as per section 15 of the U.P. Act 1953, the Cane Commissioner shall, after consulting the factory and the cane growers' Cooperative Society reserve any area for the purposes of supply of sugarcane to a factory in accordance with the provisions of section 16 during one or more crushing seasons as may be specified. For proper understanding, section 15 of the 1953 Act is being reproduced here as under :-

"15. Declaration of reserved area and assigned area.--(1) Without prejudice to any order made under clause

(d) of sub-section (2) of Section 16 the Cane Commissioner may, after consulting the Factory and cane growers' Co-operative Society in the manner to be prescribed :

(a) reserve any area (hereinafter called the reserved area); and

(b) assign any area (hereinafter call an assigned area).

for the purposes of the supply of cane to a factory in accordance with the provisions of Section 16 during one or more crushing seasons as may be specified and may likewise at any time cancel such order or alter the boundaries of an area so reserved or assigned.

(2) Where any area has been declared as reserved area for a factory, the occupier of such factory shall, if so directed by the Cane Commissioner, purchase all the cane grown in that area, which is offered for sale to the factory.

(3) Where any area has been declared as assigned area for a factory, the occupier of such factory shall purchase such quantity of cane grown in that area and offered for sale to the factory as may be determined by the Cane Commissioner.

(4) An appeal shall lie to the State Government against the order of the Cane Commissioner passed under sub-section (1)."

14. Learned counsel for the petitioners further submitted that before declaring of a 'reserved area' and an 'assigned area', the State through a 'bonding policy', which was a document by which the Cane Commissioner (Purchase) would assess as to what was the area in which the sugarcane was being grown; which farmers were to supply to which sugarcane Cooperative Society and which all sugarcane Cooperative were to supply cane to a particular factory. Learned counsel, therefore, submitted that, as per the 'bonding policy', the reserved area was declared. In the instant case, learned counsel for the petitioners submitted, when the 'reservation order' was issued for the year 2020-21 then after looking into the area adjoining the petitioner no.1-factory, it was ascertained that **47464** hectare of land which would provided **414.76** lac quintals of cane would be reserved for the petitioner no.1 and this area would include the reserved area and the assigned area. For the petitioner no.2, it was declared that 42958 hectare would be reserved for it and it would include the reserved area and the assigned area and this would give 366.45 lac quintals of sugarcane to the petitioner no.2. Learned counsel for the petitioners further informed the Court that at the time when the bonding policy is issued by the Cane Commissioner, a *"drawl percentage"* of the total sugarcane was also determined. He explained that the 'drawl percentage' is the percentage of sugarcane which would be reaching the factory despite the reservation. As per learned counsel for the petitioners, drawl percentage of the petitioner no.1 for the year 2020-21 was 61.77% and for the petitioner no.2 it was 53.76% for the year 2020-21.

15. Learned counsel for the petitioners further informed that every factory had a *"crushing capacity"* and he informed that the cane which the petitioner no.1 could crush per day was to the extent of 14000 tonnes per day and similarly for the petitioner no.2 it was 13000 tonnes per day. Learned counsel for the petitioners also informed the Court that when the reservation order was issued under section 15 of the U.P. Act 1953 then the area which was reserved and assigned took into account the sugarcane which would reach the factory and whether that would suffice the crushing capacity. It was the duty of the

authorities to see to it that as per the drawl capacity the factory had the crushing capacity. Learned counsel therefore, submitted that whenever an NOC is granted by the Cane Commissioner viz.-a-viz. the distance and whenever there is an issuance of an IEM then the criteria as is given in Rule 22 of the **U.P. Sugarcane (Regulation of Supply and Purchase) Rules, 1954** had to be looked into. Still further, he has submitted that before the NOC was given, the Commissioner had to give a personal hearing to the neighbouring factories. What is more, he has argued that the issuance of the IEM and the NOC ought to have been preceded by an active exercise wherein it could be seen that there was actual application of mind with regard to the fact that there would be enough sugarcane available to the neighbouring existing sugar factories. Learned counsel for the petitioners further submitted that if the drawl capacity was as low as had been taken note of in the bonding policies etc. then even if the petitioner no.1 was allocated **414.76** lac quintals of sugarcane from an area **47464** hectares of land and the petitioner no.2 was assured sugarcane to the tune of 366.45 lac quintals from an area of **42958** hectares of land, the cane which actually was to reach to the petitioners could be much less than the assured sugarcane.

16. Learned counsel for the petitioners in the rejoinder affidavit filed in reply to the counter affidavit filed by respondent no.4 dated 21.9.2022 has given on page 38, the details of how much area was reserved for the petitioner nos.1 and 2 in the year 2019-20, 2020-21 and 2021-22. The relevant portion of the table is being reproduced here as under :-

Year 2019-20

S. No.	Factory Name	Cane Area (In Hect.)	Allotted Production (Lac. Qtls)	Crushing (Lac Qtls)	Drawl %
1.	Dhampur	46705	401.20	231.63	57.73
2.	Seohara	40034	336.24	214.50	63.79

Year 2020-21

S. No.	Factory Name	Cane Area (In Hect.)	Allotted Production (Lac. Qtls)	Crushing (Lac Qtls)	Drawl %
1.	Dhampur	44786	386.76	238.92	61.77
2.	Seohara	48139	406.00	218.25	53.76

Year 2021-22

S. No.	Factory Name	Cane Area (In Hect.)	Allotted Production (Lac. Qtls)	Crushing (Lac Qtls)	Drawl %
1.	Dhampur	47464	414.76	244.29	58.90
2.	Seohara	31878	366.45	216.96	59.21

17. Learned counsel for the petitioners has, therefore, argued that in all the three crushing seasons even though the allotted sugarcane used to be much more the actual sugarcane which reached the

petitioners' factory was much less. He submits that for the petitioner no.1 in the year 2019-20 though 401.20 lac quintals of sugarcane was reserved, only 231.63 lac quintals of sugarcane was actually crushed. Similarly in the year 2020-21, the petitioner no.1 was allotted 386.76 lac quintals but it could crush only 238.92 lac quintals and in the year 2021-22 though 414.76 lac quintals of sugarcane was allotted but it could crush only 244.29 lac quintals. It was further submitted by learned counsel for the petitioners that similarly for the petitioner no.2 even though the allotted sugarcane was much more but the actual sugarcane which came to the factory was of a lesser quantity i.e. to say that the petitioners had crushed lesser quantity of sugarcane than the quantity allotted to them. Learned counsel for the petitioners submitted that this occurred on account of the fact that out of the 100% quantity of the sugarcane which was allotted to the petitioners, about 20% of the total sugarcane was normally sold off by the farmers to Kolhu or to the Jaggery units; 5% of it was retained by them for cattle fodders and 10-15% was retained for using as seed for the next crops.

18. Learned counsel for the petitioners further submitted that if the daily crushing capacity of the respondent no.4 was of 10000 tonnes and if for the 180 days it crushed sugarcane, it would require a minimum of 180 lac quintals of sugarcane and if there was a drawl percentage which had to be seen for the new factory, then the allotment which would have to be made for it would reach 360 lac quintals and, therefore, for an area which had an average yield of 875.25 per hectare, an area of 41140 hectares would be required to satisfy the requirement of the proposed sugar mill itself. Learned counsel submitted that the additional area of 41140 hectares for growing sugarcane was not available either in the district of Bijnor or in the district of Amroha or in any other surrounding districts as the fields in the surrounding districts had reached the point of saturation so far as the growing of sugarcane was concerned. Learned counsel for the petitioners submitted that if 41140 hectares of cultivable land were to be reserved for the respondent no.4 then it would lead to diversion of the sugarcane from the existing sugar mills and their sugarcane supply would be reduced. In effect, learned counsel for the petitioners argued that if there was a diversion of sugarcane growing areas to the reserved area of respondent no.4 then it would lead to lessening of the reserved area for the petitioners. Learned counsel for the petitioners submitted that the allocation of land proposed for the respondent no.4 was earlier for M/s. Laxmi Sugar Mill for the establishment of a sugar mill which was challenged in a suit and when no injunction was granted, a First Appeal From Order being First Appeal From Order No.1077 of 2010 was filed in the High Court. In that case when the injunction was granted by the High Court, the matter reached the Supreme Court where it was pending as Civil Appeal No.3281 of 2011. In the order of the Supreme Court it was directed that the constructions done by M/s. Laxmi Sugar Mill would be subject to the outcome of the appeal in the Supreme Court. Learned counsel for the petitioners, therefore, argued that the efforts of the respondent no.4 to establish its sugar mill in the same location was nothing else but a dubious method for circumventing the orders of the Supreme Court. Still further, learned counsel for the petitioners argued that the IEM issued to the respondent no.4 was without any application of mind and on the

basis of just the fact that NOC had been issued on 14.9.2021. He submitted that no evaluation of the availability of cane in the area for the purposes of respondent no.4 and the petitioner was made. Learned counsel for the petitioners has heavily relied upon the judgment of the Supreme Court in the case of **Ojas Industries Pvt. Ltd. vs. Oudh Sugar Mills Ltd.** and specifically relied upon paragraph 30 of the judgment, which is being reproduced here as under :-

"The Sugarcane (Control) (Amendment) Order, 2006 inserts Clauses 6-A to 6-E in Clause 6 of the Sugarcane (Control) Order, 1966. It retains the concept of "distance". **This concept of "distance" has got to be retained for economic reasons. This concept is based on demand and supply.** This concept has to be retained because the resource namely, sugarcane, is limited. Sugarcane is not an unlimited resource "Distance" stands for available quantity of sugarcane to be supplied by the farmer to the sugar mill. On the other hand, filing of bank guarantee for Rs. 1 crore is only as a matter of proof of bona fides. An entrepreneur who is genuinely interested in setting up a sugar mill has to prove his bona fides by giving bank guarantee of Rs. 1 crore. Further, giving of bank guarantee is also a proof that the businessman has the financial ability to set up a sugar mill (factory). Therefore, giving of bank guarantee has nothing to do with the distance certificate."

(emphasis supplied)

19. Sri Manish Goyal, learned Additional Advocate General assisted by Sri A.K. Goyal, learned counsel appearing for the State-respondents submitted that there was enough sugarcane available in the region and, therefore, there was no harm if a new sugar mill was established. He submitted that when the petitioners could not crush the sugarcane which was to be made available to them from the reserved/assigned areas then they could not complain against the establishment of a new factory. He further submitted that despite the fact that there was an increase in the cane areas for the three consecutive years for the petitioners but the drawl percentage for both the petitioners had been reduced. He in fact submits that even the crushing capacity was reduced every year.

20. Learned Additional Advocate General further submitted that as always there was an increase in the area where sugarcane was being grown, it was in the interest of the public in general that more sugar factories be established. He drew the attention of the Court to **"The Uttar Pradesh Sugarcane Supply and Purchase Order, 1954".** More specifically, he drew the attention of the Court to Form-C which was an agreement between the cane growers' Cooperative Society and the occupier of the factory and submitted that the occupier of the factory entered into an agreement only to the extent that the factory could crush. Definitely, the factory would not enter into an agreement by which there would be surplus sugarcane. He, therefore, submitted that the concept of "drawl capacity" was brought into existence because the sugarcane which was being utilized by a particular sugar factory was only limited to its crushing capacity.

21. Learned Additional Advocate General further submitted that nowhere have the petitioners come up with any case that their sugarcane crushing capacities were more than the sugarcane which was being made available to them. He also submitted that if more factories would be

established, the sugarcane which was available in the reserved areas of the petitioners and which was not being utilized by them on account of their low drawl capacity, could be diverted to fresh factories in public interest. He further submitted that even if the drawl capacity was not seen and only the reservation order was seen then also there was sufficient land available for the supply of sugarcane to the existing as well as for the new factories.

22. Learned Additional Advocate General while replying to the non-consideration of the objection of the petitioners, submitted that there was sufficient consideration by the authorities concerned with regard to the availability of sugarcane to the petitioners and also to the new factory. He argued that the Government had taken into account the figures of additional sugarcane which was available in the last so many years and which could not be utilized by the existing factories and also he submitted that the Government had taken into account the regular trend of the increasing sugarcane production.

23. Learned Additional Advocate General submitted that if all the Forms "C", which had been signed by the petitioners under the 1954 Rules were seen, it would become evident that much more sugarcane was being allotted to them in the reservation orders issued under section 15 of the 1953 Act than was being actually consumed by the two petitioners. For this purpose he pointed out to the various Forms "C" which have been filed along with the Supplementary Rejoinder Affidavit by the petitioners on 29.11.2022.

24. Learned Additional Advocate General specifically submitted that the order of the Supreme Court passed in Civil Appeal No.3281 of 2022 was not of any help to the petitioners as the same was no longer applicable in the case at hand. He submits that the respondent no.4 had acquired almost 400 bighas of land to establish its mill. He further submitted that the IEM which was issued to the earlier factory namely M/s. Laxmi Sugar Mill Pvt. Ltd. was cancelled vide communication dated 1.10.2021 and the respondent no.4 was granted the IEM on 12.10.2021 and, therefore, it may not be said that the respondent no.4 was in any way trying to get what was not given to M/s. Laxmi Sugar Mills Pvt. Ltd. surreptitiously.

25. Learned Additional Advocate General argued that once when it was found that there was sufficient material for taking a particular policy decision by the State Government and the Government of India within the rights guaranteed by the Statutes then the High Court may not under its powers of judicial review go into the correctness of such policy decision so as to find out better alternatives. In this regard he relied upon the following decisions of the Supreme Court :-

1. Federation of Railway Officers Association & Others. vs. Union of India

2. BALCO Employees Union vs. Union of India (UOI) & Others.

3. P.T.R. Exports (Madras) Pvt. Ltd. & Other vs. Union of India (UOI) & Others

4. Prag Ice and Oil Mills & Others vs. Union of India (UOI)

5. R.K. Garg & Others vs. Union of India (UOI) & Others

6. Dhampur Sugar (Kashipur) Ltd. vs. State of Uttaranchal & Others

7. Ugar Sugar Works Ltd. vs. Delhi Administration & Others

8. Shri Sitarm Sugar Company Limited & Another vs. Union of India & Others

26. Learned Additional Advocate General has specifically relied upon paragraphs 18, 19 and 20 of the judgment of the Supreme Court in **Ugar Sugar Works Ltd. (supra)** and therefore, the same is being reproduced here as under :-

"18. The challenge, thus, in effect, is to the executive policy regulating trade in liquor in Delhi. It is well settled that the Courts, in exercise of their power of judicial review, do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness etc. Indeed, arbitrariness, irrationality, perversity and mala fide will render the policy unconstitutional. However, if the policy cannot be faulted on any of these grounds, **the mere fact that it would hurt business interests of a party, does not justify invalidating the policy.** In tax and economic regulation cases, there are good reasons for judicial restraint, if not judicial deference, to judgment of the executive. The Courts are not expected to express their opinion as to whether at a particular point of time or in a particular situation any such policy should have been adopted or not. It is best left to the discretion of the State.

"19. In ***T.N. Education Deptt. Ministerial and General Subordinate Services Assn. vs. State of T. N. (1980) 3 SCC 97,*** noticing the jurisdictional limitations to analyse and fault a policy, this Court opined that:

"The court cannot strike down a G.O., or a policy merely because there is a variation or contradiction. Life is sometimes contradiction and even consistency is not always a virtue. What is important is to know whether mala fides vitiates or irrational and extraneous factor fouls."

20. It would also be prudent to recall the following observations of Lord Justice Lawton in **Laker Airways Ltd. vs. Deptt. of Trade, (1977) 2 WLR 234,** while considering the parameters of judicial review in matters involving policy decisions of the executive :

"In the United Kingdom aviation policy is determined by ministers within the legal framework set out by Parliament. Judges have nothing to do with either policy-making or the carrying out of policy. Their function is to decide whether a minister has acted within the powers given to him by statute or the common law. If he is declared by a court, after due process of law, to have acted outside his powers, he must stop doing what he has done until such time as Parliament gives him the powers he wants. In a case such as this I regard myself as a referee. I can blow my judicial whistle when the ball goes out of play; but when the game restarts I must neither take part in it nor tell the players how to play."

(emphasis supplied)

27. He also relied upon paragraph 12 of the the judgment of the Supreme Court in **Federation of Railway Officers Association (supra)** and the same is also being reproduced here as under :-

"12. In examining a question of this nature where a policy is evolved by the Government judicial review thereof is limited. When policy according to which or the purpose for which discretion is to be exercised is clearly expressed in the statute, it cannot be said to be an unrestricted

discretion. On matters affecting policy and requiring technical expertise the Court would leave the matter for decision of those who are qualified to address the issues. Unless the policy or action is inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of power, the Court will not interfere with such matters."

28. Learned Additional Advocate General further submitted that the ratio in the case of **Ojas Industries Pvt. Ltd. (supra)** would not help the petitioners as that was a case where two sugar mills were proposed to be established within a distance of 7.2 kilometers and he submitted that when the Supreme Court observed that the distance was to be an economic concept then he submitted that the Supreme Court held that when the State was wanting one unit to be separated by another unit by 15 kilometers then it was for "economic reasons". Learned Additional Advocate General, therefore, submitted that the judgment cited by the petitioners in the case of **Ojas Industries Pvt. Ltd. (supra)** would not in any manner help the petitioners. He also submitted that no monopolistic approach, as was being desired by the petitioners, could be given sanctity to by a Constitutional Court. In this regard reliance has been placed on the judgments of the Supreme Court in **APM Terminals BV vs. Union of India; Dhampur Sugar (Kashipur) Ltd. vs. State of Uttaranchal & Ors.** and **Sunil Kumar Sharma & Anr. vs. State of U.P..** Learned Additional Advocate General relying upon the judgment of the Supreme Court in Dhampur Sugar (Kashipur) Ltd. (supra) categorically stated that in a policy matter where the Government had come up with a policy, the Court could not annul the same only on the ground that earlier there was a lesser number of factories and now there would be more factories and, therefore, sugarcane supplied to the factories would be restricted. He submitted that whenever the Government takes a policy decision, it looks into every aspect of the matter. Learned Additional Advocate General submitted that if the respondent no.4 becomes functional and when reserved areas are to be allotted to different factories, then reservation orders would be drawn under section 15 of the 1953 Act as per the sugarcane availability; the drawl capacity and the crushing capacity. Here again, learned Additional Advocate General submitted that if in any manner the petitioners were not satisfied, at a future date, with the reservation order, then they could always file a statutory appeal.

29. Learned Additional Advocate General again relying upon the judgment of the Supreme Court in **Dhampur Sugar (Kashipur) Ltd. (supra)** submitted that before the Supreme Court the petitioner no.1 was the the appellant in that case with regard to its Kashipur Unit. In that case a Rab unit was coming up and the petitioner had opposed by filing a writ petition in the High Court that only a few days back the Government was reluctant to give licence to the Rab unit and, therefore, it could not give the licence on a later date. The High Court had dismissed the writ petition of the petitioner therein and the Supreme Court had also dismissed the appeal with a definite observation that matters of public policy could not be interfered with lightly. Learned Additional Advocate General submitted that the case at hand had also been filed virtually on the same grounds. The petitioners were only apprehending, he submits, that there would be a shortage in the supply of sugarcane to the petitioners. It had not been considered while filing the

writ petition, learned Additional Advocate General submits, that no writ lies on the basis of apprehension. He submitted that absolutely no writ lay on the basis of apprehension.

30. Learned Additional Advocate General submitted that the filing of the instant writ petition was with an oblique motive to stifle competition. He submits that Rule 22 of the 1954 Rules had sufficient provisions for seeing that reservation is done in a proper fashion.

31. He also submitted that the establishment of a new unit would be in the larger public interest and in the interest of the cane growers. He, therefore, submitted that a holistic view of the Constitution ought to be taken. In this regard, he placed heavy reliance upon the decision of the Supreme Court in **Shivshakti Sugars Ltd. vs. Shree Renuka Sugar Ltd.**

32. In the end, learned Additional Advocate General submitted that when there was a limited crushing capacity of a sugar factory and the drawl percentage was also lesser than the tonnage of sugarcane allotted, then the only conclusion was that the farmers were diverting their sugarcane produce to Khandsari units which were being run by Kolhus. Learned Additional Advocate General also submitted that not only was there more wastage but the profit margin was also minimal. He, therefore, submitted that if a new factory comes up then even farmers would be benefited from the new factory as they would definitely get more money by selling their sugarcane to sugar factories.

33. Sri Aditya Kumar Singh, learned counsel appearing for respondent nos.3, 5 and 6 also made arguments virtually on the same lines.

34. Sri Rakesh Pande, Senior Advocate assisted by Sri K.K. Rao, learned counsel appearing for respondent no.4 submitted that the petitioners' argument that the NOC ought to be issued after taking a broader view was absolutely fallacious. He submitted that under the provisions of Clauses 6-A to 6-B of the 1966 Order, the NOC was issued and they only stipulated that the NOC would be given on the basis of distance which ought not to be lesser than 15 kilometers from one factory and the other. Learned Senior Counsel submitted that if the petitioners contended that the availability of sugarcane had also to be looked into then they should have challenged the vires of Orders 6-A and 6-B of the 1966 Order which they have not done in the instant writ petition. He submits that while issuing an NOC no other parameter ought to be looked into. Learned counsel for respondent no.4 further submitted that reservation area which was the domain of the Cane Commissioner under section 15 of the 1953 Act read with Rule 22 of the 1954 Rules definitely catered for providing of a reserved area and if there was a factory, he submits, the reserved area had to be there for it as per its drawl capacity and crushing capacity. Learned counsel, therefore, submits that the writ petition was filed on the basis of absolute apprehension and no writ could be issued on the basis of apprehension. Learned counsel submitted that even before there was any shortfall in the reserved area, the writ petition had been filed. This showed that the writ petition was a premature one.

35. Learned counsel for respondent no.4 further submitted that so far as the procedure for considering the grant of NOC by the Commissioner, Cane and Sugar Department dated 12.9.2022 was concerned

(the policy dated 12.9.2022 had been attached along with the Supplementary Affidavit filed by the petitioner on 9.11.2022), when the NOC was granted and the IEM was accepted by the Central Government, then it was presumed that all factors must have been taken into consideration.

36. Having heard Sri Shashi Nandan, learned Senior Counsel assisted by Sri Rahul Agarwal, learned counsel for the petitioners; Sri Manish Goyal, learned Additional Advocate General assisted by Sri A.K. Goyal, learned counsel for respondent nos.1 and 2; Sri Rakesh Pande, learned Senior Counsel assisted by Sri K.K. Rao, learned counsel appearing for the respondent no.4 and Sri Aditya Kumar Singh, learned counsel appearing for the respondent nos.3, 5 and 6, the Court is of the view that no interference is warranted in the instant writ petition and, therefore, the same deserves to be dismissed.

37. The petitioners have challenged the NOC dated 14.9.2021 issued by the respondent no.2-Cane Commissioner to the respondent no.4-M/s. Bindal Paper Limited and the IEM bearing Acknowledgment No.IEM/A/ACK/595/2021 dated 12.10.2021 issued by the Department of Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, Government of India.

38. The first ground which the petitioners have taken is that the grant of the NOC and the issuance of the IEM thereof was done merely on the basis of the distance between the proposed sugar mill and the existing sugar mills and the learned counsel for the petitioners submitted that this contravened the scheme as provided in the U.P. Act 1953 and the 1954 Rules. Learned counsel for the petitioners had submitted that the factor of distance between the proposed mill and the existing sugar mill was only one of the many factors which was to be considered as per the Act and the Rules framed. He had submitted that when the procurement of the sugarcane and manufacturing of sugar was regulated by U.P. Act 1953 and the 1954 Rules then as per section 15 of the U.P. Act 1953 and as per Rule 22 of the 1954 Rules, power was there with the Cane Commissioner to determine the reserved area and the assigned area for each sugar mill from which the sugar mill was required to procure sugarcane for its crushing season. Learned counsel for the petitioners had stated that the quantity of the sugarcane supplied from the reserved and assigned areas to the sugar factory in the previous years and the quantity of the cane which was required to be crushed by the factory were the main criteria under Rule 22 of the 1954 Rules. He had, therefore, submitted that as per the 1966 Control Order, specifically clauses 6-A to 6-E, the Authority had to see that whenever a sugar factory was to be established then the availability of sugarcane had to be looked into. By referring to the judgment of the Supreme Court reported in (2007) 4 SCC 723, learned counsel for the petitioners had argued that the distance alone was not the criteria on the basis of which the NOC ought to have been issued. He submitted that when an NOC was to be issued then the impact on the availability of the sugarcane for the already existing sugar mills had to be examined with reference to their crushing capacity; total cultivable area of sugar cane which was there in the reserved area and the assigned area and the drawl percentage had definitely to be considered.

39. However, from the arguments heard, the Court is of the view that under

Clause 6-A of the 1966 Control Order the Cane Commissioner had to only look into the fact as to whether there was a distance of 15 kilometers from the proposed site of a fresh factory and the pre-existing factories. If that was the statutory obligation on the Cane Commissioner then he could not have gone beyond that statutory obligation. The Court has also examined section 15 of the U.P. Act 1953 and Rule 22 of the 1954 Rules and it has found that if a factory had been established then it was the bounden duty of the Authorities to see that it had to attach a reserved area and an assigned area to every sugar factory. The Court is also of the view that as and when a fresh factory is given the permission to establish itself the Authorities were under an obligation to see that the fresh sugar factory as also the pre-existing sugar factories get enough sugarcane for the purposes of crushing in a particular crushing year. Also the Court finds that when the reserved area and the assigned area is allocated to a particular sugar factory then the following amongst other aspects are taken into consideration :-

i. the drawl capacity;
ii. the crushing capacity; and
iii. the past performance of the sugar factory.

40. Also when the reserved area and the assigned area is allocated to a particular sugar factory then the Cane Commissioner definitely sees to it that the area and the sugarcane allotted is more than is required for a particular sugar factory. Also the Court finds that when the crushing year commences, the sugar factory enters into an agreement with the Cane Growers Cooperative Society in Form-C provided under the U.P. Sugarcane Supply and Purchase Order, 1954. All this leads to an inevitable conclusion that when a sugar factory, despite the fact that it has got much more land as reserved area or assigned area, enters into an agreement in Form-C with the Cane Growers Cooperative Society for the supply of sugarcane then it has in mind the extent of crushing it shall be able to do in a particular crushing year. It definitely keeps in mind the drawl percentage.

41. From the record we find that the petitioner no.1 was allocated 46705 hectares of land in the year 2019-20 and was allocated 401.20 lakh quintals of sugarcane but it actually crushed only 231.63 lakh quintals. Also we find that in the year 2019-20 the petitioner no.2 had been allocated 40034 hectares of land with the sugarcane crop to the extent of 336.24 lakh quintals but it had actually crushed only 214.50 lakh quintals. This was also the case in the year 2020-21 and in the year 2021-22.

42. The above discussion, therefore, clearly illustrates that when the Government gave its no objection and had also acknowledged the IEM, it had taken into consideration the availability of sugarcane viz.-a-viz. the existing factories and the factory which was proposed to be established i.e. the respondent no.4.

43. Sugar industry is a controlled industry. Government has a control on the sugarcane production, distribution, prices as also on the production and marketing of the finished product which is sugar. Whenever a new factory comes up with the earlier existing factories, it is the responsibility of the State to see that sugarcane, which is the raw material for the factories - old and new, is made available to all the factories.

44. The other aspect which was argued by the learned counsel for the petitioners was that whether the setting-up

of a new sugar mill would impact the availability of the sugarcane to the existing sugar mill in the reserved area/assigned area.

45. From the various arguments we have heard we are definitely of the view that the argument was misplaced. Whenever there is a reservation order or an assignment order, it is done after taking into consideration as to what would be the sugarcane grown in that area and as to how much of the sugarcane was actually required for any particular sugar factory. In the case at hand we definitely find that much more sugarcane crop was allocated to the existing factories i.e. the petitioners but out of that allocated sugarcane only a certain portion of it was actually purchased by the petitioners. This definitely means that the Cane Commissioner had in mind the capacity of the sugar factory and accordingly he allocates the reserved area and the assigned area. For the petitioners to think that the availability of sugarcane would not be there upon coming up of a new sugar factory, is only an apprehension on the basis of which the Court cannot adjudicate the matter.

46. The Court, therefore, is of the view that whenever the Government proposes to set-up a new factory, it always takes into consideration the availability of sugarcane. Before every crushing season the reserved area and the assigned area shall be allocated to every factory and every factory would be entering into an agreement with the Cane Growers Cooperative Society in Form-C under the U.P. Sugarcane Supply and Purchase Order, 1954.

47. What is more, the Court finds that if, by the reservation order any particular factory, is in any manner dissatisfied then it can always file a statutory appeal. Therefore, the Court is definitely of the view that when the new/proposed sugar factory was being brought into existence, the State Authorities which had all the data before them, considered the availability of sugarcane and the impact of a new factory on all the existing factories. Further the Court finds that the setting-up of a new sugar factory at the same location, which is the subject matter of the dispute in Civil Appeal no.3281 of 2011 before the Supreme Court, would not in any manner violate the orders passed by the Supreme Court as well as the High Court. The Court also finds that in fact the respondent no.4 had acquired 400 bighas of land to establish its mill and the IEM which was issued to the earlier factory i.e. M/s. Laxmi Sugar Mill was cancelled vide order/communication dated 1.10.2021 and only thereafter the respondent no.4 was granted the IEM on 12.10.2021.

48. Further the Court is of the view that by allowing the respondent no.4 to set-up a fresh factory was well within the realm of the powers of the Government and we would refrain from interfering in the matter.

49. We are also of the view that definitely the coming up of a fresh factory would not in any manner hurt the business interests of the existing sugar factories including the business interests of the petitioners. Therefore, when the petitioners argued that economic reasons had to be looked into while giving the consent by the Government for the establishment of a fresh factory, the argument was fallacious. The economic reasons while establishing a fresh sugar factory were looked into. Every pre-existing factory and the new factory

would get its own reserved/assigned area and every factory would get its raw material in the form of sugarcane for crushing. The policy decision taken by the Government for setting-up of a fresh sugar factory, therefore, does not, in any manner, calls for any interference by this Court. As and when the fresh sugar factory comes in, definitely the percentage of sale of sugarcane to the existing sugar factories along with the new factory would increase and thus more sugarcane would go to sugar factories. In this manner the local farmers would also be encouraged to produce more sugarcane and sell their produce to the sugar factories. This would bring in more prosperity in the area for the sugarcane growers.

50. For the reasons stated above, the writ petition stands dismissed

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(2023) 1 ILRA 230
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.01.2023

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ-C No. 16263 of 2022

Asif Khaliq ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Jahangir Haider

Counsel for the Respondents:
C.S.C.

Constitution of India, 1950 – Art. 226 - Concealment of material facts - Petitioner claimed that he neither took any loan from nor mortgaged his property nor stood as guarantor for any one and yet, his machineries were seized u/s 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 by the Additional District Magistrate (Finance and Revenue) - petitioner asserted loan was taken by his wife & that the seized machineries etc. belongs to M/s Umbrella Corporation - Held - petitioner neither stated in the writ petition that the machinery in question belongs to M/s Umbrella Corporation nor he has disclosed that the proprietor of M/s Zeb Designers is his wife nor he disclosed any GST registration of alleged M/s Umbrella Corporation nor has filed any document indicating registration of M/s Umbrella Corporation under the CGST/UPGST Act or under the Factories Act nor any proof of seized machinery belonging to him have been filed - petitioner concealed material facts in the writ petition - writ petition has been filed making false averments and suppressing material facts - writ petition dismissed with exemplary cost of Rs. One lac (3, 10, 11)

Dismissed. (E-5)

List of Cases cited:

1. United India Insurance Comp.Ltd. V. B.Rajendra Singh & ors., JT 2000(3) SC.151

2. S.P. ChengalVaraya Naidu (dead) by L.Rs Vs. Jagannath (dead) by L.Rs & ors., AIR 1994 SC 853

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Jayant Banerji, J.)

1. Heard Sri Jahangir Haider, learned counsel for the petitioner and Sri Amit Manohar, learned Additional Chief Standing Counsel for the respondents.

2. This writ petition has been filed praying for the following reliefs:-

"i. Issue a writ, order or direction in the nature of mandamus directing the respondent no.2 to restore the possession of the petitioner's factory seized machine situated at S-115 Harsha Compound, Site-2, Loni Road, Industrial Area Mohan Nagar, District Ghaziabad, in favour of the petitioner to enable him to run his factory smoothly."

3. Learned counsel for the petitioner submits that the petitioner neither took any loan from M/s Hero Fincorp Limited nor mortgaged his property nor stood as guarantor for any one and yet, his machineries located at S-115, Harsha Compound Site-2, Loni Road, Industrial Area, Mohan Nagar, District Ghaziabad have been seized by respondent no. 2 and an order dated 28.12.2021 under Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 has been passed by the Additional District Magistrate (Finance and Revenue), Ghaziabad in Case No. 7749 of 2021 (Hero Fincorp Limited Vs. M/s Zeb Designers and others) which is wholly without authority of law, arbitrary and illegal and, therefore, it deserves to be quashed.

4. Learned counsel for the petitioner on being questioned, states that the loan was taken by his wife, namely, Shabih Asif (S.Asif) who is proprietor of M/s Zeb Designers and location of her factory is 33/312, site-2, Loni Road, Industrial Area, Mohan Nagar, Ghaziabad. **He further states that the seized machineries etc. belongs to M/s Umbrella Corporation which is a proprietorship concern of the petitioner and not of his wife or M/s Zeb Designers.**

5. We have perused the writ petition and we find that the petitioner has neither stated in the writ petition that the machinery in question belongs to M/s Umbrella Corporation nor he has disclosed that the proprietor of M/s Zeb Designers is his wife nor he disclosed any GST registration of alleged M/s Umbrella Corporation nor has filed any document indicating registration of M/s Umbrella Corporation under the CGST/UPGST Act or under the Factories Act nor any proof of seized machinery belonging to him have been filed.

6. In the writ petition, no papers has been filed to indicate that there actually exist a proprietorship concern in the name and style of M/s Umbrella Corporation. On the contrary, on perusal of paragraph no. 11 of the writ petition, we find that the petitioner has stated to have made representations dated 28.4.2022 and 2.5.2022 to the Additional District Magistrate (Finance and Revenue), Ghaziabad and copy whereof has been filed as Annexure nos. 1 and 2. Perusal of Annexure-2 to the writ petition shows that **it was sent by Asif Zaidi** through e-mail and as per schedule-1 annexed to the deed of guarantee appearing at page 84 of the personal affidavit of Additional District Magistrate (Finance and Revenue) dated 10.1.2023 who is the son of the petitioner and his full name is Ashar Asif Zaidi and the petitioner's full name of Asif K. Zaidi. Learned counsel for the petitioner has stated that full name of petitioner is Asif Khalik Zaidi. The petitioner has very conveniently concealed all these material facts in the writ petition.

7. Thus, the writ petition has been filed making false averments and suppressing material facts.

8. In the case of **United India Insurance Company Ltd. V. B.Rajendra Singh and others, JT 2000(3) SC.151,** considering the fact of fraud, Hon'ble Supreme Court held in paragraph 3 as under :

"Fraud and justice never dwell together". (Frans et jus nunquam cohabitant) is a pristine maxim which has never lost its temper overall these centuries. Lord Denning observed in a language without equivocation that "no judegment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud, for fraud unravels everything"(Lazarus Estate Ltd. V. Beasley 1956(1)QB 702).

(Emphasis supplied by the Court)."

9. In the case of **S.P. ChengalVaraya Naidu (dead) by L.Rs Vs. Jagannath (dead) by L.Rs and others, AIR 1994 SC 853,** the Hon'ble Supreme Court held in para 7 as under :-

"7. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". 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. 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, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

10. We find that the petitioner has approached this Court by suppressing and concealing material facts. Therefore, the writ petition deserves to be dismissed with exemplary cost.

11. For all the reasons aforestated, the writ petition is **dismissed** with a cost of Rs. One lac which shall be deposited by the petitioner with the High Court Legal Services Committee within two weeks from today. A copy of this order shall be sent by the learned Standing Counsel to the Additional District Magistrate (Finance and Revenue), Ghaziabad within a week who shall ensure compliance of this order.

12. Since, the financier i.e. M/s Hero Fincorp Limited has not been made party in the present writ petition, therefore, we direct the Additional District Magistrate (Finance and Revenue), Ghaziabad to inform about this order to the aforesaid M/s Hero Fincorp Limited.

(2023) 1 ILRA 232
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.12.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE JAYANT BANERJI, J.

Writ-C No. 17717 of 2022

Smt. Krishna ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Jata Shankar Pandey, Sri Ashish Rai, Sri Om Prakash Rai, Sri Prabhat Kumar Srivastava, Sri Prakhar Srivastava, Sri Rakesh Kumar Srivastava

Counsel for the Respondents:
C.S.C., Ms. Anjali Upadhya, Sri Arvind Srivastava, Sri Prabhat Kumar Srivastava, Sri Rakesh Kumar Srivastava

(A) Civil Law - mere agreement to sell does not confer any title in the property - Clause U-3 of brochure - if due to any 'force majeure' or such circumstances beyond the Authority's control - the Authority is unable to make allotment or the possession of the allotted plot - entire registration money or the deposit - depending on the stage of allotment will be refunded along with simple interest at the rate of 4% per annum if delay in refund is more than one year from such date. (Para -4,11)

Plot allotted to petitioner - comprised of land acquired by Authority - under land acquisition proceedings - acquisition subject matter of challenge before Court in Writ Petition – dismissed - matter taken to Supreme Court – allowed -- delivery of possession of plot allotted to petitioner - beyond control of Authority - acquisition quashed by Supreme Court - Authority aware of factum of pending litigation - - not apprised allottees of the said fact - kept them in dark and instead of returning money - kept accepting installments.**(Para - 2,3,6)**

HELD:-Petitioner who had been deliberately deprived of the returns on her investment solely attributable to the Authority is entitled to interest at the rate of 4% per annum from the date of deposit till the date acquisition was set aside by the Supreme Court and @ 12% per annum for the period beyond it until the date of actual payment.**(Para -12)**

Petition Allowed with cost. (E-7)

(Delivered by Hon'ble Manoj Kumar Gupta, J.

&

Hon'ble Jayant Banerji, J.)

1. Heard Shri O.P. Rai, learned counsel for the petitioner, learned Standing Counsel for respondent no. 1 and Ms. Anjali Upadhya for respondent nos. 2 and 3.

2. The petitioner is an allottee of plot no. 19, Block-C, Sector Zeta-2, area 120 sq mts, vide allotment letter dated 7.1.2011, by Greater Noida Industrial Development Authority (for short "the Authority'). The allotment was on lease hold basis for 90 years. The allotment letter specifically mentions that possession was likely to be offered to the allottees within two years from the date of issue of allotment letter. The allottee had to complete formalities for execution of lease deed upon intimation. If the allottee fails to execute legal documents in time, action for cancellation of allotment and forfeiture of deposited money would be taken. According to brochure, 30% of the total premium of the plot (after adjusting registration money already paid) would be payable within 45 days from the date of allotment under Plan D-2 opted by the petitioner and balance 70% was payable in ten equal half-yearly installments calculated from the 46th day from the date of allotment with interest @ 12% per annum. The allottee had been given option to surrender the allotment. In case of surrender after the draw of plots/allotment but within 30 days from the date of allotment, 10% of the registration money would be forfeited and balance amount deposited would be refunded without interest. In case of surrender within 45 days of allotment under payment plan D-2, 50% of the registration money would be forfeited and balance amount would be refunded without any interest. In case the

allotment is surrendered after 45 days under payment plan D-2 but before six months from the date of allotment, 10% of the total premium of plot would be forfeited and the balance amount, would be refunded without any interest. In case of surrender after six months from the date of allotment, entire deposited money would be forfeited. In case the allottee fails to deposit the due amount within stipulated time, allotment was liable to be cancelled and in such case, the money deposited till the date of cancellation would be forfeited.

3. The petitioner deposited the registration money and installments (total: Rs. 19,80,071) from time to time. However, the Authority failed to execute lease deed and deliver possession of the allotted plot to the petitioner despite having realised entire amount from the petitioner in terms of the allotment letter. On 21.8.2019, the respondent-Authority for the first time informed the petitioner that the Authority had taken decision to cancel the Scheme and that refund will be made in terms of Clause U-3 of the brochure and the petitioner will only be paid 4% per annum interest. Even, thereafter, when money was not returned, the petitioner filed the instant petition for issue of a writ of mandamus directing the respondent-Authority to forthwith refund the entire amount with interest @ 12% per annum.

4. Under Clause U-3, it was provided that if due to any 'force majeure' or such circumstances beyond the Authority's control, the Authority is unable to make allotment or the possession of the allotted plot, entire registration money or the deposit, depending on the stage of allotment will be refunded along with simple interest at the rate of 4% per annum if delay in refund is more than one year from such date.

5. Learned counsel for the petitioner submitted that Clause U-3 is not applicable to the facts of the instant case inasmuch as the land acquisition proceedings in relation to the allotted land had concluded on 15.4.2011 when the Supreme Court allowed Civil Appeal No. 3261 of 2011 and quashed the acquisition proceedings. The retention of the money deposited by the petitioner thereafter was without any justification. It was not beyond the control of the Authority to refund the amount soon after the judgement was delivered by the Supreme Court. However, it kept the allottees in dark and cancelled the Scheme only on 31.5.2019, and offered to refund the money on 21.8.2019, and then also did not actually return the money, compelling the petitioner to approach this Court.

6. It is not disputed by Ms. Anjali Upadhya, learned counsel appearing on behalf of Greater Noida Authority that the plot which was allotted to the petitioner comprised of the land acquired by the Authority under the land acquisition proceedings and the acquisition was subject matter of challenge before this Court in Writ Petition No. 64127 of 2008 (Radhey Shyam Vs. State of U.P. and others). It was dismissed by this Court on 15.12.2008. Thereafter, the matter was taken to Supreme Court in S.L.P. (C) No. 601 of 2009 (Civil Appeal No. 3261 of 2011) which was allowed by the Supreme Court by judgement and order dated 15.4.2011. Thus, on the date when allotment was made, the challenge to the acquisition proceedings was pending before the Supreme Court. The draw of lots was held on 30.12.2010. The brochure did not indicate that the Greater Noida Authority had informed the prospective buyers about pendency of the said litigation before the Supreme Court.

7. As noted above, the Civil Appeal was allowed on 15.4.2011. It is true that delivery of possession of the plot allotted to the petitioner was beyond the control of the Authority as the acquisition was quashed by the Supreme Court. Nonetheless, as noted above, the Authority was aware of the factum of pending litigation but it had not apprised the allottees of the said fact even after the acquisition was quashed. It kept them in dark and instead of returning the money, it kept accepting the installments, such that it accepted money from the petitioner in half yearly installments upto 2.1.2017 with interest @ 12% per annum. It amounts to a clear fraud on part of the respondent-Authority and unjust enrichment. It was only when the petitioner raised the dispute that she was informed about return of money, without interest, taking shelter behind Clause no. U-3, which in our considered opinion, would not apply beyond the date on which the Supreme Court decided the challenge to the acquisition proceedings and quashed the same. It was well within the control of the Noida Authority to have returned the money to the allottees forthwith. In fact retention of money beyond that period amounts to breach of trust and a deliberate act on part of its officials.

8. It is noteworthy that under the scheme if the allottee opts for payment of premium in installments (Plan D-2- opted by the petitioner), he had to pay interest @ 12 per annum. In case of default in payment of installment beyond three months, the interest payable was 15% per annum. If for any reason, the allottee is unable to obtain lease and seeks surrender of the allotment, he is saddled with serious consequences including forfeiture of entire amount deposited up to that date. On the other hand, the Authority is not ready to pay interest even at the rate which it had charged from the allottees despite being grossly negligent in performing its obligations and duties. The Authority claims to have cancelled the scheme in the year 2019 which clearly goes to show that it was sleeping over the matter unconcerned with the plight of the allottees.

9. Apposite to note that after notice of the writ petition was served on the Authority on 7.6.2022, it sent a communication dated 21.6.2022 to the petitioner informing her that it would not be possible for the Authority even to return principal amount to the petitioner. It is stated therein that the version of the petitioner that the plot had not been sold by her to any one is not correct. She had executed an agreement to sell in favour of the intervenor (Gaurav Chandela) on 3.5.2013. His suit is pending in Civil Court (Case No.952 of 2021). Further, she had executed a Power of Attorney in favour of Sushil Kumar who had filed a writ in this Court. Consequently, until the cases are decided, the money would not be refunded to the petitioner.

10. The agreement to sell is without possession. On its basis, the intervenor had instituted Original Suit No.952 of 2021 against the petitioner and Greater Noida for permanent injunction restraining the defendants from acting in breach of the conditions stipulated in the agreement dated 3.5.2013 and for grant of damages @ Rs.50,000/- per month. The said suit is stated to be pending. No interim injunction or stay is operating in the said suit so as to prevent the Authority from returning the money deposited against the plot.

11. In paragraph 5 of the rejoinder affidavit, the petitioner has alleged that she

had cancelled the agreement to sell. Moreover, mere agreement to sell does not confer any title in the property. The suit that was filed was for permanent injunction and damages and not for specific performance. Additionally, as per Clause P-2, no transfer is permissible without permission of the Authority and that too, when transfer was made after execution of the lease deed. In the instant case, no lease deed was ever executed, so even otherwise, the Authority could not have taken notice of any such transaction. Therefore, the stand taken by the Authority that it would not return the money to the petitioner until the suit filed by the intervenor remains pending is also not sustainable in law. It should have left the inter se dispute between them to be decided in the suit.

12. Having regard to the facts and circumstances of the case, we are of the considered opinion that the petitioner who had been deliberately deprived of the returns on her investment solely attributable to the Authority is entitled to interest at the rate of 4% per annum from the date of deposit till the date acquisition was set aside by the Supreme Court that is 15.4.2011 and @ 12% per annum for the period beyond it until the date of actual payment.

13. We also note that not only the petitioner has been put to harassment by the respondent-Authority, but also has had to incur litigation expenses for which too she ought to be compensated.

14. In the result, the petition stands **allowed** with cost of Rs. 50,000/- to be paid by Greater Noida Authority to the petitioner within two weeks.

15. Before parting, we clarify that we should not be understood to have expressed opinion on any issue involved in the suit filed by the intervenor. All pleas and contentions therein are left open for being decided without being influenced by any observations made herein.

(2023) 1 ILRA 236
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.11.2022

BEFORE

THE HON'BLE YOGENDRA KUMAR SRIVASTAVA, J.

Writ-C No. 21993 of 2022
And
Writ-C No. 22082 of 2022

Alladin ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Hari Prakash Mishra, Sri Dharmendra Kumar Srivastava

Counsel for the Respondents:
C.S.C., Sri Ishir Sripat, Sri Krishna Kant Singh, Sri Mithilesh Kumar Mishra, Sri Saurabh Patel

(A) Revenue Law - The U.P. Revenue Code, 2006 - Sections 32, 38(1) & 210 - summary proceedings relating to correction of revenue records do not decide any question of title and the orders passed in such proceedings do not come in way of a person getting his rights adjudicated in a regular suit - writ petitions arising out of such summary proceedings, are not to be entertained in exercise of powers under Article 226 of the Constitution of India - an entry in revenue records does not confer title on a person whose name appears in records-of-rights - such entries are only for 'fiscal purposes' - no ownership is conferred on the basis thereof - question of title of a

property can only be decided by a competent court having jurisdiction in such matter.(Para - 6,9)

Entertainability of a writ petition - against orders passed in summary proceedings - order passed by Sub Divisional Magistrate and Additional Commissioner (Judicial).

HELD:-Refusal of Court to exercise its discretionary jurisdiction under Article 226 against orders passed in summary proceedings would be subject to the exceptions as laid down in case of **Smt. Kalawati vs. The Board of Revenue and 6 Others.** Exceptions not attracted in facts of either of the writ petitions. Does not wish to press the petitions. Petitioners would seek declaration of their rights by instituting proceedings before the appropriate forum. (Para -18,19)

Petitions Disposed of. (E-7)

List of Cases cited:

1. Smt. Kalawati Vs The B.O.R. & ors. , 2022 (4) ADJ 578

2. Harish Chandra Vs U.O.I. & ors. , 2019 (5) ADJ 212 (DB)

3. Mahesh Kumar Juneja & anr. Vs A.C.J. Moradabad Division & ors., 2020 (146) RD 545

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

1. The two writ petitions are based on similar set of facts and raise common questions of law, accordingly with the consent of the parties, the petitions are being taken up for hearing together.

2. Heard Sri Dharmendra Kumar Srivastava, learned counsel for the petitioner, Sri Abhishek Shukla, learned Additional Chief Standing Counsel for the State respondents, Sri Ishir Sripat, learned counsel for the private respondents and Sri Pawan Kumar Singh, holding brief of Sri K.K. Singh, learned counsel for the Gram Sabha.

3. Writ C No. 21993 of 2022 has been filed seeking to assail the order dated 7.6.2019 passed by the Sub Divisional Magistrate, Kasganj in Case No. RST/03294 of 2018 (Computer Case No. T201818750103294, Alladin vs. State of U.P.) under Section 38(1) of the U.P. Revenue Code, 2006 and also the order dated 24.2.2022 passed by the Additional Commissioner (Judicial) Aligarh in Case No. 00051/2020 (Computer Case No. C 202018000000051, Alladin vs. Gram Panchayat and others) under Section 210 of the U.P. Revenue Code, 2006.

4. Writ C No.-22082 of 2022 has been filed challenging the order dated 7.6.2019 passed by the Sub Divisional Magistrate, Kasganj in Case No. RST/03292 of 2018 (Computer Case No. T201818750103292, Alladin vs. State of U.P.) under Section 38(1) of the U.P. Revenue Code, 2006 and also the order dated 24.2.2022 passed by the Additional Commissioner (Judicial) Aligarh in Case No. 00052/2020 (Computer Case No. C 202018000000052, Alladin vs. Gram Panchayat and others) under Section 210 of the U.P. Revenue Code, 2006.

5. On the previous occasion an objection had been raised by the counsel appearing for the State respondents and the counsel appearing for the private respondents with regard to the entertainability of the writ petition by pointing out that the petition arises out of summary proceedings under Sections 32/38 of U.P. Revenue Code, 2006.

6. Counsel for the petitioners after making submissions to some extent has

fairly conceded to the settled legal position that summary proceedings relating to correction of revenue records do not decide any question of title and the orders passed in such proceedings do not come in way of a person getting his rights adjudicated in a regular suit and it is for the said reason, that a consistent view has been taken by the courts that writ petitions arising out of such summary proceedings, are not to be entertained in exercise of powers under Article 226 of the Constitution of India.

7. In regard to the aforestated legal proposition, counsel for the parties are *ad idem*, and have placed reliance on the recent judgement of this Court in **Smt. Kalawati vs. The Board of Revenue and 6 Others.**

8. The question of entertainability of a writ petition against orders passed in summary proceedings has come up before this Court earlier and it has consistently been held that normally the High Court in exercise of its discretionary jurisdiction would not entertain writ petitions which arise out of such proceedings.

9. The settled legal position that an entry in revenue records does not confer title on a person whose name appears in records-of-rights and that such entries are only for 'fiscal purposes' and no ownership is conferred on the basis thereof, and further that the question of title of a property can only be decided by a competent court having jurisdiction in such matters, has been restated in recent decisions of this Court in **Harish Chandra vs. Union of India & Ors., Mahesh Kumar Juneja and another vs. Additional Commissioner Judicial Moradabad Division and others,** and **Smt. Kalawati vs. The Board of Revenue and 6 Others (supra).**

10. The reluctance of the Courts to interfere with orders arising out of mutation proceedings is primarily for the reason that the question at issue is with regard to correction of record-of-rights which is primarily maintained for revenue purposes and an entry therein has reference only to possession and does not ordinarily confer upon the person in whose favour it is made any title to the property in question.

11. The aforesaid inference that revenue entries made on the basis of orders of mutation do not ordinarily confer upon a person in whose favour they are made, any title to the property in question, stands fortified from the express provision contained under Section 39 of the Code which states in clear terms that the orders passed under the provisions relating to mutation of revenue records would not act as a bar against any person from establishing his rights to the land by means of a declaratory suit.

12. Section 39 of the Code, as referred to above, is being extracted below :-

"39. Certain orders of Revenue Officers not to debar a suit :- No order passed by a Revenue Inspector under Section 33, or by a Tehsildar under sub-section (1) of Section 35 or by a Sub-Divisional Officer under sub-section (3) of Section 38 or by a Commissioner under sub-section (2) of Section 35 or sub-section (4) of Section 38 shall debar any person from establishing his rights to the land by means of a suit under Section 144."

13. The aforementioned section clearly provides that no person shall be debarred from establishing his rights to the land by means of a declaratory suit under Section 144, irrespective of the fact that an order has been passed by; (i) a Revenue Inspector under Section 33 (mutation in case of succession), or (ii) a Tehsildar under sub-section (1) of Section 35 (mutation in case of transfer or succession), or (iii) a Sub-Divisional Officer under sub-section (3) of Section 38 (correction of error or omission), or (iv) a Commissioner under sub-section (4) of Section 38 (correction of error or omission).

14. Section 39 which expressly provides that the orders passed by revenue officers in cases of a mutation and correction of revenue entries would not debar filing of a declaratory suit, is a substantive provision, and corresponds to a similar provision contained under Section 40-A of the U.P. Land Revenue, 1901 (now repealed).

15. The language of the section emphasizes that it applies to all orders passed by the revenue officers in matters relating to mutation and correction of errors or omission of revenue entries and it provides in clear terms that such order shall not debar any person from establishing his rights to the land by means of a declaratory suit under Section 144.

16. The object of the section being to enable a person to seek declaration of his rights on questions of title irrespective of the orders passed in mutation proceedings with regard to correction of revenue entries, the remedy of seeking a declaration on questions of title by filing a declaration suit remains open. The existence of an efficacious statutory alternative remedy would therefore also be a reason for not entertaining a writ petition in exercise of discretionary jurisdiction under Article 226.

17. It may be added as a word of caution that the rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion and existence of an alternate remedy would not divest the High Court of its powers under Article 226 which may be exercised in appropriate cases.

18. The refusal of the Court to exercise its discretionary jurisdiction under Article 226 in such matters would be subject to the exceptions as laid down in the case of **Smt. Kalawati (supra),** which are as follows:-

(i) the order or proceedings are wholly without jurisdiction;

(ii) rights and title of the parties have already been decided by a competent court, and that has been varied in these proceedings;

(iii) the order has been passed after entering into questions relating to entitlement, touching the merits of the rival claims;

(iv) rights have been created which are against provisions of any statute, or the entry itself confers a title by virtue of some statutory provision;

(v) the order has been obtained on the basis of fraud or misrepresentation of facts, or by fabricating documents;

(vi) the order suffers from some patent jurisdictional error i.e. in cases where there is a lack of jurisdiction, excess of jurisdiction or abuse of jurisdiction;

(vii) there has been a violation of principles of natural justice.

19. Counsel for the petitioners, has fairly submitted that the aforestated exceptions with regard to the rule of exhaustion of statutory remedy, would not

be attracted in the facts of either of the writ petitions. Learned counsel states that he does not wish to press the petitions and that the petitioners would seek declaration of their rights by instituting proceedings before the appropriate forum.

20. Counsel for the State respondents and the counsel for the private respondents have no objection.

21. The writ petitions stand **disposed of** in terms of the prayer so made.

(2023) 1 ILRA 240
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.12.2022

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Writ-C No. 22149 of 2000

Murali ...Petitioner
Versus
A.D.M. (Finance & Revenue), Ghazipur & Anr. ...Respondents

Counsel for the Petitioner:
Sri M.R. Gupta

Counsel for the Respondents:
C.S.C., Sri Anuj Kumar

(A) Land Law - Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952 - Rule 115-A/Form 49-A , 115-C - Notice - The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 - Section 9, 49, 117, 198, 122-B - Powers of the Land Management Committee and the Collector - If any property of Gram Sabha is damaged or misappropriated, the Land Management Committee and the Collector are duty bound to take action - no right by way of adverse possession accrues over the land of the State - Long standing possession does not confer any right to any person over the land of the State or the Gram Panchayat - no limitation regarding dispossession of any person as the such person cannot take plea that he is in occupation since long because his possession over the Gram Panchayat land is illegal - no limitation for the eviction of an unauthorized occupant. (Para - 11,22,23)

Property in suit belongs to Gram Panchayat land - no objection during consolidation proceedings – no allotment to petitioner - petitioner an unauthorized occupant - responsible for damaging, misappropriating, illegally retaining and occupying property of Gram Panchayat - petitioner liable to be evicted - to pay compensation for damages, misappropriation and wrongful occupation over the property in suit - recoverable from him as arrears of land revenue – revision by state – held - no evidence to establish possession since before abolition of zamindari - order to evict petitioner.**(Para -19)**

HELD:-Petitioner not in possession and occupation since before zamindari abolition, but later occupied land after consolidation proceedings over banjar land of Gram Panchayat, resulting in Rank trespasser and responsibility to pay damages for misappropriating and unauthorizedly occupying the land. Order of revisional court upheld. **(Para -28)**

Petition Dismissed. (E-7)

List of Cases cited:

1. Chob Singh Vs St. of U.P., 2000 RD 233

2. Suraj Bali Vs Gaon Sabha , 1982 AWC (R) 149

3. Shripati Vs Gaon Sabha , 1994 (23) ALR (R) 18

4. Uttam Singh Vs B.O.R. , 1980 AWC 600

5. Sukhdev Vs Collector, Banda , 2007 (102) RD 83 (HC)

6. Dal Singh Vs Additional Collector, Meerut , 2006 (101) RD (H) 7 (HC)

7. Bhagwan Vs Gaon Sabha, Bijnore , 2006 (100) RD 620

8. Ganga Saran Vs St. of U.P. , 1992 RD 382 (Supp)

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

1. This writ petition has been instituted to quash the order dated 25.04.2000 passed by Additional District Magistrate (Finance and Revenue), Ghazipur by which the revision was accepted and the lower court's order dated 11.07.1991 was quashed and it was held that gata no.13/4kha area 0-6-0 hectare is the Gram Panchayat land from which the petitioner was evicted and Rs.720/- as damages and Rs.5/- as execution fee were imposed.

2. The Court already heard Sri M.R. Gupta, learned counsel for the petitioner and Sri Jitendra Narayan Rai, learned Additional Chief Standing Counsel for respondent no.1.

3. The petitioner has taken ground and has mentioned the facts that a notice (annexure-1) under Rule 115-A/Form 49-A of UPZA and LR Rules was issued to the petitioner regarding plot no.13/4 area 0-6-9 dismal situated in Village Kazipur, Pargana, Tehsil and District Ghazipur by Assistant Collector First Class, Ghazipur. The petitioner filed objection (annexure-2) under Section 122-B of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 19501 and under Rule 115-C of the Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 19522 stating that over the plot in suit the petitioner's house, trees, naad, khoota and charan are standing since the period of zamindari. In evidence dated 06.04.1991 (annexure-3) lekhpal admitted that house is 50 years old and trees are 40-45 years old and there are nad, khoonta and charan which were also in the disputed land. Tehsildar, Sadar by his order dated 11.07.1991 (annexure-4) dismissed the case giving finding that he has also made inspection and the house his more than 50 years old and nad, khoonta, charan and trees of the petitioner are there and he is living since more than 50 years.

4. Respondent no.1 giving perverse finding allowed the revision vide order dated 25.04.2000 (annexure-5). As per intekhab, khatauni (annexure-6) the petitioner is a marginal farmer having only .680 area of land. If the impugned order dated 25.04.2000 is not quashed the petitioner will suffer irreparable loss and injury. Hence, the petition be allowed and impugned order be quashed and the writ of mandamus be also issued directing the respondent not to dispossess the petitioner from the property in suit.

5. All the papers referred in the petition are annexed by the petitioner. No counter affidavit has been filed by the respondents. The petitioner is Yadav by caste. He has annexed only one extract of khatauni from which it is disclosed that an area 0.680 hectare is recorded in the name of petitioner but no other paper like question-answer has been filed to establish that except the aforementioned area of land the petitioner is not the owner of any other land. If the petitioner is marginal farmer and he comes under the category of priority, any land not belonging to public utility land of the village panchayat can be allotted to him but neither proposal for allotment of patta of the property in suit has been made in favour of the petitioner nor any patta has been executed in his favour as per law.

6. It is admitted to the parties that the property in suit khasra no.13/4 is Gram Panchayat banjar land. According to the petitioner there is naad, khoonta, charan, hut, trees, house and khalihan of the petitioner for more than 50 years and the petitioner is living there for more than 50 years but the Lekhpal has deposed that the petitioner has illegally occupied the land after consolidation. According to the petitioner these things are since the time of his father, Vishambhar.

7. Neither the petitioner nor the respondent has filed extract of khatauni and khasra but from the impugned order and on the basis of admission of the petitioner, it was established fact that the property in suit is Gram Panchayat banjar land.

8. In cross-examination the Lekhpal has admitted that before consolidation the property in suit was not abadi land but it would have been banjar land. At present also it is recorded as banjar land in which about 8 persons have unauthorizedly occupied the land of Gram Panchayat against which reports have been made.

9. According to Lekhpal name of Murali's father is Tufani not Vishuni. He further reported that over the property in suit the petitioner has constructed naad, charan, khoonta, hut and house. There are trees also in front of the house. The land is used by the petitioner as abadi land. The petitioner is in possession for about 5-6 years before. The Tehsildar has also referred the statement of Lekhpal in which the Lekhpal had deposed that the total area of khasra no.13 is 5-11-13 out of which 6 dismal area has been occupied by the defendant. Khasra no.13 was not the abadi land before the consolidation. The property in suit is recorded as banjar land. In order dated 11.07.1991 the Tehsildar concluded that there are about 50 years old houses in the property in suit. There are other things hence notice under Section 49-A had been taken back. The State had preferred revision i.e. Revision No.9 of 1991, under Section 122-B(4A) of the Act, 1950 which has been decided by Additional Collector/ADM, Ghazipur on 25.08.2000 in which the State has condemned the order of Tehsildar and said that Tehsildar has not rightly analyzed the evidence available on record.

10. From the records it is proved that the property in suit is Gram Panchayat property and the Tehsildar has passed the order beyond his jurisdiction. The revisional court found that the property in suit i.e. khasra no.13/4 area 6 dismal is banjar Gaon Sabha land upon which the petitioner had constructed houses etc. The petitioner has said that the house etc. are since before the zamindari abolition, naad khoonta, charan, khalihan and hut are also there since before the zamindari abolition. The revisional court pointed out the statement of Lekhpal that the property in suit was not the abadi land since before the consolidation but was a banjar land which has been occupied by the respondent after the consolidation. The revisional court also found that the petitioner has not produced any evidence to establish his possession since before the abolition of zamindari and for the purposes of suit oral evidence is not sufficient. The revisional court concluded that the order of the lower court is incorrect and allowed the revision and passed an order to evict the petitioner and imposed Rs.720/- as damages and Rs.5/- as execution fees. The revisional court also directed that the file be consigned after complying with the order.

11. From perusal of the papers available on record it has been clearly

established that the property in suit is Gram Panchayat banjar land and the petitioner is Yadav by caste who belongs to OBC. If any property of Gram Sabha is damaged or misappropriated, the Land Management Committee and the Collector are duty bound to take action. In this regard rules and laws are framed under Section 122-B of the Act, 1950. Since the matter belongs to the time when the Act, 1950 was into operation therefore, the provisions of the aforementioned Act are considered and referred. Section 122-B of the Act, 1950 reads as under:-

***"122-B. Powers of the Land Management Committee and the Collector.**--(1) Where any property vested under the provisions of this Act in a Gaon Sabha or a local authority is damaged or misappropriated or where any Gaon Sabha or local authority is entitled to take or retain possession of any land under the provisions of this Act and such land is occupied otherwise than in accordance with the provisions of this Act, the Land Management Committee or local authority, as the case may be, shall inform the Assistant Collector concerned in the manner prescribed.*

(2) Where from the information received under sub-section (1) or otherwise, the Assistant Collector is satisfied that any property referred to in sub-section (1) has been damaged or misappropriated or any person is in occupation of any land, referred to in that sub-section, in contravention of the provisions of this Act, he shall issue notice to the person concerned to show cause why compensation for damage, misappropriation or wrongful occupation as mentioned in such notice be not recovered from him or, as the case may be, why he should not be evicted from such land.(3) If the person to whom a notice has been issued under sub-section (2) fails to show cause within the time specified in the notice or within such extended time not exceeding thirty days from the date of service of such notice on such person, as the Assistant Collector may allow in this behalf, or if the cause shown is found to be insufficient, the Assistant Collector may direct that such person may be evicted from the land any may for that purpose, use, or cause to be used such force as may be necessary and may direct that the amount of compensation for damage, misappropriation or wrongful occupation be recovered from such person as arrears of land revenue.

(4) If the Assistant Collector is of the opinion that the person showing cause is not guilty of causing the damage or misappropriation or wrongful occupation referred to in the notice under sub-section (2) he shall discharge the notice.

(4-A) Any person aggrieved by the order of the Assistant Collector under sub-section (3) or sub-section (4) may, within thirty days from the date of such order, prefer a revision before the Collector on the grounds mentioned in clauses (a) to (e) of Section 333.

(4-B) The procedure to be followed in any action taken under this section shall be such as may be prescribed.

(4-C) Notwithstanding anything contained in Section 333 or Section 333-A, but subject to the provisions of this section--

(i) every order of the Assistant Collector under this section shall, subject to the provisions of sub-sections (4-A) and (4-D), be final,

(ii) every order of the Collector under this section shall, subject to the provisions of sub-section (4-D), be final.

(4-D) Any person aggrieved by the order of the Assistant Collector or

Collector in respect of any property under this section may file a suit in a Court of competent jurisdiction to establish the right claimed by him in such property.

(4-E) No such suit as is referred to in sub-section (4-D) shall lie against an order of the Assistant Collector if a revision is preferred to the Collector under sub-section (4-A)

Explanation.- For the purposes of this section, the expression "Collector' means the officer appointed as "Collector' under the provisions of the U.P. Land Revenue Act, 1901 and includes an Additional Collector.

(4-F) Notwithstanding anything in the foregoing sub-sections, where any agricultural labourer belonging to a Scheduled Caste or Scheduled Tribe is in occupation of any land vested in a Gaon Sabha under Section 117 (not being land mentioned in Section 132) having occupied it from before May 13, 2007 and the land so occupied together with land, if any, held by him from before the said date as bhumidhar, Sirdar or asami, does not exceed 1.26 hectares (3.125 acres), then no action under this section shall be taken by the Land Management Committee or the Collector against such labourer, and he shall be admitted as bhumidhar with non-transferable rights of that land under Section 195 and it shall not be necessary for him to institute a suit for declaration of his rights as bhumidhar with non-transferable rights in that land.

Explanation.--The expression "agricultural labourer" shall have the meaning assigned to it in Section 198.

5. Rules 115-C to 115-H of the U.P. Zamindari Abolition and Land Reforms Rules, 1952, shall be and be always deemed to have been made under the U.P. Zamindari Abolition and Land Reforms Act, 1950 as amended by the Uttar Pradesh Land Laws (Second Amendment) Act, 1961, as if this section has been in force on all material dates and shall accordingly continue in force until altered or repealed or amended in accordance with the provisions of this Act."

12. According to Section 122-B(1) if any property vested in Gram Panchayat is damaged or misappropriated the Gram Panchayat is entitled to take or retain possession. If the land is occupied otherwise than in accordance with the provisions of the Act, 1950, the Land Management Committee or local Authority shall inform the Assistant Collector concerned in the manner prescribed. Under Section 122-B(2) if Assistant Collector is satisfied that the property of Gram Panchayat has been damaged or misappropriated or any person is in occupation of any land in contravention of the provisions of the Act, 1950, he shall issue notice to the concerned person to show cause why compensation for damages, misappropriation or wrongful occupation be not recovered from him and why he should not be evicted from such land. According to Section 122-B(3) if the explanation is found to be insufficient the Assistant Collector may direct that such person may be evicted from the land and direct that the amount of compensation for damages, misappropriation or wrongful occupation be received as arrears of land revenue. According to Section 122-B(4) if the Assistant Collector is of opinion that the person is not guilty of causing the damage or misappropriation or wrongful occupation, he shall discharge the notice.

13. In this case the Assistant Collector has discharged the notice being satisfied that the petitioner was in occupation for about 50 years over the property in suit.

14. According to Section 122-B(4A) any person aggrieved by the order of Assistant Collector may within 30 days prefer a revision before the Collector on the grounds mentioned in clauses (a) to (c) of Section 333 of the Act, 1950. According to Section 122-B(4C) every order of the Assistant Collector shall be final subject to the provisions of sub-sections (4A) and (4D) meaning thereby the order of the Assistant Collector would be subject to the decision of the revisional court or subject to sub-section (4D) and further every order of the Collector under shall be final subject to the provisions of sub-section (4D). According to Section 122-B(4D), any person aggrieved by the order of the Assistant Collector or the Collector in respect of any property under this Section, may file a suit in a court of competent jurisdiction to establish the right claimed by him in such property. But sub-section (4E) imposes a rider that no such suit as is referred to in sub-section (4D) shall lie against an order of the Assistant Collector, if a revision is preferred to the Collector under sub-section (4A).

15. In this case the State has exercised its power under sub-section (4A) and has preferred revision before the Collector which has been allowed on 25.04.2000 though no revision has been preferred by the petitioner. Thus, it appears that the right to file suit by the petitioner still exists.

16. Sub-section (4F) provides a remedy from the eviction to the persons who are agricultural labourer belonging to a Scheduled Caste or Scheduled Tribe. If they are in occupation of any land vested in a Gaon Sabha under Section 117 (not being the land mentioned in Section 132) having occupied it from before May 13, 2007 and the land so occupied together with land, if any, held by him from before the said date as bhumidhar, sirdar or asami does not exceed 1.26 hectares (3.125 acres) then no action (under this section) shall be taken by the Land Management Committee or the Collector against such labourer and shall be admitted as bhumidhar with non-transferable rights of that land under Section 195 and it shall not be necessary for him to institute a suit for declaration of his rights as bhumidhar with non-transferable rights in that land.

17. As it is admitted to both the parties that the petitioner being Yadav by caste is a member of OBC, he does not belong to scheduled caste or scheduled tribe, therefore, the protection of sub-section (4F) is not available to him.

18. It is also admitted to the parties that the concerned village has been under the consolidation operation and after the consolidation new records of rights have been prepared in which the property in suit has been left as Gaon Sabha banjar land which belongs to Gram Panchayat property under Section 117 of the Act, 1950. If the petitioner's house and the other things would have been there, certainly at the time of preparation of *akar patra 2-Ka* during the consolidation operation it would have been noticed by the consolidation authorities meaning thereby consolidation authorities left this land for the purposes of Gaon Sabha as Gaon Sabha land which can be allotted to the eligible persons in accordance with law as enumerated in Section 198 of the Act, 1950. The petitioner has neither made any representation nor moved any application to allot the land to him nor Land Management Committee has proposed the land in suit to allot the petitioner nor any such order has been passed by the

competent authority. If the petitioner was in use and occupation over the property in suit since before the zamindari abolition, it was his duty to file objection before the consolidation authorities that the property in suit has been vested with him under Section 9 of the Act, 1950 and is not open and available for the consolidation. If no such objection or application has been moved or if such objection or application has been moved but has been declined by the consolidation authorities, there would be bar to raise the objection again in view of Section 49 of the UP Consolidation of Holdings Act, 1953.

19. In this case the property in suit belongs to the Gram Panchayat land about which no objection had been raised by the petitioner during the consolidation proceedings. The property in suit has not been allotted to the petitioner, therefore, it is concluded that the petitioner is an unauthorized occupant and is responsible for damaging, misappropriating, illegally retaining and occupying the property of the Gram Panchayat, therefore, the petitioner is liable to be evicted and is also liable to pay compensation for damages, misappropriation and wrongful occupation over the property in suit which is recoverable from him as arrears of land revenue.

20. In **Chob Singh Vs. State of UP, Suraj Bali Vs. Gaon Sabha** and **Shripati Vs. Gaon Sabha** it is held that illegal construction on Gaon Sabha land, planting of trees and including a part of chakroad in the adjoining land are instances of causing damage or misappropriation of Gaon Sabha property.

21. In **Uttam Singh Vs. Board of Revenue** it is held that the Board of Revenue is competent to direct the demolition of construction.

22. It is settled law that no right by way of adverse possession accrues over the land of the State. Long standing possession does not confer any right to any person over the land of the State or the Gram Panchayat and there is no limitation regarding dispossession of any person as the such person cannot take plea that he is in occupation since long because his possession over the Gram Panchayat land is illegal.

23. In **Sukhdev Vs. Collector, Banda** it is held that there is no limitation for the eviction of an unauthorized occupant.

24. In this petition the petitioner has also taken plea that he is in possession since before the abolition of zamindari but about this the revisional court had given finding that on the basis of the evidence of Lekhpal that about eight persons have illegally occupied the land of the impugned khasra and notices have been issued to them. The revisional court has concluded that the petitioner has occupied land after the termination of consolidation proceedings.

25. In **Dal Singh Vs. Additional Collector, Meerut** it is held that finding regarding unauthorized occupation is a finding of fact and it is not liable to be quashed by the High Court. The principles laid down in this case goes against the petitioner.

26. Though the property in suit is not the abadi land but is recorded as banjar land but in **Bhagwan Vs. Gaon Sabha, Bijnore** it is held that proceedings under

this section can be initiated, even if land in dispute is abadi land.

27. It has already been concluded that since the petitioner does not belong to the scheduled caste or scheduled tribe, the benefit under sub-section (4F) is not available to him. In **Ganga Saran Vs. State of UP** it is held that the benefit of sub-section (4F) is not available to a member of backward class.

28. On the basis of the aforesaid discussion this Court is of the view that the petitioner was not in possession and occupation over the property in suit since before the zamindari abolition. He had occupied the land later on after the closer of consolidation proceedings over the banjar land of Gram Panchayat for which he was in no way entitled. He is a rank trespasser and he is responsible to pay the damages for misappropriating and unauthorizedly occupying the land of Gram Panchayat hence the order of the revisional court is upheld. The petition lacks merit and is liable to be dismissed with costs.

ORDER

29. The petition is dismissed and the order of revisional court dated 25.04.2000 is affirmed. The respondents may proceed to comply with the order of the revisional court and this Court as well.

30. A copy of this order be sent to the Collector, Ghazipur for necessary compliance.

(2023) 1 ILRA 247
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.11.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE VIPIN CHANDRA DIXIT, J.

Writ-C No. 22594 of 2022
Connected with
Other Writ-C Cases

Shipra Hotels Ltd. & Anr. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Sri Komal Mehrotra, Sri Aditya Sharma, Sri Mohammad Khalid, Sri Amit Saxena, Sri Anurag Khanna (Senior Adv.)

Counsel for the Respondents:
C.S.C., Sri Raghav Dwivedi, Sri Veerendra Kumar Shukla, Sri Navin Sinha (Senior Adv.), Sri Apurva Hajela

(A) SARFAESI Law - The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 - Section 13(2), 13(4) - Enforcement of security interest, Section 14 - Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset - "Ministerial Act" - The Security Interest (Enforcement) Rules, 2002 - Rule 8 - sale of immovable secured assets - principles of natural justice are integral part of Article 14.(Para - 43)

Validity of order passed under Section 14 of the SARFAESI Act' 2002 - under challenge - ground - no notice or opportunity of hearing granted to petitioners (borrowers) - issue - whether borrower entitled to notice and opportunity of hearing in the proceeding under Section 14 of the SARFAESI Act, 2022.**(Para -2,22)**

(B) Principles of natural justice - observance of principles of natural justice is at the stage of Section 13(3A), i.e. before the secured creditor proceeds to initiate coercive measure against the borrower under Section 13(4) of the Act - Once the borrower is granted opportunity at the stage prior to initiation of the

coercive measures after calling upon him to pay the dues of the secured creditor - no further opportunity is to be given either at the stage of Section 13(4) or Section 14.(Para - 46)

HELD:-Section 14 of the SARFAESI Act, 2002 states that CMM/DM acting under this act is not required to give notice to the borrower at the stage of the decision or passing order. Instead, the Magistrate must serve upon the borrower before taking any steps for his forcible dispossession by such steps or use of force. The date fixed for such forcible action must be sent in advance so that the borrower can remove their belongings or make alternative arrangements. Orders passed under this Act, however, were turned down.**(Para - 52,53)**

Petitions Dismissed. (E-7)

List of Cases cited

1. Shipra Hotels Limited & anr. Vs St. of U.P. & ors., Writ-C No. 22594 of 2022

2. Dharampal Satyapal Ltd. Vs Deputy Commissioner of Central Excise, Gauhati & ors. , (2015) 8 SCC 519

3. A. K. Kraipak & ors. Vs U.O.I. & ors. , 1969 (2) SCC 262

4. Managing Director, ECIL, Hyderabad Vs B. Karunakar , 1993 (4) SCC 727 (para 20)

5. Kumkum Tentiwal Vs St. of U.P. & Ors. , (2019) 2 AII L J 332

6. Harsh Govardhan Sondagar Vs International Assets Reconstruction Co. Ltd.. , (2014) 6 SCC 1

7. M/s Kaushambi Paper Mills Pvt. Ltd. & ors. Vs A.D.M. & 2 ors. , Writ-C No. 12699 of 2020

8. Smt Shakeela Begum Vs St. of U.P. & ors. , Writ-C No. 16399 of 2021

9. Zainul Abdin Vs B.O.B. & 3 ors. , Writ-C No. 12624 of 2020

10. CA. Manisha Mehta & ors. Vs Board of Directors & ors. , AIR 2022 Bombay 178

11. Standard Chartered Bank Vs V. Noble Kuma r & ors.. , (2013) 9 SCC 620

12. M/s Trade Well, a Proprietorship Firm, Mumbai & anr. Vs Indian Bank & anr. , 2007 SCC Online Bom 1232

13. Anuradha Singh & anr. Vs C.M.M. Kanpur Nagar & ors. , 2018 (5) ADJ 712 (DB)

14. Shakuntala Devi Jan Kalyan Samiti through Secretary & ors. Vs St. of U.P. & ors. , 2020 (139) ALR 466

15. Mardia Chemicals Ltd. etc. etc. Vs U.O.I. & ors. etc. etc. , (2004) 4 SCC 311

16. Kanhaiyalal Lalchand Sachdev & ors. Vs St. of Maha. & ors. , (2011) 2 SCC 782

17. NKGSB Cooperative Bank Ltd. Vs Subir Chakravarty & ors. , 2022 SCC Online SC 239

18. M/s R.D. Jain & Co. Vs Capital First Ltd. & ors. , Civil Appeal no. 175 of 2022

19. Phoenix ARC Private Ltd. & ors. Vs the St. of Maha. & ors. , Writ Petition No. 9794 of 2021

20. C. Bright Vs District Collector & ors. , (2021) 2 SCC 392

21. Phoenix ARC Pvt. Ltd. Vs Vishwa Bharati Vidya Mandir & ors.. , (2022) 5 SCC 345

22. Transcore Vs U.O.I.and anr. , (2008) 1 SCC 125

23. St. of U.P. & anr. Vs Synthetics & Chemicals Ltd. & anr. , (1991) 4 SCC 139

24. Hyder Consulting (UK) Ltd. Vs Governor, St. of Orissa through Chief Engineer, (2015) 2 SCC 189

25. Fuerst Day Lawson Ltd. Vs Jindal Exports Ltd. , 2001 (6) SCC 356

26. A. R. Antulay Vs R. S. Nayak & anr., (1988) 2 SCC 602

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Vipin Chandra Dixit, J.)

1. Heard Sri Amit Saxena learned Senior Counsel assisted by Sri Komal Mehrotra learned counsel for the petitioners, Sri Manish Goyal learned Additional Advocate General assisted by Sri Apoorva Hajela learned Standing Counsel for the State-respondents, Sri Anurag Khanna learned Senior Counsel assisted by Sri Veerendra Kumar Shukla learned counsel for the respondent No.3 and Sri Navin Sinha learned Senior Counsel assisted by Sri Raghav Dwivedi learned counsel for respondent No. 4. Ms. Rekha Singh learned Advocate holding brief of Sri Sanjay Kumar Gupta appeared for the respondent bank. Sri Utkarsh Singh learned counsel for the petitioner in Writ-C No. 27814 of 2022 has adopted the arguments of Sri Amit Saxena learned Senior Counsel on the issue of providing opportunity of hearing at the stage of the decision by CMM/DM under Section 14 of the SARFAESI Act' 2002. Learned counsels for the petitioners in other connected writ petitions have also adopted the arguments of the learned Senior Counsels for the petitioners.

2. The common dispute raised in all the connected writ petitions is about the validity of the order passed under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter referred to as "SARFAESI Act, 2002") by the authorized officer namely the Additional District Magistrate (Finance & Revenue), Ghaziabad, Meerut Commissionerate and the Additional District Magistrate (Finance & Revenue), Varanasi, on the ground that no notice or opportunity of hearing has been granted to the petitioners herein who are the borrowers and, thus, the orders impugned suffer from violation of principles of natural justice. Hence, they have been heard together and are being decided by this common judgment.

3. In Writ-C No. 22594 of 2022 (Shipra Hotels Limited and another vs. State of U.P. and 3 others), an issue with regard to the jurisdiction of the Additional District Magistrate (F.&R.), Ghaziabad has also been raised to pass such order beyond the period of 60 days prescribed in the 3rd proviso to sub-section (1) of Section 14 of the SARFAESI Act, 2002.

4. The main prayer of the petitioners, thus, is that a declaration that natural justice as implied mandatory requirement, should be read into Section 14 of the SARFAESI Act, be made by this Court.

5. It is argued by Sri Amit Saxena learned Senior Advocate assisted by Sri Komal Mehrotra learned counsel for the petitioners in the leading writ petition that it is well known principle of law that if a statute does not exclude compliance with the principles of natural justice either expressly or by necessarily implication, compliance with natural justice has to be read into the statute. The fundamental principles of natural justice, including audi altrum paltrum have been insisted by the Courts to bring procedural fairness into a decision and infraction thereof has lead to quashing of such decisions.

It is argued that the applicability of principles of natural justice is not

dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not.

Reliance is placed on the decision of the Apex Court in **Dharampal Satyapal Limited Vs. Deputy Commissioner of Central Excise, Gauhati and others** to assert that where a statute authorises interference with properties or other rights and is silent on the question of hearing, the Courts would apply rule of universal application founded on plainest principles of natural justice. [Reference **De Smith {Judicial Review of Administrative Action (1980), at page 161}]**

It is argued that the fundamental principle of administrative law in **Wade [Administrative Law (1977), at page 395]** emphasizes that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power.

In **A. K. Kraipak and others vs. Union of India and others**, it was held that the rules of natural justice operate in areas not covered by any law. They do not supplant the law of the land but supplement it. They are not embodied rules and their aim is to secure justice or to prevent miscarriage of justice.

It was held in **Managing Director, ECIL, Hyderabad v. B. Karunakar** that the subject of natural justice is to be made applicable to administrative proceedings also especially when it is not easy to draw the line that demarcates administrative enquiry from quasi-judicial ones. An unjust decision in an administrative inquiry may have a more far reaching effect than a decision in a quasi-judicial inquiry.

6. Based on the said principles, it was vehemently argued by the learned Senior Counsels for the petitioners that by virtue of sub-section (3) of Section 14, finality has been attached to the order of the Chief Metropolitan Magistrate (CMM)/District Magistrate (DM)/Autorised Officer. No other forum has been provided under the SARFAESI Act, 2002 to challenge the order under Section 14 and the only remedy is to approach the Writ Court.

7. It is contended that since an order of CMM/DM under Section 14 for taking possession would visit a borrower with civil consequences, no such order can be made without complying with natural justice. It is further argued that as per the first proviso to sub-section (1) of Section 14, the application under sub-section (1) moved by the secured creditor is to accompany by an affidavit duly affirmed by the authorized officer of the secured creditor which require declaration as per clauses (i) to (ix) of the said proviso. Meaning thereby, for maintaining an application under Section 14(1) of the Act, 2002, the secured creditor/bank is required to make out a case for initiation of action under Section 14. The factual disclosure made by the secured creditor in the affidavit accompanying the application would be the basis for application of mind by the Authorized Officer namely CMM/DM to record a satisfaction as to whether the proceedings under Section 14 of the Act, 2002 is to be drawn or not. The factual statements made in the affidavit of the secured creditor can be rebutted by the borrower, only when notice and opportunity is provided to him. It is argued that in order to verify the correctness of the statement made by the authorized officer of the secured creditor, it is necessary to grant opportunity of hearing to the borrower. The satisfaction to be recorded by the CMM/DM to the contents of the affidavit

though is subjective but the information provided to the said Authority must be correct so as to initiate coercive measure of dispossession of the borrower from the secured asset.

It is argued that wherever coercive measures are taken under any statute by administrative/quasi-judicial authorities, principles of natural justice have to be followed.

Reliance is placed on the decision of the Division Bench of this Court in **Kumkum Tentiwal vs. State of U.P. & Others** to submit that no exparte satisfaction can be recorded by the CMM/DM on the affidavit of the secured creditor when he files an application for taking possession by use of force. The Division Bench therein has held that it is essential that principles of natural justice are followed even while exercising the powers under Section 14 which include the right to be heard. It has taken note of the fact that sub-section (2) of Section 14 authorises the District Magistrate to "take or caused to be taken such steps and use or caused to be used such force as matter, in his opinion, be necessary". It is held therein that the import of the said power is that the District Magistrate can use coercive measures for taking the possession, the right of the occupier to resist or object to the use of force or to point out any deficiency in the affidavit that has been filed by the secured creditor, can be exercised only when a notice is given and an opportunity of hearing is afforded to such person, who may be in occupation. The objection with regard to the maintainability of the writ petition on the plea of remedy of filing application under Section 17 of the SARFAESI Act, 2002 has been turned down therein holding that it cannot be said that an appeal lies against an order passed under Section 14 of the SARFAESI Act or that the necessity of hearing can be dispensed with under Section 14 by the District Magistrate. It was held therein that from the scheme of the Act, it is implicit that the procedure of Sections 13(2) and 13(4) is mandatorily to be followed before initiating action under Section 14 of the Act. The borrower on initiation of action under Section 14 of the Act, may at times plead that he was not provided any opportunity of hearing as envisaged under Section 13(2) of the Act entitling him to pay the dues within 60 days and, therefore, the action under Section 14 is illegal and misconceived. From this point of view as well, notice or opportunity of hearing is necessary to the borrower or guarantor although it may be as a formality at times, before initiating action under Section 14 of the Act.

8. It is argued that the said principle was laid down by the Division Bench in **Kumkum Tentiwal** (supra) taking note of the law laid down by the Apex Court in **Harsh Govardhan Sondagar v. International Assets Reconstruction Company Ltd..** In the said case, in paragraph "28', while analyzing the scope of Section 14, it was clearly observed that when an application is filed, the Chief Metropolitan Magistrate or the District Magistrate will have to give a notice and opportunity of hearing to the persons claiming to be the lessee as well as to the secured creditor, consistent with the principles of natural justice, and then take a decision. If the CMM/DM is satisfied that there is a valid lease created before the mortgage or there is a valid lease created after the mortgage in accordance with the requirements of Section 65A of the Transfer of Property Act and that the lease has not been determined in accordance with

the provisions of Section 111 of the Transfer of Property Act, he cannot pass an order for delivering possession of the secured asset to the secured creditor.

It was further noted by the Division Bench that the Apex Court therein while dealing with the remedies available to the aggrieved party against any action/order passed under Section 14 of the SARFAESI Act has held that the SARFAESI Act, 2002 attaches finality to the decision of the Chief Metropolitan Magistrate or the District Magistrate and this decision cannot be challenged before any court or any authority and, as such, the remedy lies to the aggrieved party to challenge the said decision before the High Court under Articles 226 and 227 of the Constitution of India where the High Court can examine the decision of the CMM/DM, as the case may be, in accordance with the settled principles of law.

9. It was argued that relying upon the said decision, various Division Benches of this Court from time to time have disposed of the writ petitions filed by the borrowers relegating them to approach the Chief Metropolitan Magistrate/District Magistrate with the direction to grant opportunity of hearing. The decisions in **M/s Kaushambi Paper Mills Pvt. Ltd. And 2 others vs. Additional District Magistrate and 2 others** dated 31.8.2020 and **Smt Shakeela Begum vs. State of U.P. and 4 others** dated 9.8.2021 have been placed before us. A judgment and order dated 4.11.2020 passed by a Division Bench of this Court in **Zainul Abdin vs. Bank of Baroda and 3 others** has further been placed before us to point out that doubting the correctness of the Division Bench judgment in **Kumkum Tentiwal** (supra) to provide notice and opportunity of hearing to the borrower, the question has been referred for reconsideration by a Full Bench.

It is, thus, argued that as on date, the judgment in Kumkum Tentiwal (supra) is holding the field and is to be applied in the facts and circumstances of the present case.

10. In rebuttal, Sri Manish Goyal learned Additional Advocate General for the State respondents, Sri Naveen Sinha and Sri Anurag Khanna learned Senior Counsels appearing for the private respondents, at the outset, submitted that the judgment and order dated 31.8.2020 in Writ-C No. 12699 of 2022 passed by this Court has been subjected to challenge before the Apex Court in Special Leave to Appeal (C) No. 3687 of 2021 wherein the operation of the said judgment has been stayed vide an interim order dated 19.7.2021 passed therein.

As regards the law laid down by the Division Bench in **Kumkum Tentiwal** (supra), it is argued by the learned Senior Counsels appearing for the respondents that the said judgment proceeds on wrong appreciation of the legal provisions pertaining to the proceeding under Section 14 of the SARFAESI Act, 2002.

The contention is that the scheme of the Act and the decision of the Apex Court in **Harsh Govardhan Sondagar** (supra) has been misappreciated in arriving at the conclusion drawn by the Division Bench of this Court. Various decisions of the Supreme Court pertaining to the field and the statutory provisions of SARFAESI Act, 2002 have been ignored while arriving at the conclusion therein and hence the said decision may not be followed, being *per incuriam*.

11. Learned Senior Counsels for the respondents have insisted that the matter be

heard on merits to deal with the arguments of the learned Senior Counsel for the petitioners instead of keeping it pending in view of the reference made by another Division Bench doubting correctness of the decision in **Kumkum Tentiwal** (supra). As the pendency of the reference does not restrain this Court in dealing with the question of law.

12. To support his arguments, Sri Manish Goyal learned Additional Advocate General has taken us to the scheme of the SARFAESI Act, 2002, the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Bill, 2016 whereby amendment in the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 have been brought to place the statement of objects and reasons for bringing the said enactment. It is placed before us that the statement of objects and reasons of the aforesaid Bill No. 144 of 2016 records that the SARFAESI Act, 2002 and the Recovery of Debts due to Banks and Financial Institutions Act, 1993 were enacted for expeditious recovery of loans of banks and financial institutions. Though the Recovery of Debts due to Banks and Financial Institutions Act, 1993 provided for a period 180 days for disposal of recovery applications, the cases were pending for many years due to various adjournments and prolonged hearing. In order to facilitate expeditious disposal of recovery applications, it had been decided to amend the said Acts. The amendments in the SARFAESI Act, 2002 were proposed to suit changing credit landscape and to augment ease of doing business which inter alia include "specific timeline for taking possession of secured assets". The time period of 30 days within which the CMM/DM is required to dispose of the applications filed by the secured creditor has been inserted by Act No. 44 of 2016 w.e.f. 1.9.2016. Third proviso to sub-section (1) of Section 14 of the SARFAESI Act has also been added to make it incumbent upon the CMM/DM to give reasoning in writing for delay in disposal of the application of the secured creditor within the period of 30 days prescribed in the Second proviso to pass orders under Section 14.

It is then argued that the entire scheme of the SARFAESI Act, 2002 is to be seen to examine as to how and where Section 14 has been placed by the legislature and to see whether any Grievance Redressal Scheme is in place to challenge the coercive action taken to secure possession. It is submitted that Chapter III under the scheme of SARFAESI Act, 2002 is for "Enforcement of Security Interest" which includes Section 17, the remedy, for the application before DRT by an aggrieved person including borrower. Section 18, in the same chapter, provides for appeal to the appellate tribunal by a person aggrieved by the order of the Tribunal under Section 17. Section 19 of the Act, 2002 contained in Chapter III further safeguards the borrower against dispossession from the secured asset by the secured creditor, except in accordance with the provisions of the Act, 2002 and Rules made thereunder. It provides for the right of the borrower or any other aggrieved person to receive such compensation and cost as may be determined, in the proceedings before the Tribunal under Sections 17 or appeal under Section 18, if the possession of secured assets by the secured creditor is not in accordance with the provisions of the Act and rules made thereunder and also seek direction to the

secured creditors to return such secured assets.

13. It is argued by Sri Manish Goyal learned Additional Advocate General that Section 13(2) provides for 60 days time to the borrower to discharge his full liabilities and, in case, he is aggrieved by the notice or the details given in the notice under sub-section (2) of Section 13, he may make representation or raise objection by invoking provisions of sub-section (3A) of Section 13. In case such objection/representation is filed by the borrower, it becomes incumbent upon the secured creditor to consider the same and communicate its decision, the reasons for non-acceptance of the representation/objection. The decision on the said representation/objection has not been made justiciable, i.e. it cannot be challenged by taking recourse to Section 17 of the Act, 2002 for the reason that the borrower has right to challenge the notice issued at the next step, i.e. under sub-section (4) of Section 13, whereunder the secured creditor may take recourse to the measures provided therein to recover his secured debts, in case, the borrowers fails to discharge his liability within the period specified in sub-section (2) of Section 13. It is placed before us that the application under 17 under Chapter III before the Tribunal is maintainable at this stage that means if the representation/objection(s) of the borrower under sub-section (3A) of Section 13 is/are not accepted and the secured creditor proceeds to take any of the measures to secure his/its debt by issuing notice under sub-section (4) of Section 13, the borrower has a right to challenge the action of the secured creditor. The contention is that the Grievance Redressal Forum is provided at every stage of the proceeding, when a notice under sub-section (2) of Section 13 is issued to the borrower calling upon him to make payment of outstanding dues and further when the secured creditor decides to take coercive measure to recover its secured debt by issuing notice under sub-section (4) of Section 13.

One of the measures provided in sub-section (4) of Section 13 to recover the secured debts is to take possession of the secured asset of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset. The stage of Section 14 reaches only where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of the Act, for the purpose of taking possession or control of any such secured asset, i.e. for taking physical possession or control of the secured asset. The contention is that Section 14 is extension of the measures provided in sub-section (4) of Section 13 to the secured creditor to recover his secured debt. The CMM/DM/Authorized Officer under Section 14 is only an extended hand of the secured creditor to help the secured creditor in taking physical possession of the secured asset being administrative authorities. Clauses (a) and (b) of sub-section (1) of Section 14 make it clear that the Authorized Officer/CMM/DM while invoking its jurisdiction is required to take possession of such asset and forward it to the secured creditor. The measure taken under Section 14 of the Act, 2002 though adversarial in nature, but there is no occasion for a contest by the borrower to the application moved by the secured creditor to take possession of the secured asset as no adjudicatory proceeding is to be conducted by the Authorized Officer/CMM/DM.

14. As regards the declaration by the Authorized Officer of the secured creditor in the affidavit accompanying application

under Section 14, it is argued that the information provided in the affidavit are required to facilitate the Authorized Officer/CMM/DM to record its satisfaction that the stage of recovery of physical possession of the secured asset has reached and the secured creditor is entitled to take possession by taking recourse under Section 14. The "satisfaction" to be recorded by the Authorized Officer/CMM/DM "to the contents of the affidavit" before passing a suitable order to take possession of the secured asset as per the second proviso to sub-section (1) of Section 14 of the Act, 2002 is a subjective satisfaction. The act of the Authorized Officer/CMM/DM in passing the order under Section 14 is only a ministerial act and as no adjudicatory process is involved in the said act, the principles of administrative law of natural justice for providing opportunity of hearing cannot be read into as implied mandatory requirement.

15. Reliance is placed on the decision of the Bombay High Court in **CA. Manisha Mehta and others vs. Board of Directors and others** to assert that Section 14 cannot stand independent of Section 13(4) as explained by the Apex Court in **Standard Chartered Bank vs. V. Noble Kumar and others.**

It was held in **V. Noble Kumar** (supra) that since the borrower has no right of hearing when the secured creditor takes possession under Section 13(4), no hearing can be demanded by a borrower when by his action in resisting possession being gained over by the authorized officer of the secured creditor or refusing to deliver possession on his own, he compels such officer to seek assistance of the Authorized Officers under Section 14. The right to approach the tribunal is conferred on a borrower in terms of Section 17, post possession, whether it is symbolic possession under Section 13(4) or physical possession under Section 14 of the Act, 2002. The scheme of SARFAESI Act' 2002, thus, does not admit of any requirement of complying with natural justice by putting the borrower on notice while an application under Section 14 is under consideration. In view of the efficacious mechanism under the Act being in place, the borrower cannot seek a right of hearing at an intermediary stage.

Reliance is further placed on the decision of the Bombay High Court in **M/s Trade Well, a Proprietorship Firm, Mumbai & another vs. Indian Bank & another**, the judgment of the Division Bench of this Court in **Anuradha Singh and another vs. Chief Metropolitan Magistrate Kanpur Nagar and others**, a decision of the learned Single Judge of this Court in **Shakuntala Devi Jan Kalyan Samiti through Secretary and others vs. State of U.P. and others**, the judgments of the Apex Court in **Mardia Chemicals Ltd. etc. etc. vs. U.O.I. and others etc. etc.**; **Kanhaiyalal Lalchand Sachdev and others vs. State of Maharashtra and others**; **NKGSB Cooperative Bank Limited vs. Subir Chakravarty and others** and the judgment and order dated 27th July, 2022 in **M/s R.D. Jain and Co. vs. Capital First Ltd. & others** as also the decision of the Bombay High Court in **Phoenix ARC Private Limited and others vs. the State of Maharashtra and others** to buttress the above submissions.

16. The meaning of "Ministerial Act" in "Advanced Law Lexicon" has been placed before us to assert that while doing a ministerial act, a government official is dictated by law and has no power to form his own judgment or exercise discretion.

17. In essence, it is argued by Sri Manish Goyal learned Additional Advocate General that at the stage of the proceedings under Section 14 of the SARFAESI Act, 2002, as there is no independent consideration and the Authorized Officer/CMM/DM has to act without application of its own independent mind, merely on the information provided by the secured creditor/bank, the requirement of following principles of natural justice, cannot be read into the said provision. Moreover, effective remedy is available to the borrower to challenge the action initiated by the secured creditor even prior to the stage of Section 14, the borrower cannot be granted another opportunity under the scheme of the Act in view of the object and purpose of the enactment, i.e. the SARFAESI Act, 2002.

18. Sri Naveen Sinha learned Senior Advocate for the respondent no. 4 has adopted the arguments of Sri Manish Goyal learned Additional Advocate General.

In addition to the above contentions, it was argued by the learned Senior Counsel that the order passed under Section 14 of the SARFAESI Act, 2002 is only a ministerial act. No adjudicatory process qua points or issue is involved and, as such, there is no question of independent application of mind by the Authorized Officer/CMM/DM. There is no dichotomy between symbolic and physical possession taken under Section 13(4) and Section 14 of the Act, 2002. Rule 8 of the Security Interest (Enforcement) Rules, 2002 (In short as "the Rules, 2002") provides for affixation of possession notice on the outer door or at such conspicuous place of the property, whereby the Authorized Officer take or cause to take possession. With the affixation of the possession notice as per sub-rule (1) of Rule 8 and publication thereof in accordance with sub-rule (2) in two daily newspapers and the service through electronic mode as per sub-rule (2A), the possession of the secured asset stood transferred in favour of the secured creditor. The question remains, thus, of taking actual physical possession of the secured asset, in case, the borrower does not part with his possession despite receipt of the notice.

19. Further contention of the learned Senior Counsel for the petitioners is about the delay in passing the order under Section 14, beyond the time limit of 60 days provided under the Act.

It is argued that the Authorized Officer/CMM/DM has no jurisdiction to pass order beyond the period of 60 days, as mandated in the third proviso to Section 14. The proviso states that the officer concerned has to record reasons in writing, in case, it fails to pass order within the period of 30 days from the date of application prescribed in the Second proviso. The order passed, in the instant case, is beyond the period of 60 days and hence suffers from the vice of jurisdiction.

20. In rebuttal, the reliance is placed on the decision of the Apex Court in **C. Bright vs. District Collector and others** by the learned Senior Counsel for the respondent to assert that the District Magistrate does not become *functus officio*, if it is unable to take possession within the time limit, which is prescribed to instill a confidence in creditors that the District Magistrate will make an attempt to deliver possession as well as to impose a duty on the District Magistrate to make an earnest effort to comply with the mandate of the statute to deliver the possession within 30

days and for reasons to be recorded within 60 days.

It was argued that it was held by the Apex Court that the remedy under Section 14 of the Act is not rendered redundant if the District Magistrate is unable to handover the possession. The District Magistrate will still be enjoined upon the duty to facilitate delivery of possession at the earliest.

21. Sri Anurag Khanna learned Senior Advocate appearing for the respondent no. 3 in Writ-C No. 22594 of 2022 while adopting the arguments of Sri Manish Goyal learned Additional Advocate General on the scheme of the Act raises an objection with regard to the maintainability on the ground that a writ petition against a private financial institution against the proposed action/actions under the SARFAESI Act, 2002 cannot be maintained.

Reliance is placed on the decision of the Apex Court in **Phoenix ARC Private Limited vs. Vishwa Bharati Vidya Mandir and others.**

22. Having heard learned counsel for the parties and perused the record, in light of the arguments made by the learned counsels for the parties, the main issue which arises for our examination is as to "whether a borrower is entitled to notice and opportunity of hearing in the proceeding under Section 14 of the SARFAESI Act, 2022".

23. This Court is also required to answer the contentions of the learned Senior Counsel for the petitioners based on the decision of the Division Bench in **Kumkum Tentiwal** (supra) which has answered the issued in favour of the borrower and that the issue has been referred to the Full Bench by another Division Bench doubting the correctness of **Kumkum Tentiwal** (supra).

24. To answer the above issues, we are required to go through the legislative scheme of the SARFAESI Act, 2002. The SARFAESI Act' 2002 has been enacted to enable banks and financial institution to secure recovery by exercising powers to take possession of the securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction, without the intervention of the Court. Section 34 bars the jurisdiction of the Civil Court to entertain any suit or proceeding in respect to any matter which the Tribunal constituted under the Act is empowered to determine.

25. The validity of the SARFAESI Act, 2002 has been upheld by the Apex Court in **Mardia Chemicals Ltd.** (supra). A question was framed by the Apex Court therein as to whether the provisions as contained in Sections 13 and 17 of the Act provide adequate and efficacious mechanism to consider and decide the objection/dispute raised by a borrower against the recovery, particularly in view of bar to approach the Civil Court under Section 34 of the Act.

While answering the said question, the forums or remedies available to the borrower to ventilate his grievances under the Act have been considered and it was noted therein:-

(i) The purpose of serving a notice upon the borrower under sub-section (2) of Section 13 is that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under sub-section (4) and

Section 13 in case of non-compliance of notice within 60 days.

(ii) The creditor must apply his mind to the objection raised in reply to such notice and an internal mechanism is to be evolved to consider such objections raised in reply to the notice.

(iii) Meaningful consideration of the objection raised by the borrower is mandated before proceeding to take drastic measures under sub-section (4) of Section 13.

(iv) The bank and financial institution are required to communicate to the borrower of the reasons for not accepting the objections or points raised in reply to the notice served upon them before proceeding to take measures under sub-section (4) of Section 13.

(v) The communication of reasons is for the purpose of knowledge of the borrower as he has right to know as to why his objections have not been accepted by the secured creditor who intends to start hard steps of taking over possession/management/business of secured asset without intervention of the Court under Section 13(4) of the Act.

(vi) The next safeguard available to a borrower within the framework of the Act is to approach the Debt Recovery Tribunal under Section 17 of the Act. Such a right accrues only after measures are taken under sub-section (4) of Section 13 of the Act.

The arguments that the borrower is entitled to be heard before a notice under sub-section (2) of Section 13 is issued failing which there is denial of the principles of natural justice, was turned down, stating therein that the issuance of a notice to the debtor by the creditor does not attract the application of the principles of natural justice. It is always open to tell the debtor what he supposed to repay. No hearing can be demanded from the creditor at this stage. But the secured creditor must bear in mind that the reply of the borrower to the notice under Section 13(2) of the Act has been considered applying mind to it, before stringent measures, a process of recovery is initiated. The reasons, however, brief they may be, for not accepting the objection, if raised in the reply, must be communicated to the borrower. The requirement of pre-deposit of 75% of the demand at the initial proceeding as per sub-section (2) of Section 17 has been held *ultra vires* of Article 14 of the Constitution of India with the observation that the said requirement at the initial proceeding sounds unreasonable and oppressive and cannot be said to be a reasonable condition at the first instance itself before start of adjudication of the dispute.

26. In **Transcore vs. Union of India and another**, the question was considered whether recourse to take possession of the secured assets of the borrower in terms of Section 13(4) of the SARFAESI Act (referred as the NPA Act therein) comprehends the power to take actual possession of the immovable property?

While answering the same, it was held that there is no dichotomy under the Act between symbolic and physical possession. Section 13(4) of the NPA Act proceeds on the basis that the borrower, who is under liability, has failed to discharge his liability within the period prescribed under Section 13(2), which enables the secured creditor to take recourse to one or more of the measures namely taking possession of the secured assets including the right to transfer by way of lease, assignment or sale for realising the secured asset. The mechanism for taking possession has been provided under Rule 8

of the 2002 Rules framed under the NPA Act. Section 14 of the NPA Act provides for taking possession of the secured asset through the District Magistrate. Section 17(3) states that if the DRT after examining the facts and circumstances of the case comes to the conclusion that any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor are not in accordance with the provisions of the Act and the Rules thereunder, it may by order declare that the recourse taken to anyone or more measures is invalid and consequently, restore possession to the borrower and can also restore management of the business of the borrower. Therefore, the scheme of Section 13(4) read with Section 17(3) shows that if the borrower is dispossessed, not in accordance with the provisions of the Act, then the DRT is *entitled to put the clock back by restoring the status quo ante.*

It was observed therein that for the fact that the NPA Act provides for recovery of possession by non-adjudicatory process, it would be erroneous to say that the rights of borrower shall be defeated without adjudication.

27. In **Standard Chartered Bank** (supra), the challenge was to the legality of the order passed by the Chief Judicial Magistrate in the proceedings under Section 14 of the SARFAESI Act to take possession of the secured asset and to hand over the same to the secured creditor.

It was argued that a secured creditor before invoking the authority of the Magistrate under Section 14 must necessarily make an attempt to take possession of the secured asset. Only when the creditor faces resistance to such an attempt the creditor could resort to the procedure under Section 14 of the Act. It was further urged that Section 17 of the Act provides remedy only against the measure taken by the creditor under Section 13(4) of the Act and the said remedy is not available against an action taken by the Magistrate under Section 14 of the Act. Therefore, permitting the secured creditor to invoke Section 14 without first resorting to the procedure under Section 13(4) would deprive the owner of the secured asset an opportunity of filing application under Section 17 to have his grievances adjudicated. It was also argued that even a Magistrate exercising power under Section 14 of the Act is required to follow the procedure contemplated under Rule 8 of the Security Interest (Enforcement) Rules' 2002 though the rule does not expressly say so. Failure to comply with the requirement of Rule 8, in that case, would vitiate the order of the Magistrate.

Turning down the above contentions, the decision of the Bombay High Court in **M/s Trade Well, a Proprietorship Firm, Mumbai & another vs. Indian Bank** (supra) was noted therein in Para "22' as under:-

"22. However, the Bombay High Court in Trade Well v. Indian Bank opined:

"2.....CMM/DM acting under Section 14 of the NPA Act is not required to give notice either to the borrower or to the third party.

3. He has to only verify from the bank or financial institution whether notice under Section 13(2) of the NPA Act is given or not and whether the secured assets fall within his jurisdiction. There is no adjudication of any kind at this stage.

4. It is only if the above conditions are not fulfilled that the CMM/DM can refuse to pass an order under Section 14 of the NPA Act by recording that the above conditions are not

fulfilled. If these two conditions are fulfilled, he cannot refuse to pass an order under Section 14."

In Para "24', the Apex Court has taken note of the amendment brought in Section 14 by Act No. 1 of 2013 w.e.f. 15.1.2013, to insert the first proviso to sub-section (1) of that Section, the requirement of affidavit of the authorised officer of the secured creditor, Para "24' to Para "24.7' are to be extracted hereinunder:-

"24. An analysis of the nine sub-clauses of the proviso which deal with the information that is required to be furnished in the affidavit filed by the secured creditor indicates in substance that:

24.1. (i) there was a loan transaction under which a borrower is liable to repay the loan amount with interest,

24.2. (ii) there is a security interest created in a secured asset belonging to the borrower,

24.3. (iii) that the borrower committed default in the repayment,

24.4. (iv) that a notice contemplated under Section 13(2) was in fact issued,

24.5. (v) in spite of such a notice, the borrower did not make the repayment.

24.6. (vi) the objections of the borrower had in fact been considered and rejected,

24.7. (vii) the reasons for such rejection had been communicated to the borrower, etc."

It was concluded in paras "25', "27' as under:-

"25. The satisfaction of the Magistrate contemplated under the second proviso to Section 14 (1) necessarily requires the Magistrate to examine the factual correctness of the assertions made in such an affidavit but not the legal niceties of the transaction. It is only after recording of his satisfaction the Magistrate can pass appropriate orders regarding taking of possession of the secured asset.

27. The "appeal" under Section 17 is available to the borrower against any measure taken under section 13(4). Taking possession of the secured asset is only one of the measures that can be taken by the secured creditor. Depending upon the nature of the secured asset and the terms and conditions of the security agreement, measures other than taking the possession of the secured asset are possible under section 13(4). Alienating the asset either by lease or sale etc. and appointing a person to manage the secured asset are some of those possible measures. On the other hand, section 14 authorises the Magistrate only to take possession of the property and forward the asset along with the connected documents to the borrower (sic the secured creditor). Therefore, the borrower is always entitled to prefer an "appeal" under section 17 after the possession of the secured asset is handed over to the secured creditor. Section 13(4)(a) declares that the secured creditor may take possession of the secured assets. It does not specify whether such a possession is to be obtained directly by the secured creditor or by resorting to the procedure under section 14. We are of the opinion that by whatever manner the secured creditor obtains possession either through the process contemplated under section 14 or without resorting to such a process obtaining of the possession of a secured asset is always a measure against which a remedy under section 17 is available."

It was noted therein that there will be three methods for the secured creditor to take possession of the secured asset. (i) The first method would be where

the secured creditor gives the requisite notice under Rule 8(1) and where he does not meet with any resistance. In that case, the authorised officer will proceed to take steps as stipulated under Rule 8(2) onwards to take possession and, thereafter, for sale of the secured asset to realise the amounts that are claimed by the secured creditor. (ii) The second situation will arise where the secured creditor met with resistance from the borrower after the notice under Rule 8(1) is given. In that case, he will take recourse to the mechanism provided under Section 14 of the Act, viz. making application to the Magistrate. The Magistrate will scrutinize the application and then if satisfied, appoint an officer subordinate to him as provided under Section 14(1)(A) to take possession of the asset and documents. (iii) The third situation will be one where the secured creditor approaches the Magistrate concerned directly under Section 14 of the Act. The Magistrate will, thereafter, scrutinize the application as provided in Section 14, and then if satisfied, authorise a subordinate officer to take possession of the assets and documents and forward them to the secured creditor. [Reference paragraphs "36.1' to "36.3' of the decision].

In Para "37', the law laid down in **Mardia Chemicals Ltd.** (supra) has been noted to state therein as under:-

"37. In this connection, it is material to refer to the judgment in Mardia Chemicals (supra) wherein the Court was concerned with the legality and validity of the SARFAESI Act. The Court held the Act to be valid except Section 17(2) thereof as it then stood. In paragraphs 59, 62 and 76 of the judgment the Court in terms held that in remedy under Section 17 of the Act was essentially like filing a suit in a Civil Court though it was called an Appeal. It is also relevant to note that in the ultimate conclusions in paragraph 80 of the judgment this Court held in sub-para (2) thereof as follows:-

"80.(2). As already discussed earlier, on measures having been taken under sub-section (4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under Section 17 of the Act before the Debts Recovery Tribunal."

The grievance of the respondent that it will be left with no remedy is, therefore, misplaced. As held by a bench of three Judges in Mardia Chemicals (supra), it would be open to the borrower to file an appeal under Section 17 any time after the measures are taken under Section 13 (4) and before the date of sale/auction of the property. The same would apply if the secured creditor resorts to Section 14 and takes possession of the property with the help of the officer appointed by the Magistrate"

28. It was, thus, held that the borrower is not remediless, inasmuch as, it would be open to the borrower to file an "application' under Section 17 any time after the measures are taken under Section 13(4) and even before the sale/auction of the property. The same would apply as well if the secured creditor resorts to Section 14 and takes possession of the property with the help of the officer appointed by the Magistrate.

29. Coming to the legislative scheme, Chapter III under the heading "Enforcement of Security Interest" contains the provisions under Sections 13 to 19 of the Act, 2002. The Act provides for steps to be taken for Enforcement of Security Interest created in favour of any secured creditor, without the intervention of the

Court or Tribunal. Before taken stringent measures, the secured creditor is obliged to give notice to the borrower, consider his objection and given reasons not to accept the same, if raised in the reply. Sub-section (4) of Section 13 and Section 14 provide as to how stringent measure of taking possession of the secured asset would be taken to ensure recovery of secured debt. Sections 17 & 18 provide remedy to the borrower against the action of the secured creditor at both stages, sub-section (4) of Section 13 and Section 14 at the post possession stage. However, at the time of challenge to the action taken under Section 14, the challenge to the notice under sub-section (4) of Section 13 is necessary. And further the challenge to the action under Section 14, i.e. the act of taking over physical possession of the secured asset can be sustained by the tribunal only after the borrower is dispossessed. Section 19, however, safeguards the interest of the borrower in case of any illegal act of dispossession from his property/secured asset by empowering the tribunal, both the Debt Recovery Tribunal or the Appellate Tribunal, to restore the possession of such secured asset if it has held that the possession of the secured creditor is not in accordance with the Act and the rules made thereunder. The borrower or any other aggrieved persons is also entitled to the payment of such compensation and cost for such illegal action of the secured creditor, as determined by the Tribunal.

30. Having regard to the scheme of the SARFAESI Act' 2002, as explained by the Apex Court in **Mardia Chemicals Ltd.** (supra), **Transcore** (supra) and **Standard Chartered Bank vs. V. Noble Kumar** (supra), it is to be noted that the object of the SARFAESI Act is to facilitate quick recovery of secured debts without the intervention of the Court. The statement of objects and reasons of the bill bringing amendment in Section 14 by Act No. 14 of 2016 providing specific time line for taking possession of the secured asset is further in aid of the principle laid down by the Apex Court that the measures taken by the secured creditor at the stage of Sections 13(4) and 14 is without judicial/quasi judicial intervention, till such time, the possession of the secured asset is taken by the secured creditor after serving requisite notice and responding to the objections/representations, if any, prayed by the borrower under Section 13(3A) of the Act. Explanation to sub-section (1) further clarify that any decision on the representation of the borrower shall not entitle him to file application under Section 17 of the Act. The secured creditor is not required to give any notice or opportunity to the borrower at the stage of Section 13(4) when it proceeds to take recourse to one or more of the measures provided in sub-section (4) to recover its secured debts. Section 14 of the SARFAESI Act is an extension of the measures taken by the secured creditor to take possession of the secured asset of the borrower, on the resistance of the borrower. It would be legal fallacy, if it is said that though the secured creditor is not liable to give hearing to the borrower at the stage of Section 13(4) of the Act but if on resistance put forth by the borrower in getting physical possession of the secured asset, the secured creditor if approach the Magistrate to seek help/assistance, the borrower who is resisting possession being taken by the Authorized Officer of the secured creditor or does not on his own surrender possession, would be entitled to the opportunity of hearing. The borrower has right to approach the Tribunal in terms of Section 17 to challenge any of the measures

taken by the secured creditor referred to in sub-section (4) of Section 13, which include the measure taken under Section 14 of the Act by seeking assistance of the District Magistrate/Chief Metropolitan Magistrate. The right to approach the Tribunal is conferred upon the borrower only post possession.

As held by the Apex Court in **Transcore's case** (supra), there is no dichotomy between symbolic possession taken under sub-section (4) of Section 13 and physical possession by force taken with the assistance of the District Magistrate/Chief Metropolitan Magistrate under Section 14 of the SARFAESI Act.

31. Insofar as the right of the borrower to challenge the steps/measures taken by the secured creditor, the Apex Court in **M/s R.D. Jain and Co.** (supra) while dealing with the provisions of Section 14 of the SARFAESI Act has observed that the powers of the Chief Metropolitan Magistrate under Section 14 of the SARFAESI Act is purely executionary in nature and has no element of quasi-judicial function or application of mind and he cannot brook delay. Time is of the essence. The statutory obligation enjoined upon the CMM/DM is to immediately move into action after receipt of a written application under Section 14(1) of the SARFAESI Act from the secured creditor. The CMM/DM is expected to pass an order after verification of compliance of all formalities by the secured creditor referred to in the proviso in Section 14(1) of the SARFAESI Act, and after being satisfied in that regard, to take possession of the secured asset and documents relating thereto and to forward the same to the secured creditor at the earliest opportunity.

32. Same view has been taken by the Apex Court in **NKGSB Cooperative Bank Limited** (supra), which has been relied in the decision of **M/s R.D. Jain and Co.** (supra).

Relevant paragraph "39' of the said decision is noted as under:-

"39. As regards the procedure for taking possession of the secured assets, it can be discerned from Section 13 read with Section 14 of the 2002 Act. Section 13(4) permits the secured creditor to take recourse to one or more of the specified measures; and to enable the secured creditor to do so even at the stage of pre-confirmation of sale; in terms of Section 14, the CMM/DM has power in that regard albeit after passing order on a written application given by the secured creditor for that purpose. Once the order is passed, the statutory obligation cast upon the CMM/DM stands discharged to that extent. The next follow-up step is of taking possession of the secured assets and documents relating thereto. The same is ministerial step. ...xxxxxxxxxxxxxxx....."

33. In **Kanhaiyalal Lalchand Sachdev** (supra), the Apex Court while answering the question as to whether the DRT would have jurisdiction to consider and adjudicate post Secction 13(4) events or whether its scope in terms of Section 17 of the Act will be confined to the stage contemplated under Section 13(4) of the Act, has held that:-

"22. We are in respectful agreement with the above enunciation of law on the point. It is manifest that an action under Section 14 of the Act constitutes an action taken after the stage of Section 13(4), and therefore, the same would fall within the ambit of Section 17(1)

of the Act. Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action under Section 13(4) of the Act, by providing for an appeal before the DRT."

34. The Bombay High Court in **M/s Trade Well, a Proprietorship Firm, Mumbai** (supra) has faced with the issue as to whether the Chief Judicial Magistrate or the District Magistrate, as the case may be, is required to give notice to the borrower or any person who may be in possession of secured asset and give him a hearing.

Taking note of the decision of the Apex Court in **Transcore's case** (supra), it was held therein that adjudication of rival claims is absent at that stage, there is no question of dealing with rival claims and giving a reasoned judgment as regards the merits of the case. In any event, if a party has any grievance as regards the contents of that order, his remedy would be to voice them in the application under section 17 before the DRT after measures under section 13(4) are taken. At the time of passing order under Section 14 of the NPA Act, CMM/DM will have to consider only two aspects. (i) He must find out whether the secured asset falls within his territorial jurisdiction and; (ii) whether notice under Section 13(2) of SARFAESI Act is given or not. No adjudication of any kind is contemplated at that stage.

35. Same view has been taken by the Bombay High Court in **CA. Manisha Mehta** (supra), wherein it was noted that:-

"8. Pertinently, Section 14 of the SARFAESI Act was amended twice, once in 2013 and then again in 2016. If it were the intention of the legislature to extend opportunity of hearing to a borrower before the District Magistrate/Chief Metropolitan Magistrate, as the case may be, it was free to do so. Advisedly, the legislature did not do so, for, it would have militated against the scheme of the SARFAESI Act and more particularly Section 13 thereof. It is implicit in the scheme of the SARFAESI Act that natural justice, only to a limited extent, is available and not beyond what is expressly provided. There seems to be little merit in the argument advanced by Mr. Nedumpara and we hold that the language of Section 14 is too clear and unambiguous, and does not admit of any requirement of complying with natural justice by putting the borrower on notice while an application thereunder is under consideration."

36. A Division Bench of this Court in **Anuradha Singh** (supra) has dealt with the issue in the following manner:-

"9. .....xxxxxxxxx.....We do not find any statutory provisions for providing an opportunity to the borrower at the stage of passing of an order under Section 14 of the Act nor any decision either of this Court or the Apex Court has been pointed out that may enable us to read such principles of administrative law in to the statutory provisions of Section 14 of the Act. Consequently the said argument does not hold water."

37. Learned Single Judge of this Court in **Shakuntala Devi Jan Kalyan Samiti through Secretary** (supra) has noted the Division Bench judgments in **Anuradha Singh** (supra) as also **Kumkum Tentiwal** (supra) and taking note of the decisions of the Apex Court in **Mardia Chemicals Ltd.** (supra) and **Standard Chartered Bank vs. V. Noble Kumar** (supra), it has observed that:-

"34. This Court taking into account the judgments rendered by three Division Benches of this Court, as referred to hereinabove, and the observations of the Supreme Court in the case of Mardia Chemicals Ltd. (supra), is of the opinion that nothing can be read into the language of Section 14 of the Act, which has not been provided specifically therein by the Parliament.

After the judgment was rendered in Mardia Chemicals Ltd. (supra), the Act was amended and the provisions for pre-deposit of 75% was done away with for approaching the Tribunal.

35. Since in the statute itself there is no provision for giving opportunity of hearing in an action under Section 14 of the Act, this Court cannot provide such opportunity of hearing to the writ petitioner. It is settled position in law that the Court ought to decide matters on the basis of law as it exists and declare the same instead on the basis of what law should be."

38. In light of the above discussion, in the legislative scheme of the Act' 2002, Section 14 is placed in Chapter III in such a manner that the proceedings undertaken by the CMM/DM for the purpose of taking possession or control of any secured asset, is in the nature of execution proceeding, in furtherance of the measures taken by the secured creditor to recover his secured debt under Section 13(4) of the Act. The enabling provision is Section 13(4) whereunder the secured creditor has been conferred power to take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset. In case, the actual physical possession of an immovable property, which is secured asset, is not handed over by the borrower to the secured creditor on his own on initiation of measures under Section 13(4), or the Authorised Officer of the secured creditor met with resistance from the borrower when he proceed to take steps as stipulated under Rule 8(2) onwards to take possession after the notice, the bank (who is secured creditor) may make a request in writing to the CMM/DM, within whose jurisdiction the secured asset is situated, to take possession thereof and forward such asset to the secured creditor. The borrower has a remedy to challenge the measures taken by the secured creditor including the order passed under Section 14 of the SARFAESI Act, 2002 before the Debt Recovery Tribunal post-possession. As no enquiry either in the nature of judicial or quasi-judicial proceeding is to be conducted at this stage, and as held by the Apex Court the proceedings before the CMM/DM under Section 14 of the Act is ministerial in nature, we hold that no opportunity of hearing is required to be given to the borrower at this stage.

39. We are now required to go through the Division Bench judgment of this Court in **Kumkum Tentiwal** (supra) relied by the learned counsels for the petitioners, wherein a contrary view has been taken.

40. While dealing with the question as to whether a borrower is entitled to right of hearing prior to any order having been passed by the District Magistrate while exercising power under Section 14, the Bench has observed that the secured creditor is bound to file an affidavit giving declaration as required in Section 14. On the said affidavit being filed by the secured creditor, the CMM/DM is to satisfy itself about the contents of the affidavit to pass a suitable order for the purpose of taking

possession of the secured asset. It was, thus, observed that from the plain reading of the said provision, it is inconceivable as to how the District Magistrate can record a satisfaction ex-parte with regard to the averments to be made in the affidavit filed by the secured creditor along with the application making request for taking possession by use of force. Taking note of sub-section (2) of Section 14, it was observed that the said provision authorises the District Magistrate to take such steps or use such force as in his opinion be necessary. The import of the said power is that the District Magistrate can use coercive measure for taking the possession. The right of the occupier whether it is the borrower or otherwise to resist or object to use of force or to point out any deficiencies in the affidavit that has been filed by the secured creditor, can be exercised only where the notice is given to the person who is sought to be dispossessed and an opportunity of hearing is afforded to such person, who may be in occupation.

41. With the above reasonings, it was held that it is essential that principle of natural justice are followed, even while exercising the powers under Section 14 which include the right to be heard. Before initiation of proceeding under Section 14, it is essential that the procedure of Sections 13(2) and 13(4) is followed and the borrower may at times plead that he was not given opportunity of hearing as envisaged under Section 13(2) to payment of the dues within 60 days and, therefore, the action under Section 14 is illegal. The notice or opportunity of hearing, thus, is also necessary to the borrower or guarantor, as the case may be.

The Division Bench in **Kumkum Tentiwal** (supra) has further referred to the decision of the Apex Court in **Harsh Govardhan Sondagar** (supra) which was related to the right of the lessee of the secured asset to be heard in the proceeding under Section 14 of the SARFAESI Act and taken note of the observations therein that the statutory provisions attaching finality to the decision of an Authority excluding the power of any other Authority or Court, to examine such a decision will not be a bar for the High Court or the Supreme Court to exercise jurisdiction vested by the Constitution because a statutory provision cannot take away a power vested by the Constitution. It was, thus, observed in **Kumkum Tentiwal** (supra) that the Apex Court while analyzing the provisions of Section 14 has held therein that only recourse available against an order passed under Section 14 of the SARFAESI Act is under Articles 226 and 227 of the Constitution of India.

42. As regards the observance of principles of natural justice, it was observed that the Apex Court in a catena of decisions have held that principles of natural justice are engrained and have to be read into every statute even if not specifically provided for. The statute may not contain a provision for prior hearing. But what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any statutory provision or not.

43. Taking note of the various decisions of the Apex Court, it was observed therein that it is well settled that principles of natural justice are integral part of Article 14. No decision prejudicial to a party should be taken without affording an

opportunity or supplying the material which is the basis for the decision. It was, thus, concluded that Section 14 on bare perusal does not provide for any opportunity of hearing. However, the order passed under Section 14 being a coercive measure for taking possession, the officer is bound to observe the principles of natural justice while passing the order under Section 14 of the SARFAESI Act.

It was further noted in **Kumkum Tentiwal** (supra) that the Apex Court in the case of **Dharampal Satyapal Limited** (supra) has held that the Authority exercising power cannot even take a ground to the effect that no useful purpose would be served in hearing the affected parties prior to passing of the order.

44. With due regards to the Hon'ble Judges holding the Bench, we find that the decision in **Kumkum Tentiwal** (supra) is in ignorance of the scheme of the SARFAESI Act, 2002, the construction of Chapter III of the Act which provides for "Enforcement of Security Interest". It has misread the decision of the Apex Court in **Harsh Govardhan Sondagar** (supra) in holding that only recourse available against the order passed under Section 14 of the SARFAESI Act is under Articles 226 and 227 of the Constitution of India.

45. The availability of the statutory remedy to the borrower under Section 17 of the SARFAESI Act, 2002, contained in Chapter III against the order under Section 14 cannot be disputed. The Division Bench in the case of **Kumkum Tentiwal** (supra) did not consider the law propounded by the Apex Court in **Standard Chartered Bank vs. V. Noble Kumar and others** that Section 14 cannot stand independent of Section 13(4) and if a borrower has no right of hearing when the secured creditor takes possession under Section 13(4), no hearing can be demanded by him when he succeeds in resisting possession being taken over by the Authorized Officer of the secured creditor or does not on his own surrender possession and thus, compels the secured creditor to seek assistance of the CMM/DM under Section 14. The right of a borrower to approach the Tribunal in terms of Section 17, as a post possession right, recognised in **Standard Chartered Bank vs. V. Noble Kumar and others** (supra) as per the legislative scheme has been completely ignored.

46. As noted above, under the scheme of the Act, it is implicit that the observance of principles of natural justice is at the stage of Section 13(3A), i.e. before the secured creditor proceeds to initiate coercive measure against the borrower under Section 13(4) of the Act. Once the borrower is granted opportunity at the stage prior to initiation of the coercive measures after calling upon him to pay the dues of the secured creditor, no further opportunity is to be given either at the stage of Section 13(4) or Section 14.

As regards the opportunity to be granted to the borrower to object the assertion in the affidavit accompanying application moved by the secured creditor in view of the proviso to sub-section (1) of Section 14, we may consider that the information as required under the said provision is needed for transmission to the officer passing order under Section 14 of the Act, 2002, to enable him to record his satisfaction that the secured creditor has taken necessary steps before making request to seek physical possession by force and there was a refusal or inaction on the part of the borrower to handover

physical possession. The satisfaction recorded is subjective and not based on any objective criteria. No enquiry in the nature of judicial or quasi-judicial proceeding is required to be conducted by the CMM/DM who is authorized to take possession of the secured asset and forward such asset to the secured creditor, in terms of sub-section (1)(a)&(b) of Section 14.

At this stage, the observations of the Apex Court in **V. Noble Kumar** (supra) about the scope of enquiry by the Magistrate as per the second proviso to sub-section (1) of Section 14 of the Act, in Para "25' noted above are reiterated.

47. The finality attached to the order of CMM/DM in using force to take physical possession of the secured asset under sub-section (2) of Section 14 has no bearing on the right of the borrower to challenge the measures taken by the secured creditor by initiation of the proceedings under Section 13(4) of the SARFAESI Act, 2002, to take possession of the secured asset in order to recover his secured debt.

The object and purpose of SARFAESI Act, 2002 to enable the secured creditor to secure recovery by exercising powers to take possession of the securities, sell them and reduce Non-performing assets by adopting measures for recovery or reconstruction, without the intervention of the Court, has not been considered by the Division Bench in **Kumkum Tentiwal** (supra). Further Amendments brought in Section 14 by Act No. 16 of 2016 providing specific timeline for taking possession of the secured asset have not been taken note of.

The decision in **Mardia Chemicals Ltd.** (supra) about the safeguards available to borrower within the framework of SARFAESI Act to approach the Debt Recovery Tribunal under Section 17 of the Act has been ignored. The observations of the Division Bench in **Kumkum Tentiwal** (supra) that no other remedy is available against the order under Section 14 of the SARFAESI Act within the scheme of the Act is in ignorance of the statutory scheme under Chapter III for "Enforcement of Security Interest". It is implicit under the said chapter that if a party has any grievance as regards the contents of the order under Section 14, his remedy would be to voice them in the application under Section 17 before the Debt Recovery Tribunal.

48. Having noted the above, we are required to consider as to whether the Division Bench judgment in the **Kumkum Tentiwal** (supra) would operate as a binding precedent and has to be followed to maintain uniformity and consistency, which is the core of judicial discipline and in case of the contrary opinion, reference to the Larger Bench has to be made.

It is held in **State of U.P. and another vs. Synthetics and Chemicals Ltd. and another** that a decision is binding not because of its conclusion 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 a 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.

It was held in **Hyder Consulting (UK) Limited vs. Governor, State of Orissa through Chief Engineer** that a prior decision of a Court on identical facts

and law binds the Court on the same points of law in a later case. However, in exceptional circumstances, where owing to obvious inadvertence or oversight, a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, the principle of per incuriam may apply. [Reference was also made to the decision in **Fuerst Day Lawson Ltd. vs. Jindal Exports Ltd.** therein].

49. The latin expression "per incuriam" literally means "through inadvertence'. A decision can be said to be given per incuriam when the Court of record has acted in ignorance of the relevant law declared on a given subject matter.

As observed in **State of U.P. and another vs. Synthetics and Chemicals Ltd.** (supra) that:-

"40. Incuria' literally means 'carelessness'. In practice per incurium appears to mean per ignoratium.' 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 ignoratium of a statute or other binding authority'."

Reference may also be made to the observation in paragraph "42' in **A. R. Antulay vs. R. S. Nayak and another** as under:-

"42. .....xxxxxxx... "Per incuriam" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong. See Morelle v. Wakeling, [1955] 1 All E.R. 708, 718F. .....xxxxxxx....."

50. For the above discussion, the Division Bench judgment in **Kumkum Tentiwal** (supra) is held per incuriam.

The reference made to the Larger Bench by another Division Bench doubting the correctness of the said judgment in **Zainul Abdin** (supra), therefore, does not detain us in any manner.

51. At the cost of repetition, it may be noted at this juncture, that in a recent decision dated 27th July, 2022 in **M/s R.D. Jain and Co.** (supra), the Apex Court has considered that the powers of the Chief Metropolitan Magistrate under Section 14 of the SARFAESI Act is purely executionary in nature having no element of quasi-judicial functions and the power exercised by CMM/DM is a Ministerial Act. As per the dictionary meaning of "Ministerial Act", an authority performing "Ministerial Act" has no liberty to exercise of his own judgment. The enquiry under Section 14 by the CMM/DM is restricted to only two aspects; (i) whether the secured asset falls within his territorial jurisdiction, and (ii) whether notice under Section 13(2) of the Act, 2002 is given or not. No adjudication of any kind is contemplated at that stage. The legal niceties of the transaction is not to be examined by the Magistrate to examine the factual correctness of the assertions made in the affidavit, filed in accordance with the first proviso to sub-section (1) of Section 14 to record his satisfaction to pass appropriate order for taking of possession of the secured asset.

52. In view of the above discussion, it is held that the CMM/DM acting under Section 14 of the SARFAESI Act, 2002 is not required to give notice to the borrower at the stage of the decision or passing order

as no hearing can be demanded by the borrower at this stage. However, it is clarified that the order passed by such Magistrate has to be duly served upon the borrower before taking any steps for his forcible dispossession by such steps or use of force, as may be necessary in the opinion of the Magistrate, and the date fixed for such forcible action shall be duly intimated to such borrower in advance giving him sufficient time to remove his belongings, or to make alternative arrangement.

53. Lastly, for the ancillary issue raised by the learned Senior Counsel for the petitioners about the delay in passing the order under Section 14 beyond 60 days being fatal, suffice is to note the decision of the Apex Court in **C. Bright vs. District Collector and others** (supra) wherein it is held that the District Magistrate does not become *functus officio,* if he is unable to take possession within the time limit. The remedy under Section 14 of the Act is not redundant if the District Magistrate could not adhere to the timeline provided therein.

The challenge to the orders impugned by the competent Authorities passed under Section 14 of the SARFAESI Act, 2002, on the plea of violation of principles of natural justice, therefore, is liable to be turned down.

Accordingly, all the connected writ petitions are **dismissed** being devoid of merits.

(2023) 1 ILRA 270
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.01.2023

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ-C No. 23459 of 2018

B.S.N.L. & Anr. ...Petitioners

Versus

Central Govt. Industrial Tribunal Cum Labour Court, Lucknow & Anr. ...Respondents

Counsel for the Petitioners:
Rajeev Kumar Sinha

Counsel for the Respondents:
Vikas Misra, Anupriya Srivastava, Jay Prasad Yadav, Kaushlendra Yadav, Virendra Kumar Dubey

(A) Civil Law - The Industrial Disputes Act, 1947 - Section 25F - Conditions precedent to retrenchment of workmen , Section 25B - 'continuous service' ,Section 25B(2) - if a workman, during a period of 12 actual months preceding the date with regard to which calculation is given - has actually worked under the employer for 240 days then he will be deemed to be in continuous service for a period of one year - in case of short working, order of reinstatement and the back wages would not be automatic instead workman should be given monetary compensation to meet the ends of justice.(Para -23,27)

Termination of workman took place on 01.09.2001 - working considered by Tribunal (as corrected on 10.09.2018) from December 1999 to December 2000 - services upto 31.08.2001 not considered by Tribunal for calculating continuous service of workman . **(Para -28)**

HELD:-Once the alleged continuous service of the workman right upto 31.08.2001 has not been considered by the Tribunal consequently it cannot be said that the petitioners have violated the provisions of the Act 1947. Impugned award set aside. Matter remitted to Tribunal to pass a fresh order.(Para -28,29)

Petition Allowed. (E-7)

List of Cases cited:

1. D.D.O. & anr. Vs Satish Kantilal Amrelia , (2018) 12 SCC 298

2. Municipal Corp., Faridabad Vs Siri Niwas , (2004) 8 SCC 195

3. St. of Uttarakhand & ors. Vs Raj Kumar , (2019) 14 SCC 353

4. B.S.N.L. Vs Bhurumal , (2014) 7 SCC 177

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

1. Heard learned counsel for the petitioners and Shri O. P. Srivastava, learned Senior Advocate, assisted by Shri Kaushlendra Yadav, learned counsel for the respondent no. 2.

2. The instant petition has been filed challenging the judgement and award dated 16.05.2017 published on 03.04.2018, a copy of which is annexure 1 to the petition. By the said order the Central Government Industrial Tribunal cum Labour Court, Lucknow (hereinafter referred to as the learned Tribunal) in Industrial Dispute No. 25 of 2003 has held the oral termination order of the workman Shri Manjeet Singh/respondent no. 2 (hereinafter referred to as the workman) with effect from 01.09.2001 to be illegal and unjustified and he has been directed to be reinstated with effect from 01.09.2001 alongwith 50% of the backwages.

3. The case set forth by the petitioners is that a claim petition was filed before the learned Tribunal by the workman, a copy of which is annexure 2 to the petition, contending that despite he having worked continuously from 10.12.1998 to January 2000 and thereafter from February 2000 to May 2000 and from June 2000 to August 2001, his services have been dispensed with on 01.09.2001. In support of his claim the workman filed various documents including the logbooks, the working in the shape of gate passes and the documents to show running of the vehicle to prove that he had worked in the aforesaid period.

4. The claim was contested by the petitioners herein on various grounds including the ground that the workman was not an employee of the B.S.N.L. rather had been engaged through a contractor and his working was also disputed.

5. The learned Tribunal by means of the impugned award was of the view that as the workman has worked from December 1999 to November 2000 and from June 2000 to December 2000 as such he has worked for 280 days and 270 days respectively as per the logbooks, that the duties performed by the workman have been corroborated by the witnesses adduced before the learned Tribunal and that the management could not muster the courage to specifically deny the truthfulness or authenticity of the documents and consequently directed for the reinstatement of the workman with effect from 01.09.2001 alongwith 50% of the back-wages after holding the oral termination of the workman to be illegal and unjustified.

6. Being aggrieved the instant petition has been filed.

7. Learned counsel for the petitioner has primarily argued on three grounds namely:

(a) that the learned Tribunal in paragraph 21 of its award has indicated that the workman has worked from December 1999 to November 2000 and from June 2000 to December 2000 and the total

working has been indicated as 280 days and 270 days but by no stretch of imagination can the working of the aforesaid period result in two separate workings of 280 days and 270 days respectively,

(b) the learned Tribunal has directed for reinstatement of the workman without indicating the reasons which have prevailed upon the learned Tribunal for directing for reinstatement in as much as it is settled position of law that reinstatement of a workman who has worked for only a short period of time cannot be directed automatically and

(c) as per Section 25F of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act, 1947) the condition precedent to retrenchment of workmen are that no workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched while the words "continuous service' would mean the service upto the alleged termination of the workman, in this case 01.09.2001 meaning thereby that the continuous working upto 31.08.2001 was to be considered by the learned Tribunal but the learned Tribunal has only indicated about working from December 1999 till December 2000 and as such the continuous service upto 31.08.2001 has not even been considered by the learned Tribunal while passing the impugned award.

8. Elaborating the same learned counsel for the petitioner contends that so far as ground (a) is concerned the learned Tribunal had suo motu made correction in the award vide order dated 10.09.2018 which has been brought on record as annexure CA 1 to the counter affidavit filed by the workman whereby the period of the workman now stands corrected to read as working from December 1999 to November 2000 and from June 2000 to December 2000 which would also not correctly render the recording of two separate workings of 280 days and 270 days respectively and as such it is apparent that the said number of working days have erroneously been recorded by the learned Tribunal which reflects patent non application of mind on the part of the learned Tribunal.

9. So far as ground (b) is concerned, reliance has been placed on the judgement of Hon'ble the Apex Court in the case of **District Development Officer and another vs Satish Kantilal Amrelia** reported in **(2018) 12 SCC 298** to argue that the Apex Court has categorically laid down that short working of a workman would not result into an automatic reinstatement order rather a workman can always be compensated in terms of money in case his retrenchment or termination has been found to be illegal.

10. As regards ground (c) reliance has been placed on the judgment of Hon'ble the Apex Court in the case of **Municipal Corporation, Faridabad vs Siri Niwas** reported in **(2004) 8 SCC 195** to hold that the Apex Court has held that the words "continuous service' are contained in Section 25B of the Act 1947 and that a workman has to show his continuous working during a period of 12 calendar months **preceding** the date with reference to which calculation is to be actually made.

11. On the basis of the aforesaid three grounds it is contended that the learned Tribunal has patently erred in law in passing the impugned award and as such the impugned award merits to be set aside.

12. On the other hand, Shri O. P. Srivastava, learned Senior Advocate,

appearing for the respondent no. 1 argues that before the learned Tribunal various documents had been placed by the workman including the logbooks, the working in the shape of gate passes and documents indicating the running of the vehicle which incidentally were never denied by the management. He argues that this aspect of the matter has been considered by the learned Tribunal in paragraph 21 of its award wherein the learned Tribunal has categorically held that the concerned officers of the management have miserably failed to discharge their duties and could not muster courage to specifically deny the truthfulness or authenticity of the documents relied upon by the workman.

13. It is also argued that once all the documents were available before the learned Tribunal and the documents were never denied by the management, as found specifically recorded in paragraph 20 of the award of the learned Tribunal, as such, even if the learned Tribunal has committed an error in determining the number of days of working of the workman the same can not and will not resile from the fact that the workman has worked from December 1998 to August 2001 and as such the presumption is of he having rendered 240 days of service right upto his illegal termination on 01.09.2001 which would entitle the workman to being reinstated in service.

14. So far as the erroneous working having been indicated by the learned Tribunal in paragraph 21 of its award, the argument of learned Senior Advocate is that before the learned Tribunal, reliance had been placed on various documents to indicate the continuous working of the workman from December 1998 till August 2001 and as such even in case the learned Tribunal has committed an error while indicating the working days of the workman the same cannot be held against him.

15. As regards of there being no automatic reinstatement on account of the short working, learned Senior Advocate has placed reliance on the judgement of the Apex Court in the case of **State of Uttarakhand and others vs Raj Kumar** reported in **(2019) 14 SCC 353** to contend that the Apex Court while considering its earlier judgement in the case of **Bharat Sanchar Nigam Limited vs Bhurumal** reported in **(2014) 7 SCC 177** has categorically laid down a caveat to there being no automatic reinstatement which would not be applicable where there could be cases where daily wager is found to have been illegally terminated on the ground of unfair labour practice or in violation of principles of last come first go vis a vis the juniors to him being retained in service or certain juniors having been regularised and in such circumstances, the workman can be reinstated despite his short working.

16. Placing reliance on the averments contained in the counter affidavit which has been filed in the instant petition it is contended that various juniors of the workman have been regularised in service and as such there is no error in learned Tribunal having directed for reinstatement of the workman.

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

18. From the arguments as raised by learned counsel for the contesting parties and perusal of record it emerges that the

respondent no. 2 workman filed an application before the learned Tribunal contending that he has been illegally terminated from service on 01.09.2001. He claimed benefit of the provisions of Act 1947. Further he filed various documents before the learned Tribunal including logbooks, his working in the shape of gate passes and various other documents to show that he was driving a vehicle on behalf of the petitioners. He claimed continuous working from 10.12.1998 till the alleged illegal termination on 01.09.2001. The petitioners contested the claim and denied that there was continuous working of the workman or for that matter the workman was an employee of the petitioners rather they contended that he had been engaged through a contractor.

19. The learned Tribunal after considering the documents on record and also considering that there was no rebuttal on the part of the petitioners of the said documents, was of the view that as the workman has worked from December 1999 to December 2000 and from June 2000 to December 2000 as such his workings is 280 days and 270 days and thus would be entitled for the benefit of the provisions of the Act 1947 in as much as the working was more than 240 days in a year and thus the oral termination on 01.09.2001 cannot be said to be legal and justified and thus by means of the impugned award directed for reinstatement of the workman with effect from 01.09.2001 alongwith 50% of the back wages.

20. Challenging the award the first ground which has been taken by the petitioners is that the learned Tribunal after considering the working of the workman including the logbooks and other documents was of the view that the workman has worked from December 1999 to November 2000 and from June 2000 to December 2000 and his working has been indicated to be 280 days and 270 days i.e. more than 240 days but even if on the face of the working, as recorded by the learned Tribunal, the period from December 1999 to November 2000 and from June 2000 to December 2000 is to be counted at most it may amount to 280 days but by no stretch of imagination would the other period of working i.e. 270 days emerge and consequently there has been patent non application of mind on the part of the learned Tribunal.

21. While examining the said ground what the Court finds is that learned Tribunal has specifically recorded the working of the workman from December 1999 to November 2000 and from June 2000 to December 2000 and the total working has been indicated as 280 and 270 days. The award has been corrected suo-motu by the learned Tribunal vide its order dated 10.09.2018 whereby the working now reads as December 1999 to November 2000 and from June 2000 to December 2000. Even if the working, as corrected by the learned Tribunal through the order dated 10.09.2018 is seen at its face value by no stretch of imagination can it be said that the same would result in separate days of working i.e. 280 days and 270 days as has been recorded by the learned Tribunal as there is clear overlapping of the period of working / double counting from June 2000 to November 2000. Needless to mention that the said working has been recorded by the learned Tribunal on the basis of the documents as were before it. Considering there is a fallacy in recording of the said dates and clear double counting as such the first ground taken by the petitioner while challenging the impugned

awarded finds favour with this Court and this Court records that there being patent non application of mind on the part of the learned Tribunal while recording the number of days of working by the workman.

22. So far as the second ground taken by the petitioners is concerned i.e. the learned Tribunal having directed for reinstatement of the workman without indicating the reasons thereto, reliance has been placed upon the judgement of Hon'ble the Apex Court in the case of **Satish Kantilal Amrelia (supra).** The Apex Court in the said judgement has held as under :

"12. Having gone through the entire record of the case and further keeping in view the nature of factual controversy, findings of the Labour Court, the manner in which the respondent fought this litigation on two fronts simultaneously, namely, one in Civil Court and the other in Labour Court in challenging his termination order and seeking regularization in service, which resulted in passing the two conflicting orders - one in respondent's favour (Labour Court) and the other against him (Civil Court) and lastly, it being an admitted fact that the respondent was a daily wager during his short tenure, which lasted hardly two and half years approximately and coupled with the fact that 25 years has since been passed from the date of his alleged termination, we are of the considered opinion that the law laid down by this Court in the case of Bharat Sanchar Nigam Limited vs Bhurumal [(2014) 7 SCC 177] would aptly apply to the facts of this case and we prefer to apply the same for disposal of these appeals.

13. It is apposite to reproduce what this Court has held in the case of Bharat Sanchar Nigam Limited (supra):

"33. It is clear from the reading of the aforesaid judgments that the ordinary principle of grant of reinstatement with full back wages, when the termination is found to be illegal is not applied mechanically in all cases. While that may be a position where services of a regular/permanent workman are terminated illegally and/or mala fide and/or by way of victimisation, unfair labour practice, etc. However, when it comes to the case of termination of a daily-wage worker and where the termination is found illegal because of a procedural defect, namely, in violation of Section 25-F of the Industrial Disputes Act, this Court is consistent in taking the view that in such cases reinstatement with back wages is not automatic and instead the workman should be given monetary compensation which will meet the ends of justice. Rationale for shifting in this direction is obvious.

34. The reasons for denying the relief of reinstatement in such cases are obvious. It is trite law that when the termination is found to be illegal because of non-payment of retrenchment compensation and notice pay as mandatorily required under Section 25-F of the Industrial Disputes Act, even after reinstatement, it is always open to the management to terminate the services of that employee by paying him the retrenchment compensation. Since such a workman was working on daily-wage basis and even after he is reinstated, he has no right to seek regularisation [see State of Karnataka v. Umadevi (3)17]. Thus when he cannot claim regularisation and he has no right to continue even as a daily-wage worker, no useful purpose is going to be served in reinstating such a workman and he can be given monetary compensation by the Court itself inasmuch as if he is terminated again after reinstatement, he

would receive monetary compensation only in the form of retrenchment compensation and notice pay. In such a situation, giving the relief of reinstatement, that too after a long gap, would not serve any purpose.

35. We would, however, like to add a caveat here. There may be cases where termination of a daily-wage worker is found to be illegal on the ground that it was resorted to as unfair labour practice or in violation of the principle of last come first go viz. while retrenching such a worker daily wage juniors to him were retained. There may also be a situation that persons junior to him were regularised under some policy but the workman concerned terminated. In such circumstances, the terminated worker should not be denied reinstatement unless there are some other weighty reasons for adopting the course of grant of compensation instead of reinstatement. In such cases, reinstatement should be the rule and only in exceptional cases for the reasons stated to be in writing, such a relief can be denied."

23. From perusal of the aforesaid judgement it emerges that the Apex Court has categorically held that where there is a short working of the workman (in the case of Satish Kantilal Amreila the working was 2 and 1/2 years) then the law laid down by the Apex Court in the case of Bhurumal (supra) would be applicable i.e. in case of short working, order of reinstatement and the back wages would not be automatic instead workman should be given monetary compensation to meet the ends of justice.

24. Here the Court may hasten to add that the learned Senior Advocate for the respondents has placed reliance on the judgement of the Apex Court in the case of **Rajkumar (supra)** which was passed considering the earlier judgement of the Apex Court in the case of **Bhurumal (supra)** to argue that as juniors to the workman have been regularised in services as such there is no error in the learned Tribunal having directed for reinstatement of the workman.

25. The said argument of learned Senior Advocate is attractive on the face of it but what the Court finds is that learned Tribunal while directing for reinstatement of the workman has not considered that the alleged juniors of the workman have been regularised in service or retained in the service rather the learned Tribunal, upon finding the alleged termination to be illegal, has directed for automatic reinstatement of the workman. Even if considering the alleged working of the workman, as per his case before the learned Tribunal of he having worked continuously from 10.02.1998 to August 2001 the same would amount to alleged working of 2 years and 8 months and consequently the law laid down in the case of **Satish Kantilal Amrelia (supra)** would be squarely applicable in as much as there would not be automatic reinstatement on the short working of the workman. Thus this ground taken by the petitioners also finds favour with the Court.

26. As regards the third ground taken by the petitioners for challenging the award of the learned Tribunal that there has been no continuous service of the workman prior to his alleged termination, the Court would now consider the judgment of Hon'ble the Apex Court in the case of **Siri Niwas (supra)** over which reliance has been placed by the learned counsel for the petitioners. In the case of **Siri Niwas (supra)** the Apex Court has held as under:

"For the said purpose it is necessary to notice the definition of

'Continuous Service' as contained in Section 25-B of the Act. In terms of sub-Section (2) of Section 25-B that if a workman during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer 240 days within a period of one year, he will be deemed to be in continuous service. By reason of the said provision, thus, a legal fiction is created. The retrenchment of the respondent took place on 17.5.1995. For the purpose of calculating as to whether he had worked for a period of 240 days within one year or not, it was, therefore, necessary for the Tribunal to arrive at a finding of fact that during the period between 5.8.1994 to 16.5.1995 he had worked for a period of more than 240 days. As noticed hereinbefore, the burden of proof was on the workman. From the Award it does not appear that the workman adduced any evidence whatsoever in support of his contention that he complied with the requirements of Section 25-B of the Industrial Disputes Act. Apart from examining himself in support of his contention he did not produce or call for any document from the office of the Appellant herein including the muster rolls. It is improbable that a person working in a Local Authority would not be in possession of any documentary evidence to support his claim before the Tribunal. Apart from muster rolls he could have shown the terms and conditions of his offer of appointment and the remuneration received by him for working during the aforementioned period. He even did not examine any other witness in support of his case."

27. From a perusal of the judgement of **Siri Niwas (supra)** it emerges that Hon'ble the Apex Court while considering the definition of the words "continuous service" has considered Section 25B of the Act 1947 and has held that in terms of sub Section (2) of Section 25B of the Act 1947 if a workman, during a period of 12 actual months **preceding** the date with regard to which calculation is given, has actually worked under the employer for 240 days then he will be deemed to be in continuous service for a period of one year.

28. In this case the alleged termination of the workman took place on 01.09.2001 while his working has been considered by the learned Tribunal (as corrected on 10.09.2018) from December 1999 to December 2000 meaning thereby that the services upto 31.08.2001 have not been considered by the learned Tribunal for calculating the continuous service of the workman. Thus once the alleged **continuous service** of the workman right upto 31.08.2001 has not been considered by the learned Tribunal consequently it cannot be said that the petitioners have violated the provisions of the Act 1947. Thus this ground also finds favour of the Court.

29. Keeping in view the aforesaid discussion, the writ petition is **allowed**. The impugned award dated 16.05.2017 published on 03.04.2018, a copy of which is annexure 1 to the petition, is set aside. The matter is remitted to the learned Tribunal to pass a fresh order on merits. As the matter is pending since long as such let an order be passed within a period of six months from the date of receipt of certified copy of this order after hearing all the parties concerned.

(2023) 1 ILRA 277
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2022

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE AJIT SINGH, J.

Writ-C No. 29605 of 2022

Basoo Yadav ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ramesh Chandra Yadav, Sri Ram Krishna Mishra

Counsel for the Respondents:
C.S.C., A.S.G.I., Sri Narendra Singh

(A) Civil law - Issuance of passport - The Code of Criminal Procedure, 1973 - Section 155(1) - Information as to non-cognizable cases and investigation of such cases , Section 468 - Bar to taking cognizance after lapse of the period of limitation , The Passports Act, 1967 - Section 6 - Refusal of passports, travel documents. etc. , Section 22 - Power to exempt.

Online application form for issuance of passport - rejected on basis of two reports of non-cognizable cases – view of Director General of Police - reports with regard to the non-cognizable cases could not be made the basis for rejecting an application for issuance of passport if they had not been investigated into - no appeal provided against order of rejection - hence petition.**(Para - 1, 2, 3, 14)**

HELD:-No non-cognizable report which was registered could be taken into cognizance if no investigation was ordered by the concerned Magistrate. Even during the pendency of any criminal case, passport could be issued/renewed as per the Government Order dated 25.8.1993 if the Court passes orders for that purpose. Direction issued **.(Para - 14)**

Petition Allowed. (E-7)

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

1. The instant writ petition has been filed for the issuance of a writ of mandamus directing the respondent no.2 to issue a passport in favour of the petitioner. A further prayer has been made that the respondent no.3 i.e. the Passport Sewa Kendra, Varanasi may be directed to appropriately take action upon the application which the petitioner had filed for the issuance of his passport.

2. In the instant case, the petitioner on 28.6.2022 had filled-up an online application form for the issuance of a passport and he was given an appointment for appearing before the passport office on 5.8.2022 at 11.30 AM. When the petitioner reached on 5.8.2022 before the passport office, he was informed that there was a police report against the petitioner which stated that there were reports with regard to non-cognizable cases being NCR No.111/2012 and NCR No.114/2018 and therefore, the passport could not be issued to him.

3. Learned counsel for the petitioner states that thereafter the petitioner went back to district Azamgarh and filed an application on 11.8.2022 praying that the Court i.e. the Court of Additional Chief Judicial Magistrate may call for a report from police station Nijamabad, District Azamgarh with regard to the two NCRs being NCR No.111/2012 and NCR No.114/2018. The Court on the very same day passed an order directing the Station House Officer, Police Station, Nijamabad to submit a report with regard to the petitioner's application. On 1.9.2022, the Station House Officer submitted a report wherein it was mentioned that there was no order of the Court for investigating into non-cognizable cases which were registered against the petitioner as NCR No.111/2012 and NCR No.114/2018. Learned counsel states that since the petitioner's application for issuing a passport had already been rejected and there is no appeal provided against the order of rejection, the petitioner has filed the instant writ petition.

4. When the case was being argued as a fresh case, learned counsel for the petitioner had argued that as per the provisions of the Code of Criminal Procedure, 1973 (hereinafter referred to as the "Cr.P.C."), if there was no order of any Magistrate for investigation under section 155(1) Cr.P.C. then no police officer could investigate a non-cognizable case.

5. For convenience, section 155 Cr.P.C. is being reproduced here as under :-

"155. Information as to non-cognizable cases and investigation of such cases

.--(1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate.

(2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

(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."

6. Learned counsel for the petitioner had also argued that normally non-cognizable cases had punishments which were ranging from one year to seven years and he submitted that as per section 468 Cr.P.C., if cognizance of the cases could not be taken after a lapse of limitation, then the reports of the non-cognizable cases were worthless documents. Since, learned counsel for the petitioner has relied upon section 468 Cr.P.C., the same is being reproduced here as under :

"468. Bar to taking cognizance after lapse of the period of limitation

.--(1) Except as otherwise provided elsewhere in this Code, no Court, shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.

(2) The period of limitation shall be--

(a) six months, if the offence is punishable with fine only;

(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;

(c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

(3) For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment."

7. Learned counsel for the petitioner further stated that when there was no investigation ordered by the Magistrate, as was clear from the report of the Station House Officer dated 1.9.2022, then the petitioner also had no knowledge about the pendency of the case. He, therefore, submits that while he was filling the application form then also he could not

have mentioned about the NCR No.111/2012 and NCR No.114/2018.

8. When the case was argued as a fresh case and the Court was of the view that the NCRs could not be taken cognizance of when the Magistrate had not ordered for any investigation, a direction was issued to the Director General of Police to send instructions. The orders dated 19.11.2022 and 28.11.2022 are being reproduced here as under :

Order dated 19.11.2022

"Learned counsel for the petitioner states that the Police had sent a report on 01.09.2022 with regard to the fact that there were two NCRs being NCR No.111 of 2012 and NCR No.114 of 2018 where no order from the Court was passed for investigation and, therefore, no investigation had taken place.

Learned counsel for the petitioner states that as per the Cr.P.C. if there was no investigation on the orders of the Magistrate for an NCR then definitely there was no case pending against the petitioner and, therefore, such a report should not have been sent.

The Director General of Police, Uttar Pradesh may send instructions in the matter. While getting the instructions he may inform the Court as to whether it was necessary for sending a report with regard to such NCRs, in which no action had been taken by the Magistrate for investigation.

Place this case on 28.11.2022 as fresh at 10.00 am."

Order dated 28.11.2022

"Instructions filed today be kept on record.

The Court had asked for instructions specifying as to whether it was necessary for sending a report with regard to an N.C.R. in which no action had been taken by the Magistrate for investigation when the period for the punishment had lapsed.

The Director General of Police was required to send the instructions but some Superintendent of Police has sent them. The Court also was not satisfied with the averments made in paragraph no. 7 of the instructions.

Place this petition as fresh on 30.11.2022 at 10:00am.

On the next date, the Director General of Police may send instructions. He would clearly specify as to whether when the police report is given for the purposes of the report asked by the passport authorities, could a report be submitted if the N.C.R. filed against an individual was for an offence in which no action could be taken as per the provisions of Section 468 of Cr.P.C.

This order was passed in the presence of Sri Narendra Singh learned counsel for the Union of India."

9. On 30.11.2022 learned Standing Counsel Sri Manvendra Dixit produced the instructions which he had received from the Director General of Police. The same is being reproduced here as under :-

"मुख्यालय पुलिस महानिदेशक उत्तर प्रदेश
विधि प्रकोष्ठ, प्रथम तल, टावर –2, पुलिस मुख्यालय, गोमती नगर विस्तार , लखनऊ– 226002
पत्रांकःडीजी–दस–वि0प्र0–रिट–651 / 2022
दिनांक : नवम्बर 29, 2022

सेवा में,
मुख्य स्थायी अधिवक्ता,
मा0 उच्च न्यायालय इलाहाबाद।

विषयः सिविल रिट याचिका संख्या– 29605 /2022 बासु यादव बनाम भारत संघ व 4 अन्य में मा0 उच्च न्यायालय इलाहाबाद द्वारा पारित आदेश दिनांक – 28.11.2022 के अनुपालन में Instruction उपलब्ध कराये जाने विषयक।

महोदय,

कृपया उपरोक्त विषयक श्री मानवेन्द्र दीक्षित, स्थायी अधिवक्त, मा0 उच्च न्यायालय इलाहाबाद के पत्र दिनांकित 28.11.2022 का संदर्भ ग्रहण करें, जिसके द्वारा मा0 उच्च न्यायालय द्वारा पारित आदेश दिनांकित 19.11.2022 तथा 28.11.2022 की छायाप्रति संलग्न करते हुए मा0 न्यायालय द्वारा दिये गये निर्देशों के अनुपालन में Instruction उपलब्ध कराये जाने की अपेक्षा की गयी हैं।

याची बासु यादव पुत्र जाबिर यादव के पासपोर्ट आवेदन प्रार्थना पत्र पर आजमगढ़ पुलिस द्वारा प्रस्तुत रिपोर्ट में प्रश्न संख्या–2 में उत्तर में NCR संख्या–111/2012 धारा–323, 504, 506 भादवि तथा NCR संख्या– 114/2018 धारा– 323, 504 भादवि अंकित करते हुए पासपोर्ट जारी न करने की संस्तुति की गयी जबकि याची के विरूद्ध पंजीकृत NCR की विवेचना नहीं की गयी थी।

पासपोर्ट के कार्यालय से प्राप्त पुलिस वेरीफिकेशन रिपार्ट में स्पष्ट रूप से यह प्रश्न पूछा गया है कि–

Is the applicant facing any criminal charges in any Court? (If 'YES', please provide specific details of criminal case)

उपरोक्त पश्न के उत्तर में याची के विरूद्ध पंजीकृत ऐसी NCR का उल्लेख करते हुये, जिनकी विवेचना नहीं की गयी है, पासपोर्ट जारी न किये जाने की संस्तुति नहीं की जा सकती है।

कृपया उपरोक्त तथ्यों से मा0 न्यायालय को अवगत कराते हये प्रकरण का निस्तारण कराने का कष्ट करें।

(देवेन्द्र सिंह चौहान)
पुलिस महानिदेशक
उत्तर प्रदेश"

10. The Director General of Police very categorically stated that such reports of non-cognizable cases which were not investigated into could not be the reason for refusing a passport to the petitioner. Learned Standing Counsel submitted that the reasons for the rejection of an application for the issuing of a passport had been enumerated in section 6 of the Passports Act, 1967 (hereinafter referred to as the "Passports Act").

11. For convenience, section 6 of the Passports Act is being reproduced here as under :-

"6. Refusal of passports, travel documents. etc.

-- (1) Subject to the other provisions of this Act, the passport authority shall refuse to make an endorsement for visiting any foreign country under clause (b) or clause (c) of sub-section (2) of Section 5 on any one or more of the following grounds, and on no other ground, namely.--

(a) that the applicant may, or is likely to, engage in such country in activities prejudicial to the sovereignty and integrity of India;

(b) that the presence of the applicant in such country may, or is likely to, be detrimental to the security of India;

(c) that the presence of the applicant in such country may, or is likely to, prejudice the friendly relations of India with that or any other country;

(d) that in the opinion of the Central Government the presence of the applicant in such country is not in the public interest.

(2) Subject to the other provisions of this Act, the passport authority shall refuse to issue a passport or travel document for visiting any foreign country under clause (c) of sub-section (2) of Section 5 on any one or more of the following grounds, and on no other ground, namely:--

(a) that the applicant is not a citizen of India;

(b) that the applicant may, or is likely to, engage outside India in activities prejudicial to the sovereignty and integrity of India;

(c) that the departure of the applicant from India may, or is likely to, be detrimental to the security of India;

(d) that the presence of the applicant outside India may, or is likely to, prejudice the friendly relations of India with any foreign country;

(e) that the applicant has, at any time during the period of five years immediately preceding the date of his application, been convicted by a court in India for any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than two years;

(f) that proceedings in respect of an offence alleged to have been committed by the applicant are pending before a criminal court in India;

(g) that a warrant or summons for the appearance, or a warrant for the arrest, of the applicant has been issued by a court under any law for the time being in force or that an order prohibiting the departure from India of the applicant has been made by any such court;

(h) that the applicant has been repatriated and has not reimbursed the expenditure incurred in connection with such repatriation;

(i) that in the opinion of the Central Government the issue of a passport or travel document to the applicant will not be in the public interest."

12. Learned Standing Counsel further submitted that with regard to pendency of criminal cases, section 6(2)(e) and (f) of the Passports Act were relevant. Learned Standing Counsel submitted that the issuance of a passport could be refused under section 6(2)(e) of the Passports Act if in the five years immediately preceding the date of the application, the applicant had been convicted by a Court in India for any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than two years. Learned Standing Counsel further relying upon section 6(2)(f) of the Passports Act stated that if proceedings in respect of an offence alleged to have been committed by the applicant are pending before a Criminal Court in India then also the passport application could be rejected. However, learned Standing Counsel submitted that as per the notification gazetted on 25.8.1993 which was issued under section 22 of the Passports Act by the Government of India, Ministry of External Affairs, passports could be issued in certain circumstances even while a criminal case was pending if there were orders of the Court. Since, learned Standing Counsel brought to the notice of the Court the Government Order dated 25.8.1993, the same is being reproduced here as under :-

"GOVERNMENT OF INDIA

MINISTRY OF EXTERNAL AFFAIRS

NOTIFICATION

New Delhi, the 25th August, 1993

G.S.R. 570(E). - In exercise of the powers conferred by clause (a) of section 22 of the Passports Act, 1967 (15 of 1967) and in supersession of the notification of the Government of India in the Ministry of External Affairs no. G.S.R.298(E), dated the 14th April, 1976, the Central Government, being of the opinion that it is necessary in public interest to do so, hereby exempts citizens of India against whom proceedings in respect of an offence alleged to have been committed by them are pending before a criminal court in India and who produce orders from the court concerned permitting them to depart from India, from the operation of the provisions of Clause (f) of sub-section (2) of Section 6 of the said Act,

subject to the following conditions, namely:-

(a) the passport to the issued to every such citizen shall be issued--

(i) for the period specified in order of the court referred to above, if the court specifies a period for which the passport has to be issued; or

(ii) if no period either for the issue of the passport or for the travel abroad is specified in such order, the passport shall be issued for a period one year,

(iii) if such order gives permission to travel abroad for a period less than one year, but does not specify the period validity of the passport, the passport shall be issued for one year; or

(iv) if such order gives permission to travel abroad for a period exceeding one year, and does not specify the validity of the passport, then the passport shall be issued for the period of travel abroad specified in the order.

(b) any passport issued in terms of a(ii) and a(iii) above can be further renewed for one year at a time, provided the applicant has not travelled abroad for the period sanctioned by the court; and provided further that, in the meantime, the order of the court is not cancelled or modified;

(c) any passport issued in terms of a(i) above can be further renewed only on the basis of a fresh court order specifying a further period of validity of the passport or specifying a period for travel abroad;

(d) the said citizen shall give an undertaking in writing to the passport issuing authority that he shall, if required by the court concerned, appear before it at any time during the continuance in force of the passport so issued.

[No.VI/401/37/79]

L.K. PONAPPA, Jt. Secy. (CPV)"

13. In this connection, the provisions of Section 22 of the Passports Act are also relevant which read as under:-

"22. Power to exempt.--Where the Central Government is of the opinion that it is necessary or expedient in the public interest so to do, it may, by notification in the Official Gazette and subject to such conditions, if any, as it may specify in the notification,--

(a) exempt any person or class of persons from the operation of all or any of the provisions of this Act or the rules made thereunder; and

(b) as often as may be, cancel any such notification and again subject, by a like notification, the person or class of persons to the operation of such provisions."

14. Having heard learned counsel for the petitioner and learned Standing Counsel and after having gone through the instructions which have been sent by the Director General of Police, the Court is definitely of the view that no non-cognizable report which was registered could be taken into cognizance if no investigation was ordered by the concerned Magistrate. Even though in the instant case, whether the passport can be refused on the basis of the pendency of the criminal case is not the question involved, we are of the view that even during the pendency of any criminal case, passport could be issued/renewed as per the Government Order dated 25.8.1993 if the Court passes orders for that purpose. In the instant case, we do find that the application of the petitioner was rejected on the basis of the two reports of non-cognizable cases namely

NCR No.111/2012 and NCR No.114/2018. The Director General of Police has also given his view that the reports with regard to the non-cognizable cases could not be made the basis for rejecting an application for issuance of passport if they had not been investigated into.

15. Under such circumstances, we issue the following directions :-

(1) The passport form of the petitioner for the issuance of a passport be considered within a period of two weeks from the date of presentation of a certified copy of this order before the respondent no.2-Regional Passport Officer, Regional Passport Office, Vipin Khand, Gomti Nagar, Lucknow;

(2) Since we are finding that in quite a few cases the reports of non-cognizable cases in which the concerned Magistrate had not even ordered for investigation were being taken into account for rejection of passport, we issue a direction to the Director General of Police to instruct his officers to give a report with regard to the pendency of reports in non-cognizable cases after appropriate and proper application of mind;

(3) Outright the passport applications be not rejected under section 6(2)(f) of the Passports Act if orders of the Court, where the criminal case is pending, have been passed as per the Government Order dated 25.8.1993. The Director General of Police to issue notification in this regard also.

16. With these observations, the writ petition is, accordingly, allowed.

(2023) 1 ILRA 284
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.11.2022

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Writ-C No. 32884 of 2022

Lalji Yadav ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shri Ram Pandey

Counsel for the Respondents:
A.S.G.I., Sri Anand Tiwari, C.S.C.

(A) Writ - Issuance of mandamus - mandamus may be issued to compel the authorities to do something but it must be shown that there is a statute which imposes a legal duty and aggrieved party has a legal right under the statute to enforce legal rights - a right not exercised for a long time becomes non-existent - mere representation does not extend the period of limitation - aggrieved person has to approach the Court expeditiously and within reasonable time.(Para - 11,16,17)

Land of petitioner acquired - received full compensation - provided under Section 23 of Land Acquisition Act – controversy - to provide employment - in lieu of land acquired by respondent-Corporation or by other authorities - various representations made - no action taken on representations - no statute shown - for which a mandamus has been sought - hence present writ petition. **(Para - 4,7,11)**

HELD:-Petitioner not placed any statutes before court on basis of which an employment could be given to him in lieu of the land, which was taken by the Corporation in the year 1985. No relief could be granted to petitioner. Laches on part of petitioner for approaching Court. **(Para -15,16,18)**

Petition Dismissed. (E-7)

List of Cases cited:

1. Dau Dayal Vs A.D.A & ors. , Writ Petition No. 27690 of 1991

2. Butu Prasad Kumbhar & ors. Vs S.A.I.L. & Ors. , JT 1995(3) SC 428

3. B.E.G.F.C.S. Ltd. Vs Sipahi Singh & ors. , AIR 1977 SC 2149

4. Ravindra Kumar Vs D.M. , Agra , 2005 (2) AWC 1650.

5. Baljeet Singh (Dead) through L.R. & ors. Vs St. of U.P. & ors. , (2019) 15 SCC 33

6. Surjeet Singh Sahni Vs St. of U.P. & ors. , SLP (C) No.3008 of 2022

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard learned counsel for the petitioner. Office of the Additional Solicitor General of India has accepted notice on behalf of respondent no.1 and Shri Anand Tiwari, learned counsel has accepted notice on behalf of respondents no.2 to 4.

2. The petitioner has preferred present writ petition inter-alia with the following prayers :-

"(i) Issue a writ order or direction in the nature of certiorari quashing the impugned order dated 06.02.1989 issued by Respondent No. 4

(ii) Issue a writ order or direction in the nature of mandamus directing the Respondent Nos. 2, 3 and 4 to consider the grievances of the Petitioner and passed an appropriate order upon the letters pending before Respondents within stipulated period to meet the end of Justice."

3. The facts in brief as contained in the writ petition are that the land of the petitioner was acquired by the respondent-Indian Oil Corporation in the year 1985. Thereafter, an application was submitted by the petitioner seeking his appointment with the respondent-Corporation on the ground that his land has been acquired hence apart from compensation, which was paid in lieu of the land an appointment should also be given by the corporation. The claim for appointment of the petitioner was rejected by the respondent-Corporation because he was over age. Subsequently a meeting was held in the area office of the respondent-Indian Oil Corporation at Allahabad on 18.01.1989.Thereafter a letter dated February 06, 1989 was written by the Deputy General Manager (Personal), Indian Oil Corporation Ltd. New Delhi to the Employment Officer, Employment Exchange, Varanasi, U.P. In the said letter name of the petitioner was at item number-1. The letter reads as follows :-

"Kindly refer the meeting our Area Manager, Allahabad, Shri P.N.Shukla had with you on 18/1/89 on the subjects :

1/ We would like you to confirm that shri Lalji Yadav has not been sponsored because he is over age. His date of birth being 20.1.60.

2/ Although the name of Shri Ashok Kumar S/o Shri - Matabhik has appeared twice in the list of land- losers (Sl.Nos. 31-32 & 167-168), but his name has not been sponsored by you so far. You may take necessary action for sponsoring the name of Shri Ashok Kumar.

3/ Whereas you have sponsored the name of shri Ram Ashrey s/o Shri Jagar Dev who is 8th pass. But, you have not sponsored the name of Shri Shyan Narain s/o Shri Sarvesh who is also 8th pass. You may please sponsor the name of Shri Shyam Narain also.

4/ You have sponsored the name of one shri Rajinder Prasad s/o sh

Tribhuvan whereas as per our list of landlosers, the candidate sponsored by the land-loser is Sh. Rajesh Kumar s/o sh Tribhuvan, and not sh. Rajinder Kumar. You may please clarify this.

You may please take necessary action on items mentioned at Sl. Nos. 1 to 4 at the earliest so as to enable us to proceed further on the matter."

4. It is argued that after the aforesaid letter was written no action was taken either by the Employment Exchange Officer or by the Officer of Indian Oil Corporation Ltd. It is stated in paragraph 12 of the writ petition that petitioner is continuously approach the respondents no.3 and 4 and thereafter, various representations were made by him but no action has been taken in the matter. Since no action has been taken on the representations made by the petitioner hence present writ petition.

5. On the other hand it is argued by Shri Anand Tiwari, learned counsel for the respondent-corporation that the land of the petitioner was acquired in the year 1985 but nothing has been stated in the entire writ petition that any assurance was given by the corporation to the petitioner to provide employment. It is further argued that the petitioner was sleeping over his rights from last more than 37 years hence apart from merits of the case, the writ petition is liable to be dismissed on the ground of laches.

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

7. After land of the petitioner was acquired, he received full compensation as provided under Section 23 of the Land Acquisition Act, which means an amount equal to full market value of the land with interest as well as solatium under sub section (2) of Section 23 of the Land Acquisition Act was paid to him. Time and again controversy to provide employment in lieu of the land acquired by the respondent-Corporation or by other authorities were came up before this Court from time to time.

8. It is well known that there is already surplus staff in most Government Departments and Public Sector Undertakings, and further jobs cannot be given in this manner as that would only be putting a greater burden on the tax payers, and there would be violation of Article 16 of the Constitution.

9. In ***Writ Petition No. 27690 of 1991, Dau Dayal v. Agra Development Authority and others,*** decided on 23.3.1995 the then Hon'ble G.P. Mathur, J. held that as there is no provision for granting a job in addition to the compensation provided for in Section 23 of the Land Acquisition Act, no such job can be granted.

10. In the case of ***Butu Prasad Kumbhar and Ors. v. Steel Authority of India Ltd. and others, JT 1995(3) SC 428*** it was held that there is no requirement under Article 21 of the Constitution to provide employment to a member of the family displaced by the acquisition of land. In Director, Mandi Pahshad v. Sohan Lal, 2003 ALJ 540, a Division Bench of this Court held that when the petitioner has received compensation under the Land Acquisition Act he cannot claim appointment in addition.

11. It is also settled law that a mandamus may be issued to compel the authorities to do something but it must be

shown that there is a statute which imposes a legal duty and aggrieved party has a legal right under the statute to enforce legal rights. In so far as present case is concerned, no statute has been shown by the counsel for the petitioner for which a mandamus has been sought for by him. In this connection law is well settled by the Hon'ble Apex Court in paragraph 21 in the case of ***Bihar Eastern Gangetic Fishermen Co-opera- tive Society Ltd. v. Sipahi Singh and others, AIR 1977 SC 2149***. The paragraph 21 is reproduced hereinbelow :-

"21. In order that mandamus may be issued to compel the authorities to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance."

12. In so far as the present case is concerned, no statutory provisions has been placed by the counsel for the petitioner requiring a job to be given to one member of the family of the person whose land has been acquired.

13. Similar controversy has also came up before Full Bench of this Court in the case of ***Ravindra Kumar v. District Magistrate, Agra*** reported in ***2005 (2) AWC 1650***. In the aforesaid case following questions were placed before the Full Bench namely:-

"(1) Whether Government Orders/Circulars providing employment to one member of a family whose land has been acquired, (over and above the compensation awarded under law) is valid or not ?

(2) Whether the acquiring bodies for whose benefit the land is acquired are bound by these Government Orders/Circular ?

(3) Whether a writ can be issued directing the acquiring body to consider the claim in accordance with the Government. Orders/Circulars ? "

14. The answer of aforesaid questions were given by the Full Bench in paragraph 25 of the judgement, which reads as follows :-

"(1) The Government Orders/Circulars providing employment to one member of a family of a person whose land has been acquired (over and above the compensation awarded under the law) are invalid.

(2) The acquiring body for whose benefit the land is acquired are not bound by such Government Order/Circular.

(3) No writ can be issued directing the acquiring body to consider the claim in accordance with the aforesaid Order/Government Circular."

15. In view of the settled proposition of law as quoted above, I am of the opinion that no relief could be granted to the petitioner in so far as present writ petition is concerned.

16. In so far as laches on part of the petitioner for approaching this Court is concerned, law is well settled by Hon'ble Apex Court in the case of ***Baljeet Singh (Dead) through Legal Representatives and others Vs. State of U.P. and others*** reported in ***(2019) 15 SCC 33*** that it is a recognised principle of jurisprudence that a right not exercised for a long time becomes non-existent. Even when there is no limitation period prescribed by any statute relating to certain proceedings, in such cases, courts have coined doctrine of laches

and delay as well as doctrine of acquiescence and non suited litigants who approached court belatedly without any justifiable explanation for bringing action after unreasonable delay--Estoppel, Acquiescence and Waiver- Acquiescence-Evidence Act, 1872. Section 115. The paragraph 7 is reproduced hereinbelow :-

"7. The matter requires examination from another aspect viz. laches and delay. It is a very recognised principle of jurisprudence that a right not exercised for a long time is non-existent. Even when there is no limitation period prescribed by any statute relating to certain proceedings, in such cases, courts have coined the doctrine of laches and delay as well as doctrine of acquiescence and non-suited the litigants who approached the court belatedly without any justifiable explanation for bringing the action after unreasonable delay. In those cases, where the period of limitation is prescribed within which the action is to be brought before the court, if the action is not brought within that prescribed period, the aggrieved party loses remedy and cannot enforce his legal right after the period of limitation is over, however, subject to the prayer for condonation of delay and if there is a justifiable explanation for bringing the action after the prescribed period of limitation is over and sufficient cause is shown, the court may condone the delay. Therefore, in a case where the period of limitation is prescribed and the action is not brought within the period of limitation and subsequently proceedings are initiated after the period of limitation along with the prayer for condonation of delay, in that case, the applicant has to make out a sufficient cause and justify the cause for delay with a proper explanation. It is not that in each and every case despite the sufficient cause is not shown and the delay is not properly explained, the court may condone the delay. To make out a case for condonation of delay, the applicant has to make out a sufficient cause/ reason which prevented him in initiating the proceedings within the period of limitation. Otherwise, he will be accused of gross negligence. If the aggrieved party does not initiate the proceedings within the period of limitation without any sufficient cause, he can be denied the relief on the ground of unexplained laches and delay and on the presumption that such person has waived his right or acquiesced with the order. These principles are based on the principles relatable to sound public policy that if a person does not exercise his right for a long time then such right is non-existent."

17. Very recently Hon'ble Supreme Court in the case ***of Surjeet Singh Sahni Vs. State of U.P. and others in SLP (C) No.3008 of 2022 decided on 28.02.2022*** held that mere representation does not extend the period of limitation and the aggrieved person has to approach the Court expeditiously and within reasonable time. The paragraphs 5 & and 6 are reproduced hereinbelow :-

"5. As observed by this Court in catena of decisions, mere representation does not extend the period of limitation and the aggrieved person has to approach the Court expeditiously and within reasonable time. If it is found that the writ petitioner is guilty of delay and latches, the High Court should dismiss it at the threshold and ought not to dispose of the writ petition by relegating the writ petitioner to file a representation and/or directing the authority to decide the representation, once it is found that the original writ petitioner is guilty of delay and latches. Such order shall

not give an opportunity to the petitioner to thereafter contend that rejection of the representation subsequently has given a fresh cause of action.

6. Even otherwise on merits also, we are in complete agreement with the view taken by the High Court. The High Court has rightly refused to grant any relief which as such was in the form of specific performance of the contract. No writ under Article 226 of the Constitution of India shall be maintainable and/or entertainable for specific performance of the contract and that too after a period of 10 years by which time even the suit for specific performance would have been barred by limitation."

18. In view of the aforesaid, the Court is of the opinion that neither petitioner has placed before this Court any statutes on the basis of which an employment could be given to him in lieu of the land, which was taken by the Corporation in the year 1985.

19. Accordingly, present writ petition is dismissed.

(2023) 1 ILRA 289
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.12.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE JAYANT BANERJI, J.

Writ-C No. 33578 of 2022

Sonu & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Brijesh Chandra Tripathi, Sri Sunil Kumar Dubey

Counsel for the Respondents:
C.S.C., Sri Virendra Singh Chauhan

(A) Civil Law - Constitution of India, 1949 - Article 243-P - "Municipal area" , Article 243-Q - Constitution of Municipalities, The U.P. Municipalities Act, 1916 - Section 3 - Declaration etc. of transitional area and smaller urban area, Section 3(2) - notification under clause (2) of Article 243-Q of the Constitution, Section 4 - Preliminary procedure to issue notification - No prohibition for a person not living in the area which is sought to be included to file objection. (Para -12)

Petitioners are Corporators of Nagar Palika Parishad - notification - inclusion of various Gram Panchayats in the Municipal Council - locus to file objection against the draft notification pendency of writ petition - final notification in abeyance - granted time to petitioners to file objection - under circumstances defect has been cured. (Para - 3,12,13)

HELD:-Defect cannot be cured as post decisional hearing of objections is not contemplated under law. Objections were to be decided before finalizing the draft notification and not after the issuance of final notification. Goes to the root of the matter and renders the final notification illegal. **(Para - 14)**

Petition Allowed. (E-7)

(Delivered by Hon'ble Manoj Kumar Gupta, J.
&
Hon'ble Jayant Banerji, J.)

1. Heard Sri Brijesh Chandra Tripathi, learned counsel for the petitioners, learned Standing Counsel Sri Pradeep Kumar Tripathi for respondent nos. 1 and 2 and Sri Virendra Singh Chauhan, learned counsel for respondent no.3.

2. With consent of counsel for the parties, the petition is being disposed of finally at the admission stage.

3. The facts in brief are that petitioner no.1 is elected Corporator from Ward No. 3, Nagar Palika Parishad, Baghapat and petitioner no.2 also is an elected Corporator from Ward No. 19, Nagar Palika Parishad, Baghpat. They have challenged the notification issued on 21.9.2022 by respondent no.1 in exercise of power under Article 243-Q of the Constitution read with sub-section (2) of Section 3 of the U.P. Municipalities Act, 1916 including the area specified in Schedule-1 of the said notification in smaller urban area of the Municipal Council, Baghpat and a declaration under clause (d) of the Article 243-P of the Constitution that the area specified in Schedule-2 would be territorial area of Municipal Council, Baghpat.

4. The facts and grounds on which the challenge has been made is noted in our order dated 15.11.2022, which is as follows:-

"The contention of counsel for the petitioners is that a draft notification was issued on 26.8.2022 under Section 4 of the U.P. Municipalities Act, 1916, for inclusion of certain areas in the smaller urban area of Nagar Palika Parishad, Baghpat. Its Hindi version was published in "Amar Ujala" dated 27.8.2022 and thereby objections and suggestions were invited against the draft notification within fifteen days. On 4.9.2022, a corrigendum was published in the newspaper, stating that the draft notification in English provides only seven days time for filing objections/suggestions. However, on account of error, the Hindi version provided fifteen days time for filing objections/suggestions. Accordingly, the Hindi version was sought to be amended, so as to bring it in line with the notification issued in English.

Learned counsel for the petitioners submitted that issuance of draft notification in Hindi in a local area, is the requirement of law. The petitioners on basis of the said notification filed objections against the draft notification on 6.9.2022. However, while issuing the final notification dated 21.9.2022, their objections have not been considered, apparently on the ground that the same was filed after seven days. It is submitted that the corrigendum issued by the respondents deprives the petitioners of their valuable right to file objections against the draft notification and therefore, the final notification is rendered illegal.

Sri Dilip Kesarwani, learned Additional Chief Standing Counsel, on instructions, admits that the objections and suggestions that were received within seven days alone were considered, meaning thereby that the objections filed by the petitioners were not considered.

Prima facie, the exercise undertaken in this behalf appears to be against the spirit of the statutory provisions.

We grant three days time to the Secretary, Urban Development, Government of U.P., Lucknow to file his personal affidavit in the matter on the above aspect.

List as fresh on 21.11.2022.

Sri Dilip Kesarwani, learned Additional Chief Standing Counsel, shall communicate the instant order to the concerned respondent for due compliance.

The order has been passed in the presence of Sri Virendra Singh Chauhan, learned counsel for respondent no. 3."

5. In compliance, respondent no.1 has filed his affidavit.

6. The State-respondents admit that the objections filed by the petitioners

against the draft notification on 6.9.2022 had not been decided on the ground that the same was filed beyond prescribed period of seven days.

7. Section 3 of the U.P. Municipalities Act, 1916 reads as follows:-

"3. Declaration etc. of transitional area and smaller urban area*.(1) Any area specified by the Governor in a notification under clause (2) of Article 243-Q of the Constitution with such limits as are specified therein to be a transitional area or a smaller urban area, as the case may be.*

(2) The Governor may, by a subsequent notification under clause (2) of Article 243-Q of the Constitution, include or exclude any area in or from a transitional area or a smaller urban area referred to in sub-section (1), as the case may be.

(3) The notifications referred to in sub-sections (1) and (2) shall be subject to the condition of the notification being issued after the previous publication required by Section 4 and notwithstanding anything in this section, no area which is, or is part of a, cantonment shall be declared to be a transitional area or a smaller urban area or be included therein under this section."

8. Under the scheme of the Act, before issuance of a notification under Section 3 of the Act, the mandate of law is that the Governor shall publish in the official gazette and in a paper approved by it for purposes of publication of public notices in the district, or if there is no such paper in the district, in the division in which the local area covered by the notification is situate and cause to be affixed at the office of the District Magistrate and at one or more conspicuous places within or adjacent to the local area concerned a draft in Hindi of the proposed notification alongwith a notice stating that the draft will be taken into consideration on the expiry of the period as may be stated in the notice. The law also mandate that before issuing final notification, any objection or suggestion received in writing from any person in respect of the draft within the period stated shall be considered.

9. The publication of the draft notification in the Hindi newspaper is one of the mandatory requirement under Section 4 of the Act apart from other prescribed modes.

10. In the instant case, admittedly the Hindi version of the draft notification as initially published provided fifteen days time for filing objections. The Hindi version was published in 'Amar Ujala' on 27.8.2022 and thus, the time for filing objections and suggestions was upto 11.9.2022. However, on 4.9.2022, the respondents published a corrigendum notifying that only seven days time would be available for filing objections as is the period provided in the English version. On the date the corrigendum was published, seven days time fixed for filing objection as per English version of the draft notification had already expired and thus, any person who had read the Hindi version of draft notification was completely prevented from filing objection. One of the objects of conferring right in the general public to file objections and make suggestions is to empower them in matter of self-government. The objection could be in relation to the size of the area or the municipal services being provided or proposed to be provided and with regard to the population of the area, the density of

the population therein, the revenue generated for local administration, the percentage of employment in non-agricultural activities, the economic importance or such other factors as provided for in clause (2) of Article 243-Q of the Constitution. All these factors are to be taken into consideration while issuing notification under Section 243-Q. The respondents in the instant case have cut short the period during which general public was initially entitled to file objections. This had prevented the petitioner, and many like him, from filing objections against the draft notification. This in our opinion, goes to the root of the matter and renders the final notification illegal.

11. Learned Additional Chief Standing Counsel submits that the petitioners are not residents of the area which has been included in the smaller urban area and, therefore, they had no locus to file objections.

12. Under law, there is no prohibition for a person not living in the area which is sought to be included to file objection. Concededly, the petitioners are Corporators of the Nagar Palika Parishad, Baghpat and the impugned notification is in regard to the inclusion of various Gram Panchayats in the Municipal Council, Baghpat. As such, it cannot be said that they had no locus to file objection against the draft notification.

13. Learned Additional Chief Standing Counsel further submits that during pendency of the writ petition, the respondents have kept the final notification in abeyance and granted time to the petitioners to file objection. It is urged that under the circumstances, the defect has been cured.

14. We are of the considered opinion that the aforesaid exercise will not cure the defect as post decisional hearing of objections is not contemplated under law. The objections were to be decided before finalizing the draft notification and not after the issuance of final notification. Moreover, we notice that the order by which the final notification was kept in abeyance is in form of office memorandum and it is not clear at all whether it was notified to general public so that others who are not before us but were deprived of right to file objection against the proposed notification had the opportunity to file the objections.

15. For all the reasons aforesaid, the impugned notification dated 21.9.2022, issued by respondent no.1 is hereby quashed.

16. The writ petition stands **allowed**.

(2023) 1 ILRA 292
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.12.2022

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Writ-C No. 37294 of 2006

Soteem & Ors. ...Petitioners
Versus
Upper Commissioner (Judicial) IInd, Varanasi Division, Varanasi & Ors. ...Respondents

Counsel for the Petitioners:
Sri Anant Vijay, Sri Anand Kumar, Sri Ashok Kumar Rai, Sri Shyam Sunder Maurya

Counsel for the Respondents:
C.S.C., Sri Pramod Kumar Sinha

(A) Land Law - U.P. Land Revenue Act, 1901 - Section 33/39 - annual registers/ Correction of mistakes in the annual register - U.P Consolidation of Holdings Act, 1953 - Section 49 - Bar to civil Courts jurisdiction , section 52 - Close of consolidation operations - mere entry in revenue records does not confer any right - entries in revenue record are not conclusive proof and are not the record of title, they are only for the purposes to collect the revenue - duty of maintaining correct record lies on the Collector. (Para - 8,10,12)

Right, title and interest between parties predecessors - finally adjudicated by C.O and S.O.C during consolidation proceeding - ended in favour of respondents' father - incorporated in *Aakar Patra* 11 (part II) - Due to insufficient space - not incorporated in concerned *Khata* - created doubt - orders of C.O and S.O.C not forwarded - entered in C.H. Farm No. 41 and 45 and later on in *Khatauni*. **(Para - 24)**

HELD:-No basis of entries in favour of father of petitioner during consolidation. Name of petitioners wrongly entered in the Revenue Records. Mere on the basis of baseless and illegal entries, no right accrues to the petitioners. Order of Courts below found to be correct and need no interference.**(Para - 24)**

Petition Dismissed. (E-7)

List of Cases cited:

1. Vishwa Vijay Bharati Vs Fakhrul Hassan, AIR 1976 SC 1485

2. Wali Mohhd. Vs Ram Surat, AIR 1989 SC 2296

3. Vikram Singh J.H.S. Vs D.M. (Fin. & Rev.), (2002) 9 SCC 509

4. Mohd. Anis Vs The Additional Commissioner, Alld. Division, 2001 RD 761

5. Sri Ram Vs Gram Sabha , 1997 R.D 549

6. Kamta Prasad Vs B.O.R., 1985 R.D 411

7. Nandhu Vs Ram Jatan ,1987 R.D, 274

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

1. Heard learned counsel for the petitioners and learned Standing Counsel for the State and perused the record.

2. The petitioners have filed the present writ petition for quashing the impugned orders dated 04.04.2006 passed by the Additional Commissioner (Judicial) II, Varanasi - respondent no. 1 in Revision Nos. 575, 515/355/482/94386 of 1992 District Ghazipur as well as order dated 30.04.1992 passed by Sub Divisional Officer, District- Ghazipur in Case No. 36/31/157 under Section 33/39 U.P. L.R. Act, 1901.

3. The brief facts of the case are that disputed plots nos. are 513, 515 & 518, out of which plot nos. 513 & 518 were recorded in the name of the petitioners from 1360-*Fasali* in C.H. Form-41, and its old plot nos. were 544 and 533. The petitioners have annexed extract of *Khatauni* no. 1369-*Fasali* and C.H. Form 41 dated 21.08.1987 as Annexure No. 1.

4. During the consolidation Proceeding C.H Form No.-45 was prepared, in which petitioner's father was recorded as Sirdar, which is Annexure no. 2. On 15.10.1986 father of the respondent nos. 3 to 6 moved an application under Section 33/39 of U.P. Land Revenue Act, 1901, praying therein for mutation of his name in respect of new plot nos. 515 and 518 deleting the name of the petitioners on the basis of the order dated 10.11.1964 alleged to have been passed by the Settlement Officer of Consolidation in Suit No. 499 of 1790.

5. The petitioners raised an objection that application was moved after 26 years on the basis of forged orders, it was also objected that under Section 33/39, such application cannot be entertained and the application was barred by Section 49 of the C.H. Act. It has also been specifically objected that during the Consolidation, no case was proceeded between the parties about the land-in-dispute allotted to the petitioners. After making a detailed inquiry and inspection as well as after hearing the matter the concerned *Naib Tehsildar* submitted his report dated 26.10.1991 recommending rejection of the application to the respondent no. 2 - S.D.O.

6. The respondent no. 2, vide his order dated 30.40.1992 allowed the application dated 15.10.1986 directing the deletion of name of the petitioners from the land-in-dispute, which is annexed as Annexure 4.

7. The petitioners on 22.05.1992 filed a Revision No. 94 of 1992 - Soteem and others Vs. Ghar Bharan and others before respondent no. 1 - Upper Commission (Judicial-II) challenging the order dated 30.04.1992 passed by respondent no. 2. The memo of revision is annexed as Annexure No. 5. Respondent no. 1 *vide* his order dated 29.05.1992 stayed the impugned order dated 30.04.1992 passed by respondent no. 2, which is Annexure no. 6. The respondent no. 1, vide his order dated 04.04.2006 dismissed the Revision, which is annexed at Annexure no. 7. The respondent nos. 1 and 2 have passed the orders in arbitrary manner without giving any finding in respect of fraud played by the respondents, which is against the set principle of law. The Court below failed to consider that no explanation, about inordinate delay of 26 years have been given by the respondents for moving the application for mutation and failed to consider the long standing entry of revenue record. The respondent no. 2 without any basis recorded perverse finding that after the death of Jodhi his heirs Murali and others are in possession over the plot-in-dispute. The Revisional Court did not record any finding in respect of possession. The certified copy of the order dated 10.11.1964 was never produced before the court below by the respondents and the same is not available in record room as per the office report. The court below illegally discarded the report of *Naib Tehsildar* in respect of Mutation, in which he has specifically proposed that after such delay no such application can be allowed. The petitioners are still in possession over the land-in-dispute and their names are running recorded even since the time of their ancestors. The petitioners filed questionnaire dated 08.06.1995 issued by the Record Officer (Revenue), in which it has been answered that file of Case No/ 499 of 1790 date of order dated 10.11.1964 was not sent to the Record Room, which has not been considered by the Revisional Court, which is annexed as Annexure 8 and when the record was not in the Record Room, the Revenue Authority has no power to disturb the entry of the revenue record after 26 years. The courts below have passed the order on presumption, conjuncture and surmises, which is not sustainable in the eyes of law. On the basis of aforesaid facts, the petitioners have prayed to quash the impugned orders.

8. Learned counsel for the respondents have filed counter affidavit and have denied the allegations levelled by the petitioners and has submitted that father of the contesting respondents 3 to 6 moved an application dated 15.10.1986 for mutation

of his name in the revenue record on the basis of order dated 23.12.1962 passed by the Consolidation Officer and the order dated 10.11.1964 passed by S.O.C in respect of plot nos. 513 old no. 545 area 0-6-16, plot no. 515 old no. 544 area 0-8-12 and plot no. 518 old no. 545 area 0-17-12. It was specifically mentioned in it that the applicants/petitioners were in exclusive possession of the aforesaid plot numbers, copy of the same is annexed as Annexure No. CA-1. Objection dated 29.10.1987 filed by the petitioner was based on surmises and conjectures and there were no details as to how the petitioners are the owner of disputed land. It is settled law that mere entry in revenue records does not confer any right. The Consolidation Courts held that father of the contesting respondents late Jodhi was a *Bhumidhar* with non-transferable right of the disputed land, while the petitioners had neither declaration of any Court in their favour nor they have produced any document in support of their claim, a copy of the same is annexed as Annexure No. CA-2. The report of *Naib Tehsildar* Sadar dated 26.10.1991 is baseless and is a bogus document as it has been prepared in cursory manner. The order passed by respondent nos. 1 and 2 are just and proper and they are based on cogent grounds and are in accordance with law. The order passed by the Consolidation Courts were never challenged by the petitioners before the Competent Court, hence it became final between the parties. On the basis of wrong entries in the revenue record judgments of the Competent Court cannot be nullified. The contesting respondents are in exclusive possession of the disputed land, a true photocopies of the *Khatauni* No. 1408 - 1413 *Fasli*, *Kisan Bahi* and CH. Form No. 11 are enclosed as CA-3 to the counter affidavit. The writ petition is devoid of any merit and deserves to be dismissed with cost.

9. The petitioners have filed rejoinder affidavit, denying the averments of counter affidavit and have repeated the same story of the writ and have given parawise reply and have said that the plot nos. 513, 515 and 518 old nos. 544 & 545 were recorded in the name of petitioner's father late Ziyut Bhandhan S/o Hanshraj as Sirdar from 1360 - 1371 *Fasali*. On 15.10.1986, father of the respondent no. 3 to 6 Late Jodhi filed an application under Section 33/39 of U.P. L.R Act, 1901 and prayed for mutation of his name in respect of plot no. 513, 515 and 518 after deletion of the name of the petitioners on the basis of order date 23.12.1962 passed by Consolidation Officer in Case No 13/1962 and order dated 10.11.1964 passed by Settlement Officer Consolidation in Appeal No. 499 / 1790. Late Jodi father of respondent nos. 3 to 6 arrayed Ziyut Bhandhan as respondent and after his death his sons 1/1 to 1/4 Badri, Ganga, Shiv Pujan, Sita Ram, Mangroo, Jang Bahadur and Lal Ji. Application under Section 33/39 of U.P.L.R Act was moved after a delay of 22 years, it appears that both the orders of Consolidation Officer and Settlement Officer Consolidation were forged because Ziyut Bandhan was never served any notice or summon and he was quite unaware about the aforesaid proceedings. Jodhi was not entitled to move the aforesaid application and it was barred by Section 49 C.H. Act.

10. From the perusal of the record, it has been established that the petitioners had not challenged the order of S.O.C, hence it has become final. There is no iota of evidence that order of the S.O.C had been challenged by the father of the petitioners or by the petitioner in superior courts. On

the basis of question-answer, the petitioners have argued that no such file regarding decision of S.O.C is available, but it is very much clear from the order of S.D.O. Ghazipur that after a lapse of time the concerned file has been weeded out, therefore it is not available in record room. In that situation it can not be argued that there was no such file and no such case was decided by the C.O. and the S.O.C, during the consolidation. The respondents' and petitioners' father Jyodhi and Jeeyut Bhandhan, had contested the case and S.O.C passed an order about the plots in suit in favour of Jyodhi, therefore it can not be said that the case of the respondents is barred by Section 49 of the C.H. Act. Contrary to it when no appeal/revision had been preferred by Jeeyut Bhandhan or by the petitioners, the dispute ended by the order of S.O.C. during the consolidation and when it was not challenged then it can safely be concluded that the petitioners' case is barred by Section 49 of the C.H. Act. C.H Form 11 is available on record, in which order of S.O.C. is available, which confirms the right, title and interest of the respondents' father and thereafter the petitioners can not deny the title of the respondents' father and the respondents. It is settled law that entries in revenue record are not conclusive proof and are not the record of title, they are only for the purposes to collect the revenue.

"17. Supreme Court in ***Vishwa Vijay Bharati v. Fakhrul Hassan, AIR 1976 SC 1485,*** *held that it is true that the entries in the revenue record ought, generally, to be accepted at their face value and courts should not embark upon an appellate inquiry into their correctness. But the presumption of correctness can apply only to genuine not forged or fraudulent, entries. The distinction may be fine but it is real. The distinction is that one can not challenge the correctness of what the entry in the revenue record states but the entry is open to the attack that it was made fraudulently or surreptitiously. Fraud and forgery rob a document of all its legal effect and cannot found a claim to possessory title. This judgment has been followed in* ***Wali Mohhd. v. Ram Surat, AIR 1989 SC 2296****. Again in* ***Vikram Singh Junior High School v. District Magistrate (Fin. & Rev.), (2002) 9 SCC 509****, it has been held that the entry in the revenue record, must have a legal basis."*

11. In this case after the order of S.O.C available in C.H-11 (Part-II), it was the duty of the concerned officials to get it mutated and forwarded in future records, but there is a note that this order is entered here due to non-availability of space in concerned *Khata*. Probably the mistake started due to non recording of the order of S.O.C in concerned *Khata*. Therefore, the name of the petitioners' father continued in C.H. 41, 45 and later on in *Khatauni*. The petitioners could not place any order in favour of their father of themselves. From the order of S.O.C the right, title and interest of the petitioners about the property in suit had been extinguished and because it was not challenged in any superior competent court, it become final. If the order of S.O.C was not forwarded in future records, it would not create any right, title or interest in favour of Jeeyut Bhandhan or the petitioners and it shall also not create any hindrance, estoppel or acquiescence against the respondents. If an entry is bogus, false and baseless it has no value in the eyes of law, how long it is.

12. The petitioners are only hammering and emphasizing on long standing entry in favour of their father and

themselves, but since it is a wrong entry, therefore how so much long, it would not create any right to the petitioners and their father, it would remain always inadmissible and *void ab-initio*.

It would be expedient to describe Sections 33/39 L.R. Act below.

"33. The annual registers. - (1) Tire Collector shall maintain the record-of-rights, and for that purpose shall annually, or at such longer intervals as the [State Government] may prescribe, cause to be prepared an amended [register mentioned in Section 32.]

The [register] so prepared shall be called the annual register.

[(2) The Collector shall cause to be recorded in the annual register -

(a) all successions and transfers in accordance with the provisions of Section 35; or

(b) other changes that may take place in respect of any land ; and shall also correct all errors and omissions in accordance with the provisions of Section 39 :

Provided that the power to record a change under clause (b) shall not be construed to include the power to decide a dispute involving any question of title.]

(3) [No such change or transaction shall be recorded without tire order of the Collector or as hereinafter provided, of tire Tahsildar or [the Kanungo].]

[(4) The Collector shall cause to be prepared and supplied to every person recorded as bhumidhar, whether with or without transferable rights, assami or Government Lessee a Kisan Bahi (Pass book) which shall contain -

(a) such extract from the annual register prepared under sub-section (1) relating to all holdings of which he is so recorded (either solely or jointly with others);

(b) details of grants sanctioned to him; and

(c) such other particulars as may be prescribed :

Provided that in the case of joint holdings it shall be sufficient for the purpose of this sub-section of Kisan Bahi (Pass book) is supplied to such one or more of the recorded co-sharers as may be prescribed.

(4A) The Kisan Bahi (Pass book) referred to in sub-section (4) shall be prepared in such manner and on payment of such fee, which shall be realisable as arrears of land revenue, as may be prescribed.

(5) Every such person shall be entitled, without payment of any extra fee, to get any amendment made in the annual register under sub-section (2) incorporated in his Kisan bahi (Pass book.)]

(6) The State Government may make rules to carry out the purposes of this section, including, in particular , rules, prescribing the mode of reception in evidence, and of proof in judicial proceedings, of entries in the [Kisan Bahi (Pass Book)], and the mode of its revision and authentication up-to-date and for issue of duplicate copies thereof, and tire fees, if any, to be charged for any of the said purposes.

(7) In this section, 'prescribed' means prescribed by rules made by the State Government.

(8) Nothing in sub-sections (4) to (7) shall apply in relation to any area which is either under consolidation operations or under record operations.

39. ***Correction of mistakes in the annual register. -(1) An application for correction of any error or omission in the***

annual register shall be made to the Tahsildar.

(2) On receiving an application under sub-section (1) or any error or omission in the annual register coming to his knowledge otherwise, the Tahsildar shall make such inquiry as appears necessary and then refer the case to the Collector, who shall dispose it of, after deciding the dispute in accordance with the provisions of Section 40.]

[Provided that nothing in this sub-section shall be construed to empower the Collector to decide a dispute involving any question of title.]

(3) The provisions of sub-sections (1) and (2) shall prevail, notwithstanding anything contained in the U.P. Panchayat Raj Act, 1947."

In ***Mohd. Anis Vs. The Additional Commissioner, Allahabad Division, 2001 RD 761,*** it is held that wherever and whenever on a basis of a sale-deed, a person got his name recorded in Khatauni and such sale deed is cancelled by competent civil court, then the Collector or S.D.O has no option but to correct the Khatauni in pursuant to judgment, passed by civil court provided such decree has attained finality instead of relegating proceedings under Section 34 of the Act.

In this case order of S.O.C is final hence it was duty of the Collector to correct the register of record - of - rights. Hence the impugned orders are in conformity with the aforementioned judgment.

In ***Sri Ram Vs. Gram Sabha 1997 R.D 549*** on a complaint by Pradhan, notices were issued to Sri Ram and Dulare under Section 33 read with Section 39. After approval from the Collector their names were expunged from the records. In revision, the Board held that the title to land does not descend in consolidation proceedings from heaven, like Manna and Salwa of Biblical story. The revisionist could not produced any evidence to show that their title was duly recognized during consolidation proceedings. It was also held that the action should have been taken either by the Collector appointed Under Section 14 or by the acting Collector appointed under Section 15 of the Act. In the instant case it is difficult to know as to who passed the decisive order. Revision was however dismissed.

Applying the principle laid down in the cited case it can be concluded that no order regarding entry in favaour of the petitioner's father Jeut Bandhan was passed during the consolidation.

In ***Kamta Prasad Vs. Board of Revenue, 1985 R.D 411*** it was held that if the consolidation authorities declared Smt. Kanti Devi as co-tenure holder and the said order could not be incorporated in the revenue records, such orders do not become non-est after de-notification under Section 52 (1) of C.H. Act. These orders cannot be challenged before any civil or revenue court because of the bar of Section 49 of the said Act. After the close of the consolidation operations, the Collector can not refuse to do it merely on the ground that consolidation authorities themselves ought to have carried out the work of *Amaldaramad*.

The facts of the case in hand and of the cited case are quite similar, therefore the principles laid down in the cited case apply in favour of the respondents.

In ***Nandhu Vs. Ram Jatan 1987 R.D, 274,*** it is held that only such entries made during consolidation operations, which have been legally and correctly made carry presumption of correctness. Where an apparent mistake has crept in C.H. Form 23, it can be rectified in proceedings under Section 33 and 39 of the L.R. Act, because the duty of maintaining

correct record lies on the Collector. The principles laid down in this precedent is also in support of the respondents case.

13. Another ground has been taken by the petitioners that when the order was passed by the S.D.O. and the Commissioner, second successive consolidation proceeding was going on, hence they were not competent to entertain the petition and pass the order.

14. It is argued by respondent's counsel that under sections 33/39 of the L.R. Act, it is the duty of the Collector and Tehsildar, to correct all errors and omissions in accordance with the provisions of Section 39 and to maintain annual register of the record- of- rights and if any application is moved for correction of error or omission, it would be entertained and suitable order shall be passed. It is made clear that by the impugned orders both the courts below have not decided a dispute involving any question of title. They have only corrected the errors and omissions according to the orders passed during the first consolidation operation. No question of title remained to be decided in second consolidation operation.

15. It would be noteworthy that by passing the impugned order, the lower courts were not interfering in the jurisdiction of the consolidation courts as after termination of the consolidation proceedings, it was the duty of the revenue authorities to remove the errors and correct the record-of-right and to maintain the correct records. It was also their duty to comply with the orders of the consolidation courts passed during the consolidation proceedings. Why the order of S.O.C was not entered into the right place, has also been discussed. Initially the petitioners were not the party to the suit before the C.O. and S.O.C, therefore how the petitioners could say that their father had not received the notice and had not contested the case in consolidation courts. It appears that this denial is for the sake of denial and is a bald denial without any cogent reason. Thus it can not be said that their father had not participated in the proceeding/litigation with the father of the respondents, therefore, such denial has no legal sanctity and the existence of the file can not been denied.

16. At one point of time the petitioner's counsel argued that the revenue authorities had no right to pass the impugned order, as the second time consolidation proceedings were going on, when the impugned orders were passed. On the other hand they say that property in suit is *Chak* out, if the property is *Chak* out as alleged by the petitioners, then it becomes out of the scope and jurisdiction of the consolidation courts. In that case also the revenue authorities had right to pass the impugned order under Section 33/39 of the L.R. Act.

17. It transpires that both the orders had been passed after giving proper opportunity of hearing of evidence during the consolidation proceedings title of the petitioners' father had not been found correct and the property in suit were ordered to be recorded in the name of respondents' father. Order of the Consolidation Court have not been challenged in any competent authority. The order was not forwarded and entered into future record, therefore, if the revenue authority found fit to correct the record in accordance of the order of the consolidation court, there is no bar at all.

18. The S.D.O. in his order has referred the order of S.O.C. dated 10.11.1964, which has been inscribed as *Amaldaramad* regarding Arazi No. 545-C in the name of Jyodhi S/o Charittar, rejecting the name of the petitioners' father Jeeyut Bandhan S/o Hans Raj.

19. It is evident from the question answer that the file decided by the S.O.C had been weeded out from which it is clear that a case between the parties had been decided in favour of Jyodhi. S.D.O has also referred that as per the report of land Inspector dated 26.04.1987 after the death of Jyodhi respondents Murali etc. sons of late Jyodhi are in possession.

20. Learned S.D.O. has also referred a citation 1988 A.W.C Page 77, in which it is held that an application can be maintained under Section 33/39 of the C.H Act for correction of record based on the basis of order passed by the Consolidation Court. In this precedent, it has also been held that there is no time limit regarding correction of record on the basis of the order passed by the Consolidation Court.

21. In this regard, respondents' counsel has also cited *1986 R D Page 206 - 209,* in which it has also been held that there is no time limits for correction of the record.

22. The order of the S.D.O. was challenged in the Court of Commissioner Varanasi Mandal, Varansi, in revision which has affirmed the order of S.D.O. The petitioner's counsel referred some judicial precedents and argued that since the name of the revisionist was recorded as *Bhumidhar*, with non transferable rights, therefore, their names could only be challenged by way of regular suit.

23. Contrary to that, on the basis of judicial precedents and arguments of the respondents it had been argued that the impugned orders have been passed on the basis of the order of C.O. dated 23.12.1962 and S.O.C dated 10.11.1964, hence the orders are factually and legally correct and are not liable to be interfered with and it was duty of the Collector and *Tehsildar* to correct the errors and omissions in the Record - of - Rights.

24. Thus, it is concluded that the right title and interest between the parties predecessors had already been finally adjudicated by the C.O and the S.O.C during the consolidation proceeding, which ended in favour of the respondents' father Jyodhi and it was incorporated in *Aakar Patra* 11 (part II). Due to insufficient space, it was not incorporated in the concerned *Khata*, which created doubt and the orders of the C.O and S.O.C were not forwarded and entered in C.H. Farm No. 41 and 45 and later on in *Khatauni*, thus, it is concluded that there was no basis of the entries in favour of Jeeyut Bandhan and thereafter the name of the petitioners were also wrongly entered in the Revenue Records, mere on the basis of baseless and illegal entries, no right accrues to the petitioners. Thus, order of the Courts below are found to be correct and need no interference. Therefore, petition lacks merit and liable to be **dismissed**.

25. The petition is dismissed accordingly.

(2023) 1 ILRA 300
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.12.2022

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Writ-C No. 48244 of 1999

Bhola ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri C.V.P. Mishra, Sri Ajeet Kumar Baranwal

Counsel for the Respondents:
C.S.C., Sri Ghanshyam Yadav, Sri P.C. Srivastava, Sri S.N. Srivastava

(A) Land Law - The U.P. Zamindari Abolition and Land Reforms Act, 1950 - Section 122-B (4F) , 229-B , 129-B(4B) , 132 & 339(B) - Powers of the Land Management Committee and the Collector - it is not necessary to institute a suit four declaration for getting the benefit of Section 122-B (4-F) - If the person is entitled for the benefit of Section 122-B he would be admitted as the bhumidhar with non-transferable right of the land.(Para - 30)

Property in suit belongs to Gram Panchayat - not a land under Section 132 U.P.Z.A & L.R. Act as public utility land - petitioner and respondent no. 5 both belong to Scheduled Caste - after death of wife (legal representative) of owner of disputed plot - land in question vested in Gram Sabha - petitioner in continuous possession - revision - revisional court directed to file title suit.**(Para -17)**

HELD:-Right from Lekhpal to S.D.O, were of the opinion that property in suit is under occupation of petitioner - who is a member of Scheduled Caste - at the time of settlement, he was entitled to taken the benefit of Sub Section 4-F - accordingly the benefits of Sub Section 4-F were awarded to him - therefore there was no occasion to interfere with it - order of revisional court not justifiable - quashed - order of S.D.O restored. **(Para - 33,35,36,38)**

Petition Allowed. (E-7)

List of Cases cited:-

1. Raj Kumar Vs Shri S.B. Tewari, S.D.M. G.B.N. , 2014 (2) RLT (DOC-71) 105

2. Smt. Reshma Devi Vs Commissioner, Gorakhpur Division, Gorakhpur, 2014 (2) RLT 459

3. Smt. Ramakanti Vs Gaon Sabha, 2013 (2) RLT (BR) 114

4. Manorey @ Manohar Vs B.O.R. (U.P.) & , 2003 0 Supreme Court (S.C) 396

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

1. Heard learned counsel for the petitioner, leaned Standing Counsel for the State and perused material available on record.

2. None appeared from the side of respondent no. 5.

3. This writ petition has been preferred against the order dated 22.09.1999(Annexure No. 4 to the writ petition) passed by respondent no.2 in Revision No.42/156 (Ram Milan Vs. Bhola and others) by which the Upper Ayukt (Prashasan), Basti Mandal, Basti allowed the revision and cancelled the orders dated 30.12.1995 and 05.08.1997 passed by the SDM, Bansi.

4. The petitioner has averred in the writ petition that one Salava son of Ali Raza was the owner of disputed plot no.78/1 area 0.2.1 and plot no.84 area 0.10.0 lying in Village Batwasia, Pargana Bansi Purab, District Siddhartha Nagar. After his death his wife was recorded as legal representative. She died issueless hence the land was vested in Gaon Sabha.

5. The petitioner was in continuous possession for the last 15 years over the plot in question and his name was recommended on 15.12.1995 to be substituted and mutated as Bhumidhar with non-transferable right. Tehsildar recommended his name which was approved by SDO, Bansi vide his approval dated 30.12.1995 which is annexed as Annexure-1 to this writ petition. Petitioner's name was recorded over the plot in question as bhumidhar with transferable right vide order of the SDO dated 06.04.1996 which is annexed as Annexure-2 to this writ petition. After that an objection was raised before the SDO, Bansi by respondent no.5, Ram Milan, that he was in possession and the petitioner had got his name recorded by playing fraud. Petitioner filed objection against the application of the respondent no.5 stating his case that petitioner was a member of scheduled castes and he is continuing his possession much prior to 03.06.1995 and his name was recorded after verification by the Revenue Authorities under Section 122-B(4)(f) of UPZA & LR Act.

6. The SDO rejected the application of respondent no.5 holding that he himself had inspected the spot and had found the petitioner's possession and rejected the restoration application of respondent no.5 vide his judgment and order dated 05.08.1997 which is annexed as Annexure-3.

7. Being aggrieved respondent no.5 filed revision before respondent no.2 who unjustifiably set aside the order dated 30.12.1995 and 05.08.1997 vide his judgment and order dated 22.09.1999 which is annexed as Annexure-4 to the writ petition. The revisional Court also directed the parties to get the title decided by a Competent Court which is wholly unjust and illegal.

8. Observation of the revisional Court that Gaon Sabha was not the party is wholly illegal and unjust and against the evidence on record as before the revisional Court Gaon Sabha was respondent no.2. The SDO has rightly passed the order in favour of the petitioner who had himself inspected the spot and found the petitioner in possession.

9. Hence a prayer has been made to issue a writ, order or direction in the nature of certiorari to cancel the order/judgment of Additional Commissioner (Administration), Basti Mandal, Basti dated 22.09.1999 passed in Revision No.42/106 and also to issue a writ, order or direction in the nature of mandamus commanding the respondents not to dispossess the petitioner from the plot in question.

10. The petitioner has annexed following documents in this petition:-

(i) Annexure no.1, photocopy of the order dated 30.12.1995 passed by SDO, Bansi certified by oath commissioner;

(ii) Annexure no.2, khatauni 1405 to 1410 fasli certified by oath comissioner;

(iii) Annexure no.3, order dated 05.08.1997 passed by SDO, Bansi, certified by oath commissioner;

(iv) Annexure no.4, order dated 22.09.1999 passed by the Additional Commissioner (Administration), Basti Mandal, Basti, certified by oath commissioner.

11. A counter affidavit has been filed by respondent no.5 in which it is stated that the petitioner was never in possession over the land in question but answering

respondent came into possession after death of Makuma widow of Salvan, the land in question was vested in Gaon Sabha on 18.01.1993 and that time the answering respondent was in possession but the petitioner with the collusion of Tehsil Authorities got recorded his name as bhumidhar under Section 122-B(4)(5) of UP ZA Act. The petitioner is not an agricultural labourer but was working as teacher after retirement from military service hence he can not get the benefit of Section 122-B(4)(F). The S.D.O. neither made any spot inspection nor examined the possession of the parties and illegally by order dated 05.08.1997 rejected the restoration application of the answering respondent holding possession of the petitioner without any evidence.

12. The order dated 22.09.1999 is quite just whereby no harsh and prejudice occurred to any one. The learned court rightly set aside the order dated 30.12.1995 by advising the parties to get declared their title through competent court.

13. The Gaon Sabha has not been heard and has not been given opportunity of hearing before passing the order dated 30.12.1995. The answering respondent filed a suit under Section 229-B of UP ZA & LR Act but proceedings of the same have been stayed due to interim order dated 08.12.1999 passed by this Court which is liable to be vacated. The impugned order does not require any interference hence the writ petition be dismissed with costs.

14. A photocopy, certified by the oath commissioner, of the order dated 17.08.2002 passed by the SDO, Bansi has been annexed.

15. The petitioner has filed rejoinder affidavit denying almost all the averments made in the counter affidavit and has said that respondent no.5 had no concern with the property in question. The petitioner was a member of scheduled caste at the time of recommendation dated 15.12.1995 and was completing the criteria required under Section 122-B(4B) of the UP ZA & LR Act. The petitioner was subsequently engaged as teacher in February, 1997 which will not adversely affect the recommendation made earlier. Respondent no.2 has committed gross illegality while passing the impugned order dated 22.09.1999 before the Court of SDO the Gaon Sabha was a party and it was provided opportunity of hearing before passing the order dated 30.12.1995. The impugned order dated 22.09.1999 is illegal and unjustified and is liable to be quashed by allowing the writ petition.

16. Heard learned counsel for the petitioner and the learned Standing Counsel. None appeared for the respondent no.5. Perused the file.

17. Admittedly, the property in suit belongs to the Gram Panchayat and it is not a land under Section 132 U.P.Z.A & L.R. Act as public utility land. It is also admitted that the petitioner and respondent no. 5 both belong to the Scheduled Caste. It is also admitted that after the death of Smt. Makuna W/s Salvan, the land in question was vested in Gram Sabha on 18.01.1993.

18. According to the respondent no. 5, he was in possession, while according to the petitioner after the death of Smt. Makuna, he came into possession over the property in suit and considering his possession the property in suit was recommended for him being a member of Scheduled Caste on 15.12.1995. Since he was completing the criteria required under

Section 122 - B (4-B), the land was settled with him. The Tehsildar has recommended his name and the S.D.O has approved his name on 30.12.1995, which is evident from Annexure No. 1. later on he became Bhumidhar of the property in suit vide order dated 06.04.1996 by the concerned S.D.O. These facts are clearly established from the Annexure Nos. 1 & 2.

19. According to the petitioner and according to the evidence available on record when his name was recorded the respondent no. 5 - Ram Milan came into picture and filed objection before the S.D.O that he was in possession and he is also a member of Scheduled Caste. The petitioner has got his name recorded by playing fraud. According to him he was in possession for more than fifteen years. After hearing both the learned counsel for the parties, the S.D.O. Bansi dismissed the objection of the respondent no.5, considering the facts that the property in suit had been vested in Gram Sabha first time on 18.03.1993 after the death of Smt. Makuma, so it was not possible for respondent no. 5 to have prior possession for about fifteen years at the time of filing of objection. it was noticed that when the name of the petitioner had been recorded in the Revenue Record only thereafter the respondent no. 5 has raised the objection, though, the respondent no. 5 had blamed the Tehsildar, officials and the officers that virtually he was in possession, he was unable to pay a sum of Rs.5,000/- to the Lekhpal, therefore the Lekhpal did not make any report in his favour. There is no proof about it. No photograph or any other document in respect of possession except the affidavit of seven persons, who are not cross examined, have been relied upon by respondent no. 5.

20. Another objection had been taken by respondent no. 5 that the petitioner - Bhola was an Ex-Military personal, he was Government Teacher, therefore, the property in suit could not be settled with him under Section 122-B (4-F). In this regard the fact had been examined by the S.D.O and it was found that the property in suit was settled with the petitioner in the year 1995 while the petitioner was appointed as Teacher in the month of February, 1997, therefore at the time of settlement of the land with the petitioner, the petitioner was not in Government Service but certainly he was the member of Scheduled Caste. Therefore this objection is also meaningless.

21. Another fact has also came into picture that the wife of the petitioner was Block Pramukh of the concerned Block.

22. According to this Court in the eyes of law the entity of wife and husband are separate and distinct and if a person is entitled of any benefit under the law he cannot be deprived of the benefit because of the status of his wife.

23. Another fact has also been mentioned in the order of the S.D.O. that he himself visited the spot and found that petitioner was in possession in the presence of villagers and none of the villagers had said that respondent no. 5 - Ram Milan is in possession over the property in suit.

24. Another question arisen about the finding of the fact regarding spot inspection made by the S.D.O. Bansi, Siddharth Nagar.

25. The Revisional Court made an interference and opined that the parties should file a suit for declaration for taking the benefit of Section 122 - B (4-f) even after the decision of the revision.

Respondent no. 5 has instituted the suit under 339 (B) of the U.P.Z.A & L.R. Act.

26. Though due to stay order passed by this Court the proceedings of the case under Section 229-B has been stopped and is in abeyance.

27. Section 122-B(4F) is as under:

"122-B. Powers of the Land Management Committee and the Collector.--

(4F). Notwithstanding anything in the foregoing sub-sections, where any agricultural labourer belonging to a Scheduled Caste or Scheduled Tribe is in occupation of any land vested in a Gaon Sabha under Section 117 (not being land mentioned in Section 132) having occupied it from before May 13, 2007 and the land so occupied together with land, if any, held by him from before the said date as bhumidhar, Sirdar or asami, does not exceed 1.26 hectares (3.125 acres), then no action under this section shall be taken by the Land Management Committee or the Collector against such labourer, and he shall be admitted as bhumidhar with non-transferable rights of that land under Section 195 and it shall not be necessary for him to institute a suit for declaration of his rights as bhumidhar with non-transferable rights in that land.

Explanation.- The expression "agricultural labourer" shall have the meaning assigned to it in Section 198."

28. In this regard following relevant citations are mentioned herein below:

29. In **Raj Kumar Vs. Shri S.B. Tewari, S.D.M. Gautam Buddh Nagar, 2014 (2) RLT (DOC-71) 105** the question was as to whether for the benefit of Section 122-B (4-F) of the U.P. Zamindari Abolition and Land Reforms Act, 1950 a suit under Section 229-B is required to be filed. It was held that it is not necessary to file the suit under Section 229-B for claiming the benefit of Section 122-B (4-F) of the Act, 1950. The impugned order setting aside the order granting the benefit of Section 122-B (4-F) of the Act was found unsustainable.

30. In **Smt. Reshma Devi Vs. Commissioner, Gorakhpur Division, Gorakhpur, 2014 (2) RLT 459** the question was as to whether it is necessary to institute a suit for declaration for getting the benefit of the benefit of U.P. Zamindari Abolition and Land Reforms Act, 1950 Setion122-B (4-F). It was held that it is not necessary to institute a suit four declaration for getting the benefit of Section 122-B (4-F). If the person is entitled for the benefit of Section 122-B he would be admitted as the bhumidhar with non-transferable right of the land. The very issue was not decided by the Court below.

31. In **Smt. Ramakanti Vs. Gaon Sabha, 2013 (2) RLT (BR) 114** the Trial Court passed the order granting the benefit of Section 122-B(4F) on the basis of the report submitted by Tehsildar. The appeal was filed before the Appellate Court. the appellate Court set aside the order passed by the trial Court. The order passed by the Appellate Court is not sustainable inasmuch as the same is against the evidence available on the record. The impugned order passed by the Appellate Court was restored.

32. In the last line of Sub Section 4-F, it has also been mentioned that "it shall not be necessary for him to institute a suit for declaration of his right as Bhumidhar with

non-transferable right in that land" Obviously, the order of the Revisional Court is not in consonance of Sub Section 4-F.

33. In the facts and circumstances when the right from Lekhpal to S.D.O, were of the opinion that property in suit is under occupation of the petition, who is a member of Scheduled Caste and at the time of settlement, he was entitled to taken the benefit of Sub Section 4-F and accordingly the benefits of Sub Section 4-F were awarded to him, therefore there was no occasion to interfere with it.

34. This aspect has also been considered by the Supreme Court in the case of ***Manorey @ Manohar Vs. Board of Revenue (U.P.) & 2003 0 Supreme Court (S.C) 396,*** in which in Para Nos. 3, 9, 10, 11 & 12 are important, in which the Apex Court has held that: -

"Going by the orders of the Board of Revenue and the High Court, the maintainability of an application seeking recognition of right under Section 122B(4F) of U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as 'the Act') is the issue that loomed large before the Board and the High Court. We are of the view that it would be travesty of justice to deny relief to the appellant who is a Scheduled caste agricultural labourer and relegate him to an unfortunate situation of being left without remedy though he has a statutory right to continue in possession and enjoyment of the land. The High Court seems to have taken a narrow view of the rights and remedies of the appellant, leaving him to pursue a tortuous course of litigation to safeguard his rights.

Thus, sub-Section (4F) of Section 122B not merely provides a shield to protect the possession as opined by the High Court, but it also confers a positive right of Bhumidhar on the occupant of the land satisfying the criteria laid down in that sub-Section. Notwithstanding the clear language in which the deeming provision is couched and the ameliorative purpose of the legislation, the learned single Judge of the High Court had taken the view in Ramdin Vs. Board of Revenue (supra) (followed by the same learned Judge in the instant case) that the Bhumidhari rights of the occupant contemplated by sub-Section (4F) can only blossom out when there is a specific allotment order by the Land Management Committee under Section 198. According to the High Court, the deeming provision contained in sub-Section (4F) cannot be overstretched to supersede the other provisions in the Act dealing specifically with the creation of the right of Bhumidhar. In other words, the view of the High Court was that a person covered by the beneficial provision contained in sub-Section (4F) will have to still go through the process of allotment under Section 198 even though he is not liable for eviction. As a corollary to this view, it was held that the occupant was not entitled to seek correction of revenue records, even if his case falls under sub-Section (4F) of Section 122B. We hold that the view of the High Court is clearly unsustainable. It amounts to ignoring the effect of a deeming provision enacted with a definite social purpose. When once the deeming provision unequivocally provides for the admission of the person satisfying the requisite criteria laid down in the provision as Bhumidhar with non-transferable rights under Section 195, full effect must be given to it. Section 195 lays down that the Land Management Committee, with the previous approval of the Assistant Collector in-charge of the Sub Division, shall have the right to admit any

person as Bhumidhar with non-transferable rights to any vacant land (other than the land falling under Section 132) vested in the Gaon Sabha. Section 198 prescribes "the order of preference in admitting persons to land under Sections 195 and 197". The last part of sub-Section (4F) of Section 122B confers by a statutory fiction the status of Bhumidhar with non transferable rights on the eligible occupant of the land as if he has been admitted as such under Section 195. In substance and in effect, the deeming provision declares that the statutorily recognized Bhumidhar should be as good as a person admitted to Bhumidhari rights under Section 195 read with other provisions. In a way, sub-Section (4F) supplements Section 195 by specifically granting the same benefit to a person coming within the protective umbrella of that sub-Section. The need to approach the Gaon Sabha under Section 195 read with Section 198 is obviated by the deeming provision contained in sub-Section (4F). We find no warrant to constrict the scope of deeming provision.

That being the legal position, there is no bar against an application being made by the eligible person coming within the four corners of sub-Section (4F) to effect necessary changes in the revenue record. When once the claim of the applicant is accepted, it is the bounden duty of the concerned revenue authorities to make necessary entries in revenue records to give effect to the statutory mandate. The obligation to do so arises by necessary implication by reason of the statutory right vested in the person coming within the ambit of sub-Section (4F). The lack of specific provision for making an application under the Act is no ground to dismiss the application as not maintainable. The revenue records should naturally fall in line with the rights statutorily recognized. The Sub-Divisional Officer was therefore within his rights to allow the application and direct the correction of the records. The Board of Revenue and the High Court should not have set aside that order. The fact that the Land Management Committee of Gaon Sabha had created lease hold rights in favour of the respondents herein is of no consequence. Such lease, in the face of the statutory right of the appellant, is nonest in the eye of law and is liable to be ignored.

It is surprising that the State of U.P. had chosen to file an appeal against the order of the S.D.O., in tandem with the Gaon Sabha. It seems to be a clear case of non-application of mind on the part of the concerned authorities of the State who are supposed to effectuate the socio-economic objective of the legislation.

The appeal is allowed. The orders of the Board of Revenue and the High Court are set aside. The S.D.O's order is restored. No costs."

35. The Principals laid in aforementioned judgements are totally apples in this case and in view of that this Court is of the opinion that judgement of the Revisional Court is not correct.

36. On the basis of the aforementioned discussion, this Court is of the view that the order of revisional court is not justifiable and is liable to be quashed and the revision is liable to be allowed.

37. Accordingly, this revision is **allowed**.

38. The order of Revisional Court dated 22.09.1999 annexed as Annexure no. 4 to this writ petition is hereby quashed and the order of S.D.O dated 30.12.1995 and 05.08.1997 are restored.

39. Let a certified copy of the order be sent to the S.D.O. Bansi, District Siddharth Nagar, for necessary compliance.

(2023) 1 ILRA 308
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2022

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Writ-C No. 49973 of 2005

Ramesh Chandra Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Devendra Kumar

Counsel for the Respondents:
C.S.C.

(A) Civil Law - Arms Act 1961 - Section 17 - Variation, suspension and revocation of licences - mere pendency of criminal case is no ground to cancel fire arm licence - mere involvement in a criminal case cannot in any way affect the public security or public interest - Right to possess arms is statutory right but right to live and liberty is fundamental right guaranteed by Article 21 of the Constitution of India - arms licence should not be suspended in a routine manner mechanically, without application of mind and keeping in view the letter and spirit of Section 17 of the Arms Act. (Para - 16,17,18)

Arms license and revolver not surrendered before competent Court - both properties are still in possession of petitioner - mandamus - not to compel petitioner for depositing of Arms License and revolver before anyone **-** three cases against petitioner - no case made out - no trial started against petitioner – apprehension by District Magistrate and Commissioner - petitioner may breach public peace and tranquility by misusing fire arm - Grounds of Section 17 do not exist - no material to establish that petitioner involved in any criminal activity.**(Para - 3,5,15)**

HELD:-No criminal case pending against petitioner on which basis Arms License could have been terminated. Order passed by District Magistrate and Commissioner canceling arms license of the petitioner are liable to be quashed.**(Para - 23)**

Petition Allowed. (E-7)

List of Cases cited:

1. Ram Prasad Vs Commissioner & ors. , 2020 0 Supreme (All) 104

2. Masiuddin Vs Commissioner, Alld. Division, Alld. & anr., 1972, A.L.J. 573

3. Habib Vs St. of U.P. & ors., 2002 (44) ACC 783

4. Satish Singh Vs D.M., Sultanpur , 2009 (4) ADJ (LB)

5. Chandrabali Tewari Vs The Commissioner, Faizabad , 2014 (32) LCD 1696

6. Indrajeet Singh Vs St. of U.P. & ors. , Writ C No. 4947 of 2019

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

1. Heard learned counsel for the petitioner and learned Additional Chief Standing Counsel for the State-respondents. Perused the record.

2. The present petition has been filed with the following prayer:

"(a) issue a writ, order or direction in the nature of certiorary to quash the orders dated 17.2.2004 (Annexure No.1) passed by respondent no.2 and order dated 26.4.2005 (Annexure No.3) passed by respondent no.3.

(b) issue a writ, order or direction in the nature of of Mandamus directing the respondents not to compel the petitioner for depositing of Arms Licence No. 1316 and Revolver before anyone."

3. As per the petition and the documents annexed with the petition, following cases were pending against the petitioner:

(a) Case Crime No. 16 of 2000, under Section 323, 307 IPC, Police Station Civil Lines Etawah, in which I.O. has submitted final report no 265 of 2001 on 14.3.2000 which was accepted by the trial Court on 2.6.2005.

(b) Case Crime No. 442 of 1999, under Section ¾ of Goondas Act, Police Station- Civil Lines, Etawah in which a report was sent by the police to the respondent no.2, but he had returned all the papers on 8.9.1999 to the concerning Station House Officer and in this regard question-answer dated 27.5.2005 (annexed as No. 4) wherein it is stated that neither the case is pending nor the challani report has been received.

(c) Case Crime No. 167 of 1999 under Section 323, 504 and 506 IPC, Police Station Ushrahar, District- Etawah.- In this case police has submitted charge-sheet only for the Section 504 I.P.C. and final order was passed by the Trial Court on 27.4.2005 discharging the petitioner. (Annexure No. 6 to the writ petition).

4. According to the petitioner the arms license and revolver has not been surrendered before the competent Court and both the properties are still in possession of the petitioner. The license was valid upto 31.12.2006. The respondents were bound to afford opportunity of personal hearing and if they would have provided the opportunity of hearing, they would have not passed such order. The orders have been passed on the basis of false and fabricated report sent by the police with the collusion of inimical persons to the petitioner. Hence the impugned orders are liable to be quashed with cost.

5. On the aforesaid grounds the petitioner has prayed to issue a writ, order or direction in the nature of mandamus directing the respondents not to compel the petitioner for depositing of Arms License No. 1316 and revolver before anyone.

6. Against the petition no counter affidavit has been filed by the respondents nor instructions have been sent by the respondents to the learned Standing Counsel to enable him to argue the case. Hence this order is being passed after considering the material available on record.

7. From the perusal of records it transpires that Case Crime No. 16 of 2000, under Section 323, 307 IPC, Police Station Civil Lines, Etawah, final report number 265 of 2001 has been accepted by the trial court on 2.6.2005.

8. Case Crime No. 442 of 1999, under Section ¾ of Goondas Act, Police Station-Civil Lines, Etawah, question-answer dated 27.5.2005 shows that no challani report regarding the Goondas Act has been sent to the District Magistrate, Etawah.

9. So far as Case Crime No. 167 of 1999 under Section 323, 504 and 506 I.P.C. is concerned, only charge-sheet under Section 504 I.P.C. was produced from which petitioner has been discharged as evident from the perusal of annexure no. 6.

10. It would be proper to see the case in view of the cases decided by the Courts of Records on the point. Hence some relevant cases are referred and discussed to reach at the correct conclusion.

11. In ***Ram Prasad Vs. Commissioner And Others 2020 0 Supreme (All) 104***, District Magistrate cancelled the arms license on the basis of pendency of criminal cases against the petitioner. Petitioner was later on acquitted from the criminal cases. Order of Acquittal was not showing use of fire arm of the petitioner. It was held that after acquittal the very basis of the order of cancellation vanished and mere apprehension expressed in the impugned orders that the petitioner would misuse the fire arm and would extend threat to the persons of the weaker section of the society, the arm licence could not be cancelled.

12. Section 17 of the Arms Act is as under:

17. Variation, suspension and revocation of licences.--

(1) The licensing authority may vary the conditions subject to which a licence has been granted except such of them as have been prescribed and may for that purpose require the licence-holder by notice in writing to deliver-up the licence to it within such time as may be specified in the notice.

(2) The licensing authority may, on the application of the holder of a licence, also vary the conditions of the licence except such of them as have been prescribed.

(3) The licensing authority may by order in writing suspend a licence for such period as it thinks fit or revoke a licence--

(a) if the licensing authority is satisfied that the holder of the licence is prohibited by this Act or by any other law for the time being in force, from acquiring, having in his possession or carrying any arms or ammunition, or is of unsound mind, or is for any reason unfit for a licence under this Act; or

(b) if the licensing authority deems it necessary for the security of the public peace or for public safety to suspend or revoke the licence; or

(c) if the licence was obtained by the suppression of material information or on the basis of wrong information provided by the holder of the licence or any other person on his behalf at the time of applying for it; or

(d) if any of the conditions of the licence has been contravened; or

(e) if the holder of the licence has failed to comply with a notice under sub-section (1) requiring him to deliver-up the licence.

(4) The licensing authority may also revoke a licence on the application of the holder thereof.

(5) Where the licensing authority makes an order varying a licence under sub-section (1) or an order suspending or revoking a licence under sub-section (3), it shall record in writing the reasons therefor and furnish to the holder of the licence on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement.

(6) The authority to whom the licensing authority is subordinate may by order in writing suspend or revoke a licence on any ground on which it may be suspended or revoked by the licensing authority; and the foregoing provisions of this section shall, as far as may be, apply in

relation to the suspension or revocation of a licence by such authority.

(7) A court convicting the holder of a licence of any offence under this Act or the rules made thereunder may also suspend or revoke the licence: Provided that if the conviction is set aside on appeal or otherwise, the suspension or revocation shall become void.

(8) An order of suspension or revocation under sub-section (7) may also be made by an appellate court or by the High Court when exercising its powers of revision.

(9) The Central Government may, by order in the Official Gazette, suspend or revoke or direct any licensing authority to suspend or revoke all or any licences granted under this Act throughout India or any part thereof.

(10) On the suspension or revocation of a licence under this section the holder thereof shall without delay surrender the licence to the authority by whom it has been suspended or revoked or to such other authority as may be specified in this behalf in the order of suspension or revocation.

13. In ***Masiuddin Vs. Commissioner, Allahabad Division, Allahabad and Another, 1972, A.L.J. 573***, it is held that ' *After a license is granted, the right to hold the license and possess a gun is a valuable individual right in a free country."*

14. Further it is held that *" a license may be cancelled, inter alia on the ground that it is necessary for the security of the public peace or for public safety, to do so. Mere existence of enmity between the licensee and another person would not establish the necessary connection with the security of public peace or public safety.*

15. In this case, the Magistrate has based his order on three criminal cases which have been decided in favour of the petitioner. Nature of all the cases was not heinous. There is no proof that the fire arm was used in commission of any of the crimes. The District Magistrate and Commissioner have merely expressed the apprehension that the petitioner may breach the public peace and tranquility by misusing the fire arm. Grounds of Section 17 of Arms Act 1961, do not exist. Since the year 2005, no material has been placed to establish that the petitioner has been involved in any criminal activity.

16. In ***Habib Vs. State of U.P. And Others, 2002 (44) ACC 783***, it has been held that "mere involvement in a criminal case cannot in any way affect the public security or public interest and the order cancelling or revoking licence of fire arm was not justified.

17. In ***Satish Singh Vs. District Magistrate, Sultanpur 2009 (4) ADJ (LB),*** it has been held that, *"Right to possess arms is statutory right but right to live and liberty is fundamental right guaranteed by Article 21 of the Constitution of India. Corollary to it, it is citizen's right to possess firearms for their personal safety to save their family from miscreants. It is often said that ordinarily in a civilised society, only civilised persons require arms licence for their safety and security and not the criminals. Of course, in case the government feels that the arms licence are abused for oblique motive or criminal activities, then appropriate measure may be adopted to check such mal-practice. But arms licence should not be suspended in a routine manner mechanically, without application of mind and keeping in view the*

letter and spirit of Section 17 of the Arms Act."

18. In ***Chandrabali Tewari Vs. The Commissioner, Faizabad, 2014 (32) LCD 1696***, it has been held that *"mere pendency of criminal case is no ground to cancel fire arm licence. It has also been held that as in that case there were no allegations that the licenced gun was ever taken out by the licensee and was used in the act, the order canceling petitioner's fire arm licence was quashed."*

19. In *Ram Prasad (Supra), following principles have been laid down regarding licence possession of firearms and its suspension and revocation;*

(i) Right to hold fire arm licence granted by the authorities in accordance with the provisions contained in the Arms Act, 1959 is a valuable right of an individual.

(ii) Licencing authority has the power to suspend or revoke an arm's licence only if any of the conditions mentioned in Sub-Clauses (a) to (e) of Sub Section (3) of Section 17 of the Arms Act exists.

(iii) The provisions of Section 17 of the Act cannot be invoked lightly in an arbitrary manner.

(iv) The licencing authority has to satisfy itself if it is necessary for the security of public peace or for public safety to suspend or revoke the licence.

(v) Such satisfaction of the licencing authority must be expressed in the order and must be based on relevant material.

(vi) Public peace or public safety do not mean ordinary disturbance of law and order. Public safety means safety of the public at large and not of few persons only.

(vii) Mere involvement or pendency of a criminal case does not, of its own, necessarily affect public peace or public safety. The licencing authority in each case has to record a finding as to how and under what circumstances the possession of the arm licence is detrimental to the public peace or public safety.

(viii) On mere apprehension of misuse of fire arm or that the licencee would extend threat to the persons of the weaker section, the arm licence cannot be cancelled. There must be some positive incident in which the licencee participated or used his arm, leading to breach of public peace or public security.

(ix) After acquittal of the licencee from the criminal case, the very basis of cancellation of arm licence is vanished.

20. In the light of the above principles, the impugned order does not satisfy the test.

21. However, learned Standing Counsel has tried to support the impugned orders and placed reliance on the judgment of this Court passed in ***Indrajeet Singh Vs. State of U.P. & Ors. (Writ C No. 4947 of 2019)*** decided on 22.10.2021, wherein relying upon the judgment given in the case of Deputy Inspector General of Police and Another Vs. S.Samuthiram, 2013(1) SCC 598, it has been held that- *"The expressions 'honorable acquittal', 'acquitted of blame,' 'fully exonerated' are unknown to the Code of Criminal Procedure or the Penal Code, which are coined by judicial pronouncements. It is difficult to define precisely what is meant by the expression 'honorably acquitted'. When the accused is acquitted after full consideration of prosecution evidence and that the prosecution had miserably failed to prove the charges leveled against the accused, it*

can possibly be said that the accused was honorably acquitted."

22. In this case, in all the three cases no case against the petitioner has been made out and in one case final report has been submitted, in another case, the petitioner was discharged and in the case of Goondas Act, the proceedings were dropped. Therefore, it can safely be said that even no trial started against the petitioner. Hence, both the judicial precedents cited above, do not apply against the petitioner.

23. Thus, on the basis of the papers annexed with the petition and discussions made hereinabove, it transpires that no criminal case is pending against the petitioner on which basis Arms License No. 1316 police station Civil Lines, could have been terminated, hence, the order dated 17.2.2004 passed by the District Magistrate, Etawah, and the order dated 26.4.2005 passed by the Commissioner, Kanpur Region, Kanpur, canceling the arms license of the petitioner Ramesh Chandra Yadav s/o of Shri Taleh Singh, r/o Ashok Nagar, Police Station Civil Lines, District- Etawah, are liable to be quashed.

Order

24. The writ petition is **allowed** and the impugned order dated 17.2.2004 passed by respondent no.2, District Magistrate/Licencing Authority, District Etawah and the order dated 26.4.2005 passed by respondent no.3, Commissioner, Kanpur Region, Kanpur are hereby **quashed**.

25. If no any other reason exists for cancellation of the arms license of the petitioner, the arms license, already granted to the petitioner, shall continue and if it is terminated or revoked, it shall be revived/reissued.

(2023) 1 ILRA 313
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.12.2022

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Writ-C No. 51738 of 2000

Ram Roop & Ors. ...Petitioners
Versus
Commissioner, Azamgarh Division, Azamgarh & Ors. ...Respondents

Counsel for the Petitioners:
Sri Raj Kishore Yadav, Sri S.C. Varma

Counsel for the Respondents:
C.S.C., Sri Anuj Kumar

(A) Consolidation Law - The Consolidation of Holdings Act, 1953 - Sections 4(2),5(2) & 9-A(2) - notification , Section 52 - Close of consolidation operations , The U.P. Land Revenue Act, 1901 - Section 33 r. w. Section 39 - annual registers - Correction of mistakes in the annual register , section 219 - Revision .

Villages denotified under Section 52 of CH Act - petitioner granted Sirdari rights over plot - possession over plots for last 25/26 years - notification issued under Section 4(2) - consolidation proceedings restored - consolidation operation – change of entries in revenue records by respondent no.1 - without issuing notice or affording an opportunity of hearing – objection – revision – dismissed – hence petition.**(Para - 2 to 9)**

(B) The Consolidation of Holdings Act, 1953 - consolidation court has no power to pass an order regarding the holding of Gram Samaj and if they pass any order, it would be null and void - Consolidation

courts or the respondents have not provided the land in suit to petitioner as sirdar - entries in revenue records were secretly recorded without any basis and it was the result of manipulation. **(Para - 17)**

(C) The Consolidation of Holdings Act, 1953 - no one gets any right on the land of Gram Samaj/State on the basis of adverse possession and he cannot be the owner of the land of the Gram Samaj/State - No opportunity of hearing is required for expunging the forged and fabricated entry - A forged and fictitious entry how so long will not confer any right to the petitioner - no right, title or interest had been conferred to petitoner on the basis of forged and fabricated entry - trespasser and unauthorized occupant over the land of Gram Panchayat - who can be evicted forcefully - liable to pay damages etc. **(Para - 18,19,21)**

(D) The Consolidation of Holdings Act, 1953 - any judicial order obtained by playing fraud is null and void - They do not confer any right - Such fraudulant entry can be removed at any time - notification under Section 4(1) of CH Act was no bar in exercising the jurisdiction by the revenue authorities under Section 33/39 of LR Act as the matter was not open for the intervention of the consolidation courts - impugned orders do not suffer from any manifest error. **(Para - 25)**

HELD:-Petition meritless and deserves to be dismissed.**(Para -26)**

Petition Dismissed. (E-7)

List of Cases cited:

1. St. of U.P. Vs Mahatam

2. Jamuna Vs St. of U.P. , 2010 (1) RLT 312

3. Jagram Vs Brija , 2010 (1) RLT 9(BR) 15

4. Raj Singh Vs St. of U.P. , 2011 (1) RLT 79

5. Sri Ram Vs Gaon Sabha, 1997 RD 549

6. Chandra Datt Vs St. of U.P. , 1992 RD 160

7. Vikram Singh J.H.S. Vs D.M., Farrukhabad , 1992 RJ 380

8. S.P. Chengal Daria Naidu Vs Jaggannath , 1993 (6) JT 331

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

1. Heard Shri Raj Kishore Yadav, learned counsel for the petitioner and Shri Jitendra Narain Rai, learned Additional Chief Standing Counsel for the respondents.

2. This writ petition has been instituted to quash the order dated 13.12.1995 (Annexure No.1), order dated 05.08.1997 (Annexure No.7) passed by respondent no.2 - Additional Collector, Land Revenue, Azamgarh, and order dated 31.10.2000 (Annexure No.6) passed by respondent no.1- The Commissioner, Azamgarh Division, Azamgarh.

3. In brief facts of the case are that, villages in Tehsil Mohammadabad Gohna, now Sadar, District Azamgarh, were denotified under Section 52 of the Consolidation of Holdings Act, 1953 (hereinafter referred to as the CH Act) in the year 1972. By orders of the respondent no.2 dated 10.6.1969 the petitioner was granted Sirdari rights over plot no.2093 (new no.1216) 740 kari and plot no. 226 (new no.138/5) 421 kari as evident from form CH-45 and the petitioner is in possession over the aforesaid plots for the last 25/26 years. By notification issued under Section 4(2) of the Act (published in U.P. Gazette on 5th September, 1992), the consolidation proceedings were restored in district Azamgarh. During the consolidation operation, respondent no.1 exercising its power under Section 33 read with Section 39 of the U.P. Land Revenue

Act, 1901 (in short "the LR Act') changed the entries in the revenue records, based on the orders passed by the consolidation Authorities during first consolidation operations in the village, without issuing notice to the petitioner or affording him an opportunity of hearing (Annexure No.1 to the writ petition).

4. The petitioner has been in peaceful and cultivatory possession over the land in dispute for more than 31 years without there being any dispute regarding the same and without any claim by the Gaon Sabha and his name was also recorded in the Khatauni since 1969 and Jotvahi was also issued till date (Annexure No.2).

5. Against the order dated 13.12.1995, a Civil Misc. Writ Petition No.6181 of 1996 was filed and vide judgment dated 15.12.1996, operation of the order dated 13.12.1995 was stayed and further it was directed to the petitioner to move objection within 15 days before the respondent no.2 (Annexure No.3).

6. Pursuant to the aforesaid order, the petitioner filed objection before the respondent no.2 on 27.02.1996 in case no.49 of 1996 on 27.02.1996. (Annexure No.4). Respondent no.2 summoned the original record of CH form 23 and form 45 along with original khatauni. It was argued that the petitioner's name was recorded by order dated 10.6.1969 of C.O. Manshipur in case no. 704. Since the file of case no. 704 was weeded out hence it was not available in the revenue records and the name of the petitioner was mutated in CH form 23 and CH form 45 by the consolidation authorities and it was just and proper and there was no forgery done by the petitioner. It was also argued that after the issuance of notification U/s 4(2) of the U.P. C.H. Act, the revenue authorities have no jurisdiction to decide the entry or make any correction. After publication of notification U/s 4(2) of U.P. C.H. Act, the provisions of Section 5(2) of the U.P. C.H. Act will come into play. But without considering the arguments, after 26 years, respondent no.2 changed the entry while the entry could not be changed in summary proceeding and such entry can be corrected only by way of regular suit but without considering the arguments of the petitioner, the respondent no.2 rejected the objection of the petitioner vide order dated 5.8.1997 (Annexure No. 5).

7. Against the order dated 05.08.1997, the petitioner preferred revision before the respondent no.1 and it was argued that order dated 13.12.1995 and 05.08.1997 were without jurisdiction in view of the publication of notification under Section 4(2) of the Act and it was admitted by the respondent no.1, even then he dismissed the revision and confirmed the judgment and order, passed by the court below vide judgment and order dated 31.10.2000 (Annexure No.6).

8. In the impugned order dated 13.12.1995, no finding is recorded or given against the petitioner that he was responsible for making entries in the revenue record. Once the village has been renotified for consolidation, the respondent no. 2 ceases to have any jurisdiction to pass any orders as the powers vest with the consolidation courts/authorities.

9. On the aforesaid grounds, it has been contended that all the three impugned orders i.e. 13.12.1995, 5.8.1997 and 31.10.2000 are wholly illegal and not sustainable in the eyes of law and therefore, they deserve to be quashed and the petition be allowed.

10. From the side of respondent counter affidavit has been filed by

Tehsildar wherein respondents have denied the allegations of the petitioner and have replied that petitioner's name was fictitiously recorded in pursuance of the alleged order dated 10.06.1969 and when it came to the notice of the authority concerned, the name of the petitioner was expunged from the revenue record as there was no such order in the office. Admittedly plot in question is the property of the Gaon Sabha and no Sirdhari right accrues to the petitioner over the same. If the petitioner had any grievance, he should have filed an objection under Section 9-A (2)of the U.P. C.H. Act before consolidation authority as the village in question was notified under Section 4(2) of the Act and was published in the gazette on 5.9.1992 but the petitioner did not file any objection as such he has no right or title in view of the fictitious entry in the revenue record. It is not the case of the correction of the paper and applications are not maintainable under section 33/39 of the U.P. Land Revenue Act after village in question was notified under Section 4(2) of the Act.

11. By order dated 13.12.1995 passed by respondent no.2, name of the petitioner was ordered to be expunged from the revenue record. The petitioner filed Civil Misc. Writ Petition No.6181 of 1996 against the aforesaid order and the Hon'ble Court vide order dated 15.12.1995 disposed of the petition directing the petitioner to file an application/objection before the Chief Revenue Officer within 15 days. In pursuance of the order dated 15.12.1996, the petitioner should have filed an application/objection separately before respondent no.2. Annexure no.4 shows that the petitioner has filed objection in case no.49 of 1996 under Section 33/39 of the U.P. Land Revenue Act. In fact the petitioner succeeded to get his name recorded in the revenue record on the basis of fictitious order which is not available in the record room. As the petitioner has already filed Writ Petition No.6181 of 1996, it could not be clearly ascertained that how the petitioner escaped himself and filed another writ petition No.5930 of 1996 filed by Jaintri. The petitioner was directed to comply with the order dated 15.02.1996 passed in Civil Misc. Writ Petition no.6180 of 1996. The petitioner filed Revision/Reference No.82/261 A/97 under Section 219 of the U.P. Land Revenue Act against the order dated 05.08.1997 passed by the Additional District Magistrate, Azamgarh in case of **State of UP Vs. Mahatam** under Section 33/39 of the UP Land Revenue Act. After considering the material on record and giving opportunity of hearing to the petitioner, the revision was dismissed vide order dated 31.10.2000 which is legal and just. There is no question of law involved in the writ petition to be decided.

12. Therefore, it was submitted that the writ petition is devoid of merit and in view of the facts and circumstances, the same is liable to be dismissed.

13. Denying the allegations made in the counter affidavit, the petitioner had filed rejoinder affidavit on 07.05.2000 in which he has reiterated the version of the petition.

14. On the basis of the averments and arguments of the petitioner, the following three main points emerge, resolving which this petition can be disposed of:

(I) Whether by the orders of respondent no.2/consolidation court dated 10.06.1969 sirdari rights were granted to late Ram Roop over plot no.2093 (new

no.121) area 740 kari and plot no.226 (new no.138/5) area 421 kari?

(II) Whether on the basis of above entries the petitioners are in peaceful possession over the plots in question and whether on the basis of such long standing entries and alleged peaceful possession any indestructible right has accrued in favour of the petitioner?

(III) Whether after renotification of consolidation proceedings under Section 4(2) of CH Act on 05.09.1992 the revenue authorities had no right to exercise their power under Section 33/39 of LR Act to remove the entries from the record of rights? and on that basis the impugned orders are liable to be quashed.

Conclusion

15. **Issue No.1**--The petitioner could not produce the extract of the order dated 10.06.1969 passed by the concerned authorities either in previous petition or in this writ petition and also could not produce such order before the respondents. The order of CRO/In charge Officer, Azamgarh and Commissioner. Azamgarh is based on the report of the record keeper from which it was revealed that 14 forged orders have been incorporated in blue ink instead of red ink and by such forged orders properties of Gram Samaj (now Gram Panchayat) have been named to the private persons. By such forged orders navin parti, banjar, pond, grave yard, land allotted for plantation, khaliyan (barn), pasture and bhita land have been named to the petitioners and other persons. It was also found that no such orders were available in the concerned bundle. Even it was found that in case of Jaintri an order under Section 229-B is shown but it was entered in jild consolidation whereas there is no such procedure.

16. It is obvious that consolidation court has no power to pass an order regarding the holding of Gram Samaj and if they pass any order, it would be null and void. But in these cases even no such order of consolidation court was found to be passed. It was also found that even an order under Section 9 of CH Act was written in blue ink over the pond land. Among these 14 forged entries at serial no.5 name of Ram Roop and the impugned lands are mentioned. Thus, the revenue authorities found that all these 14 entries were entered by playing fraud by which no right, title or interest passes and accrues in favour of the petitioner and the other persons. The petitioner and the other persons could not show any paper of their right and title at the time of abolition of zamindari or prior to that. Such right can not arise all of sudden and without any basis. Why these lands would be allotted to the petitioner and the other persons. The consolidation courts were acting as revenue authorities. They were not entitled to award sirdari rights over the land of Gram Samaj without any basis. These lands were not given to the concerned persons in lieu of their land etc. There was no basis at all to enter the name of the petitioner and the other persons over those lands.

17. On the basis of above discussion it is concluded that consolidation courts or the respondents have not provided the land in suit to late Ram Roop as sirdar. The entries in revenue records were secretly recorded without any basis and it was the result of manipulation. Thus, issue no.1 is decided in negative and against the petitioner.

18. **Issue No.2**--From the above discussions it is proved that the name of late Ram Roop was recorded in revenue

records without any basis. No such order was passed, therefore, the petitioner does not get any right on the basis of fake entry, no matter how old it is. It is also an established principle that no one gets any right on the land of Gram Samaj/State on the basis of adverse possession and he cannot be the owner of the land of the Gram Samaj/State.

19. In **Jamuna Vs. State of UP** about the exercise of power under Section 33/39 of LR Act principles have been laid down about dealing with forged and fabricated entry in revenue record. In the cited case the entry in revenue record was found to be forged and fabricated, therefore, it was expunged. This Court held that fraud vitiates everything. Such entries can be expunged at any stage. No opportunity of hearing is required for expunging the forged and fabricated entry.

20. In **Jagram Vs. Brija** the board of revenue held that claim on the basis of wrong entry in the khatauni can not be sustained. Such entry should be in accordance with the provisions of law. If an entry is wrongly made in the khatauni, no right can be claimed on the basis of such entry. If the entry in the name od tenure holder is wrong, the entry of the name of successor will also be treated as wrong. If the order for correction of entry has been passed, there is no illegality in the same.

21. On the basis of the above discussion and the judicial precedents it is concluded that no right, title or interest had been conferred to late Ram Roop on the basis of forged and fabricated entry. A forged and fictitious entry how so long will not confer any right to the petitioner. Therefore, it cannot be said that the late Ram Roop and his legal representatives were in peaceful and lawful possession over the property in suit but it can be concluded that they are the trespasser and unauthorized occupant over the land of Gram Panchayat who can be evicted forcefully and they are also liable to pay damages etc.

22. On the basis of above discussions issue no.2 is decided against the petitioner.

23. **Issue No.3**--According to the petitioner after renotification under Section 4(2) of the CH Act on 05.09.1992 the respondents were not entitled to expunge the entry already existed in favour of the petitioner exercising the power under Section 33/39 of the LR Act. While deciding issue no.1 it has been held that no such order was passed in favour of Ram Roop as no such file existed in record room and the entries were also not made in accordance with law. There was no basis of such entries. The properties were of Gram Samaj and out of the jurisdiction of the consolidation courts. Though no such order was passed by the consolidation court but even it was beyond the power of the consolidation court to pass an order and enter the petitioner as sirdar on the property of Gram Samaj. Under Section 33/39 of the LR Act the Collector and the Tehsildar are duty bound to remove the errors and omissions from the record-of-rights register. The papers were submitted by the consolidation authorities after the closer of the consolidation proceedings. Thereafter it was the duty of the Collector and Tehsildar to maintain the revenue records in accordance with law. For this they are empowered under Section 33/39 of the LR Act. So they applied their rights.

24. In **Raj Singh Vs. State of UP** it is held that if the entry is not based on any

document of title or the order has not been passed by the competent court, the same may be expunged in the proceeding under Section 33/39 of LR Act treating them to be a clerical mistake. In the cited case the original patta and the allotment resolution was not produced in original. Similarly in this case, the order dated 10.09.1969 has not been produced by the petitioner.

25. In **Sri Ram Vs. Gaon Sabha4 and Chandra Datt Vs. State of UP** the lower courts have also held that if for the sake of argument it is presumed that the order would have been passed by consolidation court the question arises as to whether the consolidation court has right to deal with the land of the Gram Samaj? The answer is, No, because the Gram Samaj land is not included under the definition of "holding' when the records were under the revenue authorities, this order was passed. The lower courts have also referred some judicial precedents such as **Vikram Singh Junior High School Vs. District Magistrate, Farrukhabad6, S.P. Chengal Daria Naidu Vs. Jaggannath** in which it is held that any judicial order obtained by playing fraud is null and void. They do not confer any right. Such fraudulant entry can be removed at any time. Thus, this Court is of the considered view that the notification under Section 4(1) of CH Act was no bar in exercising the jurisdiction by the revenue authorities under Section 33/39 of LR Act as the matter was not open for the intervention of the consolidation courts. The impugned orders do not suffer from any manifest error. Therefore, issue no.3 is decided against the petitioner.

26. On the basis of the aforesaid discussion it is concluded that this petition is meritless and deserves to be dismissed.

ORDER

27. This writ petition is **dismissed** with costs.

(2023) 1 ILRA 319
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.10.2021

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Misc. Writ Petition No. 6693 of 2021

Anil Saha ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Prashant Rai, Ms. Vishakha Pande, Sri Rakesh Pande (Sr. Adv.)

Counsel for the Respondents:
G.A.

A. Criminal Law - Constitution of India,1950 - Article 226 - U.P. Gangsters and Anti-Social Activities (Prevention) Act,1986 - Sections 2/3-Quashing of FIR-Case under the Act 1986 may not be registered on the basis of single criminal antecedent, rather the condition precedent is that the ingredients for registration of case under above the Act ought to be fulfilled as per section 2(c), 2(b) of the Act-In the present case, offence against petitioner is within above category of offences and gang with its gang leader and members have been committing these offences for which this registration of case crime number is there-the case does not fall in all the categories recognized by the Apex Court which may justify their quashing-there appears to be sufficient ground for investigation-Hence, no indulgence is required.(Para 1 to 14)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Sanjay Bhati & ors. Vs St. of UP & ors. CMWP No. 489 of 2012

2. Somvir Vs St. of UP & ors. CMWP No. 4622 of 2019

3. R.Kalyani Vs Janak C. Mehta & ors. (2009) 1 SCC 516

4. Kamlesh Kumari & ors. Vs St. of U.P. & ors. (2015) AIR SCW 3700

5. St. of Haryana & ors. Vs Bhajan Lal & ors.(1992) Supp. 1 SCC 335

6. M/s Neeharika Infra Pvt. Ltd. Vs St. of Mah.(2021) AIR SC 1918

7. Leelavati Devi @ Leelawati & anr. Vs the St. of U.P., SLP (Cri.) No. 3262 of 2021

(Delivered by Hon'ble Mahesh Chandra Tripathi, J. & Hon'ble Subhash Vidyarthi, J.)

1. We have heard Shri Rakesh Pande, learned Senior Advocate assisted by Shri Prashant Rai and Ms. Vishakha Pande, appearing for the petitioner and Shri Manish Goyal, learned Additional Advocate General assisted by Shri S.A. Murtaza, learned A.G.A. for all the respondents.

2. This petition under Article 226 of Constitution of India has been filed by Anil Saha with a prayer for issuing writ, order or direction in the nature of certiorari, quashing the impugned First Information Report dated 26.06.2021 registered as Case Crime No.0558 of 2021 under Sections 2 and 3 (1) of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 at Police Station Dadri, District Gautam Budh Nagar. Further prayer has been made not to arrest the petitioner in the aforesaid case.

3. It appears that the petitioner is a qualified architect and business man. He has constructed several residential complexes in Gautam Budh Nagar and New Delhi. A company was formed in the name of 'Garvit Innovative Promoters Limited' (in short, the Company), which was duly registered under the Companies Act, 1956. The petitioner was not associated with the said company as Director, Promoter, Signatory, Shareholder or in any other capacity. The said company decided to start a business of E-bikes/Taxi Bikes under a "BIKEBOT" scheme in August 2017 and under this Scheme, anybody could invest Rs.62,100/- and in lieu thereof, he would receive monthly profit of Rs.4,590/- per month for a period of 12 months and Rs.5,175/- per month for reimbursement/repayment of the invested amount. Thus, the company was required to pay Rs.9,765/- per month against an investment of Rs.62,100/-. The aforesaid amount was to be paid monthly for a period of 12 months. The investor was also required to enter into written agreements with the Company in this regard. More than 2,43,000 persons invested under the said Scheme. Consequently, the company raised a sum of Rs.2,500/- crores under the Bike Bot Scheme. From the money so raised, 10,000/- Bikes, 129 Luxury Cars like Fortuner, Mercedes, Jaquar etc. and 700 Cars of middle segment were purchased and the same are stated to be running as taxis in various cities. The Company suffered some losses, as a result whereof, rumours were spread that its entire business had collapsed and the Company was not in a position to refund the money to the investors, according to the agreement entered into between them. Subsequently,

on account of rumours and certain fake and malicious newspaper reports, more than 70 FIRs were lodged in District Gautam Budh Nagar by the investors of the Scheme. On the basis of the FIRs, the property of the Company has been seized as also the Bank Accounts of the Company and its Directors. It also appears that one FIR was registered as Case Crime No.510 of 2019 at P.S. Dadri, District Gautam Budh Nagar under Sections 420, 409, 201, 467, 468, 471 and 120B IPC on 19.5.2019. The petitioner was not named in the said FIR but he was arrested in the case on 01.3.2021 on the allegation that certain amount had been transferred to the account of the petitioner by the said Company. The petitioner approached this Court and preferred Criminal Misc. Bail Application No.19568 of 2021 (**Anil Saha vs. State of UP**) in which learned A.G.A. was directed to file response in the matter. In the meanwhile, impugned FIR has been lodged.

4. In this backdrop, learned Senior Counsel for the petitioner argued that the petitioner is not named in the FIR dated 19.5.2019 registered as Case Crime No.510 of 2019. The petitioner is neither a Director, Promoter, Signatory or Shareholder of the company nor a beneficiary of the 'Bike Bot Scheme' in any way floated by the said Company. However, the Investigating Officer had given an application under Section 167 Cr.P.C. for remand on 01.3.2021, wherein, it was indicated that the petitioner, who is Director of Saha Infratech Private Ltd., was an accused in view of the fact that the company and its sister concern company Primex Broadcast Private Ltd. had transferred a sum of Rs.21,67,00,177/- to Saha Infratech. The name of the petitioner has been included as an accused only on the basis of surmises and conjectures. In the year 2018, the representatives of the said Company approached the petitioner for taking over Saha Infratech and in this regard, a Memorandum of Understanding (for short, MOU) dated 19.9.2018 was signed between two companies. For acquisition of equity shares, the said Company paid advances to the tune of R.19,16,00,000/- to Ms/ Abet Build Tech Pvt. Ltd. The said Company suffered losses and eventually, the MOU dated 29.1.2019 was signed between them, whereby the company expressed inability to complete the transaction of acquisition of shares and thus, agreed to utilize the advances paid to M/s Saha Infratech Pvt. Ltd. towards booking of flats in the group housing projects. The advance money deposited with Saha Infratech had been utilized for construction of its ongoing project.

5. Learned Senior Advocate further submits that in the impugned FIR the allegations of fraud and cheating have been levelled against Sanjay Bhati and other named accused. There is no allegation of violence, threat or show of violence or intimidation or coercion or otherwise against the petitioner either singly or collectively as a constituted member of a gang and as such, no offence is made out against the petitioner under Section 2 read with Section 3 (1) of the Act. The concept of violence, threat or show of violence or intimidation or coercion is the necessary ingredients under Section 2 (b) of the Act and no offence is made out against the petitioner on the basis of sole allegation relied upon for treating the petitioner as Gang or Gangster. In all the FIRs, the allegations of fraud and cheating have been levelled against Sanjay Bhati, who is Managing Director of the said Company. There is no material on record to indicate that the petitioner could be treated as

member of the gang. In the impugned FIR, allegations have been levelled that the accused as an organized members of the gang was committing forgery under a criminal conspiracy and duped innocent investors and money and as such, it was not in the public interest that he would remain free. The charge sheet has been submitted in most of the cases relating to Bike Bot Scheme. Hence, protection has been claimed.

6. Per contra, Shri Manish Goyal, learned Additional Advocate General has vehemently opposed the writ petition with this contention that huge amount invested by the investors in the Scheme in question was parked by the Directors of said company & its sister companies in the account of Saha Infratech Pvt. Ltd. & its sister companies only to defraud the investors. If there was MOU between said company and Saha Infratech Pvt. Ltd. for sale of entire share-holding, the value of shares must have been cleared in the agreement itself. It was further submitted that aforesaid MOU dated 19.9.2018 was not meant for acquisition of entire share-holding. Due to this reason, agreement could not materialize and further agreement was entered into between the parties on 28.1.2019, changing the purpose of payment. It was further contended that since the amount of Rs.21 Crores said to have paid to Saha Infratech Pvt. Ltd., the company was only for the purpose of parking the aforesaid amount and thus, aforesaid MOUs were prepared only for the purpose to show the paper work. The intention of the parties was only to park the investors' amount in the garb of acquiring of the share-holding of Saha Infratech & its Sister Companies. In similar matter, a coordinate Bench of this Court has already dismissed the writ petition1 on 16.7.2021 with following observations:-

"In our considered opinion, only two points arise for our consideration. One, whether the criminal prosecution lodged against the petitioners under the provisions of the Indian Penal Code and the U.P. Gangster & Anti-social Activities (Prevention) Act, 1986 are barred in view of Section 5 of the Indian Panel Code.

The second and ancillary question which arises is the forum for trial of the petitioners, in case, it is held that the allegation against them are liable to be looked into under the provisions of the Companies Act, 2013 in view of Sections 36 and 337 thereof.

The first argument is not tenable as Section 5 I.P.C., read in conjunction with the provisions of the General Clauses Act, provides that a person cannot be punished twice for the same offence. Section 5, per se, does not provide as to which Act, a general Act or a Special Act is to be used for prosecuting an offender. In any case, admittedly, petitioners are not being prosecuted under the Companies Act, 2013. The choice in this regard is that of the prosecutor and not that of the person being prosecuted. It is also settled vide Emperor Vs. Jiwa Lal, AIR 1932 All 69 that where an offence falls strictly within the purview of a special Act, it is appropriate to prosecute the offender under the Special Act. The petitioners are being prosecuted under the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 which is undisputedly a special Act. Therefore, in view of the above facts and circumstances, petitioners are not entitled to any relief on the basis of the argument raised.

Insofar as the second question is concerned, it no doubt appears that both the Gangsters Act and the Companies Act 2013

provide for trial by special courts constituted there under. A conflict, if any, can arise only in the case of simultaneous prosecution and trial both under the Gangsters Act and the Companies Act, 2013. Such is not the position in the case at hand and therefore the second question does not require consideration in the instant case as it does not arise in the facts and circumstances of the instant case.

Apart from the above, there are specific allegations against the petitioners, who are Directors of a Company, that they in connivance with his other co-accused, while running a company in the name of GIPL have duped innocent people of crores of rupees and have misappropriated the same after assuring them of good returns in the form of interest on the amount invested as also return of the principal invested amount.

Besides, perusal of the record reflects that the investigation is still on and is being conducted to establish the complete nexus between all those involved. The aspect of money laundering and the petitioner's specific involvement in the same is also being investigated. The accused persons/petitioners are not only the beneficiaries of the alleged fraudulent earnings, but are also the brains behind the business.

In our view, quashing the subject FIR at this stage is unwarranted, keeping in view the allegations and the alleged fraud committed.

The writ petition is accordingly, dismissed."

7. Shri Manish Goyal further submitted that the petitioner was arrested in Case Crime No.510 of 2019 on 01.3.2021. Consequently, he moved Bail Application2 and the same has been rejected by learned Single Judge of this Court 07.10.2021 with following observations:-

"In this matter, as is evident from the record, although applicant is not named in the F.I.R. nor he is the Director, share-holder, signatory of G.I.P.L. & its Sister Companies, but keeping in view this fact that MOU entered into between the parties did not materialize, huge amount of investors invested in the Scheme has been diverted in the account of applicant's company and same has not been returned to G.I.P.L. on non-completion of the agreement entered into between the parties nor the flats shown in the affidavit have been handed over to the G.I.P.L. & its Sister Companies, thus, keeping in view the entire facts and circumstances of the case; the large amount of money invested by the investors, who are mainly the retired persons having life long savings and invested hard earned money, in the Scheme as well as the transactions made in the account of the applicant's Company were nothing but sham transactions as also the fact that numerous F.I.R.s have been lodged against the applicant by the investors, the Court is of the view that the applicant cannot be allowed on bail in the aforesaid crime number / F.I.R. simply on the basis of order passed in respect of co-accused referred here-in-above.

Bail application of the accused-applicant Anil Saha is hereby rejected."

8. It is further submitted that there is no provision that case under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, may not be registered on the basis of single criminal antecedent. Rather, the condition precedent is that the ingredient for registration of case under above Act ought to be fulfilled as per

definition of "gangster" given in Section 2 (c) and "gang" given under Section 2 (b) of Act. The offence for which this Act is in effect are given in Section 2 (b) (I):- "offences punishable under Chapter XVI or Chapter XVII or Chapter XVIII of the Indian Penal Code (Act No. 45 of 1860), or ....(i.e. ii to xv)". Hence, as has been propounded by Division Bench of this Court in Writ Petition3, the point of single offence as a basis for registering a case under Act No. 7 of 1986 is of no effect, rather, the condition of offences given under Section 2 (b) (i) to (xv) of Act, being committed by gang or member of gang amounting to gangster i.e. defined in sub-section (c) of Section 2 of the Act. Hence, in the present case, offence against petitioner is within above category of offences and gang with its gang leader and members have been committing these offences for which this registration of case crime number is there. Hence, no indulgence is required.

9. As has been propounded by Division Bench in the case of **Somvir** as well as in many judgments by this Court that even a single case, if fulfils the category of offences given under Section 2(b) (i) to (xv) of Act and is being committed by gang defined under Section 2 (b) or gangster defined under Section 2 (c) of the Act may be basis for registration of case crime number for offence punishable under Section 2/3 of Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986.

10. So far as legal position regarding quashing of F.I.R. is concerned, in the case of **R. Kalyani v. Janak C. Mehta and Others**4, Hon'ble Apex Court has held as under:

"(1) The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a First Information Report unless the allegations contained therein, even if given face value and taken to be correct in their entirety, disclosed no cognizable offence.

(2) For the said purpose, the Court, save and except in very exceptional circumstances, would not look to any document relied upon by the defence.

(3) Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the court shall not go beyond the same and pass an order in favour of the accused to hold absence of any mens rea or actus reus.

(4) If the allegation discloses a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue."

11. The said decision has also been followed by the Apex Court in the case of **Kamlesh Kumari and Ors. v. State of U.P. and Ors**.5

"The law regarding sufficiency of grounds which may justify quashing of F.I.R. in a given case is well settled. The court has to eschew itself from embarking upon a roving enquiry into the last details of the case. It is also not advisable to adjudge whether the case shall ultimately end in submission of charge sheet and then eventually in conviction or not. Only a prima facie satisfaction of the court about the existence of sufficient ingredients constituting the offence is required in order to see whether the F.I.R. requires to be investigated or deserves quashing. The ambit of investigation into the alleged offence is an independent area of operation and does not call for interference in the same except in rarest of rare cases."

12. Hon'ble Apex Court in **State of Haryana and others vs. Bhajan Lal and others**6; **M/s Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra**7, as well as in **Leelavati Devi @ Leelawati & another vs. the State of Uttar Pradesh**8 has further reiterated above principle.

13. The statements raised by learned counsel for the petitioner called for determination of question of fact, which may be adequately discerned either through proper investigation or it may be adjudicated upon only by the trial court and even the statements made on points of law can also be more properly gone into by the trial Court in case charge-sheet is submitted in this case. The perusal of record makes out prima facie offence at this stage and there appears to be sufficient ground for investigation in the case. This Court does not find any justification to quash the impugned FIR or proceeding against the accused-petitioner arising out of above case crime number as the case does not fall in all the categories recognized by the Apex Court, which may justify their quashing. Moreover, in the similar matter, a coordinate Bench of this Court has already dismissed Criminal Misc. Writ Petition No.489 of 2021 on 16.7.2021.

14. Accordingly, the writ petition is dismissed.

(2023) 1 ILRA 325
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE SYED WAIZ MIAN, J.

Criminal Misc. Writ Petition No. 10571 of 2022

along with Crl. Misc. Writ Petitions No. 11425 of 2021 & 11148 of 2021

Rajpal Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anil Kumar Bahpai

Counsel for the Respondents:
G.A., Sri Gaurav Pundir

A. Criminal Law - Constitution of India, 1950 - Article 226 - Indian Penal Code, 1860-Sections 420 & 406-Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002-Section 13(2), 13(4), 14 & 17-Debt Recovery Tribunal Act,1993-Section 19-Quashing of FIR-Default in repayment of loan-Assets seized by Bank in proceedings under the Act, 2002 was stolen due to negligence of officials of bank-complaint filed by the complainant is an intimidatory tactic and afterthought-the officials of the financial institution/bank are provided immunity from prosecution u/s 32 of SARFAESI Act-the issue relates to the exercise of remedy relating to a secured assests as defined in the Act, cannot be in dispute-SARFAESI Act is a complete Code in itself which provides the procedure to be followed by the secured creditor by invoking section 13 of the Act-Hence, criminal proceedings would not be sustainable in the present matter-direction issued-FIR quashed.(Para 1 to 60)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Priyanka Srivastava & anr. Vs St. of U.P & ors..

2. K. Virupaksha & anr. Vs St. of Karn. & anr.

3. St. of Har. & ors. Vs Bhajan Lal & ors..

(Delivered by Hon'ble Suneet Kumar, J. & Hon'ble Syed Waiz Mian, J.)

1. Heard Shri Anil Kumar Bajpai, learned counsel for the petitioners, learned A.G.A. for the State and Shri Gaurav Pundir, learned counsel for respondent no. 4.

2. The batch of writ petitions arise from the same cause and incident, accordingly, are being heard and decided together on the consent of the parties.

3. The facts of Writ Petition No. 10571 of 2021 is being referred to for the sake of convenience.

4. The writ petitioners before the Court are bank officials of the rank of Assistant General Manager, Field General Manager, Chief Manager and Branch Manager.

5. By the instant petition, petitioners seek quashing of the impugned First Information Report dated 16.10.2021, registered as Case Crime No. 0412/2021, under Sections 420 and 406 I.P.C., Police Station Fatehpur, District Saharanpur.

6. Union Bank of India is a body corporate duly constituted under the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1970 (Act No. V of 1970) having its Head Office at Mumbai1. The petitioner was posted as Branch Manager at Saharanpur Main Branch, Saharanpur.

7. M/s Shyamvi Steels Private Limited, incorporated under the Companies Act, 1956, having its Head Office, at Ghaziabad, and Registered Office at New Delhi, and Unit/Works at Village Rehdi, Post Office Chuttmalpur, District Saharanpur2. The first-informant/ respondent no. 4 is one of the Directors of the Company.

8. The Bank sanctioned loan to the Company on 01.03.2013. Fund Based Loan at Rs. 175.00 Lakh and Term Loan at Rs. 400.00 Lakh i.e. total loan amount at Rs. 575.00 Lakh was sanctioned to the Company. Collateral security was furnished and hypothecated to the Bank at Rs. 4,41,780.00.

9. A Hypothecation Agreement of goods and debts for Rs. 1.75 crores was executed by the Company through its directors. The Company also hypothecated stock of raw material, office equipments, furniture and fixtures, air conditioners, stock in process, finished goods, consumables, plant and machinery, receivables, all present and future goods, book debts, all other movable assets of the company, plant and machinery, both present and future and bills etc. in favour of the Bank.

10. Further, to secure the credit facility Company mortgaged its immovable property with the Bank as an equitable mortgage or primary /collateral security, for the amount due to the Bank by depositing original title deed and also confirmed the creation of mortgage in favour of the Bank.

11. The Company through fourth respondent again requested to enhance the cash credit limit to Rs. 2.75 crores and on the said request Bank sanctioned/modified credit facilities to the Company on 01.03.2014. Thereafter, the credit facilities aggregating at Rs. 5,91,28,000.00 was sanctioned and disbursed by the Bank to the Company.

12. Fund Based Loan i.e. Rs. 175.00 Lakh was enhanced to Rs. 275.00 Lakh and on review the Term Loan was also enhanced at Rs. 316.28 Lakh on 25.02.2014.

13. The Company availed various credit facilities from the Bank aggregating at Rs. 575.00 Lakhs. The directors of the

Company have also executed letter of personal guarantee securing the credit facility granted by the Bank to the Company.

14. The Company defaulted, consequently, the debt was classified Non-Performing Asset3 on 01.02.2015.

15. The Bank issued notice dated 12.03.2015, under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 20024 duly served/ delivered to the Company, whereby, the Company was called upon to discharge its liability in full with future interest and incidental expenses costs, within a period of 60 days from the date of notice, failing which Bank would proceed under Sub-Section (4) of Section 13 of the SARFAESI Act. The Bank on 02.06.2015 issued and delivered possession notice to the mortgagors.

16. The fourth respondent challenged the aforesaid notice before the Debts Recovery Tribunal, Lucknow5 by filing S.A. No. 444 of 2015 (M/s Shyamvi Steel Private Limited & two others Vs Union Bank of India).

17. The aforesaid application was allowed by the DRT, on technical ground directing the Bank to hand over the possession of the seized assets.

18. The Bank filed an application being Original Application No. 852 of 2016 (Union Bank of India Vs M/s Shyamvi Steels Private Limited) before the DRT, against the directors of the Company for recovery of the amount due under Section 19 of the Debt Recovery Tribunal Act, 19936.

19. A stay application was also filed by the Bank in the aforesaid application praying for setting aside the recovery citation dated 11.11.2016, issued by the Collector, Saharanpur, under Sections 284 and 286 of the U.P. Zamindari Abolition & Land Reforms Act, 1950, for recovery of the electricity dues at Rs. 2,11,55,523/- against the Company. The Presiding Officer passed an interim order on 09.12.2016, in favour of Bank.

20. The Bank handed over the possession of the Factory to the Company on 29.07.2017.

21. Thereafter, Bank again issued a corrected notice dated 05.06.2018, under Section 13(4) of the SARFAESI Act and took possession of the Factory.

22. The Bank made a complaint before the Station House Officer, Police Station Sadar, Saharanpur, alleging therein that some persons, who are hand-men of the fourth respondent, have broken the lock of the factory, but no action was taken by the police.

23. The Bank came to know from the customers that there was certain dues of the Electricity Department against the Company, consequently, Additional District Magistrate (City), Saharanpur, forcibly had taken possession of the premises of the Company from the Bank on 08.12.2018.

24. In the meantime the S.A. No. 444 of 2015, filed by the fourth respondent before the DRT, came to be dismissed for non-prosecution.

25. The fourth respondent moved an application for One Time Settlement7 before the Bank on 12.07.2019.

26. The police arrested a person on 11.09.2019, who was carrying iron materials, which were the theft items, at about 2.00 P.M. near Kali Temple of Redi Village; on query he disclosed his name as Haseen, son of Naseem, resident of Muslim Colony, Chhutmalpur, Police Station Fatehpur, Saharanpur. The aforesaid person was caught by one Ravindra, son of Manmohan, resident of Redi, Police Station Fatehpur, District Saharanpur. Subsequently, a First Information Report8 was also lodged by Ravindra on 11.09.2019; being Case Crime No. 0306/2019, under Sections 379 & 411 I.P.C., Police Station Fatehpur, District Saharanpur.

27. The fourth respondent in his letter dated 15.09.2019, made allegations against the Electricity Department and the persons involved with the Electricity Department. But subsequently, fourth respondent taking somersault, moved an application under Section 156(3) Code of Criminal Procedure, 19739, before the Chief Judicial Magistrate, Saharanpur, deviating from his earlier allegations levelled in the letter dated 15.09.2019, and the entire allegations of theft was fastened against the Bank officers, including, the petitioner.

28. The Bank received letter dated 14.07.2020, issued by the Ministry of Finance, Government of India, New Delhi, directing the Managing Director/Chief Executive Officer, Union Bank of India, to take action, strictly, in accordance with the representation of the Company.

29. Pursuant thereof, Bank sent a letter dated 18.03.2020, to the fourth respondent, accepting the offer for OTS submitted by the fourth respondent at Rs. 4,46,07,745.00.

30. The Bank, however, was compelled to send letters dated 04.09.2020 and 17.12.2020, to the fourth respondent informing that since the fourth respondent did not comply with the terms and conditions of the OTS offered by the Bank, therefore, the Bank proceeded to reject the OTS and sought recovery of the dues.

31. The fourth respondent moved an application on 03.02.2021, under Section 156(3) Cr.P.C., before the Chief Judicial Magistrate, Saharanpur, praying for registering criminal case against the officers of the Bank.

32. The Bank officially informed the fourth respondent vide letter dated 18.02.2021, that OTS has finally been cancelled as he had not complied with the terms and conditions of the OTS. Bank informed that the outstanding dues of the Company on date stands at Rs. 12,49,15,622.83, plus legal charges.

33. The Chief Judicial Magistrate, Saharanpur, directed Bank to submit inventory prepared at the time of taking possession of the Company under the SARFAESI Act. Pursuant thereto, petitioner supplied the inventory prepared by the Bank on 05.06.2018.

34. The fourth respondent further attempted to create obstacles, accordingly, entered into a registered rent agreement letting out the premises of the Company in favour of one Ashok Gupta, son of, Late Ram Nath Gupta, Proprietor of M/s Ram Prem Stocky Yard, resident of Roorkie Road, Chhutmalpur, District Saharanpur, the possession of which was taken by the Bank on 05.06.2018.

35. The Chief Judicial Magistrate, Saharanpur, passed an order dated 30.09.2021, in Misc. Application No. 245 of 2021 (Sanjay Tomar Vs Rajpal Singh and others), filed by respondent no. 4 under

Section 156(3) Cr.P.C., wherein, Station House Officer, Police Station Fatehpur, District Saharanpur, was directed to register F.I.R. and investigate the matter. The impugned First Information Report in compliance was lodged on 16.10.2021, which is under challenge by the petitioner.

36. In the counter affidavit filed by the fourth respondent, the facts are not being disputed. It is, however, submitted that F.I.R. should have also been lodged under Section 409 I.P.C. against the accused petitioners being public servant and having committed breach of trust as some of the materials and articles, as per the inventory, was stolen while it was in the custody and possession of the Bank. It is further submitted that the possession of the premises (secured assets) was taken by the Bank with the assistance of the District Magistrate and police personnal in the absence of the fourth respondent.

37. In this backdrop, it is urged that it was the bounden duty of the Bank officials to have protected the assets. It is further urged that the bank officials were not only negligent with regard to the security and safety of the assets, but, attempted to grab the articles, as well as, the machinery of the Company out of malafide intention. The petition being devoid of merit is liable to be dismissed.

38. Rival submissions fall for consideration .

39. The sole question that arises for consideration is as to whether it is a case of malicious prosecution against the Bank and whether ingredients of the offence under Section 420, 406 I.P.C. is made out from the impugned F.I.R.

40. The petitioners herein are officials of the Bank, the malafide intent of the complainant is reflected from the fact that the fourth respondent has lodged F.I.R. in retaliation to counter the recovery proceedings, and to coerce the officers of the Bank from not taking possession of the Company under Section 13 of the SARFAESI Act.

41. It is not being disputed by learned counsel for the fourth respondent that the Company is borrower and the complainant happens to be the Director. Company defaulted and further failed to accept the OTS scheme offered by the Bank, consequently, Bank proceeded to exercise its statutory and contractual right as per the SARFAESI Act to take possession of the secured assets of the Company and ensure recovery of the amount due to the Bank. Proceedings of recovery is pending before the DRT, wherein, Company and the Revenue authorities i.e. the Collector are parties. The SARFAESI Act and DRT Act is a complete code for redressal of the grievance of the debtor company and at the same time it is always open for the debtor company to raise counter claim against the Bank for the loss of inventory/assets for any reason, including, theft.

42. The allegations made in the F.I.R. taken on face value alleges that the assets seized by the Bank in proceedings under SARFAESI Act was stolen due to the negligence of the officials of the Bank, consequently, on an application under Section 156(3) Cr.P.C. the impugned F.I.R. came to be lodged. The allegations taken as it is, would not make out a case of cheating (Section 415 I.P.C.) as there is no deception of any person, fraudulently or dishonestly inducing such a person to deceive to deliver any property. Further, it is also not the case of cheating and dishonestly inducing the delivery of property to any person or to

make alter or destroy the whole or any part of a valuable security or anything which is signed or sealed, and which is capable of being converted into a valuable security.

43. Criminal breach of trust (Section 405 I.P.C.) mandates that for whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use of property, or dishonestly uses or disposes of that property in violation of any direction of law or of any legal contract which he has made touching the discharge of such trust commits "criminal breach of trust".

44. To constitute an offence of criminal breach of trust, it is essential that the prosecution must prove first of all that the accused was entrusted with some property or with any dominion or power. It has to be established further that in respect of the property so entrusted, there was dishonest, misappropriation or dishonest conversion or dishonest use or disposal in violation of a property or law of legal contract by the accused himself or some one else which he willingly suffered to do. It follows automatically from the defence that the ownership or beneficial interest in property in respect of which criminal breach of trust alleged to have been committed must be in some person other than the accused and the later must hold it on account of misappropriation and some ways for his benefit.

45. In this backdrop, admittedly, the Company, of which complainant is one of the Director, had obtained loan from the bank, on default, the Bank was within its statutory/contractual right to recover the assets mortgaged/hypothecated to the Bank as per law. The Bank taking recourse as per law had taken possession of the property with the intervention of the District Collector and the police officials, which the Bank was entitled in proceedings under Section 13/14 of the SARFAESI Act. It is also not in dispute that the Company had outstanding electricity dues, for recovery thereof, it is alleged that the Revenue authorities attempted to take possession of the property, which was in the custody of the Bank. The Bank while taking possession had drawn an inventory of the assets, which as per the complainant is alleged to have been stolen while in custody of the Bank, therefore, the officials of the Bank are liable to face criminal prosecution.

46. The proceedings initiated and the action taken by the Bank under SARFAESI Act are assailable under the said Act before the higher forum and if, borrower is allowed to take recourse to criminal law in the manner, as it has been taken, it needs no special emphasis to state, has an inherent potential to affect the financial health of the Bank. It is noticeable by the conduct of the fourth respondent that the statutory remedies have cleverly been pypassed and prosecution route has been undertaken for instilling fear amongst the officials of the Bank compelling them to concede to the request of the Company for settlement.

47. It needs to be reiterated that the learned Magistrate has to remain vigilant with regard to the allegations made and the nature of allegations in an application filed under Section 156(3) Cr.P.C. and not to issue directions without proper application of mind. The petitioners herein are officers of the Bank and the complainant is the Director of the defaulted Company. The bank has statutory right of effecting recovery of the security interest, which if

allowed to be given criminal colour by the defaulting Company would be fatal to the Banking System.

48. 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 to be noted that when a borrower of the financial institution covered under the SARFAESI Act, invokes the jurisdiction under Section 156(3) Cr.P.C. and also there is separate procedure under the DRT Act/SARFAESI Act, an attitude of more care, caution and circumspection had to be adhered to by the Magistrate.

49. The evil design of the complainant is writ large while lodging the complaint, was to harass the petitioners with the sole intent to avoid payment of loan and to pressurize Bank for settlement as per the terms of the Company. When a person avails a loan from a financial institution, it is his obligation to pay back the loan, in the event of default the financial institution is at liberty to proceed in accordance with law to enforce the contractual obligation at the statutory forum prescribed by the law.

50. Taking a case that the assets seized and taken possession by the Bank to secure its dues, some of it may have been stolen, as is being alleged by the complainant, that would not give rise to criminal prosecution as it is always open to the aggrieved defaulter Company to raise the issue before the DRT and plead counter claim for the value of the stolen inventory. In the event, it is found that the inventory, in any manner is deficit, while it was in possession of the Bank, at the most the Bank would have to adjust the deficit amount against the dues sought to be recovered by the Bank against the Company. Taking recourse to criminal prosecution against the Bank is unwarranted.

51. In **Indian Overseas Bank Versus Ashok Saw Mill**10, Supreme Court held as follows:

"34. The provisions of Section 13 enable the secured creditors, such as banks and financial institutions, not only to take possession of the secured assets of the borrower, but also to take over the management of the business of the borrower, including the right to transfer by way of lease, assignment or sale for realising secured assets, subject to the conditions indicated in the two provisos to clause (b) of sub-section (4) of Section 13.

35. In order to prevent misuse of such wide powers and to prevent prejudice being caused to a borrower on account of an error on the part of the banks or financial institutions, certain checks and balances have been introduced in Section 17 which allow any person, including the borrower, aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor, to make an application to the DRT having jurisdiction in the matter within 45 days from the date of such measures having taken for the reliefs indicated in sub-section (3) thereof.

36. The intention of the legislature is, therefore, clear that while the banks and financial institutions have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid

and also to restore possession even though possession may have been made over to the transferee."

52. In the facts and circumstances of the case, the issue as per the allegations in the F.I.R. relates to the exercise of remedy relating to a secured asset as defined under the SARFAESI Act, cannot be in dispute. The fact that the account of the complainant Company was classified NPA is also admitted position. The OTS was also not acted upon. In that regard when a right accrues to the secured creditor to enforce the security interest, the procedure as contemplated under Sections 13 and 14 of the SARFAESI Act is to be resorted to by the Bank. If the complainant, as a borrower had any grievance with regard to any of the measures taken by the secured creditor invoking the provisions of Section 13 of the SARFAESI Act, the remedy is provided under Section 17/19 of the SARFAESI Act, and certainly not to take recourse of criminal proceedings. The SARFAESI Act is a complete Code in itself which provides the procedure to be followed by the secured creditor and also the remedy to the aggrieved parties including the borrower.

53. In the given admitted facts, the complaint filed by the complainant was an intimidatory tactic and afterthought which is an abuse of process of law. Further, the officials of the financial institution/bank are provided with immunity from prosecution under Section 32 of SARFAESI Act. The act or action of the Bank officials having not taken in good faith, that aspect of the matter is also an aspect which can be examined in the proceedings under the SARFAESI Act before the prescribed forum. In such circumstances, criminal proceedings would not be sustainable in a matter of the present nature, exposing the petitioners to proceeding before the investigating officer or the criminal court, would not be justified.

54. In **Priyanka Srivastava and another Vs. State of U.P. and others**11, Supreme Court while allowing the appeal filed by an officer of the financial institution set aside the order passed by the High Court and quashed the registration of F.I.R. lodged through an application under Section 156 (3) Cr.P.C. The Court in the opening paragraph observed as follows:

"The present appeal projects and frescoes a scenario which is not only disturbing but also has the potentiality to create a stir compelling one to ponder in a perturbed state how some unscrupulous, unprincipled and deviant litigants can ingeniously and innovatively design in a nonchalant manner to knock at the doors of the Court, as if, it is a laboratory where multifarious experiments can take place and such skillful persons can adroitly abuse the process of the Court at their own will and desire by painting a canvas of agony by assiduous assertions made in the application though the real intention is to harass the statutory authorities, without any remote remorse, with the inventive design primarily to create a mental pressure on the said officials as individuals, for they would not like to be dragged to a court of law to face in criminal cases, and further pressurize in such a fashion so that financial institution which they represent would ultimately be constrained to accept the request for "one-time settlement" with the fond hope that the obstinate defaulters who had borrowed money from it would withdraw the cases instituted against them."

55. The Court further reiterated that the learned Magistrate while exercising jurisdiction under Section 156 (3) Cr.P.C.

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. The Court in Para-27 observed as follows:

".....But, the learned Magistrate should take note of the allegations in entirety, the date of incident and whether any cognizable case is remotely made out. It is also to be noted that when a borrower of the financial institution covered under the SARFAESI Act, invokes the jurisdiction under Section 156(3) Cr.P.C. and also there is a separate procedure under the Recovery of Debts due to Banks and Financial Institutions Act, 1993, an attitude of more care, caution and circumspection has to be adhered to."

56. Recently, in K. Virupaksha and another Versus State of Karnataka and another12, Supreme Court in an appeal filed by Deputy General Manager, Canara Bank, quashed the complaint and the order passed therein, as also the F.I.R. insofar as the appellants are concerned. The financial institution had initiated recovery proceeding against the defaulting party but in retaliation and counterblast, the officials were exposed to criminal prosecution. The Court in paragraph 16 observed as follows:

"We reiterate, the action taken by the Banks under the SARFAESI Act is neither unquestionable nor treated as sacrosanct under all circumstances but if there is discrepancy in the manner the Bank has proceeded it will always be open to assail it in the forum provided."

57. In State of Haryana & Ors. Vs. Bhajan Lal & Ors.13 Supreme Court considered in detail the scope of the High Court powers under Section 482 Cr.P.C. and/or Article 226 of the Constitution of India to quash the FIR and referred to several judicial precedents and held that the High Court should not embark upon an inquiry into the merits and demerits of the allegations and quash the proceedings without allowing the investigating agency to complete its task. The Court, inter alia, identified the following cases in which FIR/complaint can be quashed:

"102. (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) ....

(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."

58. Having regard to the facts and circumstances of the case, the order of the Magistrate directing lodging of the F.I.R. against the officers of the Bank, mechanically and without application of mind cannot be appreciated. The writ petitions are liable to succeed and is ordered accordingly.

59. The writ petitions are allowed. The complaint, the order of the Magistrate passed therein and also the impugned F.I.R., insofar, it relates to the petitioners is set aside and quashed.

60. The cost assessed at Rs. 50,000/- to be paid by the fourth respondent to the Bank, at the Branch, within, six weeks from the date of order.

(2023) 1 ILRA 334
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE SYED WAIZ MIAN, J.

Criminal Misc. Writ Petition No. 16983 of 2022 along with Crl. Misc. Writ Petition No. 18326 of 2022

Ambuj Parag Dubey & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rakesh Dubey, Sri Manish Tiwary, Sr. Advocate

Counsel for the Respondents:
G.A.

A. Criminal Law - U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986-Section 3(1)-Quashing of FIR-FIR lodged against gang leader and members of gang-they have been chargesheeted in base cases shown in gang chart-But that alone is not basis for prosecution under Gangster Act- Where the competent authority is not convinced on the material placed by police authorities, the competent authority may necessarily decide to call for a discussion to prima facie satisfy himself that prosecution is warranted-FIR that follows the approval of gang chart cannot be faulted or quashed merely for want of discussion.(Para 1 to 43)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Ashok Kumar Dixit Vs St. of U.P.(1987) AIR All 235(All HC, FB)

2. Romesh Thappar Vs St. of Madras (1950) AIR SC 124

3. Nagen Murmu Vs St. of W.B. (1973) AIR SC 844

4. Bablu Mitra Vs St. of W. B. (1973) AIR SC 197

5. Jadunandan Sha Vs DM, Dhanbad (1983) 4 SCC 301

(Delivered by Hon'ble Suneet Kumar, J. & Hon'ble Syed Waiz Mian, J.)

1. Heard Sri Rakesh Dubey, learned counsel appearing for the petitioners and learned A.G.A. for the State-respondents.

2. Facts of Writ Petition No. 16983 of 2022 is being referred to for the sake of convenience.

3. Petitioners by the instant writ petition, seek quashing of FIR bearing Case Crime No. 0424 of 2022 lodged under Section 3(1) of the The Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 (For short "Gangster Act') at Police Station-Bhognipur, District Kanpur Dehat. The FIR came to be lodged by the In-charge Inspector P.S. Bhognipur, wherein, the second petitioner has been shown as the gang leader along with ten other members of the gang, including, first and third petitioners. Against the second petitioner/gang leader three base cases have been included in the gang-chart, whereas, against the first and second petitioners one base case have been shown. In Writ Petition No. 18326 of 2022, the petitioner is at serial no. 6 of the gang-chart and two cases have been shown against him.

4. It is alleged in the FIR that the petitioners, along with other members, are

operating as a gang and have committed offence under Section 302 IPC and other economic offences on the basis of forged and manufactured documents. They indulged in antisocial activities, thereby, creating fear and terror amongst the public; it is alleged that due to fear of the gang no member of the public is prepared to come forward and depose against the gang leader and gang members. Police report (charge-sheet) has been filed in the base cases against the petitioners and from the input collected by the Investigating Officer, it has become incumbent in public interest to prosecute the petitioners under the Gangster Act so as to prevent them from indulging in antisocial activities or committing further organized crime.

5. The first petitioner, has been shown as a gang member, claims to be qualified, having B.Tech (Mechanical) degree and a degree in Law, and is aged about 27 years. The second petitioner is the gang leader, claims to be a practising lawyer at District Court Bhognipur, District Kanpur Dehat, for the last 20 years, and the third petitioner is a gang member.

6. The following cases have been registered against the second petitioner/gang leader :- Crime Case No. 98 of 2022 under Section 302, 394, 504, 506, 34, 120B IPC, P.S. Bhognipur, District Kanpur Dehat, Case Crime No. 190 of 2021 under Sections 420, 467, 468, 471, 323, 504, 506 IPC, P.S. Bhognipur, District Kanpur Dehat & Case Crime No. 173 of 2019 under Sections 420, 467, 468, 471 IPC, P.S. Bhognipur, District Kanpur Dehat.

7. Learned counsel for the petitioners submits that registration of the impugned FIR rests on the base case noted in the gang-chart. It is urged that before lodging of the impugned FIR, the mandatory provisions of the U.P. Gangster and Anti Social Activities (Prevention) Rules, 2021 (for short "Gangster Rules), in particular, Rules, 5, 8, 10 and 12 have not been followed in its true spirit, further, it is urged that petitioners would not be covered within the definition of "gang' as defined under Section 2(b) of Gangster Act.

8. It is further submitted that in Case Crime No. 98 of 2022, the second petitioner is not nominated, however, during investigation the name of the first and second petitioner surfaced. In case Crime No. 173 of 2019, on further investigation a supplementary charge-sheet came to be filed against the gang leader. In case Case Crime No. 190 of 2021, the second petitioner is nominated, wherein, it is alleged that the accused, therein, are trying to procure the property of the informant on the basis of forged document.

9. In case Crime No. 173 of 2019 and Case Crime No. 190 of 2021 the second petitioner has obtained bail/anticipatory bail. It is further urged that sub-rule (3) of Rule 5 mandates that the gang-chart would not be approved summarily but after due discussion in a joint meeting of the officials has not been complied.

10. It is submitted that in the instant case the District Magistrate/competent authority granted approval without applying his judicial mind in the joint meeting with Superintendent of Police; the approval was granted on a printed proforma, whereas, Rule 17 prohibits recommendations on a printed proforma forwarded by the Nodal Officer and approved by the Superintendent of Police, as well as, the Competent Authority. It is

urged that the approval violates Rule 17 of the Gangster Rules.

11. Learned State Counsel opposing the writ petition submits that the petition lacks merit; FIR cannot be quashed on mere procedural irregularity; it is not being disputed by the petitioners that in the base case they have been charge-sheeted for offences covered under the Gangster Act; the scope of quashing of the impugned FIR lodged under a special statute is miniscule; the writ petition being devoid of merit is liable to be dismissed.

12. Rival submissions fall for consideration.

13. Gangster Act was enacted to make special provision for the prevention of, and for coping with gangsters and anti-social activities and for matters connected therewith and incidental thereto. The Gangster Act is a special statute, as well as, a penal statute.

14. The Gangster Act seeks to punish declared criminals who have deliberately chosen the life of crime. The activities of these professional perpetrators of organized crimes, violence and orgy has a far more baneful effect on the health and morals of the society and its people. If the activities of such recidivists are subjected to same punishment as that other ordinary criminals, the confidence of public in the efficacy and efficiency of State Administration is bound to shake (vide; **Ashok Kumar Dixit vs. State of U.P., AIR 1987 (All) 235 (All HC,FB).**

15. As per Section 20 of Gangster Act, provisions of the Act or any Rule made thereunder shall have overriding effect notwithstanding anything inconsistent therewith contained in any other enactment. The State Government in exercise of powers under Section 23 of the Gangster Act and in supersession of all Government Orders and notifications, duly notified on 27 December 2021, the Gangster Rules to provide for speedy and transparent procedure to punish gangster and to establish efficient recovery system in respect of property of gangsters and incidental benefits acquired by them through crimes and acts related therewith.

16. Chapter-I of the Gangster Rules defines "Base Cases', "Form' "Nodal Officer' and "worldly', which reads thus:

2. (1).....

a.....

b. "Base Cases" means the cases on the basis of which a gang-chart has been prepared with the intention of taking action against the gang under the Act;

c.....

d.....

e. "Form" means the form appended to these rules;

f. "Nodal Officer" means a police officer not below the rank of Deputy Superintendent of Police under the Police Act, 1861 (Act no. 5 of 1861) and the Uttar Pradesh Police Regulations, 1861, for the time being in force, designated by the district head of Police, the Commissioner of Police/Senior Superintendent of Police/Superintendent of Police, as the case may be, to prepare the gang chart under the Act;

g.....

h. "Worldly" includes illegal audacious acts done for the sake of temporal gratification.

17. Chapter-II of Gangster Rules lays down "Conditions of Criminal Liability of

Gangs'. Rule 3(1) provides that the offences mentioned in Sub-sections (i) to (xxv) of clause (b) of section 2 of the Gangster Act shall be punishable under the Gangster Act only if they are: (a) committed for disturbing public order; or (b) committed by causing violence or threat or display of violence, or by intimidation, or coercion or otherwise, either singly or collectively, for the purposes of obtaining any unfair worldly, economic, material, pecuniary or other advantage to himself or to any other person.

18. Section 2(b) defines Gang- The requirement of "Gang' are that

(i) Gang means a group of persons; (ii) these persons might act either singly or collectively; (iii) such action is to be associated with violence or threat or show of violence or intimidation or coercion or otherwise; (iv) such action must be with the object of disturbing public order or of gaining any undue advantage (temporal, pecuniary, material or otherwise for himself or for any other person).

19. The expression "public order' is of wide connotation and signifies the state of tranquillity prevailing among the members of political society as a result of the internal regulation of the Government. (**Romesh Thappar vs. State of Madras, AIR 1950 SC 124**). Thus, public order means even tempo of the life of the community taking within its fold even a specified locality and a substantial section of the society. (**Nagen Murmu vs. State of West Bengal, AIR 1973 SC 844**). In other words, the word public order is virtually synonymous with public peace, safety and tranquillity. The incidents of breach of public order would include the legislation to regulate the use of sound amplifiers in public places, forcing entry into, schools, setting fire to school building, public property, public gambling, manufacture and distribution of spurious and adulterated liquor, drugs, attempting to throw a bomb at the Police etc. are all connected with public order. (**Bablu Mitra vs. State of West Bengal, AIR 1973 SC 197**).

20. Prima facie, a single incident relating to a single individual based on personal enmity may not disturb public order, and may remain confined to "law and order' problem but it is not always necessary. The basic question for determination is whether the incident disturbs the public order or law and order, has to be determined on the basis of the cumulative effect on the facts and circumstances of each and every case. It rather depends on the reaction of the public to the happening and the consequential terror spread by the culprits and the atmosphere surcharged thereby. The distinction between public order and law and order was concisely explained by the Supreme Court in **Jadunandan Sha vs. District Magistrate, Dhanbad, (1983) 4 SCC 301.**

21. Under the Gangster Act no distinction has been made between public order and law and order, it is not the status of criminal but the act which is made punishable under the Gangster Act. The activities of gangsters for offences under the Gangster Act, since they pose grave threat to the even tempo of the society, therefore, called for sterner and more deterrent punishment and speedier hike and early booking. The Gangster Rules thereafter mandates that although a person may not be physically present on the place of occurrence yet he may be roped in under the provisions of the Gangster Act in

relation to that occurrence on the facile ground that he is a gangster. Thus, there is no need of any overt and positive act of the person intended to be apprehended at the place. It is enough to prove his active complicity which has a bearing on the crime. (Vide: **Ashok Kumar Dixit (supra)).**

22. The expression "or otherwise' as used in the definition of gang can be read conjunctively or disjunctively. If read conjunctively, the words "or otherwise', in law, when used in a general phrase, following an enumeration of particulars, are commonly interpreted in a restricted sense, as referring to such other matters as are kindred to the classes before mentioned. The word "or" in "or otherwise" is a disjunctive that marks an alternative which generally corresponds to the words "either". An interoperation of the general words "or otherwise" limiting them to the matters and things of the same kind as the previous words (violence, intimidation, coercion) would make the general words "or otherwise" following the preceding specific words, redundant. These words "or otherwise" are not words of limitation, but of extension so as to cover all possible offences. The word "otherwise" is, therefore, not to be read "ejusdem generis" with the other instances of violence mentioned in the earlier part of sub-section.

23. Further, on perusal of the offences which have been included in the definition of Gang includes offences under Chapter-XVII of Indian Penal Code which include the offence of theft under Section 378, offences under Section 403 and the related sections dealing with criminal misappropriation of property, Section 405 and allied sections deals with the crime of criminal breach of trust, dishonest misappropriation of property. Section 410 and related sections concern stolen property, Section 420 and related sections deal with offences of cheating which only involve deception, fraudulent or dishonest inducement to a person or his property. It is evident from the provisions included within the definition of gang do not require existence of force or violence. Similarly, offences under Section 3 of U.P. Public Gambling Act may not necessarily involve the use of force. Thus, the word "otherwise' has been employed disjunctively in the definition of gang and cannot be read as "ejusdem generis", with other incidents of violence mentioned in the earlier part of this sub-section (Vide: **Verneet Kumar** (supra)).

24. Rule 4 of the Gangster Rules clarifies that persons at the scene of incident or direct participation in the incident is not necessary. It is further provided that it is not necessary to commit any offence together with all members of the said gang. If a member of that gang has committed any offence which comes within the purview of the Gangster Act, along with any other member or gang leader, they may be presumed to be a gang.

25. Rule 4 is extracted:

4. (1) **Presence at the scene of incident or direct participation in the incident is not necessary**: For committing the criminal act defined in clause (b) of section 2 of the Act, if any person organizes the whole gang or abets or aids the gang leader or member of that gang or provides protection and shelter to any such person, with the knowledge that the person in question is a gang leader or member of a gang or involved in committing/aiding/abetting a criminal act,

before or after the commission of such activity, then such a person shall also be liable under the provisions of the Act even though the whole gang had not participated in the incident at the time of commission of the said incident or was not present at the scheme of the incident.

(2) **It is not necessary to commit any offence together**: For a person to be a member of a gang under the Act, it is not necessary for him to have committed any offence together with all the members of the said gang. If a member of that gang has committed any offence which comes within the purview of the Act, along with any other member or gang leader, they may be presumed to be a gang:

Provided that no such person shall be included in gang who has committed a few offences which do not come within the purview of the Act, along with a member three years or earlier.

26. All the anti-social activities mentioned in the definition of gang are not covered as offences but are certainly unlawful activities having serious reflection on the society, though not termed as offences. Thus, the law never required that offences must have been committed in past or involve use of violence for prosecution under the Gangster Act. Further, as per definition of gang, the Gangster Act seeks to prevent and punish activities which may result in undue temporal, pecuniary, material or other advantage to the gangsters or any other person and which may or may not necessarily, involve the use of violence. (**Verneet Kumar vs. State of U.P. 2009 (1) ALL CrJ 377**).

27. Chapter-III of Gangster Rules lays down the principles related to Gang Chart. Rule-5 mandates that Incharge of a Police Station/Station House Officer/ Inspector shall prepare a Gang Chart (Form No. 1) mentioning the details of criminal activities of the gang. The Gang Chart will be presented to the district head of the Police after clear recommendation of the Additional Superintendent of Police mentioning the detailed activities in relation of all the persons of the said gang. Sub-rule (2) of Rule 5 provides that the provisions contained therein shall be complied in respect of gang charts. The provision reads thus:

5. (1) To initiate proceedings under this Act, the concerned Incharge of Police General Rules Station/Station House Officer/Inspector shall prepare a gang-chart mentioning the details of criminal activities of the gang.

(2) The gang-chart will be presented to the district head of police after clear recommendation of the Additional Superintendent of Police mentioning the detailed activities in relation to all the persons of the said gang.

(2) **The following provisions shall be complied with in respect of gang-charts:-**

a. The gang-chart will not be approved summarily but after due discussion in a joint meeting of the Commissioner of Police/District Magistrate/Senior Superintendent of Police/ Superintendent of Police.

b. There may be **no gang of one person but there may be a gang of known and other unknown persons** and in that form the gang-chart may be approved as per these rules.

c. The gang-chart shall not mention those cases in which acquittal has been granted by the Special Court or in which the final report has been filed after the investigation. However, the gang-chart

shall not be approved without the completion of investigation of the base case.

d. Those cases shall not be mentioned in the gang-chart, on the basis of which action has already been taken once under this Act.

e. A separate list of criminal history, as given in Form No. 4, shall be attached with the gang-chart detailing all the criminal activities of that gang and mentioning all the criminal cases, even if acquittal has been granted in those case or even where final report has been submitted in the absence of evidence.

Along with the above, a certified copy of the gang register kept at the police station shall also be attached with the gang-chart. In addition to the above, the information of crime and gang members mentioned in the gang-chart will also be updated on Interoperable Criminal Justice (ICJS) portal and Crime and Criminal Tracking Network System (CCTNS).

28. Rule 6 provides that while preparing the Gang Chart it shall be clearly mentioned, if the alleged act of the gang falls within the purview of clause (b) of Section 2 of the Act along with relevant provisions, further, sub-rule (2) mandates that the Investigating Officer makes an endorsement to the effect that the accused is causing panic, alarm or terror in public, then evidence shall be collected in this regard. In addition to the above, a list of criminal history may be attached separately in the prescribed format. (Form No. 4)

29. Rule 10 mandates that records of base cases, would accompany the gang chart and Rule 11 mandates that the present status of all the accused, whether they are in jail or on bail or absconding, shall be clearly mentioned. Rule 13 mandates that while writing abstract below the gang chart and particulars of those officials shall be specifically mentioned. Rule 13 is extracted:

13. While writing the abstract below the gang-chart and particulars separately with the gang-chart, the particulars of those offences shall be specifically mentioned:-

i. which have been committed for pecuniary, materialistic and temporal or similar benefits; or

ii. which disturb the public order; or

iii. Which are a ground for detention under the National Security Act, 1980 (Act no. 65 of 1980)

30. Sub-rule 3 of Rule 15 provides that final decision as to whether to include or not to include the name of member of a gang in the gang and gang-chart shall be at the discretion of the Commissioner of Police/District Magistrate, as the case may be.

31. Rule 16 provides the manner and the recommendations to be made while forwarding the gang chart Rule 16 reads thus:

16. The following manner shall be followed in the forwarding of Gang-Chart:

(1) Forwarding of the gang-chart by the Additional Superintendent of Police: The Additional Superintendent of Police will not only take a quick forwarding action in the case but **he will duly peruse the gang-chart and all the attached forms; and when it is satisfied that there is a just and** satisfactory basis to pursue the case, only then will he forward the letter along with the recommendation given below on the gang-chart to the Superintendent of Police/Senior Superintendent of Police.

"Throughly studies the gang-chart and attached evidence. The basis of action under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 exists. Accordingly, forwarded with recommendation."

(2) Forwarding of the gang-chart by the district police in-charge: When the gang-chart along with all the Forms is received by the Senior Superintendent of Police/Superintendent of Police with the clear recommendation of the Additional Superintendent of Police, he will also **thoroughly analyze all the facts and when it is confirmed that all the formalities of the Act have been fulfilled and there is a legal basis for taking action in the case,** then he should forward the gang-chart to the Commissioner of Police/District Magistrate stating that: "I have duly perused the gang-chart and attached forms and I am fully satisfied that all the particulars mentioned in the case are correct and there is a satisfactory basis for taking action under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act 1986. Accordingly, approved"

(3) Resolution of the Commissioner of Police/District Magistrate: When the gang-chart is sent to be the Commissioner of Police/District Magistrate along with all the Forms, all the facts will also be thoroughly perused by the Commissioner of Police/Districts Magistrate and when **he is satisfied that the basis of action exists in the case, then he will approve the gang-chart** stating therein that: "I duly perused the gang-chart and attached Forms in the light of the evidence attached with the gang-chart, satisfactory grounds exist for taking action under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986. The gang-chart is approved accordingly."

It is noteworthy that the words written above are only illustrative. There is no compulsion to write the same verbatim but it is necessary that the meaning of approval should be the same as the recommendations written above, and it should also be clear from the note of approval marked.

32. Satisfaction of the competent authority only means that the competent authority must be in fact satisfy and not a dishonest satisfaction, which will be no satisfaction at all. The satisfaction contemplated by the Gangster Rule is satisfaction in point of fact on the materials placed before the competent authority. The satisfaction of the competent authority referred to under the Rule is not with respect to the allegations levelled against the gangster but the satisfaction is confined to those allegations that the accused can be prosecuted under the Gangster Act. Whatever may be the nature of charge against the accused, the satisfaction of the competent authority should be with regard to that the materials placed before him and the nature of the accused indulging in community antisocial activities. It is expedient to sanction prosecution under the Gangster Act.

33. The expression satisfied is much narrower than "application of mind'. The competent authority is not to apply his mind and satisfy himself as to whether the material placed before him would be sufficient for convicting the accused under the Gangster Act. The satisfaction is confined within a narrow domain based on the materials placed before the competent authority, the authorities forwarding the gang chart is satisfied that the accused should be prosecuted under the Gangster Act. The expression satisfaction is not satisfaction on evidence but a prima facie

satisfaction based on the representations of the nodal authority and the district police that the accused should be prosecuted under the Gangster Act.

34. Rule 17 mandates that the competent authority is bound to exercise its own independent mind while forwarding the gang chart and should not be on a pre-printed rubber seal gang chart. Rule 17 reads thus:

17 (1) the Competent Authority shall be **bound to exercise its own independent mind while forwarding the gang-chart.**
(2) **A pre-printed rubber seal gang-chart should not be signed** by the Competent Authority; otherwise the same **shall tantamount to the fact that the Competent Authority has not exercised its free mind.**

35. Rule 18 provides that gang chart shall be sent only in the manner as given in Form No. 1 of these rules.

36. Rule 17 and 18 would have to be read together. Gang chart has to be sent in the prescribed Form No. 1. The endorsement to be made by each of the authorities have also been specified in Rule 16. The rule itself prescribes and mandates a printed Form. Rule 17 merely mandates that the competent authority while approving the gang chart should not be swayed by the recommendation of the police authorities mechanically but should satisfy himself independently that the grounds for prosecution is made out. The satisfaction at that stage is subjective and does not rest upon any evidence. The competent authority has to satisfy that the materials placed with the gang chart calls for prosecution. The stage of collecting evidence follows thereafter. The scope of judicial review is miniscule, the accused cannot challenge the FIR without challenging the gang chart. The question as to whether the antisocial activities of the proposed accused is that of a gang or gangster is a matter of investigation.

37. Rule 22 clarifies and specifies that a single act/omission will also constitute an offence under the Act and a first information report must be registered on the basis of a single case. Rule 22(1) reads thus:

22(1) **A single act/omission will also constitute an offence under the Act, and First Information Report may be registered on the basis of a single case** i.e., it is not mandatory that any criminal history must be recorded and alleged before registering an offence under the Act.

38. Further, sub-rule (2) of Rule 22 necessarily provides prosecution on certain class of cases, on a single offence which includes Section 302, 376D, 395, 396 or 397 of Indian Penal Code out of the offences mentioned in sub-clause (i) or clause (b) of Section 2 of the Act.

39. Rule 27 clarifies that if the accused are minors, and their age is less than 18 years, then they should not be included in the gang chart, however, the proviso to the Rule clarifies that if the act of juvenile falls under the category of offences mentioned in Rule 22 and his age is more than 16 years, then action can be taken against him. Rule 27 reads thus:

27. If the accused are minors, and their age is less than 18 years, then they should not be included in the gang-chart:

Provided that if the act of a juvenile falls under the category of offences

mentioned in rule 22 and his age is more than 16 years, then action can be taken against him under the relevant provisions of the Act, subject to the decision of the District Level Supervision Committee mentioned in rule 64.

40. Reverting to the facts of the case in hand, the gang leader and the members of the gang have been charge-sheeted in the base cases shown in the gang chart. But that alone is not the basis for prosecution under Gangster Act, the Act provides for prosecution of such persons for engaging in anti-social activities which has been made an offence under the Gangster Act. The gang leader claims to be a practising lawyer, one of the gang members is well educated, but that would not mean that they are not indulging in anti social activities for worldly gain. The Gangster Rules merely spells out the guiding principle to lodge prosecution. The steps of collecting evidence follows thereafter.

41. The submission of the learned counsel for the petitioners that there was no "discussion' by the competent authority with the police officers before approving the gang chart would not be fatal to the prosecution of the petitioners. The expression "discussion' has to be followed mandatorily by the competent authority in every case does not follow from reading of the Rule, though the rule employs the word "shall'. The Gangster Rule no where mandates the consequence of not following "discussion' by the competent authority. In our opinion the rule mandating discussion is directory. It is left to the discretion of the competent authority, having regard to the material placed before him for approval of the gang chart. In a case, on the materials, the competent authority is convinced and prima facie satisfied that a case for prosecution is made out he may approve the gang chart bypassing discussion with the police officials. But in a case where the competent authority is not convinced or in two mind, on the material placed by the police authorities, the competent authority may necessarily decide to call for a discussion to prima facie satisfy himself that prosecution is warranted. The FIR that follows the approval of the gang chart cannot be faulted or quashed merely for want of discussion.

42. The purpose of the Gangster Act is to check the antisocial activities of gangster. The anti-social activity need not necessarily be violent. The court is not oblivious of the fact that for temporal and worldly gain, the modus operandi of a gangster can be effected on merely a phone call or through a messenger to intimidate or coerce a resident to part with property or demand ransom. There is no overt act of violence, but it tantamounts to organised antisocial activity. It is pleaded by the petitioners that in one of the base case, the complainant has given her affidavit to withdraw the case against the accused/gang member. The conduct of the complainant in handing over the affidavit to the petitioners could appear to be a voluntary act, but at the same time the act could be resting upon tacit threat, intimidation or coercion by the gang. It is to be gone into during investigation. The petitioners would have to face prosecution.

43. In view thereof, the writ petitions being devoid of merit are, accordingly, **dismissed.**

(2023) 1 ILRA 344
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.12.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE SYED WAIZ MIAN, J.

Criminal Misc. Writ Petition No. 20563 of 2019

Gayyur Hasan & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Nipun Singh

Counsel for the Respondents:
A.G.A.

A. Criminal Law - Constitution of India, 1950.-.Article 226-Criminal Procedure Code, 1973 - Sections 110,111 & 116 - Prevention of Damage to Public Property Act, 1984-Section 3/4-Violation of principle of natural justice-Petitioners were not given an opportunity to defend themselves with regard to contents of the notice-Show cause notice was not issued prior to issuing of the impugned notice cum order-Proceedings u/s 110 Cr.P.C. was initiated on the strength of a solitary case u/s ¾ Prevention of Damage to Public Property Act, 1984, that single case would not make the petitioners habitual offender.(Para 1 to 12)

B. Since the person to be proceeded against has to show cause, it is but natural that he must know the grounds for apprehending a breach of the peace or disturbance of the public tranquility at his hands. Although the section speaks of the 'substance of the information' it does not mean the order should not be full. It may not repeat the information bodily but it must give proper notice of what has moved the Magistrate to take the action. (Para 10)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Mohan Lal Vs St. of U.P.(1977) All Cri. 333

2. Madhu Limaye Vs S.D.M. Mongyr (1971) AIR 2486

(Delivered by Hon'ble Suneet Kumar, J. & Hon'ble Syed Waiz Mian, J.)

1. Heard Sri Nipun Singh, learned counsel for the petitioners and learned A.G.A. for the State.

2. Petitioner by the instant petition is seeking quashing of the impugned notices under section 110 of the Code of Criminal Procedure, 1973 (for short "Code') dated 01.07.2019, issued by the third respondent, Sub Divisional Magistrate, Kairana, District Shamli.

3. The conduct of the State-respondent in not cooperating with the present proceeding is writ large, that inspite several opportunities counter affidavit was not filed, accordingly, vide order dated 14.09.2022, the Court was restrained to impose Rs. 10,000/- cost on the State-respondent. Counter affidavit on behalf of the third respondent thereafter has been filed.

4. The thrust of the argument of learned counsel for the petitioner rests on two assertions, viz, that the notice under Section 110 of the Code is in violation of the principle of natural justice as no show cause was issued prior to issuing of the impugned notice cum order. Further, proceedings under Section 110 of the Code was initiated on the strength of a solitary case being Case Crime No. 52 of 2019, under section 3/4 Prevention of Damage to

Public Property Act, 1984. That single case would not make the petitioners habitual offender.

5. The assertions made in paragraphs 13 and 19 of the writ petition reads thus:

"13. That impugned order/notice under section 11 of Cr.P.C. is in violation of principle of natural justice and therefore the impugned notice dated 01.07.2019 deserves to be quashed. The impugned order is based on solitary report of Station House Officer, police Station Jhinjhana, District Shamli dated 08.06.2019 without applying any mind.
19. That section 110 of Cr.P.C. applies only to habitual offenders, which means the consistent in committing offence, therefore on a solitary case no order could be passed under section 110 of Cr.P.C., the same is meant for habitual offender."

6. Learned A.G.A., on instructions, submits that charge sheet has been filed in the aforenoted criminal case.

7. The reply to the aforesaid paragraphs has been given in paragraphs 18 and 20 of the counter affidavit, wherein, there is no denial that the mandate of Section 110 of the Code was not complied by issuing a show cause notice, further, it is submitted that on a single case provisions of Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1988 (for short "Gangster Act'), is attracted. Paragraph 18 and 20 is extracted:

"18. That, the contents of paragraphs No. 12, 13 and 14 of the writ petition as stated are wrong and incorrect hence denied. In reply thereto, it is submitted that the local police who are well familiar with the activities of their territorial limit who submitted the adverse report against the petitioners holding that due to fear of the petitioners no one dare to make complaint against them and therefore, the then Sub Divisional Magistrate rightly issued the notice under section 110 of Cr.PC. Moreover, on the application of the petitioners the then Sub Divisional Magistrate further directed for enquiry and the report filed by the Revenue Authority were found against the petitioners and therefore, the notice under section 110 of Cr.P.C. does not suffer from any illegality or infirmity.
20. That, the contents of paragraphs No. 16, 17, 18, 19 and 20 of the writ petition as stated are not admitted hence denied. In reply thereto it is submitted that this Hon'ble Court as well as the Hon'ble Apex Court have constantly held in catena of cases that even on the basis of only one case crime the provisions of Gangsters Act is attracted and in view of the above, the order under section 110 of Cr.P.C. is just and proper."

8. Section 110 of the Code mandates security for good behaviour from habitual offenders. It appears that where the Executive Magistrate receives information that there is within his local jurisdiction a person who is habitual of committing offence, the Magistrate, in the manner provided, requires such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit.

9. Section 111 provides that when a Magistrate acting under Section 110 deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of

the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.

10. Thereafter, the Code mandates that the Executive Magistrate under Section 116 would make an enquiry as to the truth of the information. Sub-clause (3) of Section 116 contemplates that the Magistrate if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of public tranquillity or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under section 111 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry. Sub-clause (3) of Section 116 is extracted:

"(3) After the commencement, and before the completion, of the inquiry under sub- section (1), the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the com3mission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under section 111 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded: Provided that-

(a) no person against whom proceedings are not being taken under section 108, section 109, or section 110 shall be directed to execute a bond for maintaining good behaviour;

(b) the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under section 111."

11. After following the aforesaid procedure as mandated under the Code, an order to give security can be passed by the Magistrate under Section 117. Section 117 reads thus:

"117. Order to give security. If, upon such inquiry, it is proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond with or without sureties, the with Magistrate shall make an order accordingly:

Provided that-

(a) no person shall be ordered to give security of a nature different from, or of an amount larger than, or for a period longer than, that specified in the order made under section 111;

(b) the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive;

(c) when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties."

12. On perusal of the procedure contemplated and mandated under the Code, it appears that by the impugned order the third respondent bypassing the procedure under section 111, 116 and 117

directly passed the order in the form of notice calling upon the petitioner to furnish security for good behaviour. In other words, the third respondent without making an enquiry on the report, and/or, on the objection of the petitioners, had directed the petitioners to give security. There is no reference of any pending enquiry or of any objection of the petitioners.

13. In the case of **Mohan Lal Vs. State of U.P., 1977 All Cri C 333**, this Court observed:-

"There are a series of decisions in which it has been held that the provisions contained in Section 111 of the Code are mandatory and that the non-compliance thereof vitiated the entire proceedings."

14. In the case of Madhu Limaye v. S. D. M. Mongyr, 1971 AIR 2486, the Apex Court, in para 36 of its judgment observed:

"36. We have seen the provisions of Section 107. That section says that action is to be taken in the manner here-in-after provided and this clearly indicate that it is not open to a Magistrate in such a case to depart from the procedure to any substantial extent. This is very salutary because the liberty of the person is involved and the law is rightly solicitous that this liberty should only be curtailed according to its own procedure and not according to the whim of the Magistrate concerned. It behooves us, therefore, to emphasise the safeguards built into the procedure because from there will arise the consideration of the reasonableness of the restrictions in the interest of public order or in the interest of the general public."

15. In this very case the Apex Court went on to observe in para 37.

"37. Since the person to be proceeded against has to show cause, it is but natural that he must know the grounds for apprehending a breach of the peace or disturbance of the public tranquillity at his hands. Although the section speaks of the `substance of the information' it does not mean the order should not be full. It may not repeat the information bodily but it must give proper notice of what has moved the Magistrate to take the action. This order is the foundation of the jurisdiction and the word 'substance' means the essence of the most important parts of the information."

16. In this backdrop, it is submitted by learned counsel for the petitioner that petitioners were not given an opportunity to defend themselves with regard to the contents of the notice. It is further submitted that the counter affidavit filed by the third respondent is without application of mind and a case of casual approach, as it reflects from the averment made in para 20 of the counter affidavit, that for a single case crime the provisions of Gangster Act is attracted. The matter does not pertain to prosecution of the petitioner under the Gangster Act. The proceedings are under section 110 of the Code arising from a case registered under the Prevention of Damage to Public Property Act, 1984. The writ petition accordingly is liable to be allowed.

17. The writ petition is allowed. The impugned notice dated 01.07.2019, issued by the third respondent, Sub Divisional Magistrate, Kairana, District Shamli, is set aside and quashed. A cost at Rs. 20,000/- is imposed upon the third respondent having regard to the casual approach adopted in the matter, to be deposited with the High Court Legal Services Committee

Allahabad, within four weeks from the date of order.

18. Learned A.G.A. to communicate the order and ensure compliance.

(2023) 1 ILRA 348
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.01.2023

BEFORE

THE HON'BLE OM PRAKASH SHUKLA, J.

Writ-A No. 1223 of 2006
with other connected cases

Sushil Kumar Dubey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Har Govind Singh Parihar

Counsel for the Respondents:
C.S.C.

A. Service Law- U.P. Intermediate Education Board Act-Section 16 E (11)-UP High School and Intermediate College(Payment of salaries to teachers and employees) Act, 1971-Petitioners claim to be Teachers L.T. Grade seeking regular payment of salary and non-interference in regular functioning of the petitioners-Petitioners was appointed as adhoc teachers but they did not get any salary despite several request made by them-No doubt a temporary vacancy can be filled by management in case of an exigency but the petitioners could not allowed to be continue on the said post for perpetuity without his appointment having been referred to selection committee-Judgment passed by Apex Court in Sanjay Singh's case and the compliances made by the State leading to the conducting of examination/interview and preparation of panel sent to the DIOS, nothing survives to be decided.(Para 1 to 11)

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

List of Cases cited:

1. Sanjay Singh & ors.. Vs St. of U.P & ors.. Civil Appeal No. 8300 of 2016

2. Vinod Kumar Yadav Vs St. of U.P. Writ-A No 95 of 2011

3. St. of Punj. & anr. Vs Devans Modern Dreweries Ltd. & anr. (2004) 11 SCC 26

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

1. Heard Shri H.J.S. Parihar, learned Senior Counsel assisted by Mrs. Meenakshi Singh Parihar for the petitioner. Shri Ashish Kumar Pathak, Mrs. Alka Verma, Shri Anand Dubey, Shri Anupam Shukla, Shri I.P. Singh, Shri R.D. Shahi, Shri S.S. Rajawat, Shri Bhanu Bajpai, Shri Pradeep Kumar Singh, Shri Firoz Ahmad Khan, Shri Chandrashekhar Singh, , Shri Alok Srivastava, Shri Prashant Kumar Singh, Shri S. Chandra, Shri Vinod Kumar Gupta, Shri Ravikant Mishra, Shri Ajay Kumar Singh, Shri P.K. Singh, Shri Pawan Kumar Pandey, Shri G.C. Verma, Shri Y.K. Mishra, Shri Ansuman Singh, Shri Ashutosh Shahi, Shri Ganesh Nath Mishra, Shri Sanjay Mishra, Shri Ramchandra Gupta, Shri Rajendra Pratap Singh, Shri Alok Pandey, Shri Udai bhan Pandey, Shri Shashank Singh, Shri Kshemenda Shukla, Shri Jitendra Kumar Pandey, Shri Vinod Kumar Srivastava, Shri Anupam Mehrotra, Shri Krishna Kumar Dubey are present for the petitioners. Shri Badrish Kumar Tripathi, learned Counsel Shri V.P. Nag & Shri Gopal Kumar Srivastava, learned Standing Counsel are present for the opposite parties.

2. The Petitioners in this leading Writ Petition claim to be Teachers L.T Grade and as such have knocked the door of this Court, thereby seeking regular payment of

salary, arrears of salary from their respective date of joining and non-interference by the respondents in regular functioning of these Writ Petitioners on the post of Assistant Teachers L.T. Grade in their respective institution.

3. Since common issue has been raised in this bunch of matter, they are being taken up together for disposal. In order to appreciate the controversy in these bunch of writ petition, it would be appropriate to curl the facts of any writ petition and for the limited purpose, the fact of leading Writ Petition bearing no. 1223 of 2006 (Sushil Kumar Dubey vs. State of U.P & Ors.), is being taken for consideration. The Petitioner in the said Writ Petition claims to be fully qualified for appointment to the post of Assistant Teacher L.T Grade and having been appointed on a vacant post. The Petitioner claims pursuant to the arising of the said vacancy, the post was advertisement and he applied in view of the said advertisement. It is the case of the petitioner that he had been post on the post of Assistant Teacher L.T Grade pursuant to a resolution dated 15.07.2003 issued by the managing committee of the intermediate college, Newadhiya District Jaunpur. The Petitioner claims to have been issued appointment letter on 16.07.2003 and joined on the said post on 18.07.2003 and his name being sent to the office of the District Inspector of schools on 21.07.2003. In view of his said appointment, the petitioner claimed that although several request were made by him to the Manager and Principal of Institution for payment of salary however the same was not released and on his inquiry to the District Inspector of Schools, Jaunpur he was told that the Secretary of Secondary Education, Government of Uttar Pradesh has issued circular dated 10.05.2002 mentioning therein that no approval to the adhoc appointments be made as there was no provision for making adhoc appointment by the management.

4. Although, this court finds on fact that the petitioner ought to be bound by the circular as it was issued much prior to his appointment and was commensurate to the existing law relating to appointment under the U.P Education Act, however the petitioner claims that the Government has no power to make adhoc appointment under the rules or regulations framed under U. P Secondary Education Service Selection Board (U.P Act no. 5 of 1982) as well as U.P Intermediate Education Board Act as it is the Managing committee of an institution, which has been vested with the said power. Thus, it is the case of the petitioner that the state government has no power and authority to stop the management of its essential functions of appointment of Teachers and Principal in the name of grant in aid as his appointment has been made by the Committee of Management in exercise of powers conferred under Section 16 E (11) of U. P Intermediate Education Board Act read with Regulation 9 of Chapter II of the U.P Intermediate Education Board Act. He also claims that since the post in question is under grant in aid it is the responsibility of the State Government to make payment of his salary and any violation thereof is in the teeth of the provisions contained under the U. P High School and Intermediate Colleges (payment of salaries to teachers and other employees) Act, 1971. Thus, it has been prayed by the petitioner that since he has been continuously and regularly working in the said post of Assistant Teacher L.T Grade, he is entitled for salary and arrears thereof.

5. This court finds profitable to quote, section 16 E of the U. P Intermediate Education Board Act, 1921, which provides procedure for filling of temporary vacancy of teachers and head of institutions. Sub -

section 11 of Section 16 E inter alia provides as under: -

"Notwithstanding anything contained in the foregoing sub sections, appointments in the case of a temporary vacancy caused by the grant of leave to an incumbent for a period not exceeding six months or 1 [by death, termination or otherwise] of an incumbent occurring during an educational session, may be made by direct recruitment or promotion without reference to the Selection Committee in such manner and subject to such conditions as may be prescribed.

[Provided that no appointment made under this sub-section shall, in any case, continue beyond the end of the educational session during which such appointment was made."

6. The aforesaid clause is an exception to the general rule that recruitment or promotion can be made by reference to the selection committee only for all grant-in aid institutions. The said non-obstante clause makes it loud and clear that no doubt a temporary vacancy can be filled by the management of the institution in case of an exigency like death or termination etc., during an educational session, however it is also equally clear that the same can be done for a period not exceeding 6 months and in any case no appointment can continue beyond the end of the educational session during which such appointment was made. Thus, on facts of the case, it seems apparently the petitioner could not allowed to be continue on the said post for perpetuity without his appointment having been referred to selection committee.

7. However, this court finds that the controversy relating to the issue being raised in this bunch of matters has been decided by the Hon'ble Supreme Court vide Judgment dated 20.08.2020 passed in ***Civil Appeal no. 8300 of 2016 (Sanjay Singh & Ors. vs. State of U.P & Ors.),*** wherein the Hon'ble Supreme Court in the said judgment gave a slew of directions to the commission in paras 7 to 11 of the judgment relating to conducting of one single examination, interview, weightage to the persons who have worked as TGT or Lecturers etc. etc. Seeing the number of petitions engaging the attention of this court on an issue, which stands already decided by the Apex Court, it would be pertinent to mention Para 7(e) of the said direction which clearly says that the decision taken by the commission shall be final and no further litigation will be entertained in respect thereof.

8. It is also reported that an M.A no. 818/2021 was also filed in the said Civil Appeal no. 8300 of 2016 which was decided on 07.12.2021 wherein the court clarified that weightage will be given to only those who have been found appointed on adhoc basis following procedure as prescribed under section 16 E (11) of the Act. The Ld. Standing Counsel has submitted that in compliance to the directions passed by the Hon'ble Supreme Court in the aforesaid Sanjay Singh's case an advertisement was issued for selection to the post of Assistant Teacher for which test/interview was held on 07/08 of August, 2022 and similar advertisement was issued for selection to the post of Lecturer for which test/interview was held on 17/18 of August, 2021. It is the further submission of the Ld. Standing Counsel that after holding the selection process which was participated by total 1455 (1446 TGT and 9 Lecturer) candidates, who claimed to be working on adhoc basis, only 126 adhoc

teachers on being verified were found to be working and appointed as per Section 16 E (11) of the Act. The Ld. Counsel submits that due weightage were given to these successful candidates and accordingly panel has been sent to DIOS concerned. Thus, he submits that in view of the direction of the Hon'ble Apex court the selection process were initiated, completed and names of successful adhoc teachers whose services could be verified has been already sent to the DIOS and as such nothing remains in the present bunch of Writ Petitions as the writ petitioners have no legally enforceable right to continue in the respective institutions nor they may be granted salary from the public ex chequer.

9. This court finds that a similar writ petition as the present bunch of the writ petition has been decided by a coordinate bench of this court based on the judgment passed by the Hon'ble Court in the aforesaid Sanjay Singh's Case. The Ld. Coordinate Bench in ***Writ - A No. 95 of 2011 (Vinod Kumar Yadav vs. State of U.P)***, after extensively quoting the judgment passed by the Hon'ble Supreme Court in Sanjay Singh's case has held as follows: -

"The petitioner has been working as LT Grade Teacher in the opposite party no. 4-Institutoin in terms of the interim order dated 11.01.2011, however, his rights, if any, are now restricted in terms of the judgment of Hon'ble the Supreme Court in the case of Sanjay Singh (supra).

On being asked as to whether the petitioner appeared in the selection held by the Board in pursuance to the said judgment vide advertisements No. 1 and 2 of 2021, learned counsel fairly submitted that the petitioner did not appear.

In these circumstances, it is difficult to pass any order in favour of the petitioner.

At this stage, learned counsel for the petitioner submitted that the State Government proposes to frame some policy for adjustments of ad hoc teachers such as the petitioner on honorarium basis. He says that policy will be applicable only to those Teachers who are still working on the date of issuance of the policy.

On being asked, learned counsel for the State and the petitioner's submitted that the matter is still under consideration and no policy has been issued by the State Government as yet.

In this view of the matter, there is nothing that this Court can do anything in favour of the petitioner. The matter stands concluded by the decision of Hon'ble the Supreme Court in Sanjay Singh's case quoted hereinabove, therefore, this writ petition is disposed of in terms thereof."

10. Thus, this court is of the considered opinion that all the issues raised by the petitioner stands decided by the Hon'ble Apex Court as well as by this court in one matter or the other and the issues raised are no longer res integra. Moreover, this court cannot be oblivious of the law of precedents, which forms the foundation of administration of Justice and it has been held time and again that a single Judge of a High Court is ordinarily bound to accept as correct judgments of Courts of coordinate jurisdiction and of Division Benches and of the Full Benches of his Court. The rule of precedent is binding for the reason that there me view as has been taken earlier. The earlier decision of the coordinate bench is binding upon any latter coordinate bench deciding the same or similar issues. If the latter bench wants to take a different view than that taken by the earlier bench, the proper course is for it to refer the matter to a larger bench. The Apex Court in the judgment reported in the ***State of Punjab***

and another versus Devans Modern Breweries ltd. and another, (2004) 11 SCC 26, held at paragraph 339 as follows:-

"339. Judicial discipline envisages that a coordinate Bench follow the decision of an earlier coordinate Bench. If a coordinate Bench does not agree with the principles of law enunciated by another Bench, the matter may be referred only to a Larger Bench. (See Pradip Chandra Parija v. Pramod Chandra Patnaik, (2002) 1 SCC 1 followed in Union of India Vs. Hansoli Devi, (2002) 7 SCC 273. But no decision can be arrived at contrary to or inconsistent with the law laid down by the coordinate Bench. Kalyani Stores (supra) and K.K. Narula (supra) both have been rendered by the Constitution Benches. The said decisions, therefore, cannot be thrown out for any purpose whatsoever; more so when both of them if applied collectively lead to a contrary decision proposed by the majority."

11. In view of the above and keeping in mind the Judgment passed by the Hon'ble Apex Court in ***Sanjay Singh's case*** and the compliances made by the respondent-State leading to the conducting of examination/interview and preparation of panel sent to the DIOS, nothing survives to be decided in these bunch of matters and as such the present bunch of writ petitions are DISPOSED OF in the said terms. It is made clear that this court has not expressed its view on any individual matters, which nonetheless shall be guided on their own merits and may also be entitled for the benefits, if any, in case accrued to them as per the judgment in ***Sanjay Singh's case*** and the subsequent compliances made by the State as aforesaid. There shall be no order as to costs. is a desire to secure uniformity and certainty in law. It is expected that a coordinate bench must follow the decision of another coordinate bench and take the same view as has been taken earlier. The earlier decision of the coordinate bench is binding upon any latter coordinate bench deciding the same or similar issues. If the latter bench wants to take a different view than that taken by the earlier bench, the proper course is for it to refer the matter to a larger bench. The Apex Court in the judgment reported in the ***State of Punjab and another versus Devans Modern Breweries ltd. and another, (2004) 11 SCC 26***, held at paragraph 339 as follows:-

"339. Judicial discipline envisages that a coordinate Bench follow the decision of an earlier coordinate Bench. If a coordinate Bench does not agree with the principles of law enunciated by another Bench, the matter may be referred only to a Larger Bench. (See Pradip Chandra Parija v. Pramod Chandra Patnaik, (2002) 1 SCC 1 followed in Union of India Vs. Hansoli Devi, (2002) 7 SCC 273. But no decision can be arrived at contrary to or inconsistent with the law laid down by the coordinate Bench. Kalyani Stores (supra) and K.K. Narula (supra) both have been rendered by the Constitution Benches. The said decisions, therefore, cannot be thrown out for any purpose whatsoever; more so when both of them if applied collectively lead to a contrary decision proposed by the majority."

12. In view of the above and keeping in mind the Judgment passed by the Hon'ble Apex Court in **Sanjay Singh's** case and the compliances made by the respondent-State leading to the conducting of examination/interview and preparation of panel sent to the DIOS, nothing survives to be decided in these bunch of matters and

as such the present bunch of writ petitions are **DISPOSED OF** in the said terms. It is made clear that this court has not expressed its view on any individual matters, which nonetheless shall be guided on their own merits and may also be entitled for the benefits, if any, in case accrued to them as per the judgment in ***Sanjay Singh's*** case and the subsequent compliances made by the State as aforesaid. There shall be no order as to costs.

(2023) 1 ILRA 353
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.12.2022

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ-A No. 12434 of 2017

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

Counsel for the Petitioner:
Piyush Shrivastava, Rajeev Shukla, Sanjeev Kumar Singh

Counsel for the Respondents:
C.S.C.

A. Service Law – UP Qualifying Service For Pension and Validation Act, 2021 – Pension – Appointment on the substantive vacancy – Period of adhoc service, how far relevant to fix the pension – Held, once the appointment is made against the substantive vacancy following the rules, service rendered in the adhoc capacity must have been considered while fixing the pensionary benefits – Non consideration of adhoc services is bad and contrary to settle proposition of law. (Para 13)

Writ petition allowed. (E-1)

List of Cases cited:

1. Service Single No. 5433 of 2013; Shiv Shankar Vajpayee Vs St. of U.P. decided on 21.11.2014

2. Writ A No. 35301 of 2017; Bhanu Pratap Singh Vs St. of U.P. & ors. decided on 06.10.2020

3. Appeal No. 6798 of 2019; Prem Singh Vs St. of U.P.& ors.

4. Special Appeal No. 152 of 2021; St. of U.P. through Secretary, Lok Niram Vibhag & ors. Vs Bhanu Pratap decided on 14.7.2021

5. Writ A No. 15529 of 2018; Dr. Ram Sharan Tripathi Vs St. of U.P. & anr. decided on 15.09.2021

6. Writ A No. 6583 of 2022; Dr. Anil Kumar Singh Vs St. of U.P. & ors. decided on 30.09.2022

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

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

2. Present petition has been filed with the following prayer:-

(i) Issue a writ, order or directing in the nature of mandamus commanding the opposite parties to calculate pension and other post retiral benefits from the date of his appointment as Ad-hoc employee i.e. from 13.7.1978 and give the pension on the basis of recalucated period of service and furnish the arrears accumulated till date alongwith time scale prescribed by the Government of U.P."

3. At the very outset, learned counsel for the petitioner submitted that he is not pressing his prayer so far relate to grant of time scale. He further requested that he may be permitted to pursue his remedy

before the authorities for which learned standing counsel has no objection.

4. Learned counsel for the petitioner submitted that petitioner was initially appointed on 3.7.1978 on the post of Junior Engineer in Irrigation Department on Ad-hoc basis. His services were regularized on 1.4.1985. After retirement, while fixing the pension, his adhoc services has not been taken into consideration. He next submitted that alongwith petitioner by the same appointment letter dated 3.7.1978, one Shiv Shankar Vajpayee was also appointed on the said post and his services has also not been considered while fixing the pension. Thereafter, he has approached this Court by filing ***Service Single No. 5433 of 2013 (Shiv Shankar Vajpayee vs. State of U.P.),*** which was allowed vide order dated 21.11.2014 directing the respondents to consider the services of petitioner on adhoc capacity while fixing the pension. In compliance of the order dated 21.11.2014, adhoc services of Shiv Shankar Vaypayee was considered and acccordingly, pension was fixed. He further submitted that State Government has published Ordinance on 21.10.2020 named as ***Uttar Pradesh Qualifying Service For Pension and Validation Ordinance, 2020*** (hereinafter referred to as Ordinance, 2020). The said Ordinance was enacted by U.P. Act No.1 of 2021 on 5.3.2021 as the ***Uttar Pradesh Qualifying Service For Pension and Validation Act, 2021*** (hereinafter referred to as Act, 2021). He also submitted that the Ordinance, 2020 as well as Act, 2021 is under the definition of qualifying service, but the same are not having the provision for adhoc services.

5. After publication of Ordinance, 2020, one Bhanu Pratap Singh has approached this Court by filing ***Writ-A No. 35301 of 2017 (Bhanu Pratap Singh vs. State of U.P. & others)***, which was allowed vide order dated 6.10.2020 directing the respondent to consider the Ad-hoc services of petitioner in light of judgment of Apex Court in the matter of ***Prem Singh Vs. State of U.P. and others*** passed in ***Appeal No. 6798 of 2019***. Against the said order, State Government has preferred ***Special Appeal No. 152 of 2021 (State of U.P. Through Secretary, Lok Niram Vibhag and 3 others vs. Bhanu Pratap***) and Appellate Court considering the Ordinance, 2020 & Act, 2021, has dismissed the said appeal vide order dated 14.7.2021 affirming the order of learned Single Judge dated 6.10.2020 directing the respondents to consider the services of petitioner as work charge employee while calculating the pension.

6. Against the very same order, State Government has also preferred SLP No. 10381 of 2022, which was also dismissed vide order dated 11.7.2022. Again, this issue came before this Court in the matter ***Dr. Ram Sharan Tripathi vs. State of U.P. and Another in Writ-A No. 15529 of 2018*** and Court after considering the all provisions and judgments has held that while calculating the qualifying services for the purpose of pension, Ad-hoc services shall also be taken into consideration.

7. Learned counsel for the petitioner further submitted that once again this issue was raised before this Court in the matter of ***Dr. Anil Kumar Singh vs. State of U.P. thru. Addl. Chief Secy Ayush Anubhag-1 Civil Sectt. Lko. And 4 others in Writ- A No. 6583 of 2022*** and this Court after relying upon the judgment of ***Dr. Ram Charan Tripathi (supra)*** and Act, 2021, has allowed the petition. He further submitted that his appointment was made

against substantive vacancy and also in accordance with Rules. He firmly and lastly submitted that controversy so involved about not having provision of Ad-hoc service as qualifying service in Ordinance, 2020 or Act, 2021 has already been decided by the Apex Court and also followed by this Court in different judgments, therefore, petitioner is also entitled for the same relief and petition may be allowed.

8. Learned Standing Counsel though opposed the submission, but could not dispute the controversy settled by the Apex Court as well as this Court.

9. I have considered the rival submissions advanced by the learned counsel for the parties and perused the judgments as well as record. There is no dispute on the fact that while fixing the pension, Ad-hoc services of petitioner has not been considered. Prior to publication of Ordinance, 2020 & Act, 2021 in the similarly situated matter of ***Shiv Shankar Vaypayee (supra)***, Court has taken clear cut view that Adhoc services shall be taken into consideration. Relevant paragraph of the said judgment is quoted hereinbelow:-

"21. On a scrutiny of the facts of the instant case, what transpires is that it is not in dispute that ever since initial appointment on ad hoc basis, the petitioner held a substantive office of the post of Junior Engineer in the Irrigation Department in its permanent establishment. Thus, I am of the considered opinion that except for the period, the petitioner remained on deputation in Betwa River Board, under the Ministry of Agriculture & Irrigation, Government of India i.e. w.e.f. 22.07.1978 till 31.07.1981, the services rendered by him in ad hoc capacity before regularization of his service by means of order dated 26.02.1998 ought to have been taken into account for the purpose of counting qualifying service for reckoning the pension."

10. This fact is also undisputed that State Government has published Ordinance, 2020 on 21.10.2020 and considering the same, this Court in the matter of ***Bhanu Pratap Singh (supra)*** has directed the respondents to consider the services of petitioner as work charge employee while calculating the pension in light of judgment of Apex Court in the matter of Prem Singh (supra). Relevant paragraph of the said judgment is quoted hereinbelow:-

"Sofar as the aforesaid averment of the counter affidavit is concerned, the Apex Court has settled the controversy in Appeal No. 6798 of 2019 (Prem Singh vs. State of U.P. and others) & connected petitions wherein the Apex Court has held that the services rendered as work-charge employee are liable to counted for the purposes of counting qualifying service for pension.

In this view of the fact, the plea taken by the respondents that the services rendered by the petitioner as work charge employee are not liable to be counted for the pension is misconceived and not sustainable.

Thus, for the reasons given above, the writ petition is allowed and mandamus is issued upon the respondent No. 3-Engineer in Chief, Department of Irrigation Government of U.P. Lucknow to pay all the pensionary benefits to the petitioner in terms of the judgment of Apex Court in the case of Prem Singh (supra) within a period of four months from the date of filing of copy of the order."

11. Thereafter, Appellate Court in the case of ***State of U.P. Through Secretary, Lok Niram Vibhag (supra),*** has considered

the provisions of Ordinance, 2020 & Act, 2021 and dismissed the appeal vide order dated 14.7.2021 affirming the order of learned Single Judge dated 6.10.2020 with direction to respondents to consider the service of petitioner as work charge employee while calculating the pension. Relevant paragraphs of the aforesaid judgment are quoted hereinbelow:-

"It is informed that this Ordinance has been enacted by U.P. Act No.1 of 2021 on 05.03.2021 as the Uttar Pradesh Qualifying Service for Pension and Validation Act, 2021. 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."

12. Apex Court has also dismissed the SLP No. 10381 of 2022 vide order dated 11.7.2022 preferred by the State Government against the appellate order.

13. This issue was again came before this Court in the matter of ***Dr. Ram Sharan Tripathi (supra),*** and this Court has held that while fixing the pension, adhoc services shall be considered. Paragraph nos. 8 to 10 of the aforesaid judgment are quoted hereinbelow;-

"8. In the facts of the present case, the admitted position, inter se parties is, (i) petitioner came to be appointed against substantive vacancy; (ii) the salary was borne by Government; (iii) petitioner was entitled to all benefits as applicable to a State employee. 9. The expression "qualifying service", as defined under Act, 2021, would mean 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. In the present case, the Government, having regard to the large number of vacancies existing in State of U.P. of Ayurvedic and Unani Medical Officer, took a conscious decision to curtail the long procedure of appointment through the Public Service Commission by directly issuing advertisement inviting applications from eligible candidates for the post and on the recommendation of the selection committee, candidates were selected. The appointment letter were issued after obtaining approval from Hon'ble Governor. It cannot be said in the circumstances that the rules applicable for appointment were not followed. The rules, as were made applicable for appointment on ad-hoc basis

was duly complied and followed and petitioner, admittedly, came to be appointed against substantive vacancy, thereafter, his service came to be regularized under Rule, 1979. In the circumstances, it cannot be said that appointment of the petitioner was against the service rules prescribed by Government. Under the pension rules a temporary government servant appointed against a substantive post is entitled to pension. The nomenclature ''ad-hoc' would have no bearing to non-suit the petitioner towards pension. The nature of appointment is temporary appointment against a substantive post after following the procedure laid down to appoint such ad-hoc/temporary Medical Officer. In the opinion of the Court, the petitioner's service would fall within the expression "qualifying service" as petitioner came to be appointed against substantive post by following procedure prescribed by the State Government. It is not in dispute that appointing authority of the petitioner is the Hon'ble Governor.

10. In the result, the writ petition is allowed. Impugned order dated 04.01.2018, is hereby set aside and quashed. It is held that the service rendered by petitioner on ad-hoc basis would count towards "qualifying service", consequently, petitioner is held entitled for pension. The first respondent is directed to compute pension and other post retiral dues admissible to the petitioner by adding the period of ad-hoc service rendered by him. Petitioner shall be entitled to pension on month to month basis with effect from the date of his superannuation. The arrears of pension would be computed and released within the period of three months, along with simple interest at the rate of 6% per annum from the date of retirement till actual payment."

14. In the present case, it is undisputed that appointment of petitioner was made against substantive vacancy and in accordance with rules. Once the appointment is made against the substantive vacancy following the rules, service rendered in the adhoc capacity must have been considered while fixing the pensionary benefits. The same preposition of law is also laid down by this Court as well as Apex Court, therefore, non consideration of adhoc services is bad and contrary to settle proposition of law.

15. Accordingly, the writ petition is **allowed**. A writ of mandamus be issued to respondent nos. 1 & 2 to re-fix the pension of petitioner considering the services of petitioner rendered in adhoc capacity with effect from 3.7.1978 to 1.4.1985 and also pay arrears of pension alongwith 6 % interest from due date to the date of actual payment.

(2023) 1 ILRA 357
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.01.2023

BEFORE

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

Writ-A No. 16730 of 2022

Subhash Chand ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Surendra Kumar Chaubey, Sri Marjeet Mishra

Counsel for the Respondents:
C.S.C., Sri Sanjeev Singh, Sri Sumit Suri

A. Service Law – UP Recruitment to Services (Determination of Date of Birth) Rules, 1974 – Compulsory retirement from

the post of Safai Nayak – Determination of Age – No High School certificate available – Certificate of below High School, how far relevant – Age as recorded in Service book on the basis of medical test, can it be ignored – Held, all that is relevant for the purpose of recording a government servant's date of birth is his High School Certificate or a certificate of an equivalent examination and in a case, where the government servant has not passed any such examination, the date of birth or age recorded in his service-book at the time of entry into service shall be deemed to be correct – Transfer certificate relating to Class VII is not at all relevant to determine the petitioner's age – Now, what remains relevant about the petitioner's age is the entry at the time of his appointment recorded in the service-book and nothing else. The said entry is immutable and cannot be imperiled by sundry complaints from busy bodies. (Para 12)

Writ petition allowed. (E-1)

List of Cases cited:

1. Mohan Singh Vs U.P. Rajya Vidyut Utpadan Ltd.& ors., 2012 SCC OnLine All 28

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

1. Parties have exchanged affidavits.

2. Admit.

3. Heard Mr. Surendra Kumar Chaubey, learned Counsel for the petitioner and Mr. Sanjeev Singh, learned Counsel appearing on behalf of respondent Nos.3 and 4. Learned Standing Counsel has been heard on behalf of respondent Nos.1 and 2.

4. This writ petition challenges the order dated 03.10.2022 jointly passed by the Chairman and the Executive Officer of the Nagar Palika Parishad, Kairana, District Shamli, compulsorily retiring the petitioner from service as a Safai Nayak; or at least purporting to do so.

5. The case of petitioner is that he was appointed to the post of a *Safai Karmi* after his father resigned from the employ of Nagar Palika. The petitioner was appointed vide letter of appointment dated 4.12.1991. He has worked for a long period of time to the satisfaction of his employers and was never subjected to any disciplinary action. It is the petitioner's case that at the time of his appointment, he was required to submit his age and fitness certificates. The petitioner appeared before the Executive Officer of the Nagar Palika way back in the year 1991 and produced his Transfer Certificate relating to Class VII from the school that he had last attended. The Executive Officer asked the petitioner to appear before the Chief Medical Officer for the purpose of determination of his age. The Chief Medical Officer, by a Certificate dated 23.12.1991, that is on record as Annexure No.2, opined the petitioner to be aged about 25 years. In the year 2010, there was a complaint about the petitioner's age and he was required to submit an explanation. The petitioner submitted his explanation on 18.06.2010, wherein he mentioned the facts that had transpired at the time of his appointment. The petitioner submitted an explanation stating therein that he did not play any fraud, but the Chief Executive Officer at the time of his appointment asked him to go to the Chief Medical Officer for a medical examination to estimate his age. The petitioner further said that he would have no objection if his date of birth is determined according to his transfer certificate relating to Class VII. The petitioner's reply dated 18.06.2010 is on record.

6. Acting upon the complaint that was before the Nagar Palika in the year 2010, the Executive Officer sought guidance of

the Assistant Director, Local Bodies, who opined by his Memo No.462 dated 20.09.2011 that under the Uttar Pradesh Recruitment to Services (Determination of Date of Birth) Rules, 1974 (for short "the Rules of 1974'), whatever age of the employee had been entered in the service-book at the time of his appointment was immutable and could not be changed. No representation or objection to the recorded date of birth can be entertained. After the aforesaid guidance by the Assistant Director Local Bodies, proceedings against the petitioner were dropped. Now, a complaint has been made by one Deepak Kumar Chandra against the petitioner by approaching the Minister in the concerned Department reiterating the complaint about petitioner's date of birth. In this regard, a show cause notice was issued to the petitioner on 16.09.2022. The petitioner submitted a reply to the show cause with the specific assertion that the complaint has been made on account of animosity. The petitioner had never concealed his date of birth, but his plea based on the pre-High School date of birth was not accepted by the Nagar Palika. It was also pointed out that on an earlier occasion when the same question arose, after the guidance on the issue by the Assistant Director, Local Bodies, the matter was dropped and the petitioner's date of birth in his service-book was regarded as one that could not be changed.

7. By the impugned order dated 03.10.2022, jointly signed by the Chairman and the Executive Officer of the Nagar Palika Parishad, the petitioner's date of birth, on the basis of his Transfer Certificate from Class VII has been considered to be his correct date of birth, and further, taking note of the fact that the petitioner's younger brother has retired from service, it was held that the petitioner had deliberately not produced the T.C. that he held at the time of his appointment and got his age lesser than what it is recorded on the basis of medical opinion secured from the Chief Medical Officer. It is also recorded that a Transfer Certificate was produced by the petitioner when he sought promotion to the post of Safai Nayak. Now, the Nagar Palika has accepted his date of birth based on the Transfer Certificate from the school relating to his Class VII acknowledging his date of birth as 07.01.1961 instead of 23.12.1966 recorded in his service-book. On that basis, the Nagar Palika, acting through the two Authorities above mentioned, have passed an order queerly described as an order of "compulsory retirement' from service with a direction that all salary drawn by the petitioner after the age of superannuation reckoned from his date of birth going by his T.C. i.e. 07.01.1961, be recovered.

8. Mr. Surendra Kumar Chaubey, learned Counsel for the petitioner has assailed the order impugned, and amongst other things, submitted that the date of birth once entered in the service-book cannot be changed. He submits that whatever date of birth is recorded in the service-book is binding not only upon employee but also upon the employer as well. Just as the employee cannot later on produce evidence about his correct date of birth, the employer also cannot act on complaints or fish out evidence about the employee's date of birth and alter the employee's recorded date of birth in the service record to his disadvantage. The Rule about the immutability of date of birth recorded in the service record, according to the learned Counsel for the petitioner, works both ways, that is to say, for the employer and employee.

9. Mr. Sanjeev Singh, Advocate appearing for the Nagar Palika, on the other hand, states that though it is trite law that the date of birth recorded in the service record is not to be altered, but in a case where the employee has played fraud, nothing prevents the employer from correcting the date of birth. He submits that there is an admission by the petitioner that his date of birth recorded in the transfer certificate from his school relating to Class VII is 07.06.1961 and not what is entered in the service record on the basis of medical examination done by the Chief Medical Officer. According to Mr. Sanjeev Singh, there is absolutely no impediment in a case of this kind where there is patent fraud and also an acceptance on the petitioner's part for a correction of his date of birth. Mr. Sanjeev Singh, however, accepts that the order impugned should not have been characterized as one of compulsory retirement. It is an order declaring the petitioner to have retired upon attaining the age of superannuation and asking him to go home.

10. Upon hearing learned Counsel for the parties, this Court finds that there is no denying the fact that the petitioner's date of birth admittedly recorded in his transfer certificate relating to Class VII is 07.01.1961. However, at the time of the petitioner's appointment, he was sent for his medical examination to determine his age to the Chief Medical Officer. The Chief Medical Officer determined his age estimating it to be 25 years and on that basis, the petitioner's date of birth in his service-book has been recorded as 23.12.1966 i.e. the date of birth which is recorded in the petitioner's service-book way back on 15.07.1992. Now, the question is: Can the petitioner's age recorded in his transfer certificate relating to Class VII be looked into in order to hold an old entry relating to his age in the service-book wrong; or one based on fraud in this regard? The Rules of 1974 are a short statutory instrument and read as under:-

"GOVERNMENT OF UTTAR PRADESH

NIYUKTI ANUBHAG (4)

In pursuance of the provisions of clause (3) of Article 348 of the Constitution, the

Governor is pleased to order the publication of the following English translation of notification no. 41/2/69 Niyukti (4), dated May 28, 1974;

No. 41/2/69-Niyukti (4)

May 28, 1974

In exercise of the powers under the proviso to Article 309 of the Constitution, the Governor is pleased to make the following rules:

Uttar Pradesh Recruitment to Services (Determination of Date of Birth) Rules, 1974.

1. Short title and commencement:-(1) These rules may be called the Uttar Pradesh Recruitment to Services (Determination of Date of Birth) Rules, 1974

(2) They shall come into force at once.

2. Determination of correct date of birth or age.- The date of birth of a Government servant as recorded in the certificate of his having passed the High School or equivalent examination, or where Government Servant has not passed any such examination as aforesaid, the date of birth or the age recorded in his service book at the time of his entry into Government service, shall be deemed to be his correct date of birth or age, as the case may be, for all purposes in relation to his service, including eligibility for promotion, superannuation, premature retirement or retirement benefits, and no application or

representation shall be entertained for correct- ion of such date or age in any circumstances whatsoever.

3. Overriding effect.-These rules shall have effect, notwithstanding anything contrary contained in the relevant service rules or orders.

By order,

GHULAM HUSAIN,

Ayukt Evam Sachiv."

11. By the first amendment to the Rules made in the year 1980, it was provided as under :-

"2. Determination of correct date of birth or age.- The date of birth of a Government servant as recorded in the certificate of his having passed the High School or equivalent examination at the time of his entry into the Government service or where a Government servant has not passed any such examination as aforesaid or has passed such examination after joining the service, the date of birth or the age recorded in his service book at the time of his entry into the Goverment service shall be deemed to be his correct date of birth or age, as the case may be, for all purposes in relation to his service, including eligibility for promotion, superannuation, premature retirement or retirement benefits, and no application or representation shall be entertained for correction of such date or age in any circumstances whatsoever]."

12. Apparently, the first amendment does not apply to the petitioner's case because he never passed his High School either before or during service. When the petitioner entered service, he was not a matriculate and had not passed his High School or an equivalent examination. A perusal of Rule 2 of the Rules of 1974 makes it pellucid that all that is relevant for the purpose of recording a government servant's date of birth is his High School Certificate or a certificate of an equivalent examination and in a case, where the government servant has not passed any such examination, the date of birth or age recorded in his service-book at the time of entry into service shall be deemed to be correct. A perusal of the Rules of 1974 would show that any certificate from an educational institutions below the Grade of High School is not at all relevant to determine a government servant's age. It is perhaps for this reason that when the petitioner appeared before the Appointing Authority at the time of appointment, and as he says, produced his transfer certificate, he was directed to appear for his medical examination before the Chief Medical Officer. Apparently, when any school certification below the High School or an equivalent examination is not relevant to determine the employee's age, the Appointing Authority would not have looked into a transfer certificate relating to Class VII. These are circumstances which show that what the petitioner asserts is correct. Even if it was incorrect, the transfer certificate relating to Class VII is not at all relevant to determine the petitioner's age. Now, what remains relevant about the petitioner's age is the entry at the time of his appointment recorded in the service-book and nothing else. The said entry is immutable and cannot be imperilled by sundry complaints from busy bodies, or may be sworn enemies. A government servant's age of retirement cannot be subjected to perpetual uncertainty on account of disgruntled complainants questioning his date of birth and laying complaints to the Appointing Authority, saying that the government servant's recorded date of birth in the service record is incorrect. If that were permitted, it would introduce a pernicious

uncertainty about the tenure of government servants and much affect their efficiency.

13. Quite apart, Rule 3 of Rules of 1974 indicate that the said Rule gives the 1974 Rules overriding effect over any other service rules or orders. Therefore, what Rule 2 provides has to be given its fullest effect. The result is that the petitioner's date of birth recorded in his service-book cannot be questioned. It cannot be questioned by the petitioner; and likewise, it cannot be questioned by the employers as well. This Court, therefore, is of opinion that the impugned order dated 03.10.2022 is manifestly illegal and without jurisdiction.

14. The view that this Court takes is buttressed by the opinion of a Division Bench of this Court in **Mohan Singh v. U.P. Rajya Vidyut Utpadan Ltd. and others, 2012 SCC OnLine All 28**, where Rule 2 of the Rules of 1974 concerning a change to the recorded date of birth in the service-book by a non-matriculate was considered by their Lordships. In **Mohan Singh (supra)**, it was held:

"12. From a perusal of the above Rule, it transpires that if a person enters into service after passing the High School examination, then the date of birth recorded in the High School certificate shall be deemed to be his correct date of birth. However, in case, the employee has entered into service before passing the High School examination, then the date of birth recorded in the service book shall be deemed to be his correct date of birth. The said Rule also provides that no application or representation shall be entertained for correction of such date or age in any circumstances whatsoever. Thus, in relation to correction of date of birth, a legal fiction has been made which means that the date of birth recorded in either of the circumstances referred to under Rule 2 of the Rules of 1974 shall be deemed to be correct for all purposes particularly for the purpose of determining the age of retirement. The effect of deeming provision/legal fiction has been considered time and again. The Apex Court in the case of Sant Lal Gupta v. Modern Co-operative Group Housing Society Ltd., (2010) 13 SCC 336, has observed as under:

".....It is the exclusive prerogative of the legislature to create a legal fiction meaning thereby to enact a deeming provision for the purpose of assuming the existence of a fact which does not really exist...."

13. Further reference may be made to the decision of the Apex Court in Manorey alias Manohar v. Board of Revenue (U.P.), 2003 (51) ALR 341 (SC).

14. Taking note of the dictum of the Apex Court as well as Rule 2 of the Rules of 1974, it is abundantly clear that if a person has entered into service without passing the High School examination, then the date of birth recorded in his service book shall be deemed to be correct and in case the employee has entered into service after passing the High School examination, the date of birth recorded in the High School certificate shall be deemed to be correct."

15. In the result, this petition succeeds and is **allowed** with costs. The impugned order dated 3.10.2022, jointly passed by the Chairman and the Executive Officer of the Nagar Palika Parishad, Kairana, District Shamli is hereby **quashed.**

16. The petitioner shall be reinstated in service forthwith and permitted to continue on the basis of his date of birth recorded in his service-book. He shall be

paid all arrears of salary which have remained unpaid during this period of time within a month. Regular payment of salary shall be resumed forthwith.

16. Let this order be communicated to the Chariman of Nagar Palika Parishad, Kairana, Shamli and the Executive Officer of the Nagar Palika Parishad, Kairana, Shamli by the Registrar (Compliance).

(2023) 1 ILRA 363
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.11.2022

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ-A No. 18689 of 2022

Ramesh Chandra Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashwani Kumar Yadav

Counsel for the Respondents:
C.S.C., Sri Ram Prakash Shukla

A. Service Law – UP Government Servants Conduct Rules, 1956 – Suspension – Working as Head Master – Charge of posting objectionable posts regarding Hindu Gods and Goddesses and Bhramins – Suspension, when may be justified – Held, order of suspension should not normally depend merely on the gravity of charges but should depend upon a consideration of the question whether it is necessary to keep the delinquent away from his post he occupies. The effect of passing an order of suspension is to keep such delinquent away from his office temporarily – There may be cases where suspension may be justified also to avoid misuse of the authority of his office, misuse which may result in obstruction to the proper trial of the charges against him – High Court, although directed the enquiry to be continued and restrained the petitioner from making such post, but found no need to keep the petitioner under suspension. (Para 5, 9 and 11)

Writ petition allowed. (E-1)

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

1. Heard Shri Ashwani Kumar Yadav, learned counsel for the petitioner, learned Standing Counsel for the State-respondent and Shri Ram Prakash Shukla, learned counsel for respondent Nos. 2 to 4.

2. The challenge laid in this writ petition is to an order dated 3.11.2022 passed by Basic Shiksha Adhikari, Bhadohi-respondent No. 3 whereby the petitioner has been placed under suspension.

3. Learned counsel for the petitioner submits that petitioner is working as Incharge Head Master in Composite School Bhiriura, Block Gyanpur, District Bhadohi. The work and conduct of the petitioner has throughout remained satisfactory and there is no complaint whatsoever in his discharge of duties as Incharge Headmaster. The petitioner has received the impugned suspension order on his WhatsApp number and without giving any show cause notice or opportunity of hearing, he has been suspended. The allegations levelled against the petitioner is vague. Learned counsel for the petitioner submits that meantime a first information report dated 4.11.2022 being Case Crime No. 0213 of 2022, under Sections 395A, 505 (2) IPC, Police Station Gyanpur, District Bhadohi has been lodged against the petitioner. Learned counsel for the petitioner submits that there is election of Teachers Association and due to political

rivalry upon an oral complaint, the petitioner has been suspended by the impugned order.

4. Shri R. P. Shukla, learned counsel for the respondent Nos. 2 to 4 has passed-on a copy of complaint/application dated 4.11.2022 filed by Ambrish Tiwari addressed to the District Basic Education Officer, Bhadohi along with photostat copies of WhatsApp conversation, which are taken on record.

5. Learned counsel for the respondents submits that petitioner has rightly been suspended. He has made a WhatsApp Group in the name and style of Poorva Madhyamik Shiksha Sangh, Bhadohi and is its Group Admin. The petitioner is charged with posting objectionable posts regarding Hindu Gods and Goddesses and Bhramins and such conduct has been found to violate the provisions of U.P. Government Servants Conduct Rules, 1956. Besides certain general charges have been levelled against the petitioner regarding discharge of his duties as Incharge Headmaster of the Institution.

6. A perusal of the impugned suspension order dated 3.11.2022 reveals that it is founded on the complaint filed by one Ambrish Tiwary. An inquiry has also been contemplated against the petitioner and the Block Education Officer, Nagar Chetra, Bhadohi and the Block Education Officer, Aurai have been appointed as Enquiry Officers and the petitioner has been attached to BRC, Gyanpur.

7. Shri R. P. Shukla, learned counsel appearing for respondents has placed on record the complaint of Shri Ambrish Tiwari which is dated 4.11.2022 annexing the objectionable material. Surprisingly, the suspension order dated 3.11.2022 just one day before and appears to have been passed without application of mind and looking into the objectionable material. It is the case of the petitioner that he is a victim of political rivalry on account of elections of the Teachers Association.

8. The Court has gone through the complaint dated 4.11.2022 and the material annexed thereto placed on record by Shri R. P. Shukla, learned counsel for the respondents. The Court is of the opinion that the post on the WhatsApp Group by the petitioner appears to be an emotional outburst of a disgruntled person. Whether it constitutes a misconduct perhaps is the subject matter of the inquiry contemplated against the petitioner. It would be inappropriate for this Court to deal with that issue now.

9. The petitioner is under suspension since 3.11.2022. Suspension cannot be used as a weapon to penalize the petitioner. Continuation of suspension must be in larger public interest. The continuation, if pose threat to an ongoing inquiry such delinquent employee need not be reinstated pending such inquiry. In the opinion of the Court the order of suspension should not normally depend merely on the gravity of charges but should depend upon a consideration of the question whether it is necessary to keep the delinquent away from his post he occupies. The effect of passing an order of suspension is to keep such delinquent away from his office temporarily. Its objective is to remove him from his sphere of influence during the investigation into and treat of the charges levelled against him. It may be that some or many of the records which are in his custody may have to be looked into. His

colleagues or subordinates or sometimes even his superiors in office may have to be questioned. There may be cases where suspension may be justified also to avoid misuse of the authority of his office, misuse which may result in obstruction to the proper trial of the charges against him. The situation could be met by the officer being kept under suspension or in many cases merely by transferring the delinquent away from the scene, the choice necessarily depending upon the exigencies of the situation.

10. In the case at hand, there is absolutely no need to keep the petitioner under suspension. The respondents are required to respond to the matter in an unpassionate manner. What could be gathered as a misconduct is already there on his WhatsApp group. There is no scope for the petitioner to interfere with any material now gathered. Larger public interest demands that the petitioner should not be continued under suspension. This Court is not interfering with the legality of the suspension which is left open for consideration in future. This Court is also not adverting to the fact as to whether such postings constitute a misconduct or not. The Court has merely observed that there is no imminent danger that would effect the ongoing process of inquiry if the petitioner is ordered to be reinstated. However, the petitioner is restrained from making any such posts on the WhatsApp group or any portal on social media touching upon the inquiry or any disciplinary action initiated against him till the conclusion of the inquiry against him.

11. Accordingly, the petitioner is ordered to be reinstated in service. The impugned suspension order dated 3.11.2022 passed by the District Basic Education Officer, is set aside. The inquiry initiated against the petitioner shall go on and the same shall be brought to its logical end within two months from the date of service of certified copy of the order of this Court.

12. Needless to say that the petitioner shall cooperate in the ongoing inquiry.

13. With the aforesaid observation, the writ petition stands ***allowed***.

(2023) 1 ILRA 365
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.01.2023

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ-A No. 63110 of 2014
with other connected cases

Berojgar Audyogik Kalyan Samiti & Ors. ...Petitioners

Versus

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

Counsel for the Petitioners:
Sri A.K. Mishra, Sri A.N. Tripathi, Sri R.P. Mishra, Sri Ankush Sharma, Sri Govind Kumar Saxena, Sri Yogendra Kumar Srivastava, Sri Shashi Dhar Shukla, Sri Indra Raj Singh, Sri Adarsh Singh, Sri Ghanshyam Ojha, Sri C.B. Yadav, Sri Ankur Sharma, Sri Shashi Nandan(Sr. Advocate)

Counsel for the Respondents:
C.S.C., A.S.G.I., Sri Ashok Khare, Sri G.K. Singh, Sri H.P. Shahi, Sri Ram Dular, Sri Siddharth Khare, Sri Arvind Kumar Goswami, Sri Purnendu Kumar Singh, Sri Gaya Prasad Singh, Sri O.P. Gupta, Sri Pankaj Kumar, Sri Bal Mukund, Sri Sankalp Narain

A. Constitution of India – Article 73 – Executive power and legislative power – Co-

extensive – Executive instructions dated 15.12.2008, 30.09.2010 and 21.03.2013 issued by Central Govt., how far hold good law – Held, in the absence anything to the contrary, the executive power of the Union is co-extensive with legislative power of the Parliament – Since there is neither any contrary legislation by Parliament on the subject in question referable to Entry-66, List-I nor subject matter of executive instruction in question has been assigned by the Constitution to other authorities or bodies nor it encroaches upon legal rights of any member of the public, therefore, the executive instructions dated 15.12.2008, 30.09.2010 and 21.03.2013 issued by the Government of India exercising the powers under Article 73 of the Constitution of India, shall hold the field. (Para 27)

B. Constitution of India – Article 73 and 309 – VIIth Schedule – List I, Entry 65 and 66 – List III, Entry 25 – Union's legislation and St.'s legislation – Repugnancy – Effect – Held, both the Union as well as St.s have the power to legislate on education/ medical education subject – St. has the right to control education including medical education so long as the field is not occupied by any Union Legislation but the St. cannot, while controlling education in the St., impinge on standards in institutions for higher education or research and scientific and technical institutions which is exclusively within the domain of the Parliament. (Para 28)

C. Technical education – Same standard and uniformity in all technical institution – How far necessary for national progress – St.'s liability to maintain the uniformity, explained – Held, the object of providing same standards in all technical educational institutions in the country for appointment in Industrial Training Institutes, is to maintain uniform standard which may not be lowered by any particular St. or St.s to the detrimental of national progress. (Para 30)

D. Constitution of India – UP Government Industrial Training Institute (Instructors) Service Rule, 2014 – Rule 9(B), its proviso, Rule 15(3), its proviso, and Rule 17(3) – Constitutional validity challenged – Challenge on the ground of its being inconsistence to the executive order – Permissibility – Held, the constitutional validity of an Act can be challenged only on two grounds, viz. (i) lack of legislative competence; and (ii) violation of any of the Fundamental Rights guaranteed in Part III of the Constitution or of any other constitutional provision. Except the above two grounds, there is no third ground on the basis of which the law made by a competent legislature can be invalidated – Held further, the impugned Rules, not being in conflict with the Executive Orders dated 15.12.2008 and 30.09.2010 occupying the field; are not ultra vires to any of the provisions of the Constitution of India – High Court held the impugned advertisement valid and in conformity with the U.P. Service Rules, 2014 and Executive Orders dated 30.09.2010. (Para 37 and 47)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Upendra Narain Singh & ors. Vs St. of U.P. & anr.; 2006 (64) ALR 845 (All.)

2. Special Appeal No. 1078 of 2006; Pawan Kumar Sagar & ors. Vs St. of U.P.& ors., decided on 12.10.2006

3. Madan Mohan Pathak Vs U.O.I.& ors.; AIR 1978 SC (803)

4. Preeti Srivastava Vs St. of M.P., (1999) 7 SCC 120

5. Annamali University Vs Secretary to Government Information & Tourism Department; (2009) 4 SCC 590

6. Kalyani Mathivanan Vs K V Keyaraj & ors.; (2015) 6 SCC 363

7. St. of Tamilnadu & anr. VsAdhiyaman Educational & Research Institute & ors.; (1995) 4 SCC 104

8. R. Chitralekha & anr. Vs St. of Mysore & ors.; (1964) 6 SCR 368 : AIR 1964 SC 1823

9. Anant Mills Vs St. of Gu.; AIR 1975 SC 1234

10. Charanjit Lal Choudhary Vs U.O.I. & ors.; AIR 1951 SC 41

11. U.O.I. Vs Elphinstone Spinning and weaving Co. Ltd.& ors.; AIR 2001 SC 724

12. St. of Bihar & ors. Vs Smt. Charusila Dasi; AIR 1959 SC 1002

13. Kedar Nath Singh Vs St. of Bihar; AIR 1962 SC 955

14. Corp. of Calcutta Vs Libery Cinema; AIR 1965 SC 1107

15. Anandji Haridas & Co. (P) Ltd. Vs S.P. Kasture & ors.; AIR 1968 SC 565

16. Sunil Batra Vs Delhi Administration & ors.; AIR 1978 SC 1675

17. St. of Bihar Vs Bihar Distilleries, AIR 1997 SC 1511

18. Zameer Ahmad Latifur Rehman Sheikh Vs St. of Mah. & ors.; J.T. 2010 61 (4) SC 256

19. Greater Bombay Co-operative Bank Ltd Vs United Yarn Tex (P) Ltd. & ors.; (2007) 6 SCC 236

20. Promoters and Builders Association Vs Pune Municipal Corp. (2007) 6 SCC. 143

21. Hukum Chand VsU.O.I.; (1972) 2 SCC 601

22. General Officer Commanding-in-Chief Vs Subhash Chandra Yadav & anr. (1988) 2 SCC 351

23. Additional District Magistrate (Rev.) Delhi Administration Vs Siri Ram; (2000) 5 SCC 451

24. Sukhdev Singh & ors. Vs Bhagatram Sardar Singh Raghuvanshi & anr.; (1975) 1 SCC 421

25. St. of Karnataka & anr. VsH. Ganesh Kamath& ors.; (1983) 2 SCC 402

26. Kunj Behari Lal Butail & ors. Vs St. of H.P.& ors.; (2000) 3 SCC 40

27. U.O.I. Vs M/s G.S. Chatha Rice Mill; (2021) 2 SCC 209

28. Civil Appeal Nos. 9252-9253 of 2022; Kerala St. Electricity Board & ors. Vs Thomas Joseph @ Thomas M.J. & ors. decided on 16.12.2022

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri A.N. Tripathi, learned Senior Advocate assisted by Sri Arvind Kumar Mishra, Sri C.B. Yadav, learned Senior Advocate assisted by Sri Govind Kumar Saxena and Sri Shashinandan, learned Senior Advocate assisted by Sri Ankur Sharma and other learned counsels for the petitioners, Sri S.P. Singh, learned Additional Solicitor General of India assisted by Sri Bal Mukund, Ram Dular, Om Prakash Gupta, Arvind Goswami, Ajay Singh, Gaya Prasad Singh, Raj Kumari Devi, Neeru Devi, Chandra Prakash Yadav, Manoj Kumar Singh, Pankaj Kumar, Purnendu Kumar Singh, Shitla Prasad Gaur, Sudarshan Singh, Rizwan Ahmad and Arvind Singh, learned Central Government Standing Counsels for Union of India, Sri Ajeet Singh, learned Additional Advocate General assisted by Sri Sudhanshu Srivastava, learned counsel for the State-respondents, Sri Ashok Khare, learned Senior Advocate assisted by Sri Siddharth Khare and Sri Jigar Khare, learned counsels for the newly impleaded respondent Nos.8 to 13/ successful candidates in the leading Writ-A No.63110 of 2014 and Sri G.K. Singh, learned Senior Advocate assisted by Sri Avanish Kumar Rai, learned counsel for the newly impleaded respondent Nos.4 to 7 in the leading Writ-A No.63110 of 2014.

2. Learned counsels for the parties have jointly stated that facts and controversy involved in this bunch of writ petitions is similar. Therefore, with their consent, all the writ petitions have been heard together on several occasions and the Writ-A No.63110 of 2014 (Berojgar Audyogik Kalyan Samiti And 39 Ors vs. State Of U.P. And 2 Ors) is treated as the

leading writ petition, which has been filed praying for the following relief:

"i) to issue a writ, order or direction in the nature of Certiorari quashing illegal advertisement No.2 of 2014 dated 07.11.2014 issued by respondent no.2 and subsequent proceeding for filling 2498 post of instructor in Govt. post of Industrial Training Institute in U.P. (Annexure No.4 to the writ petition);

ii) issue a writ, order or direction declaring the ***Rule 9(B) including proviso, Rule 15(3) and its proviso and Rule 17(3)*** *of U.P. Government Industrial Training Institute (Instructors) Service Rule, 2014 (Annexure No.3) be declared* ***as ultra vires said Rule 16(3) (iii) and Articles 14 and 16 and*** *specifically the constitutional provision of Article 73 readwith entry 65 and 66 of Union list which override entry 25 of concurrent list of constitution and against order of Central Govt. dated 24.07.1996 issued after accepting recommendation of N.C.V.T. and being also in teeth and in contempt of judgement of Hon'ble Single Judge dated 08.08.2006 and Judgment dated 10.12.2006 of Division Bench in Special Appeal in which State of U.P. wsa party and is binding upon State Government as such.*

Iii) any other suitable writ, order or direction as this Hon'ble Court may deem fit and proper under the facts and circumstances of the case;

iv) Award costs of the writ petition petitioners throughout."

3. All the petitioners claim that they hold CITS certificate which is an essential qualification as per Government Order dated 24.07.1996 issued by the Union of India in exercise of powers conferred under Article 73 of the Constitution of India with respect to matters of Entry 66 List-I of the VIIth Schedule to the Constitution and which was incorporated by the State Government in "The U.P. Industrial Training (Instructors) Services Rules, 1991 (hereinafter referred to as "the Rules, 1991") framed in exercise of powers conferred under Article 309 of the Constitution of India as amended by the **Second Amendment Rules** dated 08.08.2003. By the **Third Amendment Rules,** the aforesaid essential qualification was lowered which was challenged in **Civil Misc. Writ Petition No.1822 of 2004 (Upendra Narain Singh & Ors. Vs. State of U.P. & Anr.) and by judgment dated 08.08.2006**, reported in **2006 (64) ALR 845 (All.)**, the Amendment made in Rule 8 of the Rules, 1991 by the Third Amendment Service Rules, 2003 was held to be unconstitutional, which was affirmed by the Division Bench judgment in **Special Appeal No.1078 of 2006 (Pawan Kumar Sagar and others vs. State of U.P. and others)**, **decided on 12.10.2006.** By the impugned newly enacted "The Uttar Pradesh Industrial Training Institutes (Instructors) Service Rules, 2014" (hereinafter referred to as "The U.P. Service Rules, 2014') **in supersession of all existing rules and orders on the subject** framed in exercise of powers conferred by the proviso to Article 309 of the Constitution of India, the **aforesaid essential qualification of CITS has been again lowered** and it has been **made merely preferential** for recruitment on the post of instructors. Under the circumstances, the petitioners have filed the present writ petitions seeking the relief as noted above.

4. The petitioners have chosen not to file rejoinder affidavits to the counter affidavits of the respondent Nos.4 to 7 and 8 to 13. Statement of learned counsels for

the petitioners in this regard is recorded in the order dated 01.12.2022 passed in the leading Writ-A No.63110 of 2014.

SUBMISSIONS ON BEHALF OF THE PETITIONERS:-

5. **Submission by Sri A.N. Tripathi, learned Senior Advocate for the petitioners:-**

(i) The Uttar Pradesh Industrial Training Institution (Instructor) Service Rules, 1991 (hereinafter referred to as the "Rules, 1991") were initially enacted by the State Government in exercise of powers conferred under Article 309 of the Constitution of India. Rule 9 (B) of the Rules, 1991 provided the **successful training from Central Training Institute (hereinafter referred to as "CTI") in respective trades, as preferential qualification.** Subsequently, the Central Government issued a direction vide DGE&T-19 (20) / 95 - OD dated 24.07.1996 indicating that the Government of India has accepted the recommendation of the council and accordingly, requested all the State Governments / Union Territories to amend the recruitment Rules providing the **C.T.I. certificate as essential qualification** for the post of instructor. Consequently, the State Government accepted the recommendation / direction of the Government of India and amended Rules 1991 by the **second amendment Rules** dated 08.08.2003, whereby Craft Instructor Training certificate (CTI certificate) was made essential qualification for recruitment on the post of Instructor. However, by the **third amendment Rule 2003**, the aforesaid essential qualification of CTI certificate was made preferential by amending Rule 8 of Rules, 1991. Hence, the amendments were challenged in various writ petitions. The leading writ petition was Writ-A No.1822 of 2004 (Upendra Narayan Singh vs. State of U.P. and another) which were allowed by Hon'ble Single Judge by judgement dated 08.08.2006. **The amendment made in Rule 8 of the Rules, 1991 by third amendment Service Rules, 2003 was held to be violative of Constitutional Scheme of distribution of legislative powers, as also Articles 14 and 16 of the Constitution of India.** The advertisement dated 13.12.2003 was also quashed with a direction that those, who have obtained qualification up to the date of fresh advertisement shall also be considered for selection and that all those candidates, who were within the age limit on the last date of receiving applications pursuant to advertisement dated 20.08.2003, shall also be eligible to apply for selection in pursuance of fresh advertisement. The aforesaid judgement of Hon'ble Single Judge dated 08.08.2006 was upheld by the Division Bench judgement dated 12.10.2006 in Special Appeal No. 1078 of 2006 (Pawan Kumar Sagar vs. State of U.P. and others). Thus, it stood settled that CITS shall be an essential qualification for recruitment on the post of instructors and yet by the impugned Rule 9(B) and its proviso, Rule 15(3) and its proviso and Rule 17(3) of Uttar Pradesh Industrial Training Institution (Instructors) Service Rules, 2014 (hereinafter referred to as the "the Rules, 2014"), has been enacted the State Government, providing the "CITS certificate" as a **preferential qualification.**

(ii) Apart from above, the impugned Rules, 2014, also accommodates even those, who do not possess the preferential qualification, by making a provision that if they are appointed then they may acquire qualification within three years, else they

shall not be entitled to first increments. Thus, the essential qualification as prescribed by Government of India, has been completely done away and even prescribed preferential qualification is merely an eye wash and just to appoint incompetent and ineligible persons to obtain Government employment, contrary to the Rules and the Constitutional scheme.

(iii) By **Rule 16(3)** of the Rules, 2014, it has been provided that in making selection by direct recruitment, the merit list of the eligible candidates shall be prepared by awarding marks as under :- **(a)** 50% of the percentage of marks secured in High School examination and, **(b)** 20 % of the marks secured in national trade certificate test / national apprentice training test or 20% of the percentage of marks secured in diploma and degree examination and **(c) 15 % of the percentage of the marks secured in CITS and POT test.** Thus, the quality point marks for determination of merit for the purposes of preparation of select list is wholly arbitrary and is in the teeth of the direction of the Government of India and the very basic object behind creation of ITI. Very little marks i.e. 15% of the marks has been provided for the most essential qualification of CITS whereas 50% marks has been provided for the academic qualification which has nothing to do with the merits of the candidates and suitability for the employment.

(iv) Thus, the impugned provisions of the Rules, 2014 are violative of Constitutional Scheme as well as the field occupied by the Government of India, and the impugned Rules being arbitrary, are also violative of Article 14 and 16 of the Constitution of India.

(v) Reliance is placed upon the judgement of learned Single Judge and Division Bench judgement of this Court referred above and the judgement of Hon'ble Constitutional Bench of Hon'ble Supreme Court in the case of **Madan Mohan Pathak vs. Union of India and others, AIR 1978 SC (803) (Para 24, 25 and 26)**.

(vi) When the present writ petitions were filed, an interim order was granted by this Court providing that "meanwhile selection process will go on but the result of selection will be subject to the final decision of this writ petition." Despite this interim order, the State Government, in its wisdom, has issued appointment letters and appointed number of candidates, who do not possess the basic essential qualification. None of the candidates so appointed conditionally, have not come forward to oppose these writ petitions.

(vii) The degree and diploma holders cannot be tested together. Therefore, Rule 9 of the Rules, 2014 read with the appendix, is arbitrary and thus violative of Article 14 of the Constitution of India.

(viii) The letters of the Government of India dated 26.05.2014, 27.05.2014 and 07.01.2016 are not relevant for the purposes of the present controversy and they do not dilute the essential qualification of CITS certificate. Therefore, the reliance as may be placed by Sri S.P. Singh, learned Additional Solicitor General of India and the learned Additional Advocate General would be of no help to the respondents.

6. **Submission by Sri C.B. Yadav, learned Senior Advocate for the petitioners:-**

(i) The Rules in question are referable to subject matter provided in Entry 65 and 66, List-I of Union List or Entry 25 of List-III of Concurrent List of the 7th Schedule to the Constitution of India. Therefore, by issuing directions to include CITS as

essential qualification, the Union of India has occupied the field. Therefore, the Rules framed by the State Government providing the CITS as essential qualification is in conflict with the field occupied by the Union of India. Thus, the Rules under challenge framed by the State Government lack legislative competence and are hit by Article 246 (1)/(2) of the Constitution of India.

(ii) Reiterating the submission No.(viii) as noted in the order of this Court dated 10.11.2022, it is submitted that these letters are not relevant since Rules under challenge, i.e. the Rules, 2014 were notified on 30.01.2014. Therefore, the aforesaid letters dated 26.05.2014, 27.05.2014 and 07.01.2016 subsequently issued by the Government of India are not relevant for the purposes of the present controversy. The above referred government letters are not binding. The earlier Government Order dated 24.07.1996 has now been incorporated in the new Rules, i.e. Uttar Pradesh Government Industrial Training Institute (Instructors and Foreman Service) Rules, 2021 notified on 03.01.2022.

SUBMISSIONS ON BEHALF OF RESPONDENTS:-

7. **Sri S.P. Singh, learned Additional Solicitor General of India** submits as under:

(i) As per Article 73 of the Constitution of India, the executive power of the Union of India shall not, save as expressly provided in the Constitution or in any law made by the Parliament extend in any State to matters with respect to which the legislature of the State has also power to make law. Since the Rules, 2014 has been enacted in legislative exercise of power by the State Government, therefore, even if there is any conflict between the executive instructions under Article 73 of the Rules, 2014, still the Rules, 2014 shall prevail. So far as the question of validity of Rules, 2014 is concerned, that is for the State to defend. The letters of the Central Government dated 15.12.2008, 30.09.2010 and 21.03.2018 filed as Annexure CA-1, CA-2 and CA-3 with the counter affidavit of the State-respondents, at best may be said to be referable to Article 73 of the Constitution of India and would bind the State only in the absence of statutory provisions. Since the Rules, 2014 have been enacted, therefore, that shall hold the field and the aforesaid three letters of the Government of India would not come in the way of the Rules, 2014.

8. **Sri Ajeet Singh, learned Additional Advocate General** assisted by Sri Sudhanshu Srivastava submits that he has adopted the submissions of Sri Ashok Khare, learned Senior Advocate as aforenoted. He further submits that the impugned Rules neither lack legislative competence by the State Government in view of Article 309 of the Constitution of India nor it infringes any of the fundamental rights guaranteed under Part-III of the Constitution of India. Therefore, the impugned Rules are wholly valid and the impugned advertisement being in conformity with the Rules, 2014 are also valid. Most of the petitioners have participated in the selection process but after being unsuccessful, they have filed the present writ petition. Therefore, they cannot be permittied to maintain the writ petition. Reliance is placed upon the Division Bench judgment of this Court in Writ Tax

No.760 of 2022 {M/s K. Jain (P) Ltd. vs. Union of India and 4 others (para-24)}.

9. **Sri Ashok Khare**, learned Senior Advocate assisted by Sri Siddharth Khare and Sri Jigar Khare, learned counsels for the newly impleaded respondents/ successful candidates, submits as under:-

(a) Replying to submission No.(i) of learned counsel for the petitioners, it is submitted that the Government Order dated 24.07.1996 issued by the Government of India was the subject matter of consideration in Writ-A No.1822 of 2004, decided on 08.06.2006 and the Special Appeal No.1078 of 2006, decided on 12.10.2006. Therefore, the aforesaid government order dated 24.07.1996 issued by the Government of India has been subsequently superseded by subsequent Government Orders dated 15.12.2008 and 13.09.2010 (Annexure CA-1 and 2 to the counter affidavit filed on behalf of the respondent Nos.8 to 13 in Writ-A No.63110 of 2014). Therefore, neither the Government Order dated 24.07.1996 nor the aforesaid two judgments of this Court have any relevance on facts of the present case. On the contrary, the ratio of decision of the aforesaid two judgments supports the case of the respondents. By aforesaid Government Order dated 15.12.2008 issued by the Government of India, "Passed Principal of Teaching (POT)" course from DGE&T which is equivalent to CITS, has been made **desirable qualification and not essential qualification**. Similarly by aforesaid Government Order dated 30.09.2010, the aforesaid qualification of **CITS has been made desirable qualification** and not the essential qualification. Thus, CITS is not the essential qualification of recruitment in question.

(b) Replying to submission No.(ii) of learned counsel for the petitioners, it is submitted that since CITS/ POT is a desirable qualification in terms of the aforesaid government orders of the Government of India followed by letters dated 21.03.2013 (Annexure CA-3), letter of the Director Training and Employment dated 21.10.2014 (Annexure CA-5), therefore, to give weightage to it, Rule 16(3)(a)(iii) of the Rules, 2014 provides for weightage marks as 15% of the percentage of mark secured in CITS/ POT test to each candidate. Thus, for having the desirable qualification, provision for awarding certain marks as aforesaid have been made in aforesaid sub-Clause (a)(iii) of Rule 16 of the Rules, 2014, notified on 30.01.2013 subsequent to which the impugned advertisement dated 07.11.2014 was issued. Thus, the impugned advertisement is in conformity with the Rules, 2014 and directives issued by the Central Government as existing on the date of enactment of the Rules, 2014 and issuance of impugned Advertisement dated 07.11.2014. It is well settled that selection process has to be completed in accordance with the Rules existing as on the date of advertisement. Reliance is placed upon the judgment in Civil Appeal No.9746 of 2011 (State of Himanchal Pradesh vs. Raj Kumar, decided on 20.05.2022.

(c) Replying to submission No.(iii) of learned counsel for the petitioners, it is submitted that provision providing for marks is exclusively within the domain of the employer. Therefore, submission No.(iii) of the petitioners is contrary to all settled principles of law. The argument of petitioners is based on the presumption as if the government order dated 24.07.1996 is still operating whereas it is a fact evident on record that the said government order does not hold the field inasmuch as it has

been superseded and that apart, the new Rules, 2014 hold the field. For the same reasons, the submission Nos.(iv), (v) and (vi) also do not hold good.

(d) Replying to submission No.(vii) of learned counsel for the petitioners, it is submitted that the argument No.(vii) is based on misreading and mis-interpretation. There is no prohibition providing diploma or degree in mechanical engineering as minimum technical qualification. It does not violate the fundamental rights guaranteed under Article 14 of the Constitution of India.

(e) Replying to the arguments advanced by Sri C.B. Yadav as noted in the order dated 09.11.2022 and also in today's order, it is submitted that the training manual extract of eligibility qualification mentioned in paragraph-8 of the writ petition and filed as Annexure-2 to the writ petition is the part of earlier training manual and not the training manual holding the field. The aforesaid paragraph-8 has been replied in paragraph-8 of the counter affidavit and the relevant extracts of 2014 Training Manual has been filed as Annexure CA-7 which itself discloses that CITS qualification has been specified only as a desirable qualification and not as essential qualification. Thus, Rules, 2014 are in conformity with the training manual published in the year 2014, before the issuance of the impugned advertisement. **The petitioners have made a statement before this Court not to file rejoinder affidavit to the aforesaid counter affidavit.** Therefore, the aforesaid averments made in paragraph-8 of the counter affidavit is liable to be treated as correct. That apart, in paragraph-5 of the rejoinder affidavit dated 13.02.2015 (in reply to the counter affidavit of the State-respondents), the petitioners have stated that Rule 9A(2) read with Column 4 of the Appendix to the Rules, 2014 provides NPC as defined in Rule 2(k) and NAC as defined in Rule 2(l) as essential qualification whereas preferential qualification has been prescribed in Rule 9B read with Column 5 of the Appendix as CITS defined in Rule 2(f) read with Rule 2(e) of the Rules, 2014. Thus, an additional qualification has been prescribed in Rule 9B which is not essential qualification but a preferential qualification. Therefore, to hold a CITS certificate is merely a preferential qualification for which 15% of the marks obtained in CITS has been provided to be added in awarding quality point marks. Rule 17(3) makes this position further clear. NTC and NAC is the essential qualification for taking admission for acquiring the preferential qualification of CITS. Thus, both the qualifications are different. While, the former is the essential qualification, the later is the preferential qualification as provided in Rule 9A and 9B respectively of the Rules, 2014.

10. **Sri G.K. Singh**, learned senior advocate assisted by Sri Avanish Kumar Rai, learned counsel for the respondent Nos.4 to 7 in Writ-A No.63110 of 2014, adopts the arguments advanced by Sri Ashok Khare, learned Senior Advocate.

11. **Sri Inder Raj Singh,** learned counsel for impleadment-applicant in Writ-A No.63110 of 2014 submits that he adopts the arguments advanced by Sri Ashok Khare, learned Senior Advocate. Additionally he submits that Article 309 of the Constitution of India confers power upon the Union of India and the State Government to make subordinate legislation. Since there is no conflict between the Rules, 2014 and any sub-ordinate legislation enacted by the Union of India, therefore, the Rules, 2014 shall hold

the field. The applicant-respondent are all serving as government employee and have also completed the CITS training.

Submissions in Rejoinder by counsels for the petitioners:-

12. **Sri A.N. Tripathi,** learned counsel for the petitioners submits as under:-

(i) Entry 25 of the concurrent list of Schedule 7 is subject to Entries 63, 64, 65 and 66 of List 1. Entry 64(a) of the Union List provides for provisional, vocational or technical training. Entry 66 of the Union List provides for coordination and determination of standards institutions for higher education or research and scientific and technical institutions. **Therefore, Craft Instructor Training Scheme is a matter falling under the Entry 65 and 66 of the Union List. Therefore, executive instructions, i.e. the Government Order dated 24.07.1996** issued by the Government of India **would be binding** upon the State Government under Article 73 of the Constitution of India, in so far as the essential qualification for recruitment on the post of instructors is concerned. **Since Rule 9B does not contain the CITS as essential qualification, therefore, the Rule 9B, Rule 15(3) and Rule 17(3) lack legislative competence inasmsuch the field of legislation is referable to Entries 65-66 and has been occupied by the Union of India by issuance of Executive Order 24.07.1996 under Article 73 of the Constitution of India. This question has already been settled by a learned Single Judge (Paras-21 to 27, 31, 32 and 33) and also by the Division Bench in Special Appeal (paras - at Page 5 and 6**) as referred in the submissions made on 10.11.2022. Therefore, in view of the law settled by this Court, the aforesaid Government Order dated 24.07.1996 is mandatory in nature and the **State Government cannot, by Rules, lower the essential qualification of CITS and make it as a preferential qualification**. The State lacks legislative competence to enact the Rules lowering the essential qualification to lower the essential qualification by CITS. Reliance is also placed upon the Constitution Bench judgment of Hon'ble Supreme court in the case of **Madan Mohan Pathak and another vs. Union of India and others, AIR 1978 SC 803 (Paras 24, 25 and 26),** in which it has been held that mandamus issued by the High Court cannot be nullified by any legislative act.

13. **Sri Ankur Sharma**, learned counsel for the petitioners in Writ-A No.5517 of 2019, 21295 of 2019 and 5345 of 2015 submits in rejoinder as under:

(i) The **letter of the Government of India dated 15.12.2008 does not relate to qualification for recruitment** on the post of Instructors. It provides only "norms for instructor qualification for trades under Craftsman Training Scheme". Therefore, the qualification provided under the executive order of the Government of India dated 15.12.2008 is with respect to a particular scheme i.e. for trade under Craftsman Training Scheme for the purposes of instructor (CA-1). Similarly **subsequent letter of the Government of India** (Annexure-CA-2) relates to instructor qualification for "Advance Module of Multiskilled Courses being implemented in ITIs upgraded COE." **Therefore, the said letter only provides for qualification of instructors specifically only for Advance Module of Multiskilled Courses, which are run by**

ITIs upgraded Centre of Excellence. Therefore, it does not provide qualification for instructors. Thus, it provides for qualification of instructors for a trade course/ module and not for regular courses as are involved in the present writ petition. **The petitioners have not participated in the selection process and have filed writ petition challenging the advertisement itself.**

Discussion and Findings:-

14. Before we proceed to consider the controversy, it would be useful to reproduce the **relied upon Government Orders and Rules,** as under:-

(A) Executive Instructions dated 24.07.1996 issued by Government of India Ministry of Labour (DGE & T), New Delhi providing essential qualification for recruitment on the post of Vocational Instructors:-

श्रम मंत्रालय

MINISTRY OF LABOUR

NO. DGE&T-10(20)/95-CD(रो0 एवं प्र0 महानिदेशालय)

Goverment of India (D.G. E. & T.)
Ministry of Labour नई दिल्ली .110001
(D.G.E. & T.) NEW DELHI-110001
New Delhi, dated 24th July 1996

To,

All the Secretaries of Governments/UT Administrations (Dealing with Craftsman Training Scheme)

Subject: ***To enhance the recruitment qualifications for the post of Vocational Instructor***

Sir,

I am directed to inform you *that the proposal to enhance the recruitment qualifications for post of Vocational Instructor was placed as item No.14 of Agenda during the* ***31st Meeting*** *of the NCVT held on 30-11-95.*

After deliberation the council recommended the following:

The proposal to have two separate streams of Vocational instructors (Vis) one for teaching theory subjects including Workshop Calculation and Science and Engineering Drawing and another for conducting practicals having separate recruitment qualifications and norms, as proposed (as per Annexure-I) was agreed to.

Government of India has accepted, the above recommendation for implementation under CTS. You are requested to take necessary action to amend the Recruitment Rules in respect of V.I.s *(Theory & Practical) accordingly* ***latest by 31.7.97. The recruitment of V.I.s may be done in accordance with the revised Recruitment Rules w.e.f. 1-8-97 onwards****, as approved by NCVT during its above stated meeting.*

These norms are also applicable to private ITIs of your State and they may, therefore, be requested to recruit V.I.s as per revised qualifications w.e.f. 1.8.97 onwards. ***Institute not recruiting V.I.s as per the revised qualifications after 1.8.97 are liable to be de-affiliated*** *for non-engineering trade, status-quo would be maintained.*

Yours faithfully,
Sd-ill
(ABHIK GHOSH)
Director General/ Joint Secretary
Copy to:
1. All the State Directors dealing with CTS
2. All the Directors of field institution of Trg. Dte. Of DGE&T
3.All RDATs
4. Principal ,CTI ..... NVTI, Noida, ...

5.TA.1 Section with the request to take necessary action for revising the recruitment rules of Vis accordingly

6.All officers of the Trg. Dte. of DGE&T, New Delhi upto JDT level

Sd-ill.

(Y.P. Sharma)

Joint Director of Training

INSTRUCTOR (THEORY/PRACTICAL) AT INDUSTRIAL TRAINING INSTITUTES FOR ENGINEERING TRADES ONLY

S. NO.	Name of the Post	Capacity of ITIs	Essential qualification	Pay Scale
1.	2.	3.	4.	5.
1.	Vocational Instructor (Trade Theory, Workshop)Calculation & Science and Engineering Drawing	One V.I. for a minimum of 36 trainees falling under the same group of trades.	a) <u>Academic:</u> Passed 10th standard exam under 10+2 system of education. b) Technical: Passed 3 years diploma in appropriate branch of engineering for a recognized Institution. c) Possesses Certificate under Instructor Training Scheme (One year course) or should have successfully completed minimum two modules viz.,Teaching Methodology Module (3 months durati

			on) and Trades Technology Module (Six months duration) under Craft Instructor Training programme on modular patter n or should have passed one year course from a Technical Teacher Training Institute (TTTI)under M/O ERD.		2.	**Vocational Instructor (Practical)**	One Instructor per unit in the trade for conducting Practicals & to look after Maintenance of machines under his charge	a) Academic: Passed 10th Standard under 10+2 system of education. b) Technical Possesses NTC/ NAC for the trade. c) (i) A certificate under regular Craft Instructor Training scheme of one year duration. OR (ii) passed POT Module in	

			trades not having facilities for instructors training. Necessary practical.	

(B) Instructions dated 15.12.2008 issued by Government of India accepting the recommendation of National Council for Vocational Training prescribing minimum qualification **for appointment on Vocational Instructor in ITIs/ ITCs:-**

DGE&T-19(8)/2008-CD
Government of India
M/o Labour & Employment
Directorate General of Employment & Training
Shram Shakti Bhavan
New Delhi dated 15th December, 2008

To,

1. Secretaries/Principal Secretaries of all the State Govts/ UT Administrations dealing with Vocational Training

2. Directors dealing with Vocational Training of all States/ UT Administrations

Subject:

Norms for Instructor qualification for trades under Craftsman Training scheme.

Sir,

*This is to inform you that **37th meeting** of the National Council for Vocational Training (NCVT) under the Chairmanship Hon'ble Minister of State for Labour & Employment (IC), was held on 23rd November, 2008. Norms for Instructor qualification for trades under Craftsman Training scheme were discussed vide Agenda item No 3,4 in the meeting.*

*2. **Following minimum Qualification** (academic as well as technical) **for appointment** of **vocational instructor** in ITIs/ITCs for trades under CTS was approved by the council.*

Qualification		***Experience in trade relevant field after technical qualification***	***Desirable***
Academic	***Technical***		
10th class pass or equivalent	*i. *Degree in Engineering/ **Three year Diploma in appropriate branch of trade concerned* ***or*** *ii. National Apprenticeship Certificate or*	*One year for degree and two years for Diploma. Three years for NAC/NTC*	*Passed Principle of Teaching (POT) course from any of DGE&T institutes.*

	National Trade Certificate in relevant trade		

***Degree should be from recognized University.**

****Diploma should be from recognized Board/Institution.**

3. Government of India has accepted the above recommendation of Council for implementation with immediate effect. *Accordingly, instructors with above qualification should be appointed in ITIs/ITCs and same would be strictly followed for grant of affiliation of these institutes.*

Yours faithfully,
(R.L. Singh)
Director of Training

Copy to,

1. Director, ATI/ Chennai, Hyderabad, Bombay, Kolkata, Kanpur, Ludhiana CSTARI, Kolkata/ATI(EPI)Hydrabad, & Dehradun, FTI Bangalore & Jamshedpur & NIMI Chennai.

2. RDAT Kanpur, Mumbai, Kolkata, Chennai, Faridabad & Hyderabad

3. Principal CTI Chennai, MITI, Haldwani, Calicut, Jodhpur, Choudwar, NVTI, New Delhi, all RVTIs

4. All officers up to JDT level of DGE & (HQ)

(Anita Srivastava)
Dy. Director of Training
Copy for information:
1. PS to Minster of Stated(IC)
2. PS to Secretary (L&E)
3. PS to DG/JS

(C) Instructions of the Government of India dated 30.09.2010 accepting the qualification of Craft Instructor for Advanced Module of Multiskilled courses in ITIs upgraded as COE:-

DGE&T-19(20)/2010-CD
Government of India
M/o Labour & Employment
Directorate General of Employment & Training

Dated 30/09/2010

To.

1. Secretaries/Principal Secretaries of all the State Govts / UT Administrations dealing with Vocational Training

2. Directors dealing with Vocational Training of all States/ UT Administrations

3. Director, ATI Hyderabad, ATI Bombay, ATI Kolkata, ATI Kanpur, ATI Ludhiana, Principal CTI, Chunnal

Subject: ***Item No. 3804.19: Instructor Qualification for Advanced Module*** *of Multi Skill Courses being Implemented in ITs upgraded as CoE.*

Sir/Madam,

I am directed to inform you that the ***38th meeting*** *of the National Council for Vocational Training (NCVT) under the Chairmanship Hon'ble Minister of Labour & Employment, was held on 31st May 2010* ***Qualification for Instructor of Advanced Module of Multi Skill Courses*** *being implemented* ***in ITIs upgraded as CoE*** *was discussed vide item No 3****804*** *19 of agenda.*

*The f****ollowing qualification of Instructor for Advanced Module*** *of Multi Skill Courses Implemented in ITIs upgraded as CoE was recommanded by the council*

**Essential*	*Experience*	*Desirable*

Qualification	*(in industry/ training)*		
Academic	*Technical*		
10th class pass or equivalent	*A)* ***For Engineering sectors*** *I. Degree in appropriate branch of engineering from a recognised University or equivalent or II. 3 years Diploma in appropriate branch of engineering from recognised Board/ Institute or equivalent* ***B) For Non-engineering sectors*** *Degree in appropriate sector from a recognised University or equivalent I. 3 years Diploma in appropriate sector from recognised Board/ Institute or equivalent*	*2 years in appropriate/ concerned module or 5 years in appropriate/ concerned module 2 years in appropriate/ concerned module or 5 years in appropriate/ concerned module*	*Pass NCVT approved Training Methodology Module of Craft Instructor Programme Pass NCVT approved Training Methodology Module of Craft Instructor Programme*

**Appointed instructor if do not posses Certificate of Training Methodology module of Craft Instructor Training Programme, he should be trained in Training Methodology module with in first six months period of his joining*

Government of India has accepted the above qualification of Craft Instructor for Advanced Module of Multiskilled Courses for implementation with immediate effect. Henceforth, instructors for advanced module should be appointed as per above qualification and if appointed instructor do not posses Certificate of Training Methodology module of Craft Instructor Training Programme, he should be trained in Training Methodology module with in first six months period of his joining

Yours faithfully

Director of Training
Member secretary NCVT

(D) Instruction issued by Government of India dated 21.03.2013 relaxing the condition of CITS by providing that the instructors appointed may be trained under CITS may acquire training under CITS within three years. The aforesaid Government Order dated 21.03.2013 is **reproduced below**:-

"25 भा0 स0/89–का0 शि0–2013
दूरभाष 23710446
PHONE 23710446
फैक्स 91&11&23351878
FAX 91&11&23351878

रोजगार और प्रशिक्षण महानिदेशक एवं अपर सचिव
भारत सरकार
श्रम एवं रोजगार मंत्रालय
नई दिल्ली–110001
अ. शा. स.–डीजीईटी–7/4/2013–सी0डी0

DIRECTOR GENERAL
EMPLOYMENT &
TRAINING/ADDITIONAL SECRETARY
GOVERNMENT OF INDIA
MINISTRY OF LABOUR AND EMPLOYMENT
NEW DELHI-110001
दि0 21 मार्च, 2013

प्रिय राजीव,

कृपया अपने अ. शा. पत्र सं0 614/पी0एस0टी0वी0/2013, दिनांक 15 फरवरी, 2013 का अवलोकन करने का कष्ट करें जो औद्योगिक प्रशिक्षण संस्थान के अनुदेशकों की अर्हताओं के पुर्नविचार के सम्बन्ध में है। इस सम्बन्ध में सूचित करना है कि राष्ट्रीय व्यावसायिक प्रशिक्षण परिषद् की बैठकों मे सम्यक् विचारोंपरांत तथा श्रम बाजार एवं उद्योग की मांगो को ध्यान में रखते हुए आई.टी.आई. अनुदेशकों के पद हेतु डिप्लोमा/डिग्रीधारक की अर्हता निर्धारित की गयी है। उसमें यह भी प्रावधान किया गया है कि आई0 टी0 आई0 अनुदेशकों के पद पर भर्ती डिप्लोमा/डिग्रीधारकों को कार्यभार ग्रहण करने की दिनांक से तीन वर्ष की अवधि के भीतर डीजीईटी के एडवांस्ड प्रशिक्षण संस्थाओं से शिल्प अनुदेशक प्रशिक्षण योजना (सी.आई.टी.एस.) के अंतर्गत प्रशिक्षित किया जा सकता है जिससे उन्हे व्यवहारिक कौशल में भी निपुणता प्राप्त हो सके। इसलिये इसके पुर्नविचार की आवश्यकता प्रतीत नही होती।

2. अतः मैं अनुग्रहीत हूंगा यदि कृपया उपरोक्तानुसार सेवा नियमावली में तत्काल संशोधन कर अनुदेशकों के रिक्त पदों को भरने का कष्ट करें और की गयी कार्यावाही से इस कार्यालय को भी अवगत करा दें।

सस्नेह, भवनिष्ठ,
.1824/PSTV-2/2013 ह0 अप0
25/3
(शारदा प्रसाद)
श्री संजीव कपूर,

प्रमुख सचिव, प्राविधिक एवं व्यावसायिक शिक्षा विभाग,
उत्तर प्रदेश शासन,
लखनऊ।"

Legislative History of NCVT & Rules:-

15. Prior to the year 1991 the service conditions of the Vocational Instructors were regulated by Government Orders and Administrative Instructions. The Rules of 1991 replaced these orders and provided for amongst other, the qualifications and method of recruitment. Rule 5 of the Rules of 1991 provides for recruitment through U.P. Public Service Commission on the basis of competitive examination and interview. The Rules were amended in 1994 by 1st Amendment to these rules providing for source of recruitment through the Subordinate Services Selection Commission, under the Rules known as U.P. Procedure for Direct Recruitment for Group 'C' Posts (Outside the Purview of U.P. Public Service Commission) Rules, 1998, read with U.P. Procedure for Direct Recruitment to Group 'C' Posts of Technical Nature Or For Which Specific Qualifications are Prescribed (Outside the Purview of the U.P. Public Service Commission), Rules, 2001.

16. The **National Council of Vocational Training (NCVT) was established under the administrative order of the Central Government, with Cabinet approval.** It made recommendations to the Central Government to enhance the qualifications required for the post of Vocational Instructors in Industrial Training Institutes. **The NCVT proposed that for Vocational Instructors teaching, Theory** including Workshop, Calculation, Science and Engineering Drawing, should be possessed apart from the minimum academic qualifications of 10+2 system of education, and three years diploma, in appropriate branch of engineering from recognized institutions and **in addition the teaching qualification namely Certificate under Draft Instructor Training Scheme (one year course)** or should have successfully completed minimum two modules, teaching methodology module (three months duration) (six months duration) under Draft Instructor Training Programme on module pattern, or should have passed one year course from Technical Teachers Training Institute (TTTI) under Ministry of Human Resource Development.

17. **The NCVT further proposed that for Vocational Instructor (Practical)** apart from the academic qualification of 10+2 system of education **the candidate should possess technical qualification of NTC/CAC for Trade; (1)** a certificate under regular draft instructor training scheme of one year duration; or (2) the principles of teaching module in trade not having facilities for instructors training, necessary practical be provided after the appointment within three years; and (3) a minimum of two years experience in an industry or a training/ teaching institution either before or after obtaining instructor training.

18. **The recommendations of NCVT, were accepted by the Central Government and that by letter dated 24.7.1996 of Director General/ Joint Secretary (DGE & I), Ministry of Labour, Government of India, the Central Government, issued directions to all Secretaries of the Government/ UT Administration (dealing with Draftsman Training Scheme), for necessary amendments in recruitment rules by 31.7.1997**. The institutions not recruiting instructors as per revised qualifications after 01.8.1997 were liable to be de-affiliated. **The Central Government extended the period for amending the rules. The last such extension was given upto August, 2001.**

19. The Government of Uttar Pradesh accepted the recommendations and amended the Rules of 1991 by 2nd Amendment notified on 08.8.2003 and advertised the vacancies on 20.8.2003 inviting applications from the candidates possessing the higher teachers training qualifications provided in the amended rules. The petitioners in writ petition No. 1822 of 2004 applied for these vacancies in pursuance of the advertisement. The State Government by a notice in the newspapers on 29.9,2003 by the Director, Vocational Training, cancelled the advertisement.

20. **The State Government, then, amended the Rules of 1991 again by 3rd Amendment to the Rules of 1991 notified on 09.12.2003, deleting enhanced teaching qualifications, directed by the Central Government on recommendations of the National Council of Vocational Training**. A fresh advertisement was issued on 13.12.2003 inviting applications for 742 vacancies of Instructors existing in ITI's in 34 Trades.

21. **Constitutional Validity of the** aforesaid **Third Amendment Rules** was challenged in the case of **Upendra Narain Singh (supra)** and it was struck down holding as under:-

"21. The short point for determination in these writ petitions is ***whether the directions issued by the Central Government on the recommendations of NCVT are mandatory and are binding upon the State Government, which has the powers under proviso toArticle 309to frame service rules subject to the provisions of the Constitution and acts of appropriate legislature*** *and further having acted upon these recommendation whether the State Government could have again amended the Rules of 1991 to lower these qualifications arbitrarily without a valid and justiciable reason. In all the judgments cited by Shri A.N. Tripathi, learned Counsel for the petitioners, the Supreme Court was dealing with recommendations made by statutory bodies namely Medical Council of India, established underMedical Council of India Act, 1956 and the National Council of Teachers Education Act, established under the Act of 1993. In Ajay Kumar Singh (Supra) the Supreme Court considered the regulation of admission to postgraduate medical courses by Medical Council of India providing for reservation for SC/ ST etc. and found that theMedical Council Actdoes not empower the council to regulate or prescribe qualifications for admission to postgraduate courses. However, by virtue of Entry 66 of List I, which overrides Entry 25 of List III, the States are denuded of all and every power to determine and coordinate the standards of higher education, which must necessarily take in, regulating the admission to these courses. The regulations do not provide for any reservation and the regulations being a species of delegated legislation bind all the institutions imparting medical education.*

22. In Dr. Preeti Srivastava (Supra) it was held that universities must necessarily be guided by the standards underSection 70(1)of the Medical Council of India, if their degrees and diplomas are to be recognized, It was found that Medical Council regulations have statutory force and are mandatory.The Actcontemplates Medical Council of India as an expert body to control the minimum standards of education. This view was reiterated in Harish Verma's case (Supra) in 2003.In Union of India v. Shah Goverdhan L. Kabra Teachers College (Supra) the Supreme Court upheld the legislative competence of the Central Government to enact National Council for Teachers Education Act, 1993 and held that the opinion of the National Council, which is an expert body should not be likely tinkered with. The High Court's order setting aside de-recognition was quashed. In St. Johns Teachers Training Institute (Supra) the same view was followed with regard to recognition for the courses by the National Council for Teachers Education and the regulations were held an ultra vires the Act.

23. ***The National Council of Vocational Training has not been established under any statute.*** *Entry 25 in List III (concurrent list) of Schedule 7, as amended by 42ndAmendment Act, 1976 deals with education including technical education, medical education in universities, subject to provision of Entry 63, 64, 65 and 66 of List-I; vocational and technical training of labour. Entry 65 and 66 of List I of Schedule VII refers to union agencies and institutions for professional, vocational and teachers training and coordination and determination of*

standards in institutions for higher education or research and scientific and technical institutions.Article 73, empowers the Central Government to exercise executive powers in the matters with respect to which the Parliament has powers to make laws. Entry 65 and 66 of List I reads as follows:

"65. Union agencies and institutions for-

(a) ***professional, vocational or technical training****, including the training of police officers; or*

(b) the promotion of special studies or research; or

(c) scientific or technical assistance in the investigation or detection of crime.

66. Co-ordination and determination of standards in institutions for *higher education or research and scientific and* ***technical institutions."***

24. Shri Ashok Khare, learned Senior Advocate did not dispute that coordination and determination of standards in technical institutions in Entry 66 in List I of Schedule VII will include laying down the standards for teaching and teaching qualifications. The power of the Central Government as such underArticle 246to legislate and to issue executive orders on the subject is not in doubt. The point, however, is whether in the absence of legislation, the administrative order made underArticle 73of the Constitution of India on the subject would still be binding on the State Government. The executive power of the union underArticle 73extends to matters with respect to which parliament has power to make laws. In the absence of legislation by parliament, the State may in its executive power deal with matters enumerated in concurrent list. Specific legislation is not required for exercise of executive power relating to a particular subject and that in many spheres the executive functions by exercising executive power. The exercise of power, however, is subject to provisions of the Constitution.Article 309provides for regulating the recruitment in conditions of service of the persons appointed in public services and posts in connection with the affairs of the union or any of the state, until provision in that behalf are made by the legislation. The President in the case of the Union and the Governor in case of the State have been authorized to make regulations, which are legislative in character.Article 309does not prohibit the prescription of rules for selection or for qualification for appointment. (Pandu Ranga Rao v. A.P. Public Service Commission, AIR 1993 SC 268).

25. In the present case there is no conflict between power exercised by the Governor, who acts on the advise of the State Government in making service rules or regulations under the proviso toArticle 309of the Constitution and the executive order issued by the Central Government. The coordination and determination of standards in technical education, which includes teachers' qualification, fall under Entry 66 in List I in the exclusive domain of the Union. The education including technical education falls within Entry 25 of List III, So long as Central Government had not issued any direction accepting recommendations of the NCVT, it was open to the State Government to prescribe qualification for appointment in Industrial Training Institutes, which are technical institutions. The executive order issued underArticle 73, in respect of matters on which parliament has exclusive power to make laws have the same force as laws made by Parliament. *The proviso to Clause (1) ofArticle 73shall not, save as expressly provided in the Constitution, or in any law made by parliament, extend in*

any state to matters with respect to which the Legislature of the State has also power to make laws.

26. The interrelation between Entry 25 of List III and Entry 66 of List I was subject matter of consideration inUnion of India v. Shah Goverdhan L. Kabra Teachers College. The Supreme Court held as under:

Bearing in mind the aforesaid principles of rule of construction, if the provisions of the impugned statute namely, theNational Council of Teacher Education Act, 1993 are examined and more particularlySection 17(4)thereof which we have already extracted, the conclusion is irresistible that the statute is one squarely dealing with coordination and determination of standards in institutions for higher education within the meaning of Entry 66 of List I of the Seventh Schedule. ***Both Entries 65 and 66 of List I empower the Central Legislature to secure the standards of research and the standards of higher education. The object being that the same standards are not lowered at the hands of the particular State or States to the detriment of the national progress and the power of the State legislature must be so exercised as not to directly encroach upon power of Union under Entry 66. The power to co-ordinate*** *does not mean merely the power to evaluate but it* ***means to harmonise or secure relationship for concerted action. A legislation made for the purpose of co-ordination of standards of higher education is essentially a legislation by the Central legislature in exercise of its competence under Entry 66 of List 1 of the Seventh Schedule*** *and Sub-section (4) ofSection 17merely provides the consequences if an institutions offers a course or training in teacher education in contravention of the Act though the ultimate consequences under Sub-section (4) ofSection 17may be that unqualified teacher will not be entitled to get an employment under the State or Central Government or in a university or in a college. But by no stretch of imagination the said provision can be construed to mean a law dealing with employment as has been held by the High Court in the impugned Judgment.*

In our considered opinion, the High Court committed gross error in construing the provisions of Sub-section (4) ofSection 17of the Act to men that it is a legislation dealing with recruitment and conditions of services of persons in the State service within the meaning of Proviso toArticle 309of the Constitution. The High Court committed the aforesaid error by examining the provisions of Sub-section (4) on its plain terms without trying to examine the true character of the enactment which has to be done by examining the enactment as a whole, its object and scope and effect of the provisions. Even the High Court does not appear to have applied the doctrine of "pith and substance" and, thus, committed the error in interpreting the provisions of Sub-section (4) ofSection 17to mean to be a provision dealing with conditions of service of an employee under the State Government.

32. I find substance in the submissions of Shri A.N. Tripathi. The State Government having acted upon the directions of the Central Government and amended the rules, was not competent to again amend the rules lowering the higher teaching qualifications and making them preferential. The State Government rightly understood its legal obligations and the constitutional scheme. Having accepted the position, the State Government acted grossly illegally and arbitrarily in amending the rules by the 3rd Amendment, in violation ofArticle 14and16of the Constitution, The Court takes judicial

notice of the fact in the State of U.P. the teaching standards in all the educational institutions are falling gradually. In order to improve these standards, the national level teaching institutions have been established offering higher teaching qualifications and the Central Government is insisting the State Government to appoint only such teachers, who have higher and specific teaching qualifications. The candidates possessing such higher teaching qualifications have legitimate expectation to be considered for appointment on teaching posts. In case the State Government allows the persons having lower teaching qualifications to hold the posts, the rights of candidates having higher teaching qualifications will be violated. It will give rise to invidious discrimination and violate their constitutional right of equality before law.

33. The amendment in Rule 8 by the U.P. Industrial Training Institute (Instructor) (3rd Amendment) Service Rules, 2003, is thus held to be violative to the Constitutional Scheme of distribution of legislative powers, as also Article 14 and16of the Constitution of India. The writ petitions challenging the advertisement dated 13.12.2003 are thus liable to be allowed and the advertisement dated 13.12.2003 is consequently quashed.

34. The State Government is directed, in addition, and in modification to the direction issued by Lucknow Bench of this Court in its judgment and order dated 05.3.2003, in writ petition No. 6565 (SS) of 2001,Kalyan Rai v. State of U.P. and Ors. to advertise, hold and complete the selection process on all the vacancies within a period of four months from the date of delivery of this judgment. Now since directions have to be issued for fresh advertisement for these vacancies and all those vacancies, which may have arisen subsequently, the rights of those candidates, who have obtained these higher/ teaching qualifications as recommended by the Central Government and provided in the rules by the 2nd Amendment to the Rules of 1991, on 08.08.2003 cannot be ignored. It is as such further directed that all those candidates, who have obtained qualifications upto the date of fresh advertisement shall also be considered for selections and that all those candidates, who were within the age limit on the last date of receiving application in pursuance of advertisement dated 20.8.2003, shall also be eligible to apply for selections in pursuance of the fresh advertisement.

35. All the writ petitions except writ petition No. 13724 of 2006 are allowed. The writ petition No. 13724 of 2006 is dismissed. The successful petitioners are entitled for cost from the State."

22. The aforesaid judgment in the case of **Upendra Narain Singh (supra)** was challenged in **Special Appeal No.1078 of 2006 (Pawan Kumar Sagar and others vs. State of U.P. and others)** and by **judgment dated 12.10.2006**, the Division Bench upheld the aforequoted judgment of learned Single Judge after noticing Entry 66 of List-I and Entry 25 of List-III of the 7th Schedule, observing as under:

"There cannot be any two opinions about what the essentiality qualification of a training Instructor in a Government Industrial Training Institute actually is. It has everything to do with the standard of a technical institution; that is the main and guiding factor. No doubt it is also a qualification, necessary for obtaining service, but service is not the main factor. Also it is much more relatable to Entry 66 rather than Entry 25 which contains

vocational and technical training of labour. The reason for our concluding to this effect is that the Training Instructors should be looked upon more, and much more, as those entrusted with the responsibilities of maintaining the standard of instruction rather than merely as part of a labour force. Even in a List III matter, the central exercise of power would prevail, on the principles akin to those contained in Article 254, as Presidential assent thereof.

On this basis it would not be right to permit the State of U.P. to make out a different standard for this State alone within India and to have Instructors who do not have the required advanced training. A State is not permitted in an all India matter lo cut out a pocket for itself and suit its own needs even if it might be practical and of benefit to some powerful sections. The necessity of maintaining technical standard specially in, current the days, falling standards has been emphasised by the Hon'ble Singe Judge and we would respectfully repeat the sentiments of Ourselves also."

23. Thereafter, the U.P. Service Rules, 2014 was enacted by the State Government in exercise of powers conferred by the proviso to Article 309 of the Constitution of India

24. **Rule 3(e), 3(f), 3(g), 3(i), 3(j), 3(k), 3(l), 3(s), 3(t), Rule 4, 7, 8, 9, 16, 17 and Appendix (in part only upto Sl. No.12) of the U.P. Rules, 2014**, are reproduced below:-

"3(e) "Crafts Instructor Training Scheme (CITS)' means the training scheme of the National Council for Vocational Training (NCVT) for preparing trained Instructors for Industrial Training Institutes.

3(f) "CITS Certificate' f*or a trade means a* ***certificate awarded by NCVT upon successful completion of one year training*** *under the CTTS or in case of modular pattern the combined certificate awarded by NCVT upon successful completion of all the prescribed modules*

3(g) "Government' means the State Government of Uttar Pradesh;

3(i) "'member of the service' means a person substantively appointed under these rules or the rules or orders in force prior to the commencement of these rules to a post in the cadre of the service,

3(j) "National Council for Vocational Training ***(NCVT)' means the council set up by Director General of Employment and Training (DGET). Government of India for regulating the vocational training throughout India:***

3(k) National Trade Certificate (NTC) in a trade means the certificate awarded by the NCVT upon successfully passing the All India Trade Test in that trade. For a candidate who has undergone training in any sector under the Centre of Excellence Scheme, certificates awarded by NCVT upon successful completion for all the three modules, namely Broad Based Basic Training, Advanced Module and the Specialized Module, together, shall constitute the National Trade Certificate for the purpose of these rules;

3(l) National Apprenticeship Certificate (NAC) in a trade means the certificate awarded by the NCVT upon successfully passing the National Apprenticeship Test;

3(n) "Principles of Teaching (POT) Certificate' means the certificate awarded by NCVT upon successful completion of the relevant training or the completion of the module on Training Methodology under the modular pattern of CITS.

3(s) "Trade' means a vocation or occupation which is notified by the National Council for Vocational Training or the State Council for Vocational Training in Industrial Training Institutes under the Craftsmen Training Scheme;

3(t) "year of recruitment' means a period of twelve months commencing on the first day of July of a calendar year.

Part-III
Cadre

4. (1) All posts of Instructors for various Trades/Subjects in which Training/Instructions are provided in Industrial Training Institutes shall together constitute the Cadre of Service.

(2) The number of posts of Instructors for various Trades/Subjects in the service shall be such as may be determined by the Government from time to time.

(3) The number of posts of Instructors for various Trades Subjects in the service shall, until orders varying the same are passed under sub-rule (2), be as given in column 3 of the Appendix.

Provided that:-

(i) the appointing authority may leave unfilled or the Governor may hold in abeyance any vacant post, without, thereby entitling any person to compensation;

(ii) the Governor may create such additional permanent or temporary posts as he may consider proper.

Part-IV
Qualification

7. A candidate for recruitment to a post in the Service must be

(a) citizen of India; or

(b) Tibetan refuge who came over to India before the 1st January, 1962 with the intention of permanently settling in India; or

c) a person of Indian origin who has migrated from Pakistan, Burma, Sri Lanka or any of the East African countries of Kenya, Uganda and the United Republic of Tanzania (formerly Tanganyika and Zanzibar) with the intention of permanently settling in lndia:

Provided that a candidate belonging to category (b) or (c) above must be a person in whose favour a certificate of eligibility has been issued by the State Government;

Provided further that a candidate belonging to category (b) will also be required to obtain a certificate of eligibility granted by the Deputy Inspector Genural of Police, Intelligence Branch, Uttar Pradesh;

Provided also that if a candidate belongs to category (c) above, no certificate of eligibility will be issued for a period of more than one year and the retention of such a candidate in service beyond a period of one year, shall be subject to his acquiring Indian citizenship.

NOTE-A candidate in whose case a certificate of eligibility is necessary but the same has neither been issued nor refused, may be admitted to an examination or interview and he may also be provisionally appointed subject to the necessary certificate being obtained by him or issued in his favour.

8. A candidate for recruitment to the post of Instructor in the service must have attained the ***age of*** *21 years and must not have attained the age of more than 40 years on the first day of July of the calendar year in which vacancies for recruitment are advertised:*

Provided that the upper age limit in the case of candidates belonging to the Scheduled Castes, Scheduled Tribes and such other categories as may be notified by

the Government from time to time shall be greater by such number of years as may be specified.

***9. (A)** A candidate for recruitment to the post of Instructor in the service must possess the following qualifications:*

(1) Must have passed the High School Examination of the Board of High School and Intermediate Education, Uttar Pradesh or an Examination recognised by the Government as equivalent thereto;

(2) Must possess the technical qualifications for different trades/subjects as prescribed in column 4 of the Appendix.

***(B)** Should **possess the preferential qualification t**o provide training/teaching in relevant trades/subjects as prescribed for different trades/subjects in column 5 of the Appendix.*

Provided that the candidates who do not possess the preferential qualification as prescribed for different trades/subjects in column 5 of the Appendix, shall also be considered for selection and if selected, they shall be required to obtain the said qualification in the prescribed period as per rule 17(3).

15. (1) Subject to the provisions of sub-rules (2) and (3), of this rule the appointing authority shall determine the number of vacancies to be filled during the course of the year of recruitment as also the number of vacancies to be reserved for candidates belonging to Scheduled Castes, Scheduled Tribes, and other categories under rule 6. For making direct recruitment the appointing authority shall notify the vacancies in the following manner:-

(i) by issuing advertisement in at least two daily newspapers having wide circulation and in Employment News paper,

(ii) by pasting the notice on the notice board of the Directorate and subordinate offices

(iii) by notifying vacancies to the Employment Exchange, and

(iv) by publishing the notice on the website of the office of the appointing authority.

(2) The posts of Instructors for a trade/subject shall be filled from amongst candidates from two streams, namely (i) National Trade Certificate/ National Apprenticeship Certificate holders, and (ii) Diploma/ Degree holders in the proportion laid down in column 4 of the Appendix.

(3) The number of vacancies of the post of the Instructor for each trade/subject shall be determined separately for posts which are to be filled from amongst National Trade Certificate/National Apprenticeship Certificate holder candidates and which are to be filled from amongst Diploma or Degree holder candidates, in the proportion as laid down in the column 4 of the Appendix:

Provided that if in any trade/ subject the existing strength of Instructors from any stream is in excess of the proportion laid down for that stream, the said proportion shall be gradually achieved by adjusting such excess numbers in future recruitments, without affecting the incumbents:

Provided further that the sum of the vacancies for both the streams shall not exceed the total number of vacancies for that trade/ subject.

16. (1) Direct recruitment shall be made by a Selection Committee comprising:-

Procedure for direct recruitment

(i)Appointing Authority Chairman

(ii)An officer belonging to the Scheduled Castes or Scheduled Tribes,

nominated by the Chairman, if the Chairman does not belong to Scheduled Castes or Scheduled Tribes. If the Chairman belongs to the Scheduled Castes or Scheduled Tribes an officer other than belonging to the Scheduled Castes or Scheduled Tribes, or Other Backward Classes shall be nominated by the Chairman.

Member

(iii)

An officer belonging to the Other Backward Classes nominated by the Chairman, if the Chairman does not belong to Other Backward Classes. If the Chairman belongs to the Other Backward Classes, an officer other than belonging to Other Backward Classes or Scheduled Castes or Scheduled Tribes shall be nominated by the Chairman.

Member

(iv)

Two officers as subject experts nominated by the appointing authority

Members

NOTE - The appointing authority may, on his behalf. nominate an officer senior to other members as Chairman of the Selection Committee and he may constitute more than one Selection Committee for holding interview only.

(2) Applications for being considered for selection shall be invited by the appointing authority in the form published in the advertisement issued under rule 15.

(3) In making selection for direct recruitment, the merit list of the eligible candidates shall be prepared in the following manner:-

(a) For academic qualifications prescribed for the post, the marks shall be awarded to each candidate in the following manner:

(i) Fifty percent of the percentage of marks secured in the High School Examination shall be given to each candidate.

(ii) Twenty percent of the percentage of marks secured in the National Trade Certificate Test /National Apprenticeship Certificate Test shall be given to each candidate,

Or

***Twenty percent** of the percentage of marks, secured in Diploma or Degree Examination shall be given to each candidate.*

(iii) Fifteen percent of the percentage of the marks secured in CITS/POT test shall be given to each candidate.

(b) (i) After the results of the evaluations under clause (a) have been received and tabulated, the Selection Committee shall hold an interview. If the applications received are large in numbers, then in such situation the number of candidates to be called for interview shall be four times the number of vacancies. For this purpose the merit list of candidates shall be prepared separately on the basis of aggregate of marks obtained by them under clause (a).

(ii) The interview shall carry one hundred marks Fifteen percent of the marks obtained at the interview shall be given to each candidate

(4) The marks obtained by each candidate under clause (a) of sub-rule (3) shall be added to the marks obtained by him under clause (b) of sub-rule (3). The final select list shall be prepared on the basis of aggregate of marks so arrived. If two or more candidates obtain equal marks in the aggregate, the candidate obtaining higher marks under clause (a) of sub-rule (3) shall be placed higher in the select list. In case two or more candidates obtain equal marks under clause (a) of sub-rule

(3) also, the candidate senior in age shall be placed higher in the select list.

(5) The select list referred to in sub-rule (4) shall be forwarded to the appointing authority.

PART-VI

Appointment, Probation, Confirmation and Seniority

17. (1) Subject to the provisions of sub-rule (3) of this rule, the appointing authority shall make appointment by taking the names of candidates in the order in which they stand in the list prepared under rule 16.

(2) If more than one order of appointment are issued in respect of any one selection, a combined order shall also be issued, mentioning the names of the persons in order of seniority as determined in the selection.

(3) The appointed persons will have to complete the CITS/POT and CCC Courses referred to in column 5 of the Appendix and obtain the requisite Certificates at their own expenses within three years from the date of joining *and leave shall be granted to them for the said period.* ***If a person is unable to complete the same due to reasons beyond his control, he shall be allowed one more year to complete the said. courses***

If a person is unable to obtain CITS/POT and CCC certificates within the prescribed period as mentioned in above, he shall not be allowed his first increment.

APPENDIX

[See rules 4 and 9]

Technical qualifications for the post of Instructor for different trades/ subjects shall be as follows:

Serial No.	***Trade/ Subjects***	***Total Sanctioned posts***	***Minimum Technical Qualifications***	***Preferential Qualification to provide training / teaching in the relevant trades***
1	***2***	***3***	***4***	***5***
1	Fitter	287	(1) 50% posts in each trade to be filled from amongst candidates having National Trade Certificate (NTC) in the relevant trade OR National Apprenticeship Certificate (NAC) in the relevant trade. (2) 50% posts in each trade to be filled from amongst	Certificate under one year Craft Instructor Training Scheme (CITS) in the relevant trade and Certificate in Course on Computer Concepts (CCC) from NIELIT (Formerly DOEACC Society
2	Welder (Gas & Electric)	194		
3	Sheet Metal Worker	13		
4	Turner	216		
5	Machinist	137		
6	Machinist (Grinder)	19		
7	Mechanic Machine Tools Maintenance	02		
8	Foundryman	13		

9	Tool & Die Maker (Dies & Moulds)	06	the candidates having Diploma in Mechanical Engineering from the Board of Technical Education, Uttar Pradesh or equivalent OR Degree in Mechanical Engineering from recognised Institute/ University.	of India) or from other equivalent recognised Institution.
10	Tool & Die Maker (Press Tools, Jigs & Fixtures)	07		
11	Carpenter	10		
12	Plumber	38	(1) 50% posts to be filled from amongst the candidates having National Trade Certificate (NTC) in the relevant trade OR National Apprenticeship Certificate (NAC) in the relevant trade. (2) 50% posts to be filled from amongst the candidates having Diploma in Civil/ Mechanical Engineering from the Board of Technical Education, Uttar Pradesh or equivalent OR Degree in Civil/ Mechanical Engineering from a recognised Institute/ University.	Certificate of Training Methodology/Principles of Teaching Module (POT) under Craft Instructor Training Scheme (CITS) and Certificate in Course on Computer Concepts (CCC) from NIELIT (Formerly DOEACC Society of India) or from other equivalent recognised Institution.

"

Constitutional Provisions and Legislative Fields:-

25. **Entry 65(a) and Entry 66 of List-I, Union List and Entry 25 of List-III, Concurrent List,** of the VIIth Schedule to the Constitution of India read as under:

*"**65. Union agencies and institutions for-***

*(a) **professional, vocational or technical training,** including the training of police officers; or*

***66. Co-ordination and determination of standards in institutions for** higher education or research and scientific and technical institutions.*

***25 .** Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour."*

26. Perusal of aforequoted entries reveal that Entries 65 and 66 of List-I and Entry 25 of List-III operate in different fields. The field of legislation on the subject of Co-ordination and determination of standards in technical institutions for higher education or research and scientific and technical institutions, is specifically assigned to the Parliament. Technical education includes teachers' qualification which squarely falls under Entry 66 of List-I in the exclusive domain of the Union. Entry 25 of List-III is subject to provisions of Entry 66 of List-I. Therefore, so long as the Central Government has not issued any directions or has not enacted a law with respect to coordination and determination of standards in technical education, it shall be open to the State Government to prescribe qualifications for appointment in Industrial Training Institutes which are technical institutions. Since, in the the present set of facts, the standards in technical education which includes the prescribing of qualification for appointment in Industrial Training Institutions has been occupied by the Union of India by issuing Executive Orders dated 24.07.1996, 15.12.2008 and 30.09.2010 exercising the executive power vested in it by virtue of Article 73 of the Constitution of India, therefore, the Rules framed by the State Government has to be in conformity with the aforesaid executive orders. It is well settled that executive orders issued under Article 73 on matters on which Parliament has exclusive power to make laws, have the same force as laws made by Parliament.

27. Article 73 of the Constitution of India provides that subject to the provisions of the Constitution, the executive power of the Union of India shall extend inter alia to the matters with respect to which Parliament has power to make laws. Thus, in the absence anything to the contrary, the executive power of the Union is co-extensive with legislative power of the Parliament. Since there is neither any contrary legislation by Parliament on the subject in question referable to Entry-66, List-I nor subject matter of executive instruction in question has been assigned by the Constitution to other authorities or bodies nor it encroaches upon legal rights of any member of the public, therefore, the executive instructions dated 15.12.2008, 30.09.2010 and 21.03.2013 issued by the Government of India exercising the powers under Article 73 of the Constitution of India, shall hold the field.

28. In the case of **Preeti Srivastava vs. State of M.P., (1999) 7 SCC 120**, a

Constitution Bench of Hon'ble Supreme Court dealt with the State competence under List-III Entry 25 to control or regulate higher eduction which is subject to standards laid down by the Union of India, and held that both the Union as well as States have the power to legislate on education/ medical education subject, inter alia, to Entry 66 of List-I which deals with laying down standards in institutions for higher education or research and scientific and technical institutions. **Thus, State has the right to control education including medical education so long as the field is not occupied by any Union Legislation but the State cannot, while controlling education in the State, impinge on standards in institutions** for higher education or research and scientific and technical institutions which is exclusively within the domain of the Parliament. Similar view was taken by Hon'ble Supreme Court in the case of **Annamali University vs. Secretary to Government Information and Tourism Department, (2009) 4 SCC 590 and Kalyani Mathivanan vs K V Keyaraj And Ors, (2015) 6 SCC 363 (paras 50 to 53) and State of Tamilnadu and another vs. Adhiyaman Educational & Research Institute and others, (1995) 4 SCC 104 (Para-12).**

29. In the case of **R. Chitralekha and another vs. State of Mysore and others, (1964) 6 SCR 368 : AIR 1964 SC 1823 (para-39),** a Constitution Bench of Hon'ble Supreme Court reiterated the similar principles with reference to Article 162 of the of the Constitution of India, relating to States' executive power and held, as under:

"Again, here what we have is not a State law but merely what is claimed to be an -executive fiat. It is true that Article 162 says that the executive power of the State is co-extensive with the power of the legislature to legislate and this Court has held in Rai Sahib Ram Jawaya Kapur & Ors. v. The State of Punjab, (1995) 2 SCR 225 that the power of the State is not confined to matters over which legislation has already been passed. But neither Article 162 nor the decision of this Court goes so far as to hold that the State's power can be exercised in derogation of a law made by a competent legislature. On the other hand the Court appears to have approved of the view taken by two learned Judges of the Allahabad High Court in Motilal v. The Government of the State of Uttar Pradesh, AIR 1951 Allahabad 257 (FB) that an act would be within the executive power of the State if -it is not an act which has been assigned by the Constitution to other authorities or bodies and is not contrary to the provisions of any law and does not encroach on the legal rights of any member of the public. Here we have the Mysore University Act, Section 23 of which provides that the Academic Council shall have power to prescribe the conditions for admission of students to the University. Now since a competent legislature has conferred this power on a particular body the State cannot encroach upon that power by its executive act. Thus this is a case where there is not merely an absence of legislative sanction to the action of the State but there is an implied limitation on its executive power in regard to this matter."

30. **The object of providing same standards in all technical educational institutions in the country for appointment in Industrial Training Institutes, is to maintain uniform standard which may not be lowered by any particular State or States to the**

detrimental of national progress. The power of coordination as provided in Entry-66 of List-I does not mean merely the power to evaluate but it also means to harmonise or secure relationship for concerted action. Therefore, a legislation made for the purpose of co-ordination and determination of standards in institutions for higher education or research in scientific and technical institutions, is essentially a legislation in the field reserved for Union under Entry 66 of List-I, Union List of the VIIth Schedule to the Constitution of India. Therefore, executive orders dated 24.07.1996, 15.12.2008 and 30.09.2010 are well within the executive powers of the Government of India under Article 73 of the Constitution of India, on the subject matter referable to Entry 66.

Essential and Preferential Qualification (CITS) under Rules/ Executive Orders:-

31. The Rules, 1991 as amended by the IInd Amendment Rules notified on 08.08.2003 incorporating the academic qualification of vocational instructors provided by the executive order dated 24.07.1996, are the Service Rules enacted by the State Government in exercise of powers under the proviso to Article 309 of the Constitution of India. Since, subsequently by the Third Amendment to the U.P. Rules, 1991 notified on 09.12.2003, the essential qualification of CITS for the post of instructors was lowered as opposed to the G.O. dated 24.07.1996 then holding the field, therefore, a learned Single Judge of this Court in the case of **Upendra Narain Singh (supra)** held the Third Amendment to the U.P. Rules, 1991 as ultra vires, which was affirmed by the Division Bench in Special Appeal in the case of **Pawan Kumar Sagar (supra)**. Thus, the qualification for the post of instructors was governed by the G.O. dated 24.07.1996 till the issuance of the G.Os. dated 15.12.2008 and 30.09.2010.

32. In its 37th Meeting the NCVT under the Chairmanship of Hon'ble Minister of State for Labour and Employment (IC) held on 23rd November, 2008, resolved and approved norms for instructor qualification for trades under Craftsman Training Scheme vide Agenda Item Nos.3 and 4. The qualification so approved by NCVT, has been reproduced in paragraph-2 of the aforequoted executive order dated 15.12.2008. The recommendation of the NCVT was accepted by the Government of India vide para-3 of the aforequoted executive order dated 15.12.2008. Subsequently, in its 38th Meeting, the NCVT under the Chairmanship of Hon'ble Minister of State for Labour and Employment held on 31.05.2010 resolved/ recommended qualification for instructor of "Advance Module of Multiskilled Courses being implemented in ITIs upgraded COE," which have been extracted in the aforequoted executive order of the Government of India dated 30.09.2010, which was accepted by the Government of India and a direction was issued to implement it. It appears that subsequently, vide DO letter No.614/PSTV/2013 dated 15.02.2013, the State Government had requested for review of the aforequoted executive instructions. **The Government of India vide aforequoted D.O. letter dated 21.03.2013 informed** that after due consideration of the demands of the labour market and industry, the qualification for ITI instructors was determined. However, it provided that **those instructors who were**

working, may complete the CITS within three years. It was concluded that there is no need for review of the qualification recommended by the NCVT as prescribed by the aforesaid executive orders. Consequently, the Government of India has required the States to amend the State Rules and accordingly to fill up vacancies. Thereafter, the State Government has enacted the impugned U.P. Service Rules, 2014 incorporating the academic qualification of instructuors as determined by the aforesaid two executive orders of the Government of India dated 15.12.2008, 30.09.2010 and the letter dated 21.03.2013. Thus, the impugned provisions of the U.P. Service Rules, 2014 are not in conflict with the executive orders issued by the Government of India dated 15.12.2008 and 30.09.2010 read with the letter dated 21.03.2013 which in fact have superseded the executive order dated 24.07.1996. Thus, the judgment of Hon'ble Single Judge in the case of **Upendra Narain Singh (supra)** as affirmed by the Division Bench in the case of **Pawan Kumar Sagar and others (supra)** are of no help to the petitioners in the changed circumstances.

33. **Rule 3(j)** of the U.P. Service Rules, 2014, itself defines the words **"National Council for Vocational Training (NCVT)"** to mean the Council set up by Director General of Employment and Training (DGE&T), Government of India **for regulating the vocational training throughout India.** The word "**CITS Certificate**' for a trade has been defined in Rule 3(f), means a certificate issued/ awarded by NCVT upon successful completion of one year training under the CTTS or in case of modular pattern the combined certificate awarded by NCVT upon successful completion of all the prescribed modules. The word "**Trade**' has been defined in **Rule 2(s)** of the U.P. Service Rules, 2014. The words ""**Crafts Instructor Training Scheme (CITS)**" have been defined under Rule 3(e) to mean the training scheme of the **National Council for Vocational Training (NCVT) for preparing trained Instructors for Industrial Training Institutes. Thus, CITS certificate is a certificate of training granted by the NCVT for preparing trained instructors for Industrial Training Institutes, upon completion of one year training under the CITS or in case of modular pattern, the combined certificate awarded by NCVT upon successful completion of all the prescribed modules. The NCVT has been created by the Government of India for regulating the vocational training throughout India.**

34. Rule 9(A) provides for essential qualifications of candidates for recruitment to the post of instructors. As per Rule 9(B), a candidate should possess the preferential qualification to provide training/ teaching in relevant trades/ subjects as prescribed for different trades/ subjects in column-5 of the Appendix. Column-5 of the Appendix to Rule 9 of the U.P. Service Rules, 2014 provides preferential qualification of one year certificate of CITS in the relevant trade and CCC certificate from NIELIT, for trades at Sl. No.1 to 11. The aforequoted executive order of the Government of India dated 15.12.2008 provides POT certificate as a desirable qualification for appointment of vocational instructors in ITIs/ ITCs for trades under CTS as approved by the Council. The executive order dated 30.09.2010 prescribes qualification of candidates for the post of instructor for Advance Module of Multiskilled Courses

implemented in ITIs upgraded as COE, which includes "Pass NCVT approved Training Methodology Module of Craft Instructor Programme" as a desirable qualification. The word "POT" has been defined in Rule 3(n) of the U.P. Service Rules, 2014 to mean the certificate awarded by the NCVT upon successful completion of relevant training or the completion of the module on Training Methodology under the modular pattern of CITS. Thus, CITS certificate has been made a desirable qualification as per aforequoted executive orders dated 15.12.2008 and 30.09.2010 which have been incorporated in Rule 9(B) and Rule 15(3) of the U.P. Service Rules, 2014.

35. The proviso to Rule 9(B) of the U.P. Service Rules, 2014 provides that the candidates who do not possess the preferential qualification as prescribed for different trades/ subjects in Column-5 of the Appendix shall also be considered for selection and if selected, they shall be required to obtain the said qualification in the prescribed period as per Rule 17(3). The proviso to Rule 9(B) and Rule 17(3) are in fact the incorporation of last paragraph of the executive order of the Government of India dated 30.09.2010 and executive order dated 15.12.2008 as reiterated by the letter of the Government of India dated 21.03.2013, as under:

"..... इस सम्बन्ध में सूचित करना है कि राष्ट्रीय व्यावसायिक प्रशिक्षण परिषद् की बैठकों मे सम्यक् विचारोंपरांत तथा श्रम बाजार एवं उद्योग की मांगो को ध्यान में रखते हुए आई.टी.आई. अनुदेशकों के पद हेतु डिप्लोमा/डिग्रीधारक की अर्हता निर्धारित की गयी है। उसमें यह भी प्रावधान किया गया है कि आई0 टी0 आई0 अनुदेशकों के पद पर भर्ती डिप्लोमा/डिग्रीधारकों को कार्यभार ग्रहण करने की दिनांक से तीन वर्ष की अवधि के भीतर डीजीईटी के एडवांस्ड प्रशिक्षण संस्थाओं से शिल्प अनुदेशक प्रशिक्षण योजना (सी.आई.टी.एस.) के अंतर्गत प्रशिक्षित किया जा सकता है जिससे उन्हे व्यवहारिक कौशल में भी निपुणता प्राप्त हो सके। इसलिये इसके पुर्नविचार की आवश्यकता प्रतीत नही होती।

2. अतः मैं अनुग्रहीत हूंगा यदि कृपया उपरोक्तानुसार सेवा नियमावली में तत्काल संशोधन कर अनुदेशकों के रिक्त पदों को भरने का कष्ट करें और की गयी कार्यावाही से इस कार्यालय को भी अवगत करा दें।"

36. It is also relevant to mention that technical qualification for appointment of Vocational Instructor in ITIs/ ITCs for trades under CTS as prescribed by the aforequoted executive order dated 15.12.2008 is the degree in Engineering/ three year diploma in appropriate branch of trade concerned OR National Apprenticeship Certificate OR National Trade Certificate in relevant trade. The words "National Apprenticeship Certificate (NAC)" have been defined in Rule 3(l) of the U.P. Service Rules, 2014 to mean the certificate awarded by the NCVT upon successfully passing the National Apprenticeship Test. The words "National Trade Certificate (NTC)" have been defined in Rule 3(k) to mean the certificate awarded by the NCVT upon successfully passing the All India Trade Test in that trade and a candidate who has undergone training in any sector under the Centre of Excellence Scheme, certificates awarded by NCVT upon successful completion for all the three modules, namely Broad Based Basic Training, Advanced Module and the Specialized Module, together, shall constitute the National Trade Certificate. The third column of executive order dated 15.12.2008 prescribes experience in trade as one year for degree-holder, two years for diploma holders and three years for NAC/ NTC. In addition to these essential qualification and experience, a desirable qualification has been prescribed as "POT". P**erusal of the proviso to rule 9(B) read with Rule 17(3) of the U.P. Service Rules,**

2014 further makes it clear that the desirable qualification is not simply a desirable one and if it is not possessed by a selected candidate then he has to possess it within three years and in circumstances beyond his control within a further period of one year, at his own expense, failing which he shall not be allowed his first increment. Thus, the impugned Rules provide for certain period to a selected candidate who does not possess CITS Certificate, to complete CITS mandatorily within a definite time frame, which is in fact incorporation of the aforementioned executive orders of Government of India in the impugned rules.

37. **Thus, the Rules impugned in the present writ petitions are in fact incorporation of the aforequoted executive orders dated 15.12.2008 and 30.09.2010 read with the letter dated 21.03.2013, in the U.P. Service Rules, 2014. Therefore, the impugned Rules, not being in conflict with the Executive Orders dated 15.12.2008 and 30.09.2010 occupying the field; are not ultra vires to any of the provisions of the Constitution of India. Since the impugned advertisement is in conformity with the U.P. Service Rules, 2014 and the Executive Orders of the Government of India dated 15.12.2008 and 30.09.2010, therefore, the impugned advertisement is wholly valid.**

38. We also find it relevant to mention that after the U.P. Service Rules, 2014 was notified on 30.01.2014, the Government of India has accepted the recommendation of 41st Meeting of the NCVT vide Executive Order dated 27.05.2014, which is reproduced below:

"DGSAT-18 703 2014-CD

Government of India
M/o Labour & Employment
Directorate of Employment & Training
Shram Shakti Bhavan

New Delhi, dated 27 May, 2014

To,

1.Secretaries/Principal Secretaries of all the State Govts/UT Administrations dealing with Vocational Training
2. Directors dealing with Vocational Training of all States/UT Administrations

Subject: Norms for Vocational Instructor qualification for trades under Craftsmen Training scheme.

Sir,

The 41st meeting of the National Council for Vocational Training (NCVT) under the Chairmanship of Hon'ble Minister of Labour & Employment was held on 30th April, 2014, Norms for Instructor qualification for trades under Craftsmen Training scheme was discussed vide Agenda item No 41031 in the meeting.

2. A Working Group was constituted by M/o Labour & Employment for examining all aspects of the various DGE&T schemes including Craftsmen Training Scheme (CTS) and suggesting improvements therein. Working Group recommended that for every unit in a trade, one of the instructors appointed should be with professional qualification as ITI pass-outs with National Craft Instructor Certificate(CITS) (for trades where Craft Instructor Training Scheme was available) and one should be with professional qualification as degree / diploma holder, ***who will be trained in CITS in prescribed time.*** *The recommendations of working group were further put up for the approval*

of the NCVT at its 41st meeting held at New Delhi,

3. Council approved that for every unit in a trade, one of the instructors appointed should be with professional qualification as ITI pass-outs ***with National Craft Instructor Certificate (for trades where Craft Instructor Training courses was available) and*** *one should be with professional qualification as degree / diploma holder, who will be trained in CITS in prescribed time as per following academic as well as technical qualification.*

Qualification		Experience in trade relevant field after technical qualification
Academic	Technical	
10th class pass or equivalent	* Four years degree in Engineering/ Three years Diploma in **appropriate branch of engineering or National Apprenticeship Certificate in trade of National Trade Certificate in trade and National Craft Instructor Certificate (for those trades where courts under Crafts Instructor Training courses are available)	One year for degree and two years for Diploma. Three years for NAC/NTC.

Degree/Diploma holders will have to undergo only second semester of CITS training, if they pass the direct test of first semester, within three years of appointment, as outlined in office order No. DGE&T- 19/07/(2)/2014-CD dated 26th May,2014

*****As specified in syllabus of respective trades.***

4. Council also recommended that every instructor who has already joined ITIs must complete CITS course within three years of joining. This shall be made mandatory condition for the purpose of affiliation and promotion.

5. Council, further recommended that the contractual appointment to the post of instructors should be for a period of one year, and also that within the period of this one year, vacancies should be filled through regular recruitment with the objective of ensuring commitment of the Instructors for quality training on the basis of a career in this field.

6. Government of India has accepted the above recommendation of Council for Implementation with immediate effect. Henceforth, instructors for two units of a trade as per norms given in para 3 above, be appointed in Government and Private ITIs. The above academic as well as technical qualification be followed while appointing new instructors in Government

and Private ITIs and same would be strictly monitored for grant of affiliation of these institutes. The norms given in para 4&5 above shall also be followed by all concerned strictly.

6. This supersedes previous orders on above subject.

Yours faithfully
(R.L, Singh)
Dy. Director General of Training
Member secretary NCVT

Copy to

1 Director, ATI-Chennal / Hyderabad/ Mumbai/ Kolkata/ Kanpuri Ludhiana, ATI(EPI) Hyderabad, & Dehradun, FTI Bangalore & Jamshedpur, NIMI Chennai, Director RDAT Kanpur Mumbai / Kolkata / Chennai/Faridabad & Hyderabad, Director-CSTARI, Kolkata.

2. Principal CTI Chennai, Principal MITI, Haldwani/Calicut/Jodhpur/ Choudwar, Principal-NVTI, Noida and Principals of all RVTIs.

3. All Directors at DGE&T (HQ)

4. PPS to Secretary (L&E), PS to DG/JS for Information, please.

(SNS Rahi)
Dy. Director of Training"

39. Perusal of the aforenoted Executive Order dated 27.05.2014 shows that **neither the impugned Rules nor the impugned advertisement is in conflict with it. The appointed candidates who have joined, have to complete CITS Course within three years.**

40. By another subsequent Executive Order dated 07.01.2016, the Government of India has issued "Guidelines for recruitment of Instructors for ITIs by respective States and road map for Mandating CITS for all Instructors" as under:-

"MSDE 19/03(8)/2015-CD
Government of India
Directorate General of Training
Ministry of skill Development & Entrepreneurship (MSDE)

Shram Shakti Bhawan, Rafi Marg
New Delhi, dated 7th January, 2016

To,

1. Secretaries/Principal Secretaries of all the State Govts/UT Administrations dealing with Craftsmen/Vocational Training

2. Directors dealing with Craftsman/ Vocational Training of all States/ UT Administrations

Subject:- Norms for "Recruitment of the Instructor in ITIs" and "mandating Crafts Instructor Training Scheme (CITS) for all ITI instructors".

Sir/Madam

A Working Group was constituted comprising of Secretaries of the 04 States on the "Care Progression of ITI Instructors and changes in CTS programme." Three meetings of the Working were held to discuss on the Career Progression of ITI Instructors and changes in CTS programme.

The recommendations of working group on recruitment of the instructors and mandating CITS for all instructors of ITIs was discussed vide agenda item No.9 in the meeting of Sub Committee of NCVT dealing with Norms & Courses held on 17.12 2015, at New Delhi. After detailed discussion, the Sub-committee approved following guidelines for recruitment of the instructors for ITIs by respective State Governments and roadmap for "Mandating CITS for all instructors":

I. Guidelines for recruitment of the instructors for ITIs:

i. 60% weightage fixed for marks in relevant technical qualifications i.e. Degree/ Diploma or CTS.

ii.30% weightage fixed for marks in CITS qualification to ensure that CITS passed candidates are engaged as instructors

iii.Maximum 10% weightage for interview

iv.The threshold condition for experience criteria prevails as given in NCVT norms

v.The above criteria will also apply for contractual employment

II. Roadmap for "Mandating CITS for all instructors"

i. For affiliation /re-affiliation for all ITIs:

- By 2018-Availability of at least 40% instructors with CITS

- By 2020-Availability of at least 60% instructors with CITS

By 2022- Availability of at least 80% instructors with CITS

ii. ***No promotion for instructors without CITS in Govt. ITI's.***

Iii. Separate scheme for part-funding of training expenses for the training of trainers working in Private ITIs.

*All State Governments/UT Administrations are requested to follow above guidelines as given at Sl. No. I and II above, with immediate effect. *

Yours faithfully

(D.Mallick)

Dy Director General of Training"

41. Thus, perusal of the aforequoted subsequent Executive Order of Government of India dated 07.01.2016 also makes it clear that appointed Instructors in Government ITIs who have not completed CITS, shall not be given promotion. Therefore, if any of the appointed candidate does not complete CITS then he shall be dis-entitled for promotion in Government ITIs. Thus, even in view of these Executive Orders, the appointment of the selected candidates cannot be quashed.

42. We also find that now the Rules in question, i.e. U.P. Service Rules, 2014 has been superseded by the Uttar Pradesh Government Industrial Training Institute (Instructors and Foreman Service) Rules, 2021.

No valid reason to interfere with the impugned Advertisement and Recruitment:-

43. We also find that by the impugned advertisement, 2498 vacancies for the post of instructors were advertised for recruitment and the petitioners applied for recruitment. According to the learned Additional Advocate General about 2300 candidates could be selected against the 2498 vacancies. The petitioners, by electing not to file rejoinder affidavits, have admitted the contents of counter affidavits filed by the selected candidates, i.e. the respondent Nos.4 to 7 and the respondent Nos.8 to 13. Thus the petitioners have admitted that there has been no breach of Articles 14 and 16 of the Constitution of India, reservation laws in the recruitment in question have been observed and Rule 16 regarding method of preparation of merit list of the eligible candidates in making selection for direct recruitment, does not suffer from any infirmity. The petitioners have also admitted the contents of paras 8 and 15 of the counter affidavit of the respondent Nos.8 to 13 that the Training Manual, 2014 issued by the Government of India issued for Industrial Training Institutes shortly prior to framing of the

U.P. Rules, 2014 prescribes CITS as desirable qualification. Also, undisputedly the selected candidates were appointed and they are working since their appointments in the Year, 2016. Thus there is no valid reason to interfere with recruitment pursuant to the impugned advertisement and appointments of the selected candidates on the post of Instructor.

Presumption of the Constitutional Validity:-

44. In the case of **Anant Mills Vs. State of Gujarat reported in AIR 1975 SC 1234 (para 20)**, the Hon'ble Supreme Court has held that :-

*"20. **There is a presumption of the constitutional validity of a statutory provision.** In case any party assails the validity of any provision on the ground that it is violative of Article 14 of the Constitution, it is for that party to make the necessary averments and adduce material to show discrimination violative of Article 14. No averments were made in the petitions before the High Court by the petitioners that the assessments before the coming into force of Ordinance 6 of 1969 bad been made by taking into account the rent restriction provisions of the Bombay Rent Act. Paragraph 2B and some other paragraphs of petition No. 233 of 1970 before the High Court, to which our attention was invited by Mr. Tarkunde, also do not contain that averment. No material on this factual aspect was in the circumstances produced either on behalf of the petitioners or the Corporation. The High Court, as already observed, decided the matter merely on the basis of a presumption. It is, in our opinion, extremely hazardous to decide the question of the constitutional validity of a provision on the basis of the supposed existence of certain facts by raising a presumption. The facts about the supposed existence of which presumption was raised by the High Court were of such a nature that a definite averment could have been made in respect of them and concrete material could have been produced in support of their existence or non-existence. Presumptions are resorted to when the matter does not admit of direct proof or when there is some practical difficulty to produce evidence to prove a particular fact. When, however, the fact to be established is of such a nature that direct evidence about its existence or non- existence would be available, the proper course is to have the direct evidence rather than to decide the matter by resort to presumption. A pronouncement about the constitutional validity of a statutory provision affects not only the parties before the Court, but all other parties who may be affected by the impugned provision. There would, therefore, be inherent risk in striking down an impugned provision without having the complete factual data and full material before the court. It was therefore, in our opinion, essential for the High Court to ascertain and field out the correct factual position before recording a finding that the impugned provision is violative of article 14. The fact that the High Court acted on an incorrect assumption is also borne out by the material which has been adduced before us in the writ petitions filed under article 32 of the Constitution."*

(Emphasis supplied by us)

45. In **Charanjit Lal Choudhary Vs. Union of India and others, AIR 1951 SC 41 (para 10),** Hon'ble Supreme Court has held that there is presumption that the legislature understands and correctly appreciates the need of its people. In **Union**

of India Vs. Elphinstone Spinning and weaving Co. Ltd. and Ors., AIR 2001 SC 724 (para 9), Hon'ble Supreme Court has held that there is presumption that the legislature does not exceed its jurisdiction. In State of **Bihar and others Vs. Smt. Charusila Dasi, AIR 1959 SC 1002 (para 14)**, the Hon'ble Supreme Court has laid down the law that there is presumption that the legislature does not intend to exceed its jurisdiction. In **Kedar Nath Singh Vs. State of Bihar, AIR 1962 SC 955 (para 26)**, Hon'ble Supreme Court held that provision should be construed in the manner as will uphold its constitutionality. In **Corporation of Calcutta Vs. Libery Cinema, AIR 1965 SC 1107**, Hon'ble Supreme Court has laid down the law that the provision should be read in the manner as will make it valid. Similar view has been expressed by the Constitution Bench of Supreme Court in **Anandji Haridas and Co. (P) Ltd. Vs. S.P. Kasture and ors., AIR 1968 SC 565 (para 32). In Sunil Batra Vs. Delhi Administration and ors., AIR 1978 SC 1675,** Hon'ble Supreme Court observed that the legislature expresses wisdom of community. In **State of Bihar VS. Bihar Distilleries, AIR 1997 SC 1511 (para 18)**, Hon'ble Supreme Court observed that an Act made by legislature represents the will of people and cannot be lightly interfered with. In **Zameer Ahmad Latifur Rehman Sheikh Vs. State of Maharashtra and ors., J.T. 2010 (4) SC 256 (para 34),** Hon'ble Supreme Court observed that every legally possible effort should be made to uphold the validity. **In Greater Bombay Co-operative Bank Ltd Vs. United Yarn Tex (P) Ltd. and others, (2007) 6 SCC 236 (paras 82 to 85),** Hon'ble Supreme Court observed as under :

" 82 ***The constitutional validity of an Act can be challenged only on two grounds,*** *viz. (i) lack of legislative competence; and (ii) violation of any of the Fundamental Rights guaranteed in Part III of the Constitution or of any other constitutional provision. In State of A. P. & Ors. v. McDowell & Co. & Ors. [(1996) 3 SCC 709], this Court has opined that except the above two grounds, there is no third ground on the basis of which the law made by the competent legislature can be invalidated and that the ground of invalidation must necessarily fall within the four corners of the afore-mentioned two grounds.*

83. Power to enact a law is derived by the State Assembly from List II of the Seventh Schedule of the Constitution. Entry 32 confers upon a State Legislature the power to constitute cooperative societies. The State of Maharashtra and the State of Andhra Pradesh both had enacted the MCS Act 1960 and the APCS Act, 1964 in exercise of the power vested in them by Entry 32 of List II of the Seventh Schedule of the Constitution. Power to the enact would include the power to re-enact or validate any provision of law in the State Legislature, provided the same falls in an entry of List II of Seventh Schedule of the Constitution with the restriction that such enactment should not nullify a judgment of a competent court of law. In the appeals / SLPs/petitions filed against the judgment of the Andhra Pradesh High Court, the legislative competence of the State is involved for consideration. Judicial system has an important role to play in our body politic and has a solemn obligation to fulfil. In such circumstances, ***it is imperative upon the courts while examining the scope of legislative action to be conscious to start with the presumption regarding the constitutional validity of the legislation. The burden of proof is upon the shoulders of the the incumbent who challenges it.*** *It is true that it is the duty of*

the constitutional courts under our Constitution to declare a law enacted by Parliament or the State Legislature as unconstitutional when Parliament or the State Legislaturehad assumed to enact a law which is void, either for want of constitutional power to enact it or because the constitutional forms or conditions have not been observed or where the law infringes the fundamental rights enshrined and guaranteed in Part III of the Constitution.

84. As observed by this Court in CST v. Radhakrishnan in considering the validity of a Statute the presumption is always in favour of constitutionality and the burden is upon the person who attacks it to show that there has been transgression of constitutional principles. For sustaining the constitutionality of an Act, a Court may take into consideration matters of common knowledge, reports, preamble, history of the times, objection of the legislation and all other facts which are relevant. It must always be presumed that the legislature understands and correctly appreciates the need of its own people and that discrimination, if any, is based on adequate grounds and considerations. *It is also well- settled that the courts will be justified in giving a liberal interpretation in order to avoid constitutional invalidity. A provision conferring very wide and expansive powers on authority can be construed in conformity with legislative intent of exercise of power within constitutional limitations. Where a Statute is silent or is inarticulate, the Court would attempt to transmutate the inarticulate and adopt a construction which would lean towards constitutionality albeit without departing from the material of which the law is woven. These principles have given rise to rule of "reading down" the provisions if it becomes necessary to uphold the validity of the law.*

85. In State of Bihar & Ors. v. Bihar Distillery Ltd. & Ors. [(1997) 2 SCC 453], this Court indicated the approach which the Court should adopt while examining the validity/constitutionality of a legislation. It would be useful to remind ourselves of the principles laid down, which read: (SCC p.466, para 17):

"The approach of the court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. Indeed, any such defects of drafting should be ignored out as part of the attempt to sustain the validity/constitutionality of the enactment. After all, an Act made by the legislature represents the will of the people and that cannot be lightly interfered with. The unconstitutionality must be plainly and clearly established before an enactment is declared as void. The same approach holds good while ascertaining the intent and purpose of an enactment or its scope and application."

In the same para, this Court further observed as follows:

"The Court must recognize the fundamental nature and importance of legislative process and accord due regard and deference to it, just as the legislature and the executive are expected to show due regard and deference to the judiciary. It cannot also be forgotten that our Constitution recognizes and gives effect to

the concept of equality between the three wings of the State and the concept of "checks and balances" inherent in such scheme."

(Emphasis supplied by us)

46. In the case of **Promoters and Builders Association Vs. Pune Municipal Corporation (2007) 6 SCC. 143 (para 9),** Hon'ble Supreme Court has held that while exercising legislative function, unless unreasonableness and arbitrariness is pointed out it is not open for the Court to interfere.

Principles of Constitutional Validity:-

47. The constitutional validity of an Act can be challenged only on two grounds, viz. (i) lack of legislative competence; and (ii) violation of any of the Fundamental Rights guaranteed in Part III of the Constitution or of any other constitutional provision. Except the above two grounds, there is no third ground on the basis of which the law made by a competent legislature can be invalidated. The ground of invalidation must necessarily fall within the four corners of the aforementioned two grounds. In considering the validity of a Statute the presumption is always in favour of constitutionality and the burden is upon the person who attacks it to show that there has been transgression of constitutional principles. For sustaining the constitutionality of an Act, Court may take into consideration matters of common knowledge, reports, preamble, history of the times, object of the legislation and all the other facts which are relevant. It must always be presumed that the legislature understands and correctly appreciates the need of its own people and that discrimination, if any, is based on adequate grounds and considerations. The courts will be justified in giving a liberal interpretation in order to avoid constitutional invalidity. Where a Statute is silent or is inarticulate, the Court would attempt to transmutate the inarticulate and adopt a construction which would lean towards constitutionality albeit without departing from the material of which the law is woven. These principles give rise to rule of "reading down" the provisions if it becomes necessary to uphold the validity of the law. While examining the challenge to the constitutionality of an enactment, the court is to start with the presumption of constitutionality and try to sustain its validity to the extent possible. The court cannot approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. An act made by the legislature represents the will of the people and that cannot be lightly interfered with. It is presumed that the legislature expresses wisdom of the community, does not intend to exceed its jurisdiction and correctly appreciates the need of its own people.

Principles governing validity of subordinate legislation:-

48. Apart from the aforenoted principles to determine constitutional validity, one additional ground is available to test the validity of a subordinate legislation. The additional ground is that **the authority making subordinate legislation must act within the limits of its power and cannot transgress the same.** Reference with regard to these settled principles of validity of a subordinate legislation can be found in the judgments of Hon'ble Supreme Court in **Hukum Chand vs. Union of India, (1972) 2 SCC 601, General Officer**

Commanding-in-Chief vs. Subhash Chandra Yadav and another, (1988) 2 SCC 351, Additional District Magistrate (Rev.) Delhi Administration vs. Siri Ram, (2000) 5 SCC 451, Sukhdev Singh and others vs. Bhagatram Sardar Singh Raghuvanshi and another, (1975) 1 SCC 421, State of Karnataka and another vs. H. Ganesh Kamath and others, (1983) 2 SCC 402, Kunj Behari Lal Butail and others vs. State of H.P. and others, (2000) 3 SCC 40, Union of India vs. M/s G.S. Chatha Rice Mill, (2021) 2 SCC 209 and judgment dated 16.12.2022 in Civil Appeal Nos.9252-9253 of 2022 (Kerala State Electricity Board and others vs. Thomas Joseph @ Thomas M.J. and others). In the present set of facts, we have found that the State Government has not transgressed the power in framing the impugned Rules. The impugned Rules are well in terms with the Executive Orders of Government of India issued under Article 73 of the Constitution of India.

49. In view of the settled principles of law and discussion made above with regard to the U.P. Service Rules, 2016, we hold that the impugned Rules 9(B), 15(3) and 17(3) of U.P. Government Industrial Training Institute (Instructors) Service Rule, 2014 neither suffer from lack of legislative competence nor it is violative of Articles 14, 16 or 21 of the Constitution of India nor it suffers from any invalidity. These provisions are wholly valid. The impugned advertisement is also wholly valid.

50. It has been stated on behalf of the selected candidates before us that all the appointed Instructors were either possessing CITS certificates prior to their selection/appointment OR have completed CITS subsequently during the period provided under the U.P. Service Rules, 2014 and subsequent executive orders.

51. For all the reasons aforestated we hold that the impugned Advertisement No. 2 of 2014 dated 07.11.2014 and the impugned Rule 9(B), 15(3) and 17(3) are valid. All the writ petitions lack merit and are, hereby, dismissed.

(2023) 1 ILRA 406
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.01.2023

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ-C No. 294 of 2023

Smt. Sajida ...Petitioner
Versus
S.D.M., Kairana, Shamli & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nipun Singh, Sri Sumit Suri

Counsel for the Respondents:
C.S.C., Sri Vineet Singh Parmar

(A) Civil Law - Election - U.P. Panchayat Raj Act, 1947 - Section 12 (C) - Application for questioning the elections, Section 12-C(6) - revision , 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 - As a rule relief not founded in pleadings should not be granted.(Para - 16,)

In body of election petition - vague assertions made - regarding illegal rejection of valid votes - not substantiated - either in examination of election petitioner or otherwise on the basis of record available - Parties to take proper

pleadings by adducing evidence - by particular irregularity of illegality result of election has been materially affected.**(Para -16)**

HELD:-Sub-Divisional Magistrate exercised its jurisdiction of recounting only on 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. Impugned order suffers from illegality. Order Quashed.**(Para - 17,18)**

Petition Allowed. (E-7)

List of Cases cited:

1. Hari Vishnu Kamath Vs Ahmad Ishaque , AIR 1955 SC 233

2. Mohd. Mustafa Vs U.P. Ziladhikari, Phoolpur, Azamgarh & ors. , 2007(7) ADJ 1 (DB)

3. Abrar Vs St. of U.P. & ors. , 2004(5) AWC 4088

4. Ram Adhar Singh Vs D.J. & ors. , 1985 AWC 246

5. Arikala Narasa Reddy Vs Venkata Ram Reddy Reddygari & anr., (2014) 5 SCC 312

6. T.A. Ahammed Kabeer Vs A.A. Azeez , (2003) 5 SCC 650

7. Satyanarain Dudhani Vs Uday Kumar Singh & ors. , 1993 Supp. (2) SCC 82

8. M.R. Gopalalkrishnan Vs Thachady Prabhakaran & ors. , 1995 Supp (2) SCC 101

9. Bhabhi Vs Sheo Govind & ors., AIR 1975 SC 2217

10. Ram Sewak Yadav Vs Hussain Kamil Kidwai & ors. , AIR 1964 SC 1249

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

1. Petitioner before this Court is a returned candidate (Village Pradhan of Village Panchayat Pawatikalan, Kairana, District Shamli) whereas contesting Respondent-2/ Election Petitioner (Smt. Anita) is runner up candidate and the margin of victory was only three votes.

2. The election petitioner (Respondent-2) filed an election petition under Section 12-C of U.P. Panchayat Raj Act, 1947 (hereinafter referred to as "Act, 1947") wherein after exchange of pleadings following five issues were framed:

"1. क्या पेटीशनर व अन्य प्रतिवादीगण ने ग्राम पावटीकलां से प्रधान पद हेतु विधि अनुसार आवेदन प्रस्तुत किया था यदि ना तो प्रभाव क्या?

2. मतगणना के दौरान वादी के एजेन्टों द्वारा क्या-2 आपत्ति उठायी गयी। क्या इन्हे प्रतिवादी सं. 15 व 16 द्वारा अस्वीकार किया गया यदि हाँ तो प्रभाव?

\ 3. उक्त याचिका में किये गये कथनों के अनुसार मतगणना विधि व नियम के अनुसार नहीं की गयी यदि हां तो प्रभाव?

4. क्या याचिका में किये गये कथन के अनुसार पुनः मतगणना किया जाना है?

5. क्या वादी अन्य कोई अनुतोष पाने का हकदार है यदि हां तो क्या?"

3. Sub-Divisional Magistrate, Kairana after considering material on record by impugned order dated 23.12.2022 accepted election petition and disposed of same with direction of recounting. Petitioner has approached this Court directly without availing alternative remedy provided under Section 12-C(6) of Act, 1947.

4. A preliminary objection was raised by Sri Bhupendra Kumar Tripathi, Advocate holding brief of Sri Vineet Singh Parmar, learned counsel appearing for Respondent-2, with regard to maintainability of writ petition and he

placed reliance on a Constitution Bench decision of Supreme Court in **Hari Vishnu Kamath vs. Ahmad Ishaque, AIR 1955 SC 233** and relevant para 23 is reproduced as under:

"23. It may therefore be taken as settled that a writ of certiorari could be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The real difficulty with reference to this matter, however, is not so much in the statement of the principle as in its application to the facts of a particular case. When does an error cease to be mere error, and become an error apparent on the face of the record? Learned Counsel on either side were unable to suggest any clear-cut rule by which, the boundary between the two classes of errors could be demarcated."

5. In reply to preliminary objection Sri Anurag Khanna, learned Senior Advocate assisted by Sri Nipun Singh and Sri Raghav Dev Garg, learned counsel for petitioner, placed reliance on a judgment passed by Division Bench of this Court in **Mohd. Mustafa vs. U.P. Ziladhikari, Phoolpur, Azamgarh and others, 2007(7) ADJ 1 (DB)** and he referred the answers to the question referred by learned Single Judge. Relevant para 27 is mentioned hereinafter:

27. We answer the questions referred to by the learned Single Judge as follows:

(I) A revision under Section 12-C(6) of the Act shall lie only against a final order passed by the Prescribed Authority deciding the election application preferred under Section 12-C(1) and not against any interlocutory order or order of recount of votes by the Prescribed Authority.

(II) The judgment of the learned Single Judge in the case of Abrar v. State of U.P. and Ors. (2004) 5 AWC 4088 does not lay down the law correctly and is, therefore, overruled to the extent of the question of maintainability of a revision petition, as indicated hereinabove.

(III) As a natural corollary to the above, we also hold that a writ petition would be maintainable against an order of recount passed by the Prescribed Authority while proceeding in an election application under Section 12-C of the U.P. Panchayat Raj Act, 1947."

6. Learned Senior Advocate also referred that facts of the matter under reference are similar to present case wherein election petition was finally disposed of with direction of recounting of votes and as such writ petition is maintainable against order of recounting passed by Sub-Divisional Magistrate, Kairana.

7. In order to consider the preliminary objection, I have carefully perused the judgment passed by Division Bench in **Mohd. Mustafa (supra)** as well as **Abrar vs. State of U.P. and others, 2004(5) AWC 4088** and found that facts of present case are similar, therefore, preliminary objection is rejected by holding that present writ petition is maintainable.

8. Sri Anurag Khanna, learned Senior Advocate 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. Learned Senior Advocate placed reliance on Full Bench judgment of this Court in **Ram Adhar Singh vs. District Judge and others, 1985 AWC 246** 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."

9. Learned Senior Advocate also placed reliance on Supreme Court's judgment in **Arikala Narasa Reddy vs. Venkata Ram Reddy Reddygari and another (2014) 5 SCC 312; T.A. Ahammed Kabeer vs. A.A. Azeez (2003) 5 SCC 650; Satyanarain Dudhani vs. Uday Kumar Singh and others 1993 Supp. (2) SCC 82; and, M.R. Gopalalkrishnan vs. Thachady Prabhakaran and others, 1995 Supp (2) SCC 101.**

10. Per contra, learned counsel appearing for Respondent-2 has referred the findings on Issues No. 1, 2, 3, 4 and 5 that election petitioner has raised objection at the time of counting, however, she was ignored and during hearing of election petition Government Respondents have not come up with any explanation, why complaints made by election petitioner were rejected. Learned counsel further submits that returned candidate has made an assertion on affidavit that she has no objection for recounting.

11. I have heard learned counsel for parties and perused the material available on record as well as the judgments cited at Bar.

12. 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.

13. Election petitioner has made a assertion in election petition that vote given in her favour were placed in the bundle of votes given in favour of returned candidate and during counting when election petitioner came to know that number of votes given in her favour are 990 and in

favour of elected candidate are 993 and number of rejected votes are 157, she raised an objection and prayed for recounting but Election Officer has not paid attention. A further assertion has been made that bundle of 157 rejected votes included some valid votes also.

14. As referred above, the Sub-Divisional Magistrate framed five issues. During proceedings witnesses appears and they were cross-examined also. Sub-Divisional Magistrate while considering Issues No. 2 and 3 has accepted version of election petitioner that counting was not done properly as well as that no proper explanation was afforded by Election Officer, why request of recounting was denied. However, in the impugned order there is no evidence that there are a good ground for believing that there is mistake in counting. Sub-Divisional Magistrate has accepted bald statement of election petitioner which was not supported by any material or evidence and for reference relevant part of impugned order is mentioned hereinafter:

"इस कथन से यह स्पष्ट होता है कि याचिकाकर्ता व विपक्षी नं. 1 जो 3 वोट से निर्वाचित घोषित हुई सन्तुष्ट नहीं है तथा जवाबदावा के पैरा नं. 19 में मतगणना की समस्त प्रक्रिया नियमानुसार पूरी कराकर परिणाम घोषित किया। इस प्रकार प्रतिवादी नं. 1 का कथन स्वयं विरोधाभाषी है। एक तरफ मतगणना नियमानुसार न किये जाने का कथन किया है तथा दूसरी तरफ मतगणना सही होना बताया इसलिये प्रतिवादी नं. 1 का कथन विरोधाभाषी व संदिग्ध है तथा विपक्षी नं. 15 जो निर्वाचन अधिकारी था उसने अपने लिखित उत्तर में मतगणना सही होना बताया तथा परिणाम सही घोषित करने का कथन किया। किसी के द्वारा पुनः मतगणना के लिए कोई प्रार्थना पत्र नहीं दिया गया। पुनः मतगणना किये जाने हेतु प्रार्थना पत्र देने का कथन अस्वीकार किया गया है। लेकिन विपक्षी नं. 15 ने अपने जवाबदावे में किये गये कथन की पुष्टि न्यायालय में उपस्थित होकर नहीं की है जबकि विपक्षी नं. 15 को साक्ष्य देने का अवसर दिया गया इसलिये विपक्षी नं. 1 के द्वारा दिये गये लिखित कथन की पुष्टि न होने के कारण कथन सही मानने का आधार पर्याप्त नहीं है।

विपक्षी नं 1 ने साक्ष्य में शपथ पत्र दिया तथा यह कथन किया कि मतगणना के समय वह उपस्थित नहीं थी उसका अभिकर्ता उसका पति डी0 डब्लू0 2 उपस्थित था तथा विपक्षी नं. 1 ने अपनी जिरह में यह भी कथन किया कि पुनः मतगणना किये जाने में मुझे कोई आपत्ति नहीं है।"

15. I have carefully perused the statements of witnesses recorded before Sub-Divisional Magistrate. Petitioner has not mentioned in categorical terms that she raised any objection during counting including the prayer to recount on specific ground and that her husband was not present at counting centre though in later part of cross-examination she referred about complaint that her polling agent has communicated her that some votes were wrongly rejected. Therefore, there is no specific averment with regard to number of votes which have been declared wrongly invalid and could materially affected the election. In this regard following paragraph of judgment passed by Supreme Court in **M.R. Gopalalkrishnan (supra)** would be relevant:

"20. We now come to the third ground advanced by the learned counsel for the appellant that invalid votes were counted in favour of the returned candidate respondent No. 1 and that out of the total rejected votes of 1375, quite a large number of valid votes in

favour of the appellant were rejected, which materially affected the result of the election. Learned counsel for the respondent submitted that the appellant has not set forth the concise statement of material fact with regard to the allegation of counting invalid votes in favour of the respondent No. 1 nor has given any particulars of such invalid votes which are alleged to have been counted in favour of respondent No. 1 He also submitted that similarly there are no particulars with regard to the rejection of valid votes in favour of the appellant nor number of such votes in order to support the allegation that such rejection of valid votes in favour of the appellant materially affected the result of the election. In our opinion there is no substance in these submissions made by the learned counsel for the appellant. In fact the appellant has neither pleaded the details and the number of such invalid votes which were counted in favour of respondent No. 1 nor has given the particulars of the number of such valid votes in favour of die, appellant which were wrongfully rejected during the course of counting. This apart, the Returning Officer, Supervisors and other officials were also present in the counting hall throughout the process of counting and the observers also visited the counting hall, but neither the appellant nor any of his counting agents pointed out or objected either orally or in writing that invalid votes were counted in favour of the respondent No. 1 or valid votes in favour of the appellant were rejected. The evidence of the Returning Officer, PW 16 clearly goes to show that no such complaint was made by any one during the course of counting. In these facts and circumstances it is difficult to accept the allegations made by the appellant which seem to be only an after thought and without any evidence or material to support the same."

16. 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 of 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 [See, **Arikala Narasa Reddy (supra)]**.

17. In the present case, 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, therefore, the order impugned suffers from illegality and liable to be set aside.

18. In the result, writ petition is allowed. Impugned order dated 23.12.2022 passed by Sub-Divisional Magistrate, Kairana, District Shamli, is hereby quashed.

(2023) 1 ILRA 411
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.11.2022

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Writ-C No. 27289 of 2022

HDFC Standard Life Insurance Co. Ltd.
...Petitioner

Versus

Permanent Lok Adalat Moradabad & Anr.
...Respondents

Counsel for the Petitioner:
Sri Aditya Bhardwaj

Counsel for the Respondents:

(A) Civil law - Companies Act, 1956 - The Insurance Act, 1938 - Section 3 , The Insurance Regulatory and Development Authority of India (Protection of Policy Holder's Interest) Regulations, 2002 - Clause 8 (3), The Legal Services Authorities Act, 1987 - Section 22 - Powers of Lok Adalats , Section 22(C) - Cognizance of cases by Permanent Lok Adalat - In the absence of following the prescribed procedure as specially provided under Section 22(C)(7) of the Legal Services Authorities Amendment Act by the Permanent Lok Adalat, the order/award is vitiated . (Para - 19)

Quashing of award - order passed by Permanent Lok Adalat - without providing opportunity of hearing to petitioner - no reasons given while allowing petition filed by claimant-respondent - Permanent Lok Adalat does not follow procedure - provided under the Legal Services Authorities Amendment Act.**(Para -15)**

(B) The Legal Services Authorities Act, 1987 - Section 22-C(7) & 22-C(8) - Section 22-C(8) comes into effect once an agreement under Section 22-C(7) has failed - proposed terms of settlement under Section 22-C(7), and the conciliation proceedings preceding it, are mandatory - If Permanent Lok Adalats are allowed to bypass this step just because a party is absent, it would be tantamount to deciding disputes on their merit ex parte and issuing awards which will be final, binding and will be deemed to be decrees of civil courts - Conciliation proceedings under Section 22-C of the Legal Services Authorities Amendment Act are mandatory in nature. (Para -18)

HELD:-Permanent Lok Adalat does not follow the procedure as provided under the Legal Services Authorities Amendment Act, therefore, the award is vitiated and illegal in the eyes of law, the same is liable to be set aside and is hereby set aside. Direction to Permanent lok Adalat to pass fresh order after following the complete procedure under the law as well as the law laid down by the Hon'ble Apex Court in the case of ***Canara Bank.*** **(Para -20,22)**

Petition Allowed. (E-7)

List of Cases cited:

1. L.I.C. of India Vs Asha Goel , (2001) 2 SCC 160

2. P. C. Chacko & anr. Vs Chairman, L.I.C. of India & ors. , (2008) 1 SCC 321

3. Satwant Kaur Sandhu Vs N.I.A. Co. Ltd., (2009) 8 SCC 316

4. R.L.I. Co. Ltd. Vs Rekhaben Nareshbhai Rathod , (2019) 6 SCC 175

5. Manager, B.A.L.I. Co. Ltd. & ors. Vs Dalbir Kau , AIR 2020 SC 5210

6. A.I.G.I. Co., Ltd. Vs S. P. Maheshwari , AIR 1960 Mad 484

7. L.I.C. of India, Kanpur Nagar Vs Syed Zaigham Ali & anr. , 2016 (3) AllLJ289

8. Canara Bank Vs G.S. Jayarama , (2022) 7 SCC 776

(Delivered by Hon'ble Prakash Padia, J.)

1. The petitioner has preferred present writ petition inter-alia with the prayer to quash the award dated 08.12.2021 passed by respondent no.1 namely Permanent Lok Adalat, Moradabad, U.P.

2. The facts in brief as contained in the writ petition are that petitioner namely H.D.F.C. Standard Life Insurance Company Ltd. is a company registered under Companies Act, 1956 and as per Section 3 of the Insurance Act, 1938 carrying on life insurance business. The life assured namely

late Ravi Kiran has approached the petitioner- insurance company for issuance of insurance policy in the year 2018 and has submitted the proposal form and other required documents to obtain the insurance policy. Upon his instructions and the declaration made thereunder, the petitioner considering the same to be true and correct in all aspect issued the policy. The salient features of the policy are as under :-

Policy no	20043201
Date of proposal received	01.02.2018
Date of RCD	02.02.2018
Date of death	27.03.2018
Policy duration	1 month 25 days
Plan	HDFC Life ProGrowth Plus
Life Assured	Late Ravi Karan

3. On 04.08.2018 petitioner received the claim intimation form, from the respondent No.2 informing that the life assured died on 27.03.2018. Since the death of the life assured occurred within two months from the risk commencement date of the subject policy, the petitioner has conducted a statutory investigation as per Clause 8 (3) of the Insurance Regulatory and Development Authority of India (Protection of Policy Holder's Interest) Regulations, 2002. During investigation it was revealed that life assured has submitted incorrect income and occupation in the proposal form.

4. It is argued that life assured has no permanent job and was absconding from home since past two months and he died due to unknown accident on 27.03.2018. According to panchanama death was due to falling from a vehicle & sustaining injury, leading to death. No FIR was registered and only a general diary bearing number GD No.017, dated 27.03.2018 was recorded on the basis of statements of Sunil Kumar, son-in-law of respondent, along-with respondent three sons and complainant went to police station and gave a statement that insured is a habitual chronic alcoholic & is always intoxicated and insured never listened to family member's advice of giving up alcohol. In the post-mortem report cause of death was recorded as hemorrhage & shock. The immediate cause was mentioned as shock due to anti-mortem injury. It has been mentioned in the post-mortem report that stomach contents smell of alcohol. It is argued that life assured had taken policy by concealing the material information from the petitioner. Due to non disclosure of material facts and untrue statement contained in the proposal form petitioner repudiated the claim of the respondent and refunded the fund value of Rs.56,521.55/- and intimated the said facts to the respondent No.2 vide letter dated 30.11.2018.

5. Being aggrieved by the repudiation of the claim, respondent No.2 filed a complaint on 9.7.2019 before the respondent no.1. After receiving the summons petitioner company assigned the matter to the local counsel. The insurance company was under the impression that local counsel is attending the matter regularly and written arguments were filed by him. However, on receipt of the impugned order it was revealed that the local counsel did not appear in the said matter, therefore, complaint was decided ex-parte.

6. A contract of insurance is one of utmost good faith. A proposer who seeks to

obtain a policy of life insurance is duty bound to disclose all material facts bearing upon the issue as to whether the insurer would consider it appropriate to assume the risk which is proposed. It is with this principle in view that the proposal form requires a specific disclosure of pre-existing ailments, so as to enable the insurer to arrive at a considered decision based on the actuarial risk.

7. In the present case as indicated above, the proposer failed to disclose the fact that he is habitual chronic alcoholic & is always intoxicated and insured never listened to family member's advice of giving up alcohol. In the post-mortem report cause of death was recorded as hemorrhage & shock. The immediate cause was mentioned as shock due to anti-mortem injury. It has been mentioned in the post-mortem report that stomach contents smelled alcoholic.

8. This brings the ground for repudiation squarely within the principles which have been formulated by the Hon'ble Apex Court in series of decisions. In the case of **Life Insurance Corporation of India Vs Asha Goel reported in (2001) 2 SCC 160**, it was held by the Hon'ble Apex Court that :-

"12...The contracts of insurance including the contract of life assurance are contracts uberrima fides and every fact of material (sic material fact) must be disclosed, otherwise, there is good ground for rescission of the contract. The duty to disclose material facts continues right up to the conclusion of the contract and also implies any material alteration in the character of risk which may take place between the proposal and its acceptance. If there is any misstatements or suppression of material facts, the policy can be called into question. For determination of the question whether there has been suppression of any material facts it may be necessary to also examine whether the suppression relates to a fact which is in the exclusive knowledge of the person intending to take the policy and it could not be ascertained by reasonable enquiry by a prudent person."

9. This has been reiterated by the Hon'ble Apex Court in the case of ***P. C. Chacko & another Vs. Chairman, Life Insurance Corporation of India and others*** reported in ***(2008) 1 SCC 321***. It has been held by the Hon'ble Apex Court that proposal can be repudiated if a fraudulent act is discovered. The relevant paragraph namely paragraph 17 is reproduced hereinbelow :-

"17. The purpose for taking a policy of insurance is not, in our opinion, very material. It may serve the purpose of social security but then the same should not be obtained with a fraudulent act by the insured. Proposal can be repudiated if a fraudulent act is discovered. The proposer must show that his intention was bona fide. It must appear from the face of the record. In a case of this nature it was not necessary for the insurer to establish that the suppression was fraudulently made by the policy-holder or that he must have been aware at the time of making the statement that the same was false or that the fact was suppressed which was material to disclose. A deliberate wrong answer which has a great bearing on the contract of insurance, if discovered may lead to the police being vitiated in law."

10. In the case of ***Satwant Kaur Sandhu Vs. New India Assurance***

Company Ltd., reported in ***(2009) 8 SCC 316 a***t the time of obtaining the Mediclaim policy, the insured suffered from chronic diabetes and renal failure, but failed to disclose the details of these illnesses in the policy proposal form. Upholding the repudiation of liability by the insurance company, Hon'ble Apex Court held that :-

"25. The upshot of the entire discussion is that in a contract of insurance, any fact which would influence the mind of a prudent insurer in deciding whether to accept or not to accept the risk is a "material fact". If the proposer has knowledge of such fact, he is obliged to disclose it particularly while answering questions in the proposal form.

Needless to emphasise that any inaccurate answer will entitle the insurer to repudiate his liability because there is clear presumption that any information sought for in the proposal form is material for the purpose of entering into a contract of insurance."

11. Recently, Hon'ble Apex Court in the case of ***Reliance Life Insurance Co. Ltd. Vs. Rekhaben Nareshbhai Rathod*** reported in ***(2019) 6 SCC 175,*** has set aside the judgement of the NCDRC, whereby the NCDRC had held that the failure of the insured to disclose a previous insurance policy as required under the policy proposal form would not influence the decision of a prudent insurer to issue the policy in question and therefore the insurer was disentitled from repudiating its liability. Hon'ble Apex Court, while allowing the repudiation of the insurance claim, held that :-

"30. It is standard practice for the insurer to set out in the application a series of specific questions regarding the applicant's health history and other matters relevant to insurability. The object of the proposal form is to gather information about a potential client, allowing the insurer to get all information which is material to the insurer to know in order to assess the risk and fix the premium for each potential client. Proposal forms are a significant part of the disclosure procedure and warrant accuracy of statements. Utmost care must be exercised in filling the proposal form. In a proposal form the applicant declares that she/he warrants truth. The contractual duty so imposed is such that any suppression, untruth or inaccuracy in the statement in the proposal form will be considered as a breach of the duty of good faith and will render the policy voidable by the insurer. The system of adequate disclosure helps buyers and sellers of insurance policies to meet at a common point and narrow down the gap of information asymmetries. This allows the parties to serve their interests better and understand the true extent of the contractual agreement.

31. The finding of a material misrepresentation or concealment in insurance has a significant effect upon both the insured and the insurer in the event of a dispute. The fact it would influence the decision of a prudent insurer in deciding as to whether or not to accept a risk is a material fact. As this Court held in Satwant Kaur (supra) "there is a clear presumption that any information sought for in the proposal form is material for the purpose of entering into a contract of insurance". Each representation or statement may be material to the risk. The insurance company may still offer insurance protection on altered terms."

12. The same view was again taken by the Hon'ble Apex Court in the case of

Branch ***Manager, Bajaj Allianz Life Insurance Company Ltd. and others Vs. Dalbir Kau*** reported in ***AIR 2020 SC 5210.***

13. The Division Bench of Madras High Court in ***All India General Insurance Co., Ltd. V. S. P. Maheshwari*** reported in ***AIR 1960 Mad 484*** after taking into consideration the history of insurance laws in United States of America, in England and in India stated in paragraph 10, which reads as follows :-

"(10) One great principle of insurance law is that a contract of insurance is based upon utmost good faith Uberrima fides; in fact it is the fundamental basis upon which all contracts of insurance are made. In this respect there is no difference between one contract of insurance and another. Whether it be life or fire or marine the understanding is that the contract is uberrima fides and though there may be certain circumstances from the peculiar nature of marine insurance which require to be disclosed, and which do not apply to other contracts of insurance, that is rather an illustration of the application of the principle than a distinction in principle. From the very fact that the contract involves a risk and that it purports to shift the risk from one party to the other, each one is required to be absolutely innocent of every circumstance which goes to influence the judgment of the other while entering into the transaction."

14. A Single Judge Bench of this Court in the case of ***Life Insurance Corporation of India, Kanpur Nagar Vs. Syed Zaigham Ali and another*** reported in ***2016 (3) AllLJ289*** was pleased to held that the provisions contained under Section 22 (C) of the Act, 1987 are mandatory and it was incumbent upon the PLA to have conducted conciliation proceeding to settle the dispute. In paragraph 27 of the aforesaid judgement it was held that the Court is constrained to observe that PLAs in the state are not functioning within the parameter of the 1987 Act, erratic orders are being passed even on matters which do not fall within their domain. In paragraph 27 certain guidelines were framed in the aforesaid judgement, which reads as follows :-

"(27) This Court is constrained to observe that the PLAs in the State are not functioning within the parameter of the 1987 Act, erratic orders are being passed even on matters which do not fall within their domain, it is, therefore, expected that the PLA while exercising power under 1987 Act would observe the following points and must at the outset formulate the questions before proceeding to adjudicate. The guidelines are not exhaustive but merely illustrative.

(1) Whether PLA has jurisdiction on the subject matter;

(2) Primary role of PLA is that of conciliation upon failure of the parties to reach an agreement, PLA mutates into an adjudicatory body;

(3) PLA should not give an impression to the disputants that it from the beginning has an adjudicatory role;

(4) PLA being a Tribunal lacks the inherent power of a Court, therefore, cannot grant injunction/interim orders;

(5) The role assigned to PLA is to settle/adjudicate "most of the petty cases which ought not to go in the regular courts would be settled in the pre-litigation stage itself";

(6) Matters where genuineness of the claim itself is in dispute, parties have taken extreme positions, the same, prima facie, may not be the subject matter of conciliation/adjudication,

(7) Whether or not an offence, which is non compoundable or compoundable in

nature, has indeed been committed would fall outside the jurisdiction of PLA;"

15. Apart from the same, from perusal of the order passed by the Permanent Lok Adalat, Moradabad, it appears that the same has been passed without providing opportunity of hearing to the petitioner. Further after going through the aforesaid order, the Court is of the firm opinion that no reasons whatsoever has been given while allowing the petition filed by the claimant-respondent.

16. A complete procedure has been prescribed under Section 22(C) of the Legal Services Authorities Act, 1987 (In short "Act, 1987") to decide the dispute by the Permanent Lok Adalat and Section 22 (C) of the Act, 1987 provides that conciliation proceedings are mandatory, thereafter the Permanent Lok Adalat have adjudicatary function under Legal Services Authorities Act, 1987. Section 22 outlines the powers of the Lok Adalats and Permanent Lok Adalats. Section 22 is extracted below:

"Section 22. Powers of Lok Adalats.-

(1) The Lok Adalat or Permanent Lok Adalat shall, for the purposes of holding any determination under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:-

(a) the summoning and enforcing the attendance of any witness and examining him on oath;

(b) the discovery and production of any document;

(c) the reception of evidence on affidavits;

(d) the requisitioning of any public record or document or copy of such record or document from any court or office; and

(e) such other matters as may be prescribed.

(2) Without prejudice to the generality of the powers contained in sub-section (1), every Lok Adalat or Permanent Lok Adalat shall have the requisite powers to specify its own procedure for the determination of any dispute coming before it.

(3) All proceedings before the Lok Adalat or Permanent Lok Adalat shall be deemed to be judicial proceedings within the meaning of Sections, 193, 219 and 228 of the Indian Penal Code (45 of 1860) and every Lok Adalat shall be deemed to be a civil court for the purpose of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974)."

17. Section 22-C of the Legal Services Authorities Act, 1987 stipulates the instances in which Permanent Lok Adalats can take cognizance of cases. Section 22-C provides as follows:

"22-C. Cognizance of cases by Permanent Lok Adalat.- *(1) Any party to a dispute may, before the dispute is brought before any court, make an application to the Permanent Lok Adalat for the settlement of dispute:*

Provided that the Permanent Lok Adalat shall not have jurisdiction in respect of any matter relating to an offence not compoundable under any law:

Provided further that the Permanent Lok Adalat shall also not have jurisdiction in the matter where the value of the property in dispute exceeds ten lakh rupees:

Provided also that the Central Government, may, by notification, increase the limit of ten lakh rupees specified in the second proviso in consultation with the Central Authority.

(2) After an application is made under sub-section (1) to the Permanent Lok

Adalat, no party to that application shall invoke jurisdiction of any court in the same dispute.

(3) Where an application is made to a Permanent Lok Adalat under sub-section (1), it-

(a) shall direct each party to the application to file before it a written statement, stating therein the facts and nature of dispute under the application, points or issues in such dispute and grounds relied in support of, or in opposition to, such points or issues, as the case may be, and such party may supplement such statement with any document and other evidence which such party deems appropriate in proof of such facts and grounds and shall send a copy of such statement together with a copy of such document and other evidence, if any, to each of the parties to the application;

(b) may require any party to the application to file additional statement before it at any stage of the conciliation proceedings;

(c) shall communicate any document or statement received by it from any party to the application to the other party, to enable such other party to present reply thereto.

(4) When statement, additional statement and reply, if any,have been filed under sub-section (3), to the satisfaction of the Permanent Lok Adalat, it shall conduct conciliation proceedings between the parties to the application in such manner as it thinks appropriate taking into account the circumstances of the dispute.

(5) The Permanent Lok Adalat shall, during conduct of conciliation proceedings under sub-section (4), assist the parties in their attempt to reach an amicable settlement of the dispute in an independent and impartial manner.

(6) It shall be the duty of every party to the application to cooperate in good faith with the Permanent Lok Adalat in conciliation of the dispute relating to the application and to comply with the direction of the Permanent Lok Adalat to produce evidence and other related documents before it.

(7) When a Permanent Lok Adalat, in the aforesaid conciliation proceedings, is of opinion that there exist elements of settlement in such proceedings which may be acceptable to the parties, it may formulate the terms of a possible settlement of the dispute and give to the parties concerned for their observations and in case the parties reach at an agreement on the settlement of the dispute, they shall sign the settlement agreement and the Permanent Lok Adalat shall pass an award in terms thereof and furnish a copy of the same to each of the parties concerned.

(8) Where the parties fail to reach at an agreement under sub-section (7), the Permanent Lok Adalat shall, if the dispute does not relate to any offence, decide the dispute."

18. Taking into consideration the aforesaid aspect of the matter, very recently the Hon'ble Supreme Court in the case of **Canara Bank Vs. G.S. Jayarama (2022) 7 SCC 77**6, it was held that Section 22-C(8) is amply clear that it only comes into effect once an agreement under Section 22-C(7) has failed. The corollary of this is that the proposed terms of settlement under Section 22-C(7), and the conciliation proceedings preceding it, are mandatory. **If Permanent Lok Adalats are allowed to bypass this step just because a party is absent, it would be tantamount to deciding disputes on their merit ex parte and issuing awards which will be final, binding and will be deemed to be decrees of civil courts.** This was simply not the

intention of the Parliament when it introduced the Legal Services Authorities Amendment Act. Its main goal was still the conciliation and settlement of disputes in relation to public utilities, and a decision on merits always being the last resort. In this view of the matter, it was held that conciliation proceedings under Section 22-C of the Legal Services Authorities Amendment Act are mandatory in nature. Paragraph 37 of the aforesaid judgement is reproduced below:-

"37. Section 22-C(8) is amply clear that it only comes into effect once an agreement under Section 22-C(7) has failed. The corollary of this is that the proposed terms of settlement under Section 22-C(7), and the conciliation proceedings preceding it, are mandatory. If Permanent Lok Adalats are allowed to bypass this step just because a party is absent, it would be tantamount to deciding disputes on their merit ex parte and issuing awards which will be final, binding and will be deemed to be decrees of civil courts. This was simply not the intention of the Parliament when it introduced the Legal Services Authorities Amendment Act. Its main goal was still the conciliation and settlement of disputes in relation to public utilities, with a decision on merits always being the last resort. Therefore, we hold that conciliation proceedings under Section 22-C of the LSA Act are mandatory in nature."

19. From perusal of the aforesaid, this Court is of the opinion that the law is now well settled that in the absence of following the prescribed procedure as specially provided under Section 22(C)(7) of the Legal Services Authorities Amendment Act by the Permanent Lok Adalat, the order/award is vitiated.

20. In the present case, Permanent Lok Adalat Moradabad does not follow the aforesaid procedure as provided under the Legal Services Authorities Amendment Act, therefore, the award is vitiated and illegal in the eyes of law, the same is liable to be set aside and is hereby set aside.

21. Since no reply has been filed by the petitioner before the Permanent Lok Adalat, Moradabad, he is directed to file reply in the aforesaid case along-with copy of this order expeditiously.

22. Permanent Lok Adalat Moradabad is directed to pass fresh order after following the complete procedure under the law as well as the law laid down by the Hon'ble Apex Court in the case of ***Canara Bank (supra)*** most expeditiously and preferably within a period of four months from the date reply filed by the petitioner.

23. In view of the facts as narrated above, writ petition is liable to be allowed and the same is hereby allowed.

24. No order as to costs.

25. Registrar (Compliance) is directed to communicate this order to the Permanent Lok Adalat, Moradabad immediately.

(2023) 1 ILRA 419
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.11.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J
THE HON'BLE JAYANT BANERJI, J.

Writ-C No. 32992 of 2022

Smt. Anju Agarwal ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vivek Mishra, Sri Shashi Nandan(Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Arvind Prabodh Dubey, Sri Atul Tej Khulshrestha, Sri Nipun Singh, Sri Anurag Khanna(Sr. Advocate)

(A) Civil Law - The U.P. Municipalities Act, 1916 - Section 48 - Removal of President - Reasons are the links between the material, the foundation for their erection and the actual conclusions - not only administrative but also judicial order must be supported by reasons, recorded in it - reason is the heartbeat of every conclusion - recording of reasons in writing is mandatory to fulfill the requirements of Article 14 and 21 of the Constitution and Section 48 (2-A) of the Act.(Para - 10)

Petitioner removed from office of President of Nagar Palika Parishad **-** submitted detailed explanation - specifically denied charges - charges of serious nature - based on disputed facts as well as record - respondent no. 1 (State) not examined issues independently - quote from report of District Magistrate - abruptly concluded - charges found proved - removed - no independent application of mind.**(Para - 11)**

HELD:-The report of District Magistrate called for by State Government in response to person charged is not final word nor a substitute to the statutory requirement of holding a full-fledged inquiry and recording of reasons by the State Government. Impugned order quashed and open to State Government to pass a fresh order in accordance with law.**(Para -12)**

Petition Allowed. (E-7)

List of Cases cited:

1. Shaila Tahir Vs St. of U.P. & ors. , Writ - C No. 21595 of 2022

2. Ravi Yashwant Bhoir Vs District Collector, Raigad & ors. , (2012) 4 SCC 407

3. Sanjeev Agrawal Vs St. of U.P. , 2011 (6) AWC 5502

4. Girish Chand Srivastava Vs St. of U.P. & ors. , 2007 AWC (6) 6051

5. Umesh Baijal & ors. Vs St. of U.P. & ors. , (2004) 2 UPL BEC 1235

(Delivered by Hon'ble Manoj Kumar Gupta & Hon'ble Jayant Banerji, J.)

1. Heard Shri Shashi Nandan, learned Senior Counsel assisted by Shri Vivek Mishra, for the petitioner, Sri M.C. Chaturvedi learned Additional Advocate General, for the State Respondent, Shri Anurag Khanna, learned Senior counsel assisted by Shri Nipun Singh, for the Intervenor and Shri Atul Tej Kulshrestha, learned counsel for respondent nos. 5 & 6.

2. The petitioner is challenging the order dated 10.10.2022 by which she has been removed from the office of President of Nagar Palika Parishad, Muzaffar Nagar. The order has been passed by respondent no. 1 in exercise of power under section 48 of the U.P. Municipalities Act, 1916 (hereinafter referred to as the Act).

3. Initially, an order was passed on 19.07.2022 ceasing the financial power of the petitioner, pending inquiry in relation to charges of irregularities in award of contract, defalcation of accounts, failure to perform duties attached to her post and causing damage to the property of municipality . The said order was subjected to challenge by the petitioner in Writ -C No. 24233 of 2022 on the ground that the explanations submitted by her on 2.5.2022 and 8.7.2022 in response to show cause notice dated 28.03.2022 were not considered. During course of hearing of the said writ petition, a statement was made on

behalf of the State respondents that the reply submitted by the petitioner on 08.07.2022 had been received on 21.07.2022, after passing of the order impugned in the writ petition. The submission on behalf of the petitioner was that the order ceasing her financial power did not consider even the reply submitted by her on 02.05.2022 and there was no independent application of mind to the material available on record. The writ petition was decided by order dated 2.9.2022. The order impugned was quashed with liberty to respondent no. 1 to pass a fresh order in accordance with law. While giving the aforesaid liberty, it was clarified that respondent no. 1 shall consider the reply submitted by the petitioner on 02.05.2022 as well as the reply dated 08.07.2022, which had concededly been received by that time.

4. On 23rd September, 2022, a notice was issued to the petitioner requiring her to remain present on 26.09.2022 for personal hearing before respondent no. 1. The petitioner appeared on that date and submitted a written note and requested that copies of the comments/reports obtained by respondent no. 1 from the District Magistrate in response to her reply be made available to her to enable her to rebut the same. It is her specific case that on that date, no hearing took place. The petitioner has also specifically alleged that the State Government did not supply copy of the report of the District Magistrate dated 19.09.2022 to her, despite written request made by her and proceeded to pass the impugned order removing her from the office of President, Nagar Palika Parishad, Muzaffar Nagar.

5. The submissions made by Shri Shashi Nandan, learned Senior Counsel appearing for the petitioner are recorded in our order dated 22.11.2022, which is as follows:-

" Shri Shashi Nandan, learned Senior Counsel assisted by Shri Vivek Mishra, learned counsel for the petitioner submits that the impugned order directing removal of the petitioner from the post of Chairperson, Nagar Palika Parishad, Muzaffarnagar is ex-facie illegal inasmuch as; (a) no enquiry has been held, (b) there is no independent application of mind by the State Government to the explanation submitted by the petitioner, and (c) the report obtained from the District Magistrate dated 19.9.2022 has been blindly relied upon without providing its copy to the petitioner."

6. Shri M.C. Chaturvedi, learned Additional Advocate General has received instructions from the State respondents. He admits that report of the District Magistrate dated 19.09.2022 was not made available to the petitioner. He places reliance on para 19 of the counter affidavit, wherein it is alleged that the petitioner never requested for copy of the said report being made available to her. He, however, does not dispute that the primary consideration in removing the petitioner from the post of President is the report of the District Magistrate dated 19.09.2022. He also could not dispute that apart from calling for explanation of the petitioner and thereafter obtaining report from the District Magistrate in reference to the reply submitted by the petitioner, no oral inquiry was held.

7. As noted above, the charges are of serious nature. The petitioner has specifically denied the charges and had offered a detailed explanation to each charge.

8. In **Shaila Tahir vs. State of U.P. and 2 others**1 decided on 13.10.2022, this

Court, while dealing with a case of a similar nature relating to removal of President of Nagar Palika Parishad, examined the scope of inquiry to be held under Section 48 of the Act. Taking notice of the amendment made in the Constitution by the Constitution (Seventy Fourth Amendment) Act, 1992 and relying on the judgement of the Supreme Court in **Ravi Yashwant Bhoir vs. District Collector, Raigad and others**2, and Division Bench judgements of this Court in **Sanjeev Agrawal vs. State of U.P.**3, **Girish Chand Srivastava vs. State of U.P. and others**4, and **Umesh Baijal and others vs. State of U.P. and others**5, it has been held that removal of elected head of a local self-government castes stigma on that person and has the effect of taking away valuable rights. Such a person is not only removed from the office held by him/her but the electoral college is also deprived of the representation by such person. He/she also stands disqualified to contest election for a stipulated period.

9. The standard of proof in any enquiry held for removal of an elected representative is of a much higher degree as compared to the case of a Government Servant. The principles of natural justice are required to be given full play and proper opportunity of placing the defence is a must.

10. The recording of reasons in writing is also mandatory to fulfil the requirements of Article 14 and 21 of the Constitution and Section 48 (2-A) of the Act. Some of the relevant observations made in this behalf in **Shaila Tahir** (supra) are reproduced below:-

"23. In the instant case, the petitioner, who is President of Municipality, would stand disqualified from contesting a re-election as President or Member for a period of five years from the date of her removal in view of Section 48 (4) of the U.P. Municipalities Act, 1916 [the removal being under clause (a) and sub-clause (vi), (vii) and clause (b) of sub-section (2) of Section 48].

24. Sub-section (2-A) of Section 48 contemplates making of such inquiry as may be considered necessary by the State Government after considering the explanation that may be offered by the President. An order of removal should be in writing and contain reasons for removal of the President from office. The said provision is quoted below for convenience of reference:-

(2-A) After considering any explanation that may be offered by the President and making such enquiry as it may consider necessary, the State Government may, for reasons to be recorded in writing, remove the President from his office.

26. What is nature and scope of inquiry which is required to be held under Section 48 was considered by this Court in Umesh Baijal and others Vs. State of U.P. and another6. It has been held that there could be cases where the charges are admitted and in which event, it would not be necessary to hold a regular inquiry and examine witnesses etc. There may be cases where the allegations are based on complaint made by certain persons. In such cases, if the State intends to rely on affidavit filed by the complainant, it has to give opportunity of hearing to the Chairperson to cross-examine the complainant. In a given case, the allegations may be of a very serious nature and which have to be proved by documentary as well as oral evidence and in such cases, full fledged inquiry would be

required, as merely calling for explanation and considering the same would not meet the requirements of law. The relevant paragraphs from the said judgment are as follows:-

"13. Thus, it is evident that if a Chairman is removed under these provisions, it would have a very serious repercussion and consequence not only on the Chairman but also on the constituency, which he represented because he is being removed from the membership also, therefore, it cannot be permissible in law to remove him without complying with the requirement of law, as required under the facts and circumstances of a particular case. Sub-section (2A) of Section 48 of the Act, 1916 provides for a procedure of removal stipulating that after considering any explanation that may be offered by the President and making such enquiry as it may consider necessary, the State Government may, for reasons to be recorded in writing, remove him. The law does not permit or give unfettered powers to the State Government for passing an order of removal of the Chairman merely after considering his explanation to the show cause. It would depend upon the facts of each case as to whether an enquiry is required. There may be a case of admission by the President himself or the case against him is of such a nature for which he can furnish no explanation or the facts of a case are so admitted or admittedly such that no explanation is required at all, in such eventuality, it will not be necessary to hold a regular enquiry and examine the witnesses etc. giving an opportunity of cross-examination of the witness. There may be a case where the State is considering the affidavits filed by certain persons complaining against the misconduct of the Chairman, if State wants to take into consideration the said affidavits and in his explanation the Chairman denies the allegations, the affidavit cannot be relied upon without giving an opportunity to the Chairman to cross-examine the deponents, as required under the provisions of Order XIX, Rule 2 of the Code of Civil Procedure, for the reason that the Code itself is nothing but codification of the principles of natural justice. The provisions of Order XIX, Rule 2 of the Code become mandatory.

39. Thus, in view of the above, it cannot be held that in each and every case, non-observance of principles of natural justice would vitiate the order. It has to be understood in the context and facts-situation of each case and requirement of statutory Rules applicable therein. However, in a given case, if the allegations are of a, serious nature and has to be proved on a documentary as well as on oral evidence, it is desirable to have a fulfledged enquiry for the reason that removal only on asking the explanation and consideration thereof, would not be sufficient to meet the requirement of law unless the facts are admitted or undeniable. It is not possible to lay down any strait-jacket formula as in what cases the fulfledged enquiry is to be held and in what cases removal is permissible on asking office bearers to furnish the explanation to the charges. It will depend on the facts of an individual case."

27. In Sanjeev Agrawal (supra), after considering the Division Bench judgment in Umesh Baijal and another Division Bench judgement in Shamim Ahmad (Dr.) Vs. State of U.P. and another7, it was concluded as follows:-

10. Thus, in our view, it is clear that once an explanation is submitted by the President denying the charges, it is incumbent upon the State Government to make "such enquiry as it may consider

necessary" before passing an order of removal. The word "inquiry" contemplates investigation. Therefore, where the President denies the charges and offers his explanation, the State Government is required to consider his explanation. If the State Government is satisfied with the explanation offered by the President, in that case, nothing further is required to be done other than passing a consequential order dropping the proceedings. However, if the State Government is not satisfied with the explanation, in that case, the State Government is required to enquire into the matter by holding a full-fledged enquiry.

28. In Ravi Yashwant Bhoir Vs. District Collector, Raigad and others, the Supreme Court also considered the issue as to whether recording of reasons is mandatory while passing an order of removal. The Supreme Court placed reliance on its previous judgements in case of Krishna Swami Vs. Union of India8, Sant Lal Gupta Vs. Modern Coop. Group Housing Society Ltd9 and thereafter concluded by holding as follows:-

46. The emphasis on recording reason is that if the decision reveals the `inscrutable face of the sphinx', it can be its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind of the authority before the court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made. In other words, a speaking out, the inscrutable face of the sphinx is ordinarily incongruous with a judicial or quasi-judicial performance.

29. The quotation from Krishna Swami (supra) relied upon in the said judgment reads thus:-

"Reasons are the links between the material, the foundation for their erection and the actual conclusions. They would also demonstrate how the mind of the maker was activated and actuated and their rational nexus and synthesis with the facts considered and the conclusions reached. Lest it would be arbitrary, unfair and unjust, violating Article 14 or unfair procedure offending Article 21."

30. In Sant Lal Gupta (supra), it was held as follows:-

. "27. It is a settled legal proposition that not only administrative but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice - delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice.

"3. The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before Courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind."

The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes

lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected."

31. The consistent judicial opinion thus is that recording of reasons in writing is not merely an attribute of the principles of natural justice but also essence of transparency and fairness in decision making process. It has been held to be a hallmark of sound and objective exercise of power. An order bereft of reasons violates Article 14 and 21 of the Constitution. ".

11. Coming to the facts of the instant case, as noted above, the petitioner had twice submitted detailed explanation (dated 02.05.2022 and 08.07.2022). In her explanation, she has specifically denied the charges. The charges are of serious nature and are based on disputed facts as well as the record. However, respondent no. 1 instead of examining these issues independently in the light of the explanation offered and the material available on record, proceeded to quote from the report of the District Magistrate dated 19.09.2022 in extenso (in Paragraph 6 of its order) and thereafter it has abruptly been concluded that the charges are found proved and accordingly, she has been removed. There is no independent application of mind.

12. In **Shaila Tahir** (supra), we have held that the report of District Magistrate called for by the State government in response to the reply submitted by the person charged is only an opinion which could have been considered by the State Government alongwith the defence and evidence of the person charged. It is not the final word nor a substitute to the statutory requirement of holding a full-fledged inquiry and recording of reasons by the State Government while passing an order of removal of the President in view of Section 48(2-A) of the Act. Despite exposition of law in the recently delivered judgement, the State Government has repeated the mistakes while passing the instant order in a most casual manner.

13. Even the plea taken in paragraph no. 19 of the counter affidavit that the petitioner had not asked for the report of District Magistrate dated 19.09.2022, consequently, it was not supplied to her, is not worthy of acceptance, firstly, for the reason that it was the obligation of the State Government to have supplied said report to the petitioner if it was intending to rely on the same, and second, because the petitioner had specifically asked for a copy of the said report in the written brief submitted by her on 26.09.2022, the date fixed for hearing.

14. Since the State Government has merely endorsed the report of the District Magistrate dated 19.09.2022, without applying its own independent mind, the impugned dated 10.10.2022 is held to be untenable in law.

15. We accordingly quash the impugned order dated 10.10.2022, leaving it open to the State Government to pass a fresh order in accordance with law.

16. As a result of the removal order being quashed, it is further provided that

the respondent shall not interfere in the working of the petitioner as President of Nagar Palika Parishad, Muzaffar Nagar except in accordance with law.

17. The writ petition stands allowed to the extent indicated above.

(2023) 1 ILRA 426
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.01.2023

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MANISH KUMAR, J.

Writ-A No. 47 of 2023

Babu Ram & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Shiv Nath Goswami, Sri Santosh Kumar Ramakant Upadhyay

Counsel for the Respondents:
C.S.C., Sri Shikhar Anand

A. Service Law – Selection grade salary – Similarly situated employees were granted selection grade – Benefit of GO dated 17.10.1985 claimed – There was delay of 32 years in approaching the authority – Effect – Held, in case the respondents did not pay any heed to the claim of the petitioners, then, they should have agitate the issue forthwith by preferring appropriate application/representation or to approach a Court of law but approaching the authority concerned after a period of almost 32 years seeking selection grade w.e.f. 01.07.1982 to them, cannot stand judicial scrutiny. (Para 13)

Writ petition dismissed. (E-1)

List of Cases cited:

1. C. Jacob Vs Director of Geology and Mining & anr.; (2008) 10 SCC 115

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

1. The instant writ petition under Article 226 of the Constitution of India has been filed by the petitioners, **Babu Ram, Atar Singh, Juglal, Sadhu Ram, Ram Singh, Ravidutt and Phool Singh,** challenging the judgment and order dated 25.01.2021 passed by the State Public Services Tribunal in Claim Petition No. 24 of 2019 : Babu Ram and 13 others Vs. State of U.P. and others as well as judgment and order dated 28.09.2022 passed in Review Petition No. 15 of 2021 by the State Public Services Tribunal, whereby the Tribunal dismissed the claim petition as well as review petition.

2. Shri Shiv Nath Goswami, learned Counsel for the petitioner has sent an illness slip. It appears that along with Shri Shiv Nath Goswami, Advocate, the name of Shri Santosh Kumar and Ramakant Upadhyay has also been shown in the cause list as Counsel for the petitioner but neither they are present nor there is any request to pass over or adjournment of the case. In these backdrops, we proceeds to hear the matter with the assistance of learned Standing Counsel.

3. Heard Shri Anil Kumar Singh Bisen, learned Standing Counsel for the State/respondents no. 1 to 4 and perused the impugned judgments as well as material brought on record.

4. Brief facts of the case are that petitioners were appointed on the post of Vaccinator in the Health Department on 18.09.2067, 09.06.1973, 25.07.1962, 28.09.1971, 22.09.1978, 29.03.1971,

18.06.1971, respectively. Petitioners no. 1, 2, 3, 4, 6 and 7 were retired from the post of Health Inspector on 30.09.2004, 31.07.2010, 31.01.1996, 30.09.2011 and 31.07.2012, respectively, whereas petitioner no.5-Ram Singh appears to be still in service.

5. According to the petitioners, the Government of U.P. had issued a Government Order dated 04.02.1983 in regard to granting the selection grade to those employees who have completed his 10 years satisfactory services but the petitioners, even after completion of 10 years satisfactory services, were not granted the selection grade because they were already drawn higher pay scale. Subsequently, Government of U.P. had issued another Government Order dated 17.10.1985, by which the benefit of selection grade has been granted to those employees, who have been given the higher pay-scale before 01.07.1982 but the petitioners were not given the benefit of the aforesaid Government Order dated 17.10.1985 also.

6. It has been stated in the writ petition that several similarly situated persons have filed the claim petition before the Tribunal, claiming selection grade w.e.f. 01.07.1982, which was allowed and they have been granted selection grade w.e.f. 01.07.1982 in compliance of the judgment and order passed by the Tribunal, but the petitioners were not granted the selection grade w.e.f. 01.07.1982 and as such, they preferred a joint representations dated 03.04.2017 to the authority concerned but as no heed was paid, the petitioners had preferred claim petition, bearing No. 1613 of 2018, before the Tribunal, which was disposed of vide judgment and order dated 11.09.2018, directing to decide the petitioners' representation dated 03.04.2017 within three months.

7. In compliance of the aforesaid order dated 11.09.2018, the petitioners' representation dated 03.04.2017 was considered by the authority concerned and the same was rejected vide order dated 18.12.2018, which was challenged by the petitioners before the Tribunal in Claim Petition No. 24 of 2019. The Tribunal, after hearing the parties and going through the record, opined that the petitioners have filed the representation claiming selection grade after 32 years and further claim petition raising the issue of grant of selection grade w.e.f. 01.07.1982 is also barred by limitation and the same is not maintainable, dismissed the claim petition vide judgment and order dated 25.01.2021. Not satisfied with the judgment and order dated 25.01.2021, the petitioners have preferred Review Petition No. 15 of 2021 before the Tribunal, which was also dismissed by the Tribunal vide judgment and order dated 28.09.2022.

8. Feeling aggrieved by the aforesaid orders dated 25.01.2021 and 28.09.2022 passed by the Tribunal, the instant writ petition has been filed by the petitioners.

9. Learned Standing Counsel, on placing reliance upon the judgment of the Apex Court in **C. Jacob Vs. Director of Geology and Mining and Anr.** : (2008) 10 SCC 115, contended that the repeated approach by the petitioners to the respondents for the redressal of their grievances cannot explain the laches inasmuch as any such order which was sought to be challenged by the petitioners should have been challenged within a reasonable time. He also contended that in

C. Jacob (supra), the Apex Court, after considering the modus of representation as submitted by the employees, has held that repeated representations would not revive a stale claim. Hence, the Tribunal has rightly dismissed the claim petition as well as review petition preferred by the petitioners by means of the impugned orders.

10. We have examined the submission advanced by the learned Standing Counsel and perused the impugned judgments as well as the material brought on record.

11. The ground in the petition is that similarly situated persons were granted the selection grade in compliance of the order of the Tribunal passed in a claim petition but the petitioners? claim was rejected by the authority concerned vide order dated 18.12.2018, which was challenged before the Tribunal by filing claim petition No. 24 of 2019 but the Tribunal, without going into the merits of the case, has erred in rejecting the claim of the petitioners by means of the impugned orders on the grounds that the petitioners have moved the representation for grant to selection grade after 32 years.

12. It transpires from the impugned judgment passed by the Tribunal that the Tribunal, after hearing the parties and going through the record, has recorded specific finding of facts that when the Government Order dated 17.10.1985 was issued by the State Government, granting selection grade to those employees who have drawn higher pay scale, the petitioners did not submit any representation for granting the benefit of the aforesaid order dated 17.10.1985 and kept mum. After 32 years, the petitioners woke up in a deep slumber and preferred a representation on 03.04.2017, claiming to grant them selection grade in the light of the Government Order dated 17.10.1985. The said representation was rejected by the authority concerned on 18.12.2018 by observing that the petitioners are not entitled to get selection grade. Accordingly, the claim petition as well as review petition was dismissed by the Tribunal by means of the impugned orders.

13. On due consideration, we are of the view that in case the respondents did not pay any heed to the claim of the petitioners, then, they should have agitate the issue forthwith by preferring appropriate application/ representation or to approach a Court of law but approaching the authority concerned after a period of almost 32 years seeking selection grade w.e.f. 01.07.1982 to them, cannot stand judicial scrutiny. The Tribunal has placed reliance upon the judgment of the Apex Court in **C. Jacob (supra)**. For the sake of convenience, the relevant observations of the Apex Court in **C. Jacob (supra)** are

"8. Let us take the hypothetical case of an employee who is terminated from service in 1980. He does not challenge the termination. But nearly two decades later, say in the year 2000, he decides to challenge the termination. He is aware that any such challenge would be rejected at the threshold on the ground of delay (if the application is made before Tribunal) or on the ground of delay and laches (if a writ petition is filed before a High Court). Therefore, instead of challenging the termination, he gives a representation requesting that he may be taken back to service. Normally, there will be considerable delay in replying such representations relating to old matters. Taking advantage of this position, the ex-employee files an application/writ petition

before the Tribunal/High Court seeking a direction to the employer to consider and dispose of his representation. The Tribunals/High Courts routinely allow or dispose of such applications/petitions (many a time even without notice to the other side), without examining the matter on merits, with a direction to consider and dispose of the representation.

9. 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.

10. Every representation to the government for relief, may not be replied on merits. Representations relating to matters which have become stale or barred by limitation, can be rejected on that ground alone, without examining the merits of the claim. In regard to representations unrelated to the department, the reply may be only to inform that the matter did not concern the department or to inform the appropriate department. Representations with incomplete particulars may be replied by seeking relevant particulars. The replies to such representations, cannot furnish a fresh cause of action or revive a stale or dead claim.?

14. Considering the facts and circumstances of the case, we are of the view that there is no illegality or infirmity in the impugned judgments passed by the Tribunal.

15. The instant writ petition is, accordingly, **dismissed.**

(2023) 1 ILRA 429
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.09.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C. J.
THE HON'BLE VIKRAM D. CHAUHAN, J.

Special Appeal Defective No. 253 of 2022

State of U.P. & Ors. ...Appellants
Versus
Rohit Bhatt & Ors. ...Respondents

Counsel for the Appellants:
Sri Pranab Kumar Ganguli, S.C.

Counsel for the Respondents:
Sri Ram Tiwari

A. Service Law – Primary Teacher – Selection – Recruitment Examination – Possession of minimum qualification – Respondent-candidate duly passed the

BTC course – Mistake was at the behest of appellant in preparation of result of BTC course – Effect – Held, on account of mistake, the respondent No. 1-petitioner was declared as failed by the Appellants. The mistake is attributable to the Appellants and for such a mistake the respondent No. 1-petitioner cannot be made to suffer – The delay in correction of the mark sheet of the respondent No. 1-petitioner is at the behest of the Appellants – The respondent No. 1-petitioner's candidature for Primary Teachers Recruitment Examination, 2019 cannot be faulted. (Para 16 and 17)

Special Appeal dismissed. (E-1)

(Delivered by Hon'ble Rajesh Bindal, C. J.
&
Hon'ble Vikram D. Chauhan, J.)

1. The present special appeal is preferred by the Appellants challenging the judgement and order dated September 8, 2020 passed by learned Single Judge in Civil Misc. Writ Petition No. 5910 of 2020 (Rohit Bhatt Vs. State of U.P. and others) and judgement and order dated July 30, 2021 passed by the learned Single Judge in Civil Misc. Review Application No. 158 of 2021.

2. The brief facts are that the respondent No.1-petitioner secured admission in BTC Training Course 2015 in Jaymurti College Nagla Ball, Sirsaganj, Firozabad. The respondent No.1-petitioner passed the first semester examination. Thereafter the respondent No.1-petitioner has also passed the second semester written exam of BTC Training Course (Batch 2015) and was sent for internship on August 31, 2017 to Primary School Chandari, Vikas Khand Madanpur, Firozabad. The Respondent No.1-petitioner appeared before aforesaid college on September 4, 2017 and completed his internship on October 13, 2017. Result of internship was declared on October 13, 2017 and respondent No.1-petitioner obtained 97/100 marks. The Respondent No.1-petitioner on October 13, 2017 submitted the above-mentioned result in the office of the Principal, District Institute of Education and Training, Firozabad and thereafter the result of the second semester of BTC Course-2015 was declared on March 21, 2018, in which the respondent No.1-petitioner was found unsuccessful due to absence in internship.

3. Thereafter, respondent No.1-petitioner on enquiry came to know that the marks of internship of second semester was not available with the Principal, District Institute of Education and Training, Firozabad (Appellant No.4) although the same was submitted on October 13, 2017. On September 19, 2018, respondent No.1-petitioner submitted an application along with the photocopy of the result of the internship of second semester and other documents before the Secretary, Examination Regulatory Authority, Uttar Pradesh, Allahabad (Appellant No.2), however, the result of the respondent No.1-petitioner was not corrected by the respondent authorities.

4. On October 28, 2018, Principal, District Institute of Education and Training, Firozabad (Appellant No.4) has issued a letter to the Secretary, Examination Regulatory Authority, Uttar Pradesh, Allahabad (Appellant No.2) and informed that the marks of the respondent No.1-petitioner of the internship of second semester of BTC 2015 have not been shown in the marksheet and requested to correct the marks of the respondent No.1-petitioner in respect of second semester internship and issue a correct mark sheet to the respondent No.1-petitioner.

5. In the meantime, the Appellants invited online application for Primary

Teachers Recruitment Examination, 2019. The last date for submission of the online application was December 22, 2018. The respondent No.1-petitioner applied for the Primary Teachers Recruitment Examination, 2019.

6. There was inaction on the part of Appellants in issuing corrected mark sheet and as such the respondent No.1-petitioner preferred Civil Misc. Writ Petition No.89 of 2019 (Rohit Bhatt Vs. State of U.P. and others) before this Court. On January 4, 2019 an order was passed in Writ Petition No. 89 of 2019 as an interim measure permitting the respondent No.1-petitioner to provisionally appear in the Primary Teachers Recruitment Examination 2019.

7. In compliance of the above-mentioned order dated January 4, 2019 passed by this Court, respondent No.1-petitioner was permitted to appear in the examination of Primary Teachers Recruitment Examination, 2019 on January 6, 2019. The result of the aforesaid examination was declared on May 12, 2020 in which the result of the respondent No.1-petitioner has not been shown due to pendency of the above-mentioned writ petition before this Court.

8. Under the circumstances, respondent No.1-petitioner has filed Writ Petition No. 5910 of 2020 before this Court seeking mandamus commanding the respondents to declare the result of the respondent No.1-petitioner in respect of the examination of Primary Teachers Recruitment Examination 2019 and in case the respondent No.1-petitioner is successful in the aforesaid examination, he may be permitted to participate in selection proceedings of the primary teachers in Uttar Pradesh.

9. In the meantime, Appellants have issued the corrected mark sheet to the respondent No.1-petitioner in respect of BTC Course-2015 in which the respondent No.1-petitioner has been shown to have passed.

10. The above-mentioned Writ Petition No.5910 of 2020 along with Writ Petition No.89 of 2019 was finally decided by impugned judgment and order dated September 8, 2020 with the direction that as the mark sheet has been issued and respondent No.1-petitioner has appeared in the examination and result has also been declared, further steps shall be taken in terms of the result so declared. It is further directed that steps shall be taken in accordance with result declared in respect of the respondent No.1-petitioner expeditiously preferably within a period of four weeks from the date of filing of the application before the respondent ? Appellant No. 3.

11. It is submitted on behalf of Appellants that the respondent No.1-petitioner was declared unsuccessful in the training course in respect of second semester and the result of the fourth semester of the BTC training course was declared on December 12, 2018 and the net result of the total semester of the respondent No.1-petitioner concluded to have failed and as such it is argued that on the last date for submission of the online application in respect of Primary Teachers Recruitment Examination 2019, respondent No.1-petitioner did not possess the minimum qualification as prescribed under the relevant rule. It is also submitted on behalf of the Appellants that the opposite party has submitted a false declaration in respect of the result of BTC Training

Course at the time of submission of online form.

12. It is submitted on behalf of Respondent no.1 that the marks of the internship was not declared by the Appellants despite the fact that the respondent No.1-petitioner successfully completed the internship for the second semester and the marks were duly forwarded to the concerned authority. It is submitted that the mistake of not taking into consideration the marks in the internship of second semester is at the behest of the Appellants for which the respondent No.1-petitioner cannot be faulted and any such corrected mark sheet being issued to the respondent No.1-petitioner subsequently would relate back to the date of the result.

13. The result of BTC examination was declared on March 21, 2018 in which the respondent No.1-petitioner was shown as unsuccessful on account of absence in the internship of second semester despite the fact that the respondent No.1-petitioner had successfully completed the internship and the marks were also submitted on October 13, 2017. The respondent No.1-petitioner thereafter had applied before the authority concerned for issuance of corrected mark sheet by showing the marks of the respondent No.1-petitioner in respect of internship of second semester in BTC course. It is not dispute between the parties that the respondent No.1-petitioner would have passed the BTC course in case the aforesaid marks of internship would have been included in the result prepared by the authority concerned.

14. The mistake in preparation of the result of the BTC course was at the behest of the Appellant. Although respondent No.1-petitioner had successfully completed the internship in the second semester of the BTC course and thereafter has further successfully completed the remaining semesters, when the result of the BTC course was declared, the respondent No.1-petitioner was shown as failed solely on account of non consideration of the marks obtained by the respondent No.1-petitioner in internship in second semester. On October 28, 2018 the Principal, District Institute of Education and Training, Firozabad has written a letter to the Examination Regulatory Authority, Uttar Pradesh, Allahabad (Appellant No.2) for issuance of the corrected mark sheet by including the marks already obtained by the respondent No.1-petitioner in the internship completed in the second semester.

15. It is not the case of the Appellants that on account of any fraud or misrepresentation, respondent No.1-petitioner has claimed the eligibility qualification in the Primary Teachers Recruitment Examination, 2015. The mistake in not considering the marks of internship of second semester by the Appellants was brought to the notice of the examining body immediately by the respondent No.1-petitioner.

16. It is further not in dispute that subsequent to the cut off date the mark sheet of the respondent No.1-petitioner has been corrected by the Appellants thereby accepting the mistake in issuance of the earlier mark sheet. The respondent No.1-petitioner had duly passed the BTC course before cut off date, however, on account of mistake, the respondent No.1-petitioner was declared as failed by the Appellants. The mistake is attributable to the Appellants and for such a mistake the respondent No.1-petitioner cannot be made to suffer.

17. The Appellants have submitted that the respondent No.1-petitioner had filed a false declaration in the application form for Primary Teachers Recruitment Examination, 2019 as on the cut off date the respondent No.1-petitioner did not have prescribed qualification for applying in the aforesaid examination. In this respect, it is to be noted that prior to the cut off date the mistake/error in the result of BTC Course 2015 of the respondent No.1-petitioner was brought to the notice of the Appellants by the respondent No.1-petitioner. Appellant No.4 by his communication dated October 28, 2018 has acknowledged the aforesaid mistake and has recommended to Appellant No.2 for issuance of the corrected mark sheet. The delay in correction of the mark sheet of the respondent No.1-petitioner is at the behest of the Appellants and for no fault of the respondent No.1-petitioner, the respondent No.1-petitioner candidature for Primary Teachers Recruitment Examination, 2019 cannot be faulted. Once the respondent No.1-petitioner has duly passed the BTC course on the relevant date. The Appellants cannot be permitted to take benefit of their own mistake and subsequently objected to the candidature of the respondent No.1-petitioner for Primary Teachers Recruitment Examination 2019.

18. In the result, we do not find any error in the impugned judgment and order passed by the learned Single Judge and as such the present Special Appeal lacks merit and is dismissed

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(2023) 1 ILRA 433
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.01.2023

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE JASPREET SINGH, J.

Special Appeal. No. 467 of 2022
&
Special Appeal. No. 464 of 2022
&
Special Appeal. No. 465 of 2022
&
Special Appeal. No. 466 of 2022

U.P. Subordinate Services Selection Commission Lko. ...Appellant
Versus
Poonam Dwivedi ...Respondent

Counsel for the Appellant:
Sri Gaurav Mehrotra

Counsel for the Respondent:
Sri Alok Mishra, Sri Abhay Pratap Singh, C.S.C., Priyanka Singh

A. Service Law – UP Public Service (Reservation for Economically Weaker Sections) Act, 2020 – Post of Health workers (female) – Selection – Reservation under Economic Weaker Section (EWS) segment claimed – Income certificate was issued prior to the date of issuance of advertisement – Relevance – Petitioners were considered under General category – Legality challenged – Held, the action of the appellants ignoring the certificates and considering the case of the writ petitioners in open category which they did not make the cut-off for the open category cannot be faulted. (Para 38)

B. Procedural law – Non-impleadment of last selected candidate – Objection raised in the counter affidavit filed in writ petition – However, no effort to cure the defects was made – Effect – Held, the writ petitioners did not implead the last selected candidates of the open category rather some randomly selected candidates have been impleaded, this shall not cure the defect of not impleading the last appointed candidates from the open category – *Ranjan Kumar's case* relied upon. (Para 36 and 40)

Special Appeal allowed and Writ petition dismissed. (E-1)

List of Cases cited:

1. Special Leave Petition No. 9040 of 2020; Km. Laxmi Saroj & ors. Vs St. of U.P.& ors. decided on 15.12.2022

2. Ranjan Kumar& ors. Vs St. of Bihar & ors.; 2014 (16) SCC 187

3. Vijay Kumar Kaul& ors. Vs U.O.I. & ors.; 2012 (7) SCC 610

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

1. This is a bunch of four special appeals which arise out of a common judgment and order dated 19.10.2022 passed by the learned Single Judge in writ petitions no. 5392 (Writ-A) of 2022 (Poonam Dwivedi Vs. State of U.P. and others); Writ Petition No. 6974 (Writ-A) of 2022 (Divya Awasthi Vs. State of U.P. and others); Writ Petition No. 6911 (Writ-A) of 2022 (Archana Saxena Vs. State of U.P. and others); Writ Petition No. 5264 (Writ-A) of 2022 (Komal Vs. State of U.P. and others) and Writ Petition No. 6357 of 2022 (Shanu Tiwari Vs. State of U.P. and others as well as in Writ Petition No. 2109 of 2022 (Thakura Devi and Another Vs. State of U.P. and others). Since the issue of fact and law is common in all the four appeals, hence, they are being decided by this common judgment.

2. In order to appreciate the controversy involved in the instant appeals, certain facts leading up to the appeals are being noticed hereinafter. For the sake of convenience, the facts are being noted from leading Special Appeal No. 467 of 2022, however, wherever required the respective data and dates relating to the contesting respondents/writ petitioners will be noted at the appropriate place.

3. The U.P. Subordinate Service Selection Commission had issued an advertisement on 15.12.2021 for filling up 9212 posts of health workers (female). The last date for submission of the application form was 05.01.2022. In pursuance of the said advertisement, the main written examination was conducted on 08.05.2022 wherein the petitioners before the writ court had all appeared. The results were declared on 26.05.2022 and all the petitioners before the writ court were declared successful in the main examinations and then they were required to appear in the next level examination which was held between 09.06.2022 to 18.06.2022 and after the eligibility documents were verified, the final results were declared on 06.08.2022 where the names of the petitioners before the writ court did not find mention and it is in the aforesaid backdrop that the writ petitions came to be filed.

4. The issue raised before the writ court was that all the writ petitioners before the writ court were claiming the benefit of reservation under the Economic Weaker Section segment.

5. It has been the specific case of the writ-petitioners before the writ court that they all possess the requisite income certificate which clearly indicated that they were covered by the eligibility criteria for the grant of such reservation for economically weaker section and that the Commission had arbitrarily ignored the said certificates.

6. It is in light thereof it was prayed by the writ petitioners that the final select list made on 06.08.2022 be set aside and further direction was sought that the said select list may not be given effect to prior to considering the case of the petitioners who were eligible to be given the benefit of reservation under the EWS segment.

7. The U.P. Subordinate Service Selection Commission contested the claim

of the writ petitioners before the writ court by filing a counter affidavit and raised the plea that the certificate submitted by the writ petitioners was not in accordance with the advertisement and was defective.

8. It was also pleaded that the EWS certificate was neither in consonance with the format issued by the Government of Uttar Pradesh which was in furtherance of the Government Orders dated 18.02.2019 and 14.03.2019 and that the said EWS certificate did not relate to the financial year in question, hence, the same was not found appropriate for being considered. It was also pleaded that since the certificate was not found valid of the writ petitioners, consequently, they were considered in the open category and as they did not meet the cut-off in the open category, hence, their names did not find place in the select list. It was also urged that the writ petitions were bad for non-impleadment of the necessary parties as the persons who have been selected had not been impleaded and the petitions were also defective on the aforesaid count.

9. The writ court taking note of the respective submissions and the material on record held that since the details and income of the candidate and his/her family member was filled up by the Competent Authority and that the advertisement was vague and the Government Order dated 14.03.2019 as well as the advertisement did not mention the word 'financial year' and used the words "previous year' hence, the previous year would normally be taken to be the calender year and found that there appeared to be some confusion and considering the aforesaid, the writ petitions were partly allowed and the writ court directed the concerned Tehsildar to issue fresh certificates to the writ petitioners correctly indicating the income of the candidates and that the said certificates be issued for the period 2021-22 and documents pertaining to the financial year 2021 shall be issued by the Competent Authority. The said exercise was required to be completed within a period of two weeks with a further direction that after having received the fresh certificates, the same were to be submitted before the U.P. Subordinate Service Selection Commission within a week thereafter and the Commission was required to proceed considering the candidature of the writ-petitioners on their merits before finalizing final results/issuing appointment letters. A further direction was issued to the State Government to look into the matter and issue necessary clarification with regard to the contents of the EWS certificates and instruct the Competent Authorities to fill up the same as it is incorrect issuance which affects the innocent candidates.

10. The relevant paras of the impugned judgment reads as under:-

"18. In view of above, it is directed that the concerned Tehsildar who is the competent authority and who has issued EWS certificates to the petitioners shall issue fresh certificate correctly indicating the income of the candidate and his/her family members, the said income certificate shall be issued for period 2021-22 and documents pertaining to financial year 2020-2021 shall be issued by the competent authority.

19. Let aforesaid exercise be completed within a period of two weeks from the date of production of certified copy of this order before the competent authority and fresh certificate shall be issued in the light of observations made

herein above and same shall be submitted to the U.P. Subordinate Service Selection Commission, within one week thereafter on issuance of the same. On receipt of such certificate(s) the Commission shall proceed to consider candidature of the petitioners on their merits before finalising the final results/issuing appointment letters.

20. Before parting with the matter this Court is of the considered view that the State Government should also look into the matter and issue necessary clarification with regard to the contents of EWS certificate and instruct the competent authorities to fill up the same legally and properly, as its incorrect issuance will adversely impact innocent candidates, who rely on the wisdom of the competent authority and presume that the certificate issued is valid and correct and in accordance with law. "

11. It is being aggrieved against the aforesaid judgment and order dated 19.10.2022 that the U.P. Subordinate Service Selection Commission have assailed the said judgment in the aforesaid four appeals which as noticed above is being decided by this common judgment.

12. We have heard Sri Gaurav Mehrotra, learned counsel appearing for the U.P. Subordinate Service Selection Commission, the appellants of the appeals, Sri Alok Mishra, learned counsel for the Poonam Dwivedi who is the respondent no. 1 in Special Appeal No. 467 of 2022, Sri Sandeep Kumar Srivastava, learned counsel for the respondent no. 1 in Special Appeal No. 465 of 2022, Sri Shobh Nath Pandey, learned counsel appearing for Ms. Komal, the respondent no. 1 of Special Appeal No. 464 of 2022 and Sri Durga Prasad Shukla, learned counsel for Sri Shanu Tiwari, the respondent no. 1 in Special Appeal No. 466 of 2022 and the learned Standing Counsel for the State-respondents.

13. Sri Alok Mishra, learned counsel appearing for the respondent Smt. Poonam Dwivedi in Special Appeal No. 467 of 2022 has filed a preliminary objection which is taken on record.

14. Sri Gaurav Mehrotra, learned counsel for the appellants in all the appeals has strenuously urged that the impugned order dated 19.10.2022 is bad for the reasons that admittedly the date of the advertisement inviting applications was 15.12.2021 and the last date of submission of the application was 05.01.2022. The advertisement clearly indicated that in case of any modification, the same could be made latest by 12.01.2022. In so far as the issue in hand is concerned, it related to the grant of benefit of EWS Reservation to the writ petitioners. In terms of the advertisement which was issued, a copy of which was annexed as Annexure No. 8 to the writ petition in Clause-8 clearly required the candidates to furnish the necessary documents claiming the benefit of reservation which included the EWS certificate and its profarma was also annexed with the advertisement.

15. It has been further submitted that since the selection for the post of Health Worker (female) was being done in the year 2022, hence, the EWS certificate which was required of the previous year ought to be that of the year 2021 which commenced on 01.04.2020 and ended on 31.03.2021.

16. It has further been pointed out that in so far as the case of Ms. Poonam Dwivedi is concerned, her certificate is

dated 12.01.2021 and it is urged that the same has been furnished and it does not relate to the financial year 2021 as on the date of issuance of the said certificate i.e. 12.01.2021, the financial year 2020-21 had yet not ended and therefore there could not have been a proper estimation regarding the income of the candidate and his/her family which could only be issued after the end of the said financial year.

17. In order to further buttress his submissions, the learned counsel for the appellants has drawn the attention of the Court to the Government Order dated 18.02.2019 which was filed as Annexure No. 9 with the short counter affidavit by the appellant before the writ court also to the Government Order dated 14.03.2019 which was filed as Annexure No. 10 with the counter affidavit before the writ court and to the provisions of the Uttar Pradesh Public Service (Reservation for Economically Weaker Sections) Act, 2020 (hereinafter referred to as "Act of 2020) which was filed as Annexure No. 8 to the counter affidavit before the writ court.

18. The thrust of the submission is that the certificate which is issued by the Tehsildar was being done in terms of the Government Order dated 18.02.2019. The said Government Order clearly referred to the notification issued by the Central Government in this regard dated 19.01.2019 which also specified the criteria which determined the eligibility of a person seeking the benefit of reservation for economically weaker sections.

19. It has been submitted that in Clause-IV of the said Government Order dated 18.02.2019, it is clearly mentioned that an application for seeking such certificate claiming reservation on the ground of economically weaker sections will refer to a year prior from the year when the application is made. Even in the subsequent Government Order dated 14.03.2019, the certificate would be issued in the format which was appended to the said Government Order of 14.03.2019 which also clearly had a column indicating the financial year for which it was valid.

20. It is further pointed out that the Act of 2020 clearly defined the word "Economically Weaker Sections of Citizens" in Section 2(b). Attention has been drawn to Section 7 of the Act of 2020 to indicate that the certificate was to be issued by the officer not below the rank of Tehsildar and there is a clear reference that the Government Orders dated 18.02.2019 shall be deemed to have been issued under the aforesaid Sections.

21. In the aforesaid backdrop, it is urged that where the EWS Certificate which was being issued was in pursuance of the powers conferred earlier in terms of the Government Order dated 18.02.2019 and 14.03.2019 and later after the promulgation of the Act of 2020 in terms of the Act both had a prescribed format and it was required to be mentioned that the said certificate would be valid for which financial year.

22. In the instant case, in the case of Poonam Dwivedi, the certificate as furnished by the writ petitioner was dated 12.01.2021 and was on record as Annexure No. 12 with the writ petition. It clearly stated that the said certificate was for of the financial year 2020-21. The certificate further indicated that Poonam Dwivedi belonged to an economically weaker section as for the financial year 2020-21 and the annual income of his/her family was less than Rs. 8,00,000/-.

23. As far as the certificate of Shanu Tiwari is concerned, a copy of which was

brought on record as Annexure No. 9 with the writ petition filed by her it was dated 21st of January, 2021 and it was valid for the year2019-20.

24. In so far as the EWS certificate of Archana Saxena is concerned, the same was filed as Annexure No. 11 with her writ petition and is dated 05.02.2021 and it was valid for the financial year 2019-20.

25. The certificate of Ms. Komal was filed with her writ petition as Annexure No. 1 dated 06.01.2021, however, in so far as this certificate is concerned, the same mentions only the year 2019.

26. It has also been urged by Sri Mehrotra that apart from this glaring discrepancy which was specifically pleaded by the appellants before the writ court, the petitioners did not chose to file any rejoinder affidavit. The appellants before the writ court had also raised a plea that the writ petitioners had not impleaded the validly selected candidates and thus the petition was bad for non-impleadment for such parties and consequently no relief could have been granted.

27. It is lastly urged that the contentions of the writ petitioners in the writ petition was specific to the extent that the certificate issued was valid and therefore they have been illegally denied the benefit of the reservation for the economically weaker sections. It is not their case that the Tehsildar issued incorrect certificates or that the writ petitioners were prevented from filing better and correct certificates. Neither the Tehsildar was impleaded as a party rather there was a clear contention in the petition that the certificates were absolutely valid and the action of the respondent (the appellants herein) was arbitrary.

28. In the aforesaid backdrop, it is urged that where large number of selections was conducted and appointment letters were due to be issued on account of the order impugned, the entire process has been held up even in respect of such persons who have attained the selection on their merits and for the said reasons, the impugned order deserves to be set aside.

29. Sri Alok Mishra, learned counsel who has argued the matter on behalf of Smt. Poonam Dwivedi and primarily his submissions have also been adopted by the learned counsel appearing for the other respondents (the writ petitioners) has submitted that the appellant-Commission does not have the right to assail the order. It is urged that the direction was issued to the Tehsildar to issue fresh certificates and it is only once the certificate was handed over to the Commission, was the Commission required to look into the aspect and hence at this stage where the Tehsildar has not issued the certificates, the stage for the appellants to assail the order has not arrived.

30. It is further urged that the learned Single Judge has clearly noticed that the parties had agreed that there was a confusion and for the said reason and to put the confusion at naught, the order has been passed which does substantial justice to the parties and as such the order impugned does not require any interference.

31. The Court has considered the rival submissions and meticulously perused the material on record.

32. In so far as the facts in between the parties is concerned, there is hardly any dispute. It is not disputed by the parties that the certificates, the reference of which has been mentioned in the preceding

paragraphs nos. 22 to 25, the details given therein is not correct. Now in the aforesaid backdrop, if the contentions of the respective parties is seen in context with the material available on record including the certificates, the advertisement, it would be clear that the date of issuance of the said advertisement is dated 15.12.2021. The certificates of all the writ petitioners who are before this Court were issued prior to the date of issuance of the advertisement.

33. It is not the case of any of the writ petitioners that the certificates that they have furnished was issued after the date of issuance of the advertisement dated 05.12.2021. It is also to be noticed that the EWS certificates which is issued by the Tehsildar for the purpose of claiming reservation under the Economically Weaker Segment is issued under the Government Orders dated 18.02.2019 and 14.03.2019 which further crystallized in the Act of 2020.

34. It is also not disputed that the certificates which were filed by the respective writ petitioners who were before this Court, all were issued after the promulgation of the Act of 2020 which came into effect on 31st August, 2020, thus, where the Act prescribes a mode to do a thing in a particular manner and it also saves the Government Order dated 18.02.2019 by making a reference in Section 7 of the Act, hence, it cannot be said that there was confusion amongst the candidates or the Authorities. It is also to be noticed that the advertisement clearly provided that the candidates who sought reservations must have their certificates ready which were to be submitted at the time of verification.

35. In the instant case, if the certificates are perused, it would indicate that they have been issued in the month of January, 2021 and February, 2021 as shall be evident from the details mentioned hereinafter:-

(i) In case of Poonam Dwivedi, the certificate is dated 12.01.2021 and is valid for financial year 2020-21. Hence, the certificates cannot be valid for 2020-21 as the year had not been ended by then.

(ii) In the case of Archana Saxena, the certificate dated 05.02.2021 and valid for financial year 2019-20, though, it was required to be filed for the financial year 2020-21, thus, this certificate is not valid.

(iii) In the case of Komal, the certificate is dated 06.01.2021 and is valid for financial year 2019. This certificate also did not relate to the year 2020-21, accordingly not valid.

(iv) In the case of Shanu Tiwari, the certificate is dated 21.01.2021 and valid for financial year 2019-20. This certificate too did not relate to the financial year 2020-21. Hence all the aforesaid certificates are not valid.

36. Thus, for the said reason, we find that this aspect of the matter has not been appropriately considered by the learned Single Judge. From the perusal of the material on record, we further find that the appellants had raised categorical pleas in their counter affidavit regarding non-impleadment of parties which has also not been addressed. Moreover, the writ petitioners also did not make any effort to cure the defect and the plea which had been raised.

37. In so far as the objections raised by the respondents-writ petitioners is concerned that the U.P. Subordinate

Service Selection Commission does not have the locus to file the appeal that also does not impress the Court for the reason that it is the Commission who is required to hold the examination, prepare a final list. In the instant case, the eligibility is to be considered as up to the last date of submission of the applications. The certificates which ought to have been furnished was for the financial year 2020-21 which commenced on 01st of April, 2020 and ended on 31st of March, 2021 and thus, the certificates itself were not valid for being considered and the view adopted by the U.P. Subordinate Service Selection Commission in rejecting the candidature cannot be faulted. This aspect has also not been appropriately considered by the writ court. It would have been a different matter that the certificates were validly issued for the appropriate year but due to some shortcoming of the Authority the petitioners were loosing out the benefit, but it is not the case here. Here in all the cases, since the certificates were issued on the various dates as noticed in para 35 above are not valid.

38. In light of the above, it cannot be disputed that the certificates were invalid and that the action of the appellants ignoring the certificates and considering the case of the writ petitioners in open category which they did not make the cut-off for the open category cannot be faulted.

39. The learned counsel for the private respondents have relied upon a decision of the Apex Court in the case of ***Km. Laxmi Saroj and Others Vs. State of U.P. and others*** in ***Special Leave Petition No. 9040 of 2020*** decided on ***15.12.2022,*** however, from the perusal thereof, it would indicate that the facts were different which are not applicable in the instant case. In the said case, it was found that the candidates were not at fault as the certificate of registration which was applied for in time had not been granted by the Authority concerned and in the aforesaid circumstances, the Apex Court had intervened, however, in the instant case, it is clear from the pleadings of the parties that they had submitted the certificates which were not valid and appropriate for the aforesaid reasons as noticed hereinabove, hence, the said decision of Km. Laxmi Saroj (Supra) does not come to the rescue of the writ petitioners-private respondents.

40. Another fact that needs attention is that 921 posts were reserved for EWS category against which 644 candidates were selected. The remaining 277 posts were filled up by the open category in terms of Section 3 (c) of the Act of 2020 and the writ petitioners did not implead the last selected candidates of the open category rather some randomly selected candidates have been impleaded, this shall not cure the defect of not impleading the last appointed candidates from the open category. This Court is fortified in its view in light of the decision of the Apex Court in the case of Ranjan Kumar and others Vs. State of Bihar and others reported in 2014 (16) SCC 187; Vijay Kumar Kaul and others Vs. Union of India and others 2012 (7) SCC 610.

41. In light of the aforesaid detailed discussions, we have no hesitation to hold that the impugned order passed by the writ court dated 19.10.2022 deserves to be set aside, consequently, the special appeals are allowed. The writ petitions before the Court shall stand dismissed. Costs are made easy.

(2023) 1 ILRA 441
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.11.2022

BEFORE

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

Special Appeal No. 579 of 2022

Rajendra Singh ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Ashok Khare (Sr. Adv.), Sri Ramanuj Yadav

Counsel for the Respondents:
Sri Syed Ali Murtaza, A.G.A., Sri Ankit Gaur, S.C.

A. Service Law – Post of Constable – Selection – Acquittal – Criminal proceeding u/s 376 IPC was initiated against the petitioner after his selection – Prosecutrix admitted that she made wrong St.ment under pressure of her brother and S.H.O. – Appointment claimed in view of acquittal – Writ petition dismissed with the opinion that acquittal was not honourable – Validity challenged – Held, the appellant was not acquitted giving him the benefit of doubt. Rather, the acquittal of the appellant was on account of failure of the prosecution to prove its case as the prosecutrix herself had denied any incident – *Avtar Singh's case* relied upon – Direction for fresh consideration of the appellant's case regarding his appointment and entitlement of service benefits was issued – High Court also issued show cause notice against the prosecutrix and her father and brother for getting a false criminal case registered. (Para 5, 8, 9, 11, 12 and 14)

Special appeal allowed. (E-1)

List of Cases cited:

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

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

1. Order dated July 26, 2022 passed by learned Single Judge has been impugned by filing present intra-Court appeal.

2. The appellant was before this Court impugning order dated November 21, 2020 passed by the Superintendent of Police, Jalaun whereby the representation filed by him was dismissed. It is a case in which the appellant was selected to the post of Constable vide selection list dated May 15, 2018. He received call letter dated June 9, 2018 for medical checkup and completion of other formalities. In terms thereof, the appellant was to appear for medical examination on June 12, 2018. The admitted case of the appellant is that immediately after coming to know about his selection as a Constable, his enemies in the village became active and a false First Information Report (hereinafter referred to as 'FIR') was registered against him on July 3, 2018 under Section 354A(1)(iv) of IPC. The allegation in the FIR is that the present appellant namely, the accused named in the FIR, has enticed the prosecutrix inside his house and used certain obscene words. Even in the statement got recorded by the prosecutrix under Section 161 Cr.P.C., she reiterated the stand taken in the complaint made to the police, on the basis of which FIR was registered. Thereafter, statement of the prosecutrix was recorded under Section 164 Cr.P.C. wherein she improved from the version as contained in the FIR and it was added that she was molested and she was ravished with use of force by the

accused (appellant herein). The aforesaid statement was recorded on July 5, 2018. Thereafter, medical examination of the prosecutrix was conducted on July 7, 2018. No injury was found on any part of her body.

3. The appellant faced trial. While getting her statement recorded in the Court, the prosecutrix stated that nothing, as stated in her statement to the police at the time of registration of FIR or what was stated in her statement recorded under Section 164 Cr.P.C., had happened. She had not lodged complaint and her statements were recorded under pressure of her brother and father. As a result of which, the charges having not been proved, the accused, namely the present appellant was acquitted vide judgment and order dated January 27, 2020 passed by the learned Special Judge, POCSO Act.

4. Immediately after acquittal of the appellant, he made a representation to the competent authority on February 3, 2020 for consideration of his case for appointment as a Constable. As the same was not decided, Writ Petition No. 3076 of 2020 was filed, which was disposed of on March 3, 2020 with a direction to respondent no. 4 therein for decision of the representation made by the appellant within a period of three months. As the representation was not decided in a time bound manner as directed by this Court, Contempt Application (Civil) No. 4159 of 2020 was filed. The same was disposed of on November 2, 2020 giving one more opportunity to the respondents for disposal of the representation within a period of six weeks from the date of production of a copy of the order. Thereafter, the representation was disposed of on November 21, 2020 rejecting the claim of the appellant. It is the aforesaid order, which was challenged before the learned Single Judge.

5. Learned Single Judge, with the opinion that the acquittal of appellant was not honourable. Considering the serious charges levelled against him, who had to become part of a disciplined force, he does not deserve to be given any concession and dismissed the writ petition.

6. The argument raised by Mr. Khare, Senior Advocate is that it is a case in which the prosecutrix improved her statement from what has been made at the time of registration of the F.I.R. and statement recorded under Section 161 Cr.P.C. Initially, there was no allegation of rape and subsequently while getting her statement recorded under Section 164 Cr.P.C., it was added. During the trial, she categorically stated that no incident as reported to the police, initially on the basis of which F.I.R. was registered, or what was stated by her in the statement recorded under Section 164 Cr.P.C., had happened. In fact, her statement was due to the pressure built by her brother and father to settle their personal scores, hence, it was not a case of giving benefit of doubt to the appellant, rather acquittal was honourable as the prosecution has failed to prove the charges. It is further pointed out by learned counsel for the appellant that at the time of registration of FIR the prosecutrix is shown to be a minor, whereas in evidence it was found that on the date of alleged incident, she was 19 years of age.

7. On the other hand, learned counsel for the State could not dispute the aforesaid factual matrix of the matter, however, he still tried to support the order passed by the learned Single Judge.

8. The principles regarding the right to be appointed in government service, where the background of a candidate indicates involvement in a criminal case were laid down by the Supreme Court in **Avtar Singh vs. Union of India and others, (2016) 8 SCC 471. In Avtar Singh's case (supra)**, the following principles have been enumerated :

"38. We have noticed various decisions and tried to explain and reconcile them as far as possible. In view of the aforesaid discussion, we summarise our conclusion thus:

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

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

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

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

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

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

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

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

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

38.7 In a case of deliberate suppression of fact with respect to multiple pending cases such false information by itself will assume significance and an employer may pass appropriate order

cancelling candidature or terminating services as appointment of a person against whom multiple criminal cases were pending may not be proper.

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

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

38.10 For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for.

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

9. After hearing learned counsel for the parties, we find merit in the submission made by learned counsel for the appellant. It is a case in which it is evident from the record that the prosecutrix initially got the F.I.R. registered with the allegation of use of certain obscene words by the accused while taking her to his residence while she was out to trace out her younger brother. The aforesaid stand was reiterated by her while getting her statement recorded under Section 161 Cr.P.C. However, two days thereafter, she got her statement recorded under Section 164 Cr.P.C. where the allegation against the appellant was improved and the case of outraging her modesty was sought to be made out including the allegation under Section 376 Cr.P.C. Initially, FIR was registered under Section 354A(1)(4) of IPC. However, later on, the charges under Section 376 IPC and Section 4 of POCSO Act were added. However, while appearing in the Court as a witness, she stated that on July 2, 2018 at about 3 P.M., no incident happened with her as was reported to the police. As the statement of the prosecutrix recorded under Section 164 Cr.P.C. was not available, her evidence was deferred. On the next date of hearing, she again reiterated that the appellant had not done anything with her and she had got the FIR registered under pressure of her brother on account of certain disputes between the families, as her brother had beaten her up and also threatened to kill her. She also denied her statement made under Section 161 Cr.P.C. though bearing her signature stating that signature was taken on a blank paper. Though, she had admitted her photograph and signature made on the statement under Section 164 Cr.P.C., but when confronted in Court, she stated that the aforesaid wrong statement was also made by her under pressure of her brother and father. She also stated that before getting her statement recorded under Section 164 Cr.P.C., she was threatened even by the Police Constable and S.H.O. that in case, she will not state in the manner as they propose, she will be put to jail. She also

stated that appellant was selected to the post of Constable. He had to join on July 11, 2018. She got the F.I.R. registered under pressure of her family members so that he may not be able to join the service. No incident, as stated by her in the FIR or in the statement under Section 164 Cr.P.C., has ever happened.

10. The stand taken by the prosecutrix in her statement in the Court is corroborated from the medical evidence wherein no injury mark was found on any part of her body.

11. From perusal of the judgment of the learned Special Judge (POCSO Act), it is evident that the appellant was not acquitted giving him the benefit of doubt. Rather, the acquittal of the appellant was on account of failure of the prosecution to prove its case as the prosecutrix herself had denied any incident on the basis of which FIR was registered.

12. Considering the aforesaid facts, in our view, order dated November 21, 2020 passed by the Superintendent of Police, Jalaun rejecting the claim of the appellant for giving appointment after his acquittal in the trial, is illegal. The aforesaid order as well as the order passed by the learned Single Judge dismissing the writ petition are set aside. The respondents are directed to consider the case of the appellant afresh, keeping in view the fact that the appellant was acquitted, within a period of three months from the date of receipt of a copy of the order. It is made clear that the appellant shall be entitled to all service benefits from the date of joining.

13. From the judgment passed by the Special Judge, POCSO Act, it is evident that the appellant was not at all involved in the incident, hence, it cannot be said to be a case in which the appellant was involved in a case of moral turpitude.

14. However, before parting with the case, we deem it appropriate to issue show cause notices to the prosecutrix in FIR No. 0185 of 2018, Police Station-Charkhari, District-Mahoba for getting a false case registered against the appellant, the incident of which she had denied in Court, and as well as to her father Ratan Singh and brother Sandeep, which according to the prosecutrix were instrumental in pressurizing her to get a false case registered, as to why appropriate proceedings may not be initiated against them for getting a false criminal case registered.

15. Let service on the aforesaid persons be effected through Chief Judicial Magistrate, Mahoba.

16. The present Special Appeal is allowed to the extent as mentioned above. However, for considering the notices issued to the prosecutrix, her father and brother, the appeal shall be listed before the Court on January 17, 2023.

(2023) 1 ILRA 445
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.12.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Special Appeal No. 607 of 2022

Dr. Anju Chaudhary ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Kauntey Singh, Sri Ashok Khare (Sr. Counsel)

Counsel for the Respondents:
C.S.C., Sri Arvind Srivastava III, Sri Gagan Mehta, Sri Manoj Kumar Singh

A. Service Law – UP Higher Education Services Commission Act, 1980 – Ss. 12 (4) and 13 – UP Higher Education Services Commission (Procedure for Selection of Teachers) Regulations, 1983 – Reg. 7 – Posts of Principal – Placement in the colleges, determination thereof – Criteria – Merit list, how far relevant – Principle laid down – The candidate placed higher in the order of merit would have a first right to be appointed in the college opted than the person/candidate who is lower in the order of merit irrespective of that college being lower in the order of preference than in the preference list of the candidate lower in the order of merit – But, if the person higher in the order of merit is placed in a college which was higher in his order of preference, then his/her claim to the college allotted to the other candidate, lower in the order of merit, would not sustain. (Para 23)

B. Constitution of India – Article 226 – Writ – Selection for the post of Principle was held – Writ for placement in a particular college sought – Non-impleadment of all the selected candidates – Effect – Held, the petitioner was seeking placement in the college where the respondent no. 5 had been appointed though being lower in the order of merit than the petitioner. She was not seeking relief against any other person. In such circumstances, it was not required of her to implead all the selected candidates. (Para 28)

Special Appeal allowed. (E-1)

List of Cases cited:

1. Km. Alka Rani Gupta Vs Director of Education (Higher) & anr.; 2003 (2) ESC 944

2. Dr. Vinay Kumar Vs The Director of Education (Higher)& ors.; (2006) 1 UPLBEC 334: 2006 (62) ALR 808

(Delivered by Hon'ble Manoj Misra, J.)

1. This intra-court appeal is against the judgment and order dated 20.06.2022 passed by the learned Single Judge in Writ A No. 2125 of 2022, whereby the writ petition of the appellant (i.e. the petitioner) has been dismissed.

2. Writ A No. 2125 of 2022 was filed by the appellant for quashing the order dated 20.12.2021 passed by the Director of Higher Education, U.P., Prayagraj (for short the Director) rejecting her representation for her placement as Principal of either Gokul Das Hindu Girls' College, Moradabad or Acharya Narendra Dev Nagar Nigam Kanya Mahavidyalaya, Harsh Nagar, Kanpur.

3. In brief, the facts giving rise to the present appeal are as follows. Pursuant to an advertisement issued by the U.P. Higher Education Service Commission, Prayagraj (for short the Commission), inviting applications for 290 posts of Principal in various graduate and post-graduate colleges in the State of Uttar Pradesh, the petitioner applied for appointment and, after undergoing the selection process, was placed at serial no. 200 in the revised merit / select list dated 05.10.2021. Dr. Charu Mehrotra (respondent no.5), who participated in the same selection process, was placed at serial no. 205, and Dr. Sunita Arya (respondent no. 6), who was placed at serial no 218, were placed in those colleges

which were higher in the order of preference of the petitioner than where the petitioner was placed by the Director. The case of the petitioner is that in her preference /option list of colleges for placement, pursuant to her selection, she had given multiple options in the order of preference. In that list, Gokul Das Hindu Girls' College, Moradabad was at serial no. 20 whereas, Acharya Narendra Dev Nagar Nigam Kanya Mahavidyalaya, Harsh Nagar, Kanpur was at serial no. 34 in the order of preference. However, the petitioner was placed at Mahila Mahavidyalaya, Kidwai Nagar, Kanpur, which was at serial no. 41 in the order of preference given by the petitioner. On the other hand, the respondent no.5 (Dr. Charu Mehrotra), who was placed at serial no. 205 in the merit list, and respondent no.6 (Dr. Sunita Arya), who was placed at serial no. 218 in the merit list, were placed by the Director in Gokul Das Hindu Girls' College, Moradabad and Acharya Narendra Dev Nagar Nigam Kanya Mahavidyalaya, Harsh Nagar, Kanpur, respectively. According to the petitioner, since she was placed higher in the final / revised merit list than the respondents 5 and 6, she ought to have been preferred over respondent no. 5 for her placement in Gokul Das Hindu Girls' College, if not there, then over respondent no.6 for her placement in Acharya Narendra Dev Nagar Nigam Kanya Mahavidyalaya. But since the petitioner was not given the due placement, she filed a representation before the Director. When the representation was not addressed, she filed Writ A No. 17108 of 2021, which was disposed off by order dated 09.12.2021 thereby requiring the Director to decide the claim of the petitioner, in accordance with law, by a reasoned order, after giving opportunity of hearing to the respondent no.5 (Dr. Charu Mehrotra). It was also provided therein that till the representation of the petitioner is not decided, the petitioner shall not be forced to join the allotted college, namely, Mahila Mahavidyalaya, Kidwai Nagar, Kanpur. Pursuant to the order dated 09.12.2021, the representation of the petitioner was decided and rejected by the Director by order dated 20.12.2021 impugned in Writ A No. 2125 of 2022 out of which the present appeal arises.

4. In the writ petition, two counter-affidavits were filed. One was a common counter-affidavit filed on behalf of State-respondents 1, 3 and 4, namely, the State of U.P.; the Director of Higher Education, U.P., Prayagraj and the Joint Director of Higher Education, U.P., Prayagraj. The other was filed on behalf of respondent no.5 (Dr. Charu Mehrotra). In neither of the two counter-affidavits, it was disputed that in the revised merit-list the petitioner was placed higher than Dr. Charu Mehrotra (respondent no.5) and Dr. Sunita Arya (respondent no.6). It was also not disputed in the counter-affidavits that in the list of options (preference list) submitted by the writ petitioner (i.e. the appellant herein), Gokul Das Hindu Girls' College, Moradabad, which was allotted to respondent no.5 (Dr. Charu Mehrotra), was at serial no. 20 and the other college, namely, Acharya Narendra Dev Nagar Nigam Kanya Mahavidyalaya, Harsh Nagar, Kanpur, which has been allotted to respondent no.6 (Dr. Sunita Arya), was at serial no. 34 whereas, the writ petitioner was allotted Mahila Mahavidyalaya, Kidwai Nagar, Kanpur which was at serial no. 41 in her preference list.

5. In the counter-affidavit submitted by the State-respondents, the allotment of colleges was sought to be justified by stating that it has been made in accordance

with the merit and order of preference. In the counter-affidavit filed by the respondent no.5, it is stated that according to the knowledge of the respondent no.5, the petitioner had submitted a wrong preference and therefore she has been allotted Mahila Mahavidyalaya, Kidwai Nagar, Kanpur. In addition to above, another ground was taken that pursuant to the allotment the petitioner had joined on 13.01.2022 therefore, she cannot raise a grievance in respect of the allotment.

6. In the rejoinder-affidavit, the writ petitioner stated that if the petitioner had not joined the allotted college then her candidature would have been cancelled therefore, the petitioner had no option but to join the allotted college. In these circumstances, by joining the college, it can not be said that she waived her right to question the allotment more so, when she had already lodged a protest in respect thereof and had earlier also filed a writ petition questioning the same.

7. Learned Single Judge dismissed the writ petition. The reasons for dismissal can be found in paragraph nos. 7, 8 and 9 of the judgment extracted below:-

"7. After hearing rival contentions, this Court finds that as per Regulation 7(1) of the U.P. Higher Education Services Commission (Procedure for Selection of Teachers) Regulations, 1983, the Commission may recommend three names of the candidates, in order of merit for one post of Principal as per Regulation 7 (2). As per Regulation 7 (3), the post of Principal of degree colleges shall be offered in order of merit with due regard to the options given by the candidates and the post in lower grade shall similarly be offered to candidates standing next in the order of merit. In the present case, admittedly the respondent nos. 5 & 6 are lower in merit than the petitioner and therefore, the petitioner claims to have been offered two institutions in dispute prior to respondent nos. 5 & 6.

8. The preference filled by the petitioner online on 29.07.2021 has been brought on record as Annexure No. 4 to the writ petition which shows that she had given preference to Gokul Das Hindu Girls College, Moradabad (sl.no. 20), Acharya Narendra Dev, Nagar Nigam Mahila Mahavidyalaya, Kanpur Nagar, (sl.no. 34) and third and last preference to Mahila Mahavidyalaya, Kidwainagar, Kanpur Nagar (sl.no. 41). In the counter affidavit filed on behalf of the respondents, the preference given by respondent no. 5 has been brought on record wherein she has given 8th preference to Gokul Das Hindu Girls College, Moradabad (sl.no. 20).

9. It is clear that the 20th preference of the petitioner was Gokul Das Hindu Girls College, Moradabad, while the respondent no. 5 had given 8th preference to the same in her offline option. In her online option, she has also given same preference to Gokul Das Hindu Girls College, Moradabad. Since respondent no. 6 has not appeared nor filed counter affidavit, her preference cannot be examined by this Court but it is clear from the preference of the respondent no. 5 that the petitioner had claimed for appointment in Gokul Das Hindu Girls College, Moradabad by way of 20th preference. In the impugned order passed by the respondent no. 3, Director of Higher Education, it has been mentioned that the placement of the candidates is done by the U.P. Higher Services Selection Commission, Prayagraj. Online

appointment is made by the Director of Higher Education. Further considering the fact that the petitioner gave her 20th preference for Gokul Das Hindu Girls College, Moradabad, and the respondent no.5 gave 8th preference to the aforesaid college, the preference of respondent no. 5 was more for Gokul Das Hindu Girls College, Moradabad, vis-a-vis the petitioner who opted for the aforesaid college by giving 20th preference to the same. Even though the petitioner was above in merit list but since she did not opted for the aforesaid college before the preference of respondent no. 5 (8th preference), therefore, the aforesaid college was rightly allotted to the respondent no. 5. Even otherwise, the petitioner has submitted her joining at Mahila Mahavidyalaya Kidwai Nagar, Kanpur Nagar on 15.01.2022 without any protest as clear from Annexure.C.A.5 to the counter affidavit filed on behalf of the State-respondents. She cannot be permitted to maintain her claim against respondent no. 4 anymore. In the rejoinder affidavit filed on behalf of the petitioner, it has only been stated in paragraph no.12 that the petitioner has been compelled to join at Mahila Mahavidyalaya Kidwai Nagar, Kanpur Nagar. Therefore, it is clear that the petitioner has no cause of action left. Even otherwise her preference for Gokul Das Hindu Girls College, Moradabad, was below the respondent no. 5."

8. We have heard Sri Ashok Khare, learned senior counsel, assisted by Sri Kauntey Singh, for the petitioner; learned Standing Counsel for the respondents 1, 3 and 4; Sri Arvind Srivastava-III for the respondent no.5; and Sri Manoj Kumar Singh for the respondent no.2 (the Commission).

9. Sri Khare appearing for the appellant submitted that placement of selected teachers in the colleges is to be made as per the procedure provided in the U.P. Higher Education Services Commission Act, 1980 (for short 1980 Act). Sub-section (4) of section 12 of the 1980 Act reads as under:-

"The manner of selection of persons for appointment to the posts of teachers of a college shall be such, as may be determined by regulations :

Provided that the Commission shall with a view to inviting talented persons give wide publicity in the State to the vacancies notified to it under sub-section (3):

Provided further that the candidates shall be required to indicate their order of preference for the various colleges vacancies wherein have been advertised."

10. Section 13 of the 1980 Act provides as follows:-

"[13. Recommendation of Commission. - *(1) The Commission shall, as soon as possible, after the notification of vacancies to it under sub-section (3) of Section 12, hold written examination and interview of the candidates and send to the Director a list recommending such number of names of candidates found most suitable in each subject as may be, so far practicable, twenty five per cent more than the number of vacancies in that subject. Such names shall be arranged in order of merit shown in the interview, or in the examination and interview if an examination is held.*

(2) The list sent by the Commission shall be valid till the receipt of a new list from the Commission.

(3) The Director shall having due regard in the prescribed manner, to the order of preference if any indicated by the candidates under the second proviso to sub-section (4) of Section 12, intimate to the management the name of a candidate from the list referred to in sub-section (1) for being appointed in the vacancy intimated under sub-section (2) of Section 12.

(4) Where a vacancy occurs due to death, resignation or otherwise during the period of validity of the list referred to in sub-section (2) and such vacancy has not been notified to the Commission under sub-section (3) of Section 12, the Director may intimate to the management the name of a candidate from such list for appointment in such vacancy.

(5) Notwithstanding anything in the preceding provisions, whereto abolition of any post of teacher in any college, services of the person substantively appointed to such post is terminated the State Government may make suitable order for his appointment in a suitable vacancy, whether notified under sub-section (3) of Section 12 or not in any other college, and thereupon the Director shall intimate to the management accordingly.

(6) The Director shall send a copy of the intimation made under subsection (3) or sub-section (4) or sub-section (5) to the candidate concerned."

11. Under Section 31 of the 1980 Act, the Commission may, with the previous approval of the State Government, make regulations. In exercise of that power, the Commission has made the Uttar Pradesh Higher Education Services Commission (Procedure for Selection of Teachers) Regulations, 1983 (for short 1983 Regulations). Regulation 7 of 1983 Regulations provides as follows:-

*"**7. Recommendation for appointment.** - (1) The Commission may recommend the names of up to three candidates, in order of merit, for each post.*

(2) The post of Principal shall-

(a) in the case of women's colleges, be offered to the candidates in the list of women candidates, and

(b) in the other colleges, be offered to the candidates in the general list after striking out the names of the women candidates who have been offered posts under clause (a).

(3) The posts of the Principal of degree colleges in the higher grade shall be offered in order of merit with due regard to the preference given by the candidates and the posts in the lower grade shall similarly be offered to the candidates standing next in order of merit.

(4) The procedure mentioned in sub-regulations (2) and (3) shall, mutatis mutandis, be followed in respect of the posts of teachers, other than Principal."

12. As to how the provisions of 1980 Act and the Regulations framed therein were to be applied was discussed extensively by a Division Bench of this Court in paragraph 9 of its judgment in the case of ***Km. Alka Rani Gupta v. Director of Education (Higher) and another; 2003***

(2) ESC 944 which was affirmed by a Full Bench of this Court in the case of ***Dr. Vinay Kumar v. The Director of Education (Higher) and Ors.: (2006) 1 UPLBEC 334 equivalent to 2006 (62) ALR 808***.

13. It has been urged that in **Dr. Vinay Kumar's case (supra),** the view taken by Division Bench in **Km. Alka Rani Gupta's case (supra)**, in paragraph 9 of the judgment, has been specifically affirmed in paragraph 42 of the judgment of the Full Bench in Dr. ***Vinay Kumar's case (supra)*** and the Full Bench observed, in paragraphs 36 and 37 of its judgment, that the Director at the time of making intimations is required to take into account only two things, in regard to every candidate, namely, the candidate's merit position as determined under section 13(1), and the preferential list of colleges or institutions given by the candidate himself. In paragraph 37, in ***Dr. Vinay Kumar's case (supra),*** the Full Bench further observed that the Director has to allot the candidates to different colleges on the basis of these two parameters only.

14. In paragraph 9 of Alka Rani's case (supra), it has been held as follows:-

"9. Thus, the legal position which emerges from the above provisions in the Act and Regulations is as follows :

(1) Where a large number of candidates are selected for various institutions by the Commission, the Commission has to prepare a select list in accordance with the merit determined by the Commission.

(2) The candidate who is on the top of the select list will be given his first preference ;

(3) Then the candidate who is at serial position No. 2 in the select list will be considered by the Director. If his first choice has already been filled by the candidate at the top of the select list, then this candidate will be given his second choice, otherwise he will get his first choice.

(4) Then we come to the candidate who is on the third position in the select list. If the choice of his first preference has not been already allotted to a candidate higher than him in the select list, he will be given that institution, otherwise he will be given his second choice, unless that too has been allotted to the candidate above him, in which case he will be allotted the institution of his third choice. In this way, the Director will do the placement."

15. By relying on the aforesaid judgment, the learned counsel for the petitioner submits that the reasoning recorded by the learned Single Judge fails to take into account the law laid down by Division Bench of this Court in ***Alka Rani's case (supra),*** which has been affirmed by the Full Bench in ***Dr. Vinay Kumar's case (supra)*** and therefore, the judgment and order of the learned Single Judge as well as the order impugned in the writ petition i.e. of the Director rejecting the representation of the petitioner is liable to be set aside and the Director must therefore accord fresh consideration to the representation submitted by the petitioner in light of the law laid down by this Court in ***Alka Rani's case (supra)***, affirmed in ***Dr. Vinay Kumar's case (supra).***

16. Per contra, the learned counsel for the respondent no.5 submitted that if the matter of allotment is to be reopened

afresh, several candidates placement would be affected therefore, in absence of they being party to the writ proceeding, relief sought cannot be granted to the petitioner. It has also been urged that the petitioner had joined the allotted institution therefore she has waived her right to challenge her placement. For this reason alone, the writ petition of the petitioner is liable to be dismissed and has rightly been dismissed.

17. Learned Standing Counsel has tried to justify the order passed by the Director and has supported the submissions made by Sri Arvind Srivastava-III, who appeared for the respondent no.5.

18. We have considered the rival submissions and have perused the record.

19. It is not in dispute, inter se parties, that in the order of merit, the writ petitioner (Dr. Anju Chaudhary) was placed at serial no. 200; the respondent no.5 (Dr. Charu Mehrotra) was placed at serial no. 205; and the respondent no.6 (Dr. Sunita Arya) was placed at serial no. 218. It is also not in dispute that in the order of preference submitted by the petitioner Mahila Mahavidyalaya, Kidwai Nagar, Kanpur, the college which has been allotted to the petitioner by the Director, was at serial no. 41 whereas, Gokul Das Hindu Girls' College, Moradabad, which has been allotted to respondent no.5, was at serial no. 20 and Acharya Narendra Dev Nagar Nigam Kanya Mahavidyalaya, Harsh Nagar, Kanpur, which has been allotted to respondent no.6, was at serial no. 34.

20. In ***Dr. Vinay Kumar's case (supra),*** the Full Bench examined the legislative scheme of the 1980 Act to find out as to what legislative intent is spelled out from the amended provisions of sections 12 and 13 thereof. The Full Bench on the use of phrase "**due regard**" in sub-section (3) of Section 13 of the 1980 Act, in ***Dr. Vinay Kumar's case (supra),*** observed, in paragraph 23 of the judgment, as follows:-

"23. From the definition of word "due regard" as noted above given in Black's Law Dictionary and the observations of the apex Court as quoted above it is clear that "due regard" means regard to a factor which is due according to the statutory scheme. It is also to be noted that Section 13(3) refers to " due regard" in the prescribed manner. Thus "due regard" used in Section 13(3) cannot be interpreted as only regard as sought to be canvassed by the counsel for the petitioner. In case the interpretation suggested by the counsel for the petitioner is accepted the placement of the candidate shall only depend on preference indicated by a candidate that will give a go by to the entire merit scheme. The above interpretation cannot be accepted which can be explained by giving a simple illustration. In merit list ten candidates have given their first preference of a particular college. For recommending the name of the candidate for the particular vacancy in a college, the preference of the candidate higher in merit has to be accepted. The amendment made in Sections 12 and 13 does not indicate that merit base scheme of recommendation of names against the particular vacancy has been given a go by. The merit is pivotal factor and the preference of the candidate has to be given effect to as far as possible. In the event for a particular college no one has given preference person lower in merit may get placement in that college when his chance comes for consideration. The interpretation sought to be canvassed by

the counsel for the petitioner does not fall along with the legislative scheme as indicated by amended provision of Sections 12 and 13 of the Act and the Regulations. It is true that those provisions of the regulation which can not stand along with the amended provisions of Sections 12 and 13 has to be treated as not operative but those part of the regulation which is not in conflict with any provisions of the Act, has still to be followed. This view of ours is re-enforced with express provisions of Sections 12 (4) of the amended provision which still refers to and relies the regulation for the manner of selection of persons for appointment."

21. Thereafter, in paragraph 24 of the judgment in ***Dr. Vinay Kumar's case (supra),*** the decision in ***Alka Rani's case (supra)*** was noticed. Paragraph 24 of the judgment in ***Dr. Vinay Kumar's case (supra)*** is extracted below:

*" 24. In the case of **Alka Rani Gupa (supra)**, a Division Bench of this Court said as follows in paragraph 9, which is set out below:-*

9. Thus the legal position which emerges from the above provisions in the Act and Regulations is as follows :

(i) Where a large number of candidates are selected for various institutions by the Commission, the Commission has to prepare a select list in accordance with the merit determined by the Commission.

(ii) The candidate who is on the top of the select list will be given his first preference.

(iii) Then the candidate who is at serial position No. 2 in the select list will be considered by the Director. If his first choice has already been filled by the candidate at the top of the select list then this candidate will be given his second choice, otherwise he will get his first choice.

(iv) Then we come to the candidate who is on the third position in the select list. If the choice of his first preference has not been already allotted to a candidate higher than him in the select list he will be given that institution, otherwise he will be given his second choice, unless that too has been allotted to the candidate above him, in which case he will be allotted the institution of his third choice. In this way the Director will do the placement."

22. In paragraphs 36, 37, 38 and 39 of the judgment of ***Dr. Vinay Kumar's case (supra)***, it was held as follows:-

"36. In our opinion, the Director at the time of making intimation is to take into account only two things, in regard to every candidate, namely, the candidate's merit position as determined under section 13(1), and the preferential list of colleges or institutions given by the candidate himself.

37. How the Director is to allot the candidates to the different colleges on the basis of these two items and these two items only are, with respect, correctly laid down by the Division Bench in paragraph 9 in Alka Rani's case (supra) and we agree with that paragraph in toto.

38. In our opinion the Director does not use a discretionary power in making intimations under sub-section (3) of section 13. Instead of the Director, any

other person with an equally logical mind as the Director will also be able to perform the same act but the Director has been given the authority, so as to carry conviction and to make it safe for the colleges to follow the recommendations and intimations coming under his signature.

39. The working of sub-section (3) of section 13 shows that Director's action is compulsorily prescribed by the said sub-section. Although the said sub-section does not refer to the merit list at all yet as laid down in paragraph 9 of Dr. Alka Rani's case (supra) the merit list must be considered by the Director and in this regard the Director cannot disregard sub-section (1) of section 13 and the exercise performed under that sub-section. The exercise by the Director is performed thereafter and must be performed thereon. "

23. From the decision of the Full Bench, it is clear that the Director has to accord due weightage to the merit list before making allotment of colleges. Thus, if we apply the ratio laid down in Alka Rani's case, affirmed in Dr. Vinay Kumar's case, the position that would emerge is that the candidate placed higher in the order of merit would have a first right to be appointed in the college opted than the person/candidate who is lower in the order of merit irrespective of that college being lower in the order of preference than in the preference list of the candidate lower in the order of merit. But, if the person higher in the order of merit is placed in a college which was higher in his order of preference, then his/her claim to the college allotted to the other candidate, lower in the order of merit, would not sustain.

24. As it is clear from the discussion above that the petitioner had placed Gokul Das Hindu Girls' College, Moradabad in the order of preference at serial no. 20 but was placed in a college which was at Serial No. 41 in the order of preference, whereas respondent no.5, though placed lower in the order of merit, was allotted the said college, in our view, the allotment/placement made by the Director was in the teeth of the law laid down by this Court in ***Alka Rani's case (supra)***, which has been affirmed by the Full Bench in ***Dr. Vinay Kumar's case (supra)***.

25. As the learned Single Judge has failed to take notice of the binding decisions of this Court in ***Alka Rani's case (supra)*** and in ***Dr. Vinay Kumar's case (supra)***, the view taken by the learned Single Judge cannot be sustained.

26. At this stage, we may deal with the other submission of the learned counsel for the respondent, which is, that since the petitioner had already joined the allotted college before filing this petition, she waived her right to challenge the placement made by the Director.

27. The aforesaid submission does not appeal to us because here the petitioner had earlier filed a writ petition, namely, Writ A No. 17108 of 2021, in which she had specifically challenged her placement. That writ petition was disposed off by giving her liberty to represent her cause to the Director who, in turn, was required to pass a speaking order after hearing the concerned respondent (Dr. Charu Mehrotra). It was specifically directed in the order dated 09.12.2021 that till the decision on the representation, the petitioner shall not be forced to join Mahila Mahavidyalaya, Kidwai Nagar, Kanpur. It

is only after the representation was decided that she had joined the college, without specifically giving up her right to challenge the order, because if she had not joined, her candidature would have been cancelled. In these circumstances, where the petitioner had been litigating for her cause, it cannot be said that she had waived her right to challenge the placement.

28. We also do not accept the submission of the learned counsel for the respondent no.5 that all the candidates were required to be impleaded in the writ proceedings. The reason is that the writ petitioner was seeking placement in the college where the respondent no.5 had been appointed though being lower in the order of merit than the petitioner. She was not seeking relief against any other person. In such circumstances, it was not required of her to implead all the selected candidates. Otherwise also, once the allocation/ placement is questioned and adjudicated upon, it is for the Director to adjust the allocation of colleges as per law.

29. For all the reasons recorded above, we are unable to agree with the view taken by the learned Single Judge. The judgment and order of the learned Single Judge dated 20.06.2022 is hereby set aside. The writ petition of the petitioner is allowed. The order of the Director dated 20.12.2021 is set aside and a direction is issued to the Director to pass a fresh order in respect of placement of the petitioner, as represented by her vide representation dated 16.12.2021, in accordance with the law, preferably, within a period of four weeks from the date a copy of this order is placed in his office.

30. The appeal is **allowed as above**.

(2023) 1 ILRA 455
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.12.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Special Appeal No. 671 of 2022
connected with
Special Appeal No.666 of 2022

Vice-Chancellor, Kanpur & Anr.
...Appellants
Versus
Dr. Lallu Singh & Anr. ...Respondents

Counsel for the Appellants:
Sri Rakesh Kumar

Counsel for the Respondents:
Sri Siddhartha Srivastava

A. Service Law – Constitution of India – Article 14 – Right of equality –Intelligible differentia – Pay parity – Junior was given higher pay, though discharging same duty – Effect – Junior obtained Ph.D. degree while in service, whereas the petitioner obtained the same before entry in service – Reason, how far justifiable for discrimination – Legal principle of pay parity laid down – Justifiable grounds, when the senior cannot invoke the equality doctrine, explained – Held, ordinarily, grant of higher pay to a junior would ex facie be arbitrary unless there is an intelligible differentia justifying it. No doubt, if there are justifiable grounds for doing so, the seniors cannot invoke the equality doctrine. Justifiable grounds could be such as (i) when pay fixation is done under valid statutory rules/ executive instructions; (ii) when persons recruited from different sources are given pay protection; (iii) when a senior is stopped at efficiency bar; (iv) when advance increments are given for experience/ passing a test / acquiring

higher qualifications or as incentive for efficiency. (Para 8 and 9)

B. Procedural law – Constitution of India – Article 226 – Writ – Non-joinder of necessary party – Though the University was made party, the St. and ICAR was not made party in writ petition – Effect – No objection regarding non-impleadment of St. was raised before the writ court – Objection for the first time in appeal, how far permissible – Held, the purpose of impleading a person as a party to a proceeding is to ensure that that person gets due opportunity to put its case in the proceeding. In the instant case, the Vice-Chancellor of the University, who is the principal officer of the University and is the best person to put forth the case of the University was party to the writ proceeding – High Court rejected the objection holding it hyper-technical ground. (Para 11)

Special Appeal dismissed. (E-1)

List of Cases cited:

1. St. of Andhra Pradesh & ors. Vs G. Sreenivasa Rao& ors.; (1989) 2 SCC 290

2. Govt. of A.P. & ors. Vs Veera Raghavan; (1999) 9 SCC 266

3. U.O.I. & anr. Vs R. Swaminathan & ors.; (1997) 7 SCC 690

4. Calcutta Municipal Corp. & anr. Vs Sujit Baran Mukherjee & ors.; (1997) 11 463

(Delivered by Hon'ble Manoj Misra, J.
&
Hon'ble Vikas Budhwar, J.)

1. As these two appeals are against a common judgment and order of the learned Single Judge dated 20.9.2022 in Writ-A No. 4194 of 2022, they are connected with each other and, with the consent of learned counsel for the parties, have been heard together and are being decided by a common judgment and order.

2. Writ-A No. 4194 of 2022 was filed by Dr. Lallu Singh (the appellant in Special Appeal No. 666 of 2022, who is also respondent no.1 in Special Appeal No. 671 of 2022) for quashing the orders dated 13.03.2020 and 16.07.2021 of the Director, Administration & Monitoring, Chandrashekhar Azad Krishi & Prodyogik Vishwavidyalay, Kanpur (for short the University) rejecting the claim of the writ petitioner (i.e. Dr. Lallu Singh) for stepping up his pay as to make it at par with his junior. The writ petitioner also prayed for a direction upon the University Authorities to step up the pay of the petitioner and make it at par with that of his juniors with effect from the date the juniors were given higher pay and to pay the arrears with interest.

3. The petitioner claimed for a step up in pay on the ground that by virtue of clause IV (ii) (d) of Indian Council of Agricultural Research (ICAR) circular letter dated March 3, 1999 two advance increments were to be awarded as and when a teacher of University acquires a Ph.D. Degree in his service career. On the basis thereof, the pay of many teachers, who obtained Ph.D degree during their service period, though junior to the writ petitioner, got raised and became higher than that of the petitioner therefore, on principle of pay parity, the writ petitioner was entitled to step up in pay. The University Authorities sought to justify rejection of the claim on following grounds: that the writ petitioner had entered service with Ph.D. degree and got its benefit as was available at that time for such additional qualification; whereas, the juniors with whom the writ petitioner claimed pay parity got Ph.D. degree during their service and, therefore, by virtue of ICAR circular dated March 3, 1999 they got two advance increments w.e.f.

27.07.1998 in the scale revised w.e.f. 01.01.1996; and that, the ICAR clarificatory circular, dated April 19, 2004, prohibited a claim by a senior for step up in his pay if, by such raise provided to his junior, the pay of the junior becomes higher than that of the senior.

4. What is undisputed is that the persons junior to the writ petitioner who were working on the same post were given higher pay only because they obtained Ph. D. degree during their service, which the writ petitioner held since the time of entry in service. It is also undisputed that the increment awarded to writ petitioner's junior was in light of ICAR circular letter dated March 3, 1999 which provided certain incentive for Ph.D./ M.Phil. The relevant clause of the Circular dated March 3, 1999 issued by ICAR is clause IV(ii)(d), which has been extracted below:

"A teacher will be eligible for two advance increments as and when he acquires Ph.D. degree in his service career."

5. The above part of the 1999 ICAR Circular was clarified by ICAR Circular dated April 19, 2004 in terms below: -

Sl No.	*Points of Doubt*	*Clarifications*
1	...	...
2	…	...
3	*Whether the pay of seniors can be stepped up at par with the juniors who get more pay as a result of grant of 4/2 advance increments granted for qualifications*	*The pay of seniors can not be stepped up if a junior drawing more pay on account of advance increments for acquiring Ph.D. Degree/M.Phil Degrees.*
...	...	…

6. The writ petitioner claimed that since the post on which he and his junior were working was same, the functions attached to the post were same, both got appointment through selection, the salary difference was not because any of them entered the cadre from a different stream, or with pay protection, there was no justification for the petitioner to be paid less than his junior only because the petitioner had obtained Ph.D. degree before entering service whereas, the juniors obtained after entering the service. In a nutshell the claim of the petitioner was based on the fundamental principle enshrined in Article 14 of the Constitution of India that there cannot be a class within a class and the differentiation in pay fixation has no rational basis.

7. The learned Single Judge after going through the record and pleadings of the parties took the view that the clarificatory cicular of the ICAR dated April 19,2004 is not to deprive the claim for pay parity by such seniors who hold Ph.D. degree/ M.Phil degree. Rather, it is to clarify that the senior would not have a right to claim pay parity if the junior gets the raise in pay on account of acquiring higher qualification.

8. Before we proceed further, it would be useful to notice legal principles governing pay parity. It is well settled that, ordinarily, grant of higher pay to a junior would ex facie be arbitrary unless there is an intelligible differentia justifying it. No doubt, if there are justifiable grounds for doing so, the seniors cannot invoke the

equality doctrine. Justifiable grounds could be such as (i) when pay fixation is done under valid statutory rules/ executive instructions; (ii) when persons recruited from different sources are given pay protection; (iii) when a senior is stopped at efficiency bar; (iv) when advance increments are given for experience/ passing a test / acquiring higher qualifications or as incentive for efficiency **(vide State of Andhra Pradesh and others v. G. Sreenivasa Rao and others, (1989) 2 SCC 290, reiterated in Govt. of A.P. & Ors. V. Veera Raghavan, (1999) 9 SCC 266)**; (v) where higher pay received by a junior is on account of his earlier officiation in the higher post because of local officiating promotion **(vide Union of India & Anr. v. R. Swaminathan & ors., (1997) 7 SCC 690). In Calcutta Municipal Corporation & Anr. v. Sujit Baran Mukherjee & Ors., (1997) 11 463**, the Supreme Court, in the context of stepping up pay of senior to match that of the junior, observed when all of them discharge the same duties and are under the same responsibility and not in different circumstances, the stepping up principle would apply.

9. In the instant case, there is no dispute that juniors to the writ petitioner were discharging the same duties and similarly circumstanced yet, admitted to higher pay only because they obtained Ph.D degree while in service whereas the writ petitioner held Ph. D. degree since before entry in service. This anomaly according to the learned single Judge was unjustified and discriminatory as there existed no intelligible differentia between the two. In our view, the learned single Judge is justified in taking the above view, because, a person who, in terms of qualifications, holds higher qualification from the very beginning i.e. since the time of entry in service cannot be put at a disadvantageous position qua the person who comes at par with him later. Nothing is shown either in the counter affidavit or in the order impugned in the writ petition that the junior drawing higher pay came from a different stream with pay protection or was discharging different duties or additional functions or had passed a test or was given increments out of additional experience, etc. Only ground taken is the ICAR circular dated March 3, 1999 and clarificatory circular dated April 19, 2004. In so far as 1999 circular is concerned, it provides that a teacher will be eligible for two advance increments as and when he acquires Ph.D. degree in his service career. This does not say that a teacher who is already Ph.D. is not entitled to the benefit. In so far as the clarificatory circular dated April 19, 2004 is concerned, in our view, it would bar a claim of such a senior who does not have Ph.D. degree but not of one who holds Ph.D degree. For the reasons above, we are in agreement with the view taken by the learned single Judge.

10. At this stage, Sri Rakesh Kumar, learned counsel for the University, submitted that the University derives its fund from the State Government as well as from ICAR, but neither the State Government nor the ICAR is a party in the writ petition therefore, the writ petition was liable to be dismissed for non-joinder of necessary parties. It has been submitted that even the University was not impleaded as opposite party. Only, the Vice-Chancellor of the University was impleaded as a party. For this reason alone, the petition was liable to be dismissed.

11. The aforesaid submission is hyper-technical. Had it been raised before

the learned single Judge either in the counter affidavit or orally, it might have reflected in the impugned judgment and order. The counter affidavit filed by the opposite parties in the writ proceedings is on record. A perusal thereof does not reflect that any such ground was taken. Had it been raised, the defect could have been cured by seeking impleadment of proper parties. Otherwise also, the purpose of impleading a person as a party to a proceeding is to ensure that that person gets due opportunity to put its case in the proceeding. In the instant case, the Vice-Chancellor of the University, who is the principal officer of the University and is the best person to put forth the case of the University was party to the writ proceeding and it was his decision which was communicated to the writ petitioner. Notably, he as well as the other officer of the University represented the University and a counter affidavit was also filed putting forth the stand of the University. In such circumstances, we do not find a good reason to set aside the order of the learned Single Judge on that technical ground.

12. In so far as non-impleadment of the State Government and the ICAR is concerned, the writ petitioner was employed by the University and his salary was paid by the University. Wherefrom the University sources its fund is not the concern of the petitioner. In such circumstances, we do not find any justification to set aside the order of the learned Single Judge on that ground.

13. At this stage, Sri Siddhartha Srivastava, who appears for the writ petitioner (Dr. Lallu Singh), presses his Special Appeal No. 666 of 2022 by submitting that the learned Single Judge should have awarded interest on the arrears payable on account of step up in the pay directed by the learned Single Judge.

14. We notice from the order of the learned Single Judge that he has directed step up in the pay of the writ petitioner with retrospective effect i.e. from the date when Dr. Hargyan Prakash, a junior to the writ petitioner, was first paid higher pay than the petitioner. From the submissions made at the Bar, we could assess that Dr. Hargyan Prakash was provided pay higher than what was paid to the writ petitioner from sometimes in the year 2007, may be from a back date. Although it is stated that the writ petitioner had been representing his cause since 2011 but the representation which was pressed was made in the year 2017. No doubt, since then the petitioner had been diligent in pursuing his claim but had been lethargic in pursuing his claim earlier. We, therefore, deny the prayer of the petitioner for interest on the dues from the back date.

15. In light of the discussion above, both the appeals fail and are **dismissed**. The judgment and order of the learned Single Judge is affirmed.

(2023) 1 ILRA 459
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.12.2022

BEFORE

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

Special Appeal No. 781 of 2011

The Managing Director, Pradeshik Cooperative Dairy Federation Ltd. & Ors.
...Appellants
Versus
Virendra Kumar Srivastava & Ors.
...Respondents

Counsel for the Appellants:
Sri G.D. Mishra

Counsel for the Respondents:
Sri S.C. Srivastava, Sri V.K. Saxena, Sri A.K. Tripathi, Sri Arvind Kumar Tripathi, Sri Shyamal Kumar Prayagi, Sri S.V. Srivastava

A. Service Law – UP Cooperative Societies Act, 1965 – UP Cooperative Societies' Employees' Service Regulations, 1975 – Reg. 87 – Notification dated 04.03.1972 and 17.11.1979 – Dismissal from Service – No approval of UP Cooperative Institution Service Board was taken by PCDF before passing dismissal order – Effect – Regulation of 1975, how far applicable to the PCDF – Held, the PCDF is no longer under the purview of the Board as regards recruitment, training and disciplinary control of its employees after the issue of the Notification dated 17.11.1979 – While the Regulations of 1975 would continue to apply to the PCDF, Reg. 87, which mandates prior concurrence of the Board before any of the specified major penalties, in sub-clauses (e), (f) and (g) of Clause (i) of Regulation 84 are imposed, would not be applicable to the PCDF – PCDF would not at all be required to obtain the prior concurrence of the Board before imposing any of the specified major penalties – Held further, the learned Single Judge has misunderstood the eloquent exposition of the law in Vishwanath Gupta-III and Vishwanath Gupta-II. (Para 25 and 27)

Special appeal allowed and Writ petition dismissed. (E-1)

List of Cases cited:

1. Special Appeal No. 992 of 1997; Pradeshik Cooperative Dairy Federation Ltd. & anr. Vs Vishwa Nath Gupta & ors. decided on 27.08.2007

2. Civil Appeal No. 7676 of 2009; M.D., Pradeshik Co-op. Dairy Fedn. Ltd. & anr. Vs V ishwanath Gupta decided on 19.05.2014

3. Vishwanath Gupta Vs Pradeshik Cooperative Dairy Federation & ors.; 1998 (80) FLR 457

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

1. This is a respondents' appeal, arising out of the judgment of the learned Single Judge dated April 1, 2011, allowing the writ petition and setting aside the order of dismissal from service dated June 21, 1996 passed against the writ petitioner-respondent No. 1 to this appeal. By the impugned judgment, the learned Single Judge has further directed payment of 50% back-wages. Liberty was given to the respondents to pass a fresh order in accordance with law.

2. Shorn of unnecessary details, the facts are that the writ petitioner was appointed as a Project Operator with the Pradeshik Cooperative Dairy Federation Limited, Lucknow (for short, "the PCDF'), an Apex Milk Cooperative Society, as envisaged in Section 2(a-4) of the Uttar Pradesh Cooperative Societies Act, 1965 (for short, "the Act of 1965'). A Project Operator in the employ of the PCDF holds a Class-IV post. The writ petitioner was charge-sheeted on charges of embezzlement and misappropriation of the PCDF's money. After a departmental inquiry, he was dismissed from service on June 21, 1996 by an order passed by the Managing Director, PCDF.

3. The writ petition was filed, challenging the order of dismissal from service and for consequential reliefs. After exchange of affidavits, the writ petition was allowed by the learned Single Judge vide order dated April 1, 2011 on the short ground that the order of dismissal could not be passed by the PCDF without the

approval of the U.P. Cooperative Institutional Services Board (for short, "the Board') under Regulation 87 of the Uttar Pradesh Cooperative Societies' Employees' Service Regulations, 1975 (for short, "the Regulations of 1975'). The respondents to the writ petition, who are the Managing Director and two other Officers of the PCDF, have filed appeal against the judgment of the learned Single Judge.

4. Heard Mr. G.D. Mishra, learned Counsel for the PCDF and Mr. S.C. Srivastava, learned Counsel appearing for the writ petitioner-respondent.

5. It is submitted by Mr. G.D. Mishra, learned Counsel for the PCDF that the learned Single Judge has recorded a wrong finding to the effect that in the counter affidavit, the PCDF had taken a stand that the Regulations of 1975 are not applicable to them, whereas what they say in the counter affidavit is that the Regulations of 1975 apply, except the provisions thereof dealing with recruitment, training and disciplinary control, which have been excluded under the statutory Notification dated November 17, 1979, insofar as the PCDF is concerned. The learned Counsel has drawn the Court's attention to Paragraph No. 27 of the counter affidavit at Page No. 120 of the Paper-book. It is argued by Mr. Mishra that the State constituted the Board for recruitment, training and disciplinary control of employees of Apex Level Societies, Central or Primary Societies in the exercise of their powers under Section 122 of the Act of 1965 vide Notification dated March 4, 1972, as amended on February 7, 1973. In terms of the Notification dated March 4, 1972, the Regulations of 1975 in their entirety apply, including Regulation 87. By a subsequent Notification dated November 17, 1979, according to the learned Counsel for the PCDF, the Notification dated March 4, 1972 was modified and the Apex Level Milk Society i.e. the PCDF, Central or Primary Milk Societies, whose area of operation extended to more than one district or State and Cooperative Milk Unions, including Kanpur Cooperative Milk Board, have been excluded from the purview of the Board.

6. It is further argued by Mr. G.D. Mishra that the learned Single Judge has committed an error, in taking the view that the order dismissing the writ petitioner from service, is bad in law, because no prior approval of the Board was obtained as required by Regulation 87 of the Regulations of 1975. The learned Counsel submitted that the learned Judge has reached the aforesaid conclusion following the decision of a Division Bench of this Court in **Special Appeal No. 992 of 1997,** titled as "**Pradeshik Cooperative Dairy Federation Ltd. and another vs. Vishwa Nath Gupta and others**', decided on August 27, 2007 (for short, "Vishwa Nath Gupta-I'), which is clearly distinguishable about the point on which the decision turned and received affirmation of the Supreme Court in **Civil Appeal No. 7676 of 2009, titled as "M.D., Pradeshik Co-op. Dairy Fedn. Ltd. & anr. vs. Vishwanath Gupta**', decided on May 19, 2014 (for short, "**Vishwanath Gupta-II').**

7. The learned Counsel for the writ petitioner, on the other hand, says that the decision of the learned Single is flawless and submits that the decision of the Division Bench in **Vishwa Nath Gupta-I**, which it has followed to hold prior approval by the Board mandatory, before passing the order of dismissal from service, has received the approval of the Supreme

Court in **Vishwanath Gupta-II**. It is submitted that the PCDF has never been excluded from the regime of the Regulations of 1975, which continue to apply to it. Therefore, the mandatory requirement envisaged under Regulation 87 of the Regulations of 1975 obliging the PCDF to obtain prior concurrence of the Board before inflicting the punishment, enumerated in Regulation 84(i)(g) of the Regulations of 1975 continues to apply. It is, particularly, argued by Mr. S.C. Srivastava that a reading of the Notification dated March 4, 1972, as amended by Notification dated February 7, 1973 issued under Section 122 of the Act of 1965 together with Notification dated November 17, 1979, also issued under Section 122, does not spare a shadow of doubt that the provisions relating to disciplinary control under the Regulations of 1975 have not been excluded. It is submitted that an order of dismissal from service cannot be passed by the PCDF against an employee of theirs without prior concurrence of the Board under Regulation 87. It is also emphasized that the judgment of the learned Single Judge is squarely supported by the principles laid down by Division Bench of this Court in **Vishwa Nath Gupta-I.**

8. We have considered the submissions advanced by learned Counsel appearing for the parties and perused the record.

9. There is no issue between parties that the PCDF is an Apex Society, as defined under Section 2(a-4) of the Act of 1965, which is governed by the provisions of the said Act.

10 . Sections 121 and 122 of the Act of 1965, both of which speak about the framing of service regulations for employees of Cooperative Societies and also about establishment of the Board by the State Government for recruitment, training and disciplinary control of employees of Cooperative Societies or a class of Societies, may be quoted. These read as under:

"Section 121 - Power of Registrar to determine terms of employment of society.- (1) The Registrar may, from time to time, frame regulation to regulate the emoluments and other conditions of service including the disciplinary control of employees in a co-operative society or a class of co-operative societies and any society to which such terms are applicable, shall comply with those regulations and with any orders of the Registrar, issued to secure such compliance.

(2) The regulations framed under sub-section (1) shall be published in the Gazette and take effect from the date of such publication.

Section 122. Authority to control employees of co-operative societies.- (1) The State Government may constitute an authority or authorities, in such manner as may be prescribed, for the recruitment, training and disciplinary control of the employees of co-operative societies, or a class of co-operative societies, and may require such authority or authorities to frame regulations regarding recruitment, emoluments, terms and conditions of service including disciplinary control of such employees and subject to the provisions contained in Section 70, settlement of disputes between an employee of a co-operative society and the society.

(2) The regulations framed under sub-section (1) shall be subject to the

approval of the State Government and shall, after such approval, be published in the Gazette, and take effect from the date of such publication and shall supersede any regulations made under Section 121."

11. In exercise of powers under Section 122 of the Act of 1965 read with Rule 389-A of the U.P. Cooperative Societies Rules, 1968, the State Government constituted the Board vide Notification No. 366-C/XII-C-3-36-71, published in the U.P. Gazette, Extra-ordinary dated March 4, 1972, which was amended by Notification dated February 7, 1973. The Board was constituted for the purpose of recruitment, training and disciplinary control of employees of Apex Level Societies, Central or Primary Societies, excluding Cooperative Cane Development Unions as also the U.P. Cooperative Cane Unions Federation Limited, Lucknow. The Apex Level Societies, that were placed under the purview of the Board, are those whose area of operation extended to more than one district or State. Also, placed under the purview of the Board are the District or Central Cooperative Banks, District Cooperative Federations, Cooperative Milk Unions, including Kanpur Milk Board, Cooperative Cane Sugar Factories, Cooperative Textile Mills and Cooperative Housing Federation. The constitution of Board was spelt out by the Notification dated March 4, 1972 and the Board was invested with power to frame regulations regarding recruitment, emoluments, besides terms and conditions of service, including disciplinary control of employees, serving Societies under the purview of the Board. The Board in exercise of its powers, under the Notification creating it, proceeded to frame the Regulations of 1975. The regulations were approved by the Government and published in accordance with sub-Section (2) of Section 122 of the Act of 1965 vide Notification No. 7515 (C)/ XII-C-37-74, in the U.P. Gazette, Extraordinary dated January 6, 1976.

12. Chapter VII of the Regulations of 1975 provides for penalties, disciplinary proceedings and appeals vis-a-vis employees of Cooperative Societies governed by the Regulations.

13. Regulation 84 specifies the various penalties, that may be imposed upon an employee as also the broad grounds, on the basis of which that may be done. Regulation 84(i) reads as under:

"84. Penalties.- (i) Without prejudice to the provisions contained in any other regulation, an employee who commits a breach of duty enjoined upon him or has been convicted for criminal offence or an offence under section 103 of the Act or does anything prohibited by these regulations shall be liable to be punished by any one of the following penalties: -

(a) censure,

(b) with holding of increment,

(c) fine on an employee of Category IV (peon, chaukidar, etc.).

(d) recovery from pay or security deposit to compensate in whole or in part for any pecuniary loss caused to the co-operative society by the employee's conduct,

(e) reduction in rank or grades held substantively by the employee,

(f) removal from service, or

(g) dismissal from service"

14. Regulation 87 mandates that an order inflicting penalties under sub-clauses (e) to (g) of Clause (i) of Regulation 84 shall not be made without the prior concurrence of the Board. The Notification dated March 4, 1972, whereby Apex Level Societies, Central or Primary, were placed under the purview of the Board, was modified by a Notification dated November 17, 1979 issued by the State Government in exercise of their powers under sub-Section (1) of Section 122 of the Act of 1965 read with Rule 389-A of the Rules framed under the Act of 1965 vide Notification No. 4326/XII-P-4-79-3(59)-78 dated November 17, 1979. The Notification dated November 17, 1979 reads as under:

"IN pursuance of the provisions of sub-section (1) of Section 122 of the Uttar Pradesh Co-operative Societies Act, 1965 (U.P. Act no. XI of 1966), read with Rule 389-A of the U.P. Co-operative Societies Rules, 1968 and section 21 of the U.P. General Clauses Act, 1904 (U.P. Act no. 1, 1904) and in partial modification of notification No. 366-C/XII-C-3-36-71 dated March 4, 1972, the Governor is pleased to order that the U.P. Co-operative Institutional Service Board constituted under the said notification shall forthwith cease to operate regarding the recruitment, training and disciplinary control of the employees of the Apex Level Milk Society i.e. the Pradeshik Cooperative Dairy Federation, Central or Primary Milk Societies, whose area of operation extends to more than one district or State and Co-operative Milk Unions, including Kanpur Co-operative Milk Board.

2. Further the Governor, is pleased to constitute a Selection Committee for the recruitment of category I and II employees, as specified by the Registrar from time to time, of the Apex Level Milk Society i.e. the Pradeshik Co-operative Dairy Federation, Central Milk Societies and Co-operative Milk Unions including Kanpur Co-operative Milk Board. The said Selection Committee shall consist of the following members :-

1.	An officer nominated by the State Government	-Chairman
2.	A representative of National Dairy Development Board	Member
3.	Principal, Agricultural Institute, Naini, Allahabad	Member
4.	One Chairman of a Co-operative Milk Union or Central Milk Society in the State nominated by the State Government	Member
5.	Managing Director, Pradeshik Co-operative Dairy Federation	Member-Secretary."

15. It is the writ petitioner's case that the order of dismissal passed against him is bad on account of prior concurrence of the Board having not been obtained by the PCDF.

16. The learned Counsel for the PCDF has urged that in view of the Notification dated November 17, 1979, the PCDF has been excluded from the purview of the Board and their prior concurrence is not required to impose any penalty upon the writ petitioners.

17. We find that the learned Single Judge has based his finding that the writ

petitioner's termination is in violation of Regulation 87 of the Regulations of 1975 on account of absence of prior concurrence of the Board, upon the judgment of the learned Single Judge of this Court in **Vishwanath Gupta vs. Pradeshik Cooperative Dairy Federation & Ors. 1998(80)FLR 457** (for short, "Vishwanath Gupta-III'), that was upheld by the Division Bench in **Vishwa Nath Gupta-I.**

18. In **Vishwanath Gupta-III,** it was held by the learned Single Judge of this Court:

"4. It appears from the notification dated 17.11.1979 that only U. P. Cooperative Institutional Service Board was ceased to operate regarding, recruitment, training and disciplinary control of the employees. It does not say that 1975 Regulations shall cease to operate. On the contrary, it is only the Institutional Service Board which ceased to operate, thereby it means that the jurisdiction which was due to be exercised by the Institutional Service Board, can be exercised by the authority managing such society, whose Jurisdiction was taken away and conferred on the Institutional Service Board by virtue of 1975 Regulations. By reason of the said notification, the jurisdiction of the Committee of Management or controlling authority of the society, was revived and restored within the ambit of 1975 Regulations. The said fact stands clarified by reason of the communication or letter Issued by the Milk Commissioner dated 17th September, 1981 contained in Annexure S.A. 1 to the supplementary affidavit filed today. Even without clarification as observed earlier, the said Regulations remained applicable which was only specifically mentioned. Therefore, it is not that by virtue of the said order (S. A. 1), 1975 Regulation is applicable but by virtue of the notification dated 17.11.1979, the application of 1975 Regulation was never withdrawn. Then again in the counter-affidavit, it has been urged that the services of the petitioner were terminated according to 1975 Regulation on account of absconding of the petitioner from service. During the course of his arguments, learned counsel for the respondent, had drawn my attention to Regulation 85 (ii) (b) of 1975 Regulations that services of an employee can be terminated without holding any disciplinary proceeding if he had absconded within the mantling of clause (b) aforesaid. Therefore, preliminary objection cannot be accepted and is accordingly overruled."

19. The Division Bench in **Vishwa Nath Gupta-I** upheld the learned Single Judge's opinion on the point, observing:

"In view of the aforesaid settled legal position it has to be examined in the facts of the present case as to whether the issuance of the notification dated 17.11.1979 whereby the Pradeshik Co-operative Dairy Federation has been withdrawn from the purview of the U.P. CO-operative Institutional Services Board would have effect of making the provisions of U.P. Co-operative Societies Employees Services Regulation, 1975, inapplicable to the employees of the Society. This Court may record that the Hon'ble Single Judge has specifically held that notification dated 17.11.1979 only provided that the Institutional Board shall have no control qua recruitment training and disciplinary control of the employees of Pradeshik Co-operative Dairy Federation. The notification does not provide that Regulation of 1975 would cease to apply. The aforesaid aspect of the matter stands

clarified by reason of the communication of the Milk Commissioner who is also the Registrar of the Milk Co-operative Societies dated 17.9.1981 which provided that the statutory Regulations of 1975 would continue to be applicable to the employees of Pradeshik Cooperative Dairy Federation.

The Hon'ble Single Judge has rightly held that at no point of time the applicability of Regulation 1975 was withdrawn qua the employees of Pradeshik Co-operative Dairy Federation Ltd. Once it has been found that the statutory Regulations of 1975 were applicable, it would be seen that the impugned order of termination is in teeth of Regulation 85 (II) (b) of the U.P. Co-operative Societies Employees Services Regulation, 1975. This Court, therefore, hold that the judgment of the Hon'ble Single Judge allowing the writ petition is in accordance with law."

20. Upon Appeal by Special Leave, the Supreme Court in **Vishwanath Gupta-II** upheld the learned Single Judge's opinion, as affirmed by the Division Bench and observed:

"The facts are not in dispute. The question that emerges for consideration is whether the interpretation placed by the High Court of Regulation 85 (ii) (b) is correct and whether the High Court has oppositely opined that the terms and conditions enshrined in the said Regulation had not been complied to attract its applicability. To appreciate the controversy, it is necessary to reproduce the said Regulation:

"85. Disciplinary proceedings: (1) the disciplinary proceedings against an employee shall be conducted by the Inquiring Officer (referred to in clause (iv) below with the due observance of the principles of natural justice for which it shall be necessary:-

(ii (a) Where an employee is dismissed or removed from service on the ground of conduct which was led to his conviction on a criminal charge; or

(b) Where the employee has absconded and his whereabouts are not known to the society for more than three months; or

(c) Where the employee refused or fails without sufficient cause to appear before the Inquiry Officer when specifically called upon in writing to appear; or

(d) Where it is otherwise (for reasons to be recorded) not possible to communicate with him, the competent authority may award appropriate punishment without taking or continuing disciplinary proceedings disciplinary proceedings."

On a bare reading of the said Regulation, it is quite vivid that to attract the said Clause, two conditions precedent, namely, absconsion of the employee and, second, the employer i.e. the Society should be in a position to form an opinion that whereabouts of the employee are not known to the employer for more than three months. The High Court has found that the second condition was not satisfied. The reasoning given by the High Court reads as follows:

x x x x x

We find that the reasons assigned by the High Court on the backdrop of the facts are absolutely sound. The conditions precedent were not satisfied and hence, the

employer without holding an enquiry could not have terminated the services of the respondent. Be it noted, it is an exceptional clause and, therefore, the conditions precedent are to be strictly construed."

21. A careful reading of the judgment of the learned Single Judge in **Vshwanath Gupta-III** shows that the decision in that case did not turn on the issue of prior concurrence by the Board to the penalty imposed, but upon the point that the conditions precedent to the exercise of powers under Regulation 85 (ii) (b) were not fulfilled.

22. No doubt, an issue was raised in Vishwanath Gupta-III that a writ petition to challenge the termination of services of an employee of the PCDF was not maintainable, because it was not "State' and by virtue of the Notification dated November 17, 1979, the PCDF was no longer under the purview of the Board, but this Court did not accept the PCDF's contention regarding the maintainability of a writ petition against them by an employee questioning the imposition of a penalty. It was opined that it is only the Board, whose jurisdiction has ceased under the Regulations of 1975 and can now be exercised by the Authority managing the concerned Society, which was earlier taken away and conferred on the Board by virtue of the Regulations of 1975. It was also held that the Notification dated November 17, 1979 has not placed the PCDF beyond the purview of the Regulations of 1975. The other provisions of the Regulations of 1975, including those in Chapter VII were, therefore, held, in the opinion of this Court, to be applicable to the PCDF.

23. The logical corollary of the holding in **Vishwanath Gupta-III** is that after issue of the Notification dated November 17, 1979, prior concurrence of the Board before one or the other specified major penalties were imposed on an employee of the PCDF was no longer necessary. But, that was not the *ratio decidendi*. The Division Bench in Special Appeal No. 992 of 1997 also upheld the learned Single Judge not on the point that prior concurrence of the Board was necessary before termination of services of an employee of the PCDF, but that the Regulations of 1975 continue to be applicable notwithstanding withdrawal of jurisdiction of the Board vide Notification dated November 17, 1979. And, therefore, the termination before the Court in that case was in teeth of Regulation 85(ii)(b) of the Regulations of 1975.

24. The holding of their Lordships of the Supreme Court in Vishwanath Gupta-II upholding both the learned Single Judge and the Division Bench also is to the effect that the termination of the employee in the cause before the Court was in violation of Regulation 85(ii)(b) of the Regulations of 1975, which continue to apply notwithstanding the Notification dated November 17, 1979.

25. In our opinion, therefore, the learned Single Judge was not right in holding that the Division Bench in **Vishwa Nath Gupta-I** having opined that the Regulations of 1975 were applicable to the PCDF, prior concurrence of the Board had to be obtained by the PCDF before passing the impugned order of dismissal. In our opinion, the learned Single Judge has misunderstood the eloquent exposition of the law in **Vishwanath Gupta-III and Vishwanath Gupta-II,** that is, both in the judgment of the learned Single Judge and the Division Bench there, which clearly lay

down that in view of the Notification dated November 17, 1979, the Regulations of 1975 have not been withdrawn and continue to regulate the service conditions of employees of the PCDF, but the control and the jurisdiction of the Board no longer extends to the PCDF. It is this removal of the jurisdiction of the Board under the Regulations vis-a-vis the PCDF by the Notification

26. The learned Single Judge has proceeded to opine on the premise that since the Regulations of 1975 have been held to apply to the PCDF by the learned Single Judge in **Vishwanath Gupta-III** and the Division Bench in **Vishwanath Gupta-I**, the impugned order of dismissal without compliance with Regulation 87, that is to say, without obtaining prior concurrence of the Board is bad. We are afraid that this is not at all so.

27. Upon a careful reading of the Notification dated March 4, 1972 and the subsequent Notification dated November 17, 1979, we are of opinion that it is not that the Regulations of 1975 have ceased to apply to the PCDF, but it is indubitable that the PCDF is no longer under the purview of the Board as regards recruitment, training and disciplinary control of its employees after the issue of the Notification dated November 17, 1979. Therefore, in our considered opinion, while the Regulations of 1975 would continue to apply to the PCDF, Regulation 87, which mandates prior concurrence of the Board before any of the specified major penalties, in sub-clauses (e), (f) and (g) of Clause (i) of Regulation 84 are imposed, would not be applicable to the PCDF. The PCDF would not at all be required to obtain the prior concurrence of the Board before imposing any of the specified major penalties.

28. No other point has been argued before us to support the judgment of the learned Single Judge.

29. In our opinion, therefore, the impugned order passed by the learned Single Judge cannot be sustained.

30. This Special Appeal is allowed, the impugned judgment and order passed by the learned Single Judge is set aside and the writ petition dismissed.

(2023) 1 ILRA 468
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.12.2022

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ-A No. 2830 of 2020

Rampyari @ Budhrani ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Jitendra Kumar Mishra, Sri Ram Naresh Singh, Sri Sarvesh Singh, Sri Shiv Datta Yadav

Counsel for the Respondents:
C.S.C.

A. Service Law – Compassionate appointment – Live in partner's right – Petitioner was married to someone else – Though the marriage was not dissolved, she claimed herself to be wife of deceased – Claim of compassionate appointment, how far considerable – Held, a legally wedded wife of one person may never be heard to claim compassionate appointment against death of her live in partner, during subsistence of her marriage – Citizens may exercise their free choice in these matters i.e. to live

such life as may not infringe with law yet, the Court can only recognise the legal right and act to protect the same – Though the petitioner's life and liberty was protected despite her choice to live outside her marriage, at present the law may not recognise the right of the petitioner to compassionate appointment for reason of death of her live in partner. (Para 10 and 11)

Writ petition dismissed. (E-1)

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. Heard Sri Shive Datta Yadav learned counsel for the petitioner and Dr. Santosh Shukla learned Standing Counsel for the State respondents.

2. Supplementary affidavit filed today, taken on record. Also, learned Standing Counsel has produced original service book of the deceased Ram Sajivan. Original marriage agreement between the petitioner and Ram Sajivan dated 24.6.2006 has also been produced by learned counsel for the petitioner.

3. Present petition has been filed to challenge the order dated 10.8.2019 passed by the District Inspector of Schools, Fatehpur. Thereby the said authority has rejected the application for grant of compassionate appointment made by the petitioner arising from the death of Ram Sajivan who died in harness on 20.1.2014 while working on the post of Peon at Sukhdev Inter College, Khaga, Fatehpur.

4. In rejecting the application made by the petitioner, the District Inspector of Schools, Fatehpur has considered the affidavit of the mother of the deceased namely Phoolmati dated 12.8.2014 wherein she had stated, her son Ram Sajivan died a bachelor. Also, service book of the deceased did not support the claim made by the petitioner that she was the married wife of the deceased.

5. In the present proceedings, learned counsel for the petitioner has first relied upon a compromise stated to have been arrived between the petitioner and the sisters of the deceased Ram Sajivan namely Ms. Durga Devi, Ms. Sharda Devi and Ms. Lakshmi. It is dated 11.7.2018. It may be noted, the mother of the deceased Phoolmati died on 13.1.2017. Therefore, though her name appears in the compromise deed, she is not a signatory thereto.

6. Upon such facts being noted, learned counsel for the petitioner was required to file supplementary affidavit to bring on record the certificate to establish the occurrence of death of Smt. Phoolmati. Further, original of the Marriage Agreement (relied upon by the petitioner), was also required to be produced.

7. Having heard learned counsel for parties and having perused the record, it now transpires, petitioner was first married to one Hori Lal, as has been stated in paragraph-4 of the supplementary affidavit, filed today. During subsistence of that marriage and without its legal dissolution, petitioner claims to have entered into a relationship with the deceased Ram Sajivan pursuant whereto they entered into a written agreement described as Marriage Agreement. It is dated 24.6.2006.

8. Original document produced today indicates, the same has been signed by one in the name Ram Sajivan and the other in the name Budhrani. That document does not mention any alias of

the said Budhrani. It describes that person as daughter of Om Prakash. Signatures affixed to that Marriage Agreement is also in the writing-Budhrani. Then, though the document has been prepared on 24.6.2006, it has been stamped on 26.9.2005. Also, grave doubt exists as to the identity of the petitioner being the same person who may have entered into Marriage Agreement with the deceased. It is so because the signatory of that document did not describe herself as Budhrani @ Ram Pyari. She also did not disclose her parentage in that document.

9. Present petition has been filed by Ram Pyari @ Budhrani. Affidavit thereto is of one Ram Pyari. It does not disclose any alias of the said Ram Pyari. Identity of said Ram Pyari has been claimed on the strength of a photostat copy of Voter ID Card. It also describes the holder of that card to be Ram Pyari and not Ram Pyari @ Budhrani. Facts, noted above may themselves prevent the Court from granting any relief under Article 226 of the Constitution to such a person about whose identity there exists grave doubt.

10. Yet, a more serious objection exists-the petitioner admits to have married one Hori Lal in the year 2006 and further that that marriage was never legally dissolved. Being Hindu, by religion, it is difficult to accept the status of the petitioner as the legally wedded wife of the deceased Ram Sajivan, during lifetime of Hori Lal. No fact disclosure has been made as to the identity of Hori Lal or his current status. A legally wedded wife of one person may never be heard to claim compassionate appointment against death of her live in partner, during subsistence of her marriage.

11. Citizens may exercise their free choice in these matters i.e. to live such life as may not infringe with law yet, the Court can only recognise the legal right and act to protect the same. Thus, though the petitioner's life and liberty was protected despite her choice to live outside her marriage, at present the law may not recognise the right of the petitioner to compassionate appointment for reason of death of her live in partner. That law being Rule driven, the petitioner is found not covered by any category of heirs of the deceased entitled to compassionate appointment. The Service Book of the deceased also does not include the name of the petitioner as a family member of the deceased.

12. For the reasons noted above, writ petition lacks merit and is **dismissed**.

13. The original service book of the deceased has been returned to the learned Standing Counsel and the original Marriage Agreement has been returned to learned counsel for the petitioner after due perusal.

(2023) 1 ILRA 470
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.01.2023

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-A No. 3042 of 2015

Rajendra Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Som Kartik, Sri Piyush Mishra

Counsel for the Respondents:
C.S.C., Sri Abhishek Dwivedi, Sri Ajay Kumar, Sri Dileep Kumar Mishra, Sri Jogendra Nath Verma

A. Service Law – Post of Head Master – Appointment – Requisite qualification, non-possession thereof – Concealment of material fact – Effect – Principle of natural justice, how far applicable – Held, considering the fact that the petitioner never had the requisite qualification for appointment, the non following of principles of natural justice would have no effect on outcome of the petition as it is well settled that in service jurisprudence the allegations of violation of principles of natural justice have to be fortified by the test of prejudice caused on account of violation of principles of natural justice. (Para 16)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Abhiram Vs St. of U.P. & ors.; 2021 (2) ALJ 102

2. Sushil Kumar Dwivedi Vs Basic Shiksha Adhikari, Banda & ors.; (2003) 2 UPLBEC 1216

3. Ram Surat Yadav& ors. Vs St. of U.P.& ors. (2014) 1 UPLBEC 1

4. Ram Surat Yadav& ors. Vs St. of U.P.& ors. (2014) 1 UPLBEC 1

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

1. Heard learned Counsel for the petitioner, learned Standing Counsel for the respondent no.1, learned Counsel for the respondent no.2, Sri Ajay Kumar, learned Counsel appearing on behalf of the respondents no.3 and 4 and Sri Dileep Kumar Mishra,

2. The present petition has been filed challenging the order dated 11.05.2015 whereby the appeal filed by the Committee of Management against the order of Basic Education Officer rejecting the resolution of termination of the petitioner's services was allowed.

3. Subsequently during the pendency of the writ petition, an amendment application was filed in view of the fact that in pursuance to the appeal being allowed, a fresh order had been passed on 19.09.2015 whereby the Basic Education Officer has accepted the resolution of the Committee of Management for removal of the petitioner from the institution in question.

4. The facts in brief are, that the petitioner claiming to have the requisite qualification applied for being appointed to the post of Headmaster with the College run by the respondent no.5. Initially, the appointment was granted to the petitioner and the appointment of the petitioner was also recognized by the Basic Education Officer and the petitioner continued to work in the institution, for almost 10 years.

5. It is argued that subsequent to the said period, proceedings were initiated against the petitioner for having obtained the appointment as well as the approval by concealing the material facts. The petitioner was served with the charge-sheet dated 10.11.2014 by the Committee of Management calling upon the petitioner to show cause as to why the appointment granted to him may not be cancelled in view of the fact that the same has been obtained by concealing the material facts.

6. In support of the said, the first charge as levelled against the petitioner was for obtaining the employment, the petitioner had placed reliance on two Experience Certificates having been issued by one Indian Public Inter College,

Lucknow, where the petitioner had allegedly worked as an Assistant Teacher from July, 1998 to 10.03.2000 and the certificate issued by one Survodya Public Inter College, Lucknow, where the petitioner had admittedly served as an Assistant Teacher from July, 2000 to 10.08.2003. The petitioner gave a reply to the said show cause notice denying the allegations. The said show cause notice was held by the respondents to be without any merit and orders were passed holding that the appointment of the petitioner in both the said schools were without the requisite qualifications on the date of appointments. It was also recorded that although the Survodya Public Inter College, Lucknow had not responded to the efforts for finding the truth, Indian Public Inter College had given its report. Finding the explanation given by the petitioner to be unacceptable, a resolution came to be passed on 30.11.2014 terminating the services of the petitioner. The said order of termination passed through resolution by the respondent no.5 was sent for approval before the Basic Education Officer who by means of an order dated 16.01.2015 disapproved the resolution of the Committee of Management.

7. The said order rejecting the approval, was challenged in an appeal by the Committee of Management before the Secretary, Board of Basic Education, Prayagraj. The said appeal came to be allowed on 11.05.2015 whereby the disapproval order was set aside. Thereafter the Committee of Management passed an order dated 21.05.2015 stating that services of the petitioner stood terminated and the appointment order was cancelled. In terms of the said order, a fresh order came to be passed by the Basic Education Officer whereby the approval was granted to the resolution of the Committee of Management terminating the services of the petitioner on 19.09.2015. The said order is under challenge by means of filing an amendment application.

8. The contention of the Counsel for the petitioner is that the principles of natural justice were not followed, inasmuch as, from the perusal of the records, it is clear that subsequent to the filing of reply filed by the petitioner to the charge-sheet efforts were made to collect the evidence from the two schools and the petitioner was never confronted with the said evidences before passing of the final orders. He further argues that the provisions of The U.P. Government Servant (Discipline and Appeal) Rules, 1999 (in short 'the 1999 Rules'), applicable to the State Government employees, were never followed, inasmuch as, procedure prescribed under Rule 7 of the 1999 Rules was not followed as no inquiry was held and the mandatory requirement of Rule 7 was not followed in toto.

9. In support of the said submissions, the Counsel for the petitioner places reliance on the judgment of this Court in the case of Abhiram vs State of Uttar Pradesh and others; 2021 (2) ALJ 102 wherein this Court had the occasion to consider the applicability of U.P. Government Servant (Discipline and Appeal) Rules, 1999 and the Court was of the view that without holding of the inquiry as contemplated under the Rule 1999, the dismissal order could not be justified.

10. The Counsel for the petitioner further argues that even by passing the termination order, it has been merely recorded that the reply submitted by the petitioner is not satisfactory, which

according to the petitioner is itself arbitrary and no reasons have been recorded for not accepting the contention of the petitioner. He thus argues that the order impugned is liable to be set aside.

11. The Counsel for the respondent no.5, on the other hand, specifically argues that the appointment to the Headmaster, at the relevant point of time, were governed under the provisions of U.P. Recognized Basic Schools (Junior High School) (Recruitment and Conditions of Service of Teachers) Rules, 1978 (in short 'the 1978 Rules'). He places reliance on Rule 4 to argue that Rule 4(1) prescribes the manner in which an Assistant Teachers of a recognized school can be appointed and Rule 4(2) prescribes for the minimum qualification required for the appointment to the post of Headmaster of a recognized school. Rule 4 of the 1978 Rules is quoted below:

*"**4. Minimum qualifications.** (1) The minimum qualifications for the post of assistant teacher of a recognised school shall be Intermediate Examination of the Board of High School and Intermediate Education, Uttar Pradesh or equivalent examination (with Hindi) and a teacher's training course recognised by the State Government or the Board such as Hindustani Teaching Certificate, Junior Teaching Certificate, Basic Teaching Certificate, or Certificate of Training,*

(2) The minimum qualifications for the appointment to the post of Headmaster of a recognised school shall be as follows: (a) A degree from a recognised University or an equivalent examination recognised as such;

(b) A teacher's training course recognised by the State Government or the Board, such as Hindustani Teaching Certificate, Junior Teaching Certificate, Certificate of Training or Basic Teaching Certificate; and

(c) Three years' teaching experience in a recognised school."

12. This rule quoted above lays down the minimum qualifications both for the post of assistant teachers as well as for post of Headmasters. While a degree from recognised University, training certificate and teaching experience are necessary for being appointed as Headmaster, the essential qualification for the appointment as an assistant teacher is only Intermediate in addition to a teachers' training course.

13. He further draws my attention to the definition of 'Recognized School' as contained in Rule 2(g) to mean as under:

*"2. **Definitions.** - In these rules, unless the context otherwise requires -*

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g). 'Recognised School' means any Junior High School, not being an institution belonging to or wholly maintained by the Board or any local body, recognised by the Board as such."

14. The Counsel for the respondent no.5 argues that admittedly the petitioner

had obtained the training in the year 2003 and thus, even as per the submission of the petitioner, he did not have the requisite qualification for being appointed as an Assistant Teacher of a recognized school which is specified under Rule 4(1) of the 1978 Rules. He further argues that once the petitioner did not have the requisite qualification to be appointed as an Assistant Teacher in terms of Rule 4(1) of the 1978 Rules, he could have produced the experience certificate of teaching in a recognized school, which is required specifically in Rule 4(2) of the 1978 Rules. He thus argues that the petitioner did not possess the requisite qualification for being appointed and had obtained the appointment as well as the recognition to the said appointment on the strength of certificates, which could not have been issued by the schools in question as the petitioner did not have the requisite qualification for appointment as Assistant Teacher. He places reliance on the judgment in the case of ***Sushil Kumar Dwivedi vs Basic Shiksha Adhikari, Banda and others; [(2003) 2 UPLBEC 1216]*** as well as in the case of ***Ram Surat Yadav and others vs State of U.P. and others [(2014) 1 UPLBEC 1].***

15. From the submissions made at the bar, it is culled out that the petitioner got the appointment on the post of Headmaster placing reliance on two experience certificates which were obtained by the petitioner on his having worked on the post of Assistant Teacher from July 1998 to 10.03.2000 as well as the other certificate in which the petitioner claims to work from July, 2000 to 10.08.2003. The petitioner as per his own showing did not have the Teachers Training Course Certificate which is a sine qua non for appointment to the post of Assistant Teacher as specified under Rule 4(1) of the 1978 Rules. The experience certificates issued by the schools which had granted appointment to the petitioner on the post of Assistant Teacher will be of no consequence as the phrase "Teaching Experience" used in Rule 4(2) has to be interpreted to be 'teaching experience in a recognized school'. The three years teaching experience as specified in Rule 4(2)(c) has to be interpreted to mean an experience certificate issued from the recognized school where the appointment is made in accordance with Rule 4(1). Any other interpretation to Rule 4(2)(c) would militate against the whole scheme of providing the requisite qualification under Rule 4(2) and would render the entire purpose of providing qualification under Rule 4(2)(c) as nullity. This issue was dealt with the by the Full Bench of this Court in the case of ***Ram Surat Yadav and others vs State of U.P. and others [(2014) 1 UPLBEC 1]*** wherein the Full Bench in para 7 has observed as under:

"7. Before we deal with the submissions of the appellants, it is necessary to note that Rule 4 (1) provides minimum qualifications for appointment to the post of an Assistant Teacher. Rule 4 (1) as it existed prior to 12 June 2008 prescribed as qualifications of eligibility (i) Intermediate Examination of the Board of High School and Intermediate Education, Uttar Pradesh or an equivalent examination with Hindi; and (ii) a teachers' training course recognized by the State Government or the Board of Basic Education, such as Hindustani Teaching Certificate (HTC), Junior Teaching Certificate (JTC), Basic Teaching Certificate (BTC) or Certificate of Training (CT). The selection process was undertaken in pursuance of an approval which was

received with reference to the Rules of 1978 as they stood prior to the amendment which took place on 12 June 2008 obviously because the selection process was initiated and completed before the amendment had taken effect. ***Where statutory Rules prescribe conditions of eligibility for appointment to a post, a person who does not possess the qualification which is prescribed cannot have a lawful entitlement to hold the post. The appointment of a person who does not fulfill the eligibility qualification would be unlawful, being contrary to the Rules."***

16. The submission of the Counsel for the petitioner with regard to the violation of principles of natural justice, although on the first brush merit acceptance, however, considering the fact that the petitioner never had the requisite qualification for appointment, the non following of principles of natural justice would have no effect on outcome of the petition as it is well settled that in service jurisprudence the allegations of violation of principles of natural justice have to be fortified by the test of prejudice caused on account of violation of principles of natural justice, as such, the submission on that count by the Counsel for the petitioner merits rejection.

17. For all the reasons recorded above, the writ petition lacks merit and is accordingly ***dismissed.***

18. The submission of Counsel for the petitioner with regard to the non-following of the 1999 Rules also merit rejection for the simple reasons that the appointment of the petitioner itself was found to be dehors the Rules and thus, once the appointment is obtained based upon the incorrect facts, the Rules need not to be followed.

(2023) 1 ILRA 475
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.11.2022

BEFORE

THE HON'BLE RAJIV JOSHI, J.

Writ-A No. 40280 of 2011

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

Counsel for the Petitioner:
Sri Radha Kant Ojha, Sri A.K. Singh, Sri Pradeep Kumar VI, Sri Shivendu Ojha

Counsel for the Respondents:
C.S.C., Sri Ramesh Chandra Mishra, Sri Govind Narayan Srivastava

A. Service Law - U.P. Recruitments of Dependants of Government Servants Dying in Harness Rules, 1974 - Rule 7-Challenge to- Compassionate appointment-Petitioner father died in harness and younger brother of the petitioner was appointed as an assistant teacher-Petitioner claim was rejected before the Committee headed by the District Inspector of Schools as the petitioner submitted that the wife of younger brother is working as assistant teacher and therefore, he is not in harness and not entitled for appointment-While Rule 7 of the Rules, 1974 provides that if more than one member of the family of the deceased Government servant seeks employment under these rules, the Head of Office shall decide about the suitability of the person for giving employment keeping in view of the overall interest of the entire family-Therefore the compassionate appointment to the younger brother of the petitioner has been passed on the basis of the consent of mother and other family members, hence the same cannot be quashed.(Para 1 to 11)

The writ petition is dismissed. (E-6)

(Delivered by Hon'ble Rajiv Joshi, J.)

1. Heard Sri Shivendu Ojha, Advocate holding brief of Sri R.K. Ojha, learned Senior Advocate appearing for the petitioner and Sri Govind Narain Srivastava assisted by Sri Rajesh Pandey, learned Additional Chief Standing Counsel for the respondents-1 & 2.

2. The instant writ petition under Article 226 of the Constitution has been filed quashing the impugned order dated 20.06.2011 passed by respondent no.2-The Selection Committee, District Maharajganj through its Chairman/District Inspector of Schools, Maharajganj, whereby younger brother of the petitioner was appointed as an assistant teacher under Rule 7 of The U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 (hereinafter referred to as the Rules, 1974) on the basis of consent given by the petitioner on account of death of his father, who died in harness.

3. Brief facts of the case are that father of the petitioner namely, Late Paras Nath Singh, who was working as Assistant Teacher in Bapu Shatabdi Inter College, Jahda, Post Basulifarm, District Maharajganj died on 11.12.2004. The respondent no.4-Arun Kumar, who is younger brother of the petitioner got an order in his favour for appointment as Assistant Teacher under the provisions of Regulations 101 to 107 of Chapter III of the U.P. Intermediate Education Act.

4. The petitioner filed a petition bearing Writ Petition No. 37405 of 2008 (Raj Kumar Vs. Joint Director of Education, VII Region, Gorakhpur and others) for his appointment as Assistant Teacher as the petitioner being M.A. in Sociology was eligible for appointment as Art Teacher. This Court vide order dated 1.8.2008 directed the authority concerned to decide the matter. In pursuance of the aforesaid order, the District Inspector of Schools rejected the claim of the petitioner as there was no compromise between the parties.

5. Being aggrieved with the aforesaid order, the petitioner filed a petition before this Court bearing Writ Petition No. 58694 of 2008, which was allowed and the order dated 22.10.2008 passed by District Inspector of Schools, Maharajganj was set aside and the matter was remitted back with direction that committee may consider the matter and pass appropriate order.

6. In pursuance of the aforesaid order, the Committee headed by the District Inspector of Schools, Maharajganj as its Chairman, The Basic Shiksha Adhikari, Maharajganj and the Finance and Account Officer as members vide impugned order dated 20.06.2011 rejected the claim of the petitioner and granted approval for appointment of respondent-4 under The Rules, 1974. Thereafter, the petitioner moved another application before District Inspector of Schools, Maharajganj on 29.6.2011 disclosing the fact that wife of respondent-4 namely, Smt. Poonam Chaudhary is working as Assistant Teacher in Primary School Gaura Nipania, Block Nichlaul, District Maharajganj, therefore, he is not under harness. Hence, this writ petition.

7. Learned counsel for the petitioner submits that petitioner is the eldest son of late Paras Nath Singh and also fully qualified to be appointed as Assistant Teacher. He further submits that the wife of respondent-4, who is younger brother of the

petitioner is working as Assistant Teacher and therefore, he is not in harness and not entitled for appointment under the Rules, 1974.

8. On the other hand, learned Additional Chief Standing Counsel submits that in view of Rule 7 of The Rules, 1974, the order dated 20.06.2011 granting compassionate appointment to the younger brother of the petitioner has been passed on the basis of the consent of other family members, hence, the same cannot be quashed.

9. I have considered the rival submission and perused the record.

10. Rule 7 of the Rules, 1974 provides that if more than one member of the family of the deceased Government servant seeks employment under these rules, the Head of Office shall decide about the suitability of the person for giving employment. The decision will be taken keeping in view also the overall interest of the welfare of the entire family, particularly the widow and the minor members thereof. Rule 7 of the Rules, 1974, is quoted as under:

*"**7. Procedure when more than one member of the family seeks employment.** - If more than one member of the family of the deceased Government servant seeks employment under these rules, the Head of Office shall decide about the suitability of the person for giving employment. The decision will be taken keeping in view also the overall interest of the welfare of the entire family, particularly the widow and the minor members thereof."*

11. I do not find any illegality or infirmity in the impugned order dated 20.06.2011 passed by respondent no.2 granting compassionate appointment to respondent-4 as the same has been passed on the basis of consent of mother of the petitioner and other family members.

12. The writ petition lacks merit and is, accordingly, dismissed.

(2023) 1 ILRA 477
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.01.2023

BEFORE

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

Writ-A No. 50939 of 2017

Prem Narain Singh ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Ashutosh Tripathi

Counsel for the Respondents:
C.S.C., Sri Om Prakash Singh, Sri Sushil Kumar Rao

A. Service Law – Dismissal – Major penalty – Inquiry – Liability of inquiry officer during the enquiry – Failure to discharge it – Effect – Held, the Inquiry Officer, entrusted with the task of holding inquiry, has mandatorily to fix a date, time and venue of the inquiry which he has to intimate to the delinquent before proceeding further – It is the establishment's obligation to produce witnesses and other evidence in support of charges in an oral inquiry held by the Inquiry Officer – High Court directed the Corp. to treat the petitioner continuing in service till the date of his superannuation – However, High Court left it open to the Corp. to examine as to whether after retirement they can proceed against the

petitioner on the basis of the charge-sheet. (Para 12, 13, 20 and 22)

B. Service Law – Dismissal – Inquiry – Charge-sheet issued – No reply could be filed – Effect – Assumption of admission of charges, due to non-filing of the reply – How far permissible – Obligation of establishment to prove the charges – Non-fulfillment – Effect – Held, obligation of the establishment could not be wished away because the petitioner was in default, assuming that he was – The course of action adopted by the Inquiry Officer is absolutely contrary to law for the reason that he did not require the establishment to prove the charges by examining witnesses or producing other evidence in support of the charge. (Para 14)

Writ petition allowed. (E-1)

List of Cases cited:

1. St. of U.P. & ors. Vs Saroj Kumar Sinha; (2010) 2 SCC 772

2. Smt. Karuna Jaiswal Vs St. of U.P. through Secy Mahila Evam Bal Vikas; 2018 (9) ADJ 107 (DB) (LB)

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

1. This Writ Petition is directed against an order dated 30.06.2015 passed by the Managing Director, U.P. State Warehousing Corporation, Lucknow dismissing the petitioner from service and directing recovery of a sum of Rs. 6,34,369.52. The said order has been affirmed in Appeal by the Appellate Authority vide order dated 12.01.2016. The appellate order is also under challenge.

2. Parties have exchanged affidavits.

3. Admit.

4. Heard Mr. Ashutosh Tripathi, learned counsel for the petitioner, Mr. O.P. Singh, learned Senior Advocate assisted by Mr. Sushil Kumar Rao, learned counsel appearing on behalf of Respondent No. 2 and the learned Standing Counsel appearing on behalf of Respondent No. 1.

5. The petitioner was a Technical Officer posted at the U.P. State Warehousing Corporation Centre, District Allahabad. He was a permanent employee of the Corporation. The petitioner was to superannuate from service of the Corporation on 30.06.2015 upon attaining the age of 60 years. Disciplinary proceedings were instituted against the petitioner on 15.07.2014 on allegation of causing loss of rice-stock at the Ghazipur Centre of the U.P. State Warehousing Corporation (for short 'the Corporation') during the period of 2003-2004 and 2009-2010. An Inquiry Officer was appointed on 15.07.2014 and a letter was issued to the petitioner on 26.05.2015 by the Inquiry Officer, wherein the petitioner was directed to submit a reply to a charge-sheet dated 01.09.2014 and attend before the Inquiry Officer on 8.06.2015 at 3:00 p.m.

6. It is the petitioner's case that he was not served with a copy of the charge-sheet and, therefore, it was not possible for him to submit a reply.

7. Attending at the inquiry would not, according to the petitioner, serve any purpose. The petitioner after receiving the letter dated 26.05.2015 from the Inquiry Officer informed the Deputy Manager, Finance about the non-service of charge-sheet dated 01.09.2014. The Deputy Manager, Finance directed the Inquiry Officer to ensure service of the charge-sheet upon the petitioner. The petitioner was served with the charge-sheet under a letter of the Inquiry Officer dated

28.05.2015. It is the petitioner's case that without a copy of the charge-sheet, the petitioner submitted a reply of sorts dated 28.05.2015, where the stand taken was that copies of the charge-sheet and the documents, that were proposed to be produced against him in evidence, had not been served. The petitioner asserts that he was in a helpless position because he was scheduled to retire on 30.06.2015 and the charge-sheet was served upon him on 2.06.2015, along with the letter dated 28.05.2015.

8. The petitioner has come up with a specific case in paragraph 13 of the Writ Petition that the Inquiry Officer, without fixing any date, time or place for holding the inquiry, submitted his inquiry-report dated 15.06.2015 to the Disciplinary Authority, holding the petitioner guilty. It is the petitioner's case that the Inquiry Officer held the charges proved without the establishment, leading any evidence or examining witnesses to prove them. The charges were held proved by default because the petitioner did not submit a reply to the charge-sheet or produce evidence in defence. The petitioner was held responsible for causing loss of the bulk of rice i.e. subject matter of the charge by the Inquiry Officer.

9. Based on the report of the Inquiry Officer, the petitioner was dismissed from service by the impugned order dated 30.06.2015. The petitioner carried an Appeal from the order of dismissal under Regulation 21 of the Staff Service Regulation of the Corporation to the Executive Committee. The Appellate Authority by its order dated 12.01.2016 dismissed the appeal and affirmed the order of dismissal.

10. Aggrieved, this writ petition has been instituted.

11. It is argued by the learned counsel for the petitioner that the impugned orders are manifestly illegal and vitiated because it is imperative in a case involving the imposition of a major penalty that a date, time and place of inquiry be specified by the Inquiry Officer and intimated to the delinquent. In this case no date, time and place of the inquiry was communicated to the petitioner. It is next submitted that a charge, particularly one involving imposition of a major penalty, cannot be held proved by the Inquiry Officer unless the establishment examine witnesses in support of the charge at an oral inquiry and establish the charge by their evidence. It is urged by learned Counsel for the petitioner that it is not the law that merely because the delinquent does not appear or fails to submit a reply to the charge-sheet or produce evidence in his defence, the charges stand proved by default. The burden of the establishment to prove the charges cannot be cast away. A perusal of paragraph Nos. 16, 17 and 18 of the counter-affidavit shows that the averments in paragraph Nos. 13, 14, 15 and 16 of the Writ Petition have not been denied. The averments in paragraph Nos. 13 to 16 of the Writ Petition carry specific allegation that no date, time and place of the inquiry was fixed by the Inquiry Officer and that no witnesses were examined at an oral inquiry held to establish the charges before the Inquiry Officer. There is in point of fact, therefore, no denial of this position by the respondents.

12. Upon hearing learned Counsel for the parties and perusal of records, this Court finds that indeed no date, place and venue of the inquiry was fixed by the Inquiry Officer, before holding and concluding the inquiry, wherein the petitioner was judged guilty. Also, it is

evident that no witnesses were examined before the Inquiry Officer by the establishment in support of the charge of which the petitioner has been held guilty. It is evident that the petitioner has been held guilty, merely because he was ex-parte and did not respond to the charge-sheet and did not appear before the Inquiry Officer or produce evidence. The legal position is too well settled to brook doubt that in a case involving the imposition of a major penalty upon a public servant, or the servant of a Corporation, whose terms and conditions of service are governed by law, the Inquiry Officer, entrusted with the task of holding inquiry, has mandatorily to fix a date, time and venue of the inquiry which he has to intimate to the delinquent before proceeding further. This requirement is imperative in all those cases, where a major penalty is proposed to be imposed.

13. Here, the admitted position is that the aforesaid requirement of the law was given a go-by. It is also trite law that in any disciplinary proceedings, the outcome of which leads to imposition of a major penalty, it is the establishment's obligation to produce witnesses and other evidence in support of charges in an oral inquiry held by the Inquiry Officer. Though the Inquiry Officer may be an officer of the same establishment, but he is not a party who might identify himself with the establishment. The Inquiry Officer has to act as an impartial arbiter. It is the establishment's obligation to prove, by evidence, the charges against the employee even if he remains ex-parte. It does not absolve the establishment of their obligation to prove the charges by examining witnesses and leading evidence. It is not that the employee's or the delinquent's default in defending himself would lead to the charges being established ipso facto. It would be particularly relevant to refer to the relevant finding of Inquiry Officer figuring in his report on the basis of which the orders impugned have been passed. The finding reads:

"श्री प्रेम नारायण सिंह, प्राविधिक अधिकारी, क्षेत्रीय कार्यालय इलाहाबाद को उपलब्ध कराये गये आरोप पत्र के सन्दर्भ में उनके द्वारा आरोप पत्र का प्रत्युत्तर आज दि० 15.06.2015 तक उपलब्ध नही कराया गया है। श्री प्रेम नारायण सिंह द्वारा उक्त आरोप पत्र के अनुपालन में पत्र सं० 523 दि० 28.05.15 अधोहस्ताक्षरी को प्रेषित किया गया जिसमें उनके द्वारा बिन्दु सं० 01 से 05 तक पर जानकारी चाही गई। प्रधान कार्यालय के पत्र सं० 4313 दिनांक 28.05.2015 द्वारा बिन्दु सं० 01 से 04 के सम्बन्ध में सूचना उपलब्ध कराई गई एवं पत्र सं० 4653 दिनांक 03.06.2015 द्वारा श्री प्रेम नारायण सिंह, प्राविधिक अधिकारी, द्वारा बिन्दु सं० 05 पर तत्समय गाजीपुर केन्द्र पर चार्ज के आदान प्रदान हेतु गठित की गई कमेटी की रिपोर्ट चाही गई जिसे प्राप्ति हेतु उन्हे क्षेत्रीय कार्यालय वाराणसी/गाजीपुर केन्द्र पर जाने की अनुमति दी गई। प्रेषित अनुस्मारक पत्रों पर आरोप पत्र का उत्तर दिनांक 06.06.2015 तक अधोहस्ताक्षरी को प्रेषित करने हेतु निर्देशित किया गया परन्तु उनके द्वारा आरोप पत्र का उत्तर दिनांक 15.06.2015 तक अधोहस्ताक्षरी को उपलब्ध नही कराया गया है एवं ऐसा प्रतीत होता है कि उन्हें इस सम्बन्ध में कुछ नहीं कहना है तथा उनके विरूद्ध लगाया गया आरोप उन्हे स्वीकार है। इस प्रकार श्री प्रेम नारायण सिंह, प्राविधिक अधिकारी, के गाजीपुर केन्द्र पर तैनाती के दौरान वर्ष 2008-09 तथा 2009-10 में खाद्य एवं रसद विभाग के भण्डारित चावल स्टाक में प्रघटित भण्डाण क्षति की मात्रा 382.89.543 कु० कुल कीमत रू० 6,34,369,52 (रूपये छः लाख चौतीस हजार तीन सौ उनहत्तर पैसे बावन) मात्र हेतु उत्तरदायी पाये जाते हैं।"

[Emphasis provided]

14. A perusal of the aforesaid finding by the Inquiry Officer places the matter beyond cavil that the Inquiry Officer has held the petitioner guilty by default on an assumption that since the petitioner has not filed a response to the charge-sheet, he admits the charge. This finding is absolutely contrary to the law. The course of action adopted by the Inquiry Officer, evident from the inquiry report also, is absolutely contrary to law for the reason that he did not require the establishment to prove the charges by examining witnesses or producing other evidence in support of the charge. It has already been said that this obligation of the establishment could not be wished away because the petitioner was in default, assuming that he was. The legal position adumbrated above is fortified by the decision of the Supreme Court in ***State of U.P. and others vs. Saroj Kumar Sinha, (2010) 2 SCC 772,*** wherein it was observed:

"27. A bare perusal of the aforesaid sub-rule shows that when the respondent had failed to submit the explanation to the charge-sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the government servant despite notice of the date fixed failed to appear that the inquiry officer can proceed with the inquiry ex parte. Even in such circumstances it is incumbent on the inquiry officer to record the statement of witnesses mentioned in the charge-sheet. Since the government servant is absent, he would clearly lose the benefit of cross-examination of the witnesses. But nonetheless in order to establish the charges the Department is required to produce the necessary evidence before the inquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge.

28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/ disciplinary authority/ Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. 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."

15. Following the decision in ***Saroj Kumar Sinha*** *(supra)*, a Division Bench of this Court, sitting at Lucknow, in ***Smt. Karuna Jaiswal vs. State of U.P. Through Secy Mahila Evam Bal Vikas, 2018 (9) ADJ 107 (DB) (LB)*** has held:

"14. It is also equally relevant and significant to notice in this case that though the petitioner failed to submit her reply to the charge-sheet, however, the Enquiry Officer did not fix any date, time and place for oral enquiry. It is settled principle that even in a situation where the delinquent officer/employee does not submit reply to the charge-sheet, the Enquiry Officer still needs to prove the charges on the basis of material and evidence available on record and for the said purpose he needs to fix and intimate to the charged officer, the date, time and place for oral enquiry.

15. The law in this regard is very well settled and does not need a reiteration, however, we may refer to a judgment of Hon'ble Supreme Court in the case of State of Uttar Pradesh and others vs. Saroj Kumar Sinha, reported in [(2010) 2 SCC 772], wherein it has clearly been held that Enquiry Officer acts as a quasi judicial authority and his position is that of an independent adjudicator and further that he cannot act as a representative of the department or disciplinary authority and further that he cannot act as a prosecutor neither he should act as a judge; his function is to examine the evidence presented by the department and even in the absence of the delinquent officer, has to see as to whether the unrebutted evidence is sufficient to bring home the charges.

16. Hon'ble Supreme Court has further held in the said judgment of Saroj Kumar Sinha (supra) that it is only in case when the government servant, despite notice, fails to appear during the course of enquiry that Enquiry Officer can proceed ex-parte and even in such circumstances it is incumbent upon the Enquiry Officer to record the statement of witness.

17. In the instant case, no oral enquiry was held, neither the petitioner was given any notice to participate in any oral enquiry by fixing date, time and place for oral enquiry. It is only that the Enquiry Officer after noticing that despite sufficient time having been given to the petitioner, she did not furnish her reply to the charge-sheet, he proceeded to submit ex-parte report without conducting any oral enquiry by fixing date, time and place for such an oral enquiry. Accordingly, the Enquiry Officer, in this case, has violated the aforesaid principles, which clearly vitiates the enquiry proceedings and any punishment order based on such a vitiated enquiry, is clearly not sustainable."

16. In view of settled position of the law and what this Court has found, the impugned orders cannot be sustained as also the Inquiry Report on which these are based.

17. The question that now arises for consideration is whether inquiry proceedings can be resumed against the petitioner from the stage of issue of charge-sheet, the petitioner having retired on the same day on which he was dismissed from service i.e. 30.06.2015.

18. Learned counsel for the petitioner here submits that the relationship of employer and employee has ceased to exist and there is nothing in the Rules of the Corporation entitling them to continue disciplinary proceedings against an ex-employee.

19. Learned Counsel for the petitioner has drawn the Court's attention to the Staff Regulations of the Corporation annexed as Annexure 9 to the Writ Petition to submit that the Corporation has no jurisdiction to continue with the inquiry against the petitioner, post retirement. Upon a perusal of the Rules, it cannot be said with certainty that the Corporation would lack jurisdiction in a matter where the disciplinary proceedings were initiated while the employee was in service. There are both possibilities, but for the purpose, the relevant Rules would have to be examined. It may require something besides the Staff Regulations annexed to the Writ Petition to be considered.

20. In the circumstances, this Court is of opinion that the Corporation ought to be

left free to examine the issue with reference to the relevant Rules whether after retirement they can proceed against the petitioner on the basis of the charge-sheet, already issued, from the stage of inquiry.

21. In the result, this Writ Petition **succeeds** and is **allowed**. The impugned orders dated 30.06.2015 and 12.01.2016 passed by the Disciplinary Authority and the Appellate Authority respectively are hereby **quashed.** The report of the Inquiry Officer dated 15.06.2015 is also **quashed**.

22. The petitioner shall be treated to have continued in service till the date of his superannuation. He shall be paid his post retiral benefits within two months next. However, it will be open to the respondents to conclude the inquiry proceedings initiated against the petitioner from the stage of seeking his reply to the charge-sheet, provided it is permissible under the law to continue disciplinary proceedings against an ex-employee of the Corporation, who superannuates pending proceedings. In the eventuality, disciplinary proceedings are taken afresh against the petitioner, post retiral benefits shall not be paid until conclusion of proceedings, which if permissible and pursued by the Corporation, shall be completed within a period of not more than three months from the date of receipt of a copy of this order.

23. Let this order be communicated to the Managing Director, U.P. Ware Housing Corporation, New Hyderabad, Lucknow by the Registrar Compliance.

24. The original records produced before the Court in sealed cover, which have been opened and examined, are directed to be placed in a sealed cover and returned to the employee of the Corporation, who has produced them before the Court.

(2023) 1 ILRA 483
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.01.2023

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Application U/S 482. No. 1558 of 2023

Mohd. Haroon ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Deepak Pandey

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Criminal Procedure Code, 1973 – Section 293 – Sections 227 & 239 – Discharge – Scope – Rejection of discharge application by the Trial Court – Interference, how far warranted – Applicant is named in the FIR as well as in the St.ment u/s 161 Cr.P.C. and 164 Cr.P.C. – Effect – Sajjan Kumar's principle relied upon – At the time of framing of charge, the Court has to look at all the material placed before it and determine whether a prima facie case is made out or not – The court is not required to consider the evidentiary value of the evidence as any question of admissibility or reliability of evidence is a matter of trial – Held, there is prima facie evidence against the applicant which only is to be seen. The truthfulness of the allegations cannot be seen and adjudicated at this stage – At the stage of discharge/framing of charge, the Court is merely required to shift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. (Para 13, 26 and 27)

Application dismissed. (E-1)

List of Cases cited:-

1. Sajjan Kumar Vs C.B.I.; (2010) 9 SCC 368

2. Amit Kapoor Vs Ramesh Chander; (2012) 9 SCC 460

3. Asim Shariff Vs National Investigation Agency; (2019) 7 SCC 148

4. Vikram Johar Vs St. of U. P.; 2019 SCC OnLine SC 609

5. Bhawna Bai Vs Ghanshyam; (2020) 2 SCC 217

6. M.E. Shivalingamurthy Vs CBI; (2020) 2 SCC 768

7. St. of Raj. Vs Ashok Kumar Kashyap; 2021 SCC OnLine SC 314

8. St. of Raj. Vs Ashok Kumar Kashyap; 2021 SCC OnLine SC 314

9. St. of Orissa Vs Pratima Mohanty; 2021 SCC OnLine SC 1222

10. Hazrat Deen Vs St. of U.P. ; 2022 SCC Online SC 1781

11. St. Through Deputy Superintendentof Police Vs R. Soundirarasu; 2022 SCC OnLine SC 1150

12. Manendra Prasad Tiwari Vs Amit Kumar Tiwari; 2022 SCC OnLine SC 1057

13. Kanchan Kumar Vs St. of Bihar; (2022) 9 SCC 577

(Delivered by Hon'ble Samit Gopal, J.)

1. The present application under Section 482 Cr.P.C. has been filed by the applicant- Mohd Haroon with the prayer to quash / set-aside of rejection order of Discharge Application dated 15.11.2022 in Case No. 10417 of 2022 (State Vs. Mohd Haroon) arising out of Case Crime No. 248 of 2022, under Sections 354, 354-A, 354-D and 509 I.P.C., Police Station Kotwali, District Hamirpur with a further prayer to stay the further proceedings of the said case pending in the Court of Civil Judge (Jr. Division), F.T.C. Crime against Women Court, Hamirpur.

2. The facts as set out in the case are that a first information report was lodged on 19.08.2022 by the opposite party no.2 for an incident which took place from 25.07.2022 to 18.08.2022 which was lodged as Case Crime No. 248 of 2022, under Sections 354 (Ga), 354 (Gha) I.P.C., Police Station- Kotwali, District Hamirpur against the applicant Mohd. Haroon, Advocate, Hamirpur. The contents of the said first information report which set out the prosecution case are extracted herein below:-

"नकलप्रा०पत्र- To SHO Police Station Kotwall, Hamirpur, From Harshita Sachan, Civil Judge (J.D.)/F.T.C., Hamirpur. Subject: Complaint against Advocate Mohammad Haroon practicing at District Court Hamirpur Sir, This is to inform that I took charge as Civil Judge (J.D.)/F.T.C., Hamirpur on 05.07.2022. In the fourt week of July (18th July - 24 July), saw an advocate (Mohammad Haroon practicing at District Court Hamirpur) ogling at me through the gap between the wall behind my chamber while I was walking out of my chamber. It happened twice that week. It did not know the name of the Advocate at that point of time but I recognised him as he had appeared in my Courtroom before. On 25th of July, around 8:45 pm, after going for my usual walk at the Yamuna walkway, I had sat down at a bench there. I had earphones on and was listening to music. Two minutes later, I saw the same advocate standing right next to the bench saying something. Out of courtesy, I removed my earphones and exchanges greetingsThen the following conversation took place M. Haroon: आप

हमीरपुर वापस आ गयी है तो अच्छा लग रहा होगा। I nodded M Haroon: आप सरीला चली गयी थी तो मन नही लग रहा था। I was visibly uncomfortable and as he seemed drunk, so I started to stand up from the bench, when he said - मैने आपको डिस्टर्ब तो नही किया। Where I said काफी लेट हो गया है, मुझे निकलना चाहिये। and then I turned around. As I was leaving, he said, वैसे अच्छी लग रही हो। AS it was already quite late. I ignored that comment and I left. I was disturbed by this incident and I stopped going to the walkway for a couple of days. I mentioned that incident to my friends who urged me to report, but believing that it was a one time transgression, I decided to ignore it. A few days later, I saw M. Haroon staring at me again from the wall behind my chamber while I was walking outside. It made me very uncomfortable and anxious and I walked back into my chamber not knowing what to do. I had been avoiding going to the walkway since the inappropriate conversation as well On 01.08.2022, after I had calmed down, I went for a walk on the Yamuna walkway at 8:18 pm, I even sent my live location to a friend because of the fear of any untoward incident happening. At 8.40 pm, I sat on a bench and within a minute, M. Haroon walked towards the bench. The following conversation took place I asked him straightway. आपका नाम क्या है? M. Haroon: मोहम्मद हारून Then I proceeded to warn him, आपके उस दिन के व्यवहार से में काफी डिस्टर्बड हूँ आप जो यहां मेरे पीछे-पीछे चलते हैं और कोर्ट में दीवार से झांकते हैं. यह दोबारा नही होना चाहिये। आज के बाद मुझसे बात करने की जरूरत नहीं है। अगर दोबारा ऐसा हुआ तो मैं फिर कम्पलेन्ट करुंगी। After listening to this, he walked off without saying anything. After that day, he would walk a few beet behind me every time I would go for a walk on the Yamuna walkway. He would also appear in my Courtroom even when there was no mater listed and would seat himself for hours. As he did not engage with me explicitly, I chose to ignore I have a habit of wearing black sweatpants, blue-black checkered shirts and while shoes when I go for a walk I had the same outfit on when I went for a walk yesterday, 18.08.2022 at around 8:00 pm: The moment I walked up the staircase that lies on the road in front of my house toward the walkway. I saw him walk up the staircase as well. I continued on my usual walk. That day, he walked barely two feet behind me I also noticed that he was wearing the same clothes as me, the exact same outfit down to the white shoes. I was terrified and freaked out by this behaviour and in fear called a fried and decided to sit on a bench so that he would stop following me. The moment I sat on the bench, he also stopped walking and sat on a different bench nearby around 8.55 pm. Deciding that I should go back home as I was feeling unsafe, I stood up and watching me stand up, he stood up as well and started walking I sat back down and started filming him. His steps were faltering and it was clear that he was intoxicated. He walked a few steps ahead of me and then turned around towards me After seeing that I had my phone pointed towards him, he started talking to some people there. After that whenever I would walk, he would follow and where I would stop, he would stop as well He would come towards me and mumble something and try to initiate conversation but I kept walking got a whiff of a foul liquor smell coming off him filmed him again turning towards me and then walking to and fro at the same place, waiting for me to walk again. Terrified by the whole thing, I got down at the staircase near my residence as fast as I could and

then around 9:05 pm, called senior Judges to inform about the whole series of incidents. While I was on the call, standing on the road outside Judges Complex, I saw him driving by his car and leaning outside the window staring at me I have been living in fear of further transgressions and misbehaviour on the part of M Haroon Despite my strict warning to back off after his extremely inappropriate comments and his clear intrusion of my privacy, he has resorted to keep stalking and trying to approach me am worried about my safety and well-being in court premises and outside as well. I implore you to take strict action and to ensure my safety. 19.08.2022 Copy forwarded to -1. Superintendent of Police Hamirpur Regards, SD Harshita (Harshita Sachan) Civil Judge (J.D.)/F.T.C. Hamirpur 8368471367 R/o J-6 Judges Colony District Hamirpur, PIN- 210301 Permanent R/o. 174/W-2, Juhi Damodar Nagar, Kanpur Pin-208027 मै का०मु० अखिलेश कुमार प्रमाणित करता हूं कि प्रा० पत्र की नकल मुझ का०मु० द्वारा बोलबोलकर अक्षरश अंकित करवाई गयी। - एस०डी० का०मु० अखिलेश कुमार"

3. A complaint dated 20.08.2022 was sent by the opposite party no.2 to the Chairman, Internal Complaints Committee (POSH Act), District Court, Hamirpur against the accused. On the said complaint notice was issued by the Chairman of the said committee to the accused.

4. The investigation took place in which the statement of the complainant who was the victim was recorded under Section 161 Cr.P.C. and under Section 164 Cr.P.C. Subsequently a charge-sheet dated 08.09.2022 bearing No. 182 of 2022 was submitted against the applicant under Sections 354, 354 (Ka), 354 (Gha), 509 I.P.C.

5. On the said charge-sheet the accused was summoned vide order dated 13.09.2022 passed by Civil Judge (Jr. Div)/F.T.C. (Crime Against Women), Hamirpur.

6. An application dated 12.10.2022 for discharge was moved by the applicant under Section 227 read with Section 239 Cr.P.C. The said application for discharge dated 12.10.2022 was rejected by the trial court vide order dated 15.11.2022. The present petition has thus been filed with the prayers as quoted above.

7. Heard Sri Deepak Pandey, learned counsel for the applicant and Sri B.B. Upadhyay, learned A.G.A. for the State and perused the records.

8. Learned counsel for the applicant argued that the rejection of the application for discharge dated 12.10.2022 of the applicant vide order dated 15.11.2022 is totally illegal. It is argued that the trial court has wrongly rejected the said application for discharge. It is argued that the trial court did not consider the fact that the applicant should be tried only for the offences which are made out but not for all the offences as stated in the charge-sheet. It is argued that there is no allegation of any offence under Sections 354, 354-A I.P.C. and as such the said offences are not made out at all. It is further argued that the entire prosecution case is based on the sole uncorroborated version of the opposite party no.2 / first informant / victim which is without any evidence and there is no independent witness to corroborate the same. The version as given by her in her statement under Section 161 Cr.P.C. is totally vague, baseless and contrary which cannot be relied upon. It is argued that the applicant is a practising Advocate and he

has not committed any offence. It is argued that the charge-sheet as against the applicant is groundless and no case is made out against him and he deserves to be discharged. The present application thus deserves to be allowed and the order impugned dated 15.11.2022 rejecting the application for discharge dated 12.10.2022 be set-aside and the applicant be discharged.

9. *Per contra* learned A.G.A. for the State opposed the prayer for quashing and argued that the applicant is named in the first information report and there are allegations against him. The first informant who is the victim of the present case has corroborated the version of the first information report in her statement given under Section 161 Cr.P.C. and under Section 164 Cr.P.C. The Investigating Officer after investigation has submitted a charge-sheet against the applicant on which he has been summoned to face trial vide order dated 13.09.2022. It is further argued that in so far as the application for discharge of the applicant is concerned, the court at the stage of discharge has to see only the prima facie case against the accused and cannot judge the truthfulness of the allegations made therein. It is argued that the first information report and the version of the first informant / victim during investigation implicates the applicant in the present case and there are prima facie allegations against him. The trial court has by a detailed order on merits rejected the application for discharge of the applicant vide order dated 15.11.2022. The said order takes into account the relevant facts and circumstances of the case and keeping in view of the law as is consistent till date rejected the same.

10. Heard learned counsel for the parties and perused the records.

11. The law with regards to discharge of accused and framing of charge is well settled.

12. An accused can also be discharged as per Section 227, 239 Cr.P.C. They reads as under:

*"**Section 227. Discharge** - If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."*

*"**Section 239 Cr.P.C. Discharge** - If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for doing so."*

13. The Apex Court, in the case of ***Sajjan Kumar Vs. C.B.I.: (2010) 9 SCC 368,*** held that at the time of framing of charge, the Court has to look at all the material placed before it and determine whether a prima faciecase is made out or not, and the court is not required to consider the evidentiary value of the evidence as any question of admissibility or reliability of evidence is a matter of trial. The relevant portion of the judgment is reproduced below:

"21. On consideration of the authorities about scope of Sections 227 and 228 of the Code, the following principles emerge:

(i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.

(iii) The Court cannot act merely as a Post Office or a mouthpiece of the prose(i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to s(i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal."

14. In ***Amit Kapoor Vs. Ramesh Chander : (2012) 9 SCC 460***, the Apex Court enlisted certain principles with reference to exercise of power under Section 397 and Section 482 of Cr.P.C. by the Courts while deciding as to whether the charges framed against an accused be quashed or not. The principles listed are as under:

"27. Having discussed the scope of jurisdiction under these two provisions, i.e., Section 397 and Section 482 of the Code and the fine line of jurisdictional

distinction, now it will be appropriate for us to enlist the principles with reference to which the courts should exercise such jurisdiction. However, it is not only difficult but is inherently impossible to state with precision such principles. At best and upon objective analysis of various judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be:

27.1. Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

27.2. The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

27.3. The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

27.4. Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loathe to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

27.5. Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.

27.6. The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.

27.7. The process of the Court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

27.8. Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a ''civil wrong' with no ''element of criminality' and does not satisfy the basic ingredients of a criminal offence, the Court may be justified in quashing the charge. Even in such cases, the Court would not embark upon the critical analysis of the evidence.

27.9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a

conviction, the Court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

27.10. It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

27.11. Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

27.12. In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed with by the prosecution.

27.13. Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

27.14. Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.

27.15. Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that interest of justice favours, otherwise it may quash the charge. The power is to be exercised ex debito justitiae, i.e. to do real and substantial justice for administration of which alone, the courts exist.

27.16. These are the principles which individually and preferably cumulatively (one or more) be taken into consideration as precepts to exercise of extraordinary and wide plenitude and jurisdiction under Section 482 of the Code by the High Court. Where the factual foundation for an offence has been laid down, the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied if there is substantial compliance to the requirements of the offence."

15. In the case of ***Asim Shariff v. National Investigation Agency : (2019) 7 SCC 148,*** it was reiterated by the Apex Court that the trial court is not supposed to divulge the evidence on the record to determine whether the accused would get acquitted or convicted if a particular charge is framed against an accused. The relevant portion of the observation of the court in the case is as under:

"18. Taking note of the exposition of law on the subject laid down by this Court, it is settled that the Judge while considering the question of framing charge under Section 227 CrPC in sessions cases (which is akin to

Section 239 CrPC pertaining to warrant cases) has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the material placed before the court discloses grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing the charge; by and large if two views are possible and one of them giving rise to suspicion only, as distinguished from grave suspicion against the accused, the trial Judge will be justified in discharging him. It is thus clear that while examining the discharge application filed under Section 227 CrPC, it is expected from the trial Judge to exercise its judicial mind to determine as to whether a case for trial has been made out or not. It is true that in such proceedings, the court is not supposed to hold a mini trial by marshalling the evidence on record."

16. Further, in the case of ***Vikram Johar v. State of Uttar Pradesh : 2019 SCC OnLine SC 609*** the Apex Court has reiterated that during the stage of charge, the court must not conduct a mini-trial and the decision should be based on the prima facie appreciation of the materials placed on record. The relevant portion of the said judgment is as under:

"19. It is, thus, clear that while considering the discharge application, the Court is to exercise its judicial mind to determine whether a case for trial has been made out or not. It is true that in such proceedings, the Court is not to hold the mini trial by marshalling the evidence."

17. The Apex Court in ***Bhawna Bai Vs. Ghanshyam : (2020) 2 SCC 217,*** has observed as under:-

"13. ...At the time of framing the charges, only prima facie case is to be seen; whether case is beyond reasonable doubt, is not to be seen at this stage. At the stage of framing the charge, the court has to see if there is sufficient ground for proceeding against the accused. While evaluating the materials, strict standard of proof is not required; only prima facie case against the accused is to be seen."

18. In ***M.E. Shivalingamurthy Vs. CBI : (2020) 2 SCC 768***, the Hon'ble Apex Court, while discussing the principles to be followed while dealing with an application seeking discharge, observed as under:

"i. If two views are possible and one of them gives rise to suspicion only as distinguished from grave suspicion, the Trial Judge would be empowered to discharge the accused.

ii. The Trial Judge is not a mere Post Office to frame the charge at the instance of the prosecution.

iii. The Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding. Evidence would consist of the statements recorded by the Police or the documents produced before the Court.

iv. If the evidence, which the Prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, "cannot show that the accused committed offence, then, there will be no sufficient ground for proceeding with the trial.

v. It is open to the accused to explain away the materials giving rise to the grave suspicion.

vi. The court has to consider the broad probabilities, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This, however, would not entitle the court to make a roving inquiry into the pros and cons.

vii. At the time of framing of the charges, the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution, has to be accepted as true.

viii. There must exist some materials for entertaining the strong suspicion which can form the basis for drawing up a charge and refusing to discharge the accused..."

19. The Apex Court decision in ***State of Rajasthan Vs. Ashok Kumar Kashyap : 2021 SCC OnLine SC 314,*** held that the at the stage of framing of the charge and/or considering the discharge application, a mini trial is not permissible. The Court observed that the position of law that emerges is that at the stage of discharge/framing of charge, the Judge is merely required to take note of the material on record in order to find out whether or not there is sufficient ground for proceeding against the accused.

20. In the case of ***State of Rajasthan Vs. Ashok Kumar Kashyap : 2021 SCC OnLine SC 314,*** the Apex Court held that the evaluation of evidence on merits is not permissible at the stage of considering the application for discharge. At the stage of framing of the charge and/or considering the discharge application, a mini trial is not permissible. It has been held as under:

"23. In the case of P. Vijayan (supra), this Court had an occasion to consider Section 227 of the Cr.P.C. What is required to be considered at the time of framing of the charge and/or considering the discharge application has been considered elaborately in the said decision. It is observed and held that at the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. It is observed that in other words, the sufficiency of grounds would take within its fold the nature of the evidence recorded by the police or the documents produced before the Court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him. It is further observed that if the Judge comes to a conclusion that there is sufficient ground to proceed, he will frame a charge under Section 228 Cr.P.C., if not, he will discharge the accused. It is further observed that while exercising its judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the court, after the trial starts."

21 . Further the Apex Court in the case of ***State of Orissa Vs. Pratima Mohanty : 2021 SCC OnLine SC 1222*** decided on 11 December 2021, has comprehensively dealt with the powers exercisable and extent of the jurisdiction of the High Court while deciding a petition under Section 482 of the Cr.P.C. It has been held as under:

"16. It is trite that the power of quashing should be exercised sparingly and with circumspection and in rare cases. As per settled proposition of law while examining an FIR/complaint quashing of which is sought, the court cannot embark upon any enquiry as to the reliability or genuineness of allegations made in the FIR/complaint. Quashing of a complaint/FIR should be an exception rather than any ordinary rule. Normally the criminal proceedings should not be quashed in exercise of powers under Section 482 Cr.P.C. when after a thorough investigation the charge-sheet has been filed. At the stage of discharge and/or considering the application under Section 482 Cr.P.C. the courts are not required to go into the merits of the allegations and/or evidence in detail as if conducing the mini-trial. As held by this Court the powers under Section 482 Cr.P.C. is very wide, but conferment of wide power requires the court to be more cautious. It casts an onerous and more diligent duty on the Court."

22. In the case of ***Hazrat Deen vs. State of Uttar Pradesh: 2022 SCC Online SC 1781*** the Apex Court has in para 6 held as follows:

"6. Discrepancies between the FIR and any subsequent statement under Section 164 of the Cr.P.C. may be a defence. However, the discrepancies cannot be a ground for discharge without initiation of trial."

23. In the case of ***State Through Deputy Superintendentof Police Vs. R. Soundirarasu : 2022 SCC OnLine SC 1150*** the Apex Court has held as under:

"75. The ambit and scope of exercise of power under Sections 239 and 240 of the CrPC, are therefore fairly well settled. The obligation to discharge the accused under Section 239 arises when the Magistrate considers the charge against the accused to be "groundless". The Section mandates that the Magistrate shall discharge the accused recording reasons, if after (i) considering the police report and the documents sent with it under Section 173, (ii) examining the accused, if necessary, and (iii) giving the prosecution and the accused an opportunity of being heard, he considers the charge against the accused to be groundless, i.e., either there is no legal evidence or that the facts are such that no offence is made out at all. No detailed evaluation of the materials or meticulous consideration of the possible defences need be undertaken at this stage nor any exercise of weighing materials in golden scales is to be undertaken at this stage - the only consideration at the stage of Section 239/240 is as to whether the allegation/charge is groundless.

76. This would not be the stage for weighing the pros and cons of all the implications of the materials, nor for sifting the materials placed by the prosecution the exercise at this stage is to be confined to considering the police report and the documents to decide whether the allegations against the accused can be said to be "groundless".

77. The word "ground" according to the Black's Law Dictionary connotes foundation or basis, and in the context of prosecution in a criminal case, it would be held to mean the basis for charging the accused or foundation for the admissibility of evidence. Seen in the context, the word "groundless" would connote no basis or foundation in evidence. The test which may, therefore, be applied for determining

whether the charge should be considered groundless is that where the materials are such that even if unrebutted, would make out no case whatsoever."

24. In the case ***of Manendra Prasad Tiwari Vs. Amit Kumar Tiwari : 2022 SCC OnLine SC 1057,*** the Apex Court has explained the well-settled law on exercise of powers under Section 397 and 482 Cr.P.C. as under:

"21. The law is well settled that although it is open to a High Court entertaining a petition under Section 482 of the CrPC or a revision application under Section 397 of the CrPC to quash the charges framed by the trial court, yet the same cannot be done by weighing the correctness or sufficiency of the evidence. In a case praying for quashing of the charge, the principle to be adopted by the High Court should be that if the entire evidence produced by the prosecution is to be believed, would it constitute an offence or not. The truthfulness, the sufficiency and acceptability of the material produced at the time of framing of a charge can be done only at the stage of trial. To put it more succinctly, at the stage of charge the Court is to examine the materials only with a view to be satisfied that prima facie case of commission of offence alleged has been made out against the accused person. It is also well settled that when the petition is filed by the accused under Section 482 CrPC or a revision Petition under Section 397 read with Section 401 of the CrPC seeking for the quashing of charge framed against him, the Court should not interfere with the order unless there are strong reasons to hold that in the interest of justice and to avoid abuse of the process of the Court a charge framed against the accused needs to be quashed. Such an order can be passed only in exceptional cases and on rare occasions. It is to be kept in mind that once the trial court has framed a charge against an accused the trial must proceed without unnecessary interference by a superior court and the entire evidence from the prosecution side should be placed on record. Any attempt by an accused for quashing of a charge before the entire prosecution evidence has come on record should not be entertained sans exceptional cases.

22. The scope of interference and exercise of jurisdiction under Section 397 of CrPC has been time and again explained by this Court. Further, the scope of interference under Section 397 CrPC at a stage, when charge had been framed, is also well settled. At the stage of framing of a charge, the court is concerned not with the proof of the allegation rather it has to focus on the material and form an opinion whether there is strong suspicion that the accused has committed an offence, which if put to trial, could prove his guilt. The framing of charge is not a stage, at which stage the final test of guilt is to be applied. Thus, to hold that at the stage of framing the charge, the court should form an opinion that the accused is certainly guilty of committing an offence, is to hold something which is neither permissible nor is in consonance with the scheme of Code of Criminal Procedure

23. Section 397 CrPC vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or

an error of jurisdiction or law or the perversity which has crept in the proceeding."

25. In the case of ***Kanchan Kumar Vs. State of Bihar : (2022) 9 SCC 577*** the Apex Court while considering the judgement in the case of Dipakbhai Jagdishchandra Patel Vs. State of Gujarat summarised the principles on discharge under Section 227 Cr.P.C. and held as follows:

"15. Summarising the principles on discharge under Section 227 CrPC, in Dipakbhai Jagdishchandra Patel v. State of Gujarat [Dipakbhai Jagdishchandra Patel v. State of Gujarat, (2019) 16 SCC 547 : (2020) 2 SCC (Cri) 361] , this Court recapitulated : (SCC p. 561, para 23)

"23. At the stage of framing the charge in accordance with the principles which have been laid down by this Court, what the court is expected to do is, it does not act as a mere post office. The court must indeed sift the material before it. The material to be sifted would be the material which is produced and relied upon by the prosecution. The sifting is not to be meticulous in the sense that the court dons the mantle of the trial Judge hearing arguments after the entire evidence has been adduced after a full-fledged trial and the question is not whether the prosecution has made out the case for the conviction of the accused. All that is required is, the court must be satisfied that with the materials available, a case is made out for the accused to stand trial. A strong suspicion suffices. However, a strong suspicion must be founded on some material. The material must be such as can be translated into evidence at the stage of trial. The strong suspicion cannot be the pure subjective satisfaction based on the moral notions of the Judge that here is a case where it is possible that the accused has committed the offence. Strong suspicion must be the suspicion which is premised on some material which commends itself to the court as sufficient to entertain the prima facie view that the accused has committed the offence."

(emphasis supplied)"

26. After having heard the learned counsel for the parties, perusing the record and as per the law relating to discharge, it is apparent that the applicant is named in the first information report, the statement of first informant / victim recorded under Section 161 Cr.P.C. and under Section 164 Cr.P.C. There is prima facie evidence against the applicant which only is to be seen. The truthfulness of the allegations cannot be seen and adjudicated at this stage.

27. Thus, the position of law that emerges is that at the stage of discharge/framing of charge, the Court is merely required to shift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused i.e. whether a prima facie case is made out against the accused.

28. Looking to the facts of the case, the prima facie allegation against the applicant and the law as stated above, no case for interference is made out.

29. The present application under Section 482 Cr.P.C. is thus ***dismissed***.

30. A copy of this order be sent to the trial court by the Registrar (Compliance) of this Court within a week.

(2023) 1 ILRA 496
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.01.2023

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application U/S 482 No. 42 of 2023

Arvind Kejriwal ...Petitioner
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Petitioner:
Mahmood Alam, Anjani Kumar Mishra, Manmohan Singh, Nadeem Murtaza, Sheeran Mohiuddin Alavi

Counsel for the Opposite Parties:
G.A.

A. Constitution of India,1950 – Article 19(1)(a) – Freedom of speech and expression – Protection, extent of – Reasonable restriction – Test to determine – Extent of protection of speech would depend on whether, such speech would constitute a propagation of ideas or would have any social value. If the answer to the said question is in affirmative, such speech would be protected under Article 19 (1) (a); if the answer is in native, such speech would not be protected under Article 19 (1) (a). (Para 22)

B. Criminal Law – Representation of the People Act, 1951 – Section 125 – Offence – Elements – Knowledge and Mens rea – Allegation against a Chief Minister of making the appeal for vote on the basis of religion and promoting the enmity between the classes of people; Voters of Congress was termed as 'Gaddar of the country' – How far constitute offence – Held, if the feelings of enmity or hatred between different classes of citizens of India is promoted, that shall be treated as an offence under such section and punishable u/s 125 of the Act, 1951. (Para 24 and 25)

C. Criminal Law – Criminal Procedure Code, 1973 – Section 482 – Scope of interference – Inherent power of High Court – Held, the power enshrined u/s 482 Cr.P.C. is an inherent power to secure the ends of justice or to prevent any abuse of the process of any Court. This is an extra-ordinary power of the High Court like Article 226 of the Constitution of India but at the same time, the Court must be much careful and cautious before invoking this power to ensure that if this power is not invoked, the litigant would suffer irreparable loss and injury and it would be manifest injustice and abuse of the process of the Law. (Para 27)

Application dismissed. (E-1)

List of Cases cited:-

1. Smt. Amrawati & anr. Vs St. of U.P., 2005; Cr.L.J.755

2. Lal Kamlendra Pratap Singh Vs St. of U. P. & ors..; (2009) 4 SCC 437

3. Ramakant Mayekar Vs Celine D'Silva (Smt.); (1996) 1 SCC 399

4. Rajendra Singh Bhandari Vs St. of Uttarakhand & anr.; 2020 SCC OnLine Utt 551

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

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

1. Heard Sri H.G.S. Parihar, learned Senior Advocate, assisted by Sri Nadeem Murtaza, Sri Mahmood Alam, Sri Man Mohan Singh, learned counsel for the petitioner and Sri Alok Saran along with Sri Rajesh Kumar Singh, learned Additional Government Advocates for the State.

2. By means of this application, the applicant has made following main prayers:-

"Wherefore, it is most respectfully prayed that this Hon'ble may graciously be pleased to:

i) Quash and set aside the impugned revisional order dated 21.10.2022 passed by the Ld. Court of Sessions Judge, Sultanpur in Criminal Revision No.219 of 2022 (Arvind Kejriwal vs State of UP) arising out of Case Crime No.608/2014 registered at Police Station Musafirkhana, District Amethi, whereby, the criminal revision preferred by the Applicant has been dismissed.

ii) Quash and set aside the impugned order dated 04.08.2022 passed by the Ld. Court of ACJM Room No.18 (Special Judge MP/MLA), Sultanpur in Criminal Case No. 360/2014 (State vs Arvind Kejriwal) arising out of Case Crime No.608/2014 registered at Police Station Musafirkhana, District Amethi, whereby, application of the Applicant seeking discharged under Section 239 CrPC has been dismissed."

3. Precisely, the applicant has assailed the judgment and order dated 21.10.2022 passed by the learned Sessions Judge, Sultanpur in criminal revision rejecting the revision filed by the present applicant upholding the order dated 04.08.2022 passed by the learned trial Court i.e. Additional Chief Judicial Magistrate, Court No.18/Special Judge, MP/MLA/Sultanpur, who has rejected the discharge application of the present applicant.

4. Notably, this is the third petition/application filed under Section 482 Cr.P.C. before this Court.

5. Before adverting to earlier orders being passed in the petitions/ applications filed by the present applicant under Section 482 Cr.P.C. before this Court, it would be apt to discuss the brief facts of the present case. One Prem Chandra, Flying Squad Magistrate, lodged an FIR bearing Case Crime No.608 of 2014, under Section 125 of the Representation of the People Act, 1951 (hereinafter referred to as "the Act, 1951"), Police Station- Kotwali Musafirkhana, District Amethi, alleging inter-alia that the accused-applicant flouted the Model Code of Conduct by making public statement *"Jo Congress ko vote dega, mera manana hoga, desh ke saath gaddari hogi. Bhajpa per katakch karte hue kaha ki jo Bhajpa ko vote dega use Khuda bhi muaf nahin karega, des ke sath gaddari hogi"*. After completion of investigation, the Investigating Officer has submitted the charge sheet against him. Learned trial court has taken cognizance against the accused on 06.09.2014 under Section 125 of the Act, 1951 and summoned him.

6. The present applicant has filed a petition under Section 482 Cr.P.C. bearing U/S 482/378/407 No.3662 of 2015; Arvind Kejriwal Vs. State of U.P. and Ors, seeking prayer for quashing the entire proceedings of Case No.360 of 2014 arisen out of Case Crime No.608 of 2014 (supra). He has also prayed for quashing the charge sheet, which has been filed in the aforesaid case. The aforesaid petition was disposed of finally vide order dated 03.08.2015 giving liberty to the applicant to file appropriate application before the learned court below taking all pleas and ground including the ground for exemption of his personal appearance and such application was directed to be considered strictly in accordance with law. For a period of four weeks, the bailable warrant which was issued against the present applicant was stayed. For the convenience, the order dated 03.08.2015 is being reproduced hereunder:-

"Heard Shri Mahmood Alam, learned counsel appearing on behalf of applicant along with Shri C.L. Gupta, Advocate and Shri Rishad Murtaza, learned Government Advocate on behalf of State.

By means of of the instant petition under Section 482 Cr.P.C., the applicant has prayed for quashing of the entire criminal proceedings of Case No. 360 of 2014 arising out of Case Crime No. 608 of 2014, under Sections 125 of the Representation of the People Act, 1951 relating to the Police Station, Musafir Khana, District Amethi which is pending in the Court of Judicial Magistrate, Musafir Khana, District Amethi. The applicant has further prayed for quashing of the chargesheet filed in the aforesaid Case Crime No. 608 of 2014.

The learned counsel for the applicant, after some arguments, submits that the applicant had sought exemption from personal appearance by moving an application before the Court concerned on 20.07.2015 but the same was dismissed. He further submits that Section 317 Cr.P.C. empowers the Court to pass appropriate order for exemption. The learned counsel for the applicant further submits that the applicant intends to file an application for discharge but in the mean time, the bailable warrant issued against the applicant may be kept in abeyance.

The learned Government Advocate has submitted that although one application moved on behalf of the applicant for exemption from personal appearance has been rejected on technical ground but it is still open for the applicant to move fresh application for exemption from personal appearance on proper grounds and he has no objection in this regard. In case, the Court below considers the application for exemption from personal appearance proper, fresh order may be passed in accordance with law. So far as application for discharge is concerned, the said application has not yet been moved and therefore, no direction for expeditious disposal thereof can be passed at this stage.

In view of the above, the present application is disposed of with the observation that the grounds taken by the applicant in the instant application under Section 482 Cr.P.C. may be taken at appropriate stage before the Court below and it will be open for the learned Court below to pass appropriate order. It is further observed that if the applicant applies for exemption from personal appearance, the same shall also be considered by the Court below in accordance with law.

The bailable warrant issued against the applicant shall remain in abeyance for a period of four weeks from today.

The petition stands finally disposed of.

Copy of this order may be provided to the learned counsel for the applicant within 24 hours on payment of usual charges."

7. Perusal of the aforesaid order dated 03.08.2015 reveals that the learned counsel for the applicant had argued that the applicant had sought exemption from personal appearance by moving an application before the court concerned on 20.07.2015 but the same was dismissed. Learned counsel further argued in such petition that the applicant intends to file an application for discharge, therefore, the bailable warrant being issued against the applicant may be kept in abeyance.

8. After rejection of the application of the present applicant by the learned trial

court on 20.07.2015 whereby he had sought exemption from personal appearance, another application was filed by the applicant in compliance of the order dated 03.08.2015 passed by this Court and the learned court below rejected such application vide order dated 12.08.2015. Therefore, the present applicant has filed second petition under Section 482 Cr.P.C. bearing U/S 482/378/407 No.4136 of 2015; Arvind Kejriwal Vs. The State of U.P. and Ors., with the same prayer which has been made in the first petition filed under Section 482 Cr.P.C. with another prayer that the order dated 12.08.2015 whereby the exemption application of the present applicant had been rejected may be quashed.

9. In the second petition, considering the prayers of the present applicant and noticing the fact that the present applicant has not appeared before the learned court below and has not filed any personal bond with or without sureties and has filed two applications for exemption under Section 205 Cr.P.C., which have been rejected by orders dated 20.07.2015 and 12.08.2015 framed the question for adjudication to the effect that "Whether after taking cognizance and issuance of the process, may be summons or warrant, the exemption application under Section 205 or 317 Cr.P.C.is maintainable without personal appearance and without furnishing bail bonds? The aforesaid petition was disposed of finally vide order dated 27.08.2015, which reads as under:-

"Heard learned counsel for the petitioner, Shri Rishad Murtza, learned Government Advocate and perused the record.

This petition has been filed with the following prayers:-

(i) to quash the order dated 12.08.2015 in Criminal Case No.360 of 2014, "State of U.P. vs. Arvind Kejriwal" in pursuance of the Charge Sheet No.122 of 2014 dated 09.07.2014 in Case Crime No.608 of 2014, under Section 125 of the Representation of People Act, 1951, Police Station-Kotwali Musafirkhana, District-Amethi, pending before the learned Judicial Magistrate, Musafirkhana, District-Amethi.

(ii) to stay the entire criminal proceedings in Criminal Case No.360 of 2014, "State of U.P. vs. Arvind Kejriwal" in pursuance of the Charge Sheet No.122 of 2014 dated 09.07.2014 in Case Crime No.608 of 2014, under Section 125 of the Representation of People Act, 1951, Police Station-Kotwali Musafirkhana, District-Amethi, pending before the learned Judicial Magistrate, Musafirkhana, District-Amethi, during pendency of the present case.

(iii) to order to concerned Hon'ble Court for deciding the pending application of the applicant filed under the proviso of Section 239 Cr.P.C. in Criminal Case No.360 of 2014, "State of U.P. vs. Arvind Kejriwal" bearing Case Crime No.608 of 2014, under Section 125 of the Representation of People Act, 1951, Police Station-Kotwali Musafirkhana, District-Amethi, pending before the learned Judicial Magistrate, Musafirkhana, District-Amethi.

Learned counsel for the petitioner has submitted that the petitioner is the Chief Minister of Delhi against whom a case under Section 125 of Representation of People Act has been registered. The application for discharge under Section 239 Cr.P.C. has been moved which has not yet been decided and the application for personal exemption filed under Section 205 Cr.P.C. has wrongly been rejected. It has also been submitted that the petitioner is ready to file the undertakings before the Court that whenever his personal

appearance is required, he shall appear personally.

Learned counsel for the petitioner has relied upon the provisions of Section 88 Cr.P.C., which reads as under:-

"88. Power to take bond for appearance. When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court, or any other Court to which the case may be transferred for trial".

The main question for consideration is that whether after taking cognizance and issuance of the process, may be summons or warrant, the exemption application under Section 205 or 317 Cr.P.C.is maintainable without personal appearance and without furnishing bail bonds?

In the present case, it is admitted that till now the petitioner has not appeared before the court below and has also not filed any personal bond with or without sureties. The application for exemption under Section 205 Cr.P.C. was moved, which has been rejected by order dated 12.08.2015. The similar application was also moved previously, which was also rejected on 20.07.2015.

Learned counsel for the petitioner has relied upon the judgment of this Court rendered in Santosh Chauhan & others vs. State of U.P. & another reported in [(2011) (4) ALJ 121], in which, this Court has considered the scope of Section 205 Cr.P.C. but nowhere it has been held that without submitting the personal bond or sureties, the exemption under Section 205 Cr.P.C. can be granted.

Learned counsel for the petitioner has further relied upon the case Roitong Singpho vs. Sajjan Kumar Agarwal reported in AIR 2009 (NOC) 129 (GAU), in which, the Hon'ble Gauhati High Court has held that the Court has to take into account the magnitude of sufferings, which a particular accused person may have to bear with, in order to make himself present in the Court and the discretion must be exercised judiciously. The Gauhati High Court as well as Allahabad High Court have relied upon the case M/s. Bhasker Industries Ltd. vs. M/s. Bhiwani Denim and Apparels Ltd and others reported in AIR 2001 (SC) 3625.

In the case of M/s. Bhasker Industries Ltd. vs. M/s. Bhiwani Denim and Apparels Ltd and others reported in AIR 2001 (SC) 3625, the Hon'ble Apex Court has considered the scope of Sections 205 (2), 251 and 317 Cr.P.C. and has held in paras-12, 13, 14, 15, 16, 17 and 19 as under:-

"12. We cannot part with this matter without advertising to the plea made by the second accused before the trial court for exempting him from personal appearance. He highlighted two factors while seeking such exemption. First is that the offence under Section 138 of the Negotiable Instruments Act is relatively not a serious offence as could be seen from the fact that the legislature made it only a summons case. Second is, the insistence on the physical presence of the accused in the case would cause substantial hardships and sufferings to him as he is a resident of Haryana. To undertake a long journey to reach Bhopal for making his physical presence in the court involves, apart from great hardships, much expenses also, contended the counsel. He submitted that the advantages the court gets on account of the presence of the accused are far less than the tribulations the accused has to suffer to make such presence in certain

situations and hence the court should consider whether such advantages can be achieved by other measures. Therefore, he relied on Section 317 of the Code. It reads thus:

"317 provision for inquiries and trial being held in the absence of accused in certain cases.- (1) At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in Court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be re corded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up for tried separately."

13. Sub-section (1) envisages two exigencies when the court can proceed with the trial proceeding in a criminal case after dispensing with the personal attendance of an accused. We are not concerned with one of those exigencies i.e. when the accused persistently disturbs the proceedings. Here we need consider only the other exigency. If a court is satisfied that in the interest or justice the personal attendance of an accused before it need not be insisted on, then the court has the power to dispense with the attendance of that accused. In this context a reference to Section 273 of the Code is useful. It says that "except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in presence of the accused or, when his personal attendance is dispensed with, in the presence of his pleader." If a court feels that insisting on the personal attendance of an accused in a particular case would be too harsh on account of a variety of reasons, can't the court afford relief to such an accused in the matter of facing the prosecution proceedings?

14. The normal rule is that the evidence shall be taken in the presence of the accused. However, even in the absence of the accused such evidence can be taken but then his counsel must be presence in the court, provided he has been granted exemption from attending the court. The concern of the criminal court should primarily be the administration of criminal justice. For that purpose the proceedings of the court in the case should register progress. Presence of the accused in the court is not for marking his attendance just for the sake of seeking him in the court. It is to enable the court to proceed with the trial. If the progress of the trial can be achieved even in the absence of the accused the court can certainly take into account the magnitude of the sufferings which a particular accused person may have to bear with in order to make himself present

15. These are days when prosecutions for the offence under Section 138 are galloping up in criminal courts. Due to the increase of inter-State transactions through the facilities of the banks it is not uncommon that when prosecutions are instituted in one State the accused might belong to a different State, sometimes a far distant State. Not very rarely such accused would be ladies also. For prosecution under Section 138 of the NI Act the trial should be that of summons case. When a magistrate feels that

insistence of personal attendance of the accused in a summons case, in a particular situation, would inflict enormous hardship and cost to a particular accused, it is open to the magistrate to consider how he can relieve such an accused of the great hardships, without causing prejudice to the prosecution proceedings.

16. Section 251 is the commencing provision in Chapter XX of the Code which deals with trial of summons cases by magistrates. It enjoins on the court to ask the accused whether he pleads guilty when the "accused appears or is brought before the magistrate". The appearance envisaged therein can either be by personal attendance of the accused or through his advocate. This can be understood from Section 205(1) of the Code which says that "whenever a magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader."

17. Thus, in appropriate cases the magistrate can allow an accused to make even the first appearance through a counsel. The magistrate is empowered to record the plea of the accused even when his counsel makes such plea on behalf of the accused in a case where the personal appearance of the accused is dispensed with. Section 317 of the Code has to be viewed in the above perspective as it empowers the court to dispense with the personal attendance of the accused (provided he is represented by a counsel in that case) even for proceeding with the further steps in the case. However, one precaution which the court should take in such a situation is that the said benefit need be granted only to an accused who gives an undertaking to the satisfaction of the court that he would not dispute his identity as the particular accused in the case, and that a counsel on his behalf would be present in court and that he has no objection in taking evidence in his absence. This precaution is necessary for the further progress of the proceedings including examination of the witnesses.

19. The position, therefore, bogs down to this: It is within the powers of a magistrate and in his judicial discretion to dispense with the personal appearance of an accused either throughout or at any particular stage of such proceedings in a summons case, if the magistrate finds that insistence of his personal presence would itself inflict enormous suffering or tribulations to him, and the comparative advantage would be less. Such discretion need be exercised only in rare instances where due to the far distance at which the accused resides or carries on business or on account of any physical or other good reasons the magistrate feels that dispensing with the personal attendance of the accused would only be in the interests of justice. However, the magistrate who grants such benefit to the accused must take the precautions enumerated above, as a matter of course. We may reiterate that when an accused makes an application to a magistrate through his duly authorised counsel praying for affording the benefit of his personal presence being dispensed with the magistrate can consider all aspects and pass appropriate orders thereon before proceeding further."

I have gone through the judgment and considered the law laid down by the Hon'ble Apex Court in the aforesaid case. The aforesaid case relates to the proceedings under Section 138 N.I. Act, which is a summon case, while in the present case, the charge-sheet has been filed against the petitioner for the offence punishable under Section 125 of Representation of People Act, 1951 and the

offence punishable under Section 125 of Representation of People Act is punishable with a term of three years or with fine or with both. Therefore in view of the provisions of Section 2 (x) of Cr.P.C., it is a warrant case because the term of imprisonment is exceeding two years. It is not disputed that the provisions of Code of Criminal Procedure are applicable regarding the offence punishable under the Representation of People Act, 1951.

As far as the provisions of Section 88 Cr.P.C. are concerned, as quoted above, such provisions can be availed only in case the person for whose appearance or arrest the summon or warrant has been issued to present in such Court. Section 88 Cr.P.C. also does not speak to exempt the accused without executing the bond with or without sureties for his appearance in the Court. In view of the provisions of Section 90 Cr.P.C., this provisions is also applicable only to every summon and every warrant of arrest issued under this Code. Admittedly, the petitioner has not yet appeared personally before the Court. Therefore, he cannot get the benefit of Section 88 Cr.P.C.

Article 14 of the Constitution of India provides equality before the law and equal protection of laws. When the Constitution has not distinguished between the powerful and powerless persons, then certainly the courts also cannot grant any special concession to any powerful person like in this case where the petitioner is the Chief Minister of N.C.T. Delhi. Law is equal for all and equal protection has to be granted to all. There is no such provision in the Code of Criminal Procedure which provides that the trial of warrant case can proceed even in the absence of the accused or without his appearing personally and submitting the bail bonds. It is not disputed that on the subsequent dates of hearing, the personal appearance of the accused may be exempted if sufficient cause is shown provided the accused is represented by a pleader. But at the same time, the Code of Criminal Procedure empowers the Trial Court to direct the personal attendance of such

In the present case, the First Information Report was lodged against the petitioner regarding the offence punishable under Section 125 of Representation of People Act and after the investigation, the charge-sheet has been filed against him for the offence punishable under Section 125 of Representation of People Act. Section 125 of Representation of People Act, 1951 reads as under:-

"125, Promoting enmity between classes in connection with election. Any person who in connection with an election under this Act promotes or attempts to promote on grounds of religion, race, caste, community or language, feelings of enmity or hatred, between different classes of the citizens of India shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both."

The present case relates to the alleged speech of the petitioner on 02.05.2014 in connection with an election which allegedly attempts to promote feelings of enmity or hatred between different classes of the citizens of India. The politicians are required to observe more caution in their speeches as they have to rule the country and they should promote the spirit of common brotherhood, fraternity and harmony amongst all the people of India transcending religious, linguistic and regional or sectional diversities. The politicians as a citizen of India have also to abide by fundamental duties as provided in Article 51-A of the Constitution of India, apart from the restrictions and guidelines imposed by Representation of People Act, 1951,

because they are not above the Constitution.

But what we are experiencing now a days is that some of the politicians have no control over their fire-brand speeches with a view to attract or misguide the voters in their favour. Such tendency should be discontinued because the public of India has now become much more aware about the real truth. The politicians must use the Parliamentary Language. However, these observations shall not affect the merits of the present case.

The procedure for trial of warrant case by the Magistrate is contained in Chapter-XIX of the Code. Section 238 Cr.P.C. Specifically provides that when in any warrant case instituted on a police report, the accused appears or brought before the Magistrate, on the commencement of trial, the provisions of Section 207 Cr.P.C. shall be complied. The language of the aforesaid provision of Section 238 Cr.P.C. also envisaged that either the accused should appear or he should be brought before the Magistrate. This provision also does not classify that on the commencement of warrant trial, the accused has liberty to appear through counsel. Because it is a warrant trial, therefore, the accused has to appear in the Court and the accused cannot claim exemption under Section 205 Cr.P.C. till he has furnished bonds with or without sureties as per the direction of the Trial Court.

The question whether after taking cognizance and issuance of the process, may be summon or warrant, the exemption application under Section 205 or under Section 317 Cr.P.C. is maintainable without personal appearance and without furnishing bail bonds is, therefore, decided accordingly that in case of an accused is warrant trial, the provisions of Section 205 or Section 317 Cr.P.C. will not apply unless the accused has been granted bail and he has furnished bail bonds.

This petition has been filed under Section 482 Cr.P.C.. The scope of 482 Cr.P.C. has been considered by Hon'ble the Apex Court in various judgments.

The power under Section 482 Cr.P.C. is not to be exercised in a routine manner, but it is for limited purposes, namely, to give effect to any order under the Code, or to prevent abuse of process of any Court or otherwise to secure ends of justice. Time and again, Apex Court and various High Courts, including ours one, have reminded when exercise of power under Section 482 Cr.P.C. would be justified, which cannot be placed in straight jacket formula, but one thing is very clear that it should not preampt a trial and cannot be used in a routine manner so as to cut short the entire process of trial before the Courts below. If from a bare perusal of first information report or complaint, it is evident that it does not disclose any offence at all or it is frivolous, collusive or oppressive from the face of it, the Court may exercise its inherent power under Section 482 Cr.P.C. but it should be exercised sparingly. This will not include as to whether prosecution is likely to establish its case or not, whether the evidence in question is reliable or not or whether on a reasonable appreciation of it, accusation would not be sustained, or the other circumstances, which would not justify exercise of jurisdiction under Section 482 Cr.P.C. I need not go into various aspects in detail but it would be suffice to refer a few recent authorities dealing all these matters in detail, namely, State of Haryana and others Vs. Ch. Bhajan Lal and others 1992 Supp (1) SCC 335, Popular Muthiah Vs. State represented by Inspector of Police (2006) 7 SCC 296, Hamida vs. Rashid @

Rasheed and Ors. (2008) 1 SCC 474, Dr. Monica Kumar and Anr. vs. State of U.P. and Ors. (2008) 8 SCC 781, M.N. Ojha and Ors. Vs. Alok Kumar Srivastav and Anr. (2009) 9 SCC 682, State of A.P. vs. Gourishetty Mahesh and Ors. JT 2010 (6) SC 588 and Iridium India Telecom Ltd. Vs. Motorola Incorporated and Ors. 2011 (1) SCC 74.

In Lee Kun Hee and others Vs. State of U.P. and others JT 2012 (2) SC 237, it was reiterated that Court in exercise of its jurisdiction under Section 482 Cr.P.C. cannot go into the truth or otherwise of the allegations and appreciate evidence, if any, available on record. Interference would be justified only when a clear case of such interference is made out. Frequent and uncalled interference even at the preliminary stage by High Court may result in causing obstruction in the progress of inquiry in a criminal case which may not be in public interest. It, however, may not be doubted, if on the face of it, either from the first information report or complaint, it is evident that allegation are so absurd and inherently improbable on the basis of which no fair-minded and informed observer can ever reach a just and proper conclusion as to the existence of sufficient grounds for proceeding, in such cases refusal to exercise jurisdiction may equally result in injustice, more particularly, in cases, where the complainant sets the criminal law in motion with a view to exert pressure and harass the persons arrayed as accused in the complaint.

However, in this matter, after investigation, Police has found a prima facie case against accused and submitted charge-sheet in the Court below. After investigation the police has found a prima facie case of commission of a cognizable offence by accused which should have tried in a Court of Law. At this stage there is no occasion to look into the question, whether the charge ultimately can be substantiated or not since that would be a subject matter of trial. No substantial ground has been made out which may justify interference by this Court under Section 482 Cr.P.C.

In view of the above, I do not find any error of law or perversity in the order dated 12.08.2015, by which, the application for exemption has been rejected.

As far as the prayer to stay the entire criminal proceedings is concerned, I also do not find any sufficient ground to stay the aforesaid criminal proceedings because in view of the provisions of Chapter-XIX of Code of Criminal Procedure, the accused has a right to move the application for discharge under Section 239 Cr.P.C. and if that application is rejected then certainly the Magistrate is empowered to frame the charge as provided under Section 240 Cr.P.C. Therefore, the prayer no. (ii) is also misconceived.

As far as prayer (iii) is concerned, there is already specific provision of Section 239 Cr.P.C. to decide the application for discharge and for that the orders of this Court are not required. But certainly, before deciding the application under Section 239 Cr.P.C., the appearance of the accused in the Court for filing of the bond with or without sureties is necessary. Therefore, this prayer is also misconceived.

In the last, learned counsel for the petitioner has prayed that the accused is ready to appear personally in the Court and file the bail bonds, therefore, some protection may be granted to him.

Considering the request of learned counsel for the petitioner, it is provided that if the petitioner, Arvind Kejriwal, surrenders before the court below within four weeks from today and moves an application for bail, the same shall be

considered and disposed of expeditiously in accordance with law and in terms of law laid down in the case of Smt. Amrawati and another vs. State of U.P., 2005; Cr.L.J.755, which has been affirmed by Hon'ble the Apex Court in Lal Kamlendra Pratap Singh vs. State of Uttar Pradesh and Ors. reported in (2009) 4 SCC 437. Till then, no coercive action shall be taken against the petitioner.

The petition stands disposed of accordingly."

10. While disposing of the aforesaid petition, this Court has observed that after investigation police has found a prima facie case against the accused and submitted charge sheet in the court below. After investigation, the police has found a prima facie case for commission of cognizable offence by the accused, which should have been tried in a court of law. The Court further observed that at this stage, there is no occasion to look into the question whether the charge ultimately can be sustained or not since that would be subject matter of the trial court. In view of the above, this Court has held that no substantial ground has been made out which may justify interference by this Court under Section 482 Cr.P.C. and there is no error of law or perversity in the order dated 12.08.2015 by which the application for exemption has been rejected. Accordingly, prayer no.1 of that petition has been rejected.

11. So as to decide the second prayer of that petition, this Court has held that since the accused has right to move an application for discharge under Section 239 Cr.P.C. and if that application is rejected, then certainly the Magistrate is empowered to frame the charge as provided under Section 340 Cr.P.C., so the prayer no.(ii) is misconceived.

12. Deciding prayer no.(iii) of the said petition, this Court has held that there is already specific provision of Section 239 Cr.P.C. to decide the application for discharge and for that, the orders of this Court are not required but certainly, before deciding the application under Section 239 Cr.P.C., appearance of the accused in the court for filing bond with or without sureties is necessary, therefore, that prayer is also misconceived.

13. Thereafter, learned counsel for the petitioner has given undertaking that the present applicant is ready to appear personally in the court and file the bail bonds, therefore, some protection may be given to him. Considering that request, this Court granted four weeks' time to the present applicant to surrender before the learned court below and file application for bail and the same was directed to be considered and disposed of strictly in accordance with law in terms of the law laid down in the case of **Smt. Amrawati and another vs. State of U.P., 2005; Cr.L.J.755,** which has been affirmed by Hon'ble the Apex Court in **Lal Kamlendra Pratap Singh vs. State of Uttar Pradesh and Ors., (2009) 4 SCC 437.**

14. The aforesaid order dated 27.08.2015 has been assailed before the Apex Court by filing Petition for Special Leave to Appeal (Crl.) No.7989 of 2015; Arvind Kejriwal Vs. State of U.P. & Ors., and the Hon'ble Apex Court passed the order dated 22.09.2015, which reads as under:-

"Taken on board.

Issue notice.

The attendance of the petitioner before the trial court is dispensed with until further orders."

15. By means of aforesaid order, the Hon'ble Apex Court issued notices and directed that attendance of the petitioner before the trial court is dispensed with until further orders. The petitioner has challenged the order dated 04.08.2022 whereby the discharge application of the present applicant has been rejected by the learned trial court before the revisional court and the revisional court dismissed the revision vide order dated 21.10.2022 upholding the order dated 04.08.2022 passed by the learned trial court. Both the aforesaid orders have been assailed in this application on the ground that the applicant has not made any appeal for vote on the ground of religion etc. and he has not promoted enmity between the classes of the people, therefore, he may not be held liable for the offence under Section 125 of the Act, 1951. In support of his aforesaid argument, learned counsel for the applicant has placed reliance upon the judgment of the Apex Court in re; ***Ramakant Mayekar v. Celine D'Silva (Smt.),*** **(1996) 1 SCC 399,** citing para 27, which reads as under:-

"27. What is forbidden by law is an appeal by a candidate for votes on the ground of "his' religion or promotion etc. of hatred or enmity between groups of people, and not the mere mention of religion. There can be no doubt that mention made of any religion in the context of secularism or for criticising the anti-secular stance of any political party or candidate cannot amount to a corrupt practice under sub-section (3) or (3-A) of Section 123. In other words, it is a question of fact in each case and not a proposition of law as understood and enunciated by the High Court."

16. However, learned counsel for the applicant has informed the Court that the present applicant being a law abiding citizen appeared before the learned court of Magistrate on 25.10.2021 and has been granted bail. Recital to this effect has been given in item no.13 of the dates and events.

17. In para-9 of the discharge application of the present applicant (Annexure No.8), it has been stated that whatever statement was made by the applicant during his speech, that was merely based upon his personal opinion and such statement is protected under Article 19 of the Constitution of India i.e. "Freedom of Speech and Expressions". In para-8 of the discharge application, he has stted that his statement may not be considered as an offence under Section 125 of the Act, 1951.

18. As per learned counsel for the applicant, learned trial court as well as learned revisional court below has committed manifest error of law and fact both while rejecting the discharge application and the revision of the present applicant. Therefore, the aforesaid orders may be set aside and quashed.

19. Per contra, Sri Alok Saran, learned AGA, has opposed this application filed under Section 482 Cr.P.C. by submitting that this is the third petition/application under Section 482 Cr.P.C. in the same matter. He has also stated that as per the observation of this Court in the second petition filed under Section 482 Cr.P.C., the police has found prima facie case against the accused and submitted charge sheet in the court below after completion of the investigation and the trial court has taken cognizance of the offence, therefore, that charge could be proved or disproved before the learned trial court and at this stage, no interference would be required invoking inherent

powers of the High Court under Section 482 Cr.P.C., therefore, the trial of the present case should be conducted and concluded strictly in accordance with law.

20. Sri Saran has further submitted that the Hon'ble Apex Court has not stayed the trial pending against the present applicant; only his presence before the learned trial court has been dispensed with, therefore, the trial of the present case may not be stalled or stayed, rather directions may be issued to conduct and conclude the trial with expedition, strictly in accordance with law. He has further submitted that the statement so given by the applicant is apparently violative of Section 125 of the Act, 1951 inasmuch as his sentence that whosoever would cast vote in favour of Congress, would be branded as Gaddar and whosoever would cast vote in favour of Bhartiya Janta Party shall not be pardoned by Khuda. As per Sri Saran, the applicant could have used the word "Bhagwan' but he deliberately and intentionally used the word "Khuda' for those voters, who cast their votes to the Bhartiya Janta Party. During investigation, sufficient material has been collected by the Investigating Officer in support of the allegation, therefore, the intention of the present applicant to use the word "Khuda' for those voters, who cast their votes to Bhartiya Janta Party and also as to why the voters of Congress would be branded as "Gaddar of the country' may be determined during the course of the trial. Sri Saran has stated that both the learned court below i.e. learned trial court as well as revisional court has considered the arguments of the present applicant thoroughly and carefully and returned their findings strictly in accordance with law, therefore, there is no infirmity or illegality in those order, so the present petition may be dismissed and the applicant may be directed to participate in the trial proceedings so that the trial may be conducted and concluded with expedition. Since he has already been protected by the Hon'ble Apex Court, therefore, he has got no reasonable apprehension of his arrest in any manner whatsoever.

21. Heard learned counsel for the parties and perused the material available on record.

22. Article 19 of the Constitution of India gives all citizens the rights regarding freedom of speech and expression but subject to reasonable restrictions for preserving inter-alia public order, decency or morality. This is trite that the extent of protection of speech would depend on whether, such speech would constitute a propagation of ideas or would have any social value. If the answer to the said question is in affirmative, such speech would be protected under Article 19 (1) (a); if the answer is in native, such speech would not be protected under Article 19 (1) (a). Further, reasonable restrictions are meant for preserving inter-alia public order, decency or morality. Prima facie, it is not decent for a person, who is the Chief Minister of one State, to utter any sentence or word which has any hidden meaning. As per the contents of his speech, the voters of the Congress would be termed as "Gaddar of the country' whereas the voters of the Bhartiya Janta Party would not be pardoned by "Khuda'. It is true that Khuda, Bhagwan or God are one and the same but using the word "Khuda' by one Hindu leader only for those voters, who cast their votes to the Bhartiya Janta Party not to the Congress can only be clarified by the applicant during the course of the trial about his intent to use such word. I am unable to comprehend as to how such speech would

constitute a propagation of ideas or would have any social value. Since credible evidences to that effect are said to have been collected during investigation and charge sheet has been filed, therefore, veracity of charge may not be examined or tested by this Court by invoking its inherent power under Section 482 Cr.P.C.

23. For the convenience, Section 125 of the Act, 1951 is being reproduced herein below:-

"125. Promoting enmity between classes in connection with election. *Any person who in connection with an election under this Act promotes or attempts to promote on grounds of religion, race, caste, community or language, feelings of enmity or hatred, between different classes of the citizens of India shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both."*

24. From the perusal of Section 125 of the Act, 1951, it appears that if the feelings of enmity or hatred between different classes of citizens of India is promoted, that shall be treated as an offence under such section and punishable under Section 125 of the Act, 1951. The statement so given by the applicant is not so plain and simple inasmuch as for one set of voters, he is uttering the term "Gaddar of the country' and for the other set of voters, he is saying that "Khuda shall not pardon them'. Prima facie, it appears that he is threatening the later voters in the name of Khuda knowing fully well that if he uses the term "Khuda', some set of voters belonging to different religion might have severely been influenced.

25. So far as the submission of learned counsel for the applicant is that the speech of the applicant is based on his personal opinion, therefore, no offence under Section 125 of the Act, 1951 may be constituted as it lacks mens-rea, so he will have to clarify his opinion before the trial court as to what is his source of knowledge that if any one who believes in "Khuda' casts votes to Bhartiya Janta Party, those would not be pardoned by "Khuda' and as to why this thing would not be applicable for the voters, who cast vote to Congress. In certain cases, the Courts have considered the "knowledge' as an essential element of offence, not the "mens rea'. Therefore, if during course of investigation some credible evidences/materials have been collected, charge sheet has been filed, cognizance has been taken, discharge application has been rejected by the learned trial court by speaking and reasoned order and that order has been upheld by the revisional court, that too by speaking and reasoned order, then the applicant must participate in the trial proceedings.

26. Notably, the Hon'ble Apex Court has not stayed the proceedings pending against the present applicant before the trial court and only his presence has been dispensed with keeping the appeal pending, therefore, the trial/proceedings of the present case may not be stayed or quashed.

27. The power of this Court enshrined under Section 482 Cr.P.C. is an inherent power to secure the ends of justice or to prevent any abuse of the process of any Court. This is an extra-ordinary power of the High Court like Article 226 of the Constitution of India but at the same time, this Court must be much careful and cautious before invoking this power to ensure that if this power is not invoked, the litigant would suffer irreparable loss and injury and it would be manifest injustice

and abuse of the process of the law. Therefore, the Apex Court has observed in catena of cases that this power should be invoked very sparingly and cautiously.

28. The High Court of Uttarakhand at Nainital has considered almost the similar and identical case in re; **Rajendra Singh Bhandari Vs. State of Uttarakhand and Another, 2020 SCC OnLine Utt 551**, and considering the relevant dictums of the Apex Court, that petition was dismissed. Relevant paragraphs no.10 to 18 of the said judgment are required to be reproduced hereunder:-

"10. The scope of Section 482 of the Code has been considered by the Hon'ble Supreme Court in various judgments.

*11.In **Madhu Limaya v. State of Maharashtra,(1977) 4 SCC 551 : AIR 1978 SC 47,** the Hon'ble Apex Court has held that the following principles would govern the exercise of inherent jurisdiction of the High Court -*

(1) Power is not to be resorted to, if there is specific provision in Code for redress of grievances of aggrieved party.

(2) It should be exercised sparingly to prevent abuse of process of any Court or otherwise to secure ends of justice.

(3) It should not be exercised against the express bar of the law engrafted in any other provision of the Code.

*12. In **Pepsi Food Limited v. Special Judicial Magistrate, (1998) 36 ACC 20,** the Hon'ble Supreme Court has observed that the power conferred on the High Court under Article 226 and 227 of the Constitution of India, and under Section 482 of the Code have no limits, but more the power more due care and caution is to be exercised in invoking these powers.*

*13. In **Lee Kun Hee v. State of U.P., JT (2012) 2 SC 237**, the Hon'ble Supreme Court held that the Court in exercise of its jurisdiction under Section 482 of the Code cannot go into the truth or otherwise of the allegations and appreciate evidence, if any, available on record.*

*14. In **State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335,** the Hon'ble Supreme Court of India considered in detail the provisions of Section 482 of the Code. The Hon'ble Supreme Court summarized the legal position by laying the following guidelines to be followed by High Courts in exercise of their inherent jurisdiction:*

"(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.

15. In the instant case, cognizance has been taken in the offence punishable under Section 125 of the Act, 1951. Section 125 of the Act, 1951 reads as under:--

"Section 125. ***Promoting enmity between classes in connection with election.--****Any person who in connection with an election under this Act promotes or attempts to promote on grounds of religion, race, caste, community or language, feelings of enmity or hatred, between different classes of the citizens of India shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both."*

16. It is the fundamental duty of every citizen to promote harmony and the spirit of common brotherhood and fraternity amongst all the people of India transcending religious, linguistic and regional or sectional diversities. For fair and peaceful election, during the election campaign, party or candidate should not indulge in any activity which may create mutual hatred or cause tension between different classes of the citizens of India on ground of religion, race, caste, community or language.

17. In the present case, the learned Chief Judicial Magistrate took the cognizance after considering the evidences available on the record. It is well settled that at the time of considering of the case for cognizance and summoning, merits of the case cannot be tested and it is wholly impermissible for this Court to enter into the factual arena to adjudge the correctness of the allegations. This Court would not also examine the genuineness of the allegations since this Court does not function as a Court of Appeal or Revision, while exercising its jurisdiction under Section 482 of the Code. In this matter it cannot be said that there are no allegations against the applicant. Apart this, learned counsel for the applicant could not able to show at this stage that allegations 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 applicant.

18. The use of expression "promotes or attempts to promote" in Section 125 of the Act, 1951 shows that there has to be mens rea on the part of the accused to commit the offence of promoting disharmony amongst different religions under Section 125, whereas, the case of the applicant is that this matter is launched by the political opponents. These allegations are required to be tested only at the time of trial. This Court cannot hold a parallel trial in an application under Section 482 of the Code."

29. In view of the trite law as settled by the Apex Court (supra), facts and circumstances as considered above, the

present case does not fall in any category set out in the judgment of **State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335**. Further, I find no infirmity, illegality or perversity in the impugned orders dated 21.10.2022 passed by the revisional court and in the order dated 04.08.2022 passed by the learned trial court as both the impugned orders are well considered, reasoned and speaking orders. Accordingly, the prayers made in this application are refused.

30. Since the case has to be tried, so I make it clear that the observations made in the preceding paras of this order are only for the disposal of this application, filed under Section 482 Cr.P.C. These observations will not influence the trial court while deciding the case.

31. In the aforesaid terms, the application, filed under Section 482 Cr.P.C., is **dismissed.**

32. No order as to costs.

33. Before parting with, I appreciate the hard work and research done by my Law Intern Mr. Mudit Singh for finding out the case laws applicable in the present issue.

(2023) 1 ILRA 512
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.01.2023

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ-A No. 4900 of 2022

Dr. Rakesh Kumar Bajpai & Ors.
...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Neerav Chitravanshi, Sri Mrinal Chandra, Sri Om Prakash Pandey

Counsel for the Respondents:
C.S.C., Sri Mrinal Chandra, Pallavi Vatsala, Sri Vishal Kumar Upadhyay

Civil Law - Uttar Pradesh Homeopathic Medical Service Rules, 1990 - Appointment of Deputy Directors (Homeopathic), District Homeopathic Medical Officers, Senior Homeopathic Medical Officers - grade of the Deputy Directors (Homeopathic), District Homeopathic Medical Officers & Senior Homeopathic Medical Officers, is same - Rules only provides for appointing four senior most persons as Deputy Directors (Homeopathic) - G.O. dated 03.01.2017, provided that the senior most Homeopathic Medical Officers would be appointed as Deputy Directors (Homeopathic) and the next 75 senior most persons shall be appointed as District Homeopathic Medical Officers in the 75 districts - Subsequently, another G.O. dated 20.07.2022, altered this policy, withdrawing the previous arrangement - State Government reserved the right to appoint any Senior Medical Officer as a District Homeopathic Medical Officer, irrespective of their seniority - Held - the conditions laid out in the G.O. dated 20.07.2022, self-defeating, arbitrary, and in violation of Article 14 of the Constitution of India - G.O. dated 20.07.2022, quashed.

Allowed. (E-5)

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Heard learned counsel for the petitioner and Sri V.K. Shahi, learned Additional Advocate General assisted by Sri Prafull Yadav, learned Standing Counsel and perused the record.

2. The petitioners have approached this Court challenging the impugned order dated 20.07.2022 passed by the respondent

no.1 (Annexure No.1, to the writ petition) as well as the Government Order of the same date i.e. 20.07.2022 filed as Annexure No.2 to the writ petition.

3. Facts of the case are that the petitioners who are working as Senior Homeopathic Medical Officers claimed that they belong to one and common cadre, from amongst them persons are also appointed as District Homeopathic Medical Officers and Deputy Directors (Homeopathic). Earlier by a Government Order dated 03.01.2017, it was provided that the senior most Homeopathic Medical Officers would be appointed as Deputy Directors (Homeopathic) and the next 75 senior most persons shall be appointed as District Homeopathic Medical Officers in the 75 districts. The remaining persons shall work as Senior Homeopathic Medical Officers. The same was done as the administrative duties of the Deputy Directors (Homeopathic) and the District Homeopathic Medical Officers were much superior and they were also entitled to write the ACARs of their subordinate officers including the Senior Homeopathic Medical Officers working under them.

4. Surprisingly, by the impugned Government Order dated 20.07.2022, the said policy was modified and it was provided that the said condition of appointing four senior most persons as Deputy Directors (Homeopathic) and next 75 persons as District Homeopathic Medical Officers and the same was withdrawn. The State Government retains itself the discretion to appoint any senior Medical Officer irrespective of his seniority to work as District Homeopathic Medical Officer and the said Government Order was withdrawn to the said extent. The reasons for the same are given in Paragraph 5 of the Government Order, which reads as under:-

"यह उल्लेखनीय है कि होम्योपैथिक चिकित्साधिकारीयों का मुख्य कार्य रोगियों का उचित प्रकार से उपचार किया जाना है। वरिष्ठ एवं अनुभवी होम्योपैथिक चिकित्साधिकारयों की आवश्यकता प्रत्येक जनपद के रोगियों को है। यदि सभी वरिष्ठ होम्योपैथिक चिकित्साधिकारियों को वरिष्ठता क्रम में जिला होम्योपैथिक चिकित्साधिकारी (प्रशासनिक पद) बना दिया जाता है तो उनकी योग्यता और अनुभव का लाभ आम जनता/रोगियों को प्राप्त नहीं हो पायेगा। उक्त के दृष्टिगत आयुष अनुभाग–2 के उक्त आदेश संख्या–3141/71–आयुष–2–2016–158/2016, दिनांक 03.01.2017 को अवक्रमिक करते हुए व्यपाक जनहित में यह निर्णय लिया जाता है कि प्रदेश के समस्त जनपदों में तैनात होम्योपैथिक चिकित्साधिकारियों में से वरिष्ठतम वरिष्ठ होम्योपैथिक चिकित्साधिकारी को जिला होम्योपैथिक चिकित्साधिकारी के रूप में तैनात किया जायेगा और यह सुनिश्चित किया जायेगा कि जनपद का कोई भी वरिष्ठ चिकित्साधिकारी किसी कनिष्ठ जिला होम्योपैथिक चिकित्साधिकारी के अधीन कार्यरत न हो।'"

5. The reasons given that the senior Homeopathic Medical Officers, who are experienced are required in every district. It also states that in a district, a person senior to the District Homeopathic Medical Officer shall not be appointed as Senior Homeopathic Medical Officer. The reasons and conditions provided in Paragraph 5 of the Government Order, defeats the very purpose which is provided in this regard. Once a junior person is appointed in a district as the District Homeopathic Medical Officer, no person senior to him would be appointed. Thus, only further junior persons would be appointed in the said district as Senior Homeopathic Medical Officer. The earlier policy of the State Government which provides that 75 senior most persons be appointed as District Homeopathic Medical Officers in 75 districts, gave sufficient flexibility to the Government to appoint senior persons from

amongst Senior Homeopathic Medical Officers also in every district. The conditions provided in the impugned Government Order is self defeating and being arbitrary is hit by Article 14 of the Constitution of India. Therefore, the Government Order dated 20.07.2022, is hereby quashed.

6. Learned Standing Counsel states that the rules provide sufficient discretion to the State Government to appoint Senior Homeopathic Medical Officers, as they desire, as there is no condition placed in the rules except for appointing four senior most persons as Deputy Directors (Homeopathic). He further submits that the grade of the Deputy Directors (Homeopathic) and District Homeopathic Medical Officers and Senior Homeopathic Medical Officers, is the same.

7. I do not find any force in the submissions of learned Standing Counsel. To fill up the gap in the rules, the State Government itself has issued a Government Order dated 03.01.2017 and filled the said gap. The procedure provided in the Government Order 03.01.2017 in itself is sufficiently provided the procedure which was not arbitrary and was in consonance of Article 14 of the Constitution of India.

8. Since the Government Order dated 20.7.2022 is set aside, hence the impugned order dated 20.07.2022, whereby the persons have been appointed in furtherance of the Government Order dated 20.07.2022, also cannot stand and is hereby set aside. The State Government is directed to appoint the persons in accordance with the Uttar Pradesh Homeopathic Medical Service Rules, 1990, duly amended from time to time as well as the Government Order dated 03.01.2017. The said modification in the posting shall be made, positively within a period of four weeks from today.

9. The writ petition is ***allowed.***

(2023) 1 ILRA 514
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.12.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Writ-A No. 11196 of 2022

Smt. Kiran ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pratik Srivastava, Sri Abhishek Bhushan, Sri Anil Bhushan Sr. Advocate

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

A. Civil Law - Constitution of India, Art. 16 - Compassionate Appointment - Dying in Harness Rules, 1974 - Married Daughter - Dying in Harness Rules, 1974 on 04.05.2022 and now married daughters are also entitled for compassionate appointment – However, the Corporation is governed by its own Polices and Regulations & that the Board of the Corporation has not yet adopted amendments made in the Rules of 1974 by the Government in 2021 - compassionate appointment is an exception to the general rule of direct recruitment under Article 16 - No aspirant has a right to compassionate appointment & it can be considered only after all the norms laid down in the State Policies/Regulations are satisfied by such family members, on the date of consideration of application, which has to be strictly observed for

consideration of claim for compassionate appointment (Para 11, 12)

B. Compassionate Appointment - Married Daughter - Petitioner father was a Class III employee, who died in harness - Respondent Corporation denied the petitioner's claim for compassionate as she was married daughter, residing at her matrimonial home, her brother was a government employee, her sister was also married to a government employee - mother of the petitioner was getting family pension and has also been given all terminal benefits on the death of his father - *Held* - Only because the mother of the petitioner has started living with the petitioner and the petitioner's husband in unemployed, it cannot be said that family is facing financial crisis - petitioner unable to show that she was dependent on her father's income at the time of his death (Para 16)

Dismissed. (E-5)

List of Cases cited:

1. St. of U.P. & anr. Vs Madhavi Mishra & ors. Special Appeal No. 223 of 2021 dt 23.09.2021

2. The Director of Treasuries in Karnataka & anr. Vs Somyashree Civil Appeal No. 5122 of 2021 dt 13.09.2021

3. Smt. Vimla Srivastava Vs State of U.P. 2016 1ADJ page No. 21

4. V Sunithakumari Vs K.S.E.B. & ors., 1992 SCC online KER145

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

1. Heard learned counsel for the petitioner and Shri Abhishek Srivastava, learned counsel for the contesting respondents.

2. This petition has been filed challenging the order dated 25.06.2022 passed by the respondent no. 3 rejecting the petitioner's application for compassionate appointment.

3. It is the case of the petitioner that her father late Girish Chandra was a Class III employee working in the office of respondent no. 3 and he died in harness on 15.09.2020, he was survived by his widow and two daughters and a son. The petitioner is the second daughter, the first daughter is married to a government employee working in Amroha and the son Amit Kumar is a government employee posted in Moradabad. Late Girish Chandra was a permanent resident of Moradabad and therefore when he died his widow started living in Moradabad. The petitioner is married in Moradabad and living with her in-laws but her husband Rahul Kumar is un-employed. The petitioner's mother started living with the petitioner and her husband and in-laws after the death of her father and she has been looking after the widowed mother and therefore, she is entitled for appointment on compassionate ground.

4. The petitioner filed an application for compassionate appointment on 22.04.2022 saying that she is a Graduate and has "CCC" certificate and therefore, eligible for appointment on Class III post, when the petitioner's representation was not decided, she again made a representation this time to the Chief Engineer and also to the Chairman of the Corporation. Now, the representation of the petitioner has been rejected by the respondent No. 3, the Executive Engineer, Electricity Distribution Division, Bijnor on 25.06.2022 by a non speaking order without considering that even a married daughter is entitled for compassionate appointment, but by only stating that such a appointment

cannot be given to the petitioner in view of the Circular dated 05.07.2012 issued by the Corporation.

5. It has been submitted by the counsel for the petitioner that Dying in Harness Rules, 1974 applicable to U.P. Government Servants and their Dependents was amended in the year 2021 on the basis of judgment rendered by this Court and confirmed by the Supreme Court and now even a married daughter is included within the definition of family.

6. The counsel for the respondent Nos. 2 to 4 have filed a counter affidavit wherein they have denied the petitioner's right for compassionate appointment saying that the petitioner is married daughter and residing at her matrimonial home and her brother is a government employee and her sister is also married to a government employee. Only because the mother of the petitioner has started living with the petitioner and the petitioner's husband in unemployed, it cannot be said that family is facing financial crisis which is necessary prerequisite for appointment of dependents of deceased employee on compassionate ground. The mother of the petitioner is getting family pension and has also been given all terminal benefits on the death of late Girish Chandra. If the State Government has issued any amendment to the Rules of 1974 they shall not be automatically applicable to the Corporation as the employees of Corporation are governed by their own Rules/Regulations and Policies framed by the Board of Directors of the Company.

7. The counsel for the respondents have placed reliance upon a judgment rendered by a Division Bench of this Court in ***Special Appeal No. 223 of 2021 (State of U.P. and Another vs. Madhavi Mishra and 2 Ors.)*** decided on 23.09.2021 and also judgment of the Supreme Court in ***Civil Appeal No. 5122 of 2021 (The Director of Treasuries in Karnataka & Anr. vs. Somyashree)*** decided on 13.09.2021 to say that the petitioner not being a dependent on her deceased father and the family not being in financial crisis after the death of the employee her case for compassionate appointment cannot be considered.

8. Shri Krishna Agarwal, learned counsel for the respondents says that mistakenly a separate counter affidavit has been filed on behalf of respondent No. 3 which may be ignored by this Court as it shall be governed by the counter affidavit filed on behalf of the Corporation.

9. Learned counsel for the petitioner in his rejoinder affidavit has submitted that the petitioner's father was working as Class III employee in Bijnor and her two siblings her sister and her brother are not looking after their widowed mother. The widowed mother is living with the petitioner and she is taking care of the widowed mother and therefore she is entitled for compassionate appointment. It has also been submitted in terms of the judgment of this Court and the Supreme Court that Dying in Harness Rules, 1974 have been amended in the State of U.P. on 04.05.2022 and married daughters are also entitled for compassionate appointment. A copy of the amended Government Order dated 04.05.2022 has been filed as R.A.-1 to the rejoinder affidavit.

10. This Court having perused the notification dated 04.05.2022, finds that it refers to entitlement are of married daughters and also widowed daughter-in-laws and clarifies that the 12th Amendment

to the Dying in Harness Rules, 1974 shall be applicable with effect from 1993. It has also clarified that the State Government in cases of genuine difficulty may condone the delay in filing an application for compassionate appointment beyond 5 years also.

11. This Court after going through the Circular issued by the Corporation is clearly of the opinion that the Corporation is governed by its own Polices and Regulations. The Board of the Corporation has not yet adopted amendments made in the Rules of 1974 by the Government in 2021. That apart, the petitioner has been unable to show that she was dependent on her father's income at the time of his death. It is apparent from the pleading on record that her elder sister is married to a government employee living in Amroha. The petitioner's brother is also a government employee in Moradabad. The widowed mother of the petitioner for reasons best known to the family has not been residing with her employed son. After getting family pension and terminal benefits of late Girish Chandra she has chosen to go and live in the matrimonial home of the petitioner, may be because the petitioner's husband is allegedly unemployed, and it is the family pension of the widowed mother which is being used for taking care of the petitioner and her unemployed husband.

12. This Court has also gone through the judgment rendered by the Division Bench of this Court in Second Appeal No. 223 of 2021 (Supra) where this Court having considered the case of ***Smt. Vimla Srivastava vs. State of U.P. 2016 1ADJ page No. 21*** and the amendment to the definition of family carried out by State Government thereafter, has taken into account the criteria for compassionate appointment to dependents of deceased employees. It has been observed by the Division Bench that the death of the wage earner during service will entitle dependents for compassionate appointment only in case the family members were dependent upon the income of the wage earner and would face financial crisis in the absence of any one to look after them. This Court had placed reliance upon the judgment of Supreme Court in T***he Director of Treasuries in Karnataka & Anr. vs. Somyashree*** decided on 13.09.2021 where the Supreme Court had observed that compassionate appointment is an exception to the general rule of direct recruitment under Article 16 of the Constitution of India. No aspirant has a right to compassionate appointment. In case compassionate appointment is sought by family member of deceased employee it can be considered only after all the norms laid down in the State Policies/Regulations are satisfied by such family members. The norms prevailing on the date of consideration of application shall be strictly observed for consideration of claim for compassionate appointment.

13. The Division Bench after considering the facts in the case of ***State of U.P. and Another vs. Madhavi Mishra*** (supra) observed that nowhere in her application Madhavi Mishra had disclosed any fact about her mother getting family pension and as to how she was dependent on her father even after her marriage. The object of the scheme was to provide employment to the unemployed member of the deceased employee who died in harness. Only because the married daughter has not been excluded from the definition of family now, it could not be said that Smt. Madhavi Mishra was in anyway

dependent on her father after her marriage. The law enjoins that it is duty of the husband to maintain his wife and enables her to claim alimony in case he refuses to maintain her. Therefore, the dependency on the father ceases the moment the daughter is given in marriage and that is the justification for excluding married daughters from the category of dependents.

14. The Court also considered judgment rendered by the ***High Court of Kerela in a similar case in V Sunithakumari vs. K.S.E.B. and Others, 1992 SCC online KER145***

15. The Division Bench thereafter observed in the case of Madhavi Mishra (Supra) that petitioner cannot claim for compassionate appointment as a matter of right specially when she has deliberately omitted to mention eligibility of her mother to get family pension, thus not leaving her in penury and also not making her dependent on the present applicant. There is the tradition also that a married daughter is dependent on her husband and not on her father.

16. This Court has gone through the pleadings on record and finds that there is no pleading regarding the mother of the petitioner getting family pension and other terminal benefits on the death of late Girish Chandra. There is also no denial of such a statement made by the respondents in their counter affidavit in the rejoinder affidavit filed by the petitioner. It has not come out from the pleadings that the petitioner was in anyway dependant on the income of her father at the time he was alive. Only because the husband of the petitioner is allegedly unemployed and the mother of the petitioner is living with the petitioner and her husband and in-laws in petitioner's matrimonial home, it cannot be said that the petitioner has any right for compassionate appointment.

17. This Court finds no good ground to show interference in the order impugned. The writ petition stands dismissed.

18. No order as to cost.

(2023) 1 ILRA 518
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Writ-A No. 15733 of 2022

Khalifa Ram Chauhan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manoj Kumar Singh, Sri Awadhesh Kumar Malviya

Counsel for the Respondents:
C.S.C., Sri Omkar Dutt Malviya

A. Civil Law - Constitution of India, Art. 226 - Code Of Civil Procedure, 1908 - Allahabad High Court Rules 1952, Rule 7 of Chapter XXII - Second Writ petition - maintainability - principles of Order II Rule 2 & constructive res judicata would apply to writ jurisdiction - If a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the same cause of action - Even if the petitioner has withdrawn the earlier writ petition or it is dismissed as infructuous, without leave to file a fresh petition, a second writ petition for the same cause of action is not maintainable - Once the relief is framed in a particular manner in one

writ petition and such relief is not granted at the time of final disposal of the writ petition by the Court, it shall be presumed that relief so claimed stands rejected - In the present case, a previous petition was filed praying for retiral benefits alongwith admissible interest - In the said petition, petitioner made a statement before the Court that nothing further survives in the petition as respondents have paid post retiral benefits to him and, accordingly, the writ petition was dismissed as infructuous - Second writ petition filed for directing the respondents to pay 9% interest on retiral dues - Held, no second writ petition claiming interest on delayed payment is maintainable. (Para 7, 8,9,10)

Dismissed. (E-5)

List of Cases cited:

1. Devilal Modi Vs STO 1965 (1) SCR 686

2. Surya Deo Mishra Vs St. of U.P. 2007 (1) SLR 546 (All)

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

1. This petition has been filed with the following prayer:

"(a) To, issue a writ, order or direction in the nature of mandamus directing the respondents to pay 9% interest to the amount of Rs.15,00,000/- of retiral dues since 30.06.2017 till date to the petitioner, within stipulated period."

2. The learned counsel for the respondent has raised preliminary objection regarding maintainability of the writ petition. He states that the petitioner had earlier filed Writ-A No.9556 of 2020 before this Court praying for retiral benefits alongwith admissible interest and with further direction to the respondents to decide the representation of the petitioner dated 17.08.2020.

3. This Court initially entertained the said writ petition on 11.11.2020 directing the respondents to obtain instructions with regard to the payment of retiral dues of the petitioner. This Court directed the matter to be listed on 18.08.2021 and further directed that post retiral benefits of the petitioner may be paid to him, failing which, the Secretary (Water Supply) U.P. at Lucknow shall file his personal affidavit on or before the date fixed or otherwise, the Court would be forced to summon the Officer concerned in person. When the matter was taken up on 18.08.2021, the petitioner made a statement before the Court that nothing further survives in the petition as respondents have affected compliance with the order dated 12.07.2021 and, accordingly, the writ petition was dismissed as infructuous on the same day.

4. The copy of the order dated 18.08.2021 has been placed before this Court.

5. The counsel for the respondent says that once the petitioner had made a prayer for grant of retiral benefits alongwith the admissible interest in his earlier writ petition, which writ petition was disposed of having become infructuous, no second writ petition claiming interest of delayed payment is maintainable.

6. The counsel for the petitioner states that interest admittedly has not been paid by the respondents.

7. The Supreme Court in the case of ***Devilal Modi vs. STO 1965 (1) SCR 686*** was considering whether the principles of Order II Rule 2 and constructive res judicata would apply to writ jurisdiction and it observed that though the Courts dealing with the questions of infringement

of fundamental rights must consistently endeavour to sustain the said rights and should strike down their unconstitutional invasion, it would not be right to ignore the principle of res judicata altogether in dealing with writ petitions filed by citizens alleging the contraventions of their fundamental rights. If a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the same cause of action, because the principle of constructive res judicata is based on sound public policy of finality of judgments.

8. The Supreme Court in its Full Bench decision in ***Surya Deo Mishra vs. State of UP 2007 (1) SLR 546 (All)*** has held that the Rules of the Court prohibit second writ petition for the same cause of action. Rule 7 of Chapter XXII of the Allahabad High Court Rules 1952 provides that where an application has been rejected, it shall not be competent for the applicant to move a second application on the same facts. Even if the petitioner has withdrawn the earlier writ petition or it is dismissed as infructuous, without leave to file a fresh petition, a second writ petition for the same cause of action is not maintainable.

9. Once the relief is framed in a particular manner in one writ petition and such relief is not granted at the time of final disposal of the writ petition by the Court, it shall be presumed that relief so claimed stands rejected.

10. Thus, writ petition therefore, stands dismissed.

11. Thus, the writ petition is rejected as not maintainable.

(2023) 1 ILRA 520
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.12.2022

BEFORE

THE HON'BLE RAJIV JOSHI, J.

Writ-A No.23396 of 2014

Narsingh Rawat ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Msanjay Kumar Srivastava, Sri Siddharth Khare

Counsel for the Respondents:
C.S.C.

A. Civil Law - Compassionate Appointment - Claim - Delay - mother of the petitioner worked as Class IV employee (Sweeper) in the Institution who died on 29.6.1999 in harness during service period and at that time, age of the petitioner was 15 years four months and 16 days - Upon attaining the age of majority the petitioner applied for compassionate appointment - Principal forwarded the application on 22.06.2002 to the D.I.O.S. for consideration which remained pending – writ petition filed in year 2014 - Held - there was no delay or negligence on the part of the petitioner, but the delay was on the part of the state - respondents directed to consider the case of the petitioner for appointment on compassionate ground (Para 16)

Allowed. (E-5)

List of Cases cited:

1. Malaya Nanda Sethy Vs State of Orissa & ors. (S.L.P. (Civil) No. 936 of 2022) dt 20.05.2022

2. St. of Mah. & anr. Vs Ms. Madhuri Maruti Vidhate 2022 0 Supreme (SC) 1001

3. Govt. of India & anr. Vs P Venkatesh 2019 (15) SCC 613

4. Central Bank of India Vs Nitin Manu/SC/1151 of 2022

(Delivered by Hon'ble Rajiv Joshi, J.)

1. Heard Sri Siddharth Khare, learned counsel for the petitioner and Sri Govind Narain Srivastava, learned Standing counsel for the State respondent.

2. By means of the present writ petition, the petitioner seeks a direction in the nature of mandamus commanding the respondent nos. 3 and 4 to appoint the petitioner under Dying in Harness Rules on any Class IV post in the Institution namely Amar Shahid Bhagat Singh Inter College, Rasra, Ballia, District- Ballia.

3. The brief of facts of the present case are that the mother of the petitioner namely Janki Devi was working as Class IV employee (Sweeper) in the Institution namely Amar Shahid Bhagat Singh Inter College, Rasra, Ballia, District- Ballia who died on 29.6.1999 in harness during service period. After the death of his mother, petitioner applied for appointment on compassionate ground under the U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 (herein after referred to as the 'Rules of 1974') before the Principal Amar Shahid Bhagat Singh Inter College, Rasra, Ballia, District- Ballia on several occasions thereafter, Principal of the Institution forwarded the application of the Petitioner on 22.06.2002 to the District Inspector of Schools, Ballia for consideration of appointment of the petitioner on compassionate grounds, which remain pending till date.

4. Learned counsel for the petitioner further submits that the petitioner has completed all the required formalities for his compassionate appointment under the Rules of 1974. however, the respondent-authorities did not give any response with regard to the same. It is further submitted that there was no delay or negligence on the part of the petitioner, but the delay on the part of the state-respondent, the petitioner was fulfilled all the conditions for appointment on compassionate ground under the Rules of 1974. In support of his contention he placed reliance upon the recent judgment of Hon'ble Apex Court in **Malaya Nanda Sethy Vs. State of Orissa and Ors (S.L.P. (Civil) No. 936 of 2022) decided on 20th May, 2022.**

5. On the other hand, learned Standing counsel submits that at the time of death, petitioner was minor and his age was 15 years, 4 four month and 16 days. It is next submitted that application of the petitioner for appointment of compassionate ground has been received in the office of District Inspector of Schools, Ballia in the year-2020, there is no questions of delay on the part of the respondent authority i.e. District Inspector of Schools, District- Ballia. In support of his contention he placed reliance upon the judgment of Hon'ble Apex Court in **State of Maharashtra & Anr Vs. Ms. Madhuri Maruti Vidhate reported in 2022 0 Supreme (SC) 1001; Govt. of India & Anr. Vs. P Venkatesh reported in 2019 (15) SCC 613 and Central Bank of India Vs. Nitin reported in Manu/SC/1151 of 2022** in which, it is held that appointment on compassionate ground after a number of years from the death of deceased employee shall not be entitled.

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

7. The mother of the petitioner died in harness on 26.9.1999 and at that time, age of the petitioner was 15 years four months and 16 days. The petitioner applied for appointment on compassionate ground in place of his mother on attaining the majority before the Principal of the Institution, who forwarded the said application along with the relevant records to the District Inspector of Schools, Ballia on 22.6.2002, which is apparent from the annexure no.3 to the counter affidavit. The annexure C.A.-2 filed along with counter affidavit is not the report/comment which was alleged to be sought from the Principal of the Institution on 26.9.2020, it is only information after filing the present writ petition and in the said letter, report was sought form the Principal of the Institution within one week which is apparent from the paragraph no.8 to the counter affidavit.

8. The letter of District Inspector of Schools, Ballia dated 22.9.2020 is quoted as under:-

प्रेषक,

जिला विद्यालय निरीक्षक
बलिया।

सेवा में,

प्रधानाचार्य,
अमर शहीद भगत सिंह इण्टर कालेज,
रसड़ा, बलिया।

पत्रांक/ 3626–27/2020–21 दिनांकः 26/9/2020

विषय– मा0 उच्च न्यायालय इलाहाबाद में योजित याचिका संख्या–23396/2014 में पारित आदेश दिनांक 23.04.2014 के अनुपालन हेतु आख्या/अभिलेख मांगे जाने के सम्बन्ध में।

महोदय,

उपर्युक्त विषय के सम्बन्ध में अवगत कराना है कि श्री नरसिंह रावत पुत्र जानकी देवी द्वारा इस आशय का आवेदन पत्र दिया गया है कि उनकी माता श्रीमती जानकी देवी स्वीपर, विद्यालय में कार्यकाल के दौरान ही उनकी दिनांक 26.06.1999 को मृत्यु हो गयी। श्री रावत द्वारा अपनी माता के स्थान पर मृतक आश्रित कोटे के अन्तर्गत नियुक्ति की मांग की गयी है तथा इस हेतु मा0 उच्च न्यायालय इलाहाबाद में याचिका संख्या–23396/2014 श्री नरसिंह रावत बनाम उ0 प्र0 सरकार व तीन अन्य में दिनांक 23.04.2014 को पारित आदेश संलग्न कर आवश्यक कार्यवाही हेतु निवेदन किया गया है। मा0 उच्च न्यायालय द्वारा दिनांक 23.04.2014 को पारित आदेश निम्नवत–

9. Learned Standing Counsel representing respondent nos.1 and 2 may file counter affidavit within a month. Petitioner will have two week thereafter to file rejoinder affidavit. Issue notice to respondent nos. 3 and 4 returnable within six weeks. Steps may be taken within a week. List after service of notice.

अतः मा0 उच्च न्यायालय के उक्त आदेश दिनांक 23.04.2014 के अनुपालन/प्रकरण निस्तारण हेतु श्रीमती जानकी देवी की सेवा अभिलेख से सम्बन्धित समस्त पत्रजात तथा प्रकरण अबतक लम्बित होने का कारण का उल्लेख करते हुये अनुपूरक अभिलेखों सहित अपनी आख्या एक सप्ताह के भीतर इस कार्यालय का उपलब्ध कराने का कष्ट करें जिससे अग्रेत्तर कार्यवाही की जा सकें।

भवदीय,
ह0 अपठनीय
(भास्कर मिश्र)
जिला विद्याल निरीक्षक,
बलिया।
26/9

पृ0 सं0/3626–27/2020–21
तद्दिनांक

प्रतिलिपि– नर सिंह रावत पुत्र स्व0 जानकी देवी साकिन मुहल्ला– उततरपट्टी रसड़ा बलिया को सूचनार्थ प्रेषित।

ह0 अपठनीय
जिला विद्याल निरीक्षक,
बलिया।
26/9

10. In turn, Principal of the Institution replied to the District Inspector of Schools, Ballia vide letter dated 17.11.2020, in which, it is stated that the then Principal namely Mohd. Baseer Ansari has already forwarded the application of the petitioner for appointment on compassionate ground on 22.6.2002 which is pending in the office of District Inspector of Schools, Ballia.

11. The relevant portion of the letter dated 17.11.2020 forwarded by the Principal of Institution to the DIOS, Ballia is quoted as under:-

"उक्त के संबंध में अवगत कराना है कि श्रीमती जानकी देवी इस विद्यालय में चतुर्थ कर्मचारी के रूप में स्वीपर के पद पर कार्यरत थी। सेवाकाल में इनकी मृत्यु दिनांक 26.06.1999 को हो गयी। नियमानुसार श्रीमती जानकी देवी को मृत्यु उपरान्त परिवारिक पेंशन आदि इनके पति का पूर्व में ही मृत्यु होने के कारण नही दिया गया लेकिन मृतक आश्रित नियमानुसार के अनुसार मृतक के पाल्य श्री नरसिंह रावत का प्रस्ताव तत्कालीन प्रधानाचार्य मु0 वसीर अंसारी द्वारा मृतक आश्रित कोटे में दिनांक 22.06.2002 को प्रेषित किया गया जो अद्यतन आपके यहॉ अन्स्तारित रहा। (छायाप्रति संलग्न)

यहॉ यह भी अवगत कराना है कि श्री नरसिंह रावत द्वारा कई बार इस विद्यालय को एवं आपके कार्यालय को प्रत्यावेदन प्रस्तुत किया गया। नियमानुसार मृतक के कुटुम्ब के एक सदस्य को सेवा योजित करने का प्राविधान है। विद्यालय में परिधारक के कुल 15 की जनशक्ति शासन द्वारा निर्धारित है। वर्तमान में कुल 6 परिचारक कार्यरत है। इन 6 कर्मचारियो में स्वीपर के पद पर कोई कार्यरत एवं नियुक्त नही है। विद्यालय के साफ सफाई एवं आवश्यकता को दृष्टिगत रखते हुए श्री नरसिंह रावत को सेवायोजित किया जाना संस्था हित मे होगा।

अतः आपके आदेश के क्रम में श्री नरसिंह रावत को मृतक आश्रित के अन्तर्गत सफाई कर्मी/ स्वीपर के रिक्त पद पर चयन किये जाने की संस्तुति की जाती है।''

12. From the letter of the Principal, it is apparent that there is six posts of Class-IV employees, but no one is working on the post of Sweeper in the Institution.

13. It is apparent from the counter affidavit of the State that there was no fault or delay on the part of the petitioner and there was a delay on the part of the department/authorities, the petitioner should not be made to suffer.

14. The Hon'ble Apex Court in **Malaya Nanda Sethy (Supra)** has held as under:-

"7. Thus, from the aforesaid, it can be seen that there was no fault and/or delay and/or negligence on the part of the appellant at all. He was fulfilling all the conditions for appointment on compassionate grounds under the 1990 Rules. For no reason, his application was kept pending and/or no order was passed on one ground or the other. Therefore, when there was no fault and/or delay on the part of the appellant and all through out there was a delay on the part of the department/authorities, the appellant should not be made to suffer. Not appointing the appellant under the 1990 Rules would be giving a premium to the

delay and/or inaction on the part of the department/authorities. There was an absolute callousness on the part of the department/authorities. The facts are conspicuous and manifest the grave delay in entertaining the application submitted by the appellant in seeking employment which is indisputably attributable to the department/authorities. In fact, the appellant has been deprived of seeking compassionate appointment, which he was otherwise entitled to under the 1990 Rules. The appellant has become a victim of the delay and/or inaction on the part of the department/authorities which may be deliberate or for reasons best known to the authorities concerned. Therefore, in the peculiar facts and circumstances of the case, keeping the larger question open and aside, as observed hereinabove, we are of the opinion that the appellant herein shall not be denied appointment under the 1990 Rules. The appellant has become a victim of the delay and/or inaction on the part of the department/authorities which may be deliberate or for reasons best known to the authorities concerned. Therefore, in the peculiar facts and circumstances of the case, keeping the larger question open and aside, as observed hereinabvove, we are of the opinion that the appellant herein shall not be denied appointment under the 1990 Rules.

15. The judgment cited on behalf of the State is not applicable in the present case as there were a delay on behalf of the dependents of the deceased employee and the said judgment are not applicable in the present case.

16. In view of the above, discussions, the respondents are directed to consider the case of the petitioner for appointment on compassionate ground under the Rules of 1974 as per his application which was received in the office of District Inspector of Schools, Ballia on 22.6.2002 and if the petitioner is otherwise found to eligible to appoint him on the Class-IV in the Institution namely Amar Shahid Bhagat Singh Inter College, Rasra, Ballia, District-Ballia.

17. The aforesaid exercise should be completed by the concerned respondents within period of four weeks from today and the petitioner is entitled to all the benefits from the date of his appointment only.

18. In view of the above, writ petition stands allowed. There shall be no order as to costs.

(2023) 1 ILRA 524
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.01.2023

BEFORE

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

Writ-A No. 26963 of 2018

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

Counsel for the Petitioner:
Sri Siddharth Khare

Counsel for the Respondents:
C.S.C.

Civil Law - Service Jurisprudence - Arrear of salary - principle of "no work no pay" - when not applicable - where the employee remains out of service on account of the unilateral act of the employer which is subsequently found not valid and lawful, the employer cannot deny his salary on the principle of "no work no pay (Para 15)

Petitioner was appointed as Nalkoop Mistri in 2004, but his services were terminated by an order dated 14.09.2011, consequently he instituted Writ petition - said petition was allowed & the matter was remitted to the respondents to take a decision afresh - Respondents, vide order dated 28.04.2017, set aside the earlier order dated 14.09.2011 and reinstated him with immediate effect - Petitioner made an application for the arrears of salary for the period 14.09.2011 to 01.05.2017, which was rejected relying on the principle of "no work no pay" - Held - Petitioner reinstatement was unconditional and does not carry any condition subject to which the petitioner has been granted reinstatement - But for the respondents' decision to terminate his services on 14.09.2011, the petitioner would have continued in service and served the respondents - Petitioner was forced to stay away - Respondents directed to sanction and disburse arrears of the petitioner's salary for the period 14.09.2011 to 1.05.2017.

Allowed. (E-5)

List of Cases cited:

1. Shobha Ram Raturi Vs Haryana Vidyut Prasaran Nigam Ltd. & ors., 2016 (16) SCC 683

2. Prayag Narain Dubey Vs U.P.S.R.T.C. & ors., Writ-A No.40927 of 2004, dt 29.03.2018

3. U.P. State Road Transport Corporation & anr. Vs Prayag Narain Dubey in Special Appeal Defective No. 405 of 2018 dt 23.08.2018

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

1. This writ petition is directed against an order dated 29.10.2018 whereby the respondents have declined payment of petitioner's arrears of salary for the period 14.9.2011 to 1.5.2017 on the principle of "no work no pay". A mandamus is further sought ordering the respondents to sanction and disburse arrears of salary for the period 14.9.2011 to 1.5.2017 with interest at such rate as the Court may specify. There is a further direction sought commanding the respondents to sanction Assured Career Progression for the petitioner also, within a specified period of time.

2. Parties have exchanged affidavits.

3. Admit.

4. By consent of parties, heard forthwith.

5. Heard Mr. Siddharth Khare, learned Counsel for the petitioner and Mr Praveen Ojha, learned Additional Chief Standing Counsel appearing on behalf of the state.

6. The short facts giving rise to this petition are that the respondents who are the Government of U.P. issued an advertisement for the post of Nalkoop Mistri (for short 'the post in question) on 09.08.2004. The petitioner was duly selected, and consequent upon selection, appointed to the post in question on 12.10.2004. His services were regularized by an order dated 15.07.2010 w.e.f. 08.10.2007. The petitioner was served a show cause notice on 10.12.2010 founded on a complaint to the effect that the petitioner did not possess the necessary Trade Certificate from the I.T.I. which vitiated his eligibility for appointment as a Nalkoop Mistri. The petitioner submitted a reply saying that he had been selected after following the due procedure. It was pointed out that in the advertisement there was a stipulation as regards the essential qualifications which said: "High School/I.T.I. with five years experience". The petitioner's case is that he is a Matriculate and therefore, he fulfils one of the alternate conditions. The petitioner's services were terminated by an order dated

14.09.2011. In substance, the order dated 14.09.2011 is not an order of termination, in the sense it is understood in the disciplinary jurisdiction. It is in substance an order of cancellation of appointment on account of the petitioner not fulfilling requisite qualifications owing to the respondents' stand taken at the relevant time. The petitioner's appeal and review to the departmental authorities met with failure. Consequently he instituted Writ-A No. 52876 of 2012. The said petition was heard and allowed by an order dated 07.12.2016 holding that the order of cancellation of appointment impugned in the writ petition did not show that the authorities had considered the petitioner's case about his eligibility founded on what was mentioned in the advertisement. The matter was remitted to the respondents to take a decision afresh, bearing in mind the guidance in the judgment and after hearing the petitioner.

7. Consequent upon the matter being placed before the respondents, they passed an order dated 28.04.2017 holding that indeed the petitioner fulfilled the qualifications as advertised, though he did not fulfil the qualifications as provided under the Rules. The respondents proceeded by their order dated 28.04.2017 to set aside the earlier order dated 14.09.2011 terminating the petitioner's services and reinstated him with immediate effect to the post in question. There is no further condition, limitation or inhibition attached to the order dated 28.04.2017, reinstating the petitioner. At that stage, the petitioner made an application on 07.10.2017 followed by another dated 3.05.2018, whereby he said that he had been forced to stay away from his duties, in consequence of the order dated 14.09.2011 for no fault of his, and was therefore, entitled to the arrears of salary for the period 14.09.2011 to 01.05.2017. By the order impugned, the said application has been rejected.

8. Mr. Siddharth Khare, learned Counsel for the petitioner submits that the impugned order is manifestly illegal because the petitioner remained out of service on account of an ill-advised action of the respondents cancelling his appointment, which later on they themselves found, on a remand by this Court, to be specious.

9. Mr. Praveen Ojha, learned Additional Chief Standing Counsel, on the other hand, submits that since the petitioner did not hold the necessary I.T.I. certificate and his services were terminated on that ground by the order dated 14.09.2011, he is not entitled to arrears of salary for the relevant period. Mr. Ojha also relied on the principle of "no work no pay" which is the foundation of the impugned order.

10. Upon hearing learned Counsel for the parties, this Court finds that the respondents cannot take a vacillating stand so far as the qualifications of the petitioner go. May be, under the Service Rules, an I.T.I. trade certificate is essential but the advertisement did not mention it. The petitioner applied according to the advertisement. He was duly selected and appointed. He functioned on that basis drawing salary. His appointment was cancelled relying on the Service Rules, but without paying heed to what was mentioned in the advertisement about the essential qualifications that the petitioner fulfils. This Court set aside the order cancelling the petitioner's appointment and sent back the matter for re-consideration to the respondents. At this stage, the

respondents have taken the view that since what was advertised cannot be changed and the petitioner possessed requisite qualifications according to that advertisement, their earlier order cancelling the petitioner's appointment was wrong. The respondents acknowledged their mistake in cancelling the petitioner's appointment and ordered his unconditional reinstatement. It has been remarked above that that the reinstatement was unconditional and we emphasize that the order reinstating the petitioner in service is unqualified and does not carry any condition subject to which the petitioner has been granted reinstatement.

11. In the circumstances, to attribute the petitioner any blame for not performing his duties between the period 14.09.2011 to 01.05.2017 would be patently arbitrary. But for the respondents' decision to terminate his services on 14.09.2011 on a particular view about the essential qualification that the petitioner ought to have possessed, the petitioner would have continued in service and served the respondents. However, later on, when this Court sent the matter back to the respondents to reconsider the issue, the respondents acknowledged their mistake and held that cancellation of the petitioner's appointment, was for the reason indicated, not tenable. Therefore, the petitioner remaining out of job or not rendering work cannot be made the basis of denying him his emoluments for the period that he was forced to stay away It becomes all the more relevant in this case because the respondents have acknowledged their mistake while reinstating the petitioner, and, done so, without any limitation regarding the terms of reinstatement.

12. In this regard, reference may be made to the decision of the Supreme Court in **Shobha Ram Raturi vs. Haryana Vidyut Prasaran Nigam Ltd. and others, 2016 (16) SCC 683** where it has been held:

"1. It is not a matter of dispute, that the appellant was retired from service on 31.12.2002, even though he would have, in the ordinary course, attained his date of retirement on superannuation, only on 31.12.2005. The appellant assailed the order of his retirement dated 31.12.2002 by filing writ petition no. 751 of 2003. The same was allowed by a learned Single Judge of the Punjab and Haryana High Court, on 14.09.2010. The operative part of the order is extracted here under: "Accordingly the present writ petition is allowed; order dated 31.12.2002 (Annexure P-4) is quashed. The petitioner would be treated to be in continuous service with all consequential benefits. However it is clarified that since the petitioner has not worked on the post maxim of "no work, no pay" shall apply and the consequential benefits shall only be determined towards terminal benefits. However there will be no order as to costs."

2. The denial of back wages to the appellant by the High Court vide its order dated 14.09.2010 was assailed by the appellant by filing Letters Patent Appeal No. 489 of 2011. The High Court rejected the claim of the appellant, while dismissing the Letters Patent Appeal on 26.5.2011. The orders dated 14.09.2010 and 26.5.2011 passed by the High Court limited to the issue of payment of back wages, are subject matter of challenge before this Court.

3. Having given our thoughtful consideration to the controversy, we are satisfied, that after the impugned order of retirement dated 31.12.2002 was set aside,

the appellant was entitled to all consequential benefits. The fault lies with the respondents in not having utilized the services of the appellant for the period from 1.1.2003 to 31.12.2005. Had the appellant been allowed to continue in service, he would have readily discharged his duties. Having restrained him from rendering his services with effect from 1.1.2003 to 31.12.2005, the respondent cannot be allowed to press the self serving plea of denying him wages for the period in question, on the plea of the principle of "no work no pay". (emphasis by Court)

13. This decision has been followed by this Court in **Prayag Narain Dubey Vs U.P.S.R.T.C. and others, Writ-A No.40927 of 2004, decided on 29.03.2018**. The decision in **Prayag Narain Dubey** (supra) has been upheld by the Division Bench in **U.P. State Road Transport Corporation and another vs. Prayag Narain Dubey in Special Appeal Defective No. 405 of 2018, decided on 23.08.2018**. The principle in all these decisions is crystal clear and that is that where the employee remains out of service on account of the unilateral act of the employer which is subsequently found not valid and lawful, the employer cannot deny his salary on the principle of "no work no pay".

14. There is a further grievance that the petitioner has raised and that is about non-grant of the Assured Career Progression, taking into account the period that he remained out of service. I am of opinion that, that is a decision which the respondents have to take and not this Court; at least, in the first instance.

15. In view of the aforesaid position of the law and facts obtaining here, this petition **succeeds** and is **allowed.** The impugned order dated 29.10.2018 passed by Executive Engineer, Nalkoop Anurakshan Khand, Bhadohi (Sant Ravidas Nagar) is hereby **quashed.**

16. Let a mandamus issue ordering each of the respondents to sanction and disburse arrears of the petitioner's salary for the period 14.09.2011 to 1.05.2017 within a month of receipt of a copy of this order.

17. The respondents are further directed to consider the petitioner's case for grant of Assured Career Progression taking into account the period of service between 14.09.2011 to 01.05.2017, treating the petitioner to be in service continuously. The decision in this regard shall be taken within six weeks of the date of receipt of a copy of this order by respondent no.2.

18. There shall be no order as to costs.

19. Let this order be communicted to the Executive Engineer, Nalkoop Anurakshan Khand, Bhadohi (Sant Ravidas Nagar) by the Registrar (Compliance)

(2023) 1 ILRA 528
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.01.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE VIKRAM D. CHAUHAN, J.

Jail Appeal No. 7728 of 2010
With
Criminal Appeal No. 7484 of 2010

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

Counsel for the Appellant:

From Jail, Sri Gagan Pratap Singh (A.C.)

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

A. Criminal Law – Indian Penal Code,1860 – Section 302/45, 394 & 422 – Arms Act, 1959 – Section 25 – Murder – Life imprisonment – Appeal against conviction and Sentence – Sustainability – Death was caused due to firearms injury – Contradiction in the St.ment, how far relevance – Held, unless a contradiction is proved by putting it to the person who records the original St.ment, such contradiction is of no consequence – While appreciating the evidence, the Court must examine the evidence in its entirety, upon reading the St.ment of a witness as a whole, and if the Court finds the St.ment to be truthful and worthy of credence, then every variation or discrepancy particularly which is immaterial and does not affect the root of prosecution case, would be of no consequences. (Para 31 and 32)

B. Criminal Law – Indian Evidence Act, 1972 – Section 9 – Relevant fact – Identity – Collateral evidence, when receivable – Held, a fact which establishes the identity of anything or person whose identity is relevant are relevant fact. The principle in the section is a exception to the general rule that the evidence of collateral facts is not usually receivable – It is often important to establish the identity of a person who witness testifies that he saw on the particular occasion. Sometimes, a witness may not recognise the person but he may still testify that on subsequent event he was able to identify the person he had initially seen on the particular occasion. (Para 35 and 36)

C. Criminal Law – Indian Evidence Act, 1972 – Section 9 – Test Identification Parade – Object and necessity – Held, necessity for holding an identification parade can arise only when the accused persons are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity – Test identification parade is not substantive evidence and it can only be used as corroborative of the St.ment in court. (Para 52 and 54)

D. Criminal Law – Indian Penal Code – Section 34 – Scope – Common intention – Vicarious responsibility and constructive liability – Explained – Section 34 IPC carves out an exception from general Law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others if he has the "common intention" to commit offence. This section has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence – It recognises the principle of constructive liability and essence of that liability is the existence of a common intention. (Para 66 and 67)

E. Criminal Law – Indian Penal Code – Sections 300 – Murder and culpable homicide – Distinction – Culpable homicide is murder under section 300 of the Indian Penal Code where the act is done intentionally or with the knowledge or means of knowing that is the natural consequences of the act – No prior enemity has been shown between prosecution witness and the Appellants – The firearm wound of deceased as per the post-mortem report shows blackening and tattooing which is indicative of the fact that firing was made by Appellant at a close range – Death was due to shock and hemorrhage – High Court held the trial court justified in convicting the appellants. (Para 58, 78, 82 and 85)

Appeal dismissed. (E-1)

List of Cases cited:-

1. Kartik Malhar Vs St. of Bihar, (1996) 1 SCC 614

2. St. of Uttar Pradesh Vs Samman Dass; (1972) 3 SCC 201

3. Khurshid Ahmed Vs St. of J. & K.; (2018) 7 SCC 429

4. Mohd. Rojali Ali Vs St. of Assam; (2019) 19 SCC 567

5. Kulwinder Singh Vs St. of Punj. ; (2015) 6 SCC 674

6. Harbans Kaur Vs St. of Hary.; (2005) 9 SCC 195

7. Surinder Kumar Vs St. of Punj.; AIR 2020 SC 303

8. M. Nageswara Reddy Vs St. of Andhra Pradesh; (SC) 2022 CrLJ 2254

9. Paramhans Yadav & Sadanand Tripathi Vs St. of Bihar & ors.; AIR 1987 SC 955

10. Hari Nath Vs St. of U.P.; AIR 1988 SC 345

11. Malkhansingh Vs St. of M.P.; (2003) 5 SCC 746

12. Lal Singh Vs St. of U.P.; (2003) 12 SCC 554

13. Pramod Mandal Vs St. of Bihar; (2004) 13 SCC 150

14. Criminal Appeal No. 740 of 2018; Raja v. St. By The Inspector of Police decided on 10.12.2019

15. Criminal Appeal No.288 of 2022; Krishnamurthy @ Gunodu Vs St. of Karn. (SC) decided on 16.2.2022

16. Sudip Kr. Sen @ Biltu & ors. Vs St. of W.B. & ors.; (2016) 3 SCC 26

17. Balu @ Bala Subramanium & anr. Vs St. (UT of Pondicherry); (2016) 15 SCC 471

18. St. of A.P. Vs M. Sohan Babu; (2010) 15 SCC 69 : (2013) 2 SCC (Cri) 123 : 2010 SCC

19. Satish Narayan Sawant Vs St. of Goa; (2009) 17 SCC 724 : (2011) 2 SCC (Cri) 110 : 2009 SCC OnLine SC 1638

20. Abdul Waheed Khan Vs St. of A.P.; (2002) 7 SCC 175 : 2005 SCC (Cri) 1301

21. St. of A.P. Vs Rayavarapu Punnayya; (1976) 4 SCC 382 : 1976 SCC (Cri) 659

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

1. Heard Sri Gagan Pratap Singh, learned Amicus Curiae for the Appellant in Jail Appeal No.7728 of 2010 and Sri Anadi Krishna Narayana, learned counsel for the Appellant in Criminal Appeal No.7484 of 2010 and learned A.G.A. for the State and perused the record.

2. The present appeal is filed by Appellants challenging judgment and order dated 20th October, 2010 passed by the Special Judge (DAA), Agra. By means of impugned judgment, Appellants-Kailash and Baba Thakur @ Prawesh Kumar Singh has been convicted under Section 394 I.P.C. and sentenced to undergo 10 years rigorous imprisonment and Rs.5000/- fine. Further, Appellants have been convicted under Section 302/34 I.P.C. and sentenced to undergo life imprisonment and Rs.10,000/- fine; Appellant-Kailash has also been convicted under Section 411 I.P.C. and sentenced to undergo 2 years rigorous imprisonment; Appellant-Kailash has further been convicted under Section 25 of Arms Act and sentenced to undergo 3 years rigorous imprisonment and Rs.10,000/- fine.

3. The prosecution case as per first information report is that on 23rd June, 2005 at about 6.30 pm, informant (PW1) Babua along with his son Aslam (PW2) were going to tempo stand Mantola road to meet informant's second son Arif. When they reached near Subhash Road then one cloth agent Amar Nath (PW4) made distress call that his belongings have been taken away forcefully and on aforesaid distress call, informant and his son saw that two persons were running towards the powerhouse in which one was having

countrymade pistol and a bag and the other accused was having countrymade pistol. On hearing distress call of Amar Nath, the son of informant deceased-Arif and Aslam (PW2), Shahid Anwar, Mohd. Shahid, Fateh Singh (Tempo Driver), Ilbas, Rakesh Sharma, Muhiuddin and Amar Nath started running to catch aforesaid accused persons and caught hold of one of the accused-person, who on being caught, fired which hit son of informant, namely, Arif, who suffered firearm injury and as a result of the same, accused person was led free and on the same occasion one tempo driver hit his tempo with the accused person, as a result of same, he sustained injury and fell down. Thereafter, Amar Nath got back his bag, which was forcefully taken by accused person and when informant and his son Aslam reached the spot, accused was having countrymade pistol in his hand and there were four live cartridges in his pocket, which was taken in custody. Accused person informed that his name is Kailash s/o Asharfi Lal. Injured-Arif was brought to the hospital by Aslam and other persons and in intervening period police personnel came. The weapon cartridges and bag of Amar Nath was deposited in the police station and first information report was lodged after being scribed by Nasruddin and on the basis of the same, Case Crime No.98 of 2005, under Section 394, 411, 302 I.P.C. and Case Crime No.99 of 2005 under Section 25 Arms Act was registered at 19.20 hours on the same day.

4. The investigation in present case was carried on and panchayatnama of deceased was prepared on 23rd June, 2005. The panchayatnama was held at the S.N. Hospital, Agra on 23rd June, 2005 at 20.20 pm and same was completed at 22.05 pm. The panch witnesses of panchayatnama were Haji Mohd. Gulfam, Abdul Haneef, Mohd. Muim, Shamimoddin, Allauddin and as per opinion of panch witnesses deceased Arif died on account of firearm injury. Thereafter, body was sent for post mortem examination and post mortem held on 24th June, 2005 at 10.00 am. The post mortem was conducted by Dr. A.P. Singh (PW-6). The following injuries were found in the post mortem report:-

"Firearm wound of entry 0.4 cm X 0.4 cm situated on the anterior wall of stomach in the upper part 0.5 cm left to the midline at a level 2 cm below xephisterum. Cavity deep on probing probe reaches on the peritoneal cavity. Blackening and tatooing present.

Fracture of 3rd lumber vertebra. Metallic bullet 3 cm X 0.8 cm recovered from this bone."

5. As per post mortem report deceased Arif died due to shock and haemorrhage as a result of ante-mortem injury. Investigating Officer prepared the site plan of place of incident on 23th June, 2005. On 8th September, 2005 identification proceeding in respect of accused Baba Thakur @ Prawesh Kumar Singh was held by Investigation Officer.

6. After investigation, chargesheet was submitted against the Appellants by the Investigation Officer.

7. The trial court framed charge on 23rd January, 2006 against Appellant-Kailash under Section 25 Arms Act and Section 411 I.P.C. The trial court further framed charges against Appellants Kailash and Baba Thakur @ Prawesh Kumar Singh under Sections 394 and 302 read with Section 34 I.P.C. Appellants denied the charges and claimed to be tried.

8. The prosecution in support of its case produced following witness:-

(a) Babua (P.W.1), who is informant of case, has stated that on 23rd June, 2005 at about 5.30 pm informant and his son Aslam went to meet his second son Arif, who was working at Tempo Stand Mantola and when they reached Shubhas Nagar then they heard distress call of agent Amar Nath shouting that he has been looted and then informant and his son saw two accused persons running towards the powerhouse in which one was having countrymade pistol and a bag in his hand and other person was having countrymade pistol. On hearing distress call, his son Arif and Aslam and other persons Shahid and Anwar and Mohd. Shahid Qureshi, Fateh Singh (Tempo Driver), Mohd. Ilyas and others ran towards aforesaid accused persons; person whose bag was forcefully taken away also ran behind accused persons. While running towards accused persons his son Arif caught hold of one of the accused person. However, he fired on his son Arif and as a result of the same, Arif sustained firearm injury; aforesaid accused person was let of from the custody of the Arif. Later on one tempo driver has hit aforesaid accused person with his tempo as a result of same, he was injured and fell down. In the intervening period, Amar Nath took the bag from injured accused person. Informant took away countrymade pistol and four live cartridges from the pocket of injured accused person. Injured accused person informed his name as Kailash, s/o Asharfi Kashyap and further informed that other accused person is Baba Sindhi resident of Gurudwara Etah.

Infomant (PW1) thereafter, send his injured son Arif to hospital for medical treatment with the help of his second son Aslam and other persons. Police personnel came on place of occurrence and on his instructions first information report was scribed by Nuruddin and countrymade pistol, live cartridges and bag of Amar Nath recovered from accused Kailash was taken to police station Rakabganj and first information report was lodged. The witness has identified the first information report dated 23rd June, 2005 and same was marked as Ex.Ka.1 before trial court; recovered countrymade pistol and live cartridges were also handed over to police and a recovery memo was prepared and recovered articles were sealed in presence of the informant (P.W.1.) Informant has also stated that Mustaqeem and Sajid had signed and informant had given his thumb impression; witness has identified recovery memo dated 23rd June, 2005 and the same was marked as Ex.Ka.2 before the trial court. Witness has further testified that accused person who ran away from the place of occurrence was Baba Sindhi and he is also known as Baba Thakur. After incident he along with his son Aslam, Shahid, Anwar and Rakesh Sharma went to jail for identifying Baba Sindhi @ Baba Thakur; All the four persons had identified the accused and the identification memo is marked as Ex.Ka.3. Countrymade pistol and four live cartridges was exhibited as Ex.Ka.6 and the bag of Amar Nath was exhibited as Ex.Ka.8. Witness has further stated that both the accused persons are present in the court and as such he has identified the accused person before the trial court.

(b)Aslam (P.W.2), s/o Haji Babua has stated that on 23rd June, 2005, occurrence took place. He along with his father Haji Babua went to tempo stand, to meet his brother at about 6.30 pm and when they reached Subhash Bazar, they heard

distress call of Amar Nath who shouted that he has been looted and witness saw that two accused persons ran towards powerhouse in which one was having countrymade pistol and a bag and the other accused was having a countrymade pistol. On hearing distress call, Arif, Shahid, Anwar and Shahid Qureshi and other persons went behind aforesaid accused persons and when they caught hold of one of the accused persons, said accused person with the intention to kill fired and as a result of the same his brother Arif sustained firearm injury. Accused person was let out of custody and was trying to run away, in the meantime, one tempo driver dashed with accused person, as a result of the same, accused person sustained injury and fell down. Amar Nath (PW4) thereafter, took his bag; witness further stated that his father took the countrymade pistol and four live cartridges from injured accused. Injured accused informed that his name is Kailash and accused person who has ran away from the spot his name is Baba Sindhi. In the meantime, police came and witness took his brother with the help of other persons to the S.N. Hospital where the doctors have declared his brother dead. Witness has identified Appellants in court.

(c) Mahavir Singh Chauhan (P.W.3), S.O. Nai Ki Mandi, Agra has stated that on 23rd June, 2005 he was posted as Chowki In-charge Fort under Police Station Rakabganj. He has stated that on the said date he had conducted panchayatnama of the deceased Arif at S.N. Medical College in front of panch witnesses. Witness has identified panchayatnama and same was marked as Ex.Ka.4 before the trial court. Witness has further submitted that letter to the C.M.O., photo lash, challan nash was filled by the aforesaid witness and was duly signed and the same was marked as Ex.Ka.5, Ex.Ka.6 and Ex.Ka.7 respectively.

(d) Amar Nath (P.W.4), s/o Late Sri Sewaram has stated that on 23rd June, 2005 he went to Etah and after recovering money from cloth retailers he kept money in his bag and was going to Subhash Bazar; When he reached near tempo stand at about 6.30 pm two persons who were carrying countrymade pistols and one of the accused person hit with butt of the countrymade pistol and thereafter, forcefully took away the bag and ran towards the powerhouse. Witness made distress call and on hearing the same, some persons came and ran towards the accused person to catch them and as a result of the same, one of accused person fired; present witness and Arif sustained injuries and accused person was let off. Later on, one tempo hit one of the accused person and bag of witness was recovered. Family members of the person who sustained firearm injury in the meantime came and from the custody of one of accused person countrymade pistol and four live cartridges were recovered; accused person who was caught on the spot disclosed his name as Kailash and he also disclose the name of other accused as Baba Thakur. Injured was taken to the hospital and father of the deceased went to the police station. He has also stated that police has also prepared papers in respect of recovery of countrymade pistol, live cartridges and bag. Witness has not been able to identify the accused person as the occurrence is old.

(e) Manoj Kumar Shukla (P.W.5), S.P., Police Station Maniyaon, Lucknow has stated that on 23rd June, 2005 he was posted at Police Station Rakabganj as H.M. and chik FIR in the present case on the basis of the first

information report was lodged by Babua. He has identified the chik FIR and the same was exhibited as Ex.Ka.9 before the trial court.

(f) Dr. A.P. Singh (P.W.6), District Women Hospital, Hathras Mahamaya Nagar has stated that on 24th June, 2005 he was posted at District Women Hospital, Agra and on the aforesaid date he had conducted post mortem of deceased Arif at 10.00 am; deceased died on account of ante-mortem firearm injures; injuries could have been sustained on 23rd June, 2005 at 6.30 pm and were firearm injuries.

(g) Baleshwar Prasad Tripathi (P.W.7), S.I., Police Station Kotwali has stated that on 23rd June, 2005 he was posted at Police Station Rakabganj as S.I. and was the Investigating Officer; On the same day he had prepared the nakal chik, nakal rapat and recorded the statement of Head Moharrir Manoj Kumar, informant Haji Babua and also prepared site plan after visiting the place of occurrence. Statement of accused Kailash was also recorded on 26th June, 2005: Statement of panchayatnama witness was recorded and statement of S.I. Mahavir Singh was also recorded in the case diary: On 1st July, 2005 recorded statement of Aslam and Mustaqeem, Mohd. Sajid and Rakesh Sharma.

(h) Sri Ambesh Chand Tyagi (P.W.8), Dy. S.P., Gautam Budh Nagar has stated that on 9th July, 2005 he was posted as In-charge Inspector, Police Station Rakabganj. On 11th July, 2005 statement of S.I. Mahavir Singh was recorded. On 16th July, 2005 accused Baba Thakur was arrested and his statement was recorded and he was kept hidden. On 10th August, 2005 statement of Mustaqeem and on 15th August, 2005 statement of Mohd. Sajid was recorded. On 12th September, 2005 recovered articles were sent for forensic examination. On 15th August, 2005 chargesheet was filed against accused Kailash. On 8th September, 2007 identification of Baba Thakur was held and thereafter, chargesheet was submitted, which is Ex.Ka.15.

9. The accused persons did not examine any witness in support of their defence and their statement under Section 313 Cr.P.C. was recorded by the trial court on 26th July, 2010.

10. Appellant-Kailash in his statement under section 313 of the criminal procedure code has denied charges/allegations against him and has stated that he had come to meet his relative and one tempo has hit him and as a result he sustained injury and all the tempo drivers assembled. He has not fired on deceased nor he has any revolver.

11. The Appellant-Baba Thakur in his statement under section 313 of the criminal procedure code has denied the charges and stated that he was not present at the place of occurrence and has no knowledge with regard to the occurrence. It is further stated that the witness has not identified the Appellant.

12. As per prosecution case on 23rd June, 2005 at about 6:30 PM when P.W.4 - Amarnath was travelling near powerhouse area, police station - Rakabganj, District - Agra along with bag containing tiffin in which cash was kept then Appellant - Kailash and Baba Thakur alias Prawesh Kumar snatched away bag of Amarnath. At the same time informant (PW1) Babua along with his son namely Aslam (PW2) were going to tempo stand Mantola road to

meet informant's second son Arif. On hearing distress call of Amarnath that accused persons has forcibly taken away bag containing cash; informant and his son saw accused persons running towards Powerhouse, one was having country-made pistol & a bag and other accused person was having country made pistol.

13. On hearing distress call, son of informant deceased-Arif and Aslam (PW2), Shahid Anwar, Mohd. Shahid, Fateh Singh (Tempo Driver), Ilbas, Rakesh Sharma, Muhiuddin and Amar Nath started running to catch the aforesaid accused persons and caught hold of one accused-person, who on being caught, fired which hit son of informant, namely, Arif, who sustained firearm injury and as a result of same, aforesaid accused person was let free and at the same time one tempo driver hit his tempo with accused person, as a result of the same, he sustained injury and fell down. Thereafter, Amar Nath got back his bag, which was forcefully taken by accused person and when informant and his son Aslam reached the said place, accused was having countrymade pistol in his hand and there were four live cartridges into his pocket, which was taken in custody.

14. The aforesaid accused person informed that his name is Kailash, s/o Asharfi Lal. Accused Kailash disclosed the name of other accused person as Baba Sindhi, Near Gurudwara Colony, Etah who ran away from place of occurrence. Injured Arif was brought to hospital by Aslam and other persons and in intervening period police personnel came. Countrymade pistol, cartridges and bag of Amar Nath was deposited in police station and first information report was lodged after being scribed by Nasruddin.

15. Prosecution witnesses has supported the prosecution story. P.W.4 - Amarnath supporting prosecution case has stated that on 23rd June, 2005 he went to Etah and after recovering cash from cloth merchants which was kept in a bag; came back by bus from Etah to Agra. After he de-boarded the bus and was travelling through Subhash baazar at about 6:30 PM, two persons with country made pistol came. One person hit him with the butt and second person snatched away the bag and ran towards powerhouse. When Amarnath made distress call then common people ran towards accused person and caught hold of one person who fired on being caught and as a result of the same, Arif got injured and person who was caught was let off but fell down after being dashed with tempo. The bag of Amarnath was recovered and country made pistol and live cartridges were also recovered from the aforesaid person, who was caught; aforesaid person disclosed his name as Kailash and disclosed the name of accused who ran away as Baba Sindhi. The aforesaid statement of P.W.4 is supported by P.W.1 who is father of the deceased and P.W.2 who is brother of the deceased. P.W.1 & P.W.2 identified the Appellants before the trial court. Accused Baba Thakur was identified by prosecution witness in jail also.

16. The post-mortem of deceased was held on 24th June, 2005 by P.W.6 - Dr A.P.Singh; aforesaid witness has proved post-mortem report and same was marked as Ex Ka - 11 before trial court. As per post-mortem report deceased - Arif died due to shock and haemorrhage as a result of anti-mortem firearm injury. The deceased suffered firearm injury in stomach. Blackening and tattooing was present. Lumber Vertebra was fractured and a bullet

was recovered from body of deceased. P.W.6 has further testified that death was possible from firearm injury. The opinion of said witness was that death could have occurred at 6 PM.

17. It is submitted by learned counsel for Appellants that in present case P.W.1 - father of the deceased and P.W.2 - Aslam (Brother of deceased) are not the independent witness and testimony of P.W.4 does not prove prosecution case. The trial court has recorded finding that no enmity has been shown between Appellants and P.W.1 & P.W.2. Trial court has further recorded finding that presence of the aforesaid witnesses have been shown on the basis that they had gone for talks of marriage of sister of deceased which is natural event.

18. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is often the case that offence is witnessed by a close relative of the victim, whose presence on the scene of offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling witness as interested. It is worthy to note that there is a distinction between a witness who is related and an interested witness. A relative is a natural witness. The Apex Court in Kartik Malhar Vs. State of Bihar, (1996) 1 SCC 614 has opined that a close relative who is a natural witness cannot be regarded as an interested witness, for the term "interested" postulates that the witness must have some interest in having the accused, somehow or the other, convicted for some animus or for some other reason.

19. Merely because the witnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relative would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. There is no bar in law on examining family members as witness. Evidence of a related witness can be relied upon provided it is trustworthy.

20. The Supreme Court in **State of Uttar Pradesh Vs. Samman Dass, (1972) 3 SCC 201** observed as under:-

"23...It is well known that the close relatives of a murdered person are most reluctant to spare the real assailant and falsely involve another person in place of the assailant..."

21. In **Khurshid Ahmed Vs. State of Jammu and Kashmir (2018) 7 SCC 429,** Supreme Court on the issue of evidence of a related witness observed as under :-

"31. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused."

22. The Apex Court in **Mohd. Rojali Ali v. State of Assam, (2019) 19 *SCC 567*** in respect of related witness has observed as under :-

"13. As regards the contention that all the eyewitnesses are close relatives of the deceased, it is by now well-settled that a related witness cannot be said to be an "interested" witness merely by virtue of being a relative of the victim. This Court has elucidated the difference between "interested" and "related" witnesses in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused (for instance, see State of Rajasthan v. Kalki [State of Rajasthan v. Kalki, (1981) 2 SCC 752 : 1981 SCC (Cri) 593] ; Amit v. State of U.P. [Amit v. State of U.P., (2012) 4 SCC 107 : (2012) 2 SCC (Cri) 590] ; and Gangabhavani v. Rayapati Venkat Reddy [Gangabhavani v. Rayapati Venkat Reddy, (2013) 15 SCC 298 : (2014) 6 SCC (Cri) 182]). Recently, this difference was reiterated in Ganapathi v. State of T.N. [Ganapathi v. State of T.N., (2018) 5 SCC 549 : (2018) 2 SCC (Cri) 793] , in the following terms, by referring to the three-Judge Bench decision in State of Rajasthan v. Kalki [State of Rajasthan v. Kalki, (1981) 2 SCC 752 : 1981 SCC (Cri) 593] : (Ganapathi case [Ganapathi v. State of T.N., (2018) 5 SCC 549 : (2018) 2 SCC (Cri) 793] , SCC p. 555, para 14)

"14. "Related" is not equivalent to "interested". A witness may be called "interested" only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be "interested"."

14. In criminal cases, it is often the case that the offence is witnessed by a close relative of the victim, whose presence on the scene of the offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling the witness as interested. Indeed, one of the earliest statements with respect to interested witnesses in criminal cases was made by this Court in *Dalip Singh v. State of Punjab [Dalip Singh v. State of Punjab*, 1954 SCR 145 : AIR 1953 SC 364 : 1953 Cri LJ 1465] , wherein this Court observed: (AIR p. 366, para 26)

"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relative would be the last to screen the real culprit and falsely implicate an innocent person."

15. In case of a related witness, the Court may not treat his or her testimony as inherently tainted, and needs to ensure only that the evidence is inherently reliable, probable, cogent and consistent. We may refer to the observations of this Court in *Jayabalan v. State (UT of Pondicherry) [Jayabalan v. State (UT of Pondicherry)*, (2010) 1 SCC 199 : (2010) 2 SCC (Cri) 966] : (SCC p. 213, para 23)

"23. We are of the considered view that in cases where the court is called

upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

23. The Apex Court in ***Kulwinder Singh v. State of Punjab, (2015) 6 SCC 674*** held that the case of the prosecution cannot be rejected solely on the ground that independent witnesses have not been examined when, on the perusal of the evidence on record the Court finds that the case put forth by the prosecution is trustworthy. When the evidence of the official witnesses is trustworthy and credible, there is no reason not to rest the conviction on the basis of their evidence.

24. In ***Harbans Kaur v. State of Haryana, (2005)*** **9 SCC 195,** the Hon'ble Supreme Court observed that:

"6. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused."

25. It is held in recent judgement rendered in ***Surinder Kumar v. State of Punjab AIR 2020 Supreme Court 303*** that merely because prosecution has not examined any independent witness, same would not necessarily lead to the conclusion that the appellant has been falsely implicated.

26. In **M. Nageswara Reddy v. State of Andhra Pradesh (SC) - 2022 CrLJ 2254** the Apex Court has observed that merely because the witnesses were the relatives of the deceased, their evidence cannot be discarded solely on the aforesaid ground.

27. It is further to be seen that in the present case no material has been shown to demonstrate that there was any prior enmity between P.W.1 and P.W.2 and accused person. No reasons have been assigned as to why aforesaid witness would falsely implicate the Appellant's. There is one more aspect of the matter that in the present case P.W.4 - Amarnath is an independent witness who was travelling with the money bag and incident had occurred in presence of aforesaid witness. The said witness is the eyewitness of the aforesaid incident and as such it cannot be said that there is no independent witness to support the prosecution case.

28. It is further submitted by learned counsel for the Appellant that in present case, scribe of first information report - Nooruddin and tempo driver who had hit accused Kailash has not been examined and an important evidence has been detained by the prosecution and as such the Appellant could not have been convicted for the alleged offence. In the present case, first information report was scribed on the dictation of the first informant and informant has testified on oath before the trial court and has proved the first information report, under the aforesaid circumstances non-production of the scribe of first information report will not

adversely affect prosecution case. Further, tempo driver who had hit the Appellant - Kailash with the Tempo was seen by PW-1, PW-2 and PW-4 and Appellant-Kailash were caught at the place of occurrence with countrymade pistol and bag and same has been proved by prosecution by testimony of prosecution witnesses and as such the non-examination of the Tempo Driver will not affect the prosecution case.

29. It is further submitted by counsel for the Appellant that there is a contradiction in the statement of witnesses. It is submitted that one witness has stated that he was hundred metre away and caught hold the accused person by running whereas the other witness has stated that witness was near the place of occurrence. It is also submitted that informant has stated that the alleged occurrence is of 5:30 PM whereas other witness has stated that alleged incident is of 6:30 PM and as such there is contradiction. It is to be noted that the statement of the prosecution witness no 1 and 2 was recorded before the trial court in the year 2008 and incident has taken place on 23rd June, 2005 and as such the statement itself are recorded after three years of the date of occurrence. It is further to be noted that in first information report being Exhibit Ka.-1, time of alleged incident has been stated to be 6:30 PM. The memory of the witness fades with the passage of time and as such unless the contradiction is material the same by itself cannot demolish the prosecution case specifically when the first information report has been duly proved by the prosecution witness no 1. It is also to be noted that contradiction in the statement of witness has not been confronted with aforesaid witness in cross examination.

30. Minor variations in the accounts of witnesses are often the hallmark of the truth of their testimony. When the discrepancies were comparatively of a minor character and did not go to the root of prosecution story, they need not be given undue importance. Mere congruity or consistency is not the sole test of truth in the depositions. In the depositions of witnesses there are always normal discrepancy, however honest and truthful they may be. Such discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence, and the like. Material discrepancies are those which are not normal, and not expected of a normal person. Corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eye witnesses unbelievable.

31. Unless a contradiction is proved by putting it to the person who records the original statement, such contradiction is of no consequence.

32. The very purpose of putting the contradiction to the witness is to give an opportunity to him/her to explain contradictory statement, if any. While appreciating the evidence, the Court must examine the evidence in its entirety, upon reading the statement of a witness as a whole, and if the Court finds the statement to be truthful and worthy of credence, then every variation or discrepancy particularly which is immaterial and does not affect the root of prosecution case, would be of no consequences.

33. It is further submitted by learned counsel for Appellant that P.W.1 is father of the deceased and P.W.2 is brother of deceased however the P.W.1 went to the police station after his son was injured by gunshot injury nor blood stain clothes of the brother has been recovered and as such the testimony of aforesaid witnesses is not natural. The trial court has rejected the aforesaid contention raised by counsel for the Appellant. In the present case P.W.1 in his testimony has stated that deceased was taken by his son and other persons to hospital and in the meantime the police personnel came at the place of occurrence and as such the first information report was scribed on the dictation of the informant and he went to the police station for lodging of first information report. Police personnel had already come to the place of occurrence and as such once the deceased was sent to the hospital along with son of the informant and other persons then it is in the natural course of event that informant went to the police station for lodging the first information report immediately. It is further to be noted that just because the prosecution has not collected evidence with regard to blood stain on the clothes of the P.W.1 and P.W.2 would not demolish the prosecution case specifically when there are eyewitness of the alleged incident who have supported prosecution case before the trial court.

34. It is submitted by learned counsel for the Appellant-Baba Thakur that as per the prosecution case two accused persons were involved in the alleged occurrence. Appellant-Kailash was caught hold by prosecution witnesses and other persons at the place of occurrence. While the other accused person had fled away from the place of occurrence. Appellant-Kailash when caught by mob has disclosed name of other accused person as Baba Sindhi. The statement of the co-accused as per learned counsel for the Appellant is not of substantive evidence against the other co-accused in the trial but can only be used for lending reassurance if there are any other substantive evidence. In this reference learned counsel for the Appellant has relied upon the judgement of the apex court in **Paramhans Yadav and Sadanand Tripathi Vs State of Bihar and others, AIR 1987 SC 955.** It is submitted that the Appellant is Parvesh kumar Singh and it is not proved that Baba Sindhi, Baba Thakur and Parvesh Kumar Singh are one and the same person.

35. As per section 9 of the Evidence Act, a fact which establishes the identity of anything or person whose identity is relevant are relevant fact. The principle in the section is a exception to the general rule that the evidence of collateral facts is not usually receivable.

36. It is often important to establish the identity of a person who witness testifies that he saw on the particular occasion. Sometimes, a witness may not recognise the person but he may still testify that on subsequent event he was able to identify the person he had initially seen on the particular occasion. The subsequent event may be formal such as test identification parade or informal for instance seeing a person on a road or receiving information with regard to identity from some other person who was present at the time of occurrence. The fact of identification of the accused person is relevant fact as the same points towards the person who has committed the offence.

37. In the present case, two persons are alleged to have participated in the

alleged occurrence as per the prosecution case. One accused person namely Appellant-Kailash was caught on the place of occurrence by the prosecution witnesses. The occurrence is of a public place. When Appellant-Kailash was caught by P.W.1, 2 and 4, Appellant-Kailash has disclosed the identity of the other accused person as Baba Sindhi. The aforesaid disclosure of identity of other accused person was made by Appellant-Kailash at the place of occurrence just after he was caught by the prosecution witness.

38. P.W.1 and P.W.2 has identified accused person-Appellants' before the trial court. In the first information report dated 23rd June, 2005, name of the Appellants' have been disclosed. The first information report has been lodged by P.W.1-Babua who is father of the deceased and was present at the time of alleged occurrence.

39. Appellant-Baba Sindhi was seen by the prosecution witness at the time of alleged occurrence. The identity of the aforesaid Appellant was disclosed by accused Kailash. The fact regarding disclosure of identity by the accused Kailash is proved by the statement of prosecution witness no 1, 2 & 4. The fact relating to identity of accused person is relevant and has been proved by prosecution witnesses before trial court. It is to be noted that evidence may be given under section 3 of the evidence act in any proceedings of existence or non-existence of every fact in issue and such other facts as our declared relevant. The fact with regard to identity of the Appellant - Baba Sindi as has been disclosed by Appellant - Kailash is a relevant fact and as such the evidence in respect of the same can be given to prove the aforesaid fact. It is also important to note that the identity of the Appellant - Baba Sindhi has been disclosed at the place of occurrence just after the incident has occurred. The name of the Appellant - Baba Sindhi is stated as co-accused in the first information report lodged by P.W.1. The Appellants were seen by prosecution witnesses at the time of occurrence however the name of the aforesaid persons were disclosed when Appellant - Kailash was caught and he has disclose the name of other accused person.

40. It is further to be noted that Appellants including Baba Sindhi has been identified before trial court by the eyewitnesses and the same is corroborated by the identification of the accused person at the time of identification parade. The fact relating to identity of a person who is involved in the alleged crime is a relevant fact which conforms the presence of the Appellant at the time of occurrence. Once the accused person have been identified by the eyewitnesses as perpetrator of crime before the trial court and the same is corroborated by the test identification parade then it is not open for Appellants to submit that disclosure of co-accused cannot be a foundation for conviction of the Appellant.

41. It is further submitted by learned counsel for Appellant-Baba Sindhi that name of the Appellant is Prawesh Kumar Singh and he is not known by any other name, namely, Baba Sindhi and Baba Thakur. In this respect, counsel for the Appellant submits that P.W.1 has stated that the co-accused Kailash has disclosed the name of Appellant who has fled the place of occurrence as Baba Sindhi. He has further stated that the Appellant is also known as Baba Thakur. Similarly, P.W.4 has stated that the accused who fled from the place of occurrence was Baba Sindhi

however how he come to know that the name was Baba Thakur is not known.

42. One of accused persons namely Appellant - Kailash was caught at place of occurrence by prosecution witnesses. The occurrence is a public place. When Appellant - Kailash was caught by P.W.1, 2 and 4, the aforesaid Appellant - Kailash has disclosed the identity of other accused person as Baba Sindhi.

43. On the aforesaid basis, first information report was lodged by P.W.1 against Appellant's. Name of Appellant was disclosed as Baba Sindhi in the first information report.

44. After the lodging of the first information report, investigation was carried on by Investigating Officer and in case diary dated 26th June, 2005 it has been recorded by the Investigating Officer that Sub- Inspector Jitendra Singh along with other police officials went in search of accused Baba Sindhi however on reaching the place where the aforesaid accused was residing it has come to knowledge that the correct name of the accused is Baba Thakur and was also known as Baba Sindhi in the area.

45. The Appellant in a statement under section 313 of the Code of Criminal Procedure has got recorded his name as Baba Thakur alias Pravesh kumar. In a statement under section 313 Cr.P.C. the aforesaid accused - appellant has not stated that he is not known as Baba Sindhi. The memo of appeal has been filed by Appellant in name of Baba Thakur alias Parvesh Kumar Singh before this court. The P.W.7 in his cross examination has stated that in his investigation the name of accused Baba Thakur has come during investigation. P.W.1 in his statement has identified Appellant Baba Thakur alias Sindhi alias Parvesh Kumar. Under the circumstances, Baba Sindhi, Baba Thakur and Parvesh Kumar are same person who has been identified by prosecution witness before the trial court as the person who is one of the accused involved in alleged crime.

46. It is further submitted on behalf of the Appellant-Baba Thakur that none of the witnesses of the alleged occurrence has seen the Appellant at the place of incident.

47. The testimony of the prosecution witness who are the eyewitness of alleged incident is a substantive piece of evidence before the trial court. P.W.1 has identified the Appellants' before the trial court. P.W.1 was present at the place of occurrence on 23rd June, 2005 as he had gone to to meet his son Aslam. The alleged occurrence has taken place in presence of P.W.1. Appellants have also been identified by the aforesaid witness in the identification parade.

48. Similarly, P.W.2 has also identified the Appellants' before the trial court. The aforesaid witness has further stated that he had seen the accused persons; accused person who ran away from the place of incident was seen by him from a distance of 20 steps; both the accused persons were involved in the alleged occurrence. It is to be noted that prosecution witness no 1 and 2 are the relative of the deceased.

49. The P.W.4 has supported the prosecution story however has stated that the co-accused Kailash has disclosed the name of Baba Thakur and has further stated that he is not in a position to recognise the

accused person before the trial court as sufficient time has passed when the alleged occurrence took place. It is to be noted that the alleged incident is of 23rd June, 2005 and the statement of P.W.4 was recorded on 16th March, 2010 and as such in case there is a minor variation in the statement of prosecution witness the same will not in any manner affect the prosecution case specifically when P.W.1 and P.W.2 have identified accused persons and have supported the prosecution case.

50. It is further submitted on behalf of Appellant-Baba Thakur that identification parade was held on 8th September, 2005 whereas the alleged occurrence has taken place on 23rd June, 2005. He submits that there is inordinate delay in holding the test identification parade and as such the identification itself loses its credibility. Learned counsel for the Appellant has further relied upon the judgement of the apex court in **Hari Nath Vs State of U.P., AIR 1988 SC 345** in this respect.

51. In the present case, alleged occurrence has taken place on 23rd June, 2005 and thereafter the Appellant - Baba Sindhi was arrested on 16th July, 2005 and test identification parade was held in jail on 8th September, 2005. The accused person have been identified by P.W.1 and 2 before the trial court. The aforesaid witness were present at the time of alleged occurrence and are related to the deceased.

52. The necessity for holding an identification parade can arise only when the accused pers ons are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime.

53. The identification parades belong to investigation stage and they serve to provide investigating authority with materials to assure themselves if the investigation is proceeding on the right lines. In other words, it is through these identification parades that investigating agency is required to ascertain whether the persons whom they suspect to have committed the offence were the real culprits. There is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court.

54. Test identification parade is not substantive evidence and it can only be used as corroborative of the statement in court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court.

55. In ***Malkhansingh v. State of M.P., (2003) 5 SCC 746*** a three-Judge Bench of Apex Court observed as under:-

"7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration."

56. The value to be attached to test identification parade would depend on the facts and circumstances of the case and no hard and fast rule can be laid down. Where, however, court is satisfied that witnesses had ample opportunity of seeing the accused at the time of commission of offence and there is no chance of mistaken identity, delay in holding test identification parade may not be held to be fatal.

57. In ***Lal Singh v. State of U.P., (2003) 12 SCC 554***, the Apex Court in paras 28 and 43 dealt with the value or weightage to be attached to test identification parade and the effect of delay in holding such test identification parade.

"28. The next question is whether the prosecution has proved beyond reasonable doubt that the appellants are the real culprits. The value to be attached to a test identification parade depends on the facts and circumstances of each case and no hard-and-fast rule can be laid down. The court has to examine the facts of the case to find out whether there was sufficient opportunity for the witnesses to identify the accused. The court has also to rule out the possibility of their having been shown to the witnesses before holding a test identification parade. Where there is an inordinate delay in holding a test identification parade, the court must adopt a cautious approach so as to prevent miscarriage of justice. In cases of inordinate delay, it may be that the witnesses may forget the features of the accused put up for identification in the test identification parade. This, however, is not an absolute rule because it depends upon the facts of each case and the opportunity which the witnesses had to notice the features of the accused and the circumstances in which they had seen the accused committing the offence. Where the

witness had only a fleeting glimpse of the accused at the time of occurrence, delay in holding a test identification parade has to be viewed seriously. Where, however, the court is satisfied that the witnesses had ample opportunity of seeing the accused at the time of the commission of the offence and there is no chance of mistaken identity, delay in holding the test identification parade may not be held to be fatal. It all depends upon the facts and circumstances of each case.

43. It will thus be seen that the evidence of identification has to be considered in the peculiar facts and circumstances of each case. Though it is desirable to hold the test identification parade at the earliest-possible opportunity, no hard-and-fast rule can be laid down in this regard. If the delay is inordinate and there is evidence probabilising the possibility of the accused having been shown to the witnesses, the court may not act on the basis of such evidence. Moreover, cases where the conviction is based not solely on the basis of identification in court, but on the basis of other corroborative evidence, such as recovery of looted articles, stand on a different footing and the court has to consider the evidence in its entirety."

58. In the present case, the alleged occurrence took place on 23rd June, 2005 and the Appellant was arrested on 16th July, 2005 and the test identification parade was held on 8th September, 2005. P.W.1 and 2 in their testimony before the trial court has identified Appellants as persons involved in the alleged crime on 23rd June, 2005. P.W.1 and 2 are related to the deceased. Witnesses are not known to the Appellants prior to the alleged occurrence. No prior enemity has been shown between prosecution witness and the Appellants. Prosecution witnesses were involved in catching hold one of the Appellant namely Kailash and the other Appellant namely Baba Sindhi fled away from the place of occurrence. Appellants have been identified by the prosecution witness in the test identification parade held on 8th September, 2005. As per P.W.1 they were present in the market when the Appellants took bag of P.W.4 and started running towards powerhouse. On the distress call of P.W.4, son of the Appellant namely Arif (deceased) and Aslam went to catch the appellants. One of the Appellant's, namely, Kailash fired on Arif (deceased) as a result of same he sustained injuries and subsequently died. The firearm wound of deceased as per the post-mortem report shows blackening and tattooing which is indicative of the fact that firing was made by Appellant at a close range.

59. P.W.1 has stated that when accused person was caught he had fired. The fire was made from 2 to 3 steps. Further, P.W.2 has also stated that when accused person was caught one of them fired and arif was injured. He has further stated that the bag was being taken back from the accused person when he fired. The said witness has stated that he had seen the incident from 20 steps. P.W.8 was one of the investigating officer when the test identification parade was held. He has stated that the Appellant's face were hidden (baparda).

60. There is one more aspect of the issue, in the cross examination of prosecution witnesses accused has not put any question with regard to delay in holding the test identification parade. It was the duty of the accused to question the Investigating Officer, if any advantage was

sought to be taken on account of the delay in holding the test identification parade. The burden of establishing the guilt is on the prosecution but that theory cannot be carried so far as to hold that prosecution must lead evidence to rebut all possible defences. If test identification parade was held in an irregular manner then Investigating Officer ought to have been cross-examined in that behalf. The purpose of cross-examination is to test evidence of a witness, to expose weaknesses where they exist and if so, to undermine the account the witness has given. This gives prosecution witness the opportunity to respond to the defence case and either agree or disagree with it. Once such an opportunity to respond to the defence case is not given to prosecution witness by not cross-examining in that behalf then it would not be open to accused person to challenge the veracity of the test identification parade at the appellate stage. In the present case we find that defence has not imputed any motive to the prosecution for the delay in holding the test identification parade, nor has the defence alleged that there was any irregularity in the holding of the test identification parade before the trial court. The evidence of investigating officer has gone unchallenged in this respect.

61. In ***Pramod Mandal v. State of Bihar, (2004) 13 SCC 150***, the Apex Court has observed as under:-

"18. Learned counsel for the State submitted that in the instant case there was no inordinate delay in holding the test identification parade so as to create a doubt on the genuineness of the test identification parade. In any event he submitted that even if it is assumed that there was some delay in holding the test identification parade, it was the duty of the accused to question the investigating officer and the Magistrate if any advantage was sought to be taken on account of the delay in holding the test identification parade. Reliance was placed on the judgment of this Court in Bharat Singh v. State of U.P. [(1973) 3 SCC 896 : 1973 SCC (Cri) 574] In the aforesaid judgment this Court observed thus: (SCC p. 898, para 6)

"6. In Sk. Hasib v. State of Bihar [(1972) 4 SCC 773 : AIR 1972 SC 283] it was observed by the Court that identification parades belong to the investigation stage and therefore it is desirable to hold them at the earliest opportunity. An early opportunity to identify tends to minimise the chances of the memory of the identifying witnesses fading away due to long lapse of time. Relying on this decision, counsel for the appellant contends that no support can be derived from what transpired at the parade as it was held long after the arrest of the appellant. Now it is true that in the instant case there was a delay of about three months in holding the identification parade but here again, no questions were asked of the investigating officer as to why and how the delay occurred. It is true that the burden of establishing the guilt is on the prosecution but that theory cannot be carried so far as to hold that the prosecution must lead evidence to rebut all possible defences. If the contention was that the identification parade was held in an irregular manner or that there was an undue delay in holding it, the Magistrate who held the parade and the police officer who conducted the investigation should have been cross-examined in that behalf."

In the instant case we find that the defence has not imputed any motive to

the prosecution for the delay in holding the test identification parade, nor has the defence alleged that there was any irregularity in the holding of the test identification parade. The evidence of Magistrates conducting the test identification parade as well as the investigating officer has gone unchallenged. Learned counsel for the State is, therefore, justified in contending that in the facts and circumstances of this case the holding of the test identification parade, about one month after the occurrence, is not fatal to the case of the prosecution as there is nothing to suggest that there was any motive for the prosecution to delay the holding of the test identification parade or that any irregularity was committed in holding the test identification parade.

20. It is neither possible nor prudent to lay down any invariable rule as to the period within which a test identification parade must be held, or the number of witnesses who must correctly identify the accused, to sustain his conviction. These matters must be left to the courts of fact to decide in the facts and circumstances of each case. If a rule is laid down prescribing a period within which the test identification parade must be held, it would only benefit the professional criminals in whose cases the arrests are delayed as the police have no clear clue about their identity, they being persons unknown to the victims. They, therefore, have only to avoid their arrest for the prescribed period to avoid conviction. Similarly, there may be offences which by their very nature may be witnessed by a single witness, such as rape. The offender may be unknown to the victim and the case depends solely on the identification by the victim, who is otherwise found to be truthful and reliable. What justification can be pleaded to contend that such cases must necessarily result in acquittal because of there being only one identifying witness? Prudence therefore demands that these matters must be left to the wisdom of the courts of fact which must consider all aspects of the matter in the light of the evidence on record before pronouncing upon the acceptability or rejection of such identification."

62. In **Raja v. State By The Inspector of Police**, Criminal Appeal No. 740 of 2018 decided on 10.12.2019 the Apex Court has observed:-.

"It is, thus, clear that if the material on record sufficiently indicates that reasons for "gaining an enduring impression of the identity on the mind and memory of the witnesses" are available on record, the matter stands in a completely different perspective. This Court also stated that in such cases even non-holding of identification parade would not be fatal to the case of the prosecution."

63. In the facts and circumstances of the present case, witnesses had ample opportunity of seeing the accused at the time of the commission of the offence and there is no chance of mistaken identity, delay in holding the test identification parade may not be held to be fatal. Further, facts and circumstances are indicative of enduring impression of the identity on the mind and memory of the witnesses.

64. It is further submitted by learned counsel for Appellant-Baba Sindhi that even assuming that Appellant was present with accused at place of occurrence even then Appellant could not have been convicted under section 302 read with 34 of Indian Penal Code. He submits that there was no intention to commit murder and

common intention was to commit robbery and run away. There was no premeditation to commit murder. It is further submitted that the co-accused in order to save himself has fired which resulted in death of the deceased as such the provisions of section 34 of Indian Penal Code would not be attracted to convict Appellant-Baba Sindhi under section 302 of Indian Penal Code.

65. Section 34 of the Indian Penal Code provides that when criminal act is done by several persons in furtherance of the common intention of all, each of such person is liable for the act in the same manner as if it were done by him alone.

66. Section 34 IPC carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others if he has the "common intention" to commit offence. This section has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime.

67. The section recognises the principle of constructive liability and essence of that liability is the existence of a common intention. It is to be noted that section 34 of the Indian penal code has used the expression "criminal act" and not "offence". Section 33 of the Indian Penal Code provides that the word "act" denotes as well a series of acts as a single act. Section 34 of the Indian Penal Code is to be read along with the preceding section 33 which makes it imperative that the act referred to in section 34 of the Indian penal Court includes series of acts as a single act. All such acts which were either contemplated and were to be done in furtherance of the common intention will be included in criminal act.

68. In **Krishnamurthy @ Gunodu v. State of Karnataka (SC) : Criminal Appeal No.288 of 2022** (Arising out of Special Leave Petition (Crl.) No.6893 of 2021), decided on 16.2.2022, the Apex Court has observed as under:-

"10. Appropriate at this stage would be reference to an earlier decision of this Court in Afrahim Sheikh and Others v. State of West Bengal, AIR 1964 SC 1263, which referred to with approval the following quote on the expression "act" explained by Judicial Commissioner in Barendra Kumar Ghosh v. The King-Emperor, ILR (1925) 52 Cal. 197:

"criminal act means that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone i.e. a criminal offence".

This "criminal act" under Section 34 IPC, it was held, applies where a criminal act is done by several persons in furtherance of common intention of all. The criminal offence is the final result or outcome but it may be through achievement of individual or several criminal acts. Each individual act may not constitute or result in the final offence. When a person is assaulted by a number of accused, the "ultimate criminal act"

normally will constitute the offence which finally results or which may result in death, simple hurt, grievous hurt, etc. This is the final result, outcome or consequence of the criminal act, that is, action or act of several persons. Each person will be responsible for his own act as stipulated in Section 38 IPC. However, Sections 34 and 35 expand the scope and stipulate that if the criminal act is a result of common intention , every person, who has committed a part of the criminal act with the common intention, will be responsible for offence."

69. In case of **Sudip Kr. Sen @ Biltu and others v. State of W.B. & Ors. (2016) 3 SCC 26**, Supreme Court has held as under :-

"14. Section 34 IPC embodies the principle of joint liability in the doing of a criminal act and essence of that liability is the existence of common intention . Common intention implies acting in concert and existence of a pre-arranged plan which is to be proved/inferred either from the conduct of the accused persons or from attendant circumstances. To invoke Section 34 IPC, it must be established that the criminal act was done by more than one person in furtherance of common intention of all. It must, therefore, be proved that:-

(i) there was common intention on the part of several persons to commit a particular crime and

(ii) the crime was actually committed by them in furtherance of that common intention."

70. In **Balu @ Bala Subramanium and Anr. v. State (UT of Pondicherry) (2016) 15 SCC 471**, the Supreme Court has observed as under :-

"14. Common intention is seldom capable of direct proof, it is almost invariably to be inferred from proved circumstances relating to the entire conduct of all the persons and not only from the individual act actually performed. The inference to be drawn from the manner of the origin of the occurrence, the manner in which the accused arrived at the scene and the concert with which attack was made and from the injuries caused by one or some of them. The criminal act actually committed would certainly be one of the important factor to be taken into consideration but should not be taken to be the sole factor."

71. In **Krishnamurthy @ Gunodu v. State of Karnataka (SC) : Criminal Appeal No.288 of 2022** (Arising out of Special Leave Petition (Crl.) No.6893 of 2021), decided on 16.2.2022, the Supreme Court has observed as under:-

"19. Section 34 IPC also uses the expression "act in furtherance of common intention". Therefore, in each case when Section 34 is invoked, it is necessary to examine whether the criminal offence charged was done in furtherance of the common intention of the participator. If the criminal offence is distinctly remote and unconnected with the common intention, Section 34 would not be applicable. However, if the criminal offence done or performed was attributable or was primarily connected or was a known or reasonably possible outcome of the preconcert/contemporaneous engagement or a manifestation of the mutual consent for carrying out common purpose, it will fall within the scope and ambit of the act done in furtherance of common intention. Thus, the word "furtherance" propounds a wide scope but should not be expanded beyond

the intent and purpose of the statute. Russell on Crime, (10th edition page 557), while examining the word "furtherance" had stated that it refers to "the action of helping forward" and "it indicates some kind of aid or assistance producing an effect in the future" and that "any act may be regarded as done in furtherance of the ultimate felony if it is a step intentionally taken for the purpose of effecting that felony." An act which is extraneous to the common intention or is done in opposition to it and is not required to be done at all for carrying out the common intention, cannot be said to be in furtherance of common intention."

72. In the present case the prosecution case based on the fact that the Appellants took away the bag of one Amar Nath (P.W.4) from the marketplace and deceased and other prosecution witness ran towards the Appellants to catch them and one of the Appellant-Kailash was caught by the prosecution witness who has disclosed the name of other Appellant-Baba Sindhi. When one of the Appellant, namely, Kailash was caught he fired as a result of the same deceased Arif sustained firearm injury and later he died in the hospital. Appellant Kailash has disclosed the name of the Appellant-Baba Thakur alias Baba Sindhi. The two Appellants were engaged in a robbery of bag of Amarnath from a public place and when Kailash was caught by the prosecution witnesses, he fired on deceased.

73. The common intention of both the accused person was to commit robbery and the act of firing on the deceased was done at the time when Appellant-Kailash was caught by the deceased while both the Appellants were running away with the bag of Amarnath. The criminal offence was attributable or connected or possible outcome of the preconcert/ contemporaneous engagement or a manifestation of the mutual consent for robbery and it will fall within the scope and ambit of the act done in furtherance of common intention. The Appellant - Kailash has fired on the deceased in the act of committing robbery and as such co-accused baba Thakur will be liable for such act has been done in furtherance of the common intention of committing an offence and would come within the scope of Section 34 of the Indian Penal Code. It is to be noted that the Appellant-Kailash was carrying a fire arm while committing robbery itself is indicative of intention of the Appellants at the time of committing of crime. The manner of the origin of the occurrence, manner in which the accused arrived at the scene and concert with which attack was made and from the injuries caused by one of them leaves no doubt that accused person had common intention to commit crime and acts done in furtherance of common intention would come within the ambit of section 34 of the Indian Penal Code.

74. The Apex Court in ***State of A.P. v. M. Sohan Babu,*** **(2010) 15 SCC 69 : (2013) 2 SCC (Cri) 123 : 2010 SCC** has observed as under:-

"9. We find that in the facts of the case, the observations given above are not correct. It cannot be ignored that the two accused had entered the premises at midnight duly armed with the intention of committing robbery. They were also charged under Section 460 IPC on that account. It is also in evidence that the deceased had managed to pin A-2 down to the ground and A-2 had caused one injury in the stomach of the deceased while he lay

on top of him. Two injuries were thereafter caused on the thigh of the deceased by A-2 and the other accused. It is also in evidence that when the neighbours arrived on the scene they too were caused injuries and threatened with dire consequences. To say, therefore, that there was no intention on the part of the accused to cause death would be carrying the matter a little too far.

10. The High Court has been influenced by the fact that there was no common intention on the part of the accused to commit murder. We see, however, that the common intention can be inferred from the circumstances of the case and that the intention can be gathered from the circumstances as they arise even during an incident. The initial purpose was to commit robbery, but as the accused were armed with knives which they had used repeatedly and effectively, they were willing to kill as well and that they could not cause more damage as they were overwhelmed and pinned down."

75. It is further submitted by learned counsel for the Appellant-Baba Sindhi that the Appellant-Kailash cannot be held guilty for an offence under section 302 of the Indian penal code. It is submitted that the act of firing from country made pistol by Appellant-Kailash in worst-case scenario was done with the knowledge that it is likely to cause death but the act was not done with any intention to cause death or to cause such bodily injury as is likely to cause death. He submits that the act of firing was without premeditation and in a sudden fight in the heat of passion upon sudden quarrel. In view of the aforesaid the appellant Kailash is liable to be convicted under section 304 (II) of the Indian penal code.

76. Homicide is killing of a human being by another human being. It may either the lawful or unlawful. The lawful homicide includes several cases falling under the general exceptions provided under chapter IV of the Indian penal code. The unlawful homicide includes culpable homicide not amounting to murder (section 299), murder (section 300), rash or negligent homicide (section 304A), suicide (section 305 and 306).

77. Section 299 of the Indian Penal Code provides that whoever causes death by doing an act with 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.

78. Culpable homicide is murder under section 300 of the Indian Penal Code where the act is done intentionally or with the knowledge or means of knowing that is the natural consequences of the act. The intention or knowledge necessary in order to render culpable homicide must be clearly proved by the prosecution which can usually be done by proof of the circumstances which prove the act or omission in question for the presumption that the person knows the probable result of his conduct. An offence cannot amount to murder unless it falls within the definition of culpable homicide but an offence may also amount to culpable homicide without amounting to murder. To render culpable homicide to be murder, the case must come within the provisions of clause 1, 2, 3 or 4 of section 300 of the Indian penal code.

79. In ***Satish Narayan Sawant v. State of Goa, (2009)*** **17 SCC 724 : (2011) 2 SCC (Cri) 110 : 2009 SCC OnLine SC 1638 at page 738**, the Apex Court has observed as under:-

35. Section 299 and Section 300 IPC deal with the definition of culpable homicide and murder respectively. Section 299 defines culpable homicide as the act of causing death (i) with the intention of causing death, or (ii) with the intention of causing such bodily injury as is likely to cause death, or (iii) with the knowledge that such act is likely to cause death. The bare reading of the section makes it crystal clear that the first and the second clauses of the section refer to intention apart from the knowledge and the third clause refers to knowledge alone and not intention. Both the expressions "intent" and "knowledge" postulate the existence of a positive mental attitude which is of different degrees. The mental element in culpable homicide i.e. mental attitude towards the consequences of conduct is one of intention and knowledge. If that is caused in any of the aforesaid three circumstances, the offence of culpable homicide is said to have been committed.

36. Section 300 IPC, however, deals with murder although there is no clear definition of murder provided in Section 300 IPC. It has been repeatedly held by this Court that culpable homicide is the genus and murder is species and that all murders are culpable homicide but not vice versa. Section 300 IPC further provides for the exceptions which will constitute culpable homicide not amounting to murder and punishable under Section 304. When and if there is intent and knowledge then the same would be a case of Section 304 Part I and if it is only a case of knowledge and not the intention to cause murder and bodily injury, then the same would be a case of Section 304 Part II. The aforesaid distinction between an act amounting to murder and an act not amounting to murder has been brought out in the numerous decisions of this Court.

80. In ***Abdul Waheed Khan v. State of A.P.*** **[(2002) 7 SCC 175 : 2005 SCC (Cri) 1301]** observed as follows: (SCC pp. 184-87, paras 13-22)

"13. Clause (b) of Section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the "intention to cause death' is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by Illustration (b) appended to Section 300.

14. Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist-blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be

murder, even if the injury which caused the death, was intentionally given. In clause (3) of Section 300, instead of the words "likely to cause death' occurring in the corresponding clause (b) of Section 299, the words "sufficient in the ordinary course of nature' have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of justice. The difference between clause (b) of Section 299 and clause (3) of Section 300 is one of degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely' in clause (b) of Section 299 conveys the sense of probable as distinguished from a mere possibility. The words "bodily injury ... sufficient in the ordinary course of nature to cause death' mean that death will be the "most probable' result of the injury, having regard to the ordinary course of nature.

15. For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. *Rajwant Singh v. State of Kerala* [AIR 1966 SC 1874] is an apt illustration of this point.

20. Thus, according to the rule laid down in Virsa Singh case [AIR 1958 SC 465] even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to Section 300 clearly brings out this point.

21. Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid."

81. In ***State of A.P. v. Rayavarapu Punnayya [State of A.P. v. Rayavarapu Punnayya,*** **(1976) 4 SCC 382 : 1976 SCC (Cri) 659]** the distinction between the two provisions was noted by apex court in paragraph 12 and 13 which is quoted herein below.

"12. In the scheme of the Penal Code, "culpable homicide" is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice-versa. Speaking generally, "culpable homicide" sans "special characteristics of murder", is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called,

"culpable homicide of the first degree". This is the greatest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

13. The academic distinction between "murder" and "culpable homicide not amounting to murder" has vexed the courts for more than a century. 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 Sections 299 and 300."

In *Pulicherla Nagaraju v. State of A.P., (2006) 11 SCC 444*, this Court had an occasion to consider the case of culpable homicide not amounting to murder and the intention to cause death. It was observed and held by this Court that the intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances:

(i) nature of the weapon used;

(ii) whether the weapon was carried by the accused or was picked up from the spot;

(iii) whether the blow is aimed at a vital part of the body;

(iv) the amount of force employed in causing injury;

(v) whether the act was in the course of sudden quarrel or sudden fight or free-for-all fight;

(vi) whether the incident occurs by chance or whether there was any premeditation;

(vii) whether there was any prior enmity or whether the deceased was a stranger;

(viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation;

(ix) whether it was in the heat of passion;

(x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner;

(xi) whether the accused dealt a single blow or several blows.

82. In the present case, the appellant's forcefully took away the bag of one Amar Nath and while they were running away they were caught by the prosecution witness and deceased whereafter accused Kailash has opened fire on the deceased as a result of the same the deceased sustain firearm injury in the abdomen. The post-mortem of the deceased was conducted on 24th June, 2005 and as per the post-mortem report the death of the deceased was due to shock and haemorrhage as a result of antemortem injury.

83. The doctor who has conducted the post-mortem in his testimony before the trial court has stated that the death could have occurred as a result of antemortem injuries sustained by the deceased. It is to be noted that the blackening and tattooing was present on the injury sustained by deceased. The aforesaid is indicative of the fact that the firearm weapon was used from close range. The nature of injury sustained by the deceased and place where the injuries have been sustained it can be said that the Appellant-Kailash fired on the deceased with the intention of causing injury as is likely to cause death or the injuries were sufficient in the ordinary course of nature to cause death. Further the injuries and act of the Appellant-Kailash was imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death.

84. It is further to be noted that carrying firearm weapon at the place of occurrence is itself indicative of intention of accused person to cause death or such injury as is likely to cause death. The injury has been caused on the vital part by accused person. Under the circumstances the Appellant-Kailash is liable to be convicted under section 302 of the Indian penal code for the act of murder.

85. Considering the overall circumstances and submissions of learned counsel for the Appellants, learned A.G.A. for the State and after going through the evidence and lower court record, we are unable to persuade ourselves in taking a different opinion from that of trial court. The trial court was fully justified in convicting the Appellants.

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

87. Both the appeals lack merit and are, accordingly, **dismissed**.

88. Registrar General of this Court is directed to pay an honorarium of Rs. 25,000/- to Sri Gagan Pratap Singh, learned Amicus Curiae for rendering effective assistance in the appeal

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

(2023) 1 ILRA 555
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.01.2023

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-A No. 921 of 2020

Deep Narayan Prasad ...Petitioner
Versus
Board of Revenue, U.P. at Alld. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Surendra Kumar Chaubey

Counsel for the Respondents:
C.S.C., Sri Jitendra Kumar Yadav, Sri R.K.R. Sharma, Shri Rakesh Pandey(Sr. Advocate)

Civil Law - U.P. Land Revenue Act, 1901 - Section 34 - Mutation - Petitioner's name recorded on the basis of compromise decree of the Civil Court - Mutation court ordered to expunge the petitioner's name from the revenue records - Held - As the compromise decree had not been recalled, set aside, or modified by any court, therefore, the name of the petitioner cannot be expunged from the revenue records - Respondents directed to record

the petitioner's name in the revenue records based on the compromise decree passed by the Civil Court in Civil Suit (Para 19)

Allowed. (E-5)

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

1. Heard Shri Surendra Kumar Chaubey, Counsel for the petitioner, Shri Rakesh Pandey, learned Senior Advocate, assisted by Shri Jitendra Kumar Yadav, Counsel for respondent No. 4.

2. The brief facts of the case are that petitioner and respondent No. 4 are real brothers. A registered will deed was executed by petitioner's father Vijay Prasad on 17.01.2002 in favour of petitioner in respect of his entire property situated in Village Sonvarsha, Bahuara and Araji Mafi Bal Govind Ram Upadhaya. Petitioner's father Vijay Prasad died on 12.10.2009, accordingly petitioner applied for mutation of his name on the basis of registered will deed executed on 17.01.2002 by late Vijay Prasad. The cases were registered as Case Nos. 552, 553 and 554. Respondent No. 4 also applied for mutation of his name on the basis of a will deed executed on 28.01.2002 which were registered as Case Nos. 626, 627 and 628. During pendency of the mutation case, respondent No. 4 filed a civil suit No. 333 of 2010 challenging the validity of the will deed dated 17.01.2002 executed in favour of the petitioner. However, respondent No. 4 and petitioner have entered into a compromise on 02.01.2015 in Civil Suit No 333 of 2010. Accordingly, Civil Suit No. 333 of 2010 was decreed in terms of compromise vide judgement dated 20.01.2015. A compromise was also entered into between both parties in aforementioned mutation cases 552 553 and 554 accordingly, an order was passed by respondent No. 3 in the mutation proceeding to record the name of petitioner in place of deceased tenure holder Vijay Prasad vide order dated 26.05.2016. After passing of order dated 26.05.2016, a recall application has been filed by respondent No. 4 before the respondent No. 3 and vide order dated 17.05.2018 respondent No. 3 ordered to expunge the name of petitioner and to record the name of petitoner as well as respondent No. 4 being natural heirs of deceased Vijay Prasad. Against the order dated 17.05.2018 petitioner filed an appeal before respondent No. 2 taking specific ground that civil suit in respect to the registered will deed in question has been decided in favour of petitioner vide order dated 20.01.2015 but the appellate court without considering the same has dismissed the petitioner's appeal vide order dated 31.12.2018 on the ground that will deed has not been proved in accordance with law. Petitioner challenged the order of the Tehsildar as well as order of the appellate court before Board of Revenue through revision before the Board of Revenue. Board of Revenue has entertained the revision filed by petitioner and granted an interim order in the pending revision but after hearing both parties Board of Revenue has dismissed the petitioner's revision vide order dated 04.03.2020, hence this writ petition.

3. This Court while entertaining the writ petition, has passed the following order dated 06.08.2020:-

"Shri R.K.R. Sharma, Advocate has filed his power on behalf of respondent no. 2 after having obtained the no objection of Shri Jitendra Kumar Yadav, who had filed a caveat in this case.

The contention of learned counsel for the petitioner is that his mutation application stands dismissed by the impugned order, although, the parties had entered into a compromise before the civil court, which is an admitted fact. The compromise admitted petitioner's claim.

Counsel appearing for the respondent no. 4 may file a counter affidavit within three weeks.

Petitioner will have two weeks thereafter to file rejoinder affidavit.

List thereafter for admission/final disposal."

4. On 20.09.2022 this Court passed the following interim order dated 20.09.2022:-

"Heard learned counsel for the parties.

Since the civil court has decided the civil suit filed by contesting respondent in respect to will deed in question on the basis of compromise which has attained finality and in the subsequent suit filed by contesting respondent, no injunction is operating.

Accordingly, till the next date of listing, no alienation shall be made by the parties in respect to property in dispute.

List this petition on 10.10.2022."

5. On 14.10.2022 interim order granted on 20.09.2022 was extended till further orders of this Court.

6. Respondent No. 4 has filed his counter affidavit and the petitioner has filed his rejoinder affidavit also.

7. Counsel for the petitioner submitted that petitioner has claimed the right on the basis of registered will deed dated 17.01.2002. He further submitted that civil suit filed by respondent No. 4 for cancellation of the petitioner's registered will deed has been decided on the basis of compromise entered into between the parties in the Civil Court vide judgement dated 20.01.2015 and the compromise application dated 02.01.2015 has been made part of the judgment and decree. He further submitted that in the compromise application signed by both the parties it is specifically mentioned that defendant of the Civil Suit No. 333 of 2010 namely Deep Narayan will be recorded on the basis of registered will deed dated 17.01.2002 and the plaintiff Prem Chandra will have no objection regarding the same. He further submitted that unless the compromise decree of the Civil Court is recalled/ set aside/ modified the mutation Court has no jurisdiction to alter the revenue entry in respect to the plot in dispute. He further submitted that impugned orders have been passed arbitrarily as such, the same are liable to be set aside.

8. On the other hand, learned senior counsel for the respondent No. 4 submitted that will deed in question is a fictitious document. He further submitted that earlier suit No. 333 of 2010 filed by petitioner was an act of petitioner in order to obtain fraudulent compromise decree. He further submitted that compromise decree is vague decree and the same cannot be relied upon in any proceeding. He further submitted that mutation of the petitioner as well as contesting respondent No. 4 has been rightly ordered by the mutation court and petitioner have no right to challenge the same before this Court under Article 226 of the Constitution of India as the impugned order has been passed in the summary proceedings as such writ petition is not maintainable and liable to be dismissed.

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

10. Petitioner claims the right on the basis of registered will deed dated 17.01.2002 executed by petitioner's father Vijay Prasad, who died on 12.10.2009. According to petitioner, compromise decree has been passed by the civil court in Civil Suit No. 333 of 2010, by which right has been given to petitioner to get his name recorded in the revenue record on the basis of registered will deed dated 17.01.2002, although respondent No. 4 is denying the validity of the decree of civil court passed in Suit No. 333 of 2010 as such, respondent No. 4 has filed subsequent Civil Suit No. 1037 of 2020 for declaration to the effect that plaintiff Deep Narayan Prasad be declared legal heir of ½ share and will deed dated 17.01.2002 be declared void and ineffective, it is also prayed in the suit that compromise decree dated 04.02.2015 passed in Civil Suit No. 333 of 2010 be also declared void and ineffective. The mutation court initially passed the order for recording the name of the petitioner only but subsequently passed the order to record the name of the petitioner as well as of respondent No.4 being natural heir of declared Vijay Prasad.

11. Since, the Civil Suit No. 333 of 2010 filed by respondent No. 4 for declaration and injunction has been decided on the basis of compromise entered into between Prem Chandra and Deep Narayan and the suit was decided on the basis of compromise application dated 02.01.2015. The averments made in the paragraph No.4 of the compromise application dated 02.01.2015 is as under:-

"न्यायालय सिविल जज सीनियर डिवीजन बलिया
मु.न. 333/10 96 क
प्रेमचन्द्र बनाम दीपनारायण

4. एकरार व बयान मुझ वादी यह है कि प्रतिवादी को सभी अधिकार हासिल है जो पिता वादी को हासिल थे। प्रतिवादी अपना नाम कागजात सरकारी में मुताबिक पंजीकृत वसीयत दिनांक 17.01.2002 के आधार पर दर्ज करा लेंगे। इसमें मुझ वादी को कोई उज व एतराज न होगा।"

12. The oral statement of Prem Chand (plaintiff) recorded in Suit No. 333 of 2010 is as under:-

"न्यायालय सिविल जज सीनियर डिवीजन बलिया
मु.न. 333/10 94 क 2
प्रेमचन्द्र बनाम दीपनारायण
दिनांक .5.01.2015
सीक्षी:. प्रेमचन्द्र उम्र लगभग 50 वर्षए पेशे से दुकानदारए पुत्र स्व0 विजय प्रसाद सा0 चिरंजी छपरा परगना द्वाबा जिला बलिया।
हलफनामा बयान किया गया है कि.
विजय प्रसाद के दो लड़के प्रेमचन्द्र व दीपनारायण हैं। लालगंज बाजार में हम लोगों की दुकान है। उसे प्रेमचन्द्र चलाते हैं। पिताजी ने जो वसीयत किया था वह सही है। उसी वसीयत के बावत मैंने मुकदमा किया था। वसीयत में मेरे पिता जी द्वारा दिनांक 17.01.02 को रजिस्टर्ड दीपनारायण के पक्ष में लिखा गया था। अब गाँव के प्रतिष्ठित व्यक्ति सुमेर सिंह व सुनील सिंह की गवाहान से सुलह हो गया है। सुलहनामे का कागज जो पंचों ने लिखा हैए वह मेरे पास है। इस मुकदमे में मैंने सुलहनामा दाखिल किया हैए उसके अनुसार मुकदमे का फैसला कर दिया जाए।
सुनकर तसदीक किया गया है।
प्रेमचन्द्र प्रसाद
बयान मेरे बोलने पर पेशकारद्वारा लिखा गया है।

ह0 – सी0 जी0 एस0 डी0
05.01.2015"

13. The compromise application dated 02.01.2015 contains very specific Paragraph No. 4 to the effect that defendant Deep Narayan will get his name recorded on the basis of registered will dated 17.01.2002 in the revenue records and the plaintiff Prem Chandra will have no objection regarding the same. In the oral Statement of plaintiff Prem Chand dated 05.01.2015 he admitted the compromise between plaintiff and defendant accordingly civil suit was decided on the basis of compromise decree dated 02.01.2015. The operative portion of the compromise decree passed by civil Court is as follows:-

"न्यायालय सिविल जज सीनियर डिवीजन बलिया
मु.न. 333/10 98 क1 98 क1
1 4
प्रेमचन्द्र बनाम दीपनारायण

" प्रेमचन्द्र प्रसाद उम्र अंदाजी 45 वर्ष पुत्र स्व. विजय प्रसाद उर्फ छोटकन प्रसाद, सा. चिरंजी छपरा पत्रालय सूर्यभानपुर, परगना द्वाबा जिला बलिया।
....वादी
बनाम

दीप नारायन प्रसाद उम्र अंदाजी 52 वर्ष पुत्र स्व. विजय प्रसाद उर्फ छोटकन प्रसाद, सा. चिरंजी छपरा पत्रालय सूर्यभानपुर, परगना द्वाबा जिला बलिया।
....प्रतिवादी आदेश

वादी का वाद पक्षों के बयानात एवं कागजात दिनांकित 02.01.2015 में वर्णित कथन के आधार पर डिक्री किया जाता है। बयानात एवं कागजात दिनांकित 02.01.2015 डिक्री का भाग होगा। उभय पक्ष अपना वाद व्यय स्वयं वहन करेंगे।
दिनांकः- 20-01-2015
(एस.एन.सिंह)
सिविल जज (वरिष्ठ वर्ग),
बलिया।"

14. It is also relevant to mention that, respondent No. 4 Prem Chandra instituted Civil Suit No. 1037 of 2020 for declaration and injunction to the effect that will deed dated 17.01.2002 as well as the compromise decree dated 20.01.2015 be declared void and ineffective. The subsequent Suit No. 1037 of 2020 is still pending for adjudication before the civil court between the parties, the copy of the plaint of Civil Suit No.1037 of 2020 has been annexed by respondent No.4 himself along with counter affidavit as Annexure C.A.-1, the relief clause of plaint will be relevant which is as follows:-

"न्ययालय सिविल जज (जू0 डि0) पूर्वीबलिया
वाद संख्या 1037/2020
प्रेमचन्द्र उम्र तख0 55 साल पुत्र स्व0 विजय प्रसाद उर्फ छोटकन प्रसाद, ग्राम चिरंजी छपरा, पो0 सूयीानपुर, परगना द्वाबा, जिला बलिया।?
वादी मो0 नं0 8896725495
बनाम
दीप नारायण प्रसाद उम्र तख0 62 साल पुत्र स्व0 विजया प्रसाद उर्फ छोटकन प्रसाद, ग्राम चिरंजी छपरा, पो0 सूयीानपुर, परगना द्वाबा, जिला बलिया

"11- उपरोक्त वादी निम्नलिखित अनुतोष पाने का अधिकारी हैः-

अ- यह कि डिक्री घोषणात्मक वहक वादी खिलाफ प्रतिवादी पारित किया जाये कि वादी सम्पत्ति जिसका विवरण वाद पत्र के अन्त में दिया गया है का वरासतन वकदर ½ का हिस्सेदार है तथा यह भी घोषित किया जावे कि वसीयतनामा दिनांक 07.01.2002 एवं दिनांक 17.01.2002 निष्पादक स्व. विजय प्रसाद उर्फ छोटकन वहक प्रतिवादी शून्य वो

निष्प्रभावी है तथा यह उद्घोषित किया जावे कि सुलहनामा डिक्री दिनांक 04.02.2015 पारित न्यायालय सिविल जज (सी.डी.) बलिया मु.नं. 333/2010 प्रेमचन्द्र बनाम दीपनारायन प्रसाद शून्य व निष्प्रभावी है तथा उक्त डिक्री का असर वादी के राईट, टाइटिल व इन्टरेस्ट पर नहीं पड़ता है।

ब- यह कि वजरिये हुक्म इम्तनाई दवामी प्रतिवादी को मना किया जावे कि उपरोक्त दोनो वसीयतनामा दिनांक 07.01.2002 व 17.01.2002 निष्पादक विजय प्रसाद उर्फ छोटकन वहक प्रतिवादी के आधार पर जायदाद जिसका विवरण वाद पत्र के अन्त में दिया गया है के हक व हिस्सा वकदर ½ भाग के अनुसार वादी के कब्जा दखल में न तो किसी भी प्रकार से कोई मुजाहिमत करे न कराये न उसके किसी भाग का विक्री करे न किसी प्रकार का अंतरण करे न ही कोई ऐसा कार्य करे जिससे उक्त सम्पूर्ण जायदाद पर हम वादी के तन्हा कब्जा दखल में कोई मुजाहिमत व व्यवधान न डाले।

स- यह कि खर्चा मुकदमा हम वादी को प्रतिवादी से दिलवा दिया जावे।

द- यह कि अलावे ख्वाह बजाय दादरसी बाला के जिस किसी दीगर दादरसी के मुश्तहक हम वादी वनजदीक राय अदालत करार पाये जावे उसकी भी डिक्री वहक वादी विरूद्ध प्रतिवादी सादिर फरमायी जावे।"

15. In view of the aforementioned fact that decree of civil court dated 20.01.2015 has not been recalled/set aside/modified by any Court as such, the name of the petitioner could not be expunged from the revenue records unless the decree of the civil court dated 20.01.2015 is recalled/set aside/modified.

16. The courts below in exercise of power under Section 34 of the U.P. Land Revenue Act arbitrarily ordered vide order dated 17.05.2018 for recording the name of respondent No. 4 along with petitioner and expunged the name of the petitioner, who was recorded exclusively on the basis of compromise decree of Civil Court dated 20.01.2015 in place of their father Vijay Prasad. The order of Tehsildar dated 17.05.2018 has been maintained in appeal and revision arbitrarily, which is against the order passed by the civil court in Civil Suit No. 333 of 2010.

17. Considering the entire facts and circumstances the case, the impugned order dated 04.03.2020 passed by respondent No. 1 Board of Revenue, U.P. Allahabad, order dated 31.12.2018 passed by respondent No. 2 Up-Ziladhikari, Bairiya, District-Ballia and order dated 17.05.2018 passed by respondent No. 3- Tehsildar, Tehsil-Bairiya, District-Ballia are liable to be set aside and are hereby set aside.

18. **The writ petition stands allowed.**

19. Respondents are directed to record the name of the petitioner in the revenue records on the basis of compromise decree dated 20.01.2015 passed by civil court in Civil Suit No. 333 of 2010, which shall be subject to the final adjudication of subsequent Civil Suit No.1037 of 2020 filed by respondent No.4 in the civil court at Ballia.

20. No order as to costs.

(2023) 1 ILRA 560
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.01.2023

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-A No. 3985 of 2018

Jagdish Singh & Anr. ...Petitioners
Versus
Board of Revenue U.P. at Allahabad & Ors. ...Respondents

Counsel for the Petitioners:
Sri Om Prakash Pandey, Sri Arvind Kumar Mishra

Counsel for the Respondents:
C.S.C., Sri Dharm Vir Jaiswal, Sri Pradeep Kumar, Sri Ajay Kumar Gautam, Sri Ajay Pal, Sri Ashutosh Kumar Gautam, Sri Mahesh Prasad, Sri Satya Priya Mishra, Sri Tariq Maqbool Khan

A. Civil Law - U.P Consolidation of Holdings Act, 1953 - Section 49 - Bar to civil Courts jurisdiction - findings recorded by the Consolidation Courts in consolidation proceedings is final & binding on all the parties and, such findings cannot be re-adjudicated or challenged in any Civil or Revenue Court - Section 49 of the Consolidation Act in a way laid down a rule of res-judicata in so far as the question relating to declaration and adjudication of the rights of a tenure holder in respect of his holding (Para 8, 9)

B.Civil Law - U.P Consolidation of Holdings Act, 1953- Section 49 - Petitioners claimed themselves to be in possession since before the Consolidation operation - land was not vacant at the time of grant of patta – Illegal entry was made in respect to the petitioner's plot that was corrected by the order of Deputy Director Consolidation - there was no occasion to grant the lease to the contesting respondent - Held - All the three Courts arbitrarily rejected the petitioners' application for cancellation of patta - Courts below failed to consider that order passed by the Consolidation Court cannot be ignored by the Revenue Court, but the Courts below arbitrarily rejected the petitioners' application for cancellation of lease executed in favour of contesting respondents (Para 10)

Allowed. (E-5)

List of Cases cited:

1. Balbir Singh & ors. Vs St. of U.P. & ors. 2011 I.B.R.D. 201

2. Benimadho Vs Deputy Director Consolidation Deoria & ors. (2003) 5 AWC 3808

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

1. Heard Mr. O.P. Pandey, learned counsel assisted by Shri A.K. Mishra, learned counsel for the petitioners and Mr. D.V. Jaiswal, Advocate assisted by Mr. Pradeep Kumar, counsel for respondent No.4.

2. Brief facts of the case are that old Plot No.138m area 0.9 acre and 520m area 0.14 acre, allotted plot no.262 (New Plot No.448m area 0.17 hectare situated in Village Illahabad, Tappa Banki, Pargana, Haveli Tehsil - Sadar, Gorakhpur, now Maharajganj. Petitioners are in possession over Plot Nos.138 and 520 (new Plot No.448) even prior to the consolidation operation and also during consolidation operation, petitioners are in possession of the aforementioned plot and are cultivating the same. During consolidation operation allotted plot No.262 (new Plot No.448) was carved out. C.H. Form No.41 has been annexed along with the writ petition as Annexure No.1 to the writ petition. Aforesaid old Plot No.138m area 14 decimal and 520m area 14 decimal was recorded as matrook. Consolidation Officer, Gorakhpur, vide order dated 4.7.1984 passed the order in favour of petitioner and expunged the entry of matrook in respect to disputed plot. Consolidation Officer has also ordered that the plot be recorded in the name of the Jai Nath Singh s/o Ram Raj (father of the petitioner No.1 and grandfather of petitioner No.2). Order dated 4.7.1984 passed in Case No.14570/452 has been implemented and reference Case No.649 dated 20.4.1985 was initiated and on the basis thereof, revision No.649 was registered before the Deputy Director Consolidation. Deputy Director

Consolidation approved the report referred to him by Consolidation Officer. In pursuance of the order of Deputy Director Consolidation approving the report, the Old Plot No.262m (New Plot No.448) was entered in Chak No.80 of the petitioners. Area was accordingly deducted from ***naveen parti*** of Chak No.294. In pursuance of the order dated 4.7.1984 and implementation order dated 25.4.1985 passed in Case No.2091 as well as Reference Order dated 29.5.1985 passed in Revision No.649, the final records have been prepared in the name of the petitioners.

3. Copy of the Khatauni has been annexed as Annexure No.4 to the writ petition in order to demonstrate that plot No.448m area 0.17 has been recorded in the name of Jai Nath (father of petitioner No.1). Plot No.448 was not recorded as Gram Sabha land nor it was vacant land even then the patta was alleged to be executed in favour of respondents No.4 to 10 under Section 19(5) of the U.P.Z.A. & L.R. Act. According to petitioners, contesting respondents Nos.4 to 10 are not in possession of disputed Plot No.448 nor patta was executed in the name of contesting respondent. Petitioners filed an application for cancellation of patta on 13.2.1985 against the alleged allotment order made in favour of respondent Nos.4 to 10 taking specific ground that disputed plot was not vacant nor disputed plot was recorded as Gaon Sabha plot at the relevant point of time as such the patta is liable to be cancelled. Respondent No.3, vide order dated 31.12.1987, rejected the application filed by petitioners for cancellation of patta. Petitioners filed revision No.710 of 1995 on 16.1.1988 before the Commissioner against the order dated 31.12.1987, the Commissioner, Gorakhpur Division, Gorakhpur through its order dated 27.8.1988 dismissed the revision filed by petitioners. Petitioners challenged the order of the Additional Commissioner through revision before the Board of Revenue in which initially interim order was granted but subsequently, Board of Revenue after hearing the parties dismissed the revision vide order dated 25.5.2002. Petitioners filed review petition before the Board of Revenue against the order dated 25.5.2002 which was rejected vide order dated 28.2.2018 on the ground of limitation. Hence, this writ petition.

4. This Court while entertaining the writ petition passed the following interim order dated 23.5.2018 which was extended from time to time :-

"It is stated that the Board of Revenue has granted status quo order while admitting the revision on 8.1.1991 and it was continuing till the disposal of the revision.

Learned Standing Counsel appears for respondent nos. 1, 2 & 3 and Sri Tariq Maqbool Khan, learned Advocate has put in appearance on behalf of respondent no. 11.

Issue notice to respondent no. 4 to 10 returnable on 5.9.2018.

Steps be taken within ten days.

Respondents may file counter affidavit counter affidavit on or before the next date of listing.

List this case on 5.9.2018. Till then parties are directed to maintain status quo and they shall not create third party interest without leave of the Court."

5. Counsel for the petitioner submitted that the petitioner is owner in possession of the disputed plot as such, patta cannot be executed in favour of respondents No.4 to 10

as plot in dispute is neither Gram Sabha plot nor it was vacant at the relevant point of time as provided under Section Section 19(5) of the U.P.Z.A. & L.R. Act. He further submitted that in pursuance of the order dated 4.7.1984 along with implementation order dated 25.4.1985 passed in Case No.2091 as well as reference order dated 29.5.1985 passed in Revision No.649, the final records have been prepared in the name of the petitioner as such, there was no occasion for allotment of plot in dispute in favour of respondents No.4 to 10. He further submitted that application filed by petitioner under Section 198(4) of the U.P.Z.A. & L.R. Act., the grant of patta prior to the publication of notification under Section 52 of the U.P. Consolidation of Holdings Act, is wholly illegal as disputed plot was not vacant plot, petitioner is in possession of the same, Gaon Sabha was not owner of the disputed plot No.448 nor in possession of the same coupled with the fact that there was no publication of notification under Section 52 of the U.P.C.H. Act. He further submitted that respondent Nos.1, 2 and 3 have arbitrarily rejected the revision appeal and application for cancellation of patta filed by petitioners without considering the point raised by petitioners in accordance with law. He further submitted that Board of Revenue has further committed illegality in rejecting the review application filed by the petitioners. He placed reliance upon the following judgments of this Court ;

(i) 2011 I.B.R.D. 201 Balbir Singh and others vs. State of U.P. and others.

(ii) (2003) 5 AWC 3808 Benimadho vs. Deputy Director Consolidation Deoria and others.

6. On the other hand, counsel for the contesting respondents Nos.4 to 10 submitted that petitioner has not impleaded all the necessary parties in the proceedings as such writ petition filed by petitioners cannot be entertained. He further submitted that plot in dispute was recorded in favour of the Gram Sabha as such the allotment was made in accordance with law to the respondent No.4 who belonged to Scheduled Caste community. He further submitted that the name of respondent No.4 has been accordingly recorded in the revenue record. He further submitted that Appellate Court and Revisional Court have rightly dismissed the appeal and revision filed by petitioners. He further submitted that plot No.448, area 0.41 hectare was recorded as naveen parti in the C.H. Form 45 accordingly, the patta was executed in favour of respondents in accordance with law. He further submitted that order passed by the Deputy Director Consolidation dated 30.3.1992 appears to be fictitious, as such, no reliance can be placed upon the same. He next submitted that petitioners have filed Civil Suit No.915 of 2012 which was dismissed for non-prosecution, vide order dated 21.4.2014, as such, no interference is required against the impugned order. He finally submitted that allotment was made to the contesting respondent much before the order passed by Deputy Director Consolidation, the land was admittedly recorded as matrook which means nobody's land vested in the Gaon Sabha. As such, no case for cancellation of patta granted in favour of the contesting respondent is made out and writ petition is liable to be dismissed.

7. I have considered the arguments advanced by learned counsel for the parties and perused the records. There is no dispute about the fact that application for cancellation of lease filed by petitioners under Section 198(4) of the U.P.Z.A. & L.R. Act has been dismissed by the

respondent No.3 and the order has been maintained in appeal and revision by respondent No.2 and 1 respectively. According to petitioners in the consolidation proceedings, Deputy Director Consolidation, vide order dated 25.04.1985 approved the reference submitted in the proceeding by which the plot in dispute was ordered to be recorded in the name of the petitioners' father and the entry of matrook has been expunged. Although contesting respondents are denying the fact and submitting that orders passed by Consolidation Court are not genuine order.

8. Since Consolidation Court has passed the order dated 4.7.1984, 25.4.1985 and 29.5.1985 by which the entry of matrook has been expunged and the name of petitioners' father was ordered to be recorded and the order has attained finality, as such, mere denial by the contesting respondents about the genuineness of the order of Consolidation Court is not sufficient. The case cited by counsel for the petitioners with respect to the order passed by the Consolidation Court and its binding affect in the other proceedings are relevant for consideration. Paragraph No.11 of the judgment rendered in **Balbir Singh (Supra)** is as follows :-

"11. Admittedly, when the ceiling proceedings were initiated against the tenure holder Jaswant, the consolidation proceedings stood completed in the village and Jaswant became the absolute owner of the property in his individual capacity. In Jaswant Kumar v. State of U.P. and others, it was held that the findings recorded by the Consolidation Courts in consolidation proceedings is final and binding on all the parties and, such findings cannot be re-adjudicated or challenged in any Civil or Revenue Court. The Court further held that section 49 of the Consolidation Act in a way laid down a rule of res-judicata in so far as the question relating to declaration and adjudication of the rights of a tenure holder in respect of his holdings. The Court further held that the ceiling authorities had a right to take the land from the tenure holder as it was declared surplus by the Consolidation Court.

9. Para No.14 of the judgment rendered in **Benimadho (Supra)** is as follows :-

"14. Another ground for not interfering is that the parties have been given full opportunity to contest their matter on merits in appeal in the consolidation proceedings where rights are settled finally and after such orders neither civil court nor revenue court could interfere in such adjudication. The consolidation disputes are disputes which arise on notification under Section 4 of the U.P. Consolidation of Holdings Act. Parties willing or not willing are compelled to go to this forum compulsorily in order to get their rights finally settled. In such a situation, the technical view in the matter of limitation could not be taken and all such technical matters are required to be construed liberally. I do not consider it a fit case for interference on this additional ground also."

10. All the three Courts have arbitrarily rejected the petitioners' application for cancellation of patta and approved the patta granted in favour of the contesting respondents on the ground that at the time of grant of patta, plot-in-dispute was recorded as naveen parti and vacant land. The Courts below have failed to

consider the effect of the order passed by the Consolidation Court. Courts below have failed to consider that order passed by the Consolidation Court cannot be ignored at all but the Courts below have arbitrarily rejected the petitioners' application for cancellation of lease executed in favour of contesting respondents.

11. It is also relevant to mention that petitioners are claiming themselves to be in possession since before the Consolidation operation, as such, the land was not vacant at all at the time of grant of patta and the entry which was illegally made in respect to the petitioner's plot that was corrected by the order of Deputy Director Consolidation, as such, there was no occasion to grant the lease to the contesting respondent.

12. Considering the entire facts and circumstances as well as ratio of law laid down in Balbir Singh (Supra) as well as **Benimadho (Supra),** the impugned orders dated 28.2.2018 and 25.5.2002 passed by Board of Revenue, 27.8.1988 passed by Additional Commissioner and 31.12.1987 passed by Additional District Magistrate, Finance and Revenue, Gorakhpur are liable to be set aside and the same are hereby set aside.

13. **The writ petition stands allowed** and matter is remitted back before the respondent No.3 ? to decide the petitioners' application under Section 198(4) which was registered as Case No.382 of 1985 afresh on merit in the light of the observations made in the body of the judgment expeditiously, preferably within a period of three months from the date of production of certified copy of this order.

14. No order as to costs.

(2023) 1 ILRA 565
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.11.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-B No. 6490 of 2002

Smt. Manorama ...Petitioner
Versus
Board of Revenue & Ors. ...Respondents

Counsel for the Petitioner:
Sri S.K. Chaturvedi

Counsel for the Respondents:
C.S.C.

Civil Law - Indian Stamp Act, 1899 - Section 47-A - Under-Valuation of the instrument - deficiency of stamp duty - Collector is not permitted to launch upon a speculative inquiry about the prospective use to which a land may be put to use at an uncertain future date - market value of the property has to be determined with reference to the use to which the land is capable reasonably of being put to immediately or in the proximate future - In the instant case disputed plot recorded as agricultural plot in the revenue record on the date of execution of sale deed in favour of petitioner i.e. on i.e. 23.03.1995 - Naib Tehsildar submitted report dated 06.11.1995 that plot in dispute is an agricultural plot and no building is situated over the same - However, Stamp duty imposed by Additional Collector on the ground of future potential of the land - Held - imposition of residential/ abadi rate for determining the valuation of land on the ground of future potential of the land in dispute is illegal - there was no evidence on record to hold that land in dispute is not an agricultural land - impugned orders cannot be sustained in the eye of law (Para 9, 10)

Allowed. (E-5)

List of Cases cited:-

1. Chhotey Lal Vs St. of U.P. & ors. 2021 (152) RD 141

2. Smt. Pushpa Sarin Vs St. of U.P. 2015 (127) RD 855

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

1. Heard Mr. S. K. Chaturvedi, counsel for the petitioner and learned Standing Counsel for respondent Nos.1 and 2.

2. The brief facts of the case are that petitioner has purchased agricultural plot No.26 area 5 biswa 6 dhoor situated at village-fautapar, Tappa-Haveli, District-Basi through registered sale-deed executed on 23.03.1995 for Rs. 47,200/- The stamp of Rs. 15370/- has been paid on the value of Rs. 1,06,000/-. Proceeding under Section 47-A of Indian Stamp was initiated in respect of petitioner's aforementioned sale deed which was registered as Stamp Case No.899/301/1994 under Section 47A Stamp Act State Vs. Manorama. A report was called for in the case accordingly Naib Tehsildar submitted his report dated 06.11.1995 before Collector in Stamp Case No.899/301/1994 mentioning that disputed sold plot is agricultural property and no building is situated in the disputed plot, the disputed plot is not of residential/commercial importance. The user of land has not been changed and there is no declaration under Section 143 of U.P.Z.A. & L. R. Act in respect of disputed plot No.26. Petitioner appeared in the aforementioned case after notice and Additional Collector heard the matter. The additional collector without considering the report of Naib Tehsildar dated 06.11.1995 and without making the spot inspection himself fixed the rate of Rs. 1000/- per square meter accordingly Stamp duty of Rs. 97,585 was fixed hence deficiency of Rs. 82,215 and penalty of Rs. 82,215 was imposed vide his order dated 29.01.1996. Petitioner challenged the order passed by additional collector dated 29.01.1996 through revision before Board of Revenue/Chief Controlling revenue authority taking specific ground in the ground of revision that land in dispute is agricultural land and surrounded by agricultural land on all sides but Board of Revenue in arbitrary manner allowed the revision party setting aside the order imposing penalty only but the order of deficiency of stamp duty was maintained, hence this writ petition on behalf of petitioner.

3. This Court while entertaining the writ petition passed the following interim order dated 13.02.2002:

"The learned Standing Counsel has appeared for respondent Nos.1 and 2. He prays for and is allowed six weeks' time to file a counter affidavit.

Subject to petitioner giving security of the equal amount of deficiency of Stamp duty of Rs.82,215/- to the satisfaction of respondent no.2 within a period of six weeks from today, the recovery proceedings against the petitioner in pursuance of the impugned order shall remain stayed."

4. In spite of the interim order dated 13.02.2002 passed by this Court no counter affidavit has been filed by Standing Counsel on behalf of State denying the averment made in the writ petition.

5. Counsel for the petitioner submitted that the proceeding under

Section 47-A of the Indian Stamp Act has been arbitrarily initiated against the petitioners. He further submitted that Naib Tehsildar has submitted his report dated 06.11.1995 that disputed plot is an agricultural plot and building is not situated over the disputed plot but Additional Collector without considering the report of Naib Tehsildar dated 06.11.1995 has ordered for payment of stamp duty and penalty without any evidence on record to that effect. he further submitted that revisional court although set aside the order of imposition of penalty but on the ground of probability maintained the order of payment of stamp duty. He further submitted that proper opportunity of hearing was also not afforded by revisional Court. He further submitted that no declaration has been made under Section 143 of U.P.Z.A. & L. R. Act in respect to disputed plot No 26 area 5 biswa 6 dhoor.

6. Counsel for the petitioner has placed reliance upon the judgment of this court reported in **2021 (152) RD 141 Chhotey Lal Vs. State of U.P. and others,** in which this Court has held that valuation has to be done on the date of execution of the sale deed and not on the grounds of its potential use subsequently for a different purpose. Paragraph No.8 of the judgment has been relied upon which is as follows:

On the basis of the submissions made, the short question that arises are as to whether levy of stamp duty can be justified on the basis of land not being used for the purposes for which it was purchased and whether stamp duty can be levied on the ground that in the vicinity, lands are being used for residential purposes, the above two referred judgments give a clear answer to the questions raised in the present writ petition. These aspects have been duly considered by this Court. Even otherwise in the Rules provided for valuation of the property, it is clear that the valuation has to be done on the date of execution of the sale deed and not on the grounds of its potential use subsequently for a different purpose. There is nothing on record to demonstrate that on the date of the execution of the sale deed, the land was not agricultural property referred in the revenue records. There is further nothing on record to demonstrate that the land in question was declared fit for residential use under Section 143 of the U.P. Z.A. & L.R. Act. That being the case, it is a simple case of improper exercise of jurisdiction vested in the A.D.M. and an improper exercise of jurisdiction vested in the Revisional Court.

7. On the other hand learned Standing Counsel submitted that revisional court has partly allowed the revision of petitioner setting aside the order of imposition of penalty against the petitioner and the order of imposition of stamp duty has been rightly affirmed by revisional court on the ground of future potential of the land in dispute although learned stand Counsel failed to satisfy the quarry of the court that if revenue record, sale deed and the report of Naib-Tehsildar dated 06.11.1995 fully demonstrate that plot in dispute is an agricultural land on the date of execution of sale deed dated 23.03.1995 then under what circumstances the rate of residential plot can be imposed for fixation of stamp duty against the petitioner.

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

9. There is no dispute about the fact that disputed plot No.26 area 5 biswa 6 dhoor was recorded as agricultural plot in the revenue record on the date of execution of sale deed i.e. 23.03.1995 in favour of petitioner. There is also no dispute about the fact that Naib Tehsildar has submitted his report dated 06.11.1995 in Case under Section 47-A of Indian Stamp Act that plot in dispute is an agricultural plot and no building is situated over the same. Additional Collector ordered to deficient stamp duty as well as penalty against the petitioner without considering the report of Naib Tehsildar dated 06.11.1995 and revisional court although set aside the order of imposition of penalty against the petitioner but affirmed the order of payment of stamp duty on the ground of future potential of the land.

10. Since the plot in dispute was recorded as agricultural plot in the revenue record on the date of execution of sale deed coupled with the fact that report of Naib Tehsildar submitted on 06.11.1995 that is after about more than 7 months from the date of execution of sale deed the plot in dispute was found to be agricultural land in all respect as such the imposition of residential/ abadi rate for determining the valuation of land on the ground of future potential of the land in dispute is illegal.

11. Paragraph Nos. 6, 7 and 8 of the writ petition is relevant for perusal which are as under:

"6. That Naib Tehsildar has reported the following things land in question is agricultural land and is surrounded by agricultural land user and purpose is also agriculture. Land situate 500 meter away from Block road and situate at Siwan, Not use full for Abadi purposes. Nature of the land is 'Doras-4' valuation also fixed and found to be Rs.50,880/-

7. That it is pertinent to mention here that apart of inspection report dated 06.11.1995 (Annexure 2) there is no other report nor Presiding Officer ever visited the spot or gave its own valuation report. Nor there is any report by the Collector/Presiding Officer on record.

8. That it is also very much pertinent to state that nature of the land and it/s user has also not been changed till today. As is required under Section 43 of U.P.Z.A. & L.R. Act, for the use of land other than the agricultural purposes. it is further stated that land in question is still being used as agricultural purposes."

12. State has not controverted the allegation made in the above mentioned paragraph by filing counter affidavit in spite of expiry of 20 years as such the allegations made in paragraph Nos. 6, 7 and 8 of the writ petition is deemed to be correct.

13. The full Bench of this Court in the case reported in **2015 (127) RD 855 Smt. Pushpa Sarin Vs. State of U.P.** has held as under in paragraph Nos. 27, 28 and 29:-

"27. The true test for determination by the Collector is the market value of the property on the date of the instrument because, under the provisions of the Act, every instrument is required to be stamped before or at the time of execution. In making that determination, the Collector has to be mindful of the fact that the market value of the property may vary from location to location and is dependent upon a large

number of circumstances having a bearing on the comparative advantages or disadvantages of the land as well as the use to which the land can be put on the date of the execution of the instrument.

28. Undoubtedly, the Collector is not permitted to launch upon a speculative inquiry about the prospective use to which a land may be put to use at an uncertain future date. The market value of the property has to be determined with reference to the use to which the land is capable reasonably of being put to immediately or in the proximate future. The possibility of the land becoming available in the immediate or near future for better use and enjoyment reflects upon the potentiality of the land. This potential has to be assessed with reference to the date of the execution of the instrument. In other words, the power of the Collector cannot be unduly circumscribed by ruling out the potential to which the land can be advantageously deployed at the time of the execution of the instrument or a period reasonably proximate thereto. Again the use to which land in the area had been put is a material consideration. If the land surrounding the property in question has been put to commercial use, it would be improper to hold that this is a circumstance which should not weigh with the Collector as a factor which influences the market value of the land.

29. The fact that the land was put to a particular use, say for instance a commercial purpose at a later point in time, may not be a relevant criterion for deciding the value for the purpose of stamp duty, as held by the Supreme Court in State of U.P. and others vs. Ambrish Tandon and another11. This is because the nature of the user is relatable to the date of purchase which is relevant for the purpose of computing the stamp duty. Where, however, the potential of the land can be assessed on the date of the execution of the instrument itself, that is clearly a circumstance which is relevant and germane to the determination of the true market value. At the same time, the exercise before the Collector has to be based on adequate material and cannot be a matter of hypothesis or surmise. The Collector must have material on the record to the effect that there has been a change of use or other contemporaneous sale deeds in respect of the adjacent areas that would have a bearing on the market value of the property which is under consideration. The Collector, therefore, would be within jurisdiction in referring to exemplars or comparable sale instances which have a bearing on the true market value of the property which is required to be assessed. If the sale instances are comparable, they would also reflect the potentiality of the land which would be taken into consideration in a price agreed upon between a vendor and a purchaser"

14. In the present case except the Naib Tehsildar report dated 06.11.1995, revenue record and the sale deed in question there was no evidence on record to hold that land in dispute is not an agricultural land as such the impugned orders cannot be sustained in the eye of law in which on the point of future potential of the land without any basis the stamp duty paid by the petitioner was found deficient.

15. The case law cited by learned counsel for the petitioner in **Chotey Lal (Supra)** is also applicable in the present controversy in which the full bench

decision rendered in **Smt. Pushpa Sarin (Supra)** has been also considered.

16. Considering the facts and circumstances of the case as well as ratio law laid down in **Smt. Pushpa Sarin(supra)** and **Chhotey Lal (Supra)** the impugned order dated 29.01.1996 passed by the Additional Collector and order dated 14.05.2001 passed by the Board of Revenue Allahabad cannot be sustained in the eye of law as such the same are hereby set aside. The writ petition stands allowed. No order as to costs.

(2023) 1 ILRA 570
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.12.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-B No. 45796 of 2017

Birendra Singh & Ors. ...Petitioners
Versus
Board of Revenue U.P. at Allahabad & Ors. ...Respondents

Counsel for the Petitioners:
Sri Suneel Kumar Rai, Sri Basant Kumar Upadhyay, Sri Saket Mani Tripathi

Counsel for the Respondents:
C.S.C., Sri Madan Mohan, Sri Prem Sagar Verma

Civil Law - Indian Stamp Act, 1899 - Section 47-A - Instruments undervalued - valuation has to be done on the date of execution of the sale deed and not on the grounds of its potential use subsequently for a different purpose - Petitioner purchased agricultural plot vide registered sale deed for Rs. 47,200 - stamp of Rs. 15370/- was paid on the value of Rs. 1,06,000 - Proceeding under Section 47-A of Indian Stamp was initiated - Naib Tehsildar submitted his report dated 06.11.1995 that plot in dispute is an agricultural plot and no building is situated over the same - Additional Collector ordered to deficient stamp duty as well as penalty against the petitioner - order of imposition of stamp duty affirmed by revisional court on the ground of future potential of the land in dispute - Held - imposition of residential/ abadi rate for determining the valuation of land on the ground of future potential of the land in dispute is illegal - Impugned order set aside (Para 10, 14, 16)

Allowed. (E-5)

List of Cases cited:

1. Chhotey Lal Vs St.of U.P. & ors. 2021 (152) RD 141

2. Smt. Pushpa Sarin Vs St of U.P. 2015 (127) RD 855

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

1. Heard Sri Suneel Kumar Rai, learned counsel for the petitioner, Sri Madan Mohan, learned counsel for contesting respondent Nos.6 and learned Standing Counsel for the State-respondents.

2. Brief facts of the case are that Khasara No.395 M measuring 1.06 hectare (2.68 acre) situated in Mauja Basai Sher Ghar, Bangar, Tehsil-Chhata, District-Mathura belong to one Munshi son of Ghanturi, who executed a registered sale deed on 21.11.1991 in favour of Basanta son of Bhajana. Another sale deed was executed by Basanta with respect to 0.82 acre in favour of Bhagwat son of Ghanturi and for 0.62 acre area sale deed was executed by Basanta in favour of Balram son of Maunsi. On 21.06.1993 Balram executed sale-deed in favour of respondent No.6 Basanta executed another sale deed

on 07.02.1992 with respect to 0.62 acre area in favour of Harveer son of Munshi. On 07.05.1994 Mushi further executed sale deed with respect to 0.62 acre area in favour of one Bhanwar Singh and others who executed the sale deed in favour of respondent No.6 on 29.08.2000. Due to violation of Section-168-A of U.P.Z.A. & L. R. Act the mutation applied by respondent No.6 were rejected by Tehsildar vide order dated 30.06.2006. The revision filed by respondent No.6 against the order of Tahildar dated 30.06.2006 was dismissed by Additional Commissioner vide order dated 26.06.2008. Balram and others (Vendor of respondent NO.6 executed two sale deed in favour of petitioner's father on 23.07.2008 and 01.08.2008, the name of petitioner's father was accordingly mutated vide order dated 09.09.2008. Respondent No.6 filed an application to recall the order dated 09.09.2008 passed by the Tehsildar which was rejected vide order dated 09.06.2009 on the ground of pendency of writ petition No.47211 of 2008 Bhagwat versus State of U.P. And others, the order of status quo has been also passed by this Court in Writ Petition No.47211 of 2008. Respondent No.6 filed another mutation application dated 05.05.2010 on the basis of Government Notification dated 05.02.2010 by which bar of Section-168-A was lifted with condition of payment of Rs. 1000/- or 2% of the cost of the land whichever is higher accordingly Upziladhikar vide order dated 22.05.2010 ordered that if respondent No.6 will deposit Rs. 14420/- in treasury the sale-deed executed in his favour will become regular and legal.

3. Petitioners filed an application under Order 9 Rule 13 C.P.C. For recalling the ex parte order dated 22.05.2010 but the same was rejected vide order dated 04.04.2012 by Upziladhihar. Petitioners challenged the order dated 04.04.2012 through Revision before Board of Revenue which was dismissed in default on 16.11.2016 accordingly petitioners filed restoration application on 30.01.2017 which was dismissed by Board of Revenue vide order dated 04.08.2017 on the ground earlier passed on 30.11.2016 was on merit as such no interference was made against the order dated 30.11.2016 hence this writ petition.

4. This Court while entertaining the writ petition has passed the following orders dated 22.09.2017:-

"Heard learned counsel for the petitioner as well as learned Standing counsel appearing for the State respondents no. 1 to 5.

Issue notice to the respondents no. 6 to 10 fixing at an early date by registered post AD. Steps be taken within a week.

All the respondents are granted six weeks time to file counter affidavit. The petitioner shall have three weeks thereafter to file rejoinder affidavit.

List immediately thereafter. "

5. In pursuance of the order dated 22.09.2017 respondent No.6 has put in appearance and filed his counter affidavit to the writ petition. Petitioners have filed their rejoinder affidavit also.

6. Counsel for the petitioners submitted that amendment made in Section 168-A of U.P.Z.A.& L.R. Act in 2010 does not have any retrospective effect as such mutation of respondent No.6 cannot be allowed on the basis of sale deed executed in favour of respondent No.6 which was void according to Section 168-A of U.P.Z.A.& L.R. Act. He further submitted

that sale deed prior to amendment of Section 168-A of U.P.Z.A.& L.R. Act were void and non existent coupled with the fact their mutation was also rejected as such the same cannot be validated through subsequent deposit. He further submitted that impugned order passed by respondent Nos.1 and 4 suffers from irregular exercise of jurisdiction as such are liable to be set aside. Counsel for the petitioner in support of his argument on the point of Section 168-A of U.P.Z.A.& L.R. Act has placed reliance upon two judgments which are as follows:

[1] 1991 (2) JT 75 = 1991 RD 184

Mithilesh Kumar Vs. Fateh Bahadur Singh

[II] 2000 (4) AWC 2891

Fateh Bahadur Singh Vs. Jang Bahadur Gupta and others

7. Counsel for the petitioner further submitted that suit No.84 of 2006 filed by respondent Nos. 7, 9 and 10 (Harveer and two others) for declaration to declare the sale deed dated 21.12.1991, 08.05.1992, 21.06.1993, 07.05.1994 and 29.08.2000 in respect to Plot No. 395 M as void and ineffective is pending in Civil Court in which respondent no.6 (Bhagwat) and respondent no.8 (Balram) are defendant nos. 1 and 2, one Civil Suit No.120 of 2005 filed by respondent Nos.7, 9 and 10 for injunction in respect of disputed plot is also pending in civil court, as such impugned orders be set aside which shall be subject to decision of Civil Suit.

8. On the other hand Counsel for respondent No.6 submitted that in view of the Gazette Notification dated 05.04.2010 issued by the State of Uttar Pradesh the sale deed which became barred by the provisions of Section-168-A of U.P.Z.A.&L.R. Act has been validated on certain deposit within stipulated time as such the entire argument advanced by counsel for the petitioners is misconceived, the notification dated 05.04.2010 is the complete reply to the controversy involved in the matter. He further submitted that respondent No.6 complied the condition of government notification dated by depositing Rs.14,420/- (2% of the cost of the land) on 24.05.2010 as such the order dated 22.05.2010 was passed by Sub Divisional Officer for validating the sale deed in favour of respondent No.6. He further submitted that since Munshi had already transferred the entire land as such heirs of Munshi i.e. Respondent Nos.7 to 10 could not succeed any land of his father accordingly, respondent Nos. 7 to 10 had no right and title to transfer the disputed plot No. 395M to any person, the sale deed alleged to be executed on 23.07.2008 by respondent Nos.7 to 10 in favour of predecessor in interest of petitioners is null and void so they cannot acquire any title in the disputed plot. He further submitted that Writ Petition No.47211 of 2008 filed by respondent No.6 was dismissed as withdrawn by order dated 14.12.2018 due to validation of sale-deed executed in favour of respondent No.6 under Notification dated 05.04.2010 issued by State Government. Counsel for the respondent No.6 in support of his argument placed following judgments:-

(i) 2011 (4) ADJ 796 = 2011 (4) AWC 3366, Smt. Sumitra Devi vs. Sushila Devi and others

(ii) 2011 (114) R.D. 767, Deep Chand vs. Board of Revenue U.P. at Allahabad and others.

(iii) Second Appeal No.1138 of 2011, Vijai Bahadur vs. Lakshmi Devi, decided on 02.02.2012

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

10. There is no dispute about the fact that three sale deeds were executed by Basanta, Balram and Bhanwar Singh in favour of respondent No.6 in respect to disputed plot No.395M total area 2.06 acre and remaining area of 0.62 acre was transferred in favour of Harveer. The sale deed executed in favour of respondent No.6 could not be included in the mutation proceedings in view of provisions contained under Section 168-A of U.P. Zamindari Abolition and Land Reforms Act but due to State Government Notification dated 05.04.2010 the sale deed became validated and the mutation of the petitioners has been ordered accordingly.

11. In order to appreciate the controversy involved in the instant writ petition, the perusal of the provision of Section 168-A of U.P.Z.A & L.R. Act before 23.08.2004 and after 23.08.2004 as well as Government Notification dated 05.04.2010 will be necessary which are as follows:

Before 23.08.2004:-

(1) "168-A. Transfer of fragments.-

(1) Notwithstanding the provisions of any law for the time being in force, no person shall transfer whether by sale, gift or exchange any fragment situate in a consolidated area except where the transfer is in favour of tenure-holder who has a plot contiguous to the fragment or where the transfer is not in favour of any such tenure-holder the whole or so much of the plot in which the person has bhumidhari rights, which pertains to the fragment is thereby transferred.

(2) The transfer of any land contrary to the provisions of sub-section (1) shall be void.

(3) When a bhumidhar has made any transfer in contravention of the provisions of sub-section (1) the provisions of Section 167 shall mutatis mutandis, apply."

Since 23.08.2004:-

*(2) **"Section 168-A: Prevention of Fragmentation" "omitted"***

168-A Transfer of fragments- Statutory Amendments

Section 168-A was inserted by U.P. Act 18 of 1956. But it was omitted by U.P. Act 27 of 2004 with effect from 23 August, 2004. Before its deletion, Section 168 -A stood as under:

(1) Notwithstanding the provisions of any law for the time being in force, no person shall transfer whether by sale, gift or exchange any fragment situate in a consolidated area except where the transfer is in favour of tenure-holder who has a plot contiguous to the fragment or where the transfer is not in favour of any such tenure-holder the whole or so much of the plot in which the person has bhumidhari rights, which pertains to the fragment is thereby transferred.

(2) The transfer of any land contrary to the provisions of sub-section (1) shall be void.

(3) When a bhumidhar has made any transfer in contravention of the provisions of sub-section (1) the provisions of Section 167 shall mutatis mutandis, apply.".

"सरकारी गजट, उत्तर प्रदेश
उत्तर प्रदेशीय सरकार द्वारा प्रकाशित
असाधारण
विधायी परिशिष्ट
भाग-4 खण्ड (ख)

(परिनियत आदेश)
(लखनऊ, सोमवार, 05 अप्रैल, 2010)
चैत्र 15, 1932 शक सम्वत
उत्तर प्रदेश सरकार
राजस्व अनुभाग-1
संख्या .....
लखनऊ अप्रैल 2010
अधिसूचना
प0अ0-19... .....
21/4

"उत्तर प्रदेश जमीदारी विनाश और भूमि व्यवस्था (विशेष उपबन्ध) अधिनियम, 2010 (उत्तर प्रदेश अधिनियम संख्या 4 सन् 2010) की धारा 2 के अधीन शक्ति का प्रयोग करके राज्यपाल अधिसूचित करते हैं कि किसी टुकड़े के किसी अंतरण जो उत्तर प्रदेश जमीदारी विनाश और भूमि व्यवस्था अधिनियम, 1950 (उत्तर प्रदेश अधिनियम संख्या 1 सन् 1951) की धारा 168-क जैसा कि वह उत्तर प्रदेश जमींदारी विनाश और भूमि व्यवस्था (संशोधन) अधिनियम, 2004 (उत्तर प्रदेश अधिनियम संख्या 27 सन् 2004) के प्रारम्भ के पूर्व विद्यमान थी, के अधीन शून्य हो गया था और जिसकी राज्य सरकार के पक्ष में राजस्व अभिलेखों में प्रविष्टि नहीं की गयी थी, निर्विहित समझा जाएगा, के विधिमान्यकरण के लिए एक हजार रुपये या भूमि के मूल्य का 2 प्रतिशत, जो भी अधिक हो, होगी जो लेखा शीर्षक "0029 भू-राजस्व- 800 - अन्य प्राप्तियां- 08- मालिकाना राजस्व- 0806 प्रकीर्ण प्राप्तियों के अधीन जमा की जायेगी। विधिमान्यकरण हेतु आवेदन पत्र इस अधिसूचना के गजट में प्रकाशित होने के दिनांक से छ: माह के भीतर परगना के प्रभारी असिस्टेन्ट कलेक्टर के समक्ष प्रस्तुत किया जायेगा। भूमि वो मूल्य का होगा जो कलेक्टर द्वारा स्टाम्प शुल्क के लिए अवधारित किया गया है और ऐसे आवेदन ..... को लागू हो।

आज्ञा से

शम्भु नाथ शुक्ला

"In Pursuance of the provision of clause (3) of Article 348 of the Constitution the Governor is pleased to order the publication of the following English translation of notification no. 605/1.1 2010-12(7)2003-31. dated April 05, 2010 for general information.

No. 605/1-1-2010-12(7)2003-31
Dated Lucknow April 05, 2010

In exercise of the powers under section 2 of the Uttar Pradesh Zamidari Abolition and Land Reforms (Special Provision) Act 2010 (U.P. Act no. IV of 2010) the Governor is pleased to apply that the fee for validation of any transfer of a fragment which had become void under section 168-A of the Uttar Pradesh Zamindari Abolition and Land Reforms Act 1950 (U.P. Act no. 1 of 1951) as it stood before the commencement of the Uttar Pradesh Zamindari Abolition and land Reforms (Amendment) Act. 2004 (U.P. Act no. XXVII of 2004) and had not been entered in revenue records in favour of the State Government shall be deemed to have been divested shall be rupees one thousand or two percent of the cost of the land whichever is higher to be deposited under the head "0029 BHU-RAJASVA-800-ANYA PARPTIYA-08-MALIKANA RAJASVA-0806 PRAKIRN PRAPTIYA" An application for validation shall be submitted before the Assistant Collector In-Charge of sub-division with in six months from the date of publication of this notification in the Gazette. The cost of the land shall be such as determined by the collector for the Stamp Duty and applicable on the date of such application"

12. From the provisions quoted above it is established that the provisions of

Section 168-A of U.P.Z.A. & L.R. Act has been omitted by U.P. Act No.27 of 2004 with effect from 23.08.2004 and the notification of the State Government issued on 05.04.2010 has validated the sale-deed which were barred by Section 168-A of the U.P.Z.A. & L.R. Act on certain terms and conditions.

13. Respondent No.6 in compliance of Government Notification dated 05.04.2010 deposited Rs.14,420/- on 05.05.2010 which is 2% of the cost of the land in dispute within time period of six month. Accordingly, mutation was also ordered in favour of petitioners and restoration application as well as revision filed by petitioners were dismissed in accordance with law.

14. The judgment cited by counsel for the respondent No.6 are applicable in the present controversy. Paragraph Nos.4 and 7 of the judgment rendered in Smt. Sumitra Devi (supra) will be relevant which is as follows:-

"4. I fully agree with the contention of the learned Counsel for the petitioner that after dismissal of the civil suit and appeal, it was not permissible for Additional Collector or the revisional authority/Court to take a contrary view and it was an abuse of process of Court by respondent No. 2 to approach them. Moreover as held by the Appellate Court/A.D.J. plea of sale-deed being hit by section 168-A of the Act under the facts and circumstances of the case, could be raised only by the State or Gaon sabha and respondent No. 2 had absolutely no locus standi to agitate the matter. The sale-deed was executed by respondent No. 5 in favour of petitioner and both of them were fully satisfied and the Gaon Sabha or the State Government had not challenged the same. In the scenario, no other person had any authority to agitate the matter.

7. Moreover provisions of section 168-A were quite harsh. The section has also been deleted. U.P. Act No. 27 of 2004 which deleted section 168-A made the previous transactions hit by the said section voidable (in stead of void) and curable (capable of being validated) on payment of some nominal fees within a particular period which has now expired (Section 11). Accordingly, for these two reasons the section shall be interpreted (for the sake of past transactions) liberally, in favour of vendor and vendee."

15. Another judgment Deep Chand (supra) cited by learned counsel for the respondent No.6 is also relevant. Paragraph Nos.6, 7 & 8 of the judgment rendered in Deep Chand (supra) are as follows:-

"6. Learned counsel for the respondent no. 4, Sri Gupta submits that the answering respondent had his adjoining Chak over Khasra No. 518 belonging to him and his brother Murli and accordingly the petitioner vide sale dated 8.10.1985 transferred fifteen Biswas of land out of Chak No. 521 to the father of the answering respondent. The petitioner never challenged the execution of the sale deed. On the contrary, the petitioner turned dishonest and he moved an application that the proceedings should be initiated as the transfer amounted to a transfer of a fragment of land, hence was invalid. On coming to know about the same, the answering respondent moved before the Additional Collector and orders were passed. Accordingly, the name of the father of the answering respondent was also mutated on 18.8.1987 and while passing the order dated 9th July, 1987, there was full compliance of the principles of natural

justice. It is only the dishonest intention of the petitioner which was reflected in the proceedings that were sought to be pursued by him. Even otherwise, assuming if the land was a fragment then too it would vest in the State and petitioner would not gain anything to the contrary. It has also been submitted that as a matter of fact, the State Government has issued Notifications that in case, there is a fragmentation then the same can be regularized by making certain deposits and, therefore, the sale deed would not be void.

7. Having heard learned counsel for the parties and having perused the counter and rejoinder affidavits, it is evident that the rights of the petitioner stood extinguished with the execution of the sale deed. The petitioner had never challenged the sale deed, as such it appears that the petitioner has somehow the other tried to cause damage to the answering respondent for no valid reason. The petitioner would not stand to gain anything except causing sheer harassment to the respondent no. 4. The contention of the respondent that the petitioner would not stand to gain anything appears to be correct.

8. In view of the fact that the petitioner has been unable to make out any case for interference in view of the facts that have been brought on record and the findings recorded by the authorities, I am not inclined to interfere in the exercise of jurisdiction under Article 226 of the Constitution of India. The writ petition lacks merit and it is accordingly dismissed. Interim order granted earlier stands discharged."

16. The judgment cited by learned counsel for the petitioners are not applicable in the present controversy as both the judgment are of year 1991 & 2000 while the Section 168-A of U.P.Z.A. & L.R. Act has been omitted by U.P. Act No.27 of 2004 w.e.f. 23.08.2004 and State Government notification for validation of sale deed which was hit by Section 168-A of U.P.Z.A. & L.R. Act came into force on 05.04.2010.

17. It is also material that Civil Suit No.4 of 2006 has been filed by respondent Nos.7, 9 and 10 (vendor of petitioners) to declare the sale-deed of respondent No.6 as illegal, void and ineffective which is pending for adjudication before civil court.

18. Considering the entire facts and circumstances of the case as well as ratio of law laid down by this Court in Smt. Sumitra Devi (supra) and Deep Chand (supra) coupled with the provisions of validation of sale-deed in view of Government notification dated 05.04.2010, no interference is required against the impugned orders.

19. The writ petition is devoid of merit and the same is accordingly dismissed.

20. No order as to cost.

(2023) 1 ILRA 576
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.12.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MOHD. ASLAM, J.

Criminal Appeal No. 500 of 1984

Ram Shankar & Ors. ...Appellants
Versus
The State of U.P. ...Opposite Party

Counsel for the Appellants:

Subudh, K. Shukla, Kr. M. Rakesh, Kr. Mukul Rakesh, Shanti Prakash, Prachi

Counsel for the Opposite Party:
G.A.

A. Criminal Law – Criminal Procedure Code, 1973 – Section 374(2) – Appeal against conviction and Sentence – Scope of hearing – Principle explained – Held, the First Appellate Court while deciding the criminal appeal on facts must apply its independent mind and record its own findings on the basis of its own assessment, the evidence is appreciated for our independent assessment of evidence and recording the findings if we reach to the findings that the findings recorded by the trial court is in consonance of our findings, the appeal could be dismissed and if two views are possible after appreciation of the evidence and one view is in favour of acquittal, the appeal would be allowed or on the basis of appreciation of evidence if we find that trial court has not appreciated the evidence while recording the findings of guilt and it is illegal, the appeal would be allowed. (Para 24)

B. Criminal Law – First Information Report – Delay, how far affects its authenticity – *Anjan Dasgupta's case* relied upon – A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question – Held, trial court has rightly held that first information report was lodged promptly which rules out any sort of concoction and deliberation and it gives assurance regarding the truth of informant's version. (Para 25 and 26)

C. Criminal Law – First Information Report – Omission of few facts, how far fatal for prosecution – Held, certain omission like non-mentioning of covering of the face by Shyam Bihari by scarf and certain other minor omissions in FIR does not go to the root of the prosecution case, therefore, that is not fatal. Moreover, the FIR cannot be said to be an encyclopedia. It is not expected that all the details must find in FIR. Therefore, it will not affect the prosecution case. (Para 29)

D. Criminal trial – Interested witness – Reliability – Held, the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance – Dalip Singh's case relied upon. (Para 37)

E. Criminal trial – Indian Penal Code,1860 – Sections 302 – Murder – Injured witness – St.ment of witnesses that the appellant opened fire on the injured – Reliability – Nothing came in his cross-examination which makes his testimony unreliable – Relevance – Held, the factum that accused were identified in the light of lantern and in the light of torch of the accused was not challenged in the cross-examination. Therefore, the testimony of this witness inspires confidence and is liable to be relied on – Prosecution has proved its case beyond reasonable doubt against the accused-appellants for offence punishable under Sections 302/149, 307/149, 148, 323/149 and Section 449 I.P.C. The learned lower court has rightly convicted and sentenced the appellants. (Para 31 and 40)

Appeal dismissed. (E-1)

List of Cases cited:-

1. Majjal Vs St. of Har.; (2013) 6 SCC 798

2. Bakshish Ram & anr. Vs St. of Pun.; AIR 2013 SC 1484

3. Phula Singh Vs St. of H. P.; AIR 2014 SC 1256

4. Anjan Dasgupta Vs St. of W. B. & ors.; (2017) SCC 2022

5. Criminal Appeal Nos. 525-526 of 2012; Jai Prakash Singh Vs St. of Bihar & anr. decided on 14 March, 2012

6. Gangadhar Behera & ors. Vs St. of Orissa; (2002) 8 SCC

7. Dalip Singh & ors.. Vs The St. of Punj.; (AIR 1953 SC 364)

8. Guli Chand & ors.. Vs St. of Raj.; (1974 (3) SCC 698

9. Vadivelu Thevar Vs St. of Madras; AIR 1957 SC 614

10. Masalti & ors.. Vs St. of U.P.; AIR 1965 SC 202

11. Sandu Saran Singh Vs St. of U. P. & ors.; (2016) 4 SCC 357

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

1. Heard Ms. Prachi Trivedi, learned counsel for applicant No.3, Sri Dharm Trivedi, learned counsel for appellant No.4 as well as Sri Umesh Chandra Verma, learned Additional Government Advocate for State of U.P. and perused the record.

2. This criminal appeal is preferred on behalf of the appellants (1) Ram Shankar, (2) Gokaran Shukla, (3) Jageshwar, (4) Sabit, and (5) Mukaddar under Section 374 (2) Cr.P.C. against the impugned judgment of conviction and order of sentence dated 27.06.1984 passed by learned Additional Sessions Judge, Court No.1, Lakhimpur Kheri in Sessions Trial No. 168 of 1984 (State of U.P. Vs. Ram Shanker and 4 others), arising out of Case Crime No. 146 of 1981, Police Station- Dhaurahra, District- Lakhimpur Kheri, whereby the appellants were convicted for offence punishable under Section 302/149 Indian Penal Code (in short "I.P.C") and were sentenced to undergo imprisonment for life, they were also convicted for offence punishable under Section 148 I.P.C. and were sentenced to undergo rigorous imprisonment for one year, also convicted for offence punishable under Section 307/149 I.P.C. and sentenced to undergo rigorous imprisonment for seven years and they were also convicted for offence punishable under Section 449 I.P.C. and were sentenced to undergo rigorous imprisonment for eight years, further convicted for offence punishable under Section 323/149 I.P.C. and were sentenced to undergo rigorous imprisonment for one month. It was further directed that all the sentences shall run concurrently.

3. During the pendency of appeal, appellant no.(1) Ram Shankar, (2) Gokaran Shukla and (5) Mukaddar died and the appeal in respect of them was dismissed as abated vide order dated 29.09.2021, now the present appeal survives only against appellant no. (3) Jageshwar and (4) Sabit.

4. In brief, the prosecution case is that informant Devi Charan Mishra (PW-1) son of Ram Swaroop Mishra, resident of village Shekhan Purwa, Police Station- Dhaurahra, District- Lakhimpur Kheri lodged the first information report on 06.07.1981 at 7.00 a.m. at Police Station- Dhaurahra alleging therein that he was living with his cousin Lalji Prasad son of Santram in the same house. His second marriage took place about 12 years ago with Vidya, daughter of Babu Ram Shukla, resident of village Murasa, Police Station- Mitauli. His wife Vidya was a lady of easy virtue on account of which his relation with her was not good and she parted company with him and was living at her paternal house. It is also alleged that due to this his father-in-law, brother-in-law Ram Shankar and others had suspicion that Lalji Prasad and his wife Smt. Ram Shree were behind all this trouble so that they made repeated unsuccessful attempt to persuade Devi Charan to separate himself from Lalji Prasad. One year before the incident, his wife had also exhorted that as long as Lalji and his wife would not die or be killed she

would not come to her matrimonial home. His wife Vidya had developed illicit relation with accused Sabit and Mukaddar, who were living in the neighborhood, and on account of this unholy activity the aforesaid accused had exchange of words with Lalji Prasad. In the night of 5/6.07.1981 he and his cousin Lalji Prasad were sleeping in the courtyard after taking dinner and his sister-in-law (Bhauji) Ram Shree, niece Shravan Kumari and nephew Dinesh Kumar were sleeping on the terrace and his another brother Shrikant and his servant Arjun Lodh (PW-3) were sleeping in the western side of the same courtyard. A lantern (lamp) was burning in the courtyard (ANGAN). In the mid of night, informant woke up and sat down on CHAUKI and at around 12:30 hrs. in the night, 5-6 persons infiltrated from the north side of TATIHAR (thatched) gate flashing torches, thereupon, informant accosted them, then the miscreants commanded him to sit quietly. Then he saw in the flashes of torch that his brother-in-law Ram Shankar armed with gun, Shyam Bihari Shukla armed with country made Addhi and his brother-in-law's son Jageshwar armed with stick, Sabit armed with spade, Mukaddar armed with stick. Accused Sabit and Mukaddar caught hold of him but as soon as his brother-in-law and Shyam Bihari said not to kill him otherwise his sister will become a widow, they had to kill Lalji Prasad and his wife. On his alarm, Shrikant and Arjun Lodh woke up and Basudev flashed torch from adjacent terrace, then Sabit exclaimed that Lalji Prasad was sleeping nearby on which Ram Shankar and Shyam Bihari opened fire on Lalji Prasad resultantly he died, then Sabit said that wife of Lalji Prasad is sleeping on the terrace, thereupon, all the miscreants run towards the terrace. Informant and Arjun Lodh also went on the terrace to save his sister-in-law (BHABHI), then Ram Shankar opened fire on his BHABHI. The informant Debi Charan hugged his BHABHI then Jageshwar and Mukaddar assaulted with stick as a result of which he, his BHABHI Ram Shree and niece sustained injury. Meanwhile, Sunder Lal Tiwari and many other people of the village came armed with stick, flashing torches and raised alarm. Then all the accused persons fled towards north while firing. They identified the accused persons clearly and by their names also. His brother's dead body was lying at home and the injured were also at home. He prayed that his first information report be lodged and legal action be taken against accused persons.

5. Head Constable Raghunath Singh scribed the chick report (Exhibit-Ka-5) on 06.07.1981 at 7 a.m. at Police Station-Dhaurahra on the basis of Tehir (Exhibit-Ka-1) of informant and by making necessary entry in GD vide report No. 9 at 7 a.m. on 06.07.1981, registered Case Crime No. 146 under Sections 147, 148, 149, 449, 302 I.P.C. at Police Station-Dhaurahra.

6. Investigation of the case was entrusted to Sub-Inspector Sardar Singh. He copied the chick report and GD registering the case in the case diary and recorded the statement of Head Constable Raghunath Singh, scriber of the chick and GD, on 06.07.1981. Sub-Inspector Sardar Singh along with Sub-Inspector Irshad, Constable Ram Prakash, Constable Ragini, Constable Gayatri Prasad Yadav and Constable Uday Narayan proceeded for the place of occurrence thereafter. He appointed Shrikanth, Basudev, Sri Krishna,Vansh Gopal and Parashuram as witnesses of the Panchayatnama. The dead body of the deceased Lalji Prasad was

found lying in a room of the house of informant. The head of the dead body was towards South and the foot was towards North. The elbow was found on side of dead body. The fingers were found bend. Eyes were opened and mouth was closed. Blood stained Janeu, Kurta and Dhoti were found on the body of deceased. The matting (Kathari) and cot were found blood stained. Blood stained firearm injury was found on the left side of the chest. Injury with blood-stain was also found on the right side of the chest. The Panch witnesses opined that deceased died due to injury and for ascertaining the exact cause of death postmortem of the dead body is needed. Sub-Inspector Sardar Singh prepared the Panchayatnama (Exhibit-Ka-7), photo nash (Exhibit-Ka-8), Challan lash (Exhibit-Ka-9), sample seal (Exhibit-Ka-10), letter to CMO (Exhibit-Ka-11) and sent the dead body for postmortem examination by Constable Ram Prakash (PW-4) and village Chowkidar Kunj Bihari. He also took plain soil and blood stained soil from the place of occurrence and sealed them into containers. He also took blood stained towel, piece of matting, piece of rope of cot and sealed them. He further took a used old lady's Dhoti and sealed it. He took four empty cartridges (red in colour) and two tickles of cartridge and sealed it. The investigation of the case was later on undertaken by Station Officer Sub-Inspector K.D. Singh (PW-5). On 06.07.1981 he recorded the statement of informant Debi Charan (PW-1) who supported the prosecution case, inspected the place of occurrence at the instance of Debi Charan and prepared the site-plan (Exhibit-Ka-13). On 07.07.1981 Sub-Inspector K.D. Singh recorded the statement of eyewitness Shrikant, Arjun Lodh (PW-3), Smt. Ram Shree (PW-2), Shravan Kumari, daughter of the deceased.

7 . Injured Shravan Kumari, daughter of Lalji, aged about 14 years was medically examined by Dr. R.P. Rathore, Medical Officer, in-Charge Primary Health Center, Dhaurahra on 06.07.1981 at 02:45 p.m. At the time of medical examination, following injuries were found on her body:

"(i). Contusion 5 cm x 4 cm on the middle of the forehead.

(ii) C/o pain both buttocks."

Dr Rathore prepared the injury report in his own handwriting (Exhibit-Ka-2) and had identified the thumb impression RTI of Sharvan Kumari.

8. On the same day at 03:00 p.m. he also examined Ram Shree, wife of Lalji Prasad, aged about 40 years. Following injuries were found on her body:

"(i) contusion 5 cm x 4 cm on back of left forearm, 4 cm below left elbow,

(ii) abrasion 4 cm x 2 cm on the back of left ankle,

(iii) contusion 7.5 cm x 2.5 cm on the front of left knee,

(iv) gunshot wound of entry 8 cm x 4 cm x muscle deep on the inner and lower quadrant of left buttock extending upto vulva, charring and tattooing present, and

(v) gunshot wound of entry 5 cm x 3 cm x muscle deep on the lower and inner quadrant of right buttock, charring and tattooing present."

Dr. Rathore prepared the injury report of Ram Shree (Exhibit-Ka-3) in his own

handwriting. He also identified the RTI of Ram Shree on the injury report.

9. Dr. R.P. Rathore on the same day at 3:15 p.m. also medically examined Debi Charan aged about 30 years. At the time of medical examination, following injuries were found on his body:

"(i) contusion 4.5 cm x 1 cm on the upper face right angle, and

(ii) contusion with abrasion 10 cm x 1.5 cm."

10. Dr R.P. Rathore prepared the injury report of injured Debi Charan (Exhibit-Ka-4) in his own handwriting. He also identified the RTI of Debi Charan.

11. The postmortem of the deceased Lalji Prasad was conducted by Dr. Kamlesh Kumar (PW-6) on 07.07.1981 at 2:40 p.m. At the time of post-mortem examination, the age of the deceased was found to be 55 years. The deceased was found having average body built. Rigor mortis passed off from upper parts and present in the lower parts. Post-mortem staining was found present over back. Body of the deceased was found distended. Blister present all over body. Skin peeled off at certain places. Eyes were found opened. Following ante-mortem injuries were found on the body of the deceased Lalji Prasad:

"(i) gunshot wound of entry 9 cm x 5 cm x chest cavity deep over front of upper part of left side chest just below inner end of collar bone. Blackening and tattooing were found present around the wound, margins were irregular, everted. Clotted blood present in the wound.

(ii) gunshot wound of exit 11 cm x 7 cm x chest cavity deep over front of left side chest and shoulder, 2 cm to the left of injury no.1. Margins irregular, everted. Clotted blood present.

Injury No. 1 is communicating with injury No. 2 while track of wounds contains clotted blood, bone fragments from broken ribs and extensive laceration of muscles, vessels and nerves as found on dissection of wounds 1st to 6th ribs of left side found fractured into multiple pieces. 75 small irregular metallic shots found embedded in the posterior muscle of left side axila muscle of inner side of left arm, shoulder joint, muscle of arm on back portion of shoulder and arm and taken out the injuries and muscles in which shots were embedded contains clotted blood.

(iii) penetrating wound 4 cm x 2 cm x chest cavity deep over front of upper part of left side chest, 3 cm below right collar bone, elliptical in shape, margins clear-cut sharp, clotted blood found present."

12. Doctor opined that the deceased died due to shock and hemorrhage as a result of ante-mortem injuries at about one and a half day before. Dr. Kamlesh Kumar (PW-6) prepared the post-mortem report (Exhibit-Ka-16) in his own handwriting. He handed over one sealed bundle containing Dhoti-1, Kurta-1, Janeu-1, all blood stained to constable who took the dead body for post-mortem. He also sealed one envelope containing 75 small metallic shots (pellets) recovered from the body of the deceased and sent it to S.P., Kheri.

13. On 17.07.1981, the Investigating Officer came to know that accused Jageshwar and Ram Shankar surrendered in the court of Additional Munsif Magistrate, Court No.8 and accused Shyam Bihari,

Gokaran, Mukaddar and Sabit were arrested and sent to the jail. On 05.08.1981, he recorded the statement of Basudev Tiwari. Later on, investigation was transferred to the Station Officer, Sub-Inspector Laeeq Ahmed. He recorded the statement of witnesses Sunder Lal Tiwari and Babu Ram Tiwari on 01.03.1982. Investigating Officer also recorded the statement of Ram Shankar and Shyam Bihari wherein they denied the incident. The Investigating Officer recorded the statement of witnesses of the Panchayatnama, namely, Vansh Gopal, Shrikanth, Parashuram and Sri Krishna on 20.05.1982 and also recorded the statement of Dinesh Kumar. The Investigating Officer after investigation submitted the charge-sheet against the accused Sabit and Mukaddar (Exhibit-Ka-14) and another charge-sheet against accused Ram Shankar, Gokaran Shukla and Jageshwar (Exhibit-Ka-15) in Case Crime No. 146 of 1981, under Sections 147, 148, 149, 302, 449 I.P.C.

14. The cognizance of offence on the basis of aforesaid charge-sheet was taken on 18.06.1982 by Additional Judicial Magistrate, Lakhimpur Kheri and after complying the provision of Section 207 Cr.P.C. the case was committed to the Court of Sessions for trial. The charges for offence punishable under Section 148 I.P.C., 302 I.P.C. read with 149 I.P.C., 307 I.P.C. read with Section 149, 323 read with 149, and section 449 I.P.C. were framed against Ram Shankar, Gokaran Shukla, Jageshwar, Sabit and Mukaddar. The accused-appellants pleaded not guilty and claimed to be tried.

15. In order to prove its case, prosecution has examined informant Debi Charan (injured) as PW-1 who proved the Tehrir report (Exhibit-Ka-1). Witness Ram Shree, widow of deceased Lalji Prasad, as PW-2 and Arjun Lodh as PW-3, alleged eyewitness of the occurrence. As formal witness, prosecution has examined Constable Ram Prakash who carried the dead body for postmortem as PW-4, Investigating Officer K.D. Singh as PW5. The Investigating Officer proved the steps taken in the investigation and the check report (Exhibit-Ka-5), GD registering the case (Exhibit-Ka-6) by secondary evidence. He also proved that Panchayatnama of the deceased was done in his presence by S.I. Sardar Singh and proved the Panchayatnama (Exhibit-Ka-7), photo lash (Exhibit-Ka-8), challan lash (Exhibit-Ka-9), sample sale (Exhibit-Ka-10), letter to CMO for post-mortem (Exhibit-Ka-11) which was prepared in the handwriting of Sub-Inspector Sardar Singh. He also proved that from the place of occurrence Sub-Inspector Sardar Singh had taken in possession a blood-stained bed sheet, Towel and piece of matting (Kathari), piece of rope of cot (baan) and plain soil and blood stained soil, blood stained lady's Dhoti, four empty cartridges and two ticklies and sealed them separately. He produced the sealed packet in the court from which a piece of Kathari and a towel that was alleged to have been found and taken in possession from the place of occurrence by S.I. Sardar Singh and the sealed bundle was exhibited as Material Exhibit-1. He also produced the sealed container having plain soil and blood-stained soil as Material Exhibits- 2 & 3. He also produced a sealed container having four empty cartridges and two ticklies as Material Exhibit-4 before the Court below. He also proved that these articles were taken in possessed by Sub-Inspector Sardar Singh from the place of occurrence. He also proved the site-plan (Exhibit-Ka-13).

He also proved that he was transferred from Police Station Dhaurahra and later on investigation was conducted by Sub-Inspector Laeeq Ahmed who had filed charge-sheet (Exhibit-Ka-14) and (Exhibit-Ka-15) against the accused persons. The prosecution has examined Dr. Kamlesh Kumar, Medical Officer to prove the post-mortem report (Exhibit-Ka-6). He also produced sealed packet from which 75 shots (pellets) were found and stated that these metallic shots were taken out from the body of the deceased. He also proved a sealed bundle from which blood stained Janeu, Kurta and Dhoti were found and it was exhibited as Material Exhibit-6. The genuineness of medical report of Shravan Kumari (Exhibit-Ka-2), Ram Shree (Exhibit-Ka-3) and Debi Charan (Exhibit-Ka-4) was admitted by learned counsel for the accused-appellant before the Court below.

16. The statement of the accused-appellant under Section 313 Cr.P.C. was recorded by learned Court below wherein they denied the prosecution case and stated that they were falsely implicated due to enmity with police. They stated that they have enmity with Basudev regarding land and dispute took place. They did not produce any oral evidence in their defence and filed following documents in their defence and closed their evidence:

"(i). copy of remand application dated 05.07.1981 moved by Investigating Officer in the court of Munsif Magistrate East in relation to Crime No. 117 of 1981, Police Station- Beniganj, District- Hardoi, under Section 60 Excise Act (Exhibit-Kha-1).

(ii) copy of order dated 12.04.1983 passed by Munsif Magistrate East, Hardoi in Case Crime No. 117 of 1981, under Section 60 Excise Act, Police Station- Beniganj, District Hardoi (Exhibit-Kha-2).

(iii) copy of charge-sheet dated 01.08.1981 (State vs Shyam Bihari) under Section 60 Excise Act in Case Crime No. 117 of 1981, Police Station- Beniganj, District Hardoi (Exhibit-Kha-3).

(iv) copy of first information report dated 04.07.1981 registered as Case Crime No. 117 of 1981 against accused Shyam Bihari under Section 60 of Excise Act (Exhibit-Kha-4).

(v) copy of bail application dated 08.07.1981 moved on behalf of accused Shyam Bihari in Case Crime No. 117 of 1981 under Section 60 Excise Act (Exhibit-Kha-5).

(vi) copy of bail order passed by the Munsif East, Hardoi in Case Crime No. 117 of 1981 under Section 60 Excise Act, Police Station- Beniganj, Hardoi (Exhibit-Kha-6).

(vii) copy of order of remand dated 08.07.1981 in Case Crime No. 117 of 1981 under Section 60 Excise Act, Police Station- Beniganj, Hardoi (Exhibit-Kha-7).

(viii) copy of surety bond dated 08.07.1981 filed by surety Raja Baksh in Case Crime No. 117 of 1981 under Section 60 Excise Act, Police Station- Beniganj, Hardoi (Exhibit-Kha-8)."

17. Learned lower court held that after close scrutiny of the circumstances and the evidence adduced the charges against the accused are established beyond reasonable doubt. It was also held that there was no dispute that Lalji Prasad was

murdered. On this point there is more than sufficient evidence, (Exhibit-Ka-1) the Tehrir corroborates this fact. The evidence and paper relating to the inquest proceeding give utmost support to it because doctors found gunshot wounds of entry and exit in the chest communicating with each other. Ribs were found broken. Muscles, vessels, and nerves also extremely lacerated and 75 small irregular metallic shots were found embedded in the pectoral muscle left side, axilla muscle of inner side of left arm, shoulder joint, muscle of arm and taken out. The wound and muscles in which shots were embedded contains clotted blood. PW-6 Dr. Kamlesh Kumar proved the post-mortem report (Exhibit-Ka-16) and proved the antemortem injuries of the deceased found at the time of post-mortem. He has also proved that punctured wound on the chest of deceased. It is further held by learned court below that witness Debi Charan PW-1, Ram Shree PW-2 and Arjun Lodh PW-3 have proved the murder of the deceased Lalji Prasad. Sub-Inspector K.D. Singh PW-5 proved the formalities of the investigation. Constable Ram Prakash had taken the dead body in sealed condition to mortuary for post-mortem examination. The defence suggested the witnesses of the fact that dacoity was committed at the house of complainant and in dacoity the murder was committed. In this way murder of Lalji at the given time and place is asserted by the defence also. Blood stained articles were also found on the spot. Blood stained lady's dhoti and empty cartridges were also found at the place of occurrence. The assessment of the time of death as stated by the doctor is also corresponds with the manner in which the occurrence has taken place and the time of incident. Learned court below recorded the finding that all appellants, namely, Ram Shankar, Gokaran Shukla, Jageshwar, Sabit and Mukaddar have committed murder of the deceased Lalji Prasad, attempted murder of Ram Shree, and voluntarily assaulted and caused simple injury to injured in furtherance of common object, unlawful assembly and also committed the offence of rioting armed with deadly weapons and has committed house trespass in order to commit offence punishable with death and held them guilty for offence punishable under Sections 148, 302 read with Section 149 I.P.C., 307 read with Section 149 I.P.C., 323 read with Section 149 I.P.C. and 449 I.P.C. and each were sentenced to undergo rigorous imprisonment for a term of one year for offence punishable under Section 148 I.P.C., imprisonment for life for offence punishable under Section 302 read with Section 149 I.P.C., rigorous imprisonment for a term of seven years for offence punishable under Section 307 read with Section 149 I.P.C., to undergo rigorous imprisonment for one month for offence punishable under Section 323 read with Section 149 I.P.C., and to undergo imprisonment for a term of eight years for offence punishable under Section 449 I.P.C. It was directed that all the sentences shall run concurrently. Feeling aggrieved by it, appellants/convicts Ram Shankar, Gokaran Shukla, Jageshwar, Sabit and Mukaddar have preferred this appeal under Section 374 (2) Cr.P.C against conviction and sentence awarded by learned lower court.

18. Learned counsel appearing for the appellants has submitted that it is admitted position that there is prior enmity among the deceased and appellants. It is also an admitted position that the witnesses of fact, namely, Debi Charan PW-1, Ram Shree PW-2 are closely related to the deceased and witness Arjun Lodh PW-3 is the servant of brother of the deceased Shrikant,

and therefore, they are most interested witnesses and no reliance can placed on their testimony. It is also submitted that the first information report is ante-timed and is lodged after due deliberation and consultation to falsely implicate the appellants/convicts after delay of about six and a half hours of the incident. It is also submitted that since no independent witness has been examined by the prosecution and only on the basis of uncorroborated testimony of PW-1, PW-2 and PW-3, the conviction of the appellants is not warranted. It is further submitted that during autopsy, the doctor has found the stomach of the deceased empty. It is also submitted that the empty stomach suggests that the murder of the deceased has taken place in the early morning and not in the midnight. It is also submitted that the occurrence is alleged to have taken place in the midnight, whereas the first information report has been lodged at 7:00 a.m. in the morning after a delay of about six and a half hours. The delay has not been explained by the prosecution and in above circumstances non-explanation of the delay leads to conclusion that the first information report is concocted. In view of the aforesaid facts, it is submitted by learned counsel for the appellants that the aforesaid finding of the doctor goes to show that the deceased had died about 10 hours after he took his meal. Accordingly, it is submitted that the time of death could not have been at 12:30 a.m. in night, rather the same might have taken place at 5-6 a.m. in the early morning. Accordingly, the evidence of PWs. 1, 2 and 3 are not reliable and the same cannot become the basis for conviction of the appellants. It is further submitted that PW-1 Debi Charan in his statement has admitted that Investigating Officer has not prepared any supurdiginama regarding lantern. It is further submitted that the statement regarding availability of light is not mentioned in the statement under Section 161 Cr.P.C. In the statement before the court, witnesses have stated that there was light of torches of the appellants and light of lantern was also there. Investigating Officer K.D. Singh (PW-5) has deposed that while giving the statement under 161 Cr.P.C. Ram Shree stated that she was weeping badly and could not tell other facts. It is further submitted that in above circumstances it is not established that there was any source of light as to recognize the appellants/convicts. It is also submitted that statement of the witnesses was recorded by the Investigating Officer with delay, therefore, no reliance can be placed on the testimony of prosecution witnesses. It is also submitted that post-mortem examination of the deceased and medical examination of the injured were conducted with delay which cast doubt on the prosecution case. It is further submitted that Investigating Officer had not prepared any Supurdginama of lantern and torches. It is further submitted that for the first time in the court the witnesses deposed that Shyam Bihari had covered his face and his face could not be seen by them. This fact is not mentioned in the Tehrir (Exhibit-Ka-1) and in the statement of the witnesses recorded under Section 161 Cr.P.C. It is further submitted that appellants/convicts Shyam Bihari was arrested on 04.07.1981 in Hardoi under Section 60 Excise Act and remained in jail to 08.07.1981 and Ram Shankar was at police duty. It is further submitted that in above circumstances, it is proved that Shyam Bihari and Ram Shankar were not present at the place of occurrence. Shyam Bihari was detained in jail and appellant Ram Shankar was on duty at the place of his posting. It is further submitted that learned lower court has not

considered the documentary evidence produced by defence and has not properly appreciated the evidence on record in right prospective. It is further submitted that there is no mention of injury by Ballam in Tehrir (Exhibit-Ka-1), but in the statement under Section 161 Cr.P.C. the complainant and witnesses have stated that Sabit has given Ballam blow to the deceased. It is further contended that this was an improvement made after seeing the post-mortem report, therefore, the statement of the witnesses are not reliable. It is further submitted by learned counsel for the appellants that admittedly the occurrence took place in the night but there is nothing on record to show that there was any source of light for identification. Accordingly, it is submitted that in the absence of any source of identification of appellants/convicts, as such claim of PWs 1, 2 and 3 appears to be doubtful. It is also submitted that the prosecution has not been able to bring home the charges levelled against the appellants beyond the shadow of all reasonable doubts. Therefore, the impugned judgment of learned court below cannot be sustained in this appeal.

19. On the other hand, learned Additional Government Advocate has submitted that it is well settled that only because the witnesses are related to each other, their evidence cannot be brushed aside. The law only demands that their evidences shall be scrutinized with all care and caution. It is submitted that the court below, keeping in view the aforesaid law, has carefully evaluated the evidence of PWs 1, 2 and 3 and come to the conclusion that their evidences are wholly reliable and acceptable. It is further submitted that on careful scrutiny of the evidence of PWs 1, 2 and 3, it is clear that their statement is consistent with regard to the genesis of occurrence, manner of occurrence, place of occurrence, time of occurrence and during cross-examination the defence has not been able to elicit any material from their evidence on which their credibility can be impeached. It is further submitted that only because of empty stomach of the deceased it cannot be said that the occurrence took place at later point of time than the time stated by the witnesses PWs 1, 2 and 3. It is submitted that as per the Medical Jurisprudence, the process of digestion in normal, healthy person may completed within three hours and passed to intestine. It is submitted that admittedly in the instant case, the post-mortem was conducted on 07.07.1981 at about 2:40 p.m. and fecal matter was found in small and large intestine, thus, the food consumed by the deceased might have been digested during that period and it has passed to small and large intestine. In above circumstances, the aforesaid submission of learned counsel for the appellants appears to be misconceived. It is further submitted that the Doctor (PW-6) has found huge collection of blood and blood clots within the chest cavity. It is further submitted that it has come in evidence that deceased was immediately removed from the place of occurrence and taken to hospital on the motorcycle. It is also submitted that the occurrence took place on 05/06.07.1981 in the night at about 12.30 a.m., thus it is apparent that the occurrence took place during summer, and therefore, the deceased must have been wearing scarf clothes apart from other clothes. Accordingly, it is submitted that because of the aforesaid circumstance, the blood had fallen on the ground, cot, Kathri and baan and the Investigating Officer has collected the same from the place of occurrence. Investigating Officer has also collected four empty cartridges and two ticklies near from the place of occurrence.

Under the aforesaid circumstance, it cannot be said that the occurrence might had not taken place at the place of occurrence as claimed by the prosecution witnesses. It is further submitted that it has come in evidence of PWs 1, 2, 3 and 4 that the occurrence also took place at terrace of the house of the complainant. It is also submitted that at the time of occurrence, the deceased was sleeping in courtyard. It has also come in evidence that at that time 5 to 6 persons entered in the house from thatched door to the courtyard where informant PW-1 along with his brother Shrikant, Arjun Lodh (PW-3) and Lalji Prasad were sleeping and lantern was burning there. It is further submitted that in courtyard and at terrace they saw the accused committing the offence in the light of torches of appellants/convicts, lantern and light of torch of neighbours. It is further submitted that the aforesaid circumstance shows that lantern was burning in the courtyard. Accordingly, it is submitted that since the deceased, informant and Shrikant were residing in the same house, therefore, in the said source of light the appellants/convicts can easily be identified by PWs 1, 2 and 3. It is further submitted that the pellets which were taken out from the body of the deceased were also produced in the court below, consequently in view of the fact that the direct ocular evidence coupled with the medical evidence fully supports and establishes the case of prosecution. It is further submitted that learned court below has rightly held that the document produced by appellants/convicts could not be related to Shyam Bihari. Moreover, appellant/convict Ram Shankar, against whom appeal has been dismissed as abated, could not prove that he was on duty at the place of his posting, and accordingly, it cannot be said that surviving appellants were falsely implicated. Accordingly, it is submitted that there is no illegality or irregularity in the judgment of the Court below which may warrant any interference by this Court.

20 . We have given thoughtful consideration to the contentions raised on behalf of the parties and have also gone through the record.

21. First of all we find it necessary to enumerate the principal and the procedure governing the hearing of appeal against conviction by First Appellate Court. Hon'ble Apex Court in ***Majjal vs. State of Haryana***, *reported in (2013) 6 SCC 798* has held in paragraph 7 as under:

"7. It was necessary for the High Court to consider whether the trial court's assessment of the evidence and its opinion that appellants must be convicted deserves to be confirmed. This exercise is necessary because the personal search holiday report state its reason why it is accepting the evidence on record. The High Court's concurrence with the trial courts view would be acceptable only if it is supported by reasons. In such appeals it is the court of first appeal. Reasons cannot be cryptic. By this, we do not need that High Court is expected to write and unduly long treaties. The judgement may be short but must reflect proper application of mind to vital evidence and important submissions which go to the root of the matter. Since this exercise is not conducted by the High Court, the appeal deserves to be remanded for fresh hearing after setting aside the impugned order."

22. Hon'ble Apex Court in ***Bakshish Ram and Another vs. State of Punjab,*** *reported in AIR 2013 SC 1484* has laid

down the law regarding manner for disposal of criminal appeal by First Appellate Court. It has been held that the First Appellate Court has to apply its independent mind and record while making independent assessment of evidence and in absence of independent assessment by the court, its ultimate decision cannot be sustained and has observed in paragraph 14 as under:

"14. The High Court, as a First Court of Appeal, on facts must apply its independent mind and record its own findings on the basis of its own assessment of evidence. Mere reproduction of assessment of the trial court may not be sufficient and in absence of independent assessment by the High Court, its ultimate decision cannot be sustained. The same view has been reiterated by this Court in Sakatar Singh and Others vs. State of Haryana, (2004) 11 SCC 291:"

23. Hon'ble Apex Court in ***"Phula Singh vs. State of Himachal Pradesh,*** reported in AIR 2014 SC 1256" has held that where two views on the evidence available on record are possible, one of conviction and other of acquittal, the beneficial to the accused should be taken by the Appellate Court.

24. Keeping in view the law laid down by the Apex Court that the First Appellate Court while deciding the criminal appeal on facts must apply its independent mind and record its own findings on the basis of its own assessment, the evidence is appreciated for our independent assessment of evidence and recording the findings if we reach to the findings that the findings recorded by the trial court is in consonance of our findings, the appeal could be dismissed and if two views are possible after appreciation of the evidence and one view is in favour of acquittal, the appeal would be allowed or on the basis of appreciation of evidence if we find that trial court has not appreciated the evidence while recording the findings of guilt and it is illegal, the appeal would be allowed.

25. In the instant case, now we will proceed to consider the submission of learned counsel for the appellants regarding ante-time as well as delay in lodging the F.I.R. In this case, the occurrence is alleged to have taken place on 5/6.7.1981 in the midnight at about 12:30 a.m., whereas, the first information report is alleged to have been lodged by PW-1 Debi Charan on 06.07.1981 at about 7 a.m. on the basis of written Tehrir (Exhibit-Ka-1) which was scribed outside the police station and handed over to Munshi of police station Dhaurahra, District Lakhimpur Kheri. PW-1 Debi Charan has deposed that in the morning he had gone to police station Dhaurahra and has ascribed the written complaint (Exhibit-Ka-1) outside the police station, and thereafter, handed over the same to Constable Clerk of police station Dhaurahra for lodging of the report. The Chick report (Exhibit-Ka-5) and GD registering the case (Exhibit-Ka-6) were proved by formal witnesses. Perusal of the chick report shows that the place of occurrence is six miles away from the police station Dhaurahra. In his written complaint, he has narrated the entire story and has specifically mentioned that the dead body of his brother was laying at his house. The injured were also at his house. PW-1 has further deposed that after lodging of the FIR, Sub-Inspector of the police station took him to place of occurrence by jeep. He has further deposed that from the place of occurrence he along with other injured was sent to hospital for medical

examination along with police constable. Perusal of the inquest report (Exhibit-Ka-7) shows that it finds mention that FIR was lodged at 7 a.m. in the morning and Sub-Inspector reached at the place of occurrence for inquest at about 9 a.m. In this case the inquest of dead body was conducted in the morning after lodging of the FIR and the dead body was handed over to Constable Ram Prakash and Village Chowkidar for carrying it for post-mortem at about 11 a.m. Learned counsel for the appellants/convicts has not challenged the time of lodging of the FIR in cross-examination. In above circumstances, it cannot be said that FIR was ante-timed. From the perusal of the chick report, it appears that it finds no mention of time and date of the receipt in the Court of Magistrate. The Hon'ble Apex Court in the case of ***Anjan Dasgupta vs. State of West Bengal and Others***, *(2017) SCC 2022* has held that delay in forwarding the FIR to court is not fatal in a case in which investigation has commenced promptly on its basis. It is also held that it is only extraordinary and unexplained delay, which may raise doubts regarding the authenticity of the FIR. The Apex Court in ***Criminal Appeal Nos. 525-526 of 2012 "Jai Prakash Singh vs. State of Bihar and Another"***, decided on 14th March, 2012 in paragraphs 11 & 12 has held as under:

"11. Admittedly, the FIR had been lodged promptly within a period of two hours from the time of incident at midnight. Promptness in filing the FIR gives certain assurance of veracity of the version given by the informant/complainant.

12. The FIR in criminal case is a vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye- witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it looses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question. (Vide: Thulia Kali v. The State of Tamil Nadu, AIR 1973 SC 501; State of Punjab v. Surja Ram, AIR 1995 SC 2413; Girish Yadav & Ors. v. State of M.P., (1996) 8 SCC 186; and Takdir Samsuddin Sheikh v. State of Gujarat & Anr., AIR 2012 SC 37)."

26. In the case in hand, the occurrence has taken place at about 12:30 a.m. in the midnight. The place of occurrence is six miles away from the police station Dhaurahra. In the occurrence, the brother of the informant was murdered and the wife of the deceased sustained fatal injury and the daughter of the deceased had also sustained injury. In above circumstances, no one could dare to go to police station to lodge first information report due to fear. The counsel of the appellants/convict had only given the suggestion that dacoity has taken place in the night at the house of the informant and they sustained injury in dacoity and due to enmity the appellants were falsely named in the first information report. The time of lodging of the first information report is not challenged by the

counsel of appellants before the trial court. Keeping in view the facts and circumstances of the case, it is proved that the first information report was lodged promptly and the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question. In above circumstances, learned trial court has rightly held that first information report was lodged promptly which rules out any sort of concoction and deliberation and it gives assurance regarding the truth of informant's version.

27. In this case, the witnesses PW-1 Debi Charan, cousin of the deceased, PW-2 Ram Shree, wife of the deceased and PW-3 Ajun Lodh, servant of his brother Shrikant, are eyewitnesses of the occurrence. The witnesses Debi Charan and Ram Shree are alleged to be injured witnesses.

28. PW-1 Debi Charan has stated in his deposition that he was living with his cousin Lalji Prasad son of Santram in the same house. His second marriage took place about 12 years ago with Vidya, daughter of Babu Ram Shukla, resident of village Murasa, Police Station- Mitauli. His wife Vidya was a lady of easy virtue on account of which his relation with her was not good and she parted company with him and was living at her paternal home. Due to this his father-in-law, brother-in-law Ram Shankar and others had suspicion that Lalji Prasad and his wife Smt. Ram Shree were behind all this trouble so that they made repeated unsuccessful attempt to persuade him to separate himself from Lalji Prasad. One year before the incident, his wife had also exhorted that as long as Lalji Prasad and his wife would not die or be killed she would not come to her matrimonial home. He has further stated that his wife Vidya had developed illicit relation with accused Sabit and Mukaddar, who were living in the neighborhood, and on account of this unholy activity the aforesaid accused had exchange of words with Lalji Prasad. In the night of 5/6.07.1981 he and his cousin Lalji Prasad were sleeping in the courtyard after taking dinner and his sister-in-law (Bhauji) Ram Shree, niece Shravan Kumari and nephew Dinesh Kumar were sleeping on the terrace and his another brother Shrikant and his servant Arjun Lodh (PW-3) were sleeping in the western side of the same courtyard. A lantern (lamp) was burning in the courtyard (ANGAN). In the mid of night, he woke up and sat down on CHAUKI and at around 12:30 hrs. in the night, 5-6 persons infiltrated from the north side of TATIHAR (thatched) gate flashing torches, thereupon, he accosted them, then the miscreants commanded him to sit quietly. Then, in the flashes of torch he saw his brother-in-law Ram Shankar armed with gun, Shyam Bihari Shukla armed with country made Addhi and his brother-in-law's son Jageshwar armed with stick, Sabit armed with spade, Mukaddar armed with stick. Accused Sabit and Mukaddar caught hold of him but as soon as his brother-in-law and Shyam Bihari said not to kill him otherwise his sister would become a widow, they had to kill Lalji Prasad and his wife. On his alarm, Shrikant and Arjun Lodh woke up and Basudev flashed torch from adjacent terrace, then Sabit exclaimed that Lalji Prasad was sleeping nearby on which Ram Shankar and Shyam Bihari opened fire on Lalji Prasad resultantly he died, then Sabit said that wife of Lalji Prasad is sleeping on the terrace, thereupon, all the miscreants run towards the terrace. He and Arjun Lodh also went on the terrace to save his sister-in-law

(BHABHI), then Ram Shankar opened fire on his BHABHI. He hugged his BHABHI then Jageshwar and Mukaddar assaulted with stick as a result of which he, his BHABHI Ram Shree and niece sustained injury. Meanwhile, Sunder Lal Tiwari and many other people of the village came armed with stick, flashing torches and raised alarm. Then all the accused persons fled towards north while firing. They identified the accused persons clearly and by their names also.

29. In cross-examination, he has supported the version of the prosecution that he has no other house. He has further deposed that he and deceased Lalji Prasad were living together in the same house. He has further deposed that his first marriage had taken place in village Naye Gaon and his first wife is alive and one son was born from their wedlock. He has further supported the version of first information report that after his second marriage with Vidya, his first wife had left him and she started living separately. He has denied the suggestion of the accused's counsel that because of his illicit relation with the wife of Lalj Prasaad his first wife had left him. He has further deposed that he had not mentioned that appellant Shyam Bihari had concealed his face by scarf. He has further deposed that he had shown lantern to Daroga ji, but he is not aware whether Daroga ji had prepared the memo regarding it or not. He has further clarified that lantern was burning in the South of Chhapper. He has further clarified that he raised alarm on seeing the accused persons, but Lalji Prasad could not awakened and meanwhile he sustained firearm injury. He has further explained that at that time Lalji Prasad was sleeping facing mouth towards South. He has further deposed that the fire was made from his side on the deceased. He has further explained that the fire was opened on his brother Lalji Prasad from a close range. During cross-examination, he has further explained that when the fire was opened on his brother Lalji Prasad, his brother Shrikant and his servant Arjun Lodh woke up. He has also corroborated that the fire on Ram Shree was opened by Ram Shankar. Certain omission like non-mentioning of covering of the face by Shyam Bihari by scarf and certain other minor omissions in FIR does not go to the root of the prosecution case, therefore, that is not fatal. Moreover, the FIR cannot be said to be an encyclopedia. It is not expected that all the details must find in FIR. Therefore, it will not affect the prosecution case. From the perusal of the statement of PW-1 Debi Charan, it is apparent that nothing came in his cross-examination which makes his testamentary unreliable. The statement of PW-1 Devi Charan is corroborated by the written complaint (Exhibit-Ka-1), injury report of informant, daughter and wife Ram Shree of the deceased genuineness of which were admitted by the counsel of the appellants before the trial court. The statement of PW-1 Debi Charan is also supported by the post-mortem report, site-plan and by the depositions of PW-2 Ram Shee and PW-3 Arjun Lodh. The manner in which the deceased and injured Ram Shree, her daughter and informant sustained injury is corroborated by medical evidence. The statement of PW-1 Debi Charan inspires confidence and the same is liable to be relied on. Therefore, learned lower court has rightly relied on the deposition of witness PW-1 Debi Charan.

30. PW-2 Ram Shree is the wife of the deceased Lalji Prasad. She in her statement has stated that Debi Charan is her cousin (Devar) who was living with her

husband in joint family. Devi Charan had solemnized his second marriage with Vidya who had illicit relationship with accused/appellant Sabit. She has further stated that Devi Charan had left her due to it and she was living at her parental home. She has further deposed that Vidya had organized dacoity many times. When Vidya was about to leave she had said that she will not come to Shekhanpurwa until Ram Shree and her husband Lalji Prasad would be murdered. She was lady of easy virtue and she got angry when she was pointed out. She has also deposed that occurrence has taken place three years ago at about 12 o'clock in the midnight. Her husband Lalji Prasaad and Devi Charan were sleeping in the courtyard. She was sleeping on the terrace along with her daughter Shravan Kumari and son Dinesh Kumar. A lantern was burning in the courtyard. When Devi Charan shouted and fire broke out, she woke up and saw that Ram Shankar, a man concealing his face who was probably Shyam Bihari, Jageshwar, Gokaran, Sabit and Mukkadar was there. Ram Shankar armed with gun, Shyam Bihari armed with big country made pistol, Gokaran armed with country made pistol, Jageshwar armed with lathi, Sabiit having Ballam and Mukaddar armed with lathi were there in the courtyard. Ram Shankar and Shyam Bihari opened fire with gun and big country made pistol on her husband Lalji Prasad due to which he succumbed to injuries. Then, all the accused persons climbed up on the terrace. Debi Charan and Arjun Lodh also followed them on terrace. The accused persons started beating her. Ram Shankar opened fire on her and Jageshwar started beating her with lathi also. She was saved by Debi Charan and Arjun Lodh. Her daughter Sharvan Kumari and Debi Charan had also sustained injuries. Basudev had flashed his torch from his roof on hearing the hue and cry. She had seen the faces of the accused in the light of lantern and torches. After getting down from the terrace, the accused fled from there. She, her daughter and Debi Charan were medically examined. The dead body of her husband was sealed there and sent for post-mortem. During cross-examination, she has denied the suggestion of the accused's counsel that Vidya had strong suspicion that she (Ram Shree) had illicit relation with Debi Charan. If this was the case then why Debi Charan married to second wife Vidyawati? Vidyawati used to taunt her and Debi Charan. Vidyawati had developed illicit relation with Sabit and she (Ram Shree) had seen them with her own eyes. She had also seen Sabit and Mukaddar secretly. They used to visit her secretly. She had also seen her (Vidyawati) secretly in the room locked from inside. These persons used to come as soon as Ram Shree went out for latrine, etc. When she used to go for latrine, etc. Sabit and Mukaddar used to come to courtyard and bungalow and talk to Vidyawati and also used to lock themselves in a room. When she used to tell Vidyawati not to have illicit relationship with them, Vidyawati used to say that she will make her to taste the fruit. Vidyawati used to listen when she rebuked Vidyawati about this. She has denied the suggestion of the accused's counsel that when she reprimanded Vidyawati in this regard she used to say, of course it that she has also illicit relation with Debi Charan. She has further deposed that due to this enmity Vidyawati took away her box, etc. by robbing her. Before occurrence, all the accused persons had also committed robbery at her house ten years before the murder of her husband, in which she was assaulted by Ganasi, but no report was lodged. She has further deposed that after opening fire on her and after assaulting her

daughter and Debi Charan, the accused persons fled from there. She has further deposed that Ram Shankar has fired on her from a distance of only one step. She has further deposed that she had heard three rounds of fire in the courtyard below. She has further deposed that two shots were fired on terrace. Recently ten days back, she had gone to complain that the accused came to her house and threatened that they will throw acid on the witnesses, if they wold depose against them and also said that the witnesses would be killed like they killed her husband and acid would be poured in their eyes. She has further deposed that her blood stained clothes was taken by the Investigating Officer. She has denied the suggestion that Sabit and Mukkadar were falsely implicated due to disputes regarding road (Rasta). Nothing came in her cross-examination which makes her statement unreliable. The statement of PW-2 is corroborated by the first information report, post-mortem report and the injury reports. Therefore, her statement is liable to be relied on and learned lower court has rightly held that the deposition of PW-2 Ram Shree is trustworthy and liable to relied on.

31. The third eyewitness Arjun Lodh PW-3 is the servant of informant's brother Shrikant. This witness as PW-3 has stated on oath that he is living with Shrikant for 25 years. Lalji Prasad, Debi Charan and Shrikant are real brothers and they are living in the same house. He has also stated on oath that occurrence had taken place three years back in the midnight. He and Shrikant were sleeping in the courtyard in the Western side while Lalji Prasad and Debi Charan were sleeping in the Southern side of the same courtyard. Sharvan Kumari, Dinesh and Ram Shree were sleeping on the terrace and a lantern was burning in the South of courtyard. He woke up when he heard the shouting of Debi Charan and sound of shot of the firearm. He saw 5-6 men in the courtyard amongst them a man was covering his face, who was Shyam Bihari. Ram Shankar, Shyam Bihari, Gokaran, Jageshwar, Sabit and Mukaddar were along with him. Except Shyam Bihari, all the accused persons had opened their face. They were flashing their torches. Ram Shankar was armed with gun, Shyam Bihari was armed with a small country made gun, Gokaran was armed with country made pistol, Jageshwar and Mukaddar were armed with lathi and Sabit was armed with Bhali. When he got up, he heard the sound of firearm shot and found Lalji Prasad injured in the courtyard. Then all the accused persons climbed up on the roof. He and Debi Charan had followed them. Ram Shankar had opened fire on the injured Ram Shree and the rest accused had assaulted her with their respective weapons. He tried to save Sharavan Kumari and Debi Charan tried to save Ram Shree in which they also sustained injuries. They had recognized the accused in the flash of torches of the accused who were flashing their torches also on terrace. Meanwhile, Babu Ram and Sunder Lal came on their terrace, which was adjacent to the terrace of the informant, with flashing their torches. Thereafter, accused fled from there. In cross-examination, he has stated that he has two nephews and one brother. His house is situated in the north direction of Lalji's house leaving 10-20 houses. He used to sleep in the courtyard in night to keep eye on the animals. He woke up when he heard the sound of shot of firearm and shout of Debi Charan. When the accused persons climbed up on the terrace they had also followed them. He has further clarified that Ram Shree had sustained firearm and other injuries after their reaching on

terrace. He heard sound of two shots of fire on the terrace. When the fire was shot on Ram Shree, Debi Charan was behind. He has further clarified that they were not hitten by the shot of firearm. Debi Charan and Sharvan Kumari were also assaulted by Sabit and Mukaddar. He has denied the suggestion that he is giving evidence against the accused under the pressure of Ram Shree and police. He has also denied the suggestion of the accused's counsel that he had not seen the incident. From the perusal of the cross-examination, it transpires that the testimony of PW-3 Arjun Lodh was not challenged on the point that he was not sleeping in the courtyard to keep eyes on animals. His testimony was also not challenged that he was not servant of Shrikant, brother of the informant. His presence on the place of occurrence is unshaken. Nothing came in his cross-examination which makes his testimony unreliable. He has given a vivid description of the incident. The factum that accused were identified in the light of lantern and in the light of torch of the accused was not challenged in the cross-examination. Therefore, the testimony of this witness inspires confidence and is liable to be relied on and learned court below has rightly relied on the testimony of PW-2 Arjun Lodh. The testimony of this witness is corroborated by the testimony of injured witnesses PW1 Debi Charan, PW-2 Ram Shree and by the first information report, injury report of the injured and the post-mortem report of the deceased. Therefore, PWs 1, 2 and 3 are also reliable and their depositions can be relied on for recording conviction of the appellants.

32. It is proved by the deposition of Debi Charan PW-1 who has deposed that after the incident in the morning, he had gone to the police station along with village Chowkidar and written the Tehrir (Exhibit-Ka-1) outside the premises of police station and handed over it to the police for lodging of the first information report. Learned counsel for the defence has admitted the genuineness of the injury reports of Sharvan Kumari (Exhibit-Ka-2), PW-2 Ram Shree (Exhibit-Ka-3) and PW-1 Debi Charan (Exhibit-Ka4). It is also proved by the Sub-Inspector K.D Singh PW-5 that the chick report (Exhibit-Ka-5) was scribed by Raghunath Singh Head Constable in his absence on the basis of written Tehrir of informant Debi Charan and registered the after making entry in GD (Exhibit-Ka-6). He has also proved by secondary evidence that investigation of the case was taken up by Sub-Inspector Sardar Singh who had visited the place of occurrence and conducted the inquest proceedings of the deceased and had prepared the Panchayatnama (Exhibit-Ka-7), photo lash (Exhibit-Ka-8), challan lash (Exhibit-Ka-9), sample seal (Exhibit-Ka-10), letter to CMO (Exhibit-Ka-11). PW-5 Sub-Inspector K.D. Singh has also proved that Sub-Inspector Sardaar Singh had also collected Towel, piece of Kathari, baan of cot, blood-stained and simple soil from the place of occurrence and also took in possession the lady's blood stained Dhoti, four empty cartridges and two ticklies and sealed all the articles separately and prepared memo (Exhibit-Ka-12). Before the lower court, the sealed packet was also produced and opened in which there were baan of cot, piece of Kathari, Chadar and he proved it as Exhibit-1, the other sealed bundle containing lady's Dhoti was proved by him as Exhibit-2. The plain and blood stained soil taken from the place of occurrence sealed separately were also produced and proved as Exhibit-3, the empty cartridges and the ticklies were also produced in sealed packet and proved by Sub-Inspector K.D. Singh as Exhibit-4. All

these articles were taken into possession by Sub-Inspector Sardar Singh from the spot in respect of which memo (Exhibit-Ka-12) was prepared. The witness K.D. Singh has further stated that he took up the investigation and inspected the place of occurrence at the instance of Debi Charan and prepared the site-plan (Exhibit-Ka-13). He has also proved that Sub-Inspector Sardar Singh dispatched the dead body in a sealed cover by Constable Ram Prakash and village Chowkidar with police papers and he himself sent the injured Sharvan Kumari, Ram Shree and Debi Charan for medical examination by Constable Uday Narayanan to PHC, Dhaurahra on 07.07.1981. He has also proved that on 19.10.1981 he was transferred and later on the charge-sheet (Exhibit-Ka-14) and (Exhibit-Ka-15) were submitted by Sub-Inspector Laeeq Ahmed.

33. PW-6 Dr. Kamlesh Kumar has proved the post-mortem report of the deceased (Exhibit-Ka-16). He has also proved that 75 shots (pellets) were recovered from the dead body of the deceased which were sent in sealed cover to SSP, Kheri and proved it as Exhibit-5 and also proved blood stained Dhoti, Kurta, Jeneu which were found on the body of the deceased at the time of post-mortem. He has also proved the ante-mortem injuries of the deceased and the cause of death that the ante-mortem injury was caused by fire of firearm and Ballam which was sufficient to cause death in the ordinary course of nature. He has further proved that injury nos. 1 and 2 were caused by firearm and injury no.3 was caused by Ballam. The genuineness of injury report of injuries of Debi Charan, Sharvan Kumari and Ram Shree was admitted by learned counsel for the accused/appellants before the court below. Firearm injuries were found on the body of Ram Shree which was fired from a close range. The post-mortem report of the deceased also establishes that injury no.1 is entry wound, which was also fired from close range, and injury no.3 was caused by Ballam. The details of the injury report and post-mortem report are mentioned above, in the body of judgment. From the statement of Investigating Officer and Dr. Kamlesh Kumar (PW-6) and injury report of injured Debi Charan, Sharvan Kumari and Ram Shree, it is proved that they had sustained injuries in the incident in the manner as alleged by the prosecution. The post-mortem report shows that stomach of the deceased was found empty and fecal matters were found in the small and large intestine, which establishes that the occurrence has taken place more than four hours after taking dinner by the deceased. This fact also establishes that the occurrence has taken place at the time as alleged by the prosecution. The ocular testimony of the eyewitnesses Debi Charan, Ram Shree and Arjun Lodh is corroborated by the injury report of Debi Charan, Sharavan Kumari, Ram Shree, by the post-mortem report of deceased Lalji Prasad and is also corroborated by the version of FIR, therefore, detailed appreciation of the evidence proves that appellants Ram Shankar, Gokaran and Mukaddar (who died during the pendency of the appeal) along with Sabit, Jageshwar and Shyam Bihari in prosecution of common object of the unlawful assembly they had committed murder of the deceased Lalji and had caused injuries to Ram Shree, Devi Charan and Sharvan Kumari, therefore, the offence punishable under Sections 148, 302 I.P.C. read with Section 149 I.P.C. is proved beyond reasonable doubt against Sabit, Jageshwar and Shyam Bihari.

34. So far as the contention of learned counsel for the appellants that all the witnesses PW-1 Devi Charan, brother of the deceased, PW-2 Ram Shree, widow of

the deceased, and PW-3 Arjun Lodh, servant of brother of informant Shrikant are interested witness and no reliance can be placed upon their depositions is concerned, The Apex Court in ***Gangadhar Behera and Others vs. State of Orissa***, *reported in (2002) 8 SCC* has held as under:

".....Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent ad credible."

35. In ***Dalip Singh and Ors. v. The State of Punjab,*** *(AIR 1953 SC 364)*, it has been laid down as under:

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

36. The above decision has since been followed in ***Guli Chand and Ors. v. State of Rajasthan,*** *(1974 (3) SCC 698)* in which ***Vadivelu Thevar v. State of Madras***, *(AIR 1957 SC 614)* was also relied upon.

37. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh's case (supra) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:

"We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in "Rameshwar v. State of Rajasthan' (AIR 1952 SC 54 at p.59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

38. Again in ***Masalti and Ors. v. State of U.P.,*** *(AIR 1965 SC 202)* this Court observed: (p, 209-210 para 14):-

"But it would, we think, be unreasonable to contend that evidence

given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses.....The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct. (emphasis supplied)

[38]. Our social system is changing at a rapid pace. In the present social scenario, people refrain from going to police stations and courts due to fear of insult and harassment. Generally, people avoid to become a witness of an incident for the simple reason that deposing against the a culprit involved in a crime would endanger their life. In the present social setup, it is least possible that a third person deposes against the culprit."

39. The Apex Court in ***Sandu Saran Singh v. State of Uttar Pradesh and Others,*** *reported in (2016) 4 SCC 357* has held as under:

"29. .....In these days, civilized people are generally insensitive to come forward to give any statement in respect of any criminal offence. Unless it is inevitable, people normally keep away from the Court as they feel it distressing and stressful. Though this kind of human behaviour is indeed unfortunate, but it is a normal phenomena. We cannot ignore this handicap of the investigating agency in discharging their duty. We cannot derail the entire case on the mere ground of absence of independent witness as long as the evidence of the eyewitness, though interested, is trustworthy."

40. In the wake of aforesaid, the prosecution has proved its case beyond reasonable doubt against the accused-appellants for offence punishable under Sections 302/149, 307/149, 148, 323/149 and Section 449 I.P.C. The learned lower court has rightly convicted and sentenced the appellants for the offences as mentioned above, according to law, which requires no interference.

41. Considering the overall facts and circumstances of the case, we are of the opinion that there is no illegality or perversity in the impugned judgment of conviction and order of sentence dated 27.06.1984 passed by learned Additional Sessions Judge, Court No.1, Lakhimpur Kheri in Sessions Trial No. 168 of 1984 (State of U.P. Vs. Ram Shanker and 4 others), arising out of Case Crime No. 146 of 1981, Police Station- Dhaurahra, District- Lakhimpur Kheri, whereby the accused-appellants have been convicted and sentenced to undergo R.I. for a term of one year under Section 148 I.P.C., R.I. for life under Section 302/149 I.P.C., R.I. for a term of seven years under Section 307/149 I.P.C., R.I. for a term of one month under Section 323/149 I.P.C. and R.I. for a term of eight years under Section 449 I.P.C. Consequently, the impugned judgment of conviction and order of sentence dated 27.06.1984 passed by learned Additional Sessions Judge, Court No.1, Lakhimpur Kheri is, hereby, upheld.

42. The instant criminal appeal in respect surviving appellant no.3- Jageshwar and appellant no.4- Sabit is, accordingly, ***dismissed.***

43. The appellants Jageshwar and Sabit are on bail. Their bail bonds and surety bonds are cancelled and the sureties are discharged. The lower court concerned shall cause them to be arrested and lodge in jail to serve out the remaining sentence awarded to them by court below.

44. Certify this judgment along with lower court record to the lower Court concerned immediately for information and necessary compliance.

(2023) 1 ILRA 598
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.01.2023

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MOHD. ASLAM, J.

Criminal Appeal No. 2735 of 2004

Amitabh Dixit ...Appellant
Versus
The State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Ram Chandra Singh, Sri Arun Sinha

Counsel for the Opposite Party:
G.A., Sri Bal Keshwar Srivastava, Hari Bux Singh, Sri Izhar Husain Siddiqui, Sri Upendra Kumar Awasthi, Sri Vijay Kishor Mishra

A. Criminal Law – Indian Penal Code ,1860– Section 302 – Murder – Appeal against conviction and Sentence – Fire arm injury were caused by pistol – Two empty cartridges of 315 bore were recovered from spot – Weapon was recovered at the point of accused-appellant – F.I.R. was lodged without delay – Lapse or negligent on the part of I.O., how far favour the accused – Held, lapse on the part of the Investigating Officer should not be taken in favour of the accused, may be that such lapse is committed designedly or because of negligence – High Court found the charges of offence punishable under Section 302 I.P.C. and 25 Arms Act proved beyond reasonable doubt. (Para 6, 9, 16, 31 and 38)

B. Criminal Law – Criminal Procedure Code,1973 – Section 374(2) – Scope – Duty of appellate court while hearing appeal – Explained – It is the duty of first appellate Court to make proper analysis of evidence and to consider whether trial court's assessment of evidence and its opinion regarding conviction deserve to be confirmed because the personal liberty of an accused is curtailed because of conviction. First appellate Court's concurrence with the trial court's view would be acceptable only if it is supported by reason. (Para 23)

C. Criminal Law – Criminal Procedure Code,1973 – Sections 161 & 162(2) – Statement, how far can be treated as the Dying Declaration – Held, St.ment of the deceased recorded under Section 161 Cr.P.C. can be treated as dying declaration as per provision of Section 162(2) Cr.P.C., if from the evidence on record it is proved that the St.ment under Section 161 Cr.P.C. is beyond suspicion – Dalip Singh's case relied upon. (Para 28 and 29)

D. Criminal trial – Criminal Procedure Code, 1973 – Section 293 – Expert report – Admissibility – Not calling the expert for cross examination – Effect – Held, the appellant had not called for the cross-examination of the expert, therefore, it will be presumed that the serological report is admitted to the appellant – Report of expert may be admitted as evidence without formal proof – Bhupinder's case relied upon. (Para 33 and 34)

E. Criminal trial – Interested witness – Reliability – Gangadhar Behera's case relied upon – Relationship is not a factor to affect credibility of a witness. It is more

often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent ad credible.(Para 39)

Appeal dismissed. (E-1)

List of Cases cited:-

1. St. of Punj. Vs. Hakam Singh; (2005) SCC 408

2. Ashok Kumar Chaudhari Vs St. of Bihar; 2008 (61) ACC 1972 (SC)

3. Om Prakash & ors..Vs St.; 1995 ALL. L. J. 1210

4. Bakshish Ram & anr. Vs St. of Punj.; AIR 2013 SC 1484: 2013 AIR SCW 14

5. Majjal Vs St. of Har.; (2013) 6 SCC 798

6. Dalip Singh Vs St. of Punj.; (1979) 4 SCC 332

7. Paras Yadav & ors. Vs St. of Bihar; (1999) 2 SCC 126 : 1999 SCC (Cri) 104

8. Bhupinder Vs St. of Punj.; AIR 1988 SC 1011

9. Gangadhar Behera & ors. Vs St. of Orissa; (2002) 8 SCC 381

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

1. Heard Sri Arun Sinha, learned counsel for the appellant, Sri Vijay Kishor Mishra, learned counsel for the complainant and Smt. Smiti Sahay, learned Additional Government Advocate for the State/respondent.

2. This criminal appeal has been filed under Section 374(2) Cr.P.C. by the appellant/convict Amitabh Dixit against the impugned common judgment of conviction and order of sentence dated 16.12.2004 passed by Additional District & Sessions Judge, Fast Track Court No.4, Hardoi in Sessions Trial No.673 of 2003 (State Vs. Amitabh Dixit), arising out of Case Crime No.209 of 2003, under Sections 302/307 I.P.C., Police Station- Shahabad, District-Hardoi and Session Trial No. 674 of 2003 (State Vs. Amitabh Dixit), arising out of Case Crime No.266 of 2003, under Section 25 Arms Act, Police Station- Shahabad, District Hardoi, whereby the appellant was convicted for offence punishable under Section 302 I.P.C. and Section 25 Arms Act and was sentenced to undergo imprisonment for life along with fine of Rs.5000/- under Section 302 I.P.C. and further to undergo rigorous imprisonment for two years along with fine of Rs.500/- under Section 25 of Arms Act, in default of payment of fine, to undergo additional simple imprisonment for two years. All sentences were directed to run concurrently.

3. The brief facts necessary for disposal of this appeal are that the informant Kamal Kishore Dixit (PW-1) son of Late Moonga Ram Dixit, resident of Mohalla Budh Bazar, Police Station Shahabad, Hardoi lodged the FIR in Case Crime No.209 of 2003, under Sections 307, 302 I.P.C. on the basis of written Tahrir (Ex.Ka-1) on 25.5.2003 at 15:20 hrs. at Police Station- Shahabad, District Hardoi alleging therein that on 25.5.2003 at 02:45 hrs. his younger brother, Ram Kishore Dixit was returning home by bicycle after getting mustard oil extracted. The informant Kamal Kishore and his another brother Ram Pramod were also coming to home and they were 50 yards behind his brother Ram Kishore. When his brother Ram Kishore Dixit reached near the Mill of Parashuram near Mohallah Budh Bazar, accused Amitabh Dixit, son of Om Parkash Dixit, who was having enmity regarding the division of land property, opened fire at his brother Ram Kishore Dixit by a country made pistol with intention to kill

him. His brother Ram Kishore Dixit left his bicycle and ran towards them to save his life. Meanwhile, Amitabh Dixit fired another shot, till then his brother reached at the door of Ram Shankar Mishra. After chasing, Amitabh Dixit fired another shot by which his brother sustained injury. Witnesses Ramji Tiwari, son of Govind Prasad Tiwari, resident of Mohallah Holi Kalan town and Suresh Kumar Gupta, son of late Raghuwar Prasad Gupta who were passing by the place of incident witnessed the entire incident. On account of continuous firing by Amitabh Dixit on public road, the people around there were horrified. Ladies, gents and children entered into the house and locked their doors, by which the normal life near the place of occurrence, got disturbed, taking advantage of which accused fled from there. With the help of Ramji Tiwari and Suresh Kumar Gupta his injured brother Ram Kishore Dixit was taken to the Government Hospital Shahabad and informant went to the police station to lodge the F.I.R.

4. Head Moharrir, scribed the Chik Report No.71 of 2003 (Ex.Ka-5) under Section 307 I.P.C. at Police Station Shahabad on the basis of written *Tahrir* of informant and registered the Case Crime No.209 of 2003, under Section 307 I.P.C. by making necessary entry in GD report no.26 at 15:20 hrs. on 25.05.2003 (Ex.Ka-6) and investigation of the case was taken by SHO Shahabad, Inspector S.N. Singh PW-7. On 25.05.2003, he copied the Chik report in CD and recorded the statement of injured Ram Kishor Dixit under Section 161 Cr.P.C. (Ex.Ka-25), thereafter, he searched for the accused, but could not find him.

5. On the same day i.e. 25.05.2003 at 16:20 p.m. informant gave another written Tahrir (Ex.Ka-2) alleging therein that after lodging the FIR he had gone to the hospital to see his injured brother. By that time Ram Pramod, Suresh Kumar Gupta and Ramji Tiwari were also reached to the hospital. All of them searched a lot for doctors in hospital, but the doctors were not found, then they took the injured to private nursing home of Dr. Maya Parkash. His brother died before reaching to the clinic of Dr. Maya Parkash. He had taken the dead body of his brother to police station and kept it outside the gate of the police station. The substance of Ex.Ka-2 was entered in GD (Ex.Ka-7) vide Report No.27 at 16:20 hrs. on 25.05.2003 and Section 302 I.P.C. was added. The inquest of the dead body of the deceased was conducted by S.I. S.N. Singh on 25.05.2003. He appointed Naval Kishore Dixit, Suresh Kumar Gupta, Ram Promod, Ramji Tiwari and Kamlesh Gupta as witnesses of the inquest and prepared Panchayatnama (Ex.Ka-12), Challan Lash (Ex.Ka-13), Photo Nash (Ex.Ka-14), letter to CMO (Ex.Ka-15) and sealed the dead body, and prepared sample seal (Ex.Ka-16) and handed over the dead body to Constable Ujair Khan for carrying the dead body to mortuary for post-mortem.

6. On 25.05.2003, Investigating Officer S.N. Singh recorded the statements of injured Ram Kishore Dixit under Section 161 Cr.P.C. (Ex.Ka-25) at Primary Health Centre, Shahabad, and thereafter he recorded the statement of informant Kamal Kishore (PW-1) and inspected the place of occurrence and prepared the site plan (Ex.Ka-17) at the instance of informant. He also recovered two empty cartridges of 315 bore, one pair slipper, plain and blood stained soil, bicycle and cane of oil from which oil had flown on the road and prepared its memo (Ex.Ka-18) and sealed in presence of witnesses Vimlesh Singh and Rajeev Kumar Mishra. He also

prepared the memo of one pair slipper (Ex.Ka-19) and sealed it. He also prepared the supurdginama of bicycle and the container of oil (Ex.Ka-21) and given it in the custody of informant. On 26.05.2003, he recorded the statement of witnesses Rajeev Kumar Mishra, Vimlesh Singh, Ramji Tiwari and Suresh Kumar Gupta. He also recorded the statements Smt. Manju Dixit, wife of the deceased, Laxmi Kant Dixit, son of the deceased and witness Ram Promod.

7. The post-mortem of the deceased was conducted by Dr. J.L. Gautam (PW-5) on 26.05.2003 at 04:00 p.m. The age of the deceased Ram Kishore Dixit was found to be about 40 years, having average body built. Eyes and mouth were found open. Rigor mortis passed off from all over the body. Post-mortem staining was found present on the back and buttock. Abdomen was found distended. Following ante-mortem injuries were found on the body of the deceased:-

(i) firearm wound of entry 2 cm X 1.5 cm through and through present at the right side of abdomen 12 cm away from umbilicus at 10 o'clock, margins inverted, lacerated tattooing 15 cm X 15 cm around the wound present.

(ii) firearm wound of exit 3 cm X 2 cm present on the right back of L-2 level, margins everted, lacerated rapped communicating with injury no.1. Direction front to back towards right side.

(iii) firearm wound of entry 2 cm X 10 cm X through and through present on the left upper part of thigh near ASIS. Margins inverted and lacerated.

(iv) firearm wound of exit 3 cm X 2 cm present on the left thigh posterior aspect near lower part of gluteal region, margins everted , lacerated, communicated with injury no.3.

(v) gutter shaped firearm wound 5 cm X 1.5 cm X muscle deep present on left-hand on palmer part near middle of palm and wrist joint wound in wider on finger root side and tapper on wrist joint side margins inverted lacerated on wrist side.

femaral artery under injury no.3 is lacerated.

8. On internal examination, left chamber of the heart was found empty and right chamber was found full. Abdominal cavity was found containing 2 liters of clotted blood. Stomach was found lacerated and contains two ounce of pasty matter with clotted blood. Small and large intestine were found lacerated and loaded with faecal matter and gases. Liver was found lacerated, gallbladder was found half filled. Doctor opined that deceased died about one day before the post-mortem due to shock and hemorrhage as a result of antemortem injury. Dr. J.L. Gautam (PW-5) prepared the post-mortem report (Ex.Ka-8) in his own handwriting and sealed the clothes of deceased containing shirt, janeyu, underwear, angauchha and kalawa and send it to the Superintendent of Police.

9. On 05.06.2003, the Investigating Officer Inspector S.N. Singh PW-7 received Ropkar regarding surrender of accused Amitabh Dixit in the Court. On 06.06.2003, he recorded the statement of accused Amitabh Dixit in District Jail, Hardoi with the permission of the court wherein he had given disclosure statement that he had concealed the weapon used in the murder of deceased to which he could

get recovered. Thereafter, Investigating Officer applied for police custody of the accused which was allowed, and thereafter, he had taken the accused in police custody. On 11.06.2003 the Investigating Officer recovered the alleged weapon along with two cartridges used by the accused in the murder of deceased at the pointing out of the accused-appellant in presence of witnesses Chhedalal Verma, Ram Vilas Verma and Sanjay and prepared its recovery memo (Ex.Ka-23) and sealed it. He also recorded the statements of witnesses of recovery of country made pistol of 315 bore along with two empty cartridges.

10. On the basis of recovery memo (Ex.Ka-23), the Chik report no. 80 of 2003 (Ex.Ka-3) was scribed by Constable Ram Pratap on 12.6.2003 at 8:30 a.m. and by making necessary entry in GD (Ex.Ka-4) report no.16 at 8:30 a.m. on 12.6.2003 registered the Case Crime No.266 of 2003, under Section 3/25 Arms Act.

11. The investigation of the case under Section 3/25 Arms Act was entrusted to S.I. Ikrar Hussain PW-6 who had recorded the statement of witnesses and prepared the site-plan (Ex.Ka-9) at the instance of recovery officer Inspector S.N. Singh (PW-7). He also obtained sanction for prosecution from the then District Magistrate, Hardoi (Ex.Ka-10) on 04.07.2003 and submitted the charge-sheet (Ex.Ka-11) against accused Amitabh Dixit under Section 3/25 Arms Act.

12. Following articles i.e. (1) Pair of Slipper, (2) blood-stained soil, (3) Pants, (4) shirts, (5) underwear, (6) Scarf, (7) Janeu and (8) Raksha (Kalawa) were sent to the forensic science laboratory by the Investigating Officer, Inspector S.N. Singh for forensic examination regarding which report dated 24.9.2003 (Ex.Ka-26) was received wherein blood was found on the large parts of item nos. 1 to 8. Largest spot of blood was found on item nos. 4 to 6 having length of 50, 20 and 40 cm, respectively. Human blood was found on the item nos. 1 to 8. The two empty cartridges of 315 bore recovered from the place of occurrence and the country made pistol recovered from the accused were sent to Forensic Science Laboratory, Lucknow regarding which report dated 13.10.2003 (Ex.Ka-27) was received where the empty cartridges recovered from the place of occurrence was marked as EC-1 and EC-2, respectively, and two test cartridges TC1 and TC2 were fired from the country made pistol of 315 bore allegedly recovered from the appellant-accused and their marks on the cape of the cartridges were compared from the microscope and found that the EC1 & EC2 and TC1 and TC2 were fired from the same country made pistol of 315 bore allegedly recovered from the accused. After investigation, Inspector S.N. Singh (PW-7) submitted the charge-sheet in Case Crime No.209 of 2003, under Sections 307/302 IPC (Ex.Ka.24).

13. The cognizance of the offence punishable under Section 307/302 IPC against the accused-appellant was taken on 14th July, 2003 by the Chief Judicial Magistrate. The cognizance of offence punishable under Section 3/25 Arms Act against the accused-appellant was also taken on 14.07.2003. Both the charge-sheets were arising out of the same occurrence, therefore, both the cases were committed by the Chief Judicial Magistrate, Hardoi after complying the provision of Section 207 Cr.P.C. to the court of sessions for trial. The case arising out of Case Crime No.209 of 2003, under

Section 307/302 IPC was registered as Sessions Trial No.673 of 2003 (State of UP vs. Amitabh Dixit) and the case arising out of Case Crime No.266 of 2005, under Section 3/25 Arms Act was registered as Sessions Trial No. 674 of 2003 (State of UP vs. Amitabh Dixit).

14. These Sessions trial were later transferred to the Additional Sessions Judge, Fast Track Court No.4, Hardoi for trial. Learned Additional Sessions Judge, Fast Track Court No.4, Hardoi framed the charges of offence punishable under Section 302 I.P.C. and Section 25 Arms Act against the accused-appellant Amitabh Dixit on 07.01.2004. The appellant/accused Amitabh Dixit has pleaded not guilty and claimed to be tried.

15. Both the Sessions trial were consolidated for trial because they were related to the same transaction and the Sessions Trial No. 673 of 2003 (State vs. Amitabh Dixit) under Section 302 IPC was treated as leading case.

16. In order to prove its case, the prosecution has examined informant Kamal Kishore as PW-1 and Ramji Tiwari as PW-2 an eyewitness of the incident. The informant proved the written Tahrir (Ex.Ka-1), information of death of the deceased (Ex.Ka-2). As formal witness, the prosecution examined Constable Ram Pratap as PW-3 to prove chik report of Arms Act (Ex.Ka-3), GD registering the case under Section 3/25 Arms Act (Ex.Ka-4) and by secondary evidence he proved the chick report of FIR No.71 of 2003, under Section 307 IPC (Ex.Ka-5), GD registering the case (Ex.Ka-6) and GD report no. 27 dated 25.05.2003 (Ex.Ka-7) by which the Section 302 IPC was added. Prosecution also examined Chheda Lal as PW-4 to prove the recovery of country made pistol of 315 bore along with two live cartridges from the accused-appellant during police custody remand. The prosecution examined Dr. J.L. Gautam as PW-5 to prove the post-mortem report (Ex.Ka-8). The prosecution examined S.I Iqrar Hussain as PW-6 to prove the steps taken in investigation of case under Section 3/25 Arms Act and to prove site plan (Ex.Ka-9), sanction for prosecution (Ex.Ka-10) and the charge-sheet submitted under Section 3/25 Arms Act (Ex.Ka-11). The prosecution also examined the Investigating Officer Inspector S.N. Singh as PW-7 to prove the steps taken in investigation of the murder of the deceased and recovery of country made pistol of 315 bore and two live cartridges from the place of occurrence. On 25.05.2003, he copied the chik report and GD registering the case and recorded the statement of informant Kamal Kishore PW-1 and on the same day he had gone to Primary Health Centre, Shahabad immediately and recorded the statement of injured Ram Kishore Dixit (Ex.Ka-25) who had supported the prosecution case. He also proved that the inquest of dead body of the deceased was conducted by S.I. Siyaram who prepared the Panchayatnama (Ex.Ka-12), Chalan lash, (Ex.Ka-13), photo Nash (Ex.Ka-14), letter to CMO (Ex.Ka-15), and sealed the dead body and prepared sample seal (Ex.Ka-16) and sent the dead body to mortuary for post-mortem in his presence. He was also examined to prove that he had taken two empty cartridges of 315 bore which was recovered from the place of occurrence and sealed them and prepared memo (Ex.Ka-18) in presence of witnesses Vimlesh Singh and Rajiv Kumar Mishra, memo of taking a pair of slipper from the place of occurrence and sealed it and prepared memo (Ex.Ka-19), he had also taken plain soil and blood stained soil and

sealed them into two containers and prepared memo (Ex.Ka-20) and had taken in possession the bicycle of the deceased and prepared supurdaginama (Ex.Ka-21) and given in custody of informant. He was also examined to prove the site plan (Ex.Ka-17). He was also examined on the point of recovery of country-made pistol of 315 bore along with two cartridges in the presence of witnesses Chhedalal Verma and Sanjay Mishra on 12.6.2003 at about 06:45 hrs. during police custody remand from the appellant/accused and prepared its memo (Ex.Ka-23). He also produced the two empty cartridges recovered from the place of occurrence as Material-Ex-1 and country-made pistol of 315 bore which was recovered from the possession of appellant/accused during police custody remand (Material-Ex-2) and two live cartridges (Material-Ex-3 & 4). He also proved two test cartridges (Material-Ex-5 & 6). He also proved the charge-sheet of Case Crime No.209 of 2003, under Section 307/302 IPC (Ex.Ka-24). The prosecution also tendered the ballistic report of Forensic Science Laboratory (Ex.Ka-27) and the report of serological expert (Ex.Ka-26) and the prosecution closed its evidence.

17. Statement of the appellant/accused under Section 313 Cr.P.C. was recorded wherein he admitted that there was enmity with the family of the deceased regarding division of land property. He denied the allegation of the prosecution and stated that he was falsely implicated by the prosecution, but he did not produce any evidence in his defence.

18. Learned trial court having heard the arguments of learned ADGC for the State and learned counsel for the appellant/accused and going through the record has held that the FIR was lodged promptly and the presence of witnesses informant Kamal Kishore (PW-1) and Ramji Tiwari (PW-2) is proved beyond reasonable doubt. It is also held that although they are related to the deceased, but on the ground of relatives of the deceased their testimony cannot be disbelieved. It is further held that the testimony of the related witness requires close scrutiny. After scrutinizing their testimonies, learned trial court has held that their testimonies are natural and inspire confidence which are corroborated by the FIR, post-mortem report and ballistic expert report. It is further held that the charges of offence punishable under Section 302 IPC and Section 25 Arms Act are proved beyond reasonable doubt against the appellant and recorded the finding that appellant/accused is guilty of murder of the deceased Ram Kishore Dixit and a country made pistol along with two cartridges were recovered from him and sentenced him as above. Feeling aggrieved by the impugned judgment of conviction and order of sentence, the convict/appellant Amitabh Dixit has filed this appeal.

19. It is submitted by learned counsel for the appellant that the FIR was lodged anti-timed after concoction and due deliberation after the death of the deceased. It is further submitted that the FIR under Section 307 is not lodged at 15:20 p.m. on 25.05.2003 as alleged by the prosecution, but it was lodged after the death of the deceased and till the preparation of the inquest report FIR was not lodged and the first information report as being ante-timed only to show false prosecution story and for naming false witnesses in the first information report. It is further submitted that the inquest report shows that the alleged eyewitnesses named in the FIR have been mentioned as inquest witnesses and for eyewitnesses, namely, Kamal

Kishore (wrongly mentioned in inquest report as Nawal Kishore signed in the inquest report as Kamal Kishore), Ram Promod and Ramji Tiwari were shown as witnesses of the inquest also. It is also submitted that perusal of the inquest report shows that the inquest report has not been prepared/written by one person, but some writings are in the handwriting of different persons. It is further submitted that the GD report number regarding reporting of the death of the deceased was left blank which shows that FIR was not in existence at the time of inquest proceeding. It is further submitted that in the inquest report it was mentioned that the information regarding death of the deceased was given by some Nawal Kishore and not by the informant. It is further submitted that the GD report number regarding death of the deceased was purposely left blank in the inquest so that FIR can be lodged ante-timed to accommodate the inquest proceeding by filling in the blanks of GD report number regarding reporting of death of the deceased, but Sub-Inspector conducting the inquest report forgotten to fill up the GD report number regarding reporting of death of the deceased. It is submitted that it establishes that the FIR was lodged after the death of the deceased to falsely implicate the appellant Amitabh Dixit. It is further submitted that not only in the inquest report but also in other police papers allegedly prepared at the time of the inquest i.e. Challan lash etc. It is further submitted that it is apparent that FIR was not in existence at the time of inquest proceeding and incorrect entries in GD report and inquest proceeding. It is further submitted that police paper no.30 challan lash shows that the name of the deceased has been written by different person in different handwriting and other details have been written by some other person. It is further submitted that informant PW-1 Kamal Kishore has admitted in his examination-in-chief that his brother has died at 03:20 p.m. It is also submitted that the first information report under Section 307 IPC is ante-timed and the statement of the deceased under Section 161 Cr.P.C. was fabricated by the Investigating Officer S.N. Singh. It is further submitted that the informant PW-1 has stated that after the death of his brother, he with the help of others brought the dead body of the deceased to the police station and kept it outside the gate, but inquest report shows that the dead body was found by SI Siyaram in the premises of newly constructed Munsif court, Shahabad, which casts doubt on the prosecution case. It is further submitted that the informant has deposed in his statement before the court that the first fire from country made pistol was shot by Amitabh Dixit which hit at the hand of his brother and thereupon his brother ran towards them, thereupon, the second fire was shot by the appellant which hit at the left leg of his brother. It is further submitted that the informant has admitted that after sustaining injury by the first shot fired, his brother left the bicycle there and ran towards them. It is further submitted that the informant has also admitted that his brother Ramji Kishore fell in front of the door of Ram Shankar, meanwhile, appellant Amitabh Dixit shot third fire which hit at the right side of chest of his brother. It is further submitted that the deposition of the informant Kamal Kishore as PW-1 shows that the fire was made from the back side of the deceased which is inconsistent with the injury shown in the post-mortem report, therefore, it appears that the informant was not present at the place of occurrence and had not witnessed the occurrence. It is further submitted that learned trial court has wrongly relied on the

testimony of the informant PW-1. It is further submitted that the witness Ramji Tiwari PW-2 has admitted that the name of his father is Govind Prasad Tiwari. The sister of Govind Prasad Tiwari, namely, Smt. Saraswati was married to Moonga Ram, who is father of the deceased, informant Kamal Kishore Dixit and Ram Promod. It is further submitted that the alleged eyewitnesses, informant PW1 Kamal Kishore and Ramji Tiwari are related to the deceased and there is contradiction in their testimonies, therefore, no reliance can be placed on their testimonies, but learned trial court has wrongly relied on their testimonies. It is further submitted that witness Ramji Tiwari has made improvement in his statement so that injuries mentioned in post-mortem report may corroborate the prosecution case. The PW-2 Ramji Tiwari is an Advocate practicing at Shahabad and he has purposely made improvement in his statement before the trial court because he was well aware as to how he can improve his statement before the court so that the same can be corroborated from the FIR and post-mortem report and can be relied on. It is further submitted that informant PW-1 in his cross-examination has admitted that in his presence no one had touched his injured brother at the place of occurrence and he had also not touched his brother and left for police station to lodge the report, which is an unnatural conduct of the informant which also makes his presence at the place of occurrence doubtful and, therefore, no reliance can be placed on his testimony. It is further submitted that the alleged incident has taken place in public at large, but no independent witness has been examined by the prosecution, therefore, no conviction can be recorded merely on the basis of the testimonies of the interested witness. It is further submitted that in above circumstances the prosecution has miserably failed to prove its case beyond doubt for the charges of offence punishable under Section 302 IPC and 25 Arms Act. Therefore, the impugned judgment and order of conviction is liable to be set-aside and the accused-appellant may be acquitted.

20. It is submitted by learned A.G.A. that the occurrence has taken place on 25.05.2003 at 02:45 p.m. regarding which FIR was lodged on the same day at 15:20 p.m. The chick report (Ex.Ka-5) which is proved by the Constable/Clerk PW-3 Ram Pratap by his secondary evidence deposing that chik FIR was scribed by Head Moharrir Hemraj in whose handwriting he is acquainted with. This fact that the chik report was scribed by Head Moharrir Hemraj was not challenged by the learned counsel for appellant/accused in his cross-examination before the trial court. It is further submitted that the place of occurrence from the police station is shown to be one and half kilometers away and this fact was also not challenged before the trial court. It is further submitted that the PW-1 Kamal Kishore in his deposition has stated that after the occurrence he had gone to police station by rickshaw and handed over the Tahrir at Police Station, Shahabad. It is also submitted that the informant further deposed that he scribed the Tahrir in his own handwriting and under his signature. It is further submitted that PW-1 Kamal Kishore has further deposed that Daroga ji met him at the police station and the deceased has died at about 03:30 p.m. on 25.5.2003 in hospital regarding which he has given Tahrir (Ex.Ka-2) to police station Shahabad in his own handwriting. He has further stated that he has given the information regarding death of his brother. It is further submitted that PW-1 Kamal

Kishore has stated that by mistake he in his statement has said that his brother died at 03:30 p.m. It is further submitted that PW-1 Kamal Kishore has deposed that police station is about 2 km away from the place of occurrence. It is further submitted that PW-1 Kamal Kishore has further stated in his statement before the court that he neither has picked up Ram Kishore nor has taken him to the hospital or police station, but he immediately proceeded to the police station to lodge the FIR. It is further submitted that PW-1 Kamal Kishore has deposed that he has told before lodging of the FIR to Daroga Ji that his brother Ram Kishore has sustained three firearm injuries, and thereafter, Daroga Ji had gone to PHC, Shahabad and found Ram Kishore present and recorded his statement. PW-1 Kamal Kishore has further deposed that the copy of the FIR was given to him on the same day in evening. It is further submitted that in this incident the real younger brother of the informant was murdered, his mental condition can also be adjudged on his deposition that the dead body was sealed in hospital. Meaning thereby, as per the statement of this witness the inquest proceeding was conducted at district hospital. It is further submitted by learned AGA that he was shown as witness of the inquest, but he has stated that he had not signed on the Panchayatnama which shows that he was in shock with the incident and had even lost his mental equilibrium at the time of recording of his statement as eyewitness, so such type of contradiction has occurred in his statement. It is also submitted that so far as the conduct of this witness is concerned regarding not picking up his injured brother and going to police station does not make his statement unreliable because the conduct depends upon his mental condition. It is further submitted that it cannot be said that informant had not lodged the FIR at 15:20 p.m. at police station Shahabad. It is further submitted that it cannot be said that the FIR is ante-timed. It is also submitted that the post-mortem of the deceased was conducted at 04:00 p.m. on 26.5.2003 and post-mortem report was prepared by PW-5 Dr. J.L. Gautam who has deposed as PW-5 that the deceased died on 25.5.2003 at about 3-4 p.m. It is further submitted that at the time of post-mortem two ounce of pasty matter with clotted blood was found in stomach, meaning thereby, the occurrence has taken place about 2-3 hours after taking lunch, therefore, it cannot be said that the deceased had sustained injury in night in robbery committed by unknown persons. It is further submitted by learned AGA that PW-1 Kamal Kishore had denied the suggestion of learned counsel for appellant/accused before the trial court that the deceased Ram Kishore was looted at a lonely place in the darkness of the night. It is further submitted that in the present case the FIR was lodged promptly, therefore, it will rule out any sort of concoctions and deliberations for falsely implicating the appellant. It is further submitted by learned AGA that from the statement of PW-7 Inspector S.N. Singh, it is proved that the investigation was started on the same day after lodging of the FIR without delay. It is also submitted that PW-7 S.N. Singh has deposed that informant had come alone to lodge FIR. It is further submitted that these circumstances also rule out the chances of concoction and false implication of the accused. It is also submitted that from the statement of PW-7, it is also apparent that there was some delay in forwarding the FIR to Circle Officer of the police and court having jurisdiction by itself, which cannot be said that the FIR is ante-timed and the learned A.G.A. has placed reliance on the law laid down by the Apex Court in ***State***

of Punjab versus Hakam Singh, *reported in (2005) SCC 408* wherein it is held that the delay in sending the copy to the area Magistrate is not material where FIR is shown to have been lodged promptly and investigation has started on its basis. It is also submitted that even if there is delay in lodging the FIR and the delay is not material in the event prosecution has given cogent and reasonable explanation for delay and has relied on the law laid down by the Apex Court in ***Ashok Kumar Chaudhari Vs. State of Bihar,*** *2008 (61) ACC 1972 (SC)* wherein it is held that even if there is delay in lodging the FIR and causes are not attributable to any effort to concoct a version and the delay is satisfactorily explained by the prosecution, no consequence shall be attached to mere delay in lodging the FIR and the delay would not adversely affect the case of the prosecution. The delay caused in sending the copy of FIR to Magistrate having jurisdiction would be also immaterial if the prosecution has proved its case by reliable evidence. It is further submitted that the witness PW-7 Inspector S.N. Singh has stated in his statement that 10 minutes time were taken by Constable Moharrir Hemraj in scribing the chik FIR and GD registering the case, and thereafter, he took the copy of the same and proceeded to PHC, Shahabad, which is about 200-300 meters away from the police station where he found Ram Kishore and the person accompanying the injured were searching for doctor. It is further submitted that PW-7 has recorded the statement under Section 161 Cr.P.C. of the injured Ram Kishore, and thereafter, injured was taken to private nursing home for treatment. It is further submitted that Ram Kishore has died on the same day at about 03:30-03:45 p.m. as a result of injuries sustained in the incident, therefore, his statement under Section 161 Cr.P.C. will be treated as dying declaration according to sub-section (2) of Section 162 Cr.P.C. It is further submitted that the statement under Section 161 Cr.P.C. of the deceased was proved by I.O. PW-7 Inspector S.N. Singh as (Ex.Ka-25) in which he has supported the version of FIR. It is further submitted that FIR is supported by dying declaration and also by informant-eyewitness PW-1 Kamal Kishore and eyewitness PW-2 Ramji Tiwari whose presence at the place of occurrence could not be shaken in cross-examination, who have given vivid description of the incident which is corroborated by the FIR and post-mortem report. Therefore, their testimonies are liable to be relied on and he has relied on the law laid down by this Court in ***Om Prakash and Ors. v. State***, *reported in 1995 ALL. L. J. 1210*. It is also submitted that two empty cartridges of 315 bore were recovered from the place of occurrence by the Investigating Officer, who prepared the memo (Ex.Ka-18) and has proved it as PW-7. Investigating Officer Shyam Nath Singh also came to know that accused has surrendered before the court on receiving Robkar and with the permission of the court he interrogated the appellant/accused Amitabh Dixit on 6.6.2003 and recorded his statement wherein he has disclosed that the weapon used in the murder of Ram Kishore was concealed by him after committing murder to which he is ready to get recovered. Thereafter, he was taken in police custody by the order of court on 11.6.2003 and on 12.6.2003 he was taken to the place at the tube-well near Kabristan by following him and came down in the well of the tube-well in presence of witnesses PW-3 Chhedalal Verma and Sanjay Mishra and came out with black polythene from which a country made pistol of 315 bore in running condition along with two live cartridges were taken

out. He also proved that the country made pistol of 315 bore and two cartridges of 315 bore were recovered from the possession of the appellant. He also proved that he had prepared the recovery memo of the same (Ex.Ka-23) and sealed the pistol of 315 bore and two cartridges in presence of witnesses Chhedalal Varma and Sanjay Mishra. The recovery of the pistol of 315 bore and two cartridges from the appellant was also proved by witness PW-4 who has proved that the recovery of the same was made before him and he signed on the same. Although he was declared hostile on the point of giving of the copy of the recovery memo to the appellant and signing of the appellant on recovery memo regarding receipt of copy of recovery memo. It is further submitted that statement of PW4 Chhedalal and PW7 Inspector S.N. Singh remained unshaken on the point of recovery of pistol 315 bore and two live cartridges of 315 bore. It is further submitted by learned A.G.A. that PW-7 Inspector S.N. Singh has also proved that he had send the empty cartridges recovered from the place of occurrence and the pistol along with cartridges recovered at the pointing out of the appellant/accused to forensic science laboratory. The ballistic report dated 13.10.2003 (Ex.Ka.-27) was tendered by the prosecution which proves that the empty cartridges recovered from the place of occurrence were fired by the pistol of 315 bore recovered at the instance of appellant/accused during police custody remand. It is also submitted that PW-7 Inspector S.N. Singh has also produced a sealed bundle containing two empty cartridges of 315 bore marked as EC (examined cartridge) and the other TC (tests cartridge) before the trial court. The EC cartridge was exhibited as Material.Ex.Ka-1 and TC cartridge was exhibited as Material.Ex.Ka-3. From the same bundle a country made pistol of 315 bore was also found. It is also proved by the PW-7 S.N. Singh that it was the same pistol which was recovered at the pointing out of the accused which was exhibited as Material-Ex.Ka-2. The two live cartridges were also produced before the trial court which was recovered along with pistol at the pointing out of the appellant during police custody remand and the same was exhibited as Material.Ex.Ka-4 & 5. It is further submitted that PW-6 Sub-Inspector Ikrar Hussain has proved the steps taken in investigation of the case under Section 25 Arms Act and has proved the site plan (Ex.Ka.9), sanction for prosecution (Ex.Ka-10) and the charge-sheet submitted under Section 3/25 Arms Act (Ex.Ka-11). It is further submitted that witnesses PW-1 Kamal Kishore and PW-2 Ramji Tiwari are related witness. Learned trial court has scrutinized their depositions with great care and caution and found that their statements are reliable which does not suffer from any infirmity. It is further submitted that learned trial court on the basis of evidence available on record has recorded the finding that the charges of offence punishable under Sections 302 IPC and 25 Arms Act are proved beyond reasonable doubt against the appellant which is according to law and has rightly convicted and sentenced the accused-appellant by the impugned judgment and order which requires no interference. In view of above, the instant appeal is liable to be dismissed.

21. Having considered the rival contentions raised by learned counsel for the appellant as well as learned AGA and gone through the record including the impugned judgment and order of the trial court, we find it pertinent to mention the law governing for hearing of the criminal appeal. The Apex Court in ***Bakshish Ram***

and Another versus State of Punjab, reported in AIR 2013 SC 1484: 2013 AIR SCW 14 in paragraphs 10 and 11 has observed as follows:

"10. The High Court, as a First Court of appeals, on facts must apply its independent mind and record its own finding on the basis of its own assessment of evidence. Mere reproduction of the assessment of the trial Court may not be sufficient and in absence of independent assessment by High Court, its ultimate decision cannot be sustained. The same view has been reiterated by this court in ***Shankar Singh and others versus State of Haryana*** *[(2004) 11 SCC 291: (AIR 2004 SC 2570:2004 AIR SCW 2388)].*

11. In ***Arun Kumar Sharma versus State of Bihar*** *[(2010) 1 SCC 108: (AIR SC (Supp) 2882:2009 AIR SCW)], while reiterating the above view, this court held that in its appellate jurisdiction all the facts were open to High Court and, therefore, the High Court was expected to go deep into the evidence and, more particularly, the record as also the proved documents, contrary to above principle, we are satisfied that in the case on hand, the High Court failed to delve deep into the regard of the case and the evidence of witnesses. The role of the Appellant Court in the criminal appeal is extremely important and all questions of fact are open before the appellate Court. The said recourse has not been adopted by the High Court while confirming the judgment of the trial court."*

22. The Apex Court in ***Majjal versus State of Haryana***, *reported in (2013) 6 SCC 798* (Three Judges Bench) has observed regarding duty of appellate court while dealing with the appeal under Section 386 Cr.P.C. and has observed in paragraphs 6 & 7 as follows:

"6. In this case what strikes us is the cryptic nature of the High Court's observation on the merit of the case. The High Court is set out the facts in detail. It has mentioned in the name and number of prosecution witnesses. Particular of all documents produced in the court along with their exhibit numbers have been mentioned. Gist of the trial court's observation and findings are set out in a long paragraph. Then there is a reference to the arguments advanced by the counsel. Thereafter, without any proper analysis of the evidence almost in a summary way the High Court has dismissed the appeal. The High Court's cryptic reasoning is contained in two short paragraphs. We find such disposal of criminal appeal by High Court particularly in a case involving charge under Section 302 IPC where the accused is sentenced to life imprisonment unsatisfactorily.

7. It was necessary for the High Court to consider whether the trial court's assessment of the evidence and its opinion that the appellant must be convicted deserves to be confirmed. This exercise is necessary because the personal liberty of an accused is curtailed because of the conviction. The High Court must state its reason why it is accepting the evidence on record. High Court's concurrence with the trial courts view would be acceptable only if it is supported by reasons. In such appeals it is a court of first appeal. Reasons cannot be cryptic. By this, we do not mean that the High Court is expected to write and unduly long treatise. The judgment may be short but must reflect proper application of mind to vital evidence and important submissions which

go to the root of the matter. Since this exercise is not conducted by the High Court, the appeal deserves to be remanded for a fresh hearing after setting aside the impugned order."

23. The principle emerges for deciding the criminal appeal from the ratio of above mentioned rulings of the Apex Court is that it is the duty of first appellate Court to make proper analysis of evidence and to consider whether trial court's assessment of evidence and its opinion regarding conviction deserve to be confirmed because the personal liberty of an accused is curtailed because of conviction. First appellate Court's concurrence with the trial court's view would be acceptable only if it is supported by reason. Judgment may be short but must reflect proper application of mind to vital evidence and important submissions which go to the root of the matter.

24. In this appeal the informant PW-1 Kamal Kishore Dixit and witness PW-2 Ramji Tiwari are the eyewitnesses of the incident. PW-1 is the real brother of the deceased and PW-2 is a close relative of the deceased. PW-1 has admitted in his cross-examination that Moonga Ram is his father and Govind Prasad is brother-in-law (Saala) of his father and witness PW-2 Ramji Tiwari is the son of Govind Prasad.

25. The informant PW-1 Kamal Kishore Dixit has deposed that the incident took place on 25.05.2003 at 02:45 p.m. The accused Amitabh Dixit a resident of his locality belongs to his family pedigree. There was a dispute between them before the incident regarding partition of land property. He has further deposed that on 25.05.2003 at 02:45 p.m. his brother Ram Kishore Dixit had gone to Mohallah Chowk to get mustard oil extracted and while he was returning back to home on bicycle, he and his another brother Ram Pramod were also coming to home from the market and they were 50 yards behind the deceased and when his brother Ram Kishore reached near the Mill of Parashuram at Budh Bazar, the accused armed with country made pistol of 315 bore came and opened fire on his brother Ram Kishore which hit at his left hand and his brother sustained injury. Then, his brother Ram Kishore ran towards them. On this, appellant Amitabh Dixit followed his brother and again opened fire upon him from about 8-9 paces away behind his brother and again appellant fired another shot which hit in the left leg of his brother. Thereafter, his brother (deceased) in order to save his life tried to enter into the house of Ram Shankar, but the door was closed. Till then appellant accused again opened fire which hit on the right side of chest of his brother (deceased) due to which he fell down. The witnesses PW-2 Ramji Tiwari, Suresh Chandra Gupta and several other persons reached there and challenged the appellant, then the appellant fled from there. Then he went to the police station on rickshaw to lodge the FIR and got the FIR registered on the basis of written Tahrir which was scribed in his own writing and under his signature. After the incident, the Investigating Officer PW-7 S.N. Singh recorded his statement. Later on, the deceased died on the same day, i.e., 25.05.2003 at 03:30 p.m., and thereafter, the informant had given another written Tahrir (Ex.Ka-2) in his own handwriting regarding death of his brother Ram Kishore. The informant has further deposed that prior to the incident the deceased had given an application to the Chowki In-charge, Sardarganj, Shahabad regarding demolition of wall by the accused-appellant

and his associates, carbon copy of which was filed before the trial court which bears the signature of the deceased Ram Kishore.

26 . So far as the submission of learned counsel for the appellant that the dying declaration is not believable because PW-1 Kamal Kishore has admitted in his statement before the court that the deceased has died at 03:30 p.m. on 25.05.2005 and the FIR was lodged at 03:20 p.m. on the basis of written Tahrir (Ex.Ka-1 & Ka-2) at the same time, so the dying declaration can be accommodated.

27. In this regard, we have gone through the deposition of PW-1 Kamal Kishore and PW-7 Inspector S.N. Singh. The informant PW1 has stated before the court that the occurrence has taken place at 02:45 p.m. The chik report no. 71 of 2003 was scribed by Head Moharrir Hemraj on 25.05.2003 at 15:20 p.m. He has deposed that he had left the place of occurrence immediately and had gone to police station to lodge the FIR on rickshaw. The witness PW-3 Constable Ram Pratap by secondary evidence has stated that the chik report under Section 307 IPC (Ex.Ka-5) was scribed by Head Moharrir Hemraj at 15:20 p.m. on 25.05.2003 at police station Shahabad and by making entry in GD report no.26 (Ex.Ka-6) on 25.05.2003 at 15:20 p.m., the Case Crime No. 209 of 2003, under Section 307 IPC was registered. PW-3 Constable Ram Pratap has proved the Ex.Ka-5 and Ex.Ka-6 by secondary evidence. The Investigating Officer PW-7 S.N. Singh has deposed that the case was registered in his presence at the police station. He has further deposed that Head Moharrir Hemraj had scribed the chik report (Ex.Ka-5) and GD registering the case (Ex.Ka-6) within 10 minutes, and thereafter, he had taken the copy of chik report and GD registering the case and proceeded to PHC, Shahabad which is about 200-300 meters away from the police station and recorded the statement of the injrued Ram Kishore under Section 161 Cr.P.C. The witness PW-1 Kamal Kishore has stated in his statement that Daroga Ji had recorded his statement at the police station and later on Daroga Ji had recorded the statement of Ram Kishore at PHC, Shahabad. He has further stated that on reaching the police station he had told Daroga Ji that three shots were fired at his brother which hit him and he is at PHC, Shahabad. He has further deposed that Daroga Ji took him to PHC, Shahabad. Moreover, the report number of GD wherein information of the death was received was left blank in panchayatnama. Therefore, from above discussion it is proved that the FIR was lodged at 15:20 p.m. on 25.05.2003 at Police Station Shahabad. From the statement of informant PW-1 Kamal Kishore, it is proved that his brother has died on 25.05.2003 at 03:20 p.m. The PW-7 Inspector S.N. Singh has admitted in his cross-examination that ten minutes time was taken by the Head Moharrir Hemraj in scribing the chik report and GD registering the case. The informant (PW-1) has admitted that Daroga Ji had recorded his statement, and thereafter, proceeded to PHC, Shahabad. In this respect, we also perused the case diary wherein it is mentioned that on 25.05.2003 at 15:30 hours the Investigating Officer had copied the chik report in case diary, and thereafter, he copied the contents of GD registering the case. Thereafter, he had recorded the statement of injured Ram Kishore. From the close scrutiny of the evidence, it is proved that the deceased has died at 03:20 p.m. as per the statement of PW-1 Kamal Kishore and as per the case diary the Investigating Officer recorded the

chik report and GD registering the case in CD thereafter, therefore in above circumstances as the deceased has died at 03:20 p.m. there was no occasion for the Investigating Officer to record his dying declaration (Ex.Ka-25). In above circumstances, the dying declaration is doubtful and cannot be relied on and we find substance in the arguments of learned counsel for the appellant that the dying declaration is suspicious and it cannot be relied on.

28. So far as the contention of learned AGA regarding treating the statement of the deceased recorded under Section 161 Cr.P.C. as dying declaration is concerned, it can be treated as dying declaration as per provision of Section 162(2) Cr.P.C., if from the evidence on record it is proved that the statement under Section 161 Cr.P.C. is beyond suspicion. The provision of Section 162 Cr.P.C. reads as follows:

*"**162. Statements to police not to be signed: Use of statements in evidence.**- (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any enquiry or trial in respect of any offence under investigation at the time when such statement was made:*

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of Section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of Section 27 of that Act.

Explanation. - An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact."

29. The statement of witness under Section 161 Cr.P.C. can amount to dying declaration as held by the Apex Court in ***Dalip Singh versus State of Punjab***, *reported in (1979) 4 SCC 332* in paragraph 8, which reads as follows:

"8....We may also add that although a dying declaration recorded by police officers during investigation is admissible under Section 32 of the Indian Evidence Act in view of exception provided to sub-section (2) of Section 162 of the Code of Criminal Procedure, 1973, it is better to leave such dying declaration out of consideration until and unless the prosecution satisfies the court as to why it

was not recorded by the Magistrate or Doctor. As observed by this court in ***Munnu Raja versus state of MP*** *[(1976) 3 SCC 104], the practice of the investigating officer himself recording a dying declaration during investigation ought not to be encouraged. We do not mean to suggest that such dying declaration are always untrustworthy but what we want to emphasize is that better and more reliable method of recording a dying declaration of an injured person should be taken recourse to and one recorded by the police officer may be relied upon if there was no time or facility available to the prosecution for adopting any better method."*

30. From the position of law settled by the Apex Court that statement recorded by the Investigating Officer under Section 161 Cr.P.C. can be treated as dying declaration, but it should be free from suspicion. As discussed above, the statement under Section 161 Cr.P.C. of the injured recorded by the Investigating Officer is suspicious. Therefore, we find no substance in the contention of learned AGA that the statement of the injured recorded under Section 161 Cr.P.C. was a genuine one and was free from suspicion or doubt, therefore, it cannot be relied on in view of Section 162 Cr.P.C. In above circumstance, we find substance in the contention of learned counsel for the appellant that the dying declaration was not a genuine one and it cannot be relied on, therefore, the same cannot be looked into for the purpose of proof of the case.

31. Now, we are considering the submission of learned counsel for the appellant that FIR was ante-timed. PW-1 Kamal Kishore in his statement has stated that after the incident he without picking up his injured brother Ram Kishore he proceeded to the police station for lodging the FIR on rickshaw. He has further deposed that the incident has taken place at 02:45 p.m. and he lodged the FIR at 15:20 p.m. on 25.05.2003 by handing over written Tahrir which was scribed by him in his own handwriting and under his signature. Perusal of the chik report (Ex.Ka-5) proved by the witness PW-3 Constable Ram Pratap by secondary evidence shows that the distance between the place of occurrence and police station was one and half kilometer. The witness PW-1 Kamal Kishore might have taken some time in writing the Tahrir and might have taken sometime in search of rickshaw, and thereafter, he had gone to the police station via a busy road. Therefore, in above circumstance it is proved that the FIR was lodged without delay. So far as the submission of learned counsel for the appellant that the FIR was lodged after the death of the deceased and in order to create false dying declaration, FIR regarding sustaining of injury by the deceased was lodged ante-time at first and later on the information regarding the death of the deceased was taken by the Investigating Officer for accommodating the recording of statement under Section 161 Cr.P.C. is concerned, it was the lapse on the part of the Investigating Officer which should not be taken in favour of the accused, may be that such lapse is committed designedly or because of negligence, so that it will not infer that FIR was not lodged promptly as held by the Apex Court in Paras Yadav & Ors. versus State of Bihar, [(1999) 2 SCC 126 : 1999 SCC (Cri) 104]. In this case, FIR was lodged on 25.05.2003 at 15:20 p.m., and thereafter, the information regarding death of the deceased was communicated by PW-1 Kamal Kishore by written Tahrir (Ex.Ka.-2) at 16:20 hours at the police station Shahabad which was

entered in GD (Ex.Ka-7) vide report no.27 on 25.05.2003 at 16:20 hours which was proved by the witness PW-3 Constable Ram Pratap by secondary evidence and Section 302 IPC was added. If the police wanted to ante-time the FIR, police might had stopped the GD (Ex.Ka-7). The witness PW-5 Dr. J.L. Gautam has proved the post-mortem report (Ex.Ka-8) and has stated that the deceased might have died one day before the post-mortem. He had found clotted blood and pasty matter in the stomach of the deceased. The post-mortem of the deceased was conducted on 26.05.2003 at about 04:00 p.m., meaning thereby, the deceased had taken lunch in the noon and occurrence has taken place after about two hours of his taking the meal, which also proves that the occurrence has taken place at about 02:45 p.m. on 25.05.2003 and it rules out that deceased was robbed at some lonely place in the dark of night. Because in the interval of an hour of lodging of FIR, the information regarding the death of the deceased was given by the informant PW-1 Kamal Kishore, therefore, SI Siyaram might have left the GD report number while reporting the death of the deceased in panchayatnama to avoid the mistake in writing wrong GD report number in panchayatnama, but due to mistake later on he could not fill in the blanks. At the top of panchayatnama he had written the Case Crime No. 209 of 2003, under Section 307/302 IPC and the name of the informant who had given the information regarding the death was also mentioned as Kamal Kishore in the body of panchayatnama (Ex.Ka-12). He had also mentioned the Case Crime No. 209 of 2003 under Section 307/302 IPC in the Challan Lash (Ex.Ka-13), Photo Nash (Ex.Ka-14). The inquest proceeding was proved by the PW-7 Inspector S.N. Singh by secondary evidence. It is proved that the investigation was started promptly after lodging of the FIR, therefore it is proved beyond reasonable doubt that the FIR was lodged promptly. In above circumstances, we find no merit in the submission of learned counsel for the appellant that FIR was ante-time and was lodged after due deliberation and concoction to falsely implicate the appellant Amitabh Dixit. So far as the conduct of informant PW-1 Kamal Kishore is concerned regarding not picking up his brother after sustaining injury is of no consequence because different person reacts differently in a given situation and he might have thought that there are other person present at the place of occurrence who would pick up his injured brother and take him to the hospital. Therefore, it cannot be said that PW-1 Kamal Kishore was not present at the place of occurrence at the time of incident. Therefore, we find that PW-1 Kamal Kishore had in above circumstances proceeded to lodge the FIR first immediately without losing time so that police help might be extended to his brother for saving his life and for better treatment in the hospital.

32. Now, the question arises whether the incident has taken place at the place of occurrence or at some lonely place and the deceased was robbed at a lonely place and has sustained injuries in robbery?

33. The Investigating Officer PW-7 Inspector S.N. Singh has deposed that he had collected the plain and blood stained soil from the place of occurrence and had prepared its memo (Ex.Ka-20). He had also found two empty cartridges of 315 bore at the place of occurrence and prepared its memo (Ex.Ka-18), a pair of slipper and prepared its memo (Ex.Ka-19) and also found the bicycle of the deceased and a plastic container from which oil had flown on the road and prepared

its memo (Ex.Ka-21). PW-7 has also deposed that he sent the pair of slipper, plain and blood stained soil along with clothes, i.e., scarf, janeyu and Raksha of the deceased to Forensic Science Laboratory, Lucknow in a sealed cover and the report of the forensic science laboratory dated 24.09.2003 (Ex.Ka.26) was tendered by the prosecution. The aforesaid report was prepared by the Government Serologist Expert which was forwarded by Joint Director Forensic Science Laboratory, Lucknow. The appellant had not called for the cross-examination of the expert, therefore, it will be presumed that the serological report is admitted to the appellant. Section 293 of the Code of Criminal Procedure speaks about the reports of certain government scientific expert. Section 293 Code of Criminal Procedure, 1973 reads as follows:-

*"**293. Reports of certain Government Experts:** (1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any enquiry, trial or other proceeding under this Code.*

(2) The court may, if it thinks fit, summon and examine any such expert as to the subject matter of his report.

(3) Where any such expert is summoned by a Court and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the court, if such officer is conversant with the facts of the case and can satisfactorily depose in court on his behalf.

4. This section applies to the following Government scientific experts namely: -

(a) any Chemical Examiner or Assistant Chemical Examiner to Government;

(b) the Chief Controller of Explosives;

(c) the Director of Finger Print Bureau;

(d) the Director, Haffkein Institute, Bombay;

(e) the Director, [Deputy Director or Assistant Director] of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;

(f) the Serologist to the Government."

(g) [any other Government Scientific Expert specified by notification by the Central Government for this purpose.]"

34. The sub-section merely provides that the report of expert may be admitted as evidence without formal proof as held by the Apex Court in ***Bhupinder versus State of Punjab,*** *reported in AIR 1988 SC 1011*. The word "may' in sub-section (1) makes it clear that it is only an enabling provision. Though the report of Chemical Examiner, when properly admitted is entitled to the same weight as sworn testimonies as held by the Apex Court in Bhupinder versus State of Punjab (supra). The serological expert report was not challenged by the learned counsel for the appellant in the trial court by summoning for cross-examination.

The presence of blood on the blood stained soil and nature of plain soil proves that it was taken from the same place. The presence of human blood on a pair of slipper, plain and blood stained soil proves beyond doubt that the occurrence has taken place at the place as alleged by the prosecution. It also rules out the defence case that the deceased had sustained injury in a robbery in the night at a lonely place and the appellant was falsely implicated due to enmity.

35. Now, we have to analyze whether the motive of the crime is proved beyond reasonable doubt? In this regard, PW-1 Kamal Kishore has deposed that the appellant belongs to the same pedigree and there was a dispute between them regarding partition of the land property before the incident. He has also deposed in cross-examination that the deceased had given an application to the In-charge Chawki Sardarganj regarding the demolition of wall, which was being raised by the deceased, by the appellant and his associates on 08.08.2000. He has also filed the carbon copy of the aforesaid application which is on record. The appellant/accused has admitted in his statement under Section 313 Cr.P.C. that the statement of witness PW-1 Kamal Kishore that the he (appellant) belongs to his pedigree is correct. He has also admitted the statement of PW-1 Kamal Kishore that there was dispute between the family of accused and family of the appellant regarding partition of land property. He has further admitted that the informant and his family member grabbed his house due to this enmity, he has been falsely implicated in this case. From the above discussion, it is proved beyond doubt by the evidence and admission of the appellant in the statement under Section 313 Cr.P.C. that there was enmity between the family of the deceased and the appellant. The enmity is two edged weapon which can be used for false implication as well as provided the reason to commit the offence. The suggestion suggested by the learned counsel for the accused-appellant may be looked into while appreciating the evidence. The suggestion of the appellant's counsel that the deceased was robbed in the darkness of night somewhere at a lonely place and not at the place of occurrence and sustained injury in the robbery is not plausible in this case, therefore, the plea of false implication of the appellant is ruled out in this case. Therefore, the motive to commit the offence by the appellant is proved beyond reasonable doubt.

36. PW-2 Ramji Tiwari is also alleged to be an eyewitness of the incident who has deposed and corroborated at the time of recording of his statement that the occurrence had taken place about 9-10 months ago. He has also deposed that on the day of occurrence while he was returning from his field he had seen Ram Kishore Dixit coming from the market on a bicycle and Amitabh Dixit stopped him and opened fire upon him, then he was at a distance of 10-12 meters from the deceased Ram Kishore, the fire hit at the hand of the deceased. Thereupon, Ram Kishore ran towards back leaving his bicycle, then the appellant Amitabh Dixit again opened fire which hit at the thigh of Ram Kishore. Thereafter, Ram Kishore (deceased) started running towards the house of Ram Shankar and wanted to enter into his house, but the door was closed. Then Ram Kishore (deceased) fell down on the platform outside of the house of Ram Shankar, meanwhile, the appellant Amitabh Dixit again opened fire which too hit him, and thereafter, the appellant fled from there

waving his pistol. He has further deposed that Kamal Kishore (informant) and Ram Pramod were also coming from behind. Suresh Gupta was also with him. He, Ram Promod and Suresh Gupta picked up the injured Ram Kishore and took him to the Government Hospital, Shahabad in the afternoon, but no doctor was found there, then they took Ram Kishore to the clinic of Dr. Maya Prakash where the deceased Ram Kishore has died at around 03:30-03:45 p.m. In his cross-examination, he has admitted that he is the resident of Mohalla Holi Kalan, about 1 km North to the place of occurrence. He has further clarified that Inayatpur is about 1.5-2 km towards South of his house. His farm is situated in village Inayatpur. There are three roads to reach his farm, one goes through Rai Saheb Gate via Pali Road. He has further clarified that he did not use to go to his farm by scooter as he did not have scooter. He used to go to his farm via these three roads and often via two roads and sometimes via Pali Road. On the day of incident, he had gone to his farm from his house via middle one of the roads. He has further clarified that the place of occurrence does not fall on these three roads. On the day of occurrence, he had gone to receive the share of his crops, but the sharecropper did not deliver because he was not present at his house. The name of the sharecropper is Ramdeen. He arrived at the house of sharecropper at around 01:15 p.m. and stayed there for about 15 minutes. On the day of occurrence, he was coming back from Mandir Devi Wala Kharanja Road. Suresh met him by chance at the door of Sanjay Mishra at Mohallah Budh Bazar talking with him. The house of Sanjay is situated by the side of road where the incident has taken place. The place of incident is hundred meters towards South from the house of Sanjay. He had no work to go to Budh Bazar on the day of occurrence. He was coming back looking after his farm and Suresh was also coming back from the house of Sanjay. He has admitted that he was a practicing Advocate at Tehsil Shahabad at the time of incident. He has further clarified that Suresh runs a book shop opposite to the post office at Mohalla Chowk. He has further admitted that the deceased and witness Kamal Kishore are son of his Bua. In cross-examination, he has further corroborated that injured Ram Kishore was taken to Government Hospital by Suresh, Ram Pramod and him and they reached at the hospital at about 03:00 p.m. He has further deposed that the Government Hospital is about one kilometer to the North from the place of occurrence. He has further deposed that doctors were not found in the Government Hospital, then they took the injured Ram Kishore to the clinic of Dr. Maya Prakash which is about one kilometer to the South-West from the Government Hospital. He has further deposed that they reached at the clinic of Dr. Maya Prakash at about 03:45 p.m. where the injured Ram Kishore has died. He has clarified in his cross-examination that the deceased was coming from North to South on a bicycle who had left the bicycle and ran towards the North when the second fire was opened by the appellant. He has also corroborated in his cross-examination that when the third fire was shot which too hit Ram Kishor, Ram Kishore had fell down on the platform in front of the house of Ram Shankar. He has further deposed that he had stated before the Investigating Officer that Ram Kishore was running looking behind, but he could not tell the reason as to why the Investigating Officer had not written this fact in his statement under Section 161 Cr.P.C. This omission is of minor nature and does not go to the root of the case, therefore, this omission will not affect the

prosecution case. He has denied the suggestion of the accused-appellant's counsel in his cross-examination that he was not present at the place of occurrence and had not seen any incident.

37. This witness has given vivid description of the incident and has also deposed that while he was returning from his field and from the house of sharecropper, Suresh met him on the way. This witness is shown as witness of panchayatnama. His statement is corroborated by the FIR and the post-mortem report. Although, this witness is related to the deceased, the law requires that statement of related witness cannot be discarded on the basis of relation, but can be scrutinized with great care and caution. After scrutinizing the deposition of PW-2 Ramji Tiwari, we find that it inspires confidence and is liable to be relied on and the trial court has according to law relied on his statement and held that PW-2 had seen the occurrence and was present at the place of occurrence at the time of incident.

38. PW-1 in cross-examination has corroborated that he, his brother Ram Pramod and Ram Kishore (deceased) were living together in the same house and there was no partition amongst them. He has further stated that he had come back to his house after lodging the FIR. He might have returned to his house after lodging the FIR to arrange for money for the treatment of his brother. He has further deposed that the copy of the report was given to him in the evening on the same day. At the time of sealing of dead body of the deceased, he was not asked by the police as to who had killed his brother Ram Kishore. He has not told the police at the time of inquest proceeding that his brother was killed by the appellant Amitabh Dixit. This witness has denied the suggestion of the accused-appellant's counsel that he was not present at the place of occurrence at the time of incident. He has also denied the suggestion that he had not received the chik report on the same day and also that he had not scribed the written Tahrir (Ex.Ka-1 and Ka-2) and the same was written on the dictation of the police. He has also explained the reason for going to the market to purchase clothes for marriage of his daughter along with his brother Ram Pramod and the deceased also came there at the shop. He has further clarified that the mustard seed was handed over to the machine holder one day before. He has further stated that he had gone to the market having a sum of Rs.1200/- with him and had purchased clothes for Rs.900/-. He has further clarified that he had purchased the clothes from the shop of Ram Kishan & Son's. Thereafter, he along with deceased Ram Kishore and his another brother Ram Pramod was returning to the house from the market. The deceased Ram Kishore was on a bicycle having a plastic container containing mustard oil and on the way the occurrence has taken place at 02:45 p.m. He has given the details of the incident in his statement and has also given the reasons as to why he was present at the place of occurrence which is unshaken in cross-examination. The statement of PW-1 Kamal Kishore is supported by the medical evidence and also by the forensic science report as well as ballistic report, therefore, his statement is reliable and the trial court has rightly relied on his statement. The deposition of PW-1 Kamal Kishore is corroborated by the deposition of PW-2 Ramji Tiwari. The Investigating Officer has proved that on 12.06.2003 the country made pistol of 315 bore along with two live cartridges were recovered at the pointing out of the appellant during police custody remand. The recovery is also proved by the independent witness PW-4 Chhedalal who has admitted his

signature on the recovery memo (Ex.Ka-23), which remained unshaken. Therefore, on the point of recovery the statement of PW-7 Inspector S.N. Singh is corroborated by the statement of witness PW-4 Chhedalal. PW-7 Inspector S.N. Singh has also proved the recovery of two empty cartridges from the place of occurrence on 25.05.2003 and empty cartridges and country made pistol of 315 bore along with two live cartridges were sent to Forensic Science Laboratory and in the ballistic report (Ex.Ka-27) dated 13.10.2003 it was found that the empty cartridges recovered from the place of occurrence were fired by the same pistol of 315 bore which was recovered at the pointing out of the appellant during police custody remand. Therefore, it is proved beyond reasonable doubt that the two empty cartridges were recovered from the place of occurrence and the country made pistol of 315 bore along with two live cartridges were recovered at the instance of the accused-appellant on 12.06.2003 at 8:10 a.m. and the recovered empty cartridges were fired by the appellant accused Amitabh Dixit. Therefore, the recovery of the pistol and two live cartridges during police custody remand confirms the disclosure statement of the accused under Section 27 of Evidence Act which is also confirmed by the report of Forensic Science Laboratory and Ballistic Expert as well. Therefore, in above circumstances, the prosecution case is proved beyond reasonable doubt and the trial court has rightly recorded the findings that the charges of offence punishable under Section 302 I.P.C. and 25 Arms Act are proved beyond reasonable doubt and has rightly held the accused-appellant guilty and convicted and sentenced him according to the law.

39. So far as the contention of learned counsel for the appellants regarding interested witnesses is concerned, the Apex Court in ***Gangadhar Behera and Others vs. State of Orissa***, *reported in (2002) 8 SCC 381* has held as under:

".....Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent ad credible."

In ***Dalip Singh and Ors. v. The State of Punjab****, (AIR 1953 SC 364), it has been laid down as under:*

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

The above decision has since been followed in ***Guli Chand and Ors. v.***

State of Rajasthan, *(1974 (3) SCC 698) in which* ***Vadivelu Thevar v. State of Madras,*** *(AIR 1957 SC 614) was also relied upon.*

We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in ***Dalip Singh's case (supra)*** *in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:*

*"We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in "****Rameshwar v. State of Rajasthan****' (AIR 1952 SC 54 at p.59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."*

Again in ***Masalti and Ors. v. State of U.P.,*** *(AIR 1965 SC 202) this Court observed: (p, 209-210 para 14):-*

"But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses.....The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct. (emphasis supplied)

[38]. Our social system is changing at a rapid pace. In the present social scenario, people refrain from going to police stations and courts due to fear of insult and harassment. Generally, people avoid to become a witness of an incident for the simple reason that deposing against the a culprit involved in a crime would endanger their life. In the present social setup, it is least possible that a third person deposes against the culprit."

40. The Apex Court in ***Sandu Saran Singh v. State of Uttar Pradesh and Others,*** *reported in (2016) 4 SCC 357* has held as under:

"29. .....In these days, civilized people are generally insensitive to come forward to give any statement in respect of any criminal offence. Unless it is inevitable, people normally keep away from the Court as they feel it distressing and stressful. Though this kind of human behaviour is indeed unfortunate, but it is a normal phenomena. We cannot ignore this handicap of the investigating agency in discharging their duty. We cannot derail the entire case on the mere ground of absence of independent witness as long as the evidence of the eyewitness, though interested, is trustworthy."

41. In the wake of aforesaid, the prosecution has proved its case beyond reasonable doubt against the accused-

appellant for offence punishable under Section 302 I.P.C. and Section 25 Arms Act. The learned trial court has rightly convicted and sentenced the appellant for the offences as mentioned above, according to law, which requires no interference.

42. Considering the overall facts and circumstances of the case, we are of the opinion that there is no illegality or perversity in the impugned common judgment of conviction and order of sentence dated 16.12.2004 passed by Additional District & Sessions Judge, Fast Track Court No.4, Hardoi in Sessions Trial No.673 of 2003 (State Vs. Amitabh Dixit), arising out of Case Crime No.209 of 2003, under Sections 302/307 I.P.C., Police Station- Shahabad, District- Hardoi, and Session Trial No. 674 of 2003 (State vs. Amitabh Dixit), arising out of Case Crime No. 266 of 2003, under Section 25 Arms Act, Police Station- Shahabad, District Hardoi, whereby the appellant was convicted for offence punishable under Section 302 I.P.C. and Section 25 Arms Act and was sentenced to undergo imprisonment for life along with fine of Rs.5000/- under Section 302 I.P.C. and further to undergo rigorous imprisonment for two years along with fine of Rs.500/- under Section 25 of Arms Act, in default of payment of fine, to undergo additional simple imprisonment for two years. Consequently, the impugned judgment of conviction and order of sentence dated 16.12.2004 passed by Additional District & Sessions Judge, Fast Track Court No.4, Hardoi is, hereby, upheld.

43. The instant criminal appeal is, accordingly, ***dismissed.***

44. Since the appellant Amitabh Dixit is on bail, his personal bonds are cancelled and the sureties are discharged. The trail court concerned shall cause him to be arrested and lodge in jail to serve out the remaining sentence awarded to him by the trial court.

45. Let certified copy of this judgment along with lower court record be transmitted to the trial court concerned immediately for information and necessary compliance.

(2023) 1 ILRA 622
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.12.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 3544 of 2012

Rakesh Kumar Pandey @ Daddu Pandey ...Appellant

Versus

State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Apul Misra, Sri A.N. Pandey, Sri D.M. Tripathi, Sri Lav Srivastava, Sri Prabha Shanker Mishra, Sri Tarun Pratap Singh, Sri Saghir Ahmad, Sri V.P. Srivastava (Sr. Adv.), Sri Manish Tiwari (Sr. Adv.)

Counsel for the Opposite Party:
G.A., Sri Sheshadri Trivedi, Sri Satish Trivedi, Sr. Adv.

A. Criminal Law – Indian Penal Code,1860 – Sections 302 – Murder – Appeal against conviction and Sentence – Related and interested witnesses – Reliability – Rajesh Yadav's case relied upon – A close relative cannot be characterised as an 'interested' witness. He is a 'natural' witness. His evidence, however, must be scrutinised carefully. If on such scrutiny, his evidence

is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the "sole" testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence – Held, The court below has accepted the prosecution case relying upon the testimony of PW-2 and PW-3 without subjecting it to careful scrutiny and analysis. The fact that PW-2 and PW-3 are chance and interested witnesses and their testimony leaves many unexplained aspects are left totally untouched – High Court disapproved the judgment of conviction. (Para 35 and 61)

Appeal allowed. (E-1)

List of Cases cited:-

1. Rajesh Yadav & anr. Vs St. of U.P., 2022 online SC 150

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. This appeal is directed against judgment and order passed by the Additional Sessions Judge (Ex-cadre), Court No.20, Allahabad, dated 31.7.2012, in Sessions Trial No.99 of 2006, arising out of Case Crime No.152 of 2005 under Section 302 IPC, Police Station Khuldabad, District Allahabad as well as in Sessions Trial No. 100 of 2006, arising out of Case Crime No.169 of 2005, under Section 3/25 of the Arms Act, Police Station Khuldabad, District Allahabad, convicting the accused appellant under Section 302 IPC read with Section 3/25 of the Arms Act and sentencing him to rigorous imprisonment for life and Rs.5,000/- fine under Section 302 IPC and on failure to deposit the fine to undergo additional rigorous imprisonment for a year; five years imprisonment under Section 3/25 of the Arms Act and Rs.2,000/- fine and on failure to deposit the fine to undergo additional imprisonment for six months. All punishments are to run concurrently.

2. First informant in the present case is one Sudhir Kumar Dwivedi (PW-1) who has lost his brother Suresh Kumar Dwivedi in the incident in question. Prosecution case is that the deceased was going on his motorcycle on 18.7.2005, at about 8.45 pm, from Rajrooppur to Beniganj in Allahabad. When he reached Chak Niratul Badi Maszid two persons fired on him due to which he died. The assailants fled towards Karbala. The incident is alleged to have been seen by Sushil Kumar Tripathi (PW-3), who happens to be the first cousin of the deceased and; Nagendra Kumar Dwivedi (PW-2), the nephew of the deceased; alongwith others and that they can recognize the assailants on seeing them, since there was sufficient light at the place of occurrence. On account of the incident members of public started running helter-skelter and an atmosphere of terror was created in the locality. The shutters of shops were pulled down and there was complete chaos.

3. The prosecution case further is that informant's other brother namely, Surendra Kumar Dwivedi was earlier killed on 14.5.2004. Accused Rakesh Kumar Pandey @ Daddu Pandey and Munna Pandey were accused of murdering him. The deceased Suresh Kumar Dwivedi was the informant in respect of murder of his brother Surendra Kumar Dwivedi. The bail application of accused Rakesh Kumar Pandey was allowed and he was enlarged on bail while that of Munna Pandey was rejected by the High Court. The deceased Suresh Kumar Dwivedi was to appear as the prosecution witness in that case and he has been eliminated so that he may not survive to support the prosecution case and accused

Munna Pandey be released on bail. The Court is further informed that the prosecution in the murder case of Surendra Kumar Dwivedi ended in acquittal of accused as the main witness, namely Suresh Kumar Dwivedi, could not depose and other witnesses turned hostile.

4. The informant's family was allegedly on inimical terms with Awadh Narain Pandey and his two sons Rakesh Kumar Pandey @ Daddu Pandey i.e. accused appellant and Munna Pandey. This enmity is the alleged reason for commissioning of crime in this case.

5. The two eye-witnesses, who have come forward to support the prosecution version namely PW-2 and PW-3, are close relatives and the primary issue to be examined in this appeal is the credibility and reliability of these eye-witnesses. PW-1 is the first informant, who got the written report in respect of the above incident scribed from PW-3, on the basis of which the first information report was lodged and registered as Case Crime No. 152 of 2005, under Section 302 IPC. Two unknown persons were shown as accused in the FIR.

6. Pursuant to the FIR registered in this case the Investigating Officer collected bloodstained and plain earth from the place of occurrence vide Ex. Ka-4. The motorcycle of deceased was also recovered and was given in custody of the first informant. The inquest proceedings commenced at 6.30 am and ultimately concluded at 8.00 am on 19.7.2005. The delay apparently was explained stating that sufficient light was not available at the place of occurrence.

7. Various injuries were noticed on the deceased in the inquest and the inquest witnesses opined that the deceased had died on account of gunshot injuries sustained by him. The body was sealed and sent for postmortem. The postmortem has been conducted on 19.7.2005 and following ante-mortem injuries have been found on the body of the deceased:-

"1. Firearm wound of entry 5cm x 3cm in front of right ear adjacent to labula. Blackening and tattooing present. Depth of wound brain cavity deep. Blood present in brain cavity. Right temporo-parital and left temporal base fracture. Four piece of pallet and wedding piece recovered from brain cavity direction to wound front to backward region obliquely left side. Right mandible fracture.

2. Firearm wound of entry 2cm x 2cm thoracic region deep on the right side of the chest 5cm below the mid point of right clavicle. Blackening and tattooing present directed from front to back slightly oblique. Bullet recovery from heart.

3. Abraded contusion 6cm x 4cm on the left shoulder."

8. The two eye-witnesses to the incident, namely PW-2 and PW-3, did not know the assailants from before, although it was claimed that they could recognize the assailants. PW-2 claims that he visited a relative at Village Imli and there he saw one of the two assailants, namely the accused appellant. On enquiry the assailant was identified as Rakesh Kumar Pandey i.e. the accused appellant. PW-2 claims to have returned and informed the Investigating Officer about the identity of one of the accused who had fired at the deceased. On the basis of aforesaid disclosure made by PW-2, with regard to identity of assailant, the police arrested the

accused appellant on 2.8.2005. From his possession a .315 bore Tamancha was recovered and accused confessed that this is the same firearm with which he shot the deceased. Recovery of country-made pistol, live cartridges and memo of arrest of accused was consequently prepared vide memo of recovery marked as Ex. Ka-16. A first information report was also lodged under Section 3/25 of the Arms Act being Case Crime No.169 of 2005.

9. The investigation proceeded and ultimately two chargesheets came to be filed before the concerned magistrate in Case Crime No. 152 of 2006 on 26.8.2005 and in Case Crime No.169 of 2005 on 29.10.2005 (Ex. Ka-18 and Ex. Ka-15 respectively). The District Magistrate also sanctioned prosecution under Section 39 of the Arms Act vide his order dated 18.8.2005. Session Trial No. 99 of 2006 was registered in respect of Crime No.152 of 2005, under Section 302 IPC and Sessions Trial No. 100 of 2006 was registered in respect of Case Crime No. 169 of 2005, under Section 3/25 of the Arms Act. The charges were read out to the accused on 22.3.2006, who denied the charges and demanded trial.

10. The prosecution in order to establish the guilt of the accused adduced documentary evidence in the form of written report (Ex.Ka-1), FIR dated 18.7.2005 (Ex.Ka-20), FIR dated 3.8.2005 (Ex.Ka-22), postmortem report (Ex.Ka-2), site plan with index dated 19.7.2005 (Ex.Ka-3), recovery memo of country-made pistol, live cartridges and memo of arrest (Ex.Ka-16), recovery memo of blood stained and plain earth (Ex.Ka-4), recovery memo of Chappal (Ex.Ka-5), recovery memo & supurdaginama of motorcycle (Ex.Ka-6), Panchayatnama (Ex.Ka-7), chargesheet dated 26.8.2005 (Ex.Ka-18), chargesheet dated 29.10.2005 (Ex.Ka-15), order of District Magistrate (Ex.Ka-19), site plan with index dated 29.10.2005 (Ex. Ka-14) and site plan with index dated 4.8.2005 (Ex.Ka-17).

11. Prosecution has also adduced oral evidence of Sudhir Kumar Dwivedi (first informant) (PW-1), Nagendra Kumar Dwivedi (PW-2) and Sushil Kumar Tripathi (PW-3). Dr. A.P. Tripathi, who had conducted the autopsy, has been produced as PW-4. Mahmood Alam (PW-5), Krishna Kant Tiwari (PW-6), Praduman Kumar Singh (PW-7), Mahabali (PW-8), Shavimuddin (PW-9), Rajaram (PW-10) and Dhanush Dhari Pandey (PW-11) are formal witnesses.

12. PW-1 has supported the prosecution case and has stated that the deceased was coming from Rajrooppur to Beniganj by a motorcycle and was followed by two assailants, who shot him dead. The accused fled towards Karbala. PW-1 and PW-2 alongwith others have seen the incident in the street light and the assailants can be identified by them. He has implicated the appellant on the ground that deceased was a witness in the trial in the murder case of his brother Surendra Kumar Dwivedi and the deceased allegedly has been done to death so that the accused Munna Pandey could be enlarged on bail. In the cross-examination PW-1 has stated that there was a dispute relating to land between father of the accused appellant and the informant.

13. The witness PW-1 has also denied the suggestion that on account of enmity the accused appellant has been falsely implicated. PW-1 in the cross-examination has stated that he reached the place of

occurrence at 9.00 pm and only 10 minutes thereafter the Investigating Officer arrived. When the Investigating Officer arrived PW-3 also came to the place of occurrence. On the enquiry by Investigating Officer PW-3 informed that he is literate person and on the asking of PW-1 the FIR was scribed by PW-3.

14. PW-2 has also supported the prosecution case. He has stated that the deceased was coming from Beniganj to Rajrooppur. His motorcycle was got stopped by two persons. PW-2 and PW-3 claims to have been present and seen the incident. Initially the two assailants talked to deceased, which turned into a hot talk and abuses were hurled on deceased, whereafter the assailants fired one gunshot each at the deceased. PW-2, however, claims that he was not aware of the identity of the accused. PW-2 has recognized and identified the accused appellant, in the Dock, as being one of the two assailants, who fired on the deceased. PW-2 has claimed that by the time he reached the deceased, he had already died. Leaving the dead body at the place of occurrence PW-2 left for Beniganj and informed PW-1 of the incident. PW-1 and PW-3 thereafter came on the spot. PW-2, however, remained at Beniganj.

15. On the next day PW-2 left for his village and informed the family members about the incident. After 2-3 days he visited Village Imli where he saw the accused appellant. On inquiry from the villagers he could ascertain the identity of the accused appellant. In the cross-examination he, however, admitted that he had not informed the Investigating Officer that he was coming from Rajrooppur or that he had gone to meet the deceased at Rajrooppur. No reasons for meeting the deceased was disclosed either.

16. The deceased was although the uncle of PW-2, yet he did not return to enquire about the condition of the deceased. He further admitted that his statement was not recorded on the day of incident or the day thereafter, as he had gone to his native village and thereafter to Village Imli and only thereafter his statement was recorded under Section 161 Cr.P.C. He claims that he did not know the accused from before and was also not aware as to whether the identification of other accused was undertaken in jail or not. He, however, admitted later that he visited the jail for identification of Rajesh Kumar Mishra but he was not identified as one of the assailants.

17. PW-3 has stated in his sworn testimony that he was at a distance of about 10-15 paces when he heard the gunshot injury and by the time he reached the spot the accused had fled on their motorcycle. PW-3 claims to have accompanied PW-2 for going to Rajrooppur from Beniganj. PW-3, unlike PW-2, claims to have signalled the deceased to stop when they crossed each other, but the deceased had moved ahead. By the time he returned to the deceased he found that the two assailants were abusing the deceased and shot him dead. By the time PW-3 reached the place of occurrence, the deceased had already died and the accused had fled.

18. PW-3 has also identified the accused appellant in the dock as being the accused who fired at the deceased. PW-3 has, however, identified a different place as being the place of occurrence from the one informed by PW-2. As per PW-3 the place of occurrence was at G.T. Road, whereas the place of occurrence as per the prosecution is on Rajrooppur-Beniganj Road. The two eye-witnesses are therefore not consistent with each other in their

testimony with regard to the place of incident. There is a distance of nearly 600 metres between the locations identified by them.

19. PW-3 claims that he had gone to meet the deceased but he left for Rajrooppur after getting to know that deceased had left for Rajrooppur. This disclosure, however, was not made to the police under Section 161 Cr.P.C. This witness has denied the suggestion that he has not seen the incident and that the incident had already occurred by when he reached the place of occurrence.

20. The doctor and other formal witnesses have also supported the prosecution case. The incriminating material collected against the accused has been put to him under Section 313 Cr.P.C. The accused has stated that though he was an accused in the murder of Surendra Kumar Dwivedi but he was falsely implicated and the proceedings have resulted in his acquittal. About the FIR he claims that its registration was after consultation with police. He has also denied the recovery of firearm from him and has alleged that he was arrested from his house. He specifically asserted that due to enmity he has been falsely implicated in the matter.

21. Trial court on the basis of evidence led by the prosecution during trial has found the charges to be proved against the accused under Section 302 IPC and Section 3/25 of the Arms Act. Life sentence under Section 302 IPC alongwith lesser sentence under the Arms Act and fine etc. has been awarded to the accused appellant. Thus aggrieved, the accused appellant is before this Court.

22. Sri Manish Tiwari, learned Senior Counsel assisted by Sri D.M. Tripathi for the appellant submits that the accused appellant has been falsely implicated in the present case on account of old enmity, and that the two eye-witnesses are not trustworthy. Various contradictions in the statement of witnesses have been pointed out in order to allege that the witnesses are not reliable. He further submitted that the conduct of witnesses in leaving the dead body at the place of occurrence; not taking the deceased to the hospital for medical aid; not being a witness of inquest proceedings etc. clearly go to show that the alleged eye-witnesses were actually not present at the spot when the incident occurred. Argument is that this is a case of blind murder on account of involvement of deceased in property dealing and merely because there was an old enmity with the accused appellant, therefore, he has been falsely implicated in the matter.

23. Sri Tiwari also argued that there was no source of light available at the place of occurrence for the assailants to have been recognized. He further submitted that though various shops etc. were in existence in the vicinity but no independent witness has come forward to testify and merely on the strength of suspicion, due to old enmity, the accused appellant has been implicated. Submission is that the judgment of conviction and sentence is contrary to the weight of evidence and material available on record.

24. Per contra, learned AGA and Sri Satish Trivedi, learned Senior Counsel assisted by Mr. Sheshadri Trivedi for the informant submits that this is a case of murder of an eye-witness only to ensure that the deceased may not testify against Munna Pandey, so that he may be enlarged on bail. He further submits that there was sufficient light on the spot. It is also urged

that eye-witnesses account is wholly natural and believable and the judgment of conviction and sentence is well reasoned and requires no interference.

25. In the facts of this case we are therefore required to examine whether the incident occurred in the manner stated by the prosecution; the two eye-witnesses PW-2 and PW-3 are reliable and trustworthy; whether there was sufficient light on the spot in which the assailants could be recognized; the conduct of witnesses are natural and inspiring and whether the court below has rightly returned the finding of guilt against the accused and the sentence is just, fair and proper?

26. We have carefully examined the testimony of the two eye-witnesses PW-2 and PW-3. As per prosecution the incident occurred when the deceased was going on a motorcycle from Rajrooppur to Beniganj. He was all alone on his bike. The two accused allegedly stopped the deceased; hurled abuses at him and fired one shot each causing his death. The place of incident is Rajrooppur-Beniganj Road near Chak Niratul Badi Maszid falling within the limits of Khuldabad Police Station. The time of incident is around 8.45 pm on 18th July, 2005.

27. The site plan is on record. The road coming from Rajroopur joins the old G.T. Road. There is a narrower road originating from this road joining G.T. Road, through Karbala, a little further towards east on G.T. Road. On one side of this road is Chakia locality having cluster of houses and shops of Raj Kumar, Satish Kumar, Pappu Verma and Santosh etc., while on the other side of the road is Mohalla Chak Niratul followed with a lane whereafter is the house of Shyam Carpenter and house of Farrukh followed with the mosque of Chak Niratul. The place is surrounded by small shops and houses of various persons and is just in front of the mosque. It transpires that there are shops and houses of various persons around the place of incident and thus existence of public around the place of occurrence is natural and probable. However, none has been produced by the prosecution from the nearby shops or houses nor any endeavour is made to enquire from the local residents about the manner in which the incident occurred.

28. The prosecution has placed reliance upon the three witnesses of fact, namely PW-1, PW-2 and PW-3. So far as PW-1 is concerned, he is not an eye-witness to the incident. His testimony is based upon the disclosure of facts made to him by PW-2 and PW-3. His personal knowledge is limited to the aspect of enmity between the parties i.e. the accused family and the informant family. PW-1 came to the police station to lodge the report. PW-3 is the scribe of the written report (Ex.Ka-1). PW-1 has verified the contents of the written report. In his cross-examination PW-1 has stated that he arrived at the place of occurrence at 9.00 pm and the Investigating Officer came ten minutes thereafter. When the Investigating Officer arrived, at about the same time PW-3 also came.

29. PW-2 is the first eye witness produced by the prosecution. He is 19 years of age and is a resident of Pure Bunapurwa, Police Station Sarai Akil, District Allahabad and is a student. He claims that it was around 9.00 or quarter to 9.00 when he was coming alongwith PW-3 from Beniganj to Rajrooppur. The deceased was coming from the opposite direction i.e.

Beniganj to Rajrooppur when the two assailants stopped him a little ahead of the mosque. PW-2 is the nephew of the deceased and claims to have seen the incident.

30. The purpose of visit of PW-2 is not disclosed. This witness has not disclosed his place of residence in Allahabad nor any specific reason is disclosed for having gone to meet the deceased or returning from Rajrooppur to meet him. It is not even alleged that this was his daily route. His presence at the spot in connection with any specific purpose is also not established. In his statement under Section 161 Cr.P.C. PW-2 has not claimed that he was going to meet the deceased. No reason for meeting the deceased is disclosed either. Thus, from the testimony of PW-2 it can safely be deduced that he is a chance witness.

31. Before proceeding with the matter any further it would be worth examining the circumstances relating to the presence of PW-3 at the place of occurrence, at this juncture. PW-3 is a resident of Karela Bagh Colony and is aged about 48 years. He is doing some job. He claims that he was going alongwith PW-2 from Beniganj to Rajrooppur. The deceased was the son of his father's sister (Bua) and thus PW-3 was the first cousin of the deceased. He has, however, disclosed the place of occurrence to be on the G.T. Road, contrary to the prosecution case of incident occurring on Rajrooppur-Beniganj Road. He too claims that he had gone to meet the deceased at Beniganj where he came to know that he had gone to Rajrooppur and so PW-3 was also going to Rajrooppur. PW-3 also had not disclosed this fact to the Investigating Officer in his statement under Section 161 Cr.P.C. nor even the purpose of his visit was disclosed to the Investigating Officer. This witness too is thus a chance witness.

32. There is yet another aspect, which has to be borne in mind before evaluating the testimony of PW-2 and PW-3. Both PW-2 and PW-3 are related to the deceased being his nephew and cousin. There is an admitted old enmity between the deceased and the accused. Enmity can be the cause for committing the offence and can also be the cause for false implication.

33. The two witnesses nevertheless are related to the deceased and apparently would be interested in conviction of the accused. They would thus fall in the category of interested witnesses. The Court, therefore, has to be careful in evaluating their testimony upon whom the prosecution case rests.

34. Law with regard to chance witness and interested witness has been summed up, recently, by the Supreme Court in Rajesh Yadav and another Vs. State of U.P., 2022 online SC 150. In paragraph 26 and 27 of the judgment the Court has observed as under:-

"26. A chance witness is the one who happens to be at the place of occurrence of an offence by chance, and therefore, not as a matter of course. In other words, he is not expected to be in the said place. A person walking on a street witnessing the commission of an offence can be a chance witness. Merely because a witness happens to see an occurrence by chance, his testimony cannot be eschewed though a little more scrutiny may be required at times. This again is an aspect which is to be looked into in a given case by the court. We do not wish to reiterate the aforesaid position of law which has

been clearly laid down by this Court in State of A.P. v. K. Srinivasulu Reddy, (2003) 12 SCC 660:

"12. Criticism was levelled against the evidence of PWs 4 and 9 who are independent witnesses by labelling them as chance witnesses. The criticism about PWs 4 and 9 being chance witnesses is also without any foundation. They have clearly explained as to how they happened to be at the spot of occurrence and the trial court and the High Court have accepted the same.

13. Coming to the plea of the accused that PWs 4 and 9 were "chance witnesses" who have not explained how they happened to be at the alleged place of occurrence, it has to be noted that the said witnesses were independent witnesses. There was not even a suggestion to the witnesses that they had any animosity towards any of the accused. In a murder trial by describing the independent witnesses as "chance witnesses" it cannot be implied thereby that their evidence is suspicious and their presence at the scene doubtful. Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere "chance witnesses". The expression "chance witness" is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter explaining their presence."

27. The principle was reiterated by this court in Jarnail Singh v. State of Punjab, (2009) 9 SCC 719:

"21. In Sachchey Lal Tiwari v. State of U.P. [(2004) 11 SCC 410: 2004 Supp SCC (Cri) 105] this Court while considering the evidentiary value of the chance witness in a case of murder which had taken place in a street and a passerby had deposed that he had witnessed the incident, observed as under:

If the offence is committed in a street only a passerby will be the witness. His evidence cannot be brushed aside lightly or viewed with suspicion on the ground that he was a mere chance witness. However, there must be an explanation for his presence there.

The Court further explained that the expression "chance witness" is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country like India where people are less formal and more casual, at any rate in the matter of explaining their presence.

22. The evidence of a chance witness requires a very cautious and close scrutiny and a chance witness must adequately explain his presence at the place of occurrence (Satbir v. Surat Singh [(1997) 4 SCC 192 : 1997 SCC (Cri) 538], Harjinder Singh v. State of Punjab [(2004) 11 SCC 253 : 2004 Supp SCC (Cri) 28], Acharaparambath Pradeepan v. State of Kerala [(2006) 13 SCC 643 : (2008) 1 SCC (Cri) 241] and Sarvesh Narain Shukla v. Daroga Singh [(2007) 13 SCC 360 : (2009) 1 SCC (Cri) 188]). Deposition of a chance

witness whose presence at the place of incident remains doubtful should be discarded (vide Shankarlal v. State of Rajasthan [(2004) 10 SCC 632 : 2005 SCC (Cri) 579]).

23. Conduct of the chance witness, subsequent to the incident may also be taken into consideration particularly as to whether he has informed anyone else in the village about the incident (vide Thangaiya v. State of T.N. [(2005) 9 SCC 650 : 2005 SCC (Cri) 1284]). Gurcharan Singh (PW 18) met the informant Darshan Singh (PW 4) before lodging the FIR and the fact of conspiracy was not disclosed by Gurcharan Singh (PW 18) and Darshan Singh (PW 4). The fact of conspiracy has not been mentioned in the FIR. Hakam Singh, the other witness on this issue has not been examined by the prosecution. Thus, the High Court was justified in discarding the part of the prosecution case relating to conspiracy. However, in the fact situation of the present case, acquittal of the said two co-accused has no bearing, so far as the present appeal is concerned.""

35. The Court has also dilated upon the distinction between the related and interested witness in paragraph 28 and 29 of the report, which is reproduced hereinafter for the better understanding of the issue:-

"28. A related witness cannot be termed as an interested witness per se. One has to see the place of occurrence along with other circumstances. A related witness can also be a natural witness. If an offence is committed within the precincts of the deceased, the presence of his family members cannot be ruled out, as they assume the position of natural witnesses. When their evidence is clear, cogent and withstood the rigor of cross examination, it becomes sterling, not requiring further corroboration. A related witness would become an interested witness, only when he is desirous of implicating the accused in rendering a conviction, on purpose.

29. When the court is convinced with the quality of the evidence produced, notwithstanding the classification as quoted above, it becomes the best evidence. Such testimony being natural, adding to the degree of probability, the court has to make reliance upon it in proving a fact. The aforesaid position of law has been well laid down in Bhaskarrao v. State of Maharashtra, (2018) 6 SCC 591:

"32. Coming back to the appreciation of the evidence at hand, at the outset, our attention is drawn to the fact that the witnesses were interrelated, and this Court should be cautious in accepting their statements. It would be beneficial to recapitulate the law concerning the appreciation of evidence of related witness. In Dalip Singh v. State of Punjab, 1954 SCR 145 : AIR 1953 SC 364 : 1953 Cri LJ 1465], Vivian Bose, J. for the Bench observed the law as under : (AIR p. 366, para 26)

"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along

with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

33. In Masalti v. State of U.P., (1964) 8 SCR 133 : AIR 1965 SC 202 : (1965) 1 Cri LJ 226], a five-Judge Bench of this Court has categorically observed as under : (AIR pp. 209-210, para 14)

"14. ... There is no doubt that when a criminal court has to appreciate evidence given by witnesses who are partisan or interested, it has to be very careful in weighing such evidence. Whether or not there are discrepancies in the evidence; whether or not the evidence strikes the court as genuine; whether or not the story disclosed by the evidence is probable, are all matters which must be taken into account. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, criminal courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard-and-fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

34. In Darya Singh v. State of Punjab [(1964) 3 SCR 397 : AIR 1965 SC 328 : (1965) 1 Cri LJ 350], this Court held that evidence of an eyewitness who is a near relative of the victim, should be closely scrutinised but no corroboration is necessary for acceptance of his evidence. In Harbans Kaur v. State of Haryana [(2005) 9 SCC 195 : 2005 SCC (Cri) 1213 : 2005 Cri LJ 2199], this Court observed that : (SCC p. 227, para 6)

"6. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused."

35. The last case we need to concern ourselves is Namdeo v. State of Maharashtra [(2007) 14 SCC 150 : (2009) 1 SCC (Cri) 773], wherein this Court after observing previous precedents has summarised the law in the following manner : : (SCC p. 164, para 38)

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

to spare the real culprit and falsely implicate an innocent one."

36. From the study of the aforesaid precedents of this Court, we may note that whoever has been a witness before the court of law, having a strong interest in result, if allowed to be weighed in the same scales with those who do not have any interest in the result, would be to open the doors of the court for perverted truth. This sound rule which remains the bulwark of this system, and which determines the value of evidence derived from such sources, needs to be cautiously and carefully observed and enforced. There is no dispute about the fact that the interest of the witness must affect his testimony is a universal truth. Moreover, under the influence of bias, a man may not be in a position to judge correctly, even if they earnestly desire to do so. Similarly, he may not be in a position to provide evidence in an impartial manner, when it involves his interest. Under such influences, man will, even though not consciously, suppress some facts, soften or modify others, and provide favourable colour. These are most controlling considerations in respect to the credibility of human testimony, and should never be overlooked in applying the rules of evidence and determining its weight in the scale of truth under the facts and circumstances of each case.""

36. In the context of the above law we are required to carefully scrutinize the testimony of two interested chance witnesses in order to determine their credibility and reliability for ascertaining whether the prosecution has established its case beyond reasonable doubt.

37. PW-2 claims that while deceased was returning from Rajrooppur to Beniganj two persons stopped him a little ahead after the mosque. They talked initially and then abused the deceased and shot two fires causing the death of deceased. He claims that he was at a distance of 10-15 paces when he heard the gunshot. Hearing the gunshot the witness stopped and the assailants fled towards Karbala on their motorbike, by the time the witnesses reached the place of occurrence.

38. This witness further stated that he was going towards west to south having come from the east and the road where the incident occurred was going from the east to west.

39. We have seen the site plan in which the road where incident occurred is running from north to south with Rajrooppur shown on the south in the site plan. The deceased was thus coming from the south and going towards north while PW-2 was heading in the opposite direction towards west and south. The direction of deceased was thus towards north while that of PW-2 towards south. PW-2 also was on motorbike as was the deceased and the assailants.

40. The statement of PW-2 shows that deceased and PW-2 were both on the motorbike and were travelling in opposite directions. Though PW-2 states that he was present at the spot but it is not clarified by him as to whether he had crossed the deceased who was coming from the other direction or not?

41. PW-2 has, however, admitted that he heard the gunshots from a distance of 10-15 paces and by the time he came near the deceased the assailants had already fled towards Karbala.

42. The direction of PW-2 and deceased being opposite two eventualities

are possible. Either he had crossed the deceased or he was yet to cross him. If he had crossed the deceased then the witness PW-2 was facing towards south after crossing the deceased while deceased was moving northwards. The incident in that scenario must have occurred on the back of the witness at 10-15 paces and it is difficult to believe that PW-2 would have seen the incident.

43. If we take the alternative scenario then PW-2 was yet to cross the deceased. The deceased was at a distance of 10-15 paces from PW-2 and it is difficult to imagine as to how PW-2 could see the deceased being stopped by the assailants; followed with their talks and hurling of abuses and lastly the firing. The direction of the assailants in that event would be towards the north and their back would be towards PW-2. The assailants eventually fled towards further north on the Karbala Road. The possibility of PW-2 having recognized the assailants in that event would be remote and doubtful.

44. In the either of the two eventualities it is difficult to accept that PW-2 saw the incident. It is also to be kept in mind that this was a night incident and no street light is shown to exist in the site plan. Even if we accept the argument of Mr. Trivedi that light was available in the adjoining shop, yet, we are doubtful whether it was sufficient for the witness to have clearly recognized the accused from the motorbike at a distance of 10-15 paces. The prosecution case, in such circumstances, is rendered doubtful.

45. The testimony of PW-2 is a little amusing from a different aspect also. PW-2 states that he did not know the accused from before. Upon seeing the incident he came straight to PW-1 and informed him about the incident. He did not return to the place of occurrence to ascertain whether his uncle (deceased) was dead or alive or any report was lodged. His statement was not recorded on that day or even on the next date. He (PW-2) claims to have left for his village and on the fifth day he left for Village Imli. Village Imli incidentally is the village where the accused appellant admittedly lived. In his cross-examination this witness has stated that at Village Imli he enquired about the accused. In reply to a specific query PW-2 admitted that after death of deceased he remained engaged in identifying the accused Daddu Pandey. This clearly shows that PW-2 had already decided that the assailant was accused Daddu Pandey and the purpose of visit to village Imli was only to confirm his identity.

46. PW-2 visited village Imli where the accused Daddu Pandey lived and was informed by a villager about the identity of the accused Daddu Pandey. Name of such villager, however, is not disclosed. The manner in which identity of accused appellant Daddu Pandey is established, as per prosecution, contains too many coincidents and raises a doubt on the prosecution version.

47. Interestingly, statement of PW-2 was recorded by the Investigating Officer only on 23.7.2005 i.e. on the fifth day of the incident, by when he had recognized and identified the accused appellant. The manner in which PW-2 has identified the accused appellant remains questionable.

48. Another accused Rajesh Kumar Mishra was also arrested and test identification parade was conducted on him but PW-2 failed to recognize him.

49. The circumstances and peculiar manner in which PW-2 travelled to Village Imli to identify the accused appellant assumes significance in the background of strong enmity existing between the deceased and the accused.

50. The cross-examination of PW-2 was concluded on 13.7.2007. PW-3 was introduced in evidence thereafter on 25.7.2007. Although PW-3 and PW-2 were together on the motorbike but the version of PW-3 is distinct from that of PW-2. PW-3 has stated that he was going with PW-2 towards Rajrooppur and saw the deceased near the Maszid and signalled him to stop. PW-3 and PW-2, however, went a little ahead and returned towards the deceased and saw the assailants abusing the deceased and firing at him. By the time PW-3 reached the deceased he had already died and the assailants had fled.

51. PW-3 in his cross-examination has stated that the incident occurred on the road from his residence to Rajrooppur on G.T. Road which is at variance with the place of incident disclosed by the prosecution in the site plan. An issue is thus raised with regard to the place of occurrence as per the testimony of two eye witnesses, adding to the doubt on the prosecution case. This witness has also admitted that he had not disclosed the Investigating Officer about the purpose of his visit to meet the deceased or that he came to know at Beniganj that deceased had left for Rajrooppur.

52. In his cross-examination PW-3 admitted that the road on which the incident occurred goes from north to south and he was going towards the south. He too has stated that he heard the gunshot from a distance of 10-15 paces.

53. This witness has been confronted with his previous statement under Section 161 Cr.P.C. wherein he had not disclosed the fact that he had signalled the deceased to stop or that he returned towards the deceased and then saw the incident. His statement under Section 161 Cr.P.C. was also recorded belatedly on 27.7.2005 i.e. almost after 09 days of the incident for which no explanation is furnished.

54. PW-5, the Investigating Officer has deposed that neither PW-2 nor PW-3 had informed him that they were going to meet the deceased or that on reaching Beniganj they came to know that deceased had gone to Rajrooppur. He also stated that PW-3 never informed him that he signalled the deceased to stop or that they had moved ahead and on return saw the incident of firing. He also admitted that electricity poll was not shown in the site plan at the place of occurrence.

55. As per prosecution case both the eye witnesses, namely PW-2 and PW-3 were together on a bike. They have seen the occurrence together as per the prosecution. It would thus be expected that they would be consistent on the factual assertions regarding the manner in which they saw the incident.

56. We have already noticed that PW-2 in his statement had not explained the manner in which he saw the incident. It was not clarified as to whether he had crossed the deceased or not and we have already expressed our doubt about the incident being witnessed by PW-2 for such reason. The statement of PW-3 that he signalled the deceased to stop and on return seeing the incident is clearly an improvement in the statement of PW-3 over what was stated by PW-2. Such a disclosure was otherwise not

made to the Investigating Officer while recording the statement of PW-3 under Section 161 Cr.P.C. This inconsistency in the testimony of PW-3 vis-a-vis PW-2 creates a serious doubt not only upon their presence at the place of occurrence but also on their seeing the incident.

57. We also find substance in the argument of Sri Manish Tiwari, learned Senior Advocate that the conduct of PW-2 and PW-3 in not stopping near the injured, making no efforts to take him to a hospital or provide medical help or failing to be present at the time of inquest etc. and delayed recording of their statement are factors contributing to the doubt in the prosecution case.

58. The argument of Sri Satish Trivedi, learned Senior Advocate that not naming the accused in the FIR discloses the fairness of prosecution although seems attractive at the outset but that itself may not be determinative of credibility of the prosecution case. The prosecution witnesses fall in the category of chance and interested witness and their testimony will have to be shown to be entirely reliable before their testimony could be relied upon. Upon careful evaluation of the testimony of PW-2 and PW-3 we find that doubt remains regarding their presence at the place of occurrence as also the manner in which they allegedly saw the incident.

59. Enmity otherwise is admitted between the parties, which acts as a double edged sword and cuts both ways. It can be a cause for committing the offence and can also be a cause for false implication. In a matter of this kind the Court will otherwise have to be careful and cautious in analyzing the evidence to determine whether the witnesses are wholly reliable, wholly unreliable or partially reliable and partially unreliable.

60. As observed earlier, PW-2 and PW-3 are chance and interested witnesses and a careful evaluation of their statements shows material contradictions in their testimony which largely remains unexplained. Their presence on the place of occurrence or the manner in which they saw the incident remains doubtful. Their conduct is also not natural. Difference in their version while being together remains unexplained. The subsequent improvement in the statement of PW-3 over and above the version of PW-2, seeking to explain the lacunae in the oral testimony of PW-2, generates sufficient doubt upon the prosecution case so as to render it unfit for reliance. Once that be so, we are not inclined to examine other aspects raised by the defence including the non-holding of test identification parade of accused appellant to determine his identity and the judgments cited at the bar on such aspect. We find that even bereft of the T.I.P. issue the testimony of prosecution witnesses is not found credible and reliable.

61. The trial court after noticing the facts and evidence brought on record has analyzed the evidence in paragraph 38 to 48 of the judgment, which has been carefully examined by us. The court below has accepted the prosecution case relying upon the testimony of PW-2 and PW-3 without subjecting it to careful scrutiny and analysis. The fact that PW-2 and PW-3 are chance and interested witnesses and their testimony leaves many unexplained aspects are left totally untouched. We, therefore, do not approve the judgment of conviction and sentence for the reasons contained in our judgment.

62. For the discussions and deliberations held above, we find that the

prosecution has failed to establish the guilt of accused appellant beyond all reasonable doubts. The appellant who has already undergone more than twelve years of actual incarceration is entitled to the benefit of doubt in the matter.

63. Consequently, the present appeal succeeds and is allowed. The judgment and order dated 31.7.2012, passed by the Additional Sessions Judge (Ex-cadre), Court No.20, Allahabad, dated 31.07.2012, in Sessions Trial No.99 of 2006, arising out of Case Crime No.152 of 2005 under Section 302 IPC, Police Station Khuldabad, District Allahabad and in Sessions Trial No. 100 of 2006, arising out of Case Crime No.169 of 2005, under Section 3/25 of the Arms Act, Police Station Khuldabad, District Allahabad, is set aside. Since the accused appellant is in jail, he shall be set at liberty, forthwith, unless he is wanted in any other case, subject to compliance of Section 437-A Cr.P.C.

(2023) 1 ILRA 637
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.01.2023

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 6107 of 2018

Smt. Geeta Rakesh ...Appellant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Appellant:
Sri Raj Kumar Mishra, Sri Aditya Gupta, Sri Ashish Malhotra, Sri R.B. Singh, Sri G.S. Chaturvedi(Senior Advocate), Ms. Saumya Chaturvedi

Counsel for the Opp. Party:
G.A., Imran Ullah, Sri Faiz Ahmad, Sri Yashdeep Rastogi, Ms. Nandita Bharti

A. Criminal Law – Indian Penal Code 1860 – Sections 120-B, 188, 363, 370(3), 370(5) & 370(7) – Immoral Traffic (Prevention) Act, 1956 – Section 9 – UP Immoral Traffic (Prevention) Rules, 1993 – Rule 38 – Prevention of Children from Sexual Offence Act, 2012 – Sections 16 & 17 – Indian Evidence Act, 1972 – S. 65-B(4) – Appeal against conviction and Sentence – Sustainability – Allegation of releasing 43 inmates alongwith their children was leveled against the Superintendent – Detention period of one year was to expire on 20.05.2017 – F.I.R. was lodged on the report of Deputy Chief Probation Officer saying that detention period was extended by order dated 18.05.2017, which was not complied with – Defense of lack of knowledge and no service of order dated 18.05.2017 was contended – Relevance – Held, the prosecution has failed to establish that the order dated 18.5.2017 was served upon the accused appellant or was received in the office of Superintendent, Government Women Protection Home, Agra prior to 24.5.2017 by when the inmates had been released – The 43 inmates were released alongwith their eight children. The released inmates were natural guardian of these eight minor children – Release of inmates upon expiry of the detainment period would not amount to any offence as per the provisions of the Act of 1956. (Para 54, 60, 61, 70 and 71)

Appeal allowed .(E-1)

(Delivered by Hon'ble Ashwani Kumar Mishra, J. & Hon'ble Shiv Shanker Prasad, J.)

1. Heard Sri G.S. Chaturvedi, learned Senior Advocate assisted by Sri Aditya Gupta as well as Ms. Saumya Chaturvedi for the appellant; Km. Meena, learned AGA for the State and Sri Faiz Ahmad and Sri Yashdeep Rastogi holding brief of Sri

Imran Ullah on behalf of PW-2 and perused the records of the present criminal appeal.

2. This criminal appeal is directed against the judgment and order dated 6.10.2018, passed by the Special Judge (POCSO Act)/VIII Additional Sessions Judge, Agra in Special Trial No. 1848 of 2017 arising out of Case Crime No. 455 of 2017, under Sections 370(3), 370(5), 370(7), 363, 188, 120B IPC; 9 Immoral Traffic (Prevention) Act and Section 16/17 POCSO Act, Police Station - Etmaddaula, District Agra; whereby the appellant Smt. Geeta Rakesh has been convicted under Section 370(3) IPC and sentenced to 10 years rigorous imprisonment alongwith fine of Rs. 50,000/- and on its failure to undergo additional rigorous imprisonment of six months; under Section 370(5) IPC sentenced to 14 years rigorous imprisonment alongwith fine of Rs. 1,00,000/- and on its failure to undergo additional rigorous imprisonment of one year; under Section 370(7) IPC sentenced to rigorous life imprisonment alongwith fine of Rs. 1,00,000/- and on its failure to undergo additional rigorous imprisonment of one year; under Section 363 IPC sentenced to five year rigorous imprisonment alongwith fine of Rs. 1,00,000/- and on its failure to undergo additional rigorous imprisonment of one year; under Section 188 IPC sentenced to six months simple imprisonment alongwith fine of Rs. 1,000/- and on its failure to undergo additional simple imprisonment of one month; under Section 120B IPC sentenced to rigorous life imprisonment alongwith fine of Rs. 1,00,000/- and on its failure to undergo additional rigorous imprisonment of one year; under Section 9 Immoral Traffic (Prevention) Act sentenced to 10 years rigorous imprisonment alongwith fine of Rs. 1,00,000/- and on its failure to undergo additional rigorous imprisonment of one year; and under Section 16 read with Section 17 of the POCSO Act sentenced to rigorous life imprisonment alongwith fine of Rs. 1,00,000/- and on its failure to undergo additional rigorous imprisonment of one year. All the sentences are directed to run separately.

3. Accused appellant Geeta Rakesh was posted as Superintendent of Government Protection Home (Women) at Agra. It transpires that the State Authorities at Allahabad undertook an exercise referable to Section 16 of the Immoral Traffic (Prevention) Act, 1956 (hereinafter referred to as "the Act of 1956'), wherein sixty seven females and thirty seven children involved in immoral trafficking were rescued. These rescued victims were then produced before the magistrate exercising jurisdiction under Section 17 of the Act of 1956, who proceeded to pass an order on 21.5.2016, directing these rescued victims to be lodged at the Government Protection Home (Women) at Agra under the care and control of the accused appellant. The order dated 21.5.2016 specified the term of detention of the recovered inmates to be one year or further orders. As per this order the detainment period of one year was to expire on 20.5.2017. The accused appellant released forty three inmates alongwith their eight children between 21.5.2017 to 23.5.2017 apparently on the ground that the period of their detainment had come to an end. Release of these rescued victims by the appellant has ultimately led to her prosecution and consequential sentence.

4. It appears that the magistrate, who had passed the initial order of detainment under Section 17(4) of the Act of 1956 extended the period of detainment of these rescued victims by a further period of two years

vide his subsequent order dated 18.5.2017. This order allegedly was sent by the office of the concerned magistrate by whatsapp/e-mail and also by registered post. The primary accusation against the appellant is that she released the rescued victims in derogation of the order dated 18.5.2017.

5. The fact of release of these forty three inmates alongwith their eight children in teeth of subsequent order dated 18.5.2017 was highlighted before the State authorities by Mr. Sunil Kumar (PW-2).

6. Taking note of the facts brought before the authorities a first information report came to be lodged pursuant to a written report of PW-1 against the accused appellant under Sections 370, 363, 188, 120B IPC and Section 9 of the Act of 1956 as Case Crime No. 455 of 2017. Upon conclusion of investigation a charge-sheet was filed against the accused appellant which led to her ultimate conviction in Special Trial No. 1848 of 2017 arising out of Case Crime No. 455 of 2017, under Sections 370(3), 370(5), 370(7), 363, 188, 120B IPC; 9 Immoral Traffic (Prevention) Act and 16/17 POCSO Act, Police Station - Etmaddaula, District Agra and sentence vide judgment and order dated 6.10.2018, which is assailed in the present appeal.

7. It was also brought to the notice of the authorities that the competent court at Allahabad had earlier passed orders for release of twenty two out of these 67 victims on 3.2.2017. This order of the concerned court was challenged in Special Leave to Appeal (Criminal) No. 3324 of 2017 and the Supreme Court on 13.2.2017 and again on 21.4.2017 directed the released inmates to be retrieved and lodged again in Government Protection Home (Women) at Agra.

8. The prosecution case is that sixty seven recovered victims were lodged at the Government Protection Home (Women) at Agra for a period of one year vide order dated 21.5.2016. The FIR further records that the term of detention of these inmates was extended by a period of two years vide subsequent order of the magistrate dated 18.5.2017. This subsequent order is alleged to have been served upon the accused appellant and its contents were actually perused/seen by the accused appellant on her whatsapp on 20.5.2017 itself, yet she proceeded to release forty three detainees alongwith their eight children without any order passed by the magistrate or the competent court. The action of the accused appellant in releasing forty three inmates alongwith their eight children to their alleged family members/supurdgars after obtaining notarial affidavit and undertaking, etc., amounted to offences under the IPC, POCSO Act and the Act of 1956. The FIR has been registered on the basis of a written report sent by the Deputy Chief Probation Officer, Directorate, Women Welfare, Uttar Pradesh, Lucknow dated 1.6.2017.

9. The investigation proceeded in the matter and statement of various witnesses were recorded under Section 161 Cr.P.C. Statement of two inmates, who had yet not been released, was also recorded under Section 164 Cr.P.C. Various teams were sent to locate the released inmates but they were not found at their disclosed addresses and an inference was drawn that these inmates may have landed in immoral trafficking, once again. Doubts were also expressed regarding the supurdgars' relationship with the inmates. The Investigating Officer also collected documents regarding dispatch of subsequent order dated 18.5.2017

extending the term of detainment of these victims and proceeded to submit a charge-sheet against the accused appellant on 21.8.2017. The magistrate took cognizance on the charge-sheet and committed the case to the court of sessions. The court of sessions consequently framed following charges against the accused appellant:-

"मै, सुनील कुमार मिश्रए विशेष न्यायाधीश/ (Pocso Act) /अपर सत्र न्यायाधीश, न्यायालय संख्या.17, आगरा आप गीता राकेश को निम्न आरोप से आरोपित करता हूँः.

प्रथमः यह कि राजकीय संरक्षण गृह ;महिला), आगरा की अधीक्षिका के पद पर रहते हुये आपको उप जिला मजिस्ट्रेट, सदर इलाहाबाद के आदेश दिनांक 21.05.2016 के तहत 67 पीडिताएं और 37 बच्चो को एक साल या अग्रिम आदेश तक के लिये नारी संरक्षण गृह ;महिला), आगरा में आवासित किये जाने का आदेश दिया गया था। इनमें से 22 पीडिताओं को अपर सत्र न्यायाधीश, इलाहाबाद के आदेश से मुक्त कर दिया गया था। उप जिला मजिस्ट्रेट, सदर, इलाहाबाद ने अपने आदेश दिनांक 18.05.2017 से शेष बची 45 पीडिताओं और उनके बच्चों को एक साल के लिये और आवासित किया और उक्त आदेश की तामीला के बाबजूद आपने इन पीडिताओं में से 43 पीडिताओं व उनके बच्चों को बिना समुचित आदेश के दिनांक 21.05.2017 से 23.05.2017 के मध्य किसी समय पर राजकीय संरक्षण गृह ;महिला), अंतर्गत थाना . एत्माद्दौला, जिला आगरा में अवमुक्त कर दिया। चुंकि अवमुक्त की गयी पीडिताओं की संख्या काफी है और पीडिताए अवमुक्त होने के बाद अपने अंकित पते पर मौजूद नही मिली। पीडिताओं को अवमुक्त करते समय उनके संबंध में समुचित अण्डरटेकिंग व आई०डी०प्रूफ आदि भी नहीं मिलेए जिससे उनके दुर्व्यापार में सम्मिलित होने की प्रबल सम्भावना है। इस प्रकार आपने धारा 370 (3) भारतीय दण्ड संहिता के अंतर्गत दण्डनीय अपराध किया है, जो इस न्यायालय के प्रसंज्ञान में है।

द्वितीयः यह कि उपरोक्त दिनांक, समय व स्थान पर आपके द्वारा अवमुक्त की गयी 43 पीडिताओं के साथ उनके अवयस्क बच्चों को भी अवमुक्त किया गयाए जिससे कि बच्चों से भी दुर्व्यापार कराया जाएगा। इस प्रकार आपने धारा 370 (5) भारतीय दण्ड संहिता के अंतर्गत दण्डनीय अपराध किया हैए जो इस न्यायालय के प्रसंज्ञान में है।

तृतीयः यह कि उपरोक्त दिनांक, समय व स्थान पर आपने उक्त कार्य लोक सेवक होते हुये किया है। इस प्रकार आपने धारा 370 (7) भारतीय दण्ड संहिता के अंतर्गत दण्डनीय अपराध किया है, जो इस न्यायालय के प्रसंज्ञान में है।

चतुर्थः यह कि उपरोक्त दिनांक, समय व स्थान पर आपको उप जिला मजिस्ट्रेट, सदर, इलाहाबाद के आदेश से उक्त तिथि पर जिन पिडिताओं व बच्चों को राजकीय नारी संरक्षण गृह ;महिला), आगरा में आवासित करने के लिये दिया गया था। उनके संरक्षक उस समय उप जिला मजिस्ट्रेट, सदर, इलाहाबाद थे और उनकी अनुमति के बिना आपने उन पीडिताओं व बच्चों को अवमुक्त कर दिया। इस प्रकार संरक्षक की सहमति के बिना पीडिताओं और बच्चों को हटाकर आपने धारा 363 भारतीय दण्ड संहिता के अंतर्गत दण्डनीय अपराध किया हैए जो इस न्यायालय के प्रसंज्ञान में है।

पंचमः यह कि उपरोक्त दिनांक, समय व स्थान पर लोक सेवक होने के नाते आपका यह कर्तव्य था कि आपके ऊपर जिस आदेश को प्रख्यापित किया जाय, उसका आप अनुपालन करें। आपने उप जिला मजिस्ट्रेट, सदर, इलाहाबाद दिनांक 18.05.2017 की अवज्ञा की। इस प्रकार आपने धारा 188

भारतीय दण्ड संहिता के अंतर्गत दण्डनीय अपराध किया है, जो इस न्यायालय के प्रसंज्ञान में है।

षष्टमः यह कि उपरोक्त दिनांक, समय व स्थान पर आपने जिन 43 पीडिताओं और उनके बच्चों को बिना किसी समुचित आदेश के अवमुक्त किया, दौरान विवेचना उन पीडिताओं में से ज्यादातर अपने अंकित पते पर नहीं मिली तथा कुछ स्थानों पर ताले लगे हुये मिले, जो पूर्व से प्रशासन द्वारा सील किये गये थे। इन पीडिताओं को अवमुक्त करते समय आपने समुचित तरीके से आई०डी०प्रूफ व अण्डरटेकिंग नहीं ली, जिससे यह बात प्रमाणित होती है कि आपके द्वारा इन पीडिताओं से वैश्यावृत्ति कराने के उद्देश्य से मानव तस्करों के साथ मिलकर एक षडयन्त्र किया गया। इस प्रकार आपने धारा 120 बी भारतीय दण्ड संहिता के अंतर्गत दण्डनीय अपराध किया है, जो इस न्यायालय के प्रसंज्ञान में है।

सप्तमः यह कि उपरोक्त दिनांक, समय व स्थान पर आपके द्वारा जिन 43 पीडिताओं व बच्चों को उपरोक्त कथित मानव तस्करों की ओर से दिये गये प्रलोभन के तहत अवमुक्त किया गया। इस प्रकार आपके द्वारा धारा 9 अनैतिक व्यापार ;निवारण) अधिनियम के अंतर्गत दण्डनीय अपराध किया है, जो इस न्यायालय के प्रसंज्ञान में है।

ृअष्टमः यह कि उपरोक्त दिनांकए समय व स्थान पर आपके द्वारा 43 पीडिताओं व बच्चों को यह जानकारी रखते हुये अवमुक्त किया गया कि उनका उपयोग पाक्सो अधिनियम के अंतर्गत गठित विभिन्न अपराधों में किया जाएगा। इस प्रकार आपने उनको अवमुक्त करके उनको पाक्सो अधिनियम के अंतर्गत विभिन्न अपराध करने के लिये दुष्प्रेरित किया है। इस प्रकार आपने धारा 16/17 पाक्सो अधिनियम के अंतर्गत दण्डनीय अपराध किया है, जो इस न्यायालय के प्रसंज्ञान में है।

एतद्द्वारा मैं आपको निर्देश देता हूँ कि आपका उपर्युक्त आरोपों पर विचारण इस न्यायालय द्वारा किया जावे।"

10. The contents of charges were read out to the accused who denied the charges and demanded trial.

11. Prosecution in order to prove its case produced oral and documentary evidence which shall be dealt with hereinafter. The documentary evidence led by the prosecution were duly exhibited and included the first information report dated 1.6.2017 as Ex.Ka.3; written report dated 1.6.2017 of Punit Kumar Mishra, Dy. Chief Probation Officer, Directorate, Women Welfare, UP Lucknow as Ex.Ka.1; U.P. Directorate Application dated 31.5.2017 as Ex.Ka.3; written report dated 31.7.2017 as Ex.Ka.6; Statement under Section 164 Cr.P.C. dated 9.7.2017 of victim Sona as Ex.Ka.7; Statement under Section 164 Cr.P.C. dated 5.7.2017 of victim Anita as Ex.Ka.8; Application to BSNL dated 30.8.2018 by Rakesh Kumar as Ex.Ka.3; Order of Police Superintendent dated 9.6.2017 as Ex.Ka.11; Fax Receipt as Ex.Ka.14; Certified copy of speed post receipt as Ex.Ka. 15; Certified Copy of E-mail Receipt as Ex.Ka.16; Certified Copy of Dak-bahi as Ex.Ka.17; Certified copy of Whatsapp messages as Ex.Ka.18; Letter of SDM Sadar Allahabad dated 13.6.2017 as Ex.Ka.13; Certified Copy of SDM Order dated 18.5.2017 as Ex.Ka.19 and Final Form/ Report as Ex.Ka.9.

12. The prosecution has also produced Punit Kumar Mishra, the Deputy Chief Probation Officer posted in the office of Directorate, Women Welfare, U.P., Lucknow as PW-1, who has reiterated the contents of the first information report in his examination-in-chief. He has stated that

the object of placing these inmates in the Protection Home was to ensure rehabilitation of the victims and the exercise in that regard was being undertaken under the Act of 1956 in which the term of detention was extended by a further period of two years, but contrary to the orders of the competent authority, the accused appellant has released these inmates, as a result of which the inmates may have landed again in trafficking, resulting in their exploitation and would defeat the object for which they had been rescued and lodged in the Protection Home. He has also stated that the description of family members of these inmates, as was mentioned in the documents, was subsequently found to be false and at variance with their actual addresses, and that most of these inmates were not found on the addresses shown in the release orders. He has further stated that the relationship of alleged family members were also not ascertained by holding their DNA test, etc., as it was apprehended that the alleged family members of inmates were not the family members but were persons engaged in immoral trafficking who would have restored these inmates to immoral trafficking leading to their exploitation. This witness has also been cross examined. He has stated that a direction was issued by the Director Women Welfare U.P. for an FIR to be lodged in the matter but there was no specific direction to lodge FIR against the accused appellant. He has verified the contents of the written report on the basis of which the FIR itself was lodged. He has feigned ignorance about the provisions under which offences were conducted by the accused appellant except Section 9 of the Act of 1956. He has categorically stated that he has no personal knowledge with regard to service of order dated 18.5.2017 upon the accused appellant. He has also stated that report of the District Probation Officer and the complaint of Sunil Kumar is on record as per which the inmates were prematurely released. He has however denied the suggestion given to the witness that the order extending the term of detainment was not communicated to the officer concerned. He has no information that any of these forty three inmates made any complaint to the competent authority about their being put back into prohibited activities.

13. Sunil Kumar has been adduced as PW-2, who represents Guriya Swayam Sevi Sansthan which is a registered society engaged in eradication of human trafficking and child prostitution and claims that on account of their intervention about 2500 victims have been got released so far. He has stated that on a communication sent by him to the District Magistrate, Allahabad on 19.4.2016, the authorities proceeded to take action in respect of the alleged trafficking and sexual exploitation of females at Allahabad. A PIL was also filed by him on which directions were issued. It was in furtherance of complaint made by PW-2 that 67 females and 37 children were rescued and lodged at the Government Protection Home (Women) at Agra under an order of the magistrate passed in exercise of his jurisdiction under Section 17(4) of the Act of 1956. He claims that the order extending the term by a further period of two years was actually served upon the appellant by Fax on 19.5.2017 and also by e-mail, whatsapp and registered post on 20.5.2017. He further claims that the SDM Sadar Allahabad personally informed him that the accused appellant has seen the whatsapp and e-mail containing the order dated 18.5.2017 sent to her. He has also stated that on 27.5.2017 he came to know

that despite the order passed by the magistrate the accused appellant has released forty three victims alongwith their eight children in a criminal conspiracy for their ultimate trafficking and sold these inmates to brothel owners. He further claims that complaint in that regard was also sent to State Government on 29.5.2017. He claims that his statement under Section 161 Cr.P.C. was recorded by the Investigating Officer on 14.6.2017. This witness has been cross examined wherein he admits that he is not a member of Guriya Swayam Sevi Sansthan. He claims that he is only a social activist working in the field for nearly three years. He also claims that he is aware of the whatsapp; e-mail and fax, etc. He has shown ignorance about the policy of the Central Government for dispatch of official communication through official e-mail or whether the e-mail was actually sent to the accused appellant pursuant to such policy. He is not aware of the date of dispatch of communication by registered post. He has not seen the dispatch register. He is not aware of the telephone number of the accused appellant, nor he is aware of her whatsapp; fax or e-mail number. He has stated that SDM Sadar had informed him that the contents of the order dated 18.5.2017 were seen by the accused appellant on 20.5.2017 at around 5 pm, on her whatsapp. He has denied the suggestion that accused appellant had no whatsapp, e-mail ID and that a false statement has been given by him in that regard.

14. PW-3 is Constable Hoshiyar Singh, who has verified the Chik FIR. PW-4 is Inspector Yogendra Yadav, who claims that he was posted at police station Etmaddaula as Sub-Inspector and on the direction of the Investigating Circle Officer, he had gone to trace the inmate Roopa D/o Rubir through her supurdgar Manmaya wife of Chandra Bahadur at Pune. He claims that on the given address the inmate was not found. No information about the supurdgar could be collected either. In the cross-examination this witness has admitted that photograph of Roopa was not available in the records and that her photograph was seen by him on whatsapp.

15. Sub-Inspector Satendra Singh is PW-5, who similarly has gone to locate the inmates Pooja and Babita at Jalpaiguri in West Bengal, but they could not be traced. He has however stated that on inquiry he found that inmate Pooja D/o Sanjay is working as a Cook at Jalpaiguri and Babita is living at Calcutta. Their supurdgars could be contacted by the witness. In the cross-examination, he admitted that the details with regard to his arrival at Jalpaiguri was not mentioned nor the details have been given in his statement under Section 161 Cr.P.C. It is also admitted that he did not visit Calcutta to trace out the whereabouts of Babita.

16. PW-6 Sona is one of the inmates, who in her statement under Section 164 Cr.P.C. had claimed that she was not released by the accused appellant alongwith other inmates, as she had no money to bribe her. However, in her statement made before the Court this witness has stated that she was lodged in the Protection Home and was not released as her parents had not come to take her. She has specifically denied the allegation that inmates were released by the accused appellant after receiving bribe. This witness has been declared hostile. In the cross-examination this witness has stated that she had given a false statement under Section 164 Cr.P.C.

17. PW-7 Anita is another inmate, who too has not stated anything against the

accused appellant in her statement before the Court. She has however, stated that her statement was earlier recorded under Section 164 Cr.P.C.

18. PW-8 is Sub-Inspector Nityanand Pandey, who too had made attempts to trace out inmates Anita and Pinki, who had been released to their family members at Basti. He claims that these inmates were not traceable at the given address. This witness has been cross examined and has admitted that he did not carry any photograph of the inmates who he wanted to trace and has denied the suggestion that he has actually not visited Basti to trace out the inmates.

19. PW-9 is the Investigating Officer, who was posted as Circle Officer, Chhatta and has proved the charge-sheet. In his cross-examination, he has admitted that no complaint was received from any of the inmates and that he has no knowledge whether the inmates were minor or not. He has admitted that he has no information about the age of the inmates. He has also admitted that for an offence of criminal conspiracy there must be more than one person and that in this case apart from the accused appellant there is no other person accused as conspirator. He admitted that during the course of investigation the SDM Sadar Allahabad, who had passed the order of detainment and its extension has not been interrogated and his statement under Section 161 Cr.P.C. has not been recorded. He has also admitted that details of phone number of SDM Sadar or whatsapp number or official whatsapp number, fax number of the accused appellant Geeta Rakesh are otherwise not available on record. He also admitted that he is not the designated authority under the Act of 1956. He has admitted that no information by the SDM Sadar Allahabad with regard to extension of inmates term to the accused appellant is available in the case diary.

20. PW-10 B.S. Tyagi is the first Investigating Officer, who stated that on 17.6.2017 he had recorded the statement of Sub-Inspector Azad Pal Singh, who had gone to locate the inmates on their given address at Allahabad, but they were not found. In the cross-examination, he has admitted that he was not the designated officer under the Act of 1956, yet he had arrested the accused appellant on 1.6.2017. He too has stated that he has not personally met the SDM Sadar Allahabad, nor has he recorded his statement under Section 161 Cr.P.C. As per him the Fax number in the office of SDM Allahabad as well as his whatsapp and e-mail ID have been mentioned in the case diary on 11.6.2017 in the statement of Umashankar. In the same statement mobile number of Sanjiv Khare working in the office of SDM Sadar has also been mentioned as 9450509758 from which the contents of the order dated 18.5.2017 was sent by mobile to the accused appellant on her mobile number 9457020485. He has admitted that he has not made inquiries with regard to the aforesaid two mobile numbers nor details in that regard are mentioned in the case diary. He further states that he has not met Sanjiv Khare. He has admitted that mobile number and fax number of accused appellant is not mentioned in the case diary. **This witness has clearly stated that all inmates released by the accused appellant were major**. He has also admitted that for an offence under Section 363 IPC to be attracted the

21. PW-11 Anand Pal Singh, is a member of the team deputed to locate the inmates released by the accused appellant and the inmates have not been located at

their given addresses. Supurdgars however were located and they disclosed the whereabouts of the released inmates.

22. PW-12 is one Deepak Prajapati, who was posted as Collection Amin in the office of Sadar Tehsil at Allahabad. He claims that Samar Patel was posted as Steno in the office of SDM Sadar Allahabad, where he was also posted, and he has seen Samar Patel working in the office. Samar Patel was posted as Steno in the office of District Magistrate, Allahabad. He admits that summons were actually issued for appearance to Samar Patel, but instead of Samar Patel it is he, who has appeared alongwith records on the instructions of the Sub Divisional Magistrate, Sadar, Allahabad. He has filed certified documents. The testimony of this witness is important as he is the only person who has supported the prosecution case about dispatch of the communication dated 18.5.2017 to the accused appellant. He is also the main witness who has verified the alleged service of the order dated 18.5.2017 upon the accused appellant. This witness has stated that the term of detention of 67 inmates and 37 children at Government Protection Home (Women), Agra was extended by two years vide order dated 18.5.2017. The copy of the order dated 18.5.2017 has been filed by him in Court and its original is stated to be available in the office records. The original copy of the order dated 18.5.2017 has not been produced and its xerox copy certified by the authorities has been exhibited on record as A-13. An objection with regard to its admissibility is raised by the defence. Photocopy of alleged Fax has been exhibited as K-14, while copy of the dispatch by registered speed post has been marked as Exhibit K-15. Photocopy of dispatch register maintained in the office has also been exhibited. Exhibit K-18 is the alleged whatsapp communication which is in the nature of a photocopy containing two blue tick marks with a certification annexed on the document stating that the contents have been sent from the mobile of one Sanjiv Khare no. 9450509758 to the accused appellant on her mobile number 9457020485 at 4.56 pm on 20.5.2017.

23. Exhibit K-19 is also a certified copy of the communication of the order dated 18.5.2017 extending the period of detainment by a further period of two years. The testimony of PW-12 along with cross-examination is extracted hereinafter:-

"नाम साक्षी- दीपक प्रजापति पिता का नाम- स्व० बुलाकीलाल प्रजापति उम्र- 48 वर्ष पेशा- नौकरी, निवासी-38 सी बेली रोड नया कटरा, इलाहाबाद ने सशपथ बयान किया कि-

मै वर्तमान में संग्रह अमीन, तहसील सदर, इलाहाबाद के पद पर तैनात हूँ। समर पटेल, स्टेनो उप जिलाधिकारी कार्यालय, सदर इलाहाबाद में तैनात थे। वहां पर मै भी अमीन के पद पर तैनात हूँ। मै समर सिंह पटेल को जानता हूँ तथा उनको लिखते पढ़ते देखा है। समर पटेल वर्तमान में जिलाधिकारी, इलाहाबाद के कार्यालय में स्टेनो के पद पर तैनात है। समर पटेल के नाम के द्वारा जारी समन के आधार पर मुझे उप जिलाधिकारी, सदर इलाहाबाद द्वारा इस मुकदमें से सम्बन्धित चाहे गये दस्तावेज के साथ साक्ष्य हेतु भेजा गया है। जिस पत्र के द्वारा मुझे आदेशित किया गया है, वह मै साथ लाया हूँ, जिसे मै पत्रावली पर दाखिल कर रहा हूँ।

कार्यालय उपजिलाधिकारी, सदर इलाहाबाद द्वारा दिनांक 13/06/2017 को पत्रांक संख्या 4470/एस०डी०एम० सदर-एस-17 के माध्यम से इस मुकदमें के विवेचक बी०एस० त्यागी क्षेत्राधिकारी, छत्ता जनपद आगरा को दिनांक 18/05/2017 को जरिये फैक्स/स्पीड

पोस्ट/पंजीकृत/ईमेल/व्हाटसअप के माध्यम से डाक संख्या 115 दिनांक 19 व 20/05/2017 को इलाहाबाद के अर्न्तगत क्षेत्र मीरगंज में अनैतिक व्यापार अधिनियम 1956 के अर्न्तगत की गयी कार्यवाही में मुक्त कराई गयी पीड़िताओ को उप जिला मजिस्ट्रेट, सदर के आदेश दिनांक 21/05/2016 अर्न्तगत धारा 17(4) अनैतिक देह व्यापार अधिनियम 1956 द्वारा 67 संवासनियो एवं 37 बच्चो को एक वर्ष की अवधि तक राजकीय संरक्षण, गृह आगरा में भेजा गया था, जिसकी अवधि दिनांक 18/05/2017 को बढ़ाकर दो वर्ष के लिए कर दी गयी थी। उक्त बढ़ाई गयी समयावधि के आदेश को अधीक्षिका, आगरा एवं अन्य अधिकारियो को भेजे गये थे, जो उप जिलाधिकारी, सदर इलाहाबाद के हस्ताक्षरित पत्र, इस पत्रावली में मौजूद है। जिसकी कार्यालय प्रति मै आज अपने साथ लेकर आया हूँ। जिसकी मूल पत्रावली पर उपलब्ध है। मूल को रिकॉर्ड से मिलान कर लाये गये कार्यालय रिकॉर्ड से मिलान कर साबित किया गया। जिस पर प्रदर्श क-13 डाला गया। जिस पर अभियुक्त के विद्वान अधिवक्ता की ओर से आपत्ति की गयी।

इस पत्र के साथ संलग्न फैक्स रसीद एस०डी०एम० सदर, इलाहाबाद द्वारा दिनांक 19/05/2017 की प्रमाणित है, जिसे उप जिलाधिकारी, सदर इलाहाबाद द्वारा अपनी सील एवं हस्ताक्षर से प्रमाणित की गयी है। जिसकी मूल प्रति मै साथ लेकर आया हूँ। जो मिलान कर मूल की छाया प्रति है। पत्रावली पर उपलब्ध फैक्स रसीद पर प्रदर्श क-14 डाला गया। जिस पर अभियुक्ता के विद्वान अधिवक्ता द्वारा आपत्ति की गयी। एस०डी०एम० सदर इलाहाबाद द्वारा भेजे गये पत्र जो इस मुकदमें के विवेचक बी०एस० त्यागी को भेजा गया था, के अतिरिक्त जिलाधिकारी, आगरा, अधीक्षिका राजकीय संरक्षण गृह आगरा, जिला प्रोवेशन अधिकारी, वरिष्ठ पुलिस अधीक्षक, आगरा को पंजीकृत डाक से पत्र भेजे गये थे, उनकी मूल डाक रसीद मै अपने साथ लेकर आया हूँ। मूल डाक रसीद की छाया प्रतियां एस०डी०एम० सदर, इलाहाबाद की सील एवं हस्ताक्षर से प्रमाणित है। रसीदे पत्रावली पर मौजूद है, मै उनके हस्ताक्षर की शिनाख्त करता हूँ। रसीदो पर प्रदर्श क-15 डाला गया। जिस पर अभियुक्ता की ओर से आपत्ति की गयी। उप जिलाधिकारी, सदर इलाहाबाद द्वारा दिनांक 19/05/2017 को समय 08.54 पी०एम० पर अभियुक्त गीता राकेश को उनके ईमेल आई०डी० पर जरिये ईमेल उपरोक्त आदेश की प्रति प्रेषित की गयी। जिसे गीता राकेश द्वारा दिनांक 19/05/2017 को 09.01 पी०एम० पर खोलकर पढ़ा गया। इस ईमेल संदेश आदान-प्रदान की मूल प्रिंट को मै आज अपने साथ लेकर आया हूं जिसकी फोटो प्रति एस०डी०एम० सदर इलाहाबाद द्वारा अपने हस्ताक्षर व सील से प्रमाणित की गयी है, जो पत्रावली पर मौजूद है। जिस पर प्रदर्श क-16 डाला गया। जिस पर अभियुक्ता की ओर से आपत्ति की गयी।

उप जिलाधिकारी सदर इलाहाबाद द्वारा अपने आदेश दिनांकित 18/05/2017 को अपने डाक वही क्रमांक 115/एस०डी०एम० सदर/18/05/2017 का इन्द्राज अपने डाक रजिस्टर में करते हुए इस आदेश को राजकीय संरक्षण गृह, महिला अधीक्षिका, आगरा व जिलाधिकारी इलाहाबाद, जिलाधिकारी आगरा, एस०एस०पी० इलाहाबाद, एस०एस०पी० आगरा, जिला प्रोवेशन अधिकारी आगरा को भेजा गया। वह मूल डाक बही/रजिस्टर मै अपने साथ लेकर आया हूँ। जिसकी छाया प्रति उप जिलाधिकारी, सदर इलाहाबाद द्वारा प्रमाणित कर दाखिल कर रहा हूँ। उनके हस्ताक्षरो की मै शिनाख्त करता हूँ। जिस पर प्रदर्श क-17 डाला गया। जिस पर अभियुक्ता की ओर से आपत्ति की गयी। एस०डी०एम० सदर इलाहाबाद के आदेश दिनांकित 18/05/2017 को उनके कार्यालय में कार्यरत लेखपाल श्री संजीव खरे के मोबाइल नम्बर 9450509758 द्वारा राजकीय

संरक्षण गृह, आगरा की अधीक्षिका श्रीमती गीता राकेश के मोबाइल नम्बर 945(अस्पष्ट)020485 व दिनांक 20/05/2017 को समय 04.56 पी०एम० पर व्हाट्सअप किया गया है, जिसकी रंगीन प्रिटंआउट जिसमें व्हाट्सअप के रिसीव डबल ब्लू टिक साइन मौजूद है तथा इस रंगीन व्हाटसअप की प्रिंटआउट पर एस०डी०एम० सदर इलाहाबाद महोदय ने इस आशय का प्रमाणपत्र अपने हस्तलेख में दिया है। मै उनके हस्तलेख व उनकी सील मुहर व मूल हस्ताक्षर (का०फटा) तस्दीक करता हूँ। जिस पर प्रदर्श क-18 डाला गया। जिस पर अभियुक्ता की ओर से (का०फटा) गयी। उप जिलाधिकारी सदर इलाहाबाद के आदेश दिनांकित 18/05/2017 पत्रांक संख्या (का०फटा) जो अधीक्षिका राजकीय संरक्षण गृह, महिला आगरा के नाम संबोधित है, आदेश विषय राजकीय संरक्षण गृह महिला आगरा में आवासित थाना कोतवाली इलाहाबाद में पंजीकृत अभियोग संख्या 119/2016 की पीड़िताओं व बच्चो के अनैतिक व्यापार अधिनियम 1956 की धारा 17(4) के तहत पारित आदेश की प्रमाणित प्रतिलिपि कुल 08 वर्क मे मौजूद है। मूल आदेश मै आज उप जिला मजिस्ट्रेट सदर इलाहाबाद के कार्यालय से अपने साथ लाया हूँ। यह मूल आदेश भी 08 वर्क का है। प्रमाणित व मूल आदेश का अक्षरशः मिलान किया गया, जो एक ही है। इस आदेश पर कार्यालय की मुहर एवं हस्ताक्षर मौजूद है। जिसे आज मैं पुनः प्रमाणित कर रहा हूँ। जिस पर प्रदर्श क-19 डाला गया। जिस पर अभियुक्ता की ओर से आपत्ति की गयी।

प्रति परीक्षा द्वारा अभियुक्ता

x x x x x

यह कहना सही है मुझे न्यायालय से गवाही के लिए समन नही मिला था। संजीव खरे लेखपाल कार्यालय में सम्बद्ध थे तथा कार्यालय का कार्य देखते थे। यह कहना गलत है कि संजीव खरे फील्ड वर्क करते हो और कार्यालय का कार्य नही करते हो। संजीव खरे का मोबाइल मैने नही देखा है। न ही संजीव खरे ने मेरे सामने मोबाइल का प्रयोग किया।

मेरी ड्यूटी रेवेन्यू कलेक्शन के लिए है। मै फील्ड वर्क के लिए जाता हूँ। मै सुबह 09 बजे फील्ड में जाकर 12 बजे तहसील में आ जाता हूँ और शाम को पांच बजे वहाँ से वापस आ जाता हूँ। गीता राकेश का मोबाइल नम्बर मुझे नही मालूम। गीता राकेश को मैं नही जानता हूँ। मैं केवल मांगा गया रिकार्ड अपने अधिकारी के कहने पर न्यायालय में लेकर आया हूँ और उसी रिकार्ड के संबंध में मैंने अपना साक्ष्य दिया है। मुझे गीता राकेश के किसी फोन के विषय में कोई जानकारी नही है।

यह कहना सही है कि प्रदर्श क-13, दिनांक 13 जून 2017 का है। प्रदर्श क-14 जीराक्स प्रमाणित प्रति है। प्रदर्श क-14 किसको भेजा गया, यह प्रमाणित नही है। प्रदर्श क-15 प्रमाणित छाया प्रति है। इस रसीद से क्या भेजा गया, यह कवरिंग पत्र में लिखा होगा। रसीद में नही लिखा है। मै नही बता सकता कि जा भी मजमून भेजा गया, वह प्राप्तकर्ता पर कब पहुंचा।

मुझे नही मालूम कि गीता राकेश की कोई ईमेल आई०डी० है या नही। मै अधीक्षिका कार्यालय में ईमेल, व्हाटसअप या फैक्स की क्या सुविधाये है, इसकी जानकारी नही रखता हूँ। मै नही बता सकता कि गीता राकेश के कार्यालय में ईमेल, व्हाटसअप या फैक्स की सुविधा नही है। मुझे इसकी भी जानकारी नही है कि प्रदर्श क-17 से भेजा गया पत्र कार्यालय में किस तारीख को पहुंचा। यह कहना गलत है कि प्रदर्श क-18 से भेजा गया व्हाटसअप फर्जी हो तथा नही भेजा गया हो। यह कहना गलत है कि प्रदर्श क-19 फर्जी बनाकर तैयार किया गया हो। यह कहना सही है कि यह मेरे सामने किसी को नही भेजे गये। यह कहना गलत है कि कोई भी फैक्स, ईमेल, व्हाटसअप या पत्र गीता राकेश अधीक्षिका को प्राप्त नही हुए हो तथा उसे फंसाने के लिए बाद में फर्जी प्रपत्र तैयार किये

गये हो। यह कहना गलत है कि जो प्रपत्र मैंने दाखिल किये है, वह फर्जी हो। यह कहना गलत है कि मै आज न्यायालय में झूठी गवाही दे रहा हूँ।"

24. Incriminating material produced during the trial, noticed above, has been put to the accused appellant who has denied the accusations in her statement under Section 313 Cr.P.C. She has stated that in the year 2016, she had filed a writ petition for her promotion and some persons were opposed to her who were also impleaded as a party and that she has been discriminated only because she belongs to scheduled caste. She has also stated that Principal Secretary, Women Welfare was annoyed with her and that is why she has been falsely implicated by upper caste officers.

25. The accused appellant has also entered the witness box as DW-1 and has clearly stated that the order dated 18.5.2017 was never served upon her nor she had any knowledge about issuance of such an order. She has categorically stated that the order dated 18.5.2017 was received by her in her office on 24.5.2017 at 2.15 pm whereby the term of detainment was extended by two years but by then all the 43 inmates had already been released by her. She has stated that after 20.5.2017 she could not detain any of the inmate, even for a day, and any detainment of inmates would have exposed her to accusations later. She stated that the inmates were released to their family members including brothers and sisters whose notarial affidavits were taken and their undertakings were also taken on record. These inmates were all major and their request letters for release are available on record. She has stated that there is no facility of e-mail; fax or whatsapp in her office and that she has not received any e-mail; fax or whatsapp from the office of the SDM Sadar Allahabad. She has stated that all documents evidencing dispatch of the order dated 18.5.2017 by e-mail; whatsapp are fabricated and forged. She has also stated that for the last 19 years she has not been promoted and as her claim was not considered she approached the High Court and only because of it the higher authorities were annoyed with her. She has further stated that under orders of the Supreme Court, the District Judge, Agra is the ultimate authority in respect of the affairs of the Protection Home and she had sent communication to the District Judge informing him that the period of detainment of these inmates was to expire on 20.5.2017. She further claims that in response to such communication the District Judge vide his order dated 4.5.2017 and 20.5.2017 directed her to comply with the orders of Sub Divisional Magistrate Sadar Allahabad. She claims to have filed such orders but apparently they are not part of records of the present appeal. In the cross-examination, DW-1 has stated that apart from 67 female inmates, the SDM Sadar Allahabad had also sent 29 minor children who are being looked after by the Child Welfare Committee and she exercised no control in respect of these 29 inmates. The eight inmates released were actually minor children of the 43 female inmates lodged in the Protection Home. She has denied the suggestion that the communication of order dated 18.5.2017 was received by her by whatsapp; e-mail or fax.

26. DW-2 Rakesh Kumar is the other defence witness who is the husband of the accused appellant. He is a teacher working in a Government Institution at Etawah. He lives in his official accommodation and is working since 2009. He has stated that

there are three kinds of mobile SIM namely ordinary SIM, nano SIM and micro SIM. He has categorically stated that Mobile Number 9457020485 is his mobile number issued by BSNL and is being utilized by him. He has produced the mobile phone alongwith SIM during the course of trial and the same has been exhibited as Exhibit-B. He has categorically stated that facility of whatsapp; e-mail or fax was never available on his mobile number. This witness has also been cross examined and has denied the suggestion that whatsapp and e-mail could be operated on any SIM.

27. It is on the basis of above evidence led during the course of trial that the court below has come to the conclusion that the prosecution has succeeded in establishing the guilt of accused appellant beyond reasonable doubts. The court below has held that the order dated 18.5.2017 was duly served upon the accused appellant and her action of releasing the 43 inmates contrary to the orders of the Sub Divisional Magistrate amounted to an offence as these 43 inmates are likely to again land up in activities prohibited under the Act of 1956 and, therefore, she has committed offence under various sections of the IPC.

28. The conviction and sentence awarded to the accused appellant is assailed in the present appeal on various factual and legal grounds.

29. Sri G.S. Chaturvedi, learned Senior Counsel for the appellant submits that the accused appellant had acted bona fidely and as the detainment of inmates was only for a period of one year, as such she could not have kept the inmates in the protection home beyond the period of one year and her action in releasing the inmates was legal and proper. He further submits that the order extending the term of detainment of inmates was never served upon the accused appellant and there is no evidence on record to demonstrate the service of order dated 18.5.2017 upon the accused. He also submits that the alleged service by e-mail, fax or whatsapp are electronic modes of service which are not admissible as there is no certificate available under Section 65-B of the Evidence Act and this aspect of the matter has been completely overlooked by the court below. He further submits that the dispatch of communication has otherwise not been proved, since the dispatcher i.e. SDM Sadar, Allahabad has neither appeared as a witness nor the person in his office, who allegedly dispatched the letter, has been produced. He further argued that the non-availability of e-mail, fax or whatsapp in the office of the Superintendent of Government Protection Home (Women), Agra has also not been taken into consideration. Sri Chaturvedi further submits that the original records of the office of SDM Sadar containing the order dated 18.5.2017 have also not been produced and exhibited during the course of trial and in the absence of any reason of its absence the secondary evidence in the form of certified copy of the communication cannot be looked into. He emphatically argued that even if the prosecution version is taken its entirety, yet, no offence under the IPC or the Act of 1956 is disclosed. With reference to the prosecution evidence brought on record, learned Senior Counsel contends that the prosecution witnesses have clearly admitted the 43 inmates to be major and no evidence was otherwise led to prove their minority, and therefore the provisions of the POCSO Act are not shown to be attracted in the facts of the present case. The 08 minors released are stated to be the

children of 43 inmates, who were their guardians, and therefore none of the offences under the POCSO Act could even remotely be attributed to the accused. Sri Chaturvedi also placed reliance upon the directions issued by the Supreme Court in its various orders, as per which the District Judge, Agra was the ultimate supervisory authority in respect of the affairs of the Government Protection Home (Women) and the appellant duly intimated him and sought his guidance when the term of release of inmates was coming to an end and she was told by the District Judge, Agra to act in terms of the order of Sub-Divisional Magistrate. Submission, therefore, is that the accused appellant acted lawfully in releasing the inmates after entertaining their applications alongwith notarial affidavits of their family members. He submits that offence under Section 188 IPC also could not have been attributed to the accused appellant as cognizance in respect thereof could only be taken on a complaint by virtue of Section 195 IPC and the court below has erred in recording conviction of accused under it. Learned Senior Counsel lastly submits that the authorities of the State acted in an undue hot haste on the complaint made by PW-2 without verifying the records, which has resulted in denial of rights of the accused appellant, who has been unnecessarily kept in incarceration for more than six and a half years.

30. Sri Faiz Ahmad has appeared for PW-2 and submits that the conviction and sentence of accused appellant is just, legal and valid and requires no interference in appeal. He argues that the object of inmates recovered from Mirganj, Allahabad was to ensure their proper rehabilitation so that they are not forced to undergo exploitation as sex workers. He submits that the directions of the Supreme Court and the provision of the Act of 1956 as well as Rules of 1993 have been violated by the accused appellant, who has acted in undue hot haste, for extraneous reasons, in releasing inmates contrary to the orders of the Magistrate, as a result of which these inmates are no longer traceable and in all likelihood may have landed again in prostitution. He further submits that the authority to release these inmates was the Chief Inspector and not the Superintendent of Government Protection Home (Women) and her action in releasing the inmates contrary to the directions of the Supreme Court are wholly without an authority of law. He also submits that the evidence adduced by the prosecution clearly shows service of the order dated 18.5.2017 upon the accused and the finding of the court below, in that regard, warrants no interference.

31. Km. Meena, learned AGA for the State, while adopting the argument of Sri Faiz Ahmad submitted that undue hot haste was shown by the accused appellant in releasing the inmates immediately upon expiry of their detainment period without obtaining any guidance from the concerned Sub-Divisional Magistrate shows her complicity in the matter. She also contends that two of the remaining inmates were not released, in similar circumstances, which clearly shows that release of inmates was for extraneous consideration and the two inmates have also specifically stated so in their statement under Section 164 Cr.P.C. She submits that considering the serious consequences which followed for the 43 inmates, their conviction and sentence is proper.

32. It is in the context of the above submissions that this Court is required to

examine as to whether the accused appellant has rightly been convicted and sentenced for offences committed by her or not. The legality of release also needs to be examined. The trial court has formulated following issues for consideration in the matter:-

1. Whether 43 inmates alongwith their children had been placed in the custody of accused Geeta Rakesh, Superintendent, Government Women Protection Home, Agra vide order dated 21.5.2016 for a period of one year/till further orders by the SDM Sadar, Allahabad and whether there was any direction in it to release the inmates?

2. Whether accused Geeta Rakesh has illegally released 43 inmates alongwith their children before expiry of their detainment period and whether she was competent to do so or any competent authority having jurisdiction had directed her to do so?

3. Whether it was mandatory to obtain sanction under Section 197 Cr.P.C. before proceeding against the accused appellant?

4. Whether this matter could be pursued only upon a complaint filed under Section 195(1)(a) Cr.P.C. or not?

5. Whether investigation is faulty and it was not undertaken by the designated officer?

6. Analysis of evidence led by the prosecution and the defence in respect of the charges levelled against the accused?

33. On the first issue trial court has held that inmates were lodged for a period of one year/further orders vide order dated 21.5.2016 and there was no authority with the Superintendent to release them upon completion of the period of detainment. At best, upon receiving any application for release of the inmates, the Superintendent could have referred the matter either to the Chief Inspector or the competent court. On issue no.2 the court below has held that the 43 inmates alongwith their children were lodged pursuant to the order of the SDM, who alone was competent to direct to release of these inmates and as no orders have been passed by him, the action of accused appellant in releasing these 43 inmates with their 8 children was without jurisdiction. On issue no.3 the court below opined that as charges against the accused appellant included Section 370 IPC, therefore, by virtue of proviso to Section 197 no prior permission was required for initiation of penal action in respect of the offences committed by the accused.

34. In respect of issue no.4, it has been observed by the court below that no preliminary objection was raised on behalf of accused before the court below and as the offences are not just limited to Section 188 Cr.P.C. but included offence under the Act of 1956, therefore, it cannot be said that only on the basis of complaint the accused could be prosecuted. On issue no.5 the court below has observed that though initially the investigation was done in the matter by Inspector Brijesh Kumar Pandey but the main investigation was done by B.S. Tyagi. Reliance has been placed upon Government Order dated 17.7.2003 in which offences under the Act of 1956 have been permitted to be investigated by Assistant/Deputy Superintendent of Police within their territorial jurisdiction and as B.S. Tyagi was holding such office, the investigation cannot be faulted. On issue no.6 the trial court has analyzed the evidence led by the parties to hold that the prosecution has succeeded in proving the guilt of accused appellant beyond reasonable doubt of offences attributed to her, and therefore, her conviction is

accorded. Considering the gravity of the offences the court below has sentenced the accused appellant.

35. Before adverting to the issues raised in the present appeal in light of the evidence led by the parties and the argument advanced, we deem it appropriate to refer to certain orders passed by the Supreme Court in the matter relating to affairs/management of the Government Protection Home (Women), Agra. A Writ Petition (Crl.) No.1900 of 1981 came to be filed before the Supreme Court under Article 32 of the Constitution of India by Dr. Upendra Baxi and others (II) Vs. State of U.P. and others, which came to be decided on 23.7.1986 vide judgment reported in (1986) 4 SCC 106. Concerns relating to conditions in which girls were living in the Government Protection Home (Women) at Agra and denial of their right to live with basic human dignity was the issue raised in the matter. Various directions were issued in the matter by the Supreme Court. We would confine ourselves to the directions which may have bearing for the present purposes. The direction contained in para 6 and 9 of the judgment has been highlighted before us and is reproduced hereinafter:-

"6. Fourthly, the Superintendent of the Protective Home shall take care to see that no woman or girl is detained in the Protective Home without due authority and process of law. The District Judge, Agra who carries out monthly inspection of the Protective Home shall verify during every visit that no woman or girl is detained except under the authority of law and if he finds that any of them is detained without any authority of law, he shall take steps to see that she is released and repatriated to her parents or husband or other proper authority.

9. The District Judge, Agra or any other Additional District Judge nominated by him shall visit the Protective Home once every month for the purpose of ensuring that the aforesaid directions given by us are carried out fully and effectively and he shall submit an Inspection Report to this Court on/or before the 15th of every month."

(Emphasis supplied)

36. We may also refer to the judgment passed in the same petition reported earlier in (1983) 2 SCC 308 (Dr. Upendra Baxi (I) Vs. State Of Uttar Pradesh And Another). The Supreme Court in respect of release of inmates referred to the provisions of the Rules framed under Section 23 of the Act of 1956 readwith section 21 of the General Clauses Act vide notification dated 6.2.1961, containing Rule 37, which empowered the State Government to discharge any inmate, at any time, either absolutely or on such conditions as is deemed appropriate. Vide order dated 29.1.1982 in the aforesaid petition the Supreme Court issued following directions:-

"..... The District Judge, Agra will visit the Protective Home immediately and submit detailed report to us in regard to the present position of the girls lodged in the Protective Home as also in regard to the conditions prevailing there. This report will be submitted by the District Judge to this Court on or before February 10, 1982 and when the report is submitted, one copy to Mr. R.K. Bhatt learned Advocate appearing on behalf of the respondents. One copy of the directions and orders made by the Court from time to time may also be supplied to Dr. Sodhi who has really brought this matter before the Court through the petitioners."

37. The directions of the Supreme Court, extracted above, are not shown to

have been arrived or rescinded and we are informed at bar that the District Judge, Agra continues to oversee the affairs of the protection home. We may also note that in supersession of the Rules of 1961 the State of Uttar Pradesh has framed the Uttar Pradesh Immoral Traffic (Prevention) Rules, 1993, which contains provisions with regard to establishment of protective homes/corrective institutions. Rule 2(h) defines Superintendent in following terms:-

"(h) "Superintendent" means the Principal Officer in charge of a protective home or a corrective institution, as the case may be, and shall include any person appointed as such by the State Government to discharge the functions of a Superintendent under these rules."

38. Rule 13 of the Rules of 1993 provides that each protective home or corrective institution shall be headed by a whole time Superintendent, preferably a woman, who is professionally trained in social work or has a wide experience in women's welfare. Rule 14 contains duties of Superintendent. By virtue of Clause (I) of Rule 14 the Superintendent shall be in charge of general supervision of the protection home. Rule 38 provides for discharge of inmates of protective home or corrective institution and is reproduced hereinafter:-

"38. Discharge of inmates of protective home or corrective institution. - (1) On a report from the Superintendent the Chief Inspector may order any person detained in a protective home or corrective institution, whose behaviour is found to be good and who is unlikely to commit any offence under the Act, to be discharged without or with conditions as he deems fit to impose and grant him a written licence of such discharge in Form-X:

Provided that no such person shall be discharged on licence unless he has resided in the corrective institution for a period not less than six months or in a protective home for not less than one-third of his detention, as the case may be.

(2) The Superintendent shall at the end of each month prepare a statement of inmates who have to be discharged in the subsequent month and read out that statement to the inmates. All such cases in which the inmates have no safe place to go back shall be reported by the Superintendent to Chief Inspector at least one month before the date of third charge from the home or institution for such rehabilitative placement as the Chief Inspector deems appropriate.

(3) On the day of the discharge, the inmate's state of health shall be recorded by the Superintendent in the Inmate's Register he shall compare the entries in the warrant of Committal with those in the Register and shall satisfy himself that they agree and the term of the inmate has been duly served. He shall then sign the endorsement for discharge on the warrant, certifying the due expiry of the term. The belongings of the inmates shall be handed over to him and the details recorded in the appropriate column in the Inmate Register. The inmate shall be given food for the day before he is discharged. The inmate shall, if necessary, be provided with suitable clothing.

(4) Every discharged inmate whose destination is on or near a Railway Line, shall be supplied with a railway ticket of the lowest class. Payment of the fare shall be made by railway warrant where the cost of journey exceeds rupees fifty. In other cases, payment shall be made in cash. When a journey is to be made by boat/bus or steamer, the inmate shall be provided with passage or passage money to the halting place nearest to his destination at

the lowest rate. Every inmate who has to proceed to a destination of more than 8 kilometres by road or has to perform more than three hours journey by rail or any other mode of conveyance shall on discharge be given subsistence allowance at the rate of rupees five if the journey is to be completed on the following morning and rupees ten per day otherwise.

(5) In case where the parent, relative or guardian of the discharged inmate fails to make his own arrangement to take charge of the inmate at the protective home or corrective institution, the inmate on discharge shall be sent under the charge of an official of the home or institution who shall be responsible for the care and safety of the inmate until he is handed over to such parent, relative or guardian. The official shall be granted travelling allowance for the to and for journeys, the rates admissible under the rules of the State Government.

(6) The State Government may at any time order suitable inmate of the protective homes or corrective institutions to be admitted into institutions established under the After Care programmes of the State Government.

(7) A disposal register in Form XI shall be kept in every protective home or corrective institution in which full particulars shall be entered of the manner in which every inmate is disposed of on discharge and of his after carers. Every effort shall be made by the Superintendent to keep in touch with the inmates for at least five years after their discharge.

(8) An annual return in Form XII shall be made by the Superintendent to the Chief Inspector. The remarks made by the Board of Visitors from time to time during the year to which the return relates shall also be communicated to the Chief Inspector with the return."

39. The court below has taken note of Rule 38 to opine that the Superintendent had no jurisdiction, in law, to direct release of an inmate even if the period of detainment had come to an end and that such power could be exercised either by the Chief Inspector or by the Magistrate, who placed these inmates in the custody of Superintendent by virtue of Section 17(4) of the Act of 1956.

40. It is in the context of above statutory scheme and in light of the directions issued by the Supreme Court for running of the Government Protection Home (Women) at Agra that the action of accused appellant needs to be examined on the basis of evidence led by the prosecution and the defence.

41. The records clearly reveal that the State authorities on the basis of information received with regard to running of prostitution in a brothel at Meerganj, Allahabad raided the premises and rescued 67 females and 37 children. These rescued victims were produced before the SDM Sadar, Allahabad on 21st May, 2016. The order of Magistrate records that 67 inmates alongwith 37 children are to be lodged in the Government Protection Home (Women), Agra for a period of one year/further orders and in case if any application for release is moved during this period then appropriate orders would be passed on the basis of materials/evidence, in accordance with law. The term of detainment of these inmates by virtue of order dated 21st May, 2016 was one year. This period of one year was to expire on 20th May, 2017. It is the admitted case of prosecution that 43 inmates have been released by the accused appellant after expiry of one year term of detainment on 20th May, 2017. The release of 43 inmates

is between 21st May, 2017 to 23rd of May, 2017.

42. It would be worth noticing, at this stage, that out of 67 adult females lodged in the protection home, 22 inmates were released under the directions of the concerned court at Allahabad. The order of the concerned court was challenged before the Supreme Court in Special Leave to Appeal (Crl.) No.3324 of 2017 and vide orders passed on 13.2.2017 and 21.4.2017, these inmates were directed to be retrieved and lodged again in the protective home. There is no allegation that any of these twenty two inmates have been released by the accused appellant and, therefore, legality of release of twenty two inmates is not to be commented upon as the same is not the subject matter of this appeal. The scope of the present appeal is confined to the release of forty three inmates alongwith their eight children between 21.5.2017 to 23.5.2017.

43. Broadly speaking two issues arise for consideration in the present appeal. The first is whether the inmates were released by the accused appellant prior to the expiry of term of their detainment? The second aspect of the first issue would be whether the order dated 18.5.2017, extending the term of detainment by two years, was served upon the accused appellant prior to release of these inmates. The second issue would be whether the accused appellant in her capacity as the Superintendent of Government Protection Home (Women) was competent to release the inmates or she had no jurisdiction to do so?

44. The evidence on record has already been noticed above and is now examined for the purpose of determination of issues framed in this appeal.

45. Admittedly, the initial lodgment of inmates was for a period of one year/further orders which was to expire on 20th May, 2017. The accused appellant is not charged of releasing any of these inmates within the period of one year. She is charged for releasing the inmates within the extended period of detainment ordered by the concerned magistrate on 18.5.2017. The parties are at issue with regard to service/communication of the order dated 18.5.2017 prior to release of the inmates between 21.5.2017 to 23.5.2017.

46. It is the prosecution case that the term of initial detainment of inmates was extended by the concerned magistrate on 18.5.2017. The Magistrate who has passed the order dated 18.5.2017 has not been produced in evidence. The original order of 18.5.2017 has also not been produced before the court below. Its certified copy has been exhibited as Ex.-19. This order is allegedly sent by e-mail, fax, whatsapp and by registered post to the Superintendent. There is, however, a specific denial of the appellant regarding receiving of this order prior to release of the inmates. The accused appellant has herself appeared in the witness box and has admitted that the order dated 18.5.2017 was received by her on 24.5.2017 at 2.15 PM. Her specific case is that by then she had released all the forty three inmates as they had completed the period of detainment and their continued detention would have been contrary to law.

47. The first document with regard to dispatch of the order dated 18.5.2017 is a photocopy of the fax receipt marked as Ex.Ka.14. This document does not show the details of the dispatcher or the number from it is dispatched and it merely shows that a fax message has been sent to District Magistrate, Agra. What are the contents of

this fax message are not shown. There is nothing on record to show that this document was actually sent to the Superintendent, Government Protection Home (Women), Agra. This document otherwise is a photocopy with neither its original produced, nor any explanation has been furnished with regard to non-availability/absence of the original document. The prosecution otherwise has not produced any evidence to show that there existed facility of fax in the office of the Superintendent of Government Protection Home (Women). There is also no evidence to show that the office of District Magistrate, Agra had, in turn, communicated the alleged fax message to the Superintendent of the Government Protection Home (Women). DW-1 in her statement has denied existence of any facility of fax in her office and has denied the suggestion given to her about receipt of order dated 18.5.2017 in her office by fax.

48. The responsibility to prove dispatch of order dated 18.5.2017, by fax, from the office of Sub Divisional Magistrate, Sadar, Allahabad to the Superintendent, Government Protection Home (Women), Agra was of the prosecution. We have minutely examined the evidence on record of this appeal including the lower court record and we have no hesitation in concluding that the alleged order dated 18.5.2017 is not shown to have been dispatched to the office of the Superintendent, Government Protection Home (Women), Agra by fax and its receiving by fax is not proved. The prosecution has thus, failed to establish the dispatch of the order dated 18.5.2017 to the office of accused appellant by fax.

49. The next document on record is the photocopy of certain letters dispatched by speed post and the photocopy of such receipts have been exhibited as Ex.Ka. 15. The photocopy of the dispatch shows that some communication has been sent to the Superintendent of Government Protection Home (Women), Agra by the office of Sub Divisional Magistrate, Allahabad on 20.5.2017. The original of this dispatch has not been exhibited and a specific objection is taken by the defence to the admissibility of such evidence. Even if we treat that some communication was sent by registered speed post on 20.5.2017, it would have to be shown by the prosecution that the order dated 18.5.2017 was actually received in the office of Superintendent prior to 24.5.2017. As a matter of fact, the accused appellant has admitted that she received the order dated 18.5.2017 on 24.5.2017 at 2.15 pm. The prosecution, therefore, was required to show that this order was actually received in the office of Superintendent prior to 24.5.2017 at 2.15 pm. The document (Ex.Ka.15), therefore, cannot be treated as a proof of receipt of the order dated 18.5.2017 by the Superintendent prior to 24.5.2017 at 2.15 pm. This document, therefore, cannot help the prosecution case, even if we overlook the objection with regard to its admissibility on the ground that it is a photocopy and the contents of the dispatched communication remains un-ascertained.

50. Next document produced by the prosecution is the photocopy of the e-mail sent from

51. The next prosecution document is the certified copy of dispatch register in which a communication is shown to have been sent to the Government Women Protection Home, Agra. How this letter has been served or even dispatched is not clear.

The photocopy of this document would, therefore, not be a proof regarding service of order dated 18.5.2017 in the office of Superintendent prior to 24.5.2017.

52. The other document of prosecution is Ex.Ka.18 on which heavy reliance has been placed by the prosecution. This document is a certified photocopy of the whatsapp communication sent by a Lekhpal working in the office of Tehsil Sadar at Allahabad namely Sanjiv Khare from his Mobile No. 9450509758 to the Superintendent on her Mobile No. 9457020485. This document allegedly has been seen by the receiver at 4.56 pm on 20.5.2017.

53. So far as the dispatch of order dated 18.5.2017 by whatsapp is concerned, the sender of this communication is one Sanjiv Khare, who has not been produced in evidence. The sender of this whatsapp number is not of the Sub Divisional Magistrate, Sadar, Allahabad. The receiver of this whatsapp is Mobile No. 9457020485 which admittedly does not belong to the accused appellant. Mobile no. 9457020485 is registered in the name of the husband of the accused appellant, namely, Rakesh Kumar son of Ram Dulare, who lives at Etawah and has emphatically stated that he had an ordinary sim on which there was no facility of whatsapp. He has denied the suggestion that this SIM number was with the accused appellant or that she was utilizing it.

54. The evidence on record regarding receiving of letter dated 18.5.2017 is the admission of the accused appellant that she received it on 24.5.2017 at 2.15 pm. There is no legal evidence to show that this communication was received by the Superintendent prior to 24.5.2017 at 2.15 pm. Though it is not specifically so stated but it appears that the order dated 18.5.2017 was actually received in the office of Superintendent on 24.5.2017 by speed post.

55. So far as the dispatch of order dated 18.5.2017 by e-mail, whatsapp or fax is concerned, the dispatch in all three modes would amount to electronic record and evidence of such kind would be admissible only if it is backed by a certificate issued in terms of Section 65-B(4) of the Indian Evidence Act. Section 65-B(4) of the Evidence Act reads as under:-

"65-B(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,--

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it."

56. The provision contained in Section 65-B(4) of the Evidence Act has

been examined by the Supreme Court in Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal, (2020) 7 SCC 1 and again in Ravindra Singh @ Kaku Vs. State of Punjab, (2022) 7 SCC 581 to hold as under:-

"21. Lastly, this appeal also raised an important substantive question of law that whether the call records produced by the prosecution would be admissible under Sections 65-A and 65-B of the Evidence Act, given the fact that the requirement of certification of electronic evidence has not been complied with as contemplated under the Act. The uncertainty of whether Anvar P.V. v. P.K. Basheer [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 occupies the filed in this area of law or whether Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801 lays down the correct law in this regard has now been conclusively settled by this Court by a judgment dated 14-7-2020 in Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal (2020) 7 SCC 1 wherein the Court has held that:

"61. We may reiterate, therefore, that the certificate required under Section 65-B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in Anvar P.V.[Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473], and incorrectly "clarified" in Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801. Oral evidence in the place of such certificate cannot possibly suffice as Section 65-B(4) is a mandatory requirement of the law. Indeed, the hallowed principle in Taylor v. Taylor, (1875) LR 1 Ch D 426, which has been followed in a number of the judgments of this Court, can also be applied. Section 65-B(4) of the Evidence Act clearly states that secondary evidence is admissible only if lead in the manner stated and not otherwise. To hold otherwise would render Section 65-B(4) otiose.

Anvar P.V. (supra), as clarified by us hereinabove, is the law declared by this Court on Section 65-B of the Evidence Act. The judgment in Tomaso Bruno [Tomaso Bruno v. State of U.P., (2015) 7 SCC 178], being per incuriam, does not lay down the law correctly. Also, the judgment in Shafhi Mohammad (supra) and the judgment dated 3-4-2018 reported as Shafhi Mohammad (supra) , do not lay down the law correctly and are therefore overruled.

The clarification referred to above is that the required certificate under Section 65-B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the device concerned, on which the original information is first stored, is owned and/or operated by him. In cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information contained in such electronic record can be in accordance with Section 65-B(1), together with the requisite certificate under Section 65-B(4).

22. In light of the above, the electronic evidence produced before the High Court should have been in accordance with the statute and should have complied with the certification requirement, for it to be admissible in the court of law. As rightly stated above, oral evidence in the place of such certificate, as is the case in the present matter, cannot possibly suffice as Section 65-B(4) is a mandatory requirement of the law."

57. The argument of Sri G.S. Chaturvedi, Senior Advocate that no certificate in terms of Section 65-B(4) of

the Evidence Act has been produced during the trial by the prosecution is not disputed by learned AGA or the counsel appearing for PW-2.

58. We have examined the original records also and we do not find existence of any such certificate under Section 65-B(4) on record. In its absence the electronic evidence produced by the prosecution in the form of dispatch of whatsapp, e-mail or fax would clearly be inadmissible. Even otherwise, we find that the State has adopted a callous approach in proving the dispatch of the order dated 18.5.2017, inasmuch as, neither the SDM himself, nor his Stenographer or any other employee responsible for dispatch of such communication has been produced in evidence. The original records of the office of SDM have also not been produced or exhibited. In the absence of evidence to show non-availability of original records, we are not persuaded to entertain the secondary evidence sought to be adduced by the prosecution. We may also note that even during the course of investigation none of the Investigating Officers met the SDM Sadar, Allahabad, nor his statement was recorded under Section 161 Cr.P.C. No attempt was made to ascertain the details of official fax number, e-mail number, whatsapp number of the office of SDM Sadar, Allahabad. PW-9, was the investigating officer who submitted the charge-sheet has stated categorically in his cross examination that the whatsapp number of SDM Sadar Allahabad or the whatsapp number, fax number of the accused appellant is not on record. The following extract of his statement is reproduced:-

"पूरी विवेचना में SDM सदर इलाहाबाद का कोई भी ब्यान हस्व दफा 161Crpc दर्ज नहीं है। आरोप पत्र में भी उन्हे दस्तखत नही बनाया गया। सम्पूर्ण विवेचना में SDM सदर इलाहाबाद का कोई भी WhatsApp नम्बर बनाया फोन नम्बर तथा गीता राकेश का सरकारी WhatsApp नम्बर, फैक्स नम्बर फोन नम्बर दर्ज नही है।"

59. The other Investigating Officer namely B.S. Tyagi has also admitted that he never met the SDM Sadar Allahabad. His statement with regard to ascertainment of phone number is reproduced hereinafter:-

"यह सही है कि SDMसदर इलाहाबाद से व्यक्तिगत मेरी मुलाकात नही हुई। और अपने 161 CrPC का ब्यान भी मेरे CD में दर्ज नही किये। क्योंकि मेरी उनसे कभी व्यक्तिगत मुलाकात नही हुई। चार्जशीट मेरे द्वारा दाखिल नही की गई है। SDMइलाहाबाद का फैक्स नम्बर और whatsApp नम्बर email ID दर्ज कराई थी जो मैने केस डायरी में दिनांक 11/6/17 को उमाशंकर के ब्यान में दर्ज की है। और उसी में SDM सदर के कार्यालय में तैनात संजीव खरे के मोबाइल नम्बर 9450509758 के द्वारा श्री मती गीता राकेश के मोबाइल नम्बर 9457020485 पर सूचना देना अंकित कराया था। समय 4.56PM पर 20 मई 2017 को फैक्स नम्बर CD मे दर्ज नही है। मैने स्वंय इन नम्बरो की जाँच नही की ये नम्बर सही है या नही। नही थे ये किसी जाँच का उल्लेख C.D. में किया है। संजीव खरे से भी मेरी व्यक्तिगत मुलाकात नही हुई।"

He has further stated as under:-

"गीता राकेश का Email तथा फैक्स नम्बर C.D. में दर्ज नही है।"

60. The evidence on record, therefore, clearly shows that the prosecution has failed to establish that the order dated 18.5.2017 was served upon the accused appellant or was received in the office of

Superintendent, Government Women Protection Home, Agra prior to 24.5.2017 by when the inmates had been released.

61. At this juncture, we may also note that the accused appellant has also been convicted for offences under Section 16 read with 17 of the POCSO Act and she has been sentenced to life imprisonment for it. There is no evidence led by the prosecution to show that any of the inmates, released, was a minor. The 43 inmates were released alongwith their eight children. The released inmates were natural guardian of these eight minor children. All the forty three inmates otherwise were major and no evidence has been led by the prosecution to show that they were minor. PW-10, who was the Investigating Officer of the case has clearly admitted that all the inmates, released by the accused appellant, were major. Categorical statement in that regard is extracted hereinafter:-

"संवासिनियाँ जो छोड़ी गई थी वो सभी बालिग है।"

62. The other Investigating Officer has also admitted that there is no material available on record to show that any of the released inmate was a minor. We have been taken through the evidence of all other witnesses and we find that none of the witnesses have even claimed that any of the released inmates was a minor. Once that be so, we are at a loss to understand as to how the offence under Section 16/17 of the POCSO Act could have been proved against the accused appellant.

63. This takes us to the second question, which is, whether the accused appellant could have released the forty three inmates alongwith their eight children on her own or it required approval of some other officer to release them.

64. Before proceeding to examine the evidence with regard to the second issue formulated above, we would like to refer to the charges framed against the accused appellant in the present trial. There are eight charges levelled against the accused appellant. The charges have already been extracted above. The fourth charge is that the inmates were lodged in the Government Women Protection Home, Agra under the guardianship of the Sub Divisional Magistrate, Sadar, Allahabad and without his permission they could not have been released. This amounted to offence under Section 363 IPC.

65. The court below doubted the jurisdiction of Superintendent to release the inmates in view of Rule 38 of the Rules of 1993, which are already extracted above. The counsels opposing the appeal have also laid much emphasis upon it. Though we propose to examine this aspect, but we may indicate that an accused can be tried only for the charges specifically framed against her/him. The accused would have the opportunity to put-forth its defence only in the context of the charge levelled. There is no charge framed against the accused appellant with regard to non-observance of Rule 38, which vests the jurisdiction for discharge of inmate in the Chief Inspector. We are, therefore, doubtful whether the accused appellant could be punished for violation of Rule 38 when no such charge has been levelled against her. Violation of Rule 38 is also not an offence under the Act or the Rules of 1993.

66. It is settled that an accused cannot be punished without being charged for the offence at the trial. We are, therefore, of the considered opinion that Rule 38 could not be relied upon nor a charge with regard to its violation could be attributed to the

accused appellant. This is more so when the statute/law does not hold violation of Rule 38 to be a substantive offence. The accused appellant is only charged of exceeding her jurisdiction in releasing the inmates as authority for release vested with the Sub Divisional Magistrate and to such extent alone the accused appellant could be tried.

67. The order of Sub Divisional Magistrate dated 21.5.2016 directed for detainment of inmates in the protection home for a period of one year/further orders. We have already held that the further order dated 18.5.2017 was not communicated to the accused appellant prior to release of inmates. The only order on record is of 21.5.2016, as per which, period of detainment of inmate was for one year. This period admittedly expired on 20.5.2017. None of the inmates was released by the accused appellant till 20.5.2017. In the circumstances it needs to be examined whether the inmates could be detained in the protection home even after expiry of the term of their detainment i.e. 20.5.2017?

68. On the above issue, we find that there is a specific order of the Supreme Court in Dr. Upendra Baxi and others (II) (supra), which has already been extracted above. The Supreme Court has clearly directed the Superintendent of the Protection Home to take care that no women or girl is detained without due authority and process of law. The District Judge, Agra was also directed to carry out monthly inspection of the protection home and verify during every visit that no woman or girl is detained except under the authority of law and if he finds that any of them is detained without any authority of law, he shall take steps to see that she is released and repatriated to her parents or husband or other proper authority. The accused appellant (DW-1) has clearly stated in her testimony that she wrote to the District Judge, Agra for his guidance in the matter and the District Judge, Agra directed her to act in accordance with the order passed by the SDM Sadar Allahabad. The statement of DW-1 in this regard is reproduced hereinafter:-

''मा0 जिला जज के 4.5.17 एवं 20.5.17 दोनो पत्रों में पीड़िता की आवासित अवधि 20.5.17 को ही समाप्त होना बताया है तत्क्रम मे SDM सदर इलाहाबाद के आदेश तत्काल अनुपालन आदेश मुझे दिये। दोनो पत्र में अन्य सबूत के साथ दाखिल कर रही हूँ।''

69. The above statement of accused appellant has not been challenged by the prosecution, nor such statement is shown to be false or incorrect. The Superintendent otherwise is the Principal Officer (Incharge) of Protection Home and the charge of general supervision of protection home vests in the Superintendent. It would thus be the responsibility of the Superintendent to ensure that no person is detained in a protection home without the authority of law. Her decision to release the inmates after term of detainment of inmates had come to an end, therefore, cannot be frowned upon.

70. Rule 38, which has been referred to by the court below and has been pressed by the respondents apparently is in respect of discharge of inmates of a protection home and not release upon expiry of detainment period. This power apparently regulates a distinct exigency where the inmate is to be discharged from a protection home on account of good behaviour and is not likely to commit any offence during the subsistence of the detainment period. The exigency which attracts Rule 38 does not arise in the facts of

the present case. The inmates in the present case had completed the term of their detainment and as they were otherwise major their detainment beyond 20.5.2017 would not have been lawful. In her capacity as the Principal Officer of the Protection Home, it was within the competence of the Superintendent to have released the inmates once the term of their detainment had come to an end. The officer otherwise had taken due precaution of writing to the District Judge, Agra and the limited guidance received from the District Judge was to act in terms of the order of the SDM. The decision taken by the accused appellant to release the inmates upon expiry of their detainment period cannot thus be said to be illegal.

71. Moreover, the release of inmates upon expiry of the detainment period would not amount to any offence as per the provisions of the Act of 1956. The accused appellant however has been charged of offence under Section 370(3), 370(5), 370(7), 363, 188, 120B IPC read with Section 9 of the Act of 1956 and Section 16/17 of the POCSO Act. Section 370 IPC provides for trafficking of a person. Section 370 IPC is reproduced hereinafter:-

"370. Trafficking of person. - (1) Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by--

First. - using threats, or

Secondly. - using force, or any other form of coercion, or

Thirdly. - by abduction, or

Fourthly. - by practising fraud, or deception, or

Fifthly. - by abuse of power, or

Sixthly. - by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.

Explanation 1.- The expression "exploitation" shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.

Explanation 2.- The consent of the victim is immaterial in determination of the offence of trafficking.

(2) Whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine.

(3) Where the offence involves the trafficking1 of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(4) Where the offence involves the trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

(5) Where the offence involves the trafficking of more than one minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than fourteen years, but which may extend to imprisonment for life, and shall also be liable to fine.

(6) If a person is convicted of the offence of trafficking of minor on more than one occasion, then such person shall be punished with imprisonment for life, which shall mean imprisonment for the

remainder of that person's natural life, and shall also be liable to fine.

(7) When a public servant or a police officer is involved in the trafficking of any person then, such public servant or police officer shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine."

72. Sub-section (1) of Section provides that whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by--

First.--using threats, or Secondly.--using force, or any other form of coercion, or Thirdly.--by abduction, or Fourthly.--by practising fraud, or deception, or Fifthly.--by abuse of power, or Sixthly.-- by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.

73. Sub-Sections (3)(5) & (7) of Section 370 IPC deals with specific exigencies arising in the context of an offence contained in Section 370(1) IPC.

74. In the facts of the present case, we find that there is no allegation or evidence against the accused appellant that she has either recruited or transported or harboured or transferred or received a person or persons for exploitation by using threats or coercion or abduction or by practising fraud or deception or abuse of power or by inducement, etc. The only allegation against the appellant is of unlawfully releasing the inmates from the protection home in derogation of the order passed by Magistrate on 18.05.2017. There is no evidence on record to show that release of inmates was for the purpose of their exploitation, nor they are recruited; transported; harboured; transferred or received for exploitation. At best there is an apprehension that the released inmates may be forced again into immoral trafficking. There is otherwise no evidence that any of the released inmate was again forced into trafficking at the instance of the accused appellant. The apprehension that these inmates may again be involved in human trafficking cannot be a substitute for evidence to be led by the prosecution for establishing charge under Section 370 IPC. In the absence of evidence of trafficking against the accused appellant, she could not have been convicted and sentenced under Section 370(3)(5)(7) IPC. The court below has completely overlooked this aspect of the matter.

75. So far as charge under Section 363 IPC is concerned, none of the inmates are shown to be a minor and the period of their detainment had come to an end. Necessary ingredients to establish offence under Section 363 IPC are completely missing in the facts of the case. The inmates are not shown to be removed or kidnapped from lawful guardianship of someone else.

76. So far as the offence under Section 188 IPC is concerned, we find that there was no disobedience to any order duly promulgated by public servant. We have already held that the subsequent order of Sub Divisional Magistrate, dated 18.5.2017 was not served upon the accused appellant prior to the release of the inmates and in the absence of any complaint filed in

that regard the conviction and sentence of the accused appellant under Section 188 IPC would also be impermissible in law.

77. So far as the offence under Section 120B IPC is concerned, the criminal conspiracy requires two or more persons to agreed to do or cause to be done an illegal act or an act by illegal means. One person alone cannot commit criminal conspiracy. Since the offending act is attributed to the accused appellant alone, the charge under Section 120B IPC cannot be established when it is not proved that any criminal conspiracy has been hatched to commit an offence punishable for a term of two years or more.

78. So far as charge under Section 9 of the Act of 1956 is concerned, it contemplates seduction of a person in custody. The provision contemplates that any person having the custody of another causes or aids or abets the seduction for prostitution of that person he/she shall be punished 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. In the facts of the present case there is neither any allegation nor any evidence that any person in care or charge of the accused appellant has been seduced for prostitution and, therefore, the charge under Section 9 of the Act also cannot be made out.

79. The last charge against the accused appellant is of committing offence under Section 16/17 of the POCSO Act. We have already noticed that none of the inmates released from the Protection Home was a minor. Only eight children were released alongwith forty three inmates who were minor children of these inmates and, therefore, the released inmates were the legal and lawful guardians of these children. Once these inmates were being released from the protection home on completion of their detainment period it was necessary that their dependent children be also released with their mothers. The positive evidence of prosecution is that all inmates were major. In such circumstances, we fail to understand as to how the accused appellant could be punished for the offence under Section 16/17 of the POCSO Act.

80. Upon evaluation of the evidence led on record and for the discussions held above, we find that the court below has completely misdirected itself in holding the accused appellant guilty for the offence committed under the various sections of IPC; Act of 1956 and the POCSO Act. The only action on part of the accused appellant is of releasing the inmates after completion of their period of detainment at the protection home. Such act by no stretch of imagination could be construed as an act amounting to offence on part of the accused appellant.

81. Before parting, we must indicate our displeasure at the manner in which the officers of State have handled the concerns of rehabilitation of the forty three inmates who were rescued and then placed in the custody of the Superintendent of Government Women Protection Home, Agra as also the manner in which evidence is led at the stage of trial in this case. The detainment of inmates was for a period of one year and none of the State Authorities apparently oversaw the steps to be taken for their rehabilitation over a period of one year. There is nothing on record to show that any concrete steps towards rehabilitation of these inmates were taken. These inmates were not punished for any offence and the object of their detainment

was merely to ensure their rehabilitation. The authorities having kept these inmates in the custody of Superintendent apparently lost track of them. PW-1, who is the official of the department of Women Development has admitted that he never visited Agra even once to look after the rehabilitation of forty three inmates in question. It appears that after a concern was raised by PW-2, the authorities suddenly woke up from their deep slumber and washed their hands by merely placing all responsibility upon the accused appellant. In our opinion the department of Women Development and the authorities under the Act of 1956 ought to have monitored the exercise to be undertaken for rehabilitation of these rescued inmates and some scheme/plans ought to have been formulated so as to ensure that these inmates are not forced again into immoral trafficking.

Even at the stage of trial none from the office of concerned magistrate was produced nor the original records were exhibited. This shows callousness on part of the responsible officers in dealing with the plight of rescued workers. In the circumstances of the present case, we deem it appropriate to observe that the authorities entrusted with the task of rehabilitation of rescued sex workers must be made more responsive and appropriate schemes be formulated for protection and rehabilitation of the rescued workers. We hope and trust that the authorities of the State would give due attention to such serious concerns of well being of rescued workers so that the object of the Act of 1956 are fulfilled.

82. For the deliberations and discussions held above, this appeal succeeds and is allowed. The judgment and order dated 6.10.2018, passed by the Special Judge (POCSO Act)/VIII Additional Sessions Judge, Agra in Special Trial No. 1848 of 2017, is set-aside. The accused appellant, who is in jail since 1.6.2017, shall be set to liberty, forthwith, unless she is wanted in any other case, subject to compliance of Section 437A Cr.P.C.

(2023) 1 ILRA 665
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.12.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAMEER JAIN, J.

Connected with Reference No. 3 of 2021
Capital Case No. 4 of 2021

Chandan ...Appellant

Versus

State of U.P. ...Opp. Party

Counsel for the Appellant:
From Jail, Shweta Singh Rana, Sri Pradeep Kumar Mishra, Sri Vinay Saran(Sr. Advocate)(A.C.)

Counsel for the Opp. Party:
G.A.

A. Criminal Law – Prevention of Children from Sexual Offence Act, 2012 – Sections 5(i)(m) & 6(1) – Indian Penal Code, 1860 – Sections 302, 376-A & 376-B – Death penalty – Medical report and FSL report were not put to accused to seek his explanation u/s 313 Cr.P.C. – Effect – The doubt that arises from the note put in the forensic report is not dispelled by the prosecution – The reports, how far have evidentiary value – Held, incriminating circumstance that neither the medical examination report of the appellant which discloses collection of undergarments nor FSL report were put to the appellant during his examination under Section 313 CrPC, have to be eschewed from consideration – Forensic report on which

heavy reliance has been placed by the trial court to record conviction cannot form a valid piece of evidence as against the appellant. (Para 29, 71, 72 and 74)

B. Criminal Law – Evidence Act,1872 – Section 106 – Circumstantial evidence – Reliability – Principle laid down – These circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation of hypothesis other than that of the guilt of the accused and inconsistent with their innocence – Held, when the prosecution is successful in establishing a chain of incriminating circumstances leading to the logical inference that in all human probability it is the accused and accused alone who could have committed the crime, the burden shifts upon the accused to explain those circumstances and in absence whereof an adverse inference can be drawn against the accused with the aid of section 106 of the Evidence Act. (Para 41 and 45)

C. Criminal trial – Last seen evidence, how far sufficient for conviction – Held, ordinarily, the circumstance of the deceased being last seen alive with the accused may alone not be sufficient to record conviction. (Para 44)

D. Criminal trial – Prevention of Children from Sexual Offence Act, 2012 – Section 29 – Presumption against the accused – Benefit when available to prosecution – Held, benefit of the presumption would be available to the prosecution under Section 29 of the Act only when the foundational facts are proved by the prosecution by legally admissible evidence and that too, only in respect of offences specified therein. (Para 49 and 51)

Appeal allowed. (E-1)

List of Cases cited:-

1. Vijay Shankar Vs St. of Har.; (2015) 12 SCC 644

2. Sharad Birdhichand Sarda Vs St. of Mah.; (1984) 4 SCC 116

3. Bablu Vs St. of Raj.; (2006) 13 SCC 116

4. Shivaji Sahabrao Bobade & anr. Vs St. of Mah.; (1973) 2 SCC 793

5. Devi Lal Vs St. of Raj.; (2019) 19 SCC 447

6. Nizam Vs St. of Raj.; (2016) 1 SCC 550

7. Navneetakrishnan Vs St.; (2018) 16 SCC 161

8. St. of U.P. Vs Satish; (2005) 3 SCC 114

9. Ramreddy Rajesh Khanna Reddy & anr. Vs St. of A.P.; (2006) 10 SCC 172

10. Bodhraj Vs St. of J & K; (2002) 8 SCC 45

11. Shambu Nath Mehra Vs St. of Ajmer; AIR 1956 SC 404

12. Nagendra Sah Vs St. of Bihar; (2021) 10 SCC 725

13. Shivaji Chintappa Patil Vs St. of Mah.; (2021) 5 SCC 626

14. Raj. Vs Kashi Ram; (2006) 12 SCC 254

15. Capital Cases No.13 of 2021; Monu Thakur Vs St. of U.P. decided on March 14, 2022

(Delivered by Hon'ble Manoj Misra, J.)

1. By the impugned judgment and order dated 18.01.2021 /20.01.2021 passed by Special Judge (Pocso Act)/ Additional District and Sessions Judge, Ghaziabad in Case No.313 of 2020, arising out of Case Crime No.1470 of 2020, P.S. Kavi Nagar, District Ghaziabad, the appellant has been convicted under Sections 302, 376-A, 376-AB, 201 IPC and Section 5(i)(M)/6(1) of Protection of Children from Sexual Offences Act (Pocso Act) and as the offences punishable under Sections 376-A, 376-AB IPC and Section 5(i)(m)/ 6(1) of Pocso Act were offences of the same nature, upon noticing that the sentence under Section 5(i)(m)/ 6(1) of the Pocso

Act is greater, in light of the provisions of Section 42 of the Pocso Act, the appellant has been punished as follows:- (i) Death penalty under Section 5(i)(m)/6(1) of Pocso Act; (ii) Imprisonment for life as well as fine of Rs. 1,00,000/- under Section 302 IPC; Seven years R.I. as well as fine of Rs.50,000/- under Section 201 IPC, coupled with default sentence of additional one year.

2. As death penalty was awarded by the trial court, the trial court submitted a reference under section 366 of the Code of Criminal Procedure, 1973 for confirmation of death penalty, which has been registered as Reference No.3 of 2021.

3. The convicted accused requested the Jail Authorities to forward his appeal against the order of conviction and sentence, as a result whereof, the Jail Superintendent, District Jail, Ghaziabad has forwarded the appeal of the appellant vide letter dated 25.01.2021 giving rise to Capital Cases No.4 of 2021.

4. This appeal was earlier heard by a Bench comprising Pankaj Naqvi, J. and Naveen Srivastava, JJ. After hearing the counsel for the parties, on 19.07.2021 the judgment was reserved. However, instead of pronouncing the judgment, the matter was directed to be listed for further hearing and, ultimately, was directed to be put up before appropriate Bench. Thereafter we heard the matter and reserved the judgment. But before we could deliver the judgment our Bench was dissolved, consequently, the judgment could not be delivered. Whereafter, the matter was again nominated to us by order of the Chief Justice dated 24.11.2022. On 9.12.2022 we heard the matter again and reserved the judgment, which is now being delivered.

5. We have heard Sri Vinay Saran, learned Senior Counsel, as Amicus Curiae, assisted by Sri Pradeep Kumar Mishra, for the appellant; and Sri J.K. Upadhyay, learned AGA, for the State.

6. Considering the nature of the crime, we are not disclosing the name of the victim /members of her family including the witnesses of that area therefore, wherever required they have been described by a pseudo name or their witness number.

INTRODUCTORY FACTS

7. A written report (Ex. Ka-1) was submitted by PW-1 (the father of the victim) at P.S. Kavi Nagar, District Ghaziabad on 20.10.2020, at 14.34 hrs, giving rise to Case Crime No.1470 of 2020. The written report was scribed by nephew of the informant, namely, PW-3. In the written report it is alleged as follows: that the informant is a resident of Bihar; he had been residing with his wife and children in a rented accommodation in the industrial area of Kavi Nagar, District Ghaziabad, which is owned by X; that the accused-appellant, who is also a resident of Bihar, had been regularly visiting informant's house for the last 10 years; that on 19.10.2020, the informant, the accused-appellant and two others, namely, "Y' and "Z' were having drinks (liquor) at / near informant's house; during the course of the drinking session, the accused-appellant at about 8.00 pm went to informant's room, asked informant's wife (PW-2) to handover informant's younger daughter i.e. the victim, aged about 2½ years, and took the victim away under the pretext that he would play with her; that when the informant entered his room, his wife (PW-2) told the informant that the accused-

appellant has taken the victim to play with her; that, thereafter, the entire night, along with the police, a search for the victim was made; that next day i.e. 20.10.2020, at about 12.30 hrs, information was received that dead body of the victim has been found near a drain adjoining Beer Factory Road close to RTO office. By alleging that the informant has reason to believe that the accused-appellant has raped and killed informant's daughter, the aforesaid written report was registered as a first information report (FIR).

8. After the FIR was lodged, inquest was conducted on 20.10.2020 and completed by 15.30 hrs. Inquest report (Ex. Ka-2) was prepared by S.I. Mehak Singh Baliyan (PW-6). PW-1 (the informant), PW-4 (aunt of the victim) and PW-3 (the nephew of the informant and scribe of the written report) were, inter alia, witnesses of the inquest report. The inquest report recites that the body of the victim was naked and near the body a yellow coloured frock was lying. The entire body including face and private parts disclosed marks of injuries.

9. On 20.10.2020, at about 7 pm, a team of doctors, of which PW-7 and PW-8 were part, conducted autopsy of the cadaver. The relevant features of the **autopsy report** (Ex. Ka-5) are as follows:-

Age: 2 ½ years.
Sex: Female.

External General Appearance

(i) General appearance: Average body found nude. Eyes congested, Nails cyanosed, Tongue clenched between teeth.

(ii) Rigor mortis present all over body.

Ante-mortem external injuries:-

(i) Abraded contusion (multiple) 12 cm x 6 cm on anterior region of neck (max: 5 cm x 1 cm, min: 1 cm x 0.5 cm). Contusion mark is 6 cm below from right ear, 4 cm below from chin and 4 cm below from left ear. On suction effusion of blood under deeper tissues is present.

(ii) Contusion 10 cm x 7 cm on left cheek.

(iii) Contusion 9 cm x 6 cm on right cheek.

(iv) Abraded contusion 2 cm x 2 cm over and above the tip of nose.

(v) Multiple abraded contusion 19 cm x 10 cm (max: 1 cm x 1 cm and min: 0.5 cm x 0.5 cm) on both side of chest just below the clavicle.

(vi) Multiple abraded contusion 35 cm x 18 cm (max 5 cm x 0.5 cm and min 0.5 cm x 0.5 cm) on back of chest and abdomen both side.

(vii) Contusion 1 cm x 1 cm anterior region of left elbow joint.

(viii) Contusion 1.5 cm x 0.5 cm right thigh inner side, 13 cm above right knee joint.

Internal examination:-

(i) Trachea congested. Tracheal ring fractured; hyoid bone fractured.

(ii) About 50 ml semi digested food present in stomach. Small Intestine: Digested food and gases. Liver: congested. Gallbladder: half full and congested.

(iii) Uterus empty swelling over vulval area. Hymen ruptured. Contusion present in inner aspect of vulval region.

(iv) Rectovaginal tearing present.

Time since death: About one day.

Cause and manner of death: Asphyxia as a result of ante-mortem throttling.

10. As per autopsy report following items were preserved for forensic examination/ DNA analysis:- (i) one frock, (ii) one tooth, (iii) one pair vaginal slide (iv) one vaginal swab, (v) one pair anal slide, (vi) and one anal swab, (vii) one pair oral slide (viii) one oral swab, (ix) nail scrape and (x) one hair present on pubic area. All items were sealed and handed over to concerned constable for spermatozoa and further examination.

11. During the course of investigation, the site plan of the place from where the body was recovered was prepared which was proved by PW-9 and exhibited as Ex. Ka-6. The index of the site plan (Ex. Ka-6) would suggest that it was an open place having access to all. It also suggests that near the place where the body was found, empty pouches of salted snacks, an empty water bottle and two one rupee coin was noticed. The index of the site plan suggests that wet soil and plain soil was lifted from there. It be noted that a seizure memo of these articles lifted from the spot was also prepared by PW-9, which was marked as Ex. Ka-7.

12. On 20.10.2020, Mehak Singh Baliya (PW-6) effected arrest of the accused from near Atma Ram Steel Underpass, Kavi Nagar. The arrest memo (Ex. Ka-4) prepared pursuant to directions issued by the Apex Court in D.K. Basu's case, reflects the date and time of arrest as 20.10.2020 and 21.50 hrs, respectively. It bears the signature of the accused and carries an acknowledgement of the arrested person (i.e. the appellant) that he was subjected to medical examination and that on the medical report, his thumb impression has been obtained and that a copy thereof has been handed over to the arrested person. This medical report of the accused-appellant is there on record as paper no.6-Ka but the doctor who examined the appellant has not been examined as a witness and is also not separately marked as an exhibit in the record of the court below. But since in the arrest memo which has been exhibited it is stated that the accused was medically examined at the time of arrest and was given the injury report we propose to notice the contents of the injury report. The injury report reflects that the medical examination of the accused-appellant was conducted on 20.10.2020 at 11.30 pm. At the time of his medical examination, the doctor noticed following injuries:-

(i) Contusion at left forearm, size 10 cm x 5 cm just above left wrist joint.

(ii) Contusion at right forearm, size 9 cm x 5 cm just above right wrist joint.

(iii) Contusion at left thigh (posterior), size 10 cm x 6 cm: 10 cm above left knee joint.

(iv) Contusion at right thigh (posterior), size 11 cm x 6 cm: 10 cm above right knee joint.

(v) Contusion at posterior of left lower leg, size 8 cm x 5 cm.

(vi) Contusion at posterior of right lower leg. Size 8 cm x 5 cm.

(vii) Contusion at left buttock, size 10 cm 5 cm.

Injuries are simple in nature caused by hard and blunt object.

It be noted that blood sample and undergarments of the accused-appellant were taken for the purposes of DNA profiling along with his oral smear, penile

swab and swabs from urethral meatus, frenulum, glans, scrotum, shaft, perineum and nail clipping.

13. On 21.10.2020, the investigating officer - Nagendra Chaubey (PW-9- the I.O.) recorded the statement of the witnesses including the statement of Mehak Singh Baliyan who carried out the inquest proceeding and on 22.10.2020 the I.O. inspected the spot where the accused, the informant and others were having their drinks and prepared site plan (Ex. Ka-8). On the same day, I.O. also obtained CCTV footage from the owner of the premises and a seizure memo in respect thereof was prepared as Ex. Ka-9. On 24.10.2020, I.O. entered the postmortem report in the CD and recorded the statement of the doctors who were part of the team of doctors that carried out autopsy of the cadaver. On 26.10.2020, vide Parcha No.5, the materials collected were sent for forensic examination to FSL, Ghaziabad.

14. On 16.11.2020, the investigation of the case was assigned to Ajay Kumar Singh (PW-10). PW-10 sent reminder letters on 21.11.2020 and 01.12.2020 for providing forensic reports. On 16.12.2020, upon finding sufficient material against the accused-appellant, charge sheet (Ex. Ka-10) was submitted. On 05.01.2021, report was obtained from the Forensic Laboratory, Ghaziabad which was entered in the supplementary case diary and the report was filed in court as paper No.25-Ka/3.

15. After taking cognisance, on 24.12.2020 the Special Court, Pocso Act charged the appellant for commission of offences punishable under Sections 376-A, 376-AB, 302 and 201 IPC and Section 5(i)(M)/6(1) of the Pocso Act. The accused-appellant denied the charges and claimed trial.

PROSECUTION EVIDENCE

16. During trial, the prosecution examined 10 witnesses. Their testimony, in brief, is as under:-

17. **PW-1 - the informant - father of the deceased/victim.** - He stated that on 19.10.2020 he along with the accused-appellant and two others were having drinks (liquor) at the ground level near his apartment. While they were having liquor, the accused-appellant stood up, went to informant's room and took away informant's daughter under the pretext that he would be playing with her. When PW-1 went to his apartment, his wife (PW-2) informed that the accused has taken the victim to play with her. Thereafter, PW-1 along with the police searched for the victim in the night but could not find her. PW-1 stated that on 20.10.2020, at about 12.30 hrs, he got information that his daughter (the victim) is lying dead near a drain close to the R.T.O Office on the Beer factory road. He proved the written report (Ex. Ka-1).

During cross examination, PW-1 stated that they were having liquor at about 8 pm on the ground floor, below his own apartment, in the room of "Y'; "Y' used to stay alone in his room and his family used to reside in the village; liquor bottle was brought by the accused-appellant; it was country made liquor; PW-1 entered that room with his own liquor pouch at about 8.30 pm whereas, the accused-appellant and "Y' were having their drinks since day time and were totally drunk but were in a position to walk. While they were having drinks, between 8.45 and 9 pm, accused-appellant stood up and went, saying that he is going to his room. When PW-1 reached his apartment at about 9.30 pm, he was

informed that the accused-appellant had come and had taken the victim under the pretext that he was taking her to PW-1. PW-1 added that the accused did not bring his daughter to him. He then stated that the accused-appellant stays nearby at "Bhatia Mod" (crossing) but his family use to reside in the village and he used to stay near one of his friends about whom he has no knowledge. PW-1 added that he first met the accused-appellant in Ghaziabad and had been in touch with him for the last 10-12 years in as much as they were both from Bihar and used to work as labourers. He, however, clarified that the accused-appellant and he were not regular visitors to each other's house though, on a few occasion he had called the accused-appellant over to his house to have food.

On further cross examination, in respect of the night of the incident, PW-1 stated that after he had searched for the victim in the lanes of the area, in the night of 19.10.2020 itself, he gave written information to the police. At that time, along with him his Bhabhi, nephew, brother and sister were there. He stated that when they had lodged the report it must be about mid-night of 19/20.10.2020 whereas the body of the victim was found next day (i.e. 20.10.2020) around noon time (12 hrs).

In respect of discovery of the body of the deceased, PW-1 stated that "दि0 20 तारीख को मिली थी। मेरी बेटी आराध्या की डेड बाडीपुलिस वालों को मिली थी। पुलिस वालों ने हमें सूचना दी थी जहां पर बच्चीकी डेड बाडी मिली थी वहां पर दरोगा जी ने लिखत पढत नहीं की बल्किथाने पर ले जाकर (पंचायतनामा) की थी। लिखत पढत वाले कागज पर मैनेमेरी पत्नी मेरी बहन मेरी भाभी व महेश ठेकेदार ने दस्तखत किये थे। थाने घटनास्थल से लगभग 1 किमी0 दूर था। जहां पहुंचने में करीब 7–8 मिनट लगेथे। लडकी की डेड बाडी के पास खाने पीने का सामान मिला था उसकीलिखत पढत हुयी थी।" In addition to above, he stated that "मै चन्दन को पिछले 10–12 साल से जानता हूं मेरा चन्दन से कोई पैसा का लेन देन था और ना ही मेरी चन्दन से कोई पुरानी रंजिश थी।

18. PW-2- mother of the victim (wife of the informant). She stated that the accused-appellant had been visiting them for the last 10 years; that the accused-appellant and few others including her husband used to work for a Thekedar (i.e. contractor); her own children were well acquainted with the accused-appellant; her daughter (the deceased) used to call accused-appellant "Chacha" (uncle); the accused-appellant did not have a fixed abode; sometimes he used to stay overnight at Thekedar's place. On the date of the incident, her husband, accused-appellant and two others were having liquor; between 7.30 and 8 pm, accused-appellant came to her room and took the victim outside to play with her under the pretext that her father (i.e. the informant) had called for her; that, initially, she resisted but her daughter started playing with the accused and she got busy in her own work therefore, the accused-appellant lifted her daughter and took her away by saying that he will bring her back shortly. PW-2 stated that when she told her husband (i.e. PW-1) that the accused-appellant had told her that he was taking their daughter to PW-1, she was informed by her husband (i.e. PW-1) that the accused-appellant had not brought his daughter to him. Whereafter, they all started searching for their daughter. During the course of search, PW-1's nephew (i.e. PW-3) came and informed them that he saw accused-appellant carrying the victim on his shoulder. PW-2 stated that on the next day, the body of the deceased was found near a drain.

During cross examination, PW-2 stated that she was married seven years ago; the accused-appellant had been known

to her husband for the last 10-12 years since before her marriage; the accused-appellant was a married person with two children but his wife and children were not noticed by her though, she had spoken to them over the telephone. PW-2 stated that accused-appellant's wife had complained about her husband beating her and not sending her sufficient money for expenses. PW-2 stated that she never expected that the accused-appellant could commit such a heinous crime with her daughter. In respect of the day of the incident, PW-2 stated that she was aware that the accused-appellant and her husband were having liquor together. She stated that her husband was more intoxicated than the accused-appellant at that time. She stated that initially she tried to stop accused-appellant from taking her daughter because her husband was under the influence of liquor but, later, she did not resist the accused-appellant as he was well acquainted to her husband and she believed that he would return her daughter safely. On further cross examination, she stated that she had lodged the report forthwith at the police chowki; and next day, the dead body of her daughter was found. She stated that after the body was found, papers were written at the police station and some were written at the spot and thereafter, the body was sent for autopsy. She stated that when papers were being written, her entire family was present. She again reiterated about lodging of the report on the day of the incident. Her statement in that regard is as follows:-

''रिपोर्ट घटना वाले दिन ही मेरे द्वारा करा दी गयी थी अगले दिन मेरी बेटी की डेड बाडी एक बजे के करीब दिन में मिली थी। चन्दन पाण्डे को पुलिस ने रात मे घटना के बाद ही पकड लिया था। मैने चन्दन पाण्डे से बेटी के गायब होने के बाद पूछताछ की थी कि मेरी बेटी कहा है तो चन्दन ने कुछ नहीं बताया और यह कह रहा था कि मैने तुम्हारी बेटी को तुम्हारे पति के पास छोड दिया था। चन्दन मेरे पति को फंसाने के चक्कर में लग रहा था।''

After stating as above, PW-2 stated that on the next day the police came to the house of her landlord and took the CCTV footage of the camera placed over the mobile phone shop from which it was confirmed that the accused-appellant took away her daughter. She denied the suggestion that whatever she has stated is incorrect and false and that the accused-appellant did not assault and kill her daughter.

19. **PW-3 - nephew of the informant and scribe of the report**. He stated that on the date of the incident while he was going to his house on his cycle, he saw the accused-appellant carrying the victim on his shoulder near Anmol Biscuit Factory. When he reached the house, he saw everybody worried and searching for the victim. PW-3 told them what he had seen. After that, they went in search of the victim. Later, the body of the victim was found near a drain. He recognised the appellant as the person who was carrying the victim and stated that he has reason to believe that it is the appellant who has committed the heinous crime. He stated that on the dictation of his uncle (the informant), he had written the written report on which his uncle has put his thumb impression. He stated that during investigation his statement was recorded by the I.O.

During cross examination, he stated that he had been knowing the accused appellant for the last 10-12 years. He also comes from the same State (i.e. Bihar) but from a different district. PW-3 stated that at the time when they went to lodge the report at the police station along with him and his uncle (PW-1), his aunt (Bua) was also there. He stated that after the body had been discovered, the report was written

between 1 and 1.30 pm of 20.10.2020. PW-3 stated that the inquest papers were prepared in his presence by the Chowki Incharge and at the time when those papers were being prepared all family members were present. He stated that the I.O. recorded his statement on 21.10.2020. PW-3 also stated that his uncle (PW-1) did not use to have drinks with the accused-appellant on a daily basis but they use to drink together at least once or twice in a week. PW-3 stated that the informant (PW-1) is his real uncle (*Chacha*); that his aunt (*Chachi*) had told him that the victim was taken away by the accused-appellant; that his uncle (PW-1) never had a fight, or any kind of enmity, with the accused-appellant and that he had good relations with the accused-appellant. PW-3 denied the suggestion that because of his uncle, he scribed a false report. He also denied the suggestion that he is telling lies.

20. **PW-4 - aunt of the deceased.** She stated that her husband is a heart patient; on the date of the incident, she had ventured out to fetch medicine for him. She then saw the accused-appellant standing outside and playing with the victim. When she went upstairs to her room, victim's mother told her that the accused-appellant had taken the victim; PW-4 confirmed that she informed victim's mother what she had just seen i.e. the victim with the appellant. She stated that later, when they could not find the victim, a search for the victim was made. She stated that police had taken her statement and that she was a witness of the inquest report. She proved her signatures on the inquest report which was marked Ex. Ka-2.

During cross examination, she stated that her apartment and her brother's (informant's) apartment are adjacent to each other. They are both tenants of "X'. On further questioning, she stated that the accused-appellant was arrested on 19.10.2020. She stated that she herself had caught the accused-appellant and had called the police. Though she could not remember the number at which she had called but stated that the I.O. had himself given the number to her. She stated that when she had caught the accused-appellant, he was alone and had blood on his trouser. She added that when the accused-appellant was apprehended by her, her Bhabhi (PW-2) was also there. PW-4 stated that the body of the victim was recovered by the police on the next day and papers in respect of inquest was prepared by the police in front of her. PW-4 stated that when the body was dispatched for autopsy, she had accompanied the body. She also stated that she had learnt that the accused-appellant killed his own daughter in the village and, therefore, she had warned her Bhabhi (PW-2) and brother (PW-1) about it. She also stated that she hated the accused-appellant because of his habits. She denied the suggestions that the accused-appellant did not kill her niece; that she is telling lies; and has falsely implicated the accused-appellant.

21. **PW-5 - son of ''X' (the landlord)**. He stated that he has a mobile phone shop in the complex where the informant resides as a tenant of his father (X). The shop has a CCTV camera installed over it. In the evening of 19.10.2020, he received a call from Daroga (Sub Inspector) that he needs the CCTV footage of his shop. On the next day i.e. 20.10.2020, in the morning, at about 7.30 am, he gave the DVR of the CCTV recording to the Daroga which was played. He stated that the CCTV footage disclosed that the accused-appellant was carrying the

deceased on his shoulders between 8.50 and 8.55 pm. He stated that this clip was given by him to the Daroga. He stated that video clip which he gave to the Daroga was not tampered. He stated that he had also given a certificate of the footage. The certificate given by PW-5 was marked as Ex. Ka-3.

During cross examination, PW-5 stated that the informant and his family had been residing as tenants of the accommodation for last 4-5 years and the accused-appellant had been a regular visitor of his tenants and he had seen him several times. He denied tampering the CCTV footage or the DVR. He denied the suggestion that he is telling lies.

22. **PW-6 - S.I. Mehak Singh Baliya.** He stated that on 20.10.2020 he was posted at P.S. Kavi Nagar. On the written report of the informant, the FIR was registered. The FIR alleged that the body of the deceased was lying on the road side near RTO office close to Beer factory. He stated that upon receipt of the information, he along with Senior Inspector, constable and lady constable along with Inquest register and other papers left to go to the spot. At the spot, he saw the body of the deceased. The body was examined by a lady constable and after appointing inquest witnesses, the inquest proceedings were completed. On the same day i.e. 20.10.2020, at about 23.00 hrs (Note: arrest memo reflects time of arrest as 21.50 hrs), he along with his police team arrested the accused-appellant near Atma Ram Steel Underpass. After his arrest, he got the arrest memo prepared, which was marked Ex. Ka-4. He also proved his signature on the inquest report as also the signature of PW-4 thereon.

During cross examination, PW-6 stated that at the time of inquest the family members of the informant were present and amongst those, informant's sister (PW-4), informant's nephew (PW-3), informant's relative (not examined) and informant's neighbour (not examined) were there. PW-6 stated that he arrested the accused on the information received from an informer. He specifically denied that the accused was apprehended by any one other than the police. He specifically denied receiving any information from any of the family members of the deceased in respect of the accused being apprehended. PW-6 denied the suggestion that the inquest was not conducted on the spot and that it was conducted while sitting at the police station. He also denied the suggestion that whatever he has stated is false.

23. **PW-7 - Dr. Sudhir Kumar Sharma - Autopsy Surgeon**. He proved the autopsy report of the victim and stated that the body of the deceased was brought to the mortuary for autopsy in a sealed condition. He stated that on the body there was one Pajeb (thread tied around waist) and a frock which was kept separate. He stated that the *Pajeb* and frock was separately sealed and handed over to the constable. He described the injuries that were noticed and mentioned in the autopsy report (As we have already noticed the injuries above, we do not propose to notice it again here). He stated that following articles were sealed at the time of autopsy:- one tooth for DNA profiling, one pair vaginal slide and one vaginal swab, one pair anal slide and one anal swab, one pair oral slide and one oral swab, nail scrape and one hair present on pubic area of the deceased. He stated that all the above articles were sealed for forensic examination. He also stated that the entire

autopsy procedure was video recorded. After autopsy, the body was handed over to the constable. According to his opinion, death had occurred a day before due to asphyxia on account of ante-mortem throttling. He stated that there were other doctors also in his team and they were Dr. Dinesh Kumar and Dr. Sushma Bharti (PW-8). He stated that at the time of autopsy, the hymen and vulva was found ruptured and there was recto-vaginal tear which could have been a result of forceful penetration of hard object either in the vagina or in the anus.

During cross examination, he stated that rigor mortis was noticed by him all over the body. Rigor mortis could set in within 2-3 hours of death and covers the entire body within 12 hours and remains there for the next 12 hours and thereafter it passes off in next 12 hours. He accepted the possibility that recto-vaginal tear noticed by him could be on account of insertion of any hard object or human penis. He was questioned by the court as regards allele. He stated that allele is part of DNA.

24. **PW-8 - Dr. Sushma Bharti.** She stated that she was part of the team of doctors that conducted autopsy of the cadaver. She confirmed the autopsy report which was marked Ex. Ka-5.

During cross examination, she stated that from the bleeding caused by the injury, the victim could have died but the victim of the present case died on account of strangulation. She denied the suggestion that she was not part of the team that conducted autopsy.

25. **PW- 9 - Nagendra Chaubey - Investigating Officer.** He stated that on 20.10.2020 he was the police officer incharge of P.S. Kavi Nagar. After registration of the case, the investigation of the case was taken over by him. He stated that he recorded the statement of the informant as also of the arrested accused which was entered in the CD. On 20.10.2020, he prepared the site plan of that area from where the body was recovered at the instance of the informant, which was marked Ex. Ka-6. He stated that he recovered an empty bottle, three empty pouches of salted snacks, two one rupee coin and wet soil and plain soil from the spot from where the body of the deceased was recovered. The recovery memo was exhibited as Ex. Ka-7. PW-9 stated that on 21.10.2020, he obtained the medical report of the accused and entered the same in the CD and took blood sample for DNA profile. He stated that he entered the inquest report prepared by PW-6 in the CD and also recorded the statement of other police personnel and proceeded further with the investigation. On 22.10.2020, he prepared the site plan of the spot where the deceased was last seen alive with the accused. He stated that the site plan was prepared at the instance of the informant. The site plan was marked as Ex. Ka.-8. PW-9 stated that on the same day, he prepared a seizure memo of the CCTV footage and recorded the statement of other witnesses. He proved the seizure memo of the CCTV footage, which was marked Ex. Ka-9. He stated that a pen drive was taken and sealed. The same was opened before the court and the pen drive was marked as material Ex.1. He stated that on 24.10.2020 he entered the postmortem report of the deceased in the CD and recorded the statement of the doctors, which was in the CD. He stated that on 26.10.2020 he dispatched the recovered articles for forensic examination.

During cross examination, he stated that the accused was arrested by Mehak Singh Baliyan on 20.10.2020; and that the statement of PW-4 was recorded on 22.10.2020. He denied the suggestion that PW-4 had stated that she had herself arrested the accused-appellant and had informed the police about it on the phone. He stated that he does not know the reason why she gave such statement, if any. He denied the suggestion that the CCTV footage and pen drive of it was not taken by him and no seizure memo thereof was prepared. He also denied the suggestion that he had not prepared the site plan by going to the spot. He denied the suggestion that the entire investigation was carried out while sitting at the police station. He denied the suggestion that whatever he has stated is a lie.

26. **PW-10 - SHO Ajay Kumar Singh - Second Investigating Officer**. He stated that the investigation of the case was assigned to him on 16.11.2020. He prepared Parcha No.6 and thereafter prepared CD Parcha No.7 on 21.11.2020 by sending a reminder for obtaining the forensic report. He stated that a second reminder was sent by him on 01.12.2020 of which entry was made in CD Parcha No.8. He stated that on 16.12.2020 after finding sufficient evidence against the accused-appellant, he submitted charge sheet of which entry was made in CD Parcha No.9. The charge sheet submitted by him was marked Ex. Ka -10. He stated that on 05.01.2021 he prepared a supplementary CD parcha after receiving report from the Forensic Laboratory, Ghaziabad. He stated that the report obtained from the Forensic Laboratory, Ghaziabad has been placed by him on record as paper No.25-Ka/3.

During cross examination, he admitted that he had not recorded statement of any of the witnesses in support of the charge sheet. He also admitted that the charge sheet was submitted by him before receiving report from the Forensic Laboratory. He denied the suggestion that he submitted charge sheet without following due procedure.

27. At this stage, we may notice the forensic evidence brought in the form of a report provided by the Forensic Science Laboratory, U.P., Ghaziabad. This forensic report is dated 29.12.2020 and was entered in the supplementary case diary on 05.01.2021, i.e. after submission of the charge sheet. The same was taken on record by the trial court on 08.01.2021. The entire forensic report is reproduced below:-

कार्यालय विधि विज्ञान प्रयोगशाला उ0 प्र0 गाजियाबाद C.2414

प्रेषक,

संयुक्त निदेशक,
विधि विज्ञान प्रयोगशाला, उ0 प्र0,
गाजियाबाद।

सेवा में,

पुलिस अधीक्षक नगर।
गाजियाबाद।

पत्रांकः 4760–डी0एन0ए0–2020 दिनांकः
अ0सं0– 1470/2020 थानाः कविनगर
राज्य बनामः चन्दन पाण्डेय धाराः376।ठ,302,201 भा.द.वि. 5/6 पोक्सो एक्ट
पत्र संख्याः छपस दिनांकः 25.10.2020
उपर्युक्त मामले से सम्बन्धित प्रदर्श प्रयोगशाला में दिनांक 26.10.2020 को विशेष वाहक द्वारा प्राप्त हुये।

पार्सल व सील का विवरण

नौ समुद्रित लिफाफे, दो समुद्रित बंडल (बंडल+थर्माकोल) तथा दो प्लास्टिक डिब्बी, लिफाफे (1) से (7) व दो प्लास्टिक डिब्बी (8) व (9) तथा एक बंडल (10) पर क्प्ज्ज् डव्ज्न्त्ल् ळ्ठ, मुद्रा नमूनानुसार, दो लिफाफो (11) व (12) तथा (13) थर्माकोल पर म्डव् डण्डण्ळण् ळ्ठ, मुद्रा नमूनासार अक्षत थी।

प्रदर्श का विवरण

1. दांत(एक) । मृतका आराध्या से एक समुद्रित लिफाफे में।
2. वैजाइनल स्लाइड (दो) । मृतका आराध्या से एक समुद्रित लिफाफे में।
3. ओरल स्लाइड (दो) । मृतका आराध्या से एक समुद्रित लिफाफे में।
4. एनल स्लाइड (दो) मृतका आराध्या से एक समुद्रित लिफाफे में।
5. एनल स्वैब (एक) । मृतका आराध्या से एक समुद्रित लिफाफे में।
6. वैजाइनल स्वैब । मृतका आराध्या से एक समुद्रित लिफाफे में।
7. ओरल स्वैब । मृतका आराध्या से एक समुद्रित लिफाफे में।
8. नेल्स के टुकडे । मृतका आराध्या से एक समुद्रित प्लास्टिक डिब्बी में।
9. बाल (एक) । मृतका आराध्या से एक समुद्रित प्लास्टिक डिब्बी में।
10. फ्राक । मृतका आराध्या से एक समुद्रित बंडल में।
11. एक पायल (सफेद धातु) ।
12. अण्डरवियर । अभि0 चन्दन पाण्डेय से एक समु0 लिफाफे में।
13. स्लाइड (दो) । अभि0 चन्दन पाण्डेय से एक समु0 लिफाफे में।
14. यूरेथ्रल मीट्स स्वैब(एक) ।
15. फ्रेनूलम स्वैब(एक) ।
16. ग्लान्स स्वैब(एक) ।
17. फोरस्किन स्वैब(एक) ।
18. स्कोट्रन स्वैब(एक) ।
19. शाफ्ट स्वैब(एक) ।
20. ओरल स्मीयर(एक) ।
21. हेयर (बाल) (कागज में) ।
22. नेल्स के टुकडे (कागज में) ।
23. रक्त नमूना (एक वायल में) । एक समुद्रित थर्माकाल डिब्बे मे अभि0 चन्दन पाण्डेय से।

नोटः अग्रेषण पत्र व लिफाफे पर अभियुक्त के अन्डरवियर व बनियान वर्णित थे, किन्तु अन्डर वियर ही प्राप्त हुआ।

कार्यालय विधि विज्ञान प्रयोगशाला उ0 प्र0 गाजियाबाद ह2415

पत्रांकः 4760– डी0 एन0 ए0–2020 गाजियाबाद

परीक्षा परिणाम

प्राप्त प्रदर्शों (1) से (23) का डी0 एन0 ए0 परीक्षण किया गया।

स्रोत प्रदर्शों (12) (अभि0 चन्दन पाण्डेय से) पर उपस्थित बायोलाजिकल द्रव्य का स्रोत, प्रदर्श (3) व (7) (मृतका से) पर उपस्थित स्रोत के समान पाया गया, तथा प्रदर्श (12) के स्रोत में, स्रोत प्रदर्श (23) (चन्दन पान्डेय से) के एलील्स की उपस्थिति भी पायी गयी। (भ्क – ल ैज्ज्ञ ज्ञपज)

स्रोत प्रदर्श (2), (4), (5), (6) व (10) (मृतका से) में पुरुष विशिष्ट एलील की उपस्थिति पायी गयी किन्तु आंशिक डी0 एन0 ए0 प्रोफाइल जेनरेट होने के कारण, स्रोत प्रदर्श (23) (अभियुक्त से) से मिलान के सम्बन्ध में अभिमत दिया जाना संभव न हो सका। (भ्क – ल ैज्ज्ञ ज्ञपज)

स्रोत प्रदर्श (1) व (8) का डी0 एन0 ए0 प्रोफाइल, स्रोत प्रदर्श (3) व (7) के समान व स्त्री मूल का पाया गया।

स्रोत प्रदर्श (13) से (20) का डी0 एन0 ए0 प्रोफाइल, स्रोत प्रदर्श (23) के समान तथा पुरुष मूल का पाया गया।

स्रोत प्रदर्श (9), (11), (21) व (22) में डी0 एन0 ए0 निष्कर्षण न हो सका।

डी0 एन0 ए0 परीक्षण में जेनेटिक एनेलाईजर व जीन मैपर साफ्टवेयर का प्रयोग किया गया। उक्त परीक्षण में मानक विधियां प्रयोग में लायी गयी।

नोट– परीक्षणोपरान्त समस्त प्रदर्शों को एक समुद्रित बण्डल में वापस लौटाया जा रहा है।

ह0 अप0 29.12.2020
ज्येष्ठ वैज्ञानिक सहायक
करुन कुमार
ज्येष्ठ वैज्ञानिक सहायक
विधि विज्ञान प्रयोगशाला
गाजियाबाद, उ0 प्र0

आवश्यक कार्यवाही हेतु अग्रसारित
ह0 अप0 29.12.2020
डा0 सुधीर कुमार
(उप निदेशक)
विधि विज्ञान प्रयोगशाला
गाजियाबाद

ह0 अप0 29.12.2020
वैज्ञानिक अधिकारी
डा0 राजेन्द्र सिंह
(वैज्ञानिक अधिकारी)
विधि विज्ञान प्रयोगशाला
गाजियाबाद

STATEMENT OF THE ACCUSED UNDER SECTION 313 CrPC

28. On 12.01.2021, the statement of the accused-appellant was recorded under Section 313 CrPC. The accused-appellant denied commission of rape and murder by him and claimed that he has been falsely

implicated. The statement of the accused-appellant in respect of question nos.7, 8, 11, 17 and 19 gives an explanation of certain incriminating circumstances appearing against him in the prosecution evidence. We therefore deem it appropriate to extract and reproduce those questions and answers for a bird's eye view of the defence. They read as follows:-

'' प्रश्नः–7 साक्षी पी0 डब्लू–1 वीरेन्द्र ठाकुर ने अपने शपथपूर्ण बयान की मुख्य परीक्षा में कहा है कि दि0 19.20.20 को मैं चन्दन और दो अन्य व्यक्ति साहेब और अमरजीत अपने घर के पास शराब पी रहे थे उस समय चन्दन हमारे पास से उठकर कमरे पर गया और मेरी पत्नी से मेरी बेटी आराध्या को खिलाने को कहकर घर से ले गया। मेरी बेटी की उम्र करीब

उत्तर– पी0 डब्लू0 1 के बयान मे यह बात सही है कि मैने विरेन्द्र, साहेब व अमरजीत के साथ शराब पी थी और मै वीरेन्द्र की पुत्री को उसकी पत्नी के पास से लाया क्योंकि वीरेन्द्र ने ही मेरे से ऐसा करने को कहा था विरेन्द्र ने अपनी बेटी आराध्या को दस रुपये दिये थे तथा आराध्या 10 रुपये लेकर चली गयी थी फिर वापस नही आयी। मै तो वीरेन्द्र के पास ही शराब पीता रहा तथा उसके बाद अपने घर चला गया।

प्रश्नः–8 साक्षी पी0 डब्लू0 – 2 गुंजन देवी ने अपने बयान की मुख्य परीक्षा में यह अभिकथन किया है कि चन्दन हमारे यहां 10 वर्षों से आता जाता था। मेरे पति के साथ चन्दन, साहिब पासवान, अमरजीत उ अमरपाल ठेकेदार महेशचन्द शर्मा के यहां काम करते थे। मेरे बच्चे उसे जानते पहचानते थे और मेरी बेटी चन्दन को चाचा कहती थी। उसके सोने का कोई ठिकाना नही था कभी मेरे यहां कभी ठेकेदार के यहां कभी शर्मा जी के घर पर सो जाता था। हमारी शादी से पहले कभी चन्दन व मेरे पति के बीच झगड़ा हुआ था परन्तु फिर दोस्ती हो गयी थी। घटना वाले दिन मेरे पति व चन्दन पांडे, साहेब पासवान और अमरजीत दुकान के पीछे बैठकर शराब पी रहे थे। शाम को करीब 07.30 – 08.00 बजे के करीब चन्दन हमारे कमरे पर आया और सने मेरी बेटी आराध्या को बाहर खिलाने के लिए ले जाने के लिए आराध्या को मेरे से जबरदस्ती ले लिया और कहा उसके पापा मंगा रहे हैं। मैंने उसे मना किया मेरी बच्ची खेलने लगी और मैं अपने काम में लग गयी, इसी बीच चन्दन मेरी बच्ची को मेरे सामने से उठाकर ले गया और कहा कि अभी दे जाउंगा। मैंने अपने पति से पूछा कि आराध्या कहां है चन्दन उसे लेकर गया था और कह रहा था कि आपके पास ले जा रहा हूं तो मेरे पति ने कहा कि चन्दन मेरे पास आराध्या को लेकर नही आया था। उसके बाद हमने बेटी को तलाश करना शुरु किया, पर वह नही मिली, तब विक्की जो मेरे पति का भतीजा है ने बताया कि चन्दन आराध्या को कंधे पर बैठाकर ले जा रहा था। अगले दिन बियर वाली फैक्ट्री रोड पर तलाश करते रहे। बाद में मेरी बेटी की लाश सड़क के किनारे नाले के पास मिली थी। मेरा पूरा विश्वास है कि घटना वाले दिन चन्दन ने ही मेरी बेटी आराध्या का बलात्कार कर उसकी हत्या की। आपको इस सम्बन्ध में क्या कहना है ?

उत्तर– पी0 डब्लू0 – 2 का बयान यहां तक सही है कि मै वीरेन्द्र के घर 10 वर्षों से आता–जाता था तथा महेश शर्मा ठेकेदार के यहां काम करते थे तथा वीरेन्द्र से झगड़ा हुआ था। इसके अतिरिक्त सारा बयान गलत व झूठा है। यह बयान मुझे फंसाने के लिए दिया गया है।

प्रश्नः–11 साक्षी पी0 डब्लू0–5 कुलदीप यादव ने अपने शपथ पूर्ण बयान में कहा है कि औद्योगिक क्षेत्र कविनगर में धर्मवीर ट्रेवल्स के नाम से हमारी मोबाईल की दुकान है। दुकान के उपर बना कमरा पिता जी ने वीरेन्द्र ठाकुर, गुंजन देवी, सतेन्द्र देवी, रानी देवी को किराये पर दे रखा है। अभी भी ये लोग किराये पर वहीं रह रहे हैं। उस दिन दिनांक 19.10.20 की शाम को दरोगा जी का मेरे पास फोन आया कि दुकान पर लगे सी0 सी0 टी0 वी0 फुटैज की जरुरत है तो मैने अगले दिन 20.10.20 की सुबह 07.30 बजे के करीब दरोगा जी को डी0 वी0 आर0 उपलब्ध करा दी थी, क्योंकि सी0 सी0 टी0 वी0 फुटैज को मैने व गुंजन देवी व उसके परिवार के अन्य लोगो ने दरोगा जी के सामने चलाकर देखा था तो हाजिर अदालत चंदन अपने कंधे पर मृतका को बैठाकर समय 08.50 से 08.55 पी0 एम0 तक घटना वाले दिन चन्दन को ले जाते हुए क्लिप में देखा था। यही फुटैज व डी0 वी0 आर0 मैने दरोगा जी को दे दिया था। मैने सी0 सी0 टी0 वी0 फुटैज जो दरोगा जी को दी है उसमें कोई छेडछाड नहीं की है। वह जैसी थी वैसी ही दरोगा जी को दे दिया था। कपडे में रखकर सील किया था, नमूना मोहर भी बनाया गया था। उक्त सी0 सी0 टी0 वी0 फुटैज का प्रमाण पत्र अन्तर्गत धारा 65 बी साक्ष्य अधिनियम पत्रावली पर मौजूद है उस पर साक्षी ने अपने हस्ताक्षर देखकर तस्दीक कर प्रमाण पत्र को प्र0 क–3 के रुप में साबित किया है। इस बारे में आपको क्या कहना है ?

उत्तर– कुलदीप यादव का यह बयान सही है कि वीरेन्द्र, सत्येन्द्र व कुलदीप की मोबाइल की दुकान के उपर किराये पर मकान मे वादी लोग रहते हैं तथा सी0 सी0 टी0 वी0 फुटेज मे आराध्या को ले जाता हुआ मै दिखाई दिया यह सही है क्योंकि वीरेन्द्र ठाकुर ने ही मुझसे अपनी पुत्री को मंगवाया था।

प्रश्नः–17 आपके विरुद्ध मुकदमा क्यों चला?

उत्तर– वीरेन्द्र ठाकुर के साथ मेरा झगडा हुआ था उसका बदला लेने के लिए मेरे विरुद्ध झूठा मुकदमा चला है। वीरेन्द्र ठाकुर की पुत्री आराध्या को किसी और व्यक्ति ने मारा है मैने नही मारा मै निर्दोष हूं।

प्रश्नः–19 क्या आपको कुछ और कहना है ?

उत्तर– श्रीमान जी मैने यह अपराध नही किया है मै बिल्कुल निर्दोष हूं। मेरे मां–बाप काफी बुजुर्ग है। मेरी एक पत्नी है तथा दो छोटे–छोटे बच्चे है। मेरे अलावा कमाने वाला कोई नही है मै एकदम गरीब आदमी हूं मुझे इन्साफ चाहिए।

29. At this stage, we may observe that neither the medical examination report of the accused-appellant nor the FSL report dated 29.12.2020 was put to the accused appellant to seek his explanation. The statement of PW-6, S.I. Mehak Singh Baliyan, was put to the accused-appellant vide question No.12. The accused-appellant denied the incriminating circumstances appearing therein in his answer to that question. For the sake of convenience, question no.12 and answer to question no.12 is being extracted below:-

'' प्रश्नः–12 साक्षी पी0 डब्लू–6 उपनिरीक्षक महक सिंह बालियान नेअपने शपथपूर्ण बयान की मुख्य परीक्षा में कहा है कि दि0 20.10.20 को मैंथाना कविनगर पर नियुक्त था। उस दिन वादी मुकदमा की लिखित तहरीर केआधार पर थाना हाजा पर मु0 अ0 सं0 1470/20 धारा 302,201,376 ए बी भा0दं0 सं0 व 5/6 पोक्सो अधिनियम पंजीकृत हुआ था। उस दिन एफ0 आई0आर0 में अंकित मुकदमा उपरोक्त में मृतका कु0 आराध्या आयु करीब ढाई वर्षका शव आर0 टी0 ओ0 आफिस के पास बीयर फैक्ट्री वाली रोड पर सड़क केकिनारे पड़ा है पर मैं वरिष्ठ उप निरीक्षक मय का0 1993 फारुख अहमद वमहिला का0 656 बबीता पंवार के साथ थाने से जिल्द पंचनामा व दीगरकागजात लेकर घटनास्थल आर0 टी0 ओ0 आफिस के पास पहुंचा तथा मृतकाकु0 आराध्या के शव को महिला कांस्टेबल द्वारा स्त्री की लाज व हया कोदेखते हुए निरीक्षण कराकर उसके द्वारा बतायी गयी चोट एवं हुलिया कपडे केआधार पर मृतका के परिजनो से पंच नियुक्त कर पंचायतनामे की कार्यवाही कीगयी थी तथा दि0 20.10.20 को ही समय करीब 23 बजे मेरे द्वारा हमराही फोर्सके मुकदमा उपरोक्त के नामजद अभियुक्त चन्दन को आत्मा स्टील अन्डर पास से गिरफ्तार किया था। अभियुक्त का गिरफ्तारी मैमो पत्रावली पर मेरे लेख वहस्ताक्षर में है जिसे प्र0 क–4 के रुप में साक्षी ने साबित किया है। साक्षी नेआगे कहा है कि मेरे द्वारा पंचायतनामे को नियुक्त की गयी पंच रीना देवी नेपत्रावली पर प्र0 क–2 के रुप मे साबित किया है। इस बारे में आपको क्याकहना है ?

''उत्तर–ॅ 6 का सारा बयान गलत है।

30. At this stage, we may also notice that in his answer to question no.11, which related to PW-5's statement regarding the CCTV footage of the period between 8.50 and 8.55 pm showing the deceased on the shoulder of accused-appellant, the accused-appellant admitted that deceased's father (PW-1) was a tenant of an accommodation situated above the shop of PW-5 and that the CCTV footage does disclose him carrying the deceased on his shoulder. However, he clarified that the deceased's father (PW-1) had asked the accused-appellant to get his daughter (the deceased). In his answer to question no.7, the appellant admitted taking drinks with the informant (PW-1) and two others and also admitted that he had brought informant's daughter from informant's wife to the place where informant was having drinks because informant himself had requested him to bring his daughter and after informant's daughter was brought to the informant, the informant gave her rupee 10 and thereafter she went away but did not return. Appellant stated that he kept having drinks with the informant and thereafter he went to his home. In reply to question no.8, the accused-appellant admitted that he was on visiting terms with the informant for the last 10 years. In respect of the reason for false implication, in reply to question no.17, he stated that he had a dispute with the informant in the past and because of that dispute, he has been falsely implicated.

TRIAL COURT FINDINGS

31. The trial court found:- (i) that it is not only proved by PW-1 and PW-2 but also admitted to the accused-appellant that in the evening of 19.10.2020 the accused-appellant, the informant and two others were having drinks (liquor) together and that the accused-appellant left the place where they were having drinks and, thereafter, took custody of informant's daughter (i.e. the deceased) from her mother; (ii) that the CCTV footage confirms that the deceased was on the shoulder of accused-appellant and, therefore, it is proved beyond doubt that the deceased was with the accused-appellant at or about 8.50 pm of 19.10.2020; (iii) that PW-3 and PW-4 have also confirmed that the accused-appellant and the deceased were together on the date of the incident; (iv) that the deceased was not seen alive thereafter and on 20.10.2020 her body was recovered; (v) that the medical/forensic evidence suggests that she was raped and murdered; and (vi) that the forensic report confirms that the underwear recovered from the appellant carried biological material which matched with the biological material present in the oral slide and oral swab obtained from the body of the deceased. The trial court found the aforesaid incriminating circumstances as forming a chain so complete that it conclusively pointed towards the guilt of the appellant for committing the offences of rape and murder of the child consequently, upon finding the explanation of the accused-appellant false and unconvincing, convicted and punished the appellant, as above.

SUBMISSIONS ON BEHALF OF THE APPELLANT

32. Sri Vinay Saran, learned Senior Counsel, appearing as Amicus Curiae, on behalf of the appellant, submitted that (i) the accused was on visiting terms with the informant and his family; their relationship had a span of 10-12 years; the child (victim) used to call the appellant Chacha and was very friendly with the appellant and so was the appellant with the child; even the CCTV footage would suggest that the child was in a playful mood and was on the shoulder of the appellant therefore, mere presence of the deceased with the appellant by itself cannot be taken as an incriminating circumstance because they had close bonding with each other. (ii) from the testimonies of PW-1 (the informant) and PW-2 (informant's wife) it is clear that the informant, two others and the appellant were having drinks for quite sometime; from the testimony of PW-2 (informant's wife) it is also clear that informant (PW-1) was drunk (in a state of intoxication); in these circumstances, the issue that needs to be examined is whether PW-1 was in his senses to have a clear understanding of the sequence of events, that is whether the deceased was brought by the accused-appellant to him as is claimed by the accused-appellant or not. In such a state of intoxication, where both persons are drunk it is difficult to decide as to whose version is to be accepted and believed therefore, the benefit of doubt must go to the accused; (iii) The two other persons who were there with the accused-appellant and the informant have not been examined by the prosecution. Their statement could have thrown light on rival claims whether the accused-appellant had brought the deceased to her father or not, as claimed by the accused-appellant, or after taking the deceased on his shoulder had walked away from the premises as claimed by the prosecution.

33. It was also urged that there is discrepancy in the statement of PW-1 (the informant) and his wife (PW-2) in respect

of the time when the accused-appellant took the deceased (i.e. daughter of PW-1 and PW-2) to play with her. According to PW-1, he , the accused-appellant and two others were having drinks in the room of "Y'. At about 8.30 pm, PW-1 brought a pouch of country made liquor to join the other drinking partners who were drinking since day time and completely drunk though, in a position to walk. PW-1 stated that between 8.45 and 9.00 pm the accused-appellant left them to go to the room. When PW-1 went to his room at 9.30 pm, he did not find his daughter. He was informed by his family members that the accused-appellant had taken his daughter with him by saying that PW-1 has called for her. Interestingly, the time disclosed by PW-2 regarding accused-appellant coming to the room to take the victim is between 7.30 and 8.00 pm which is a lot earlier than the time alleged by PW-1. In so far as PW-3 and PW-4 are concerned, they had not disclosed the time when they saw the accused-appellant and the deceased together. It has been urged that since it is an admitted fact that the accused-appellant had been a regular visitor to the house of the informant and used to play with the victim and were happy in each others company, it is very much possible that the accused-appellant took the deceased on his shoulder, played with the deceased for sometime, handed back the deceased to the informant and thereafter the deceased went somewhere and was not seen alive thereafter. As all the players, namely, the informant, the accused and the other two persons, who were having drinks together, were drunk and their consciousness impaired, the statement of these players in respect of what they have witnessed would have to be understood in light of the surrounding circumstances as their statement might be more on their belief than on their knowledge. Thus, what is crucial is, as to when the accused-appellant parted company of the informant and others while they continued to have their drinks. The CCTV footage shows the presence of the deceased on the shoulder of the appellant at about 8.51 pm. Whether the appellant thereafter went back to the informant is also important as regards which the evidence is not clear, inasmuch as, according to PW-1 the appellant parted his company between 8.45-9.00 pm, whereas, according to PW-2, the appellant came to fetch the victim between 7.30 and 8 pm and, in so far as the other two witnesses, namely, PW-3 and PW-4, are concerned, they do not disclose the time when they saw the appellant with the deceased. According to the learned counsel for the appellant, these circumstances by itself are not incriminating and are not conclusive as to enable the court to hold that the deceased was last seen alive in the company of the appellant and not thereafter. Learned counsel for the appellant next submitted that from the statement of PW-1 it appears that the police was informed on 19.10.2020 itself but the report in respect of that information has been suppressed by the prosecution. He submits that according to PW-4, the accused was arrested on 19.10.2020 by the complainant party and handed over to the police. Interestingly, the statement of PW-5 discloses that the police had contacted him on phone in the evening of 19.10.2020 for having a look at the CCTV footage, which he provided in the morning of 20.10.2020. This means that the police was given information about the missing girl on 19.10.2020 itself; the information was inconclusive and, therefore, the I.O. wanted to confirm from the CCTV footage of the spot. In these circumstances, it can be said that the prosecution has deliberately suppressed the

earliest information given to the police as a result whereof, an adverse inference need be drawn against the prosecution.

34. In addition to above, it was submitted that there is a serious doubt as regards the date and time of arrest of the appellant. According to PW-6, the appellant was arrested on 20.10.2020 at 23.00 hrs from a place near the underpass of Atma Ram Steel. Interestingly, the arrest memo (Ex.Ka-4) reveals that the time of arrest was 21.50 hrs. The testimony of PW-4 (sister of the informant), who resides in the same complex, is to the effect that the accused-appellant was arrested by her on 19.10.2020 and she informed the police on the number provided by the I.O. It is submitted that the statement of PW-4 finds corroboration in the statement of PW-3 to the extent that the report of the incident was given on the same day and the body was recovered on the next day. The fact that some report was lodged in the night itself and next day body was recovered is also corroborated by statement of PW-2 extracted below:-

''उसके बाद चन्दन मेरी बेटी को ले गया तो मैने इसलिए मना नही किया कि वह मेरे पति का जानने वाला है और मेरी बेटी को खिला कर वापस ले आयेगा। इस घटना की रिपोर्ट मैने तुरन्त पुलिस चौकी में करायी थी। मेरी बेटी घटना के अगले दिन डेड बाडी के रुप मे मिली थी।''

The statement of PW-4 also suggests that the police had arrested the appellant in the night of the incident itself. Further, PW-2's statement also indicates that when the appellant was arrested and interrogated, he had stated that the victim was handed over to the informant. In these circumstances, it was submitted that there was some information to the police about the missing girl; that information has deliberately been suppressed; that the appellant was arrested on the same day by the police and was interrogated; that the appellant maintained that he had handed over the daughter of the informant to the informant; that the body of the victim was recovered on the next day; that there is no clue in the entire prosecution case as to how the body was recovered; that the doctor who prepared the injury report of the appellant has not been produced to avoid close cross-examination as regards presence of torture marks on the body of the accused. The reason for not producing the doctor is that the body of the accused-appellant carried multiple injuries simple in nature caused by hard and blunt object and it was not disclosed in the medical report dated 20.10.2020 that the injuries were fresh, which means that those injuries must have been caused much earlier and might have been caused either by the police that arrested the appellant on 19.10.2020, or by the witnesses who apprehended the appellant and handed him over to the police. Importantly, despite torture, to extract confession/disclosure, nothing could come out of the appellant, whereas the body was recovered from some other information, which too has been suppressed. Thus, the appellant was implicated by suppressing all the earlier developments. It has been urged that all these circumstances would suggest that the appellant has been falsely implicated only on ground of strong suspicion.

35. With regard to forensic evidence i.e. the report of FSL, Ghaziabad, learned counsel for the appellant submitted that firstly, the report has not been put to the appellant while recording his explanation under Section 313 CrPC therefore, the same cannot be taken into consideration and, secondly, the incriminating part of the report, namely, the biological material found on the underwear matching with the

biological material found in the oral slide/swab of the deceased cannot be accepted in evidence because there is no evidence on record with regard to the recovery/seizure of the underwear from the appellant and, thirdly, another interesting feature which emerges from the FSL report is that in the note put in the report it is mentioned that the cover of the envelop /forwarding letter mentioned that the envelop contains an underwear and a Baniyan (vest) of the accused but inside the envelop only an underwear was found which means that the envelop was tampered. It was also urged that the underwear alleged to have been recovered and sent for DNA profiling has not been produced as a material exhibit during the course of trial and there is no link evidence led by the prosecution to demonstrate that the underwear recovered from the appellant was sealed and handed over to a person in whose custody it was kept safely and the sanctity of the seal was maintained till its testing by FSL. It was urged that in absence of evidence as to how the underwear was kept and given for forensic examination, the forensic report in respect thereof cannot be read in evidence against the appellant.

36. In addition to what has been noticed above, learned counsel for the appellant submitted that there is a serious doubt with regard to the recovery of dead body of the deceased from the place alleged by the prosecution. According to the FIR, the informant (PW-1) received information about discovery of the body and on the basis of that information, at 12.30 hrs, on 20.10.2020, he saw the body of the deceased lying on the side of a drain adjoining a road near RTO office. Whereas according to PW-1, police personnel found the dead body of the deceased and they informed the informant about recovery of the body, whereafter the inquest was held. Similar is the statement of PW-4, but, interestingly, the police has suppressed the evidence as to how they were able to find the dead body which suggests that the prosecution is suppressing material facts that might have thrown light on the involvement of some other person in the crime. It was also argued that suppression of evidence by the prosecution is also evident from the fact that the place from where the body was recovered, a bottle, three empty pouches of salted snacks etc were lifted but no effort was made to match the finger prints on that bottle with that of the accused-appellant because it could have clearly established that the accused-appellant was not involved. It is, therefore, a case where the prosecution is guilty of suppressing material evidence.

37. After submitting as above, learned counsel for the appellant submitted that the trial court did not properly scrutinise the evidence on record and it failed to notice whether the forensic report could be taken into consideration in absence of link evidence i.e. proof of recovery of the material and its safe custody till its examination. Moreover, the report was not put to the accused while recording his statement under Section 313 CrPC. It was thus contended that the trial court's judgment and order of conviction is erroneous in law and the same deserves to be set aside. In the alternative, learned counsel for the appellant submitted that if the appellant is held guilty then death penalty would not be justified, inasmuch as, as per the prosecution evidence, the appellant was under the influence of liquor and therefore might not be in a position to have control over his acts. In such circumstances, bearing in mind that the appellant is a married person with children,

he is entitled for commutation of death penalty to imprisonment for life which may serve as a reformative measure.

SUBMISSIONS ON BEHALF OF THE STATE

38. Sri J.K. Upadhyay, learned AGA, submitted that it is proved on record that the appellant had the deceased with him on his shoulder at 8.51 pm on 19.10.2020 and, thereafter the deceased was not seen alive. The statement of the appellant that he had handed over the deceased to the informant (father of the deceased) is not proved by any legally admissible evidence except the statement of the appellant recorded under Section 313 CrPC. The testimony of PW-3 and PW-4 also confirms that the appellant was seen with the deceased that evening therefore, in absence of clear and cogent evidence led by the appellant that he handed over the deceased to her lawful guardian, the logical inference would be that whatever happened to the deceased was the wrongdoing of the appellant. Consequently, the trial court was justified in convicting the appellant. As regards admissibility of the forensic report, learned AGA submitted that under Section 293 CrPC a report of scientific expert can be used as evidence in any inquiry or trial or other proceeding without the requirement of formal proof. Learned AGA also submitted that although the medical examination report of the accused-appellant may not have been formally proved by examination of the doctor but the arrest memo (Ex. Ka-4) specifically mentions that the appellant has been medically examined and that he has put his thumb impression on the report. The report bears the thumb impression of the appellant therefore, the contents of the report can be read in evidence. He submits that the medical examination report indicates that in compliance of the provisions of Section 53-A CrPC, to enable forensic examination, following materials were taken from the accused: "Oral smear; penile swab; scrotum swab; shaft swab, perineum, nail cutting, undergarments and blood vials."

39. Further, the FSL report indicates that the biological material found in the underwear of the appellant carried genes of the appellant as well as of the deceased, inasmuch as it matched with the oral smear obtained from the body of the deceased as well as the blood of the appellant. Learned AGA submitted that this being a case dealing with an offence punishable under the Pocso Act, the benefit of legal presumption would be available to the prosecution. Thus, the trial court on the basis of evidence led by the prosecution was justified in recording conviction. He also submitted that as it is a case relating to rape and murder of a child, 2 ½ years old, who had been treating the appellant as her uncle, it is one of the rarest of rare cases where conviction must result in a death penalty. He, therefore, prayed that the conviction and sentence recorded by the trial court be affirmed and death penalty awarded to the appellant be confirmed.

40. In response to the submission of the learned counsel for the appellant that the prosecution is guilty of suppressing vital facts, learned AGA submitted that assuming that the finger prints expert report was not obtained or placed on record, the DNA profiling report indicates involvement of the appellant and the circumstance that the deceased was last seen with the appellant clinches the issue therefore, even if the finger prints expert report was not obtained, it would not be fatal to the prosecution as there were other

clinching circumstances linking the appellant to the crime.

ANALYSIS

41. Having noticed the rival submissions and the evidence brought during the course of trial, this is a case based on circumstantial evidence. There is no direct eye-witness account of the incident. As to when on the basis of evidence circumstantial in nature, conviction can be recorded, the law is well settled, which is, that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that these circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation of hypothesis other than that of the guilt of the accused and inconsistent with their innocence **(vide Vijay Shankar V. State of Haryana, (2015) 12 SCC 644; Sharad Birdhichand Sarda V. State of Maharashtra, (1984) 4 SCC 116; Bablu V. State of Rajasthan, (2006) 13 SCC 116)**. Further, in the celebrated judgment of the Supreme Court in **Sharad Birdhichand Sarda's case (supra)**, it has been clarified that the circumstances from which the conclusion of guilt is to be drawn should be fully established meaning thereby they 'must or should' and not 'may be' established. In addition to above, we must bear in mind that the most fundamental principle of criminal jurisprudence is that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions **(vide Shivaji Sahabrao Bobade & Another v. State of Maharashtra, (1973) 2 SCC 793).** These settled legal principles have again been reiterated in a three-judge Bench decision of the Supreme Court in **Devi Lal v. State of Rajasthan, (2019) 19 SCC 447** wherein, in paragraphs 18 and 19 of the judgment, it was held as follows:-

"18. On an analysis of the overall fact situation in the instant case, and considering the chain of circumstantial evidence relied upon by the prosecution and noticed by the High Court in the impugned judgment, to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. Though the materials on record hold some suspicion towards them, but the prosecution has failed to elevate its case from the realm of "may be true" to the plane of "must be true" as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion, howsoever grave, cannot substitute proof.

19. That apart, in the case of circumstantial evidence, two views are possible on the case of record, one pointing to the guilt of the accused and the other his innocence. The accused is indeed entitled to have the benefit of one which is favourable to him. All the judicially laid parameters, defining the quality and content of the circumstantial evidence, bring home the guilt of the accused on a criminal charge, we find no difficulty to hold that the prosecution, in the case in hand, has failed to meet the same."

42. In light of the law noticed above, what we have to see is whether the incriminating circumstances sought to be

proved against the appellant have been proved beyond reasonable doubt. If yes, whether those circumstances put together constitute a chain so complete as to point out out that in all human probability it is the appellant and no one else who committed the crime.

43. In the instant case, to bring home the charge the prosecution places reliance on the following circumstances : (i) that the appellant took the child from her mother to play with him; (ii) that the child was last seen alive on the shoulders of the appellant or so to say in the company of the appellant on or about 9 pm on 19.10.2022; (iii) that thereafter the child was not seen alive; (iv) on 20.10.2022, at about 12.30 hrs, the body of the child was found, brutally killed and ravished; (v) that the underwear of the appellant revealed presence of biological material which matched with oral smear obtained from the cadaver of the child; and (v) lastly, the explanation of the appellant that he handed over the child to her father was found false.

44. Before we proceed to test the prosecution evidence on the circumstances specified above, it would be useful to discuss the legal worth of the circumstance of the deceased being last seen alive in the company of the accused. Ordinarily, the circumstance of the deceased being last seen alive with the accused may alone not be sufficient to record conviction (**vide Nizam V. State of Rajasthan, (2016) 1 SCC 550; and Navneetakrishnan V. State, (2018) 16 SCC 161**). But, it is an important link in the chain of circumstances that could point towards the guilt of the accused with some certainty. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is long gap and possibility of other persons coming in between exists **(vide State of U.P. V. Satish, (2005) 3 SCC 114**). Similar view has been taken in **Ramreddy Rajesh Khanna Reddy & Another V. State of A.P., (2006) 10 SCC 172,** where following the decisions in **State of U.P. V. Satish (supra) and Bodhraj V. State of J & K, (2002) 8 SCC 45**, in paragraph 27 of the judgment, it was held that "the last seen theory, furthermore, comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. Even in such cases the courts should look for some corroboration."

45. In matters based on circumstantial evidence, when the prosecution is successful in establishing a chain of incriminating circumstances leading to the logical inference that in all human probability it is the accused and accused alone who could have committed the crime, the burden shifts upon the accused to explain those circumstances and in absence whereof an adverse inference can be drawn against the accused with the aid of section 106 of the Evidence Act. Therefore, it would be useful to notice the law as to when a conviction could be sustained with the aid of section 106 of the Evidence Act. In the case of Shambu Nath Mehra vs. State of Ajmer, AIR 1956 SC 404, the Supreme Court had explained the scope of Section

106 of the Evidence Act in criminal trial. It was held in para 9:

"9. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are preeminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle v. Emperor [AIR 1936 PC 169] and Seneviratne v. R. [(1936) 3 All ER 36, 49]."

46. The Apex Court in **Nagendra Sah Vs. State of Bihar (2021) 10 SCC 725** observed in paragraphs 22 and 23 as:-

"22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the Court can always draw an appropriate inference.

23. When a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. ***In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused."***

47. Further, in the case of **Shivaji Chintappa Patil V. State of Maharashtra, (2021) 5 SCC 626** in paragraph no. 25 it was observed:-

"25. Another circumstance relied upon by the prosecution is, that the appellant failed to give any explanation in his statement under Section 313 Cr.P.C. ***By now it is well-settled principle of law, that false explanation or non-explanation can only be used as an additional circumstance, when the prosecution has proved the chain of circumstances leading to no other conclusion than the guilt of the accused. However, it cannot be used as a link to complete the chain.*** *Reference in this respect could be made to the judgment of this Court in Sharad Birdhichand Sarda (supra)."*

48. In **Rajasthan Vs. Kashi Ram, (2006) 12 SCC 254,** the Supreme Court in paragraph 26 of the judgment, clarified the

law with regard to the provisions of Section 106 of the Evidence Act in the following words:-

"It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohd."

49. Before we proceed to analyse the evidence led by the prosecution in respect of the circumstances through which the prosecution seeks to bring home the charge against the appellant, as this case also deals with an offence punishable under the provisions of the Pocso Act, it would be useful to examine as to when the presumption under section 29 of the Pocso Act could be raised against the accused. In this regard, in the case of ***Monu Thakur Vs. State of U.P. (Capital Cases No.13 of 2021, decided on March 14, 2022)*** we had the occasion to decide the issue as to when and in what situation a presumption under Section 29 of the Pocso Act could be raised. After noticing various judgments of the Apex Court and other High Courts, we, in paragraph 33, held as follows:-

"33. In the light of the decisions noticed above, the legal position that emerges is that though the presumption of innocence is a human right but there can be statutory exceptions to it. A statutory provision laying down the procedure for holding an accused guilty of an offence by raising a presumption with regard to his guilt, must meet the tests of being fair, just and reasonable as enshrined in Articles 14 and 21 of the Constitution of India. To ensure that a statutory provision putting a reverse burden on the accused does not violate the mandate of Articles 14 and 21 of the Constitution, it has to be interpreted in a manner that it does not lead to absurd result such as mistaken conviction on mere failure to lead satisfactory evidence in defence after submission of police report. As a result, the courts have been consistent in holding that the burden to prove his innocence can be cast on the accused with the aid of presumptive clause only where the prosecution succeeds in proving the basic or foundational facts with regard to commission of the offence by the accused in respect of which the presumption is available to the prosecution under the statute. Mere registration of a case

punishable under the statute, without proving the foundational facts with regard to its commission by the accused, will not ipso facto shift the burden on to the accused to prove his innocence. More so, because to prove a negative is difficult, if not impossible. It is only when a foundation is laid to prove, at least prima facie, existence of a fact that one can expect a person, called upon to refute its existence, to lead evidence negating its existence. Interpreting the provisions of section 29 of the Act in a manner that it puts absolute burden on the accused to prove a negative i.e. innocence, even in absence of prosecution proving the basic facts with regard to commission of specified offence(s) by the accused, in our view, would lead to complete miscarriage of justice and thereby render the provisions of section 29 of the Act vulnerable and in the teeth of Articles 14 and 21 of the Constitution. We, therefore, hold that to take the benefit of the presumptive provisions of section 29 of the Pocso Act, the prosecution, by leading legally admissible evidence, would have to prove the foundational or basic facts in respect of commission of the offence(s) specified therein by the accused. Mere submission of police report against the accused in respect of the offence(s) specified in section 29 of the Pocso Act would not absolve the prosecution of its responsibility to lead legally admissible evidence to prove the foundational facts with regard to their commission by the accused."

50. In **Monu Thakur's case (supra)**, we had also clarified in paragraph 36 of our judgment that the presumptive provisions contained in Sections 29 and 30 of the Pocso Act were limited to the offences specified therein. Paragraph 36 of our decision in **Monu Thakur's case (supra**) is extracted below:-

"36. At this stage, we may clarify that though the presumptive provisions contained in sections 29 and 30 are there in the Act but their operation is limited to the offences specified therein. No doubt, by virtue of sub-section (2) of section 28 of the Act, while trying an offence under the Act, a Special Court has also to try an offence other than the offence referred to in sub-section (1) of section 28 of the Act (i.e. the offences punishable under the Act), with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial but, as the presumptive provisions of section 29 are applicable only to the offences specified therein, they would not apply to prove an offence of murder punishable under section 302 IPC. In our view therefore, the trial court completely misunderstood the true import of the presumptive provisions contained in section 29 of the Pocso Act."

51. From the law noticed above it is clear that benefit of the presumption would be available to the prosecution under Section 29 of the Act only when the foundational facts are proved by the prosecution by legally admissible evidence and that too, only in respect of offences specified therein. As the instant case is based on circumstantial evidence, the prosecution would have to establish the incriminating circumstances with the aid of legally admissible evidence.

52. We now proceed to examine whether the prosecution has been successful in proving those incriminating circumstances.

53. The incriminating circumstances on which the prosecution places reliance to bring home the charge against the appellant are recapitulated below: (i) that the appellant took the deceased from her mother (PW-2) under the pretext to play with her or to bring her to her father (PW-1); that PW-4 saw the appellant playing with the deceased in the night whereafter the deceased went missing; that PW-3 also saw the deceased on the shoulders of the appellant near Anmol Biscuit Factory whereafter, he did not notice the deceased alive; that on 20.10.2020, the body of the deceased was found, examination of which suggested that she was sexually assaulted and brutally murdered; on 20.10.2020, the appellant was arrested, at the time of his medical examination, his undergarments were taken and sealed; and that the underwear of the appellant carried biological material which matched with the oral swab/oral smear taken from the body of the deceased. Thus, in a nutshell, there are four incriminating circumstances against the appellant:- (a) the deceased being last seen alive with the appellant on or about 9.00 p.m. on 19.10.2020; (b) the body of the deceased being found at 12.30 hrs on 20.10.2020 i.e. the day following the evening she was last seen alive with the appellant; (c) the autopsy report of the deceased indicated that she was sexually assaulted and murdered and the probable time of her death matches with the time when she was last seen alive with the appellant; and (d) the forensic evidence confirms the presence of biological material of the body of the deceased on the underwear of the appellant.

54. Before we proceed to deal with each of the circumstances noticed above, at this stage, we may clarify that this is a case where the body of the victim was found in an open place which has no connect with the appellant. More over, the body has not been recovered on the disclosure made by the appellant or at his pointing out. In fact, it is not clear from the prosecution evidence as to who found the body. PW-1 and PW-4, namely, the informant and sister of the informant, maintain that the police found the body and they were given information regarding discovery of the body whereas the police witnesses maintain a golden silence in that regard. PW-6, the Sub-Inspector, who conducted inquest after the FIR was lodged, in his deposition states that the written report (Ex. Ka-1) was the source of information that the body has been found. The investigating officer (PW-9) gives no indication as to how discovery of body came to their notice. He simply states that after the first information report was lodged, he took over the investigation of the case and proceeded with the investigation. The other police witness, namely, PW-10, who submitted the charge sheet, took over investigation on 16.11.2020, therefore, he is not a witness competent to depose about the information resulting in discovery/recovery of the body. As no evidence is coming from the police witnesses as to how the body was found whereas, to the contrary, the informant (PW-1) and informant's sister (PW-4) maintain that the body was found by the police and police gave information regarding discovery of the body, this cleavage in the testimony of two sets of witnesses assumes importance because there has to be some information from somewhere leading to the discovery of the body. This information may also be incriminating against some person therefore, suppression of this information by the prosecution assumes importance and causes us to ponder whether some one else was the perpetrator of crime whom the

police is shielding. More so, because in a case based on circumstantial evidence, the court can record conviction not only when the chain of incriminating circumstances is complete, unerringly pointing towards the guilt of the accused, but it leaves no room for any hypothesis consistent with the innocence of the accused by ruling out the involvement of some other person in the crime.

55. In light of what we have discussed above, there is another circumstance which indicate that the investigation had been lethargic and not up to the mark to ascertain the truth, which is, that from the spot near the body an empty bottle of water, empty pouches of snacks and two one rupee coins were recovered but no effort was made to get finger prints on them matched with the accused appellant.

56. In addition to above, when we carefully look at the testimony of the prosecution witnesses including the statement made in the first information report by the informant it appears to us that some information was given to the police on 19.10.2020 regarding the girl having gone missing and in furtherance of that information the accused-appellant was arrested that very day in the night itself and was also interrogated but, during investigation, the accused-appellant maintained that he had handed over the child to her father. In this regard, we may notice that in the FIR also, which was lodged on the next day i.e. 20.10.2020 at 14.34 hrs, it was specifically mentioned by the informant (PW-1) that with the help of police a search for the girl started in the night itself and next day, the body was found. The statement of PW-5 is also to the effect that in the evening of 19.10.2020 the Sub-Inspector had asked him for the CCTV footage of the camera installed at his shop. Not only that, PW-5 states that the Sub-Inspector viewed the CCTV footage (DVR) in the morning at 7.30 am of 20.10.2020. When these evidences are read together in conjunction with the statement of PW-1 that on 19.10.2020 at about midnight the report was lodged by him and the body was discovered by the police it leaves a lingering doubt in our mind with regard to involvement of some other person because as to what was that information which led to the discovery of the body has been suppressed by the prosecution. What is also important is that the family members of the deceased have maintained that on 19.10.2020 the appellant was handed over to the police and was interrogated by the police. The wife of the informant also admits that the appellant denied his involvement and vehemently maintained that he had handed over the deceased to the informant. In these circumstances it appears to us that the police was not sure with regard to the involvement of the appellant and therefore they had waited for the CCTV footage to confirm the accusation, if any, against the appellant. Bearing the above discussion in mind, we now proceed to evaluate the prosecution evidence in respect of the circumstances which the trial court relied upon to record conviction

(A) LAST SEEN CIRCUMSTANCE

57. In so far as the circumstance of the deceased being last seen alive with the appellant is concerned, the prosecution relies on the testimony of three witnesses, namely, PW-2 (mother of the deceased), PW-3 (nephew of the informant) and PW-4 (sister of the informant); and the CCTV footage. PW-2 states that the accused-

appellant, her husband (PW-1) and two others (not examined) were having liquor when, between 7.30 pm and 8 pm, the accused-appellant arrived in her room and took the deceased with him under the pretext that her father (PW-1) has asked for her and he would also play with her. PW-2 stated that later, on arrival of her husband, when she asked her husband (PW-1) as to where her daughter is, then her husband told her that the accused-appellant did not bring his daughter to him. PW-2 also stated that PW-3 informed her that he saw the appellant carrying the deceased on his shoulder. During cross examination, PW-2 stated that initially she resisted handing over her daughter to the accused-appellant because her husband was intoxicated and that the accused-appellant was also under the influence of liquor, though not to that extent as her husband was, but she could not resist much because the accused-appellant was well acquainted with the child as well as her husband and she, therefore, had no doubts in her mind that he would bring the child back. During cross examination, PW-2 admitted that report of the incident was given to the police on the same day whereas the body was recovered on the next day. She also stated that the police had arrested the accused-appellant in the night itself and when the accused-appellant was interrogated he stated that he had left the child with her father. A careful scrutiny of the statement of PW-2 would reflect that the accused-appellant, the informant and two others were having liquor together in the evening and that the appellant had come to take the deceased (daughter of the informant and PW-2) at around 7.30 and 8 pm.

58. In so far as the statement of PW-3 is concerned, he stated that on the date of the incident while he was returning home on his cycle, near Anmol Biscuit Factory, he saw the appellant. The victim was noticed on appellant's shoulder. He stated that when he reached home, he noticed that everyone was worried about the victim. Then, he informed everyone that he had seen the appellant carrying the victim on his shoulder. He also stated that thereafter a search for the victim was made and her body was found near Beer factory. He admitted that the FIR was scribed by him. Notably, the report was lodged after finding the body on 20.10.2020. PW-3 also stated that her aunt had informed him that the victim had been taken away by the appellant.

59. The issue that arises for our consideration is whether the statement of PW-3 that he noticed the deceased on the shoulder of the appellant near Anmol Biscuit Factory is reliable or not. Notably, PW-3 is the scribe of the first information report which was lodged at the dictation of PW-1. In the written report (Ex. Ka-1) (FIR), which has lodged on the next day after the body was found, there is no mention that PW-3 had noticed the deceased with the appellant near Anmol Biscuit Factory. In these circumstances, while keeping in mind that PW-3 does not even disclose the time when he saw the deceased with the appellant and that, during cross examination, he stated that his aunt had informed him that the appellant had taken the deceased, coupled with the fact that the disclosure made by him is not reflected in the written report scribed by him, the testimony of PW-3 that he saw the appellant with the deceased near Anmol Biscuit Factory does not inspire our confidence. There is also another reason why we do not propose to rely on PW-3 as a witness of last seen circumstance because there is no disclosure in the prosecution

evidence as to where Anmol Biscuit Factory is located and what he was doing there. Moreover, prosecution evidence is silent whether Anmol Biscuit Factory is near the place from where the body of the deceased was recovered. In these circumstances, PW-3 comes in the category of a chance witness whose reason for the presence at the spot is not disclosed.

60. Now we come to the testimony of PW-4 (sister of the informant). We notice from the evidence on record including the site plan (Ex. ka-8) that PW-4 resides in the same complex where the informant and his family resided. PW-4 stated that when she came out of her residence to fetch medicine for her husband who is a heart patient, she found the appellant playing there with the child. She stated that when she went upstairs in her room she disclosed this fact to victim's mother. She stated that thereafter they became worried and made a search for the victim. When we carefully scrutinise the evidence of PW-4, we notice that she has not disclosed the time when she saw the appellant playing with the deceased and she has also not disclosed the time gap between the time when she saw the deceased playing with the appellant and the time when search for the deceased started. In such circumstances, the testimony of PW-4 that the deceased was last seen alive with the appellant is inconclusive. It could be possible that she saw the appellant playing with the deceased earlier and thereafter the deceased might have been handed over to her father as is the defence of the accused-appellant. Moreover, there is no dispute that the appellant had been carrying the deceased on his shoulder and in the past also, he used to play with the deceased as he had been well acquainted with the family of the informant including the deceased, who used to call appellant Chacha (uncle). Further, she has not made any statement that she saw the deceased taking the child away. Playing at the spot where the child resides and taking away the child from the spot are two different things. For the reasons above, the evidence of PW-4 is firstly not conclusive that the deceased was last seen alive with the appellant and not seen thereafter, though it could be taken as an evidence of the deceased being with the appellant on or about the evening time of 19.10.2020 and, secondly, the circumstance which she has disclosed is not of a definite tendency as to unerringly point towards the guilt of the accused as the accused was noticed playing and not walking away with the child.

61. The other important feature in the testimony of PW-4 is that she claims that she had arrested the appellant on 19.10.2020 and handed him over to the police after informing the police on phone about appellant's arrest. But when she was asked on which number she gave information, she stated that it was the number which the Sub-Inspector gave to her while she and her family were searching for the deceased. Importantly, the Sub-Inspector denies having received any information from PW-4 regarding the arrest of the appellant rather, it is claimed by the police witnesses that the appellant was arrested in the night of 20.10.2020 on the basis of information provided by an informer. This discrepancy in the statement of PW-4 with that of the police witnesses creates a doubt with regard to the reliability of PW-4. However, even if we accept the testimony of PW-4, her testimony is inconclusive for two reasons:- (a) that she does not disclose the time when she saw the appellant playing with the deceased; and (b) that she does not state that the

appellant was seen taking away the deceased. Rather, her testimony is that the appellant was seen playing with the deceased which we do not find incriminating as admittedly the appellant was an old acquaintance and used to visit the house and play with the child.

62. Now, we shall take up the evidence captured in the CCTV footage. On 17.02.2022, during the course of hearing this matter, at the request of learned Senior Counsel appearing for the appellant, we had played the pen drive (material Ex. 1) which bears the record of CCTV footage of the place from where the victim was taken. After playing the video, on 17.02.2022, we had observed as follows:-

"On playing the video, we noticed that the video starts at 8.50 p.m. At 8.51.41 p.m., a man appears with a girl on his shoulders. Neither the face of the man nor of the girl is seen. That man takes a right turn at 8.51.48 p.m. and is not seen again. The video clip continues up to 8.57.18 and thereafter stops. It is also noticed that the man seen carrying the girl on his shoulders, is not seen climbing or descending the stairs but is at the ground level and there is a busy road in front."

The video clip as observed by us is barely of seven minutes.

63. Notably, in his statement recorded under Section 313 CrPC, the appellant raises no dispute with regard to the CCTV footage showing him carrying the child on his shoulder. The appellant in fact admits that at the request of the informant (PW-1 - father of the deceased) he brought the deceased to her father (PW-1) and, thereafter, he continued with his drinks and then left for home. The appellant states that the informant gave 10 rupees to the deceased and thereafter he does not know where the deceased went. As this video clip is barely of seven minutes and is not the DVR recording of the entire night of the incident one cannot rule out the defence case that after few minutes of playing with the girl, she was brought to her father.

64. Sri J.K. Upadhyay, learned AGA, who appeared for the State, at this juncture invited our attention to the site plan (Ex. Ka-8) to demonstrate that by taking right turn the appellant would have gone to the main street and not to the place where the appellant, the informant and the others were having their drinks, which means that the appellant did not take the girl (the victim) to her father but had taken her away.

65. In response to the above submission, learned counsel for the appellant submitted that assuming that the right turn would be towards the road and not towards the place where they were having drinks but that is not a conclusive evidence with regard to the appellant taking away the girl somewhere else, inasmuch as the video clip is of seven minutes only. It is possible that after playing for some time the girl might have been brought to her father. What is important is that PW-4 herself stated that the appellant was playing outside with the girl. Notably, PW-4 is a resident of the same complex and she had ventured out in that area to purchase medicine for her ailing husband. While she was crossing the road, the appellant was playing with that girl. According to the appellant's counsel it means that the appellant took the girl, played with her and thereafter brought the girl to her father. This circumstance therefore is not

conclusive that the girl was taken away by the appellant. Learned counsel for the appellant further submits that the prosecution has laid no charge of the offence punishable under Section 363 IPC.

66. Having viewed the video clip, as regards its probative value, we are of the considered view that the CCTV footage is not such an evidence on the basis of which we may conclude that the appellant took away the girl to some other place. Rather, it is a proof of the appellant having the girl on his shoulder. But having the girl on his shoulder is not indicative of the fact that the appellant was walking away with the girl because, here, we are dealing with a case where the girl was pally with the accused. She use to play with the accused and called him Chacha. It is very normal to witness a child in a playful mood sitting on the shoulder. The appellant also admits that he brought the child to her father. As to whether the appellant took away the girl from that complex is not proved beyond reasonable doubt by that video clip. In fact, from the statement of PW-4, it appears that PW-4, while she was crossing the road to reach her apartment, noticed the appellant playing with the child which means that the child was in the vicinity. Moreover, the video clip is barely of seven minutes. It does not depict the events of the entire night to enable us to rule out the defence that the child was handed over to her father.

67. For the reasons discussed above, as we have found the testimony of PW-3 noticing the appellant with the deceased near Anmol Factory unreliable, the last seen circumstance which the prosecution has been able to prove is not of a definite tendency pointing towards the guilt of the accused as it fails to prove beyond reasonable doubt that the deceased left her residential area with the accused-appellant.

68. In addition to above, the last seen circumstance is a weak type of evidence. It becomes a clinching circumstance only when there is close proximity between the time and place where the deceased was last seen alive with the accused and the time and place from where the deceased's body is recovered. If there is huge gap in the place and time then possibility of the involvement of other persons cannot be ruled out therefore, courts are circumspect in taking the last seen circumstance as the sole basis of conviction. What is important in this case is that the prosecution has not charged the accused for the offence of kidnapping punishable under Section 363 IPC. No doubt, the charge can be altered at any stage but in the instant case the victim and the appellant were known to each other. The victim used to call the appellant *Chacha* (uncle) and the appellant had been a regular visitor to the house of the victim since before her birth. It is thus not in dispute that in the past also the appellant used to play with the victim. Moreover, the testimony of PW-4 is also to the effect that the appellant was playing with the victim when PW-4 saw the victim with the appellant. The prosecution therefore, rightly, did not put the charge of kidnapping as it might not have sustained against the appellant.

69. We also observe that in the instant case there is no evidence that the appellant and the deceased were seen near the spot from where the body of the deceased was recovered. The prosecution has, in fact, led no evidence to demonstrate that the said spot was in close proximity to the place

from where the deceased took the appellant or was close to the place where the deceased was last seen alive with the appellant. Thus, in our considered view, the last seen circumstance on which the prosecution places reliance is inconclusive and cannot form the basis of conviction of the appellant.

(B) MEDICAL/FORENSIC EVIDENCE

70. The prosecution has placed heavy reliance on the report of FSL, Ghaziabad as per which the biological material found on the underwear of the appellant matched with the biological material found in the oral swab taken from the body of the deceased. No doubt, scientific expert report becomes admissible in evidence without formal proof thereof, but to connect the forensic report with the accused, there has to be evidence that the incriminating material in respect of which forensic report has been obtained was duly seized/recovered, properly sealed, kept untampered, examined by FSL (laboratory) and produced in court in a sealed condition. If the incriminating material is recovered from the spot then there has to be a seizure memo in respect thereof which has to be brought on record as a piece of evidence. Likewise, if there is seizure of incriminating material from the accused, a memorandum of seizure has to be made and that seizure has to be proved. Only when the seizure is duly proved and evidence is led to the satisfaction of the court that the seized article was kept in a sealed state and was sent untampered for forensic examination, the forensic report becomes a reliable piece of evidence and may form the basis of conviction.

71. In the instant case, there is no separate memorandum of recovery of the underwear from the accused. Undergarments of the accused were allegedly taken and entry to that effect was made in the medical report of the appellant but the doctor who prepared the report has not been examined. No doubt, the prosecution has proved the arrest memo which was marked Ex. Ka-4 but the arrest memo only states that the accused was medically examined and that he has put his thumb impression on the report. But, the doctor who medically examined the accused has not been examined as a prosecution witness. There is no separate memorandum on record to demonstrate that the underwear/undergarment obtained from the appellant was sealed and sent for forensic examination. Thus, the entry in the medical examination report, which itself has not been proved nor exhibited, cannot be read as a piece of evidence of seizure of undergarments from the accused. Even if we assume that the undergarments of the appellant were taken, what renders the report unworthy of credit is that the FSL report would indicate that the envelop and the forwarding letter disclosed that a Baniyan (vest) and an underwear was forwarded for forensic examination but the envelop that arrived at FSL only had an underwear. There was no Baniyan (vest). If the forwarding letter and envelop shows dispatch of two articles but only one arrives at the laboratory, a serious doubt arises with regard to the envelop being tampered. Notwithstanding that in the forensic report it is mentioned that sealed envelops were received but there is no evidence on record to show that it bore the same seal with which it was sealed at the time of collection. We could not notice from the record that sample seals maintained by the police were exhibited during trial or that the articles sent for forensic examination were produced in a sealed condition in the court to demonstrate that such and such

article were submitted for forensic examination. In such circumstances, the doubt that arises from the note put in the forensic report is not dispelled by the prosecution.

72. That apart, neither the medical examination report of the appellant which discloses collection of undergarments nor FSL report were put to the appellant during his examination under Section 313 CrPC. In view whereof, in our considered view, this incriminating circumstance would have to be eschewed from consideration.

73. At this stage, we may observe that though the forwarding letter sending articles for forensic examination has not been made material exhibit in the trial court proceeding but it is there on record as part of the case diary etc. A perusal of that letter would reveal that FSL was required to submit answers to the following questions:-

'' प्रश्नः—1 उपरोक्त प्रदर्शो के अन्दर रखी वस्तुओं पर मानव सीमन है अथवा नही

2. मृतका अराध्या के नाखून में किसी के रक्त व त्वचा के रेशे हैं। अथवा नही।

3. मृतका के टंहपदंस ।तमं पर पाया गया बाल और अभि0 चन्दन पान्डे के बालो से क्छ। मेल खाता है। अथवा नही।

4. पीडिता के नाखून मे ब्लड व रेशे पाये जाते हैं तो क्या अभि0 के ब्लड से क्छ। से मेल खाते हैं। अथवा नही।

74. Interestingly, the forensic report on which the trial court has placed reliance is inconclusive in respect of vaginal slide, anal slide, anal swab, vaginal swab and frock of the deceased, inasmuch as, in the report it is stated that though the presence of male allele is found but the DNA profiling could not be done to enable its comparison with the blood sample of the accused. Similarly, the profiling of DNA on item No.9 (hair of the deceased), item no.11 (metallic payal of the deceased), item no.21 (hair found in the pubic area of the deceased which might have been of the cuplrit) and item no.22 (nail clipping of the accused) could not be successful. Further, the forensic report is silent in respect of presence of spermatozoa. In our view, therefore, the forensic report on which heavy reliance has been placed by the trial court to record conviction cannot form a valid piece of evidence as against the appellant for the following reasons:- (i) the only item of the appellant that could connect the appellant to the crime was the underwear (item no.12) but the seizure of this underwear from the appellant has not been proved, inasmuch as, the medical report which shows that undergarments were recovered from the appellant has neither been proved by examining the doctor nor is marked as an exhibit more over the underwear sent for forensic examination has not been produced in court as a material exhibit; (ii) the forensic report makes a note that the envelop containing the underwear and Baniyan (vest) of the accused, when opened, disclosed presence of only an underwear. There is no evidence led by the prosecution that the underwear when collected from the appellant was duly sealed and was properly kept in a sealed condition for transmission to the forensic laboratory and that the same seal with which it was sealed was matched and found intact. Further, as the contents of the envelop were different than what was noted on its cover or in the forwarding letter/ envelop, the possibility of the envelop being tampered cannot be ruled out, particularly, when the sample of the seals by which those envelops were sealed for transmission and sent back by the forensic laboratory after examination were not proved or made exhibits; and (iii) neither seizure of the underwear nor the forensic

report was to put to the appellant while recording his statement under Section 313 CrPC.

75. For all the reasons recorded above, we are of the considered view that the trial court erred in law by placing reliance on the forensic report as to connect the appellant with the crime.

76. In addition to above, we are also of the view that the prosecution has suppressed material facts, inasmuch as --

(1) The evidence of the prosecution witnesses, namely, PW-1, PW-4 and PW-2, is consistent that a report of the incident was made to the police on 19.10.2020 and that the police had carried out search for the victim in the night itself. The fact that the incident was reported to the police on 19.10.2020 itself is corroborated by the statement of PW-5 also, who states that the police on 19.10.2020 had asked for the CCTV footage from him. But, unfortunately, that report has been suppressed by the prosecution. As to who was the suspect in that report and from where the child went missing could have thrown light on the truth but as this piece of information has been suppressed by the prosecution, the court is left guessing as to whether there was someone else who was involved in the crime;

(2) PW-1, PW-2 and PW-3 stated that the accused was arrested in the night of 19.10.2020 whereas the police discloses the arrest of the appellant on 20.10.2020 at 21.50 hrs; this gives us a feeling that the police wants to hide the fact that despite in depth interrogation nothing incriminating could be found against the appellant and that nothing incriminating could be recovered at his instance;

(3) The prosecution has not examined the doctor who conducted the medical examination of the appellant at the time of his arrest. This assumes importance because the medical examination report of the appellant is there on the record of the trial court and it indicates that the medical examination was conducted at 11.30 pm on 20.10.2020 and as many as seven injuries were noticed on the body of the appellant, which were simple in nature caused by hard and blunt object. The medical report does not disclose that those injuries were fresh in nature therefore, the possibility of the appellant being arrested earlier and beaten cannot be ruled out therefore, to ensure that the police might not be caught on the wrong foot, the doctor was not examined to prove that report;

(4) The first information report suggests that information about the body being found was received at 12.30 hrs on 20.10.2020 whereafter the FIR was lodged. The oral deposition of the witnesses is to the effect that the body was found by the police and they informed the informant that the body has been found. The prosecution has led no evidence as to on whose information the body was found. This creates a doubt in our mind as to whether the incriminating information regarding the place where the body was dumped is being suppressed with a view to save someone else;

(5) A bottle and the other articles were lifted from near the spot where the body was found but they have not been sent for forensic examination or for finger prints expert report as to rule out the involvement of some other person;

(6) The prosecution has not examined those two other persons who were having drinks with the informant at the time when the appellant is stated to have got up to fetch the daughter of the informant. These witnesses could have thrown light on the defence taken by the appellant that he had brought informant's daughter to her father where they all were having liquor.

77. In view of the discussion above, though the prosecution has been successful in proving that the victim was sexually assaulted and killed but it has failed to prove that the victim was sexually assaulted and killed by the appellant. It is an unfortunate case where it appears that the father of the victim and the other three including the appellant were so drunk that they were not conscious of their acts. The appellant who was having drinks with the victim's father and had brought the victim down stairs was noticed playing with her therefore, he was the prime suspect. But, whether the victim was brought to her father or she was left on the road is anybody's guess. Rather, it appears to be a case where these three persons were so drunk that they were not even conscious of their responsibility towards the child. Whether the child was picked up by an unknown stranger or the child was handed over to a stranger or the child was brought to her father and thereafter the father sent her somewhere is just a matter of speculation. What goes in favour of the appellant is that there is nothing against the appellant as to why he would commit such a heinous crime, particularly, when he himself was a married person with children and the victim was like his own niece with whom he used to play. What also goes in favour of the appellant is that the appellant has not denied having taken the child from her mother, rather, he has maintained his stand throughout, even while he was interrogated, that he had handed over the child to his father and thereafter his father gave some money to the child and that they continued with their drinks (liquor). What further goes in favour of the appellant is that from the evidence brought on record it appears that the accused was apprehended in the night of 19.10.2020 itself but despite interrogation there appeared no disclosure leading to discovery of any incriminating material at his instance. What goes against the prosecution is that they have not come out with clean hands and they have tried to suppress material facts which we have already noticed above. Further, what goes against the prosecution is that they have not taken care to lead convincing evidence in respect of seizure of underwear of the appellant and transmission of underwear for forensic examination in a sealed and untampered condition. What also goes against the prosecution is that the incriminating circumstance relating to seizure of the underwear was not even formally proved and even the forensic report was not put to the accused during his examination under Section 313 CrPC. What further goes against the prosecution is that all the other materials except that underwear could not connect the appellant to the crime. But, since the seizure of that underwear was not proved, its transmission to FSL in a sealed/untampered condition becomes doubtful and the underwear was not made material exhibit, the forensic report becomes an unreliable piece of evidence.

78. Thus, for all the reasons recorded above, we have no hesitation in allowing the appeal and rejecting the reference. The appeal is **allowed**. The judgment and order of the trial court is set aside. The reference to confirm the death penalty is answered in the negative. The appellant is acquitted of the charges for which he has been tried. He shall be set at liberty forthwith unless wanted in any other case subject to compliance of the provisions of section 437-A CrPC to the satisfaction of the trial court below.

79. At this stage, we would like to put on record that our predecessor Bench by

order dated 28.07.2021 had called for a report from the Jail Superintendent regarding the conduct and behaviour of the accused-appellant. The said report has been placed by the office in a sealed cover which we have not opened as we have already taken a decision to acquit the appellant.

80. Let the lower court record be sent along with certified copy of the order to the trial court for compliance.

(2023) 1 ILRA 700
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 24.01.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application u/s 482 No. 677 of 2023

Krishna Kumar & Ors. ...Applicants
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicants:
Siddharth Shankar Dubey

Counsel for the Opp. Parties:
G.A.

A. Criminal Law - Criminal Procedure Code, 1973 – Sections 190(1) – Cognizance of offence – Summoning order was passed by the Magistrate on the printed proforma – Legality challenged No judicial mind applied – Effect – Held, the conduct of the judicial officers concerned in passing orders on printed proforma by filling up the blanks without application of judicial mind is objectionable and deserves to be deprecated – The summoning of an accused in a criminal case is a serious matter and the order must reflect that Magistrate had applied his mind to the facts as well as Law applicable thereto, whereas the impugned summoning order was passed in mechanical manner without application of judicial mind. (Para 12 and 23)

B. Constitution of India,1950 – Article 21 – Fundamental right – Right of fair investigation and speedy trial – Held, fair and proper investigation is the primary duty of the Investigating Officer. No investigating agency can take unduly long time in completing investigation. There is implicit right under Article 21 for speedy trial which in turn encompasses speedy investigation, inquiry, appeal, revision and retrial. (Para 14)

Application allowed. (E-1)

List of Cases cited:-

1. DiLawar Vs St. of Har.; (2018) 16 SCC 521

2. Menka Gandhi Vs U.O.I.; AIR 1978 SC 597

3. Hussainara Khatoon (I) Vs St. of Bihar; (1980)1 SCC 81

4. Abdul Rehman Antulay Vs R.S. Nayak; (1992) 1 SCC 225

5. P. Ramchandra Rao Vs St. of Karn.; (2002) 4 SCC 578

6. H.N. Rishbud Vs St. of Delhi; AIR 1955 SC 196

7. Bhushan Kumar & anr. Vs St. (NCT of Delhi) & anr.; AIR 2012 SC 1747

8. Basaruddin & others Vs St. of U.P. & ors.; 2011 (1) JIC 335 (All)(LB)

9. Bhushan Kumar & anr. Vs St. (NCT of Delhi) & anr.; AIR 2012 SC 1747

10. Sunil Bharti Mittal Vs Central Bureau of Investigation; AIR 2015 SC 923

11. Darshan Singh Ram Kishan Vs St. of Mah.; (1971) 2 SCC 654

12. Application U/S 482 No.19647 of 2009; Ankit Vs St. of U.P. & anr. decided on 15.10.2009

13. Criminal Revision No. 3209 of 2010; Kavi Ahmad Vs St. of U.P. & anr.

14. Abdul Rasheed & ors. Vs St. of U.P. & anr.; 2010 (3) JIC 761 (All)

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

1. Heard Sri Siddharth Shanker Dubey, learned counsel for the applicants as well as Smt Jan Laxmi Tiwari Senanai, learned A.G.A. for the State and perused the record.

2. The instant application under Section 482 Cr.P.C. has been filed by the applicants with a prayer to quash the entire criminal proceedings of Case No. 21 of 2019: State of U.P. Versus Krishna Kumar and other under Section 363, 366 I.P.C. and Sections 16 and 17 of Protection of Children from Sexual Offences Act, 2012, pending before the court of ASJ/POCSO-II Raibareli and also for quashing of the charge-sheet No.101/2019 dated 05.02.2019 and quashing of summoning order dated 08.02.2019.

3. As per the prosecution version of the F.I.R., on 13.11.2018 at 08.40 A.M. the complainant went to drop off his daughter to her school and after the end of school hours, the complainant found out that his daughter did not attend the school that day. The complainant went home and checked his household trunk and found that the daughter had fled with Rs.20,000/- along with her. That complainant's house is nearby to one neighbour Krishna Kumar Nayi's house who lives with his son Avinash alias Shivam wife Shrimati, daughter Shivani and second son Abhishek as a family. The complainant states that Avinash alias Shivam was living in some city for purpose of earning his livlihood. Furthermore, as per the allegations levelled by complainant on 13.11.2018 at about 8.40 AM in the morning Shivani and Abhishek dropped off the victim from school to station where accused Avinash alias Shivam was already present, who manipulated the victim in running away with him. Also, it is alleged in the F.I.R. that Krishna Kumar Nayi was connected throughout on the phone and hence Krishna Kumar Nayi mother Shrimati sister Shivani and brother Abhishek all are involved in the said crime.

4. Learned counsel for the applicants further submits that the entire prosecution story is false. No such incident took place and the applicants have been falsely implicated in the present case.

5. Learned counsel for the applicants further submits that before arguing the case on merits, he wants to draw attention of this Court on the charge-sheet dated 05.02.2019 submitted by the Investigating Officer in mechanical manner under Sections 363, 366 I.P.C. and Section 16 and 17 of Protection of Children from Sexual Offences Act, 2012, copy of the same is filed as Annexure No.1 to the affidavit, whereas he further submits that on the charge-sheet, the learned Magistrate had taken cognizance and passed the summoning order on 08.02.2019. The cognizance was taken on the printed proforma by filling the sections of IPC, dates and number and in the said proforma the learned Magistrate without assigning any reason has summoned the applicants for facing trial. Copy of the cognizance order is also annexed as Annexure No.2 to the affidavit.

6. Learned counsel for the applicants further submits that by the order dated 08.02.2019 cognizance taken by the learned Magistrate on printed proforma without assigning any reason is abuse of process of law and the same was without application of mind and was in a routine manner.

7. Learned counsel for the applicants further submits that after submission of charge sheet and cognizance order on printed proforma, the applicants have been summoned mechanically by order dated 08.02.2019 and the court below while summoning the applicants has materially erred and did not follow the dictum of law as propounded by the Hon'ble Supreme Court in various cases that summoning in criminal case is a serious matter and the court below without dwelling into material and visualizing the case on the touch stone of probability should not summon accused person to face criminal trial. It is further submitted that the court below has not taken into consideration the material placed before the trial court along with charge sheet and, therefore, the trial court has materially erred in summoning the applicant. The court below has summoned the applicant through a printed order, which is wholly illegal.

8. It is vehemently urged by learned counsel for the applicants that the impugned cognizance/summoning order dated 08.02.2019 is not sustainable in the eye of law, as the same has been passed in mechanical manner without applying the judicial mind, because on the face of record itself it is apparent that impugned cognizance/summoning order dated 08.02.2019 has been passed by the Magistrate concerned on printed proforma by filling up the gaps, therefore the same is liable to be quashed by this Court.

9. Learned counsel for the applicants has given much emphasis that if the cognizance has been taken on the printed proforma, the same is not sustainable.

10. Per contra, learned A.G.A. for the State submitted that considering the material evidences and allegations against the applicants on record, as on date, as per prosecution case, the cognizable offence against the applicants is made out, therefore, application is liable to be dismissed but has not denied that the leaned Magistrate has taken cognizance on the printed proforma. Accordingly, this case is being finally decided at this stage without issuing notice to opposite party no.2 and without calling for a counter affidavit.

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

12. The main issue for consideration before this Court is that whether the learned Magistrate may summon the accused person on a printed proforma without assigning any reason and take cognizance on police report filed under Sections 173 of Cr.P.C. In this regard, it is relevant to mention here that a Court can take cognizance of an offence only when condition requisite for initiation of proceedings before it as set out in Chapter XIV of the Code are fulfilled. Otherwise, the Court does not obtain jurisdiction to try the offences under section 190 (1) of the Cr.P.C. provided that "subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence,

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second

class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

13. At this juncture, it is fruitful to have a look so far as the law pertaining to summoning of the accused persons, by taking cognizance on a police report filed under section 173 of the Cr.P.C., is concerned and the perusal of the case law mentioned herein below would clearly reveal that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since, it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the material collected by the Investigating Officer results in sufficient grounds to proceed further and would constitute violation of law so as to call a person to appear before the criminal court to face trial. This discretion puts a responsibility on the magistrate concerned to act judiciously keeping in view the facts of the particular case as well as the law on the subject and the orders of Magistrate does not suffers from non-application of judicial mind while taking cognizance of the offence.

14. Fair and proper investigation is the primary duty of the Investigating Officer. No investigating agency can take unduly long time in completing investigation. There is implicit right under Article 21 for speedy trial which in turn encompasses speedy investigation, inquiry, appeal, revision and retrial. There is clear need for time line in completing investigation for having in-house oversight mechanism wherein accountability for adhering to lay down timeline, can be fixed at different levels in the hierarchy, vide **Dilawar vs. State of Haryana, (2018) 16 SCC 521, Menka Gandhi vs. Union of India, AIR 1978 SC 597, Hussainara Khatoon (I) vs. State of Bihar, (1980)1 SCC 81, Abdul Rehman Antulay vs. R.S. Nayak, (1992) 1 SCC 225 and P. Ramchandra Rao vs. State of Karnatka, (2002) 4 SCC 578.**

15. For the purposes of investigation, offences are divided into two categories "cognizable" and "non-cognizable". When information of a cognizable offence is received or such commission is suspected, the proper police officer has the authority to enter in the investigation of the same but where the information relates to a non-cognizable offence, he shall not investigate it without the order of the competent Magistrate. Investigation includes all the proceedings under the Cr.P.C. for the collection of evidence conducted by a police officer or by any person other than a Magistrate (who is authorised by a Magistrate in his behalf). Investigation consists of steps, namely (i) proceeding to spot, (ii) ascertainment of the facts and circumstances of the case, (iii) discovery and arrest of the suspected offender, (iv) collection of evidence relating to the commission of the offence and (v) formation of opinion as to whether on the material collected therein to place the accused before a Magistrate for trial and if so to take necessary steps for the same by filing a charge sheet under Section 173, Cr.P.C., vide **H.N. Rishbud vs. State of Delhi, AIR 1955 SC 196**. Thereafter, the learned Magistrate has to take cognizance after application of judicial mind and by reasoned order and not in mechanical manner.

16. In the case of **Bhushan Kumar and Anr. v. State (NCT of Delhi) and Anr., AIR 2012 SC 1747,** the Hon'ble

Apex Court was pleased to observe that section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceedIn the case of **Basaruddin & others Vs. State of U.P. and others, 2011 (1) JIC 335 (All)(LB),** the Hon'ble Court was pleased to observed as under:-

"From a perusal of the impugned order, it appears that the learned Magistrate on the complaint filed by the complainant has summoned the accused in a mechanical way filling the date in the typed proforma. Learned Magistrate while taking cognizance of the offence on complaint was expected to go through the allegations made in the complaint and to satisfy himself as to which offences were prima facies, being made out against the accused on basis of allegations made in the complaint. It appears that the learned Magistrate did not bother to go through the allegations made in the complaint and ascertain as to what offences were, prima facie, being made out against the accused on the basis of allegations made in the complaint. Apparently, the impugned order passed by the learned Magistrate suffers from non-application of mind while taking cognizance of the offence. The impugned order is not well reasoned order, therefore, the same is liable to be quashed and the petition deserves to be allowed and the matter may be remanded back to the learned Chief Judicial Magistrate, Lakhimpur Kheri with direction to him to go through the allegations made in the complaint and ascertain as to what offences against the accused were prima facie being made out against the accused on the basis of allegations made in the complaint and pass fresh order, thereafter, he will proceed according to law."

17. In the case of **Bhushan Kumar and Anr. v. State (NCT of Delhi) and Anr., AIR 2012 SC 1747**, the Hon'ble Apex Court was pleased to observe that section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit narration of the same is mandatory, meaning thereby that it is not a pre-requisite for deciding the validity of the summons issued.

18. In the case of **Sunil Bharti Mittal v. Central Bureau of Investigation, AIR 2015 SC 923**, the Hon,ble Apex Court was pleased to observe in paragraph no.47 of the judgment as under:

"47. However, the words "sufficient grounds for proceeding" appearing in the Section are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself.."

19. In the case of **Darshan Singh Ram Kishan v. State of Maharashtra , (1971) 2 SCC 654**, the Hon'ble Court was pleased to observe that the process of taking cognizance does not involve any formal action, but it occurs as soon as the

Magistrate applies his mind to the allegations and, thereafter, takes judicial notice of the offence. As provided by Section 190 of the Code of Criminal Procedure, a Magistrate may take cognizance of an offence either, (a) upon receiving a complaint, or (b) upon a police report, or (c) upon information received from a person other than a police officer or even upon his own information or suspicion that such an offence has been committed. As has often been held, taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint, or on a police report, or upon information of a person other than a police officer. Therefore, when a Magistrate takes cognizance of an offence upon a police report, prima facie he does so of the offence or offences disclosed in such report."

20. In the case of **Ankit Vs. State of U.P. And another** passed in Application U/S 482 No.19647 of 2009 decided on 15.10.2009, this Court was pleased to observe in paragraph No.8 of the judgment as under:-

"8. In the beginning, the name of the court, case number, state vs. ..... under section ..... P.S. ..... District ..... case crime No. ..... /2009 also have been printed and blanks have been filled up by mentioning the case number, name of the accused, section, P.S. District etc. by some employee. Below afore cited printed matter, the following sentence has been mentioned in handwriting "अभियुक्त अंकित की गिरफ्तारी मा0 उच्च न्यायायल द्वारा Crl. Writ No. 19559/08 अंकित बनाम राज्य में पारित आदेश दिनांक 5.11.08 द्वारा आरोप पत्र प्राप्त होने तक स्थगित थी।"

Below aforesaid sentence, the seal of the court containing name of Sri Talevar Singh, the then Judicial Magistrate-III, has been affixed and the learned magistrate has put his short signature (initial) over his name. The manner in which the impugned order has been prepared shows that the learned magistrate did not at all apply his judicial mind at the time of passing this order and after the blanks were filled up by some employee of the court, he has put his initial on the seal of the court. This method of passing judicial order is wholly illegal. If for the shake of argument, it is assumed that the blanks on the printed proforma were filled up in the handwriting of learned magistrate, even then the impugned order would be illegal and invalid, because order of taking cognizance of any other judicial order cannot be passed by filling up blanks on the printed proforma. Although as held by this Court in the case of **Megh Nath Guptas & Anr V State of U.P. And Anr, 2008 (62) ACC 826**, in which reference has been made to the cases of **Deputy Chief Controller Import and Export Vs Roshan Lal Agarwal, 2003 (4) ACC 686 (SC), UP Pollution Control Board Vs Mohan Meakins, 2000 (2) JIC 159 (SC): AIR 2000 SC 1456 and Kanti Bhadra Vs State of West Bengal, 2000 (1) JIC 751 (SC): 2000 (40) ACC 441 (SC),** the Magistrate is not required to pass detailed reasoned order at the time of taking cognizance on the charge sheet, but it does not mean that order of taking cognizance can be passed by filling up the blanks on printed proforma. At the time of passing any judicial order including the order

taking cognizance on the charge sheet, the Court is required to apply judicial mind and even the order of taking cognizance cannot be passed in mechanical manner. Therefore, the impugned order is liable to be quashed and the matter has to be sent back to the Court below for passing fresh order on the charge sheet after applying judicial mind."

21. In the case of **Kavi Ahmad Vs. State of U.P. and another** passed in **Criminal Revision No. 3209 of 2010**, wherein order taking cognizance of offence by the Magistrate under Section 190(1)(b) on printed proforma without applying his judicial mind towards the material collected by the Investigating Officer has been held illegal.

22. In the case of **Abdul Rasheed and others Vs. State of U.P. and another 2010 (3) JIC 761 (All).** The relevant observations and findings recorded in the said case are quoted below:-

"6. Whenever any police report or complaint is filed before the Magistrate, he has to apply his mind to the facts stated in the report or complaint before taking cognizance. If after applying his mind to the facts of the case, the Magistrate comes to the conclusion that there is sufficient material to proceed with the matter, he may take cognizance. In the present case, the summoning order has been passed by affixing a ready made seal of the summoning order on a plain paper and the learned Chief Judicial Magistrate had merely entered the next date fixed in the case in the blank portion of the ready made order. Apparently the learned Magistrate had not applied his mind to the facts of the case before passing the order dated 20.12.2018, therefore, the impugned order cannot be upheld.

7. Judicial orders cannot be allowed to be passed in a mechanical manner either by filling in blank on a printed proforma or by affixing a ready made seal etc. of the order on a plain paper. Such tendency must be deprecated and cannot be allowed to perpetuate. This reflects not only lack of application of mind to the facts of the case but is also against the settled judicial norms. Therefore, this practice must be stopped forthwith."

23. In view of the above, this Court finds and observes that the conduct of the judicial officers concerned in passing orders on printed proforma by filling up the blanks without application of judicial mind is objectionable and deserves to be deprecated. The summoning of an accused in a criminal case is a serious matter and the order must reflect that Magistrate had applied his mind to the facts as well as law applicable thereto, whereas the impugned summoning order was passed in mechanical manner without application of judicial mind and without satisfying himself as to which offence were prima-facie being made out against the applicants on the basis of the allegations made by the complainant. the impugned cognizance order passed by the learned Magistrate is against the settled judicial norms.

24. In light of the judgments referred to above, it is explicitly clear that the order dated 08.02.2019 passed by the ASJ/POCSO-II,Raibareli is cryptic and does not stand the test of the law laid down by the Hon'ble Apex Court. Consequently, the cognizance/summoning order dated 08.02.2019 cannot be legally sustained, as the Magistrate failed to exercise the jurisdiction vested in him resulting in miscarriage of justice.

25. Accordingly, the present Criminal Misc. Application U/S 482 Cr.P.C succeeds and is allowed. The impugned summoning order dated 08.02.2019 passed in Case No. 21 of 2019: State of U.P. Versus Krishna Kumar and others under Section 363, 366 I.P.C. and Sections 16 and 17 of Protection of Children from Sexual Offences Act, 2012, pending before the ASJ/POCSO-II Raibareli is hereby quashed.

26. The matter is remitted back to ASJ/POCSO-II Raibareli directing him to decide afresh the issue for taking cognizance and summoning the applicants and pass appropriate orders in accordance with law keeping in view the observations made by this Court as well as the direction contained in the judgments referred to above within a period of two months from the date of production of a copy of this order.

27. The party shall file certified copy or computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

28. The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2023) 1 ILRA 707
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.12.2022

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Application u/s 482 No. 7151 of 2022

Madan Pal Singh ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Santosh Kumar Rai, Sri V.P. Srivastava(Sr. Advocate)

Counsel for the Opp. Parties:
G.A.

A. Criminal Law – Criminal Procedure Code, 1973 – Sections 190()(b), 200, 202 & 204 – Final report was submitted and no protest petition against it was filed – Power of Magistrate to treat it as the criminal complaint case, how far lie – Held, in case of police report that no case is made out against accused, the Magistrate can ignore the conclusion drawn by police and take cognizance under Section 190(1)(b) Cr.P.C. and issue process or in the alternative he can take cognizance of original complaint and examine the complainant and his witnesses and thereafter can issue process to accused, if he is of opinion that there are sufficient ground to proceed against accused – India Carat Pvt. Ltd.'s case relied upon. (Para 14)

B. Criminal Procedure Code, 1973 – Sections 197 – Protection of prior sanction – Claim by the police personnel while performing official work – Taking the deceased to the hospital by the police personnel after arrest, will it be defined as the official duty – Held, the act of applicant was connected with official duty – Further held, there was a bar under Section 197 Cr.P.C. to proceed against applicant, a police personnel, when alleged offence was committed by him while acting or purporting to act in discharge of official duty, no Court shall take cognizance of such offence except with previous sanction – Criminal proceedings initiated against applicant was held erroneous and illegal. (Para 19, 20 and 21)

Application allowed. (E-1)

List of Cases cited:-

1. H.S. Bains Vs The St. (Union Territory of Chandigarh); AIR 1980 SC 1883

2. Abhinandan Jha & ors. Vs Dinesh Mishra; AIR 1968 SC 117

3. India Carat Pvt. Ltd. Vs St. of Karn.; 1989(2) SCC 132

4. St. of Har. & ors. Vs Ch. Bhajan Lal & ors.; AIR 1992 SC 604

5. D. Devaraja Vs Owais Sabeer Hussain; (2020) 7 SCC 695

6. Rajiv Thapar & ors. Vs Madan Lal Kapoor; (2013) 3 SCC 330

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

1. In order to consider rival submissions, it is necessary to place brief facts of the case on record.

2. On 02.12.1999 a police party intercepted three persons in a routine patrolling duty and after exchange of firing two persons were apprehended but one person managed to run away. Said two injured-accused were arrested and three FIRs were lodged being Case Crime No. 228 of 1999, under Section 307 IPC and Case Crime No. 229 of 1999 as well as Case Crime No. 230 of 1999, under Section 25 Arms Act, Police Station Roza, District Shahjahanpur and accused Yaqub alias Gulam Khwaja and Arish were remanded to police custody. They were admitted in hospital and were under treatment and on advice of Doctors one of the accused, Yaqub when on the way to Spinal Surgery Unit of KGMC, Lucknow died on 04.12.1999. Post mortem was conducted wherein five injuries were found on his body.

3. In these circumstances, Saroon wife of deceased, Yaqub filed an application under Section 156(3) Cr.P.C. before Chief Judicial Magistrate, Shahjahanpur against police party, who have arrested deceased after exchange of firing with allegation that it was a death due to custodial torture. Said application was dismissed vide order dated 02.02.2001, however a revision thereof was allowed vide order dated 09.02.2001 and thereafter a FIR was lodged on 23.02.2001 against present applicant and other police personnel under Sections 147, 148, 149, 302 IPC, Police Station Roza, District Shahjahanpur. After investigation a final report was submitted on 24.10.2001. A notice was also issued by Human Right Commission on basis of an application filed by wife of deceased-accused in which a report was submitted that deceased was rightly arrested and he died due to injuries suffered during his arrest despite proper treatment.

4. The above referred final report dated 24.10.2001 was submitted before Trial Court, however, without calling a protest petition vide order dated 03.01.2002 the Court registered a criminal complaint case and issued notice to complainant, i.e., Saroon, wife of deceased and thereafter her statement was recorded under Section 200 Cr.P.C. as well as statements of two witnesses were also recorded under Section 202 Cr.P.C. and consequently by impugned order dated 28.09.2010 passed under Section 204 Cr.P.C., summons were issued against applicant and other persons to face trial under Sections 147, 148, 149, 302 IPC.

5. Under the above factual background and on the basis of rival submissions issues before this Court for consideration are, whether without any

protest petition a Magistrate while disapproving a final report can treat it to be a criminal complaint case and further on basis of statements recorded under Sections 200 and 202 Cr.P.C. could pass an order under Section 204 Cr.P.C. to summon accused persons and if answer to above issue is in affirmative, whether in facts and circumstances of present case order impugned passed under Section 204 Cr.P.C. is legally sustainable or not as well as whether applicant being a police personnel is entitled for protection from initiation of a criminal proceeding in question under Section 197 Cr.P.C. being without previous sanction?

6. Sri V.P. Srivastava, learned Senior Advocate assisted by Sri Santosh Kumar Rai, learned counsel for applicant, vehemently urged that deceased-accused alongwith other accused were apprehended on 02.12.1999 after exchange of firing in injured condition and immediately they were produced before Magistrate who granted remand of accused by order dated 02.12.1999 that he had suffered serious injuries and was admitted in hospital and with further direction that accused be sent to custody after discharge from hospital. He was given treatment in hospital for spinal and head injuries and Senior counsel has placed reliance on medical treatment report and that after two days on 04.12.1999 he was referred to other hospital (Spinal Care Unit at KGMC, Lucknow) however he died while going to hospital and brought dead at KGMC, Lucknow. Therefore, without any dispute or challenge to the order of remand or otherwise any allegation of torture during remand by police personnel are not sustainable when accused was immediately, after arrest, admitted in the hospital. Police has fairly investigated the case and submitted a final report. Deceased died due to injuries suffered during his arrest and any allegations of custodial torture were false and baseless. On legal issue learned Senior Advocate placed reliance on **H.S. Bains vs. The State (Union Territory of Chandigarh), AIR 1980 SC 1883** in order to show, what should be correct procedure with regard to arrest, investigation, police report and procedure adopted by Magistrate after filing of a final report.

7. Learned Senior Advocate further placed reliance on paragraphs 15 and 21 of **Abhinandan Jha and others vs. Dinesh Mishra, AIR 1968 SC 117**, which are reproduced as under:

"15. Then the question is, what is the position, when the Magistrate is dealing with a report submitted by the police, under Section 173, that no case is made out for sending up an accused for trial, which report, as we have already indicated, is called, in the area in question, as a 'final report'? Even in those cases, if the Magistrate agrees with the said report, he may accept the final report and close the proceedings. But there may be instances when the Magistrate may take the view, on a consideration of the final report, that the opinion formed by the police is not based on a full and complete investigation, in which case in our opinion the Magistrate will have ample jurisdiction to give directions to the police, under Section 156(3), to make a further investigation. That is, if the Magistrate feels, after considering the final report, that the investigation is unsatisfactory, or incomplete, or that there is scope for further investigation, it will be open to the Magistrate to decline to accept the final report and direct the police to make further investigation, under Section 156(3). The police, after such further investigation, may

submit a charge-sheet, or,, again submit a final report, depending upon the further investigation made by them. If, ultimately, the Magistrate forms the opinion that the facts, set out in the final report, constitute an offence, he, can take cognizance of the offence under Section 190(1)(c), notwithstanding the contrary opinion of the police, expressed in the final report."

"21. In these two appeals, one other fact will have to be taken note of. It is not very clear as to whether the Magistrate, in each of these cases, has chosen to treat the protest petitions, filed by the respective respondents, as complaints, because, we do not find that the Magistrate has adopted the suitable procedure indicated in the Code, when he takes cognizance of an offence, on a complaint made to him. Therefore, while holding that the orders of the Magistrate, in each of these cases, directing the police to file charge-sheets, is Without jurisdiction, we make it clear that it is open to the Magistrate to treat the respective protest petitions, as complaints, and take further proceedings, according to law, and in the light of the views expressed by us, in this judgment."

8. Reliance was also placed on para 16 of **India Carat Pvt. Ltd. vs. State of Karnataka, 1989(2) SCC 132**, that:

"16. The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer ;and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Section 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(b) though it is open to him to act under Section 200 or Section 202 also. The High Court was, there- fore, wrong in taking the view that the Second Additional Chief Metropolitan Magistrate was not entitled to direct the registration of a case against the second respondent and order the issue of summons to him."

9. Learned Senior Advocate placed reliance on **State of Haryana and others vs. Ch. Bhajan Lal and others, AIR 1992 SC 604**, that *"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",* such criminal proceedings can be quashed by High Court exercising inherent jurisdiction.

10. Sri V.P. Srivastava, Senior Advocate has also submitted that applicant is a police personnel, therefore, his actions are protected in the light of Section 197 Cr.P.C. as well as that Government Order dated 30.06.1975, said protection is

extended to all police force and since there was no prior sanction, criminal proceedings are per se illegal.

11. Per contra, Sri Paritosh Malviya, learned AGA-I appearing for State, has rendered his assistance on legal issue that there are very serious charges against applicant and other police personnel of custodial torture of an arrested person, who later on died. The Magistrate cannot remain as a mere spectator and since he has considered it to be a complaint case, there was no illegality to summon the applicant and others on consideration of statements recorded under Sections 200 and 202 Cr.P.C. The protection granted under Section 197 Cr.P.C. is limited to any offence alleged to have been committed while acting or purporting to act in discharge of official duty only, however, allegations are such that it cannot be said to be an act in discharge of their official duty.

12. Heard learned counsel for parties, perused the record and written submissions.

13. In order to consider the first issue, whether a Magistrate while disapproving a final report without any protest petition could consider it to be a criminal complaint case and could proceed further, it would be relevant to refer para 17 of the judgment passed by Supreme Court in **India Carat Pvt. Ltd. (supra)** as under:

"17. The fact that in this case the investigation had not originated from a complaint preferred to the Magistrate but had been made pursuant to a report given to the police would not alter the situation in any manner. Even if the appellant had preferred a complaint before the learned Magistrate and the Magistrate had ordered investigation under Section 156(3), the police would have had to submit a report under Section 173(2). It has been held in Tufa Ram & Ors. v. Kishore Singh, [1978] 1 SCR 615 ***that if the police, after making an investigation, send a report that no case was made out against the accused, the Magistrate could ignore the conclusion drawn by the police and take cognizance of a case under Section 190(1)(b) and issue process or in the alternative he can take cognizance of the original complaint and examine the complainant and his witnesses and thereafter issue process to the accused, if he is of opinion that the case should be proceeded with."***

(Emphasis added)

14. It is not in dispute that in the present case initially an application filed under Section 156(3) Cr.P.C. was rejected but on an order passed in revision to lodge FIR investigation was conducted but a final report was submitted. Therefore, before the Magistrate a complaint in form of an application under Section 156(3) Cr.P.C. was already on record. Though, normally in these circumstances when a final report was submitted a notice could be issued to complainant who can file a protest petition, which can be considered as a complaint, however, as referred in above referred paragraph of **India Carat Pvt. Ltd. (supra)** even in absence of a protest petition a complaint already filed under Section 156(3) Cr.P.C. could be considered as a criminal case and Magistrate may proceed further to ask the complainant to record his/her statement under Section 200 Cr.P.C. and statements of witnesses under Section 202 Cr.P.C. and if there are sufficient grounds to proceed against accused persons, he can issue summons under Section 204 Cr.P.C. As referred in **India Carat Pvt. Ltd. (supra)** that in case

of police report that no case is made out against accused, the Magistrate can ignore the conclusion drawn by police and take cognizance under Section 190(1)(b) Cr.P.C. and issue process or in the alternative he can take cognizance of original complaint and examine the complainant and his witnesses and thereafter can issue process to accused, if he is of opinion that there are sufficient ground to proceed against accused and in present case the Magistrate has adopted similar procedure and original complaint filed under Section 156(3) Cr.P.C. was considered to be a complaint and after disapproving the final report proceeded to issue process after considering statements recorded under Sections 200 and 202 Cr.P.C. that there are sufficient ground to proceed under Section 204 Cr.P.C.

15. The order sheet also indicates that on 03.01.2002 Magistrate passed order that final report received, a criminal case be registered and issue notice to complainant. Thereafter on request of complainant her statement was recorded and further statements of witnesses were also recorded and on the basis of statements summons were issued. Therefore, there was no procedural irregularity or illegality adopted by Magistrate concerned as such there was no abuse of process of law.

16. As the first issued is answered in affirmative, the Court now proceed to consider the second issue, whether order impugned is legally sustainable or not and that applicant being a police personnel is protected under Section 197 Cr.P.C. or not?

17. In order to consider the rival submissions on this issue, I have carefully perused the statements of complainant as well as witnesses. Complainant has alleged that deceased, her husband, was illegally arrested and it was a case of custodial torture. She further states that when police personnels were taking her husband to Lucknow, he told about torture committed on him during custody. Witnesses also narrated that allegation of custodial torture on deceased that it was communicated to them by victim. Considering the above statements though a prima facie case is made out against applicant and other police personnels, however, the facts and documents which are part of this record that deceased alongwith co-accused were arrested during a police raid in injured condition after exchange of firing and that he was medically examined that he suffered serious injuries, there are evidence of medical treatment also as well as as per record victim was arrested on 02.11.1999 and was immediately admitted in hospital and order for remand was passed to be executed only after his discharge from hospital but before discharge considering his condition he was referred to KGMC, Lucknow when he died during journey. The cause of death, therefore, cannot be held outrightly to be due to custodial torture, if any.

18. In the order of remand, Magistrate had referred condition of victim after interaction with him. Therefore, prima facie it cannot be held that police personnels have done an act beyond their official duty. The Magistrate concerned ought to have considered before issuing summon, whether protection can be granted under Section 197 Cr.P.C. that without prior sanction no cognizance can be taken. However, the Magistrate has not even make an attempt to consider this aspect. In this regard it would be relevant to reproduce few paragraphs of a judgment of Supreme Court in **D. Devaraja vs. Owais Sabeer Hussain (2020) 7 SCC 695:**

"65. The law relating to the requirement of sanction to entertain and/or take cognizance of an offence, allegedly committed by a police officer under Section 197 of the Code of Criminal Procedure read with Section 170 of the Karnataka Police Act, is well settled by this Court, inter alia by its decisions referred to above.

66. ***Sanction of the Government, to prosecute a police officer, for any act related to the discharge of an official duty, is imperative toprotect the police officer from facing harassive, retaliatory, revengeful and frivolous proceedings. The requirement of sanction from the government, to prosecute would give an upright police officer the confidence to discharge his official duties efficiently, without fear of vindictive retaliation by initiation of criminal action, from which he would be protected under Section 197 of the Code of Criminal Procedure,*** *read with Section 170 of the Karnataka Police Act. At the same time, if the policeman has committed a wrong, which constitutes a criminal offence and renders him liable for prosecution, he can be prosecuted with sanction from the appropriate government.*

67. Every offence committed by a police officer does not attract Section 197 of the Code of Criminal Procedure read with Section 170 of the Karnataka Police Act. ***The protection given under Section 197 of the Criminal Procedure Code read with Section 170 of the Karnataka Police Act has its limitations. The protection is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and official duty is not merely a cloak for the objectionable act. An offence committed entirely outside the scope of the duty of the police officer, would certainly not require sanction.*** *To cite an example, a police man assaulting a domestic help or indulging in domestic violence would certainly not be entitled to protection. However if an act is connected to the discharge of official duty of investigation of a recorded criminal case, the act is certainly under colour of duty, no matter how illegal the act may be.*

68. If in doing an official duty a policeman has acted in excess of duty, but there is a reasonable connection between the act and the performance of the official duty, the fact that the act alleged is in excess of duty will not be ground enough to deprive the policeman of the protection of government sanction for initiation of criminal action against him.

69. The language and tenor of Section 197 of the Code of Criminal Procedure and Section 170 of the Karnataka Police Act makes it absolutely clear that sanction is required not only for acts done in discharge of official duty, it is also required for an act purported to be done in discharge of official duty and/or act done under colour of or in excess of such duty or authority.

70. ***To decide whether sanction is necessary, the test is whether the act is totally unconnected with official duty or whether there is a reasonable connection with the official duty. In the case of an act of a policeman or any other public servant unconnected with the official duty there can be no question of sanction. However, if the act alleged against a policeman is reasonably connected with discharge of his official duty, it does not matter if the policeman has exceeded the scope of his powers and/or acted beyond the four corners of law.***

71. If the act alleged in a complaint purported to be filed against the policeman is reasonably connected to discharge of some official duty, cognizance thereof cannot be taken unless requisite sanction of

the appropriate government is obtained under Section 197 of the Code of Criminal Procedure and/or Section 170 of the Karnataka Police Act." (Emphasis added)

19. As discussed in the penultimate paragraph that there are documents which shows that after arrest of victim he was admitted in hospital in injured condition and was put under treatment. The injuries were of serious nature and Magistrate while granting order of remand not only visited the hospital but interacted with victim also. Further, after arrested of victim on 02.12.1999 he was remained admitted in hospital from 02.12.1999 to 04.12.1999 when he was referred to Spinal Care Unit, KGMC, Lucknow and on way to said hospital on 04.12.1999 he died. In these circumstances the test, whether prior sanction is necessary is a satisfaction that alleged act has reasonable connection with official duty or not. It cannot be held, ignoring the documents on record, that act of applicant, a police personnel, was unconnected with official duty.

20. In these circumstances, considering the principle enumerated in **Ch. Bhajan Lal (supra)**, specifically that, *"where there is an express legal bar engrafted in any of the provisions of the Code or concerned Act (under which a criminal proceeding is instituted) to the institution or continuance of proceedings....."*, and as discussed above that in facts and circumstances of present case there was a bar under Section 197 Cr.P.C. to proceed against applicant, a police personnel, when alleged offence was committed by him while acting or purporting to act in discharge of official duty, no Court shall take cognizance of such offence except with previous sanction.

21. As discussed above, the act alleged has atleast reasonable connection with official duty of applicant, therefore, without any prior sanction, as required under Section 197 Cr.P.C. criminal proceedings initiated against applicant are erroneous and illegal. Further, documents on record are not refuted by complainant, therefore, in view of judgment passed by Supreme Court in **Rajiv Thapar and others vs. Madan Lal Kapoor (2013) 3 SCC 330**, these documents can be considered to secure the ends of justice.

22. The outcome of above discussion is that the criminal proceedings initiated against applicant in Complaint Case No. 3848 of 2010 (Smt. Sairoon vs. Jitendra Nath Singh and others), under Sections 147, 148, 149, 302 IPC as well as impugned orders dated 10.01.2022 passed by Sessions Judge, Shahjahanpur in Criminal Revision No. 58 of 2021 (Madan Pal Singh vs. State of U.P. and another) and summoning order dated 28.09.2010 passed by Chief Judicial Magistrate, Shahjahanpur, are hereby quashed. However, complainant will have liberty to sought sanction as required under Section 197 Cr.P.C., if so advised, to initiated any criminal proceeding against the applicant in accordance with law.

23. The application is accordingly allowed.

(2023) 1 ILRA 714
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.11.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Application u/s 482 No. 8292 of 2018

Dr. Syed Fareed Haider Rizvi @ Dr. S.F.H. Rizvi ...Applicant

Versus

C.B.I. ...Opp. Party

Counsel for the Applicant:
Nandit Kumar Srivastava, Prnajal Krishna

Counsel for the Opp. Parties:
Bireshwar Nath

A. Criminal Law – The Delhi Special Police Establishment Act, 1946 – Section 6 – Prevention of Corruption Act, 1988 – Section 19 – Prosecution of public servant – C.B.I. enquiry in compliance of order of High Court was initiated – No prior sanction of competent authority was taken – Effect – Consent of the St., how far is required – Held, where the investigation of an offence has been entrusted to the CBI pursuant to the order passed by the Constitutional Court and role of a public servant comes as an accused for committing such an offence, no prior sanction under Section 19 PC Act would be required for prosecuting such a public servant. (Para 18)

B. Criminal Law – Amendment in the statute – Relevant date of it's applicability – Held, the relevant date for applicability of Law in respect of a crime would be the date of commission of the crime. Subsequent amendment in the statute would not govern the investigation and prosecution of an accused for an offence which was committed before the Amendment in the statute came into force. (Para 19)

Application rejected. (E-1)

List of Cases cited:-

1. St. of Telangana Vs Managipet @ Mangipet Sarveshwar Reddy; (2019) 19 SCC 87

2. Kaushlesh Kumar Sinha Vs CBI; 2018 SCC OnLine All 5546

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

1. Heard Mr. Nandit Kumar Srivastava, learned Senior Counsel, assisted by Mr. J.P. Awasthi and Mr. Mohd. Ibrahim Khan Advocates, representing the applicant as well as Mr. Anurag Kumar Singh, learned counsel for the respondent - CBI, and gone through the record.

2. This application under Section 482 of The Code of Criminal Procedure, 1973 (hereinafter referred to as the "CrPC") has been filed, impugning the order dated 13.12.2018, issuing non-bailable warrants of arrest against the applicant in connection with Criminal Case No.1968 of 2018 (CBI Vs. Sachidanand Dubey and others) under Sections 120-B read with Sections 420 and 409 Indian Penal Code, 1860 (hereinafter referred to as the "IPC") and Sections 13(2) read with Sections 13(1)(d) of the Prevention of Corruption Act, 1988 (hereinafter referred to as the "PC Act"), pending in the Court of learned Special Judge, CBI, Court No. 2, Lucknow, arising out of Crime No. RC0062014A0008 lodged at Police Station CBI/ACB, Lucknow.

3. The applicant was a public servant, employed/posted as District Development Officer, Balrampur during the years 2007 to 2009; at the relevant time, large scale of financial bungling, gross irregularities and misappropriation of public funds allocated under the National Rural Employment Guarantee Scheme (hereinafter referred to as the "NREGS") was reported to have been done by the then government officers/officials in criminal conspiracy and connivance with the private suppliers in purchase of stationery and other materials.

4. Public Interest Litigation Petition No.12802 (M/B) of 2011 came to be filed by Mr. Sachchidanand Gupta before this Court regarding large scale corruption, bungling and misappropriation of NREGS funds by the Block Development Officers

and other government officers/officials in connivance with the private suppliers in the centralized purchase of stationery and other items worth Rs. 1,81,18,602/- on exorbitant price by the then Chief Development Officer, Project Director, D.R.D.A. and other officers of District Balrampur. These government officers/officials and private persons had allegedly caused huge loss to the government exchequer and made corresponding gains to themselves. A prayer was made for registration of the FIR and investigation by the Central Bureau of Investigation (hereinafter referred to as the "CBI").

5. This Court, vide judgment and order dated 31.01.2014 passed Public Interest Litigation Petition No.12802 (M/B) of 2011, issued a Mandamus directing the CBI to investigate the abuse and misappropriation of funds allocated under the NREGS with regard to seven districts of State of Uttar Pradesh, namely, Balrampur, Gonda, Mahoba, Sonbhadra, Sant Kabir Nagar, Mirzapur and Kushinagar during the years 2007 to 2010 and take appropriate action and prosecute the persons involved, in accordance with law.

6. Pursuant to the said order, reports of State Quality Monitor (hereinafter referred to as "SQM") in respect of seven districts, mentioned above, for the relevant period, were examined by the CBI. It was revealed that in District Balrampur during the period 2007-2008 and 2008-2009 large scale financial bungling, gross irregularities and misappropriation of NREGS funds had been found to have been done by the Block Development Officer and other government officers/officials in connivance with private suppliers in the central purchase of stationery and other items wroth Rs. 1,81,18,602/- on exorbitant price by the then Chief Development Officer, Project Director, D.R.D.A. and other officers of District Balrampur in connivance with the private suppliers and thereby they had caused a huge loss to the government exchequer and made corresponding gains to themselves.

7. A regular case, mentioned above, got registered against the then Chief Development Officer, Project Director and other officers/officials of the District Balrampur along with the private suppliers.

8. The CBI after conducting a thorough investigation, lodged the FIR on 21.02.2014 and filed charge-sheet under Section 173(2) CrPC dated 15.11.2018 under Section 120-B read with Sections 420 and 409 IPC and Sections 13(2) read with Sections 13(1)(d) of the PC Act and substantive offences thereof.

9. The CBI found the applicant as one of the architects of the crime, who was posted at the relevant time as District Development Officer, Balrampur. However, he got retired from service when the charge-sheet came to be filed.

10. The learned trial Court took cognizance on 23.11.2018 and issued summons for appearance of the applicant and co-accused on 30.11.2018.

11. The applicant did not appear on 30.11.2018 and thereafter non-bailable warrants of arrest were issued.

12. The only ground, which has been urged by Mr. Nandit Kumar Srivastava, learned Senior Counsel, appearing for the applicant, is that without seeking sanction from the competent authority, the order,

taking cognizance on charge-sheet and further proceedings, including issuance of non-bailable warrants of arrest, are nullity. The learned Senior Counsel has submitted that in view of amendment in PC Act (Amending Act No. 16 of 2018) the sanction for prosecution of a person, who was a public servant at the time of commission of the offence, is must. The learned Senior Counsel has further submitted that the cognizance was taken on 23.11.2018 and the amendment in Section 19 PC Act received President's assent on 26.07.2018 and published in the official gazette on the same day, and it came into force with effect from 26.07.2018 itself. Since the order of cognizance has been passed after the amendment in Section 19 PC Act came into effect with effect from 26.7.2018, the same is bad in law, and the entire subsequent proceedings after cognizance are nullity.

13. On the other hand, Mr. Anurag Kumar Singh, learned counsel for the respondent - CBI has submitted that the amendment in Section 19 PC Act (Amending Act No. 16 of 2018) has no application in respect of the applicant inasmuch as the alleged offence was committed by the applicant and co-accused during the years 2008 to 2010. The Amending Act will have prospective effect and would be applicable in respect of the offences which were/are committed after the amendment came into force in Section 19 PC Act. It will have no effect on a government servant who got retired before the Amendment came into force. In the present case, the applicant allegedly committed the offence before 26.07.2018. The learned counsel has, therefore, submitted that the application has no merit and substance and the same is liable to rejected.

14. The CBI undertook the investigation in compliance of the Mandamus issued by this Court vide judgment and order dated 31.01.2014 passed in Public Interest Litigation Petition No.12802 (MB) of 2011. The following two questions need to be considered in the present case:-

(I) whether when the CBI or any other agency undertakes investigation of an offence in compliance of the judgment and order passed by the Constitutional Court (High Court/Supreme Court) and the role of public servant comes as an accused for committing offence under the PC Act, sanction under Section 19 PC Act from the competent authority for prosecuting such public servant would be sine-qua-none before taking cognizance by the Court?

(II) Whether the Amending provisions of Section 19 PC Act would have prospective effect that is to say offence allegedly committed after 26.07.2018 or the Amending Act would be applicable in respect of the offence which was allegedly committed before 26.07.2018?

15. Section 19 PC Act, after Amending Act No. 16 of 2018 would read as under:-

***"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 (1 of 2014)],--*

(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.

[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."

16. It is well settled that the CBI cannot take any investigation in respect of an offence without the consent of the State Government concerned, as mandated under Section 6 of The Delhi Special Police Establishment Act, 1946 (hereinafter referred to as "DSPE Act"). The powers of the Constitutional Courts are not fettered by statutory restrictions of the DSPE Act. Under the constitutional scheme and division of powers between the Centre and the States, the State Police is under Schedule-VII, List-2 of the Constitution. Normally, investigation of a crime is to be undertaken by the police of the concerned State where the case is registered. In some cases, where the nature of crime is such and to maintain confidence of the people in fair and impartial investigation, the investigation may be entrusted to the CBI, either with the consent of the State Government concerned or on orders of the Constitutional Court. The mandate of Section 6 DSPE Act is done away with when the Court entrusts investigation to the CBI. If after investigation the role of a public servant is found as an accused in commission of the offence.

17. In recent past, several States have withdrawn general consent under Section 6 DSPE Act for investigation of an offence by the CBI, but the Constitutional Courts still have entrusted the investigation for offence(s) in such States where the impartial and fair investigation had been doubted in the hands of the State Police. If the sanction for prosecution of a public servant is mandated where the investigation of the crime has been handed over to the CBI on the order of the Constitutional Court, it may result in a futile exercise as such a State Government which has withdrawn the consent under Section 6 of DSPE Act may not accord sanction for prosecution of a public servant.

18. In view of the aforesaid, I am of the considered view that where the investigation of an offence has been entrusted to the CBI pursuant to the order passed by the Constitutional Court and role of a public servant comes as an accused for

committing such an offence, no prior sanction under Section 19 PC Act would be required for prosecuting such a public servant.

19. The relevant date for applicability of law in respect of a crime would be the date of commission of the crime. Subsequent amendment in the statute would not govern the investigation and prosecution of an accused for an offence which was committed before the Amendment in the statute came into force.

20. The Supreme Curt in the Case reported in ***(2019) 19 SCC 87 (State of Telangana Vs. Managipet alias Mangipet Sarveshwar Reddy)*** has held that Amending Act No. 16 of 2018 would not be applicable for an offence which was committed prior to amendment being carried out. Whether any offence has been committed or not has to be examined in the light of the provisions of the statute as existed prior to the Amendment carried out on 26.07.2018 in the PC Act. It would be apt to quote paragraphs-35, 36 and 37 of the said judgment:-

"35. We also do not find any merit in the argument that there has been no sanction before the filing of the report. The sanction can be produced by the prosecution during the course of trial, so the same may not be necessary after retirement of the accused officer. This Court in K. Kalimuthu v. State [K. Kalimuthu v. State, (2005) 4 SCC 512 : 2005 SCC (Cri) 1291] held as under : (SCC p. 521, para 15)

"15. The question relating to the need of sanction under Section 197 of the Code is not necessarily to be considered as soon as the complaint is lodged and on the allegations contained therein. This question may arise at any stage of the proceeding. The question whether sanction is necessary or not may have to be determined from stage to stage."

36. The High Court has rightly held that no ground is made out for quashing of the proceedings for the reason that the investigating agency intentionally waited till the retirement of the accused officer. The question as to whether a sanction is necessary to prosecute the accused officer, a retired public servant, is a question which can be examined during the course of the trial as held by this Court in K. Kalimuthu [K. Kalimuthu v. State, (2005) 4 SCC 512 : 2005 SCC (Cri) 1291] . In fact, in a recent judgment in Vinod Kumar Garg v. State (NCT of Delhi) [Vinod Kumar Garg v. State (NCT of Delhi), (2020) 2 SCC 88 : (2020) 1 SCC (Cri) 545 : (2020) 1 SCC (L&S) 146] , this Court has held that if an investigation was not conducted by a police officer of the requisite rank and status required under Section 17 of the Act, such lapse would be an irregularity, however unless such irregularity results in causing prejudice, conviction will not be vitiated or be bad in law. Therefore, the lack of sanction was rightly found not to be a ground for quashing of the proceedings.

37. Mr Guru Krishna Kumar further refers to a Single Bench judgment of the Madras High Court in M. Soundararajan v. State [M. Soundararajan v. State, 2018 SCC OnLine Mad 13515] to contend that amended provisions of the Act as amended by Act 16 of 2018 would be applicable as the amending Act came into force before filing of the charge-sheet. We do not find any merit in the said argument. In the aforesaid case, the learned trial court applied amended provisions in the Act which came into force on 26-7-2018 and acquitted both the accused from charge under Section 13(1)(d) read with Section

13(2) of the Act. The High Court found that the order of the trial court to apply the amended provisions of the Act was not justified and remanded the matter back observing that the offences were committed prior to the amendments being carried out. In the present case, the FIR was registered on 9-11-2011 much before the Act was amended in the year 2018. Whether any offence has been committed or not has to be examined in the light of the provisions of the statute as it existed prior to the amendment carried out on 26-7-2018."

21. This Court vide judgment and order dated 22.10.2018 reported in ***2018 SCC OnLine All 5546 (Kaushlesh Kumar Sinha Vs. CBI)*** has also rejected the contention that after the Amending Act No.16 of 2018 came into force with effect from 26.07.2018, the sanction in respect of a public servant, who got retired, before cognizance could be taken by the learned trial Court is a must.

22. In view thereof, I do not find the argument of Mr. Nandit Kumar Srivastava, learned Senior Counsel, representing the applicant impressive and, therefore, the application is hereby **rejected**. However, the applicant is granted ***four days time from today*** to surrender and apply for regular bail and if does so, his application for regular bail shall be considered and decided expeditiously, in accordance with law.

(2023) 1 ILRA 721
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.12.2022

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Application u/s 482 No. 10778 of 2022

with

Crl. Misc. Anticipatory Bail Application u/s 438 No. 8945 of 2020

Bal Kumar Patel @ Raj Kumar ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Satya Dheer Singh Jadaun, Sri Durgesh Kumar Singh, Sri Bindeshwari Prasad Tiwari, Sri Sankalp Narain, Sri Hemant Kumar Srivastava, Sri Dhananjay Shukla

Counsel for the Opp. Parties:
Sri Sanjay Kumar Singh(A.G.A.), Sri Jitendra Prasad Mishra

A. Criminal Law - Criminal Procedure Code, 1973 – Sections 482 – Scope – Quashing of charge-sheet and proceeding – Inherent power, how can be exercised – Questions of facts, how far can be adjudicated – Held, exercise of inherent power of the High Court u/s 482 Cr.P.C. is an exceptional one. Great care should be taken by the High Court before embarking to scrutinize the complaint/FIR/charge-sheet in deciding whether the rarest of the rare case is made out to scuttle the prosecution in its inception – At the stage of quashing, only the material of the prosecution has to be seen and the court cannot delve into the correctness of the allegations or the defence of the accused and then proceed to examine the matter on its merit by weighing the evidence so produced – The disputed questions of facts of the case cannot be adjudged and adjudicated at this stage while exercising powers under Section 482 Cr.P.C. and only the *prima facie* prosecution case has to be looked into as it is. Evidence needs to be led to substantiate the defence of the accused. (Para 20 and 24)

B. Criminal Law - Criminal Procedure Code, 1973 – Sections 438 – Anticipatory Bail – Scope – Transaction of money through the Bank – Allegation of committing offence u/s 419, 420 and 406 I.P.C. – Earlier the applicant was a public representative and he was involved in

many criminal cases, wherein he failed to make himself available at the call of the Investigating Officer during investigation – Relevancy – *Narinderjit Singh Sahni's* case relied upon – Accused facing a charge u/s 406, 409, 420 and 120-B is ordinarily not entitled to invoke the provisions of section 438 of the Criminal Procedure Code unless it is established that such criminal accusation is not a *bonafide* one – Rejecting the application, the High Court also issued the direction to the Principal Secretary (Home) regarding disclosure of the criminal history of the accused before the concern court. (Para 26, 28 and 31)

Applications rejected. (E-1)

List of Cases cited:-

1. R.P. Kapur Vs St. of Punj.; AIR 1960 SC 866

2. St. of Har. & ors.. Vs Bhajan Lal & ors.; 1992 Supp (1) SCC 335

3. St. of Bihar Vs P. P. Sharma; 1992 Supp (1) SCC 222

4. Trisuns Chemical Industry Vs Rajesh Agarwal & ors..; (1999) 8 SCC 686

5. M. Krishnan Vs Vijay Singh & anr.; (2001) 8 SCC 645

6. Zandu Pharmaceuticals Works Ltd. Vs Mohd. Sharaful Haque & anr.; (2005) 1 SCC 122

7. M. N. Ojha Vs Alok Kumar Srivastava; (2009) 9 SCC 682

8. Joseph Salvaraj A. Vs St. of Gujarat & ors..; (2011) 7 SCC 59

9. Arun Bhandari Vs St. of Uttar Pradesh & ors..; (2013) 2 SCC 801

10. Md. Allauddin Khan Vs St. of Bihar; (2019) 6 SCC 107

11. Anand Kumar Mohatta & anr. Vs St. (NCT of Delhi), Department of Home & anr.; (2019) 11 SCC 706

12. Rajeev Kourav Vs Balasaheb & ors.; (2020) 3 SCC 317

13. Nallapareddy Sridhar Reddy Vs The St. of Andhra Pradesh; (2020) 12 SCC 467

14. Priti Saraf & anr. Vs St. of NCT of Delhi & anr.; 2021 SCC Online SC 206

15. Ramveer Upadhyay Vs St. of U.P.; 2002 SCC Online SC 484

16. Bhadresh Bipinbhai Sheth Vs St. of Guj.; (2016) 1 SCC 152

17. Narinderjit Singh Sahni Vs U.O.I.; (2002) 2 SCC 210

18. Adri Dharan Das Vs St. of W. B.l; (2005) 4 SCC 303

19. Balachand Jain Vs St. of M. P.; (1976) 4 SCC 572

(Delivered by Hon'ble Samit Gopal, J.)

1. Heard Sri Satya Dheer Singh Jadaun, Advocate learned counsel for the applicant, Sri Jitendra Prasad Mishra, Advocate learned counsel for the first informant and Sri Sanjay Kumar Singh, Advocate learned Additional Government Advocate for the State of U.P. and perused the records.

2. These two petitions are connected together as they relate to the same case and are of the same accused and as such are being decided by a common order.

3. Criminal Misc. Application U/S 482 Cr.P.C. (hereinafter referred to as "the 482 petition") has been filed by the applicant- **Bal Kumar Patel @ Raj Kumar** with the following prayers:-

"It is, therefore, most respectfully prayed that this Hon'ble Court may kindly be pleased to allow this application and quash the proceedings of Criminal Case No. 02 of 2022 arising out of Case Crime No. 0831 of 2020 under Sections 419, 420 and 406 I.P.C. Police Station Kotwali Nagar District Banda on which cognizance was taken up on 2.11.2021 following the submission of charge sheet against the

applicant on 29.9.2021 by the police of Police Station Kotwali Nagar District Banda and also further be pleased to pass an interim order in favour of the applicant, granting protection from arrest by directing the investigative authorities not to take any coercive action against him; so that justice be done.

3. That it is further prayed that during the pendency of the present criminal misc. application, the proceedings of Criminal Case No. 02 of 2022 arising out of Case Crime No. 0831 of 2020 under Sections 419, 420 and 406 I.P.C. Police Station Kotwali Nagar District Banda on which cognizance was taken up on 2.11.2021 following the submission of charge sheet against the applicant on 29.9.2021 by the police of Police Station Kotwali Nagar District Banda may remain stayed and also further be pleased to pass an interim order in favour of the applicant, granting protection from arrest by directing the investigative authorities not to take any coercive action against him and / or be pleased fit and proper to pass such order as the Hon'ble Court deem fit and proper in the facts and circumstances of the present case; so that justice be done."

4. Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. (hereinafter referred to as "the anticipatory bail application") has been filed by the applicant- **Bal Kumar Patel @ Raj Kumar** with the following prayers:-

"It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to allow the application and direct that in the event of the applicant's arrest in Case Crime No. 831 of 2020 u/s 419, 420 and 406 I.P.C., registered at Police Station Kotwali Nagar, District Banda, he may be released on anticipatory bail.

It is further prayed that during the pendency of this application before this Hon'ble Court the interim order be issued directing the P.S. Kotwali Nagar, District Band (or any other investigating agency of the State of U.P.) not to apprehend the applicant in Case Crime No. 831 of 2020 u/s 419, 420 and 406 I.P.C., And/or may pass such other & further order as this Hon'ble Court, may deem, just and proper in the facts and circumstances of the case."

5. A counter affidavit dated 21.05.2021 has been filed in the anticipatory bail application which has been sworn by Mohammad Akram Sub-Inspector, Police Station Kotwali Nagar, District Banda. In the said counter affidavit paragraph 10 & 12 referred to the applicant having criminal history and thereby stating in both the paragraphs that he is a habitual criminal. Paragraph 10 & 12 of the said counter affidavit is quoted herein-below:-

*"10. That the contents of paragraph No. 14 of the affidavit are wrong and as such are denied. The true fact is that the applicant is named accused and man of habitual criminal and has long criminal history. Photostat copy of the criminal history of the applicant is being filed herewith and marked as **Annexure No. C.A.1** to this affidavit.*

12. That the contents of paragraph No. 16, 17, 18 & 19 of the affidavit are wrong and as such are denied. The true fact is that the applicant is named accused and he taken money from the informant on the false pretext of sand business and he did not return the money of the informant and has committed fraud. It is further submitted that the applicant is habitual criminal and has long criminal history."

6. Annexure-CA-1 to the said counter affidavit is stated to be the criminal history of the applicant. A perusal of the same shows that there are 18 criminal cases against him. Annexure-CA-1 to the said counter affidavit is extracted herein-below:-

"प्रार्थी अभियुक्त बालकुमार पटेल उर्फ राजकुमार पटेल शातिर किस्म का अपराधी है और राजनीति का संरक्षण लेकर आपराधिक गतिविधियों में सक्रिय रहा है जिसके विरूद्ध आपराधिक इतिहास की सूची निम्नवत् है:-

1. अ०सं०-61/79 धारा-147,148,149,302 आई०पी०सी० थाना- रैपुरा।

2. अ०सं०-05/84 धारा-399,402 आई०पी०सी० थाना- रैपुरा।

3. अ०सं०- 68/84 धारा- 216ए आई०पी०सी थाना- रैपुरा।

4. अ०सं०-155/85 धारा-3 यूपी गुण्डा एक्ट,थाना- रैपुरा।

5. अ०सं०-158/85 धारा - 506 आई०पी०सी० थाना- रैपुरा।

6. अ०सं०-70/84 धारा-364,395,120 आई०पी०सी० थाना- मानिकपुर।

7. अ०सं०-147/06 धारा-142,504 आई०पी०सी० थाना- मानिकपुर।

8. अ०सं०-245/84 धारा-216ए आई०पी०सी० थाना- कर्वी।

9. अ०सं०-652/07 धारा-419,420,467,468,147 आई०पी०सी० थाना- कर्वी।

10. अ०सं०-653/07 धारा-419,420,467,468,147 आई०पी०सी० थाना-कर्वी।

11. अ०सं०- 654/07 धारा-25,27,30ए एक्ट थाना-कर्वी।

12. अ०सं०- 655/07 धारा-25,27,30ए एक्ट थाना-कर्वी।

13. अ०सं०- 656/07 धारा-25,27,30ए एक्ट थाना-कर्वी।

14. अ०सं०- 658/07 धारा-147,148,447,448,504,506 आई०पी०सी० व 2/3 गैंगेस्टर एक्ट, थाना-कर्वी।

15. अ०सं०- 728/07 धारा-147,148,467,468,471 आई०पी०सी० थाना- कर्वी।

16. अ०सं०- 860/07 धारा-406 आई०पी०सी०, थाना- कर्वी।

17. मु०अ०सं०-46/07 धारा-147,148,349,364,302,120 आई०पी०सी० थाना-रैपुरा।

18. मु०अ०सं०- 173/09 धारा- 2/3 गैंगेस्टर एक्ट, थाना- रैपुरा।"

7. A rejoinder affidavit dated 20.08.2022 to the counter affidavit dated 21.05.2022 of the State has been filed in the anticipatory bail application explaining the criminal history of the applicant.

8. In the 482 petition a counter affidavit of the State dated 10.06.2022 has been filed which is sworn by Brahmdev Goswami, Sub-Inspector, Police Station Kotwali Nagar, District Banda. In para no.12 of the said affidavit which is in reply to para 19 and 20 of the affidavit in support of the 482 petition, it is stated that the accused applicant has no criminal history to his credit. The said para is quoted herein-below:-

"12. That the contents of paragraph no.19 & 20 of the affidavit are wrong and denied. In reply, it is stated that accused applicant and co-accused in premeditated manner committed collusive fraud and cheating with the informant and during the course of investigation, investigating officer recorded statement of informant and witnesses who have supported prosecution story beyond all reasonable doubts and the investigating officer after thorough investigation collected credible and concrete evidence and submitted charge sheet dated 21.09.2021 against the accused applicant under Section 419, 420, 406 IPC and the learned Magistrate has taken cognizance on the charge sheet vide order

dated 02.11.2021 and the case was registered as Criminal Case No.02 of 2022 and the case was pending in the court of Chief Judicial Magistrate, Banda.

According to DCRB and CCTNS reports, the accused applicants has no criminal history to his credit. Copies of the DCRB and CCTNS reports are being file herewith and marked as Annexure No.C.A.-1 to this affidavit."

9. Phased with the averment in the 482 petition with regards to the criminal history of the applicant particularly the fact that the applicant states to be having criminal history but the counter affidavit of the State stating that he has no criminal history to his credit, this Court passed an order on 28.07.2022 with regards to the same. The same is extracted herein below:-

"Heard Sri Durgesh Kumar Singh, learned counsel for the applicant, Sri Jitendra Prasad Mishra, learned counsel for the first informant and Sri Gyan Prakash Singh, learned counsel for the State.

Learned counsel for the applicant has provided copy of the petition and counter affidavit filed by State to learned counsel for the State today in Court as due to unfortunate incident of fire on 17.07.2022 in the office of the Advocate General, many files have been burnt and it was impossible to locate the file due to the extensive fire in the record rooms.

Learned counsel for the first informant states that the applicant has criminal history of 11 cases to which learned counsel for the applicant states that the present case is a case in which the applicant has been falsely implicated. He states that although in para no.20 of the affidavit filed in support of present application under Section 482 Cr.P.C. it is stated that the applicant has criminal history and it has been disclosed in his anticipatory bail application but in the counter affidavit filed on behalf of the State, in para no.12, there is a specific recital that the applicant has no criminal history. Para no.20 of the affidavit filed in support of present application under Section 482 Cr.P.C is quoted here-in-below:-

"20. That, the applicant has dutifully explained his criminal history in his anticipatory bail application which is already pending before this Hon'ble Court. It is irrelevant for the purpose of deciding the present petition."

The counter affidavit of the State dated 10.06.2022 is on record which has been sworn by Brahmdev Goswami in the capacity of Sub-Inspector, Police Station Kotwali Nagar, District Banda. In para no.12 of the said affidavit which is in reply to para 19 and 20 of the affidavit in support of the application under Section 482 Cr.P.C., it is stated that the accused applicant has no criminal history to his credit. The said para is quoted here-in-below:-

"12. That the contents of paragraph no.19 & 20 of the affidavit are wrong and denied. In reply, it is stated that accused applicant and co-accused in premeditated manner committed collusive fraud and cheating with the informant and during the course of investigation, investigating officer recorded statement of informant and witnesses who have supported prosecution story beyond all reasonable doubts and the investigating officer after thorough investigation collected credible and concrete evidence and submitted charge sheet dated 21.09.2021 against the accused applicant under Section 419, 420, 406 IPC and the learned Magistrate has taken cognizance on the charge sheet vide order

dated 02.11.2021 and the case was registered as Criminal Case No.02 of 2022 and the case was pending in the court of Chief Judicial Magistrate, Banda.

According to DCRB and CCTNS reports, the accused applicants has no criminal history to his credit. Copies of the DCRB and CCTNS reports are being file herewith and marked as Annexure No.C.A.-1 to this affidavit."

This Court is at loss to appreciate the contents of para no.12 of the counter affidavit as on the own pleadings of the applicant, he has his criminal history which has been explained in his anticipatory bail application which is stated to be pending before this Court. The first impression which the Court gets from the said counter affidavit is that the deponent of the counter affidavit is trying to conceal the criminal history for the reasons best known to him, he is trying that the accused may not disclose his entire criminal history in the matter and to the contrary, prima-facie is giving a wrong statement in para no.12 of the same in which he states that the applicant has no criminal history to his credit.

In these circumstances, let the matter be taken up by Superintendent of Police, Banda forthwith who shall file his personal affidavit in the matter within seven days from today disclosing the criminal history of the applicant and also disclosing as to why the same has not been disclosed in the counter affidavit filed earlier in the matter. He is free to initiate any action against the deponent of the counter affidavit for the contents of para 12 if he finds it to be untrue. If any action is taken, the same shall also be disclosed in his personal affidavit. If the said personal affidavit is not filed, Superintendent of Police, Banda shall be personally present before this Court on the next date.

If the criminal history of the applicant is found, the Court may further consider to proceed against the deponent of the counter affidavit for filing false affidavit.

Let the matter be listed on 06.08.2022 as fresh.

The Registrar General of this Court and learned counsel for the State shall communicate this order by tomorrow to Superintendent of Police, Banda."

10. In compliance of the order dated 28.07.2022, a personal affidavit dated 05.08.2022 sworn by Sri Abhinandan, the Superintendent of Police, Banda has been filed containing 11 paragraphs in all. The said paragraphs are quoted herein-below:-

"1. That the deponent is presently posted as Superintendent of Police, District Banda and in compliance of the Hon'ble Court's order dated 28.07.2022, he is filing the instant personal affidavit in the above-noted matter. The deponent has perused the record as available to him and as such, he is well acquainted with the facts deposed herein below. The deponent is enclosing his photograph and the photocopy of his identity card according to the provisions of Rules of Court, 1952.

2. That this Hon'ble Court had been pleased to direct, vide order dated 28.07.2022, the Superintendent of Police, Banda shall file his personal affidavit disclosing as to why the same has not been disclosed in the counter affidavit filed earlier in the matter. Further the Hon'ble Court has been pleased to direct that he is free to initiate any action against the deponent of the counter affidavit for the contents of para 12 if he finds it to be untrue. If any action is taken, the same shall also be disclosed in his personal affidavit. If the said personal affidavit is not filed, Superintendent of Police, Banda

shall be personally present before the Hon'ble Court on the next date.

3. That in compliance of the aforesaid order (supra), the deponent is filing the instant personal affidavit and prays this Hon'ble Court may kindly be pleased to permit the instant affidavit to be taken on record.

4. That at the very outset, the deponent tenders her unconditional, unqualified, unfettered and sincere apology for the inconvenience caused to this Hon'ble Court, though the same was inadvertent.

5. That the deponent noted the justified concern expressed by the Hon'ble High Court as to why, when the applicant himself had indicated that he had some criminal history (although explained) yet, it was stated in the paragraph no. of the counter affidavit sworn by Sub-Inspector Brahmdev Goswami at Police Station Kotwali Nagar, District Banda that the applicant had no criminal history according to the reports of DCRB and CCTNS. Admittedly, if the knowledge of the deponent was confined to criminal history of the applicant or lack of it, in District Banda, the correct averment should have read that to the best of his knowledge, he had no criminal history in District Banda.

6. That stating the DCRB and CCTNS records did not contain any criminal history gives the impression of a clean chit to the applicant and appears to state that he has no criminal history. Since the applicant does have a criminal history, the aforesaid averment, even if it is a bonafide example of unhappy drafting but, it cannot be condoned.

7. That however, the applicant has criminal history of long criminal cases in different districts viz. 01 criminal case in District Banda (criminal case in question), 10 criminal cases in District Chitrakoot, 10 criminal cases in District Raibareli, 04 criminal cases in District Pratapgarh, 01 criminal case in District Mirzapur and 01 criminal case in District Prayagraj. A copy of the chart reflecting the entire criminal history of the applicant is being enclosed herewith and marked as ***annexure no. 1 to this affidavit.***

8. That it is humbly submitted that the deponent took a serious note of the lapse aforesaid committed by the Sub-Inspector and passed an order dated 30.07.2022 to conduct a preliminary inquiry by the Additional Superintendent of Police, District Banda, into the apparently arbitrary, negligent and irresponsible manner, in which the counter affidavit dated 10.06.2022 had been filed by the Sub-Inspector Brahmdev Goswami at Police Station Kotwali Nagar, District Banda. A copy of the order dated 30.07.2022 passed by the deponent is being enclosed herewith and marked as annexure no. 2 to this affidavit.

9. That the deponent assures this Hon'ble Court that the most stringent action as per the relevant and extant law and rules, will be taken against the delinquent police officer.

10. That the deponent humbly reiterates his unconditional, unfettered and unqualified apologies to this Hon'ble Court for the inconvenience caused, and he is sincerely sorry for the same, though the same was inadvertent.

11. That in view of the aforesaid facts and circumstances, stated above, it is humbly prayed that this Hon'ble Court may pass such other or further order, which this Hon'ble Court may deem fit and proper under the facts and circumstances of the present case, so that the justice may be done."

11. Annexure-1 to the said personal affidavit is a chart showing the criminal

history of the applicant. The same has been referred to in paragraph 7 of the said personal affidavit. The criminal history as stated in the said chart is of 27 criminal cases. The case mentioned at Serial No. 27 being Case Crime No. 831 of 2020, under Sections 419, 420, 406 I.P.C., Police Station Kotwali Nagar, District Banda is the case which is the subject matter in the 482 petition and the anticipatory bail application also. The list of 27 cases distributed in five columns in the said chart is extracted herein-below:-

आपराधिक इतिहास बालकुमार पटेल उर्फ राजकुमार पटेल पुत्र श्री रामप्यारे निवासी पता- 01 ग्राम देवकली थाना रैपुरा जनपद चित्रकूट 02- ए-42 आवास विकास इन्द्रिरानगर कालोनी जनपद रायबरेली।

क्र० स०	मु०अ०सं०	धारा	थाना	जनपद
1.	61/79	147/148/149/302 भा.द.वि.	रैपुरा	चित्रकूट
2.	05/83	399/402 भा.द.वि.	रैपुरा	चित्रकूट
3.	68/84	216ए भा.द.वि.	रैपुरा	चित्रकूट
4.	70/84	364/395/120 भा.द.वि.	मानिकपुर	चित्रकूट
5.	245/84	216ए भा.द.वि.	कोत० कर्वी	चित्रकूट
6.	155/85	03 यूपी गुण्डा एक्ट	रैपुरा	चित्रकूट
7.	158/85	504/506भा.द.वि.	कोत० कर्वी	चित्रकूट
8.	147/06	142/504 भा.द.वि.	मानिकपुर	चित्रकूट
9.	6014/06	147/506 भा.द.वि.	मानिकपुर	चित्रकूट
10.	46/07	147/148/149/364/302/120 भा.द.वि.	रैपुरा	चित्रकूट
11.	652/07	420/467/468/471 भा.द.वि.	कोतवाली	रायवरेली
12.	653/07	420/467/468/471 भा.द.वि.	कोतवाली	रायवरेली
13.	654/07	25/27/30 आर्म्स एक्ट	कोतवाली	रायवरेली
14.	655/07	25/27/30 आर्म्स एक्ट	कोतवाली	रायवरेली
15.	656/07	25/27/30 आर्म्स एक्ट	कोतवाली	रायवरेली
16.	658/07	147/148/149/447/448/504/506 भा.द.वि.	कोतवाली	रायवरेली
17.	728/07	419/420/467/468/471 भा.द.वि.	कोतवाली	रायवरेली
18.	860/07	406 भा.द.वि	कोतवाली	रायवरेली
19.	49/07	188 भा.द.वि	पट्टी	प्रतापगढ़
20.	73/07	188 भा.द.वि.	पट्टी	प्रतापगढ़
21.	173/09	2/3 गैंगस्टर एक्ट	कोतवाली	रायवरेली
22.	470/09	147/332/35	कोतवा	मिर्जापुर

		3/188 भा.द.वि. व ¾ लो०सं०क्ष० नि० अधिनियम	ली सिटी	
23.	341/16	147/148/504/506/420 भा.द.वि.	कोतवाली	रायवरेली
24.	129/18	419/420/406/504/506 भा.द.वि. व 66 डी आई टी एक्ट	उतरांव	प्रयागराज
25.	432/20	153/500/505 भा.द.वि. व 66 डी आई टी एक्ट	कोत० सिटी	प्रतापगढ़
26.	133/20	269/188 भादवि व 51क आपदा प्रबंधन अधि०	पट्टी	प्रतापगढ़
27.	831/20	419/420/406 भा.द.वि.	कोत० नगर	बांदा

12. An affidavit dated 16.08.2022 in the 482 petition has been filed on behalf of the applicant in response to the personal affidavit of the Superintendent of Police, Banda in which an explanation has been given about the criminal history of the applicant as detailed in Annexure-1 to the said personal affidavit from paragraph nos. 8 to 22 of it stating therein that the cases from Serial Nos. 1 to 5 have ended in acquittal as per the Goshwara register, but the lawyer of the applicant is making an effort to obtain the certified copies of the judgements of the said cases, the case at Serial No. 6 is a punitive proceeding, the cases at Serial Nos. 7, 8 and 9 are non cognizable offences, the case at Serial No. 10 has ended in acquittal, the cases at Serial Nos. 11 to 17 related to obtaining firearm licences by the applicant from the places where he was living at that time, the said weapons were seized which were then released in his favour on the orders of the concerned District Magistrate, the case mentioned at Serial No. 18 also ended in acquittal, the case at Serial No. 19 though a charge-sheet has been sent to the concerned court in which cognizance has been taken but the applicant has not received any summons or notices till date, the cases at Serial Nos. 20 & 21 are the cases in which the applicant is not named in the first information report, no charge-sheet has been submitted against him and he has neither been summoned nor has received any notice till date, the case at Serial No. 22 has been withdrawn under Section 321 Cr.P.C., the case at Serial No. 23 has ended in Final Report in favour of the applicant, for the cases at Serial Nos. 24 & 25 the applicant has no knowledge of any charge-sheet being submitted against him and neither has he received any summon or any notice till date and the case at Serial No. 26 is a case simple in nature.

13. An affidavit of compliance dated 06.09.2022 has been filed by Sri Abhinandan, the Superintendent of Police, Banda in the anticipatory bail application containing 12 paragraphs in all. The same are extracted herein-below:-

"1. That the deponent is presently Superintendent of Police, Banda, and he is filing the instant affidavit in the above

noted matter. The deponent has perused the record as available to him and as such, he is well acquainted with the facts deposed herein below. The deponent is enclosing his photograph and the photocopy of his identity card according to the provisions of Rules of Court, 1952.

2. That this Hon'ble Court had been pleased to direct, vide order dated 02.09.2022, the State to file a proper affidavit about criminal history of the applicant.

3. That in compliance of the aforesaid order (supra), the deponent is filing the instant affidavit, and humbly prays that this Hon'ble Court may graciously be pleased to permit the instant affidavit to be taken on record.

4. That the deponent at the very outset tenders his unconditional, unqualified, unfettered and sincere apologies for the inconvenience caused to this Hon'ble Court, though the same was inadvertent.

5. That it is humbly prayed that this Hon'ble Court may graciously be pleased to permit the instant affidavit to be read in conjunction with the affidavit sworn by Superintendent of Police, Banda and filed on 05.08.2022 in criminal misc. application (under section 482 Cr.P.C.) no. 10778 of 2022.

6. That taking serious note of the negligence and irresponsible manner in which the counter affidavit dated 10.06.2022 had been filed by the Sub-Inspector Brahm Dev Goswami of Police Station Kotwali Nagar District Banda in the aforesaid (supra) application under section 482 Cr.P.C., the deponent had ordered the Addl. Superintendent of Police, Banda to conduct a preliminary inquiry against him by order dated 30.07.2022. A copy of the order dated 30.07.2022 passed by the deponent is being enclosed herewith and marked as ***annexure no. 1 to this affidavit.***

7. That it was prima-facie found that the said Sub-Inspector named Brahm Dev Goswami had been guilty of gross negligence and carelessness, therefore, a show cause notice dated 24.08.2022 was issued to him requiring him to submit a reply within 15 days why action against him be not taken under the relevant and extant rules. A copy of the show cause notice dated 24.08.2022 issued by the deponent is being enclosed herewith and marked as ***annexure no. 2 to this affidavit.***

8. That considering the serious nature of the allegations against the concerned Sub-Inspector, the deponent invoked the powers vested in him under rule 17(1)(Ka) of the Non-Gazetted Police Officers (Punishment & Appeal) Rules, 1991 and by order dated 24.08.2022 suspended the concerned Sub-Inspector Brahm Dev Goswami, and it was also communicated to him that a departmental inquiry against him was contemplated. A copy of the order of suspension dated 24.08.2022 passed by deponent is being enclosed herewith and marked as ***annexure no. 3 to this affidavit.***

9. That with regard to the incomplete criminal history (showing only 18 cases), which was attached as annexure no. CA-1 to the counter affidavit sworn by Sub-Inspector Mohammad Akram of Police Station Kotwali, District Banda dated 21.05.2021, the deponent took serious note of this egregious lapse on the part of the delinquent officer and by order dated 01.09.2022, the deponent ordered the Addl. Superintendent of Police, Banda to conduct a preliminary inquiry as permitted under the relevant and extant rules. A copy of the order dated 01.09.2022 passed by the deponent is being enclosed herewith and marked as annexure no. 4 to this affidavit.

10. That the fact is that there are a total of 27 criminal cases comprising the history of the applicant. A list of the complete criminal history is being enclosed herewith and marked as ***annexure no. 5 to this affidavit.***

11. That the deponent humbly reiterates his unconditional and unqualified apologies to this Hon'ble Court for the inconvenience caused, though the same was inadvertent.

12. That in view of the facts and circumstances of the case, stated above, it is expedient in the interest of justice that this Hon'ble Court may graciously be pleased to reject the bail application of the applicant."

14. Annexure-5 to the said affidavit which is refereed to in paragraph 10 is the criminal history of 27 cases against the applicant which are the same as stated in the personal affidavit filed in the 482 petition and have been quoted above and as such are not being quoted as being repetitive.

15. The prosecution case as per the first information report lodged on 11.10.2020 by Ramakant Tripathi as Case Crime No. 0831 of 2020, under Sections 419, 420, 406 I.P.C., Police Station Kotwali Nagar, District Banda against the applicant and Bhanu Pratap Chaturvedi son of Virendra Chaturvedi alleges therein that he is a contractor in P.W.D. and lives in Gali No. 9, Swaraj Colony, District Banda. Bhanu Pratap Chaturvedi is his relative. He is a Lekhpal in Banda. In March 2017, Bhanu Pratap Chaturvedi came to his house and told him that there is big work of sand in which if he invests once then he would have no tension any time. The first informant told him that there is a marriage in the house till 10th December and as such he cannot invest money. On 14th December he told that on 17.12.2017 "Sahab" will be coming who will them make him a partner of 10 percent. On 17.12.2017 the first informant with Bhanu Pratap Chaturvedi went to the Irrigation Inspection Bungalow, Banda and then an information was sent to Sahab who after 10 months called them on which Chaturvedi introduced each other and then he came to know that Sahab is former M.P. Bal Kumar Patel after which Chaturvedi told him to give money. Then Bal Kumar Patel former M.P. told him that he will be in Rai Bareilly and Rs. 5 lakhs be deposited in his Account No. 06122800100031928 in Punjab National Bank. The first informant then on 20.12.2017 through RTGS transferred Rs. 5 lakhs in the said account. Whenever he used to call Bal Kumar Patel and ask him for getting the agreement done he used to say for getting it done in a day or two. One day Chaturvedi called the first informant and said that on 28.05.2018 the Member of Parliament Bal Kumar Patel is coming and will be meeting in the Inspection Bungalow as there is lot of sand and there will be a requirement of about 50-60 lakhs for which he is trying to make arrangement through his friends. Then contractor Rudra Prakash, contractor Satendra Shukla and his relative Yogesh Pandey agreed to invest money and on 28th May they reached Inspection Bungalow where Bal Kumar Patel told them that a lease has been granted in favour of his son Sudheer and a required rawanna is to be filled. On believing the same, Rudra Prakash gave Rs. 10 lakhs, Satendra Shukla gave Rs. 20 lakhs and Yogesh Pandey gave Rs. 9 lakhs to which Yogesh was told that he would be a partner of only 9 percent on which he said that he would send the money or get it transferred through RTGS after which he transferred Rs. 16 lakhs through RTGS in the account of Bal

Kumar Patel. Bal Kumar Patel used to delay the talks and then on 27.12.2018 the first informant through RTI requested for information as to whether any file has been approved for lease of sand in the name of Sudheer, Rama Shanker Patel and Dev Sharan Patel for Manpur Khurd Naraini to which he did not get any reply and then he himself went to the concerned department and inquired from there and came to know that there is no file for the said names. He then tried to contact Bal Kumar Patel former M.P. on phone on which he used to say sometimes he is in Delhi, sometimes in Rae Bareilly and sometimes in Pratapgarh and later on in the year 2019 he left Samajwadi Party and joined Congress Party and contested the elections from Banda Chitrakoot Loksabha constituency but lost it. The first informant and his persons have a belief that Bhanu Pratap Chaturvedi and Bal Kumar Patel former M.P. have together committed cheating and fraud with him and his associates Rudra Prakash, Satendra Shukla and Yogesh Pandey. The first informant and his associates then went 2-3 times to the house of Bal Kumar Patel in Chitrakoot and asked about the partnership to which he tried to mislead them and then they demanded their money back which is also being avoided by him. He has not returned Rs. 65 lakhs due on the first informant and his associates and is neither responding to their phone calls. Bal Kumar Patel @ Raj Kumar former M.P. was called repeated times and then on 07.07.2020 he promised to return the money in September 2020 but now is not responding to the phone calls. Some unknown people came to the house of the first informant and gave a threat that he should forget the money given to Bal Kumar Patel otherwise it will not be good for him. He and his family is under threat of life. He prays that a first information report be lodged. Along with the first information report enclosures being RTGS receipts, the application and receipt of registry of RTI have been enclosed. The first information report has thus been lodged.

16. Learned counsel for the applicant argued that the first information report has been lodged under misconception. The deal between the first informant and his friends and relatives with the applicant and co-accused was a business transaction. There was no offer and assurance given by the applicant either to the first informant or his associates. The offence is petty in nature. The statements of the first informant and the witnesses recorded during investigation are stereo typed statements. The present dispute is a private dispute. It is argued while placing Annexure-4 to the paper-book of the 482 petition that an application under Section 156 (3) Cr.P.C. was filed by Bal Kumar Patel @ Raj Kumar (the applicant) against Ramakant Tripathi (the first informant), Yogesh Pandey, Rudra Prakash and Satendra Shukla alleging therein that the accused persons had given money for purchase of land but some dispute arose between the parties and as such the applicant gave an application dated 17.11.2020 to the Superintendent of Police, Chitrakoot to the said effect and since there was no action on it an application under Section 156 (3) Cr.P.C. has been moved by him. Paragraph 4 of the affidavit and Annexure-4 being the said application dated 17.11.2020 (page numbers 62 and 63 of the paper-book) and the application under Section 156 (3) Cr.P.C. (page numbers 64 to 67 of the paper-book) have been placed before the Court. It is argued that the same is the reason for false implication of the applicant. It is argued that the present dispute if any is a private dispute arising

out of business transaction and as such the proceedings deserve to be quashed. There is no criminality in the allegations. It is argued that subsequent to lodging of the first information report the investigation concluded and a charge-sheet dated 21.09.2021 has been submitted against the applicant and co-accused Bhanu Pratap Chaturvedi under Sections 419, 420, 406 I.P.C. on which vide order dated 02.11.2021 they have been summoned to face trial which is totally illegal. While placing the anticipatory bail application, learned counsel argued that if this Court is not of the view of allowing the 482 petition then the applicant may be granted anticipatory bail till conclusion of trial, the arguments and grounds are the same as argued.

17. Learned counsel for the first informant while opposing the prayers of the 482 petition and the anticipatory bail application argued that the intention of the applicant to cheat was right from the very inception as is apparent from the allegations itself. Money was taken on false assurance. The applicant has not only cheated the first informant but many other people. While placing paragraph 2 of his counter affidavit dated 27.08.2022 in the anticipatory bail application it is argued that the Investigating Officer tried to serve notice under Section 41 (A) Cr.P.C. to the applicant but the applicant did not meet him and as such he pasted the said notice at his house. Subsequently the Investigating Officer received a call from the mobile phone of one Dinesh Kumar Patel stating that the applicant is busy in elections and cannot come and since notice under Section 41 (A) Cr.P.C. has been sent to him, he may talk to him on phone only on which the Investigating Officer talked to the applicant on phone and recorded his statement on phone itself. Learned counsel has placed CD No. 25 dated 18.09.2021 which is annexed as Annexure-CA-1 to the counter affidavit to demonstrate the same and while further elaborating his argument has stated that the same would go to show that the applicant never cooperated in the investigation and even the Investigating Officer felt handicapped in recording his statement under Section 161 Cr.P.C. which was done by him on telephone.

Learned counsel has further argued that a recording of the demand of money and the conversation between the parties as was recorded was given to the Investigating Officer by the first informant in a pen-drive which was sealed by him and made part of the case diary. Paragraph 7 of the additional submissions in the counter affidavit dated 27.08.2022 in the anticipatory bail application and Annexure-7 to the same being CD No. 5 dated 24.11.2020 in which a note has been made by the Investigating Officer regarding the said pen-drive and making it part of the case diary has been placed before the Court to demonstrate the same. It is further argued that the alleged application dated 17.11.2020 addressed to the Superintendent of Police, District Chitrakoot and the application under Section 156 (3) Cr.P.C. as stated to have been moved by the applicant against the first informant and his associates is a totally false version containing a concocted story. It is argued while placing the counter affidavit that the applicant is a man of criminal antecedents. Paragraph 18 of the said counter affidavit has further been placed to argue that the applicant was a member of dreaded Dadua gang and is involved in criminal activities since the year 1979 which is still continuing. It is further argued that there are 27 cases against the applicant. Learned counsel argued that the 482 petition and the

anticipatory bail application deserve to be dismissed.

18. Learned counsel for the State also opposed the 482 petition and the anticipatory bail application and argued that the applicant is named in the first information report and there are allegations against him. There has been misrepresentation on behalf of the applicant and he was actively involved in the conversation due to which money was transferred in his account. There was *mens rea* on his part. It is argued that the applicant has not cooperated in the investigation as is apparent from the case diary. A notice under Section 41 (A) Cr.P.C. was tried to be served on him but could not be served and as such the same was pasted at his house after which the Investigating Officer received a call from some person of the applicant stating about the inability of the applicant to appear before the Investigating Officer and then the Investigating Officer recorded his statement under Section 161 Cr.P.C. through telephone only. It is argued that although there was a non-disclosure of the criminal antecedents of the applicant in the counter affidavit previously but the affidavit of compliance of the Superintendent of Police, Banda in both the petitions goes to show that there are 27 cases including the present case in which the applicant has been involved. It is argued that the Superintendent of Police, Banda has taken action against the earlier deponent of the counter affidavit dated 10.06.2022 who did not at all disclose the criminal antecedents of the applicant but stated in paragraph 12 that the applicant has no criminal history to his credit. It is further argued that the investigation in the matter has concluded in which credible evidence has been found against the applicant. There has been transfer of money which is a recorded event and recorded transaction. The money has gone in the bank account of the applicant. A charge-sheet has been submitted after thorough investigation upon which the court concerned has taken cognizance in the present case. It is argued that as such the 482 petition and the anticipatory bail application deserve to be dismissed.

19. After having heard learned counsels for the parties and perusing the records, it is apparent that the applicant is named in the first information report. The transaction of money has been through bank transfers as have been stated in the first information report. The allegations prima facie show active participation of the applicant along with co-accused while dealing with the first informant and his associates. The matter has been investigated and charge-sheet has been submitted on which the court concerned has taken cognizance and summoned the applicant and co-accused. The application given to the Superintendent of Police, District Chitrakoot by the applicant is dated 17.11.2020 and the application allegedly moved under Section 156 (3) Cr.P.C. is an undated application and even unnumbered. Even on probe to the learned counsel for the applicant its date could not be disclosed. More so the first information report of the present case has been lodged on 11.10.2020 whereas the application allegedly moved before the Superintendent of Police, District Chitrakoot is dated 17.11.2020 which is after about 01 month and 07 days of lodging of the present first information report. The application under Section 156 (3) Cr.P.C. if moved has to be obviously after 17.11.2020 which is the date of the application mentioned as alleged to be given to the Superintendent of Police, District Chitrakoot. The same is

thus after lodging of the present first information report and is a defence of the accused in the present case.

20. The law with regard to quashing of proceedings / charge-sheet is well settled.

In the cases of :

i) R.P. Kapur Vs. State of Punjab : AIR 1960 SC 866;

ii) State of Haryana and Ors. Vs. Bhajan Lal and Others : 1992 Supp (1) SCC 335;

iii) State of Bihar Vs. P. P. Sharma : 1992 Supp (1) SCC 222;

iv) Trisuns Chemical Industry Vs. Rajesh Agarwal and Ors. : (1999) 8 SCC 686;

v) M. Krishnan Vs. Vijay Singh & Anr. : (2001) 8 SCC 645;

vi) Zandu Pharmaceuticals Works Ltd. Vs. Mohd. Sharaful Haque & another : (2005) 1 SCC 122;

vii) M. N. Ojha Vs. Alok Kumar Srivastava : (2009) 9 SCC 682;

viii) Joseph Salvaraj A. Vs. State of Gujarat and Ors. : (2011) 7 SCC 59;

ix) Arun Bhandari Vs. State of Uttar Pradesh and Ors.: (2013) 2 SCC 801;

x) Md. Allauddin Khan Vs. State of Bihar : (2019) 6 SCC 107;

xi) Anand Kumar Mohatta and Anr. Vs. State (NCT of Delhi), Department of Home and Anr. : (2019) 11 SCC 706;

xii) Rajeev Kourav Vs. Balasaheb & others : (2020) 3 SCC 317;

xiii) Nallapareddy Sridhar Reddy Vs. The State of Andhra Pradesh : (2020) 12 SCC 467,

it has been held by the Apex Court that exercise of inherent power of the High Court under Section 482 of the Code of Criminal Procedure is an exceptional one. Great care should be taken by the High Court before embarking to scrutinize the complaint/FIR/charge-sheet in deciding whether the rarest of the rare case is made out to scuttle the prosecution in its inception.

21. Further in the case of ***Priti Saraf & anr. Vs. State of NCT of Delhi & anr. : 2021 SCC Online SC 206*** the Apex Court while considering the powers under Section 482 Cr.P.C. has held as follows:

"23. It being a settled principle of law that to exercise powers under Section 482 CrPC, the complaint in its entirety shall have to be examined on the basis of the allegation made in the complaint/FIR/charge-sheet and the High Court at that stage was not under an obligation to go into the matter or examine its correctness. Whatever appears on the face of the complaint/FIR/charge-sheet shall be taken into consideration without any critical examination of the same. The offence ought to appear ex facie on the complaint/FIR/charge-sheet and other documentary evidence, if any, on record.

24. The question which is raised for consideration is that in what circumstances and categories of cases, a criminal proceeding may be quashed either in exercise of the extraordinary powers of the High Court under Article 226 of the Constitution, or in the exercise of the inherent powers of the High Court under Section 482 CrPC. This has often been hotly debated before this Court and various High Courts. Though in a series of decisions, this question has been answered on several occasions by this Court, yet the same still comes up for consideration and is seriously debated.

25. In this backdrop, the scope and ambit of the inherent jurisdiction of the High Court under Section 482 CrPC has been examined in the judgment of this

Court in ***State of Haryana and Others Vs. Bhajan Lal and Others, (1992 Suppl (1) SCC 335).*** *The relevant para is mentioned hereunder:-*

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with malafide 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."

26. This Court has clarified the broad contours and parameters in laying down the guidelines which have to be kept in mind by the High Courts while exercising inherent powers under Section 482 CrPC. The aforesaid principles laid down by this Court are illustrative and not exhaustive. Nevertheless, it throws light on the circumstances and the situation which is to be kept in mind when the High Court exercises its inherent powers under Section 482 CrPC.

27. It has been further elucidated recently by this Court in Arnab Manoranjan Goswami Vs. State of

Maharashtra and Others, 2020 SCC Online SC 964 where jurisdiction of the High Court under Article 226 of the Constitution of India and Section 482 CrPC has been analyzed at great length.

28. It is thus settled that the exercise of inherent power of the High Court is an extraordinary power which has to be exercised with great care and circumspection before embarking to scrutinize the complaint/FIR/charge-sheet in deciding whether the case is the rarest of rare case, to scuttle the prosecution at its inception."

22. In the case of ***Ramveer Upadhyay Vs. State of U.P. : 2002 SCC Online SC 484*** the Apex Court has held in paragraphs 27, 38 and 39 that quashing of a criminal case by exercising jurisdiction under Section 482 Cr.P.C. should be done in exceptional cases only. It was further held that criminal proceedings cannot be nipped in the bud, whether the allegations are true or untrue would have to be decided in the trial, the court cannot examine the correctness of the allegations in the complaint. Paragraphs 27, 38 and 39 are quoted herein:

"27. Even though, the inherent power of the High Court under Section 482 of the Cr.P.C., to interfere with criminal proceedings is wide, such power has to be exercised with circumspection, in exceptional cases. Jurisdiction under Section 482 of the Cr.P.C is not to be exercised for the asking.

38. Ends of justice would be better served if valuable time of the Court is spent on hearing appeals rather than entertaining petitions under Section 482 at an interlocutory stage which might ultimately result in miscarriage of justice as held in Hamida v. Rashid @ Rasheed and Others, (2008) 1 SCC 474.

39. In our considered opinion criminal proceedings cannot be nipped in the bud by exercise of jurisdiction under Section 482 of the Cr.P.C. only because the complaint has been lodged by a political rival. It is possible that a false complaint may have been lodged at the behest of a political opponent. However, such possibility would not justify interference under Section 482 of the Cr.P.C. to quash the criminal proceedings. As observed above, the possibility of retaliation on the part of the petitioners by the acts alleged, after closure of the earlier criminal case cannot be ruled out. The allegations in the complaint constitute offence under the Atrocities Act. Whether the allegations are true or untrue, would have to be decided in the trial. In exercise of power under Section 482 of the Cr.P.C., the Court does not examine the correctness of the allegations in a complaint except in exceptionally rare cases where it is patently clear that the allegations are frivolous or do not disclose any offence. The Complaint Case No.19/2018 is not such a case which should be quashed at the inception itself without further Trial. The High Court rightly dismissed the application under Section 482 of the Cr.P.C."

23. Further in the case of ***Daxaben Vs. State of Gujarat : 2022 SCC Online SC 936*** in para 49 the Apex Court has held as under:

"49. In exercise of power under section 482 of the Cr.P.C., 1973 the Court does not examine the correctness of the allegation in the complaint except in exceptionally rare cases where it is patently clear that the allegations are frivolous or do not disclose any offence."

24. Thus, it is trite law that at the stage of quashing only the material of the prosecution has to be seen and the court cannot delve into the correctness of the allegations or the defence of the accused and then proceed to examine the matter on its merit by weighing the evidence so produced. The disputed questions of facts of the case cannot be adjudged and adjudicated at this stage while exercising powers under Section 482 Cr.P.C. and only the prima facie prosecution case has to be looked into as it is. Evidence needs to be led to substantiate the defence of the accused. The accused can raise their grievances while claiming discharge at the appropriate stage before the trial court.

25. The law with regards to anticipatory bail is also well settled.

In the case of ***Bhadresh Bipinbhai Sheth v. State of Gujarat : (2016) 1 SCC 152*** the law relating to anticipatory bail has been reiterated. It is stated as under:

"21. Before we proceed further, we would like to discuss the law relating to grant of anticipatory bail as has been developed through judicial interpretative process. A judgment which needs to be pointed out is a Constitution Bench judgment of this Court in Gurbaksh Singh Sibbia v. State of Punjab [(1980) 2 SCC 565 : 1980 SCC (Cri) 465]. The Constitution Bench in this case emphasised that provision of anticipatory bail enshrined in Section 438 of the Code is conceptualised under Article 21 of the Constitution which relates to personal liberty. Therefore, such a provision calls for liberal interpretation of Section 438 of the Code in light of Article 21 of the Constitution. The Code explains that an anticipatory bail is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore, effective at the very moment of arrest. A direction under Section 438 is therefore intended to confer conditional immunity from the "touch" or confinement contemplated by Section 46 of the Code. The essence of this provision is brought out in the following manner : (Gurbaksh Singh case [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] , SCC p. 586, para 26)

"26. We find a great deal of substance in Mr Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An overgenerous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in Maneka Gandhi v.

Union of India [(1978) 1 SCC 248] , that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein."

22. Though the Court observed that the principles which govern the grant of ordinary bail may not furnish an exact parallel to the right to anticipatory bail, still such principles have to be kept in mind, namely, the object of bail which is to secure the attendance of the accused at the trial, and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. The Court has also to consider whether there is any possibility of the accused tampering with the evidence or influencing witnesses, etc. Once these tests are satisfied, bail should be granted to an undertrial which is also important as viewed from another angle, namely, an accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody. Thus, grant or non-grant of bail depends upon a variety of circumstances and the cumulative effect thereof enters into judicial verdict. The Court stresses that any single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail. After clarifying this position, the Court discussed the inferences of anticipatory bail in the following manner: (Gurbaksh Singh case [(1980) 2 SCC 565 : 1980 SCC (Cri) 465], SCC p. 588, para 31).

"31. In regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made. But the converse of these propositions is not necessarily true. That is to say, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; and, equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations, too numerous to enumerate, the combined effect of which must weigh with the court while granting or rejecting anticipatory bail. The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the State' are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail. The relevance of these considerations was pointed out in State v. Captain Jagjit Singh [AIR 1962 SC 253 : (1962) 1 Cri LJ 215 : (1962) 3 SCR 622] , which, though, was a case under the old Section 498 which corresponds to the present Section 439 of the Code. It is of

paramount consideration to remember that the freedom of the individual is as necessary for the survival of the society as it is for the egoistic purposes of the individual. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints on his freedom, by the acceptance of conditions which the court may think fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail."

26. The Apex Court in the case of ***Narinderjit Singh Sahni v. Union of India : (2002) 2 SCC 210*** has observed that accused facing a charge under sections 406, 409, 420 and 120-B is ordinarily not entitled to invoke the provisions of section 438 of the Criminal Procedure Code unless it is established that such criminal accusation is not a bonafide one.

27. While considering the scope of anticipatory bail under section 438 of Criminal Procedure Code the Apex Court in the case of ***Adri Dharan Das v. State of West Bengal : (2005) 4 SCC 303***, relying on the earlier Constitutional Bench judgment in case of ***Balachand Jain v. State of Madhya Pradesh : (1976) 4 SCC 572***, in para 7 has observed thus:-

"7. The facility which Section 438 of the Code gives is generally referred to as "anticipatory bail". This expression which was used by the Law Commission in its 41st Report is neither used in the section nor in its marginal note. But the expression "anticipatory bail" is a convenient mode of indication that it is possible to apply for bail in anticipation of arrest. Any order of bail can be effective only from the time of arrest of the accused. Wharton's Law Lexicon explains "bail" as "to set at liberty a person arrested or imprisoned, on security being taken for his appearance". Thus bail is basically release from restraint, more particularly the custody of police. The distinction between an ordinary order of bail and an order under Section 438 of the Code is that whereas the former is granted after arrest, and therefore means release from custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. (See Gurbaksh Singh Sibbia v. State of Punjab [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] .) Section 46(1) of the Code, which deals with how arrests are to be made, provides that in making an arrest the police officer or other person making the same "shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action". The order under Section 438 of the Code is intended to confer conditional immunity from the touch as envisaged by Section 46(1) of the Code or any confinement. The Apex Court in Balchand Jain v. State of M.P. [(1976) 4 SCC 572 : 1976 SCC (Cri) 689 : AIR 1977 SC 366] has described the expression "anticipatory bail" as misnomer. It is well known that bail is ordinary manifestation of arrest, that the court thinks first to make an order is that in the event of arrest a person shall be released on bail. Manifestly there is no question of release on bail unless the accused is arrested, and therefore, it is only on an arrest being effected the order becomes operative. The power exercisable under Section 438 is somewhat extraordinary in character and it is only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty, then power is to be exercised under Section 438.

The power being of important nature it is entrusted only to the higher echelons of judicial forums i.e. the Court of Session or the High Court. It is the power exercisable in case of an anticipated accusation of non-bailable offence. The object which is sought to be achieved by Section 438 of the Code is that the moment a person is arrested, if he has already obtained an order from the Court of Session or the High Court, he shall be released immediately on bail without being sent to jail."

(emphasis supplied)

28. Looking to the discussions as above, facts of the case, the *prima facie* allegations against the applicant, the law on the subject and the criminal antecedents of the applicant, this Court does not deem it proper to quash the proceedings in the 482 petition as prayed for.

In so far as the anticipatory bail application is concerned, although a case for interference could have been made out but looking to the facts and circumstances of the case cumulatively that the applicant was a public representative earlier, the fact that he was involved earlier in many criminal cases, the non-cooperation by him in the investigation by not making himself available at the call of the Investigating Officer, the recorded fact of transfer of money in his bank account, the allegation of the applicant misrepresenting the first informant right from the inception of the talks, the allegation of threat being extended to the first informant by the henchmen of the applicant, the evidence as collected after which the investigation being concluded by filing a charge-sheet against the applicant and co-accused and as such the case being prima facie proved, the court taking cognizance on it and summoning the accused persons, the fact that there was absolutely no reason for the first informant to falsely implicate the applicant, the hesitation of general public of making allegations against a politician or a public representative but still lodging a first information report and the law as stated above, this Court rejects the anticipatory bail application also.

29. Accordingly, **the 482 petition and the anticipatory bail application** are ***rejected***. The interim order dated 07.09.2022 passed in the 482 petition stands discharged.

30. *Before parting with the case it would be apt to give certain directions with regard to filing of counter affidavit specially with regard to the criminal antecedents of an accused. The present case is a glaring example of how things have moved specially with regards to the criminal antecedents of the accused in counter affidavit dated 10.06.2022 being filed by Brahmdev Goswami, Sub-Inspector, Police Station Kotwali Nagar, District Banda on behalf of the State of U.P. initially by mentioning in it that he has no criminal history to his credit after which on the statement of learned counsel for the first informant that the applicant has a criminal history of 11 cases, this Court took cognizance of it and passed an order on 28.07.2022 to the said effect after which the personal affidavit of the Superintendent of Police, Banda was filed and then it was disclosed that the applicant has a criminal history of 27 cases including the present case. Although the criminal antecedents of a person may not be the sole decisive factor in a case but surely need to be looked upon while deciding a matter. The affidavit of compliance of the Superintendent of Police, Banda in the anticipatory bail application though shows that the some action has been*

initiated against the deponent of the earlier counter affidavit but the manner in which this fact has emerged and that too on the pointing out of learned counsel for the first informant is a matter of concern. There may be a case where the first informant may not be represented in a Court of law and thus the Court believing the affidavit filed by the State / Police authorities to be true proceeds to hear and decide the matter but the actual fact about the criminal history of the accused would not come before the Court.

With the present digital age where everything is now possible and available with the press of a button or a click of a mouse, it cannot be said that the criminal history of a person cannot be gathered by the police agency instantaneously through a dedicated portal for it for reporting it to the Courts. If the same is not updated or is non functional, it is a matter of concern.

31. *The* ***Principal Secretary (Home), Government of Uttar Pradesh, Lucknow*** *and the* ***Director General of Police, Government of Uttar Pradesh, Lucknow*** *are directed to look into this issue and do the needful and also take up the issue at their level for having the details of criminal history of a person at one stroke. Even responsibility should be fixed for the person responding in Court(s) through instructions / reply / affidavit or otherwise for disclosing the entire criminal history of the accused failing which there should be some deterrent for it to avoid intentional efforts to shield the accused persons and not disclose their criminal history before the concerned courts.*

32. The ***Registrar General*** *of this Court and the learned* ***Additional Government Advocate*** *for the State of U.P. are directed to send a copy of this order within a week from today to the P****rincipal Secretary (Home), Government of Uttar Pradesh, Lucknow****, the* ***Director General of Police, Government of Uttar Pradesh, Lucknow*** *and the* ***Superintendent of Police, Banda*** *for necessary compliance and the needful.*

(2023) 1 ILRA 742
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.11.2022

BEFORE

THE HON'BLE RAJENDRA KUMAR-IV, J.

Application u/s 482 No. 24025 of 2021

Chaudhary Chhatrapal Yadav ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Ramanuj Yadav, Sri V.P. Srivastava, Sr. Advocate

Counsel for the Opp. Parties:
G.A., Sri Anurag Vajpeyi, Sri Ashwini Kumar Awasthi, Sri Rajesh Kumar Singh

A. Criminal Law – Criminal Procedure Code, 1973 – Sections 227 – Discharge – Framing of charge – Offence u/s 306 was alleged to be taken place –Interference by the High Court, when warranted – Held, learned trial judge framed the charges against the petitioners-accused under Section 306 of IPC, so it must be seen that what is the evidence against the petitioners-accused – Held further, there is no evidence collected by the Investigating Officer to suggest that the applicant intended by such act to instigate the deceased to commit suicide – High Court discharged the applicant from the offence. (Para 15, 23 and 24)

B. Criminal Law – Indian Penal Code, 1973 – Section 306 – Abetment to suicide – Ingredient of abetment – Explained –

Held, abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. There has to be a positive act on the part of the accused to instigate or aid in committing suicide. If there is no positive act on behalf of the accused to instigate or aid in committing suicide, offence under Section 306 cannot be said to be made out – Held further, all ingredients of instigation of abetment to commit suicide are completely absent in the material collected during the course of investigation and, therefore, it cannot be said that the accused-applicant has committed any offence under Section 306 IPC. (Para 10, 20 and 23)

Application allowed. (E-1)

List of Cases cited:-

1. St. of Kerala & ors. Vs S. Unnikrishnan Nair & ors.; (2015) 9 SCC 639

2. Ude Singh & ors. Vs St. of Har.; (2019) 17 SCC 301

3. Arnab Manoranjan Goswami Vs St. of Mah. & ors.; (2021) 2 SCC 427

4. Praveen Pradhan Vs St. of Uttaranchal & anr.; (2012) 9 SCC 734

5. Amit Kapoor Vs Ramesh Chander & anr.; (2012) 9 SCC 460

6. Niranjan Singh Karam Singh Punj., Advocate Vs Jitendra Bhimraj Bijja & ors.; AIR 1990 SC 1962

7. U.O.I. Vs Prafulla Kumar Samal & anr.; AIR 1979 SC 366

8. St. of W.B. Vs Orilal Jaiswal; (1994) SCC (Cri) 107

9. Chitresh Kumar Chopra Vs St. (Govt. of NCT of Delhi); 2009 (16) SCC 605: (2010)3 SCC (Cri) 367

10. Sanju Vs St. of M.P.; (2002) 5 SCC 371

11. Criminal Appeal No. 93/2019; Rajesh Vs St. of Har. decided on 18th January, 2019

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. Heard learned Counsel for the respective parties.

2. The present application under Section 482 Cr.P.C. has been filed by applicant to quash the order dated 08.10.2021 passed by Additional District and Sessions Judge, Court No.1/Special Judge, DAA, Mahoba in Session Case No.291 of 2021, State versus Chaudhary Chhatrapal Yadav and other, (Case Crime No.65 of 2021), under Section 306, 504 and 506 IPC, Police Station Kotwali Nagar Mahoba), District Mahoba whereby learned trial Court dismissed the discharge application moved by applicant under Section 227 for discharging him in the alleged sections and charge has been directed to be framed under Sections 306, 504 and 506 against the applicant and other co-accused.

3. Main Prayer in the application is as under:-

"It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to allow the present application and set aside the order dated 08.10.2021 passed by Additional District and Sessions Judge, Court No.1/Special Judge, D.D.A., Mahoba in Sessions Case No.291 of 2021, (State Vs. Chaudhary Chhatrapal Yadav and others), arising out of Case Crime No.65 of 2021, under Sections 306, 504 and 506 IPC, Police Station Kotwali Nagar (Mahoba), District Mahoba whereby the learned Court below has rejected the discharge application under Section 227 Cr.P.C. of applicant."

4. Impugned order has been assailed by the accused-applicant mainly on the ground that he has been falsely implicated in the present case due to political rivalry.

He has no concerned with the present crime. He has committed no offence. Prosecution story is false and fake. He neither tortured the victim/deceased nor demanded/took any money. He never instigated the victim to commit suicide. There is no role of the present applicant in committing suicide of the victim. Accused-applicant has no concerned at all with the present case. Learned Counsel contends that no offence, as alleged, is made out. He showed some papers as well as statements in support of his contention and relied upon the judgments as under :-

i. Jalil Khan and others versus State of M.P., (2021 Law Suit (MP) 2021).

ii. M. Mohan versus State Represented by the Deputy Superintendent of Police, (2011) 3 Supreme Court Cases 626.

iii. Gurcharan Singh versus State of Punjab, (2017) 1 Supreme Court Cases 433.

iv. M. Arjunan versus State Represented by its Inspector of Police, (2019) 3 Supreme Court Cases 315.

5. From the side of opposite parties, application under Section 482 Cr.P.C. has been opposed by alleging that accused-applicant is man of criminal antecedents, number of criminal cases have been registered against him. He operates a gang of criminals. Prior to the present incident, accused-applicant has demanded/ took some money from the son of victim/deceased who lodged an FIR against the applicant and some other persons under Section 386 IPC in police station concerned. When the police took no action, victim/deceased has decided to end his life and committed suicide by way of shooting himself with his licency rifle, which is alleged to be used in incident, was found on spot and suicide note allegedly written by victim himself was also recovered by the police from the spot. It is further stated that the Investigating Officer has collected credible evidence like suicide note, previous FIR and CCTV clip and statements of witnesses who have verified the prosecution versions. The Investigating Officer has rightly submitted charge sheet against the applicant and other accused persons and no illegality in the same. It was further alleged that accused-applicant is habitual offender having long criminal history of heinous crime like murder, dacoity, extortion etc. in order to take goonda tax. He started threatening to the brother of opposite party no.2 and took huge amount from him, when the victim/deceased came to know the fact of goonda tax taken by the accused-applicant, objected the same and lodged an FIR under Section 386 IPC bearing case Crime No.52 of 2021 but the local police did not take any action against such applicant, due to which victim/deceased reached the position to commit suicide. Investigating Officer rightly filed charge sheet under the alleged section. So far as the criminal history against the victim/deceased is concerned, he was implicated by local enemies and victim was acquitted by the Court. There was sufficient ground to frame the charge against the accused-applicant. Trial Court rightly passed the order of framing charge which has no illegality or irregularity.

6. In response to the ground taken by the opposite parties, from the side of accused-applicant, it has been stated that statement of informant and other witnesses recorded under Section 161 Cr.P.C. are contradictory and Investigating Officer without conducting fair and impartial investigation and collecting credible evidence, submitted charge sheet in the matter and trial Court illegally rejected the

discharge application. There was nothing on record to frame the charge against the applicant and in all the cases previously registered against the applicant, either the applicant has been acquitted by the Court or the cases have been withdrawn by the State Government or accused-applicant on bail. All the cases registered against him are totally false due to political rivalry as he is in active politics. Photo copy of counter affidavit and rejoinder affidavit are on record.

7. Prosecution case, briefly stated, is as under:-

Informant moved an application before In-charge Officer police station concerned alleging that his father Mukesh Kumar Pathak has committed suicide by shooting himself with his licency rifle on 13.02.2021 at about 10:45 PM in the night due to threatening of accused-applicant Chhatrapal Yadav and his other companion Ravi and others. It is also stated in written tehreer that on 13.02.2021 at about 05:00 PM in RRC Hotel situated at Gandhi Nagar, victim / deceased and complainant were called, where accused-applicant threatened him to see in the future. After the death of his father, Additional SP recovered a suicide note written by victim himself which was taken by police. Dying declaration itself reveals that in FIR dated 07.02.2021 against accused-applicant and his other companion, namely, Vikram, Anand Mohan, Ravi, Manish, Ankit and Abhay Pratap, no action was taken by the police, resultantly due to indifference and negligence of police officer, threat of killing and false implication in criminal case, victim/deceased committed suicide. On the basis of this written tehreer submitted by informant, an FIR bearing case crime no.65 of 2021 has been registered against the applicant and six others under Section 306 IPC in Police Station Kotwali Nagar Mahoba. Matter was investigated by police who submitted the charge sheet against the applicant and other persons in the alleged section.

8. Suicide note, as alleged to be written by deceased, on English translation would read as under:-

"I, Mukesh Kumar Pathak, Chattrapal Chaudhary and his other companion Ravi, Vikram, Manish Chaubey, Anand Mohan Yadav took about Rs.60,00000/- (sixty lacs) from my son and assaulted him. On being complaint made by me, I was being continuously threatened to implicate under Section 376 IPC by them. Mahoba police, SP, CO colluded him. He was being threatened of life. He is committing suicide out of compulsion, responsibility thereof would be on Chattrapal and others. My children, wife to forgive me, I am leaving you in the middle. Salute to my both elder brothers and good bye to younger Ramesh.

Sd/-
Dt:13.02.2021
Time: 08:00 PM"

9. FIR Crime No.65 of 2021 of the present case, lodged by informant Rahul Pathak depicts that on 13.02.2021 at about 10:45 PM in the night, his father Mukesh Kumar Pathak committed suicide by shooting himself with his licency rifle due to threat and terror of applicant and his companion. It further speaks that on the same day in the evening at 05:00 PM, he (informant) and his father (deceased) were called in RRC Hotel situated at Gandhi Nagar, Mahoba where accused Chattrapal and his other companion threatened to see in future. After the death of his father Additional SP got a suicide note written by

his father to which police took with him and photostat copy whereof is annexed with the tehreer. It has also been mentioned in the FIR that dying declaration of deceased clarifies that due inaction of police officers in respect of FIR dated 07.02.2021 against the accused persons and threat of killing and false implication in criminal cases by accused person, his father committed suicide. From the perusal of FIR itself reveals that Additional SP along-with other police officers reached on spot before registration of the case and got alleged suicide note. It is not clear from the record how the police officer got information of the incident and how they reached on spot. On one place informant Rahul Pathak stated in his statement under Section 161 Cr.P.C. that original copy of suicide note has got received to investigator at the time of statement, thus recovery of suicide note, as alleged to be written by deceased, himself is surrounded by high suspicion and according to suicide note itself, if there is any reason of suicide, it may be the negligence of Police Officer who have been given a clean chit in investigation.

10. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. There has to be a positive act on the part of the accused to instigate or aid in committing suicide. If there is no positive act on behalf of the accused to instigate or aid in committing suicide, offence under Section 306 cannot be said to be made out. In order to convict a person under Section 306 IPC, there has to be a clear mens rea to commit the offence. There should be an active act or direct act, which led the deceased to commit suicide. The overt act must be such a nature that the deceased must find himself having no option but to an end to his life. That act must have been intended to push the deceased into such a position that he commit suicide. In the suicide-note, only allegation is that deceased was threatened to see in future and he was being harassed by the applicant to which deceased could have complained to the authority concerned but it was not a ground to commit suicide. Without there being any intention to push the deceased to commit suicide, the offence under Section 306 IPC against the applicant cannot be said to be attracted. On a plain reading of the suicide-note itself reflects that there was no abetment on the part of the applicants for committing suicide by the deceased.

11. In **State of Kerala and others Vs. S. Unnikrishnan Nair and others, (2015) 9 SCC 639**, observed as under:-

13. In Netai Dutta [(2005) 2 SCC 659 : 2005 SCC (Cri) 543] , a two-Judge Bench, while dealing with the concept of abetment under Section 107 IPC and, especially, in the context of suicide note, had to say this: (SCC p. 661, paras 6-7)

"6. In the suicide note, except referring to the name of the appellant at two places, there is no reference of any act or incidence whereby the appellant herein is alleged to have committed any wilful act or omission or intentionally aided or instigated the deceased Pranab Kumar Nag in committing the act of suicide. There is no case that the appellant has played any part or any role in any conspiracy, which ultimately instigated or resulted in the commission of suicide by deceased Pranab Kumar Nag.

7. Apart from the suicide note, there is no allegation made by the complainant that the appellant herein in any way was harassing his brother, Pranab Kumar Nag. The case registered against the appellant is

without any factual foundation. The contents of the alleged suicide note do not in any way make out the offence against the appellant. The prosecution initiated against the appellant would only result in sheer harassment to the appellant without any fruitful result. In our opinion, the learned Single Judge seriously erred in holding that the first information report against the appellant disclosed the elements of a cognizable offence. There was absolutely no ground to proceed against the appellant herein. We find that this is a fit case where the extraordinary power under Section 482 of the Code of Criminal Procedure is to be invoked. We quash the criminal proceedings initiated against the appellant and accordingly allow the appeal."

14. In M. Mohan [(2011) 3 SCC 626 : (2011) 2 SCC (Cri) 1] , while dealing with abetment, the Court has observed thus: (SCC p. 638, paras 44-45)

"44. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained.

45. The intention of the legislature and the ratio of the cases decided by this Court are clear that in order to convict a person under Section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he/she committed suicide."

15. As far as Praveen Pradhan [(2012) 9 SCC 734 : (2013) 1 SCC (Cri) 146] , is concerned, Mr Rao, has emphatically relied on it for the purpose that the Court had declined to quash the FIR as there was a suicide note. Mr Rao has drawn our attention to para 10 of the judgment, wherein the suicide note has been reproduced. The Court in the said case has referred to certain authorities with regard to Section 107 IPC and opined as under: (SCC p. 741, paras 18-19)

"18. In fact, from the above discussion it is apparent that instigation has to be gathered from the circumstances of a particular case. No straitjacket formula can be laid down to find out as to whether in a particular case there has been instigation which forced the person to commit suicide. In a particular case, there may not be direct evidence in regard to instigation which may have direct nexus to suicide. Therefore, in such a case, an inference has to be drawn from the circumstances and it is to be determined whether circumstances had been such which in fact had created the situation that a person felt totally frustrated and committed suicide. More so, while dealing with an application for quashing of the proceedings, a court cannot form a firm opinion, rather a tentative view that would evoke the presumption referred to under Section 228 CrPC.

19. Thus, the case is required to be considered in the light of the aforesaid settled legal propositions. In the instant case, alleged harassment had not been a casual feature, rather remained a matter of persistent harassment. It is not a case of a driver; or a man having an illicit relationship with a married woman, knowing that she also had another paramour; and therefore, cannot be compared to the situation of the deceased in the instant case, who was a qualified graduate engineer and still suffered persistent harassment and humiliation and additionally, also had to endure continuous illegal demands made by the appellant,

upon non-fulfilment of which, he would be mercilessly harassed by the appellant for a prolonged period of time. He had also been forced to work continuously for a long durations in the factory, vis-à-vis other employees which often even entered to 16-17 hours at a stretch. Such harassment, coupled with the utterance of words to the effect, that, "had there been any other person in his place, he would have certainly committed suicide' is what makes the present case distinct from the aforementioned cases. Considering the facts and circumstances of the present case, we do not think it is a case which requires any interference by this Court as regards the impugned judgment and order of the High Court."

12. The Supreme Court in ***(2019) 17 SCC 301 (Ude Singh and others Vs. State of Haryana)***, extensively surveyed essentials of offence of abetment of suicide, as defined under Section 306 IPC, and summarized the principles. It has been held that in cases of alleged abetment of suicide, there must be cogent and convincing proof of direct or indirect act(s) of incitement to the commission of suicide. Mere allegation of harassment of the deceased by any person would not be sufficient to attract the offence of abetment of suicide unless there is such action on the part of accused which compelled the deceased to commit suicide. It is also relevant that such an offending action ought to be proximate to the time of occurrence. It has been further held that psyche, sensitivity / hypersensitivity of victim are relevant and material considerations. Each case is required to be examined on its own facts and taking note of all the surrounding factors, having bearing on the actions and psyche of the accused and the deceased. The Court in para-16 of Ude Singh and others Vs. State of Haryana's case (supra) has explained the essentials of abetment of suicide which read as under:

"16. In cases of alleged abetment of suicide, there must be a proof of direct or indirect act(s) of incitement to the commission of suicide. It could hardly be disputed that the question of cause of a suicide, particularly in the context of an offence of abetment of suicide, remains a vexed one, involving multifaceted and complex attributes of human behaviour and responses/reactions. In the case of accusation for abetment of suicide, the court would be looking for cogent and convincing proof of the act(s) of incitement to the commission of suicide. In the case of suicide, mere allegation of harassment of the deceased by another person would not suffice unless there be such action on the part of the accused which compels the person to commit suicide; and such an offending action ought to be proximate to the time of occurrence. Whether a person has abetted in the commission of suicide by another or not, could only be gathered from the facts and circumstances of each case.

16.1. For the purpose of finding out if a person has abetted commission of suicide by another, the consideration would be if the accused is guilty of the act of instigation of the act of suicide. As explained and reiterated by this Court in the decisions above referred, instigation means to goad, urge forward, provoke, incite or encourage to do an act. If the persons who committed suicide had been hypersensitive and the action of the 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.

16.2. We may also observe that human mind could be affected and could react in myriad ways; and impact of one's action on the mind of another carries several imponderables. Similar actions are dealt with differently by different persons; and so far a particular person's reaction to any other human's action is concerned, there is no specific theorem or yardstick to estimate or assess the same. Even in regard to the factors related with the question of harassment of a girl, many factors are to be considered like age, personality, upbringing, rural or urban set-ups, education, etc. Even the response to the ill action of eve teasing and its impact on a young girl could also vary for a variety of factors, including those of background, self-confidence and upbringing. Hence, each case is required to be dealt with on its own facts and circumstances."

13. In the case of ***Arnab Manoranjan Goswami Vs. State of Maharashtra and others, (2021) 2 SCC 427***, the Supreme Court has held that a person, who is said to have abetted commission of suicide, must have played an active role by an act of instigation or by doing certain acts to facilitate the commission of suicide. Paras 50 and 51 of the said judgment read as under:-

"50. The first segment of Section 107 defines abetment as the instigation of a person to do a particular thing. The second segment defines it with reference to engaging in a conspiracy with one or more other persons for the doing of a thing, and an act or illegal omission in pursuance of the conspiracy. Under the third segment, abetment is founded on intentionally aiding the doing of a thing either by an act or omission. These provisions have been construed specifically in the context of Section 306 to which a reference is necessary in order to furnish the legal foundation for assessing the contents of the FIR. These provisions have been construed in the earlier judgments of this Court in State of W.B. v. Orilal Jaiswal [State of W.B. v. Orilal Jaiswal, (1994) 1 SCC 73 : 1994 SCC (Cri) 107] , Randhir Singh v. State of Punjab [Randhir Singh v. State of Punjab, (2004) 13 SCC 129 : 2005 SCC (Cri) 56] , Kishori Lal v. State of M.P. [Kishori Lal v. State of M.P., (2007) 10 SCC 797 : (2007) 3 SCC (Cri) 701] ("Kishori Lal") and Kishangiri Mangalgiri Goswami v. State of Gujarat [Kishangiri Mangalgiri Goswami v. State of Gujarat,

(2009) 4 SCC 52 : (2009) 2 SCC (Cri) 62] . In Amalendu Pal v. State of W.B. [Amalendu Pal v. State of W.B., (2010) 1 SCC 707 : (2010) 1 SCC (Cri) 896] , Mukundakam Sharma, J., speaking for a two-Judge Bench of this Court and having adverted to the earlier decisions, observed : (SCC p. 712, para 12)

"12. ... It is also to be borne in mind that in cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. Merely on the allegation of harassment without there being any positive action proximate to the time of occurrence on the part of the accused which led or compelled the person to commit suicide, conviction in terms of Section 306 IPC is not sustainable."

51. The Court noted that before a person may be said to have abetted the commission of suicide, they "must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide". Instigation, as this Court held in Kishori Lal [Kishori Lal v. State of M.P., (2007) 10 SCC 797 : (2007) 3 SCC (Cri) 701] , "literally means to provoke, incite, urge on or bring about by persuasion to do anything". In S.S. Chheena v. Vijay Kumar Mahajan [S.S. Chheena v. Vijay Kumar Mahajan, (2010) 12 SCC 190 : (2011) 2 SCC (Cri) 465] , a two-Judge Bench of this Court, speaking through Dalveer Bhandari, J., observed : (SCC p. 197, para 25)

"25. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. The intention of the legislature and the ratio of the cases decided by this Court is clear that in order to convict a person under Section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and that act must have been intended to push the deceased into such a position that he committed suicide."

14. Learned AGA for the State has, placing reliance upon judgment of Supreme Court reported in ***(2012) 9 SCC 734 (Praveen Pradhan Vs. State of Uttaranchal and another)*** submitted that offence of abetment by instigation depends upon intention of the person who abets and it is not dependent upon act which is done by the person who has abetted. Instigation has to be gathered from the circumstances of a particular case and in the present case from the circumstances it is clear that the deceased was harassed in the hands of the applicant and, therefore, deceased committed suicide. AGA further submitted that impugned order of framing charge does not suffer from illegality and not to be quashed. He has also placed reliance upon the judgment of the Supreme Court in ***Amit Kapoor Vs. Ramesh Chander and another, (2012) 9 SCC 460*** wherein it is observed that the Court is required to consider record of the case and documents submitted therewith to find out whether strong suspicion for commission of offence by the accused would arise and proof him guilty.

15. It is evident from the record that learned trial judge framed the charges against the petitioners-accused under Section 306 of IPC, so it must be seen that what is the evidence against the petitioners-accused. Before entering into merits of the matter, I would prefer read the relevant Sections under the Code regarding framing of charges. Section 227 of Code Of Criminal Procedure, 1973 reads as under:

"227. Discharge. If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing"

Section 228 of Code Of Criminal Procedure, 1973 also reads as under:

"228. Framing of charge.(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for the trial of warrant- cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused. (2) Where the Judge frames any charge under clause (b) of sub- section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."

16. Hon'ble Supreme Court in the case of Niranjan Singh Karam Singh Punjabi, Advocate Vs. Jitendra Bhimraj Bijja and others, AIR 1990 SC 1962 has held as under:-

"7. Again in Supdt. & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja & Ors., [1979] 4 SCC 274 this Court observed in paragraph 18 of the Judgment as under: "The standard of test, proof and judgment which is to be applied finally before finding, the accused guilty or otherwise, is not exactly to be applied at the stage of Section 227 or 228 of the Code of Criminal Procedure, 1973. At this stage, even a very strong suspicion rounded upon materials before the Magistrate which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged, may justify the framing of charge against the accused in respect of the commission of that offence".

From the above discussion it seems well-settled that at the Sections 227-228 stage the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face-value disclose the existence of all the ingredients constituting the alleged offence. The Court may for this limited purpose sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case."

17. The Hon'ble Supreme Court in the case of Union of India Vs. Prafulla Kumar Samal and another, AIR 1979 SC 366 has held as under:-

"Thus, on a consideration of the authorities mentioned above, the following principles emerge: (1) That the Judge while considering the question of framing the charges under section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out:

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be, fully justified

in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused. (4) That in exercising his jurisdiction under section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

18. In State of West Bengal v. Orilal Jaiswal, (1994) SCC (Cri) 107, Court has cautioned that the Court should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it appears to the Court that a victim committing suicide was hypersensitive to ordinary petulance, discord and difference in domestic life, quite common to the society, to which the victim belonged and such petulance, discord and difference were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty.

19. In Chitresh Kumar Chopra v. State (Govt. of NCT of Delhi) 2009 (16) SCC 605: (2010)3 SCC (Cri) 367, Court had an occasion to deal with this aspect of abetment. The court dealt with the dictionary meaning of the word "instigation" and "goading". The court opined that there should be intention to provoke, incite or encourage the doing of an act by the latter. Each person's suicidability pattern is different from the others. Each person has his own idea of self- esteem and self-respect.Therefore, it is impossible to lay down any straight-jacket formula in dealing with such cases. Each case has to be decided on the basis of its own facts and circumstances.

20. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained.

21. The Hon'ble Apex Court, dealing with the similar issue in the case of Sanju Vs. State of M.P. (2002) 5 Supreme Court Cases 371 observed as under:-

"8. In Swamy Prahaladdas v. State of M.P. & Anr . , 1995 Supp. (3) SCC 438: 1995 SCC (Cri) 943, the appellant was charged for an offence under Section 306 I.P.C. on the ground that the appellant during the quarrel is said to have remarked the deceased 'to go and die' . This Court was of the view that mere words uttered by the accused to the deceased 'to go and die'

were not even prima facie enough to instigate the deceased to commit suicide.

9. In Mahendra Singh v. State of M.P., 1995 Supp.(3) SCC 731: 1995 SCC (Cri) 1157, the appellant was charged for an offence under Section 306 I.P.C basically based upon the dying declaration of the deceased, which reads as under: (SCC p. 731, para 1) "My mother-in-law and husband and sister-in-law (husband's elder brother's wife) harassed me. They beat me and abused me. My husband Mahendra wants to marry a second time. He has illicit connections with my sister-in-law. Because of these reasons and being harassed I want to die by burning."

10. This Court, considering the definition of 'abetment' under Section 107 I.P.C., found that the charge and conviction of the appellant for an offence under Section 306 is not sustainable merely on the allegation of harassment to the deceased. This Court further held that neither of the ingredients of abetment are attracted on the statement of the deceased.

11. In Ramesh Kumar V. State of Chhattisgarh (2001) 9 SCC 618, this Court while considering the charge framed and the conviction for an offence under Section 306 I.P.C. on the basis of dying declaration recorded by an Executive Magistrate, in which she had stated that previously there had been quarrel between the deceased and her husband and on the day of occurrence she had a quarrel with her husband who had said that she could go wherever she wanted to go and that thereafter she had poured kerosene on herself and had set fire. Acquitting the accused this Court said: (SCC p.620) "A word uttered in a fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation. If it transpires to the court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the court should not be satisfied for basing a finding that the accused charged for abetting the offence of suicide should be found guilty."

22. The Hon'ble Supreme Court in the case of Rajesh Vs. State of Harayana in Criminal Appeal No. 93/2019 on 18th January, 2019 has held as under:-

"9. The term instigation under Section 107 IPC has been explained in State (Govt. of NCT of Delhi2) as follows:

"16. Speaking for the three-Judge Bench in Ramesh Kumar case [(2001) 9 SCC 618 : 2002 SCC (Cri) 1088], R.C. Lahoti, J. (as His Lordship then was) said that instigation is to goad, urge forward, provoke, incite or encourage to do (2010) 1 SCC 707 (2009) 16 SCC 605: (2010) 3 SCC (Crl.) 367 "an act". To satisfy the requirement of "instigation", though it is not necessary that actual words must be used to that effect or what constitutes "instigation" must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. Where the accused had, by his acts or omission or by a continued course of conduct, created such circumstances that the deceased was left with no other option except to commit suicide, in which case, an "instigation" may have to be inferred. A word uttered in a fit of anger or emotion without intending the consequences to actually follow, cannot be said to be instigation.

17. Thus, to constitute "instigation", a person who instigates another has to provoke, incite, urge or encourage the

doing of an act by the other by "goading" or "urging forward". The dictionary meaning of the word "goad" is "a thing that stimulates someone into action; provoke to action or reaction" (see Concise Oxford English Dictionary); "to keep irritating or annoying somebody until he reacts" (see Oxford Advanced Learner's Dictionary, 7th Edn.)."

23. From the aforesaid discussions, it is evident that the deceased perceived harassment by the applicant as he was threatened to see in future or false implication under Section 376 IPC. There is nothing on record to suggest any mens-rea for instigating or abetting the suicide by the applicant. The suicide-note, as has been extracted herein above, even does not remotely suggest that the accused-applicant had any intention to aid, instigate or abate the deceased to commit suicide. Making threat to the deceased, asking him to see in future or implication in criminal case of IPC by itself would not constitute the offence of abetment to commit suicide. There is no evidence collected by the Investigating Officer to suggest that the applicant intended by such act to instigate the deceased to commit suicide. This Court is of the view that all ingredients of instigation of abetment to commit suicide are completely absent in the material collected during the course of investigation and, therefore, it cannot be said that the accused-applicant has committed any offence under Section 306 IPC. There is no offending action proximate to the time of occurrence on the part of the applicant, which would have led or compelled the deceased to commit suicide. Perceived of harassment by the deceased in the hands of the accused-applicant cannot be a ground for invoking the offence under Section 306 IPC as it cannot be said that the accused-applicant has abetted the commission of suicide by playing any active role or by an act of instigation or doing certain act to facilitate commission of suicide. While framing the charge, Trial Court has not appreciated the judgment cited in the body of impugned order in right perspective and it misinterpreted the judgment.

24. In the light of facts and circumstances of the present case, allegation made against the applicant, evidence collected by prosecution and the aforesaid discussions, this Court is of the view that the application is liable to be allowed. Impugned order dated 08.10.2021, and the further proceedings thereof against the applicant are quashed. Applicant is discharged from the offence alleged.

25. Application stands disposed of in the above terms. Order accordingly.

(2023) 1 ILRA 754
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.01.2023

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 4053 of 2014

Vimal Kumar Maurya ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Rajiv Lochan Shukla, Sri Chandra Bhan Dubey, Sri P.R. Maurya, Sri Anil Kumar Dubey, Anjali Singh, Sri Shashank Maurya

Counsel for the Respondent:
G.A., Sri Ishwar Chandra Srivastava, Sri Kamal Srivastava, Sri Kaushalendra

A. Criminal Law – Indian Penal Code, 1860 – Section 326-A – Allegation of throwing the acid (tejab) and deforming the face – Medical evidence – It's corroborative values – Held, medical evidence has always a great corroborative value as it proves not only the injuries which are said to be caused in the incident, but also the manner alleged. The case of the prosecution, as the one we have in hand, is mandatorily to be corroborated by way of medical evidence, which is always very crucial for the prosecution also for corroboration of its case and that is why the evidentiary value of a medical witness can never be ignored. (Para 38)

B. Criminal Law – Contradiction in the St.ment of injured-victim during Examination-in-chief and cross examination regarding the pot used for throwing the acid – Relevancy – Held, no doubt the evidence is not very much certain as to the acid was thrown by lota or glass, but in our view, this fact does not affect the prosecution case adversely. Both the injured were lying on cot and in the light of lantern, as they deposed, they had seen the incident of throwing the acid. The relevant is that acid was thrown. (Para 44 and 45)

C. Criminal Law – Indian Penal Code, 1860 – Section 326-A – Life imprisonment – Appeal against conviction and Sentence – Contradiction in the St.ment u/s 161 Cr.P.C. – Relevance – Non-disclosure and non-identification of the accused by the victim, when he (accused) was with her (victim) during treatment – Effect – Held, the prosecution has utterly failed to explain as to under what circumstances, the injured P.W.2 permitted the convict-appellant to accompany her after the incident and even the guilt of the appellant was disclosed by her to the police after a long time – The prosecution has miserably failed to explain the contradictions occurred in the St.ments given by P.W. 2 and P.W. 3 under Section 161 Cr.P.C. – Further held, contradictions and unnatural St.ments of these witnesses make the whole prosecution story highly doubtful. (Para 50, 53 and 56)

Appeal allowed (E-1)

List of Cases cited:-

1. St. of Har. Vs Krishan; A.I.R. 2017 SC 3125

2. Laxman Singh Vs St. of Bihar; (2021) 9 SCC 191

3. Narayan Chetanram Chaudhary & anr. Vs St. Of Mah.; (2000) 8 SCC 457

4. Khema alias Khem Chandra etc. Vs St. of U.P.; 2022 SCC OnLine SC 991

5. Sheila Sebastian Vs R. Jawaharaj; 2018 (5) Supreme 239

6. Anter Singh Vs St. of Raj.; A.I.R. 2004 SC 2865

7. Mousam Singha Roy Vs St. of W. B.; 2003 12 SCC 377

8. Suchand Pal Vs Phani Pal; 2004 SCC (Cri) 220

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

1. Heard Sri Rajiv Lochan Shukla, learned counsel for the appellant and Sri Amit Sinha, learned A.G.A. for the State.

2. The Court of Additional Sessions Judge, Court No.4, Jaunpur convicted the appellant Vimal Kumar Maurya under Section 326-A IPC in Sessions Trial No.507 of 2013 arising out of Crime No.846 of 2013, Police Station Badlapur, District Jaunpur and sentenced him for life imprisonment and fine of Rs.1 lakh with default sentence vide judgment and order dated 22.09.2014, feeling aggrieved of which the present criminal appeal has been filed.

3. The prosecution case, in brief, is as under.

On 07.11.2013 at about 12:00 at night when the informant and her family members were sleeping in their house and injured Champa Devi, the mother-in-law and Madhuri, the sister-in-law (nand) of the informant were also sleeping in a room situated in the Usahra (baramda) in front of the window, some unknown person threw acid (tejab) from the window and caused grievous hurt and deformity on their faces. The injured ladies were taken to Government Hospital, but they were referred to Janpur and subsequently to Varanasi for further treatment.

4. First information report was lodged on the basis of written report of the informant on 08.11.2013 at 6:20 A.M. and investigation started in pursuance of the said first information report.

5. The investigating officer recorded the statement of the injured witnesses, informant and other witnesses, inspected the place of occurrence and prepared site plan. He also seized acid burnt pillow, towel, dupatta and lantern from the place of occurrence and memo was prepared. During investigation, the name of present convict-appellant Vimal Kumar Maurya came into light and he was arrested by the police. Two other accused persons Sonu @ Santosh Kumar and Ved Prakash Yadav were also arrested, but subsequently final report was submitted in their favour. On the pointing out of present convict-appellant, the investigating officer also seized the pieces of bottle wherein acid was kept, the rest of the acid and acid stained soil and also a tube of gum and seizure memos were prepared. One steel glass was also recovered on the pointing out of the convict-appellant. Photographs of the injured Madhuri and mobile phone of the accused alongwith other mobile phones given by the accused to the victim were also recovered and seizure memos were prepared.

6. After completing the investigation, charge-sheet was submitted against the present convict-appellant.

7. The matter, being exclusively triable by the Sessions Court, was committed to the Court of Sessions for trial.

8. Charge under Section 326-A IPC was framed on 06.11.2014. The convict-appellant pleaded not guilty and claimed to be tried.

9. To bring home the charge, the prosecution relied upon the oral as well as documentary evidence.

10. In oral evidence, P.W.1 Suman Devi, the informant, P.W.2 Madhuri, the injured, P.W.3 Champa Devi, the injured, P.W.4 Dr. Ratnesh Dwivedi, P.W.5 Prakash Chand Rao, Chief Pharmacist, P.W.6 Dr. Saif Hussain Khan, P.W.7 Samar Bahadur Yadav, the scribe, P.W.8 Dr. Mohd. Rafeeq, P.W.9 S.I. Acchey Lal, the investigating officer and P.W.10 H.M. Amar Nath Kushwaha, scribe of first information report were examined.

11. In documentary evidence, written report Ex.Ka.-1, Medical Certificates Ex.Ka.-2 and Ka.-3, B.H.T. of injured Madhuri Ex.Ka.-4, Injury Report of injured Madhuri Ex.Ka.-5, Site Plan Ex.Ka.-6, Seizure Memo of Pillow, Towel and Dupatta Ex.Ka.-7, Seizure Memo of Lantern Ex.Ka.-8, Seizure Memo of Pieces of Acid Bottle & acid stained Soil Ex.Ka.-9, Seizure Memo of Gum Tube Ex.Ka.-10, Seizure Memo of Steel Glass Ex.Ka.-11,

Seizure Memo of Mobile Phone Ex.Ka.-12 & 13, Seizure Memo of Four Photographs of injured Madhuri Ex.Ka.-14, Charge-sheet Ex.Ka.-15, Chik F.I.R. Ex.Ka.-16 and G.D. Ex.Ka.-17 have been proved.

12. On the basis of oral and documentary evidence and after hearing the parties at length and also analysing the evidence of the defence, vide judgment and order dated 22.09.2014, the learned trial court recorded the conviction of the accused-appellant under Section 326-A of IPC and sentenced him as here-in-above mentioned.

13. Sri Rajiv Lochan Shukla, learned counsel appearing for the appellant has vehemently submitted that the conviction of the appellant is bad in the eyes of law and the learned trial court, without analyzing the evidence on record in an illegal and improper manner, has recorded the conviction of the appellant, which is not sustainable in the eyes of law. There was no evidence on record to prove that it was the appellant who was the author of the crime. He has not been identified on spot and all the recoveries relating to the incident are false and fabricated. Prosecution case does not find support from the medical evidence. Even the injured witnesses are incapable to prove the prosecution case, as their evidence is shaky and full of contradictions. The place of occurrence is not defined and investigation is bitterly faulty. It is a case of false implication of the appellant and on the basis of entire evidence on record, no guilt against the appellant is established and proved. Learned counsel for the appellant further submitted that the learned lower court has neglected the defence evidence in an arbitrary manner. The findings recorded by the trial court in the impugned judgment and order are adverse to law and perverse warranting interference by the Appellate Court. Motive of the offence is also not proved.

14. On the other hand, Sri Amit Sinha, learned A.G.A. submitted that the learned trial court has made a proper and legal analysis of the evidence on record and the appellant has been rightly convicted. There is no illegality or infirmity in the impugned judgment and as such the same does not warrant any interference by the Appellate Court and the appeal is liable to be dismissed.

15. We have considered the arguments advanced by the learned counsel appearing for the parties and perused the record.

16. The arguments advanced by the parties take us through the statement of the prosecution witnesses and also the defence witnesses and at the same time through the documentary evidence adduced by the parties.

17. P.W.1, P.W.2 and P.W.3 are the witnesses of fact.

18. P.W.1 is the informant. However, she is not the eyewitness of the incident. In her statement, she has stated that on the shrieks of two injured, her mother-in-law Champa Devi and sister-in-law (nand) Madhuri, she reached the spot and found that acid (tejab) was thrown on the faces of the two injured, who were crying for pain. They were taken to the hospital. The written report was written on her dictation by Samar Bahadur Yadav, Gram Pradhan and read over to her and then he made a signature over it. She visited the hospital after four days of the occurrence where

injured Madhuri told her that the appellant used to tease her and she had slapped him. She has also explained that the engagement of her Nand (injured Madhuri) was to take place one day after the incident, but 2 - 3 days before, the appellant had threatened her to cause deformity to her face in case she does not marry him. In her cross-examination, she had made a statement that when Renu Devi and she herself reached the place of incident, they found both the injured crying that something has been thrown on their faces. She also stated that she did not name anyone before the investigating officer as to who had thrown the acid. She has further stated that the name of the accused was also not told to her by her sister-in-law, rather she had told it to her husband, which was overheard by her in the hospital. She had also made a contradictory statement as to whether the injured Madhuri had ever told her that the convict-appellant used to tease her.

19. P.W.2 Madhuri Prajapati is the injured of the case, who, in her examination-in-chief, corroborating the prosecution version, has stated that the convict-appellant was willing to find her favour and proposed her for marriage, to which she denied. Her engagement was to take place on 08.11.2013 and 2 - 4 days before it, the accused had threatened her to cause deformity to her face and to ruin her if she denies to marry with him. At the time of the incident, she had gone to bed alongwith her mother in Usahra (baramda) where lantern was burning and one door of the window was broken. The accused moved the curtain of the window and peeped inside, then she recognized him, but he threw acid by some white metal lota (a small container for water round in shape, usually of brass or copper) whereby she and her mother got injured and they began shouting. The family members came over there and they were sent to hospital at Badlapur and from there to District Hospital, Jaunpur and subsequently to Pragya Hospital, Varanasi where she was admitted for 13 days. On 28.11.2013, her statement was recorded by the investigating officer. The burn signs are still present over her face. This witness has identified the convict-appellant as the author of the crime before the court during the course of her deposition and has stated that in the light of lantern, she had identified him. In her cross-examination, she has stated that her statement was recorded on 28.11.2013 by the investigating officer only once and no statement was recorded on 08.11.2013. She has also stated that tejab was thrown by lota and she had stated before the investigating officer that the acid was thrown by a white metal pot. She had made a significant statement further in her cross-examination that her sister Renu or sister-in-law (Bhabhi) Suman did not ask her as to who had thrown the acid nor she told anything about it because she was not in a position to speak. She has also explained that the convict-appellant remained with her during her treatment right from her house to Varanasi and during that period, she did not tell anyone as to who had thrown the acid.

20. P.W.3 Champa Devi is also the injured and the mother of other injured Madhuri. She, in her examination-in-chief, has stated that in the night of the incident at about 12:00, the convict-appellant threw acid over her and her daughter through the window and they got injuries over their faces. Lantern was burning in the room, in the light of which she had seen the convict-appellant throwing the acid by a glass. She had identified the accused before the court during her deposition and has stated that

she does not know as to why the acid was thrown by the accused. In her cross-examination, she has stated that she remained hospitalized at Varanasi for about 12 - 13 days alongwith Madhuri. She had denied her statement given to the investigating officer that Sonu Pal and Ved Prakash Yadav had caused deformity to her daughter by throwing acid over her face. She has made some contradictory statements in her cross-examination as to by which pot the acid was thrown. One more significant statement has been made by this witness that at the time of the incident, she and her daughter had shouted that Vimal Kumar is fleeing away after throwing acid over them, which was heard by her family members, her daughter Renu and her daughter-in-law Suman also.

21. P.W.4 to P.W.10 are the formal witness.

22. P.W.4 Dr. Ratnesh Dwivedi had treated both the injured at Pragya Hospital, Varanasi. In his examination-in-chief, he has stated that the acid injury was found on the face, neck and right hand of both the injured ladies, however, Champa Devi had got acid injury over her face only. They were treated by Dr. S.J. Singh. He has proved the medical certificates of both the injured ladies as Ex.Ka.2 & 3. However, in his cross-examination, he has admitted that Ex.Ka.2 & 3 are not the injury reports rather they are medical certificates having caption of "Not for medico legal purpose". No signature or thumb impression of either of the injured ladies finds place over the aforesaid certificates. Also no reference has been mentioned in the aforesaid certificates and it has also not been mentioned at to by whom they were brought. The description of acid burn injuries are also not mentioned in Ex.Ka.-2 & 3.

23. P.W.5 Prakash Chand Rao has produced B.H.T. relating to injured Madhuri of District Hospital, Jaunpur before the court, which has been prepared on 08.11.2013 at 3:00 A.M. by E.M.O. Dr. Saif Hussain Khan.

24. P.W.6 Dr. Saif Hussain Khan, E.M.O., District Hospital, Jaunpur has stated that he had treated the injured Madhuri, who was referred from C.H.C., Badlapur having burn injuries over her face and neck. Her general condition was not very good and she was referred at 3:45 A.M. for higher centre. The B.H.T. relating to injured Madhuri has been proved as Ex.Ka.-4 by this witness. However, in his cross-examination, he has admitted that he has not prepared any medical prescription or supplementary injury report of injured Madhuri rather she was not medically examined in the Sadar Hospital, Jaunpur. He is a general surgeon and not an expert of acid burn and is unable to explain as to which acid was used in the occurrence.

25. P.W.7 Samar Bahadur Yadav is the scribe, who has narrated in his examination-in-chief that 08.11.2013, in the morning, when he got information of the incident, he reached the house of the injured. This witness is the husband of Gram Pradhan, Machhli. He has stated that on the dictation of the informant, he had written the tehreer, which was read over to the informant. He has identified his signature over Ex.Ka.-1 and also over seizure memo of towel and dupatta.

26. P.W.8 Dr. Mohd. Rafeeq had treated injured Madhuri at C.H.C., Badlapur. He has stated that on 08.11.2013 at 1:40 A.M., he medically examined injured Madhuri and found signs of burn and blisters over her face and neck. Her

general condition was not very good. He gave first aid to her. The injuries appear to be acid burn injuries and fresh. The accidental medical register has been produced by this witness before the court and was proved as Ex.Ka.-5. According to this witness, after 30 - 40 minutes, the injured was referred to District Hospital, Jaunpur for better treatment. In his cross-examination, he has admitted that blisters were present only over the whole face of the injured and not over the neck. He has also admitted that he did not advice for the x-ray and no supplementary report was prepared by him and he is not sure whether the injuries were acid burn injuries or not.

27. P.W.9 S.I. Acchey Lal is the investigating officer of the case, who has proved the proceedings of the investigation and the site plan Ex.Ka.-6 and seizure memos Ex.Ka.-7, 8, 9, 10, 11, 12, 13 and 14. In his cross-examination, he has admitted some omissions in the preparation of the site plan. However, no case property has been produced before this witness. He has also admitted that the bottle, acid, acid stained soil and also the acid burnt clothes, pillow and dupatta were not sent to C.F.L. Contrary to the vicitm Madhuri, this witness has deposed that her statement was recorded on 08.11.2013 wherein she had stated that Sonu @ Santosh Pal and Ved Prakash Yadav had thrown acid over her. Another injured Champa Devi, the mother of the victim Madhuri had also corroborated the aforesaid statement of injured Madhuri and accordingly Sonu @ Santosh Pal and Ved Prakash Yadav both were sent to jail. He has also admitted that he made no investigation on the point as to in whose name the SIM of the mobile phone, collected by him, was allotted. He has also stated that the acid was thrown by a glass and not by lota and no lota as such was recovered by him. Further he has stated that injured Champa Devi in her statement recorded on 08.11.2013 had also named Sonu @ Santosh Pal and Ved Prakash Yadav as the authors of the crime. This witness has been recalled for re-examination under Section 311 Cr.P.C. wherein he has proved the case properties seized by him during the course of investigation as Material Ex.-1 to 8. He has also proved G.D. Ex.Ka.-15. He has also stated that no case property was ever identified by the victim.

28. P.W.10 H.M. Amar Nath Kushwaha is the scribe of the F.I.R., who had proved Chik F.I.R. Ex.Ka.-16 and G.D. Ex.Ka.-17 and has stated that on the basis of written report of the informant Suman Devi, the F.I.R. was lodged and prepared by him in his own handwriting and signature and the G.D. of the case as well.

29. In his statement under Section 313 Cr.P.C., when incriminating evidence and circumstances were put to the accused, he has taken a plea of false implication and has stated that the case was registered against him due to enmity and also pleaded for defence evidence.

30. A written submission has also been made by the accused stating therein that the accused was arrested without any cogent and reliable evidence and the two accused persons Sonu @ Santosh Pal and Ved Prakash Yadav, whose name came into light during the course of investigation particularly on the basis of the statement of both the injured ladies, were not charge-sheeted by the investigating officer rather a final report was submitted favouring them. No injured mentioned the name of the accused before the police and his name also does not find place in the F.I.R. itself. He

was not identified at the time of occurrence and the prosecution case is not supported by the medical evidence.

31. D.W.1 Prem Chand Gupta and D.W.2 Rajendra Singh Sengar have been examined as defence witnesses.

32. D.W.1 Prem Chand Gupta is working as Incharge Principal in Sindhi Laskar Primary School, Badlapur, Jaunpur and he has stated that the convict-appellant Vimal Kumar Maurya had been working as Shiksha Mitra in his school. On 12.11.2013, when he was present at the school, the police took him for inquiry at 11:30 A.M. but he did not inform to higher authorities. He has proved the original log book of the school as Ex.Kha.-1 and also the Attendance Register as Ex.Kha.-2.

33. D.W.2 Rajendra Singh Sengar, Additional City Magistrate-I, Varanasi has stated that on 11.11.2013, he was working as S.D.M., Pindra and had recorded the statement of injured Madhuri in Pragya Hospital, Harhua, Varanasi at about 7:00 P.M. The said statement has been proved as Ex.Kha.-3 by this witness and he has made categorical statement that the injured Madhuri did not name any accused who had thrown acid over her in her statement given to him. At the time of statement, Dr. V.K. Dubey had executed a certificate that the injured is fully conscious and in fit mental state at the time of the recording of the statement.

34. On the basis of the aforesaid evidence, the learned trial court passed the judgment and order of conviction against the appellant.

35. The submissions made by the learned counsel for the appellant are to be meet out on the basis of evidence on record.

36. The first objection relates to the fixation of place of occurrence. It has been argued that the place of occurrence in this case is not certain. There is no definite evidence on the point as to what was the specific place where both the injured were sleeping. A perusal of the impugned judgment shows that this issue has been discussed by the learned trial court also. The court finds some minor contradictions between the statement of the informant and injured persons over this issue. The site plan Ex.Ka.6 shows that at place "A' both the injured were sleeping. A window marked with letter "B' has been shown in the western side of the place through which the acid is said to be thrown. The statement of P.W.9 shows that it was a room where both the injured were sleeping. However, P.W.1, the informant, has also stated that Champa Devi and Madhuri were sleeping in the room. P.W.2 Madhuri, the injured states that she alongwith her mother was lying in the Usahra. However, further in her cross-examination, she states that she was sleeping in a room and she has also explained the width of that room. Further she states that the incident happened in a room which has a door in the northern side and window in the western side. P.W.3 the injured Champa Devi also states that "मैं व मेरी लड़की उसेहरा वाले कमरे में लेटे थे।" She has further stated that she has a kaccha house which is dilapidated and only usahra (baramda) is remaining.

37. We have to keep in mind that the present is the case wherein the incident has occurred in a village. In the villages, the usahra is a room type place surrounded by walls and normally having no fix door and in the local term generally usahra

(baramda) in a village is taken as a room. Hence, we find no contradiction on this point as to whether the injured ladies were sleeping in a room or usahra. In the site plan Ex.Ka.-6, the place of occurrence has been marked by letter "A', which has a window in the western side and exit in the northern side which corroborates the version of the prosecution witnesses of fact. In Ex.Ka.-6, it has also been shown that the informant was sleeping at place "C', which is the place just adjacent to that where the injured ladies were sleeping and that is why first of all the informant reached the place of incident after hearing the shrieks of the injured ladies. Hence, we find no discrepancy in the prosecution version so far as the fixation of place of occurrence is concerned.

38. The medical evidence adduced by the prosecution has been vehemently assailed by the learned counsel for the appellant. We cannot ignore this fact that the medical evidence has always a great corroborative value as it proves not only the injuries which are said to be caused in the incident, but also the manner alleged. The case of the prosecution, as the one we have in hand, is mandatorily to be corroborated by way of medical evidence, which is always very crucial for the prosecution also for corroboration of its case and that is why the evidentiary value of a medical witness can never be ignored.

39. The learned counsel for the appellant has vehemently argued that Ex.Ka.-2 and Ex.Ka.-3, the certificates issued by Pragya Multi Speciality Hospital & Research Centre Pvt. Ltd., Varanasi cannot be termed as injury reports of the injured ladies. A perusal of the contents of the aforesaid documents issued on 11.11.2013 shows that they are only certificates to the effect that the injured persons were admitted in the hospital on 08.11.2013 as a case of homicidal acid burn and they are still under treatment. Nowhere it is mentioned therein as to what injuries were found on the face and body of the injured persons and what treatment was going on. It was also argued that on the basis of medical reports, it cannot be certainly concluded that it was a acid burn case.

40. The learned A.G.A., per contra, has submitted that according to the prosecution evidence both the injured ladies were firstly took to C.H.C. Badlapur, then Government Hospital, Jaunpur and thereafter they were referred to District Varanasi and the documents relating to that duly proved in evidence, are available on record.

41. We have gone through the medical papers Ex.Ka.-4 & Ex.Ka.-5. Dr. Mohd. Rafeeq, P.W.8 has proved the medical report relating to C.H.C., Badlapur and he has appeared before the court with the original register and the medical report of injured Madhuri has been proved by him as Ex.Ka.-5 wherein the doctor has found blister formed all over face and burnt skin on face. The injury was kept under observation and the injured was referred to District Hospital, Jaunpur. The injury was caused due to any burning material and was fresh. The B.H.T. of District Hospital, Jaunpur has been proved by P.W.4 Dr. Saif Hussain Khan as Ex.Ka.-4, who has affirmed this fact that the injured Madhuri was brought to the District Hospital, Jaunpur being referred from C.H.C., Badlapur and he had found acid burn injuries on the face and neck of the injured. She was admitted into the hospital and treatment was started. The general

condition of the patient was not very good and she was referred to higher centre for better treatment. Subsequently, she was brought to Pragya Hospital, Varanasi. The learned A.G.A. has contended that even if the injury reports relating to Pragya Hospital are not available on record, it cannot be said that it was not an acid burn case. P.W.4 has affirmed this fact that injured Madhuri and Champa Devi both were having acid burn injuries. They were admitted into the hospital. This witness has appeared before the court alongwith original papers regarding the treatment of both the patients.

42. In the aforesaid circumstances, we also find that the circumstances regarding the treatment of acid burn injuries of both the injured ladies are fully established. Initially, the medical report of C.H.C., Badlapur and then of District Hospital, Jaunpur clearly show that it was acid burn case and the injuries were not normal. In that way the prosecution version finds corroboration from the medical evidence also and it is established that the injuries attributed on both the injured were caused by acid.

43. The other circumstances relating to the occurrence have been put into question by the learned counsel for the appellant. It has been argued that the prosecution evidence is self-contradictory on the point as to by which means acid was thrown over the injured ladies. Both the injured ladies in their respective depositions have made contradictory statements in this regard and so is the case of deposition of the investigating officer of the case.

44. From the perusal of the evidence of injured ladies P.W.2 and P.W.3 and also of the investigating officer P.W.9, we find some contradictory statements as to by which pot the acid was thrown. It is relevant to note that one steel glass has been recovered on the pointing out of the accused. Injured Madhuri P.W.2 in her statement has stated that the acid was thrown by any white metal pot, but further in her cross-examination, she has stated that the acid was thrown by a lota and the accused fled away with that lota. However, she has admitted that in her statement under Section 161 Cr.P.C. she had not stated that the acid was thrown by lota.

45. P.W.3, the other injured, in her examination-in-chief, has stated that acid was thrown by a glass. No doubt the evidence is not very much certain as to the acid was thrown by lota or glass, but in our view, this fact does not affect the prosecution case adversely. Both the injured were lying on cot and in the light of lantern, as they deposed, they had seen the incident of throwing the acid. The relevant is that acid was thrown. The acid bottle and the pieces of bottle and acid stained soil as well, have been seized by the investigating officer from outside the window from where the acid was thrown. The investigating officer has also seized acid spotted pillow cover, towel, dupatta, kathri and chadar. All the circumstances and evidence show that indubitably it is an acid burn case.

46. We are obliged to appreciate the circumstances of the case and if we take the oral and documentary evidence together, we can picturize the prosecution story in this way that the accused used to tease injured Madhuri and he wanted to marry with her, but she was not ready. The accused being annoyed to this, had threatened to cause deformity to her face

and also to cause her grievous hurt. On the next day of the incident, the engagement of injured Madhuri was to take place. The accused, prior to the occurrence, had given mobile phone to the injured Madhuri to be in touch with her. His threatening note was also seized which was affixed by using gum tube and that was also seized by the investigating officer. Photographs of injured Madhuri were also recovered from the possession of the accused. The learned A.G.A. has vehemently argued that on the basis of the aforesaid evidence and circumstances, there is no shadow of doubt that the offence was committed by the accused only.

47. The learned counsel for the appellant has vehemently argued that even if it is assumed that both the injured ladies sustained injuries by acid thrown over their face and body, by no evidence it is proved beyond doubt that it was the accused only who was the author of the crime. To give force to his argument, he has referred the oral evidence of both the injured ladies and also pressed to peruse the evidence of P.W.9, the investigating officer and P.W.1, the informant. It has been further submitted that the conduct and deposition of P.W.2 injured Madhuri throws a shadow of doubt upon the indulgence of the present appellant into the matter, rather it goes to show that the appellant is being falsely implicated in this case. It has been further argued that in fact, the injured ladies did not identify any accused who threw acid over them and subsequently by a deliberate action, the appellant was implicated in this matter.

48. The contentions raised by the learned counsel for the appellant take us through the testimonies of P.W.1, P.W.2, P.W.3 and P.W.9.

49. P.W.1 is the first informant, who came on spot upon hearing the shrieks of both the injured ladies and found her mother-in-law Champa Devi and sister-in-law (Nand) Madhuri crying with pain, as acid was thrown upon their faces. Both the injured ladies were taken to the C.H.C., Badlapur and then to the District Hospital, Jaunpur. She has further stated that four days after the occurrence, she alongwith her husband went to the hospital to see the injured ladies where injured Madhuri told her regarding the criminal intention of the accused, who was slapped by Madhuri and thereafter made a threatening to cause deformity to her face in case she does not marry him. Here we find from the perusal of the F.I.R. that it has been lodged against unknown person in the morning of 08.11.2013 i.e. the next morning of the occurrence. P.W.1 has further stated that when she reached the spot, she saw both the injured ladies crying and saying that something has been thrown on their faces. It is significant to note here that P.W.1 nowhere states that on spot, just after the incident, the injured ladies were naming the accused as the assailant. It has been further stated by P.W.1, contrary to her earlier statement, that Madhuri did not tell her the name of the accused, who had thrown the acid, but she had told this fact to the husband of P.W.1, which she overheard.

50. P.W.2 injured Madhuri in her examination-in-chief has stated that the door of the window was broken and after sliding the curtain of the window, accused Vimal Kumar Maurya peeped through the window and she had identified him in the light of the lantern. Accused Vimal threw acid over her by some white metal pot. The investigating officer had recorded her statement on 28.11.2013 and she had disclosed the facts regarding the incident.

In the court also, she has identified the accused and has clarified that in the light of lantern, she has identified the accused. It is pertinent to mention that P.W.2 has categorically denied the fact that her statement was ever recorded by the investigating officer on 08.11.2013. She was confronted to her statement given to the investigating officer as to the involvement of Sonu @ Santosh Kumar and Ved Prakash Yadav in the incident. She has also denied that she had ever given any statement to the investigating officer to the effect that Sonu @ Santosh Kumar and Ved Prakash Yadav had threatened her to cause deformity to her face in case she does not obey them. She has further stated that in her statement given to the investigating officer she had disclosed the fact that the "accused persons' (मुल्जिमान) had threatened to ruin her and to cause deformity to her face if she does not marry them. The learned A.G.A. has submitted that the statements of P.W.2 are quite natural and innocent. The lantern, in the light of which she had identified the accused, has been seized by the investigating officer and this fact was also corroborated by another injured P.W.3. P.W.2 has further given a very relevant statement that "मुल्जिम विमल कुमार दवा इलाज में मेरे साथ अस्पताल में रहा। वह घर से लेकर बनारस तक मेरे साथ था। उस अवधि में मैंने किसी से भी नहीं बताया कि तेजाब किसने फेंका था।" This statement is very significant and we are of the considered view that it hits the very foundation of the prosecution case. The occurrence happened on 07.11.2013 and injured Madhuri is said to be admitted in the hospital till 19.11.2013. It is very strange that if the accused was identified by the injured Madhuri at the moment he was throwing acid over her, then how and under what circumstances, he accompanied her right from her house to the hospital at Varanasi throughout and during the whole aforesaid period, injured Madhuri never disclosed to anyone as to he was the person who had thrown acid over her. This is not the statement of P.W.2 anywhere that during that total aforesaid period on account of any threatening of the accused, she had not disclosed his name to anyone. Hence, her conduct is quite unnatural and improbable.

51. The learned A.G.A. has failed to explain as to why injured Madhuri stated before the investigating officer that she was threatened by "accused persons' (मुल्जिमान) if she had seen only one accused i.e. the present appellant throwing acid over her and who alone had threatened her prior to the occurrence. The learned counsel for the appellant submits that the aforesaid statement shows that the offence was comitted by Sonu @ Santosh Kumar and Ved Prakash Yadav, the two accused persons and they have threatened the injured before the incident.

52. P.W.9, the investigating officer has stated that the name of accused Vimal Kumar was brought in the present matter on the basis of the statement of the injured Madhuri and also of his own confession. He has further stated that he has recorded the statement of injured Madhuri on 08.11.2013 wherein she had stated that the acid was thrown by Sonu @ Santosh Pal and Ved Prakash Yadav over her. This statement was recorded in Pragya Hospital, Varanasi and at the same time, he has also recorded the statement of injured Champa Devi and on the basis of their statements, Sonu @ Santosh Pal and Ved Prakash Yadav were again sent to jail. He has further stated that the statement of the victim was also recorded by Ranjana Sachan, Station Officer, Mahila Thana, which was also the ground for the arrest of

accused Vimal Kumar. P.W.9 has admitted that a final report was sent to the Court in respect of the accused Sonu @ Santosh Kumar Pal and Ved Prakash Yadav. In the aforesaid circumstances, we find this fact very relevant as to why P.W.2, the injured is denying her statement recorded by the investigating officer on 08.11.2013 wherein she has named Sonu @ Santosh Kumar Pal and Ved Prakash Yadav as the authors of the crime and not the present accused whereas the investigating officer P.W.9 has categorically stated that on 08.11.2013, he had recorded the statement of Madhuri and Champa Devi and some other witnesses and this was the first statement of both the injured ladies given to the investigating officer after the incident.

53. Under these circumstances, when we sift the testimony of the main injured witness P.W.2, we find ourselves in a position to record out satisfaction that the arguments extended on behalf of the appellant carry force and the entire testimony of P.W.2 is found not credible and unnatural so far as the involvement of appellant in the alleged crime is concerned. The prosecution has utterly failed to explain as to under what circumstances, the injured P.W.2 permitted the convict-appellant to accompany her after the incident and even the guilt of the appellant was disclosed by her to the police after a long time. Her statements given to the investigating officer on this point are fluctuating and so is the position of deposition of P.W.3. The prosecution has miserably failed to explain the contradictions occurred in the statements given by P.W.2 and P.W.3 under Section 161 Cr.P.C. and their depositions recorded before the court as to under what circumstances, they named accused Sonu @ Santosh Kumar Pal and Ved Prakash Yadav as the assailants when they had already identified the present convict-appellant while throwing acid over them. The conduct of both the injured ladies creates a genuine doubt in ascertaining as to who was the author of the crime.

54. The learned A.G.A. has vehemently argued that P.W.2 and P.W.3 are the injured witnesses and their presence on the scene stands established in this case and it is also proved that they have suffered injuries during the said incident. In our view, the veracity of the evidence of an injured witness is never disputed and no doubt an injured witness falls into special category of witness and the discrepancies of trivial nature cannot form basis of rejecting evidence of an injured witness, but the testimony of an injured witness cannot be taken as gospel truth in all the circumstances.

55. In **State of Haryana Vs. Krishan, A.I.R. 2017 Supreme Court 3125**, it was 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. The same view was reiterated in **Laxman Singh Vs. State of Bihar, (2021) 9 SCC 191** by holding that deposition of injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein. Evidence of injured witness is entitled to a great weight and very cogent and convincing grounds are required to discard his evidence.

56. In the light of the aforesaid observations made by the Hon'ble Apex Court and keeping in view the established

legal principles in respect of the value of testimony of an eyewitness, when we sift the evidence of injured witnesses in this case, we find that the contradictions and unnatural statements of these witnesses make the whole prosecution story highly doubtful. The contradictions and omissions, as we have pointed out earlier, are very material in nature.

57. In **Narayan Chetanram Chaudhary & Another Vs. State Of Maharashtra (2000) 8 SCC 457** while considering the issue of contradictions in the testimony in a criminal trial, it was held:

"42. Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself would not necessarily render the testimony of witness unreliable. When the version given by the witness in the Court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution becomes doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person. The omissions in the earlier statement if found to be of trivial details, as in the present case, the same would not cause any dent in the testimony of P.W.2. Even if there is contradiction of statement of a witness on any material point, that is no ground to reject the whole of the testimony of such witness."

58. If we translate the principle laid down in the above-mentioned case, we find that the contradictions and omissions finding place in the testimony of P.W.2 and P.W.3 are material and capable to discredit their evidence. That is why we certainly hesitate to affirm the conviction of the appellant on the basis of the evidence adduced by the prosecution particularly when we appreciate the evidence of injured witnesses in correct perspective. We find vital discrepancies and inconsistencies in their evidence coupled with their unnatural and improbable conduct, more particularly on the point as to who was the author of the crime and who threw acid upon the injured ladies and it makes their testimony unworthy of credence.

59. In **Khema alias Khem Chandra etc. Vs. State of U.P., 2022 SCC OnLine SC 991**, the Hon'ble Apex Court appreciating the whole oral and documentary evidence on record, and particularly scrutinizing the evidence of injured eyewitness, found that there were serious discrepancies and inconsistencies with regard to the time of the injuries sustained and time at which he was medically examined. Pointing out some other discrepancies, the Hon'ble Apex Court found that it was not safe to base the conviction on the sole testimony of injured eyewitness and the appellant was found entitled for benefit of doubt.

60. In the case in hand, no doubt the place and time of the occurrence, the manner alleged, the cause of injury, the medical evidence are the ingredients which stand in favour of the prosecution, but the most important aspect as to who was the assailant, is not proved beyond reasonable doubt on the basis of the oral and documentary evidence on record. Even if it is assumed that the convict-appellant wanted to marry with the injured P.W.2 and on earlier occasions he had also threatened her, it is not a proof of that degree which

can be taken as capable of proving the prosecution case beyond reasonable doubt but remains a mere suspicion in the light of the evidence on record. In a catena of decisions, the legal position has been established that suspicion, howsoever strong, cannot take place of proof.

61. In **Sheila Sebastian V. R. Jawaharaj 2018 (5) Supreme 239,** it was held - "Law is well settled with regard to the fact that howsoever strong the suspicion may be, it cannot take the place of proof. Strong suspicion, coincidence, grave doubt cannot take the place of proof. Always a duty is cast upon the Courts to ensure that suspicion does not take place of the legal proof."

62. The so called recovery of so many articles on the pointing out of the convict-appellant is not proved in the manner prescribed by the law. P.W.7, the independent witness of recovery of pillow and dupatta does not support the prosecution over this issue. He has stated that the police had obtained his signature over a plain paper when he was called at the police station. For the recovery evidence under Section 27 of the Evidence Act, the required conditions are propounded like this in **Anter Singh Vs. State of Rajasthan, A.I.R. 2004 SC 2865 -**

"The first condition necessary for bringing this Section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded."

63. P.W.9, in his entire testimony, as we find has not stated anywhere in clear terms that any disclosure statement was ever made by the appellant and he made discovery of a fact in consequence of the information, so received. It is the investigating officer P.W.9 who states regarding all the recoveries but as admitted by him, in his deposition, no map of any place of recovery has been prepared by him. Why the independent witnesses of recovery were not produced when they were available to the prosecution and their names also find place in the charge-sheet Ex.Ka.-15, is a dent in the prosecution case. The evidence of the investigating officer P.W.9 is also shaky and from the perusal of his deposition we find that proper investigation was not done in this case. The evidence of P.W.9 reflects that during investigation, at one place he found that the main culprits are Sonu @ Santosh Kumar Pal and Ved Prakash Yadav, but on another place he gives them clean chit and implicates the present convict-appellant, but when investigation proceeds, the involvement of the aforesaid two persons is again found in the crime, but subsequently a final report is submitted in their favour and charge-sheet against the present convict-appellant. The prosecution has utterly failed to explain that why the name of the convict-appellant was not disclosed by injured P.W.2 to anyone after so many days of the occurrence. If we accept the statement of P.W.1 that injured P.W.2 had named the present convict-appellant as assailant to her husband in the hospital, why the husband of P.W.1 was not produced in the court, is also a point not explained by the prosecution. Hence, at this

juncture, the evidence of P.W.1 remains hearsay evidence only.

64. We also find force in the contention of learned counsel for the appellant that if the convict-appellant accompanied the injured P.W.2 throughout the period she remained in the hospital, as P.W.2 also admits, why the investigating officer did not arrest him. In all, if the facts and circumstances of the case and the evidence adduced are taken together, their cumulative effect creates a strong suspicion about the involvement and participation of the convict-appellant in the alleged crime and the judicial scrutiny and analysis of the matter takes us to the direction of benefit of doubt in favour of the convict-appellant.

65. In **Mousam Singha Roy Vs. State of West Bengal, 2003 12 SCC 377,** it was held that it is also a settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof, since a higher degree of assurance is required to convict the accused.

66. In our assessment, the prosecution evidence in this case does not meet out the required degree of proof.

67. Upon careful analysis and consideration of the settled legal position in the backdrop of the facts and circumstances of the present case, we are of the considered opinion that the conclusion arrived at by the learned trial court in the impugned judgment is not in accordance with law and the evidence available on record. Thus, this Court is of the view that the prosecution has not been able to establish the guilt of the convict-appellant under Section 326-A IPC beyond reasonable doubt and to the satisfaction of the judicial conscience of the Court.

68. In **Suchand Pal vs. Phani Pal, 2004 SCC (Cri) 220**, the Hon'ble Supreme Court held that if from the evidence on record and in the facts and circumstances of the case two views are possible, one pointing to the innocence of the accused and other to the guilt of the accused, the view which favours the accused should be preferred.

69. The learned trial court has erred in scrutinizing and analysing the evidence on record and the finding in respect of the guilt of appellant is perverse and not according to law. Therefore, we are inclined to grant benefit of doubt to the convict-appellant on the ground of rule of caution.

70. Hence, the impugned judgment and order of conviction and sentence, which has been sought to be assailed, calls for and deserves interference. The criminal appeal is liable to be allowed and the same is accordingly allowed.

71. The impugned judgement and order dated 22.09.2014 is, accordingly, set aside. The convict-appellant is given benefit of doubt and accordingly is found not guilty for the offence punishable under Section 326-A IPC. He is acquitted from the charge. Convict-appellant is in jail. He shall be released forthwith, if not wanted in any other case.

72. Let a copy of this judgment along with trial court record be sent to the Court concerned for necessary compliance.

(2023) 1 ILRA 770
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.12.2022

BEFORE
THE HON'BLE JASPREET SINGH, J.

Writ B No. 692 of 2022

Smt. Anju Rajpal & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Chandra Bhushan Pandey, Asim Kumar Singh

Counsel for the Respondents:
C.S.C., Pritish Kumar, Shantanu Gupta, Vaibhav Gupta

A. Civil Law - U.P Consolidation of Holdings Act, 1953 - Remand - DDC, is the highest court in the hierarchy of Consolidation Court and have powers to appraise both the findings of fact and law - DDC is the final Court of fact and law in but in the present case the matter has proceeded ignoring the provisions contained in the Partnership Act i.e. Sections 5, 6, 14, 37, 42 to 49 and the parties have also not brought on record the requisite evidence which could support the respective contentions - none of the two authorities i.e. Consolidation Officer and the Settlement Officer of Consolidation had taken a look at the problem with the correct lens of the legal provisions, hence, in the aforesaid circumstances, the remand was the only option - order passed by the Deputy Director of Consolidation remanding the matter for decision afresh does not suffer from any error (Para 41, 46, 47, 48)

B. Civil Law - Partnership Act - Dissolution Of A Firm - Section 39 - Distinction, between distributions of assets of a firm amongst its partners upon dissolution and transferring certain assets of the firm to a third party (non-partner) for satisfying an obligation or to settle/satisfy a share demand of a third party is quite real and different - Distribution of an asset of a firm amongst the partners upon dissolution in terms of the Partnership Act may be nothing but re-adjustment for which though deed is drawn but its registration may not be required, however, but if the same is done qua a third party who is not a partner who merely has a claim against the firm then the situation changes as his capacity would be that of a creditor and what benefit may be available to the partners inter se is not available to such third party (creditor) as that would constitute a transfer attracting all its legal requirements. (Para 39)

Allowed. (E-5)

List of Cases cited:

1. Kale Vs Deputy Director of Consolidation (1976) (2) ALR 173

2. Gopi Nath Vs. Satish Chandra AIR 1964 Alld. 53

3. Controller of Estate Duty, Gujarat, Ahmedabad Vs. Mrudula (Smt.) Naresh Chandra AIR 1986 SC 1821

(Delivered by Hon'ble Jaspreet Singh, J.)

1. Heard Sri C.B. Pandey, learned counsel for the petitioner, learned Standing Counsel for the State-respondents as well as Sri Pritish Kumar, learned counsel for the private respondent no. 3.

2. Since the parties have exchanged the pleadings, accordingly, with the consent of learned counsel for the parties, the matter has been heard finally at the admission stage itself.

3. Under challenge is the order dated 20.09.2022 passed by the DDC, Sitapur by means of which the revision preferred by the private respondent no. 3 has been allowed and after setting aside the order passed by the Settlement Officer of Consolidation Officer dated 16.12.2022 and the order dated 23.01.2021 passed by the Consolidation Officer, the matter has been remanded for decision afresh. It is this order of remand which is under challenge in the instant petition.

4. Sri C.B. Pandey, learned counsel for the petitioners assails the impugned order of remand passed by the DDC, Sitapur, primarily on two grounds:-

(i) That the matter was concluded by findings of fact which were duly recorded by the Consolidation Officer and the Settlement Officer of Consolidation and there was no material before the DDC to have taken a contrary view and even otherwise the DDC erred in setting aside the orders and remanding the matter, thereby unsettling a position which had been settled after decades of litigation.

(ii) It is also urged that the DDC, Sitapur committed an error in remanding the matter especially when being the highest court in the hierarchy of Consolidation Court and having powers to appraise both the findings of fact and law, it could have decided the matter itself rather than remanding the matter and too on account of insufficient reasons as a result, the orders passed by the C.O. and the SOC respectively have been set aside resulting in sheer miscarriage of justice. The DDC further failed to notice that the respondent no. 3 admittedly could not establish its nexus with the firm which was the recorded owner of the property in dispute as well as the fact that the petitioners being the successor-in-interest of the legal heirs of the original deceased partner and the property having vested in them which has been unsettled by the order of remand which is bad in the eyes of law.

5. Elaborating his submissions, Sri C.B. Pandey, has submitted that the dispute in question relates to Khata No. 46, 124 and 125 comprising of several plots situate in Village Jamaitpur, Pargana Khairabad, Tehsil and District Sitapur which was recorded in the name of Firm Ghannumal Bhagwan Das, Sitapur.

6. It is the case of the petitioners that an unregistered firm under the name and style of Ghannumal Bhagwan Das was constituted on 15.01.1950. Both Ghannumal and Bhagwan Das belonged to the same family and a family tree has also been brought on record and indicated in paragraph 14 of the writ petition to indicate that Ghannumal and Bhagwan Das were related to each other as uncle and nephew respectively. (Bhagwan Das was the son of Bandhanmal who was the real brother of Ghannumal).

7. The said firm Ghannumal Bhagwan Das, Sitapur had the following partners namely Seth Ghannumal, Seth Bhagwan Das, Sri Hasanand and Sri Warandmal. It is also the case of the petitioners that Ghannumal and Bhagwan Das were working partners while Sri Hasanand and Warandmal were sleeping partners.

8. As per the deed dated 15.01.1950 placed on record as Annexure No. 4, it would indicate that Ghannumal had a 12.5% share in the said partnership, Sri Bhagwan Das and Hasanand had a share of 31.25% each and Sri Warandmal had a share of 25%.

9. It is also the case of the petitioners that the aforesaid firm namely Ghannumal Bhagwan Das, Sitapur was primarily engaged in Railway contracts to be carried out in different districts of Uttar Pradesh and it also established a brick kiln in Sitapur as part of its business. It has specifically been pleaded that amongst various properties purchased by the firm, the said firm purchased agricultural land by way of different sale deeds in village Jamaitpur, Pargana Khairabad, Tehsil and District Sitapur relating to Khata No. 125 over which the brick kiln was established as indicated in paragraph 7 of the writ petition whereas the other land which comprise of Khata no. 46 was purchased during the lifetime of Ghannumal by the said firm. After purchase of the aforesaid land by the firm, the mutation was also carried out in the revenue records in favour of Ghannumal Bhagwan Das, Sitapur.

10. Sri Ghannumal is said to have executed a will on 21.10.1964 whereby he had bequeathed his entire properties/assets in favour of his sons, grand sons and his wife as per details given in his will (Annexure No. 8 with the writ petition). It has further been pleaded on behalf of the petitioner that upon the death of Sri Ghannumal on 23.10.1964, the firm M/s Ghannumal Bhagwan Das, Sitapur was re-constituted on 24.10.1964 to carry on the business with the remaining three partners.

11. It is further urged that the share of the Ghannumal in the partnership namely Ghannumal Bhagwan Das, Sitapur remained intact and invested in the re-constituted firm itself. Subsequently, the re-constituted firm namely M/s Ghannumal Bhagwan Das, Sitapur was duly registered on 19.03.1965 with the remaining three partners namely Bhagwan Das, Hasanand and Warandmal to carry on the same business as was being conducted prior to the death of Sri Ghannumal.

12. It is also specifically pleaded on behalf of the petitioners that the firm namely M/s Ghannumal Bhagwan Das, Sitapur which was initially constituted in the year 1950, as mentioned above, was dissolved in the year 1972 and an intimation of the said dissolution was also communicated to the Sales Tax Officer, Sitapur on 01.11.1972.

13. It is also urged that since Sri Ghannumal and Bhagwan Das belonged to the same family being related as uncle and nephew, hence, upon the dissolution of the firm M/s Ghannumal Bhagwan Das, Sitapur in the year 1972, the properties of the firm situate in Village Jamaitpur, which is the disputed land in question fell in the share of Seth Ghannumal, accordingly, upon dissolution the said properties were inherited by the sons of Sri Ghannumal namely Daya Singh, Hashmat Rai and Hari Lal.

14. The three sons of Ghannumal thereafter constituted a new firm on 01.11.1972 with the assets inherited by them upon the dissolution of the erstwhile firm namely Ghannumal & Sons. Even this firm M/s Ghannumal & Sons was dissolved w.e.f. 31.10.1975 and the assets of the aforesaid firm Ghannumal & Sons were partitioned between the three partners (the three sons of Ghannumal) of the firm Ghannumal & Sons.

15. The eldest son of Ghannumal namely Daya Singh formed another firm namely M/s Daya Singh Bedi to run the brick kiln business situate on the land of the village Jamaitpur. In terms of the will

executed by Sri Ghannumal, the residential house situate in Sitapur was inherited by the grand son of Sri Ghannumal namely Sri Dilip Kumar.

16. It is also the case of the petitioners that the private respondent no. 3 was merely a Manager/Munshi who was appointed by the Firm to look after the brick kiln business. Even after the dissolution of the firm M/s Ghannumal & Sons, the said business of brick kiln was taken over by the firm M/s Daya Singh Bedi and Sri Uttam Chand i.e. the respondent no. 3 continued to act as the Manager to look after the business of brick kiln. Reliance has been placed upon various documents and receipts/license to indicate that the property in question continued to be in possession of the family members of Sri Ghannumal, namely Sri Dilip Kumar (grandson of Ghannumal) son of Sri Daya Singh.

17. It has also been pointed out that Sri Uttam Chand, the respondent no. 3 instituted a suit staking claim on the property by filing a suit under Section 229-B of the Uttar Pradesh Zamindari Abolition and Land Reforms Act claiming rights only in respect of Gata No. 334, 329 and 244 which were plots of Khata No. 44 only, however, the said suit came to be dismissed in default on 09.02.1983. Though, an application for recall/restoration was moved which was allowed, thereafter the consolidation operations started in the village Jamaitpur, Pargana Khairabad, District Sitapur and the proceedings abated but nevertheless the fact remains that this act of Sri Uttam Channd was nothing but an attempt to usurp the properties belonging to the firm M/s Ghannumal Bhagwan Das, Sitapur which after dissolution fell in the share of the legal heirs of Sri Ghannumal and in any case Sri Uttam Chand had no right, title or interest therein.

18. It is further urged that upon the commencement of consolidation operations, objections were filed by Sri Uttam Chand and the issue was raised by Sri Uttam Chand claiming himself to be a partner of a firm namely M/s Ghannumal Bhagwan Das Contractors, Gonda and M/s Ghannumal Bhagwan Das, Lucknow and claiming right to the property of Gata No. 329, 244, 344, 332 and 315. It is also urged that the respondent no. 3 has been taking a vacillating stand at various stages of the litigation.

19. The Consolidation Officer had upon the exchange of pleadings framed as many as seven issues and after meticulously considering the evidence led by the respective parties, recorded findings that upon the dissolution of the firm namely Ghannumal Bhagwan Das, Sitapur, a family settlement took place in the year 1975 in terms whereof the properties in question fell in the share of the petitioners and Sri Uttam Chand had no stake. It was also held that since after the death of Ghannumal, the firm being a family firm, hence, in terms of the family settlement, the properties fell in the share of the respective parties who were the heirs of Sri Ghannumal and moreover they have been in possession. As far as the private respondent no. 3 is concerned, he could not establish his rights over the property in question or to indicate how he had any connection with the erstwhile firm namely M/s Ghannumal Bhagwan Das, Sitapur which was constituted in the year 1950 and had purchased the property in question and was dissolved in the year 1972, hence, the objections of Sri Uttam Chand was rejected

and the property rights were decided in favour of the present petitioners by means of the judgment passed by the Consolidation Officer dated 23.01.2021.

20. Upon the appeal preferred by Sri Uttam Chand, the Settlement Officer of Consolidation, Sitapur by means of judgment dated 16.12.2021 dismissed the appeal of the private respondent no. 3 and affirmed the findings of the Consolidation Officer.

21. Against the aforesaid two judgments dated 23.01.2021 passed by the Consolidation Officer as well as the order dated 16.12.2021 passed by the Settlement Officer of Consolidation, the private respondent no. 3 preferred a revision before the DDC, Sitapur which by means of the impugned order dated 20.9.2022 has been allowed and the matter has been remanded and the same is not in sound exercise of jurisdiction for the grounds already noticed in para 4 of this judgment.

22. The learned counsel for the petitioner has relied upon the decision of the Apex Court in the case of ***Kale Vs. Deputy Director of Consolidation*** reported in ***(1976) (2) ALR 173*** and ***Gopi Nath Vs. Satish Chandra*** reported in ***AIR 1964 Alld. 53***

23. Sri Pritish Kumar, learned counsel for the private respondent no. 3 while making his submissions has submitted that the entire premise upon which the Consolidation Officer as well as the Settlement Officer of Consolidation has proceeded is quite erroneous. It is urged that the Consolidation Officer and the Settlement Officer of Consolidation lost sight of the fact that once it is the admitted case of the parties that the property in question belonged to the firm namely M/s Ghannumal Bhagwan Das, Sitapur which was dissolved in the year 1972 and the subsequent developments which took place have not been taken note of or appreciated in the correct legal perspective, ignoring the provisions of the Partnership Act which was essentially applicable and this has resulted in an incongruous result.

24. Elaborating his submissions, it is urged by learned counsel for the respondent no. 3 that there is a distinction between the private assets of an individual and assets of a firm. Upon the dissolution of a firm, the rights of the deceased partner is confined only to the value of his share in the firm and cannot be ascribed to any particular asset of the firm and is subject to the profit/loss sharing ratio.

25. It is also urged that Sections 14, 42(c), 46 and 37 of the Partnership Act, 1932 are vital to understand and to be followed while dealing with the assets of a firm and its distribution amongst its partners which has not been noticed by the two authorities i.e. the Consolidation Officer and the Settlement Officer of Consolidation while the Deputy Director of Consolidation has clearly noticed the distinction between the private assets of an individual and rights and assets of a partner in a firm and finding that this aspect has not been taken note of by the two authorities has rightly remanded the matter as in absence of proper appreciations of the evidence and legal provisions, the conclusions as arrived at by the two Consolidation Authorities are erroneous, hence, the DDC was absolutely justified in remanding the matter.

26. The learned counsel for the respondent no. 3 has also submitted that on

the perusal of the given facts and the admitted case of the petitioners, it is urged that it is incorrect to state that the firm M/s Ghannumal Bhagwan Das, Sitapur which was originally constituted in the year 1950 was a family firm. From the perusal of the partnership deed as filed by the petitioners, it would indicate that Sri Ghannumal had only 12.5% share rather the major shareholders were Sri Bhagwan Das, Sri Hasanand and Sri Warandmal. Even from the perusal of the pedigree as mentioned by the petitioners in paragraph 14 of the writ petition, it would indicate that Warandmal and Hasanand were not part of the family of Ghannumal. Sri Warandmal and Hasanand were outsiders to the family and they together held 56.25% i.e. the majority share in the said firm.

27. It is further elaborated that upon the dissolution of the firm M/s Ghannumal Bhagwan Das, Sitapur in the year 1972. Even if the share of Ghannumal remained intact and invested in the firm then at best the share of Ghannumal was confined to the extent and value of the invested amount in the firm which was re-constituted in the year 1964 till such time it was dissolved in the year 1972. However, even the existing partners, at the time when the firm was dissolved in the year 1972, could not claim any specific share on any particular asset. Admittedly, on the date of death Sri Ghannumal, his legal heirs were never inducted in the re-constituted partnership from 1964 to 1972 when it was dissolved and if at all, there was any claim, the legal heirs could have filed the suit against the value of the share of Ghannumal and could not claim a right over any particular asset of the firm claiming it to be their own.

28. It is further urged that in October, 1964 after the death of Sri Ghannumal, another firm M/s Ghannumal Bhagwan Das Contractors, Gonda was constituted with Sri Bhagwan Das, Panjumal, Uttam Chand (respondent no. 3) and Sri Parasram as the partners of the said firm. The attention of the Court has been drawn to the said deed which has been brought on record as Annexure No. CA-1 to the counter affidavit filed by the respondent no. 3 to state that upon the constitution of the said firm, it was clearly stated that all the railway contracts, assets and liabilities and outstanding works of the firm namley M/s Ghannumal Bhagwan Das, Sitapur shall be taken over by M/s Ghannumal Bhagwan Das, Gonda.

29. It is further stated that again a partnership deed was executed between Bhagwan Das. Sri Uttam Chand (respondent no. 3), Sri Hashmat Rai and Sri Ghanshyam Das. This firm was known as "Ghannumal Bhagwan Das, Lucknow and the said deed also clearly indicated that the firm M/s Ghannumal Bhagwan Das, Sitapur and M/s Ghannumal Bhagwan Das, Gonda are being taken over by this new firm M/s Ghannumal Bhagwan Das, Lucknow. This firm also came into being in the year 1966 wherein Sri Uttam Chand, i.e. the respondent no. 3 was a partner alongwith Sri Bhagwan Das and Sri Hashmat Rai. In the firm M/s Ghannumal Bhagwan Das, Lucknow which came into being in the year 1966, Hashmat Rai was none other than the son of Sri Ghannumal who was a partner in his HUF capacity.

30. The contention is that a deed of partnership is nothing but a contract entered between the parties. Sri Bhagwan Das was a common partner in the firm which was constituted in the year 1950 also in the firm M/s Ghannumal Bhagwan Das, Gonda which came into existence in

October, 1964 after the death of Ghannumal so also in the firm M/s Ghannumal Bhagwan Das, Lucknow which came into effect in November, 1966 which had taken over the business of the firm M/s Ghannumal Bhagwan Das, Gonda and M/s Ghannumal Bhagwan Das, Sitapur.

31. It is further submitted that upon a dissolution of a firm, a deed of dissolution is to be prepared in terms whereof the rights and liabilities of the partners is settled after paying of all the debts and outstanding of the firm. It is only thereafter that the surplus is divided amongst the partners and only partners themselves. In the instant case, the heirs of Ghannumal were never inducted in the partnership after the death of Sri Ghannumal in the year 1964, consequently, the theory as propounded by the petitioners that after the firm M/s Ghannumal Bhagwan Das, Sitapur which was re-constituted in the year 1964 with only three partners and which was dissolved in the year 1972 and upon the said dissolution, the heirs of Ghannumal got the property in question as their share equivalent to that sum invested upon the death of Ghannumal does not have any legal binding stand.

32. At best the petitioner could only get a share to the extent of the value of the share in the firm and not any particular asset representing the said share. Even otherwise, if at all, any particular asset was ascribed to the heirs of Sri Ghannumal as representing their share then the same could only be done by an appropriate deed duly stamped and registered as the heirs of the Sri Ghannumal admittedly were not partners after the death of Sri Ghannumal and they only had a right claiming the money value of the share of Ghannumal invested in the firm. In absence of any proper deed of conveyance or transfer, the theory that the assets of the firm came in the hands of heirs of Ghannumal on the basis of a family settlement is contrary to the legal provisions and no such family settlement could have been arrived at, especially, when it is clear that the firm M/s Ghannumal Bhagwan Das, Sitapur even as constituted in the year 1950 was not a family firm where Ghannumal had only a minor share of 12.5% and the larger share of 56.25 % were held by the outsiders namely Sri Hasanand and Sri Warandmal.

33. The further submission of learned counsel for the respondent no. 3 is that in absence of any proper deed, the heirs of Ghannumal could not claim a right over the particular asset of the firm and moreover from the will as has been placed on record by the petitioners, it would indicate that Sri Ghannumal himself admitted that he had not put in any particular immovable asset rather his money was invested in the firm. Any investment in the firm representing the share of Sri Ghannumal is to be treated in terms of money value and not in terms of any particular and specific asset/immovable property.

34. In the aforesaid circumstances in absence of any proper deed duly stamped and registered no rights could be created in favour of any third party who was not a partner and what is going to be its effect in law after applying the principles as well as the provisions contained in the Partnership Act the matter required re-consideration and for the said reasons, the matter has been remanded and there is no error of jurisdiction committed by the DDC, accordingly, the writ petition deserves to be dismissed.

35. The learned counsel for the private respondents has also filed his brief

submissions and in support of his contentions has relied upon a decision of the Apex Court in the case of ***Controller of Estate Duty, Gujarat, Ahmedabad Vs. Mrudula (Smt.) Naresh Chandra*** reported in ***AIR 1986 SC 1821.***

36. The Court has carefully considered the rival submissions and perused the material on record including the written submissions and the case laws cited by the respective parties.

37. At the outset, it may be noticed that partnership is nothing but a form of the contract. A Partnership Firm may be constituted by members of a family or even by such persons who may not be related but the fact remains that in either situation the rights and obligations of the respective partners is confined to the rights and obligations as provided in the partnership deed subject to the provisions of the Indian Partnership Act, 1932.

38. Upon perusal of the judgments passed by the Consolidation Officer and the Settlement Officer of Consolidation, it would indicate that both the said Authorities have based their conclusions on the premise that the firm M/s Ghannumal Bhagwan Das, Sitapur as constituted in the year 1950 was a family firm and upon the dissolution in the year 1972 in terms of a family settlement, the assets of the said firm came to be distributed amongst the legal heirs of Sri Ghannumal and the remaining partners, though no such deed was brought on record.

39. The distinction, between distributions of assets of a firm amongst its partners upon dissolution and transferring certain assets of the firm to a third party (non-partner) for satisfying an obligation or to to settle/satisfy a share demand of a third party is quite real and different. The distribution of an asset of a firm amongst the partners upon dissolution in terms of the Partnership Act may be nothing but re-adjustment for which though deed is drawn but its registration may not be required, however, but if the same is done qua a third party who is not a partner who merely has a claim against the firm then the situation changes as his capacity would be that of a creditor and what benefit may be available to the partners inter se is not available to such third party (creditor) as that would constitute a transfer attracting all its legal requirements. Apparently, even from the material brought on record before this Court, neither any dissolution deed has been brought on record to indicate that how the assets of the firm M/s Ghannumal Bhagwan Das, Sitapur were distributed upon dissolution. In absence of such evidence no clear finding could be recorded.

40. The effect of the fact that Hashmat Rai, one of the sons of the Ghannumal who was a partner in the firm M/s Ghannumal Bhagwan Das, Lucknow which came into being in the year 1966 and that too in his capacity as an HUF wherein Sri Bhagwan Das was also a partner with Uttam Chand, the respondent no. 3 herein and in the said deed there is a clear recital that all the assets and liabilities of the firm M/s Ghannumal Bhagwan Das, Lucknow and M/s Ghannumal Bhagwan Das Contractors, Gonda are being taken over by the said firm. These two deeds of partnership, its legal effect has also not been considered. Whether upon the constitution of these two firms i.e. M/s Ghannumal Bhagwan Das, Lucknow and M/s Ghannumal Bhagwan Das Contractors, Gonda wherein the partners were in their

distinct capacities, coupled with the fact even in the will executed by Ghannumal, the share of Ghannumal as invested in the firm have not been specifically bequeathed to the present petitioners or their predecessors-in-interest and there is nothing on record before this Court to show that how the present petitioners alone are claiming right even though Sri Ghannumal expired in the 1974 and in the year 1966 one of his sons namely Hashmat Rai was included in the firm M/s Ghannumal Bhagwan Das, Lucknow as an HUF and upon the dissolution of the firm in the year 1972 how the assets of the firm M/s Ghannumal Bhagwan Das, Lucknow could have been distributed amongst the heirs of Ghannumal contrary to the manner in which the "Will has been devised by the Ghannumal himself are all questions which require consideration. This aspect also was not taken note of by the C.O. and the SOC.

41. In order to arrive at a correct conclusion, the provisions contained in the Partnership Act i.e. Sections 5, 6, 14, 37, 42 to 49 have to be taken note in context with the evidence relating to the different partnership firms constituted from time to time and their respective dissolution. Since none of the two authorities i.e. Consolidation Officer and the Settlement Officer of Consolidation had taken a look at the problem with the correct lens of the legal provisions and this aspect has attracted the attention of the DDC who after noticing the same found that the matter required a re-look and for the said purpose it has remanded the matter.

42. In so far as the decision cited by the learned counsel for the petitioner in the case of Kale Vs. DDC (Supra) is concerned, the proposition is very well settled to be disputed, however, what needs to be noticed is whether the principles as laid down by the Apex Court in the case of Kale (supra) has got any applicability in the instant case. Needless to say that a family settlement can be arrived at between the family members who have any pre-existing rights. Whether the said principles can be extended to a partnership firm which comprises of family and non-family members as in the instant case and the non-family members are having a larger share is to be considered.

43. Even in the case of Chandra Kumari Vs. DDC (supra), the applicability of the proposition in the instant case is to be considered.

44. Similarly, the decision cited by the learned counsel for the respondent in the case of Mridula Naresh Chandra (supra) whether it would apply in the given facts will naturally have to be tested in the given fact situation.

45. As already noticed above that this aspect relating to the rights of the parties which flow from a partnership firm, rights of a party which they inherit as members of a family. It also has to be seen that admittedly where Sri Ghannumal had executed a will and had devised his property in terms of the said will, then whether, while the said will subsists a family settlement can be taken note of and what would be its validity also is a point to be considered. These intricate questions are interweaved with the facts which have not been considered either by the Consolidation Officer or by the Settlement Officer of Consolidation.

46. It may be true that the DDC is the final Court of fact and law in but in the present case where the matter has

proceeded upon a tangent and ignoring the principles as attracted to the dispute in question de-hors the provisions of the Partnership Act and the parties have also not brought on record the requisite evidence which could support the respective contentions, hence, this Court is of the clear view that it cannot be said that the order of remand is bad in the given circumstance.

47. In the instant case, the matter does require a re-look and in the aforesaid circumstances this Court is satisfied that the order dated 20.09.2022 passed by the Deputy Director of Consolidation remanding the matter for decision afresh does not suffer from any error.

48. The fact that the parties have been litigating since long may not be the only reason for this Court to intervene as the questions which are involved have not been looked into by the Courts below, hence, in the aforesaid circumstances, the remand was the only option and thus taking care of the apprehension that the parties have been litigating since several years, this aspect can be taken care by directing the parties to appear before the Consolidation Officer concerned on 05.01.2023 and the parties shall be entitled to file any additional evidence they wish to file in support of their contentions in light of the issues raised before the Court within a period of three weeks of putting their appearance and thereafter the matter be decided by fixing dates on weekly basis within a further period of four weeks by affording a reasonable opportunity of hearing to the parties but without granting any unnecessary adjournments on any ground except in exceptional circumstances.

49. It is made clear that any observations by this Court may not be treated as an expression of opinion on merits but was for the limited purpose to assess the respective contentions of the parties in juxtaposition to test the order of remand passed by the Deputy Director of Conosolidation, hence, the Court of Consolidation Officer shall be free to decide the controversy on its own merits, in light of the issues and observations noticed in this judgment and on the basis of the evidence on record strictly, in accordance with law.

50. Keeping the order dated 20.09.2022 intact subject to the directions and observations as noted above, the petition is dismissed. In the facts and circumstances, there shall be no order as to costs.

(2023) 1 ILRA 779
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2022

BEFORE
THE HON'BLE CHANDRA KUMAR RAI, J.

Writ B No. 3586 of 2018

Smt. Saidan ...Petitioner
Versus
Board of Revenue, Allahabad & Ors. ...Respondents

Counsel for the Petitioner:
Sri Santosh Kumar Tiwari

Counsel for the Respondents:
C.S.C., Sri Arun Kumar Pandey

Civil Law - Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 - Section 157-A - Restrictions on transfer of land by members of Scheduled Castes - Auction sale - bar of Section 157-A of the U.P. Z.A. & L.R. Act will not apply in respect to the auction sale proceeding -

Section 157-A of the U.P.Z.A. & L.R. Act does not apply to a distraint sale for recovery of dues by the bank in accordance with law, as such, the restriction of prior permission from Collector could not apply (Para 12)

Civil Law - Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 - Section 157-A - Disputed plot initially recorded in the name of a scheduled caste - due to his failure to repay a loan, the mortgaged land was attached and put up for auction - In the auction proceeding, the petitioner, who belonged to upper caste, emerged as the highest bidder, and a sale deed was executed in his favour - On complaint that property in question originally belonged to scheduled caste, as such, same cannot be transferred to the petitioner, who belonged to upper caste, without obtaining permission from the Collector - On said complaint Additional Collector expunged the name of the petitioner from the revenue records and vested the property in favour of the State - Held - borrower who was the owner of the property belonged to the scheduled caste - property of the borrower was auctioned as per the U.P. Z.A. & L.R. Act - after the auction took place and affirmed, the said sale deed was executed in favour of the petitioner by the State, as such, the bar of section 157-A will not apply in the matter (Para 11)

Allowed. (E-5)

List of Cases cited:

1. Ram Saran Vs The 1st Addl. District Judge, Rampur and Others, Civil Misc. Writ Petition No.28205/1992 1981 All. L.J. 794 794,

2. Harmal Vs Special / Addl. District Judge, decided on 1.10.1992

3. Shyam Sunder and Others Vs Deputy Director of Consolidation, Sitapur & ors. 2019 0 Supreme (All) 37

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

1. Heard Mr. Santosh Kumar Tiwari, counsel for the petitioner, Sri Arun Kumar Pandey, counsel for the respondent - gaon sabha and the learned standing counsel for respondent nos. 1 & 2.

2. Brief facts of the case are that khata no.4. khasra no.6/12, area 1.265 hectare situated at mauja- Sabuwala, Pargana- Badhapur, Tehsil- Nagina, District Bijnor, was initially recorded in the name of Amar Singh, son of Sukke who belongs to the scheduled caste community. Amar Singh had taken a loan from Khadi Gramodyog by mortgaging the aforesaid land but the borrower failed to repay the amount, accordingly, the mortgaged land was attached and put to auction. In the auction proceeding, petitioner was the highest bidder, accordingly, the sale deed was executed in favour of the petitioner on the basis of auction sale took place on 21.12.2000. On the basis of the sale deed, name of the petitioner was recorded in the revenue records through mutation proceeding. Some complaints were lodged by respondent nos. 4 to 10 before the Additional Collector stating that property in question originally belongs to scheduled caste, as such, same cannot be transferred to the petitioner, without obtaining permission from the Collector. The Additional Collector without affording any opportunity of hearing to the petitioner, passed an ex parte order dated 6.10.2008, expunging the name of the petitioner from the revenue records and vesting the property in favour of the State. Petitioner filed a restoration application, delay condonation application and stay application against the order dated 6.10.2008 but the Additional Collector has

dismissed the restoration application of the petitioner vide order dated 9.4.2009 on the ground that petitioner was not party in the proceeding, hence the order dated 6.11.2008, cannot be recalled / set aside on the application of the petitioner. Petitioner under the legal advice, challenged the orders dated 6.10.2008 and 9.4.2009 before the District Consumer Redressal Forum, Bijnor by means of filing a Complaint Case No.167/2009 which was dismissed on 1.1.2011 on the ground that Forum has no jurisdiction to decide the dispute. After receiving the certified copies of the order and other relevant documents, petitioner approached counsel for taking necessary steps in the matter, accordingly, a revision was filed before the Board of Revenue on 22.12.2017 along with an application under Section 5 of the Limitation Act supported by an affidavit. The Board of Revenue, without considering the case of the petitioner on merit, has dismissed the revision filed by the petitioner on the ground of limitation. Hence, this writ petition.

3. This Court while entertaining the writ petition has passed the following interim order dated 23.4.2018:-

"It is contended on behalf of the petitioner that Plot No.4 area 1.265 hectare has been purchased by the petitioner in auction. Owner of the said land, namely, Amar Singh had taken loan from Khadi Gramodyog by mortgaging the aforesaid land in favour of the Khadi Gramodyog. Due to default in payment of loan amount, the said land was put to auction and the petitioner being a highest bidder had purchased the said land. A copy of the sale deed executed by the concerned authority is on record as Annexure No.1 to the writ petition. It is stated that without considering the matter in its proper perspective, the second application of the petitioner has wrongly been rejected by the Board of Revenue.

The matter needs consideration.

Learned Standing Counsel has accepted notice on behalf of the respondent no.3.

Issue notice to the respondent nos. 4 to 10.

Counter affidavit be filed by all the respondents on or before date fixed.

List this case on 28th August 2018.

Till the next date of listing, both the parties shall maintain status quo with regard to the property in dispute."

4. In pursuance of the order dated 23.4.2018, respondent no.3 has filed his counter affidavit and petitioner has filed his rejoinder affidavit also. Service upon respondent nos.4 to 10 is deemed sufficient as per office report dated 27.8.2018.

5. Counsel for the petitioner submitted that petitioner had purchased the land in question in an auction sale being the highest bidder, accordingly, the sale deed was executed in favour of the petitioner by the State, as such, the bar of Section 157-A of the U.P.Z.A. & L.R. Act cannot be imposed upon the petitioner in spite of the fact that borrower belongs to the scheduled caste community. He further submitted that on the basis of the auction sale, a sale certificate and sale deed executed in favour of the petitioner, the name of petitioner was recorded in the revenue records but without affording opportunity of hearing to the petitioner, petitioner's entry has been expunged and the land was ordered to be vested in the State. He also submitted that the recall / restoration application filed by the petitioner has been dismissed on the

arbitrary ground that petitioner was not party in the proceeding under Section 157-A, as such, there is no necessity to afford opportunity to the petitioner. He further submitted that revision filed before the Board of Revenue against the order of the Additional Collector was barred by limitation but the delay was properly explained, the Board of Revenue has dismissed the revision on the ground of limitation which is illegal.

6. Counsel for the petitioner placed reliance upon the judgment reported in **1981 All. L.J. 794 794, Ram Saran vs. The 1st Addl. District Judge, Rampur and Others, Civil Misc. Writ Petition No.28205/1992, Harmal vs. Special / Addl. District Judge, decided on 1.10.1992, 2019 0 Supreme (All) 37, Shyam Sunder and Others vs. Deputy Director of Consolidation, Sitapur and Others.** Counsel for the petitioner, on the basis of the aforesaid judgments, submitted that bar of Section 157-A of the U.P. Z.A. & L.R. Act will not apply in respect to the auction sale proceeding. Counsel for the petitioner further placed reliance upon the judgment reported in **AIR 1987 SC 1353, Collector, Land Acquisition Anantnag and Another vs. Mst. Kantiji & Others** on the point that in place of deciding the dispute on technical grounds, the matter should be adjudicated on merit. It is also submitted that the writ petition be allowed and the petitioner, who is a *parda nasheen* lady is entitled to the relief claimed in the writ petition.

7. On the other hand, learned standing counsel submitted that revision filed by the petitioner before the Board of Revenue was filed with inordinate delay of about 7 years, as such, the revision was rightly dismissed by the Board of Revenue on the ground of limitation. He further submitted that sufficiency of cause and reality of cause are two different things and while considering the reality of cause, there can be no liberal view of the matter, as such, case law cited by counsel for the petitioner in the case of **Collector, Land Acquisition Anantnag and Another** (supra), will not be applicable. He further submitted that the land has been rightly vested in the State as provisions of Section 157-A of the U.P. Z.A. & L.R. Act is fulfilled.

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

9. There is no dispute about the fact that the petitioner is the highest bidder in the auction sale proceeding which was held on 21.12.2000 and the sale deed was accordingly executed in favour of the petitioner by State after holding auction of the property belonging to borrower who belongs to scheduled caste community. The name of the petitioner was accordingly recorded in the revenue records but the proceedings under Section 157-A have been initiated and the land of the petitioner has been vested in the State after expunging his name. The revision filed by the petitioner with delay before the Board of Revenue was dismissed on the ground of limitation.

10. For appreciating the controversy involved in the instant petition, a perusal of Section 157-A of the Act will be necessary which is as follows:

"157-A Restrictions on transfer of land by members of Scheduled Castes.-

(1) Without prejudice to the restriction contained in Sections 153 to

157, no bhumidhar or asami belonging to a scheduled caster shall have the right to transfer any land by way of sale, gift, mortgage or lease to a person not belonging to a scheduled caste, except with the previous approval of the Collector:

Provided that no such approval shall be given by the Collector in case where the land held in Uttar Pradesh by the transferor on the date of application under this section is less than 1.26 hectares or where the area of land so held in Uttar Pradesh by the transferor on the said date is after such transfer, likely to be reduced to less than 1.26 hectares.

(2) The Collector shall, on an application made in that behalf in the prescribed manner, make such inquiry as may be prescribed."

11. The perusal of the Section 157-A of the U.P. Z.A. & L.R. Act fully demonstrates that when a person belonging to the scheduled caste, is transferring his property to a person not belonging to a scheduled caste, the previous approval of the Collector is mandatory but in the present case the borrower who was the owner of the property belong to the scheduled caste and the property of the borrower was auctioned according to the provisions contained under the U.P. Z.A. & L.R. Act and the Rules framed thereunder, after the auction took place and affirmed, the said sale deed was executed in favour of the petitioner by the State, as such, the bar of section 157-A will not apply in the matter.

12. This Court in **Shyam Sunder** (supra) has considered the controversy relating to Section 157-A and has held that Section 157-A of the U.P.Z.A. & L.R. Act does not apply to a distraint sale for recovery of dues by the bank in accordance with law, as such, the restriction of prior permission from Collector could not apply. Paragraph no.10 of the judgment in Shyam Sunder (supra) is as follows:

"10. As regards the other contention based on Section 157-A of the Act, 1950 is concerned, the said provision intents to protect the Schedule Caste persons from exploitation or fraudulent transaction under undue influence, coercion etc. The transaction at hand is not such a transaction but is a transaction permissible in law for recovery of dues. Here also the provision applies to a bhoomidhar, Asami belonging to a Schedule Caste, who shall have the right to transfer any land by way of sale, gift, mortgage or lease to a person not belonging to a Schedule Caste, with the previous approval of the Collector. This does not apply to a distraint sale for recovery of dues by a Bank in accordance with law as is the case at hand. In this regard also there is a direct decision on the point reported in 1981 RD 252; Ram Saran Vs. 1st Additional District Judge, Rampur and Ors. wherein it has been held that the said restriction of prior permission from Collector applies to voluntary sale by the Bhoomidhar but not to forced sale undertaken under the coercive steps and distraint prescribed under the Act, 1989 and the Rules, 1971 referred hereinabove. The principle contained therein applies to this case also."

13. Paragraph no.7 of the judgment rendered in **Ram Saran** (supra) is also relevant which is as follows:-

"7. Learned counsel for the petitioner has particularly relied on Section 23(2) of the Act which provides that nothing in sub-section (1) shall apply to any sale

made under order of court in execution of any decree or order for payment of money. The Legislature was aware of the fact that the sale by an auction may come up for consideration in execution of a decree which specifically excludes the said sale under Section 23 of the Act. No such specific provision has been made under Section 157-A of the Act. In the circumstances Section 23 does not advance the arguments made on behalf of the petitioner but in fact supports the view which I have already taken above. In any case as I have already stated above here it is not a case for transfer by the petitioner in favour of a third party. It is a case of an auction sale held in pursuance of the decree by the court passed against the petitioner."

14. Considering the provisions of Section 157-A of the U.P.Z.A. & L.R. Act as well as ratio of law laid down in **Shyam Sunder** (supra) & **Ram Saran** (supra), it is very much clear that bar of Section 157-A of the U.P. Z.A. & L.R. Act will not be applicable in the present matter where the sale deed has been executed after auction sale by state in favour of petitioner who belongs to upper caste irrespective of the fact that earlier owner of the land who was borrower, belongs to scheduled caste community.

15. So far as the dismissal of revision by the Board of Revision on the ground of limitation is concerned, the Apex Court in the case of **Collector, Land Acquisition Anantnag and Another** (supra) has held that in place of deciding the dispute on technical ground, the controversy should be conducted on merits.

16. In the present case, since the bar of Section 157-A of the U.P. Z.A. & L.R. Act is not applicable, as such, the Board of Revenue in place of dismissing the revision on limitation, should have considered the revision on merit, as such, the impugned revisional order cannot be sustained in the eyes of law. The order impugned passed by the Additional Collector, rejecting the recall application of the petitioner on the ground that petitioner has no authority in the proceeding under Section 157-A of the U.P.Z.A. & L.R. Act, is also erroneous.

17. Considering the facts and circumstances of the case as well as the ratio of law laid down by this Court, the right of the petitioner cannot be infringed and the property cannot be vested in the State due to bar contained under Section 157-A of the U.P. Z.A. & L.R. Act, as such, the impugned order dated 23.2.2018 passed by the Board of Revenue and orders dated 9.4.2009 and 6.10.2008 passed by the Additional Collector (Administration), District Bijnor are liable to be set aside and the same are hereby set aside.

18. **The writ petition stands allowed** and the petitioner's entry shall remain intact on the basis of the sale deed executed in favour of the petitioner on 27.3.2001 in respect of the disputed plots.

19. No order as to costs.

(2023) 1 ILRA 784
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.11.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ B No. 15899 of 1985

Harbar Chamar ...Petitioner
Versus
Board of Revenue U.P. at Allahabad & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjai Srivastava, Sri H.N. Pandey, Sri Rajesh Kumar Tripathi

Counsel for the Respondents:
S.C., Sri M.N. Singh, Sri Bhupendra Kumar Tripathi

Civil Law - Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 - Sections 112-B & 122-B (4-F) - - Whether Lekhpal in his individual capacity, without any resolution of the Gaon Sabha, has right to file restoration application against the order conferring sirdari right? - Petitioner, belonged to the scheduled caste & was a landless agricultural laborer - Proceedings initiated u/s 122-B UPZLR Act - Lekhpal stated that the petitioner had been in possession since June 1976 - In a report dated 30.03.1977, the Tehsildar mentioned that the petitioner had been in possession since before 30.06.1975 and recommended that the petitioner be declared a Sirdar in accordance with Section 122-B (4-F) of the Act - Subsequently, the Sub Divisional Officer dropped the proceedings u/s 122-B of the Act and conferred Sirdari rights on the petitioner - Later, the Lekhpal filed a restoration application against the Tehsildar's order - *Held* - Petitioner, being a member of the scheduled caste community and a landless agricultural laborer, & had been in continuous possession since before 30.06.1975 - relevant date of possession under Section 122-B (4-F) of the U.P.Z.A. & L.R. Act was now 13.05.2007 instead of 30.06.1975 - Lekhpal in his individual capacity, without any resolution of the Gaon Sabha, has no right to file restoration application, which was in violation of para 128 of the Gaon Sabha Manual - trial court, without affording the petitioner an opportunity for a hearing, unlawfully set aside the earlier order - Board of Revenue arbitrarily dismissed the revisions filed by the petitioner – Earlier order of trial court dated 19.04.1977 granting benefit of section 122-B (4F) of U.P.Z.A.&L.R. Act in favour of petitioner affirmed (Para 18)

Allowed. (E-5)

List of Cases cited:

1. Manorey @ Manohar Vs Board of Revenue & ors. A.I.R. 2003 SC 4102 2003 (94) RD 538

2. Azimullah Vs Gram Sabha 1971 R.D. 115

3. Jagdish Pandey (dead) through LRs. Vs Additional Collector (City) Gorakhpur & ors. 2011 (114) RD 106

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

1. Heard Mr. Rajesh Kumar Tripathi and Mr. H.N. Pandey, Counsel for the petitioner, learned Standing Counsel for respondent Nos.1, 2, 3 and 5 and Mr. Bhupendra Kumar Tripathi, Counsel for respondent Nos.4 and 6.

2. The brief facts of the case are that proceeding under Section 122-B of U.P. Z.A.& L.R. Act was initiated against the petitioner in respect to plot No.314 area 1.28 acre on the basis of report of lekhpal that petitioner is in illegal possession of Gaon Sabha land. Petitioner filed his objection stating that petitioner belongs to scheduled caste community and he is in possession of disputed plot since before 30.06.1975 and having land less than one (1) acre as such petitioner is entitled to be recorded as sirdar. Lekhapl was examined before the Court and stated that petitioner belongs to scheduled caste community, his possession is since June 1976. Sub-Divisional Officer vide order dated 19.04.1977 on the basis of oral and documentary evidence on the record of the

case has declared the petitioner as sirdar of the plot in dispute. A restoration application without any prayer for condonation of delay has been filed by lekhpal on 25.05.1977 to recall the order dated 19.04.1977. The Sub-divisional officer vide his order dated 12.10.1977 allowed the restoration application setting aside the order dated 19.04.1977 and sent the record before Tehsildar for necessary action. Petitioner challenged the order dated 12.10.1977 before the Commissioner through revision and Additional Commissioner recommended the revision before Board of Revenue through reference vide order dated 19.09.1978 that revision be allowed on the ground the Lekhpal in his individual capacity has no right to file restoration application and Sub-Divisional officer without hearing the petitioner has set aside the order dated 19.04.1977, but board of revenue vide order dated 10.07.1985 dismissed the revision of petitioner and maintained the order of trial court date 12.10.1977. Hence this writ petition.

3. This court while entertaining the writ petition has passed the following interim order dated 12.11.1987:-

"Mr. K. B. Garg, learned counsel for the gaon sabha prays for and is granted two months' time for filing a counter affidavit. Rejoinder affidavit, if any, may be filed within another one month. List the petition for admission on 08.03.1988.

Until further orders of this Court, the petitioner shall not be dispossessed from the land in dispute."

4. On 04.07.1988 writ petition was admitted and following interim order was passed:-

"Issue notice.

Until further orders of this Court, the petitioner shall not be dispossessed from the land in dispute."

5. In pursuance of the order dated 12.11.1987/ 04.07.1988 Standing Counsel filed counter affidavit along with stay vacation application on 09.05.2012 which was heard and disposed of vide order dated 24.07.2012, the order runs as follows:-

"This is a stay vacation application filed on behalf of respondents no. 3 and 5 along with counter affidavit. Learned counsel for the petitioner states that he does not intend to file rejoinder affidavit.

According to learned Standing Counsel under the interim orders dated 04.07.1988 and 12.11.1987 the dispossession of the petitioner from the land in dispute has been stayed which requires to be vacated in view of the averments made in the counter affidavit to the effect that although the Tehsildar had recommended that the petitioner would be entitled and be given benefit of Section 122-B (4-F) of the U.P.Z.A. & L.R. Act but the Lekhpal was competent to file a restoration application against the said order of the Tehsildar since the proceedings under Section 122-B were initiated on the report of the Lekhpal.

Learned counsel for the petitioner has submitted that under the impugned order passed in Reference no. 208 of 1978-79 (Harbar Chamar Vs Board of Revenue and others) the revisional court has illegally held that the Lekhpal could file an application to recall the order dated 30.3.1977 passed by the Tehsildar wherein he had recommended that the petitioner be declared Sirdar in accordance with Section 122-B (4-F) of

the Act whereupon the Sub Divisional Officer had dropped the proceedings under Section 122-B of the Act and conferred sirdari rights on the petitioner. He states that once the sirdari rights had been conferred on the report of the Tehsildar the Lekhpal could not have filed a restoration application.

The submissions require adjudication.

In view of the aforesaid circumstances the stay vacation application stands dismissed. The interim order dated 4.7.1988 stands confirmed.

No order is passed as to costs"

6. Counsel for the petitioner submitted that petitioner belongs to the scheduled caste Community and is a landless agricultural labourer. He further submitted that petitioner is in possession since before 30.06.1975. He further submitted that trial court on the basis of report submitted by the Tehsildar has granted benefit of Section 122B (4F) of U.P. Zamindari Abolition and Land Reforms Act, 1950 in favour of the petitioner and declared the petitioner as sirdar vide order dated 19.04.1977. He next submitted that against the order of trial court dated 19.04.1977 Lekhpal filed a restoration application without any prayer for condonation of delay and trial court vide order dated 12.10.1977 has allowed the restoration application and set aside the order dated 19.04.1977 without affording any opportunity to the petitioner. He next submitted that against the order dated 12.10.1977 revision filed by the petitioner, has been dismissed without considering the case of the petitioner. Counsel for the petitioner has relied upon the provisions contained under Section 122-B -(4F) of U.P.Z.A.&L.R. Act, which is as follows:

"Section 122-B(4F):- Notwithstanding anything in the foregoing sub-section, where any agricultural labourer belonging to a Scheduled Caste or Scheduled Tribe is in occupation of any land vested in a Gaon Sabha under Section 117 (not being land mentioned in section 132) having occupied it from before (May 13, 2007) and the land so occupied together with land, if any, held by him from before the said date as bhumidhar, sirdar or assami does not exceed 1.26 hectares (3.125 acres) then no action under this section shall be taken by the Land Management Committee or the Collector against such labourer, and he shall be admitted bhumidhar with non-transferable rights of this land under Section 195 and it shall not be necessary for him to institute a suit for declaration of his rights as bhumidhar with non-transferable rights in that land."

7. Counsel for the petitioner further submitted that application for restoration/recall filed by lekhpal is against the provisions contained under para 128 of Gaon Sabha Mannual. He placed reliance upon the judgment reported in ***1971 R.D. 115 Azimullah Vs. Gram Sabha.***

8. On the other hand, learned Standing Counsel as well as counsel for respondent-gaon sabha submitted that earlier order of trial court has been recalled on the ground that petitioner was not found in possession on the relevant date, as such no interference is required in the matter and writ petition is liable to be dismissed.

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

10. There is no dispute about the fact that petitioner belongs to scheduled caste community and was having 1.28 acre of land on the relevant date as such he was land less agricultural labourer. According to the petitioner, he is in possession of disputed plot since before 30.06.1975, but in the proceeding initiated under Section 122-B of UPZA & LR Act Lekhpal in his statement stated that petitioner is in possession since June 1976. Tehsildar in his report dated 30.03.1977 mentioned that from the oral evidence and the documentary evidences adduced in the proceeding under Section 122-B of U.P.Z.A.& L.R. Act, it is established that petitioner is in possession sine before 30.06.1975 accordingly trial court vide order dated 19.04.1977 granted benefit of Section122-B (4F) of U.P.Z.A. & L.R. Act to the petitioner and ordered to record the petitioner as sirdar. On the recall application of Lekhpal the order of trial court dated 19.04.1977 has been set aside vide order dated 12.10.1977 without any opportunity of hearing to the petitioner. Against the order of trial court dated 12.10.1977 petitioner filed revision which was sent before Board of Revenue through reference for allowing the revision but Board of Revenue has dismissed the revision and maintained the order of trial court dated 12.10.1977.

11. Since the trial court while ordering to record the name of petitioner has sirdar giving benefit of section-122-B (4F) of U.P. Z.A. & L.R. Act has considered the report of Tehsildar dated 30.03.1977 which was submitted after considering the statement of lekhpal, members of Gaon Sabha, petitioners & revenue records as such the order of trial court cannot be set aside on the recall application filed by lekhpal without any resolution of the Gaon Sabha, the basis of the restoration application is that he has stated before the Court that petitioner is in possession since June 1976. The trial court as well as Tehsildar has considered the Statement of the lekhpal as well as the statement of the members of the gram sabha so lekhpal has no locus to file restoration/recall application on the same ground which was already considered by the trial court and without affording opportunity of hearing to the petitioner the order passed on 19.04.1977 has been set aside and the revision filed by petitioner has been dismissed, which is arbitrary approach of the trial court and revisional court.

12. The Hon'ble Apex Court in the case reported in **A.I.R. 2003 SC 4102 = 2003 (94) RD 538 Manorey @ Manohar Vs. Board of Revenue and others** discussed the scope of Section 122-B (4F) of U.P.Z.A. & L.R. Act and has held that provisions contained under Section 122-B (4F) of the U.P.Z.A.&L.R. Act are beneficial provision and person is not liable to eviction if once claim is accepted it is bounden duty of the revenue authorities to make necessary entry in the revenue records. **Paragraph Nos.8, 9, 10, 11 and 12** of the judgment rendered in **Manorey (Supra)** are as follows:

"....8. First, the endeavour should be to analyze and identify the nature of the right or protection conferred by sub-Section (4F) of Section 122B. Sub-Sections (1) to (3) and the ancillary provisions upto sub-Section (4E) deal inter alia with the procedure for eviction of unauthorized occupants of land vested in Gaon Sabha. Sub- Section (4F) carves out an exception in favour of an agricultural labourer belonging to a

Scheduled Caste or Scheduled Tribe having land below the ceiling of 3.125 acres. Irrespective of the circumstances in which such eligible person occupied the land vested in Gaon Sabha (other than the land mentioned in Section 132), no action to evict him shall be taken and moreover, he shall be deemed to have been admitted as a Bhumidhar with non transferable rights over the land, provided he satisfies the conditions specified in the sub-Section. According to the findings of the Sub- Divisional Officer as well as the appellate authority, the appellant does satisfy the conditions. If so, two legal consequences follow. Such occupant of the land shall not be evicted by taking recourse to sub-Section (1) to (3) of Section 122B. It means that the occupant of the land who satisfies the conditions under sub-Section (4F) is entitled to safeguard his possession as against the Gaon Sabha. The second and more important right which sub-Section (4F) confers on him is that he is endowed with the rights of a Bhumidhar with non transferable rights. The deeming provision has been specifically enacted as a measure of agrarian reform, with a thrust on socio-economic justice. The statutorily conferred right of Bhumidhar with non-transferable rights finds its echo in clause (b) of Section 131. Any person who acquires the rights of Bhumidhar under or in accordance with the provisions of the Act is recognized under Section 131 as falling within the class of Bhumidhar. The right acquired or accrued under sub-Section (4F) is one such right that falls within the purview of Section 131(b).

9. Thus, sub-Section (4F) of Section 122B not merely provides a shield to protect the possession as opined by the High Court, but it also confers a positive right of Bhumidhar on the occupant of the land satisfying the criteria laid down in that sub-Section. Notwithstanding the clear language in which the deeming provision is couched and the ameliorative purpose of the legislation, the learned single Judge of the High Court had taken the view in Ramdin Vs. Board of Revenue (supra) (followed by the same learned Judge in the instant case) that the Bhumidhari rights of the occupant contemplated by sub-Section (4F) can only blossom out when there is a specific allotment order by the Land Management Committee under Section 198. According to the High Court, the deeming provision contained in sub-Section (4F) cannot be overstretched to supersede the other provisions in the Act dealing specifically with the creation of the right of Bhumidhar. In other words, the view of the High Court was that a person covered by the beneficial provision contained in sub-Section (4F) will have to still go through the process of allotment under Section 198 even though he is not liable for eviction. As a corollary to this view, it was held that the occupant was not entitled to seek correction of revenue records, even if his case falls under sub-Section (4F) of Section 122B. We hold that the view of the High Court is clearly unsustainable. It amounts to ignoring the effect of a deeming provision enacted with a definite social purpose. When once the deeming provision unequivocally provides for the admission of the person satisfying the requisite criteria laid down in the provision as Bhumidhar with non-transferable rights under Section 195, full effect must be given to it. Section 195 lays down that the Land Management Committee, with the previous approval of the Assistant Collector in-charge of the Sub Division, shall have the right to admit any person as Bhumidhar with non-

transferable rights to any vacant land (other than the land falling under Section 132) vested in the Gaon Sabha. Section 198 prescribes "the order of preference in admitting persons to land under Sections 195 and 197". The last part of sub-Section (4F) of Section 122B confers by a statutory fiction the status of Bhumidhar with non transferable rights on the eligible occupant of the land as if he has been admitted as such under Section 195. In substance and in effect, the deeming provision declares that the statutorily recognized Bhumidhar should be as good as a person admitted to Bhumidhari rights under Section 195 read with other provisions. In a way, sub-Section (4F) supplements Section 195 by specifically granting the same benefit to a person coming within the protective umbrella of that sub-Section. The need to approach the Gaon Sabha under Section 195 read with Section 198 is obviated by the deeming provision contained in sub-Section (4F). We find no warrant to constrict the scope of deeming provision.

10. That being the legal position, there is no bar against an application being made by the eligible person coming within the four corners of sub-Section (4F) to effect necessary changes in the revenue record. When once the claim of the applicant is accepted, it is the bounden duty of the concerned revenue authorities to make necessary entries in revenue records to give effect to the statutory mandate. The obligation to do so arises by necessary implication by reason of the statutory right vested in the person coming within the ambit of sub-Section (4F). The lack of specific provision for making an application under the Act is no ground to dismiss the application as not maintainable. The revenue records should naturally fall in line with the rights statutorily recognized. The Sub-Divisional Officer was therefore within his rights to allow the application and direct the correction of the records. The Board of Revenue and the High Court should not have set aside that order. The fact that the Land Management Committee of Gaon Sabha had created lease hold rights in favour of the respondents herein is of no consequence. Such lease, in the face of the statutory right of the appellant, is nonest in the eye of law and is liable to be ignored.

11. It is surprising that the State of U.P. had chosen to file an appeal against the order of the S.D.O., in tandem with the Gaon Sabha. It seems to be a clear case of non-application of mind on the part of the concerned authorities of the State who are supposed to effectuate the socio-economic objective of the legislation.

12. The appeal is allowed. The orders of the Board of Revenue and the High Court are set aside. The S.D.O's order is restored. No costs."

13. In the present case, the trial court on the basis of the report of Tehsildar dated 30.03.1977 has found that for granting the benefit of 122B (4F) of U.P.Z.A. & L.R. Act in favour of petitioner all the ingredients are fulfilled accordingly trial court has ordered to record the name of petitioner as sirdar as such lekhpal has no authority to file restoration/recall application in violation of para 128 of Gaon Sabha Manual, the trial court without affording opportunity of hearing to petitioner has set aside the earlier order by which petitioner was given benefit of Section 122-B (4-F) of U.P.Z.A. & L.R. Act as such the order of trial court was rightly ordered to be set aside by Additional Commissioner through reference to board

of Revenue but Board of Revenue has arbitrarily dismissed the revisions filed by petitioner and maintained the ex parte order of trial court dated 12.10.1977.

14. Counsel for the petitioner relied upon the judgment of **Board of Revenue reported in 1971 R.D. Page-115 Azimullah Vs. Gaon Sabha** in which it has been held that Goan Samaj Litigation cannot be conducted at the sweet will of member of Gaon Sabha.

15. This Court in the case reported in **2011 (114) RD 106 Jagdish Pandey (dead) through LRs. Vs. Additional Collector (City) Gorakhpur and others** has held that provision of para 128 of Gaon Sabha are binding and peremptory in nature. Relevant paragraph Nos.13 and 14 of the judgment are as follows:

"...13. The provisions of Para 131 appear to be binding and peremptory in nature. The procedure therein cannot be bypassed or else it would lead to a chaos. If any person or villager is allowed to sign documents the same would be not only inappropriate but also illegal as such a person will have no authority to represent a Gaon Sabha. The said provision cannot be wished off merely as directory in view of he language employed therein.

14. In view of the aforesaid conclusions drawn, the order impugned dated 14th March, 1997 is unsustainable and is hereby quashed. Consequently the revision which has been decided by the order dated 28th April, 1997 was also an incompetent order and the same is also set aside."

16. There is one more aspect of the case that the basis of the restoration/ recall application of the lekhpal was that petitioner is in possession since June 1976 but there was no dispute that petitioner belongs to scheduled caste community and is a landless agricultural labourer. The cut of date/ relevant date of possession under Section 122-B (4-F) of U.P.Z.A.&L.R. Act has become 13.05.2007 from 30.06.1975. The petitioner is in continuous possession since before 30.06.1975 according to petitioner as well as on the basis of other evidence but according to statement of lekhpal petitioner is in possession since June 1976. This court has stayed the dispossession of the petitioner vide interim order dated 12.11.1987/ 4.07.1988 and confirmed the interim order vide order dated 24.07.2012 rejecting the stay vacation application filed by State, which fully demonstrate the possession of the petitioner over the disputed plot since long.

17. Considering the entire facts and circumstances of the case as well as the ratio of law laid down by Apex Court in the **Manorey (Supra)** the impugned order dated 10.07.1985 passed by respondent No.1 and order dated 12.10.1977 passed by respondent No.3 are liable to be set aside and are hereby set aside.

18. **The writ petition stands allowe**d and the order of trial court dated 19.04.1977 granting benefit of section 122-B (4F) of U.P.Z.A.&L.R. Act in favour of petitioner is hereby affirmed.

19. No order as to costs.

(2023) 1 ILRA 792
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.12.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ B No. 68155 of 2006

Prem Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri K.N. Mishra

Counsel for the Respondents:
C.S.C., Sri A.K. Srivastava, Sri Ashish Kumar Srivastav, Sri V.K. Singh, Sri Avinash Chandra Srivastava

A. Civil Law - U.P. Land Revenue Act, 1901 - Sections 33 & 39 - Correction of mistakes in the annual register - title question, etc. cannot be gone into summary proceedings u/s 33/39 - S. 39 does not empower the Collector to decide a dispute involving any question of title (Para 10)

B. Civil Law - Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 - Section 198 - power to cancel a lease or an allotment of land lay only in the Collector subject to a revision under Section 333 of the Act - the consolidation authorities did not have jurisdiction to decide the question of validity of the lease or allotment (Para 12)

C. Civil Law - U.P. Land Revenue Act, 1901 - Sections 33 & 39 - Petitioner was granted lease in the year 1983 - lease certificate was issued, possession proceedings were executed in favor of the petitioner, and a revenue entry was made in the petitioner's name - No proceeding for the cancellation of the petitioner's lease was initiated - neither the State nor the Gaon Sabha took any action regarding the lease granted to the petitioner or the entry of the petitioner - In the year 1997, the petitioner was declared as a bhumidhar with transferable rights, and a revision filed against this order on 25.2.1997 by a stranger, Gyan Singh, was dismissed on 18.4.2022 - Held - petitioner's entry cannot be expunged in a summary proceeding, exercising jurisdiction under Section 33/39 of the U.P. Land Revenue Act - lease granted in favor of the petitioner affirmed (Para 8, 9, 10, 16)

Allowed. (E-5)

List of Cases cited:

1. Similesh Kumar Vs Gaon Sabha Uskar, Ghazipur & ors., 1977 RD 408

2. U.P. State Sugar Corp. Ltd. Vs Deputy Director of Consolidation & ors. 2000 (91) RD 165

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

1. Heard Sri K.N. Mishra, counsel for the petitioner, standing counsel for respondent nos. 1 to 4 and Sri Avinash Chandra Srivastava, counsel for the Land Management Committee.

2. Brief facts of the case are that petitioner was granted agricultural lease of the land which was declared surplus under the U.P. Imposition of Ceiling on Land Holdings Act, 1960. The lease was granted in favour of the petitioner in the year 1983 and on the basis of the lease, the petitioner was given possession of the allotted land and the name of the petitioner was accordingly recorded in the revenue records. The petitioner remained in possession of the disputed land and his name was recorded in the revenue records

and due to operation of law, petitioner became *bhumidhar* with transferable rights vide order dated 25.2.1997 in respect to land which was allotted to the petitioner in the year 1983. One Gyan Singh who has no locus in the matter, has filed a time barred revision under Section 219 of the U.P. Land Revenue Act against the order dated 25.2.1997, passed by the Sub-Divisional Officer, declaring the petitioner as *bhumidhar* with transferable rights. The revision was heard by the revisional court and the same was ultimately dismissed by the order dated 18.4.2002, although the observation was made in the same order of dismissal that the authorities will inquire the matter with respect to correction of the revenue entries of the plot in dispute. On the basis of the order dated 18.4.2002, proceeding was initiated under Sections 33/39 of the U.P. Land Revenue Act and the entry of the petitioner has been expunged vide order dated 24.7.2002 on the ground that the lease was not executed in favour of the petitioner. The petitioner challenged the order dated 24.7.2002 in revision before the Board of Revenue and the same was dismissed vide order dated 7.12.2005, hence this writ petition.

3. This Court while entertaining the writ petition has passed an order dated 2.2.2016 which is as follows:-

"Heard Sri K.N.Mishra, learned counsel for the petitioner and the learned standing counsel for the respondents.

While assailing the impugned order, learned counsel for the petitioner contends that once the respondents have admitted execution of lease in favour of the petitioner and granted right of *Bhumidhar* with transferable right in year 1997 it was not open for the respondents to expunge the name of the petitioner from the revenue record. Prima facie, I find substance in the submission of the learned counsel for the petitioner.

Matter requires scrutiny.

Issue notice.

Notices on behalf of respondent nos. 1 to 4 have been accepted by the office of the learned chief standing counsel. Learned counsel for the petitioner understands to serve a copy of the writ petition upon Sri Ashish Kumar Srivastava, learned counsel appearing for respondent no.5 within 48 hours, therefore, notice need not be issued to respondent nos. 1 to 5. Let notice be issued to respondent no.6 by registered post returnable at an early date. Steps be taken within two weeks.

The respondents are directed to file counter affidavit within six weeks. Rejoinder affidavit, if any, be filed within two weeks thereafter. List thereafter showing the name of Sri Ashish Kumar Srivastava as counsel for the respondent."

4. In pursuance of the order dated 2.2.2016, the gaon sabha has filed counter affidavit and the petitioner has filed rejoinder affidavit.

5. Counsel for the petitioner submitted that petitioner was granted agricultural lease in respect of the plot in dispute in the year 1983 and no proceeding for cancellation of petitioner's lease has been initiated till date. He further submitted that due to operation of law, petitioner was declared *bhumidhar* with transferable rights. He next submitted that respondent no.6 who has no authority / locus to challenge the petitioner's entry, had filed a revision, declaring the petitioner

bhumhidhar with transferable rights, although, the revision was dismissed but the observations have been made to inquire the revenue entry. He submitted that on the basis of the order of the revisional court, the entry of the petitioner has been expunged under Section 33/39 of the U.P. Land Revenue Act which is wholly illegal. He also submitted that the petitioner's lease has not been cancelled till date rather petitioner has been declared *bhumidhar* with transferable rights, as such, his entry cannot be expunged in the summary proceedings. He placed reliance on the scope of Section 33/39 of the U.P. Land Revenue Act, which is as follows:-

33. The annual registers. - (1) Tire Collector shall maintain the record-of-rights, and for that purpose shall annually, or at such longer intervals as the [State Government] may prescribe, cause to be prepared an amended [register mentioned in Section 32.]

The [register] so prepared shall be called the annual register.

[(2) The Collector shall cause to be recorded in the annual register -

(a) all successions and transfers in accordance with the provisions of Section 35; or

(b) other changes that may take place in respect of any land ; and shall also correct all errors and omissions in accordance with the provisions of Section 39 :

Provided that the power to record a change under clause (b) shall not be construed to include the power to decide a dispute involving any question of title.]

(3) [No such change or transaction shall be recorded without tire order of the Collector or as hereinafter provided, of tire Tahsildar or [the Kanungo].]

[(4) The Collector shall cause to be prepared and supplied to every person recorded as *bhumidhar,* whether with or without transferable rights, assami or Government Lessee a Kisan Bahi (Pass book) which shall contain -

(a) such extract from the annual register prepared under sub-section (1) relating to all holdings of which he is so recorded (either solely or jointly with others);

(b) details of grants sanctioned to him; and

(c) such other particulars as may be prescribed :

Provided that in the case of joint holdings it shall be sufficient for the purpose of this sub-section of Kisan Bahi (Pass book) is supplied to such one or more of the recorded co-sharers as may be prescribed.

(4A) The Kisan Bahi (Pass book) referred to in sub-section (4) shall be prepared in such manner and on payment of such fee, which shall be realisable as arrears of land revenue, as may be prescribed.

(5) Every such person shall be entitled, without payment of any extra fee, to get any amendment made in the annual register under sub-section (2) incorporated in his Kisan bahi (Pass book.)]

(6) The State Government may make rules to carry out the purposes of this section, including, in particular , rules, prescribing the mode of reception in evidence, and of proof in judicial proceedings, of entries in the [Kisan Bahi (Pass Book)], and the mode of its revision and authentication up-to-date and for issue of duplicate copies thereof, and tire

fees, if any, to be charged for any of the said purposes.

(7) In this section, 'prescribed' means prescribed by rules made by the State Government.

(8) Nothing in sub-sections (4) to (7) shall apply in relation to any area which is either under consolidation operations or under record operations.

39. Correction of mistakes in the annual register. - (1) An application for correction of any error or omission in the annual register shall be made to the Tahsildar.

(2) On receiving an application under sub-section (1) or any error or omission in the annual register coming to his knowledge otherwise, the Tahsildar shall make such inquiry as appears necessary and then refer the case to the Collector, who shall dispose it of, after deciding the dispute in accordance with the provisions of Section 40.]

[Provided that nothing in this sub-section shall be construed to empower the Collector to decide a dispute involving any question of title.]

(3) The provisions of sub-sections (1) and (2) shall prevail, notwithstanding anything contained in the U.P. Panchayat Raj Act, 1947.

6. On the other hand, counsel for the respondent - gaon sabha Mr. A.C. Srivastava and the learned standing counsel submitted that under the impugned order it has been found that there is nothing incriminating on record, as such, the lease appears to be fraudulent. He further submitted that jurisdiction under Sections 33/39 of the U.P. Land Revenue Act has been rightly exercised by courts below, as such, no interference is required in the matter and the writ petition is liable to be dismissed.

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

8. There is no dispute about the fact that petitioner was granted lease in the year 1983 which is very much proved from the lease certificate issued in favour of the petitioner, possession proceeding executed in favour of the petitioner as well as revenue entry made in favour of the petitioner. No proceeding for cancellation of the petitioner's lease has been initiated either under the U.P.Z.A. & L.R. Act or under the U.P. Imposition of Ceiling on Land Holdings Act, 1960.

9. Since the petitioner was granted lease in the year 1983 and no proceeding for cancellation of the sale deed has been initiated since 1983 till date, as such, petitioner's entry cannot be expunged in the summary proceeding.

10. The scope of Sections 33/39 as quoted above, fully demonstrates that title question, etc. cannot be gone into summary proceedings. In the instant case, petitioner was declared *bhumidhar* with transferable rights in the year 1997, petitioner's entry cannot be expunged in exercise of jurisdiction under Section 33/39 of the U.P. Land Revenue Act. It is also material that proceeding has been initiated one by Gyan Singh who has no authority / locus to challenge the order / entry of the petitioner. The State or the Gaon Sabha has not initiated any proceeding in respect to lease executed in favour of the petitioner or in respect to entry of petitioner as the gaon sabha has himself granted lease in favour of the petitioner in the year 1983.

11. There is one more aspect of the case that on the basis of lease executed in favour of the petitioner in the year 1983, the petitioner became *bhumidhar* with transferable rights vide order dated 25.2.1997 and revision filed against the order dated 25.2.1997 by stranger Gyan Singh was dismissed vide order dated 18.4.2022, as such, initiation of summary proceeding to expunge the petitioner's entry on the basis of observation made in the order dated 18.4.2022, dismissing the revision of the stranger Gyan Singh is wholly illegal and abuse of process of law.

12. This Court in Full Bench decision, reported in **1977 RD 408, Similesh Kumar vs. Gaon Sabha Uskar, Ghazipur and Others,** has held that in view of the amendments made to Section 198 of the Act that the power to cancel a lease or an allotment of land lay only in the Collector subject to a revision under Section 333 of the Act and, therefore, the consolidation authorities did not have jurisdiction to decide the question of validity of the lease or allotment.

13. In view of the ratio of law laid down in **Similesh Kumar** (supra) the exercise of summary proceeding to expunge the petitioner's entry is wholly illegal unless the lease exeucuted in favour of the petitioner is cancelled in accordance with law.

14. The Full Bench decision of **Similesh Kumar** (supra) has been distinguished by the Hon'ble Apex court in the case of **U.P. State Sugar Corporation Limited vs. Deputy Director of Consolidation and Others,** reported in **2000 (91) RD 16**5, holding that if the lease in question is void then the lease can be ignored but the same is not the position in the instant case as the lease was executed in favour of petitioners which is very much proved from the evidence on record and petitioner became *bhumidhar* with transferable rights also on the basis of lease in question, as such, there is no question that lease in question is void.

15. Considering the entire facts and circumstances of the case, the impugned order dated 7.12.2005, passed by respondent no.2 / Board of Revenue and the order dated 27.4.2002, passed by the Sub-Divisional Officer are liable to be set aside and the same are hereby set aside.

16. **The writ petition stands allowed.** The lease granted in favour of the petitioner is hereby affirmed.

17. No order as to costs.

(2023) 1 ILRA 796
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.11.2022

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Application U/S 482 No. 25924 of 2022

Gaurav Sharma ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Abhishek Tripathi, Sri Vibhu Rai

Counsel for the Opposite Parties:
G.A., Sri Sanjay Kumar Dubey

A. Criminal Law – Criminal Procedure Code, 1973 – Section 319 – Scope – Power of issuing the process against person appears to be guilty of offence – Power,

how can be exercised – Investigating Officer filed closure report in favour of applicant – Duty of trial court to see the material considered by the I.O. – Held, power under section 319 Cr.P.C. is to be exercised primarily for providing or espousing the cause of criminal justice. At the stage of section 319 CrPC, the trial court is duty bound to at least look into the material which persuaded the investigating officer to file a final report/closure report against an accused person – Hardeep Singh's case relied upon. (Para 7)

Application allowed (E-1)

List of Cases cited:-

1. Hardeep Singh Vs St. of Punj.; (2014) 3 SCC 92

2. Brijendra Singh & ors. Vs St. of Raj.; (2017)7 SCC 706

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

1. The petition has been filed under Section 482 CrPC for quashing order dated 28.7.2022 passed by Addl. district & Sessions Judge, Court No.5, Hathras in S.T. No.216 of 2019 State versus Yogesh Baghel and others and the further proceedings thereof, arising out of Case Crime No.126 of 2019 under sections 307, 147, 148, 149, 120-B I.P.C., P.S. Hathras Kowali, district Hathras.

2. Heard Mr. Vibhu Rai, learned counsel for the petitioner and learned A.G.A. for the State as also Mr. Sanjay Kumar Dubey, learned counsel for respondent No.2 who has submitted that he does not want to file any counter affidavit. Both the parties' counsel state that the matter may be finally decided.

3. Learned counsel for the petitioner submits that the petitioner is presently working as Assistant Clerk in Seth Harijan Das Girls Inter College, Hathras (to be hereafter referred to as 'college'). The injured Madan Mohan Gautam was also working as Clerk at that time in the college.

It is submitted that regarding forgery committed by the injured in his two appointment letters, a complaint was filed by the applicant to the District Magistrate, Hathras, on which a reply was called from the Manager. Thereafter, the District Inspector of Schools, Hathras directed the Manager on 31.8.2020 to submit a report regarding illegal appointment of injured Madam Mohan Gautam. In the meantime, Madam Mohan Gautam, injured was also involved in appointment of one Rajeshwari on class-IV post on forged and fabricated papers and he had also taken bribe to procure the said appointment in the college. When the said illegality was surfaced, Rajeshwari was removed from service and Madan Mohan Gautam was attached in the government labrary by the District Inspector of Schools. Since Rajeshwari has given huge amount of money for appointment to the injured Madan Mohan Gautam, hence her son Laltu alias Lalit was having enmity against Madan Mohan Gautam.

On the date of the incident, i.e. on 12.4.2019, the injured Madan Mohan Gautam was transferred back to the college and joined. On that day, he was attacked by Laltu alias Lalit along with the two co-accused persons. One gun shot injury was shown in the medical examination report.

It is submitted that in the first information report, presence of the applicant has not been shown on the spot, although suspicion was raised upon the applicant along with other co-accused persons.

The prosecution witness Yashomani Gautam (respondent No.2) who

is son of the injured in his statement has alleged that three accused persons fired on his father with an intent to kill, however, presence of the present applicant was not shown at the spot. Again, suspicion was raised by him.

Another son of the injured Rajatmani alias Rahul in his statement has clearly mentioned the name of three assailants, i.e. Vishal, Laltu and Kanha and has alleged that all the three assailants were on a Platina motorcycle and fired with an intent to kill at his father Madan Mohan Gautam. The injured Madan Mohan Gautam has also taken the name of aforesaid three accused persons, i.e. Vishal, Laltu and Kanha. He also did not show presence of the applicant at the place of occurrence. In fact, he has not even taken the name of the applicant in any manner. He even stated that he is not aware as to who is behind this conspiracy and this fact can be culled out by interrogation of Vishal, Laltu and Kanha.

The co-accused Laltu in his confessional statement has confessed the guilt and has stated that the conspiracy was hatched by him with other two co-accused persons and one motorcycle Platina black colour was also made available by Yogesh Baghel and some cash was also given by him. He has also not taken the name of the applicant in the incident. After conclusion of investigation, charge-sheet was filed by the investigating officer against Yogesh Kumar, Laltu, Vishal Sharma and Kanha. The investigating officer did not find complicity of the applicant. One Bajaj Platina Black motorcycle No.UP86 E 3056 was recovered.

Learned counsel for the applicant submits that on 4.2.2020, on a complaint made by the applicant, the Commissioner, Aligarh Region has directed District Magistrate, Hathras to conduct an enquiry in the matter of forgery committed by Madan Mohan Gautam regarding his two appointment letters.

It is submitted that after the aforesaid letter dated 4.2.2020 was written, P.W.2 Madan Mohan Gautam, injured was examined before the trial court. While being examined before the trial Court, he took a u-turn and for the first time in the prosecution case, second motorcycle was introduced by the injured witness. It is submitted that it is in the statement before the court, P.W.2 injured witness while introducing second motorcycle has stated in his cross-examination that the applicant was riding on the Splender motorcycle which belongs to him. He further stated that five persons were present at the place of occurrence. The Splender motorcycle was driven by Lalit on which Gaurav Sharma, Lalit and Yogesh Baghel were riding and Nitin and Vishal were riding on the Platina motorcycle.

It is contended by learned counsel for the applicant that the trial court has failed to consider the fact that the investigating officer after meticulous investigation and on the basis of confessional statement made by Lalit has filed the charge sheet and has recovered the Platina motorcycle. No other motorcycle was recovered by the investigating officer nor was found involved in the crime. Both the sons of injured as well as the injured himself have not assigned the role of firing to the applicant or shown his presence at the spot in their statements under section 161 CrPC. The statement given by the injured Madan Mohan Gautam before the court is nothing but a clear lie and has been used as a tool to exert pressure on the applicant who happens to be the complainant against him and on his complaint, an enquiry has already been ordered by the Commissioner, Aligarh

regarding the forgery committed by him in his appointment letter.

4. Per contra, learned A.G.A. and learned counsel for respondent No.2 have opposed the petition. They have submitted that while issuing process under section 319 CrPC, only prima facie case is to be seen. The court cannot go into deeper appreciation of the evidence at this stage.

5. A Constitution Bench of Supreme court in **Hardeep Singh** versus **State of Punjab** (2014)3 SCC 92 held that power under section 319 CrPC which is a discretionary and an extraordinary power is to be exercised sparingly and only in those cases where the circumstances of the case so warrant and when there are strong and cogent evidence against a person from the evidence led before the court. It has also been held that power is not to be exercised in a casual and cavalier manner. Relevant paras 105 and 106 are extracted below :

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

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused". The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused."

In the case of **Brijendra Singh and others versus State of Rajasthan** (2017)7 SCC 706 it has been held that the trial court is required to look into the material collected by the investigating officer during the course of investigation before forming prima facie opinion for summoning a person as an additional accused if that material collected by the investigating officer shows another story.

6. In the case in hand, the statement of the injured under section 161 CrPC and the statement of his two sons do not show the presence of the applicant at the place of occurrence. All three material prosecution witnesses have stated that only one Platina motorcycle was used. There is no whisper regarding the second motorcycle. However, at the time of statement and cross examination before the trial court, the injured witness has taken an U-turn and instead of three, has introduced five assailants, one additional motorcycle belonging to the applicant and therefore, the trial court should have at least taken note of their statements given to the investigating officer under section 161

CrPC, on the basis of which, the charge sheet was filed by the investigating officer and name of the applicant was dropped.

The fact that the accused Lalit has confessed his guilt in his statement under section 161 CrPC and only one motorcycle was recovered by the investigating officer should have also been taken note of, by the trial court.

7. It is well settled that power under section 319 CrPC is to be exercised primarily for providing or espousing the cause of criminal justice. At the stage of section 319 CrPC, the trial court is duty bound to at least look into the material which persuaded the investigating officer to file a final report/closure report against an accused person. The material on the basis of which the closure report against an accused has been filed and his name has been dropped while filing the charge sheet must be taken note of, by the trial court. Merely on a statement given by a prosecution witness and introducing altogether a new fact for the first time during trial which is in stark contradiction to the statement given by that person during investigation under section 161 CrPC, that too by an injured witness, additional accused which in this case is the applicant could not have been summoned. The trial court should have, therefore, noted statement given by the injured witness to the Investigating Officer, the statement of the two sons of the injured as well as the confessional statement of the main accused person and the recovery done by the investigating officer on the basis of which the police report was filed.

8. In the present case, the trial court has not considered the aforesaid material, i.e. the statement of the injured under section 161 CrPC, statement of his two sons under section 161 CrPC, confessional statement of the co-accused person, recovery of only one motorcycle, i.e. Platina and hence by overlooking the evidence collected by the investigating officer which demonstrate that the present applicant was not present at the time and place of occurrence, neither there was any material to indicate his conspiracy in the commission of offence and merely relying on the statement recorded during examination of the injured witness before it which finds no corroboration with the entire prosecution case earlier; rather is in stark contradiction to the earlier prosecution case and the material collected by the investigating officer, therefore, the impugned order cannot be sustained and is liable to be set aside.

9. Accordingly, the petition is allowed and the impugned order dated 28.7.2022 (supra) is set aside.

(2023) 1 ILRA 800
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.01.2023

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Application U/S 482 No. 161 of 2023

Sidhique Kappan ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Ishan Baghel, Mohd. Khalid

Counsel for the Opposite Party:
G.A.

A. Criminal Law – Criminal Procedure Code, 1973 – Sections 227, 228 & 482 – Discharge – Scope and object – Order of

framing of charge was passed without considering the discharge application – Legality challenged – Held, the procedure prescribed in Section 227 of Cr.P.C. for discharge of the accused is in fact safeguard and rider so that a person who has been alleged to commit an offence, may not be harassed for facing trial proceedings – Application of mind as well as assigning reasons for passing the order under section 227 of Cr.P.C. is of much importance, which has to care of by the trial court – High Court set aside the order of framing of charges. (Para 17 and 22)

B. Criminal Law – Criminal Procedure Code, 1973 – Sections 227 & 228 – Discharge – Application, how far necessary to be moved by the accused – Duty of Trial Court – Explained – It is not incumbent upon the accused that he must have moved an application for discharge. Even in a situation that there was no application for discharge moved, then it is incumbent upon the trial court to decide it that whether there is sufficient material available against the accused so as to frame charges. (Para 18)

C. Criminal Trial – Criminal Procedure Code,1973 – Section 304 – Fair trial – Amicus Curie – Condition of appointment – Explained – An Amicus Curiae can be appointed if the accused is not represented by a pleader or the accused has not sufficient means to engage a pleader – None-fulfillment of these conditions – Effect – Held, while appointing the amicus-curiae, the trial court did not mention the exigency as is envisaged in Section 304 of Cr.P.C. and no judicial mind has been applied while appointing the Amicus-Curiae. (Para 8 and 20)

Application allowed. (E-1)

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. Heard Sri I.B.Singh, learned Senior Advocate assisted by Sri Ishan Baghel, learned counsel for the applicant, Sri Anirudh Kumar Singh, learned A.G.A.-I for the State.

2. Instant application under section 482Cr.P.C. has been filed with a prayer to quash the order dated 19-12-2022 passed by the learned Special Judge, NIA/ATS/Additional District & Sessions Judge-5, Lucknow in Sessions Case No. 2219 of 2021, arising out of FIR No. 199 of 2020, Police Station-Mant, District-Mathura, under sections 153-A,295A,120-B I.P.C. and sections 17,18, of U.P.P.A. Act, 1967 & sections 65 & 72 of the I.T. Act, 2008. It has further been prayed to direct the learned Special Judge, NIA/ATS/Additional District & Sessions Judge-5, Lucknow to decide the Discharge Application dated 19-12-2022 of the applicant on merit, after affording opportunity of hearing.

3. The factual matrix of the case in brief is that the applicant is a Journalist and was working for AZHIMUKHAM. COM. and when he was travelling to Hathras to cover the incident of "Hathras Gangrape" for reporting, he was arrested and detained under sections 107,116 and 151 of Cr.P.C. on 05-10-2020 and was produced before the SDM Court at Mathura on 06-10-2020 and thereafter, he was sent to judicial remand under section 167 Cr.P.C. However, on 06-10-2022, a false narrative was made in the media that four PFI members have been arrested by the police and thereafter, F.I.R. No. 199 of 2020 dated 07-10-2022 was registered under sections 153-A,295 A and 124 I.P.C; section 17 & 18 of UAPA Act and 65, 72 & 76 of the IT Act and thereafter, the chargesheet was filed on 02-04-2021 and the matter proceeded.

4. Learned Senior Advocate appearing for the applicant submits that several

applications were moved for compliance of Section 207 of Cr.P.C. and ultimately on 07-01-2022, only 106 pages were provided to the applicant and most of the copies are illegible. Thereafter, the applicant moved applications on 21-04-2022 and on 23-09-2022 before the trial court for ensuring compliance of Section 207 of Cr.P.C. He next added that co-accused, Firoz has been provided as many as 4872 pages whereas, the applicant has been deprieved of and only 106 pages have been provided to him.

5. He next submits that the trial court without providing the prosecution papers in compliance of section 207 of Cr.P.C., proceeded in the matter and fixed the date i.e. 16-12-2022 for framing of charges. He submits that the accused personns were not present or summoned from jail on that date and therefore, the matter has again been posted for 19-12-2022 for framing of charges.

6. He further contended that on 19-12-2022, the applicant moved a discharge application through his counsel before the trial court and thereafter, the trial court without considering the application of the discharge which was filed by the applicant under section 227 of Cr.P.C., proceeded to frame charges and thereafter, the charges have been framed on 19-12-2022 itself. He next added that though the counsel for the applicant was sitting inside of the court room, but, the court while sitting in his chamber, has passed the order and counsel for the applicant was not heard. In support of his contentions, he has drawn attention towards page no. 21 of the application wherein objection has been recorded by the counsel for the applicant on the same day.

7. He has further drawn attention of this court towards page 21 of the application itself i.e. an order passed by the trial court that "Sri Rama Shanker Dwivedi Ko Nyayamitra Niyukt Kiya Jata Hai." and submitted that neither there was any application moved on behalf of the accused nor the applicant was represented through his counsel for making any prayer for appointment of amicus curiae as is evident from the order itself. Thus, the order appointing an Amicus Curiae is also against the provisions of section 304 of Cr.P.C. Section 304 of Cr.P.C. is extracted hereinunder:-

"304. Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expenses of the State.

The High Court may, with the previous approval of the State Government make rule providing for;

the mode of selecting pleaders for defence under Sub-Section(1);

the facilities to be allowed to such pleaders by the Courts;

the fee payable to such pleaders by the Government, and generally, for carrying out the purposes of Sub-Section (1).

The State Government may, by notification, direct that, as from such date as may be specified in the notificaion, the provisions of Sub-Sections(1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before the Courts of Session."

8. Referring the aforesaid, he submits that there is a specific provision under section 304 Cr.P.C. that an Amicus Curiae can be appointed if the accused is not

represented by a pleader or the accused has not sufficient means to engage a pleader. He added that both the conditions were not prevelant and thus, the appointing an Amicus Curiae is uncalled for and is against the intent of the provisions of section 304 of Cr.P.C.

9. Adding his arguments, he submits that so far as provision of Section 227 of Cr.P.C. is concerned, if an application is filed, the same is to be considered and decided. He submits that an application under section 227 of Cr.P.C. was filed by the present applicant, which was pending consideration and the court without considering the same, has proceeded for framing of charges. He submits that it is wrong to say that no one was present for pressing the application for discharge filed by the counsel for the applicant. The discharge application is still pending. Adding his arguments, he submits that even the application for discharge is not required to be filed by the accused and it is incumbent upon the court itself that if the court considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused. He submits that there is not a single whisper with regard to the application of mind in the order dated 19-12-2022 with respect to the fact that the court below has ever applied its mind as to whether there is sufficient ground for proceeding in the matter.

10. He next added and has drawn attention of this court towards the Judgment and order dated 12-12-2022 passed by the Apex Court in the case of Chandi Puliya Versus The State of West Bengal (Criminal Appeal No. of 2022(Arising from SLP(Criminal)No. 9897 of 2022) and has referred to paragarph nos. 3.2, 4, 4.1. and 7 of the aforesaid Judgment and the aforesaid paras are extracted hereinunder :-

3.2 Accordingly, a discharge application under Section 227 r/w Section 300(1) Cr.P.C. was filed by the appellant before the learned trial Court. The learned trial Court dismissed the said application by observing that such an objection can be raised at the stage of framing of charge and not discharge. The order passed by the learned trial Court has been confirmed by the High Court, by the impugned judgment and order. Hence, the present appeal.

4. It is submitted that the stage of discharge under Section 227 Cr.P.C. is a stage prior to charge and it is at this stage alone that the court can consider an application under Section 300 Cr.P.C. It is submitted that once the court rejects the discharge application, it would proceed to framing of charge under Section 228 Cr.P.C. and the only question before it would be as to the nature of the offence, and not that the appellant has not committed an offence, or that he cannot be tried on account of the bar under section 300 Cr.P.C.

4.1 It is further submitted that the courts below have failed to appreciate that the present proceedings arise from the discharge proceedings and that the stage of discharge under Section 227 Cr.P.C. precedes the stage of framing of charge under Section 228 Cr.P.C. It is submitted that as observed and held by this Court in the case of Ratilal Bhanji Mithani v. State of Maharashtra, (1979) 2 SCC 179, once the charges are framed, the accused is disentitled from praying for discharge.

7. On a fair reading of Section 227 Cr.P.C, if, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the

prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for doing so. As per Section 228 Cr.P.C. only thereafter and if, after such consideration and hearing as aforesaid, the Judge is of the opinion that there is ground for presuming that the accused has committed an offence, the trial Court shall frame the charge. Therefore, as rightly submitted by Shri Siddhartha Dave, learned senior counsel appearing on behalf of the appellant-accused that the stage of discharge under Section 227 Cr.P.C. is a stage prior to framing of the charge (under Section 228 Cr.P.C.) and it is at that stage alone that the court can consider the application under Section 300 Cr.P.C."

11. Referring the aforesaid paragraphs, he submits that the settled proposition of law in the aforesaid Judgment has been violated by the trial court and thus he submits that the whole proceedings of the trial court so far as order dated 19-12-2022 for framing of charges is concerned, vitiates in the eyes of law and thus, the order dated 19-12-2022 as well as other consequential action is liable to be set aside.

12. On the other hand, learned A.G.A. appearing for the State has vehemently opposed the contentions aforesaid and submits that in case of non appearance of counsel for the applicant, the court has passed the order on 19-12-2022. He added that it seems that the counsel for the applicant came later on and the order impugned was passed during the court hours. He submits that none appeared to press the application for discharge and thus, the trial court had no option, but to pass the order dated 19-12-2022 and to proceed under section 228 of Cr.P.C. He further submits that after thorough investigation, sufficient material was found against the applicant and therefore there is no illegality or infirmity in the order dated 19-12-2022 passed by the trial court.

13. Considering the submissions of learned counsel for the parties and after perusal of the material placed on record, it is evident that an application for discharge was moved by the present applicant on 19-12-2022 and from perusal of the order dated 19-12-2022, by virtue of which charges were framed, it reveals that the discharge application dated 19-12-2022 was neither accepted nor rejected by the court. Further, the noting on the ordersheet discloses that the counsel for the applicant was present in the court, but, it prima facie seems that he was not heard. This court has also noticed the fact that one Rama Shanker Dwivedi, Advocate, was also appointed as Amicus Curiae on 19-12-2022 itself though there was no occasion for such appointment.

14. Since, the provision of Section 227 of Cr.P.C. itself mandates that the trial court shall consider that whether there is sufficient ground for proceeding against the accused or not and if trial court reaches to the conclusion that there is no sufficient ground, the accused shall be discharged. Section 227 of Cr.P.C. is extracted hereinunder :-

"227.If, upon consideration of the record of the case and the documents submitted therewith, and after hearing submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

15. Having at a glace of the aforesaid provisions, it is crystal clear that while passing an order in abovesaid provisions, the trial court shall consider ;-

First, the record of the case and documents submitted therewith;

Secondly submissions of the accused;

and thirdly the submisisons of the prosecution.

16. It is settled law that even after such considerations, two view are possible and if one of them gives rise to the suspicion, which is distinguished from grave suspicion, the trial Judge is empowered to discharge the accused without going into the question as to whether a case for trial has been made out by the prosecution or not.

17. This court is of considered opinion that after the application of judicial mind on discharge, the trial Judge shall enter into the next proceeding i.e. framing of the Charge. It is prima-facie overt from the wordings of Section 228 of Cr.P.C. i.e. "Framing of Charge" and "if, after such consideration and hearing, as aforesaid", the procedure of Section 227 of Cr.P.C. is of much importance and that cannot be skipped by the trial court. The intent of the legislature is very clear that the procedure prescribed in Section 227 of Cr.P.C. for discharge of the accused is in fact safeguard and rider so that a person who has been alleged to commit an offence, may not be harassed for facing trial proceedings. Therefore, the application of mind as well as assinging reasons for passing the order under section 227 of Cr.P.C. is of much importance, which has to care of by the trial court.

18. Further it is also not incumbent upon the accused that he must have moved an application for discharge. Even in a situation that there was no application for discharge moved, then it is incumbent upon the trial court to decide it that whether there is sufficient material available against the accused so as to frame charges,but opportunity of hearing to the accused at this stage is an esssential condition.

19. From perusal of the order dated 19-12-2022, it reveals that it has been recorded by the trial court that no one is present to press the application filed under section 227 of Cr.P.C. but, it is noted by the counsel for the applicant that he was present in the court and he was not heard.

20. Further so far as issue of the appointment of an Amicus Curiae is concerned, as per provisions of section 304 of Cr.P.C., there are two conditions, wherein an Amicus Curiae can be appointed and so far as the present case is concerned, prima-facie, there seems to be no such conditions prevalent. From perusal of the order dated 19-12-2022, it reveals that while appointing the amicus-curiae, the trial court did not mention the exigency as is envisaged in Section 304 of Cr.P.C. and no judicial mind has been applied while appointing the Amicus-Curiae

21. It is noteworthy that time and again, the Hon'ble Apex Court has held that if statute provides for anything to be done in a particular manner, then it must be done in that manner alone and not otherwise and thus the impugned order dated 19-12-2022 is against the law propounded by the Hon'ble Apex Court.

22. Now, it is settled proposition of law that the trial court has to make every endeavour to keep the trial fair but in the order of framing of charges, certain

illegalities and ambiguities are apparent and therefore, the order dated 19-12-2022 prima-facie, seems to unsustainable and thus the order dated 19-12-2022 is hereby set aside.

23. Resultantly, the matter is remitted back to the trial court for deciding the discharge application of the applicant dated 19-12-2022 afresh. For the purpose of hearing on the application for discharge dated 19-12-2022,the concerned parties are directed to appear before the trial court on 27-12-2022. Counsel for the applicant shall also remain present before the trial court on the said date and after hearing the parties, the trial court shall proceed in the matter. The parties or their counsels shall not seek any adjournment on the said date.

24. With the aforesaid observations, the instant application is hereby **allowed.**

25. It is made clear that observations made herein above, will have no bearing on the merits of the case pending consideration before the trial court.

(2023) 1 ILRA 806
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 30.11.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 378 No. 109 of 2022

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

Counsel for the Applicant:
G.A.

Counsel for the Opposite Party:

Criminal Law – Criminal Procedure Code, 1973 - Section - 378, - U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 - Sections 14, 14(1), 15, 15(2), 16, 16(1), 17 & 18 - Application for Leave to Appeal – against impugned order of release – Police report - District Magistrate initiated proceedings of attachment of property - representation against attachment - rejected - reference - court below finds that, the property being made subject matter of an attachment was not acquired by a gangster as a result of commission of an offence triable under the Act, - object behind providing the power of judicial scrutiny is to check arbitrary exercise of power and to restore the rule of law - Court finds that, District Magistrate has fails to recorded his satisfaction having reason to believe with regard to the property attached was acquired by the respondent as a result of commission of an offence triable under the Act, - hence, the judgment of court below cannot to be said to be illegal and not based on material on record - consequently, Leave to Appeal, rejected.(Para – 8, 10, 11, 13)

Appeal Dismissed. (E-11)

List of Cases cited:

1. Smt. Mian Devi Vs St. of U.P.(2013 (83) ACC 902,

2. Smt. Shanti Devi w/o Sri Ram Vs St. of U.P. (2007 (2) ALJ 483 (All).

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

1. The case is taken up in revised call. None is present for the respondent.

2. Heard Sri Prem Prakash, learned AGA-I for the State-appellant and perused the record.

3. The present application for leave to appeal under Section 18 of the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 read with Section 378 Cr.P.C. has been preferred by the State-

appellant against the judgment and order dated 10.3.2022 passed by Special Judge, Gangsters Act, Bahraich, in Criminal Misc. Case No. 484 of 2020, State Vs. Hafijulla arising out of case crime no. 153 of 2020, under section 16(1) U.P. Gangsters Act, 1986 (hereinafter referred to as the 'Act'), Police Station Fakharpur, District Bahraich on the reference made by the District Magistrate vide order dated 24.11.2020. The learned Special Judge vide its order dated 10.3.2022 set aside the orders dated 8.9.2020 and 24.11.2020 passed by the District Magistrate, Bahraich and released the house in favour of the respondent-Hafijulla.

4. In short the facts of the case are that on the report of Superintendent of Police, Bahraich, dated 4.9.2020 the District Magistrate, Bahraich initiated proceedings under Section 14(1) of the Act and the house of the respondent was attached as it was found that the attached property was acquired by committing criminal offences. The respondent filed an objection against the order of attachment and took a stand that the order dated 24.11.2020 was passed by the District Magistrate without dealing and considering the documents and pleas taken by the respondent.

5. The Court below after taking into consideration, the facts and circumstances of the case and the decision rendered by this Court in the case of **Smt. Maina Devi versus State of U.P. 2013(83) ACC 902 and Smt. Shanti Devi wife of Sri Ram versus State of U.P. 2007(2) ALJ 483 (All)** came to the conclusion that the attached house is the only property of the respondent and the prosecution has failed to prove its case that the house in question, which was attached, was acquired by the respondent after accumulating money after committing offence. It is settled law that the property being made subject matter of attachment under Section 14 of the Act must have been acquired by a gangster and that too by commission of an offence triable under the Act.

6. Learned A.G.A.-1 has vehemently argued that the learned court below has fell into error in not appreciating the material on record. The District Magistrate, Bahraich has passed the order dated 24.11.2020 after being fully satisfied that the respondent has acquired the property by illegal means and has followed the due procedure as prescribed under the Gangsters Act.

7. It seems to be just and expedient to refer to the relevant provisions of the Gangster Act which are as under:

14. Attachment of property.- *(1) If the District Magistrate has reason to believe that any property, whether movable or immovable, in possession of any person has been acquired by a gangster as a result of the commission of an offence triable under this Act, he may order attachment of such property whether or not cognizance of such offence has been taken by any Court.*

(2) The provisions of the Code shall mutatis mutandis apply to every such attachment.

(3) Notwithstanding the provisions of the Code the District Magistrate may appoint an Administrator of any property attached under sub-section (1) and the Administrator shall have all the powers to administer such property in the best interest thereof.

(4) The District Magistrate may provide police help to the Administrator for proper and effective administration of such property.

15. Release of property .- *(1) Where any property is attached under Section 14, the claimant thereof may, within three months from the date of knowledge of such attachment, make a representation to the District Magistrate showing the circumstances in and the sources by which such property was acquired by him.*

(2) If the District Magistrate is satisfied about the genuineness of the claim made under sub-section (1) he shall forthwith release the property from attachment and thereupon such 6 property shall be made over to the claimant.

16. Inquiry into the character of acquisition of property by court .-

(1) Where no representation is made within the period specified in sub-section (1) of Section 15 or the District Magistrate does not release the property under sub-section (2) of Section 15 he shall refer the matter with his report to the Court having jurisdiction to try an offence under this Act.

(2) Where the District Magistrate has refused to attach any property under sub-section (1) of Section 14 or has ordered for release of any property under sub-section (2) of Section 15, the State Government or any person aggrieved by such refusal or release may make an application to the Court referred to in sub-section (1) for inquiry as to whether the property was acquired by or as a result of the commission of an offence triable under this Act. Such court may, if it considers necessary or expedient in the interest of justice so to do, order attachment of such property.

(3) (a) On receipt of the reference under sub-section (1) or an application under sub-section (2), the Court shall fix a date for inquiry and give notices thereof to the person making the application under sub-section (2) or, as the case may be, to the person making the representation under Section 15 and to the State Government, and also to any other person whose interest appears to be involved in the case.

(b) On the date so fixed or on any subsequent date to which the inquiry may be adjourned, the Court shall hear the parties, receive evidence produced by them, take such further evidence as it considers necessary, decide whether the property was acquired by a gangster as a result of the commission of an offence triable under this Act and shall pass such order under Section 17 as may be just and necessary in the circumstances of the case.

(4) For the purpose of inquiry under sub-section (3), the Court shall have the power of a Civil Court while trying a suit under the Code of Civil Procedure, 1908 (Act No. V of 1908), in respect of the following matters, namely:

(a) summoning and enforcing the attendance of any person and examining him on oath ;

(b) requiring the discovery and production of documents;

(c)receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any court or office ;

(e) issuing commission for examination of witnesses or documents ;

(f) dismissing a reference for default or deciding it ex parte ;

(g) setting aside an order of dismissal for default or ex parte decision.

(5) In any proceedings under this section, the burden of proving that the property in question or any part thereof was not acquired by a gangster as a result of the commission of any offence triable under this Act, shall be on the person claiming the property, anything to the contrary contained in the Indian Evidence

Act, 1872 (Act No. 1 of 1872), notwithstanding.

17. Order after inquiry .- *If upon such inquiry the Court finds that the property was not acquired by a gangster as a result of the commission of any offence triable under this Act it shall order for release of the property of the person from whose possession it was attached. In any other case the Court may make such order as it thinks fit for the disposal of the property by attachment, confiscation or delivery to any person entitled to the possession thereof, or otherwise.*

8. It is now well settled that property being made subject matter of an attachment under sections 14 of the Act must have been acquired by a gangster and that too by commission of an offence triable under the Act. The District Magistrate has to record its satisfaction on this point. The satisfaction of the District Magistrate is not open to challenge in any appeal. Only a representation is provided for before the District Magistrate himself under section 15 of the Act and in case he refuses to release the property on such representation, he is to make a reference to the Court having jurisdiction to try an offence under the Act. The Court, while dealing with the reference made under sub-section (2) of Section 15 of the Act has to see whether the property was acquired by a gangster as a result of commission of an offence triable under the Act and has to enter into the question and record his own finding on the basis of the inquiry held by him under section 16 of the Act. If the Court comes to the conclusion that the property was not acquired by the gangster as a result of commission of an offence triable under the Act, the Court shall order for release of the property in favour of the person from whose possession it was attached.

9. The object behind providing the power of judicial scrutiny under section 16 of the Code is to check arbitrary exercise of power by the District Magistrate in depriving a person of his properties and to restore the rule of law, therefore a heavy duty lies upon the Court to hold a formal enquiry to find out the truth with regard to the question, whether the property was acquired by or as a result of the commission of an offence triable under the Act. The order to be passed under section 17 of the Act must disclose reasons and the evidence in support of finding of the Court. The Court is not empowered to act as a post office or mouthpiece of the State or the District Magistrate. If a person has no criminal history during the period the property was acquired by him, how the property can be held to be a property acquired by or as a result of commission of an offence triable under the Act is a pivotal question which has to be answered by the Court. Besides, the aforesaid question, the other important question to be considered by the Court is whether the property which was acquired prior to the registration of the case against the accused under the Act or prior to the registration of the first case of the Gangster chart can be attached by District Magistrate under Section 14 of the Act.

10. The provisions of section 14 of the Act, referred to above, empowers the District Magistrate to attach the property acquired by the Gangster as a result of the commission of an offence triable under this Act. The District Magistrate may appoint an Administrator of any property attached, to administer such property in the best interest thereof but there must be reason to believe that any property whether moveable or immovable in possession of any person, has been acquired by a Gangster as a result

of commission of an offence, triable under this Act but in the impugned order the District Magistrate, has not recorded his satisfaction having reason to believe with regard to the property attached that it was acquired by respondent as a result of commission of an offence triable under Gangster Act.

11. Keeping in view the aforesaid settled proposition of law, I am of the view that the view taken by the court below was a probable and logical view, which is based on valid reasons and the law propounded in this regard. The judgment of the court below cannot be said to be illegal, illogical and improbable and not based on material on record or is based on erroneous views and is against the settled position of law. So, this Court is satisfied that there is absolutely no hope of success in this appeal and accordingly, no interference is called for.

12. Leave to appeal is refused.

13. Application for leave to appeal is **rejected.**

14. Accordingly, the appeal does not survive, and in view of above, the appeal is **dismissed.**

15. No order as to costs.

16. Copy of this judgment be sent to the court below for its compliance.

(2023) 1 ILRA 810
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 13.01.2023

BEFORE

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

Criminal Appeal No. 530 of 2004

Mohd. Aslam **...Appellant**

Versus

State of U.P. **...Respondent**

Counsel for the Appellant:
Mr. R.B.S. Rathaur (Amicus Curiae)

Counsel for the Respondent:
Addl. Government Advocate

Criminal Law- Indian Evidence Act, 1872- Section 3- Case is based on circumstantial evidence, as there is not eye-witness of the crime- The FIR of the crime was lodged in pursuance of an order passed on an application moved under Section 156(3) of Cr.P.C. by the brother of deceased Khairunnisa-In order to prove the crime based on circumstantial evidence all the circumstances must indicate that the author of the crime is the accused and the accused alone and there is no possibility of being committed the crime by anybody else. The chain of the circumstances should be complete and no shadow of reasonable doubt must be there- The prosecution has failed to prove the circumstances leading towards the conclusion that the appellant/convict killed all the four deceased persons by administering poison in meat.

Settled law that in a case based on circumstantial evidence the prosecution has to link all the circumstances in one chain that leads to the unerringly to the guilt of the accused. (Para 7,8,11,12)

Criminal Appeal allowed. (E-3)

Case Law/ Judgements relied upon:-

1. Sharad Birdhichand Sarda Vs St. of Maha., AIR 1984 (SC) 1622.

2. Ramgopal Vs St. of Maha., AIR 1972 (SC) 656. (cited)

3. Shivaji Chintappa Patil Vs St. of Maha., (2021) 5 SCC 626

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

(The judgment is pronounced in terms of Chapter VII Sub-rule (2) of Rule (1) of the Allahabad High Court Rules, 1952 by Hon'ble Ramesh Sinha, J.)

1. This criminal appeal has been preferred by the sole appellant/convict Mohammad Aslam against the judgment and order dated 30.01.2004 passed by Additional District and Sessions Judge, Fast Track Court No.5, District Hardoi in Sessions Trial No.241 of 2002, Crime No.318 of 2001 under Section 302 of the Indian Penal Code, 1861 (in short IPC), Police Station Mallawan District Hardoi, whereby the appellant has been held guilty under Section 302 of I.P.C. and sentenced with life imprisonment coupled with a fine of Rs.10,000/- and in default of payment of fine further imprisonment of two years.

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

(i) A First Information Report (in short F.I.R.) was registered on 22.12.2001 at Case Crime No. 318 of 2001, under Section 302 of I.P.C. at Police Station Mallawan, District Hardoi in pursuance of the order passed by the learned Chief Judicial Magistrate, Hardoi on the application moved by the complainant Abdul Sattar under Section 156(3) Cr.P.C.. It was stated in the application/F.I.R. that Khairunnisa sister of the complainant was married to Mohammad Salis resident of village Purvayan, Police Station Mallawan, District Hardoi. Mohammad Aslam is the real brother of his brother-in-law Mohammad Salis. There was dispute regarding money between his brother-in-law and Salis Mohammad Aslam, because Mohammad Salis lended a sum of Rs.25,000/- to Mohammad Aslam during the season of potato crop. Mohammad Aslam was not returning the money alleging loss. Whenever he (complainant) used to ask about his own Rs.10,000/- from Mohammad Salis, then Mohammad Salis used to reply that whenever Mohammad Aslam would return the money he would pay him (complainant). Mohammad Salis told the complainant that whenever he asked about the money, Mohammad Aslam made excuses and threatened to kill.

(ii) On 13.01.2001 in the noon Mohd. Aslam brought Buffalo meat and gave to Khairunnisa the sister of the complainant to cook. After handing over the meat he went out of the house on pretext of some urgent work. After eating that meat Mohammad Salis brother-in-law of complainant, sister Khairunnisa, nephew Ajmeri and niece Gulshan died. Ajmeri and Gulshan died on way to Mallawan, whereas Mohd. Salis and Khairunnisa died in Hardoi. He (complainant) met his sister and brother-in-law in Mallawan because at that time he was in Mallalawan. It was told by his sister and brother-in-law that Mohammad Aslam mixed poison in the meat for the reason he did not want to return the money. Before this incident Mohammad Aslam left his wife in her paternal home. He informed about the incident at police station Mallawan but no action was taken. He further informed many higher officers, but no action was taken. Therefore he moved an application

under section 156 (3) of Cr.P.C and requested to lodge the FIR.

(iii) It is evident from the record that on 13.01.2001 the police of Police Station Mallawan District Hardoi prepared inquest reports of all the four deceased persons on the information received from District Hospital Hardoi. The name of the persons who gave information is Krishna Kumar the ward boy of District Hospital Hardoi. This fact has been mentioned in the inquest report of all the four persons. After preparing the inquest reports police prepared the necessary documents and sent the dead bodies for postmortem examination. The police also reached at the spot and seized some part of the meat found inside the house of the deceased persons and prepared the recovery memo of the same.

(iv) After registration of the FIR, further investigation started and the Investigating Officer prepared the site plan of the place of incident and recorded the statements of the witnesses and submitted the chargesheet against the accused appellant under section 302 of I.P.C. for killing the aforementioned four deceased persons. The concerned Magistrate after taking cognizance on the chargesheet committed the case to the Court of Sessions for trial, who in turn transferred the case for trial to the Additional Sessions Judge for trial. The Additional Sessions Judge framed charge under section 302 of I.P.C.

The accused person denied the crime and claimed to be tried. The prosecution in order to prove its case examined the following witnesses:-

(a) P.W. 1 Abdul Sattar, the complainant.

(b) P.W. 2 Nafiz Ahmad.

(c) P.W. 3 Doctor C.P. Rawat, who conducted the postmortem examination.

(d) P.W. 4 Raees Ahmad.

(e) P.W. 5 Sirajuddin.

(f) P.W. 6 Sub Inspector Santosh Kumar Dixit.

(g) P.W. 7 Sub Inspector S.N. Singh.

(h) P.W. 8 Sub Inspector C.S Saxena.

(i) P.W. 9 Sub Inspector S.K. Dixit.

(v) Apart from above oral evidences, prosecution also proved the relevant documents as Exhibit Ka-1 to Ka-34, which are as under :-

(1) Exhibit Ka-1, photo copy of the application under Section 156(3) Cr.P.C.

(2) Exhibit Ka-2, postmortem examination report of deceased Salis.

(3) Exhibit Ka-3 post-mortem examination report of deceased Khairunnisa.

(4) Exhibit Ka-4 postmortem examination report of deceased Gulshan.

(5) Exhibit Ka-5 postmortem examination report of deceased Ajmeri.

(6) Exhibit Ka-6 inquest report of deceased Salis.

(7) Exhibit Ka-7 inquest report of deceased Khairunnisa.

(8) Exhibit Ka-8 inquest report of deceased Gulshan.

(9) Exhibit Ka-9 inquest report of deceased Azmeri.

(10) Exhibit Ka-10 letter to R.I. for postmortem of deceased Salis.

(11) Exhibit Ka-11 letter to the Chief Medical Officer for conducting postmortem of deceased Salis.

(12) Exhibit Ka-12 Chalan nash of deceased Salis.

(13) Exhibit Ka-13 Photo nash of deceased Salis.

(14) Exhibit Ka-14 specimen seal of deceased Salis.

(15) Exhibit Ka-15 Photo nash of deceased Khairunnisa.

(16) Exhibit Ka-16 chalan nash of deceased Khairunnisa.

(17) Exhibit Ka-17 letter to R.I. about deceased Khairunnisa.

(18) Exhibit Ka-18 letter to the Chief Medical Officer for conducting postmortem of deceased Khairunnisa.

(19) Exhibit Ka-19 specimen seal of deceased Khairunnisa.

(20) Exhibit Ka-20 letter to the Chief Medical Officer for conducting postmortem of deceased Gulshan.

(21) Exhibit Ka-21 letter to R.I. for postmortem of deceased Gulshan.

(22) Exhibit Ka-22 chalan nash of deceased Gulshan.

(23) Exhibit Ka-23 photo nash of deceased Gulshan.

(24) Exhibit Ka-24 specimen seal of deceased Gulshan.

(25) Exhibit Ka-25 chalan nash of deceased Ajmeri.

(26) Exhibit Ka-26 photo nash of deceased Ajmeri.

(27) Exhibit Ka-27 letter to R.I. for postmortem examination of Ajmeri.

(28) Exhibit Ka-28 letter to the Chief Medical Officer for conducting postmortem report of deceased Ajmeri.

(29) Exhibit Ka-29 specimen seal of deceased Ajmeri.

(30) Exhibit Ka-30 site plan of the place of incident.

(31) Exhibit Ka-31 recovery memo of taking into custody the meat from the house of the deceased persons.

(32) Exhibit Ka-32 Chargesheet.

(33) Exhibit Ka-33 Chick FIR.

(34) Exhibit Ka-34 Nakal Report No.2 of time 14:10 hours dated 22.12.2001.

(36) Exhibit Ka-36 Viscera examination report of deceased Salis.

(37) Exhibit Ka-37 Viscera examination report of the deceased Khairunnisa.

(vi) After close of prosecution evidence, the statement of the accused Mohammad Aslam was recorded under section 313 of the Code of Criminal Procedure 1973 (in short Cr.P.C.). The accused denied all the allegations leveled against him and stated that Abdul Sattar, the complainant came to him to demand the money and threatened that if money will not be given he will lodge the FIR. He lodged the FIR for the reason that he did not pay the money demanded. In defence one witness DW-1 Mohammad Anis was examined. Thereafter the learned trial court after hearing the arguments of both the sides and analyzing the evidences available on record reached at the conclusion that prosecution has proved all the circumstances which leads to the conclusion that accused Aslam committed the crime. It has also concluded that all the circumstances cumulatively prove that accused has committed the crime and finally concluded that prosecution has established the prosecution story beyond all reasonable doubts by the evidence adduced especially the medical evidence and expert evidence. The learned trial court held the accused guilty under section 302 of I.P.C. and sentenced him with imprisonment for life coupled with a fine of Rs.10,000/- and in default of payment of fine further imprisonment of two years.

(vii) Being aggrieved of this conviction and sentence this appeal has been preferred by the convict/appellant.

(viii) The appellant/convict had challenged the impugned judgment and order mainly on the ground that the occurrence took place on 13.09.2001, but the FIR was lodged on 20.12.2001 at about 14:10 hours, on the application of Abdul

Sattar, who is the real brother of Khairunnisa. None of the close relatives of deceased Mohammad Salis or a person living nearby had lodged the FIR. Abdul Sattar, the complainant has cooked up a story that Mohammad Salis has given Rs.25,000/- to the appellant for potato business in which he has also given Rs.10,000/- who is brother in law of Mohammad Salis and the same was demanded by him but the appellant has not given the same. Among the prosecution witnesses Sirajuddin and Nafis Ahmed had turned hostile and only Abdul Sattar has stated about the incident and that too in contradictory manner which is not reliable. The finding of the learned trial court is against the law and facts both and the impugned judgment and order of the trial court is based on surmises and conjectures.

(3) Heard Mr R.B.S. Rathour, Advocate Amicus Curiae for the convict/appellant and Mr. Umesh Chandra Verma, learned Additional Government Advocate (in short A.G.A.) for the State.

(4) Learned counsel for the convict/appellant argued that this case is based on circumstantial evidence, as there is no eye-witness of the incident. There was no chance to state about the incident by Khairunnisa and Mohammad Salis to Abdul Sattar, as Abdul Sattar reached when all the four persons were dead. P.W.-4 Raees Ahmad and PW-5 Sirajuddin have turned hostile. PW-1 Abdul Sattar, the complainant has given a contradictory statement and is not trustworthy. He further argued that prosecution has failed to prove the chain of circumstantial evidence beyond reasonable doubt. In fact there is no evidence against the convict appellant therefore the impugned judgment and order should be set-aside and the convict/appellant be released. He relied upon following case laws:-

(1) **Sharad Birdhichand Sarda Vs. State of of Maharashtra AIR 1984 (SC) 1622.**

(2.) **Ramgopal Vs. State of Maharashtra, AIR 1972 (SC) 656.**

(5) Contrary to it learned A.G.A. opposed the submissions made by learned Amicus Curiae and submitted that the strong motive was there to commit the crime and the poison was found in the meat tested in the Forensic Science Lab and also in the Viscera preserved of the diseased persons. Hence the appeal deserves dismissal and should be dismissed.

(6) Considered the arguments of both the sides, perused the evidence available on record and also the impugned judgment and order, and gone through the case law cited by the learned Amicus Curiae.

(7) This case is based on circumstantial evidence, as there is not eye-witness of the crime. The principle governing the appreciation of evidence based on circumstantial evidence have been summarized by the Hon'ble Apex Court in **Sharad Birdhichand Sarda Vs. State of of Maharashtra (supra)** cited by the learned Amicus Curiae and have been reiterated in catena of cases by the Hon'ble Apex Court. Recently the Hon'ble Apex Court in this regard in the case of ***Shivaji Chintappa Patil Vs. State of Maharashtra reported in (2021) 5 SCC 626***, has laid down as under (para 12):-

"12. The law with regard to conviction on the basis of circumstantial evidence has been very well crystalised in the judgment of this Court in Sharad

Birdhichand Sarda v. State of Maharashtra :-(SCC p.185, paras 153-54)

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra where the observations were made: [SCC p. 807 : para 19, SCC (Cri) p. 1047]

"19. .....Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

(8) In short in order to prove the crime based on circumstantial evidence all the circumstances must indicate that the author of the crime is the accused and the accused alone and there is no possibility of being committed the crime by anybody else. The chain of the circumstances should be complete and no shadow of reasonable doubt must be there. In the present matter admittedly there is no eye witness of the crime as nobody has come to say that he saw the accused committing the crime. The FIR of the crime was lodged in pursuance of an order passed on an application moved under Section 156(3) of Cr.P.C. by the brother of deceased Khairunnisa. It is also undisputed that the death of all the four deceased persons resulted due to poison Thayodon (Organochloro) insecticide poison as found in the viscera preserved of Salis and (Fairoom) Khairunnisa. The viscera reports of Salis as Exhibit Ka-36 and Exhibit Ka-37 are on record.

In order to prove the murder by poisoning the prosecution had to establish the following three essentials:-

(a) The person died due to poison.

(b) The accused was in possession of poison.

(c) The accused had opportunity to administer poison to the deceased.

(9) In the case in hand, it is undisputed that all the four deceased persons died of poison as has been reported by the Forensic Science Laboratory in viscera examination reports, hence first ingredient is proved. Now comes the second ingredient, whether Mohd. Aslam

the appellant/convict had poison in his possession. In this regard there is no reliable evidence on record. The P.W.1 has only stated that when he met Mohd. Aslam in the bus he was carrying meat and a bottle of medicine. When he asked Mohd. Aslam about bottle he answered that it was a Cough Syrup. No other evidence is there to show that Mohd. Aslam had poison in his possession. There is no evidence on record that bottle which Mohd. Aslam carried on the pretext of cough syrup was containing poison. Even there is no evidence to prove that Mohd. Aslam handed over the meat pieces to Khairunnisa the deceased and mixed that cough syrup in that meat. Hence, the second ingredient is not proved by the prosecution. Now comes the third ingredients, whether Mohd. Aslam had opportunity to administer poison to the deceased person. There is allegation in the FIR lodged by Abdul Sattar brother of the deceased lady Khairunnisa and brother-in-law of deceased Mohd. Salis and maternal uncle of two deceased children, that Mohd. Aslam brought meat and gave the same to Khairunnisa to cook that and when the meat was being cooked he mixed some poison in that meat and after consuming that meat all the four persons died. Admittedly the complainant Abdul Sattar was not present at the time of alleged bringing of meat and mixing the poison or handing over the meat to the deceased lady. None other witness could be produced who saw the accused, handing over the meat to the deceased lady or mixing the poison or atleast saying that he saw the poison in the possession of the convict-Aslam.

(10) Prosecution has emphasized on the statement of Abdul Sattar (P.W.1 Complainant), wherein he has stated that his deceased sister and brother-in-law told him before death, while Adbul Sattar was taking them to Hospital in Hardoi that Mohd. Aslam brought meat and gave it to her deceased sister to cook up alongwith spices. While meat was being cooked, Mohd. Aslam poured some poison in the pot and that was witnessed by his deceased sister. Upon scrutiny of evidence of Abdul Sattar it is surfaced that he received information about the serious condition of his sister, brother-in-law and their two children. On this he went to Mallawan, but the doctors at Mallawan asked to take them to Hospital at Hardoi. When he was carrying them to Hardoi, on the way his sister told him that Mohd. Aslam gave meat alongwith spices to cook and poured some poison in the meat while meat was being cooked. In this regard this witness has given the contradictory statement. At one place he said that his sister and brother-in-law had already died when he reached, at another place he stated that they were alive. Further he said that his brother-in-law was dead but sister was alive. Further more Defence Witness (D.W.1) Mohd. Anis has said that Abdul Sattar was not with him when he carried the deceased persons to Hardoi. Thus the testimony of P.W. 1 Abadul Sattar is not trustworthy. There is nothing on record to establish that the convict Mohd. Aslam brought meat alongwith spices and handed over to Khairunnisa for cooking and mixed some poison when the meat was being cooked.

(11) Thus the prosecution has failed to prove the circumstances leading towards the conclusion that the appellant/convict killed all the four deceased persons by administering poison in meat. There is no reliable evidence to establish that Mohd. Aslam brought meat and spices and handed over to the deceased lady to cook. There is no reliable evidence that Mohd. Aslam had poison in his possession and there is no

trustworthy and cogent evidence to prove that Mohd. Aslam mixed some poison in the meat while the meat was being cooked.

(12) The evidence on record is not of such a quality that we can unhesitatingly hold that the death of deceased persons were result of administration of poison by the convict/appellant. In other words the prosecution has failed to prove that Mohd. Aslam brought meat alongwith spices and handed over to Khairunnisa to cook and mixed the poison in the meat at the time of cooking.

(13) It is painful for this Court to note that four persons of the family were done to death by poisoning but the real culprit of the crime could not be brought to book. So far as the appellant-accused Mohd. Aslam is concerned the prosecution has failed to conclusively establish by cogent evidence that it was the accused/appellant who committed the murder of four deceased.

(14) Hence the impugned judgment and order deserves to be set-aside and is set-aside.

(15) The appeal is ***allowed.*** The appellant is in jail. He shall be released forthwith, if not required in any other case.

(16) Appellant Mohd. Aslam is directed to file personal bond and two sureties each in the like amount to the satisfaction of the court concerned in compliance with Section 437-A of the Code of Criminal Procedure, 1973.

(17) Before we part with the case, we must candidly express our unreserved and uninhibited appreciation for the assistance rendered by Mr. R.B.S.Rathaur, Amicus Curiae for the convict-appellant, therefore, we deem it appropriate to direct for payment to Mr.R.B.S.Rathaur, learned *Amicus Curiae* for his valuable assistance as per Rules of the Court.

(18) Office is directed to pay remuneration to Mr.R.B.S.Rathaur, learned Amicus Curiae as per Rules of the Court within a month.

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

(2023) 1 ILRA 817
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.01.2023

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. RENU AGARWAL, J.

Criminal Appeal No. 551 of 1982

Ram Sanehi & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
R.K. Singh, Anurag Kumar Singh, Brij Mohan Sahai, Sunil Kumar Singh

Counsel for the Respondent:
Govt. Advocate

Criminal Law- Indian Evidence Act, 1972- Section 3 - Interested Witness- P.W.-2 is the real brother of deceased, he admitted in his statement that his brother Prakash was tried for the murder of Chote, who is the real brother of Ram Sahai, he also stated that he was prosecuted for the murder of the brother of accused Ram Sahai, therefore, he may be partisan

witness, but merely because he is the brother of deceased and both families has inimical relationship, his evidence cannot be discarded, moreover his evidence is corroborated by independent witness-The evidence of related witness cannot be brushed aside merely on the ground that he is related to deceased.

Settled law that a witness can be called interested only when he derives some benefit from implicating the accused but where the witness is a natural one, his evidence is cogent and truthful, and is the only possible eyewitness in the circumstances of the case, then he cannot be said to be interested. (Para 29, 30)

Criminal Appeal rejected. (E-3)

Case Law/ Judgements relied upon:-

1. Gulab Vs St. of U.P., 2021 SCCOnline SC 1211

2. Rajesh Yadav & anr. etc. Vs St. of U.P., 2022 SCCOnline SC 150

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

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

1. The present Criminal Appeal has been filed under Section 374(2) Cr.P.C. against the judgment and order passed by IInd Additional District & Sessions Judge, Hardoi on 14.07.1982, in S.T. No.06 of 1982, arising out of Case Crime No.43/143, Police Station Pali, District Hardoi, convicting the appellants Ram Sahai, Bishram, Jograj and Motilal and sentencing them to rigorous imprisonment for life under section 302 read with section 34 IPC.

2. Wrapping the facts in brief, complainant Jhinguri son of Lochan, Resident Ahir Mauja Anta, had previous enmity with Ram Sahai as his brother Prakash (deceased) had fired at Ram Sahai 10 years ago and his brother was tried and convicted for the same with the imprisonment of 7 years and he come out of jail few days before the incident after completing his incarceration. Accused Bishram & Jograj are the real brother and nephews of accused Ram Sahai. Accused Motilal is also the nephew of Ram Sahai. On the date of incident i.e. on 11.07.1981 at about 6.30 p.m. complainant had gone for defecation near pond on the western side of village and his brother Prakash was going to home from the path situated on the north side of pond. He heard a sound of fire shot and saw his brother running towards village followed by Ram Sahai son of Diwani armed with katta, Jograj son of Murli armed with lathi, Moti son of Chote armed with Spear, Bishram son of Murli armed with Katta. His brother fell down on the western path near the house of Baijnath. All the four accused started beating and assaulting his brother with the arms in their hands. He rushed towards the place of occurrence and shouted to save his brother. Raghunandan, Bare, Darbari and many other villagers reached there and scolded the accused, but all the accused started threatening them and dragged & beat his brother, rushed towards western side of sugar cane field. They followed the accused keeping some distance, then the accused leaving the brother of complainant in the fields of Jawahar took to their heels towards western side. His brother sustained injuries of Kanta, Spear Bhala and Fire Arm. There was slight cut on the neck of deceased. The written report was moved to police station in the next morning and is is explained in the FIR itself that he could not report in the night due to fear and darkness.

3. On the basis of written report FIR was lodged in Police Station Pali, District Hardoi and the investigation was entrusted upon S.I. Prahalad Tiwari, who recorded the

statement of complainant and proceed to the place of occurrence immediately. He conducted inquest and prepared inquest report alongwith other connected papers Photo Lash, Challan Lash, letter to CMO and Letter to R.I, etc. The dead body was sealed and sent for postmortem examination to District Hospital Shahajahanpur. Investigating officer thereafter recorded the statement of witnesses. He visited to place of occurrence and found the bundle of grass at the place of occurrence and prepared site plain (Ex. Ka-9), collected grass and prepared recovery memo (Ex. Ka-10). Investigating officer collected six pellets and 3 bullets at the scene of occurrence. He collected the same and prepared recovery memo (Ex. Ka-11). He also collected plain and blood stained earth from two different places and prepared recovery memo Ex.Ka-12 and Ex.Ka-13, respectively. The investigating officer deputed S.I., B. P. Singh for the arrest of accused. Accused Ram Sahai and Bhishram were arrested on 15.07.1981 and Jograj and Motilal surrendered in court on 02.07.1981. After collecting essential evidence the investigating officer submitted charge sheet in the court on 24.07.1981.

4. All the accused were summoned in the court and after the compliance of section 207 Cr.P.C. all the accused were committed to the Court of Session for their trial. Charges were framed against the accused under section 302 read with section 34 IPC and read over and explained to the accused, who abjured from the charges and claimed to be tried.

5. Prosecution produced following eight witnesses to prove the prosecution story:-

(i) P.W.-1 Ram Prasad, who brought the dead body for postmortem examination,

(ii) P.W-2 Jhinguri, complainant,

(iiI) P.W.-3, Bade, who is said to be witness of the case,

(iv) P.W.-4, Prahlad Tewari, investigating officer,

(v) P.W.-5, Head Constable, Bhola Singh, who proved the G.D. Ex. Ka-17 regarding the dispatch of the case property,

(vi) P.W.-6, Constable. Shivlal who brought the case property in sealed bundles to Sadar Malkhana, Hardoi,

(vii) P.W.-7, Dr. M.L. Tandon, who conducted postmortem examination of the dead body of Prakash at 4.00 P.M. on 13.07.1981.

(viii) P.W.-8, Constable, Ram Samujh Yadav, who brought the case property from place of occurrence to Police Station Pachdeora, District Hardoi on 13.07.1981.

6. Besides ocular evidence the following documentary evidences are also produced and proved by the prosecution.

(i) Ex. Ka.-1, First Information Report,

(ii) Ex. Ka-2, Sight Plan,

(iii) Ex. Ka-3, inquest report,

(iv) Ex. Ka-10, recovery of grass,

(v) Ex. Ka-11, recovery of Tikuli and Charra,

(vi) Ex. Ka-12, recovery of blood stain and plain earth,

(vii) Ex. Ka-18, report of postmortem examination,

(ix) Ex. Ka-19, Affidavit filed by one Vishwa Nath Pandey,

(x) Ex. Ka-20, Affidavit filed by Rangnath Mishra,

(xi) Ex. Ka-21, report of chemical examiner,

(xii) Ex. Ka-22, report of Serologist and the recovery list.

7. On the basis of evidence produced in court, learned trial court found all the accused Ram Sahai, Bishram, Jograj and Motilal guilty of the charges under section 302 read with section 34 IPC and convicted & sentenced them to undergo imprisonment for life. Aggrieved with the judgment and order dated 14.07.1982 passed by learned trial court, the present appeal is filed.

8. During the course of appeal, the accused Ram Sahai, Bishram and Motilal, have expired and appeal was ordered to be abated against them, vide order dated 20.11.2019, passed by Co-ordinate Bench of this Court and now in fact the appeal survives only on behalf of appellant Jograj, hence the Court proceed to hear it.

9. We have heard the submissions of Sri Brij Mohan Shai, learned counsel for the appellants, Sri Chandra Shekhar Pandey, learned Additional Government Advocate for the State and perused the material brought on record.

10. Learned counsel for the appellants submitted that the finding arrived by the learned trial court are perverse and contrary to the evidence on record. The medical evidence is in not in consonance with the eye witness account given in the FIR. The prosecution case is falsified with the absence of abrasion on the body which makes whole story of prosecution doubtful. There is material contradictions in the statement of witnesses, therefore, the judgment and order passed by the trial court is liable to be set-aside.

11. On the contrary, learned AGA for the State-respondent argued that the judgment and order passed by trial court is based on cogent evidence and there is no material contradictions between the medical evidence and the ocular evidence. The appellants committed brutal murder and created terror in whole of the village. Motive of the case is proved, therefore, the judgment of the trial court is liable to be upheld.

12. It transpires from the FIR that on account of previous enmity the appellants assaulted Prakash, the brother of complainant Jhinguri. The incident occurred on 11.07.1981 at 18.30 p.m. and the report was lodged on 12.07.1981 at 7.10 a.m. The delay has been explained in the FIR itself that the brother of complainant was assaulted and murdered brutally by appellants, therefore, due to fear and darkness of night he could not lodged the FIR in the night and lodged the report in the morning, therefore, the delay is properly explained. Before elucidating the evidence produced in the trial court it is desirable to recapitulate them in brief.

13. P.W.-1, stated on oath that he was posted as a constable clerk in Chauki Pachdewra and brought the dead body of deceased Prakash in sealed condition with the necessary documents and sample seal and handed over the dead body in District Hospital, Shahjahanpur. He stated that constable-58 Ramdayal, watchman Ram Sahai and the brother of complainant Sarkas were also with him. He endorsed his arrival in G.D. No.3 at 6.10 a.m. on 13.07.1981 and got the docket prepared. He identified the dead body before doctor and after postmortem, the cloths of deceased were handed over to him in sealed envelop from the Hospital, which he submitted on the next day in Chauki Pachdewra. The dead body, envelop and bundles remained in his custody intact and sealed.

14. P.W.-2 complainant stated that Murli, Chote, Ram Singh and Ram Sahai are

four sons of of Dewani. Ten years ago his brother Prakash (now deceased) was tried under section 307 IPC for firing on appellant Ram Sahai and he was convicted with the imprisonment of seven years and he was released from the jail two years before this incident, therefore, there was inimical relationship between the families. At about nine months ago when he went for defecation near the western side of pond at about 6.30 p.m. he saw his brother Prakash going towards eastern side towards his house. Immediately he heard the sound of fire and his brother started running and raising alarm, but he fell down on the southern path in front of house of Hemsingh and in the north west of the house of Baijnath due to fire arm injury. Two fires were shot by Ram Sahai, even after he fell down. Bishram assaulted with Kanta, Jograj with lathi and Motilal with pointed and sharp edged spear. He came to the north west corner of the house of Baijnath. On hearing the sound of fire witnesses Raghunandan, Bare and Darbari also reached there and challenged the accused, but the appellant did not pay any heed and picked the body of his brother and threw it in the southern corner of the fields of Jawahar. The witnesses identified the cloths of the deceased produced before him in the court.

15. P.W.-3 Bare is an eye witness of the case who stated on oath that 8-9 months ago at about 6.30 p.m. he heard the sound of three fires and the alarm raised by some one, he immediately reached on the north south corner of the residence of Baijnath. Jhinguri Raghunandan and Darbari also arrived there. Bishram by Kanta, Jograj with lathi and Motilal by spear were assaulting Prakash who was lying on the ground on the north west side of Baijnath and on the southern path in front of the house of Hemsing. They scolded Ram Sahai etc., then they hang Prakash and took him towards western side and threw in the fields of Jawahar and when they saw Prakash he was dead. He also stated that he saw blood on the ground.

16. P.W.-4 Prahlad Tiwari, S.I. Chauki Pachdeora, District Pali, Hardoi, stated on oath that the case was registered Chauki and he identified his signature Ex. Ka-1. He proved Ex.Ka-1 as well as G.D. No.6 dated 12.07.1981, Ex.Ka-2. He also proved site plain, inquest report and the necessary papers related to inquest from Ex.Ka-3 to Ex. Ka-8. This witness also proved site plain Ex.Ka-9, recovery memo Ex. Ka-10 and recovery memo of grass Ex.Ka-2. This witness proved recovery memo of bullets and pellets as material Ex.-11. The container was opend before the witness in court and he proved that the material is the same which he collected, sealed and saved it from the place of occurrence and brought it as Material Exhibit-3. The witness proved the recovery memo of plain and blood stain earth as Material Exhibit-12 & Material Exhibit-13 and proved all the recovered items as Material Exhibit-4. He obtained the result of postmortem and made it a part of case diary. He arrested Ram Sahai and Bishram at about 8.30 p.m. on 15.07.1981 and entered in G.D. No.24 at 23.00 p.m. and recorded the statement of accused Jograj and Motilal on 24.07.1981 with permission of court, as they were sent to jail on 22.07.1981 on the application for surrender. The witness proved charge sheet and G.D. No.9 dated 13.07.1981 at 09.30 a.m. as Ex. Ka-15 and G.D. No.16 on the same day at 16.35 as Ex. Ka-16 and G.D. No.6 dated 31.08.1981 at 6.20 a.m. as Ex. Ka-17.

17. P.W.-5 Bhola Singh and P.W.-6 Shivlal are formal witnesses, who proved Ex. Ka-17

18. P.W.-7 Dr. M.L.Tandon, conducted postmortem of the body of deceased and prepared postmortem report and proved it. He found following postmortem injuries on the dead body:-

"1 Incised wound 12 cm. x 4 cm. x Bone deep on left side neck on the back part 8 cm. below and behind lobule of left ear 6th and 7th Carvical vertibra body cut (fractured) Margins clean cut.

2. Incised wound 2 cm. x 0.5 cm. x muscle deep on left side back 1.5 cm. below injury no.1.

3. Incised wound 2 cm. x 0.5 cm. x muscle on back and mid-line 17 cm. below injury no.2 Margins clean cut.

4 Gun shot would of entry 1.5 cm. x 0.5 cm. x bone deep on left cheek adjacent to left mostril, Margins inverted, Blackening present around the wound. Upper jaw and teeth broken. Direction from front to back downwards and to the right.

5. Gunshot would of exit 2 cm. x 1.5 cm. x bone deep on inner aspect upper lip and jaw Communicating to injury no.4 with upper teeth of both Sides broken.

6. Incised wound 3 cm. x 1 cm. x muscle deep on left side neck 2 cm. above left clavical Margins clear cut.

7. Multiple incised would in an area os 29 cm. X 27 on left side chest and upper abdomen 3 cm. below left clavical. Smallest size 1 cm. X 0.5 on x muscle deep to largest size 2 cm. x 1 cm. x chest cavity deep Margins clear cut.

8. Gun shot wound of entry 1.5. cm. X 0.5 cm. x chest cavity deep on left side chest 12 cm. away and below the left nipple, Margins inverted. Direction from front to back and to right.

9. Gun shot wound of entry 1 cm. x 0.5 cm. x abdominal cavity deep on left side abdomen 13 cm. above and left of umbilicus. Margins inverted. Blackening around the wound present.

10. Gun shot wound of entry 1 cm. x 0.5 cm. x abdominal cavity deep on left side abdomen just near left anterior superior iliac spin. Margins inverted Direction from front to back downward and to left. No blackening. No tattooing.

11. Gun shot wound of exit 1.5. cm. x 1 cm. x abdomen cavity deep on left upper thigh 3 cm below left anterior Superior iliac spin and communicating injury no.10 margins everted.

12. Gun shot wound of entry 1.5 cm. x 0.5 cm. x abdomen cavity deep right side abdomen 2 cm. to the right of umilicus with piece of intestine and omentum coming out of the wound. Margins inverted. Blackening present. Direction from front to back.

13. Gun shot wound of entry on right side abdomen 11 cm. above injury no.12. Blackening around the wound present. Direction front to back. Margins inverted.

14. Contusion 3 cm. x 2 cm. on top of right shoulder.

15. Lacerated wound 2 cm. x 1 cm. muscle deep in web space between right thumb and right index finger of right hand.

16. Incised would 1 cm. x 0.5 cm. x muscle deep on back of right hand middle. Margins clean cut.

17. Incised would 1 cm. x 0.5 cm. x Bone deep on front of left leg 14 cm. below knee, Margins clean cut.

18. incised wound 2 cm. x 1 cm. x muscle deep in web space between left little and right finger of left hand. Margins clean cut.

Internal examination

6th and 7th Cervical vertebra fractured. Vassels of the neck cut and

lacerated. Left side pleura and lung lacerated. Heart empty.

Chest cavity contained 4 oz. Blood and 1 big metallic pallet was recovered from the cavity. Peritoneum lacerated. Abdominal cavity contained about 4 oz. blood one big metallic pellet recovered.

Somach contained 1-½ oz. Semidigested food material. Small intestine lacerated. Large intestine contained fecal matter at places.

Liver was lacerated 1 one big metallic pellet was recovered from left lobe of liver."

19. It is opined by the doctor that death of deceased was caused by Ante-mortem injuries and haemorrhage. Injury nos.1, 2, 3, 6, 7, 16, 17 and 18 were incised wounds and may be caused by sharp edged weapon as Kanta and injury nos. 4, 5, 8, 9, 10, 11, 12 and 13 were caused by fire arm, which he opined more than one in number. P.W.-7 identified the cloths of deceased and the three pellets recovered from the body of deceased, as Ex.Ka.-18. It is also stated that injury nos.6, 16 and 18 can be caused by pointed and sharp edged weapon like spear

20. P.W.-8, Ram Samujh Yadav, proved G.D. No.9 date 13.07.1981 time 9.30.

21. Besides the above mentioned oral evidences Vishwanath Pandey, clerk in the office of District Hospital, Hardoi, Raghunath Mishra, Head Constable No.34, C.P., Malkhana Moharar produced their affidavit in court and stated that the case property in five bundles were sent to chemical examiner Agra, U.P.. through constable-681 Shivlal, O.P. Pachdeora, Police Station Pali and case property remained intact during this period. Raghunath Mishra stated in his affidavit that the case property (4 contenor and 1 potli) were send through constable Shivlal-681 for chemical test to CMO Office Hardoi and it remained intact.

22. After the conclusion of evidence of witnesses the statements of accused were recorded under section 313 Cr.P.C. All the accused denied the allegations and the evidences produced against them and stated that they are falsely implicated in the present case due enmity and partibandi. No defence witnesses were adduced, however, opportunity to adduced defence witness were given.

23. So far as enmity is concerned all the accused-appellant admitted in their statement under section 313 Cr.P.C. that they were falsely implicated as there was previous enmity between the parties. P.W.-2 Jhinguri specifically stated in FIR that his brother Prakash, (now deceased) was tried and convicted by the court for firing on appellant Ram Sahai and he was punished with seven years imprisonment in that case. He came out of jail two years before this incident. It is true that animosity is double edged weapon and it can be used to falsely implicate or the incident may occurred due to enmity. Now it is to be seen that whether the accused appellants was falsely implicated in the case or they are actually committed the offence. In this case the P.W.-2 and P.W.-3, are eye witnesses of the case, both appeared and deposed in the court. P.W.-2 specifically stated that when he went to defecation near pond he heard the sound of fire and cries of his brother and he also seen his brother crying and running towards his house. It is also stated that he fell down due to fire and two fire were shot even after he fell down. The accused-appellants were challenged by

witnesses Raghunandan, Bare and Darbari and Bare as P.W.-3 has corroborated the evidence of P.W.-2 Jhinguri, on oath. Both of the witnesses proved that thereafter the appellants picked the dead body of deceased and threw in the fields of Jawahar. It is also admitted by P.W.-2 that when the Prakash was in jail the real brother of appellant Ram Sahai namely Chote was murdered by some one else and he alongwith his brother Sarkash, Anangpal and Harkaran were named in that case and they were acquitted of the charges of murder 4 to 5 months before the incident. The wife of his brother Sarkash was also murdered and Gangaram, Mulayam and Bhramarpal were tried for the same.

24. It is argued by learned counsel for the appellants that according to FIR the dead body of the deceased was dragged by the appellants, while taking towards the field of Jawahar. However, during the statement in court the witnesses stated that the dead body of Prakash was hang and thrown in the field of Jawahar. This is minor contradictions, which do not destroy the whole case of prosecution.

25. It is also argued on behalf of appellants that evidence of P.W.-2 is also doubtful, as appellants did not target him, however, animosity is said between both the families. In this contest it transpires from the record that deceased Prakash, aimed fire at Ram Sahai in earlier case, however, P.W.-3 has no direct concerned with that case, moreover, accused-appellants were following the deceased Prakash, while he was bringing the bundle of grass and going to his house. However, the victim was on the western side of pond for defecation. Hence there was no reason to target the complainant. Therefore, this argument is not tenable.

26. P.W.-4 collected the blood stain and the plain earth from the place of occurrence and from the place where the dead body was thrown, that material was send for chemical examination through letter Ex.Ka-21 and as per report Ex.Ka-22, human blood was found on the blood stained earth and underwear of deceased, as per serological report. It is also important to mention here that according to Ex.Ka-11, investigating officer collected six pellets and three bullets from the place of occurrence and on the bottom of bullets L.G. was engraved. According to P.W.-7 three pellets were recovered from the body of deceased and one matelic pellet was recovered from cavity of abdomen. According to P.W.-7 injury nos. 4, 5, 8, 9, 10, 11, 12 and 13 were caused by gun shot. All the case properties were produced before the P.W.-4 investigating officer, who proved in court that six tiklies and three pellets were recovered from the place of occurrence, which are proved by investigating officer in court. P.W.-4, investigating officer proved the site plan also, according to which the bundle of grass was recovered from the place shown by letter "x' in site plain. This is the bundle of grass which the deceased was carrying on his head at the time of occurrence. However, "B" is the place where he was fired and he started running towards the village and "C" is the place where he is fell down due to the injury sustained by him. The dead body of deceased was recovered from the place shown by letter "C' in the site plan.

27. It is stated on behalf of the present appellant Jograj that he is assigned role of assaulting by lathi and the persons who shot fire and assaulted by spear and kanta have already expired and the appeal has been abated against them.

28. As per injury report the injury nos.14 and 15 were found to be caused by lathi. Injury no.14 is contusion 3 cm. X 2 cm., on the top of right shoulder and injury no.15 is lacerated wound of 2 cm. X 1 cm. x muscle deep in web space between right thumb and right index finger of right hand. Therefore, there is no confusion regarding the presence of accused Jograj at the time of occurrence and the accused Jograj alongwith other co-accused assaulted the deceased Prakash and cause injury on him. According to the opinion of doctor P.W.-7, the death has taken place about two days before of postmortem examination and cause of death was opined as shock and haemorrhage as a result of antemortem injuries. It is also opined that injuries were sufficient to cause of death in ordinary course of nature. Prosecution proved the cogent evidence that fire arm, sharp & pointed weapon and lathi were used to cause death of deceased.

29. It is also argued that P.W.-2 Jhinguri is interested and related witness and, therefore, for this obvious reason he deposed against the accused persons, therefore, his statement could not be relied upon. Jhinguri, P.W.-2 is the real brother of deceased, he admitted in his statement that his brother Prakash was tried for the murder of Chote, who is the real brother of Ram Sahai, he also stated that he was prosecuted for the murder of the brother of accused Ram Sahai, therefore, he may be partisan witness, but merely because he is the brother of deceased and both families has inimical relationship, his evidence cannot be discarded, moreover his evidence is corroborated by independent witness Bare.

30. It is argued by learned counsel for the appellant that evidence of P.W-2 is not reliable as he is interested witness in the case. In this context Hon'ble Apex Court held in plethora of judgment that the evidence of related witness cannot be brushed aside merely on the ground that he is related to deceased.

31. It was held by Hon'ble Supreme Court in para-15 of the case of **''Gulab Vs. State of U.P.', reported in 2021 SCCOnline SC 1211** that:-

"a related witness cannot be said to be an "interested" witness merely by virtue of being a relative of the victim. This Court has elucidated the difference between "interested and "related" witness in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punish due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused".

32. It was also held by Hon'ble Supreme Court in para-28 of the case of **''Rajesh Yadav and Another etc. Vs. State of U.P.' reported in 2022 SCCOnline SC 150** that:-

"a related witness cannot be termed as an interested witness per se. One has to see the place of occurrence alongwith other circumstances. A related witness can also be a natural witness. If an offence is committed within the precincts of the deceased, the presence of his family members cannot be ruled out, as they assume the position of natural witnesses. When their evidence is clear, cogent and withstood the rigor of cross examination, it becomes sterling, not requiring further

corroboration. A related witness would become an interested witness, only when he is desirous of implicating the accused in rendering a conviction, on purpose."

33. In ***Kartik Malhar Vs. State of Bihar (1996) 1 SCC 614,*** the Hon'ble Apex Court has held as under:-

"We may also observe that the ground that the witness being a close relative and consequently, being a partisan witnesses, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dilip Singh's case (supra) in which this Court expressed its surprise over the impression which prevailed in the minds of the members of the Bar that relative were not independent witnesses. Speaking through Vivian Bose, J., the Court observed :

We are unable to agree with the learned Judges of High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rules. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in Rameshwar v. The State of Rajasthan [1952] SCR 377= AIR 1952 SC 54. We find, however, that it is unfortunately still persist, if not in the judgments of the Courts, at any rate in the arguments of counsel."

In this case, the Court further observed as under:

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause such an enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth.

In another case of ***Mohd. Rojali Versus State of Assam: (2019) 19 SCC 567,*** *the Hon'ble Apex Court in this regard has held as under:-*

"As regards the contention that all the eyewitnesses are close relatives of the deceased, it is by now wellsettled that a related witness cannot be said to be an "interested' witnesses merely by virtue of being a relative of the victim. This court has elucidated the difference between "interested' and " related' witness in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused (for instance, ***see State of Rajasthan v. Kalki (1981) 2 SCC 752; Amit v. State of Uttar Pradesh, (2012) 4 Scc 107; and Gangabhavani v. Rayapati Venkat Reddy, (2013) 15 SCC 298).***

Recently, this difference was reiterated in ***Ganapathi v. State of Tamil Nadu, (2018) 5 SCC 549,*** *in the following*

erms, by referring to the three Judge bench decision in State of Rajasthan v. Kalki (supra): "14. "Related" is not equivalent to "interested". A witness may be called "interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of the case cannot be said to be "interested"."

11. In criminal cases, it is often the case that the offence is witnessed by a close relative of the victim, whose presence on the scene of the offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling the witness as interested. Indeed, one of the earliest statements with respect to interested witnesses in criminal case was made by this Court in ***Dalip Singh v. State of Panjab 1954 SCR 145****, wherein this Court observed:*

"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person..."

12. In case of related witness, the Court may not treat his or her testimony as inherently tainted, and needs to ensure only that the evidence is inherently reliable, probable, cogent and conistent. We may refer to the observations of this Court in ***Jayabalan v. Union Territory of Pondicherry, (2010) 1 SCC 199;***

"23. We are of the considered view that in cases where the Court is called upon to deal with the evidence of the interested witnesses, the approach of the Court while appreciating the evidence of such witnesses must not be pedantic. The Court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the Court must not be suspicious of such evidence. The primary endeavour of the Court must be to look for consistency. The evidence of a witnesses cannot be ignored or shown out solely because it comes from the mouth of a person who is closely related to the victim."

34. Hence prosecution proved the case beyond reasonable doubts by cogent evidence that the present appellant alongwith other co-accused assaulted the deceased and caused injuries, which doctor P.W.-7 opined as sufficient caused of death. Ocular witnesses proved the case and learned counsel for the appellant could not show any flaw or any material contradiction in the statements of witnesses. Learned counsel could not reveal any perversity or illegality in the judgment passed by the trial court.

35 Learned trial court considered the entire evidence on record led by prosecution and elucidated the evidences under the circumstances of the case and found that the evidences produced by the prosecution are sufficient to prove the case against the appellant beyond reasonable doubt.

36. In view of the forgoing discussion, we are of the view that reasoning given by the court below for convicting and sentencing the appellant no.3 Jograj, to rigorous imprisonment for life, for the alleged offence under section 302 read with section 34 IPC, are sufficient and prosecution established the guilt of the accused beyond reasonable doubt.

37. On the basis of above discussion, the appeal filed by the appellant Jograj is liable to be dismissed and is accordingly **dismissed.** The judgment of trial court is hereby confirmed.

38. The accused Jograj is in jail. He shall served out the punishment awarded by the trial court.

39. Let the copy of judgment and order as well as the records of trial court be transmitted to the trial court concerned forthwith for necessary information and compliance of this order.

(2023) 1 ILRA 828
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 09.01.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 1385 of 2021

Viresh Singh & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Nadeem Murtaza, Amit Kr. Singh Bhadauriya, Jayant Mohan Verma

Counsel for the Respondent:
G.A., Anupam Rastogi, Parijat Belerwa

Criminal Law- Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989-Section 3(1)(r)- Section 3(1)(s) - It is settled law that all insults or intimidation to a person will not be an offense under the Act unless such insult or intimidation is on account of victim belonging to Scheduled Caste or Scheduled Tribe-Offence under the Act is not established merely on the fact that the informant is a member of Scheduled Caste unless there is an intention to humiliate a member of Scheduled Caste or Scheduled Tribe for the reason that the victim belongs to such caste-It is not the case of the complainant that at the time of incident other peoples of the locality were present. The incident had occurred inside a house which was not within the public view and no member of public was present at that time-The complaint neither discloses the caste of the complainant or her family members nor the allegations are that they were made in public view. Also , the offending words are not purported to be made for the reason that the informant is a person belonging to Scheduled Caste.

Where the incident has occurred inside the house and not in public view then offence u/s 3(1)(r) and 3(1)(s) of the SC/ST Act will not be made out merely because the complainant belongs to SC/ST. (Para 10, 11, 13, 14)

Criminal Appeal allowed. (E-3)

Case Law/ Judgements relied upon:-

1. Hitesh Verma Vs St. of UK &anr. (2020)10 SCC 710

2. Khuman Singh Vs St. of M.P., (2020) 18 SCC 763

3. Swaran Singh Vs St., (2008) 8 SCC 435

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

1. Heard learned counsel for the appellants, learned counsel for the respondent no.2, learned AGA and perused the material available on record.

2. By means of the present appeal under Section 14-A (1) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 the appellants have prayed for quashing the impugned summoning order dated 9.3.2021 passed by

the learned Special Judge SC/ST Act, Sitapur in Complaint Case No. 242 of 2019 (Smt. Prema alias Ramguni Vs. Rakesh Singh and others) under Section 452,323,504 and 506 IPC and Section 3(1)(r) and 3(1)(s) of the SC/ST Act and the proceedings of the said complaint case.

3. In short, the facts of the case are that Prema @ Ramguni wife of Patiram, resident of village Ram Nagar, Police Station- Ramkot, District Sitapur preferred an application under Section 156(3) CrPC before the learned Special Judge (SC/ST Act) Sitapur alleging therein on 16.08.2019 at about 9 PM the appellants entered into the house of the complainant and started abusing the complainant and her husband and also assaulted her husband. On hearing the noise, the sons and daughters came and rescued. The appellants also abused their sons and used caste aspersions. The appellants also assaulted her sons and and daughter Baby, who was pregnant. When all the family persons started raising alarm, the appellants left the spot. The aforesaid incident was brought to the notice of the police of Police Station-Ramkot but on account of influence of the appellants, the police did not help them. Thereafter, an application about the aforesaid incident was given to the Superintendent of Police, Sitapur through registered post on 26.08.2019 and also met the Superintendent of Police but no action was taken. Under compelling circumstances, the applicants filed the complaint in the court.

4. On the aforesaid complaint, the learned Sessions Judge passed an order dated 25.9.20219 registering the same as a complaint case. After recording of statement under Section 200 CrPC , statement of Patiram and Bebi, the learned court below passed the impugned order dated 9.3.2021 summoning the appellants under the aforementioned sections.

5. Learned counsel for the appellants has submitted that the complaint has been moved with malicious intention as when the appellants came to know that the respondents are destroying their trees by pouring harmful chemical, the appellants have reported the matter to the police. As a counterblast, the present complaint has been filed. It is said that the husband of the respondent no.2 Patiram and his son are working in the Sitapur Judgeship and has lot of influence. It has been stated that when his FIR was not lodged on account of influence of respondents upon the local police, the appellant no.1 has moved an application under Section 156 (3) CRPC on 6.11.2019 but the same is still pending on account of pressure tactics of the respondent no.1 and his son.

6. Learned counsel for the appellants has further argued that the ingredients of Section 3(1)(r) and 3(1)(s) of the Act are not attracted in the circumstances of the case as the alleged incident has taken place inside the house and not at a place within public view. Further, in view of the decision rendered in **Fiona Shrikhande Versus State of Mahrashtra and another (2013) 14 SCC 44,** even offence under other sections are not made out against the appellants.

7. Lastly, it has been argued that the present criminal proceedings have been initiated with an ulterior motive to harass the appellants which is causing serious prejudice as well as loss of reputation in the locality where the appellants are residing. It is said that the present criminal proceedings are nothing but an absolute abuse of the process of law.

8. Refuting the assertions of the appellants, learned counsel for the respondent no. 2 and learned AGA have submitted that there is no illegality or infirmity in the impugned order.

9. The learned Court below has proceeded to pass the summoning order after following due procedure and recording the statement of the complainant and other witnesses. Therefore, the present is liable to be dismissed.

10. It is settled law that all insults or intimidation to a person will not be an offense under the Act unless such insult or intimidation is on account of victim belonging to Scheduled Caste or Scheduled Tribe. The offense under section 3(1)(r) of the Act would indicate the ingredient of intentional insult and intimidation with an intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe. Another key ingredient of the provision is insult or intimidation in ?any place within public view?. In the case of **Hitesh Verma versus State of Uttarakhand another (2020)10 SCC 710**, which has been relied upon by the learned Counsel for the petitioner, the Hon'ble Supreme Court had an occasion to examine the applicability of Section 3 of the SC/ST Act. The Hon'ble Supreme Court observed that the basic ingredients of the offence under under section 3(1)(r) of the Act can be classified as (1) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe and (2) in any place within public view. In this case, the Hon'ble Supreme Court held as under:-

"13. The offence under under section 3(1)(r) of the Act would indicate the ingredient of intentional insult and intimidation with an intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe. All insults or intimidations to a person will not be an offence under the Act unless such insult or intimidation is on account of victim belonging to Scheduled Caste or Scheduled Tribe. The object of the Act is to improve the socio-economic conditions of the Scheduled Castes and the Scheduled Tribes as they are denied number of civil rights. Thus, an offence under the Act would be made out when a member of the vulnerable section of the Society is subjected to indignities, humiliations and harassment. The assertion of title over the land by either of the parties is not due to either the indignities, humiliations or harassment. Every citizen has a right to avail their remedies in accordance with law. Therefore, if the appellant or his family members have invoked jurisdiction of the civil court, or that respondent No.2 has invoked the jurisdiction of the civil court, then the parties are availing their remedies in accordance with the procedure established by law. Such action is not for the reason that respondent No.2 is member of Scheduled Caste."

11. In another judgment reported as **Khuman Singh V. State of Madhya Pradesh (2020) 18 SCC 763**, the Hon'ble Supreme Court held that in a case for applicability of section 3 (2)(V) of the Act, the fact that the deceased belonged to Scheduled Caste would not be enough to inflict enhanced punishment. The Court observed that there was nothing to suggest that the offence was committed by the appellant only because the deceased belonged to Scheduled Caste. Therefore, offence under the Act is not established merely on the fact that the informant is a member of Scheduled Caste unless there is

an intention to humiliate a member of Scheduled Caste or Scheduled Tribe for the reason that the victim belongs to such caste.

12. In the case of **Swaran Singh Versus State (2008) 8 SCC 435,** the Hon'ble Supreme Court define the expression "place within public view" and "public place". The relevant paragraph reads as under:-

"28. It has been alleged in the FIR that Vinod Nagar, the first informant, was insulted by appellants 2 and 3 (by calling him a `Chamar') when he stood near the car which was parked at the gate of the premises. In our opinion, this was certainly a place within public view, since the gate of a house is certainly a place within public view. It could have been a different matter had the alleged offence been committed inside a building, and also was not in the public view. However, if the offence is committed outside the building e.g. in a lawn outside a house, and the lawn can be seen by someone from the road or lane outside the boundary wall,the lawn would certainly be a place within the public view. Also, even if the remark is made inside a building, but some members of the public are there (not merely relatives or friends) then also it would be an offence since it is in the public view. We must, therefore, not confuse the expression `place within public view' with the expression `public place'. A place can be a private place but yet within the public view. On the other hand, a public place would ordinarily mean a place which is owned or leased by the Government or the municipality (or other local body) or gaon sabha or an instrumentality of the State, and not by private persons or private bodies."

13. The instant case is to be examined the light of the aforesaid proposition laid down by the Hon'ble Supreme Court in the aforesaid cases. It is the clear cut stand of the complainant-Prema @ Ramguni in the complaint under Section 156(3) Cr.PC that the appellants had entered into the house at 9 PM using expletive language and assaulted her husband and sons. It is not the case of the complainant that at the time of incident other peoples of the locality were present. The incident had occurred inside a house which was not within the public view and no member of public was present at that time.

14. Therefore, from the material on record offence under the Act is not established merely on the fact that the complainant is a member of Scheduled Caste unless there is an intention to humiliate a member of Scheduled Caste or Scheduled Tribe for the reason that the victims belong to such a caste. Moreover, it comes out from the record that there was a dispute between the parties with regard to trees standing over a piece of land which is situated near the house of the respondent no.2. The appellants have also filed a complaint against the private respondents in respect of the dispute took place earlier. It is relevant to add that the complaint neither discloses the caste of the complainant or her family members nor the allegations are that they were made in public view. Also, the offending words are not purported to be made for the reason that the informant is a person belonging to Scheduled Caste.The other sections of IPC are also not attracted, thus no case is made out against the appellants in the aforesaid case.

15. In view of the above discussion, I am of the considered opinion that the

charges levelled against the appellants under sections 452,323,504 and 506 IPC and section 3(1)(r) and 3(1)(s) of the Act are not made out against the appellants.

16. Accordingly, the appeal is **allowed** and the proceedings of complaint Case No. 242 of 2019 Smt. Prema alias Ramguni Vs. Rakesh Singh and others) so far as it relates to the appellants, under sections 452,323,504 and 506 IPC and section 3(1)(r) and 3(1)(s) of the Act, pending in the court of Special Judge, SC/ST Act, Sitapur and the impugned summoning order dated 09.03.2021 passed by the Special Judge, SC/ST Act, Sitapur are hereby quashed.

(2023) 1 ILRA 832
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.12.2022

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Second Appeal No. 2396 of 1981

Shrimati Ram Ratti & Ors. ...Appellants
Versus
Gorakh Prasad Dubey ...Respondent

Counsel for the Appellants:
Sri V.B. Khare, Sri Ashok Kumar Shukla, Sri Satendra Kumar Singh, Sri Suresh Chandra Varma

Counsel for the Respondent:
Sri D.N. Misra, Sri Adya Prasad Tewari, Sri C.B. Dhar Dubey, Sri P.P. Chaudhary

Civil Law - **Civil Procedure Code, 1908 - Section 100, - Specific Relief Act, 1963 - Sections 16(c), 20 & 20(2): -** Plaintiff's Second Appeal – challenging the Judgment & decree passed by court below in Civil Appeals - Suit for Specific performance of a contract for sale - being aggrieved the findings of trial court, both parties filed separate Appeals before first appellate court - first appellate court set aside the trial court judgment and decree in favour of plaintiff-respondent - substantial question of law - law on unfair advantage in specific performance of contract is well settled - and traced its origin from the principles of equity - and - on second issue of 'the notice' - there is no such notice on record whether plaintiff respondent expressed his willingness to perform his part of the promise - plaintiff-respondent failed to aver and prove his notice to the defendant-appellant to perform his part of contract - the law in this regard is very well settled that there must be clear and unambiguous proof of notice as required under the law - thus, both the grounds appeal succeeds and is allowed - judgment of appellate court is set aside - defendants shall return the amount received - directions issued accordingly. (Para – 8, 12, 13**)**

Second Appeal Allowed. (E-11)

List of Cases cited:

1. A.C. Arulappan Vs Ahalya Naik, reported as (2001) 6 SCC 600,

2. Ramesh ChandVs Asruddin, reported as (2016) 1 SCC 653,

3. Manjunath Anandappa Urf Shivappa Hansi Appellant VsTammanasa & ors., AIR 2003 SC 1391

4. Umabai & anr.-Appellants Vs Nilkanth Dhondiba Chavan (Dead) by Lrs.& anr. Respondents as reported in 2005 3 AWC 2948,

5. C.S. Venkatesh Vs A.S.C. Murthy (D) By Lrs. & ors. as reported in 2020 3 SCC 280,

6. Sughar Singh Vs Hari Singh (Dead) Through LRS. & ors.. as reported in 2021 AIR(SC) 5581,

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Heard counsels for the parties and perused the record with their assistance.

2. The appellants have approached this Court challenging the judgment and decree dated 04.07.1981 passed by the I Additional District Judge, Gorakhpur in Civil Appeal No. 28 of 1980 and Civil Appeal No. 29 of 1980.

3. Both the appeals arise from a suit for specific performance of a contract for sale bearing Suit No. 62 of 1973, filed by the respondent in this second appeal. The suit was partly decreed and aggrieved by the findings of the Trial Court, both parties filed their separate appeals before the First Appellate Court. First Appellate Court set aside Trial Court's Judgment and decreed the suit in favour of the plaintiff-respondent. Against the First Appellate Court's judgment, the defendants in the original suit have filed this second appeal.

4. Learned counsel for the appellants submits that there are two substantial questions of law involved in the present second appeal, viz.,

(i) whether the judgment and decree of the Appellate Court is legally perverse?

(ii) whether the appellate court has wrongly inferred readiness and willingness on the part of plaintiff-respondents to perform his part of the obligation to execute the sale deed in absence of any evidence to show his willingness?

5. With regard to the substantial question of law number one, learned counsel for the defendant-appellant contends that the first Appellate Court wrongly interpreted evidence on record and gave a finding contrary to the settled law of non-execution of a sale deed on the ground of unconscionable transaction and unfair advantage. Counsel for the appellant refers to points No. 2 and 3 of the judgment of the Appellate Court where it agrees with the view taken by the Trial Court, that the market value of the property must be at least Rs.30,000/-. Whereas, the agreement to sell was for a consideration of Rs.15,000/-. Counsel further argues that both the Courts have considered the admission of the plaintiff-respondent in his oral statement, that the property had a market value of Rs. 35,000/-, but the Appellate Court in its judgment ignored the said admission and ruled against the contention of unfair advantage and inadequacy of consideration taken by the defendant-appellant.

6. Learned counsel for the plaintiff-resondent contends that there is no perversity in the First Appellate Court's judgment and that inadequacy of consideration is not a ground for non-execution of the sale deed. He further adds that the plea that the signature of the defendant-appellant was forged is not accepted by both the Courts. Counsel for the plaintiff-respondent further avers that defendant-respondent Bansraj has already sold most of his property therefore it can be inferred that he was in dire need of money and the same reasoning has been given by the First Appellate Court while refusing the plea of unconscionability of the terms of the agreement and undue advantage raised by the defendant-appellant.

7. A perusal of the record shows that plaintiff-respondent, Gorakh Prasad as P.W.1, admitted the value of the property at around Rs.35,000/- and both the Courts in their judgments have valued it at no less than Rs. 30,000. Appellate Court, while reversing the finding of the Trial Court regarding the unfair advantage to the

plaintiff-respondent, has recorded that defendant Bansraj has been selling his other properties, and therefore, he must be in dire need of money. Furthermore, both the Courts have recorded that the sum of Rs.5,000, paid at the time of execution of the agreement to sell was to be used by the defendant-appellant for some urgent repair works on his property. Both of these findings recorded by the Appellate Court are in contradiction with each other. If the defendant was in dire need of money and he agreed to sell the property at less than half the market value of the property, at Rs.15,000/-, then why would defendant Bansraj take only Rs.5,000 as advance, and not take the entire consideration. Without recording cogent reasons, the finding of undue advantage recorded by the Trial Court could not be reversed by the First Appellate Court.

8. The law on unfair advantage in specific performance of contract is well settled and traces its origin from the principles of equity and is incorporated in Section 20 of the Specific Relief Act, 1963 (hereinafter referred to as the Act of 1963). Suffice would be to refer to the judgment of the Supreme Court in the case of **A.C. Arulappan v. Ahalya Naik, reported as (2001) 6 SCC 600,** where paragraph 15 reads;

"15. Granting of specific performance is an equitable relief, though the same is now governed by the statutory provisions of the Specific Relief Act, 1963. These equitable principles are nicely incorporated in Section 20 of the Act. While granting a decree for specific performance, these salutary guidelines shall be in the forefront of the mind of the court. The trial court, which had the added advantage of recording the evidence and seeing the demeanour of the witnesses, considered the relevant facts and reached a conclusion. The appellate court should not have reversed that decision disregarding these facts and, in our view, the appellate court seriously flawed in its decision. Therefore, we hold that the respondent is not entitled to a decree of specific performance of the contract."

9. Furthermore, the Appellate Court while decreeing the specific performance in favour of the plaintiff-respondant did not adhere to the established judicial precedent of being sound and reasonable and being guided by the settled judicial principles. The law is settled that no decree of specific performance be granted because courts are bound to do so, courts have ample discretion while deciding whether they should decree a suit for a specific performance or not. However, such discretion cannot be arbitrary and the same has been reiterated in a plethora of judgments by the Supreme Court. Suffice would be to refer to the judgment of the Supreme Court in the case of **Ramesh Chand v. Asruddin, reported as (2016) 1 SCC 653,** where it has been held in paragraph 8 that;

"8. Section 20 of the Specific Relief Act, 1963, provides that the jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so. However, the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles. Sub-section (2) of Section 20 of the Act provides the three situations in which the court may exercise discretion not to decree specific performance. One such situation is contained in clause (a) of sub-section (2) of Section 20 which provides that where the

terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant, the decree of specific performance need not be passed. It is pertinent to mention here that in the present case, though execution of the agreement dated 21-6-2004 between the parties is proved, but it is nowhere pleaded or proved by the plaintiff that he got redeemed the mortgaged land in favour of Defendant 2 in terms of the agreement, nor is it specifically pleaded that he was ready and willing to get the property redeemed from the mortgage."

10. With regard to question number two learned Counsel for the defendant-appellant submits that there was nothing on record to show that his client ever received any notice from the plaintiff-respondent regarding his willingness to get the sale deed executed on his payment of the remaining Rs.10,000/-. He further contends that as per Section 16(c) of the Act of 1963, averments and proof of the plaintiff's willingness in clear terms are a must. Merely saying that he has issued a notice for the execution of sale deed, without any proof filed in his suit for specific performance, is not enough to satisfy the requirements of Section 16(c) of the Act of 1963. Counsel for the appellant places reliance on two judgments of the Supreme Court in the cases of **Manjunath Anandappa Urf Shivappa Hansi Appellant v. Tammanasa and Others Respondents as reported in AIR 2003 Supreme Court 1391, and Umabai & Anr.- Appellants v. Nilkanth Dhondiba Chavan (Dead) by Lrs. and Anr.- Respondents as reported in 2005 3 AWC 2948.**

11. Learned Counsel for the plaintiff-respondent contends that the Appellate Court has rightly decided the issue of his willingness to perform his part of the contract, in his favour. He further adds that in the suit for eviction and recovery of rent by the defendant-appellant against the plaintiff-respondent, he has taken a stand that he is not a tenant and is willing to pay the rest of the consideration and get the sale deed executed in his favour. In reply to the respondent's notice, it was the defendant-appellant who refused to accept the remaining sum and execute a sale deed in the respondent's favour. Counsel for the plaintiff-respondent further contends that his willingness to perform his part of the deal should be adjudged by taking into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances such as his stand in the subsequent suit for eviction. Counsel for the respondent places reliance upon the judgment of the Supreme Court in the cases of **C.S. Venkatesh vs. A.S.C. Murthy (D) By Lrs. & Ors. as reported in 2020 3 SCC 280, and Sughar Singh vs. Hari Singh (Dead) Through LRS. & ORS. as reported in 2021 AIR(SC) 5581.**

12. A perusal of the Appellate Court judgment on this issue shows that nowhere it refers to "the notice" sent by the plaintiff-respondents. There is no such notice on record. All it has considered is a letter bearing paper no. 115/C marked as Ext. 2, sent by the defendant-appellant refusing to honour his part of the agreement to sell, and repudiating any contract for sale between him and the plaintiff-respondent. A perusal of the letter itself does not reveal whether it was in response to any notice sent by the plaintiff-respondent, where the plaintiff-respondent has expressed his

willingness to perform his part of the promise. Plaintiff-respondent has failed to aver and prove his notice to the defendant-appellant to perform his part of the contract. The judgments in C.S. Venkatesh (supra) and Sughar Singh(supra), relied upon by the counsel for the plaintiff-respondent, also approve this view. The law in this regard is very well settled that there must be clear and unambiguous proof of a notice as required under Section 16(c) of the Act of 1963 and Forms 47 and 48 of Appendix A of the CPC,1908. Suffice would be to refer to the judgment of the Supreme Court in the case of **Manjunath Anandappa (Supra)**, paragraphs 13,14 and 15 thus reads:

"13. Section 16(c) of the Specific Relief Act reads thus:

"Specific performance of a contract cannot be enforced in favour of a person--

***

who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant."

14. In terms of the aforementioned provision, it is incumbent upon the plaintiff both to aver and prove that he had all along been ready and willing to perform the essential terms of contract which were required to be performed by him.

15. Forms 47 and 48 of Appendix A of the Code of Civil Procedure prescribe the manner in which such averments are required to be made by the plaintiff. Indisputably, the plaintiff has not made any averment to that effect. He, as noticed hereinbefore, merely contended that he called upon Defendant 2 to bring Defendant 1 to execute a registered sale deed. Apart from the fact that the date of the purported demand has not been disclosed, admittedly, no such demand was made upon Defendant 1. We may notice, at this juncture, that the plaintiff in his evidence admitted that Defendant 1 had revoked the power of attorney granted in favour of Defendant 2. In his deposition, he merely stated that such revocation took place after the agreement for sale was executed. If he was aware of the fact that the power of attorney executed in favour of Defendant 2 was revoked, the question of any demand by him upon Defendant 2 to bring Defendant 1 for execution of the agreement for sale would not arise at all. Furthermore, indisputably the said power of attorney was not a registered one. Defendant 2, therefore, could not execute a registered deed of sale in his favour. The demand, if any, for execution of the deed of sale in terms of the agreement of sale could have been, thus, made only upon Defendant 1, the owner of the property. The balance consideration of Rs 10,000 also could have been tendered only to Defendant 1. As indicated hereinbefore, the purported notice was issued only on 8-8-1984, that is, much after the expiry of the period of three years, within which the agreement of sale was required to be acted upon."

13. From the aforesaid, it is clear that the plaintiff did not give any notice to the defendants of the execution of the sale deed as is required under the law. Thus, on both the grounds the present appeal succeeds and is allowed. The judgment of the appellate Court is set aside. The suit of the plaintiff for specific performance fails. The defendants shall return the amount received by them under the agreement to sell to the plaintiff along with interest at the rate of

6% p.a., within a period of three months from today.

14. With the aforesaid, the appeal stands ***allowed.***

(2023) 1 ILRA 837
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.11.2022

BEFORE

THE HON'BLE AJAY BHANOT, J.

First Appeal From Order No. 46 of 2013

U.P.S.R.T.C. ...Appellant
Versus
Smt. Meghkaur & Anr. ...Opposite Parties

Counsel for the Appellant:
Sri Sanjeev Kumar Yadav

Counsel for the Opposite Parties:
Sri Nigamendra Shukla, Sri Suresh Bahadur Singh, Sri Jahangir Haider

Civil Law – Motor Vehicles Act, 1988 - Section - 173, - UP Motor Vehicles Rules, 1998 - Rule 220-A(3)(i), - Civil Procedure Code, 1908 - Order 41, Rule 33 - : - Insurer's appeal - against award on two issues - quantum of compensation & contributory negligence - deceased was died in motor accident - in which a rash & negligent driving of UPSRT bus hit the deceased when he was driving a bicycle - on the issue of contributory negligence, court fixed the sole liability of incident upon UPSRT - and - on the issue of quantum of compensation, by reversing finding of learned tribunal on the issue of Income, future prospects & conventional heads in the light of judgment of Hon'ble Apex court rendered in case of Pranay Sethi's, Urmilla Shukla's, Sarla Verma's, - impugned award is modified - directions issued accordingly - Appeal disposed of. (Para - 24, 25, 30, 33, 34, 36, 38, 42, 44)

Appeal disposed of. (E-11)

List of Cases cited:

1. Jitendra Kimshankar Trivedi & ors. Vs Kasam Daud Kumbhar & ors. (2015) 4 SCC 237,

2. Arun Kumar Agarwal & anr. Vs National Insurance Co. Ltd. & ors. (2010) 9 SCC 218,

3. Mahant Dhangir & anr. Vs Madan Mohan & ors. (AIR 1988 SC 54),

4. Delhi Electric Supply Undertaking Vs Basanti Devi (AIR 2000 SC 43),

5. National Insurance Co. Ltd. Vs Smt. Vidyawati Devi & ors. (FAFO No.2389/2016 decided on 27.07.2016),

6. New India Assurance Co. Ltd. Vs Smt. Suman Mishra & ors. (2019 (5) ADJ 669),

7. National Insurance Co. Ltd. Vs Pranay Sethi & ors., (2017 (16) SCC 680),

8. New India Assurance Co. Ltd. Vs Urmilla Shukla & ors. (2021 SSC Online SC 822),

9. Smt. Sarla Verma & ors. Vs Delhi Transport Corp. & anr. (2009 (6) SCC 121).

(Delivered by Hon'ble Ajay Bhanot, J.)

I. Introduction

1. This first appeal from order arises out of the judgment and award dated 29.9.2012 passed by the learned Motor Accident Claims Tribunal/learned District and Sessions Judge, Court No.4, Ghaziabad in Motor Accident Claim Petition No.261 of 2011 (Smt. Meghkaur and another v. U.P.State Road Transport Corporation.

2. The first appeal from order has been filed by the U.P. State Road Transport Corporation contesting its liability to pay and also the quantum of compensation

awarded by the learned Tribunal. An oral cross-objection has been raised on behalf of the respondents-claimants seeking enhancement of compensation.

II. Case of the claimants and the respondents before the learned Tribunal:

3. Briefly the case of the claimants before the learned Tribunal was that the deceased-Bhikam Singh died in a motor accident on 29.12.2010, which was caused by rash and negligent driving of the UPSRTC bus driver. The deceased was riding a bicycle when he was hit by the offending UPSRTC bus. The claimants were dependant on the deceased and were entitled for compensation from UPSRTC. The UPSRTC resisted the claim of the claimants by filing a written statement. Both parties adduced evidence at the trial.

III. Compensation awarded by the learned tribunal:

4. Learned tribunal found that the accident was caused by the rash and negligent driving of the driver of UPSRTC bus number.

5. The learned tribunal in the impugned judgment dated 29.09.2012 awarded compensation which is depicted in a tabulated form hereunder:

Sr. No.	Heads	Amount (in rupees)
1	Monthly Income (A)	5,500/- p.m. from private job and 3000/- p.m. from agriculture
2	Annual Income (B)	8,500/-
3	Future prospects (C)	30% of 8,500/- = 11,050/-
4	Annual Income + Future Prospects (B + C = D)	19,550/-
5	Total income after deduction (E)	11,050 -3,683 = 7,367/-
6	Multiplier (F)	11
7	Total loss of dependency (E x F)	7367 x 12 x 11 = 9,72,444/-
8	Funeral expenses	10,000/-
9	Loss of love and affection	25,000/-
10	Loss estate	25,000/-
11	Loss of consortium	30,000/-
12	Total compensation	10,62,444/-
13	Interest	7.50%

6. Shri Sanjeev Kumar Yadav, learned counsel for the appellant has assailed the award on these two issues. The learned tribunal erred by finding against the appellant on the issue of contributory negligence. The compensation awarded to the claimants-respondents was excessive.

7. Shri Nigamendra Shukla, learned counsel for the respondents-claimants has raised an oral cross objection contesting the quantum of the awarded compensation. According to the learned counsel for the respondents-claimants, the income of the deceased was improperly assessed. The compensation is liable to be enhanced.

Rejoining the issue, the learned counsel for the appellant-UPSRTC disputes the maintainability of the cross objection at the appellate stage.

IV. Issues for consideration:

8. 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 oral cross objections can be raised by the claimants at the stage of appeal?

(B). Whether the driver of the UPSRTC bus was solely responsible for the accident or it was a case of contributory negligence?

(C). Whether learned Tribunal correctly computed the compensation under these various heads:-

(i) income,

(ii) conventional expenses,

(iii) future prospects,

(iv) multiplier, and

(v) interest while computing the compensation?

V.(A) Issue of oral cross objection:

9. 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.

10. The jurisdiction of the appellant court to allow a party 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."

(emphasis supplied)

11. The amplitude of the provision ensures that the arms of law are long enough to reach injustice, and the arms of the Court are enough to serve justice. Drawing its power from the aforesaid provision, the appellate court may pass orders to serve the ends of justice.

12. More specifically the beneficent nature of the legislation and the statutory mandate of the Motor Vehicles Act, 1988 enjoin the appellate court to exercise its powers under Order 41 Rule 33 to award just compensation. **[See: Jitendra Kimshankar Trivedi and others vs. Kasam Daud Kumbhar and others1, Arun Kumar Agarwal and another vs. National Insurance Company Ltd. and others2]**

13. The scope of Order 41 Rule 33 of the CPC the Supreme Court in **Mahant Dhangir and another v. Madan Mohan and others3** held:-

"11.The next question for consideration is whether the cross-objection was maintainable against Madan Mohan, the co-respondent, and if not, whether the Court could call into aid Order 41 Rule 33 CPC. For appreciating the contention it will be useful to set out hereunder R. 22 and R. 33 of order 41:

"R. 22 Upon hearing, respondent may object to decree as if he had preferred separate appeal. (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree (but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour, and may also take any cross-objection) to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

R. 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."

14. The same view was reiterated in **Delhi Electric Supply Undertaking vs. Basanti Devi4.**

15. Adverting to the extent of powers under Order XLI Rule 33 of the CPC, this Court in **National Insurance Co. Ltd. vs. Smt. Vidyawati Devi and others5** held thus:

"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."

16. Following ***Vidyawati Devi* (supra)** was followed in **New India Assurance Co. Ltd. v. Smt. Suman Mishra and others6**. Wherein Thaker, J. permitted counsels to raise oral objections and enhanced the compensation even in absence of written cross objections in appeal by holding:

"44. It is submitted that the amount which is granted is not just compensation and it is orally submitted that the amount of compensation requires to be enhanced in light of Division Bench decision of this High Court in First Appeal From Order No.2389 of 2016 (National Insurance Co. Ltd. Versus Smt. Vidyawati Devi And 2 Others) decided on 27.7.2016 wherein it is held that under Order 41 Rule 33 of Code of Civil Procedure, amount of compensation can be enhanced even if there is no written appeal or written cross objection. This applies to this case also recently it has been held by Apex Court in North East Karnataka Road Transport Corporation Vs. Smt. Sujatha, AIR 2018 SC 5593 that for beneficial legislation the Court should grant enhancement even if other side is not present.

45. The principles of law pertaining to grant of just compensation cannot be said to have been adhered by Tribunal and therefore, it will have to be re-decided as per the decision in First Appeal

From Order No.2389 of 2016 (National Insurance Co. Ltd. Versus Smt. Vidyawati Devi And 2 Others) decided on 27.7.2016."

17. When the conditions precedent for raising cross objections were satisfied, this Court in **Vidyawati Devi (supra)** was not found wanting in entertaining the cross objections by holding thus:

"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."

18. In wake of the preceding discussion and authorities in point, the oral cross objections on behalf of the claimants-respondents are liable to be heard. However, this Court may mould the relief appropriately to obviate prejudice to either parties.

V.(B) Issue of contributory negligence in the accident:

19. The claimants introduced P.W.2-Yameen to establish negligent driving by the UPSRTC bus driver. P.W.2-Yameen deposed before the learned tribunal that he had witnessed the accident. P.W.2-Yameen testified that the rash and negligent driving of the UPSRTC bus driver caused the accident in which the deceased died. P.W.2-Yameen was travelling in the offending bus with a valid passenger ticket on the fateful journey. He produced the bus ticket and proved the same. P.W.2-Yameen could not be shaken under cross-examination. The authenticity of the bus ticket was never challenged.

20. The learned tribunal which had the benefit of observing the demeanour of the P.W.2-Yameen found to be a credible witness and believed his testimony. From the evidence in the record, this Court has no reason to take a different view on this point.

21. It would be apposite to consider the argument on behalf of the appellant-UPSRTC that the eye witness P.W.2-Yameen was unworthy of reliance as he gave a belated affidavit to the police authorities. The argument has no legs to stand on.

22. The police investigations are made into the criminal offence under the provisions of the Cr.P.C. read with the IPC. The compensation action which is the subject matter in this appeal is taken out under the Motor Vehicles Act, 1988 for an entirely different purpose. Separate standards of evidence are applicable to the respective proceedings.

23. I see merit in the submission of Shri Nigamendra Shukla, learned for the respondents-claimants/cross objectors that the delay in recording the statement of the eye witness P.W.2-Yameen was on account of inefficiency of the police investigators for which the claimants can neither be faulted nor made liable.

24. The evidence in the record establishes that the UPSRTC bus driver drove negligently and rashly, and was entirely responsible for the accident. The over speeding bus left the deceased with no time or opportunity to prevent the accident or save himself. The deceased who was

riding a bicycle prudently and cannot be faulted in any manner for the mishap. This is not case of contributory negligence. On this foot the UPSRTC is held to be fully liable to pay compensation to the claimants.

25. Learned tribunal found for the claimants and against the UPSRTC on the issue of contributory negligence and accordingly fixed the sole liability on the latter. There is no infirmity in the manner of appraisal of pleadings and evidence by the learned tribunal on this issue.

VI. (C)(i) Income of the deceased:

26. The learned tribunal upon consideration of evidence before it found that the income of the deceased from various sources is Rs.8,500/- per month.

27. The claimants had introduced P.W.1-Meghkaur (widow of the deceased), and land records to establish the income of the deceased before the learned tribunal. The wife of the deceased P.W.1-Meghkaur testified that the deceased worked in a paper mill, and was also engaged in agricultural activities. The land records attesting the agricultural holdings in the name of the deceased were proved by the claimants.

The learned tribunal found that the deceased earned a monthly salary of Rs.5,500/- per month as a worker in the paper mill and fixed the agricultural income of the deceased at Rs.3,000/- per month.

28. Learned counsel for the respondents-claimants contends that the income of Rs.3,000/- per month towards agricultural fixed by the learned tribunal was perverse.

29. Learned counsel for both the parties have perused the original records in court and have affirmed that the land falling to the share of the deceased in the joint agricultural holding was 0.7 hectares.

30. There is merit in the contention of the learned counsel for the claimant-respondent/cross objector that the learned tribunal neglected to consider the fertility of the land and the extent of the deceased land holdings while fixing the agricultural income. It is undisputed that the agricultural holdings are situated in a fertile tract at District-Ghaziabad. Accordingly, the agricultural income is assessed at Rs.4,000/- per month. The finding of the learned trial court in this regard is reversed.

31. In the wake of preceding discussion, the total monthly income of the deceased is fixed at Rs.9,500/- per month.

IV.(C) (ii) Calculation of Conventional Heads:

32. The amount determined under conventional heads in the impugned award is at variance with **National Insurance Company Ltd. v. *Pranay Sethi* and others7.** 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."

33. The figure under conventional heads determined in ***Pranay Sethi* (supra)** shall be applicable to the facts of this case. The award is modified accordingly.

IV.(C)(iii) Future Prospects:

34. The future prospects are liable to be calculated in accordance with the Uttar Pradesh Motor Vehicles Rules, 19988. 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--

(iii) More than 50 years of age : 20% of the salary."

35. The UP Rules, 1998 came up for consideration before the Supreme Court in **New India Assurance Co. Ltd. vs. Urmila Shukla and others9**. In **Urmila Shukla (supra)** upon consideration of various judgements including ***Pranay Sethi* (supra)** 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)***

36. 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 v. Delhi Transport Company and another10.*** 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."

37. 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.

38. This Court finds that the claimants/respondents are entitled to 20% enhancement in wages towards future prospects, consistent with the UP Rules, 1998. The necessary changes in the award shall be accordingly made.

39. In this wake, this Court finds for the appellant on the issue of grant of future prospects.

IV(C)(iv) Multiplier:

40. The age of the deceased was 55 years at the time of death. Multiplier of 11 has been correctly applied by the learned Tribunal and is in line with **Pranay Sethi (supra) and Sarla Verma (supra).**

IV.(C) (v) Interest

41. Interest of 7.5% and the manner of payment does not call for interference. However, the claimants-respondents shall not be entitled to interest on the enhanced income determined in this judgement.

VII. Determination of Compensation to which claimants-respondents are entitled:

42. In the wake of preceding discussion, the amount of compensation awarded to the claimants is tabulated below:

i. Date of Accident - 29.12.2010 at 8.00 P.M.

ii. Date of death - 29.12.2010

iii. Name of the deceased - Bhikham Singh

iv. Age of the deceased -55 years

v. Occupation of the deceased -Private Job/Agriculture

vi. Income of the deceased - Rs.8,500/-

vii. Name, Age and Relationship of claimants with the deceased

Sr. No.

Sr. No.	Name	Age	Relation
1	Smt. Meghkaur	50	Wife
2	Neeraj Kumar	29	Son

vii. Computation of Compensation

Sr. No.	Heads	Amount (in Rupees)
1	Monthly Income (A)	5,500/- p.m from service and 4,000/- p.m. from agriculture =9,500/-
2	Annual Income (B)	(A x 12 = B) 9,500 x 12 = 1,14,000/-
3	Future Prospects (C)	20% of 1,14,000 = 22,800/-
4	Annual Income + Future Prospects (B + C = D)	1,14000 + 22,800/- = 1,51000/-

5	Total annual income (D)	1,36,800/-
6	Deduction 1/3rd (E)	45,600/-
7	Total income after 1/3rd deduction	(D-E= F) 1/3 of 1,36,800/- =91,200/-
8	Multiplier (G)	(FxG = H) 91,200 x 11 = 10,03,200/-
9	Compensation (H)	10,03,200/- 10
10	Conventional Heads (I): (H + I = J) (a) Loss of consortium (b) Loss of Estate (c) Funeral Expenses	70,000/-
11	Total Compensation (H+I =J)	1,003,200/- + 70,000/- =10,73,200/-
12	Interest	7.50%

VII. Conclusion and Directions:

43. The amount of compensation to which the claimants have thus been found entitled shall be deposited by the corporation 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.

44. 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.

45. The first appeal from order and the cross-objections both are decided as above.

(2023) 1 ILRA 845
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.11.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

First Appeal From Order No. 366 of 2021

Smt. Urmila Devi ...Appellant
Versus
Rajendra Pal Tayal & Ors.
...Opposite Parties

Counsel for the Appellant:
Sri Amitabh Agarwal, Sri Kiran Kumar Arora, Sri Siddharth Singh

Counsel for the Opposite Parties:
C.S.C., Sri Ramesh Upadhyay, Sri A.A. Khan, Sri Mohd. Saleem Khan, Sri Swetashwa Agarwal

Civil Law – Court Fees Act, 1870 - Section - 7 (iv)(B), 7 (v)(II): - Appeals - against impugned direction to pay court fees ad valorem - original suit - for mandatory injunction - Appellant terminated the license of defendant's for running pottery Form over the suit property - when defendant/respondent did not give possession of suit property - plaintiff claiming relief of possession - court held that - in the light of judgment of Apex Court in case of Sant Lal Jain, the original suit would lie *for mandatory injunction* - hence, the impugned direction of trial court to pay fees under section 7(v)(II) is liable to set aside - court fees paid by the plaintiff is correct and proper - Appeal allowed - direction issued for conclude suit expeditiously accordingly. (Para - 18, 24, 26)

Appeal is allowed. (E-11)

List of Cases cited:

1. Sri Dori Lal Premi Vs Smt. Vidya Devi, Second Appeal No. 975 of 2013,

2. Malik Mohd. Tanveer Vs Uzma Malik & anr., dated 18.07.2016,

3. Sudhir Bansal & anr. Vs Girish Bansal, 2015 (5) ADJ 624 (DB),

4. Dinesh Kumar Vs A.D.J. Hardwar, 1996 (1) AWC 433,

5. Azizur Rahman Vs Salaam Khan & anr. (1995 (3) AWC,

6. Sant Lal Jain Vs Avtar Singh, AIR 1985 SC 857,

7. Islam Ahmad Vs Maqsood & anr., 2007 (8) ADJ 239.

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

1. Heard learned counsel for the appellant and learned counsel for the respondents.

2. The present appeal is directed against the order dated 25.04.2014 passed by the Additional Civil Judge (S.D.), Court No.2, Bulandshahar whereby the issue no.7 in Original Suit No.1285 of 2008 instituted by the plaintiff/appellant has been decided against the plaintiff/appellant and trial court has directed the plaintiff/appellant to pay court fees ad valorem.

3. The plaintiff/appellant has instituted Original Suit No.1285 of 2008 contending inter-alia that the suit property has been purchased by the plaintiff/appellant by registered sale deed dated 24.08.1966 on which a pottery business in the name of M/s Tayal Pottery was run by the plaintiff/appellant and defendant/respondent no.1 Rajendra Pal Tayal. Subsequently, Tayal Pottery was dissolved with the consent of the plaintiff/appellant and defendant/ respondent Rajendra Pal Tayal (since deceased). It is further pleaded in the plaint that a loan was taken from the U.P. Financial Corporation, Kanpur (hereinafter referred to as 'U.P.F.C.') by M/s Tayal Pottery which was repaid on 13.06.2007, and after discharge of loan, a registered re-conveyance deed was prepared in favour of plaintiff/appellant and defendants/ respondents.

4. Further case of the plaintiff/appellant is that after the loan of U.P.F.C. was discharged, the defendant being the real brother of the husband of the plaintiff/appellant carried on the business of pottery. It is submitted that the possession of defendants/respondents over the suit property was that of a licencee. The licence has been terminated by the plaintiff/appellant by registered notice dated 16.09.2008, and defendants/respondents were asked to hand over the possession of the suit property. The defendants/respondents did not give possession of the suit property which gave the cause of action to the plaintiff/appellant to institute the present suit.

5. In the aforesaid backdrop, the following relief has been prayed for by the plaintiff/appellant:-

"अ- यह कि प्रतिवादीगण को द्वारा आदेशात्मक निशेधाज्ञा आदेशित किया जावे कि वह निम्न वर्णित पोटरी का दखल वादिनी को दे और यदि प्रतिवादीगण ऐसा ना करे तो प्रतिवादीगण के खर्चे पर द्वारा सिविल कोर्ट अमीन वादिनी को पोटरी उपरोक्त का दखल दिलाया जावे।

ब- यह कि वादिनी को प्रतिवादीगण से दौराने वाद निम्न वर्णित पाटरी के इस्तेमाल की एवज में 8000/- रूपये मासिक प्रतिवादीगण से उपयोग धन दिलाया जावे जिस पर यदि आवश्यक हुआ तो

न्याय शुल्क निष्पादन के समय दिया जायेगा।

स- यह कि वादिनी को प्रतिवादीगण से वाद व्यय दिलाया जावे।

द- यह कि कोई अन्य अनुतोष जिसका वादिनी पाने की अधिकारी हो दिलाया जावे।"

6. The trial court framed the issue with regard to the sufficiency of the court fee. According to the defendants/respondents though, the suit has been instituted for mandatory injunction, but essentially plaintiff/appellant is claiming relief of possession. Hence, the plaintiff/appellant is liable to pay the court fee ad valorem as provided under Section 7(v)(II) of the Court Fees Act.

7. The trial court after considering the facts in detail found substance in the contention of defendants/respondents and held that as the plaintiff/appellant is essentially claiming relief of recovery of possession, therefore, she is liable to pay court fee ad valorem as per Section 7(v)(II) of the Court Fees Act, 1887.

8. Challenging the aforesaid order, learned counsel for the plaintiff/appellant has contended that the trial court has failed to appreciate the correct law on the issue inasmuch as the suit has been instituted by the plaintiff/appellant for a decree of mandatory injunction on the ground that the suit property is in the name of plaintiff/appellant and the nature of possession of the defendants/respondents over the suit property is of a licencee which implies that the possession of defendants/respondents over the suit property was only permissive, therefore, the suit for mandatory injunction is maintainable, and the plaintiff/appellant is liable to pay fixed court fee as contemplated under Section 7(iv-B) of the Court Fees Act. It is submitted that the trial court has erroneously held that as the plaintiff/appellant under the garb of mandatory injunction is essentially seeking relief of possession, therefore, she is liable to pay court fee ad valorem as provided under Section 7(v)((II) of the Court Fees Act. In support of aforesaid contention, he has placed reliance upon the judgement of this Court in the case of ***(Sri Dori Lal Premi, Advocate Vs. Smt. Vidya Devi)*** passed in Second Appeal No.975 of 2013. He has further placed reliance upon the judgement of the Delhi High Court in the case of ***Malik Mohd. Tanveer Vs. Uzma Malik and Another*** decided on 18.07.2016.

9. Per contra, learned counsel for the respondents would contend that the trial court has rightly held that the plaintiff/appellant is liable to pay court fee ad valorem since it is admitted on record that defendants/respondents are in possession of the suit property, and thus, plaintiff/appellant under the garb of mandatory injunction is essentially claiming relief of possession. Thus, it is contended that the trial court has not committed any illegality in deciding the issue of court fees against the plaintiff/appellant. In support of his contention, learned counsel for the respondents has placed reliance upon the judgements of this Court in the cases of ***Sudhir Bansal and Another Vs. Girish Bansal 2015 (5) ADJ 624(DB), Dinesh Kumar Vs. A.D.J. Hardwar 1996 (1) AWC 433 & Azizur Rahman Vs. Salaam Khan and Another 1995 (3) AWC.***

10. I have considered the rival submissions of the parties and perused the record.

11. The suit has been instituted by the plaintiff/appellant on the ground that the

suit property has been purchased in the name of the plaintiff/appellant by registered sale deed dated 24.08.1966. On the suit property, a business in the name of M/s Tayal Pottery was being run jointly by the plaintiff/appellant and defendant/ respondent. A loan was taken by them in the name of Tayal Pottery from the U.P.F.C. which was repaid by them on 13.06.2007. Thereafter, with the consent of the plaintiff/appellant, the defendants/ respondents continued with the pottery business over the suit property. According to the plaint case, the possession of defendants/respondents over the suit property was only permissive and the status of the defendants/respondents was that of a licencee. The plaintiff/appellant by registered notice dated 16.09.2008 terminated the licence of the defendants/ respondents. As the defendants/ respondents did not hand over the possession of the suit property to the plaintiff/appellant, a suit has been instituted by the plaintiff/appellant for the relief quoted above.

12. Though, relief of mandatory injunction has been claimed by the plaintiff/appellant, because of the admitted facts on record that defendants/respondents are in possession of the suit property, the suit is essentially for possession.

13. Now the question which arises for consideration is as to whether in the facts of the present case, the plaintiff/appellant is entitled to pay a fixed court fee as provided under Section 7(iv-B) of the Court Fees Act or ad valorem as provided under Section 7(v)(II) of the Court Fees Act.

14. To appreciate the said issue, the first question which arises for determination in the instant case is whether the suit of the plaintiff/appellant for mandatory injunction would lie or not, or the only remedy for the plaintiff/appellant is to seek a decree of possession. In this regard, it would be apt to refer to the judgement of the Apex Court in the case of ***Sant Lal Jain Vs. Avtar Singh reported in AIR 1985 SC 857.***

15. In the said case, the identical controversy came up for consideration before the Apex Court and the Apex Court considered the effect of Section 55 of the old Specific Relief Act, 1877 which has been incorporated in the new Specific Relief Act, 1963 as Section 39 read with Section 41.

16. The Apex Court held that where a licence has been terminated and the licensor wants the possession of the suit property, a suit for mandatory injunction would lie with the only rider that to seek relief of mandatory injunction, the plaintiff has to approach the court without any delay and the reasonable time for instituting a suit for mandatory injunction would be three years from the date of cause of action. However, if the plaintiff after terminating the licence remains dormant about his right and does not approach the court for his right, and three years period has elapsed from the date of termination of the licence, then, the plaintiff has to institute a suit for recovery of possession and suit for mandatory injunction would not lie.

17. This Court also in the case of ***Sri Dori Lal Premi (supra)*** by placing reliance upon the judgement of Apex Court in the case of ***Sant Lal Jain (supra)*** as well as the judgement of this Court in the case of ***Islam Ahmad Vs. Maqsood and Another 2007 (8) ADJ 239*** held as follows:-

"In view of the aforesaid authority it is apparent that the licensor has both the remedies of a suit for mandatory injunction or for recovery of possession. If he brings the suit within three years he can do so by a suit of mandatory injunction and in case it is filed beyond three years, the suit may simplicitor be for recovery of possession. However, the licensor, who has validly determined the licence, cannot be denied possession over the property no matter in what form the prayer is made in the suit. The justice oriented approach demands to avoid technicalities and to advance substantive justice. Therefore, it would not be proper to deny the relief of possession to the plaintiff respondent when he is entitled to it in law merely the for reason the relief is not properly worded and the court fee has not been paid.

The only difference between a suit for mandatory injunction for a direction of possession and in a suit for recovery of possession would be of the court fees inasmuch as in a suit for mandatory injunction fixed court fees is payable whereas in a suit for recovery of possession ad valorem court fees would be payable.

The counsel for the plaintiff respondent agrees for payment of ad valorem court fee on the suit for possession.

A similar controversy has arisen before me in the case of Islam Ahmad Vs. Maqsood Ahmed and another 2007 (8) ADJ 239 and it was held that even though the relief claimed by the party was not properly drafted and was coughed in a language as if it was a suit for mandatory injunction but as in effect the relief claimed is of possession, the party claiming possession if legally entitled to the same cannot be denied the benefit of it subject to payment of court fees for the said relief. The court fees was permitted to be made good as non-payment of the same was held to be an irregularity which was of a curable nature.

There are ample precedence where proper court fees was not paid but the court while deciding the appeal finally and granting the relief directed payment of the requisite court fee as a condition for implementation of the decree."

18. In the present case, according to the plaint case, the licence of defendants/respondents was terminated by the plaintiff/appellant by registered notice dated 16.09.2008 and the suit had been instituted on 22.10.2008. Therefore, the plaintiff/appellant has acted promptly in instituting the suit, and thus, the controversy in hand is covered by the judgement of Apex Court in the case of ***Sant Lal Jain (supra)***, and the suit for mandatory injunction would lie.

19. It is pertinent to note that in considering the issue of court fees, only plaint averments have to be seen. In this regard, it would be apt to reproduce paragraph 9 of the judgement of the Delhi High Court in the case of ***Malik Mohd. Tanveer (supra):-***

"9. I may note that the settled legal position is that for deciding the question relating to the amount of Court Fees payable on a plaint, the averments in the plaint have to be looked into. This court in the case of Oriental Trading Corporation vs. Punjab Skin Trading Co., relying upon the Full Bench of the Circuit Bench of the Punjab High Court at Delhi in Jai Krishna Dass vs. Babu Ram, 1967 Plrd 52 stated as follows:-

"(1)....it was settled law that for deciding the question relating to the amount of court fee payable on a plaint, not

only have the averments in the plaint alone to be taken into account but the said allegations are to be assumed to be correct and the decision can neither depend on the maintainability of the suit as framed nor upon the assumption that the court must somehow spell out of the plaint such a claim which is ultimately capable of being decreed and the Court has to take the plaint as it is without omitting anything material and without reading in it by implication what is not stated therein."

20. Now coming to the judgement relied upon by the learned counsel for the respondents in the case of ***Sudhir Bansal (supra).*** This Court finds that the judgement of this Court in the case of ***Sudhir Bansal (supra)*** is not applicable in the case in hand as the facts in these cases are different.

21. In the said case, the suit property was sold by the original owner to the plaintiff, and possession of the defendant in the suit vis-a-vis the original owner was that of the licencee. After the purchase of the property by the plaintiff, he instituted a suit for mandatory injunction and paid the court fee as provided under Section 7(iv-B) of the Court Fees Act. The trial court found that plaintiff was liable to pay the court fee ad valorem. The matter came up before this Court in appeal. This Court in appeal considering the effect of Section 59 of the Indian Easement Act, 1882 held that as the plaintiff had got the property from the original licensor by transfer, the licence granted in favour of the defendant ceased to exist and there was no relationship of licensor and licencee between plaintiff/appellant and defendant/ respondent. In the said case, this Court found that as there was no relationship of licensor and licencee between subsequent purchaser i.e. plaintiff and the defendant, therefore, plaintiff has to claim a relief of possession for which the court fee as provided under Section 7(v)(II) of the Court Fees Act is to be paid.

22. In the case of ***Dinesh Kumar (supra)***, this Court was considering a case where suit property was auctioned and the bid of the petitioner was highest, consequently, he was given suit property under the terms of the agreement. The petitioner paid certain installments and thereafter, he stopped payment of installments, and recovery was effected against him by the respondent/state which was challenged by the petitioner in the suit. The petitioner in the said case prayed for relief of injunction and paid a fixed court fee of Rs.500/-. The trial court held that the petitioner was liable to pay the court fee on the full amount which is sought to be recovered from him. The finding of the trial court was affirmed by the appellate court as well as by this Court in the writ petition. So, the facts of the said case were different from the facts of the present case as in that case court was considering a case where the plaintiff has challenged the recovery of money which according to him was being recovered from him illegally which is not so in the present case.

23. In the case of ***Azizur Rahman (supra)***, this Court recorded a specific finding in paragraph 5 that relief is for recovery of possession of the house which was valued at Rs.4 lac, consequently, the Court held that court fee is payable on that amount. Accordingly, this Court upheld the order of the trial court.

24. Thus, for the reasons given above, this Court is of the view that the trial court has acted illegally in holding that the

plaintiff/appellant is liable to pay court fees under Section 7(v)(II) of the Court Fees Act. Consequently, the order of the trial court is set aside. It is further held that the fixed court fee paid by the plaintiff/appellant is correct and proper in the present case.

25. Accordingly, the appeal is ***allowed*** with no order as to costs.

26. The trial court is further directed to conclude the suit expeditiously, preferably within one year from the date of production of the certified copy of this order. In case any adjournment is inevitable, the authority concerned may grant the same by imposing a heavy cost which may not be less than Rs.5,000/-.

(2023) 1 ILRA 851
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.11.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

First Appeal From Order No. 481 of 2020

Shri Krishna Prasad Tiwari & Ors.
...Appellants
Versus
Pramod Kumar Yadav & Ors.
...Opposite Parties

Counsel for the Appellants:
Sri Ram Singh, Sri Amit Kumar Singh

Counsel for the Opposite Parties:
Sri Arvind Kumar, Sri Arun Kumar Shukla

Civil Law – Motor Vehicles Act, 1988 - Sections 166 & 168: - Claimant's Appeal - for enhancement award - Accident took placed due to rash and negligent driving of driver of offending bus who hit the motorcycle of deceased - Contributory negligence - Evaluation of evidence - this court finds that finding of Tribunal in respect of the deceased in the accident is perverse and against the evidence on record - thus, court held that, accident was the result of sole negligence of driver of offending vehicle - and - in the light of judgment of Hon'ble Apex Court rendered in case of *Magma General Insurance Co.,* the court directed to Tribunal to recomputed the compensation by treating the income of the deceased as Rs. 6000/- in place of Rs. 3000/- per month - along with 6 % simple interest upon enhance amount of compensation - appeal is partly allowed, directions for payment, accordingly. (Para -7, 8, 9, 11)

Appeal is partly allowed. (E-11)

List of Cases cited:

1. Magma General Insurance Co. Ltd. Vs Nanu Ram Alias Chuhru Ram & ors. (2018 vol. 18 SCC 130.

2. Sudhir Kumar Rana Vs Surinder singh & ors. (2008 Vol. 2 TAC 769 SC).

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

1. Heard Sri Ram Singh, learned counsel for the claimants/appellants and Sri Arun Kumar Shukla, learned counsel for the respondents.

2. The claimants/appellants being dissatisfied with the quantum of compensation have preferred the present appeal with a prayer for enhancement of compensation.

3. Learned counsel for the claimants/appellants has contended that finding of the Tribunal that since the deceased was not having a valid driving licence to drive the motorcycle, therefore, there was some negligence of the deceased in the accident is perverse and against the record inasmuch as there was no evidence

on record to prove the negligence of the deceased in the accident. It is further submitted that claimants/appellants had produced eye witness of the accident P.W.2 Ram Vilas Mishra, who proved the negligence of the driver of the offending vehicle namely Bus No.U.P.-70-CT-4080, and thus, finding of the Tribunal in respect of negligence of the deceased is not sustainable in law.

4. It is further submitted that the accident had taken place on 15.11.2015 and the Tribunal has assessed the income of the deceased as Rs.3,000/- per month and even if there was no proof of income of the deceased, the Tribunal ought to have taken Rs.6,000/- as income of the deceased in view of the judgement of Apex Court in the case of ***Magma General Insurance Company Ltd. Vs. Nanu Ram alias Chuhru Ram and others 2018 (18) SCC 130*** in computing the compensation.

5. Per contra, learned counsel for the respondents would contend that it is admitted that deceased was not holding a valid driving licence to drive the motorcycle and thus, it is obvious that there was some negligence on the part of the deceased in the accident. He further submits that compensation awarded by the Tribunal is just and proper as there was no proof of income of the deceased and hence, the same does not call for interference by this Court in the appeal.

6. I have considered the rival submissions of the parties and perused the record.

7. In the instant case, the claimants/appellants have produced the eye witness P.W.2, who had categorically stated that the accident was the result of rash and negligent driving of driver of offending vehicle. No evidence in rebuttal to the testimony of P.W.2 was filed by the insurance company. The Tribunal on its own without there being any material on record presumed that since the deceased was not having valid driving licence to drive the motorcycle, therefore, he was also negligent in the accident. This Court finds the finding of the Tribunal in respect of the negligence of the deceased in the accident is perverse and against the record. In this respect, it would be apt to reproduce paragraph nos.7 & 8 of the judgement of Apex Court in the case of ***Sudhir Kumar Rana Vs. Surinder Singh and Others 2008(2) T.A.C. 769 (SC):-***

"7. The question is, negligence for what? If the complainant must be guilty of an act or omission which materially contributed to the accident and resulted in injury and damage, the concept of contributory negligence would apply. [See New India Assurance Company Ltd. v. Avinash, 1988 A.C.J. 322: 1996 (2) T.A.C. 182 (Raj.)].

In T.O. Anthony v. Kavarnan & Ors. (2008) 3 SCC 748, it was held:

"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each

wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

8. If a person drives a vehicle without a licence, he commits an offence. The same, by itself, in our opinion, may not lead to a finding of negligence as regards the accident. It has been held by the courts below that it was the driver of the mini-truck which was being driven rashly and negligently. It is one thing to say that the appellant was not possessing any licence but no finding of fact has been arrived at that he was driving the two-wheeler rashly and negligently. If he was not driving rashly and negligently which contributed to the accident, we fail to see as to how, only because he was not having a licence, he would be held to be guilty of contributory negligence."

8. Thus, in such view of the fact, this Court finds that the accident was the result of sole negligence of driver of offending offending.

9. Further, the Apex Court in the case of ***Magma General Insurance Company (supra)*** has held the notional income to be Rs.6,000/- per month and thus, accepting the submission of learned counsel for the claimants/appellants in view of the judgement of Apex Court in the case of ***Magma General Insurance Company (supra)***, this Court directs the Tribunal to recompute the compensation by treating the income of the deceased as Rs.6,000/- per month in place of Rs.3,000/- per month.

10. It is also provided that enhanced amount of compensation shall carry 6% simple interest from the date of institution of claim petition.

11. Thus, for the reasons given above, the appeal is partly ***allowed*** and the award of the Tribunal is modified to the extent as indicated above. The insurance company is directed to pay the enhanced amount of compensation to the claimants/appellants within a period of three months from the date of production of a certified copy of this order. There shall be no order as to costs.

(2023) 1 ILRA 854
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.11.2022

BEFORE

THE HON'BLE AJAY BHANOT, J.

First Appeal From Order No. 2385 of 2017
With
First Appeal From Order No. 3211 of 2017

TATA A.I.G. General Insurance Co. Ltd. Parel Mumbai ...Appellant
Versus
Amar Kaur & Ors. ...Respondents

Counsel for the Appellant:
Sri Sushil Kumar Mehrotra

Counsel for the Respondents:
Sri Ram Singh, Sri Sudhir Dixit

Civil Law – Motor Vehicles Act, 1988 - Sections 166 & 168, - UP Motor Vehicles Rules, 1998- Rule 220-A(3) - Appeals - claimants' seeks enhancement and Insurance Co. assailed quantum of Compensation - appreciation of evidence - accident and accidental death is not in dispute - court finds that - learned tribunal not determined the compensation lawfully while computing the amounts under the heads of Salary, future prospects & conventional heads and interest except application of multiplier - hence, appeal of insurance Co. is dismissed but, in the light of judgment of Hon'ble Apex court rendered in case of Pranay Sethi's, Urmilla Shukla's, Sarla Verma's, Sarla Devi's, K.R. Madhusudhan's, K.L. Narayana Reddy's claimants' Appeal is partly allowed - impugned award modified & enhanced from Rs. 34,96,000/- to Rs. 39,17,563/- along with 7% interest - directions issued accordingly. (Para - 18, 19, 21, 22, 23, 24, 25, 26)

Appeal is partly allowed. (E-11)

List of Cases cited:

1. National Insurance Co. Ltd. Vs Pranay Sethi & ors., (2017 (16) SCC 680),

2. New India Assurance Co. Ltd. Vs Urmilla Shukla & ors. (2021 SSC Online SC 822),

3. Smt. Sarla Verma & ors. v. Delhi Transport Corp. & anr. (2009 (6) SCC 121),

4. Divisional manager, Royal Sundaram Alliance Insurance Co. Ltd. Vs Sarladevi & ors. (2013 (1) TAC 77 (Mad),

5. K R Madhusudhan VS Administrative Officer (2011 vol. 4 SCC 689),

6. Puttamma Vs K. L. Narayana Reddy (2013 vol. 15 SCC 45),

(Delivered by Hon'ble Ajay Bhanot, J.)

1. Heard Shri Ram Singh, learned counsel for the appellant-claimants and Shri Sushil Kumar Mehrotra, learned counsel for the appellant-Insurance Company.

I. INTRODUCTION

2. These two appeals arise out of an award made by the learned Motor Accident Claims Tribunal/Additional District Judge, Aligarh1 in Motor Accident Claim Petition No. 709 of 2014 (Amar Kaur and another Vs. Tata A.I.G. General Insurance Co. Ltd. and others) dated 11.04.2017 by partly allowing the claim of the claimants.

2.1. The appeals have been filed by the Insurance Company and the claimants respectively and are being decided by a common judgement.

II. Case of the claimants and respondents before the learned tribunal:

3. Briefly the case of the claimants before the learned tribunal was that the deceased died of injuries sustained in an accident which occurred on 26.08.2014, and was caused by the rash and negligent driving of the driver of Bolero Jeep bearing Registration No. UP 81 X 0168. The offending vehicle was insured by TATA AIG General Insurance Company Ltd. The deceased was pillion rider on a motorcycle bearing Registration No. DL75BK-4482 driven by his son Pawan Kumar when the accident occurred. The claimants are the dependants of the deceased Kalicharan. The deceased was 58 years of age at the time of his death.

III. Compensation awarded by the learned tribunal

4. The learned tribunal in the impugned judgement dated 11.04.2017 awarded compensation which is depicted in the tabulated form hereunder:

Sr.No.	**Heads**	**Amount Awarded by the tribunal**
1.	Monthly Income (A)	40,000/-
2.	Annual Income (B) (Ax12=B)	4,80,000/-
3.	Future Prospects (C)	20% of 4,80,000= 96,000/-
4.	Annual Income + Future Prospects (B+C=D)	4,80,000+96,000/- =5,76,000/-
5.	Deduction towards personal expenses (E)	(1/3 of D) 1/3 of 5,76,000/- =1,92,000/-
6.	Annual Loss of dependancy (F) (D-E =F)	5,76,000-1,92,000/- = 3,84,000/-
7.	Multiplier (G)	9
8.	Total loss of dependancy (F x G)	3,84,000 x 9 = 3,456,000/-
9.	Conventional Heads (a) Loss of consortium (b) loss of Estate (c) Funeral Expenses	40,000/-
10.	Total compensation	3,456,000 + 40,000/- = 3,496,000/-
11.	Interest	7%

4.1. The appeal filed by the claimants seeks enhancement of compensation, and the Insurance Company in appeal has assailed the quantum of compensation as being excessive.

IV. Submissions of learned counsels for the parties:

5. Shri Sushil Kumar Mehrotra, learned counsel for the appellant-Insurance Company submits that the income of the deceased was incorrectly calculated. Secondly the future prospects of 20% were not liable to be calculated in view of the judgement of **National Insurance Company Ltd. vs. Pranay Sethi and others2.** Thirdly adoption of split multiplier was advocated on behalf of the Insurance Company.

6. Sri Ram Singh, learned counsel for the claimants-respondents submits that the compensation was not rightly calculated. The claimants were entitled to a higher amount.

V. Issues for Consideration:

7. After advancing their arguments, learned counsels for the respective parties agree that only the following question falls for consideration in these appeals:

Whether the learned tribunal while determining the compensation lawfully computed the amounts under

these heads: salary, future prospects, application of multiplier, conventional heads and interest?

VI a. Issue of Salary of the deceased:

8. The deceased was working as a supervisor in the Agriculture Department in Rajasthan. The salary fixation certificate issued by the employer of the deceased records that the monthly salary of the deceased was 49,480/- and duly proved by the claimants.

9. Learned tribunal arbitrarily deducted an amount of Rs. 10,000/- per month. I am afraid that the aforesaid deduction is perverse and has no justification. Income tax @ 10% is liable to be deducted from the salary of the deceased. Deducting the income tax at the rate of 10%, the annual income of the deceased comes to Rs. 5,93,760/-. This amount is fixed under the head of salary and shall be the basis for computing the compensation.

VI b. Future prospects:

10. The future prospects are liable to be calculated in accordance with the Uttar Pradesh Motor Vehicles Rules, 19983. 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:

"(iii) More than 50 years of age 20% of the salary"

11. The UP Rules, 1998 came up for consideration before the Supreme Court in **New India Assurance Co. Ltd. vs. Urmila Shukla and others4.** In **Urmila Shukla (supra)** upon consideration of various judgements including **National Insurance Company Ltd. Vs. Pranay Sethi and others5** 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)***

12. 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 another6.** 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."

13. 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.

14. In this wake, this Court finds that the claimants/respondents are entitled to 20% enhancement in wages under the head of future prospects as contemplated in the UP Rules, 1998. The necessary changes in the award shall be accordingly made.

VI c. Application of Split Multiplier:

15. The second issue raised by Shri Sushil Kumar Mehrotra, learned counsel for the appellant is that since the deceased was on the verge of retirement, the multiplier of 9 was wrongly applied. He advocated use of a split multiplier by placing reliance on the judgement rendered by the Madras High Court in ***Divisional Manager, Royal Sundaram Alliance Insurance Co. Ltd. Chennai Vs. Sarladevi and Others7.*** The Madras High Court evolving the concept of split multipliers held as under:

"10. On a perusal of records, we find that deceased was 58 years old at the time of his death and he was left with only two years of service. When that being so, the Tribunal, while calculating the amount under the head 'loss of income', ought to have split up the multiplier into two parts and ought to have made the calculation i.e from the date of accident till the date of retirement based on the actual salary and for the remaining years, by fixing 50% of the salary as notional loss of income. Instead of doing so, the Tribunal adopted the multiplier of 8 and made the calculation based on the actual salary, which had resulted in awarding an exorbitant sum of Rs.36,58,248/- as total loss of dependancy. Further we find that Tribunal while making calculation under the head of loss of dependancy, has deducted 1/4th amount towards personal expenses of the deceased. Hence, we hold that the method of multiplier adopted by the Tribunal for arriving at the compensation under 'loss of dependancy' is not correct and the same has to be modified by way of reassessment.

11. As per the judgment of Hon'ble Apex Court reported in *Sarla Verma* and others vs. Delhi Transport Corporation and another (2009 (2) TN MAC 1), the correct multiplier between the age of 56 to 60 is 9. Therefore, multiplier of 9 could be taken into consideration for arriving at compensation to the case on hand since the deceased was 58 years at the time of his death. If the actual salary of Rs.50,809/- is taken into consideration, the annual loss of income works out to Rs.6,09,708/-. 10% of the amount is liable to be deducted towards income tax deduction. 10% in the sum of Rs.6,09,708/- comes to Rs.60,970.80 and the same can be

rounded off to Rs.61,000/-. If so, the balance amount works out to Rs.5,48,708- (Rs.6,09,708/- minus Rs.61,000/-), rounded off to Rs.5,49,000/-. Hence, annual loss of income could be fixed at Rs.5,49,000/-. For the first two years, the loss of income would be Rs.10,98,000/- (Rs.5,49,000/- x 2 years). For the balance seven years, only 50% annual income has to be taken into consideration as notional income, which comes to Rs.19,21,500/- (Rs.2,74,500/- x 7 years). Therefore, the total loss of income works out to Rs.30,19,500/- (Rs.10,98,000/- + Rs19,21,500/-)."

16. However, application of split multiplier method was discarded in no certain terms in ***K.R. Madhusudhan v. Administrative Officer8,*** by holding thus:

"14. In the appeal which was filed by the appellants before the High Court, the High Court instead of maintaining the amount of compensation granted by the Tribunal, reduced the same. In doing so, the High Court had not given any reason. The High Court introduced the concept of split multiplier and departed from the multiplier used by the Tribunal without disclosing any reason therefor. The High Court has also not considered the clear and corroborative evidence about the prospect of future increment of the deceased. When the age of the deceased is between 51 and 55 years the multiplier is 11, which is specified in the 2nd column in the Second Schedule to the Motor Vehicles Act, and the Tribunal has not committed any error by accepting the said multiplier. This Court also fails to appreciate why the High Court chose to apply the multiplier of 6.

15. ***We are, thus, of the opinion that the judgment of the High Court deserves to be set aside for it is perverse and clearly contrary to the evidence on record, for having not considered the future prospects of the deceased and also for adopting a split multiplier method."*** *(emphasis supplied)*

17. A similar view was taken by the Supreme Court in ***Puttamma v. K.L. Narayana Reddy9,*** by following ***K. R. Madhusudhan (supra),*** referencing provisions of the Motor Vehicles Act and the judgement rendered by Supreme Court in ***Sarla Verma (supra)***. In **K. L. Narayana Reddy (supra)** it was noticed that the Motor Vehicles Act, 1988 does not envisage application of the a split multiplier and held thus:

"32. For determination of compensation in motor accident claims under Section 166 this Court always followed multiplier method. As there were inconsistencies in the selection of a multiplier, this Court in *Sarla Verma* [*Sarla Verma* v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] prepared a table for the selection of a multiplier based on the age group of the deceased/victim. The 1988 Act, does not envisage application of a split multiplier.

34. We, therefore, hold that in absence of any specific reason and evidence on record the tribunal or the court should not apply split multiplier in routine course and should apply multiplier as per decision of this Court in *Sarla Verma* [*Sarla Verma* v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] as affirmed in *Reshma Kumari [Reshma Kumari v. Madan Mohan,* (2013) 9 SCC 65 : (2013) 4 SCC (Civ) 191 : (2013) 3 SCC (Cri) 826] ."

18. The argument for applying a split multiplier is misconceived and is accordingly rejected. There was no error in

the application of a multiplier of 9 by the learned tribunal in the facts of this case, as the deceased was 58 years of age.

VI d. Calculation of Conventional Heads:

19. 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."

20. The figure under conventional heads determined in ***Pranay Sethi (supra)*** shall be applicable to the facts of this case. The award is modified accordingly.

VI e. Interest

21. Interest of 7% and the manner of payment decided by the learned tribunal is just and lawful and does not call for interference.

VII. Determination of Compensation to which claimants are entitled:

22. In wake of the preceding discussion, the amount of compensation to which the claimants are entitled and are hereby awarded, is tabulated hereunder:

i. Date of Accident - 26.08.2014

ii. Name of Deceased - Shri Kalicharan

iii. Age of the deceased - 58 years

iv. Occupation of the Deceased - Supervisor in Agriculture Department in Rajasthan

v. Income of the deceased - 49,480/- per month

vi. Name, Age and Relationship of Claimants with the deceased:

Sr. No.	Name	Age	Relation
1.	Amar Kaur	56	Wife
2.	Lokesh Kumar	25	Son

vii. Computation of Compensation

Sr. No.	Heads	Amount (in Rupees)
1.	Monthly Income (A)	Rs. 49,480/-
2.	Annual Income (B) (A x 12 = B)	Rs. 5,93,760/-
3.	Income Tax @ 10%	59,376/-
	Yearly Income of Deceased less tax	5,93,760-59,376 = 5,34,384/-

3.	Future Prospects (C)	20% of 5,34,384/- = 1,06,876.80
4.	Annual Income + Future Prospects (B+C=D)	5,34,384 + 1,06,876.80 = 641,260.80
5.	Deduction towards personal expenses (E) (1/3 of D)	1/3 of 641,260.80 = 213753.60-
6.	Annual Loss of dependancy (F) (D-E = F)	641,260.80-213753.60 = 4,27,507.20/-
7.	Multiplier (G)	9
8.	Total loss of dependancy (F x G)	4,27,507.20/- x 9 = 38,47,563/-
9.	Conventional Heads: (a) Loss of consortium (b) Loss of Estate (c) Funeral Expenses	70,000/-
10.	Total compensation	39,17,563/-
11.	Interest	7%

VIII. Conclusion & Directions:

23. In view of the above, the appeal filed by the Insurance Company viz. First Appeal From Order No. - 2385 of 2017 is dismissed.

24. The appeal filed by the claimant viz. First Appeal From Order No.- 3211 of 2017 is partly allowed.

25. The amount of compensation to which the claimants have been awarded shall be deposited by the Insurance Company within a period of 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 adjusted.

26. The amount deposited by the Insurance Company before this Court shall be transmitted to the learned trial court which shall release the same in favour of the claimants as part of the compensation determined in this appeal.

(2023) 1 ILRA 860
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.2022

BEFORE

THE HON'BLE AJAY BHANOT, J.

First Appeal From Order No. 3227 of 2017

Mosaheb Ali ...Appellant
Versus
General Manager, U.P.S.R.T.C. & Anr. ...Respondents

Counsel for the Appellant:
Sri Brij Raj Singh. Sri Ajay Shyam Prajapati, Sri Santosh Kumar Srivastava

Counsel for the Respondents:
Sri Anirudh Kumar Misra

Civil Law – Motor Vehicles Act, 1988, Section - 168 - Constitution of India, Article 21, - Disabilities (Equal Opportunity, Protection of Rights and Full Participation) Act, 1995 - Appeal - against award - quantum of compensation - appellant sustained injuries in an accident caused by the rash and negligent driving of UPSRTC bus - tribunal partly allowed claim of claimant-appellant for compensation on account of disability suffered by him - assessment of damages and determining compensation - in the light of judgments of Hon'ble Apex Court in cases of Pappu Deo Yadav's, Kajal's, Nirmala Devi's, R.D. Hattangadi's, Raj Kumar's, K. Suresh's & Sarla Verma's - impugned award is modified from Rs. 1,52,067/- to Rs. 9,01,560/- with 7 % interest - directions issued - Appeal allowed. (Para - 16, 18, 20, 39, 40)

Appeal Allowed. (E-11)

List of Cases cited:

1. Pappu Deo Yadav Vs Naresh Kumar & ors., AIR 2020 SCC 4424,

2. Kajal Vs Jagdish Chand & ors., (2020) 4 SCC 413,

3. Ward Vs James, 1965 (1) All ER 563,

4. M/S Concord of India Insurance Co. Ltd. Vs Nirmala Devi & ors., 1980 ACJ 55 SC,

5. R. D. Hattangadi Vs Pest Control (India) Pvt. Ltd., 1995 (1) SCC 551,

6. Raj Kumar Vs Ajay Kumar & ors., 2011 (1) SCC 343,

7. K. Suresh Vs New India Assurance Co. Ltd. & ors., 2012 (12) SCC 274,

8. New India Assurance Co. Ltd. Vs Amit Kumar Yadav & anr., FAFO No. 1285 of 2008 decided on 23.03.2022.

9. Sarla Verma (Smt.) & ors. Vs Delhi Transport Co. & anr., 2009 (6) SCC 121,

(Delivered by Hon'ble Ajay Bhanot, J.)

1. This appeal arises out of the judgement and award made by the learned Motor Accident Claims Tribunal/Additional District Judge, Kushinagar1 in Motor Accident Claim Petition No. 265 of 2012 dated 29.10.2016 granting compensation to the injured-claimant by partly allowing his claim and holdings respondent-UPSRTC liable to pay the compensation.

2. Briefly the case of the claimant-appellant before the learned tribunal was that the appellant sustained injuries in an accident which occurred on 29.06.2012 and was caused by the rash and negligent driving of the driver of UPSRTC bus bearing Registration No. UP 27/T0235. The learned tribunal partly allowed the claim of the claimant-appellant for compensation on account of disability suffered by him in the accident.

3. The compensation awarded by the learned tribunal in the impugned judgement dated 29.10.2016 under various heads is tabulated hereunder:

Sr. No.	Heads	Awarded by tribunal
1.	Monthly Income	35000/-
2.	Annual Income	420,000/-
3.	Treatment	12567/-
4.	Transportation	10,000/-
5.	Future medical expenses ie. towards purchase of device	10,000/-
6.	Pain and suffering loss of amenities	1,00,000/-
7..	Special Diet and misc. expenditure	10,000/-
8.	Attendant charges	NILL
9.	Multiplier	NILL
10.	Loss of Income (19 days admitted in hospital)	9,500/-
11.	Total compensation	1,52,067/-
12.	Interest	7%

4. The appeal has been filed by the claimant-appellant who seeks enhancement of compensation.

5. Shri Ajay Shyam Prajapati, learned counsel for the appellant contends that the learned tribunal erred while considering the extent of the disability on the appellant's life and awarding paltry and unjust compensation. He also claims entitlement to an attendant and seeks enhancement of the awarded compensation under various heads.

6. Shri Anirudh Kumar Mishra, learned counsel for the UPSRTC submits that the compensation awarded by the learned tribunal is lawful and just and brooks no interference.

7. The undisputed facts borne out by the evidence and material in the record and

the findings of the learned tribunal are these. The accident was caused by rash and negligent driving of the driver of the offending UPSRTC bus. The appellant sustained serious injuries in the accident on 29.06.2012 which left him with an amputated left arm. On the date of the accident the age of the claimant-appellant was 43.

8. The disability certificate records the nature of the disability as "amputation of left arm below shoulder found". The disability of 70% of a permanent nature has been opined by the experts in the disability certificate.

9. The appellant is a teacher by profession. The learned tribunal in the impugned award has found that the loss of left arm does not reduce his earning capacity. On this footing the learned tribunal has held that the appellant is not entitled to any compensation on account of loss of earning.

10. The learned tribunal fell into error by neglecting to consider the impact of the disability on the appellant's life. His teaching activities may not be directly hampered by the aforesaid disability. The fact remains that for attending to daily chores of life and other day to day activities, the disability will greatly constrain him. Routine activities of life hitherto accomplished with ease and without thought are made burdensome by the disability. Further, a physical disability of this nature also inflicts a social disadvantage. Our society has not been fully sensitized to the plight of disabled people. Each day is a stubborn reminder of robbed personal choices and relegation to a life of lesser mortals.

11. At the cost of a slight departure but for the benefit of a holistic view, notice may be taken of the fact that the plight of physically handicapped persons across the world engaged the attention of the global community with the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and the Pacific Region, 1992. India was a signatory to the aforesaid Proclamation.

12. The concern of the global community was brought on the conscience of the nation with the promulgation of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 19952. (hereinafter referred to as the Disabilities Act, 1995).

13. The Disabilities Act of 1995 reflects the legislative recognition that people with physical disabilities face discrimination and suffer exclusion. The legislative purpose of the Disabilities Act of 1995 affirms the national resolve to purge the stigma attached to disability, and to ensure full participation in life of persons with disabilities.

14. The Disabilities Act, 1995 has been referenced only to underscore the conditions of disabled persons and highlight the consensus of international instruments, global juridical values as well as municipal laws to ameliorate their lot.

15. In these dear times, the award of just compensation by courts to persons with disabilities provides social security, serves a similar social purpose, and acts as a beneficent measure in a welfare State. The phrase "just compensation" in Section 168 of the Motor Vehicles Act, 1988, discloses the legislative intent of achieving a welfare

measure through adjudication by courts in accordance with evolved judicial standards.

16. Body of precedents also relates compensation to constitutional law holdings. Physical disability also undermines the dignity of an individual. In **Pappu Deo Yadav Vs. Naresh Kumar and others,** award of compensation was made with the iteration that human dignity is integral to right under Article 21 of the Constitution of India.

17. Given conducive social environment and support system people with disabilities can achieve soaring heights and make stellar contribution to the society. Human spirit has always triumphed over physical disabilities.

17.1. Helen Keller lost her sight but not her vision. Despite loss of limbs Douglas Bader took wing to "Reach for the Sky4". A motor neuron disease wasted Stephen Hawking's body but did not curb his quest to speak to the stars; and he pushed human knowledge to its frontiers. Major HPS Ahluwalia suffered a battle injury and was paralysed below the waist. The disability broke his stride but not his spirit. The injuries immobilized his limbs but could not inhibit his dreams. The war hero always set his sights "Higher than Everest5".

18. Legislature and courts alike have endeavoured to purge social prejudice by empowering persons with disabilities, and to create a social environment of acceptance of disabilities by mainstreaming the said class. Payment of just compensation in line with good judicial authority and legal norms is a part of this exercise.

19. In the facts of this case, without an attendant normal life for the appellant will not be possible. The appellant would need an attendant to perform routine chores of life like travelling from one place to another (including his place of work), lifting of weights and so on. Assistance of an attendant will enable the injured to overcome the hardship, reduce the inconvenience, and mitigate the discomfort and mental distress in life caused by the disability. An attendant will surely pave the way for appellant's rehabilitation and integration into the social mainstream, and enable full participation of the latter in all aspects of life. In short to lead a dignified and fuller life.

20. The assessment of personal damages in personal injury cases is a vexed question of fact and law. The exercise of assessing damages and determining compensation invariably involves educated guesswork. However, the scope of errors in such an enquiry can be reduced by determining subjective issues on an objective basis.

21. Recognizing such difficulties, the Supreme Court in ***Kajal Vs. Jagdish Chand and others,*** opined that as under:

"12. The assessment of damages in personal injury cases raises great difficulties. It is not easy to convert the physical and mental loss into monetary terms. There has to be a measure of calculated guesswork and conjecture. An assessment, as best as can, in the circumstances, should be made."

22. The enquiry of the courts in such matters can readily profit from the wealth of judicial authorities. This will not only reduce the scope of errors but will also prevent inconsistencies in judicial pronouncements.

23. Lord Denning in **Ward Vs. James** laid down the fundamental principles which should be observed in such cases:

"First, assessibility : In cases of grave injury, where the body is wrecked or the brain destroyed, it is very difficult to assess a fair compensation in money, so difficult that the award must basically be a conventional figure, derived from experience or from awards in comparable cases. Secondly, uniformity : There should be some measure of uniformity in awards so that similar decisions are given in similar cases; otherwise there will be great dissatisfaction in the community, and much criticism of the administration of justice. Thirdly, predictability : Parties should be able to predict with some measure of accuracy the sum which is likely to be awarded in a particular case, for by this means cases can be settled peaceably and not brought to court, a thing very much to the public good."

24. McGregor's Treatise on Damages, 14th Edn. Para 1157, appositely describes relevant heads in personal injury actions:

"The person physically injured may recover both for his pecuniary losses and his non-pecuniary losses. Of these the pecuniary losses themselves comprise two separate items viz. the loss of earnings and other gains which the plaintiff would have made had he not been injured and the medical and other expenses to which he is put as a result of the injury, and the courts have sub-divided the non-pecuniary losses into three categories viz. pain and suffering, loss of amenities of life and loss of expectation of life."

25. Attaching court value to life and limb in **M/S Concord of India Insurance Co. Ltd. Vs. Nirmala Devi and others,** it was held:

"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."

26. The different heads under which compensation is liable to be awarded for personal injury were thus laid down in ***R. D. Hattangadi Vs. Pest Control (India) Pvt. Ltd.:***

"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."

27. Similarly, in **Raj Kumar Vs. Ajay Kumar and others** the relevant

factors for assessing losses and fixing compensation in cases of personal injury were stated in the following terms:

"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).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."

28. The Supreme Court in **K. Suresh Vs. New India Assurance Company Ltd. and Others,** 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."

29. By now the well settled principles and guidelines for determination of just compensation in personal injury cases were reiterated in **Kajal (supra) :**

"5. The principles with regard to determination of just compensation contemplated under the Act are well settled. The injuries cause deprivation to the body which entitles the claimant to claim damages. The damages may vary according to the gravity of the injuries sustained by the claimant in an accident. On account of the injuries, the claimant may suffer consequential losses such as:

(i) loss of earning;

(ii) expenses on treatment which may include medical expenses, transportation, special diet, attendant charges, etc.,

(iii) loss or diminution to the pleasures of life by loss of a particular part of the body, and

(iv) loss of future earning capacity.

Damages can be pecuniary as well as non-pecuniary, but all have to be assessed in rupees and paise.

6. It is impossible to equate human suffering and personal deprivation with money. However, this is what the Act enjoins upon the courts to do. The court has to make a judicious attempt to award damages, so as to compensate the claimant for the loss suffered by the victim. On the one hand, the compensation should not be assessed very conservatively, but on the other hand, the compensation should also not be assessed in so liberal a fashion so as to make it a bounty to the claimant. The court while assessing the compensation should have regard to the degree of deprivation and the loss caused by such deprivation. Such compensation is what is termed as just compensation. The compensation or damages assessed for personal injuries should be substantial to compensate the injured for the deprivation suffered by the injured throughout his/her life. They should not be just token damages.

30. More recently in an injury case the Allahabad High Court in in **New India Assurance Company Ltd. Vs. Amit Kumar Yadav and another** 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."

31. "Restoring the claimant to the position prior to the accident" requires full and adequate rehabilitation which integrates the disabled persons into the social mainstream to the extent possible. This imperative of just compensation is consistent with the following preambled object of the Disabilities Act, 1995:

"Statement of Objects and Reasons

"(vi) to make special provision of the integration of persons with disabilities into the social mainstream."

32. The principles governing the line of judicial enquiry for determining the compensation to which the claimant is entitled for injuries as laid down in the preceding authorities provide a reliable guide for this case as well. Though it has to be added that the enquiry to award just compensation is a fact based enquiry. This presents a difficulty in fixing one figure or a single formula for all cases. The approach of the courts has to be nuanced and not pedantic. The quest of the courts to award just compensation should not stray from the path of golden mean.

33. While applying precedents in a fact based enquiry the courts have to

consciously avoid a representative heuristic or bias. "Errors of representative bias" occur in judicial decision making when precedents are applied to a case upon a superficial consideration of deceptive factual similarities. The end result is a judgement that excludes relevant considerations which should actually influence its outcome.

34. The role of an attendant to mitigate hardships in cases of permanent disability arising from grave injuries has long been acknowledged by courts. Once the requirement of an attendant is upheld, provisions have to be made to effectuate the services of the former. Hence while awarding just compensation in such cases attendant charges are factored in and the multiplier system is applied. Further courts have to be alert to the given future rise in attendant charges, and cater for its future enhancement as well. The aforesaid heads are integral for determining just compensation in such cases. Figure of 10% towards future enhancement of attendant charges seems reasonable in this case.

35. The narrative has the advantage of good authority in point. In **Kajal (supra)** after the need of an attendant was found, attendant charges were assessed and multiplier method was adopted to award just compensation by holding:

"22. The attendant charges have been awarded by the High Court @ Rs 2500 per month for 44 years, which works out to Rs 13,20,000. Unfortunately, this system is not a proper system. Multiplier system is used to balance out various factors. When compensation is awarded in lump sum, various factors are taken into consideration. When compensation is paid in lump sum, this Court has always followed the multiplier system. The multiplier system should be followed not only for determining the compensation on account of loss of income but also for determining the attendant charges, etc. This system was recognised by this Court in *Gobald Motor Service Ltd. v. R.M.K. Veluswami* [Gobald Motor Service Ltd. v. R.M.K. Veluswami, AIR 1962 SC 1] . The multiplier system factors in the inflation rate, the rate of interest payable on the lump sum award, the longevity of the claimant, and also other issues such as the uncertainties of life. Out of all the various alternative methods, the multiplier method has been recognised as the most realistic and reasonable method. It ensures better justice between the parties and thus results in award of "just compensation" within the meaning of the Act."

36. In wake of the preceding narrative and in light of the facts of this case the charges for the attendant are fixed at Rs. 2200/- per month. An additional provision to the extent of 10% enhancement for attendant charges is being made since future rise in such expenses is given.

37. The monthly attendant charges after making the provision for future enhancement are fixed at Rs. 2420/- per month. The age of the injured is 43 years. The applicable multiplier as per **Sarla Verma (Smt) and others Vs. Delhi Transport Company and another** read with **Kajal (supra)** is 14.

38. Apart from above, the impugned award makes inadequate provisions for various expenses like medical expenses, pain suffering. The awarded amounts are paltry when seen in light of injuries caused and the permanent disability sustained. The amounts cannot be justified from the

evidence in the record. 7% interest will serve the ends of justice.

39. In wake of the preceding discussion, the amount of compensation to which the claimant is entitled and is hereby awarded, is tabulated hereunder:

Sr. No.	Heads	Entitled Amount (in Rupees)
1.	Treatment	30,000/-
2.	Transportation	35,000/-
3.	Loss of earning for two months	50,000/-
4.	Future Medical Expenses including purchases of devices	150,000/-
5.	Pain and Suffering loss of amenities	150,000/-
6.	Special Diet	30,000/-
7.	Misc. Expenditure	50,000/-
8.	Attendant Charges	2200/- per month
9.	Future enhancement of attendant charges	10%
10.	Total attendant charges (annual)	29,040/-
11.	Multiplier	14 x 29,040 = 406,560/-
12.	Total compensation	901,560/-
13.	Interest	7%

40. The amount of compensation awarded to the deceased shall be deposited by the respondent-UPSRTC within three months before the learned tribunal. Thereafter the learned tribunal shall release the amount to the injured-claimant without delay. The amount already disbursed to the injured-claimant (if any) shall be duly adjusted.

41. The appeal is allowed to the extent above.

(2023) 1 ILRA 868
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.11.2022

BEFORE

THE HON'BLE AJAY BHANOT, J.

First Appeal From Order No. 3263 of 2014
With
First Appeal From Order No. 2556 of 2014

U.P.S.R.T.C. ...Appellant
Versus
Smt. Nirmala Kanaujia @ Nirmala Devi & Ors. ...Respondents

Counsel for the Appellant:
Sri S.K. Mishra

Counsel for the Respondents:
Mrs. Deepali Srivastava, Sri Amit K. Sinha

(A) Civil Law – Motor Vehicles Act, 1988 - Sections – 168 & 173 - UP Motor Vehicles Rules, 1998 - Rule 220-A(3)(iii): - Appeals - against same accident & award - claimants' seeks enhancement of Award & Corp. assailed award on two grounds i.e. contributory negligence and incorrect multiplier applied by tribunal - appreciation of evidence - deceased died due to sustained injuries in accident - accident caused by the rash and negligent driving of the driver of a bus of UPSRTC when bus collided with the motorcycle of deceased - court finds that - a head on collision does not ipso facto mean that it is a case of contributory negligence - on appraisal of evidence on record court held that, finding of tribunal on the issue of contributory negligence are upheld - And - since the age of deceased was 36 as such in place of 16 multiplier would be 15 as per holdings in Sarla Verma's & Pranay Sethi's judgments - directions accordingly.
(Para - 14, 15)

(B) Civil Law – Motor Vehicles Act, 1988 - Sections – 168 & 173 - UP Motor Vehicles Rules, 1998- Rule 220-A(3)(iii): - Appeals - against same accident & award - claimants' seeks enhancement of Award & Corp. assailed award on two grounds i.e. contributory negligence and incorrect multiplier applied by tribunal - quantum of Compensation - appreciation of evidence - learned tribunal not determined the compensation lawfully while computing the amounts under the heads of Salary, future prospects, deduction & Calculation towards personal expenses & conventional heads including multiplier - hence, in the light of

judgment of Hon'ble Apex court rendered in case of Pranay Sethi's, Urmilla Shukla's, Sarla Verma's, both Appeal is partly allowed and impugned award is modified & enhanced from Rs. 32,13,720/- to Rs. 58,24,375/- along with 7% interest - directions issued accordingly. (Para - 16, 17, 22, 23, 26, 28, 29, 30)

Both Appeals are partly allowed. (E-11)

List of Cases cited:

1. National Insurance Co. Ltd. Vs Pranay Sethi & ors., (2017 (16) SCC 680),

2. New India Assurance Co. Ltd. Vs Urmilla Shukla & ors. (2021 SSC Online SC 822),

3. Smt. Sarla Verma & ors. Vs Delhi Transport Corp. & anr. (2009 (6) SCC 121),

(Delivered by Hon'ble Ajay Bhanot, J.)

I. INTRODUCTION:

1. These two appeals arise out of the same accident and an award made by the learned Motor Accident Claims Tribunal/Additional District Judge, Court No.8, Allahabad on 31.05.2014, in M.A.C.P. No. 770 of 2011 (Smt. Nirmala Kanaujia @ Nirmala Devi and others Vs U.P.S.R.T.C.).

II. Case of the claimants and respondents before the learned tribunal:

2. Briefly the case of the claimants before the learned tribunal was that the deceased died of injuries sustained in an accident which occurred on 04.06.2011, and was caused by the rash and negligent driving of the driver of the UPSRTC Bus No. UP 70 AT 6658. The deceased was driving a motorcycle on the G.T. Road, Hatwa Crossing, Kaushambi when the offending bus collided with the motorcyle. The deceased was 36 years of age the time of the accident. The claimants were dependant on the deceased. The UPSRTC resisted the claim by filing a written statement. Both parties adduced evidence in the trial.

III. Compensation awarded by the learned tribunal:

3. The learned tribunal in the impugned judgement dated 21.05.2014 awarded compensation which is depicted in the tabulated form hereunder:

Sr. No.	Heads	Amount Awarded by the tribunal
1.	Monthly Income (A)	24,990/-
2.	Annual Income (B) (Ax12=B)	2,99,880/-
3.	Future Prospects (C)	Nil
4.	Annual Income + Future Prospects (B+C=D)	2,99,880+Nil =2,99,880/
5.	Deduction towards personal expenses (E) (1/3 of D)	1/3 of 2,99,880/- =99,960/-
6.	Annual Loss of Dependancy (F) (D-E =F)	2,99,880-99,960/- = 1,99,920/-
7.	Multiplier (G)	16
8.	Total loss of dependancy (F x G)	1,99,920 x 16 = 31,98,720/-
9.	Loss of love & Affection	5000/-
10.	Loss of Estate	5,000/-
11.	Funeral	5000/-
12.	Deduction towards Contributory negligence	Nil
13.	Total compensation	31,98,720 + 15,000 = 32,13,720/-
14.	Interest	7%

4. FAFO No.3263 of 2014 (U.P.S.R.T.C. v. Smt. Nirmala Kanaujia @ Nirmala Devi and Others) has been filed by UPSRTC challenging the award dated 31.5.2014 passed by the Tribunal. FAFO No.2556 of 2014 (Smt. Nirmala Kanaujia Alias Nirmala Devi and Others U.P.S.R.T.C.) has been preferred by the

claimants for enhancement of compensation.

Arguments of learned counsels:

5. Various grounds have been taken in the appeal by the UPSRTC. However, Shri S.K. Mishra, learned counsel for the appellant on behalf of appellant - UPSRTC (in FAFA No.3263 of 2014) only presses two grounds against the impugned award. Firstly, it was a case of contributory negligence, and the learned Tribunal erred in law fixing the entire liability on the appellant. Secondly, incorrect multiplier has been applied in the impugned award.

6. Per contra, in the appeal for enhancement (FAFO No.2556 of 2014), Mrs.Deepali Srivastava, learned counsel for the claimants-appellants contends that this was not a case of contributory negligence. Calling attention to various fault lines in the impugned award, learned counsel for the claimants-appellants contends that deduction towards personal expenses was excessive and unsustainable in law, future prospects were unlawfully denied and impermissible deductions were made by the learned Tribunal in the salary of the deceased. Lastly, the amounts granted under conventional heads were contrary to the law laid down by the Apex Court in **National Insurance Company Ltd. vs. Pranay Sethi and others.**

IV. Issues for Consideration:

7. After advancing their arguments, learned counsels for the respective parties agree that only the following questions fall for consideration in these appeals:-

A. Whether the accident resulted from contributory negligence on part of the deceased motorcycle driver?

B. Whether while determining the compensation the learned tribunal had lawfully computed the amounts under various heads salary, future prospects, multiplier, conventional heads, deduction towards personal expenses?

C. What is the compensation to which the claimants are lawfully entitled?

IV A. Issue of contributory negligence:

8. The claimants introduced two witnesses namely PW-1 Smt. Nirmala Devi (wife of the deceased) and PW-2 - Pradeep Kumar the person who was driving the ill-fated motor cycle witness to establish the factum of the accident and the negligence of the driver of the offending UPSRTC bus.

9. P.W. 1 Nirmala Devi testified before the learned tribunal that she had witnessed the accident. On the fateful day, she was riding pillion on the motorcycle being driven by her deceased husband. As they reached Mallahapur (Hatwa Road) a UP Roadways bus which was over speeding and being driven negligently on the wrong side of the road collided with the motorcycle. The deceased sustained mortal injuries in the accident, and P.W. 1 also suffered injuries. The motorcycle driver (deceased husband) was driving on the right side at a slow speed. There was no traffic ahead of the motorcycle on the road.

10. P. W. 2 Pradeep Kumar also testified that he was an eye witness to the accident, who saw the deceased driving a motorcycle with his wife riding pillion. The UP Roadways bus was being driven on the wrong side at an uncontrollable speed. The driving of the offending bus resulted in a collision with the motorcycle. The

deceased died of injuries and his wife was injured grievously in the accident.

11. The testimonies of the aforesaid P.W. 1 and PW 2 were not shaken under cross examination. The learned tribunal which had the benefit of observing the demeanour of the witnesses upheld the credit of the witnesses and believed their testimonies.

12. The driver of the UPSRTC bus in deposition before the learned Trial Court denied his negligence. According to his testimony, the accident occurred, when the motorcycle collided with the rear side of the bus. The credit of DW-1 Ram, (driver of the offending bus) who had testified before the learned tribunal, was impeached under cross examination. His testimony was disbelieved by the learned tribunal.

13. The learned tribunal found that the accident was caused by negligent driving of the offending bus on the wrong side of the road.

14. A head on collision does not ipso facto mean that it is a case of contributory negligence. Contributory negligence occurs and when both the parties drive negligently, flout traffic rules, or fail to observe norms of safe driving. Contributory negligence implies that both parties are culpable for the accident. In such cases, the courts have to assess the responsibility of each party in causing the accident, and apportion liability on the respective parties accordingly.

15. The facts which are established by pleadings and evidence in the record are these. The norms of safe driving as well as traffic rules were flouted only by the driver of the UPSRTC bus. The driving of the offending UPSRTC bus drove rashly on the wrong side of the road. There was no fault of the motorcycle driver in the mishap. The deceased motorcycle driver drove prudently on the right side while observing traffic rules and norms of safe driving. He had no time or opportunity to take measures to prevent the accident or save himself due to the overspeeding and negligent driving of the offending bus driver. The accident occurred entirely due to the fault of the driver of the offending UPSRTC vehicle and UPSRTC is solely liable to pay the compensation.

15.1. Appraisal of evidence by the learned trial court and its consideration of pleadings and material in the record is impeccable. This Court is not persuaded to take any other view. The findings of the learned tribunal on this issue are upheld.

15.2. The issue of contributory negligence is decided for the claimants & against the UPSRTC.

IV C. Issue of computation of the compensation under various heads:

a. Salary of the deceased:

16. The deceased was a Junior Engineer in U.P. Jal Vidyut Nigam Ltd. The salary certificate issued by the department and duly proved before the learned tribunal records that the monthly salary of the deceased was Rs. 29,205/-. The learned Tribunal made an impermissible deduction of Rs. 4,000/- in the salary of the deceased. The only deduction which was permissible in the salary was towards income tax as per the applicable rate.

b. Future Prospects:

17. The future prospects are liable to be calculated in accordance with the Uttar

Pradesh Motor Vehicles Rules, 19982. 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."

18. The UP Rules, 1998 came up for consideration before the Supreme Court in **New India Assurance Co. Ltd. vs. Urmila Shukla and others**. In **Urmila Shukla (supra)** upon consideration of various judgements including **National Insurance Company Ltd. Vs. Pranay Sethi and others** 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)

19. 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.** 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."

20. 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.

21. The argument that the UP Rules, 1998 encroach upon the judicial power of the courts, and are in the teeth of the Motor Vehicles Act, 1988 and hence beyond the legislative competence of the State is not liable to be entertained by this Court. The vires of the UP Rules, 1998 is not in issue in this appeal. Moreover, the UP Rules,

1998 are a reliable guide in an enquiry made by the court for assessing the just compensation payable in the facts and circumstances of a case.

22. In this wake, this Court finds that the claimants/respondents are entitled to 50% enhancement in wages towards future prospects.

b. Deduction towards personal expenses:

23. The deceased had four dependants(parents, wife and two minor children). The deduction of 1/3rd made towards personal expenses made by the learned tribunal was excessive. The amount which is liable to be deduction towards personal expenses of the deceased is 1/4th.

24. The discussion has the advantage of authorities in point. While deciding the issue of deduction of personal expenses, the Supreme Court in **Sarla Verma (Smt) and others Vs Delhi Transport Company and another** held:

"30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in *Trilok Chandra* [(1996) 4 SCC 362] , the general practice is to apply standardised deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six."

25. **Sarla Verma (supra)** was later followed with approval in **National Insurance Company Limited Vs. Pranay Sethi and others** (See Pr. 37).

C. Issue of multiplier:

26. There is merit in the submission of Sri S. K. Mishra, learned counsel for the UPSRTC that an incorrect multiplier of 16 has been used by the learned tribunal. The learned counsels for the claimants-respondents fairly concedes the point. The age of the victim was 36 years. The applicable multiplier applicable as per the holdings in **Sarla Verma (supra)** and **Pranay Sethi (supra)** is 15.

27. The compensation has to be recalculated by applying multiplier of 15.

d. Calculation of Conventional Heads:

28. The amount determined under conventional heads in the impugned award is at variance with **Pranay Sethi (supra).** The claimants are entitled to the sum fixed in **Pranay Sethi (supra)** which holds 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."

e. Interest:

29. Interest of 7% and the manner of payment decided by the learned tribunal is just and lawful and does not call for interference.

IV D. Determination of Compensation to which claimants-respondents are entitled:

30. In wake of the preceding discussion, the amount of compensation to which the claimants are entitled and is hereby awarded, is tabulated below:

i. Date of Accident - 04.06.2011
ii. Name of Deceased - Naresh Kumar
iii. Age of the deceased - 36 years
iv. Occupation of the Deceased - Junior Engineer
v. Income of the deceased - 29,205/- p.m.

vi. Name, Age and Relationship of Claimants with the deceased:

Sr. No.	Name	Age	Relation
1.	Smt. Nirmala Kanaujia	35	Wife
2.	Nikhil Kumar	11	Son
3.	Km. Deeksha	9	Daughter
4.	Smt. Suraj Kali	60	Mother
5.	Munni Lal	65	Father

vii. Computation of Compensation

Sr. No.	Heads	Amount (in Rupees)
1.	**Monthly Income (A)**	**29,205/-**
2.	**Annual Income (B) (A x 12 = B)**	**3,50,460/-**
3.	**Net Income Tax payable**	**9,460/-**
4.	**Yearly income of deceased less tax**	**3,50,460 -9,460 = 3,41,000/-**
5.	**Future Prospects (C)**	**50% of 3,41,000/- = 1,70,500/-**
6.	**Annual Income + Future Prospects (B+C=D)**	**3,41,000 + 1,70,500 = 5,11,500/-**
7.	**Deduction towards personal expenses (E) (¼ of D)**	**¼ of 5,11,500/- = 1,27,875/-**
8.	**Annual Loss of Dependancy (F) (D-E = F)**	**5,11,500-1,27,875 = 3,83,625/-**
9.	**Multiplier (G)**	**15**
10.	**Total loss of dependancy (F x G)**	**3,83,625 x 15 = 57,54,375/-**
11.	**Conventional Heads: (a) Loss of consortium (b) Loss of Estate (c) Funeral Expenses**	**70,000/-**
12.	**Total compensation**	**58,24,375/-**
13.	**Interest**	**7%**

V. Conclusions & Directions:

31. The amount of compensation to which the deceased has 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.

32. The security deposited by the said appellant in the wake of the order passed by this Court shall be discharged.

33. Both the appeals are partly allowed as above.

(2023) 1 ILRA 875
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.12.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE SAURABH LAVANIA, J.

Public Interest Litigation No. 878 of 2022
Connected with
Writ C No. 8904 of 2022 and other cases

Vaibhav Pandey ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sharad Pathak, Piyush Pathak

Counsel for the Respondents:
C.S.C., Anurag Kumar Singh

(A) Civil Law - U. P. Municipalities Act,1916 - Sections 2(1), 7, 9(a) & 9(a)(5)(3), - U.P. Municipal Corps Act, 1959 - Section - 2(51-A), 7 - Constitution of India,1950 - Articles 141, 144, 15(4), 16(4), 243(d), 243(d)(6), 243(t), 243(t)(1), 243(t)(2), 243(t)(6) & 243(u), - U. P. St. Public Services Reservation for Scheduled Castes, Scheduled Tribes and Other Back-ward Classes Act, 1994 - Section 2(b): – Petitions in Public interest - Nature and Purpose of Reservation in Local Bodies - challenging the notification issued by St. Govt. - inviting objections - to the proposed determination of numbers/seats of officers of the Chairpersons of different Municipals Bodies specially confined to providing reservation to the Backward Class of Citizens - St. raised takes plea that petitions are premature at this stage - provisions contained in different articles of constitution of India, enabling St. to make a provision for reservation of seats in local bodies for SC, ST, women or OBC are almost in *pari material* - court held that, the requirement of triple/conditions, regarding (i) observation of ceiling of 50% reservation provided to SC/ST/OBC & (ii) constitution of a dedicated Commission to conduct an empirical inquiry into the nature and implications of backwardness in relation to Local Bodies (iii) providing the proportion of the reservation required in the light of recommendation of such commission, as directed and contemplated by the Hon'ble Apex Court in case of *K. Krishna Murthy* & *Vikas Kishanrao Gawali,* are not full fill in this case - hence, the impugned notification dated 05.12.2022 is hereby quashed - directions issued, accordingly for notify the elections immediately and notification to be issued for elections shall include the reservation in terms of constitutional provision . (Para - 8.33, 8.52-A, C)

(B) Civil Law - U. P. Municipalities Act, 1916 - Section 2(1), 7, 9(a) & 9(a)(5)(3), - U.P. Municipal Corps Act, 1959 - Sections – 2(51-A) & 7 - Constitution of India, 1950 - Articles 141, 144, 15(4), 16(4), 243(d), 243(d)(6), 243(t), 243(t)(1), 243(t)(2), 243(t)(6) & 243(u), - U. P. St. Public Services Reservation for Scheduled Castes, Scheduled Tribes and Other Back-ward Classes Act,1994 - Section - 2(b): – Petitions in Public interest - Nature and Purpose of Reservation in Local Bodies - challenging the Government Order - whereby on expiry of the term of various local bodies, the respective District Magistrate of districts shall authorize operation of bank accounts of such Local Bodies under the joint signature of the Executive Officer - in the light of directions & interim arrangement made by the Division Bench of this Court vide its judgment in case of *Sandeep @ Sandeep Mehrotra's* - the impugned Gov. order dated 12.12.2022 is hereby quashed - directions issued, accordingly that till the formation of elected Body the affairs of such Municipal Body shall be conducted by a three-member Committee headed by the DM concern, of which the Executive Officer/Chief Executive officer/Municipal Commissioner shall be a member. (Para - 8.51, 8.52-B, D)

(C) Civil Law - U. P. Municipalities Act,1916 - Sections 2(1), 7, 9(a) & 9(a)(5)(3), - U.P. Municipal Corps Act,1959 - Section – 2(51-A) & 7, - Constitution of India,1950 - Articles 141, 144, 15(4), 16(4), 243(d), 243(d)(6), 243(t), 243(t)(1), 243(t)(2), 243(t)(6) & 243(u) - U. P. St. Public Services Reservation for Scheduled Castes, Scheduled Tribes and Other Back-ward Classes Act, 1994 - Section 2(b): – Petitions in Public interest - seeking direction to the St. Govt. to include the transgender in the Backward Class of Citizens in the matter of election to the Urban Local bodies - in the light of judgment rendered by Hon'ble Apex Court in case of National Legal Services Authority's, same may be wisdom of the St. govt. once the dedicated Commission conducts contemporaneous rigorous empirical inquiry into the nature and implications of Backwardness in the local bodies - the claim of transgender for their inclusion amongst Backward Class of citizens shall also be considered - directions accordingly. **(**Para – 8.52, 8.52-D)

Civil Law - U. P. Municipalities Act,1916 - Sections - 2(1), 7, 9(a) & 9(a)(5)(3), - U.P. Municipal Corps Act,1959 - Sections 2(51-A) & 7- - Constitution of India, 1950 – Articles 141, 144, 15(4), 16(4), 243(d), 243(d)(6), 243(t), 243(t)(1), 243(t)(2), 243(t)(6) & 243(u), - U. P. St. Public Services Reservation for Scheduled Castes, Scheduled Tribes and Other Back-ward Classes Act, 1994 - Section 2(b): – Petitions in Public interest - nature and propose of reservation in Local Bodies - Legal Maxim - *nullus commodum capere potest de injuria sua propria* - in the light of observation expressed by Hon'ble Apex Court in case of *Devendra Kumar's* - Court cannot permit the St. to reap the fruits of its own wrong - A person having done a wrong cannot take advantage of its own wrong . (Para – 8.47)

Writ Petitions Disposed of. (E-11)

List of Cases cited:

1. National Legal Services Authority Vs U.O.I. (decided on 15.04.2014 - W P (Civil) No. 400 of 2012),

2. K. Krishna Murthy Vs U.O.I., (2010) 7 SCC 202 : (2010) 2 SCC 202,

3. Vikas Kishanrao Gawali Vs St. of Mah. & ors. (2021) 6 SCC 73,

4. Suresh Mahajan Vs St. of M. P. & anr., 2022 SCC Online SC 589,

5. Sandeep @ Sandeep Mehrotra & ors. Vs St. of U.P. & ors. (delivered on 05.12.2011 - WP No.11226/2011),

6. Indira Sawhney Vs U.O.I., reported in 1992 Supp3 SCC 217,

7. Sunil Kumar Vs St. of Bihar & ors. (decided on 04.10.2022 WP (Civil) No. 13513/2022),

8. Devendra Kumar Vs St. of Uttaranchal & ors., 2013 9 SCC 363,

9. Kusheshwar Prasad Singh Vs St. of Bihar & ors., reported in (2007) 11 SCC 447,

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.)

1. Prologue

1.1 It is inclusion not exclusion, equality not inequality and democracy not executive fiat that runs as a common thread throughout our Constitution. In a society as diverse as ours it has been the endeavour of our Constitutional Courts to further strengthen this thread.

With this percept in mind, we proceed to consider the issues posed before us in this batch of petitions which raise similar questions of fact and law and hence are being decided by this common judgment which follows:

1.2 Some of these petitions have been filed as Public Interest Litigation and some of them raise the alleged personal grievance

arising out of a notification dated 05.12.2022 issued by the State Government in the Department of Urban Development which is a draft order in terms of section 9-A (5)(3) of Uttar Pradesh Municipalities Act, 1916 (hereinafter referred to as 'Municipalities Act') inviting objections to the proposed determination of number of offices of the Chairpersons of different Municipal Bodies to be reserved for the Scheduled Castes, the Scheduled Tribes, Backward Classes and Women. Challenge, however, is confined to the proposed determination for providing reservation to the Backward Class of citizens in respect of seats and offices of Chairpersons of these bodies.

1.3 Challenge has also been made to the Government Order dated 12.12.2022 whereby it has been provided that on expiry of the term of various local bodies, the District Magistrates of the respective districts shall authorize operation of bank accounts of such local bodies under the joint signatures of the Executive Officer and the Senior most officer of Uttar Pradesh Nagar Palika Centralized Services (Accounts Cadre). As per the said Government Order, current term of the local bodies is coming to an end on different dates falling between 12.12.2022 and January 31, 2023.

1.4 In one of the petitions, a prayer has been made to direct the State Government to include transgenders in the Backward Class of citizens and to provide them reservation within the reservation which may be available to backward class of citizens in the matter of election to the urban local bodies. The said prayer has been made in the light of the judgment of Hon'ble Supreme Court in the case of **National Legal Services Authority vs. Union of India and others,** rendered on 15.04.2014 in Writ Petition (Civil) No.400 of 2012.

1.5 Preliminary objection as to the maintainability of the writ petitions raised by the State on the ground that the impugned notification dated 05.12.2022 is only a draft order and hence the petitioners will have opportunity to raise their objections before the authority concerned, as such, the petitions are premature, has already been repelled by us vide our order dated 12.12.2022 and for the reasons given therein we have already held the petitions to be maintainable.

2. Facts

2.1 The Parliament by enacting the Constitution (Seventy-fourth) Amendment Act 1992 inserted Part IXA in the Constitution of India w.e.f. 01.06.1993 with the object of incorporating the provisions relating to urban local bodies in the Constitution for empowering such bodies so that these bodies are able to perform effectively as vibrant democratic units of self-government. The Statement of Objects and Reasons for the 74th Constitutional Amendment is as follows:

"STATEMENT OF OBJECTS AND REASONS

1. In many States local bodies have become weak and ineffective on account of a variety of reasons, including the failure to hold regular elections, prolonged supersession and inadequate devolution of powers and functions. As a result, Urban Local Bodies are not able to perform effectively as vibrant democratic units of self-government.

2. Having regard to these inadequacies, it is considered necessary that provisions relating to Urban Local Bodies are incorporated in the Constitution particularly for-

(i) putting on a firmer footing the relationship between the State Government and the Urban Local Bodies with respect to-

(a) the functions and taxation powers; and

(b) arrangements for revenue sharing;

(ii) Ensuring regular conduct of elections;

(iii) ensuring timely elections in the case of supersession; and

(iv) providing adequate representation for the weaker sections like Scheduled Castes, Scheduled Tribes and women.

3. Accordingly, it is proposed to add a new part relating to the Urban Local Bodies in the Constitution to provide for-

(a) constitution of three types of Municipalities:

(i) Nagar Panchayats for areas in transition from a rural area to urban area;

(ii) Municipal Councils for smaller urban areas;

(iii) Municipal Corporations for larger urban areas. The broad criteria for specifying the said areas is being provided in the proposed article 243-0;

(b) composition of Municipalities, which will be decided by the Legislature of a State, having the following features:

(i) persons to be chosen by direct election;

(ii) representation of Chairpersons of Committees, if any, at ward or other levels in the Municipalities;

(iii) representation of persons having special knowledge or experience of Municipal Administration in Municipalities (without voting rights);

(c) election of Chairpersons of a Municipality in the manner specified in the State law;

(d) constitution of Committees at ward level or other level or levels within the territorial area of a Municipality as may be provided in the State law;

(e) reservation of seats in every Municipality-

(i) for Scheduled Castes and Scheduled Tribes in proportion to their population of which not be less than one-third shall be for women;

(ii) for women which shall not be less than one-third of the total number of seats;

(iii) in favour of backward class of citizens if so provided by the Legislature of the State;

(iv) for Scheduled Castes, Scheduled Tribes and women in the office of Chairpersons as may be specified in the State law;

(f) fixed tenure of 5 years for the Municipality and re-election within six months of end of tenure. If a Municipality is dissolved before expiration of its duration, elections to be held within a period of six months of its dissolution;

(g) devolution by the State Legislature of powers and responsibilities upon the Municipalities with respect to preparation of plans for economic development and social justice, and for the implementation of development schemes as may be required to enable them to function as institutions of self-government;

(h) levy of taxes and duties by Municipalities, assigning of such taxes and duties to Municipalities by State Governments and for making grants-in-aid by the State to the Municipalities as may be provided in the State law;

(i) a Finance Commission to review the finances of the Municipalities and to recommend principles for-

(1) determining the taxes which may be assigned to the Municipalities;

(2) Sharing of taxes between the State and Municipalities

(3) grants-in-aid to the Municipalities from the Consolidated Fund of the State;

(j) audit of accounts of the Municipal Corporations by the Comptroller and Auditor-General of India and laying of reports before the Legislature of the State and the Municipal Corporation concerned;

(k) making of law by a State Legislature with respect to elections to the Municipalities to be conducted under the superintendence, direction and control of the chief electoral officer of the State;

(l) application of the provisions of the Bill to any Union territory or part thereof with such modifications as may be specified by the President;

(m) exempting Scheduled areas referred to in clause (1), and tribal areas referred to in clause (2), of article 244, from the application of the provisions of the Bill. Extension of provisions of the Bill to such areas may be done by Parliament by law;

(n) disqualifications for membership of a Municipality

(o) bar of jurisdiction of Courts in matters relating to elections to the Municipalities.

2.2 Article 243-T inserted in the Constitution vide 74th Amendment provides that in every Municipality seats shall be reserved for the Scheduled Castes and the Scheduled Tribes and number of seats to be reserved for these category of citizens shall bear the same proportion to the total number of seats to be filled by direct election, as nearly as may be, as the population of these classes in the Municipal area bears to the total population of that area. This provision also states that allotment of such seats may be done by rotation of different constituencies in a Municipality. Sub clause 2 of Article 243-T makes a provision for reserving not less than one-third of the total number of seats for women belonging to the Scheduled Castes or the Scheduled Tribes. Sub clause 3 provides that not less than one-third of the total number of seats to be filled in in every Municipality shall be reserved for women and allotment thereof shall be made by rotation, including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes. Apart from making a provision for reservation against the seats in the manner provided in Article 243-T (1)(2) & (3), sub clause (4) provides that the offices of Chairpersons shall also be reserved for the the Scheduled Castes, the Scheduled Tribes and women in such manner as may be provided by the Legislature of a State.

2.3 Thus, so far as the reservation of seats in a Municipality for the Scheduled Castes, the Scheduled Tribes and women is concerned, it is constitutionally mandated, however, so far as reservation to "backward class of citizens" is concerned, sub clause (6) of Article 243-T only contains an enabling provision according to which the Legislature of a State can make a provision for reservation of seats in a Municipality or offices of Chairpersons, in their favour.

2.4 Since various provisions contained in Part IX-A of the Constitution of India required corresponding changes to be made by the State Legislatures in the respective municipal laws, by enacting U.P.

Act no.12 of 1994, the Municipalities Act in the State of Uttar Pradesh was exhaustively amended. Similarly, by the same amending Act, namely, U.P. Act No. 12 of 1994, Uttar Pradesh Municipal Corporations Act, 1959 was also exhaustively amended.

2.5 For giving effect to Article 243-T of the Constitution of India, section 9-A and section 7 were inserted in the Municipalities Act, 1916 and the Municipal Corporations Act, 1959 respectively. These provisions provide for reservation of seats and for offices of Chairpersons in the Municipalities and in the Municipal Corporations.

2.6 We may note that almost simultaneous with insertion of Part IX-A in the Constitution of India, Part IX which is in relation to Panchayats, which are local self-government bodies working in the rural areas was inserted by enacting the Constitution (Seventy-third) Amendment Act, 1992 which came into force w.e.f. 24.04.1993. As it was the purpose of Part IX to strengthen the rural local self-government bodies, provisions almost akin to the provisions contained in Article 243-T which falls in Part IX-A was inserted in Part IX as well in the form of Article 243-D which also provides constitutionally mandated reservation in seats and offices of the Chairpersons of the Panchayats to the members belonging to the Scheduled Castes and Scheduled Tribes and also to women. Clause (6) of Article 243-D enables the Legislature of a State to make provisions for reservations of seats or offices of Chairpersons in Panchayats in favour of backward class of citizens. Thus the provisions relating to reservation of the Scheduled Castes, the Scheduled Tribes, women and backward class of citizens as available in the Constitution for Rural Local Bodies are almost in *pari materia* with such provisions available in the Constitution for Urban Local Bodies.

2.7 Constitutional validity of some aspects of reservation policy prescribed in the Constitution in respect of local self-government institutions, both for rural and urban areas, became subject matter of challenge before Hon'ble Supreme Court in the case of **K. Krishna Murthy and others vs. Union of India and another,** reported in **(2010) 7 SCC 202**. The provisions in the Constitution which enable reservation in favour of Backward Classes in the seats and also in the offices of Chairpersons of these bodies was also challenged which was considered by the Constitution Bench of Hon'ble Supreme Court and nothing foul was found with Articles 243-D and 243-T of the Constitution of India. We may also hasten to add that in the case of **K. Krishna Murthy (supra)** the provisions providing reservation in the seats and in the office of Chairpersons of Panchayats available in Uttar Pradesh Panchayat Raj Act and Uttar Pradesh (Kshettra Panchayats and Zila Panchayats) Adhiniyam, 1961, which are akin to section 9-A and section 7 of Municipalities Act and Municipal Corporations Act were also under challenge, however, the Constitution Bench of Hon'ble Supreme Court did not examine the said challenge for the reasons stated in the judgments itself.

2.8 The Constitution Bench of Hon'ble Supreme Court in the case of **K. Krishna Murthy (supra)** arrived at five conclusions and *inter alia* held that nature and purpose of reservation in relation to local bodies is considerably different from that in relation to higher education and

public employment and that Article 243-D and Article 243-T form a distinct and independent Constitutional basis for affirmative action and further that the principles evolved in relation to reservation enabled by Articles 15(4) and 16(4) cannot be applied in the context of local bodies. Hon'ble Supreme Court also found itself not in a position to examine the issue relating to over breadth of quantum of reservation provided for backward classes of citizens under the State of Legislations (which included the Legislations relating to Panchayats in the State of Uttar Pradesh as well) for the reason that there was no contemporaneous empirical data available. In this fact situation, the Constitution Bench also observed that onus is on the Executive to conduct a rigorous investigation into the patterns of backwardness that act as barriers to political participation which, in the opinion of the Constitution Bench of Hon'ble Supreme Court, are quite different from patterns of disadvantages in the matter of access to education and employment.

2.9 The Constitution Bench of Hon'ble Supreme Court in the case of **K. Krishna Murthy (supra)** expressed a view that identification of "Backward Classes" under Article 243-D(6) and Article 243-T(6) has to be distinct from identification of "socially and educationally backward Classes" for the purposes of Article 15(4) and that of "Backward Classes" for the purposes of Article 16(4).

2.10 After the judgment by the Constitution Bench of Hon'ble Supreme Court in the case of **K. Krishna Murthy (supra)** the matter relating to reservation of backward classes of citizens in terms of Article 243-T again engaged attention of Hon'ble Supreme Court in a case which emanated from State of Maharashtra, namely, **Vikas Kishanrao Gawali vs. State of Maharashtra and others**, decided on 04.03.2021, reported in **(2021) 6 SCC 73**. In this judgment Hon'ble Supreme Court clearly expressed its opinion that reservation for backward classes of citizens is only statutory in nature to be provided by the State Legislatures unlike the constitutional reservation regarding Scheduled Castes and Scheduled Tribes which is linked to the proportion of population. The apex Court in the case of **Vikas Kishanrao Gawali (supra)** also observed that State-authorities are under obligation to fulfill certain pre-conditions before reserving seats for Backward Class of citizens in the local bodies and outlined that foremost requirement is to collate adequate materials and documents that would help in identification of backward classes for the purposes of reservation by conducting a contemporaneous rigorous empirical enquiry into the nature and implications of backwardness through an independent dedicated Commission.

2.11 Keeping in view the law laid down by the Constitution Bench in the case of **K. Krishna Murthy (supra)** in **Vikas Kishanrao Gawali (supra)** the Apex Court enunciated that triple test/conditions are required to be complied with by the State before reserving the seats in local bodies for Backward Class of citizens. This triple test/conditions as outlined by Hon'ble Supreme Court in the case of **Vikas Kishanrao Gawali (supra)** are:

(A) to set up a dedicated Commission to conduct contemporaneous rigorous empirical enquiry into the nature and implications of backwardness qua local bodies, within the State,

(B) to specify the proportion of reservation required to be provisioned local

body-wise in the light of the recommendations of the Commission so as not to face foul of over breadth, and

(C) in any case such reservation shall not exceed agreegate of 50% of total seats reserved in favour of the Scheduled Castes/Scheduled Tribes/Backward Classes of citizens taken together.

2.12 These petitions have, thus, been filed with the primary allegation that the State Government by issuing the impugned notification dated 05.12.2022 is acting not only against the constitutional mandate contained in Article 243-T but is also not following the principles as mandated by Hon'ble Supreme Court in the aforesaid two judgments in the case of **K. Krishna Murthy (supra)** and **Vikas Kishanrao Gawali (supra)**.

3. Relevant Constitutional Provisions

3.1 In the course of arguments various constitutional provisions have been referred to by the learned counsel representing the respective parties and we will also be taking into account such provisions in our discussion in this judgment. The relevant constitutional provisions are:

(i) Article 243-D. Reservation of seats.-*(1) Seats shall be reserved for-*

(a) the Scheduled Castes; and

(b) the Scheduled Tribes,

in every Panchayat and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Panchayat as the population of the Scheduled Castes in that Panchayat area or of the Scheduled Tribes in that Panchayat area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Panchayat.

(2) Not less than one-third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Panchayat.

(4) The offices of the Chairpersons in the Panchayats at the village or any other level shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide:

Provided that the number of offices of Chairpersons reserved for the Scheduled Castes and the Scheduled Tribes in the Panchayats at each level in any State shall bear, as nearly as may be, the same proportion to the total number of such offices in the Panchayats at each level as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State bears to the total population of the State:

Provided further that not less than one-third of the total number of offices of Chairpersons in the 97 Panchayats at each level shall be reserved for women:

Provided also that the number of offices reserved under this clause shall be allotted by rotation to different Panchayats at each level.

(5) The reservation of seats under clauses (1) and (2) and the reservation of offices of Chairpersons (other than the reservation for women) under clause (4)

shall cease to have effect on the expiration of the period specified in article 334.

(6) Nothing in this Part shall prevent the Legislature of a State from making any provision for reservation of seats in any Panchayat or offices of Chairpersons in the Panchayats at any level in favour of backward class of citizens.

(ii) Article 243-T. Reservation of seats.--*(1) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes in every Municipality and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Municipality as the population of the Scheduled Castes in the Municipal area or of the Scheduled Tribes in the Municipal area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Municipality.*

(2) Not less than one-third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Municipality.

(4) The offices of Chairpersons in the Municipalities shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide.

(5) The reservation of seats under clauses (1) and (2) and the reservation of offices of Chairpersons (other than the reservation for women) under clause (4) shall cease to have effect on the expiration of the period specified in Article 334.

(6) Nothing in this Part shall prevent the Legislature of a State from making any provision for reservation of seats in any Municipality or offices of Chairpersons in the Municipalities in favour of backward class of citizens.

(iii) Article 243-U. Duration of Municipalities, etc.--*(1) Every Municipality, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer:*

Provided that a Municipality shall be given a reasonable opportunity of being heard before its dissolution.

(2) No amendment of any law for the time being in force shall have the effect of causing dissolution of a Municipality at any level, which is functioning immediately before such amendment, till the expiration of its duration specified in clause (1).

(3) An election to constitute a Municipality shall be completed,--

(a) before the expiry of its duration specified in clause (1);

(b) before the expiration of a period of six months from the date of its dissolution:

Provided that where the remainder of the period for which the dissolved Municipality would have continued is less than six months, it shall not be necessary to hold any election under this clause for constituting the Municipality for such period.

(4) A Municipality constituted upon the dissolution of a Municipality before the expiration of its duration shall

continue only for the remainder of the period for which the dissolved Municipality would have continued under clause (1) had it not been so dissolved.

(iv) Article 340. Appointment of a Commission to investigate the conditions of backward classes.--*(1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission.*

(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament.

(v) Article 15(4). *Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.*

(vi) Article 15(5). *Nothing in this article or in sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30.*

(vii) Article 16(4). *Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.*

4. The provisions in State enactments

The relevant provisions of the State enactments which are to be referred to and considered are :

4.1 Section 9-A of U.P. Municipalities Act, 1916 which is as under:

"Section 9-A Reservation of seats. - *(1) In every municipality seats shall be reserved for the [Scheduled Castes, the Scheduled Tribes and the Backward Classes] and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that municipality as the population of the Scheduled Castes in the Municipal area or of the Scheduled Tribes in the Municipal area [or of the Backward Classes in the Municipal area] bears to the total population of such area and such seats may be allotted by rotation to different wards in a municipality in such order as may be prescribed by rules:[Provided that the*

reservation for the backward classes shall not exceed twenty seven per cent of the total number of seats in the municipality.

Provided further that if the figures of population of the backward classes are not available, their population may be determined by carrying out a survey in the manner prescribed by rules.]

(2) [* *]*

(3) Not less than one-third of the total number of seats reserved under [sub-section (1)] shall be reserved for the women belonging to the Scheduled Castes, the Scheduled Tribes or the Backward Classes, as the case may be.

(4) Not less than one-third of the total number of seats in a municipality including the number of seats reserved under sub-section (3) shall be reserved for women and such seats may be allotted by rotation to different wards in a municipality in such order as may be prescribed by rules.

*[(5) The offices of President and[* * *] of the Municipal Councils and Nagar Panchayat shall be reserved and allotted for the Scheduled Castes, the Scheduled Tribes and the Backward Classes and Women, in the manner given below :-*

(1) Reservation and allotment of offices of the President. - (a) The reservation and allotment of offices of the President under this sub-section, shall be done separately for the Municipal Councils and Nagar Panchayats in the manner hereinafter provided.

(b) The number of offices to be reserved -

(i) for the Scheduled Castes or for the Scheduled Tribes or for the backward classes shall be determined in the manner that it shall bear, as nearly as may be, the same proportion to the total number of offices in the State as the population of the Scheduled Castes in the urban area of the State, or of the Scheduled Tribes in the urban area of the State, or of the backward classes in the urban area of the State bears to the total population of such area in the State and if in determining such number of offices, there comes a remainder then, if it is half or less than half of the divisor, it shall be ignored and if it is more than half of the divisor, the quotient shall be increased by one and the number so arrived at shall be the number of offices to be reserved for the Scheduled Castes or the Scheduled Tribes or the backward classes, as the case may be :

Provided that the number of offices to be reserved for the backward classes under this clause shall not be more than twenty-seven per cent of the total number of offices in the State;

(ii) for the women belonging to the Scheduled Castes, the Scheduled Tribes and the backward classes, as the case may be, under sub-section (3) shall not be less than one-third of the number of offices for the Scheduled Castes, Scheduled Tribes and for the backward classes and if in determining such number of offices there comes a remainder then the quotient shall be increased by one and the number so arrived at shall, as the case may be, the number of offices be reserved for women belonging to the Scheduled Castes, Scheduled Tribes and backward classes :

Provided that the number of offices to be reserved for the backward classes under this clause shall not be more than twenty-seven per cent of the total number of offices in the State;

(iii) for the women belonging to the Scheduled Castes, the Scheduled Tribes and the backward classes, as the case may be, under sub section (3) shall not be less than one-third of the number of offices for the Scheduled Castes, Scheduled Tribes

and for the backward classes and if in determining such number of offices there comes a remainder then the quotient shall be increased by one and the number so arrived at shall, as the case may be, the number of offices be reserved for women belonging to the Scheduled Castes, Scheduled Tribes and backward classes.

(c) All Municipal Councils and Nagar Panchayats of the State shall be arranged in such serial order that the Municipal Councils or Nagar Panchayats having largest percentage of population of Scheduled Castes in the State, shall be placed at Serial Number 1 and Municipal Councils or Nagar Panchayats having lesser population of the Scheduled Castes than those shall be placed at number 2 and the rest shall likewise be placed respectively at succeeding numbers.

(d) Subject to item (ii) of sub-clause (b) the number of offices of the Presidents determined under sub-clause (b) for Municipal Councils or the Nagar Panchayats of the State shall be allotted to different Municipal Councils or Nagar Panchayats in the State, as the case may be, in the manner that -

(i) the number of offices determined under item (i) of sub-clause (b) for the offices of Scheduled Castes including the number of offices determined under item (ii) of the said sub-clause for the women belonging to the Scheduled Castes, shall be allotted to Scheduled Castes next to the Municipal Council or Nagar Panchayat placed at Serial No. 1 under sub-clause (c) :

Provided that such Municipal Council or Nagar Panchayats shall be first allotted to the

women belonging to the Scheduled Castes:

(ii) the number of offices determined under item (i) of sub-clause (b) for the offices of Scheduled Tribes including the number of offices determined under item (ii) of the said sub-clause for the women belonging to the Scheduled Tribes be allotted to Scheduled Tribes serial-wise next to the last serial allotted under item (i) :

Provided that such Municipal Council or Nagar Panchayat shall be first allotted to the women belonging to the Scheduled Tribes.

(iii) the number of offices determined under item (i) of sub-clause (b), for the offices of backward classes including the number of offices determined under item (ii) of the said sub-clause for the women belonging to the backward classes shall be allotted to backward classes serial-wise next to the last serial number allotted under item (ii) :

Provided that such Municipal Council or Nagar Panchayat shall be first allotted to the women belonging to the backward classes.

(iv) the number of offices determined under item (ii) of sub-clause (b) excluding the officers determined under the said sub-clause for the women of Scheduled Castes, Scheduled Tribes and backward classes shall be allotted to the women serial-wise next to the last serial number allotted under item (iii).

(e) If on the basis of the population of Scheduled Castes or Scheduled Tribes in a Municipal Council or Nagar Panchayat-

(i) only one office could be reserved for the Scheduled Castes or for the Scheduled Tribes, as the case may be, such office shall be allotted to the women.

(ii) no office could be reserved for the Scheduled Castes or for the Scheduled Tribes, the order of allotment of

offices referred in sub-clause (d) shall be so adhered to as if there is no reference in it to the Scheduled Castes or to the Scheduled Tribes, as the case may be.

(f) The offices allotted in any previous election to the Scheduled Castes, the Scheduled Tribes, the backward classes or the women shall not be allotted in the subsequent election respectively to the Scheduled Castes, the Scheduled Tribes, the backward classes or the women and the offices in such subsequent election shall be allotted serially from the next to the last office allotted to the women in the previous election in the order referred to in sub-clause (d) in cyclic order.

["Explanation- I : It is hereby clarified that the words "previous election" and "subsequent election" as occurring in sub-clause (f) of this clause and elsewhere in the Act shall not include and shall be deemed to have never included the elections held in accordance with the provision's of the Uttar Pradesh Municipalities (Amendment) Ordinance. 2006 (Uttar Pradesh' Ordinance no. 3 0f 2006) and this Act as amended by the said Ordinance.

Explanation- II : Notwithstanding the repeal of the Uttar Pradesh Municipalities (Amendment) Ordinance 2006(Uttar Pradesh Ordinance No. 3 of 2006) and its substitution by the Uttar Pradesh Urban Local Self Government Laws' (Amendment) Act. 2006 (UP. Act no. 25 of 2006) or the judgment, order or decree of any Court. Tribunal or Authority it is hereby declared that the elections held in accordance with the provisions of' the said Ordinance and this Act as amended by the said Ordinance shall not be deemed to be the "previous election" as contemplated under this section and the next elections to be held under this section accordingly shall not be deemed to be subsequent election"]

(2) [x x x]

(3) Allotment order. - (a) Notwithstanding anything contained in the foregoing clauses the State Government shall, determining the number of offices to be reserved for the Scheduled Castes, Scheduled Tribes, Backward Classes and the women, by order published in the Gazette, allot the offices to the Municipalities.

(b) The draft of order under sub-clause (a) shall he published for objections for a period of not less than seven days.

(c) The State Government shall consider the objections, if any, but it shall not be necessary to hear in person on such objections unless the State Government considers it necessary so to do and thereupon it shall become final.

(d) The draft of order referred to in sub-clause (b) shall be published in at least one daily newspaper having wide circulation in the concerned district and shall also be affixed on the notice board of the offices of the District Magistrate and the concerned Municipality.

(6) The reservation of seats and offices of the Presidents for the Scheduled Castes and the Scheduled Tribes under this section shall cease to have effect on the expiration of the period specified in Article 334 of the Constitution.

Explanation. - It is clarified that nothing on this section shall prevent the persons belonging to the Scheduled Castes, Scheduled Tribes, the Backward Classes and the women from contesting election to unreserved seats and offices."

4.2 Section 7 of the U.P. Municipal Corporations Act, 1959 is in *pari materia* with Section 9-A of U.P. Municipalities Act, hence the same is not being extracted here.

4.3 Section 2(b) of U.P. State Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Back-ward Classes) Act, 1994 reads as under:

2. In this Act-

[(b)***"Other Backward Classes of citizens"*** means the backward classes of citizens specified in Schedule I;]

4.4 Scheduled -1 appended to U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Back-ward Classes) Act, 1994 is as under :

[SCHEDULE - I]

[See Section 2(b)]

1. Ahir, Yadav, Gwala, Yaduvanshiya	23.Jogi
2. Sonar, Sunar,, Swarnkar	24.Jhoja
3. Jat.	25.Dhafali
4. Kurmi, Chanau, Patel,, Patanwar, Kurmi-Mall, Kurmi-Seinthwar	26.Tamoli, Barai,, Chaurasia
5. Giri	27.Teli, Samani,, Rogangar,, Sahu,, Rauniar, Gundhi,, Arrak
6. Gujar	28.Darji, Idrisi,, Kakutstha
7. Gosain	29.Dhiver
8. Lodh,, Lodha, Lodhi,, Lot,, Lodhi-Rajput	30.Naqqal
9. Kamboj	31.Nat (Those not included in Scheduled Castes Category)
10. Arakh,, Arakvanshiya	32.Naik
11.Kachchi,, Kachchi-Kushwaha, Shakya	33.Faqir
12.Kahar,, Kashyap	34.Banjara, Ranki, Mukeri, Mukerani
13.Kewat, Mallah, Nishad	35.Barhai,, Saifi, Vishwakarma,, Panchal, Ramgadhiya, Jangir, Dhiman
14.Kisan	36.Bari
15.Koeri	37.Beragi
16.Kumhar, Prajapati	38.Bind
17.Kasgar	39.Biyar
18.Kunjra or Raeen	40.Bhar, Raj-Bhar.
19.Gareria, Pal, Vaghel	41.Bhurji, Bharbhunja, Bhooj, Kandu, Kashaudhan
20.Gaddi, Ghoshi.	42.Bhathiara
21.Chikwa, Qassab Qureshi, Chak	43.Mali, Saini
22.Chhippi, Chipa	

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44. Sweeper (Those not included in Scheduled Caste Category), Halalkhor	61. Khumra, Sangalarash, Hansiri
45.Lohar, Lohar-Saifi	62. Mochi
46.Lonia,. Nonia, Gole-thakur, LoniaChauhan	63. Khagi
47.Rangrez, Rangwa	64. Tanwar Singharia
48.Marchcha	65. Katuwa
49.Halwai. Modanwal	66. Maheegeer
50.Hajjam, Nai, Salmani, Savita, Sriwas	67. Dangi
51. Rai Sikh	68. Dhakar
52. Sakka-Bhisti,, Bhisti-Abbasi	69. Gada
53. Dhobi (Those not included in the Schedule Castes or Scheduled Tribes Category)	70. Tantawa
54. Kasera,, Thathera, Tamrakar	71. Joria
55. Nanbai	72. Patwa, Patahara, Patchara, Deovanshi
56. Mirshikari	73. Kalal, Kalwar, Kalar
57. Shekh Sarwari (Pirai), Peerahi	74. Manihar,, Kacher,, Lakhara
58. Mev, Mewati	75. Murao, Murai, Maurya
59. Koshta/Koshti	76. Momin (Ansar)
60. Ror	77. Muslim Kayastha
	78. Mirasi
	79. Naddar (Dhuniya),, Mansoori,, Kandere, Kadera, Karan (Karn)

4.5 Section 2(a) of Uttar Pradesh State Commission of Backward Classes Act, 1996 reads as under :

*"**2(a)** "backward classes" means such classes of citizens as are defined in clause (b) of Section 2 of the Uttar Pradesh Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 as amended from time to time".*

4.6 Section 2 (1) of the Uttar Pradesh Municipalities Act, 1916 is extracted below-

"2. Definitions. - *In this Act unless there is something repugnant in the subject or context, -*

[(1) "Backward classes" means the backward classes of citizens specified in Schedule 1 of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994;]"

4.7 Section 2(51-A) of the Uttar Pradesh Muncipal Corporation Act, 1959 reads as under-

*"**2. Definitions.** - In this Act unless there be something repugnant in the subject or context -*

.....

.....

[(51-A) "backward classes" means the backward classes of citizens specified in Schedule I of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994;]"

5. <u>Submissions on behalf of the petitioners</u>

5.1 Arguments on behalf of the petitioners in all these matters have been led by Dr. L.P. Misra and Sri Sharad Pathak, Advocates who have been assisted by other learned counsels representing the petitioners in the respective writ petitions.

In support of the prayers in the writ petitions, arguments on behalf of the petitioners in this case primarily revolve around three judgments of Hon'ble Supreme Court, which are :

(i) K. Krishna Murthy (Dr.) and another Vs. Union of India & another, (2010)7 SCC 202.

(ii) Vikas Kishanrao Gawali Vs. State of Maharashtra & Ors. (2021) 6 SCC 73

(iii) Suresh Mahajan Vs. State of Madhya Pradesh and another, 2022 SCC Online SC 589.

5.2 Referring extensively to Constitution Bench judgment in the case of **K.Krishna Murthy (supra)**, it has been argued on behalf of the petitioners that Article 243-T(6) of the Constitution is only an enabling provision and since it does not contain any guideline as to the quantum of reservation to be provided to the Backward Class of citizens, it is for the State Government to provide for the same and such reservation cannot be provided unless it is preceded by an investigation into the existence of backwardness. It has further been contended that the phrase "backward class of citizens" occurring in Article 243-T does not convey the same meaning as the phrase "socially and economically backward class" occurring in Article Article 15(4) and Article 15(5) or the phrase "backward class of citizens" occurring in Article 16(4) of the Constitution of India.

5.3 Further contention on behalf of the petitioners is that the criteria evolved for enforcing reservation made available under Article 15(4) and 16(4) cannot be applied in the context of reservation to be provided under Article 243-T(6) of the Constitution of India and that the provision of Article 243-T provides all together a distinct basis for reservation in local bodies for the reason that the purpose of providing reservation in local bodies is different from the purpose for which Articles 15(4) and 16(4) are enacted in the Constitution.

5.4 According to Dr. Misra and his colleagues, the reservation policy contemplated in Articles 15(4) and 16(4) of the Constitution of India aims at improving access to higher education and public employment whereas the reservation policy as contemplated by Article 243-T aims at a different purpose and the purpose is to improve the disadvantageous class of citizens in the realm of political representation. On behalf of the petitioners, it has been argued that social, educational and economic backwardness cannot be equated with backwardness to be taken into account for providing reservation in the elections to urban self-government bodies. Further submission is that any criteria adopted for providing reservation for achieving access to education and public employment cannot be applied for providing reservation for reserving seats and offices of chairpersons in local self government institutions.

5.5 Borrowing further from the Constitution Bench judgment in the case of **K. Krishna Murthy (supra)**, submission has been made that backwardness in the social and economic sense though can also act as a barrier to effective political participation and representation, however, such backwardness cannot be the sole criteria for identifying the backward class of citizens who can be said to be not adequately politically represented.

5.6 Taking the argument further, it has been contended on behalf of the petitioners that in view of the mandate of Hon'ble Supreme Court in the case of **K. Krishna Murthy (supra)**, it was incumbent upon the State Government to have periodically undertaken the exercise of collecting and collating adequate materials and documents for conducting an investigation into the backwardness that acts as barriers to political representation on the basis of collection of contemporaneous empirical data. Submission is that impugned Notification has been issued without any such exercise and though the Notification is tentative, which provides for reservation of seats and offices of chairperson of the municipal bodies in the State of U.P., however, from the Notification itself it is clear that State intends to provide reservation to Backward Class of citizens which is impermissible in absence of the exercise as mandated by Hon'ble Supreme Court. According to petitioners, in absence of any such exercise as mandated by Hon'ble Supreme Court in the case of **K. Krishna Murthy (supra)**, the impugned Notification cannot be permitted to be sustained.

5.7 Reference has also been made to the judgment of three Judge Bench of Hon'ble Supreme Court in the case of **Vikas Kishanrao Gawali (supra)** and it has been argued on the said basis that the said judgment though was delivered in a case which had travelled to Hon'ble Supreme Court from State of Maharashtra, however, it is binding on all States and Union Territories throughout the country including the State of U.P. Referring further to the said judgment in the case of **Vikas Kishanrao Gawali (supra)**, it has been argued that Hon'ble Supreme Court has made it mandatory for every State that before reserving the seats in local bodies for Backward Class of citizens, the triple test/conditions are required to be complied with.

5.8 It has been argued further that it is not in dispute that the State of U.P. has not yet set up the dedicated Commission to conduct contemporaneous rigorous empirical inquiry into the nature and implications of the backwardness and has also, thus, not specified the proportion of reservation required to be provided in the elections to local bodies in the light of the recommendations of the Commission and hence the elections by reserving the seats and offices of chairpersons of the municipal bodies in the State of U.P. cannot be permitted to be conducted. He has further argued that as mandated by Hon'ble Supreme Court in the case of **Vikas Kishanrao Gawali (supra)** and as also in the case of **Suresh Mahajan (supra)**, in absence of fulfillment of triple test/conditions, no seat for backward class of citizen can be reserved and elections ought to be held by providing that all such seats shall be available to be contested by unreserved/open category candidate.

5.9 Reference to the judgment in the case of **Suresh Mahajan (supra)** rendered by Hon'ble Supreme Court has also been made on behalf of the petitioners to impress upon the Court that until the triple test/conditions are completed in all respects by the State of U.P. no reservation for backward class of citizens can be provided and in case such an exercise cannot be completed before issue of election programme, the seats, except those reserved for Scheduled Castes and Scheduled Tribes, must be notified for general/open category.

5.10 So far as challenge to the Notification dated 12.12.2022 issued by the

State Government, whereby all the District Magistrates have been directed to authorize operation of the bank accounts of the respective municipalities by the joint signatures of the Executive officers and the senior most member of the U.P. Palika Centralized Services (Accounts Cadre), is concerned, it has been argued that the said Government Order could not have been issued by the State Government for the reason that it is not referable to any provision either in the U.P. Municipalities Act, 1916 or in the U.P. Municipal Corporation Act, 1959. It has been contended that the reason indicated in the said Government Order dated 12.12.2022 to the effect that the same has been issued in compliance of the judgment and order dated 05.12.2011, passed by this Court in the case of **Sandeep @ Sandeep Mehrotra and others Vs. State of U.P. and others,Writ Petition No. 11226 of 2011,** is highly misconceived and in fact the State cannot take any aid of the said judgment of the Court, dated 05.12.2011 to justify issuance of the Government Order dated 12.12.2022.

5.11 As already noted above in one of the writ petitions, a prayer has been made that in the light of the judgment rendered by the Hon'ble Supreme Court in the case of **National Legal Services Authority Vs. Union of India, decided on 15.04.2014, Writ Petition (Civil) No. 400 of 2012,** the State Government may be directed to treat the Transgenders as backward class of citizens while conducting empirical survey for the purpose of ascertaining backwardness and include them in the said class of citizens for the purpose of providing reservation in the elections for seats and offices of the chairpersons of the various municipal bodies.

5.12 It has also been argued on behalf of the petitioners that the State cannot take shelter in Schedule-I appended to the U.P. Public Services(Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Castes) Act, 1994 to submit that castes mentioned therein form the backward class of citizens for the purpose of providing reservation in the elections of the Municipal Bodies. Elaborating reasons for this argument, it has been contended that the purpose of enacting 1994 Reservation Act is to provide reservation as contemplated in Article 15(4) and 16(4) of the Constitution of India for socially and educationally-backward class of citizens whereas purpose of providing reservation as contemplated in Article 243-T(6) is to provide level playing field in the context of elections to the local bodies to backward class of citizens who are politically backward in the sense that they are not adequately represented in these bodies. Submission is that determination of adequate/inadequate political representation or political backwardness has to be made on the basis of collection and collation of material and empirical data for the said purpose. It is, thus, argued that the castes mentioned in Schedule-I of the Reservation Act, 1994 cannot be permitted to be the basis of determination of Backward Class of citizens for the purpose of providing reservation as contemplated under Article 243-T(6) of the Constitution of India.

5.13 It has also been argued by the learned counsel representing the petitioners that though Section 9-A(5)(1)(f) of the Municipalities Act provides for adopting rotational process or cyclic order for the purpose of reserving offices of the Chairpersons to Scheduled Castes and Scheduled Tribes and Backward Class or

the women, however, the State has not been following the said rotation and has not been adhering to the cyclic order as contemplated in the said provision in the past elections. In this view, the submission is that the impugned Notification, which reflects such rotation not being followed, is liable to be struck off on this count as well.

5.14 On the basis of the aforesaid arguments and contentions, it has, thus, been prayed that the impugned Notification be quashed and State Government may be directed to first complete the exercise of triple test and fulfill the triple conditions as mandated by Hon'ble Supreme Court in the case of **Vikas Kishanrao Gawali (supra)** and then hold the elections. It has also been prayed that since the term of municipal bodies is to come to an end very soon, a direction be issued to issue Notification for elections at the earliest without reserving the seats and offices of Chairpersons for Backward Class of citizens and making them available to open/general category of citizens to contest the elections.

6 Submissions on behalf of the State Government

6.1 State of U.P. in this case is represented by the learned Additional Advocate General, Sri V.K. Shahi, learned Chief Standing Counsel, Sri Abhinav N. Trivedi and learned Additional Chief Standing Counsel, Sri Amitabh Rai.

6.2 Sheet anchor of argument on behalf of the State as advanced by the Sri Amitabh Rai, learned Additional Chief Standing Counsel, is that in absence of any challenge to the provisions contained in Section 9-A of the U.P. Municipalities Act as also to Section 7 of the U.P. Municipal Corporation Act, the prayers made in the writ petition cannot be granted. He has further stated that the seats and the offices of the Chairpersons of the municipalities at different levels have been reserved as per the provisions contained in Section 9-A of the U.P. Municipalities Act and also as per Section 7 of the U.P. Municipal Corporation Act read with statutory rules framed under the said enactment which are known as U.P. Municipalities (Reservation and allotment of Seats) Rules, 1994. Accordingly, the submission made in this regard by Sri Rai is that until and unless the provisions under which the State intends to reserve the seats and offices of the chairpersons of the municipalities available under the said enactment and rules are challenged, the petitioners are not entitled to any relief which have been prayed for.

6.3 Sri Amitabh Rai, learned Additional Chief Standing Counsel has further argued that so far as reservation to backward class of citizens under Article 243-T is concerned, immediately after insertion of Part IXA in the Constitution of India, the same has been provided in all the elections to municipal bodies by making exhaustive amendments in the Municipal laws by means of U.P. Act No. 12 of 1994. He has stated that Section 2(1) of the U.P. Municipalities Act, 1916 defines backward class to mean backward class of citizens as specified in Schedule-I of the Reservation Act, 1994. He has further stated that similarly Section 2(51-A) of the U.P. Municipal Corporation Act, 1959 also defines backward class of citizens as specified in Schedule-I of the Reservation Act, 1994. It has, thus, been contended that until and unless these provisions, namely, Section 2(a) and Section 2(51-A) of the U.P. Municipalities Act, 1916 and U.P. Municipal Corporation Act, 1959 respectively are also challenged and struck

down, reservation to Other Backward Class of citizens is to be provided in the elections of the Municipal Bodies as per these two State Legislations.

6.4 It has also been argued on behalf of the State that in pursuance of the judgment of Hon'ble Supreme Court in the case of **Indira Sawhney Vs. Union of India, reported in 1992 Supp. (3) SCC 217**, the State Government had initially constituted a Commission for backward class by an executive Notification dated 22.03.1993, however, subsequently, the constitution of said Commission has been made by an enactment, known as U.P. State Commission for Backward Classes Act, 1996. He has further submitted that Section 2(a) of the 1996 Act defines backward classes to mean such classes of citizens as are defined in clause 2(b) of the Reservation Act, 1994, that is to say, the castes included in Schedule-I appended to 1994 Reservation Act, 1994 will form Backward Class of citizens for the purposes of providing reservation in the context of elections to all the municipal bodies in the State. Submission is that accordingly, so far as the State of U.P. is concerned, backward class of citizens would mean those included in Scheduled-I appended to Reservation Act, 1994 and adhering to the same the State has issued the impugned Notification dated 05.12.2022 and accordingly there does not exist any flaw or illegality so far as the prescription for reservation made by the State in the elections to the Municipal Bodies is concerned.

6.5 Sri Amitabh Rai and Sri Abhinav N. Trivedi have further argued on behalf of the State that though the provisions akin to Section 9-A of the U.P. Municipalities Act, 1916 and Section 7 of the U.P. Municipal Corporation Act, 1959 are available in U.P. Panchayat Raj Act and Chhetra Panchayat and Zila Panchayat Act were put before the Constitution Bench of Hon'ble Supreme Court in the case of **K. Krishna Murthy (supra)**, however, Hon'ble Supreme Court in the said case did not strike them off and accordingly plea being raised by the petitioners that there is no need of challenging the statutory prescriptions is not available to them.

6.6 Further submission on behalf of the State is that so far as fulfillment of requirement of triple test/conditions is concerned, the same in the State of U.P. are fulfilled as the reservation being provided does not exceed the maximum limit of 50%.

6.7 It has also been argued that the purpose for which dedicated Commission has been mandated to be constituted by the Hon'ble Supreme Court is being fully achieved by limiting reservation to the maximum ceiling of 50% and further by providing reservation to backward class of citizens not exceeding 27% and also by maintaining the reservation to backward class of citizens in proportion to their population vis-a-vis the total population.

6.8 On behalf of the State, a Government Order dated 07.04.2017 has been referred to for submitting that contemporaneous rigorous empirical inquiry is being conducted in the State of U.P. as per the mechanism provided under the said Government Order. It has also been brought to our notice that the State Government has directed all the District Magistrates by means of order dated 21.06.2022 to conduct rapid survey for the purpose of determining the population of backward class of citizens in every ward of different municipal bodies. Submission is

that the Government Order dated 07.04.2017 contains elaborate instructions to enumerators for the purpose of conducting rapid survey for counting the number of persons belonging to backward class of citizens in the municipalities and hence the procedure prescribed in the Government Order dated 07.04.2017, which is being strictly followed, fulfills the requirement of rigorous contemporaneous empirical inquiry as directed by the Hon'ble Supreme Court in the case of **Vikas Kishanrao Gawali (supra)**.

6.9 So far as the prayer in one of the writ petitions for providing reservation to Transgenders as backward class of citizens is concerned, it has been submitted on behalf of the State that the judgment in the case of **National Legal Services Authority (supra)** is confined to taking steps to treat them socially and educationally backward class of citizens and extend the benefits of reservation in admission in educational institutions and in public employment. It has, thus, been argued that, however, the said judgment does not contain any direction for providing reservation in the elections for Municipal Bodies. Hence, the submission is that the said writ petition is misconceived.

6.10 In response to the submissions made on behalf of the petitioners that the rotation as contemplated in Section 9A(5)(1)(f) of the Municipalities Act is not being followed, it has been contended on behalf of the State firstly, that such rotation or cyclic order in reservation is being maintained and secondly, that it can be an individual grievance in relation to a particular seat or office of Chairman in a particular municipal body, hence if such an objection is raised in a particular case, the same shall be decided by the authority concerned.

6.11 Making the aforesaid submissions, the State has vehemently opposed the writ petitions and has submitted that all the writ petitions deserve to be dismissed which shall pave the way to the State authorities to conduct the elections of Municipal Bodies at various levels which shall be in fulfillment of the constitutional and statutory mandate for constituting these bodies at the earliest as the term of these Municipal Bodies are coming to an end between 12.12.2022 and 31.01.2023. The prayer thus is that the writ petitions be dismissed at their threshold.

6.12 Representing the State Election Commission, Sri Rakesh Chaudhary and Sri Anurag Kumar Singh have also opposed the writ petitions by adopting the submissions made on behalf of the State. It has been submitted by them that unless Section 9-A of the U.P. Municipalities Act and Section 7 of the U.P. Municipal Corporations Act are declared *ultra-vires*, the writ petitions are not maintainable which are liable to be dismissed. Further submission is that the judgment in the case of **Indira Sawhney (supra)** was not confined to reservation for Other Backward Class in educational institutions and public employment but the primary issue which was considered by the Hon'ble Supreme Court in the said case was in respect of ascertaining social, educational and economic backwardness and accordingly Other Backward Class as defined in the Reservation Act, 1994 will form the Backward Class in the State of U.P. for the purpose of providing reservation in terms of Article 243-T of the Constitution of India. The prayer, thus, is that the writ petitions be dismissed.

7 Issues

7.1 On the basis of pleadings available on record as also considering the rival submissions made by the learned counsels representing the respective parties, the following issues emerge for our consideration in this case :

(1) As to whether in the facts as pleaded by the State, the requirement of triple test/conditions as mandated by Hon'ble Supreme Court in the cases of **K. Krishna Murthy (supra)** and **Vikas Kishanrao Gawali (supra)** stand fulfilled ? If no, the consequences thereof.

(2) As to whether in absence of challenge to the relevant statutory prescriptions in the State enactments which provide for reservation to the backward class of citizens in terms of Article 243-T(6), the petitioners are entitled to the reliefs which have been prayed for ?

(3) As to whether the Government Order dated 12.12.2022 is legally valid?

(4) As to whether any direction can be issued to include the transgenders amongst the backward class of citizens, and accordingly, to provide reservation to them in the context of elections to constitute Urban Local Bodies?

(5) Having regard to the facts and circumstances of the case, what orders and directions need to be passed and issued by the Court ?

8. Discussion

8.1 Issues which fall for our consideration in this case have already been formulated in the preceding paragraph of the judgment.

8.2 With insertions of Part IX-A in the Constitution of India by enacting the Constitution (74th) Amendment Act, 1992, the urban self-government institutions throughout the country have been raised to the status of constitutional entities. Objects of insertion of Part IX A of the Constitution have been enumerated in SOR of the Constitution (74th) Amendment Act, 1992, according to which one of the objects is to provide reservation of seat in every municipality. From a bare reading of SOR, it is clear that one of the objects of insertion of Part IXA is to provide reservation for Scheduled Castes and Scheduled Tribes in proportion to their population of which not less than one-third is to be for women. Another object in relation to seats is to provide reservation for women which shall not be less than one-third of total number of seats. So far as providing reservation of seats in favour of backward class of citizens is concerned, SOR mentions that such reservation shall be permissible if it so provided by the Legislature of the States.

8.3 In tune with the objects as enunciated in the SOR of the Constitution (74th) Amendment Act, 1992, Article 243-T provides for constitutionally mandated reservation to the Scheduled Castes, Scheduled Tribes in proportion to their population in the municipal areas, however, Sub-section (6) of Section 243-T does not contain a straight away mandate for providing reservation of seats or offices of the Chairpersons in favour of the backward class of the citizens but it contains an enabling provision which permits Legislature of a State to make such provision. It is to be noticed that so far as quantum of reservation to the Scheduled Castes, Scheduled Tribes and women is concerned, Article 243-T clearly and unambiguously provides for the same. However, the nature and quantum of reservation to be provided for backward

class of citizens has been left to the wisdom of Legislature of a State.

8.4 The Constitution Bench of Hon'ble Supreme Court in the case of **K. Krishna Murthy (supra)** has stated that underline scheme of Article 243-T is to ensure fair representation of social diversity in the local bodies so as to contribute to empowerment of the traditionally weaker section of the society. Hon'ble Supreme Court in this case also recognized that preferred means for pursuing such policy is the reservation of seats and Chairpersons of the municipal bodies in favour of the Scheduled Castes, Scheduled Tribes, women and backward class of citizens. However, as noticed above, the nature and quantum of reservation to the Scheduled Castes, Scheduled Tribes and women is constitutionally mandated, whereas as, what should be the nature and quantum of reservation to be provided to backward class of citizens has been left to the wisdom of the State Legislatures to determine.

8.5 It is in the background of the aforesaid Constitutional provision contained in Part IXA of the Constitution that the Municipal Laws in the State of U.P. were extensively amended by enacting U.P. Act No. 12 of 1994. By the said Amending Act in the definition clause contained in U.P. Municipalities Act as also U.P. Municipal Corporation Act "backward classes" has been defined to mean the backward class of citizens specified in Schedule-I of the Reservation Act, 1994. Section 2(1) of the U.P. Municipalities Act and Section 2(51-A) of the U.P. Municipal Corporation Act may be referred to in this regard.

Section 2(1) of UP Municipalities act, 1916

2. Definitions. - *In this Act unless there is something repugnant in the subject or context, -*

[(1) "Backward classes" means the backward classes of citizens specified in Schedule 1 of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994;]

Section 2(51-A) U.P municipal Corporation Act, 1959

2. Definitions. - *In this Act unless there be something repugnant in the subject or context -*

.....

.....

[(51-A) "backward classes" means the backward classes of citizens specified in Schedule I of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994;]

8.6 Thus, so far as the State of U.P. is concerned, for the purpose of providing reservation to backward class of citizens in the elections of the Municipal Bodies as per the requirement of Artice 243-T, it has statutorily been provided that the backward class shall comprise of castes enumerated in Schedule-I of the Reservation Act, 1994. Section 9-A of the U.P. Municipalities Act, the provision analogous to which are available in Section 7 of the U.P. Municipal Corporation Act, provides that so far as the quantum of reservation to the Scheduled Castes and Scheduled Tribes is concerned, the same shall be in proportion to their population. This provision for reservation for Scheduled Castes and Scheduled Tribes available in these two State enactments is perfectly in tune with the constitutionally mandated quantum of reservation to these categories of citizens.

8.7 In respect of reservation for backward class of citizens, Section 9-A of

the U.P. Municipalities Act and Section 7 of the U.P. Municipal Corporation Act provide that backward class of citizens shall also be entitled to reservation of seats and number of offices of Chairpersons in the Municipalities in proportion to their population to the total population. Thus, State of U.P. does not make any difference in the quantum of reservation to be provided to the Scheduled Castes and Scheduled Tribes and also to the Other Backward Class of citizens as both are based on the proportion of population of these category of citizens to the total population.

8.8 For the said purpose, as asserted by the learned counsel representing the State, Government Order was issued on 07.04.2017 which provides for conducting rapid survey for determining the population of Other Backward Class of citizens. Based on such rapid survey in each Constituency of the Municipality, as per submission on behalf of the State, seats are reserved in proportion to population of the backward class of citizens to the total population in the Constituency/Ward concerned.

8.9 On the basis of the aforesaid exercise being conducted in the State of U.P. in terms of the provision contained in Government Order dated 07.04.2017, the State has attempted to submit that the triple test/conditions as mandated by Hon'ble Supreme Court in the case of **K. Krishan Murthy (supra)** and **Vikas Kishanrao Gawali(supra)** are being complied with and hence the method for providing reservation to backward class of citizens does not suffer from any flaw or illegality. For testing the aforesaid submission, we need to reflect upon as to what occasioned the Hon'ble Supreme Court to call for conducting contemporaneous rigorous empirical enquiry and postulate triple test/conditions which are required to be complied with by the State before reserving the seats in local bodies for backward class of citizens.

8.10 It is not in dispute that as mandated by Hon'ble Supreme Court in **K.Krishan Murthy (supra)** and **Vikas Kishanrao Gawali (supra)** a dedicated Commission has not been constituted by State of Uttar Pradesh for undertaking contemporaneous rigorous empirical enquiry into the nature and implications of the backward class qua local bodies. What has been attempted to be argued is that the exercise being conducted by the State in terms of the Government Order dated 07.04.2017 is the same as is to be conducted by the dedicated Commission mandated by the Hon'ble Supreme Court.

8.11 Any inquiry or study into the nature and implications of the backwardness qua local bodies necessarily involves ascertainment of representation in the local bodies from amongst the citizens forming traditionally disadvantageous class. Such exercise cannot be confined to counting of heads alone as is being done through exercise which is being undertaken by the State in terms of the Government Order dated 07.04.2017.

8.12 What the Government Order dated 07.04.2017 provides is that in every Constituency/Ward population of Other Backward Class as defined in Scheduled-I of the Reservation Act, 1994 be ascertained and once the population of such backward class is ascertained, reservation is being provided in proportion to their population to the total population in the area.

8.13 Such an exercise as contemplated and being conducted under

Government Order dated 07.04.2017 misses a very crucial factor for determination of backwardness or disadvantageous situation concerning a class or group of citizens who are inadequately represented in the Municipal Bodies in the State and what is missed is that the Government Order does not provide for inquiry into with of political representation of backward class of citizens in the Municipal Bodies.

8.14 By treating the castes enumerated in Schedule-I of the Reservation Act, 1994 as backward class of citizens for the purpose of providing reservation in the elections of the local bodies what the State is doing that the State is treating the nature of backwardness requisite for providing reservation in admission to educational institutions and public employment as the requisite backwardness for providing reservation to seats and offices of the Chairpersons in the Municipal Bodies. In this regard we may refer to the very purpose for which State of U.P. has enacted Reservation Act, 1994 and the purpose is to provide for reservation in public services and posts in favour of persons belonging to the Scheduled Castes, Scheduled Tribes and Other Backward Class of citizens. Section 3 of the Reservation Act, 1994 provides that in public services and posts at the stage of direct recruitment 21% of the vacancies shall be reserved for Scheduled Castes, 2% of the vacancies shall be reserved for Scheduled Tribes and 27% of the vacancies shall be reserved for Other Backward Class of citizens. As per the definition clause 2(b) of the said Act, Other Backward Class of citizens means the backward class of citizens specified in Schedule-I appended to the said Act. Schedule-I appended to the 1994 Reservation Act enlists certain castes and accordingly the persons belonging to the said castes specified in the Schedule-I are entitled to 27% reservation in public services and posts reserved for Other Backward Class of citizens.

8.15 Since the definition clauses occurring in U.P. Municipalities Act, 1916 and U.P. Municipal Corporation Act, 1959 define "backward class' to mean backward class of citizens specified in Schedule-I appended to Reservation Act, 1994, as such it is only the persons belonging to the castes specified in Schedule-I who are being given reservation in the context of constitution of the Municipal Bodies as well. Thus, what the State of U.P. has been doing is that so far as identifying the person belonging to Other Backward Class of citizens are concerned, it is treating the persons belonging to the castes as given in the Schedule-I of 1994 Reservation Act as Other Backward Class of citizens for providing reservation in the elections to Municipal Bodies.

8.16 So far as the quantum of reservation to be provided to backward class of citizens is concerned, as stated by learned State Counsel, the State has been undertaking an exercise as per Government Order dated 07.04.2017 where the population of persons belonging to castes enumerated in Schedule-I of 1994 Reservation Act is being determined and based on the proportion of population of members belonging to these castes to the total population in the area, reservation is being provided. Such an exercise as being conducted by the State of U.P., which has been taken aid of by the State Counsel to justify that the State has satisfied the triple test criteria, in our considered opinion, does not fulfill the requirement of triple test/conditions.

8.17 Our reason to say that exercise being conducted under the Government Order dated 07.04.2017 does not fulfill the triple test criteria/conditions is that in the said exercise it is only the population of Other Backward Class of citizens in terms of Schedule-I appended to 1994 Reservation Act which is being determined, however, so far as the representation of the backward class of citizens in the Municipal Bodies is concerned, the said Government Order does not make any such provision for determination of inadequacy/adequacy of representation in the Municipal Bodies.

8.18 As observed by Hon'ble Supreme Court in **K.Krishna Murthy(supra)**, the said case had presented good opportunity to clarify whether phrase "backward classes" which appears in Article 243-T(6) is coextensive with the "socially and educationally backward classes" contemplated under Articles 15(4) and 15(5) or with the under-represented backward classes as contemplated under Article 16(4) of the Constitution of India. The plea taken before the Hon'ble Supreme Court by the Union of India in **K.Krishna Murthy (supra)** was that the spirit behind Article 243-T was akin to Articles 15(3), 15(4) and 16(4) which have enabled different forms of affirmative action in order to pursue the goal of substantive equality. Argument made on behalf of the Union of India in the said case was that the phrase "backward classes" which appears in Article 243-T(6) should be coterminous with the Socially and Educationally Backward Classes identified for the purpose of reservation enabled by Article 15(4). In this regard Para 49 of the judgment in the case of **K. Krishna Murthy(supra)** is extracted herein below :

"49.The learned Solicitor General further contended that the spirit behind Articles 243-D and 243-T was akin to Articles 15(3), 15(4) and 16(4) which have enabled different forms of affirmative action in order to pursue the goal of substantive equality. In this sense, the learned SG has taken a definitive stand by suggesting that the phrase "backward classes" which appears in Articles 243-D(6) and 243-T(6) should be coterminous with the Socially and Educationally Backward Classes (SEBCs) identified for the purpose of reservation enabled by Article 15(4)".

8.19 However, Hon'ble Supreme Court did not agree with the said submission made on behalf of the Union of India; rather it observed in Para-51 of the report that the principles that have been evolved for conferring benefit of reservation contemplated by Articles 15(4) and 16(4) cannot be mechanically applied in the context of reservations contemplated by Article 243-T. Hon'ble Supreme Court further observed that Article 243-T forms a distinct and independent constitutional basis for reservation in local self-government institutions, the nature and purpose of which is different from the reservation policies framed for providing access to higher education and public employment in terms of Article 15(4) and 16(4) respectively. Para-51 of the judgment in the case of **K.Krishna Murthy (supra)** is extracted herein below :

"51.Before addressing the contentious issues, it is necessary to examine the overarching considerations behind the provisions for reservations in elected local bodies. At the outset, we are in agreement with Shri Rajeev Dhavan's suggestion that the principles that have been evolved for conferring the reservation benefits contemplated by

Articles 15(4) and 16(4) cannot be mechanically applied in the context of reservations enabled by Articles 243-D and 243-T. In this respect, we endorse the proposition that Articles 243-D and 243-T form a distinct and independent constitutional basis for reservations in local self-government institutions, the nature and purpose of which is different from the reservation policies designed to improve access to higher education and public employment, as contemplated under Articles 15(4) and 16(4) respectively."

8.20 The Constitution Bench of Hon'ble Supreme Court in **K. Krishna Murthy (supra)** further agreed with the argument raised before it that the nature of disadvantages which restrict access to education and employment cannot be readily equated with disadvantages in the realm of the political representation. Further observation made by Hon'ble Supreme Court in this regard is that the backwardness in the social and economic sense does not necessarily imply political backwardness. Elaborating the difference between the nature of reservation provided under Article 243-D and under Article 15(4) and 16(4), Hon'ble Supreme Court in **K.Krishna Murthy (supra)** also observed that there is an inherent difference between the nature of benefits that accrue from access to education and employment on one hand and political representation at the grassroots level on the other hand. Hon'ble Supreme Court further states in the said case that while access to higher education and public employment increases the likelihood of the socio-economic upliftment of the individual beneficiaries, participation in local self-government is intended as a more immediate measure of empowerment for the community to which the elected representative belongs to. Para-55 of the said judgment in **K. Krishna Murthy (supra)** is relevant here which is quoted below :

"55.It must be kept in mind that there is also an inherent difference between the nature of benefits that accrue from access to education and employment on one hand and political representation at the grassroots level on the other hand. While access to higher education and public employment increases the likelihood of the socio-economic upliftment of the individual beneficiaries, participation in local self-government is intended as a more immediate measure of empowerment for the community that the elected representative belongs to".

8.21 Hon'ble Supreme Court in **K. Krishna Murthy (supra)** also recognizes the principle that there cannot be an exclusion of the "creamy layer" in the context of political representation. Para-56 of the judgment in **K. Krishna Murthy (supra)** is again relevant which is extracted herein below :

"56.The objectives of democratic decentralisation are not only to bring governance closer to the people, but also to make it more participatory, inclusive and accountable to the weaker sections of society. In this sense, reservations in local self-government are intended to directly benefit the community as a whole, rather than just the elected representatives. It is for this very reason that there cannot be an exclusion of the "creamy layer" in the context of political representation. There are bound to be disparities in the socio-economic status of persons within the groups that are the intended beneficiaries of reservation policies. While the

exclusion of the "creamy layer" may be feasible as well as desirable in the context of reservations for education and employment, the same principle cannot be extended to the context of local self-government".

8.22 Noting the difference between social and economic backwardness and political backwardness, Hon'ble Supreme Court in **K.Krishna Murthy(supra)** also felt the need of advising the State Governments to reconfigure their reservation policy wherein beneficiaries under Article 243-T(6) need not necessarily be coterminous with the Socially and Educationally Backward Classes [for the purpose of Article 15(4)] or even the backward classes that are underrepresented in government jobs [for the purpose of Article 16(4)]. Paragraph-63 of the report in **K. Krishna Murthy (supra)** is extracted herein below for ready reference :

"63.As noted earlier, social and economic backwardness does not necessarily coincide with political backwardness. In this respect, the State Governments are well advised to reconfigure their reservation policies, wherein the beneficiaries under Articles 243-D(6) and 243-T(6) need not necessarily be coterminous with the Socially and Educationally Backward Classes (SEBCs) [for the purpose of Article 15(4)] or even the backward classes that are underrepresented in government jobs [for the purpose of Article 16(4)]. It would be safe to say that not all of the groups which have been given reservation benefits in the domain of education and employment need reservations in the sphere of local self-government. This is because the barriers to political participation are not of the same character as barriers that limit access to education and employment. This calls for some fresh thinking and policy-making with regard to reservations in local self-government.

8.23 In the case of **K. Krishna Murthy (supra)** apart from emphasizing on determination of political nature of backwardness for the purpose of providing reservation under Article 243-T(6), Hon'ble Supreme Court also provided that in any situation upper ceiling of 50% with respect to vertical reservations in favour of Scheduled Castes/Scheduled Tribes/Other Backward Classes should not be breached. Thus, to give a shape to the discussions and observations made, the Constitution Bench of Hon'ble Supreme Court in **K. Krishna Murthy (supra)** arrived at five conclusions which are enumerated in Paragraph-82 of the report which reads as under :

"82.In view of the above, our conclusions are:

(i) The nature and purpose of reservations in the context of local self-government is considerably different from that of higher education and public employment. In this sense, Article 243-D and Article 243-T form a distinct and independent constitutional basis for affirmative action and the principles that have been evolved in relation to the reservation policies enabled by Articles 15(4) and 16(4) cannot be readily applied in the context of local self-government. Even when made, they need not be for a period corresponding to the period of reservation for the purposes of Articles 15(4) and 16(4), but can be much shorter.

(ii) Article 243-D(6) and Article 243-T(6) are constitutionally valid since they are in the nature of provisions which merely enable the State Legislatures to

reserve seats and chairperson posts in favour of backward classes. Concerns about disproportionate reservations should be raised by way of specific challenges against the State legislations.

(iii) We are not in a position to examine the claims about overbreadth in the quantum of reservations provided for OBCs under the impugned State legislations since there is no contemporaneous empirical data. The onus is on the executive to conduct a rigorous investigation into the patterns of backwardness that act as barriers to political participation which are indeed quite different from the patterns of disadvantages in the matter of access to education and employment. As we have considered and decided only the constitutional validity of Articles 243-D(6) and 243-T(6), it will be open to the petitioners or any aggrieved party to challenge any State legislation enacted in pursuance of the said constitutional provisions before the High Court. We are of the view that the identification of "backward classes" under Article 243-D(6) and Article 243-T(6) should be distinct from the identification of SEBCs for the purpose of Article 15(4) and that of backward classes for the purpose of Article 16(4).

(iv) The upper ceiling of 50% vertical reservations in favour of SCs/STs/OBCs should not be breached in the context of local self-government. Exceptions can only be made in order to safeguard the interests of the Scheduled Tribes in the matter of their representation in panchayats located in the Scheduled Areas.

(v) The reservation of chairperson posts in the manner contemplated by Articles 243-D(4) and 243-T(4) is constitutionally valid. These chairperson posts cannot be equated with solitary posts in the context of public employment".

8.24 From conclusion (iii) as can be found in paragraph-82 of the report in the case of **K. Krishna Murthy (supra)** quoted above, we can have an idea as to why the need of conducting rigorous investigation into the patterns of backwardness that act as barriers to political participation by collecting contemporaneous empirical data was felt. It is to be noticed that the State of U.P. was not only a party to the proceedings of the said case of K. Krishan Murthy (supra) but it was represented as well and submissions were also advanced on its behalf. Hon'ble Supreme Court found itself not in a position to examine the claims about over-breadth in the quantum of reservations provided for backward class of citizens under the Legislation which was challenged before it for the reason that no contemporaneous empirical data was available before the Supreme Court at that point of time. Accordingly, it is in the light of the aforesaid circumstance that Hon'ble Supreme Court observed in **K. Krishna Murthy (supra)** that onus is on the executive to conduct a rigorous investigation into the patterns of backwardness that act as barriers to political participation. In the same breath, the Hon'ble Supreme Court also observed that the patterns of the backwardness which worked as barriers to political participation are quite different from the patterns of disadvantages in the matter of access to education and employment.

8.25 If we examine the exercise being undertaken by the State Government under the Government Order dated 07.04.2017, what we find is that the said exercise, if

tested on the basis of observations made by the Hon'ble Supreme Court in **K. Krishna Murthy (supra)**, cannot be justified.

8.26. **Vikas Kishanrao Gawali (supra)**, which had emanated from State of Maharashtra. Extensively referring to the judgment of Constitution Bench in **K. Krishna Murthy (supra)** in **Vikas Kishanrao Gawali (supra)** Hon'ble Supreme Court has clearly observed that the State authorities are obliged to fulfill the pre-conditions before reserving the seats for backward class of citizens in local bodies. Hon'ble Supreme Court further observed that the foremost requirement is to collate adequate materials or documents that may help in identification of the Backward Classes for the purpose of reservation by conducting a contemporaneous rigorous empirical inquiry into the nature and implications of backwardness in the local bodies concerned through an independent dedicated Commission established for that purpose. Hon'ble Supreme Court also stated that the State Legislations cannot simply provide uniform and rigid quantum of reservation of seats for Other Backward Classes in the local bodies across the State, that too, without a proper inquiry into the nature and implications of the backwardness by an independent Commission about the imperativeness of such reservation.

8.27 In **Vikas Kishanrao Gawali (supra)**, the Hon'ble Supreme Court has also outlined that such inquiry into the nature and implications of backwardness cannot be a static arrangement; rather it must be reviewed from time to time so as not to violate the principle of over-breadth of such reservation. **Vikas Kishanrao Gawali (supra)** further mandates that such reservation must be confined only to the extent it is proportionate and within the quantitative limitation as is predicated by the Constitution Bench [**K. Krishna Murthy (supra)**].

8.28 In **Vikas Kishanrao Gawali (supra)**, the Hon'ble Supreme Court elaborated that the Constitution Bench in the case of **K. Krishna Murthy (supra)** had further observed that provisions in most of the State Legislations may require a re-look. Further observation made in the case of **Vikas Kishanrao Gawali (supra)** is that the Constitution Bench had expressed a hope that the States concerned ought to take a fresh look at policy making with regard to reservations in local self-government while ensuring that such a policy adheres to the upper ceiling of 50%, including by modifying the Legislation for reducing the quantum of existing quotas in favour of backward class of citizens and make it realistic and measurable on objective parameters.

8.29 Hon'ble Supreme Court noted in **Vikas Kishanrao Gawali (supra)** that despite a declaration of law made by the Constitution Bench of Hon'ble Supreme Court, and despite direction issued to all the States on the subject matter, State of Maharashtra did not take a re-look at the existing provisions which fell afoul of the law declared by the Constitution Bench. The Court, thus, found that no contemporaneous rigorous empirical inquiry into the nature and implications of backwardness for the purpose of providing reservation to backward class of the citizens in the matter of elections to local bodies has been conducted in the State of Maharashtra.

8.30 Hon'ble Supreme Court quashing the Notification issued by the State of

Maharashtra set aside the same to the extent it provided reservation of seats in local bodies for backward class of citizens. Hon'ble Supreme Court further declared that the result of candidates against the reserved backward class seats to be non est in law and further directed the State Election Commission to take immediate steps to announce the elections in respect of such seats to be filled from amongst general/open category of citizens. Paragraphs 9 to 13 of the judgment in the case of **Vikas Kishanrao Gawali (supra)** are extracted herein below :

"9.Besides this inviolable quantitative limitation, the State Authorities are obliged to fulfil other preconditions before reserving seats for OBCs in the local bodies. The foremost requirement is to collate adequate materials or documents that could help in identification of Backward Classes for the purpose of reservation by conducting a contemporaneous rigorous empirical inquiry into the nature and implications of backwardness in the local bodies concerned through an independent dedicated Commission established for that purpose. Thus, the State legislations cannot simply provide uniform and rigid quantum of reservation of seats for OBCs in the local bodies across the State that too without a proper enquiry into the nature and implications of backwardness by an independent Commission about the imperativeness of such reservation. Further, it cannot be a static arrangement. It must be reviewed from time to time so as not to violate the principle of overbreadth of such reservation (which in itself is a relative concept and is dynamic). Besides, it must be confined only to the extent it is proportionate and within the quantitative limitation as is predicated by the Constitution Bench of this Court.

10. Notably, the Constitution Bench adverted to the fact that provisions of most of the State legislations may require a relook, but left the question regarding validity thereof open with liberty to raise specific challenges thereto by pointing out flaws in the identification of the Backward Classes in reference to the empirical data. Further, the Constitution Bench expressed a sanguine hope that the States concerned ought to take a fresh look at policy making with regard to reservations in local self-government in light of the said decision, whilst ensuring that such a policy adheres to the upper ceiling including by modifying their legislations--so as to reduce the quantum of the existing quotas in favour of OBCs and make it realistic and measurable on objective parameters.

11. Despite this declaration of law and observations-cum-directions issued to all the States on the subject-matter, the Legislature of the State of Maharashtra did not take a relook at the existing provisions which fell afoul of the law declared by the Constitution Bench of this Court. As a matter of fact, couple of writ petitions [WP (C) No. 6676 of 2016 and WP (C) No. 5333 of 2018] came to be filed in the Bombay High Court in which solemn assurance was given on behalf of the State of Maharashtra that necessary corrective measures in light of the decision of this Court, will be taken in right earnest. The situation, however, remained unchanged.

12. As a matter of fact, no material is forthcoming as to on what basis the quantum of reservation for OBCs was fixed at 27 per cent, when it

was inserted by way of amendment in 1994. Indeed, when the amendment was effected in 1994, there was no guideline in existence regarding the modality of fixing the limits of reserved seats for OBCs as noted in the decision of the Constitution Bench in K. Krishna Murthy [K. Krishna Murthy v. Union of India, (2010) 7 SCC 202 : (2010) 2 SCC (L&S) 385] . After that decision, however, it was imperative for the State to set up a dedicated Commission to conduct contemporaneous rigorous empirical inquiry into the nature and implications of backwardness and on the basis of recommendations of that Commission take follow-up steps including to amend the existing statutory dispensation, such as to amend Section 12(2)(c) of the 1961 Act. There is nothing on record that such a dedicated Commission had been set up until now. On the other hand, the stand taken by the State Government on affidavit, before this Court, would reveal that requisite information for undertaking such empirical inquiry has not been made available to it by the Union of India. In light of that stand of the State Government, it is unfathomable as to how the respondents can justify the notifications issued by the State Election Commission to reserve seats for OBCs in the local bodies concerned in respect of which elections have been held in the year December 2019/January 2020, which notifications have been challenged by way of present writ petitions. This Court had allowed the elections to proceed subject to the outcome of the present writ petitions.

13. Be that as it may, it is indisputable that the triple test/conditions required to be complied with by the State before reserving seats in the local bodies for OBCs has not been done so far. To wit, (1) to set up a dedicated Commission to conduct contemporaneous rigorous empirical inquiry into the nature and implications of the backwardness qua local bodies, within the State; (2) to specify the proportion of reservation required to be provisioned local body-wise in light of recommendations of the Commission, so as not to fall foul of overbreadth; and (3) in any case such reservation shall not exceed aggregate of 50 per cent of the total seats reserved in favour of SCs/STs/OBCs taken together. In a given local body, the space for providing such reservation in favour of OBCs may be available at the time of issuing election programme (notifications). However, that could be notified only upon fulfilling the aforementioned preconditions. Admittedly, the first step of establishing dedicated Commission to undertake rigorous empirical inquiry itself remains a mirage. To put it differently, it will not be open to the respondents to justify the reservation for OBCs without fulfilling the triple test, referred to above".

8.31 In **Suresh Mahajan (supra)** which emanated from State of Madhya Pradesh, Hon'ble Supreme Court reiterated its observations made in the case of **Vikas Kishanrao Gawali (supra)** and directed the State Election Commission to issue election programme by directing that the seats, except those reserved for Scheduled Castes and Scheduled Tribes, must be notified for general category. The said direction was issued by Hon'ble Supreme Court in this case for the reason that the Court found that triple test formalities were not completed in all respects by the State of Madhya Pradesh. Hon'ble Supreme Court found that the exercise of collation of empirical data and further analysis thereof by the dedicated Commission was expected

to be made and thereafter Commission was to make recommendation regarding number of seats to be reserved for backward class of citizens "local body wise" and such an exercise had not been undertaken by the Commission. Thus, the Hon'ble Supreme Court observed that the State can act upon only after such an exercise is undertaken by the Commission as per its recommendation, to ensure that there is not over-breadth of such reservation in the "concerned local body". Paragraphs 8, 12, 13 and 24 of the report in the case of **Suresh Mahajan (supra)** are relevant to be referred to, which are quoted herein under :

"8.This constitutional mandate is inviolable. Neither the State Election Commission nor the State Government or for that matter the State Legislature, including this Court in exercise of powers under Article 142 of the Constitution of India can countenance dispensation to the contrary

12.Therefore, we direct the State Election Commission by way of interim order, to issue election programme without any further delay on the basis of the wards as per the delimitation done in the concerned local bodies when the elections had become due consequent to expiry of 5 (five) years term of the outgoing elected body or before coming into force of the impugned Amendment Act(s) whichever is later. On that notional basis, the State Election Commission ought to proceed without any exception in respect of concerned local bodies where elections are due or likely to be due in the near future without waiting even for the compliance of triple test by the State Government for providing reservation to Other Backward Classes. We have no manner of doubt that only such direction would meet the ends of justice and larger public interests consistent with the constitutional mandate that the local self-government must be governed by the duly elected representatives uninterrupted except in case of its dissolution before expiry of the term on permissible grounds.

13.For, until the triple test formality is completed "in all respects" by the State Government, no reservation for Other Backward Classes can be provisioned; and if that exercise cannot be completed before the issue of election programme by the State Election Commission, the seats (except reserved for the Scheduled Castes and Scheduled Tribes which is a constitutional requirement), the rest of the seats must be notified as for the General Category.

24.In other words, the exercise of collation of empirical data and after analysis thereof, the Commission is expected to make recommendation regarding the number of seats to be reserved for Other Backward Classes "local body wise". Apparently, that exercise has not been undertaken by the Commission. The State Government can act upon only thereafter and as per the recommendations of the Commission - which is an independent body created to ensure that there is no over-breadth of such reservation in the "concerned local body".

8.32 Hon'ble Patna High Court in the case of **Sunil Kumar vs. State of Bihar and others, Civil Writ Jurisdiction Case No. 13513 of 2022, decided on 04.10.2022** did not approve of the action of the Government of Bihar and also the Election Commission of Bihar in reserving the seats for backward class of citizens for elections to Municipal Bodies in absence of compliance of the dictum laid by Hon'ble Supreme Court in some cases including the

cases of **K. Krishna Murthy (supra)** and **Vikas Kishanrao Gawali (supra)**. Hon'ble Patna High Court thus directed the State Election Commission of Bihar to carry out the elections only by re-notified the seats reserved for backward class of citizens treating them as general category seats. Hon'ble Patna High Court further observed that the State of Bihar may consider enacting a comprehensive Legislation pertaining to reservations in elections to local bodies, urban or rural, to bring the State seamlessly in line with the directions issued by Hon'ble Supreme Court in the case of **K. Krishna Murthy (supra)**, **Vikas Kishanrao Gawali (supra)** and **Suresh Mahajan (supra)** amongst other judgments. The discussion made by Hon'ble Patna High Court in the case of Sunil Kumar (supra) is primarily based on the judgments of Hon'ble Supreme Court in the cases of **K.Krishna Murthy (supra)**, **Vikas Kishanrao Gawali (supra)** and **Suresh Mahajan (supra)**.

8.33 In the light of the discussions made above, if we examine the stand of the State as canvassed by the learned State Counsel, what we find is that out of triple test exercise as contemplated by Hon'ble Supreme Court in the case of **K. Krishna Murthy (supra)**, and **Vikas Kishanrao Gawali (supra)**, the State of U.P. appears to have observed only one condition i.e. the condition regarding observance of ceiling of 50% of reservation provided to Scheduled Castes/Scheduled Tribes/Backward Class of citizens together. Regarding rest of two conditions, namely, (1) constitution of a dedicated Commission to conduct an empirical inquiry into the nature and implications of backwardness in relation to local bodies and (2) providing the proportion of the reservation required in the light of recommendation of such Commission, requirement of triple test/conditions are not fulfilled in this case. In fact, the first step to fulfill the triple test/conditions is to constitute a dedicated Commission to conduct contemporaneous rigorous empirical inquiry into the nature and implications of backwardness in the local bodies and once such Commission is constituted and conducts requisite inquiry, based on recommendation of the Commission proportion of reservation required to be given to the backward class of citizens can be specified to the extent it is proportionate so that such reservation does not fall afoul of over-breadth.

8.34 The kind of inquiry into the nature and implications of backwardness vis-a-vis local bodies as is mandated by Hon'ble Supreme Court in **K.Krishna Murthy (supra)** and **Vikas Kishanrao Gawali (supra)** cannot, in our opinion, be equated with the kind of inquiry, which is confined to counting of heads alone, as is contemplated in the Government Order dated 07.04.2017.

8.35 Thus, for the aforesaid reasons, we are of the opinion that the requirement of triple test/conditions as mandated by Hon'ble Supreme Court in the case of **K. Krishna Murthy(supra)** and **Vikas Kishanrao Gawali (supra)** does not stand fulfilled and accordingly, as a consequence whereof any exercise conducted by the State for reserving the seats and offices of Chairpersons of Municipal Bodies in the State of U.P. including issuance of the impugned Notification dated 05.12.2022 is vitiated, not sustainable and hence is liable to be struck down.

8.36 The other issue before us, as culled out in the earlier part of the judgment, is as to whether in absence of

any challenge to relevant statutory prescriptions in the State enactments which provide for reservation to Backward Class of citizens in terms of Article 243-T(c), the petitioners are entitled to the reliefs which have been prayed for.

8.37 It has been argued on behalf of the State that in absence of challenge to sections 2(1) and 9-A of the Municipalities Act and also to section 2(51-A) and section 7 of Municipal Corporations Act which provide for quantum of reservation to Backward Class of citizens and also that such reservation will be available to castes included in Scheduled -1 appended to U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 the petitioners are not entitled to any relief.

8.38 In this regard, we may observe that the provisions akin to these provisions are available in Uttar Pradesh Panchayat Raj Act and Uttar Pradesh Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961 which contain similar provisions for providing reservation to Backward Class of citizens in the context of elections or rural local bodies. These provisions were under challenge before the Constitution Bench of Hon'ble Supreme Court in the case of **K. Krishna Murthy (supra)** however, Hon'ble Supreme Court did not examine such challenge in absence of adequate material that could help Hon'ble the Supreme Court to arrive at a decision about such challenge. Hon'ble Supreme Court in paragraph 60 of the report in the case of **K. Krishna Murthy** has observed that identification of Backward Classes for the purposes of reservation is an executive function and for the said purpose dedicated Commission needs to be constituted to conduct a rigorous empirical enquiry into the nature and implications of backwardness.

8.39 In absence of any such dedicated Commission having been appointed, such data which may establish over-breadth of reservation, cannot be determined. The situation as on today remains the same.

8.40 We may also notice that Hon'ble Supreme Court in the case of **K. Krishna Murthy (supra)** has observed that State authorities are obliged to fulfill the preconditions before reserving the seats for Backward Class of citizens in the local bodies and has, accordingly outlined the requirement to collect and collate adequate materials or documents that could help in identification of Backward Classes for the purposes of reservation by conducting a contemporaneous rigorous empirical inquiry into the nature and implications of Backwardness through an independent dedicated Commission established for that purpose. Hon'ble Supreme Court further noticed in **Vikas Kishanrao Gawali (supra)** that Constitutional Bench had expressed a sanguine hope that States ought to take a fresh look the policy making with regard to reservation in local self-government unit while ensuring that such a policy adheres to the upper ceiling, including by modifying their Legislations so as to reduce the quantum of existing quota in favour of Other Backward Class of citizens and make it realistic and measurable on objective parameters.

8.41 Hon'ble Supreme Court has also observed in **Vikas Kishanrao Gawali (supra)** that after the Constitution Bench decision it was imperative for the States to have set up the dedicated Commission to conduct contemporaneous rigorous empirical inquiry into the nature and

implications of backwardness and on the basis of recommendations of that Commission, to take follow up steps including amending the existing statutory dispensation.

8.42 Accordingly, State of Uttar Pradesh was also obligated by the mandate of Hon'ble Supreme Court to have a re-look at its policy regarding reservations to be made available to Backward Class of citizens in the context of elections to urban local bodies, including amendment in the existing statutory provisions.

8.43 It is not a case where the State has set up the dedicated Commission for conducting the empirical study into the nature and implications of backwardness for the purposes of providing reservation to Backward Class of citizens in the local self-government institutions and thereafter made necessary changes in the statutory prescriptions. Thus, the State has completely failed to comply with the dictum and directions of Hon'ble Supreme Court in the judgments contained in **K. Krishna Murthy (supra)** and **Vikas Kishanrao Gawali (supra)**.

8.44 State of Uttar Pradesh cannot, thus, be permitted to flout the dictum of Hon'ble Supreme Court and take a plea that State enactments have not been challenged to deny the reliefs claimed in these petitions for the reason that Hon'ble Supreme Court in **Vikas Kishanrao Gawali (supra)** reiterated that States ought to take a re-look at its policies including the Legislative policies with regard to reservation in local self-government bodies.

8.45 Needless to say that Article 141 of the Constitution of India binds all to the declarations made by Hon'ble Supreme Court. Further, Article 144 of the Constitution of India unambiguously directs that all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court.

8.46 Accordingly, State of Uttar Pradesh was under an obligation to re-frame its policy including by way of having a fresh look at its Legislative prescriptions in tune with the law declared by the Constitution Bench of Hon'ble Supreme Court in the case of **K. Krishna Murthi (supra)** and also in the case of **Vikas Kishanrao Gawai (supra)**. The State has, however, failed to re-frame its policies according to the mandate of Hon'ble Supreme Court even after a lapse of a period of 12 years hence the plea that the petitioners are not entitled to the relief as claimed in these writ petitions as there is no challenge to the State enactments, is not tenable.

8.47 State in this case is, thus, on the wrong side of law declared by Hon'ble Supreme Court and hence the Court cannot permit the State to reap the fruits of its own wrong. A person having done a wrong cannot take advantage of its own wrong and plead bar of any law to frustrate any lawful act. In the facts and circumstances of the present case the legal maxim ***nullus commodum capere potest de injuria sua propria*** applies. The persons violating the law cannot be permitted to urge that their offence cannot be subjected to inquiry, trial or investigation, nor can a person claim any right arising out of his own wrongdoing *(jus ex injuria non oritur)* **[vide Devendra Kumar vs. State of Uttaranchal and others, 2013 9 SCC 363] .**

8.48 Reference may also be had in this regard to the judgment in the case of

Kusheshwar Prasad Singh vs. State of Bihar and others, reported in (2007) 11 SCC 447 wherein para 16 Hon'ble Supreme Court has observed as under:

"16. 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"."

8.49 We may also quote a legal maxim from Legal Glossary published by the Ministry of Law, Justice and Company Affairs, Government of India, which is as under:

"Commodum ex injuria sua memo habere debet: *a person cannot be allowed to take advantage of his own wrongs. Convenience cannot accrue to a party from his own wrongs, in other words no one can be allowed to benefit from his own wrongful act* ***[Mrutunjay Pani v. Narmada Bala Sasmal and another, A.I.R. 1961 S.C.1353]."***

8.50 For the reasons aforesaid, we are of the considered opinion that absence of challenge to the statutory prescriptions in the State enactments, which provide for reservation to Backward Class of citizens in the context of elections of local urban bodies, does not dis-entitle the petitioners to seek reliefs prayed in these petitions.

8.51 As regards the validity of the Government Order dated 12.12.2022, State has utterly failed to satisfy the Court that it is referable to any provision either in the Municipalities Act or in the Municipal Corporations Act. The reason given in the said Government Order dated 12.12.2022 is based on the judgment in the case of **Sandeep @ Sandeep Mehrotra and others vs. State of U.P. and others** delivered on 05.12.2011 (Writ Petition No.11226 of 2011). However, when we peruse the said judgment what we find is that in the said case the then existing section 10(A) of Municipalities Act, which provided that where the election is not held for any unavoidable circumstance, then all powers, functions and duties of such Municipality shall be exercised by the District Magistrate or by a Gazetted Officer not below the rank of Deputy Commissioner, was challenged. The Division Bench of this Court in the said case struck down the said provision and declared the same as *ultra vires* unconstitutional and further declared the said provision as illegal, inoperative and void. The Court, however, permitted the said arrangement to continue till newly elected representatives resumed the work and provided that the affairs of the Municipalities and Municipal Corporations shall be managed by the Executive Officers and Municipal Commissioners of the respective Municipal Bodies. Accordingly, the interim arrangement made by the Division Bench vide its judgment dated 05.12.2011 in the case of **Sandeep @ Sandeep Mehrotra (supra)**, lost its efficacy on constitution of the municipalities pursuant to the said judgment dated 05.12.2011 and hence the same could not have been taken aid of by the State to issue the Government Order dated 12.12.2022.

8.52 Regarding the issue relating to prayer made in one of these writ petitions for inclusion of transgenders in the

Backward Class of citizens in the light of the judgment of Hon'ble Supreme Court in the case of **National Legal Services Authority (supra)**, we may observe that the same may be in the wisdom of the State once the dedicated Commission conducts contemporaneous rigorous empirical inquiry into the nature and implications of backwardness in the local bodies.

Order

For the discussion made and reasons given above, all the writ petitions are **allowed** in terms of the following directions:

(A) Notification dated 05.12.2022, issued by the Government of Uttar Pradesh, in the Department of Urban Development, under section 9-A (5)(3) is hereby quashed.

(B) The Government Order dated 12.12.2022, issued by the State Government which provides for operation of bank accounts of Municipalities under joint signatures of Executive Officers and the Senior Most Officer in Uttar Pradesh Palika Centralized Service (Accounts Cadre) is also hereby quashed.

(C) It is further directed that until the triple test/conditions as mandated by Hon'ble Supreme Court in **K. Krishna Murthy (supra)** and **Vikas Kishanrao Gawali (supra)** is completed in all respects by the State Government, no reservation for Backward Class of citizens shall be provided and since the term of Municipalities has either ended or shall be coming to an end by 31.01.2023 and the process of completion of triple test/conditions being arduous, is likely to take considerable time, it is directed that the State Government/State Election Commission shall notify the elections immediately. While notifying the elections the seats and offices of Chairpersons, except those to be reserved for Scheduled Castes and Scheduled Tribes, shall be notified as for general/open category.

The notification to be issued for elections shall include the reservation for women in terms of the constitutional provisions.

(D) In case, term of Municipal Body comes to an end, till the formation of the elected Body the affairs of such Municipal Body shall be conducted by a three-member Committee headed by the District Magistrate concerned, of which the Executive Officer/Chief Executive Officer/Municipal Commissioner shall be a member. The third member shall be a District Level Officer to be nominated by the District Magistrate.

However, the said Committee shall discharge only day-to-day functions of the Municipal Body concerned and shall not take any major policy decision.

We have issued the direction to immediately notify the elections being guided by the provisions of Article 243-U of the Constitution of India which mandates that election to constitute a Municipality shall be completed before expiry of its duration. We understand that collection and collation of materials by the dedicated Commission is a humongous and time taking task, however, formation of elected Municipal Bodies by election cannot be delayed for the reason of constitutional mandate contained in Article 243-U of the Constitution of India. Thus to fortify the democratic character of governance of society, it is essential that the elections are held at the earliest which cannot wait.

We also direct that once the dedicated Commission is constituted for undertaking the exercise of conducting empirical study as to the nature and implications of Backwardness for the

purposes of providing reservation to Backward Class of citizens in the context of elections to the urban local bodies, the claim of transgenders for their inclusion amongst Backward Class of citizens shall also be considered.

(E) There will be no order as to costs.

(2023) 1 ILRA 912
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.01.2023

BEFORE

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

Public Interest Litigation No. 2440 of 2022

Professor Vineeta Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shivam Yadav

Counsel for the Respondents:
C.S.C., Sri Pankaj Kumar Shukla, Sri Lal Dev Chaurasiya , Sri Avneesh Tripathi

Civil Law - P. St. Universities Act, 1973 - Sections 2(3), 4(1-A), 4(4) & 5: – Lease deed of University's Land - Executed by District Magistrate – for establishment of a huge Electricity Sub-station - Executive Council and the Vice-Chancellor of the University have not taken any step to prevent unauthorized utilization of University land, without the University's consent or permission, for the purpose of establishment of a Sub-Station by the Power Corp. – Whether present Public Interest is maintainable – court held that, there is no public interest at all involved in the petition on merits as well, in as much as the establishment of a big Sub-Station would cater to the interest of the University as well, besides other areas – It was noticed upon a perusal of the lease deed that the land, whereon the Sub-Station has been established is Government land and for that reason, the lease deed has been executed by the Collector on behalf of the Governor in favour of the Power Corp. – Petition being lacking of bona-fides, deserves to be dismissed with cost of Rs. 50,000/- upon the petitioner, directions accordingly. **(**Para – 11, 12)

Writ Petition Dismissed. (E-11)

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

1. The petitioner is a retired Professor and ex-Head, Department of Modern Languages and Linguistics of Sampurnanand Sanskrit Vishwavidyalaya, Varanasi (for short, 'the University'). While in service, she taught French language at the University and retired in the year 2018.

2. It is the petitioner's case that after retirement, she has confined herself to social life, also devoting time to better the life of fellow citizens. As part of her credentials, the petitioner says that she worked with the University for 39 yeas. It is the petitioner's case that she has come to know that the District Magistrate, Varanasi in disregard of the law has allocated land belonging to the University vide a registered lease deed dated September 13, 2022 in favour of the Uttar Pradesh Power Transmission Corporation for the purpose of enabling the said Corporation to establish a huge Electricity Sub-Station on the University's land. The University already have a small Sub-Station set up by the Corporation in order to ensure uninterrupted power supply to them. According to the petitioner, the land that has been leased out to the U.P. Power Transmission Corporation by the District Magistrate through the lease deed in question is University's land. The District

Magistrate has neither authority nor jurisdiction to execute the lease deed aforesaid in favour of the Power Corporation purporting to act in the Governor's name. The University Authorities are silent spectators and they have not taken any steps to prevent the District Magistrate from granting lease of University's land to the Power Corporation.

3. According to the petitioner, the University's land that has been leased out to the Corporation by the District Magistrate is one which the University alone can manage or deal with. It is to be utilized for future expansion of the University. The Executive Council of the University is the competent body to take a decision in the mater, but the Executive Council and the Vice-Chancellor of the University have not taken any step to prevent unauthorized utilization of University land, without the University's consent or permission, for the purpose of establishment of a Sub-Station by the Power Corporation.

4. We have heard the learned Counsel for the petitioner in support of the writ petition, purporting to one in public interest, at length.

5. According to the learned Counsel for the petitioner, the action of the District Magistrate in executing a lease deed for the purpose of setting up an Electricity Sub-Station by the Power Corporation leads to diminishing the area of the University as defined under Section 2(3) of the Uttar Pradesh State Universities Act, 1973 (for short, "the Act'). He submits that this can only be done according to the procedure prescribed under Section 4(4) of the Act, which mandates that the decision to diminish the area of the University can be taken by the State Government by Notification in the Gazette and that can be done according to the proviso to sub-Section (4) of Section 4 of the Act, with the previous approval by resolution of both House of the State Legislature.

6. The learned Counsel for the petitioner has impressed upon the Court that it is not just that the State Government can take a decision to diminish the area of the University or any other Universities by the Act, and can do so by Notification in the Gazette. The State Government's decision of this kind has to be approved first by resolutions passed by both Houses of the State Legislature, whereafter alone the decision of the State Government can be notified by publication in the Gazette.

7. Here, the decision has not at all be taken in the manner envisaged by the Statute, according to the learned Counsel. It is a decision simply taken by the Collector acting in the Governor's name, which is *ultra vires* Section 4(4) of the Act. Sub-Sections (1-A) and 4 of Section 4 as also Section 5 of the Act are quoted below:

"4. Establishment of new Universities and alteration of the areas or names of Universities.--(1) x x x x

(1-A) With effect from such date or dates as the State Government may by notification in the Gazette appoint in this behalf, there shall be established--

(a) a University of Bundelkhand at Jhansi;

(b) a University of Avadh at Ayodhya which shall be called the Doctor Ram Manohar Lohia University, Ayodhya with effect from June 18, 1994, and the Doctor Ram Manohar Lohia Avadh University, Ayodhya with effect from July 11, 1995;

(c) a University of Rohilkhand at Bareilly which shall with effect from the

date of the commencement of the Uttar Pradesh State Universities (Second Amendment) Act, 1997 be called Mahatma Jyotiba Phule Rohilkhand University, Bareilly;

(d) a University to be known as Purvanchal University at Jaunpur, which shall, with effect from the date of commencement of the Uttar Pradesh State Universities (Amendment) Act, 1999, be called "Vir Bahadur Singh Purvanchal University, Jaunpur;

(e) a University to be known as the Khwaja Moinuddin Chishti Language University, Lucknow;

(f) a University to be known as Siddharth University, Kapilvastu, Siddharth Nagar;

(g) a University to be known as Professor Rajendra Singh (Rajju Bhaiya) University, Prayagraj;

(h) a University to be known as Jananayak Chandrashekhar University, Ballia;

(i) a University to be known as Maa Shakumbhari University, Saharanpur;

(j) a University to be known as Maharaja Suhel Dev State University, Azamgarh;

(k) a University to be known a Raja Mahendra Pratap Singh State University, Aligarh;

for the areas respectively specified in the Schedule.

(4) The State Government may, by notification in the Gazette--

(a) increase the area of a University;

(b) diminish the area of a University; or

(c) alter the name of a University:

Provided that no such notification shall be issued except with the previous approval by resolution, of both the Houses of the State Legislature.

"5. Territorial exercise of powers.--(1) Save as otherwise provided by or under this Act, the powers conferred on each University (other than the Sampurnanand Sanskrit Vishvavidyalaya) shall be exercisable in respect of the area for the time being specified against it in the Schedule.

(2) The Sampurnanand Sanskrit Vishvavidyalaya may affiliate institutions situated in any part of the territory of India and recognize teachers of, and admit to its examinations candidates from such territory or abroad:

Provided that the Vishvavidyalaya shall not--

(a) affiliate an institution outside Uttar Pradesh; or

(b) recognize any teacher employed in an institution situated outside Uttar Pradesh and maintained by any Government;

except upon the recommendation of the Government concerned.

(3) & (4) x x x

(5) Notwithstanding anything contained in sub-section (1) the homoeopathic educational or instructional institutions throughout Uttar Pradesh may be affiliated to the Dr. Bhimrao Ambedkar University, Agra or Chhatrapati] Shahu Ji Maharaj University, Kanpur.

(6) Notwithstanding anything contained in sub-section (1) or sub-section (1) of Section 37, the institutions established or proposed to be established for imparting education or instruction in Western Medical Science as defined in the Indian Medical Degrees Act, 1916, engineering technology or management anywhere in Uttar Pradesh may, subject to such directions as may be issued by the State Government in this behalf, be affiliated to any University.

(7) Notwithstanding anything contained in sub-section (1) the power

conferred on the Khwaja Moinuddin Chishti Language University, Lucknow in respect of education and research of Indian and foreign languages and advancement and dissemination of knowledge thereof shall be exercisable throughout the State of Uttar Pradesh."

8. The Schedule appended to the Act, which defines the areas within which the University, as it is called by the Statute, through the Schedule exercise jurisdiction, is extracted below:

" THE SCHEDULE
(*See* Section 5)

Sl. No.	Name of the University	Areas within which the University shall exercise jurisdiction
1	2	3
1	The University of Lucknow	Districts of Hardoi, Lucknow, Lalchimpur Kheri, Sitapur and Rae Bareli.
2	Chaudhary Charan Singh University, Meerut—	
	(*i*) Until the establishment of the Saharanpur State University, Saharanpur	Districts of Bhaghpat, Bulandshahr, Gautam Buddha Nagar, Ghaziabad, Hapur, Meerut, Muzaffar Nagar, Saharanpur and Shamli.
	(*ii*) Upon the establishment of the Saharanpur State University, Saharanpur	Districts of Bhaghpat, Bulandshahr, Gautam Buddha Nagar, Ghaziabad, Hapur and Meerut.
3.	Chhatrapati Shahu Ji Maharaj University, Kanpur	Districts of Auraiya, Etawah, Farrukhabad, Kannauj, Kanpur Dehat, Kanpur Nagar and Unnao.
4	The Deen Dayal Upadhyay Gorakhpur University, Gorakhpur—	
	(*i*) Until the establishment of the Siddharth University	Districts of Basti, Deoria, Gorakhpur, Kushi Nagar, Maharajganj, Sant Kabir Nagar and Siddharth Nagar
	(*ii*) Upon the establishment of the Siddharth University	Districts of Deoria, Kushi Nagar and Gorakhpur
5	Doctor Bhim Rao Ambedkar University, Agra —	
	(*i*) Until the establishment of Raja Mahendra Pratap Singh State University, Aligarh	Districts of Agra, Aligarh, Etah, Firozabad, Hathras, Kaganj, Mainpuri and Mathura
	(*ii*) Upon the establishment of Raja Mahendra Pratap Singh State University, Aligarh	Districts of Agra, Firozabad Mainpuri and Mathura
6	Doctor Ram Manohar Lohia Avadh University, Ayodhya	Districts of Ambedkar Nagar, Amethi, Ayodhya, Bahraich, Bara Banki, Gonda and Sultanpur.
7.	Mahatma Jyotiba Phule Rohil Khand University, Bareilly	Districts of Budaun, Bareilly, Bijnor, Jyotiba Phule Nagar, Moradabad, Pilibhit, Rampur [Sambhal and Shahjahanpur
8.	The University of Bundelkhand, Jhansi	Districts of Banda, Chitrakut, Hamirpur, Jalaun, Jhansi, Lalitpur and Mahoba
9.	Vir Bahadur Singh Purvanchal University, Jaunpur—	
	(*i*) Until the establishment of the Azamgarh State University, Azamgarh	Districts of Azamgarh, Ghazipur, Jaunpur and Mau.
	(*ii*) Upon the establishment of the Azamgarh State University, Azamgarh	Districts of Ghazipur and Jaunpur]
10	Mahatma Gandhi Kashi Vidyapith Varanasi—	Districts of Ballia, Chandauli, Mirzapur, Sant Ravidas Nagar, Sonbhadra and Varanasi
	(*i*) Until the establishment of the Jananayak Chandrashekhar University, Ballia	Districts of Ballia, Chandauli, Mirzapur, Sant Ravidas Nagar, Sonbhadra and Varanasi
	(*ii*) Upon the establishment of the Jananayak Chandrashekhar University, Ballia.	Districts of Chandauli, Mirzapur, Sant Ravidas Nagar, Sonbhadra and Varanasi
11	The Khwaja Moinuddin Chishti Language University, Lucknow	Whole of Uttar Pradesh in respect of education and research in Urdu, Arabic and Persian
12	Professor Rajendra Singh (Rajju Bhaiya) University, Prayagraj.]	Districts of Fatehpur, Kaushambi Pratapgarh and Prayagraj.
13.	The Siddharth University, Kapilvastu, Siddharth Nagar	District of Balrampur, Basti, Maharajganj Shrawasti, Siddharth Nagar and Sant Kabir Nagar.
14	Jananayak Chandrashekhar University, Ballia	Ballia District
15	Maa Shakumbhari University, Saharanpur	District of Muzaffar Nagar Saharanpur and Shamli.
16.	Maharaja Suhel Dev State University, Azamgarh	Districts of Azamgarh and Mau
17	Raja Mahendra Pratap Singh State University, Aligarh	Aligarh, Etah, Hathras, Kasganj Districts

9. Upon hearing the learned Counsel for the petitioner and the learned Counsel appearing for the respondents, we find that a conjoint reading of Section 2(3), Section 4(1-A), 4(4) and 5 of the Act, along with the Schedule appended to the Act, do not spare a shadow of doubt that the "area of the University' referred to in Section 2(3) has no reference at all to the dimensions of the University campus. It has nothing to do at all with the land area, whereon the University is established. Instead, the area of the University clearly means the area within which the University has affiliating powers or other powers mentioned in the Act.

10. The endeavour of the petitioner to say that the "area of the University' means the land area of its campus, which cannot be diminished contrary to Section 4(4) of the Act, is thoroughly misconceived. Upon the fact being pointed out to the learned Counsel for the petitioner, he had no convincing answer, but persisted in his endeavour to say upon instructions received

from the petitioner that what is meant by "area of the University' under Section 2(3) of the Act, is the land, whereon the campus is located.

11. We are of opinion that the petition is not only one that is thoroughly misconceived, but has been instituted by the petitioner for some extraneous purpose. She is a retired Professor of the University and apparently has nothing to do with the campus, except some scores to settle. There is no public interest at all involved in the petition on merits as well, inasmuch as the establishment of a big Sub-Station would cater to the interest of the University as well, besides other areas. We also noticed upon a perusal of the lease deed that the land, whereon the Sub-Station has been established is Government land and for that reason, the lease deed has been executed by the Collector on behalf of the Governor for a period of 29 years, 11 months and 29 days in favour of the Power Corporation.

12. The petition, being thoroughly misconceived and lacking *bona fides*, deserves to be dismissed with heavy costs. It is, accordingly, dismissed imposing cost of Rs. 50,000/- upon the petitioner, which if not deposited within a month in the Account of the Registrar General, Allahabad High Court Mediation and Conciliation Centre, shall be recovered by the District Magistrate, Varanasi as arrears of land revenue and caused to be credited in the account aforesaid.

13. Let this order be communicated to the District Magistrate, Varanasi by the Registrar (Compliance).

(2023) 1 ILRA 916
APPELLATE JURISDICTION
CRIMINAL SIDE

DATED: ALLAHABAD 13.12.2022

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Appeal No. 98 of 1989

Digamber Singh & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri S.D.N. Singh, Sri Abhinav Dwivedi

Counsel for the Respondent:
A.G.A.

Criminal Law- Code of Criminal Procedure, 1973- Section 357- Compensation- The Probation of Offenders Act, 1958 - Section 4 & 5 - Proportionate Sentence- The charge under Section 323/34 and 325/34 IPC is proved beyond reasonable doubt against accused Digamber Singh and Dhanpal Singh- Considering the facts and circumstances of the present case as well as keeping in view the position of law as mentioned above and considering that the incident had taken place about 39 years back; the incident was occurred in spur of the moment; and considering the provisions of Section 4 & 5 of the Probation of Offenders Act, 1958 it appears justified that the appellants accused Digamber Singh and Dhanpal Singh be released under Section 4 (1) of the Act on probation- Each appellant is directed to deposit Rs. 5000/- within a period of one month from the date of receipt of certified copy of this order as compensation which shall be paid to injured.

Though the charges against the appellants stand proved but as a long time has elapsed since the commission of the offence, the same having occurred on the spur of the moment and was the first offence of the appellants hence ends of justice shall be met by providing just compensation to the victims. (Para 17, 24, 26)

Criminal Appeal disposed of. (E-3)

Case Law/ Judgements relied upon:-

1. Accused 'X' Vs St. of Maha., (2019) 7 SCC 1)

2. St. of M.P Vs Vikram Das (2019) 4 SCC 125)

3. Manohar Singh Vs St. of Raj. & ors., (2015) 3 SCC 449

(Delivered by Hon'ble Surendra Singh-I, J.)

1. Heard Sri Shailendra Kumar Tripathi holding brief of Sri Abhinav Dwivedi, learned counsel for the appellants and Sri Sunil Kumar Tripathi, learned AGA appearing for the State.

2. This criminal appeal has been filed against the judgment and order dated 21.12.1988 passed by Special Judge (Essential Commodities Act), Farrukhabad in S.T. No. 113 of 1984 (State vs. Digamber Singh and three others) arising out of Case Crime No.7 of 1983 under Sections 302 IPC P.S. Thathiya, District Farrukhabad. As per status report filed by learned AGA, no government criminal appeal has been filed against the aforesaid acquittal order.

3. By the impugned order, the trial court has convicted accused appellants Digamber Singh, Bachchu Singh and Dhanpal Singh under Section 323 IPC read with Section 34 IPC and under Section 325 IPC read with Section 34 IPC and sentenced each accused under Section 323 IPC one year's rigorous imprisonment with a fine of Rs. 1,000/- and under Section 325 IPC three years' rigorous imprisonment with a fine of Rs. 2,000/- with default stipulation. The trial court has acquitted all accused of all the charges levelled against them under Section 302 IPC read with Section 34 IPC.

4. During pendency of the criminal appeal, the appellant no. 3 Bachchu Singh died and criminal proceedings against him were abated. Thus, the criminal appeal filed by the appellants Digamber Singh and Dhanpal Singh is to be decided by this Court.

5. The prosecution case in brief is that the appellants accused Digamber Singh and Bachchu Singh are real brothers and accused Dhanpal Singh is the son of Bachchu Singh. The informant Lakhan Singh son of Kunwar Singh is the resident of village Mannapurwa, Pargana Narsai, Police Station Thathiya, District Farrukhabad. The informant Lakhan Singh and appellants accused are relatives. Mukut Singh, uncle of the informant Lakhan Singh, had gone to demand Rs. 150/- from accused Dhanpal Singh which he had borrowed from Mukut Singh about 5 to 6 years earlier. Even after repeated demands, Dhanpal Singh did not repay the loan amount. On 11.01.1983, at 5.00 pm in village Mannapurwa, Pargana Narsai, Police Station Thathiya, District Farrukhabad, Mukut Singh went and asked Dhanpal Singh to pay the loan amount. Dhanpal Singh refused to pay the loan amount and abused him. Mukut Singh forbid him from abusing, accused Bachchu Singh and Dhanpal Singh started beating Mukut Singh. On alarm being raised by Mukut Singh, informant Lakhan Singh, his father Kunwar Singh reached at the place of occurrence, thereafter accused Digamber Singh, Bachchu Singh and Dhanpal Singh brought lathi from their house and started beating Lakhan Singh and his father Kunwar Singh. They also assaulted Mukut Singh. Kunwar Singh received injury on the head and fell on the ground who died later on. Pws Indrapal Singh and Kishanpal reached at the place of occurrence and they

saw the incident and on their chasing, all the accused ran away from the spot. In the incident, Kunwar Singh died and informant Lakhan Singh and his uncle Mukut Singh received injuries caused by lathi. Informant Lakhan Singh prepared written report (Ex.Ka.9) on the basis of which FIR was lodged on 11.01.1983 at 9.30 pm as Crime No. 7 of 1983 under Section 302 IPC against accused Digamber Singh, Gorakhnath Singh, Bachchu Singh and Dhanpal Singh. Chik FIR thereof is Ex.Ka.6. The registration of criminal case was entered in GD which is Ex.Ka.9.

6. Injured Mukut Singh was medically examined on 12.01.1983 at 9.00 am in government dispensary Thathiya, by Dr. D.P.Bajpai (Ex.Ka 4). Two contusions and complaint of pain on right knee joint were found. Injured Lakhan Singh was medically examined on 12.01.1983 at 9.30 am in government dispensary Thathiya (Ex.Ka 5). Eight injuries including lacerated wound and abrasions were found in different parts of his body.

7. The panchnama proceedings (Ex.Ka.14) of deceased Kunwar Singh was done by Sub-Inspector B.S.Tomar. The investigation of the case was done by Sub-Inspector K.K.Sharma and D.S.Dixit who collected blood stained and simple soil from the place of occurrence and prepared recovery memo (Ex.Ka.12). They also took in possession blood stained towel whose recovery memo is Ex.Ka.11. The Investigating Officer visited the place of occurrence and prepared site plan (Ex.Ka.13) and recorded statement of witnesses and after investigation submitted charge-sheet (Ex.Ka.20) under Section 302 IPC against Digamber Singh, Gorakhnath Singh, Bachchu Singh and Dhanpal Singh.

8. The post mortem of the dead body of Kunwar Singh was done on 13.01.1983 at 2.30 p.m. by Medical Officer, Dr. Sarvesh Chandra Gupta at District Hospital Fatehgarh and prepared post mortem report which is Ex.Ka.2. Nine ante mortem injuries on different parts of the body of deceased were found. According to opinion of Medical Officer, Dr. Sarvesh Chandra Gupta, Kunwar Singh died due to injuries caused by lathi.

9. On 05.07.1985, the court framed charge under Section 302 read with Section 34 IPC against accused Digamber Singh, Gorakhnath Singh, Bachchu Singh and Dhanpal Singh. They denied the charge and claimed trial.

10. To prove the charge, the prosecution examined PW 1 Lakhan Singh, PW 2 Mukut Singh and PW 3 Indra Pal Singh as witnesses of fact. The prosecution also examined PW 4 Dr. Sarvesh Chandra Gupta, PW 5 Dr. D.P.Bajpayee, PW 6 Kamal Kishor, PW 7 Head Constable Jagannath Prasad and PW 8 Sub-Inspector B.S.Tomar and PW 9 Sub-Inspector Devi Shankar as formal witnesses. The formal witnesses proved the injury report, post mortem report and other prosecution papers.

11. On 08.01.1988, the court recorded statement of accused under Section 313 CrPC who denied the prosecution case. They stated that witnesses are giving false statement due to enmity.

12. The accused examined DW 1 Sudhar Singh, DW 2 Vipul Sangram Singh. In their defence, CW 1 Mahendra Singh, Constable, was examined as court witness.

13. PW 1 Lakhan Singh has deposed in his evidence that Kunwar Singh is his father. The appellants accused Digamber Singh and Dhanpal Singh are real brothers. The appellant accused Dhanpal Singh is the son of Bachchu Singh. The accused are sons of his grand father's real brothers. PW 1 Lakhan Singh has deposed in his evidence dated 01.01.1986 that about three years ago, at 5.00 pm his uncle Mukut Singh had gone to the house of Dhanpal Singh to get back Rs. 150/- which he had given him as loan about 3 to 4 years earlier. Dhanpal Singh refused to repay the amount and abused his uncle, Mukut Singh. When his uncle forbade him to abuse, Dhanpal Singh, Bachchu Singh and Digamber Singh beat him with fists. On alarm being raised by Mukut Singh, his father Kunwar Singh came there to save him. The appellants accused Digamber Singh, Bachchu Singh and Dhanpal Singh assaulted him and his father Kunwar Singh with lathi. His father received injury on his head and fell on the spot. On alarm being raised by PW 1 Lakhan Singh and PW 2 Mukut Singh, witnesses Indrapal Singh and Kishanpal Singh reached on the spot. On their arrival, accused fled away from the place of occurrence. PW 1 Lakhan Singh has deposed in his evidence that he and his uncle Mukut Singh were medically examined in Government Hospital Thathiya. PW 1 Lakhan Singh has also proved his written report (Ex.Ka.1).

14. Thus PW 1 Lakhan Singh by his evidence has proved the date, time and place of occurrence. He has also proved involvement of accused Digamber Singh, Bachchu Singh and Dhanpal Singh and injuries received by them. He has also proved the manner in which accused caused injury to him and his uncle Mukut Singh. PW 1 Lakhan Singh has also proved that the accused assaulted his father Kunwar Singh on his head resulting in fracture of his skull causing his death.

15. PW 2 injured Mukut Singh and PW 3 Indrapal Singh have also proved by their evidence date, time and place of occurrence in which accused caused injury to him and PW 1 Lakhan Singh. PW 2 injured Mukut Singh and PW 3 Indrapal Singh have also proved that the accused assaulted Kunwar Singh, father of Lakhan Singh, on his head resulting in fracture of his skull bone causing his death.

16. PW 1 Lakhan Singh and PW 2 Mukut Singh are injured witnesses. Their presence on the place of occurrence cannot be doubted. From the evidence of PW 3 Indrapal Singh, his presence on the spot can also be believed. Thus, PW 3 Indrapal Singh is also eye-witness and he has seen the occurrence. The evidence of PW 1 Lakhan Singh, PW 2 Mukut Singh and PW 3 Indrapal Singh appears to be cogent truthful and reliable. Nothing comes in their cross-examination which makes it false or unreliable. The oral evidence of PW 1 Lakhan Singh, PW 2 Mukut Singh and PW 3 Indrapal Singh has been corroborated by the documentary evidence i.e. written report, chik FIR, recovery memo of blood stained and simple earth collected from the place of occurrence, injury report of Lakhan Singh and Mukut Singh, post mortem report of Kunwar Singh, site plan of the place of occurrence and charge-sheet filed against the appellants accused.

17. From the appreciation of aforesaid oral and documentary evidence, it is proved that accused Digamber Singh, Bachchu Singh and Dhanpal Singh in pursuance of common intention caused simple and

grievous injury to Lakhan Singh, Mukut Singh and Kunwar Singh. Thus, the charge under Section 323/34 and 325/34 IPC is proved beyond reasonable doubt against accused Digamber Singh and Dhanpal Singh. The trial court has rightly convicted the appellants accused Digamber Singh and Dhanpal Singh under Section 323/34 and 325/34 IPC.

18. Heard learned counsel for the appellants accused and learned AGA on the question of sentence.

19. Learned counsel for the appellants accused has submitted that the incident took place about 40 years ago on 11.01.1983. Injured Lakhan Singh, Mukut Singh and deceased Kunwar Singh and accused Dhanpal Singh are relatives. They are the resident of same village and they are living peaceful for the last 40 years. Learned AGA for the State has not submitted any criminal history of the appellants accused Digamber Singh, and Dhanpal Singh. It is also submitted that the date of birth of appellant accused Digamber Singh is 20.05.1955 and presently he is about 66 years old. It has also been submitted that the appellants accused may be treated leniently and they should be given benefit of Probation of Offenders Act, 1958 and released on probation.

20. Per contra, learned AGA for the State has submitted that the appellants accused be awarded exemplary punishment so that it becomes deterrent for future offenders.

21. Indian legislature has not given any sentencing policy, though Malimath Committee (2003) and Madhava Menon Committee (2008) has asserted the need of sentencing policy in India.

22. Principle of sentencing has been an issue of concern before the Supreme Court in many cases and tried to provide clarity on the issue. Apex Court has time and again cautioned against the cavalier manner considering the way sentencing is dealt by High Courts and Trial Courts.

"... It is established that sentencing is a socio-legal process, wherein a Judge finds an appropriate punishment for the accused considering factual circumstances and equities. In light of the fact that the legislature provided for discretion to the Judges to give punishment, it becomes important to exercise the same in a principled manner." (para 49 of **Accused 'X' vs. State of Maharastra (2019) 7 SCC 1**)

"12. Sentencing for crimes has to be analysed on the touchstone of three tests viz. crime test, criminal test and comparative proportionality test. Crime test involves factors like extent of planning, choice of weapon, modus of crime, disposal modus (if any), role of the accused, anti-social or abhorrent character of the crime, state of victim. Criminal test involves assessment of factors such as age of the criminal, gender of the criminal, economic conditions or social background of the criminal, motivation for crime, availability of defence, state of mind, instigation by the deceased or any one from the deceased group, adequately represented in the trial, disagreement by a Judge in the appeal process, repentance, possibility of reformation, prior criminal record (not to take pending cases) and any other relevant factor (not an exhaustive list).

13. Additionally, we may note that under the crime test, seriousness needs to be ascertained. The seriousness of the crime may be ascertained by (i) bodily integrity of the victim; (ii) loss of material

support of amenity; (iii) extent of humiliation; and (iv) privacy breach." **(State of Madhya Pradesh vs. Udham and others (2019) 10 SCC 300)**"

23. It is also notable that *"... where minimum sentence if provided for, the Court cannot impose less than minimum sentence."* (Para 8 of ***State of Madhya Pradhesh vs. Vikram Das (2019) 4 SCC 125)***

24. Section 357 Cr.P.C. provides power to the Court to award compensation to victim, which is in addition and not ancillary to other sentences. While granting just and proper compensation Court ought to have consider capacity of the accused for such payment as well as relevant factors such as medical expenses, loss of earning, pain and sufferings etc.

25. Supreme Court has reiterated need for proper exercise of power of granting compensation under Section 357 Cr.P.C. in ***Manohar Singh Vs. State of Rajasthan and others : (2015) 3 SCC 449*** and in paras 11, 31 and 54 it is stated that:

"11....Just compensation to the victim has to be fixed having regard to the medical and other expenses, pain and suffering, loss of earning and other relevant factors. While punishment to the accused is one aspect, determination of just compensation to the victim is the other. At times, evidence is not available in this regard. Some guess work in such a situation is inevitable. Compensation is payable under Section 357 and 357- A. While under section 357, financial capacity of the accused has to be kept in mind, Section 357-A under which compensation comes out of State funds, has to be invoked to make up the requirement of just compensation."

"31. The amount of compensation, observed this Court, was to be determined by the courts depending upon the facts and circumstances of each case, the nature of the crime, the justness of the claim and the capacity of the accused to pay."

"54. Applying the tests which emerge from the above cases to Section 357, it appears to us that the provision confers a power coupled with a duty on the courts to apply its mind to the question of awarding compensation in every criminal case. We say so because in the background and context in which it was introduced, the power to award compensation was intended to reassure the victim that he or she is not forgotten in the criminal justice system. The victim would remain forgotten in the criminal justice system if despite the legislature having gone so far as to enact specific provisions relating to victim compensation, courts choose to ignore the provisions altogether and do not even apply their mind to the question of compensation. It follows that unless Section 357 is read to confer an obligation on the courts to apply their mind to the question of compensation, it would defeat the very object behind the introduction of the provision."

26. Considering the facts and circumstances of the present case as well as keeping in view the position of law as mentioned above and considering that the incident had taken place about 39 years back; the incident was occurred in spur of the moment; and considering the provisions of Section 4 & 5 of the Probation of Offenders Act, 1958 it appears justified that the appellants accused Digamber Singh and

Dhanpal Singh be released under Section 4 (1) of the Act on probation for a period of one year on furnishing a personal bond of Rs.20,000/- (Rupees twenty thousand) and two sureties each in the like amount. During this period, they shall maintain good conduct and keep peace and on breach of this condition, they shall appear before the Court to receive punishment. It also appears justified that under Section 5 (1) (a) of the Act, each appellant is directed to deposit Rs. 5000/- within a period of one month from the date of receipt of certified copy of this order as compensation which shall be paid to injured Lakhan singh and Mukut Singh equally. In case of death of these injured, their legal representatives shall be entitled to receive their shares of compensation.

27. The criminal appeal is disposed of accordingly.

28. Let a certified copy of this order along with record be sent to the court concerned for compliance. In case, probation bonds is not filed and compensation amount is not deposited by the appellants accused, they will have to undergo the sentence awarded by the trial court.

(2023) 1 ILRA 922
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.12.2022

BEFORE

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

Criminal Appeal No. 703 of 2017

Anil **...Appellant**

Versus

State of U.P. **...Respondent**

Counsel for the Appellant:
Sri Apul Misra, Sri Ramendra Pal Singh, Sri Veerendra Kumar Shukla, Sri Tripurari Pal

Counsel for the Respondent:
G.A.

Criminal Law- Indian Evidence Act- Sections 101 & 106 -Dowry death- Demand of additional dowry could not be proved by the prosecution- The witnesses of fact turned hostile- learned trial court has also reached to the conclusion that death of the deceased was not within the four corners of dowry death- The learned trial court had held that it is the statement of appellant in his statement u/s 313 of Cr.P.C. that he and deceased used to reside in separate house from his parents. Hence, learned trial court shifted the burden on the shoulders of the appellant to prove the factum of death of deceased as to how she died- When the offence like murder is committed in secrecy inside the house, the initial burden to establish the case would undoubtedly be upon the prosecution- There will be a corresponding burden on the inmates of the house to give cogent explanation as to how the crime was committed- The initial burden of proving that, as on the date of the alleged incident, the accused was present in the house of lastly seen with the deceased or that he was lastly in the company of the deceased at the time of the incident would be primarily upon the prosecution- The prosecution has not brought forward any evidence which could at least establish the fact that at the time of occurrence, the appellant was inside the house. Hence, there is no applicability of Section 106 of Indian Evidence Act in this case- Prosecution has not discharged its burden to prove the case beyond reasonable doubt and no reverse burden could be placed on the accused with the aid of Section 106 of Indian Evidence Act when the prosecution has not discharged its burden first.

Where the prosecution has not discharged its initial burden of proof by leading evidence that the deceased was last seen in the company of the accused then the reverse burden under section 106 of the Evidence Act cannot be placed on the accused. (Para 16, 18, 19)

Criminal Appeal allowed. (E-3)

Case Law/ Judgements relied upon:-

Santosh Vs St. of U.P. 2021 0 Supreme (All) 173

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

1. This appeal has been preferred against the judgement and order dated 08.11.2016 passed by Additional Sessions Judge/Special Judge, E.C. Act, Budaun in Session Trial No.826 of 2013, arising out of Case Crime No.100 of 2013, Police Station- Ughaiti, District- Budaun, whereby the appellant was convicted and sentenced under Section 302 IPC for life imprisonment along with fine of Rs.20,000/-, in default of the payment of fine to further undergo one year simple imprisonment.

2. The brief facts of the case as culled out from the record are that a written report is filed at Police Station- Ughaiti, District- Budaun with the averment that the marriage of sister of the informant was solemnised with appellant Anil, in which dowry was given as per his financial condition but the in-laws of his sister started demanding Rs.50,000/- as additional dowry. On 24.06.2013 at about 4:00 pm he received, a call phone from the neighbour of his sister that his sister has been done to death by her in-laws for want of dowry. On hearing the news, he reached to the matrimonial home of his sister along with other family members and saw that his sister was done to death by her in-laws by way of administering the poison.

3. On the basis of aforesaid written report, a first information report was registered as Case Crime No.100 of 2013 u/s 498A, 304B of IPC and under Section 3/4 Dowry Prohibition Act. Investigation was taken up by the I.O. He visited the spot and prepared the site-plan. The statements of witnesses were recorded u/s 161 Cr.P.C. by the investigating officer. Inquest proceedings had taken place and inquest report was prepared. The post mortem of dead body was conducted and post mortem report was prepared. The cause of death was not ascertained in post mortem and, hence, Viscera was preserved and sent to Forensic Science Laboratory for chemical examination. From where the report was received, in which organophosphorus insecticides poison was found in Viscera. After completion of investigation, the FIR was culminated into charge sheet against accused Anil, Lalu Prasad and Jaleshwari. The Magistrate took the cognizance and committed it to the Court of Sessions because the case was triable exclusively by Court of Sessions.

4. Learned trial court framed charges against all the accused persons u/s 304B IPC with alternative charge u/s 302 IPC and u/s 498A IPC and 3/4 Dowry Prohibition Act. Accused persons denied the charges and claimed to be tried.

5. The prosecution so as to bring home the charges, framed against the accused, examined the following witnesses:

1	Nirottam	PW1
2	Chatra Pal	PW2
3	Om Shankar	PW3
4	Smt. Santoshi Kumari	PW4
5	Netrapal	PW5
6	Shaukuntala	PW6

	Devi	
7	Bhikam Singh	PW7
8	Dr. Ashok Prasad	PW8
9	Mahesh Chandra	PW9
10	Narendra Pal Singh	PW10
11	Radhey Shyam Sharma	PW11

6. Following documentary evidence was filed by prosecution, which was proved by leading evidence:

1	FIR	Ex.ka3
2	Written Report	Ex.ka1
3	P.M. Report	Ex.ka2
4	Report of Vidhi Vigyan Pryogshala	Ex.ka12
5	Panchayatnama	Ex.ka7
6	Charge sheet (Mool)	Ex.ka6
7	Site Plan with Index	Ex.ka5

7. After completion of prosecution evidence, statements of accused persons were recorded u/s 313 of Cr.P.C., in which they have stated that false evidence has been led against them and specifically stated that co-accused Anil and deceased used to reside in separate house from other co-accused, namely, Lalu Prasad and Smt. Jaleshwari. No witness is examined by accused persons in defence.

8. After hearing both the parties, learned trial court convicted the accused appellant Anil for the offence u/s 302 IPC and sentenced life imprisonment and fine. Other co-accused Lalu Prasad and Smt. Jaleshwari were acquitted from all the charges. Hence, this appeal.

9. Heard Shri Tripurari Pal, learned counsel for the appellant and Shri Patanjali Mishra along with Shri N.K. Srivastava, learned AGA appearing on behalf of the State.

10. Learned counsel for the appellant submitted that appellant has been falsely implicated in this case. This is a case of no evidence. Prosecution has examined seven witnesses of fact in this case, but nobody has supported the prosecution case and they have been declared hostile, even after cross-examining by the State, no evidence is emerged, which could go against the appellant. All the witnesses of fact have stated that there was no demand of dowry on the part of the appellant. It is submitted by learned counsel for the appellant that in fact the deceased consumed insecticide, which was taken by her mistakenly in the place of medicine. This stand is taken by the appellant in his statement u/s 313 Cr.P.C. also.

11. It is next submitted by the learned counsel for the appellant that learned trial court has also opined that no case of dowry death is made out against the appellant, but he was convicted with the aid of Section 106 of Indian Evidence Act and circumstantial evidence, which is not applicable in this case. Learned counsel further submitted that prosecution has not proved that at the time when the deceased consumed insecticide, he was in the house. It is not sufficient to establish that accused and deceased used to reside in the same house. Moreover, when the learned trial court has opined that this is not the case of dowry death and no demand of additional dowry is proved, then the motive is also not proved, which is essential circumstance in the case of circumstantial evidence. There is no eye-witness in this case and

prosecution has not brought any evidence with regard to the fact that poison was administered to the deceased by the appellant. Hence, trial court has committed a grave error in convicting the appellant for the offence u/s 302 IPC and appeal is liable to be allowed.

12. Learned AGA opposed the submissions made by the learned counsel for the appellant and contended that it is not denied by the appellant that he was not living with the deceased. Hence, learned trial court has not committed any error in convicting the accused by way of provision of Section 106 of Indian Evidence Act because, in case when the deceased and appellant were residing together, the burden was on the appellant to explain and prove that he did not administer the poison, which he could not prove. With regard to the fact of demand of additional dowry, the learned AGA submitted that the witnesses of fact were won over by the accused. Hence, they did not support the prosecution case. Hence, there is no illegality or infirmity in the impugned judgement, which may call for any interference by this Court.

13. Prosecution has set up this case as a case of dowry death. Informant lodged first information report with the averments that appellant along with his family members used to torture the deceased in connection with demand of additional dowry. But this fact could not be proved by the prosecution. The witnesses of fact examined by the prosecution have turned hostile. PW1 Nirottam is informant and brother of the deceased. PW2, PW3 and PW5 are also her brothers, PW4 is Bhabhi of deceased. PW6 and PW7 are mother and father of the deceased respectively. They all have deposed that there was no demand of dowry from the side of the appellant and the poison was consumed by the deceased mistakenly. On the basis of aforesaid evidence, learned trial court has also reached to the conclusion that death of the deceased was not within the four corners of dowry death.

14. Learned trial court went further and took the recourse of provision envisaged in Section 106 of Indian Evidence Act, where the learned trial court had held that it is the statement of appellant in his statement u/s 313 of Cr.P.C. that he and deceased used to reside in separate house from his parents. Hence, learned trial court shifted the burden on the shoulders of the appellant to prove the factum of death of deceased as to how she died.

15. In our opinion, learned trial court has misread the provision of Section 106 of Indian Evidence Act, which reads as under:

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

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

16. As far as the concept of Section 106 of Indian Evidence Act is concerned, that is misread by the learned trial Judge because when the offence like murder is committed in secrecy inside the house, the initial burden to establish the case would undoubtedly be upon the prosecution. In

view of Section 106 Indian Evidence Act, there will be a corresponding burden on the inmates of the house to give cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quite and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty challenge on the accused to offer. Then the initial burden of proving that, as on the date of the alleged incident, the accused was present in the house of lastly seen with the deceased or that he was lastly in the company of the deceased at the time of the incident would be primarily upon the prosecution.

17. This High Court in the case of **Santosh Vs. State of U.P. 2021 0 Supreme (All) 173,** in which one of us (Justice Dr. Kaushal Jayendra Thaker,) is signatory, has also discussed the law relating to Section 106 of Indian Evidence Act, which is quoted herein below:

*"35. Recently, this Court in **Dharmendra Rajbhar Vs. State of U.P. (Supra)** in similar situation has considered legal position as far as Section 106 of the Act, 1872 is concerned. We do not want to burden our judgment with reproduction of the said findings and analysis except para 40 of the said judgment wherein the Court has held as under:*

"40. Section 101 to Section 114A of Chapter-VII of the Indian Evidence Act, 1872 deal with subject "OF THE BURDEN OF PROOF." Section 106 of the Indian Evidence Act provides that when any fact is especially within the knowledge of any person, the burden of proof to prove that fact is upon him. Section 106 is an exception to Section 101 of the Evidence Act which stipulates that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Section 106 of the evidence act has to be read in conjunction with and not in derogation of Section 101 Evidence Act. Section 106 of the Indian Evidence Act does not relieve prosecution of it's primary and foremost duty to establish the guilt of the accused beyond all reasonable doubts independent of weaknesses of the defence. It is only when prosecution, for well perceptible and acceptable reasons, is unable to lead evidence because of circumstances beyond it's control including the reason that the fact required to be proved was "within the special knowledge of an accused alone" and prosecution could not have known it by due care and diligence, that Section 106 can be resorted to by shifting burden on the accused to disclose that fact which is "in his special knowledge" and if accused fails to offer any reasonable explanation to satiate judicial inquisitive scrutiny, he is liable to be punished. Section 106 is not meant to be utilized to make up for the prosecution's inability to establish its case by leading, cogent and reliable evidence."

18. In our case, it is established fact that the appellant and his deceased wife used to reside in same house. Hence, the burden to prove factum of the death of the deceased cannot be shifted on the shoulders of the appellant unless the prosecution first of all discharges its burden by proving the fact that at the time of alleged occurrence or at the time when the deceased consumed the poison, the appellant was also inside the house. Learned AGA, in this regard, has contended that appellant has not taken the plea that he was not in the house when the poison was consumed by the deceased or administered to her forcibly but this was

the negative burden on the appellant accused. The prosecution has not brought forward any evidence which could at least establish the fact that at the time of occurrence, the appellant was inside the house. Hence, there is no applicability of Section 106 of Indian Evidence Act in this case.

19. In view of aforesaid discussion, we are of the considered view that prosecution has not discharged its burden to prove the case beyond reasonable doubt and no reverse burden could be placed on the accused with the aid of Section 106 of Indian Evidence Act when the prosecution has not discharged its burden first.

20. Hence, learned trial Judge has not appreciated the evidence in right perspective and wrongly convicted and sentenced the appellant. We are unable to concur with the findings recorded in impugned judgement and benefit of doubt is given to the appellant. Consequently, the appeal is liable to be allowed.

21. Accordingly, the appeal is **allowed**.

22. Conviction and sentence of appellant u/s 302 of IPC is hereby set aside. The appellant be set free forthwith, if not wanted in any other case. Fine be refunded if already deposited.

23. Record and proceedings be sent back to the court below.

(2023) 1 ILRA 927
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.09.2022

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Criminal Appeal No. 770 of 2022

Peer Mohammad ...Appellant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Dharmendra Kumar

Counsel for the Opposite Parties:
G.A., Mohd. Aslam Azhar Khan, Sri Rajeev Ratan Shukla

Criminal Law- Code of Criminal Procedure, 1973- Sections 87 & 482- Non- Bailable Warrants issued immediately after taking cognizance- After submission of charge sheet, Court below has taken cognizance vide order dated 19.08.2020 and by the same order, non-bailable warrant has also been issued against the appellant without assigning any reason- In Section 87 of Cr.P.C., it is clearly provided that while issuing summons for arrest, reasons are required to be given in writing, but without going through the same, immediate after taking cognizance, non-bailable warrant has also been issued- Therefore, it is required on the part of Judicial Officers to follow the provisions of section 87 Cr.P.C. as well as law laid down by the Courts while issuing summoning order, bailable or non-bailable warrants as the case may be. If the facts of the case require immediate issuance of bailable or non-bailable warrants while taking cognizance, it is required on the part of Magistrate to record his satisfaction.

Warrants for arrest can only be issued by the Magistrate, while summoning the accused, after recording reasons in writing and not otherwise. (Para 8, 9)

Criminal Appeal allowed. (E-3)

Case Law/ Judgements relied upon:-

1. Smt. Usha Jain & anr. Vs St. of U.P. & anr. (Application U/S 482 No. 19037 of 2018

2. Inder Mohan Goswami Vs St. of Uttaranchal, (2007) 12 SCC 1

3. Satender Kumar Antil Vs CBI & anr. (Misc. Application No. 1849 of 2021 in SLP (Crl.) No. 5191 of 2021 decided on 11.07.2022.

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

1. Heard learned counsel for the appellant, learned AGA for the State and Sri Rajeev Ratan Shukla, learned counsel for respondent No. 2.

2. By means of the present criminal appeal under Section 14A-1, the appellant is assailing the legality and validity of the order dated 19.08.2020 and charge sheet dated 06.07.2020 as well as entire proceeding of Case No. 88 of 2020, State v. Peer Mohammad, arising out of Case Crime No. 163 of 2019, under Sections- 419, 420, 467, 468, 471, 504, 506 of IPC and Sections 3(2)5A and 3(1)S of SC/ST Act, Police Station- Pashchimi Sharira, District- Kaushambi, pending in the Court of Special Judge SC/ST Act, Kaushambi.

3. Learned counsel for appellant submitted that charge sheet was submitted on 19.08.2020 and on the very same date, after taking cognizance, straight away non bailable warrant has been issued against the appellant, which is bad in law. It is next submitted that while issuing non bailable warrants, it is required on the part of Magistrate concerned to record satisfaction, but in the present case, no satisfaction has been recorded as to why, while taking cognizance, non bailable warrant has been issued . It is further submitted that it is required on the part of Courts to first issue summoning order, thereafter bailable warrant, then a non-bailable warrant, if required. In support of his contention, he has placed reliance upon the judgments of this Court as well as Apex Court passed in the matters of ***Smt. Usha Jain and another vs. State of U.P. and another (Application U/S 482 No. 19037 of 2018 , Inder Mohan Goswami v. State of Uttaranchal, (2007) 12 SCC 1 and Satender Kumar Antil vs. Central Bureau of Investigation & Anr. (Misc. Application No. 1849 of 2021 in Special Leave Petition (Crl.) No. 5191 of 2021*** decided on 11.07.2022.

4. Learned counsels for opposite parties have vehemently opposed the submissions made by learned counsel for appellant, but could not dispute the aforesaid facts as well as legal submissions.

5. I have considered the submissions advanced by counsels for parties and perused the records as well as judgments of this Court as well as Apex Court passed in ***Smt. Usha Jain (Supra)*** and ***Satender Kumar Antil (Supra).***

6. This Court in the matter of ***Smt. Usha Jain (Supra)*** has dealt with in detail about the issuance of summons, bailable and non-bailable warrants. Relevant paragraph of the said judgment is quoted below:-

"Learned counsel for the applicants has drawn the attention of the Court to the order-sheet of the criminal complaint case and from very perusal of the order sheet, I find that learned Magistrate before issuing bailable warrant on 27.11.2017 has not recorded his satisfaction with regard to the service of the summons upon the accused applicants.

A large number of applications under Section 482 Cr.P.C. are being filed every day challenging the summoning

order, bailable and non-bailable warrants issued more than 90 days before and even such applications are filed as belatedly as after 12 months from the date of summoning order and the only excuse taken to justify the delay is that summons were not served/ received and hence no knowledge.

It is very unfortunate state of affairs at the end of the Judicial Magistrate that before proceeding to issue bailable warrant, no satisfaction is recorded regarding effective service of summons against the accused persons, which should be a condition precedent for issuing bailable warrant. In the absence of any such satisfaction being recorded, the issuance of bailable and non-bailable warrant is not justified.

Under Chapter-III of the General Rules (Criminal) regarding service of process or register the processes as maintained his circular letter being C.L.No.42/98 dated: Allahabad: 20/8/1998 has been issued which reads as under:-

"The Hon'ble court has noticed that the present system of service of summons is not effectively working and service upon the witness/ accused persons are not being effected within the period fixed by the courts. The system is effecting the speedy trial of sessions and magisterial cases. In this regard, the court has taken the following decisions for strict compliance by all :-

1. Old practice of fixing one sessions trial for three days in continuation is revived. No other sessions trial except any formal part-heard trial in which one or two formal witnesses are to be examined should be fixed on the that day.

2. The process register as mentioned in rule 12 of chapter III of G.R.Criminal be strictly maintained by all courts. A police official who is receiving the summons must state his name and number in clear block letters in columns no.5 so that the responsibility be fastened upon him.

3. Public prosecutor and D.G.C. (Criminal), as the case may be, should be asked to apply to the court for issue of summons but giving complete particulars of the witness. The summons should, thereafter, be prepared and served upon the witnesses.

4. If the police personnel are not complying with the directions of the court then appropriate action under the provision of the contempt of courts Act be initiated against them."

By issuing the aforesaid circular, the High Court has virtually taken due care of the speedy disposal of trial in criminal cases but ultimately, it appears, the circular letter (supra) is not complied with in its true spirit either at the end of Magistrates as they do not take due care to ensure that police report regarding service of summons is available on record, or the police is not at all submitting any report in most of the cases.

Laxity on the part of either Judicial Officers or on the part of police administration is a serious issue and calls for an immediate action. I, therefore, direct that the Judicial Magistrates will ensure strict compliance of the circular letter dated 20th August, 1998 (supra) mandatorily.

Let a copy of this order be circulated to all the Judicial Magistrates in the State to ensure strict compliance of the circular and recording their satisfaction with regard to the service of summons before issuing bailable or non-bailable warrants.

Registry of this Court is also directed to send a copy of this order to the Director General of Police, U.P. and to the Secretary, Home Affairs, Government of

Uttar Pradesh for issuing necessary directions at their respective ends to the subordinate police officers to act in accordance with the procedure in matter of service of processes as desired under the circular letter dated 20th August, 1998 issued under General Rules (Criminal)."

7. Recently, in the matter of ***Satender Kumar Antil (Supra),*** Apex Court, while considering the compliance of Sections 41 and 41-A of Cr.P.C., has also considered sections 87 & 88 of Cr.P.C and reiterated the law laid down by the Apex Court in the matter of ***Inder Mohan Goswami (Supra)*** **.** Relevant paragraphs of the said judgment is quoted below:-

"30. We also expect the courts to come down heavily on the officers effecting arrest without due compliance of Section 41 and Section 41A. We express our hope that the Investigating Agencies would keep in mind the law laid down in ***Arnesh Kumar (Supra),*** the discretion to be exercised on the touchstone of presumption of innocence, and the safeguards provided under Section 41, since an arrest is not mandatory. If discretion is exercised to effect such an arrest, there shall be procedural compliance. Our view is also reflected by the interpretation of the specific provision under Section 60A of the Code which warrants the officer concerned to make the arrest strictly in accordance with the Code.

Section 87 and 88 of the Code

"87. Issue of warrant in lieu of, or in addition to, summons.--A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person, issue, after recording its reasons in writing, a warrant for his arrest--

(a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons; or

(b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure

88. Power to take bond for appearance.--When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court, or any other Court to which the case may be transferred for trial."

31.When the courts seek the attendance of a person, either a summons or a warrant is to be issued depending upon the nature and facts governing the case. Section 87 gives the discretion to the court to issue a warrant, either in lieu of or in addition to summons. The exercise of the aforesaid power can only be done after recording of reasons. A warrant can be either bailable or non-bailable. Section 88 of the Code empowers the Court to take a bond for appearance of a person with or without sureties.

32.Considering the aforesaid two provisions, courts will have to adopt the procedure in issuing summons first, thereafter a bailable warrant, and then a non-bailable warrant may be issued, if so warranted, as held by this Court in **Inder Mohan Goswami v. State of Uttaranchal,** (2007) 12 SCC 1. Despite the aforesaid clear dictum, we notice that non-bailable warrants are issued as a matter of course

without due application of mind and against the tenor of the provision, which merely facilitates a discretion, which is obviously to be exercised in favour of the person whose attendance is sought for, particularly in the light of liberty enshrined under Article 21 of the Constitution. Therefore, valid reasons have to be given for not exercising discretion in favour of the said person. This Court in **Inder Mohan Goswami v. State of Uttaranchal, (2007) 12 SCC 1,** has held that:

"50. Civilised countries have recognised 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 24 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.

When non-bailable warrants should be issued

53. 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:

- it is reasonable to believe that the person will not voluntarily appear in court; or

- the police authorities are unable to find the person to serve him with a summon; or

- it is considered that the person could harm someone if not placed into custody immediately.

54. 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.

55. In complaint cases, at the first instance, the court should direct serving of the summons along with the copy of the complaint. If the accused seem to be avoiding the summons, the court, in the second instance should issue bailable warrant. In the third instance, when the court is fully satisfied that the accused is avoiding the court's proceeding intentionally, the process of issuance of the non-bailable warrant should be resorted to. Personal liberty is paramount, therefore, we caution courts at the first and second instance to refrain from issuing non-bailable warrants.

56. The power being discretionary must be exercised judiciously

with extreme care and caution. The court should properly balance both personal 25 liberty and societal interest before issuing warrants. There cannot be any straitjacket formula for issuance of warrants but as a general rule, unless an accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided.

57. The court should try to maintain proper balance between individual liberty and the interest of the public and the State while issuing nonbailable warrant."

8. In the present case, facts are undisputed. After submission of charge sheet, Court below has taken cognizance vide order dated 19.08.2020 and by the same order, non-bailable warrant has also been issued against the appellant without assigning any reason. In Section 87 of Cr.P.C., it is clearly provided that while issuing summons for arrest, reasons are required to be given in writing, but without going through the same, immediate after taking cognizance, non-bailable warrant has also been issued.

9. This Court in the matter of ***Smt. Usha Jain(Supra)*** has held that satisfaction has to be recorded for issuance of bailable warrants and copy of said judgment has also been circulated to all the Judicial Officers in the State for strict compliance for recording satisfaction with regard to the service of summons before issuing bailable or non-bailable warrants. Recently, in the matter of ***Satender Kumar Antil (Supra),*** Apex Court, reiterating the law laid down by the Apex Court in the matter of ***Inder Mohan Goswami (Supra),*** has held in a very clear words that Courts will have to adopt the procedure for issuing summons first, thereafter a bailable warrant, and then a non-bailable warrant may be issued, if so warranted. Therefore, it is required on the part of Judicial Officers to follow the provisions of section 87 Cr.P.C. as well as law laid down by the Courts while issuing summoning order, bailable or non-bailable warrants as the case may be. If the facts of the case require immediate issuance of bailable or non-bailable warrants while taking cognizance, it is required on the part of Magistrate to record his satisfaction.

10. It appears that Judicial Officers are not following the provisions of Cr.P.C. as well as law laid down by the Courts and passing orders in a very casual manner.

11. So far as present case is concerned, impugned order dated 19.08.2020 passed by Special Judge, SC/ST Act, Kaushambi is not in accordance with the provisions of Section 87 Cr.P.C. as well as law laid down by the Courts in the matters of ***Smt. Usha Jain(Supra), Satender Kumar Antil (Supra) & Inder Mohan Goswami (Supra),*** therefore, the same is bad and is hereby **quashed**.

12. Special Judge, SC/ST Act, Kaushambi is directed to issue fresh summoning order in accordance with law.

13. **Registrar General is directed to circulate this order to all the Judicial Magistrates in the State through District Judges to ensure strict compliance of provisions of Cr.P.C. as well as law laid down by the Courts while issuing summoning order, bailable or non-bailable warrants, as the case may be.**

14. With the aforesaid observations, appeal is **allowed**.

15. No order as to costs.

(2023) 1 ILRA 933
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.11.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Jail Appeal No. 777 of 1991

Ram Prakash ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Devendra Dahma, Sri Raj Kumar Sharma (A.C.), Sri Rajeev Kumar Singh 'Parmar'

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

Criminal Law- Indian Evidence Act, 1872- Section 3- It is settled law that in all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

Minor inconsistencies, contradictions and embellishments in the evidence of witnesses which do not effect the core of the case of the prosecution, will not result in the court discarding such evidence but where the contradictions are serious and effect the very core of the case of the prosecution, then such evidence cannot be safely relied upon.

Indian Evidence Act, 1872- Section 3- It is well settled that the evidence of interested or inimical witnesses is to be scrutinised with care but can not be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is no bar in relying on the said evidence. It is also well settled that interested evidence is not necessarily unreliable evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon.

Where the evidence of a related or interested witness is found to be truthful and creditworthy then the same cannot be disbelieved on the ground that the witness is related to the victim , however evidence of such witness has to be scrutinised with due care and caution.

Indian Evidence Act, 1872- Section 8- It is well settled that in case of direct evidence, motive would not be relevant and only in case of circumstantial evidence, motive assumes great significance. In a case in which the evidence is clear and unambiguous and the circumstances proves the guilt of the accused, the same would not get weakened even if the motive is not a very strong one. The motive loses all its importance in a case where direct evidence of eye witnesses is available.

Settled law that in a case of circumstantial evidence motive is relevant but in a case of direct evidence, motive pales into insignificance.

Indian Penal Code, 1860- Section 302- Section 304 - The law is settled that conviction under Section 302 I.P.C. could be altered to Section 304 I.P.C., if the case falls in any of the ingredients of Exception-4 to Section 300 I.P.C., Exception-4 would be attracted. Necessary ingredients to be attracted for Exception-4 to Section 300 I.P.C. to be invoked would be that the incident occurred without premeditation; in a sudden fight; in the heat of passion upon sudden quarrel; without the offender having taken undue advantage or acted in a cruel or unusual manner -The case in hand would clearly not fall within Exception-4 to Section 300 I.P.C. only for the reason that the offender has acted in a most cruel and unusual manner while committing the offence. the accused-appellant objected to wishes of his wife (deceased) to visit her parental house and when the deceased insisted to go with her father, the accused-appellant assaulted her with sickle and caused as many as 15 blows.

Where the accused has acted with unusual cruelty and has inflicted repeated blows on the deceased then the case will not travel within the purview of Section 304 IPC.

Indian Penal Code, 1860- Section 302 I.P.C- From perusal of the aforesaid Section, it is clear that any accused, who commits any murder shall be punished with death or life imprisonment and fine shall also be imposed against him. While awarding sentence of death or life imprisonment, fine should be read together. Before the word "fine", the word "shall" is used and therefore, the imposition of fine is mandatory while awarding death or life sentence to any accused, who committed murder- Accordingly, in addition to life imprisonment, while affirming the judgment of trial court, we also impose fine of Rs. 10,000/- upon the accused-appellant. It is also clarified that in case of default in payment of the said fine, he has to undergo six months additional imprisonment.

As imposition of fine is mandatory where the punishment awarded is death or life sentence and fine has to be read along with the sentence awarded accordingly fine imposed upon the appellant. (Para 35, 37, 38, 41, 42, 43, 45, 47, 54, 55, 56)

Criminal Appeal rejected. (E-3)

Case Law/ Judgements relied upon:-

1. Dildar Singh Vs St. of Har., JT 1992 (4) SC 19 (cited)

2. Baldev Singh & anr. Vs St. of Punj., 1996 AIR 372(cited)

3. Mer Dhana Sida Vs St. of Guj., AIR 1985 SC 386(cited)

4. Dalip Singh Vs St. of Har., AIR 1993 SC 2302(cited)

5. Kansa Behera Vs St. of Ori., 1987 AIR 1507(cited)

6. Satye Singh & anr. Vs St. of U.K.,15/02/2022, Cril. Appeal No. 2374 of 2014(cited)

7. Ashiq Lal Vs St. of U.P.,1997 Legal Eagle (Ald) 35(cited)

8. Mekala Sivaiah Vs St. of A.P, 2022 SCC Online SC 887(cited)

9. Ram Kumar Madhusudan Pathak Vs St. of Guj., 1998 0 Supreme (SC) 836(cited)

10. Arulvelu & anr. Vs St. Rep. By the Public Pros. & anr., 2009 0 Supreme (SC) 1628(cited)

11. Ram Nath Nonia Vs St. of Bih., 1999 0 Supreme (Pat) 778. (cited)

12. Suresh Chandra Bahri Vs St. of Bih., 1995 Supp (1) SCC 80

13. Pulicherla Nagaraju [Pulicherla Nagaraju Vs St. of A.P.,(2006) 11 SCC 444 : (2007) 1 SCC (Cri) 500]

(Delivered by Hon'ble Shiv Shanker Prasad, J.)

1. This appeal has been preferred by appellant, Ram Prakash against the judgment and order dated 11th September, 1984 passed by the Special Judge (E.C. Act)/Additional Sessions Judge, Farrukhabad in Sessions Trial No. 169 of 1982 (State vs. Ram Prakash) under Section 302 I.P.C., Police Station- Gursahaiganj, District- Farrukhabad, whereby the accused-appellant has been convicted and sentenced to undergo imprisonment for life under Section 302 I.P.C.

2. We have heard Mr. Raj Kumar Sharma, learned Amicus Curiae on behalf of the appellant and Mr. Arun Kumar Singh, learned A.G.A. for the State and also perused the entire materials available on record.

3. Initially hearing in the matter was concluded on 2nd November, 2022 and 10th November, 2022 was fixed for delivery of judgment. While preparing the judgment it was noticed that the Session Court after convicting the accused-appellant has sentenced him to life imprisonment for the offence punishable under Section 302 I.P.C. without passing any order on the aspect relating to fine.

4. Once the concerned court of Session convicts an accused under Section 302 I.P.C., it was required to pass order in respect of the sentence and fine both. In the facts of the present case, however, no order has been passed with regard to fine. Because of the said reason, we adjourned the present case on 10th November, 2022 in order to afford an opportunity of hearing to learned Amicus curiae appearing for the accused-appellant on this aspect.

5. On 14th November, 2022, we heard the learned Amicus Curiae and the learned A.G.A. for the State on the said issue.

6. The prosecution story, as reflected from the records, is as follows:

On the written report of the informant- P.W.-2 Ram Babu dated 3rd November, 1981 (Exhibit-Ka/1) scribed by Muneshwar Dayal (son of the informant), a first information report (Exhibit-Ka/2) has been lodged on 3rd November, 1981 at 11.35 a.m. against the accused-appellant alleging therein that about 4-5 years back, he solemnized the marriage of his daughter with the accused-appellant. After marriage, the daughter of the informant (since deceased) and his son-in-law i.e. accused-appellant often used to fight with each other. There were incidents when the informant went to the place of the accused-appellant to take her along with him to his place but the accused-appellant did not send her with him. It is further alleged that about two months ago, the daughter of the informant i.e. the deceased delivered twin girls both of whom died after some time. After coming to know about the sad demise of his twin grand-daughters, the informant came to the place of accused-appellant along with his son to take his daughter (deceased) with him to his place and when the informant-P.W.2 and his son Muneshwar Dayal requested repeatedly, the accused-appellant refused to send her along with them. On the next day in the morning at about 09:00 a.m. when the daughter of the informant i.e. deceased started to get ready to go with the informant and

Muneshwar Dayal, the accused-appellant abused her and stopped her from going with them. The deceased, however, said that she would not stay with him and would go at any cost on which the accused-appellant threatened her to face dire consequences if she disobeyed him.

While the informant with his son Muneshwar Dayal were sitting outside the house on the platform, waiting for his daughter, they heard alarm/screams of the deceased for saving her. The informant and his son ran inside the courtyard and saw that the accused-appellant was hitting the deceased with a sickle (reaping hook) in the room. Seeing the same, the informant and Muneshwar Dayal shouted on which Hanumant Lal son Dhanuk, Shiv Ram son of Ram Lal Lodhi, Ram Gopal, Ram Vilash Bhurji, Ram Kishor son of Mathuri Lal and many other people came and they also saw the accused-appellant hitting the deceased with sickle. Due to the injuries of the sickle sustained by the deceased, she died on the spot. All persons present on the spot including the informant and Muneshwar Dayal caught the accused-appellant along with said sickle and handed him over to the two Police constables who were on patrolling at that time.

7. After collecting the blood stained sickle and blood stained vest (Baniyan) wore by the accused-appellant, which were marked as Exhibit-Ka/4 and Exhbit-Ka/5, the Investigating Officer reached the spot and collected the blood stained and plain earth and also recorded the statements of the witnesses. The inquest of the deceased was conducted on the same day i.e. 3rd November, 1981 between 11.35 a.m. to 02.00 p.m. and the statements of witnesses were taken on the inquest report (Exhibit-Ka-8). The inquest witnesses opined that since the cause of death of the deceased was due to injuries sustained by her from sickle, the post-mortem was necessary.

8. Thereafter the dead body of the deceased was sealed and sent to Mortuary. The autopsy of the deceased was conducted on the next day i.e. 4th November, 1981 at 03:30 p.m. by Dr. K.K. Agarwal (P.W.-5). In the opinion of P.W.-5, the cause of death of deceased was shock and haemorrhage due to following ante-mortem injuries:

"1- Incised wound 1 1/2" x 1/4" x cartilage deep on the outer side of left Pinna. Direction from upward to downward. Cartilage was cut.

2- Incised wound 1/2" x 1/10" x skin deep on the Supraclavicular fossa of the right side.

3- Stab wound 1" x 1/2" x chest cavity deep on the upper part of left breast. Direction front to back and inward.

4- Stab wound on the lower side of left breast areola 3/4" x 1/2"x chest cavity deep. Direction front to back and upward.

5- Incised wound 1" x 4/10" x muscle deep on the right side of chest mid axillary line 6" below the axilla. Tapering inward.

6- Stab wound 1 x 1/2" x chest cavity deep on right side of chest in mid axillary line 2" below injury No.5. Direction right to left.

7- Stab wound 11/4" x 3/4" x abdominal cavity deep on the right hypochondrium. Direction front to back downward.

8- Incised wounds 1/2" x 1/4" to 3/10" x 2/10"x muscle to bone deep on the palmer aspect of the left hand medial four fingers. Placed transversally.

9- Incised wound 3/4" x 1/4"x muscle deep on the back of the left forearm 2 1/2" above the wrist joint. Wound in long axis of forearm.

10- Stab wound 3/4" x 1/2" chest cavity deep on the back of right side chest 5" below the right shoulder. Direction back to front.

11-Multiple incised wound 1/4" x 1/2" x bone deep, 1/2" x 2/10" x skin deep in an area of 10" to 6" on the back of the chest and the lumbar region.

12-Incised wound 1 1/2" x 1/2" x muscle deep on the front of the right thigh. 2" above the knee joint in long axis.

13-Incised wound 2" x 3/4" x bone deep on the shin of the right leg 5" below the knee joint. Wound in transverse plane.

14-Two incised wounds 3" apart 1/2" x 1/4" x skin deep and 1" x 1/2" x muscle deep on the right hip.

15-Abrasion 4/10" x 3/10" on the outer malleolus of left foot."

9. The investigation proceeded and after completion of statutory investigation in terms of Chapter XII Cr.P.C., the Investigating Officer submitted the charge-sheet (Exhibit-Ka 18) dated 30th November, 1981 against the accused-appellant. The Magistrate concerned took cognizance of the offence on the charge-sheet and as the case was triable by the court of sessions, committed the case to the court of Sessions resultantly, the same was registered as Sessions Trial No. 169 of 1982 (State vs. Ram Prakash) under Section 302 I.P.C., Police Station-Gursahaiganj, District-Farrukhabad.

10. On 14th October, 1982, the learned Trial Court framed following charges against the accused-appellant for the offence under Sections 302 and 504 I.P.C.:

"I. K.K. Verma, 1st Addl. Session Judge, Farrukhabad at Fatehgarh, hereby charge you Ram Prakash as follows:

That you on 3.11.81 at about 9 A.M. in village Mirpur, Police Station Gursahaiganj Distt. Farrukhabad, committed murder of Smt. Usha Devi by inentnionally and knwoingly causing her death by sickle (HANSIA) and thereby committed an offence of punishable U/S 302 I.P.C. and within the cognizance of this court.

And I hereby direct you that you be tried by this court on the aforesaid charge.

11. In order to prove its case, the prosecution relied upon documentary evidence, which were duly proved and consequently marked as Exhibits. The same are catalogued herein below:-

"i). Written report dated 3rd November, 1981 (Exhibit-Ka/1) of the informant-P.W.2, which has been scribed by P.W.-3 ;

ii). The first information report dated 3rd November, 1981 has been marked as Exhibit- Ka/2;

iii). Recovery memo of blood stained sickle (Hansia) dated 3rd November, 1981 has been marked as Exhibit-ka/4;

iv). Recovery memo of blood stained vest (Baniyan) dated 3rd November, 1981 has been marked as Exhibit-ka/5;

v). Recovery memo of blood stained and plain earth dated 3rd November, 1981 has been marked as Exhibit-ka/16;

vi). Inquest report (Panchayatnama) dated 3rd November, 1981 has been marked as Exhibit-Ka/8;

vii). Site plan with Index dated 3rd November, 1981 has been marked as Exhibit-ka/15;

viii). The post-mortem/autopsy report dated 4th November, 1981 has been marked as Exhibit-Ka-7;

ix). Report of chemical examiner of 9th July, 1982 has been marked as Exhibit-ka/19;

x). Report of Chemical Examiner and Serologist dated 27th July, 1982 has been marked as Exhibit-ka/20;

xi). Extract examination of the P.W.-1 Ram Bilas; and

xii). Charge-sheet dated 30th November, 1981 has been marked as Exhibit- Ka/18."

12. The prosecution also examined total nine witnesses in the following manner:-

"i). P.W.-1 Ram Bilash, resident of village of the accused-appellant, who is said to be eye witness;

ii). Informant/P.W.-2, namely, Ram Babu, father of the deceased, who is also said to be an eye-witness; ;

iii) P.W.-3, namely, Ram Kishor resident of village of the accused-appellant, who is also said to be an eye-witness;

iv) P.W.-4, namely, Constable-697 Krishnapal Singh, who was on patrolling duty on the date and time of incident and took the accused-appellant to the Police Station along with blood stained sickle;

v). P.W.-5, namely, Constable-360 Padam Singh, who prepared the Chik first information report (Exhibit-ka/2) and has also made entry in that regard in Generl Diary (Exhibit-ka/3);

vi). P.W.-6, namely, Dr. K.K. Agarwal, who conducted the autopsy of the deceased and prepared the post-mortem report (Exhibit-ka/7);

vii). P.W.-7, namely, Sub-Inspector Hori Lal Yadav, who has investigated the case."

13. After recording of the prosecution evidence, the incriminating evidence were put to the accused-appellant for confronting with the same under Section 313 Cr.PC. In his statement recorded U/s 313 Cr.P.C. the accused appellant denied his involvement in the commissioning of the offence under Section 302 I.P.C. Accused appellant Ram Prakash has specifically stated before the trial court that he has been falsely implicated in this case due to enmity. He has further stated that on the date of occurrence, when he was in his field, some unknown persons had raided his house in the early morning, when it was still dark and they had inflicted injuries to his wife. No witness has however been adduced from the defence.

14. The trial court after relying upon the evidence adduced by the prosecution and recording its finding, has come to the conclusion under the impugned judgment of conviction that the prosecution in this case has been able to establish beyond all shadow of doubt that for a very petty reason the accused committed the murder of his innocent wife whose only fault was her insistence to go with her father for a while for a change because her newly born twin daughters had recently died. The accused lost his temper on this trifling matter and gave numerous blows with his sickle on his wife resulting in her death. The trial court has not accepted the plea of the defence that on the date of incident, when he was in his field some persons

entered into his house in early morning and they had assaulted his wife due to which she died. After recording a finding in that regard the trial court has opined that the defence version is palpable false because no report or any incident of dacoity was lodged by any member of the family of the accused and also because none from the village of the accused has come forward to support this version.

On the cumulative strength of the aforesaid, the trial court has held that the accused-appellant is guilty of offence punishable under Sections 302 I.P.C. for the murder of the deceased i.e. his wife. As such, the trial court convicted and sentenced the accused-appellant for the aforesaid offence. It is against this judgment and order of conviction passed by the trial court that the present jail appeal has been filed on the ground that conviction is against the weight of evidence on record and against the law and the sentence awarded to the accused-appellant is too severe.

15. Assailing the impugned judgment and order of conviction, Mr Raj Kumar Sharma, learned Amicus Curiae appearing for the accused-appellant submits that:

(i) As per the autopsy report of the deceased, semi-cooked food in the small intestine and fecal matter in the large intestine of the deceased were found by P.W. 6 and he also found that there was no urine in the bladder of the deceased meaning thereby that deceased must have eaten food six hours ago i.e. between 3.00 a.m. to 4.00 a.m., which does not seem to be correct. Therefore the time of death of the deceased, as per the prosecution i.e. at around 09.00 is also questionable. Therefore, it appears to be correct that the deceased must have died in the early morning, i.e. between 3.00 a.m. and 4.00 a.m.

(ii) The accused-appellant has not committed the said offence but by dacoits or some one who entered into his house between 3.00 a.m. to 4.00 a.m. in the early morning for looting the property when it was dark and in absence of the accused-appellant when he was in his field.

(iii) Neither P.W.-2/informant nor his son Muneshwar, who has not been adduced as one of the prosecution witness, had seen the incident on their own eyes as they were not present at the crime of scene, when occurrence was going on. It is impossible to believe that when a married woman (deceased) was killed by her husband (accused-appellant) and instead of saving her, her father (informant/P.W.-2) and brother (Muneshwar) stood watching and asking for help from others.

(iv) The case of the prosecution that the informant/P.W.2 and his son Muneshwar stayed at the in-law's place of the deceased for taking her along with them is also doubtful, as in Indian civilization, especially in a Hindu Brahmin family, no father or brother stays with his married daughter or sister at her in-law's place for three days. Therefore, the presence of the informant/P.W.-2 and Muneshwar at the time of incident is doubtful.

(v) The applicant has been falsely implicated by the prosecution and he has no intention or motive to commit the said offence.

(vi) There were contradictions in the statements of the prosecution witnesses.

(vii) The prosecution version that the accused-appellant has assaulted the deceased by a sickle is also doubtful as the sickle is a curved weapon and only one of its side is sharp. When as matter of fact the injuries found by the doctor at the time of

post-mortem on the dead body of the deceased could not have been inflicted by it.

On the cumulative strength of the aforesaid, learned counsel appearing for the accused-appellant submits that the impugned judgment and order of conviction cannot legally be sustained and is liable to be quashed.

Apart from the above, in the alternative learned Amicus Curiae has also submitted that since the incident in question occurred on a spur of moment and in the heat of passion upon sudden quarrel, the same would be covered under the 4th Exception to Section 300 I.P.C., which reads as under:

"Exception 4. --Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

Learned Amicus Curiae, therefore, submits that if this Court finds the accused-appellant guilty of the offence beyond reasonable doubt, he be punished under Section 304 Part II I.P.C. instead of Section 302 I.P.C. In support of the aforesaid submissions, learned Amicus Curiae has placed reliance upon following judgments of the Apex Court, Allahabad High Court:

(a) Dildar Singh vs. State of Haryana reported in JT 1992 (4) SC 19;

(b) Baldev Singh & Anr. Vs. State of Punjab reported in 1996 AIR 372;

(c) Mer Dhana Sida vs. State of Gujarat reported in AIR 1985 SC 386;

(d) Dalip Singh vs. State of Haryana reported in AIR 1993 SC 2302;

(e) Kansa Behera Vs. State of Orissa reported in 1987 AIR 1507;

(f) Satye Singh & Another vs. State of Uttarakhand decided on 15th February, 2022 passed in Criminal Appeal No. 2374 of 2014' and

(e) Ashiq Lal Vs. State of U.P. reported in 1997 Legal Eagle (Ald) 35.

16. On the other-hand, Mr. Arun Singh, learned A.G.A. for the State, supporting the judgment and order of conviction, submits that the first information report has been lodged promptly naming the accused person; there is clinching evidence to support the prosecution's case; the incident in which the deceased is alleged to have been murdered by the accused-appellant Ram Prakash, occurred at about 09:00 a.m. i.e. in broad day light; there are three eye witnesses of the alleged incident; one circumstantial witness; the place of occurrence has not been disputed by the defence; and the accused-appellant has strong motive or intention and the same has also been explained by the evidence of prosecution. Therefore, the prosecution has proved the charge levelled against the accused-appellant beyond reasonable doubt.

17. To bolster the aforesaid submissions, learned A.G.A. has invited the attention of the Court to the latest judgment of the Apex Court in the case of **Mekala Sivaiah vs. State of Andhara Pradesh** reported in *2022 SCC Online SC 887*, whereby the Apex Court *in paragraph nos.25 and 26* has held as follows:

"25. The facts and evidence in present case has been squarely abefornalyzed by both Trial Court as well the High Court and the same can be summarized as follows:

i. The prosecution has discharged its duties in proving the guilt of the appellant for the offence under Section 302 I.P.C. beyond reasonable doubt.

ii. When there is ample ocular evidence corroborated by medical evidence, mere non-recovery of weapon from the appellant would not materially affect the case of the prosecution.

iii. If the testimony of an eye witness is otherwise found trustworthy and reliable, the same cannot be disbelieved and rejected merely because certain insignificant, normal or natural contradictions have appeared into his testimony.

iv. The deceased has been attacked by the appellant in broad daylight and there is direct evidence available to prove the same and the motive behind the attack is also apparent considering there was previous enmity between the appellant and PW-1.

26. Having considered the aforesaid facts of the present case in juxtaposition with the judgments referred to above and upon appreciation of evidence of the eyewitnesses and other material adduced by the prosecution, the Trial Court as well as the High Court were right in convicting the appellant for the offence under Section 302 I.P.C. Therefore, we do not find any ground *warranting interference with the findings of the Trial Court and the High Court."*

(Emphasis added)

Mr. Arun Singh, learned A.G.A. for the State has also placed reliance upon the following judgments of the Apex Court and Patna High Court:

(a) Ram Kumar Madhusudan Pathak vs. State of Gujurat reported in 1998 0 Supreme (SC) 836;

(b) Arulvelu & Anr. Vs. State Rep. By the Public Prosecutor & Anr. Reported in 2009 0 Supreme (SC) 1628; and

(c) Ram Nath Nonia vs. State of Bihar reported in 1999 0 Supreme (Pat) 778.

On the cumulative strength of the aforesaid submissions, learned A.G.A. submits that as this is a case of direct evidence, the impugned judgment and order of conviction does not suffer from any illegality and infirmity so as to warrant any interference by this Court. As such the present jail appeal filed by the accused appellants who committed heinous crime by murdering the deceased is liable to be dismissed.

18. We have considered the submissions made by the learned counsel for the parties and have examined the original records of the court below as well as the impugned judgment and order of conviction challenged before us.

19. The only question which is required to be addressed and determined in this jail appeal is whether the conclusion of guilt arrived at by the learned trial court and the sentence awarded is legal and sustainable under law and suffers from no infirmity and perversity.

20. Before entering into the merits of the case set up by the learned counsel for the appellant and the learned A.G.A. for the State qua impugned judgment and order of conviction passed by the trial court referred to above, it is desirable for us to record statements of the prosecution witnesses in brief.

21. P.W.-1 Ram Bilas who is resident of village of accused-appellant has stated

that he knew the accused-appellant who killed his wife. It is further stated that on the date of incident at about 8.30 to 9.00 a.m. when he was coming to his house from his field and as soon as he reached the door of the house of one Pandit Radhey Shyam, he heard a loud sound and entered into the house of the accused-appellant, where he saw that the relatives of accused-appellant i.e. his father-in-law and brother-in-law were standing behind the accused-appellant who had a sickle in his hand which was full of blood. The other villagers, namely, Hanuman and Shiva, Raj, Ram Kishore, Ram Gopal were also there. The relatives of the accused-appellant caught him and brought him out. Wife of the accused-appellant was lying on the ground, blood was flowing from her body. Soon after two constables reached the spot and with their help the accused-appellant was taken to the Police Station by P.W.-2 and his son Muneshwar. However, P.W.-1 has stated that he did not see the accused beating his wife with a sickle. As such he was declared hostile. In his cross-examination by the prosecution, he has, however, conceded that his house was quite close to the house of the accused-appellant and that he had no enmity with him. However, in the cross-examination by the learned counsel for the defence, he stated that some litigation was going on between the accused-appellant and his cousin brother, namely, Benchay Lal (son of sister of his father). He has also stated that at the time of incident the other brothers of the accused-appellant were not present but his mother was present on the spot and she was crying. He has also stated that the clothes wore by P.W.-2 and his son Muneshwar had also some blood stains on them. He did not admit the defence version of the incident.

22. P.W.- 2, Ram Babu, father of the deceased and father-in-law of the accused-appellant, who is main witness of the incident, has supported and corroborated the entire prosecution story as is unfolded in the first information report and in his statement recorded under Section 161 Cr.P.C. etc. He has stated that on the date of incident, as the deceased started to get ready to go with him, he came out from the house and sat on the platform along with his son Muneshwar. After some time, the voice of his daughter came from inside of the house to save her. The villagers of the village of the accused-appellant, namely, Shivaram, Ramkishore, Ramvilas Ramgopal, Hanumant were near the platform at the time of the incident. Hearing the noise, P.W.-2 and his son Muneshwar went inside the house where they saw the entire incident.

23. P.W.-3 Ram Kishor who is also said to be an eye witness has supported the entire prosecution story. He has stated in his examination that at 09.00 a.m. when he went to Lajjaram's house to ask for a bull, he heard the scream of P.W.-2 and his son Muneshwar and entered into the house of the accused-appellant and saw that the accused was hitting the deceased by a sickle. At that time Shivram, Ramvilas, Hanumantlal also came. After sustaining such injuries of sickle the deceased fell down on the ground and died. After this, as soon as the accused-appellant came out of the room, P.W.-2 grabbed him along with sickle and brought him out. At the same time constables Krishnapal and Virendra came to the spot and the accused-appellant was handed over to them. He has also been cross-examined by the learned counsel for the defence but he has not changed his version.

24. P.W.-4 Constable-697 Krishnapal Singh, has stated that on the date of incident, he was returning to the Police Station after patrolling at around 09.15 a.m. and on the way seeing the crowd at the door of accused-appellant he stopped there and reached his door and saw that P.W.-2 and his son Muneshwar were sitting holding the accused-appellant. Ramprakash. There was a sickle on which blood was present. He has further stated that on inquiry, P.W.-2 and his son Muneshwar told him as to how the deceased was killed by the accused-appellant. P.W.-4 had taken the accused-appellant to the Police Station along with P.W.-2, where he lodged written report. P.W.-4 returned to the place of occurrence along with Investigating Officer (P.W.-7) and after completion of necessary formalities, he took the body of the deceased to Mortuary at Fatehgarh, which is 35 to 36 kilometres away from the village of accused-appellant for post-mortem.

25. P.W.-5 Constable-360 Padam Singh has stated that on the basis of written report of P.W.-2/informant (Exhibit-ka/1) scribed by son of the informant Muneshwar, he has prepared the chik first information report (Exhibiit-ka/2). He has also proved the said chik first information report. He has also proved the recovery memos (Exhibit-ka/4 and Exhibit-ka/5) of blood stained sickle and vest of the accused, which were taken in possession by the Police.

26. P.W. -6 Dr. K.K. Agarwal, who conducted the autopsy of the body of the deceased on 4th November, 1981 at 3.30 p.m. P.W.-6 has stated that the injuries found on the body of the deceased were sufficient for causing her death which must have been either instantaneous or must have occurred within an hour of the injuries sustained. P.W.-6 has also stated that at the time of autopsy he found that the stomach of the deceased was empty. There was semi-cooked food in the small intestine and fecal matter and gasses in the large intestine of the deceased. In the opinion of P.W.-6 the death of the deceased must have been occurred at about 09.00 a.m. on 3rd November, 1981 with six hours margin either away.

27. P.W.-7 Sub-Inspector Hori Lal Yadav, has stated that on the date of incident, he was posted in Police Station Gursahaiganj. The investigation of this case was handed over to him. At the police station itself, he took the statements of the accused-appellant and the informant/P.W.2. After taking the statement of the witness Muneshwar (son of the informant) and taking necessary documents from the police station, he reached the crime scene and after inspecting the same, he prepared the site plan (Exhibit-ka/15), the inquest report of the dead body (Exhibit-ka/8), other documents, namely letter to the CMO and RI, sketch of the dead body and chalan (Exhibit-Ka/9 and Exhibit-ka/14) and handed over the dead body of the deceased.

28. Having noticed the facts of the case as also the evidence led in the matter we proceed to deal with the respective submissions of the learned counsel for the parties.

29. The first submission made by the learned Amicus Curiae that timing of the death of the deceased as per the prosecution i.e. 09:00 a.m. is doubtful, is liable to be rejected on the ground that the autopsy report of the deceased clearly shows that the deceased was done to death at about

09.00 a.m. on 3rd November, 1981. In the cross-examination, P.W. 6 has clearly stated that there could have been a difference of six hours either way. There are circumstances to hold that the murder did not take place at about 4.00 or 5.00 a.m. Apart from the above, all the eye-witnesses have stated that the occurrence took place at about 9.00 a.m. as also the circumstantial evidence has also supported the same. The presence of semi-cooked food and fecal matter in the small and large intestines of the deceased respectively does not help the defence to shift the time of death. As per the prosecution, the deceased must have been very sad because of refusal of her husband i.e. accused-appellant to allow her to go with her father, she might have taken meal late in the night because of quarrel with her husband. Even otherwise, only the presence of semi cooked food in the small intestine of the deceased was not enough to change the time of occurrence.

30. The second submission made by the learned Amicus Curiae that the alleged offence has not been committed by the accused-appellant and the same has been committed by some one else or dacoits for looting the property of the accused-appellant, has also no legs to stand on the ground that there is no direct or indirect evidence on record from which it is established that the said offence has been committed by dacoits or some one else. If the offence has been committed by dacoits or some burglars for looting the property of the accused-appellant in the early morning i.e. around 04.00 a.m. when it was dark, some sort of information must have been lodged either by the accused-appellant or any other member of his family at the Police Station much earlier or some news must have been in the knowledge of the villagers and eye-witnesses. From the injuries found on the body of the deceased by P.W.-6 at the time of post-mortem, it is impossible to believe that the same have been inflicted by a dacoit or some one else. From the same it seems that the same have been inflicted by an indignant man.

31. To the third submission made by the learned Amicus Curiae that neither P.W.2 nor his son Muneshwar had seen the occurrence by their own eyes as they did not came forward to save their daughter and sister respectively, when the accused-appellant was assaulting the deceased, we may record that it is a common knowledge that when a person is killing someone with a sharp edged weapon, no ordinary person who does not have any weapon, will try to save that person, as there will be apprehension of danger of his own life and only way to save that person is to raise alarm and gather the crowd. Therefore, the mere fact that P.W.-2 and his son Muneshwar did not try to save his daughter and sister respectively, their presence at the time of occurrence cannot be doubted. Even otherwise, from the eye-witness account of P.W.-1 and other witnesses accounts, the presence of P.W.-2 and his son Muneshwar at the time occurrence is established.

32. To the forth submission made by the learned Amicus Curiae that any Brahmin father or brother who does not drink water of the place of in-law's of his married daughter or sister, then how can they stay there for three days?, the same has only been stated to be rejected on the ground that in today's world and after more years of independence of this Country, it does not go down the throat. If this was a matter of pre-independence then it could have been accepted but in today's era, this cannot be accepted. When there is direct

and clinching evidence, no such presumption can be taken in this case.

33. Qua the fifth submission made by the learned Amicus Curiae, we may notice that for false implication of the accused-appellant by the prosecution in the present case, the defence has completely failed to prove as to why he has been implicated in the present case. Neither any documentary nor oral evidence in that regard has been produced by the defence. The next plea taken by the defence that the accused-appellant has no motive or intention to commit the alleged offence has no legs to stand on the ground that he had clear intention and motive to do the same. It is borne out from the prosecution version that due to death of the twin daughters of the deceased, she was sad and for a while for a change, she insisted the accused-appellant to permit her to go with her father, the accused-appellant lost his temper on this trifling matter and gave numerous blows with his sickle on his wife resulting in her death. As per the post-mortem report, as many as 15 injuries were found on different parts of her body. The number was even larger if multiple incised wounds at serial nos. 8 and 11 and two incised wounds at serial no.14 are taken into account. It would mean that there were as many as twenty injuries on the deceased body. The injuries were on different parts including hand, thigh, hip, back, chest and the face. They must have been inflicted by a man more in anger than a person who had gone to commit dacoity.

34. So far as the sixth submission made by learned Amicus Curiae that there is contradictions in the statements of the witnesses especially P.W.-2 is concerned, this Court may record that the contradictions, which are sought to be projected by the defence in the statements of the prosecution witnesses are minor contradictions and the same cannot be the basis to discard the entire evidence, where P.W.-2 is an interested eye witness, P.W.1 and P.W.3 are independent eye-witnesses and the medical evidence has fully supported the prosecution case.

35. It is settled law that in all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

36. Qua the last submission made by the learned Amicus Curiae that the injuries found on the body of the deceased at the time of incident have not been caused by a sickle, we have carefully examined the post-mortem report and the statement of the P.W.-6. We find no infirmity in the opinion of the doctor that the shape and nature of the injuries would depend on the manner in which the weapon was used by the assailant and the manner in which the injured tried to ward off the blows. The P.W.-6 has opined that the injuries found on the body of the

deceased could have been caused by a sickle.

37. It is well settled that the evidence of interested or inimical witnesses is to be scrutinised with care but can not be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is no bar in relying on the said evidence. It is also well settled that interested evidence is not necessarily unreliable evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon.

38. Further it is well settled that in case of direct evidence, motive would not be relevant and only in case of circumstantial evidence, motive assumes great significance. In a case in which the evidence is clear and unambiguous and the circumstances proves the guilt of the accused, the same would not get weakened even if the motive is not a very strong one. The motive loses all its importance in a case where direct evidence of eye witnesses is available.

39. In **Suresh Chandra Bahri Vs. State of Bihar** reported in *1995 Supp (1) SCC 80,* the Apex Court has opined that a motive is something which prompts a person to form an opinion or intention to do certain illegal act or even a legal act but with proof of motive for the commission of the crime it affords added support to the finding of the court that the accused was guilty of the offence charged with.

40. The alternative submission made by the learned Amicus Curiae is that the incident in question occurred on the spur of the moment without any premeditation and therefore, even if the earlier submissions are not accepted, yet the husband (accused-appellant) could at best be punished under Section 304 I.P.C. and punishment of 10 years' imprisonment would suffice. This argument of the learned Amicus Curiae proceeds on the ground that the case in hand would fall under Exception-4 to Section 300 I.P.C. and therefore, the punishment would suffice under Section 304 I.P.C. in place of Section 302 I.P.C.

41. The law is settled that conviction under Section 302 I.P.C. could be altered to Section 304 I.P.C., if the case falls in any of the ingredients of Exception-4 to Section 300 I.P.C., Exception-4 would be attracted. Necessary ingredients to be attracted for Exception-4 to Section 300 I.P.C. to be invoked would be that the incident occurred without premeditation; in a sudden fight; in the heat of passion upon sudden quarrel; without the offender having taken undue advantage or acted in a cruel or unusual manner.

42. The evidence has been analyzed by us in the facts of the case. We are of the view that the case in hand would clearly not fall within Exception-4 to Section 300 I.P.C. only for the reason that the offender has acted in a most cruel and unusual manner while committing the offence.

43. The law is well settled that all ingredients of Exception-4 to Section 300

I.P.C. must be met before it is made applicable in a given case. One of the ingredients of Exception-4 to Section 300 I.P.C. is that the offender has not acted in a cruel and unusual manner.

44. In **Pulicherla Nagaraju [Pulicherla Nagaraju v. State of A.P.,** reported in *(2006) 11 SCC 444 : (2007) 1 SCC (Cri) 500]* , the Apex had an occasion to consider the case of culpable homicide not amounting to murder and the intention to cause death. It was observed and held by this Court that the intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances:

(i) nature of the weapon used;

(ii) whether the weapon was carried by the accused or was picked up from the spot;

(iii) whether the blow is aimed at a vital part of the body;

(iv) the amount of force employed in causing injury;

(v) whether the act was in the course of sudden quarrel or sudden fight or free-for-all fight;

(vi) whether the incident occurs by chance or whether there was any premeditation;

(vii) whether there was any prior enmity or whether the deceased was a stranger;

(viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation;

(ix) whether it was in the heat of passion;

(x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner;

(xi) whether the accused dealt a single blow or several blows."

45. Evidence brought on record in the facts of the present case clearly shows that the accused-appellant objected to wishes of his wife (deceased) to visit her parental house and when the deceased insisted to go with her father, the accused-appellant assaulted her with sickle and caused as many as 15 blows. The injuries have been noticed in the post-mortem report, which would clearly show that the accused-appellant acted in a cruel and unusual manner in assaulting his own wife repeatedly on account of which she died. The act of the accused-appellant, in our considered opinion, would tantamount to acting in a cruel and unusual manner, which would clearly oust the applicability of Exception-4 to Section 300 I.P.C. in the facts of the present case.

46. Except the judgment of the Apex Court in the case of **Dalip Singh (Supra),** all other judgments relied upon by the learned Amicus Curiae in support of the said alternative submission, have no application in the facts of the present case. So far as the judgment of the Apex Court in the case of **Dalip Singh (Supra)**, the facts were some what distinct. The deceased in that case was allegedly tortured in the Police Station and was later thrown on the road. It was in that context that the Apex Court treated the act to fall in Exception-4 to Section 300 I.P.C., as against facts occurring in the case of **Dalip Singh (Supra).** The act of the accused-appellant in this case however depicts cruelty on his part in inflicting 15 blows repeatedly on his own defenseless wife. Not only the accused-appellant acted with knowledge that such injuries would prove fatal but the manner of causing such injuries also depicts cruelty

47. The manner, in which the multiple wounds have been caused in a fit of rage by

the offender against his wife, clearly reflects that the offender's act is cruel and the offence has been committed by him in an unusual manner. The injuries on the victim/deceased clearly show that the offender acted with extreme cruelty and inflicted injuries for after another on her person, notwithstanding the fact that the deceased/victim was his own wife and was not armed. Her insistence to go with her father cannot justify such extreme barbaric act on part of the accused-appellant.

48. On the cumulative analyze on facts raised before us, our conscious does not permit us to grant benefit to the accused-appellant of placing his act in Exception-4 to Section 300 I.P.C. or to award punishment other than what has been awarded by the trial court.

49. In the present case intention/motive as well as direct evidence of three eye witnesses i.e. P.W.-1 to P.W.-3 and one circumstantial witness i.e. P.W.-4 are available. From the records, it is apparent that P.W.-1 i.e. an independent eye witness had reached the place of occurrence on the alarm of P.W.2 and his son and had seen the accused with a sickle in his hand. The sickle had blood stains on it. The accused-appellant was caught hold by P.W.-2 and his son Muneshwar and the deceased was lying dead in the nearby room. Though this witness has been turned hostile but this part of his evidence is admissible and there is no reason for disbelieving him on this point. P.W.-2, an interested eye witness, who is the father of the deceased and his presence at the crime of scene is natural, he along with his son went to the house of the accused-appellant in order to take back the deceased to his house for a change because her newly born twin daughters had died about two weeks back. P.W.3 who is an independent eye-witness, is the next door neighbour of the accused-appellant. His presence too at the spot was natural. They have fully corroborated with the prosecution case and have stated that they have seen the accused-appellant inflicting the sickle blows on the deceased. Similarly, the statement of P.W.-4 who had reached the place of occurrence ten minutes after the incident is reliable. He was on patrolling. When he along with his companion Constable Virendra Singh reached the place of occurrence he found the accused in the custody of P.W.-2 and his son Muneshwar and a blood stained sickle lying nearby. This too is a strong corroborative piece of evidence.

50. From the aforesaid facts, which have been noted herein above, we find substance in the submissions made by the learned A.G.A. that this is a case of direct and clinching evidence like three eye witnesses of the incident, namely, P.W.-1 to P.W.-3 and one circumstantial witness i.e. P.W.-4.The medical evidence fully supports the prosecution evidence. The incident occurred in broad day light i.e. at 09:00 a.m. The first information report lodged by the informant is prompt, which was lodged at 11.35 a.m. on 3rd November, 1981 i.e. two hours and thirty five minutes of the incident. The accused-appellant had also motive to commit such offence. The incident and the place of incident were not disputed by the defence side.

51. As already discussed above, we find that both the eye-witnesses i.e. P.W.-1 to P.W.-3 and circumstantial witness i.e. P.W.-4 have satisfactorily explained about their presence at the places of occurrence. They were subjected to lengthy cross-examination but nothing could be elicited to discredit their testimony. The police

documents and statements of Investigating officer including arrest of accused-appellant and recovery of sickle and vest of the accused-appellant having blood stains as well as medical evidence fully support the prosecution version.

52. Taking cumulative effect of the evidence, we are in respectful agreement with the finding recorded by the trial court and it was fully justified in convicting the appellant. Accordingly, we confirm the order of trial court.

53. The appeal has no substance and the same is **dismissed**. The appellant is reported to be on bail. His bail bonds stand cancelled and he be taken into custody for serving the remaining sentence.

54. Now coming to the question of fine, we find it to be mandatory where punishment is awarded under Section 302 I.P.C., as per Section 302 I.P.C. For ready reference, Section 302 I.P.C. reads as follows:

"Whoever commits murder shall be punished with death or [imprisonment for life], and shall also be liable to fine."

55. From perusal of the aforesaid Section, it is clear that any accused, who commits any murder shall be punished with death or life imprisonment and fine shall also be imposed against him. While awarding sentence of death or life imprisonment, fine should be read together. Before the word "fine", the word "shall" is used and therefore, the imposition of fine is mandatory while awarding death or life sentence to any accused, who committed murder.

56. Accordingly, in addition to life imprisonment, while affirming the judgment of trial court, we also impose fine of Rs. 10,000/- upon the accused-appellant. It is also clarified that in case of default in payment of the said fine, he has to undergo six months additional imprisonment.

57. The dismissal of this criminal appeal however shall not prejudice the rights of the accused-appellant to apply for remission, which shall be dealt with in accordance with law on merits.

58. We record our appreciation for the able assistance rendered in the case by Mr. Raj Kumar Sharma, learned Amicus Curiae, who would be entitled to his fee from the High Court Legal Service Authority.

59. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Farrukhabad, who shall transmit the same to the Jail Superintendent concerned for information of the accused-appellant henceforth.

(2023) 1 ILRA 949
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 13.01.2023

BEFORE

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

Jail Appeal No. 1545 of 2019
And
Jail Appeal No. 1546 of 2019

Minni @ Meena ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Mr. Anurag Shukla (Amicus)

Counsel for the Respondent:
A.G.A.

Criminal Law- Indian Evidence Act, 1872- Section 3- The complainant Siyapati and Pohkar who are claiming themselves as eyewitnesses of the crime were not reliable. Their presence at the place of occurrence is highly unbelievable- The statements of these two witnesses are contradictory in material terms and create a serious doubt about their presence at the spot. Further more the recovery of weapon of offence is also highly doubtful because P.W.1 Siyapati has stated in her cross-examination that both the trowels i.e. one of Minni and another of Balram were left at the spot and those were taken by the police. On the other hand, the Investigating Officer has stated that he was handed over the trowel by accused Balram from his nursery.

Settled law that where the testimony of the witnesses of the prosecution has such material contradictions that they go to the root of the story of the prosecution make their presence on the place of occurrence unbelievable and the recoveries do not stand proved ,then such evidence cannot be relied upon by the court.(Para 17, 18)

Criminal Appeal allowed. (E-3)

Case Law/ Judgements relied upon:-

1. Sunil Kundu & anr. Vs St. of Jhar., (2013) 4 SCC 422.

2. Krishnegowda & ors. Vs St. of Kar., (2017) 13 SCC 98.

3. Puran Singh Vs St. of Uttaranchal (2008) (3) SCC 795.

4. Mani Ram & ors. Vs St. of U.P. 1994 Supp (2) SCC 289

5. Bhikari Vs St. of U.P. AIR 1966 SC 1

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

1. These criminal appeals have been preferred from the jail by the appellants/convicts Minni @ Meena and Balram against the judgment and order dated 19.06.2019 passed by Additional Sessions Judge, Court No.5/ Special Judge, Gangsters Act, Lucknow in Sessions Trial No.79 of 2010 arising out of Crime No.349 of 2009, under Sections 302/34 of the Indian Penal Code 1860 (in short IPC), Police Station Mall, District Lucknow, whereby the convicts/appellants have been held guilty under Section 302/34 of I.P.C. and sentenced for life imprisonment coupled with a fine of Rs.25,000/- each and in default of payment of fine further imprisonment of six months.

2. The facts in short, necessary for disposal of these appeals are as under:-

(i) A First Information Report (in short F.I.R.) was registered at Case Crime No.349 of 2009, at Police Station Mall, District Lucknow on the basis of written report presented by Siyapati. It was stated in the written report that on 17.10.2009 at about 7:00 P.M. he went to meet her father Lallu and mother Lalain in the village Badkhorwa. As soon as she entered through door she saw that her younger sister Minni and her husband Balram assaulted and killed her parents with a trowel (khurpi) and they ran away from the house as soon as they saw her. She raised alarm and some people of the village came there, and they also saw Minni and Balram running. Her younger sister Minni and her husband Balram killed her parents for money and property. The dead bodies were lying at the spot.

(ii) After investigation chargesheet was submitted in the Court against the appellants/convicts under Section 302/34 of I.P.C. The concerned Magistrate after taking cognizance on the chargesheet committed the case to the Court of Sessions for trial which was

registered as Sessions Trial No.79 of 2010. The learned Sessions Judge transferred the case for trial to the Court of Additional Sessions Judge, Court No.5/ Special Judge, Gangsters Act, Lucknow. The Additional Sessions Judge, Lucknow framed charge under Section 302/34 of IPC. The appellants/convicts denied the crime and claimed to be tried.

(iii) The prosecution examined following witnesses to prove its case:-

(a) P.W. 1 Siyapati the complainant.

(b) P.W. 2 Pohkar husband of Siyapati the complainant.

(c) P.W. 3 Dr. P.K. Dwivedi, who conducted postmortem examination on the cadavers of both the deceased.

(d) P.W. 4, Sub Inspector Avadhu Prasad Azad who conducted the inquests of both the deceased on the direction of Station House Officer of the Police Station concerned.

(e) P.W. 5, Suraj Bhan Singh Head-Moharrir who registered FIR and prepared Chick FIR Exhibit Ka-13 and Kayami Nakal Report Exhibit Ka-14.

(f) P.W. 6, Sub Inspector Gauri Shankar Pal, Investigating Officer of the case.

(iv) Apart from above oral evidences following documentary evidences were also proved and exhibited as Exhibit Ka-1 to Ka-25:-

(1) Exhibit Ka-1, written report.

(2) Exhibit Ka-2, inquest report of deceased Lallu.

(3) Exhibit Ka-3 inquest report of deceased Lalain.

(4) Exhibit Ka-4 wrongly mentioned due to clerical error as written in the judgment.

(5) Exhibit Ka-5 postmortem report of deceased Lallu.

(6) Exhibit Ka-6 postmortem report of deceased Lalain.

(7) Exhibit Ka-7 Chalan 'Nash' of deceased (Lallu).

(8) Exhibit Ka-8 Photo 'Nash' of deceased Lallu.

(9) Exhibit Ka-9 specimen seal related to deceased Lallu.

(10) Exhibit Ka-10 Chalan 'Nash' of deceased (Lalain)

(11) Exhibit Ka-11 Photo 'Nash' of deceased Lalain.

(12) Exhibit Ka-12 specimen seal related to deceased Lalain.

(13) Exhibit Ka-13 Chick FIR.

(14) Exhibit Ka-14 Nakal report.

(15) Exhibit Ka-15 Site Plan.

(16) Exhibit Ka-16 recovery memo of collection of plain and blood stained soil from the spot.

(17) Exhibit Ka-17 recovery memo of Saree of accused Minni.

(18) Exhibit Ka-18 recovery memo of recovered weapon of crime trowel (Khurpi).

(19) Exhibit Ka-19 recovery memo of blood stained Shirt and vest of accused Balram.

(20) Exhibit Ka-20 site plan of the places of recovery of Khurpi, blood stained shirt and vest.

(21) Exhibit Ka-21 site plan of the place of recovery of Saree of accused Minni.

(22) Exhibit Ka-22 Chargesheet.

(23) Exhibit Ka-23 Forensic Science Lab report regarding plain and blood stained soil.

(24) Exhibit Ka-24 Forensic Science Lab report regarding plain and blood stained soil.

(25) Exhibit Ka-25 Forensic Science Lab report regarding the recovered clothes of accused persons and weapon of offence.

(v) After close of prosecution evidence, the statements of the appellants/convicts under Section 313 of the Code of Criminal Procedure 1973 (in short Cr.P.C.) were recorded, wherein they denied crime and stated that witnesses have deposed falsely. They have also stated that they have been implicated in the crime due to enmity. The convict/appellant Minni has further stated that her parents did not allow her sister (complainant) and her husband to come to their house, because they used to sell liquor. Her parents wanted to give all the property to her, but she denied and told them that after their death both the sisters would get equal shares. When she was imprisoned her sister had sold the land and also got the house constructed. It is wrong to say that she (her sister) used to live for some period with parents and for some period in her matrimonial home, because her parents did not allow her to come to their house. Her sister sold all the land of her father. She further stated that she did not commit any crime. She was arrested from her matrimonial home. The convict/appellant Balram has also stated that he was not present in the village at the time of incident as he was in Lucknow.

(vi) In their defence convicts/appellants examined D.W. 1 Dr. Rakesh Kumar, Physician Community Health Center, Haidargarh.

(vii) After completion of evidence, learned trial court after hearing the arguments of both the sides and analyzing the evidences available on record reached at the conclusion that convicts/appellants Minni and Balram committed the murders of Lallu and Lalain, the parents of Minni and in-laws of Balram. The learned trial court relied upon the evidences of Siyapati and Pohkar and also on the recovery of blood stained clothes of both the accused and the recovery of weapon of offence trowel (Khurpi). Learned trial court concluded that the prosecution has proved the case beyond all reasonable doubts and held both the convicts/appellants guilty under Section 302/34 of I.P.C. and sentenced them for life imprisonment coupled with a fine of Rs.25,000/- each and in default of payment of fine further imprisonment of six months.

(viii) Being aggrieved of this conviction and sentence, the present appeals have been preferred by the convicts/appellants.

3. Heard Mr. Anurag Shukla, learned Amicus Curiae for the convicts/appellants and Mr. Dhananjay Kumar Singh, learned Additional Government Advocate for the State-respondents.

4. Learned Amicus Curiae Mr. Anurag Shukla argued for the appellants that FIR is ante-timed. The police reached at the spot first, thereafter FIR was lodged in consultation with police. The presence of the alleged eye-witnesses i.e. P.W.1 and P.W.2 at the spot is highly doubtful as they were residents of another village situated at a distance of 1Km from the village of incident. Recovery of trowel and blood stained clothes is fake. This recovery has been planted and forged by the police to create evidence. P.W.1 Siyapati has said in her statement before the trial court that two trowels were there at spot, but the Investigating Officer has said that only one trowel was recovered and that too not from the spot, but from somewhere else. He further argued that alleged motive has not been proved because there was very small piece of land in the ownership of the deceased persons and after their death both the sisters would have inherited in equal shares. The statements of P.W.1, P.W.2 and P.W.6 and the Investigating Officer are

contradictory. The alleged recovery cannot be used as evidence against the convicts/appellants under Section 27 of the Indian Evidence Act as that has not been recovered from their possession or at their pointing out. He further submitted that the evidence produced by the prosecution is highly unreliable and conviction based on this evidence deserves to be set-aside and the convicts/appellants be freed.

5. Learned Amicus Curiae relied upon following case laws:-

a. Sunil Kundu and another Vs. State of Jharkhand (2013) 4 SCC 422.

b. Krishnegowda and others Vs. State of Karnataka (2017) 13 SCC 98.

c. Puran Singh Vs. State of Uttaranchal (2008) (3) SCC 795.

d. Mani Ram and others Vs. State of U.P. 1994 Supp (2) SCC 289.

e. Bhikari Vs. State of U.P. AIR 1966 SC 1.

6. On the other hand Shri Dhananjay Kumar Singh, learned A.G.A. countered the arguments made by the learned Amicus Curiae and submitted that P.W.1 and P.W.2 are eyewitnesses. They both saw the incident being committed by the convicts/appellants. When complainant Siyapati raised alarm other persons of village also reached there. The weapon of offence trowel was recovered by the police and the stains of blood were found on the trowel. The blood stained saree of Minni was also recovered at her pointing out. The blood stained shirt and vest of Balram were also recovered on his pointing out. In Forensic Science Laboratory report human blood was found on these recovered clothes. There is sufficient evidence to hold the convicts/appellants guilty. Therefore, the trial court has rightly held them guilty and punished accordingly. Hence, the appeal should be dismissed.

7. Considered the rival submissions and perused the evidences available on record and gone through the case law cited above. As per version of FIR, on the day of incident i.e. 17.10.2009 at about 7:00 pm the complainant Siyapati went to meet her parents at village Badkhorwa from her matrimonial village Atwathari. As soon as she entered through the door she saw that her younger sister Minni and Balram had killed her parents with trowel. As soon as they (appellants) saw the complainant, they ran away out of the house. When the complainant raised alarm, then people of village came there and they also saw Minni and Balram fleeing. It has also been mentioned in the FIR that appellants killed the deceased in the greed of money and property.

8. P.W.1 Siyapati has claimed herself as eyewitness of the crime and has stated in her statement given as P.W.1 that the incident occurred on the day of Deepawali at about 7:00 PM when she went to meet her father Lallu and mother Lalain at village Badkhorwa. As soon as she reached at the door she saw inside that her younger sister Minni and her husband Balram who lived in the village Badkhorwa itself, assaulted her parents with trowel and injured them, consequently they died. They both ran away out of the house as soon as they saw her. Thereafter she raised alarm and many persons of the village came there and they also saw Minni and Balram running. She has further stated that appellants have killed her parents for the greed of money and property. She has proved her written report as Exhibit Ka-1 and identified her thumb impression over that. In the cross examination she has stated

that her matrimonial home is situated at a distance of 1Km from her paternal house. Her father had two issues one she herself and another her sister, Minni her younger sister. After the death of her parents both the sisters would have inherited half and half share. She has further stated that her father had three Bighas of land at the time of his death, now only two and half Biswa land is left. She has further stated that her parents had sold the land before their murder, only two and half Biswa land was left over. Now after their death, their house is lying vacant and none is living there.

9. She has further stated that when the murder of his parents was done in the house of her father only one door was there for entry. She has further stated that she entered the house first and none else has entered the house. When she raised alarm then many people of the village came there. She first saw the appellants coming out of the door when she entered and both the appellants were in the courtyard near the dead bodies of her parents. When they ran away many people of village came there, her husband reached there after ten to fifteen minutes. She was accompanied by ten to twelve people of her matrimonial village because they (appellants) might kill her also, after seeing her alone. Dallaye, Pappu, Jagdish, Jaghatte and Vikas were with her. These all people just accompanied her, they did not have prior knowledge of the incident. The door of her house was open. The people who came from her matrimonial home were standing outside. The people of her matrimonial home and of parental village came inside when she raised alarm and by that time both the accused ran away. She has further stated that she told to the police that Minni was holding the deceased persons and Balram was assaulting and the same was written by her in the FIR. Balram is Raidas by caste and Minni had married him on his own will for that reason parents and she were not happy with Minni and Balram. Minni and Balram used to come to the house of her parents. At the time of incident Balram was wearing the white shirt and pant and tied a white handkerchief in neck. Her sister Minni was wearing a red colour saree and blouse. Both were holding trowels in their hands and they ran with trowels. She again said that trowel of Minni was left at the spot which was picked up by the police and trowel of Balram was left outside the house and that too was picked up by police. The recovery memo was prepared about the recovery of trowel and she and her husband put their thumb impressions on that recovery memo.

10. Pohkar the husband of the complainant Siyapati has been examined as P.W.2 and he has stated before the trial court that she alongwith wife Siyapati went to wife's parental house at village Badkhorwa. His wife went ahead as he stopped on the way to urinate, for that reason he remained behind. When he reached at the house he found his wife crying. His wife told that Minni and Balram were cutting his (P.W.2's) mother-in-law and father-in-law with trowel. On this he also started crying and on this village people gathered there and appellants ran away after committing murder. He has further stated that he and villagers saw Minni and Balram running after committing the murders. He also stated that he is resident of village Atwathari and that village is situated at a distance of 1Km from the village of incident. He further stated that the villagers belonging to the village also reached at the spot after hearing the noise. He has further stated that he did not open the door when Balram ran

away.The accused persons opened the door and ran away and he saw that his mother-in-law and father-in-law were lying in the courtyard. He did not catch them due to fear. He has further stated that at the place of incident first his wife reached and after five minutes he reached. He saw the accused persons committing the murders of his in-laws.

11. P.W.3 Dr. P.K. Dwivedi, conducted postmortem examination of cadavers of the both the deceased. On the cadaver of deceased Lallu he found following ante-mortem injuries:-

1. Lacerated wound 3 cm x 0.5 cm muscle deep present on left side of face 5 cm below left eye, margins, clear-cut, sharp and well defined;

2. Contusion 8 cm X 4 cm present on left side of head just above left ear;

3. Contusion 20 cm X 10 cm present on left side of ear and below left collar bone;

4. Contusion 8 cm X 5 cm present on lateral aspect of right side of abdomen 7 cm above illiac crest;

On opening ecchymosis present underneath above injuries, fracture of left temporal and parietal bone present, underneath the fracture brain meninges and brain lacerated, fracture of 2nd to 6th number rib on left side of chest present, underneath the fracture lung and pleura lacerated, about one litre fluid of clotted blood present in left chest cavity.

In the opinion of Doctor, the death resulted due to shock and hemorrhage as result of ante-mortem injuries as noted above. (Exhibit Ka-5)

12. In the postmortem examination of deceased Lalain P.W. 3 Dr. P.K. Dwivedi found the following ante-mortem injuries:-

1. Lacerated wound 3 cm x 1 cm present on right side of face 4 cm below left eye, margins, clear-cut, sharp and well defined;

2. Contusion 10 cm X 8 cm present on right side of face and chin;

3. Contusion 15 cm X 10 cm present on right side of forehead just above eyebrow;

4. Contusion 15 cm X 10 cm present on lateral aspect of right side of chest 3 cm below right clavicle;

On opening ecchymosis present underneath above mentioned injuries, fracture of frontal bone present, underneath the fracture brain meninges and brain lacerated, fracture of 2nd to 6th number rib on left side of chest present, underneath the fracture lung and pleura lacerated, about one litre fluid of clotted blood present in left chest cavity.

In his opinion the cause of death was shock and hemorrhage as aresult of ante-mortem injuries as noted above (Exhibit Ka-6).

13. P.W.4 Sub Inspector Avadhu Prasad Azad, who prepared the inquest reports at the direction of Station Houses Officer concerned has proved the inquest reports of deceased Lallu (Exhibit Ka-2) and of deceased Lalain (Exhibit Ka-3). He has also proved the other relevant documents as Exhibits Ka-7 to 12.

14. P.W. 5 Constable Moharrir Suraj Bhan Singh who has proved the Chick FIR as Exhibit Ka-13 and Kayami Nakal as Exhibit Ka-14.

15. P.W.6 Sub Inspector Gauri Shankar Pal, the Investigating Officer of the case, he has stated that after taking over the investigation he recorded the statement of witnesses, prepared the site plan of the place of incident at the pointing out of the

complainant Siyapati. He has proved the site plan as Exhibit Ka-15. She has also proved that he has collected the blood stained and plain soil from the spot and got prepared the recovery memo by Sub Inspector Arjun Singh. Thereafter he arrested the accused Minni and recorded her statement and recovered the blood stained saree in the presence of witnesses at the pointing out of Minni. He has proved the concerned recovery memo as Exhibit Ka-17. He further stated that he also arrested accused Balram, recorded his statement and recovered weapon of offence blood stained trowel, blood stained shirt and vest, which Balram gave him taking out from his nursery. He has proved the recovery memo of trowel as Exhibit-18 and of Shirt and Vest as Exhibit-19. He has also proved the site plans of the place of recovery as Exhibit Ka-20 and 21. He has also stated that after completing investigation he submitted chargesheet against the accused persons proved as Exhibit Ka-22. The allegedly recovered trowel was produced before the Court and this witness has identified, as the trowel recovered at the pointing out of the accused Balram. This witness has stated that accused persons told him that they committed the murder of deceased persons by this trowel. In the cross-examination this witness has stated that there is no mention of confession made by the accused in Exhibit Ka-19 i.e. recovery memo of trowel, shirt and vest.

16. He has further stated that he recovered no trowel from Minni, but there is mention in the column two of Forensic Science Laboratory report that the weapon used by Minni for committing the murder. He further stated that he did not know who sent this weapon. In his cross-examination he has further stated that in the docket prepared by Circle Officer Malihabad, there is mention of weapons of offence recovered from the possession of Minni and Balram from the place of incident and there is no mention in the Forensic Science Laboratory report about the recovery of weapon of offence from the possession of Balram. He further stated that it is true that Circle Officer prepared the docket and sent the same for examination in Forensic Science Laboratory. There is no mention in the whole investigation that he (Investigating Officer) recovered any trowel, weapon of offence from the possession of Minni.

17. Upon examining the evidence of all the witnesses in totality it appears that the complainant Siyapati and Pohkar who are claiming themselves as eyewitnesses of the crime were not reliable. Their presence at the place of occurrence is highly unbelievable because as per their version the day of incident was the day of Deepawali festival and they used to reside in another village situated at a distance of 1Km from the village of incident. Both P.W.1 and P.W. 2 have given contradictory statements, as P.W. 1 has stated in FIR that she went to meet her parents at village Bhadkhorwa. There is no mention in the FIR that her husband Pohkar also accompanied her. In her examination in chief, as P.W.1 she has stated that she went to meet her parents and saw that Minni and Balram had assaulted her parents with trowel. They died and they (Minni & Balram) ran away as soon as they saw Siyapati. When she raised alarm many people of village came there and they also saw Minni and Balram running from the place. In the examination in chief she has not stated that she was accompanied by her husband or her husband came there after some time. In cross examination she has

stated that after ten to fifteen minutes running of the accused persons her husband reached there. She has also stated that ten to twelve people of her matrimonial home accompanied her (Siyapati) when she went to meet her parents. She has not stated that her husband and she left from the house together, but her husband stopped on the way to urinate and she reached earlier at the house of her parents.

18. On the other hand, P.W.2 has stated that he alongwith his wife Siyapati went to his in-laws house at village Bhadkhorwa. His wife reached earlier to him as he stopped on the way to urinate. When he reached at the spot he heard the cry of his wife and his wife told him that Minni and Balram were cutting his in-laws with trowels. He has stated that he along with other villagers saw Minni and Balram fleeing. The statements of these two witnesses are contradictory in material terms and create a serious doubt about their presence at the spot. Further more the recovery of weapon of offence is also highly doubtful because P.W.1 Siyapati has stated in her cross-examination that both the trowels i.e. one of Minni and another of Balram were left at the spot and those were taken by the police. On the other hand, the Investigating Officer has stated that he was handed over the trowel by accused Balram from his nursery. In the Forensic Science Laboratory report Exhibit Ka-25 there is mention that the trowel recovered from Minni. These all facts and circumstances create serious doubt about the recovery also. Further there is nothing in the statement of the Investigating Officer that at the time of recovery of alleged blood stained clothes the accused persons told them that they wore the clothes at the time of committing the murder or the weapon allegedly handed over by Balram was used to commit the murders of the deceased persons. There is mention in the statement of Investigating Officer as P.W.2 that Circle Officer prepared docket of recovery of weapon of offence, but that Circle Officer has not been examined before the Court as witness.

19. On analyzing the evidence, it is evinced that prosecution could not prove the charges framed against the convicts/appellants beyond reasonable doubt. Hence the impugned judgment and order deserves to be set-aside and both the appeals are **allowed** accordingly. Let the appellants Minni @ Meena and Balram be released from jail, if not required in any other case.

20. Appellants **Minni @ Meena and Balram** are directed to file their personal bonds and two sureties each in the like amount to the satisfaction of the court concerned in compliance with Section 437-A of the Code of Criminal Procedure, 1973.

21. Before we part with the case, we must candidly express our unreserved and uninhibited appreciation for the assistance rendered by Mr. Anurag Shukla, *Amicus Curiae* for the convicts-appellants, therefore, we deem it appropriate to direct for payment to Mr. Anurag Shukla, learned Amicus Curiae for his valuable assistance as per Rules of the Court.

22. Office is directed to pay remuneration to Mr. Anurag Shukla, learned Amicus Curiae as per Rules of the Court within a month.

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

(2023) 1 ILRA 958
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.12.2022

BEFORE

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

Criminal Appeal No. 5125 of 2018

Km. Sandhya Singh & Ors.
...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Saroj Kumar Yadav, Sri Rahul Mishra, Sri Vishwadeep Patel

Counsel for the Respondent:
G.A., Sri Birendra Singh

Criminal Law- Indian Evidence Act, 1872- Sections 3 & 60- Case of circumstantial evidence-Evidence of 'last-seen'-Extra-judicial confession-Evidence of PW1 is hear-say evidence and is not admissible-fact of 'last-seen' was disclosed by PW2 and PW4 after 25 days of the said occurrence when the dead-body of the child was recovered- PW4-Jai Karan also did not disclose the fact of 'last-seen' to anybody during this period of 25 days-The testimony of PW2 and PW4 is not reliable and it does not inspire confidence. So the important link of the chain of circumstances breaks here.

In a case of circumstantial evidence the prosecution has to prove every link of the circumstances and where the story of last seen is rendered unbelievable and testimony of the witness is based on hearsay, then the links in the story of the prosecution break.

Indian Evidence Act, 1872- Section 3- Section 8- In a case of circumstantial evidence, motive carries a strong weight-It was incumbent upon prosecution to prove the motive behind the crime yet PW3, the mother of the deceased, has first time disclosed the motive in her testimony that appellant used to falsely allegate her husband for molesting her. This motive could not be proved by prosecution by way of any evidence.

Motive is a relevant fact in a case based on circumstantial evidence as the same forms one of the links in the chain of circumstances and where the prosecution fails to prove the motive then the story of the prosecution is rendered doubtful.

Indian Evidence Act, 1872- Section 24 - Settled law with regard to extra-judicial confession that it should be made before a person, who is in position to save or help the accused making confession. In this case, the aunt of deceased-child was not in a position to save or help the appellants so there was no question for any of the appellants to confess before PW5.

Where the extra-judicial confession is made to a person who is not in a position to save or help the accused then such extra-judicial confession cannot be believed. (Para 17, 19, 20, 21, 22, 23)

Criminal Appeal allowed. (E-3)

Case Law/ Judgements relied upon:-

1. Shivaji Chintappa Patil Vs St. of Maha. dated 2.3.2021 in Crl. Appeal No.1348 of 2013

2. Sharad Birdhichand Sarda Vs St. of Maha., (1984) 4 SCC 116

3. St. of U.P. Vs Kishanpal (2008) 16 SCC 73

4. Pannayar Vs St. of T.N, (2009) 9 SCC 152

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

1. This appeal has been preferred against the judgment and order dated 6.8.2018, passed by the learned Additional

District and Sessions Judge-V, Banda, in Session Trail No.204 of 2010 (State of UP vs. Km.Sandhya Singh and others) arising out of Case Crime No.119 of 2010 under Sections 364/34, 302/34, 201/34 IPC, Police Station-Baberu, District-Banda, whereby the appelants are convicted and sentenced for the offences under Section 364/34, 302/34 and 201/34 IPC for life imprisonment with a fine of Rs.5,000/- and in defalut of payment of fine, further imprisonemnt for one month.

2. Heard Shri Vishwadeep Patel, learned counsel for the appellants, Shri Birendra Singh, learned counsel for the informant, Shri Patanjali Mishra, learned AGA for the State and perused the record.

3. The brief facts of the case are that son of the informant, Namely, Kishan aged about 2-1/2 years went missing on 24.4.2010. Next day, on 25.4.2010 a missing report was lodged by informant at Police Station-Baberu, District-Banda. On 18.5.2010, the dead-body of the missing son was found in the well situated in the housing campus of accused-Prakashveer. In the meantime, on 1.5.2010, first information report (Ex.ka1) was lodged by informant with the averment that his son Kishan was playing in front of the gate of the house on 24.4.2010 at about 6:15 pm. and some unknown persons have kidnapped him.

4. After recovering the dead-body on 18.5.2010, another report (Ex.ka3) was given at Police Station-Baberu, District-Banda in which it is averred by informant that on 24.4.2010, his son Kishan went missing from the gate of accused-Prakashveer. On that date, he had gone to the pond with his mother. On coming back, he was following his mother and started playing near the gate of Prakashveer. At that time, Prakashveer, Sandhya (daughter of Prakashveer), Mukut, Gulab and Rakesh were present inside the house. At the same time, Shankar and Jaikaran @ Fakku were going towards the house of Shankar from the shop of Mattu. They saw that Kishan was playing inside the gate of the Prakashveer and all the aforesaid persons were standing inside the gate. He had belief that aforesaid persons have murdered his son and had thrown the body in the well with the help of Dinesh and Deshraj.

5. During the course of investigation, the Investigating Officer recorded the statement of witnesses under Section 161 Cr.P.C. Search-memo was prepared. On recovery of the dead-body, inquest proceedings were conducted and the body was sent for postmortem. Concerned doctor conducted the postmortem on the body of the deceased and prepared the postmortem report. After completion of investigation, the IO has submitted chargesheet against the accused, namely, Kumari Sandhya, Prakashveer @ Malkhan, Gulab and Mukut under Section 364, 302 and 201 IPC.

6. The case, being triable exclusively by the Court of Session, was committed by Magistrate to the Court of Session. Learned trial-court framed charges against the appellants under Sections 364, 302 IPC read with Section 34 IPC and Section 201 IPC. Accused-appellant denied the charges and claimed to be tried.

7. Prosecution examined following witnesses:

1	Virendra Singh	PW1
2	Shankar	PW2
3	Pinki @ Sandhya	PW3

4	Jai Karan	PW4
5	Sangita Devi	PW5
6	Dr.P.S. Sagar	PW6
7	Rakesh Kumar Mishra	PW7
8	Ashok Dhar Pandey	PW8

8. Apart from aforesaid witnesses, prosecution submitted following documentary evidence, which was proved by leading the evidence:

1	Written Report	Ex.ka1
2	Recovery memo of body	Ex.ka2
3	Application	Ex.ka3
4	Search Memo of Well and House and Recovery of Skull	Ex.ka4
5	Affidavit of Shankar Singh	Ex.ka5
6	Affidavit of Jai Karan Singh	Ex.ka6
7	P.M. Report	Ex.ka8
8	Site Plan with Index	Ex.ka9
9	Panchayatnama	Ex.ka10
10	Site Plan with Index	Ex.ka16
11	Site plan with Index	Ex.ka18
12	Charge-Sheet (Mool)	Ex.ka19

9. After completion of prosecution evidence, the statements of accused persons were recorded under Section 313 Cr.P.C. in which they told that they have been falsely implicated in this case and false evidence is led against them. They were implicated only on the basis of enmity. Accused persons have examined two witnesses in their defence. Learned Trial Court after hearing both the sides convicted all the accused persons, namely, Km.Sandhya Singh, Prakashveer @ Malkhan, Gulab Singh and Mukut @ Tarun Singh for the offences under Sections 364 read with Section 34, Section 302 read with Section 34 and 201 read with Section 34 IPC and sentenced them for life imprisonment and fine. Hence, this appeal.

10. Learned counsel for the appellants submitted this is a case of circumstantial evidence because as per prosecution case nobody has seen the ill-fate of the deceased child. There is no eye-witness in this case. Learned counsel submitted that detailed first information report was lodged by the informant after one week of the recovery of the dead-body of the deceased, in which, he has first of all, disclosed the names of the appellants, that too, on the basis of suspicion.

11. Further submission of learned counsel for the appellants is that in case of circumstantial evidence, motive assumes a great importance while in this case, no motive is established by the prosecution. There is nothing on record as to why the appellants committed murder of the deceased-child. The mother of the deceased-child, namely, Pinki @ Sandhya had first time in her deposition disclosed that accused Sandhya was falsely allegating the informant that he had molestated her. This is not such motive on the basis of which a crime like murder of the child could be committed.

12. Learned counsel for the appellants further submitted that the prosecution has developed the theory of 'last-seen' for which Shankar-PW2, Jai Karan-PW4 were examined. Both these witnesses have

deposed that they had seen the deceased-child in the company of appellants on 24.4.2010 and they were taking him towards the well from which the dead-body was recovered. Learned counsel strongly contended that both the above witnesses have disclosed this fact to the family-members of the deceased-child after the recovery of the dead-body, which is quite unbelievable because if such type of incident occurs in any village, nobody would keep silent for a period of 25 days, when the search of the missing-boy was on. It shows that both PW2 and PW4 are planted witnesses. Last-seen theory by prosecution is not proved at all.

13. It is next submitted by learned counsel for the appellants that there is evidence of extra-judicial confession also in this case, which is falsely created by the prosecution. It is said that Sangita Devi-PW5 is the bua of the deceased-child and accused Km.Sandhya Singh had gone to her and confessed that on 24.4.2010, she allured the deceased-child Kishan and taken him inside her house where all other accused persons were present. They all murdered Kishan and threw his body into the well. It was also told that her family was in pain because she was molested by the father of the deceased. Learned counsel submitted that this witness was also planted. It was not possible for PW5 to keep silent till the recovery of the dead-body of the child if the accused Km.Sandhya Singh has confessed before her because PW5 is bua of the deceased-child.

14. Learned counsel for the appellants also submitted that as per the statement of I.O., somebody had given clue to I.O. that the body would be found in the well of Prakashveer, then the police recovered the dead-body, but it is nowhere in the prosecution evidence as to who had given the clue. That important link is missing because the dead-body was not recovered at the behest of any of the appellants. Learned counsel for the appellants relied on the judgment of Apex Court in ***Shivaji Chintappa Patil vs. State of Marashtra*** delivered on 2.3.2021 in Criminal Appeal No.1348 of 2013 and submitted that in the aforesaid pronouncement, it is held by Hon'ble Apex Court that if two views are possible on the basis of prosecution evidence, one favouring the accused and other against the accused, the view favouring the accused is to be adopted. Hence, the learned trial court has fallen in grave error by convicting the appellants without any evidence against them and the impugned judgment is liable to be set aside and accused be set free.

15. Shri Birendra Singh, learned counsel for the informant, submitted on behalf of prosecution that the well from which the dead-body of the deceased-child was recovered is situated in the coumpound of house of the appellants, which is fortified by a boundary wall and the well in question is not in access of general public. It is also submitted that this crime appears to be a crime of sacrifice where the deceased child was sacrificed by the appellants for some superstitious rituals. With regard to the fact of last-seen evidence, learned counsel submits that PW2 and PW4 might not have told the fact of last-seen of the child with the appellants so that they may not create enmity with the appellants. It is next submitted that extra-judicial confession is made by appellant, Km.Sandhya Singh before PW5-Sangita and she also might not have told this fact to the family members of the child due to fear of enmity with the appellants.

16. Learned AGA opposed the submissions made by learned counsel for the appellants and contended that all the circumstances in this case clearly indicate towards the appellants and proved that the offence is committed by the appellants only. It is submitted that if the informant wanted to implicate the appellants falsely then in that case, he should have lodged FIR against them on the same day when his son went missing, but he did not do so and lodged a missing report in police station in which nobody was named. Learned AGA next submitted that PW2-Shankar, PW4-Jai Karan are independent witnesses, who have deposed that they had seen the deceased-boy in the company of the appellants inside their house and thereafter the deceased-boy was never seen alive with anybody else. There is no contradiction in their statements. With regard to the testimony of PW5-Sangita Devi, learned AGA submitted that she is the lady before whom the accused-Km.Sandhya Singh has confessed. PW5 did not disclose the aforesaid facts before anybody as she was in faith with accused Sandhya Singh, but after recovery of dead-body of the deceased-child, she could not stop herself and disclosed the extra-judicial confession was made by accused Sandhya Singh before her. This is not unusual. Moreover, Investigating Officer has also proved the fact of recovery of the dead-body from the well, which is situated in the housing campus of the appellants. This well was not in the approach of any other persons. This circumstance also indicates towards the guilt of the appellants. Hence, prosecution case is well proved beyond reasonable doubt on the basis of circumstantial evidence and there is no illegality in the impugned judgment, which calls for any interference by this Court.

17. This is a case of circumstantial evidence as nobody has seen the murder of the deceased-child. Prosecution has mainly based its case on the basis of evidence of 'last-seen' by PW2, PW4 and on the basis of extra-judicial confession made by one of the appellants, namely, Km.Sandhya Singh before PW5.

18. Regarding the law of circumstantial evidence, Hon'ble Apex Court in the case of ***Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116*** has held as under:

153. A clost analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstance from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is n ot only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade vs. State of Maharashtra (1973) 2 SCC 793 where the observations were made: [SCC para 19, p.807 : SCC (Cri) p.1047]

"19. ...Certainly, it is primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with 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 circumstnaces should be of a conclusive nature and tendency,

(4) they should excluse every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, consitute the panchsheel of the proof of a case based on circumstantial evidence."

19. Prosecution has examined informant-Virendra Singh as PW1, who has formally proved the missing report and first information report. The deposition with regard to the facts, leading to the death of the child, are narrated by PW1 in his evidence, but it was only hear-say. He has deposed that appellants had taken his son Kishan towards the well and they threw him into the well after murder. This witness has specifically deposed that this aforesaid fact was told to him by Shankar and Jai Karan after recovery of dead-body. Hence, the evidence of PW1 is hear-say evidence and is not admissible.

20. Prosecution has examined PW2-Shankar and PW4-Jai Karan as witnesses of 'last-seen'. They both have deposed that on 24.4.2010, they had seen that the deceased-boy was playing inside the gate of appellants where all other appellants were present. They all took away the boy towards the well. PW4-Shankar has gone further and said that he saw that accused Km.Sandhya Singh came out with biscuit in her hand and took the boy inside her house by showing the biscuit where all other appellants were sitting on the cot. It is admitted fact of position that this fact of 'last-seen' was disclosed by PW2 and PW4 after 25 days of the said occurrence when the dead-body of the child was recovered. PW2-Shankar has admitted in cross examination that he did not tell to I.O the fact that appellant-Km. Sandhya Singh had enticed away the child by showing the biscuit. Hence, this is the improvement in his evidence made by PW2. Further in his cross-examination, PW2 has admitted that since 24.4.2010 till the recovery of dead-body of the deceased-Kishan, he continuously remained in the village and used to met the family members of the deceased. In such a situation, it is very stange why PW2 did not disclose the fact of 'last-seen', as narrated above. No such explanation is given by the witness in his testimony as to why he kept silent for a period of 25 days, if he had seen the deceased-child in the company of appellants on 24.4.2010. The same goes with PW4-Jai Karan. He also did not disclose the fact of 'last-seen' to anybody during this period of 25 days. He also spoke out after dead-body was recovered. He has admitted in his testimony that he did not tell anybody that accused Sandhya had taken away the deceased-Kishan and no explanation is given by this witness as to why he also kept silent for 25 days and disclosed the fact of last seen for the very first time after recovery of the dead-body. Hence, in our considered view, the testimony of PW2 and PW4 is not reliable and it does not inspire confidence. So the important link of the chain of circumstances breaks here.

21. In a case of circumstantial evidence, motive carries a strong weight. The Apex Court in ***State of UP vs. Kishanpal (2008) 16 SCC 73,*** has observed that the motive is a thing which is primarily known to the accused themselves and it is

not possible for the prosecution to explain what actually promoted or excited them to commit the particular crime. The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available, because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction. It is further held in ***Pannayar vs. State of Tamilnadu, (2009) 9 SCC 152*** that the absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused.

22. In the case in hand, the testimony of PW2 and PW4, who are said to be witnesses of last-seen, is not found reliable by us. Hence, it was incumbent upon prosecution to prove the motive behind the crime. Although, the FIR is not encyclopedia becuase motive is not told by informant yet PW3, the mother of the deceased, has first time disclosed the motive in her testimony that appellant-Km.Sandhya Singh used to falsely allegate her husband for molesting her. This motive could not be proved by prosecution by way of any evidence. Moreover, in our opinion, this is not a strong motive, which prompted the appellants to commit the murder of small child and the argument of prosecution cannot be accepted that it appears a case of sacrifice because no evidence in this regard i s on record and nobody has said it. Hence, another link of chain of circumstances breaks.

23. The testimony of PW5-Sangita Devi also cannot be relied by us. She has deposed that appellant-Km.Sandhya Singh made extra-judicial confession before her. We cannot believe her testimony for the reason because if it was so it was not expected from her to remain silent till the recovery of dead-body of the boy because she was his aunt (bua). Moreover, this is settled law with regard to extra-judicial confession that it should be made before a person, who is in position to save or help the accused making confession. In this case, the aunt of deceased-child was not in a position to save or help the appellants so there was no question for any of the appellants to confess before PW5.

24. In the case in hand, prosecution has measurably failed to prove the motive behind the crime as well as the fact of 'last-seen' evidence. The testimony of PW5-Sangita Devi does not also inspire confidence with regard to the fact of extra-judicial confession. Hence, the prosecution has failed to prove the circumstances of the case. There is no circumstantial evidence in this case, which can exclude every possible hypothesis and can prove that the offence is committed only by appellants and none else. Hence, the chain of circumstantial evidence is not complete so as to point out that these are the appellants only who have committed the offence. Hence, the evidence produced by prosecution cannot be used as a link to complete the chain, because the chain of evidence is broken on the point of motive, theory of last-seen and extra-judicial confession. Moreover, it is settled law that if two views are possible on the

evidence adduced by the prosecution in the case; one pointing to the guilt of the accused and the other to his innocence, the view favouring the accused should be adopted. This principle has become more relevant where the prosecution seeks to establish the guilt of the accused by circumstantial evidence.

25. In the present case, we are of the considered view that let alone establishing chain of events which are so interwoven to each other leading to no other conclusion that the guilt of the accused, the prosecution has failed even to prove a single incriminating circumstance beyond reasonable doubt. As such, the appellants are given the benefit of doubt and the appeal is liable to be allowed.

26. The appeal is allowed and the conviction and sentence passed by the trial court is set aside. The appellants are acquitted of all the charges and they are directed to be released forthwith if not required in any other case.

(2023) 1 ILRA 965
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.12.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE SYED WAIZ MIAN, J.

Criminal Appeal No. 6649 of 2006

Jamshed ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Ajatshatru Pandey, Sri J.J. Munir, Sri Mohd. Faiz, Sri Mohd, Faroq, Sri Narendra Singh, Sri Prem Chand Saroj, Sri Ashish Kumar Nagvanshi, Sri R.P. Rajan, Sri Mohd. Raghib Ali, Sri Sagir Ahmad, Sr. Advocate

Counsel for the Respondents:
G.A., Sri D.K. Srivastava

Criminal Law- Indian Penal Code, 1860- Sections 300, 302 & 304- Culpable Homicide not Amounting to murder- As per the First Information Report, the incident had occurred all of sudden and it is reflected from the perusal of the material on record that act of the appellant/accused falls within the ambit of Section 300 (exception 1) as the appellant had no intention to kill the deceased and on sudden provocation and quarrel incident had occurred. Further, he had only fired once at the deceased-the ''culpable homicide' is genus and ''murder' is its specie. All ''murder' is culpable homicide but not vice versa. Speaking generally ''culpable' homicide sans ''special characteristic of murder' is culpable homicide not amounting to murder- In the case of culpable homicide the intention or knowledge is not so positive or definite.

Where the occurrence is sudden, is not pre-meditated and without intention and there is no repetition of shots, then the case will fall under Section 304 of the IPC instead of Section 302 IPC. Conviction and sentence accordingly modified.

Criminal Appeal partly allowed. (E-3)

(Delivered by Hon'ble Syed Waiz Mian, J.)

1. This Criminal Appeal under Section 374 (2) Cr.P.C. has been preferred by appellant/accused, Jamshed, against the judgment and order dated 26.10.2006, passed by Additional Session Judge, (Fast Track Court), Chandauli, in Session Trial No. 29 of 2022 (State vs. Jamshed) whereby, he has been convicted and sentenced, under Section 302 I.P.C. to

undergo Imprisonment for life with a fine of Rs. 10,000/-, and under Sections 323, 504, 506 I.P.C. 6 months, one year and 1 and half year, simple imprisonment, respectively, and in the event of default in payment of fine, he has to further undergo one year simple imprisonment. All the sentences have been directed to run concurrently.

2. Heard Shri Sagir Ahmed, learned Senior Advocate, assisted by Mohd. Farooq, learned counsel for the appellant and Shri Ratnendu Kumar Singh, learned A.G.A. for the State respondent and perused the record.

3. Brief facts of the prosecution story unfolds as under:

4. One Vijendra Yadav- informant, on 05.07.2001 at about 20.30 hours, presented a written First Information Report, whereupon, First Information Report No. 96 of 2001, Case Crime No. 113 of 2001, under Sections- 302, 323, 504 and 506 I.P.C., at Police Station-Balua, District-Chandauli, came to be registered against the appellant/accused.

5. In the First Information Report, it is alleged that on 05.07.2001, Satish Yadav, after taking kerosene oil from the Fair Price Shop, was on the way to his house; as soon as, he had reached at the tea and beetle shop at 6.30. p.m. of Nahku Prajapati, near square, the accused riding upon motor bike, came there and started to hurl abuses at him. When Satish Yadav cautioned him, the appellant got down from the vehicle and started to beat him with fists and kicks; witnesses, Lal Ji, Sanjay and others, who were present there, intervened and separated Satish Yadav from accused and also reprimanded the accused against his action; but he (accused) threatened them to leave the place, otherwise, he would shoot them; witnesses challenged him by saying that it was not easy for him to kill them, on which accused got infuriated and fired with gun on the chest of Rajvansh, who fell down and died on the spot. The accused brandishing his gun threatened the witnesses and he took to his heels leaving the people on the spot, frightened.

6. Substance of the First Information Report was got entered into G.D. on 05.07.2001 and the investigation was handed over to the incharge of the Police Station who took it and commenced the same.

7. At the instance of the informant, site plan of the place of the occurrence was prepared. Inquest over the body of the deceasedwas conducted and the dead body of the deceased along with inquest report and other necessary papers was forwarded to the district mortuary to ascertain the real cause of the death of the deceased.

8. During investigation, the investigating officer, recorded the statement of P.W.-1, and other witnesses. On 08.07.2001, accused got arrested who confessed to the incharge of the police station Samant Bhadra Shukla that in connection with the present incident he had killed Rajvansh by licensee fire arm DBBl gun .12 bore and had concealed the weapon in the bushes, near old Idgah at village Nathupur. He also disclosed to the arresting officer that he can get the same recovered from the said place, whereupon, the investigating officer Samant Bhadra Shukla, incharge of the police station, along with witnesses Raja Ram Yadav and Rajendra Yadav, in the hope of such recovery, took the accused at the given

place, where he, at 14:00 hours, got recovered DBBl gun from the bushes and admitted to have killed the deceased on 05.07.2001. He also pointed out that his brother Tanjeen Ahamad, was the license holder of the weapon who was serving in Military and posted in Jammu and Kashmir. In the cover of butt, of the recovered DBBl gun, three live cartridges were also got recovered. Both articles, ie. DBBL gun and recovered live cartridges, in the presence of the accused and witnesses were got sealed separately in a piece of cloth and memo of recovery, paper no. Exhibit-Ka15, 212 was prepared by the investigating officer Samant Bhadra Shukla and accused and others also signed the same.

9. The recovered DBBl gun was sent to CFL, Uttar Pradesh, Mahanagar, Lucknow, for examination. CFL examination report of the assault weapon, paper no. 6Ka is on record.

10. On the basis of the recovery memo Exhibit Ka-15, a First Information Report No. 98 of 2001 was registered as Crime No. 115 of 2001 under Sections 3/25/27 of Arms Act, against the accused at the Police Station and investigation of it was entrusted to SGP Rana Pratap Singh who had inspected the place of the recovery of fire arm and three cartridges. The investigating officer also recorded the statements of the informant and witnesses.

11. The investigating officer, of Case No. 113 of 2001, under Sections-323, 504, 506 and 302 I.P.C., after collecting the evidence against accused under Section 161 Cr.P.C. got convinced and submitted Chalan with relevant material to the learned Court.

12. Similarly, the investigating officer, after collecting the evidence, in Crime No. 115 of 2001, under Sections-3/25/27 of Arms Act, against the accused forwarded the charge sheet to the concerned Court.

13. By means of the instant criminal appeal, the impugned judgment and order is being assailed in connection with his conviction with regard to Session Trial No. 29 of 2002, arising out of Case Crime No. 113 of 2001, under Sections-302, 323, 504, 506 I.P.C.

14. Charges against the accused under Sections 302, 323, 504 and 506 I.P.C., were framed by the learned District Sessions Court vide order dated 03.02.2003. Appellant denied the charges and claimed trial.

15. In order to prove the charges against the accused, prosecution examined P.W.-1, Brijendra Yadav, P.W.-2-Satish Yadav, P.W.-3 Lal Ji, P.W.-4 Lal Mohar Ram, P.W.-5 Shiva Chandra Tripathi, investigating officer, P.W.-6-Samant Bhadra Shukla, Investigating Officer, P.W.-7 Sunil Kumar Saxena, who in the presence of Shiva Chandra Tripathi and Panchan, prepared the inquest report-Exhibit- Ka 6 of the deceased, in his writing and signatures and had taken the sealed dead body of the deceased to district mortuary along with inquest report and other papers to ascertain the real cause of death of the deceased, P.W.-8 H.C.P. Rana Pratap Singh, who has conducted the investigation in Case Crime No. 115 of 2001, under Section 3/25/27 of Arms Act, against the accused and P.W.10-Dr. A.K. Pradhan, had conducted and examined the dead body of the deceased and prepared the

autopsy report of the deceased in his signature and writing.

16. Statement of accused under Section 313 Cr.P.C. was recorded, wherein, accused has stated that evidence of informant and other witnesses is false. He has also denied that on his pointing out assault weapon i.e. DBBL gun and live cartridges were recovered. Further, he denied to have made confessional and disclosure statement to the investigating officer. He has further stated that his trial in the present case was conducted on account of his animosity. He also has claimed innocence.

17. Further, on behalf of the appellant, documentary evidence in connection with Session Trial No. 29 of 2002 vide schedule dated 09.03.2006, postal receipt no. 12 dated 08.07.2001, certified copy of telegraph message, transmitted by one Nafis Fatima and Shamim Ahmad and also documentary evidence in respect of S.T. No. 28 of 2002, by way of schedule dated 03.12.2004, certified copy of the G.D. No. 29 time 21.10 hours, dated 06.07.2001, Police Station- Balua, has been adduced.

18. After hearing the learned counsel for the accused appellant and learned DGC (criminal) for both respective parties, the learned trial Court convicted and sentenced the appellant/ accused vide conviction and sentence order dated 19.10.2006 and 26.10.2006, respectively.

19. Feeling aggrieved by the impugned judgment and order, the instant Criminal Appeal under Section 374 (2) Cr.P.C. has been preferred, where by the said impugned judgment and order is being assailed on the grounds inter alia that the conviction and sentences are against the weight of evidence on record and contrary to the law. It is also averred in the present appeal that the conviction and sentences are against the facts and are too severe. It is prayed that the impugned judgment and order dated 26.10.2006, passed by the learned Additional Sessions Judge (F.T.C.), Chandauli, be set aside and consequently he may be exonerated.

20. At the outset the learned counsel for the appellant/accused has submitted that in view of the facts of the alleged incident, the offence falls within Section 300 (exception 1) I.P.C. because as per the prosecution case the incident is alleged to have occurred without premeditation and on account of sudden quarrel and in the heat of the anger, therefore, the learned trial court has erred to convict the appellant under Section 302 I.P.C. He submits that the facts of the occurrence reflect that there was no intention/ premeditation, hence it amounts to culpable homicide. He has further contended that under the Indian Penal Code, murder and culpable homicide are separate offences. As per the prosecution story the act of the appellant/accused is covered under Section 300 (exception-1) i.e. culpable homicide not amounting to murder subject to certain provisos stipulated to exception 1 (Section-300).

21. Learned counsel has also submitted that the appellant/ accused has no previous criminal antecedents and is languishing in jail since 19.10.2006. It is submitted that at the most the appellant-accused could be convicted and sentenced for offence of culpable homicide not amounting to murder.

22. Under Section 304 I.P.C., it is stipulated that : The factors which reduce murder to culpable homicide:

(a) it should have been committed without premeditation:

(b) it should have been committed upon a sudden quarrel:

(c) it should have been committed in the heat of passion:

(d) it should have been committed without the offender's having taken undue advantage or acted in a cruel or unusual manner:

23. Next it is submitted by the learned counsel for the appellant that under Section 304 I.P.C. the maximum sentence prescribed is 10 years, whereas, appellant/accused is suffering incarceration since 19.10.2006.

24. Learned counsel has submitted that since the appellant/accused has suffered incarceration for more than 15 years, therefore, he could be sentenced with imprisonment for which he has already undergone.

25. As per the First Information Report, the incident had occurred all of sudden and it is reflected from the perusal of the material on record that act of the appellant/accused falls within the ambit of Section 300 (exception 1) as the appellant had no intention to kill the deceased and on sudden provocation and quarrel incident had occurred. Further, he had only fired once at the deceased.

26. P.W.-10, Dr. A.K. Pradhan, who has conducted the autopsy over the body of the deceased has also stated in his deposition that only one bullet in the body of the deceased was found.

27. Under the scheme of Indian Penal Code the "culpable homicide' is genus and "murder' is its specie. All "murder' is culpable homicide but not vice versa. Speaking generally "culpable' homicide sans "special characteristic of murder' is culpable homicide not amounting to murder. For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, culpable homicide of the first degree. This is the gravest form of culpable homicide which is defined in Section 300 as "murder'. The second may be termed as "culpable homicide of the second degree'. This is punishable under the first part of Section 304.

28. In the case of culpable homicide the intention or knowledge is not so positive or definite. An injury caused may or may not cause death. Even if the exceptions 1 to 4 to Section 300 I.P.C. are not culpable, the offence can still be culpable homicide.

29. In our opinion, offence of the accused falls within exception 1 of Section 300 I.P.C., therefore, the learned trial Court has erred by convicting the accused under Section 302 I.P.C.

30. Upon considering the rival contentions of the parties, facts and circumstances of the case, the manner of commission of the crime by the appellant, conviction of the appellant, under Section 302 I.P.C., who is in jail since 19.10.2006, is converted to Section- 304 I.P.C. accordingly, the sentence is modified to the period of incarceration accused has already undergone. As such, the instant appeal stands allowed in part.

31. The impugned judgement stands modified accordingly.

32. The accused/appellant shall be released from jail as he has already served out his requisite sentence for offence under Section 304 I.P.C., if he is not wanted in any other criminal case.

33. Let a copy of this judgment along with lower court record be sent back to the court concerned for immediate compliance.

34. Office to inform the concerned Jail Superintendent through C.J.M. concerned to ensure compliance of the order.

(2023) 1 ILRA 970
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.12.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE SYED WAIZ MIAN, J.

Jail Appeal No. 7291 of 2017

Gulam Rashul ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Abhinav Jaiswal (A.C.)

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

Criminal Law- Indian Penal Code,1860- Section 201- To constitute an offence under Section 201 I.P.C. there must be disappearance of some evidence of the commission of offence; removing the corpse of a murdered man from the scene of murder to another place does not come under Section 201 as the removal does not cause the disappearance of evidence of commission of the murder. Section 201 will apply only when the false information touching the offence with intent to screen the offender is given to those interested in brining (*sic*) the offender to justice.

Mere removing the deceased from one place to another will not amount to the offence u/s 201 IPC as the said section will come into play only when evidence is destroyed or false information is given to screen the offender from legal punishment.

Indian Evidence Act, 1872 – Section 106- There is cogent and clinching evidence of P.W.-1, Anand Singh, P.W.-2 Ashish Malik and P.W.-5 Manoj Kumar and the accused has failed to adduce iota of evidence in his favour with regard to the deceased having separated from him, therefore, it was also in the knowledge of the accused as to why or for what reason he had done the deceased to death. Merely on the basis of the subsequent conduct of the accused the trustworthy evidence of the witnesses on record cannot be disbelieved. It is evident that on 15.02.2004, at around 1.30 p.m. accused had taken the deceased along with him from his house to the filed which is situated at a distance of one kilometre from the village to collect fodder, but and had returned to the house of Ashok all alone- Accused has not denied that he had not taken the deceased from the house towards the field to collect the fodder and has also not taken a defence that on way from the house of Ashok to the sugar cane field deceased had parted his company. In such circumstances, the inference has to be drawn against him that he had killed the deceased in the sugar cane field. Accused has miserably failed to rebut the presumption under Section 106 of Evidence Act.

Where it is established that the deceased had left in the company of the accused and was found dead thereafter, then the said fact being in the special knowledge of the accused the burden of proof lay upon him to explain the circumstances under which the deceased met his death, failing which adverse presumption shall be taken against the accused. (Para 18, 19, 40, 41, 43)

Criminal Appeal rejected. (E-3)

Case Law/ Judgements relied upon:-

1. Suraj Singh Vs St. of U.P., 2008 (11) SCR 286

2. Sharad Birdhi Chand Sarda Vs St. of Maha., (1984) 4 SCC 116

(Delivered by Hon'ble Syed Waiz Mian, J.)

1. This Jail Appeal under Section 383 Cr.P.C. has been filed by appellant/accused, Gulam Rashul, through Senior Superintendent of Jail, Agra, against judgment and order dated 30.06.2005, passed by Additional Sessions Judge, Court No. 10, Ghaziabad, in Session Trial No. 576 of 2004, relating to Case Crime No. 37 of 2004, under Sections-302 and 201 I.P.C., Police Station-Muradnagar, District-Ghaziabad, whereby, accused appellant has been convicted under Sections 302 and 201 IPC. Under Section 302 IPC, he has been sentenced to undergo Rigorous Imprisonment for life with a fine of Rs. 5,000/-and in the event of default in payment of fine, he has to further undergo six months imprisonment. Under Section 201 IPC, he has been sentenced to undergo Rigorous imprisonment for three years with a fine of Rs. 1,000/- and in the event of default in payment of fine he has to further undergo one month imprisonment. Both sentences are directed to run concurrently.

2. Heard Shri Abhinav Jaiswal, learned Amicus Curiae for the appellant/accused and learned A.G.A. for the State and perused the record.

3. Brief facts of the prosecution story unfolds as under:

4. One Anand Singh- informant, on 15.02.2004 at about 1.30 p.m. to 5.00 p.m., presented a written First Information Report, at Police Station-Muradnagr, District-Ghaziabad, alleging therein that accused Gulam Rashul, who is a native of District-Samastipur, District-Bihar, is a servant of his brother Ashok. Today, he demanded Rupees 500/- on credit from his employer Ashok, who told him that he will lend the amount tomorrow and directed him to go to field to collect fodder. The accused at around 1.30 p.m. took Gaurav, son of Ashok, aged about 9 years, with him to the field but Gulam Rashul, at around 5 p.m., returned all alone without fodder. His nephew was also not accompanying him, therefore, informant and other interrogated him about Gaurav to which he admitted to have killed him in the field of Kripal by strangulation. He had also disclosed that the dead body of Gaurav was lying in the Sugar cane field. Villagers, Ashish Malik, Manoj and others had seen the deceased in the company of accused while he was on his way to sugar cane field. Gulam Rashul has killed his nephew.

5. On the basis of written First Information Report-Paper No. Ka-1, case at Crime No. 227 of 2004, under Sections 302 and 201 I.P.C. came to be registered at the Police Station-Muradnagar, District-Ghaziabad, against the appellant/accused and the substance of First Information Report was entered in the General Diary on the same day by Head Moharrir 270-Chatar Singh, and the investigation was handed over the the investigating officer, who took over the investigation and ensued it.

6. During investigation the inquest over body of the deceased after appointing "Panchan' was conducted and papers along with other formalities, were also prepared.

7. The investigating officer inspected the place of occurrence at the instance of

the informant and sketched site plan-paper no. Exhibit-Ka-11, on the spot and the Investigation Officer has recorded the statements of the informant and other witnesses.

8. To ascertain the real cause of death of the deceased, the dead body of the deceased was sent to mortuary.

9. On 16.02.2004, Doctor Rajendra Prasad, had conducted post mortem over the body of the deceased and in the autopsy report he has mentioned that the cause of death of the deceased was asphyxia as a result of throttling.

10. The investigating officer after collecting the evidence under Section 161 Cr.P.C., against the accused, concluded that the appellant/accused has killed the deceased and in view of the collected evidence, during investigation, he has submitted charge sheet against the appellant/ accused on 04.02.2004.

11. Charges against the appellant/accused under Section 302 and 201 I.P.C. were framed, by the Additional Sessions Judged, F.T.C. Court No. 2, vide order dated 01.06.2004 which has been denied by the appellant and claimed tried.

12. In order to prove charges, the prosecution has examined P.W.1-Anand Singh, P.W.-2 Ashish Malik, P.W.3-Nand Kishore, P.W.4-Narendra Singh, P.W.5-Manoj Kumar, P.W.6- Head constable Chatar Singh, P.W.7- Doctor Rajednra Prasad (Radiologist) and P.W.8-O.P. Yadav.

13. Statement of the appellant accused Gulam Rashul, under Section 313 Cr.P.C. was recorded in which he has denied the oral as well as documentary evidence on record and has also stated that the same is false. He has further stated that the witnesses have deposed against him on account of enmity.

14. After hearing the learned amicus curiae for the appellant/accused and learned ADGC for both the parties, learned trial court, vide impugned judgment and order dated 30.06.2005 has convicted the accused and also sentenced him under Sections 302 and 201 IPC. Under Section 302 IPC, he has been sentenced to undergo Rigorous Imprisonment for life with a fine of Rs. 5,000/- and in the event of default in payment of fine, he has to further undergo six months imprisonment. Under Section 201 IPC, he has been sentenced to undergo Rigorous imprisonment for three years with a fine of Rs. 1,000/- and in the event of default in payment of fine he has to further undergo one month imprisonment. Both sentences are directed to run concurrently.

15. In the First Information Report, informant-Anand Singh, has not disclosed whether at the time of request of accused to lend him Rupees 500/-, on credit, he was present in the house or not.

16. In the First Information Report, Exhibit Ka-1, it is specifically described that in the evening at about 5.00 p.m. when the appellant/ accused returned all alone and on his admission of murder of his nephew, the informant along with other had gone to the field. Perusal of First Information Report reflects that the informant was present with others at 5.00 p.m. when the appellant had returned from the field all alone.

17. Learned trial Court has also recorded the conviction of the

appellant/accused under Section 201 I.P.C. and sentenced him, accordingly.

18. It is manifested from the First Information Report and other material on record that the appellant had taken the deceased with him to collect fodder and had returned to the house of his employer, Ashok, without fodder all alone. Ashok inquired from him about his son to which he admitted that he had killed him and the dead body of the deceased was found, on the same day, lying in the sugar cane field. There is no evidence on record that appellant/accused had concealed the dead body of the deceased or the identity of the deceased. It is an admitted fact that the deceased was not killed brutally but by strangulation. There is no evidence on record to show that how the deceased was throttled,
but, as said above, appellant/accused had himself told Ashok, in the presence of the witnesses that he had strangulated the deceased, therefore, we do not find any evidence on record to show that the appellant/accused had tried to screen himself from the legal punishment or he had misled the informant or any one. There is no evidence to establish that appellant had caused any evidence of the commission of crime i.e. murder, to disappear. Section 201 I.P.C. postulates that :

" Section 201- Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false, shall if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine;"

19. In our view to constitute an offence under Section 201 I.P.C. there must be disappearance of some evidence of the commission of offence; removing the corpse of a murdered man from the scene of murder to another place does not come under Section 201 as the removal does not cause the disappearance of evidence of commission of the murder. Section 201 looks upon a person giving false information with intent to screen an offender as an accessory after the fact and makes him culpable as an offender committing an offence against public justice. Section 201 will apply only when the false information touching the offence with intent to screen the offender is given to those interested in brining the offender to justice.

20. Since there is no evidence pertaining to offence under Section 201 I.P.C., therefore, the conviction under the aforesaid section by learned trial Court is erroneous, perverse and without any evidence, therefore, the conviction of the appellant/accused, under Section 201 I.P.C. cannot be upheld against the appellant and as such the appellant/accused Gulam Rashul is accordingly acquitted of the charge under Section 201 I.P.C.

21. P.W.1 Anand Singh, has narrated the averments of the First Information Report in his examination in chief.

22. P.W.-1 Anand Singh, in his cross examination has stated that Ashok is his elder brother. Ajai and Arun are also older to him, he is youngest. He and Arun are engaged in milk business, whereas, Ashok

is doing agriculture. All of them are living in a joint family. Next he has deposed that at 5.00 p.m. all his brothers along with him were present in the house. He has further stated that among the brothers, no partition has taken place. It is reflected that they are living in a common house. However, no specific question in this regard has been put to the witnesses. Therefore, it cannot be denied that about the incident, P.W.-1 Anand Singh had knowledge of the incident as has been alleged in the First Information Report- Exhibit-Ka-1.

23. P.W.-1 Anand Singh, has also stated in his examination that the dead body of the deceased was found in the sugar cane field; he and other had gone there; the face of the deceased was covered with cloth and his hands were at his back; his back was stained with soil; dead body was lying straight; there was no sign of injury over body; it was 7-7.30 p.m; the field is situated at a distance of one kilometer from the village.

24. Thus, P.W.-1 Anand Singh, has corroborated the allegations contained in the First Information Report-Exhibit Ka-1. There is no inconsistency in his oral account.

25. Eye witness-P.W.-2 Ashish Malik has stated in his examination in chief that he knew Ashok Kumar. He is an agriculturist. Accused Gulam Rashul was his servant. The incident had occurred on 15.02.2004. On 15.02.2004, Gulam Rashul had asked Ashok to lend him money but instead of paying him the said amount, Ashok had directed him to collect fodder. Gaurav, son of Ashok, had also accompanied the accused. At around 1.30 p.m., he had seen Gaurav in the company of Gulam Rashul. Deceased was 9 years old. In the evening Gulam Rashul did not collect fodder from the field and at that time, Gaurav was also not with him. At around 5.00 p.m. Gulam Rashul was asked about Gaurav to which he had admitted that he had killed the deceased by strangulating him and dead body of the deceased was lying in the field. He along with others had gone to see the dead body of the deceased and in the field, dead body of the deceased was found lying.

26. P.W.-1-Anand Singh, neither in the First Information report, Exhibit Ka-1, nor in his ocular evidence has stated that the accused had demanded Rs. 500/- from Ashok in his presence. Therefore, the deposition of P.W.-2 Ashish Malik, in this connection is not direct and he has not disclosed in his evidence who had narrated him the incident, however, he has corroborated the averments of First Information Report-Exhibit Ka-1 and the testimony of P.W.-1 Anand Singh that he had seen the deceased in the company of accused on 15.02.2004, at around 1.30 p.m. and at 5.00 p.m. accused had disclosed to the informant, Ashok and others about the killing of the deceased. At that time also P.W. 2 Ashish Malik was not present. However, as far as his testimony regarding the facts that he had seen the deceased in the company of accused at around 1.30 p.m. and he had gone along with others to see the dead body of the deceased in the field at 5.00 p.m. is concerned is trustworthy as it finds support from allegations in the First Information Report and also the testimony of P.W.-1 AnandSingh.

27. P.W.-2-Ashish Malik has also admitted in his cross examination that in his presence accused had not requested to lend the money on 14.02.2004, nor on the

following day he had demanded Rs. 500/- from Ashok on credit, he had come to know about it.

28. P.W.-2 Ashish Malik has not disclosed in his cross examination as to who had apprised him about the request of accused to Ashok to lend Rs. 500/- on credit. However, P.W.-2 Ashish Malik, in his remaining cross examination, has categorically stated that he had seen the accused along with Gaurav at that time while he was returning from field; other persons had also witnessed the deceased Gaurav in the company of the accused; he did not see the accused when he had returned from the field. He has also denied the suggestion put on behalf of the accused that it would be true to say that he had not seen the deceased Gaurav in the company of the accused. He has further denied that he is deposing for being co-caste of P.W.-1.

29. P.W.-5 Manoj Kumar has stated in his cross examination that in his presence, accused had requested to lend Rs. 500/- at around 8 a.m. on credit but, in our opinion this piece of evidence of this witness does not inspire confidence because neither in the First Information Report-Exhibit Ka-1, nor P.W.-1 Anand Singh, nor P.W.-2 Ashish Malik, has stated that during the demand of money by the accused to Ashok Kumar, D.W.-5 Manoj Kumar was present. However, P.W.-5 Manoj Kumar, in his cross examination unequivocally has stated that he had seen the accused along with Gaurav. He has also admitted that accused had not returned with fodder, nor he had seen accused while he was returning from field to the village. He has admitted that he had not gone to the field to see the dead body of the deceased, nor he had accompanied the informant to the police station. It is wrong to suggest that he has been pressurized to depose. As such, P.W.-2 Ashish Malik and P.W.-5 Manoj Kumar, have candidly stated, in their cross examination that on 15.02.2004, at around 5.00 p.m. they had seen the deceased in the company of accused while they were coming from field towards village. P.W.-2 Ashish Malik and P.W.-5 Manoj Kumar, have supported and corroborated not only the testimony of P.W.-1 Anand Singh but also the allegations contained in this regard in the First Information Report-Exhibit Ka-1.

30. Accused in his statement has stated that the witnesses have deposed against him on account of his enmity with them but on his behalf the testimony of P.W.-2 Ashish Malik and P.W.-5 Manoj Kumar has not been confronted in their cross examination that they were inimical to him or they have deposed against him due to animosity. Further, in support of alleged enmity, no oral or documentary evidence has been adduced, therefore, no enmity prior to incident of accused/appellant with P.W.-1 Anand Singh, P.W.-2 Ashish Malik and P.W.-5 Manoj Kumar has been established.

31. P.W.-7, Dr. Rajendra Prasad, radiologist, has stated in his examination that on 16.02.2004, during his posting at mortuary, he had conducted the post mortem over the dead body of the deceased-Gaurav, who had been identified by Constable Narendra Kumar and Constable Manoj Kumar. He has also adduced evidence in detail pertaining to autopsy report-Exhibit Ka-9 and in this connection he has admitted that the said report Exhibit-Ka-9 was in his writing and signature.

32. P.W.-7 Dr. Rajendra Prasad has also deposed in his testimony that the death of the deceased was caused approximately

one day before, on the basis of examination of the dead body of the deceased, he has concluded that the death of the accused was caused due to asphyxia as a result of throttling.

33. Evidence of P.W.-7 Rajendra Prasad, lends credence to the evidence of P.W.-1 Anand Singh, P.W.-2 Ashish Malik and P.W.-5 Manoj Kumar that the death of the deceased has been caused due to throttling. These witnesses have candidly stated in their statements that no mark of injury was found on the body of the deceased and Gaurav was throttled by the appellant/accused. However, P.W.-1, Anand Singh, P.W.-2 Ashish Malik and P.W.-5 Manoj Kumar, are not eye witnesses but P.W.-1 Anand Singh has stated that accused had taken the deceased along with him from Ashok's house to the field to collect fodder, whereas, P.W.-2 Ashish Malik and P.W.-5 Manoj Kumar had seen the deceased in the company of accused at around 5 p.m. on 15.02.2004, accused on his return from the field to house the appellant had admitted before Ashok Kumar and P.W.-1 Anand Singh, that he had killed the deceased by strangulating him, thereafter, on the admission of killing of the deceased by the accused, P.W.-1 Anand Singh and P.W.-2 Ashish Malik, had gone to the spot at around 7.00 p.m. and they had seen the dead body of Gaurav lying in the sugar cane field, therefore, time of last seen on 15.02.2004, was at 5.00 p.m. and on the same day the dead body of the deceased was seen by the informant P.W.-1 Anand Singh and P.W.-2 Ashish Malik, at around 7.00 p.m. on 15.02.2004, therefore, between the evidence of last seen and the time on seens the dead body is in close proximity, and accused in his statement under Section 313 has not stated that the appellant/accused had left the deceased or had separated from him, nor in this regard P.W.-1, Anand Singh, P.W.-2 Ashish Malik and P.W.-5 Manoj Kumar, have been confronted.

34. Hon'ble Apex Court has observed consistently that in a criminal case based on the circumstantial evidence, chain of circumstances must be complete and on completion of such chain, only one conclusion can be drawn that it is only the accused who had committed the crime.

35. In ***Suraj Singh vs. State of U.P., reported in 2008 (11) SCR 286*** the Hon'ble Apex Court has held as follows:

"The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the "credit" of the witnesses; their performance in the witness box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

36. In the case of ***Sharad Birdhi Chand Sarda vs. State of Maharasthra (1984) 4 SCC 116,*** in paragrah 153, Hon'ble Apex Court has laid down five golden principles (Panchsheel). Para 153 is reproduced as follows:

"A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra where the following observations were made:

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say. they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved,

and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

37. In a case that rests upon circumstantial evidence motive is a relevant factor but is not essential if proved otherwise. We have seen that there is cogent and clinching evidence of P.W.-1, Anand Singh, P.W.-2 Ashish Malik and P.W.-5 Manoj Kumar and the accused has failed to adduce iota of evidence in his favour with regard to the deceased having separated from him, therefore, it was also in the knowledge of the accused as to why or for what reason he had done the deceased to death. There was no prior animosity between the accused with deceased and his family members, and accused has failed to prove any such prior enmity.

38. It was also submission of the learned Amicus curiae, on behalf of the appellant that had accused killed the deceased then he would not have returned from the village to the house of his master/ employer. In this connection the learned A.G.A. has contended that the appellant/accused appears to have returned to the house so that he can set up a defence of innocence.

39. In our view merely on the basis of the subsequent conduct of the accused the trustworthy evidence of the witnesses on record cannot be disbelieved.

40. On the appraisal of the evidence on record it is evident that on 15.02.2004, at around 1.30 p.m. accused had taken the deceased along with him from his house to the filed which is situated at a distance of one kilometre from the village to collect fodder, but and had returned to the house of Ashok all alone; while he along with the deceased was going towards the field, P.W.-2 Ashish Malik and P.W.-5 Manoj Kumar, had witnessed them. Further, accused had confessed on 15.02.2004, at around 5.00 p.m. to Ashok and others about killing of the deceased and the dead body, as referred above was found in the sugar cane field at around 7.00 p.m. Accused has not denied that he had not taken the deceased from the house towards the field to collect the fodder and has also not taken a defence that on way from the house of

Ashok to the sugar cane field deceased had parted his company. In such circumstances, the inference has to be drawn against him that he had killed the deceased in the sugar cane field.

41. It is for the prosecution to prove the involvement of the accused in the commission of the crime beyond all reasonable doubts. In the present case the prosecution has successfully completed the chain of circumstances. The fact that what happened to the victim after he was lastly seen by P.W.2-Ashish Malik, P.W.-5-Manoj Kumar, was within the knowledge of the accused but he has not spilled beans about the fact which was specifically in
his knowledge.

42. Section 106 of the Indian Evidence Act is as follows:

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

43. Accused has miserably failed to rebut the presumption under Section 106 of Evidence Act.

44. Hence, applying the principles laid down by the Hon'ble Apex Court in the aforesaid judgments and having regard to the totality of facts and circumstances of case, nature of offence and the manner in which it was executed or committed, we find that conviction of appellant under Section 302 I.P.C. is proper and justified in the law and the impugned judgment and order is not excessive or exorbitant and no question arises to interfere in the matter on the point of punishment imposed upon him.

45. In view of the above facts and circumstances, impugned judgment and order dated 28.03.2011 deserves to be affirmed to the extent of conviction and sentence of appellant under Section 302 I.P.C. and appeal is liable to be dismissed to that extent. Ordered accordingly.

46. In the result, the Criminal Appeal is allowed partly to the extent it relates to the conviction under Section 201 I.P.C.

47. Impugned judgment and order dated 28.03.2011, is hereby confirmed/affirmed to the extent of conviction of appellant under Section 302 I.P.C. The appellant, who is in jail, shall serve out the sentence awarded to him by the Trial Court.

47. Copy of this order along with lower Court record be sent to Court concerned forthwith.

48. A copy of this order be also sent to Appellant through concerned Jail Superintendent.

49. Shri Abhinav Jaiswal, learned Amicus Curiae, for his assistance, is entitled to fee, assessed at Rs. 21,000/-, to be paid by the State Government.

(2023) 1 ILRA 978
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.12.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 7478 of 2018

Ajeet Singh Constable
...Appellant (In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Appellant:

Sri Rajesh Kumar Singh, Sri Rajiv Lochan Shukla, Sr. Advocate, Sri Tarun Kumar Srivastava, Sri Prabhu Tripathi

Counsel for the Respondents:
G.A., Sri Pavan Kumar Srivastava, Sri R.B. Sahai, Sri Sanjay Srivastava, Sri Shailendra Kumar Dwivedi

Indian Evidence Act,1872 - Section 3- This is not a case where there are minor inconsistencies in the statements of the victim about commissioning of the offence of rape by the accused-appellant upon her, but it is a case where the victim has developed a new story for the first time when her statement was recorded under Section 164 Cr.P.C., i.e. after a month or more about the commissioning of rape upon her by the accused-appellant- The medical report otherwise does not support the commissioning of rape against the victim as the Doctor opined that her hymen was intact and no sign of external injury has been found- There is no FSL report or DNA report with regard to victim, hence the offence of commissioning of rape could not be ascertained- In the facts of the present case the solitary testimony from the prosecution side is of the victim herself but upon a deeper evaluation of the statement of the victim recorded under Section 161 and 164 Cr.P.C. and the statement given before the court below, we find that there is improvement in the statements of the victim after her statement was recorded under Section 161 Cr.P.C. on the same day i.e. date of incident and such development or improvement in the statement of the victim amounts to major improvement, which renders the testimony of P.W.1/victim unreliable- Where the previous statement and the evidence before the court below are so inconsistent and irreconcilable with each other than both cannot co-exist, therefore, it can be said that the previous statement contradicts the witness with the evidence given by him/her before the Court.

Although the conviction of the accused can be secured upon the solitary testimony of the prosecutrix but where such testimony has major contradictions and improvements going to the root of the case of the prosecution and is further not corroborated by the medical and other evidence, then no reliance can be placed upon such testimony. (Para 24, 40, 41, 45, 46)

Criminal Appeal allowed. (E-3)

Case Law/ Judgements relied upon:-

1. Sham Singh Vs St. of Har., 2018 SCC OnLine SC 1042

2. State Vs Saravanan , (2008) 17 SCC 587

3. Mahendra Pratap Singh Vs St. of U.P. (2009) 11 SCC 334

4. Sunil Kumar Sambhudayal Gupta & ors. Vs St. of Maha. (2010) 13 SCC 657

5. Dola @ Dolagobinda Pradhan & anr. Vs St. of Odisha (2018) 8 SCC 695

(Delivered by Hon'ble Shiv Shanker Prasad, J.)

1. This criminal appeal is directed against the judgment and order dated 12.11.2018, passed by the Additional Sessions Judge-VIII, Fatehpur in Special Trial No. 110 of 2015 (State vs. Ajeet Singh Constable); whereby the accused-appellant has been convicted under sections 376 IPC read with Section 3 (ii) (v)/ 3 (i) (xii) SC/ST Act and Section 5/6 POCSO Act and consequently sentenced to rigorous life imprisonment along with fine of Rs.20,000/- for the offence under Section 6 of POCSO Act and in default thereof, he has to further undergo 6 months additional simple imprisonment; rigorous life imprisonment along with fine of Rs.20,000/- for the offence under Section 3 (ii) (v) SC/ST Act and in default thereof he

has to further undergo 6 months additional simple imprisonment; and 5 years rigorous imprisonment along with fine of Rs.5000/- for the offence under Section 3 (i) (xii) SC/ST Act and in default thereof, he has to further undergo two months additional simple imprisonment with an observation that all the sentences are to run concurrently.

2. As per the prosecution case, on 9th September, 2015 a written report (Ext. Ka-8) was given to the Police Station Malva, District Fatehpur by the first informant, namely, Kallu Kori (PW-2) stating that on 9th September, 2015, at about 4:30 a.m. in the morning, the informant's daughter aged about 16 years had gone behind the house to ease herself then accused Ajit Singh, Constable posted in Police Station-Kalyanpur, who was sitting in an ambush, dragged his daughter to the field by gagging her mouth and raped her. When the gagging eased, the victim raised an alarm. After hearing her shrieks, informant's wife rushed to the spot and the accused-appellant ran away to the G.T. Road through the paddy field. At the same time, the first informant/complainant/P.W.-2 was also easing himself on the side of the road in front of Malva Police Station and when he asked the accused, he started running and the first informant/complainant/P.W.-2 chased him. The accused-appellant was not able to run as his feet were covered with mud and the first informant held the neck of the accused-appellant at Itraura Mod, G.T. Road. The accused-appellant however escaped from the grip of the first informant/complainant by sliding off his T-shirt and vest.

3. On the basis of the aforesaid written report a first information report (Ex.Ka.9) was lodged on 9th September, 2015 at 08.15 a.m., which was registered as Case Crime No. 0235 of 2015, under Section 376 IPC, Section 3 (ii) (v)/ 3 (i) (xii) of SC/ST Act and Section 3/4 POCSO Act. The chik first information report has been prepared by Constable-828 Satya Prakash Mishra (P.W.-8). After registration of the aforesaid first information the Investigating Officer i.e. Bandana Singh, Deputy Superintendent of Police (P.W.-10) has recorded the statements of first informant (P.W.-2), and his wife under Section 161 Cr.P.C. and on the disclosure of the victim, he has also prepared the site plan. Thereafter P.W.-10 has taken possession of T-shirt, black lower pant, black Sameej and white underwear, which were worn by the victim. Thereafter P.W.-10 has sent the victim to the Women District Hospital for her medical examination along with Constable Vandana Dwivedi (P.W.-3).

4. Dr. Rani Bala Sharma (P.W.-4) examined the victim and performed the medical examination on 09.09.15. P.W.-4 has opined that after external and internal examination of the victim, she found no injury on the body of the victim. Hymen was found to be intact and that according to her, no opinion related to sexual assault could be given. To ascertain the correct age of the victim, she was sent to radiologist Dr. Manu Gopal (P.W.-5) who opined the victim to be of age 16-18 years. On the constitution of Medical Board, the victim was sent to Dr. Rekha Rani (P.W.-7) for re-examination on 23.09.15, where she found no internal and external injury on the body of the victim. P.W.-7 did not found any injury of pinching on the body of the victim and no injury or blood was found on the vagina of the victim. Hymen was found to be intact. In her opinion considering the

Forensic Science Laboratory's report, physical violence cannot be ruled out. Dr. Vinay Kumar Pandey, Chief Medical Officer, Fatehpur (P.W.-6) who was the Chief Medical Officer opined that on the basis of medical report submitted by the board, age of victim is found to be 16 years.

5. The investigation proceeded thereafter and statement was recorded of the victim under Section 161 Cr.P.C. and after completing necessary formalities as provided under Chapter-XII C.P.C., charge-sheet came to be submitted on 7th November, 2015 (Exhibit-Ka-15) before the court concerned against the accused appellant under Section 376 IPC, Section 3 (ii) (v)/ 3 (i) (xii) of SC/ST Act and Section 3/4 POCSO Act on which the Magistrate concerned took cognizance and committed the case to Court of Sessions.

6. On 18th February, 2016, following charges were framed by the Court of Special Judge (POCSO Act)/Additional Sessions Judge/Fast Track Court, Fatehpur:

"मै आदिल आफताब अहमद, विशेष न्यायाधीश (लैंगिक अपराधों से बालकों का संरक्षण अधिनियम)/अपर सत्र न्यायाधीश/फास्ट ट्रैक कोर्ट, फतेहपुर आप अभियुक्त

अजीत सिंह

को निम्न आरोप से आरोपित करता हूँ–

प्रथम– *यह कि दिनांक 09.09.2015 को प्रातः 4.30 बजे स्थान बमुकाम वादी के घर के पीछे के खेत वहद ग्राम मलवॉ थाना मलवॉ जिला फतेहपुर में आप जो लोक सेवक है, ने वादी मुकदमा कल्लू कोरी की अवयस्क 16 वर्षीय पुत्री दिव्या देवी, जो अनुसूचित जाति कोरी है, के साथ लैंगिक हमला/बलात्संग किया। इस प्रकार आपने भारतीय दण्ड संहिता की धारा 376 सपठित धारा 3(2)(5)/3(1)(12)अनु0जाति/जनजातिअत्याचार निवारण अधिनियम के अन्तर्गत दण्डनीय अपराध कारित किया है, जो इस न्यायालय के प्रसंज्ञान में है।*

द्वितीय– *यह कि उक्त दिनांक समय व स्थान पर आप जो लोक सेवक (पुलिस कर्मचारी) है, ने वादी मुकदमा कल्लू कोरी की अवयस्क 16 वर्षीय पुत्री दिव्या देवी के साथ गुरूतर प्रवेशक लैंगिक हमला किया। इस प्रकार आपने धारा 5/6 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, 2012 के अन्तर्गत दण्डनीय अपराध कारित किया, जो इस न्यायालय के प्रसंज्ञान में है।*

मैं एतदद्वारा निर्देश देता हूँ कि उपरोक्त आरोपों में आपका विचारण इस न्यायालय द्वारा किया जायेगा।"

7. The prosecution in order to establish the charge levelled against the accused-appellants, has relied upon following documentary evidences, which were duly proved and consequently marked as Exhibits:

"Written report dated 9.9.2015 has been marked as Exhibit-Ka-8; F.I.R dated 9.9.2015 has been marked as Exhibit-Ka-9; Site plan with index dated 9.9.2015 has been marked as Exhibit-Ka-13; Statement of the victim has been marked as Exhibit-Ka-1; Medicolegal Examination Report dated 9.9.2015 has been marked as Exhibit-Ka-2; X-Ray Report dated 16.09.2015 has been marked as Exhibit-Ka-4, X-Ray Report dated 23.09.2015 has been marked as Exhibit-Ka-3, Medicolegal Examination Report dated 23.9.2015 has been marked as Exhibit-Ka-7, Report of the Medical Board dated 24.09.2015 has been marked as Exhibit-Ka-6 and charge-sheet (original) dated 7.11.2015 has been marked as Exhibit-Ka-15."

8. The prosecution has also adduced oral testimony of following witnesses:-

"P.W.-1/ Victim, namely, Divya Devi; P.W.-2/ Informant, namely Kallu

Kori, P.W.-3, Women Constable, namely, Vandana Dwivedi, recorded the statement of the victim under Section 161 Cr.P.C. of which videography has been done and she has also recorded the majid bayan of the victim and also taken her to the hospital for medical examination, P.W.-4, namely Dr. Rani Bala Sharma, who has medically examined the victim; P.W.-5, namely, Dr. Manu Gopal, Radiologist; P.W.-6, namely, Dr. Vinay Kumar Pandey, Chief Medical Officer from whose order the medical board was constituted; P.W.-7, namely, Dr. Rekha Rani, a member of the Medical Board; P.W.-8, namely, Satya Prakash Misra, constable, who had typed the chik F.I.R.; P.W.-9, namely Dr. Rekha Misra, In-charge Principal, Government Girls Inter College, Malva, Fatehpur, who has certified the date of birth of the victim and P.W.-10 Vandana Singh, Deputy Superintendent of Police, the Investigating Officer."

9. After recording of the prosecution evidence, the incriminating evidence were put to the accused-appellant for confronting him with the same under Section 313 Cr.PC. In his statement recorded U/s 313 Cr.P.C. the accused appellant denied his involvement in the commissioning of the offence under Section 376 I.P.C. Sections 3 (ii) (v)/ 3 (i) (xii) S.C./S.T. Act and also Sections 5/6 POCSO Act and also the charges levelled against him. In the said statement, the accused-appellant has specifically stated before the trial court that since he always reprimanded the first informant/ P.W.-2 and that is why he has been implicated in this case to teach a lesson to him, and he is otherwise innocent.

10. From the materials placed on record it appears that the statement of the victim (P.W.-1) was recorded under Section 161 Cr.P.C. wherein she did not allege the commissioning of rape upon her by the accused-appellant but in the statement recorded under Section 164 Cr.P.C., which was recorded before the Magistrate concerned, she disclosed about commissioning of offence of rape upon her by the accused-appellant.

11. The trial court after relying upon the evidence adduced by the prosecution and recording its finding that the incident happened around 4:30 a.m. in the morning and after the incident, a quick first information report was registered within about quarter to four hours in the morning of the incident as evident from the evidence of the first informant/P.W.-2 and PW-8. The fact of rape by the accused-appellant has been conclusively proved by the evidence of the victim and admittedly the accused-appellant was working in Police Station-Malwan before the incident. The accused-appellant was known to the people of Malwan area. In the statement of the accused-appellant recorded under Section 313 Cr.P.C. it was said by him that he was entrapped in rivalry, but no rivalry was explained by the defence side, so that the presumption under section 29 of POCSO Act could not be dislodged. After perusal of all the above evidences, the offence punishable under Section 376 I.P.C. and Section 6 of POCSO Act has been found proved against the accused-appellant. On the basis of aforesaid finding, the trial court has come to the conclusion that against the accused-appellant Ajit Singh Sipahi for the offence punishable under section 376 of Indian Penal Code read with section 3 (ii) (v)/ 3 (i) (xii) of S.C./S.T. Act. And Section 5/6 POCSO Act, the prosecution has been successful in proving the allegation beyond reasonable doubt. Accordingly, the accused-appellant has been convicted under Section 376 of the Indian Penal Code read

with section 3 (ii) (v)/ 3 (i) (xii) of the S.C./S.T. Act and also Section 5/6 PCOSO Act and sentenced him to life imprisonment along with fine as referred to above.

12. Sri Rajiv Lochan Shukla, learned counsel for the accused-appellant submits that as per the prosecution version, the incident took place on 9.9.2015 at 4:30 A.M., whereas statement of the victim under Section 161 Cr.P.C. has been recorded by the Police in which she has stated that she went to ease herself behind her house and someone caught hold of her from behind and gagged her mouth. When the victim raised alarm her parents came there. Due to darkness, the victim was unable to recognise the accused. She has also stated that no wrongful act had been committed upon her. She has further stated that she did not see the person who gagged her mouth due to darkness.

13. Learned counsel for the appellant has argued that since the statement of the victim under Section 161 Cr.P.C. was recorded soon after the incident and has been exhibited and accepted by the witness in Court, the same is liable to be treated as a natural statement.

14. Learned counsel for the appellant has also argued that in the medical examination, which was conducted on 9.9.2015 at 6:15 P.M. she did not disclose the name of the person as to who had committed the alleged offence upon her. The Doctor opined that hymen of the victim was intact and no definite opinion regarding sexual assault could be given. In the report of the Medical Board which conducted the re-medical examination of the victim, the hymen of the victim was found to be intact. This examination was conducted on 23.09.2015 at 2:00 P.M. The Board has opined that there are no sign of use of force, however, final opinion is reserved pending availability of F.S.L. report but the Board has also opined that the sexual violence cannot be ruled out.

15. Learned counsel for the accused-appellant has also submitted that the statement of victim under Section 164 Cr.P.C. was recorded after long interval of the incident and the victim was living with her mother and father in their house. Statement under Section 164 Cr.P.C. and statement given before the court below by the victim were under the pressure and duress of the parents of the victim. There is material improvement in the aforesaid statements of the victim. He has further argued that when the accused-appellant was posted in Police Station Malva sometimes ago, he always reprimanded the first informant/P.W.-2 and annoyed of this the informant/P.W.-2 has implicated him in this forged and frivolous case. Accused-appellant is innocent and he has not committed any crime against the victim.

16. It is also argued that no F.S.L. report and D.N.A. test report is on record. The place where the accused-appellant was caught by the informant/P.W.-2 is also not shown in the site plan. The torch by which the accused-appellant was recognised by the victim, has not been recovered and produced before the trial court so that the same may be proved. According to the medical examination report no offence of rape as alleged by the prosecution has been committed by the accused-appellant upon the victim. Subsequent change of the stand by the victim does not find any corroboration from the materials available on record and, therefore, the trial court has grossly erred in relying upon the statement of the victim as P.W.-1 while her statement

ought to have been subjected to greater scrutiny. It is also argued that in such circumstances the conviction of the accused-appellant under Sections 376 IPC read with Section 3 (ii) (v)/ 3 (i) (xii) SC/ST Act and Section 5/6 POCSO Act cannot be legally sustained on the cumulative strength of aforesaid and the same is liable to be quashed.

17. Learned A.G.A. on the other hand has supported the prosecution version and submits that the statement of the victim is credible in the facts and circumstances of the case and since she has clearly disclosed about the commissioning of the offence of rape by the accused-appellant upon her, therefore, the trial court has not committed any error in holding the conviction of the accused-appellant under Sections 376 IPC read with Section 3 (ii) (v)/ 3 (i) (xii) SC/ST Act and Section 5/6 POCSO Act.

18. It is in the context of the above facts that the present appeal has come up before us for hearing.

19. We have considered the submissions made by learned counsel for the parties and have gone through the records of the present appeal especially the judgment and order of conviction and the evidence adduced before the trial court.

20. The only question to be addressed and determined in this appeal is whether the accusation of guilt arrived at by the Trial Court and the sentence awarded is legal and sustainable and suffers from no infirmity and perversity.

21. The facts as have been noticed above would clearly go to show that a first information report was lodged on 9.9.2015 on the written report of the first-informant/P.W.-2 wherein he has alleged that in the early morning the victim in order to go to her school went to ease herself behind her house and when she was easing herself, the accused-appellant caught hold of her from behind and gagged her mouth and dragged her to the field and committed rape upon her. On the fateful day of the incident, her statement under Section 161 Cr.P.C. has been recorded by Police Constable Vandana Dwivedi (P.W.-3) on the instruction of Investigating Officer i.e. P.W.-10 wherein the victim has stated that on the fateful day she went to ease herself behind her house and someone caught hold of her from behind and gagged her mouth. It has been further alleged that when the victim raised alarm, her parents i.e. the informant/P.W.-2 and his wife (mother of the victim) came on the spot. The victim did not see the face of that unknown person due to darkness and after that it was her father, who said that he was Ajit Singh Sipahi/Constable. She did not recognise the accused due to darkness. She has further admitted that the said statement has been given by her without any pressure or duress.

22. After long interval, the statement of the victim was recorded under Section 164 Cr.P.C. which has been exhibited as Exhibit-Kha-2, wherein she has made improvement and stated that when she went to ease herself behind her house, she had a torch and in the light of the same, she recognised the accused-appellant Ajit Singh Sipahi, who caught hold of her from behind and gagged her mouth and dragged her to the paddy field and committed rape upon her. Somehow or other when the victim could speak, she raised an alarm on which her mother came there and seeing them the accused left the victim and ran away. When the accused was running

away, the father of the victim also came there and he tried to chase him but he could not apprehend him.

23. The victim has been examined as P.W.-1 before the trial court and she has admitted in her cross-examination that her statement under Section 164 Cr.P.C. was recorded after one month from the date of alleged incident and during this period she was living with her parents. She has also stated that in the statement under Section 164 Cr.P.C. she has not disclosed before the Magistrate concerned that the accused inserted his penis in her vagina. She has further stated that her father (Informant/P.W.-2) called accused Ajit Singh Sipahi but he ran away and did not stop. Victim herself has admitted that when her statement under Section 161 Cr.P.C. was recorded, videography of the same was also done. The victim has reaffirmed the contents disclosed in her statement under Section 161 Cr.P.C.

24. From overall evaluation of the statement of the victim recorded under Section 161 and 164 Cr.P.C. and the statement given before the court below, we find that this is not a case where there are minor inconsistencies in the statements of the victim about commissioning of the offence of rape by the accused-appellant upon her, but it is a case where the victim has developed a new story for the first time when her statement was recorded under Section 164 Cr.P.C., i.e. after a month or more about the commissioning of rape upon her by the accused-appellant. In the statement recorded under Section 161 Cr.P.C. on the date of incident, she did not allege commissioning of the offence of rape upon her by the accused-appellant, meaning thereby that after some interval, she developed the story about the commissioning of rape against her by the accused-appellant, which is not trustworthy and creates doubt. The medical report otherwise does not support the commissioning of rape against the victim as the Doctor opined that her hymen was intact and no sign of external injury has been found. No definite opinion regarding sexual assault has been given by the doctor. The torch in the light of which the accused-appellant was recognised by the victim has not been recovered and produced before the court below. It is also noteworthy that victim (P.W.-1) has stated in her cross-examination that at the time of incident there was water and slurry in the paddy field where the offence was alleged to have been committed. The victim has stated that the place where she went to ease herself was dry, there was no slurry and water. It is improbable to conceive that when it was dark at about 4:30 A.M. in the morning, there was any need for the accused-appellant to maintain secrecy and drag her to the paddy field where there was water and slurry to commit the offence of rape upon the victim. This assertion also adds doubt to the prosecution story.

25. It is also alleged by the prosecution that the accused-appellant caught hold of the informant on the road but this place is not shown in the site plan by the Investigating Officer i.e. P.W.-10, which also creates doubt in prosecution version. Mud stained clothes and slippers of accused which are alleged to have been recovered from the place where the accused-appellant was caught by the informant are also not produced before the court below and proved.

26. P.W.-2 Kallu Kori (informant) has also been examined by the prosecution. He has admitted in his cross-examination that

it is true that he had not seen the accused-appellant Ajit Singh Sipahi commissioning the rape upon his daughter (victim). Therefore, he is not the eye witness. His statement is simple hear-say evidence. He has admitted in his cross-examination that he has not handed over the clothes of victim to the police. No FSL report with regard to clothes has been submitted by the prosecution either.

27. P.W.-3 Women Constable Vandana Dwivedi has been examined. She has stated in her cross-examination that Exh. Kha-1 (statement of the victim recorded under Section 161 Cr.P.C.) has been recorded by her on the dictation of the victim, of which videography was being done. The victim has also signed on said statement and the same has also been read to her. The statement of the victim recorded under Section 161 Cr.P.C. has been exhibited and she has verified it.

28. She has further stated that in the open court when the C.J.M. asked the victim with regard to rape, she has stated that no offence of rape was committed upon her and she did not disclose anyone's name. Victim's statement under Section 164 Cr.P.C. was not recorded on that date. After some interval victim was again called for recording of her statement under Section 164 Cr.P.C. in which she alleged that the accused-appellant has committed the offence of rape upon her. This is clearly an improvement in the story of prosecution side.

29. P.W.-4 Dr. Rani Bala Sharma is the Doctor who has examined the injuries of the victim. She found that the hymen of the victim was intact and there was no injury either externally or internally on the body of the victim. There was also no injury on the private part of the body of the victim. Doctor has opined that the offence of rape was not committed upon the victim. No supplementary report was prepared nor any cloth of the victim was taken in possession.

30. P.W.-5 Dr. Manu Gopal, Radiologist, District Hospital, Fatehpur has also been examined and he has opined that the age of the victim at the time of incident was between 16 to 18 years. Though in the examination-in-chief P.W.-5 has stated that on 23rd September, 2015 the X-ray of the victim has been done by him and he has also stated that before 23rd September, 2015 i.e. on 10th September, 2015 he has done the X-ray of the victim but in the cross-examination he has stated that he has done the X-ray of victim only on 23rd September, 2015 and has not done the same on 10th September, 2015.

31. P.W.-6 Dr. Vinay Kumar Pandey, who was the Chairman of the Medical Board has opined the age of the victim at the time of incident was about 16 years. It may be 17 to 18 years. He has alleged that this board was constituted by the order of the District Magistrate dated 15.9.2015.

32. P.W.-7 Dr. Rekha Rani was also the member of the Board. She opined that the hymen of the victim was intact at the time of medical examination. She further opined that there are no sign of use of intercourse, however, final opinion was reserved, pending availability of FSL report. From perusal of the original records and other documents, which are available at the stage of the appeal there is no FSL report or DNA report with regard to victim, hence the offence of commissioning of rape could not be ascertained. P.W.-7 has also stated that there was no pinching injury on

the body of the victim and there was no injury and bleeding on the private parts of the body of the victim.

33. P.W.-8 Constable Satya Prakash Misra has also been examined by the prosecution. He has stated in his cross-examination that the informant Kallu Kori has not provided him any clothes of accused or victim which were wore by them at the time of the incident, during writing of the F.I.R.

34. P.W.-9 Dr. Rekha Misra, Acting Principal of Government Girls Inter College has also been examined. She has proved the date of birth of the victim, which is 6.5.2000.

35. P.W.-10 Bandana Singh, Deputy Superintendent of Police, who was Investigating Officer of the case has also been examined. She has stated that she took the clothes of the victim but with regard to the clothes of the victim or accused there is no FSL report on record. She has also corroborated in her cross-examination that in the medical report of the victim dated 9.9.2015 victim has not stated the name of the accused Ajit Singh Sipahi with regard to commissioning of offence of rape. Victim has also not disclosed the name of any one who has gagged her mouth from behind. She has also admitted that in both the medical reports there is no definite opinion about sexual assault upon the victim. She has also admitted that she has not prepared the memo of clothes which has been taken by her from the victim.

36. Apart from that statement of accused Ajit Singh Sipahi has been recorded under Section 313 Cr.P.C. by the court in which he has alleged that he is innocent and has not committed any crime upon the victim. He has reprimanded the complainant and that is why he has been falsely implicated in the present case by the complainant to teach a lesson. This statement of the accused-appellant finds support from the perusal of the evidence on record. Complainant Kallu Kori is vexatious litigant.

37. This fact has been admitted by the informant himself in his statement before the court that there is case crime no. 447 of 2013, under Section 302 I.P.C., P.S. Kotwali registered against him and there are four other litigations pending before the Court with regard to him and he has also admitted that he has filed complaint against one Dhirendra Kumar Jha before Mahila Ayog,

38. From perusal of admission with regard to implication of P.W.-2 in various cases, the possibility of the accused being falsely implicated cannot be ruled out. The accused-appellant was otherwise posted in the Police Station, till recently, where P.W.-2 had his shop and lived.

39. The law laid down by the Apex Court in the case of **Sham Singh Vs. State of Haryana reported in 2018 SCC OnLine SC 1042** can be summarized as under :

"An accused can be convicted under section 376 IPC on the basis of sole testimony of the prosecutrix, if such testimony is worthy of credence and inspires confidence and is of sterling quality then corroboration from other evidence is not required. But where the statement of prosecutrix suffers from material inconsistency, contradiction and does not inspire confidence, then some other material may be even short of

corroboration from other evidence collected during investigation is necessary."

40. In the facts of the present case the solitary testimony from the prosecution side is of the victim herself but upon a deeper evaluation of the statement of the victim recorded under Section 161 and 164 Cr.P.C. and the statement given before the court below, we find that there is improvement in the statements of the victim after her statement was recorded under Section 161 Cr.P.C. on the same day i.e. date of incident and such development or improvement in the statement of the victim amounts to major improvement, which renders the testimony of P.W.1/victim unreliable.

41. It is settled law that where the previous statement and the evidence before the court below are so inconsistent and irreconcilable with each other than both cannot co-exist, therefore, it can be said that the previous statement contradicts the witness with the evidence given by him/her before the Court.

42. In the case of **State v. Saravanan** reported in *(2008) 17 SCC 587* the Apex Court has opined as follows:

"The discrepancies in the evidence of eyewitnesses, if found to be not minor in nature, may be a ground for disbelieving and discrediting their evidence. In such circumstances, witnesses may not inspire confidence and if their evidence is found to be in conflict and contradiction with other evidence or with the statement already recorded, in such a case it cannot be held that the prosecution proved its case beyond reasonable doubt."

43. The aforesaid judgment has been followed by the Apex Court in the case of **Mahendra Pratap Singh Vs. State of U.P.** reported in *(2009) 11 SCC 334.*

44. Again the Apex Court in the case of **Sunil Kumar Sambhudayal Gupta & Others vs State Of Maharashtra** reported in *(2010) 13 SCC 657* in paragraph nos. 30 to 32 has held as follows:

"30. While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The Trial Court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate Court in normal course would not be justified in reviewing the same again without justifiable reasons.

31. Where the omission(s) amount to a contradiction, creating a serious doubt about the truthfulness of a witness and other witness also make material improvements before the court in order to make the evidence acceptable, it cannot be safe to rely upon such evidence.

32. The discrepancies in the evidence of eye-witnesses, if found to be not minor in nature, may be a ground for disbelieving and discrediting their evidence. In such circumstances, witnesses may not inspire confidence and if their evidence is found to be in conflict and contradiction with other evidence or with the statement already."

45. From the aforesaid, we are of the view that the evidence of victim is not reliable in the facts of the present case.

46. From the medical examination reports and the statements of the Doctors i.e. P.W.-4, P.W.-5, P.W.-6 and P.W.-7, it is apparent that the medical evidence does not support the prosecution case of rape upon the victim.

47. The issue of contradictions in the statement of the victim as well as the issue that medical evidence does not support the prosecution case have been well discussed by the Apex Court in the case of **Dola @ Dolagobinda Pradhan & Another Vs. State of Odisha** reported in *(2018) 8 SCC 695*. In paragraph-

*"36. **In our considered opinion, the Trial Court as well as the High Court have convicted the appellants without considering the aforementioned factors in their proper perspective. The testimony of the victim is full of inconsistencies and does not find support from any other evidence whatsoever. Moreover, the evidence of the informant/victim is inconsistent and self-destructive at different places. It is noticeable that the medical record and the Doctor's evidence do not specify whether there were any signs of forcible sexual intercourse.** It seems that the First Information Report was lodged with false allegations to extract revenge from the appellants, who had uncovered the theft of forest produce by the informant and her husband. The High Court has, in our considered opinion, brushed aside the various inconsistencies pointed out by us only on the ground that the victim could not have deposed falsely before the Court. The High Court has proceeded on the basis of assumptions, conjectures and surmises, inasmuch as such assumptions are not corroborated by any reliable evidence. **The medical evidence does not support the case of the prosecution relating to the offence of rape."***

(Emphasis added)

48. In view of the above discussions we find that the trial court was not justified in returning the finding of guilt against the accused-appellant on the basis of evidence led by the prosecution. Finding of the court below that the guilt of the accused-appellant has been proved beyond reasonable doubt is thus rendered unsustainable. We hold that the prosecution has failed to prove the guilt of the accused-appellant beyond reasonable doubt.

49. Consequently in the view of the deliberation held above this appeal succeeds and is allowed.

50. The judgment and order of conviction against the accused-appellant Ajeet Singh Sipahi dated 12.11.2018, passed by the Additional Sessions Judge-VIII, Fatehpur in Special Trial No. 110 of 2015 (State vs. Ajeet Singh Constable) is hereby set aside.

51. The accused appellant- Ajeet Singh Sipahi/Constable is clearly entitled to benefit of doubt . He is in jail since 5th November, 2018 and has already undergone four years and two months of incarceration, he is entitled to be released forthwith subject to compliance of Section 437-A Cr.P.C. unless he is wanted in any other case.

52. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Fatehpur henceforth, who shall transmit the

same to the Jail Superintendent concerned in terms of this judgment.

(2023) 1 ILRA 990
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.01.2023

BEFORE

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

Application u/s 378 No. 262 of 2017
and
Application u/s 378 No. 261 of 2017

Smt. Kalpana Gupta ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Rajesh Kumar Srivastava, Praveen Singh

Counsel for the Opp. Parties:
Govt. Advocate, Bhaskar Prasad Pandey, Manoj Sahu, Sandeep Srivastava

(A) Criminal Law – Criminal Procedure Code, 1973 - Sections 244, 246, 313, 377, 378, 378(1)(a), 378(1) (b), 378(2)(b), 378(4), 386, 397, 398, 399 & 401(5), - Indian Penal Code, 1860 - Sections - 120B, 405 &_406 : - Application for Special leave to Appeal – appeal for enhancement of the sentence - complaint of criminal breach of trust - maintainability of appeal/application - whether the complainant can file an appeal/special leave to appeal for enhancement of sentence - court held that, the complainant of a complaint case do not have any right to challenge inadequacy of the sentence passed by trial court - he/she can challenge the same by filing of a criminal revision before the appropriate court - thus, the instant appeal/application for grant of special leave is not maintainable - rejected accordingly.
(Para – 27, 31, 35, 36)

(B) Criminal Law – Criminal Procedure Code, 1973 - Sections 244, 246, 313, 377, 378, 378(1)(a), 378(1) (b), 378(2)(b), 378(4), 386, 397, 398, 399 & 401 - Indian Penal Code, 1860 - Sections 120B, 405 & 406 - Application for Special leave to Appeal – appeal against acquittal - complaint of criminal breach of trust - appreciation of evidence - respondent no. 3 & 4 died during pendency of the instant application thus, proceedings against them are abated - held, having perused the judgment of trial court in the background of the case as well as keeping settled legal position in this case, this court is of the view that the burden is always on the prosecution/complainant to prove the guilt of accused person(s) beyond reasonable doubt and if on a reasonable appreciation of evidence two views appears to be possible, then the view which is favourable to the accused persons(s) should be adopted - accordingly, the judgment of the court below is called for no interference - consequently, Special leave to Appeal is rejected.(Para – 44, 45, 46)

Appeal Dismissed. (E-11)

List of Cases cited:

1. Subhash Chand Vs St. (Delhi Administration), MANU/SC/0016/2013,

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

3. T. Jayarajan Vs P.R. Muhammed & ors., MANU/KE/0758/1999,

4. Sahab Singh Vs St. of Har., MANU/SC/0224/1990,

5. Darshan Lal v. Indra Kumar Mehta, 1980 All LJ 217,

6. Pratibha Rani Vs Suraj Kumar & ors., MANU/SC/0090/1985,

7. Topandas Vs The St. of Bombay, MANU/SC/0032/1955,

8. Parveen Vs The St. of Har., MANU/SC/1190/2021,

9. Ajmer Singh Vs St. of Pun., 1953 SCR 418,

10. Sanwat Singh & ors.Vs St. of Raj., AIR 1961 SC, 715,

11. Sadhu Sharan Singh Vs St. of U.P. & ors., 2016 Cr.L.J. 1908.

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

1. Heard Shri Rajesh Kumar Srivastava, learned counsel for the applicant/ appellant, Ms. Sonal Pandey, learned counsel for private respondent no.2 in application under Section 378 No. 262 of 2017 and for respondent no.2 and 5 in Application under Section 378 No. 261 of 2017 as well as learned AGA for the State and perused the record.

2. At the outset learned counsel for the applicant/ appellant submits that respondent no.3- Awadhesh Chandra Gupta and respondent no.4- Smt. Dhaneshwari Gupta had died during the pendency of the instant application/ appeal and the proceedings against them be abated.

3. Ms. Sonal Pandey, learned counsel appearing for respondents no. 2 to 5 in A, 378 No. 261 of 2017 does not dispute this fact, therefore the proceedings of application under Section 378 No. 261 of 2017 is abated so far as the respondent no.3- Awadesh Chandra Gupta and respondent no.4- Smt. Dhaneshwari Gupta are concerned.

4. Both above placed applications moved under Section 378(4) Cr.P.C. are connected with the same complaint case, whereby the accused persons / respondent nos.2 to 6 of Criminal Appeal No.262 of 2017 have been acquitted of all the charges and accused '' Santosh Kumar Gupta' has been acquitted of charge framed under Section 120B I.P.C. and convicted for offence under Section 406 I.P.C. and therefore for the sake of convenience both these applications are being disposed of by this common order.

5. Application under Section 378 No. 261 of 2017 as well as 262/2017 have been preferred by the complainant Smt. Kalpana Gupta requesting to grant special leave to appeal against the judgment and order dated 27.4.2017 passed by the Special Chief Judicial Magistrate, Lucknow in Complaint Case No. 9/2016, Smt. Kalpana Gupta Vs. Santosh Kumar Gupta and six others whereby only accused Santosh Kumar Gupta was convicted for committing offence under Section 406 IPC and sentenced accordingly and acquitted for charge under Section 120B I.P.C. and other accused persons, namely, Pradeep Kumar Gupta @ Tinkoo, Smt. Raj Km., Awadhesh Chandra Gupta, Smt. Dhaneshwari @ Vandana and Smt. Saroj were acquitted from the charges framed under Section 406/120B I.P.C.

6. Accused Shri Ram Gupta had died during the course of trial and proceedings against him were abated by the trial court, while as stated earlier accused Awadhesh Chandra Gupta and Smt. Dhaneshwari Gupta had died during the pendency of the instant proceedings and proceedings of this case have been abated against them.

7. Brief facts necessary for disposal of the instant proceedings, as are emerging from the record, are that the complainant Smt. Kalpana Gupta had filed a complaint before the Judicial Magistrate, Lucknow stating therein that the marriage of the complainant was solemnized with accused-Santosh Kumar Gupta on 29.11.1989 in accordance with the Hindu Rituals and at the time of her marriage her relatives and

other persons had given gifts for her use and a list of the same has been enclosed with the complaint.

8. It is further stated that all the gifts which were given to the complainant were entrusted in the custody of accused persons by the family members of the complainant and the accused persons had promised that they will handover the gifts to the complainant, however, after few days of the marriage, the behaviour of the accused persons had changed towards the complainant and accused no.1 (husband) started pressurizing the complainant to give all her salary to him and by pressurizing the complainant had withdrawn Rs. 7,600/- from her Bank Account and had given the same to the accused no. 5 and 6 for the purpose of construction of their house at Khurram Nagar, Lucknow.

9. It is also stated in the complaint that in the year 1991 on the occasion of Dashehra Festival all accused persons demanded Rs. 50,000/- from her and on refusal the complainant was not given food for many days and all her jewellary and clothes and other gifts given in the marriage were taken by the accused persons with the promise that they will return these gifts, clothes and jewelry till 28.2.1990 but they instead of returning the above mentioned articles to the complainant misappropriated the same which was "Stridhan' of the complainant and they are using the same illegally.

10. It is also stated that a notice was given to the accused persons by the applicant for returning all the items of her "Stridhan' but accused persons did not return her "Stridhan' and therefore all accused persons be summoned in the court and punished.

11. The trial court after recording the statement of complainant and her witnesses summoned the accused persons to face trial under Section 406 IPC read with 120-B IPC.

12. On the appearance of the accused persons the evidence of the complainant under Section 244 Cr.P.C. was recorded, wherein the statement of Smt. Kalpana Gupta (complainant) was recorded and in documentary evidence following documentary evidences were also produced:-

I. Notice sent by Shri C.B. Singh , Advocate on behalf of the complainant- Ext. Ka-1.

II. The acknowledgment of date 10.2.1992- Ext. Ka-2.

III. Copy of notice sent by Shri C.B. Singh, Advocate - Ext. Ka-3.

IV. The copy of acknowledgment - Ext. Ka-4.

V. Copy of the notice dated 29.4.2012- Ext. Ka-5.

VI. Copy of notice dated 7.5.91- Ext. Ka-6.

VI. Copy of notice dated 1.5.1992 Ext. Ka-7.

VII. Copy of receipt of registry Ext. Ka-9

VIII. Copy of receipt of registry dated 24.10.1989 Ext. Ka-10.

IX. Copy of receipt of registry dated 23.11.1989 Ext. Ka-11.

X. Copy of receipt of registry dated 29.11.1989, 24.11.1989, 27.11.1989 and 31.5.2015 Ext. Ka-12, Ka- 13, Ka-14 and Ka-15.

XI. List of articles given as "*Stridhan*' Ext. Ka-16.

XII. Complaint petition Ext.Ka-17.

13. Apart from the complainant whose statement was recorded under Section 244

Cr.P.C. as P.W.1. The statement of the prosecution witness no.2- Sanjay Kumar Gupta and P.W.3- Sunil Kumar Gupta was also recorded under Section 244 Cr.P.C.

14. The charges under Section 406 IPC and Section 120-B IPC were framed against all the accused persons, to which the accused persons denied and claimed trial.

15. Under Section 246 Cr.P.C. the statement of P.W. 1- Smt. Kalpana, P.W. 2- Sanjay Kumar Gupta as well as P.W. 3- Sunil Kumar Gupta was recorded.

16. After conclusion of the evidence of the complainant the statement of the accused persons was recorded under Section 313 of the Cr.P.C. wherein they denied the evidence presented by the complainant and had also produced the defence witness no.1 - Santosh Kumar Gupta and defence witness no.2- Arjun Singh as defence witnesses.

17. The trial court after appreciating the evidence available on record came to the conclusion that the complainant is able to prove its case beyond reasonable doubt only with regard to the accused Santosh Kumar Gupta for committing offence under Section 406 IPC only and convicted him only under Section 406 IPC while the other accused persons were acquitted of all the charges framed against them and accused Santosh Kumar Gupta was also acquitted of the charge under Section 120B I.P.C.

18. Being aggrieved by the impugned judgment and order the complainant has preferred instant application under Section 378(4) Cr.P.C. requesting to grant special leave to appeal in order to challenge the impugned judgment and order.

19. Shri Rajesh Kumar Srivastava, learned counsel for the complainant/ applicant vehemently submits that the trial court has committed manifest illegality in appreciating the evidence available on rerecord and has acquitted the accused persons of the charges framed against them while it was proved beyond reasonable doubt that gifts items (Stridhan) of the complainant was given in the custody of all accused persons and they have misappropriated and converted the same to their use and therefore the offence under Section 406 I.P.C. and Section 120-B IPC was proved beyond reasonable doubt.

20. It is further submitted that all the accused persons had forcibly took possession of her "Stridhan' and ousted her from her matrimonial home.

21. It is also submitted that the case of the complainant was proved by reliable evidence of herself as well as of her two witnesses, namely, P.W.2- Sanjay Kumar Gupta and P.W. 3- Sunil Kumar Gupta but the trial court appears to have given much weightage to the defence witnesses.

22. It is also submitted that the trial court has wrongly misinterpreted and passed judgment on the basis of surmises and conjectures, thus the complainant/ applicant be granted special leave to appeal in order to challenge the impugned judgment and order passed by the trial court.

23. Ms. Sonal Pandey, learned counsel appearing for the respondent no. 2 in Application under Section 378 No. 262 of 2017 and for respondent no.2 and 5 in Application under Section 378 No. 261 of 2017, vehemently submits that the trial court has committed no illegality so far as

the acquittal of the respondents is concerned as the complianant has miserably failed to prove its case beyond reasonable doubt.

24. It is further submitted that it was evident from record that without there being any basis, the whole family of the husband Santosh Kumar Gupta has been roped in while even if the case of the prosecution is believed for a moment, according to her own version the "Stridhan' was entrusted to the husband and therefore there is no illegality so far as the acquittal of other respondents is concerned.

25. Perusal of the record would reveal that by filing application for grant of special leave bearing no.262 of 2017, a request has been made to grant special leave to appeal to challenge the order of acquittal of respondent Santosh Kumar Gupta pertaining to offence under Section 120B I.P.C. with further prayer to sentence him with full imprisonment as provided under Section 406 I.P.C. wherein the respondent Santosh Kumar Gupta has been convicted by the trial court and by filing the application under Section 378(4) Cr.P.C. bearing no.261 of 2017, a request has been made to grant special leave to appeal to challenge the judgment and order of the acquittal of the trial court with regard to the other accused persons/respondent nos.2 to 6 as they have been acquitted by the trial court of the charges framed against them under Sections 406/120B I.P.C.

26. At the outset I would prefer to deal with the issue as to whether the instant appellant who is also a complainant of a complaint case may file application under Section 378(4) Cr.P.C. for grant of leave to appeal for enhancement of sentence imposed by the trial court with regard to the accused Santosh Kumar Gupta for committing offence under Section 406 I.P.C. as the issue with regard to his acquittal under Section 120B I.P.C. as well as of the other accused persons shall be dealt with later at appropriate stage of this order.

27. Perusal of the record would reveal that the respondent Santosh Kumar Gupta has been convicted by the trial court for committing offence under Section 406 I.P.C. and has been sentenced with three months' rigorous imprisonment alongwith fine. The question, therefore, is whether the complainant of the complaint case can file an appeal or special leave to appeal for enhancement of sentence. To understand this controversy, it is necessary to have a look at Section 378 of the Code. It reads as under:-

378. Appeal in case of acquittal.

(1) Save as otherwise provided in sub-section (2) and subject to the provisions of sub-sections (3) and (5), -

(a) the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court [not being an order under clause (a)] [or an order of acquittal passed by the Court of Session in revision.]

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the

Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, [the Central Government may also direct the Public Prosecutor to present an appeal], subject to the provisions of sub-section (3), also direct the Public Prosecutor to present an appeal.

(a) to the Court of Session, from an order of acquittal passed by a Magistate in respect of a cognizable and non-bailable offence;

(b) to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision.]

(3) No appeal under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court.

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6) If in any case, the application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1) or under sub-section (2).

28. Hon'ble Supreme Court in the case of **Subhash Chand Vs. State (Delhi Administration); MANU/SC/0016/2013** has opined as under:-

"15. At the outset, it must be noted that as per Section 378(3) appeals against orders of acquittal which have to be filed in the High Court under Section 378(1)(b) and 378(2)(b) of the Code cannot be entertained except with the leave of the High Court. Section 378(1)(a) provides that, in any case, if an order of acquittal is passed by a Magistrate in respect of a cognizable and non-bailable offence the District Magistrate may direct the Public Prosecutor to present an appeal to the court of Sessions. Sub- Section (1)(b) of Section 378 provides that, in any case, the State Government may direct the Public Prosecutor to file an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a High Court not being an order under clause (a) or an order of acquittal passed by the Court of Session in revision. Sub-Section(2) of Section 378 refers to orders of acquittal passed in any case investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 or by any other agency empowered to make investigation into an offence under any Central Act other than the Code. This provision is similar to sub-section(1) except that here the words "State Government' are substituted by the words "Central Government'.

16. If we analyse Section 378(1)(a) & (b), it is clear that the State Government cannot direct the Public Prosecutor to file an appeal against an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence because of the categorical bar created by Section 378(1)(b). Such appeals, that is

appeals against orders of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence can only be filed in the Sessions Court at the instance of the Public Prosecutor as directed by the District Magistrate. Section 378(1)(b) uses the words "in any case" but leaves out orders of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence from the control of the State Government. Therefore, in all other cases where orders of acquittal are passed appeals can be filed by the Public Prosecutor as directed by the State Government to the High Court.

17. Sub-Section (4) of Section 378 makes provision for appeal against an order of acquittal passed in case instituted upon complaint. It states that in such case if the complainant makes an application to the High Court and the High Court grants special leave to appeal, the complainant may present such an appeal to the High Court. This sub-section speaks of "special leave' as against sub-section (3) relating to other appeals which speaks of ''leave'. Thus, complainant's appeal against an order of acquittal is a category by itself. The complainant could be a private person or a public servant. This is evident from sub-section (5) which refers to application filed for ''special leave' by the complainant. It grants six months period of limitation to a complainant who is a public servant and sixty days in every other case for filing application. Sub- Section (6) is important. It states that if in any case complainant's application for ''special leave' under sub-Section (4) is refused no appeal from order of acquittal shall lie under sub-section (1) or under sub- section (2). Thus, if "special leave' is not granted to the complainant to appeal against an order of acquittal the matter must end there. Neither the District Magistrate not the State Government can appeal against that order of acquittal. The idea appears to be to accord quietus to the case in such a situation.

18. Since the words ''police report' are dropped from Section 378(1) (a) despite the Law Commission's recommendation, it is not necessary to dwell on it. A police report is defined under Section 2(r) of the Code to mean a report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173 of the Code. It is a culmination of investigation by the police into an offence after receiving information of a cognizable or a non- cognizable offence. Section 2(d) defines a complaint to mean any allegation made orally or in writing to a Magistrate with a view to his taking action under the Code, that some person, whether known or unknown has committed an offence, but does not include a police report. Explanation to Section 2(d) states that 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. Sometimes investigation into cognizable offence conducted under Section 154 of the Code may culminate into a complaint case (cases under the Drugs & Cosmetics Act, 1940). Under the PFA Act, cases are instituted on filing of a complaint before the Court of Metropolitan Magistrate as specified in Section 20 of the PFA Act and offences under the PFA Act are both cognizable and non-cognizable. Thus, whether a case is a case instituted on a complaint depends on the legal provisions relating to the offence involved therein. But once it is a case instituted on a complaint and an order of acquittal is passed, whether the offence be bailable or non-bailable, cognizable or non-cognizable, the complainant can file an application under

Section 378(4) for special leave to appeal against it in the High Court. Section 378(4) places no restriction on the complainant. So far as the State is concerned, as per Section 378(1)(b), it can in any case, that is even in a case instituted on a complaint, direct the Public Prosecutor to file an appeal to the High Court from an original or appellate order of acquittal passed by any court other than High Court. But there is, as stated by us hereinabove, an important inbuilt and categorical restriction on the State's power. It cannot direct the Public Prosecutor to present an appeal from an order of acquittal passed by a Magistrate in respect of a cognizable and non-cognizable offence. In such a case the District Magistrate may under Section 378(1)(a) direct the Public Prosecutor to file an appeal to the Session Court. This appears to be the right approach and correct interpretation of Section 378 of the Code."

29. Thus, under Section 378(4) Cr.P.C. the complainant has been given a right to seek special leave to appeal from the High Court to file an appeal to challenge a judgment of acquittal. Section 378(1)(a) has only permitted the District Magistrate, in any case, to direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence. This provision was introduced whereunder an appeal against an order of acquittal could be filed in the Sessions Court. Such appeals were restricted to orders passed by a Magistrate in cognizable and non-bailable offences. Section 378(1)(b) specifically and in clear words has placed a restriction on the State's right to file such appeals. It states that the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a High Court not being an order under clause (a) or an order of acquittal passed by the Sessions Court in revision. Thus, the State Government cannot present an appeal against an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence and complainant of a complaint case may file appeal only against an order of acquittal.

30. At this juncture Section 377 of the Cr.P.C. is also required to be considered and the same is reproduced as under:-

"377. Appeal by the State Government against sentence.

(1) Save as otherwise provided in sub-section (2), the State Government may, in any case of conviction on a trial held by any Court other than a High Court, direct the Public Prosecutor to present an appeal to the High Court against the sentence on the ground of its inadequacy.

(2) if such conviction is in a case in which the offence has been investigated by the Delhi Special Police Establishment, constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946) or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, 1 the Central Government may also direct] the Public Prosecutor to present an appeal to the High Court against the sentence on the ground of its inadequacy.

(3) When an appeal has been filed against the sentence on the ground of its inadequacy, the High Court shall not enhance the sentence except after giving to the accused a reasonable opportunity of showing cause against such enhancement and while showing cause, the accused may

plead for his acquittal or for the reduction of the sentence."

31. A plain reading of this Section would reveal that a power has been given to the State Government to file an appeal against the sentence imposed by trial court with regard to "any case' in the manner provided under Section 377 Cr.P.C. Thus, this Section empowers the State Government to file an appeal against inadequacy of sentence before the District Court or the High Court as the case may be. It is also clear from this Section that such appeal against adequacy sentence may be filed irrespective of the fact that the prosecution was on the basis of police charge sheet or on the basis of private complaint. Therefore, the above discussion would sufficiently demonstrate that the remedy of challenging the inadequacy of the sentence lies with the State Government or the Central Government or the District Magistrate as the case may be. In this regard, it is fruitful to have a glance on the law laid down by Hon'ble the Supreme Court in the case of **Parvinder Kansal Vs. The State of NCT of Delhi and another; (2020) 19 SCC 496**, wherein it has specifically opined that a victim as defined under Section 2(wa) could only file an appeal as provided in the Proviso of Section 372 Cr.P.C. against the order of acquittal, conviction for lesser offence and for imposition of inadequate compensation and a victim has no right to appeal for enhancement of sentence under Section 372 Cr.P.C. Thus, in the considered opinion of this Court, the complainant of the complaint case also do not have any right to challenge inadequacy of sentence passed by the trial court while convicting the accused for any offence in complaint case.

32. Now the question will arise as to what remedy would be available to an aggrieved complainant of a complaint case who is aggrieved by inadequacy of sentence imposed by the trial court and neither the District Magistrate or the State Government as the case may be has initiated any proceeding by filing appeal under Section 377 Cr.P.C. for enhancement of sentence. In this regard a single Bench judgment of Hon'ble Kerela High Court passed in **T. Jayarajan Vs. P.R. Muhammed and Ors; MANU/KE/0758/1999** would be relevant wherein learned single Judge of the Kerela High Court while referring to many authorities and also considering Section 397, 398, 399, 401 and 386 Cr.P.C. as well as after considering the law laid down by Hon'ble the Supreme Court in the case of **Sahab Singh Vs. State of Haryana; MANU/SC/0224/1990** and by this Court in **Darshan Lal v. Indra Kumar Mehta 1980 All LJ 217**, opined as under:-

"14. It is clear from the above rulings of the various High Courts and the Surpeme Court that the failure of the State Government to prefer appeal before the High Court challenging inadequacy of the sentence under Section 377 of the Cr. P.C. will not preclude the jurisdiction of the High Court and Sessions Court to consider the inadequacy of the sentence on the basis of the revision filed by the complainant or the interested party challenging inadequacy of sentence except in cases such revisions are barred under Sub-section (4) of Section 401 of the Cr. P.C. Therefore the decision of the Division Bench of the Madras High Court reported in 1984 Cri JJ 243 (In re: Krishnamoorthy) to the effect that the High Court has no jurisdiction to consider whether the sentence is inadequate in a revision filed by the complainant in a private complaint, is not good law to be followed in view of the authoritative rulings of the apex Court. Hence the order passed

by the learned Sessions judge relying upon the above decision of the Madras High Court dismissing the revision petition on the ground that it being filed by the complainant challenging the inadequacy of the sentence is not maintainable, is also not sustainable."

33. In **Sahab Singh (Supra)**, Hon'ble the Supreme Court has opined as under:-

"The failure on the part of the State Government to prefer an appeal does not, however, preclude the High Court from exercising suo motu power of revision under Section 397 read with Section 401 of the Code since the High Court itself is empowered to call for the record of the proceeding of any Court subordinate to it. Sub-section (4) of Section 401 operates as a bar to the party which has a right to prefer an appeal but has failed to do so but that sub-section cannot stand in the way of the High Court exercising revisional jurisdiction suo motu. But before the High Court exercises its suo motu revisional jurisdiction to enhance the sentence, it is imperative that the convict is put on notice and is given an opportunity of being heard on the question of sentence either in person or through his advocate."

34. A Division Bench of this Court in the case of **Darshan Lal (Supra)** was also of the opinion reproduced as under:-

"According to Section 397(1) a Sessions Judge can call for and examine the record of any proceedings of any inferior criminal Court situate within his jurisdiction for satisfying himself as to the correctness, legality or propriety of any finding, sentence or order. The grievance of the applicant in the revision filed by him before the trial Court was wholly inadequate. The Sessions Judge could, therefore, examine that question in view of the powers conferred on him by Sub-section (1) of Section 397 of the Code of Criminal Procedure. Further, under Sub-section (1) of Section 399 of Sessions Judge, while dealing with a revision, can exercise all or any of the powers which may be exercised by the High Court under Sub-section (1) of Section 401. By this it would follow that if the High Court, while dealing with a revision can enhance the sentence, the Sessions Judge can also do it. According to Sub-section (1) of Section 401 the High Court, while dealing with a revision, can exercise any of the powers conferred on an appellate Court, by Section 386 of the Code. According to Clause (c) of Section 386 of the Code, the appellate Court can, in an appeal for enhancement of sentence, alter the nature or the extent of the sentence so as to enhance or reduce the same. In view of this provision contained in Section 386, Cr. P.C. it should be held that the High Court, while dealing with a revision, can enhance the sentence. As already stated earlier the powers of a Sessions Judge, while dealing with a revision, are the same as that of the High Court. Since the High Court can enhance the sentence while dealing with the revision, the Sessions Judge can also do so. "

35. Thus, having regard to the law placed herein before, it would be clear that if the State Government is not coming forward to challenge inadequacy of sentence passed in a complaint case, the complainant of that case would not be remediless and he can challenge the same by filing criminal revision before the appropriate court and the revisional court may exercise any of the power conferred under Section 386 Cr.P.C. by virtue of

Section 401 Cr.P.C. subject to the limitation set forth under Sub Section 5 of Section 401 Cr.P.C.

36. The aforesaid legal position would suggest that it is for the State or for the District Magistrate under Section 377 Cr.P.C. to file an appeal for enhancement of the sentence and neither the victim under Section 372 Cr.P.C. nor the complainant of a complaint case could file such an appeal or application to grant special leave to appeal pertaining to the enhancement of sentence. Thus, the appeal/application for grant of special leave for enhancement of the sentence pertaining to the sentence imposed by the trial court on the accused Santosh Kumar Gupta with regard to committing offence under Section 406 I.P.C., in the considered opinion of this Court, is not maintainable under Section 378(4) Cr.P.C. Therefore, the request of the appellant/applicant to this extent is rejected.

37. Now coming to the next question, as to whether the trial court has committed any illegality in appreciating the evidence available on record in order to exonerate accused Santosh Kumar Gupta for committing offence under Section 120B I.P.C. or other accused persons for committing offence under Section 120B and 406 I.P.C., there cannot be any other preposition than the fact that to constitute an offence under Section 120B I.P.C., the meeting of minds is an important ingredient and either there must be a direct evidence or the evidence of circumstantial nature whereby a valid inference could be made that before committing particular offence, the accused persons were having an opportunity to have consesus in order to hatch a conspiracy. Perusal of the judgment of the trial court would reveal that the trial court has acquitted accused Santosh Kumar Gupta for committing offence under Section 120B I.P.C. and other accused persons of the charges framed under Section 406/120B I.P.C. on following grounds.

(i) The complainant failed to prove meeting of minds of accused persons for hatching a conspiracy to misappropriate her stridhan.

(ii) The list of articles filed with the complaint only contains signature of complainant and is not containing signatures of any accused persons.

(iii) The complainant in her statement recorded before the trial court has admitted that articles at the time of vidai were given by her parents in the custody of accused Santosh Kumar Gupta.

(iv) Notice to return articles was given to accused Santosh Kumar Gupta (himself).

(v) P.W.-3 Sunil Kumar Gupta has given hearsay evidence.

(vi) The evidence of the prosecution only proves that articles were only entrusted to husband and despite notice he has not returned the articles and misappropriated the same and then convicted only the accused Santosh Kumar Gupta for committing offence under Section 406 I.p.C. and acquitted him of charge under Section 120 I.P.C. and other persons of charge sunder Sections 120B and 406 I.P.C.

38. Hon'ble Supreme Court of India in **Pratibha Rani Vs. Suraj Kumar and Ors.; MANU/SC/0090/1985**, while discussing the ingredient of Section 405 I.p.C. as punishable under Section 406 I.P.C., held as under:-

"Section 405 of the Penal Code reads thus:

"Section 405.- Criminal breach of trust.- Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".

A careful reading of Section 405 shows that the ingredients of a criminal breach of trust are as follows:

i) A person should have been entrusted with property, or entrusted with dominion over property;

ii) That person should dishonestly misappropriate or convert to their own use that property, or dishonestly use or dispose of that property or willfully suffer any other person to do so; and

iii) That such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust.

Entrustment is an essential ingredient of the offence. A person who dishonestly misappropriates property entrusted to them contrary to the terms of an obligation imposed is liable for a criminal breach of trust and is punished under Section 406 of the Penal Code .The jurisdiction under Section 482 of the Code of Criminal Procedure has to be exercised with care. In the exercise of its jurisdiction, a High Court can examine whether a matter which is essentially of a civil nature has been given a cloak of a criminal offence. Where the ingredients required to constitute a criminal offence are not made out from a bare reading of the complaint, the continuation of the criminal proceeding will constitute an abuse of the process of the court.

"39. The Supreme Court in a large number of cases has held that the fundamental core of the offence of criminal breach of trust is that a property must be entrusted and the dominion of the property should be given to the trustee. In the present case, all these conditions, even according to the findings of the Court Though not its conclusion are clearly established. That the view of the High Court is absolutely wrong would be clear from a number of authorities, some of which we would like to discuss here.

40. In Chelloor Manaklal Naravan Ittiravi aNambudiri v. State of Travancore MANU/SC/0091/1952 : AIR1953SC478 this Court made the following observations:

As laid down in Section 385, Cochin Penal Code (corresponding to Section 405, Indian Penal Code) to constitute an offence of criminal breach of trust it is essential that the prosecution must prove first of all that the accused was entrusted with some property or with any dominion or Power over it.... It follows almost axiomatically from this definition that the ownership or beneficial interest in the property in respect of which criminal breach of trust is alleged to have been committed, must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit.

41. In Jaswantrai Manilal Akhaney v. State of Bombay MANU/SC/0030/1956 : 1956CriLJ1116 Sinha, J. (as he then was) observed thus:

For an offence under Section 409, Indian Penal Code the first essential ingredient to be proved is that the property

was entrusted.... But when Section 405 which defines "criminal breach of trust speaks of a person being in any manner entrusted with property, it does not contemplate the creation of a trust with all the technicalities of trust. It contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain events.

42. In Akharbhai Nazarali v. Md. Hussain Bhai MANU/MP/0021/1961 :AIR1961MP37 the Madhya Pradesh High Court made the following observations :

It may be that the deduction and retention of the employees' contribution is a trust created by virtue of that very fact, or by virtue of a provision in statute or statutory rule. But even apart from the latter, the mere fact of telling the employees that it is their contribution to the provident fund scheme and then making a deduction or recovery and retaining it, constitutes the offence of criminal breach of trust. This is so obvious that nothing more need be said about it.

43. These observations were fully endorsed and approved by this Court in Harihar Prasad Dubey v. Tulsi Das Mundhra and Ors. MANU/SC/0263/1980 : 1980CriLJ1340 where the following observations were made:

This, in our opinion, is a correct statement of the position and we also agree with the learned Judge of the Madhya Pradesh High Court that "this so obvious that nothing more need be said about it". We, therefore, think that the impugned order quashing the charge against the respondents is obviously wrong.

44. In Basudeb Patra v. Kanai Lal Haldar AIR 1949 Cal 207 the Calcutta High Court observed thus:

Whereas the illustration to Section 405 show equally clearly that the property comes into the possession of the accused either by an express entrustment or by some process placing the accused in a position of trust.... On the facts of the present case, which, as I have said, are not open to question at this stage, it is quite clear that the ornaments were handed over to the petitioner by the beneficial owner in the confidence that they would be returned to the beneficial owner in due time after having been used for the purpose for which they were handed over. If this is not an entrustment, it is impossible to conceive what can be an entrustment.

(Emphasis ours)

45. This ratio was fully approved by this Court in Velji Raghavji Patel v. State of Maharasatra MANU/SC/0091/1964 : 1965CriLJ431 where the following observation were made:

In order to establish " entrustment of dominion" over property to an accused person the mere existence of that person's dominion over property is not enough. It must be further shown that his dominion was the result of entrustment. Therefore, as rightly pointed out by Harris, C.J. the prosecution must establish that dominion over the assets or a particular asset of the partnership was by a special agreement between the parties, entrusted to the accused person.

46. In the case of State of Gujarat v. Jaswantlal Nathalal MANU/SC/0091/1967 : 1968CriLJ803 Hegde, J., speaking for the Court observed thus:

The expression 'entrustment' carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner. Further the person handing over the property must have confidence in the person taking the

property so as to create a fiduciary relationship between them.

47. In Sushil Kumar Gupta v. Joy Shanker Bhattacharjee MANU/SC/0201/1970 : [1970]3SCR770 this Court observed thus :

The offence of criminal breach of trust is committed when a person who is entrusted in any manner with property or with dominion over it, dishonestly misappropriates it or converts it to his own use.... The appellant's manner of dealing with the money entrusted to his custody clearly constitutes criminal breach of trust.

48. In the case of Superintendent & Remembrancer of Legal Affairs, West Bengal v. S.K. Roy MANU/SC/0229/1974 : 1974CriLJ678 this Court held that for 'entrustment' two things are necessary, viz, (1) the entrustment may arise in "any manner" whether or not it is fraudulent, and (2) the accused must have acquisition or dominion over the property."

39. Perusal of the record as well as of the statement of the prosecution witnesses in the background of above proposition of law would reveal that the finding of the trial court with regard to the fact that at the time of vidai, the articles according to the own statement of the complainant were entrusted to the accused Santosh Kumar Gupta. However, it has been specifically stated by the complainant in her evidence that the said entrustment of articles to the Santosh Kumar Gupta was for the purpose of returning the articles to her. Thus, the finding of the trial court with regard to the fact that the articles were entrusted only to accused Santosh Kumar Gupta (husband) could not be said to be not based on evidence available on record. It is to be recalled that to constitute an offence under Section 406 I.P.C., an entrustment of the articles or the property which is said to have been misappropriated is an important ingredient and in absence of the same, the accused persons could not be convicted under Section 406 I.P.C.

40. Having gone through the whole prosecution evidence on record, it is evident that at first articles were only entrusted to the accused Santosh Kumar Gupta and notice to return the said articles was also given only and only to accused Santosh Kumar Gupta. Thus, in this background of the factual matrix/evidence, I do not find any illegality in the findings of the trial court that the other co-accused persons except Santosh Kumar Gupta could not be convicted for committing offence under Section 406 I.P.C.

41. Coming to the finding of acquittal recorded for offence under Section 120B I.P.C. this Court is of the considered view, when all co-accused persons have been acquitted by the trial court of the charges framed under Section 406 I.P.C., it was not possible for the trial court to have convicted the appellant Santosh Kumar Gupta for the offence committed under Section 120B I.P.C. as the criminal conspiracy requires presence of another person and no sole accused person could be convicted for committing offence under Section 120B I.P.C. It is to be clarified that even if the allegations of the prosecution are to the tune that there are some unknown persons with whom conspiracy was hatched, in that scenario the conviction of the sole accused could be sustained under Section 120B I.P.C. which is not the case of the complainant in the instant matter. Otherwise also the evidence available on record suggests that the conviction of the only accused Santosh Kumar Gupta was justified having regard to the nature of the evidence produced before the trial court.

Hon'ble Supreme Court in the case of **Topandas Vs. The State of Bombay; MANU/SC/0032/1955** has opined as under:-

"6. Criminal conspiracy has been defined in section 120-A of the Indian Penal Code:-"When two or more persons agree to do or cause to be done (i) an illegal act, or (ii) an act which is, not illegal by illegal means, such an agreement is designated a criminal conspiracy". By the terms of the definition itself there ought to be two or more persons who must be parties to such an agreement and it is trite to say that one person alone can never be held guilty of criminal conspiracy for the simple reason that one cannot conspire with oneself. If, therefore, 4 named individuals were charged with having committed the offence under section 120- B of the Indian Penal Code, and if three out of these 4 were acquitted of the charge, the remaining accused, who was the accused No. 1 in the case before us, could never be held guilty of the offence of criminal conspiracy.

7. If authority for the above proposition were needed, it is to be found in Archbold's Criminal Pleading, Evidence and Practice, 33rd edition, page 201, paragraph 361:-

"Where several prisoners are included in the same indictment, the jury may find one guilty and acquit the others, and vice versa. But if several are indicted for a riot, and the jury acquit all but two, they must acquit those two also, unless it is charged in the indictment, and proved, that they committed the riot together with some other person not tried upon that indictment.

2 Hawk. c. 47. s. 8. And, if upon an indictment for a conspiracy, the jury acquit all the prisoners but one, they must acquit that one also, unless it is charged in the indictment, and proved, that he conspired with some other person not tried upon that indictment. 2 Hawk. c. 47. s. 8; 3 Chit. Cr. L., (2nd ed.) 1141; R. v. Thompson, 16 Q.B.D. 832; R. v. Manning, 12. Q.B.D. 241; R. v. Plummer [1902] 2 K.B. 339".

8. The King v. Plummer ([1902] 2 K.B. 339) which is cited in support of this proposition was a case in which, on a trial of indictment charging three persona jointly with conspiring together, one person had pleaded guilty and a judgment passed against him, and the other two were acquitted. It was held -that the judgment passed against one who had pleaded guilty was bad and could not stand. Lord Justice Wright observed at page 343:-

"There is much authority to the effect that, if the appellant had pleaded not guilty to the charge of conspiracy, and the trial of all three defendants together had proceeded on that charge, and had resulted in the conviction of the appellant and the acquittal of the only alleged co-conspirators, no judgment could have been passed on the appellant, because the verdict must have been regarded as repugnant in finding that there was a criminal agreement. between the appellant and the others and none between them and him: see Harrison v. Errington (Popham,202), where upon an indictment of three for riot two were found not guilty and one guilty, and upon error brought it was held a "void verdict", and said to be "like to the case in 11 Hen. 4, c. 2, conspiracy against two, and only one of them is found guilty, it is void, for one alone cannot conspire"."

9. Lord Justice Bruce at page 347 quoted with approval the statement in the Chitty's Criminal Law, 2nd ed., Vol. III, page 1141:-

"And it is holden that if all the defendants mentioned in the indictment,

except one, are acquitted, and it is not stated as a conspiracy with certain persons unknown, the conviction of the single defendant will be invalid, and no judgment can be passed upon him".

10. The following observations made by Lord Justice Bruce are apposite in the context before us:-

"The point of the passage turns upon the circumstance that the defendants are included in the same indictment, and I think it logically follows from the nature of the offence of conspiracy that, where two or more persons are charged in the same indictment with conspiracy with another, and the indictment contains no charge of their conspiring with other persons not named in the indictment, then, if all but one of the persons named in the indictment are acquitted, no valid judgment can be passed upon the one remaining person, whether he has been convicted by the verdict of a jury or upon his own confession, because, as the record of conviction can only be made up in the terms of the indictment, it would be inconsistent and contradictory and so bad on its face. The gist of the crime of conspiracy is that two or more persons did combine, confederate, and agree together to carry out the object of the conspiracy".

11. This position has also been accepted in India. In Gulab Singh v. The Emperor (A.I.R. 1916 All. 141) Justice Knox followed the case of The King v. Plummer, supra, and held that "it is necessary in a prosecution for conspiracy to prove that there were two or more persons agreeing for the purpose of conspiracy" and that "there could not be a conspiracy of one".

42. In the case of **Parveen Vs. The State of Haryana; MANU/SC/1190/2021**, Hon'ble the Supreme Court has opined as under:-

"12. It is fairly well settled, to prove the charge of conspiracy, within the ambit of Section 120-B, it is necessary to establish that there was an agreement between the parties for doing an unlawful act. At the same time, it is to be noted that it is difficult to establish conspiracy by direct evidence at all, but at the same time, in absence of any evidence to show meeting of minds between the conspirators for the intended object of committing an illegal act, it is not safe to hold a person guilty for offences under Section 120-B of IPC. A few bits here and a few bits there on which prosecution relies, cannot be held to be adequate for connecting the accused with the commission of crime of criminal conspiracy....."

43. It is to be understood that under Section 378(4) Cr.P.C., special leave to appeal is required by a complainant in contrast to Section 378(3) Cr.P.C. where only leave to appeal is required, it means that a grave illegality or evident perversity is required to be shown, in order to request a court to exercise its jurisdiction under Section 378(4) Cr.P.C. There cannot be any other view than the preposition that in an appeal against acquittal, the Court has full power to review the evidence upon which the acquittal has been recorded. However, it has to be remembered and kept in mind that the initial presumption of innocence, which was available to the respondents at the time of trial has been further fortified by the order of acquittal and the decision of the trial court could be reversed only for very substantial and compelling reasons. However, substantial or compelling or strong reasons are not to be meant to curtail undoubted powers of an appellate court in an appeal against acquittal and the appellate court may come to its own conclusion on the basis of re-appreciation

of evidence, but in doing so, the Court should not only consider every evidence available on record which may have a bearing on the questions of fact and the reasons given by the trial court in support of the order of acquittal in arriving at a conclusion, but also to express those reasons in its judgment to show that the acquittal was not justified. Our view is fortified by the judgments of the Hon'ble Supreme Court passed in **Ajmer Singh Vs. State of Punjab, 1953 SCR 418, Sanwat Singh and Others Vs. State of Rajasthan, AIR 1961 SC, 715 and Sadhu Sharan Singh Vs. State of Uttar Pradesh and Others** reported in **2016 Cr.L.J. 1908.**

44. Having perused the judgment of the trial court in the background of the above-mentioned legal position as well as keeping in view the settled principles of appreciation of evidence, I am of the view that the burden is always on prosecution/complainant to prove the guilt of the accused person(s) beyond reasonable doubt and if on a reasonable appreciation of evidence two views appears to be possible, then the view which is favourable to the accused person(s) should be adopted. However, the Court is to put itself on guard that benefit of each and every doubt could not be claimed by the accused person(s). It is only reasonable doubt, benefit of which could be extended to the accused of a crime.

45. Keeping in view the above propositions of law for grant of special leave to file an appeal from acquittal, very strong and cogent reasons are required for interfering in the judgment of acquittal, and if, the findings of the trial court are based on the evidence available on record and there is nothing which may brand the appreciation of evidence done by the trial Court as perverse, the finding of acquittal should not be easily disturbed.

46. Keeping in view the inherent weaknesses appearing in the prosecution evidence, we are of the considered opinion that the view taken by the trial court was a probable and logical view and the judgment of the trial court cannot be said to be not based on material on record or either illegal, illogical or improbable. Therefore, I am satisfied that there is absolutely no hope of success in this appeal and accordingly, no interference in the judgment of the trial court is called for. Hence, the prayer for grant of special leave to appeal is hereby rejected and the application to grant special leave to file appeal is **dismissed.**

47. Since application for grant of special leave to appeal has been rejected, the appeal would also not survive. Consequently, the appeal is also **dismissed**.

(2023) 1 ILRA 1006
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.01.2023

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Jail Appeal No. 38 of 2022

Deepak Jaiswal ...Appellant
Versus
State of U.P. ...Opp. Party

Counsel for the Appellant:
From Jail, Sri Vindeshwari Prasad

Counsel for the Opp. Party:
G.A.

Criminal Law- Indian Evidence Act, 1872- Sections 25 &27- In the absence of any

first information report lodged no disclosure statement could be recorded of the accused-appellant nor any recovery memo could be prepared in respect of the dead body on the pointing out of the accused-appellant. Confessional statement and the recovery was thus made even prior to the lodgement of first information report or the accused having been taken into custody. The alleged confessional statement as well as the recovery of dead body is thus not backed by any document prepared by the investigating officer pursuant to any first information report lodged in the matter or taking of accused in the custody. The confessional statement, therefore, would at best a disclosure made to police which would clearly be inadmissible by virtue of Section 25 of the Indian Evidence Act. The recovery moreover is not made while the accused-appellant was in custody after lodgement of the first information report, therefore, the provisions of Section 27 of the Indian Evidence Act also would not come into play and the alleged recovery cannot be treated to be a legal evidence nor can it be read in evidence at the stage of trial against the accused-appellant. Cr.P.C.

Where the alleged recovery of the dead body has been made before the FIR was lodged then the said recovery cannot be relied upon as Section 27 contemplates disclosure under police custody and as no disclosure statement was recorded, hence the confession of the accused would be hit by Section 25 of the Evidence Act.

Code of Criminal Procedure, 1973- Section 313- The plea of recovery of dead body on the pointing out of the accused-appellant otherwise cannot be read against him as the accused-appellant has not been confronted on this aspect at the stage of recording of his statement under Section 313 - Section 313 Cr.P.C.is not an empty formality and contains a substantive right in the accused to explain the circumstances arising against him at the stage of trial. Unless the incriminating material is specifically put to the accused for recording his statement under Section 313 Cr.P.C., the incriminating material itself cannot be read or relied upon against the accused for recording his conviction.

Where the incriminating fact about the recovery of the dead body on the pointing out of the accused has not been put to him under Section 313 CrPc then the said fact cannot be read against the accused. (Para 35, 36, 37, 40, 42)

Criminal Appeal allowed. (E-3)

Case Law/ Judgements relied upon:-

1. Aghnoo Nagesia Vs St. of Bih., 1966 SC 119

2. Crl. Appeal No. 2887 of 2018 (Ram Niwas Vs St. of U.P.) decided on 01/12/ 2022

(Delivered by Hon'ble Ashwani Kumar Mishra, J. & Hon'ble Shiv Shanker Prasad, J.)

1. This jail appeal has been preferred by the accused-appellant Deepak Jaiswal against the judgment and order dated 1st November, 2019 passed by the Special Judge (POCSO Act)/Additional Sessions Judge-VII, Jaunpur, in Special Sessions Trial No. 12 of 2016 (State of U.P. Vs. Deepak Jaiswal), arising out of Case Crime No. 266 of 2016 under Sections 376, 302, 201 I.P.C., Sections 3/4 POCSO Act and Section 7 Criminal Law Amendment Act, Police Station-Madiyahoo, District-Jaunpur, whereby the accused-appellant has been convicted and sentenced to undergo life imprisonment for the offence under Section 302 I.P.C. with a fine of Rs. 10,000/- each, in default thereof he has to further undergo one year additional imprisonment; life imprisonment with fine of Rs. 50,000/- under Section 376 I.P.C., in default thereof, he has to further undergo one year additional imprisonment; two years rigorous imprisonment with fine of Rs. 5,000/- under Section 201 I.P.C., in

default thereof, he has to further undergo three months additional imprisonment; and six months' simple imprisonment with fine of Rs.500/-, in default thereof, he has to further undergo one month additional imprisonment with an observation that all the sentences are run to concurrently.

2. We have heard Mr. Vindeshwari Prasad, Advocate, who has appeared on behalf of the accused-appellant as Amicus Curiae and Mrs. Archana Singh, learned A.G.A. for the State and also perused the entire materials available on record.

3. The prosecution case proceeds upon a written report dated 27th January, 2016 (Exhibit-Ka/1) of first informant, namely, Babita Chaubey (P.W.-1) on the basis of which the first information report (Exhibit-ka/3) as case crime no. 0266 of 2016 has been registered on the same day at 08:15 p.m. The report has been proved by P.W.-1 as per which the informant/P.W.-1 had come to her parents' house at Mohalla Ganj, Police Station-Madiyahu, District Jaunpur. On 27th January, 2016 informant's daughter aged about 7 years had gone to the Shiv temple in front of the house and was playing on the platform (Chabutara) with other children. Informant was watching her from the house. At 04:00 p.m. the accused-appellant, resident of nearby locality, was seen around the temple and he also showed affection to the victim and offered her toffee and biscuit and started talking to her. The accused-appellant was seen taking the victim but the first informant did not doubt his intentions and thought that the accused-appellant was only caressing her. It is alleged that several children present at the place saw the accused-appellant taking the victim. The informant's attention was diverted on account of house hold work and taking advantage of it the accused-appellant allegedly enticed the minor victim. The informant remained under the believe that her daughter was playing with her friend. After some time when the victim was not seen the informant came to the temple but could not find her daughter. The informant had the firm belief that it was the accused-appellant who had taken the victim. Since the accused-appellant had bad reputation in the locality, the informant began to believe that the accused-appellant took the victim with him to some unknown place with bad intentions.

4. Ultimately, the accused-appellant was found at the Shiv Chitra Mandir (Talkies), Madiyahu. Information in that regard was given to the Police. The Police came on the spot and made inquiry from the accused-appellant who confessed to his guilt and told that he had taken the victim to a room at Swamy Vivekanand Intermediate Girls College and raped her by gagging her mouth so that she may not shout. The victim ultimately became motionless and the accused-appellant hide himself in Shiv Chitra Mandir (Talkies). The accused-appellant informed the Police that the dead body of the victim was lying at the college. He took the Police and the first informant to the college. Gate of the college was closed from outside and there was no peon. The accused-appellant informed that there was separate passage for the college towards the Belvan Dalit Basti and adjoining the boundary wall there was a room wherein the dead body of the victim was lying. The accused-appellant took the Police and the first informant to the room and in the torch light the dead body of the victim was seen. Neither there was any window nor any door in the room. The Police along with other residents of the locality jumped the boundary wall and entered the room and in the torch light found the victim naked. The

first informant therefore, could come to know that her daughter has been sexually assaulted and then killed. Hearing the incident, people got horrified and hid in their homes and an atmosphere of fear and terror prevailed in the society and public order was breached. In the torch light and electricity the written report was scribed by Rajesh Pandey (P.W.-2) who happens to be neighbour of first informant. The informant affixed her thumb impression on the written report.

5. The investigation proceeded in the matter and the blood stained and simple earth were collected from the spot by the Police. The Police arrested the accused-appellant, who was medically examined and his undergarments (Exhibit-ka/15) were also recovered and sent for forensic opinion.

6. The inquest proceedings commenced at 10.15 p.m. and concluded at 23.50 p.m. (Exhibit-ka/8). The inquest was conducted at the place where the dead body of the victim itself was found and the first informant/P.W.-1 and P.W.-2 are the inquest witnesses. The victim was found to be 7 years old minor girl and her nose and mouth were pressed. There was bleeding from her private parts. No other injury was found. The dead body was sealed and sent for post-mortem.

7. The autopsy of the dead body has been conducted on 28th January, 2016 at 01:40 p.m. The period of death as per the post-mortem report is one day and the cause of death is Asphyxia as a result of ante-mortem smothering and contributed to vaginal hemorrhage and shock.

8. Following ante-motem injuries have been found on the victim:

"1. Abrasion and contusion present over nose, mouth,chin below chin

2. Hyoid bone is intact.

3. Nail abrasion and contusion over chest at xiphisternum and around both breast area.

4. Nail abrasion and contusion are present over left hand and lateral aspect of left arm

5. Nail abrasions are present over right upper arm

6. Abrasion over left side of pelvis

7. Bleeding from genitalia present

8. Hymen are ruptured.

9. Lacerations and contusion are present over labia majora and minora."

9. The forensic examination report dated 19th December, 2016 has also been brought on record as per which no blood was found on slide, nail clippers, pubic hair, underwear, hair, pant, pair of slippers, string of pearls, swab and slide. Human blood however was found on the plain earth recovered. No sperm or spermatozoa was found on the slide or underwear of the accused-appellant. The statements of witnesses were recorded under Section 161 Cr.P.C. and ultimately charge-sheet (Exhibit-ka/13) came to be submitted on 21st November, 2014 against the accused-appellant upon conclusion of the statutory investigation. The investigating officer found the charges under Sections 376, 302, 201 I.P.C., Sections 3/4 POCSO Act and Section 7 Criminal Law Amendment Act to be proved against the accused-appellant.

10. Having taken cognizance on the charge-sheet dated 21st November, 2014 the concerned Magistrate committed the case to the Court of Sessions where the charges were framed against the accused-appellant on 20th April, 2016 under Section 376, 302, 201 I.P.C. and Section 7 of Criminal Law Amendment Act. Charges were also framed under Section 4 of

POCSO Act against the accused-appellant. Charges were read out to the accused-appellant, who denied the accusation and demanded trial.

11. In order to establish its case, the prosecution has adduced following documentary evidence:

"i). Written report dated 27th January, 2016 submitted by the informant-P.W.-1, which has been scribed by Rajesh Pandey (P.W.-2), which has been marked as Exhibit-Ka/1

ii). The first information report dated 27th January, 2016 has been marked as Exhibit- Ka/3;

iii). The inquest report (Panchayatnama) dated 27th January, 2016 has been marked as Exhibit-ka/8;

iv). Recovery memo of blood stained and plain earth dated 28th January, 2016 has been marked as Exhibit-ka/14;

v). Recovery memo of underwear dated 28th January, 2016 has been marked as Exhibit-ka/15;

vi). Post-mortem report dated 28th January, 2016 has been marked as Exhibit-ka/2;

vii). Site plan with index dated 28th January, 2016 has been marked as Exhibit-ka/5; and

viii). Charge-sheet dated 17th February, 2016 has been marked as Exhibit-ka/7."

12. In addition to the above documentary evidence the prosecution has adduced three witnesses of fact, namely, Babita Chaubey (P.W.-1/first informant), who happens to be the mother of the victim, Rajesh Pandey (P.W.-2/scriber of the written report), who happens to be the neighbour of P.W.-1, and Sheetla Prasad Pathak (P.W.-3) who happens to be the brother of P.W.-1. Dr. Bhaskar Singh (P.W.-4) has conducted the autopsy of the victim. Dr. Surya Prakash (P.W.-5) had assisted P.W.-4 in conducting autopsy of the victim. Constable Vijay Prakash Yadav (P.W.-6) proved the chik first information report. Sub-Inspector Akhilesh Kumar Yadav (P.W.-7) was the first investigating officer, who arrested the accused-appellant and has also recorded his confessional statement and verified the recovery of dead body on his pointing out. Ram Bharose Kushwaha (P.W.-8) was the second investigating officer. Sub Inspector Akhilesh Kumar Yadav (P.W.-9) has stated that at the time when the dead body was recovered, the nose and mouth of the victim were pressed. He has verified the inquest report.

13. On the basis of above incriminating material brought on record during the course of trial the statement of the accused-appellant has been recorded under Section 313 Cr.P.C. in which he has denied the accusation and has stated that he has been falsely implicated in the present case.

14. The trial court on the basis of evidence led in the matter has come to the conclusion that the prosecution has succeeded in establishing the guilt of the accused-appellant beyond reasonable doubt. The post-mortem report and the inquest report have been relied upon to come to the conclusion that the victim has been subjected to offence under Section 376 I.P.C. and thereafter she has been done to death. The statements of the prosecution witnesses i.e. P.W.-1, P.W.-2 and P.W.-3 have been found credible and reliable and as they have seen the victim in close company of the accused-appellant and took the victim, whose dead body has been found thereafter, as such the court below

has held that the offence of rape and murder upon the deceased/victim has been committed by the accused-appellant. The court below has accordingly convicted the accused-appellant and sentenced him to undergo life imprisonment as already noticed herein above.

15. Mr. Vindeshwari Prasad, Advocate who has appeared on behalf of the accused-appellant as Amicus Curiae, submits that the accused-appellant has been falsely implicated in the present case and that the prosecution has not been able to establish the guilt of the accused-appellant beyond reasonable doubt. He submits that statement of P.W.-1/first informant that she saw the deceased/victim in the close company of the accused-appellant is not reliable and in view of her statement that the accused-appellant had bad image in the locality, it was otherwise expected that the mother would object to such company of the accused-appellant with the victim. He further submits that none of the witnesses has actually seen the occurrence in the manner suggested by the prosecution. He further submits that the first informant/P.W.-1 had come to her parents' house while her in-laws were residing elsewhere and the accused-appellant was from different locality, as such the identification of the accused-appellant by the informant/P.W.-1 itself remains doubtful, particularly as the accused-appellant was not known to the informant/P.W.-1 from before. He also submits that the alleged recovery of the dead body on the pointing out of the accused-appellant is not admissible, inasmuch as the recovery of the dead body was made prior to the lodgement of the first information report when the accused-appellant was not in custody and therefore, the disclosure allegedly made to Police is inadmissible by virtue of Section 25 of the Indian Evidence Act. He further submits that as the recovery was made while the accused-appellant was not in custody and even the first information report had not been lodged, provisions of Section 27 of the Indian Evidence Act would not come into play and therefore, the recovery would not be legally admissible as against the accused-appellant. He also submits that except these two circumstances, there is no other evidence on the basis of which the accused-appellant could be implicated in the present case.

16. Per contra, Mrs. Archana Singh, learned A.G.A. for the State submits that the statements of all the witnesses of fact i.e. P.W.-1, P.W.-2 and P.W.-3 are reliable and as the accused-appellant has committed heinous offence of rape upon a 7 years old girl and has also killed her by smothering, as such he deserves no leniency. Mrs. Archana Singh further submits that the dead body has been recovered on the pointing out of the accused-appellant. It is, therefore, urged that in the circumstances, the conviction and sentence awarded to the accused-appellant by the court below merits no interference.

17. We have examined the respective contentions as urged by the learned counsel for the parties and have perused the records of the present appeal including the lower court records.

18. The facts of the case, as have been noticed above, will go to show that the written report in respect of incident has been made by P.W.-1/informant after the entire incident occurred and the Police had already intervened and the dead body of the victim was recovered. The investigation has clearly revealed that the victim was a

minor, who has been subjected to sexual assault and she has been killed by smothering thereafter. The autopsy report of the victim has been duly proved by Autopsy Surgeons, Dr. Bhasker Singh and Dr. Surya Prakash (P.W.-4 and P.W.-5) respectively. From the evidence led by the prosecution it is therefore, clear that the deceased/victim was subjected to sexual assault and she has been done to death thereafter. It is, therefore, clear that the death is homicidal.

19. The prosecution has alleged that the offending act has been committed by the accused-appellant and the evidence against the accused-appellant is primarily two folds. The evidence in first part is in the form of the statement of P.W.-1, who claims to have seen the victim in the close company of the accused-appellant; offered her toffee and biscuit; and later taken the victim with him. The statements of P.W.-2 and P.W.-3 supports the version of P.W.-1 but these two witnesses have themselves not seen the occurrence or the close company of the accused-appellant with the victim just prior to her death. The primary evidence on the first part is, therefore, of P.W.-1.

20. The second part of the evidence relates to the alleged recovery of the dead body of the deceased on the pointing out of the accused-appellant. The prosecution evidence on both these counts needs to be carefully examined in the present jail appeal in order to ascertain as to whether the prosecution has succeeded in establishing the guilt of the accused-appellant beyond reasonable doubt.

21. We have examined the statements of P.W.-1, who has stated that she came to her parents house i.e. Mohalla Ganj town Madiyahu Jaunpur nearly 4 to 5 days prior to the date of incident i.e. 27th January, 2016. She claims that there is a temple of Lord Shiva in front of her parents' house. The children of the locality used to play on the platform (Chabutara) within the premises of the temple. 7 year old daughter of P.W.-1 also used to play on the said platform. On the fateful day, the daughter of P.W.-1 was playing on the platform. Other children of the locality including Aryan, who is neighbour of P.W.-1, were also playing. P.W.-1 was seeing the children playing from her house. She has stated that at about 04:00 p.m. the accused-appellant was seen, who offered toffee and biscuit to her daughter and was caressing her and gradually took her with him. P.W.-1 did not pay much attention and was under the illusion that the accused-appellant must be playing pranks on her daughter. Meanwhile, P.W.-1 got busy with her household work and her attention was diverted from her daughter. Meanwhile, the accused-appellant took away her daughter by alluring her. After some time, when she did not find her daughter near the temple she informed P.W.-2 and P.W.-3 and all of them tried to locate the victim. P.W.-1 turned apprehensive against the accused-appellant and therefore, P.W.-1, P.W.-2 and P.W.-3 visited the house of the accused-appellant, who was not available there, which further strengthened her apprehension of some untoward incident by the accused-appellant. Ultimately after much efforts the accused-appellant was found in the premises of Shiv Chitra Talkies, Madiyahu. The brother of P.W.-1 i.e. P.W.-3 gave information of it to the Police. The Police came to the Talkies and inquired about the victim from the accused-appellant. During interrogation, he confessed that he lured the victim with wrong intention and took her to a room in

Swami Vivekanand Inter College, Madiyahu; committed rape upon her; gagged her mouth on account of which she became motionless and ultimately died and he hide himself so that none could trace him. It has been then stated that the accused-appellant then took the Police and P.W.-1 to the Vivekananda Inter College Madiyahun, where the gate was locked and there was no peon available in the premises. The accused-appellant informed that there is a separate passage close to the boundary wall and in the adjoining room which has no door and window, lies the body of the victim. When P.W.-1 reached there in the presence of the police, it was a bit dark and in the light of the torch, the dead body of the victim was found on the pointing out of the accused-appellant. She has further stated that seeing dead body, she was convinced that the accused-appellant had seduced, raped and killed her. On the statement of P.W.-1 written report was scribed by P.W.-2 on the basis of which the first information report has been registered.

22. P.W.-1 has been cross-examined. She has stated that apart from the deceased/victim, she has two other sons, who are both younger to the deceased/victim. She has stated that the temple is at a short distance from her house and is visible. The distance between the temple and her house is 15 metres and in between there are four houses. Height of these houses are about 20 to 30 feets and are of single story. She has then stated that report was lodged soon after the dead body was recovered. In the cross-examination, she has disclosed that on the date of incident she was sitting on a cot in her room from where she could see her daughter. She has further stated that she does not know the direction of her house. She has then stated that there is a wide passage in front of her house and that passage leads to her house only. After walking for about 10 paces from house of P.W.-1, the passage turns to the right. She has admitted that this passage after moving 7 to 8 paces turns towards right and straightens after moving another 7 to 8 paces. The straight passage thereafter is about 15 to 20 paces whereafter the passage turns to the left and after going 25 to 30 paces leads to the temple where the victim was playing on the date of incident and she was sitting in her room watching her playing.

23. The statement of P.W.-1 with regard to situation of the temple is extracted herein-below:

"लाश मिलने के बाद पुलिस तुरन्त रिपोर्ट लिखी थी। घटना के दिन मैं अपने घर जमीन पर नहीं बैठी थी। रूम में खटिया पर बैठी थी। मेरे घर का मुहारा किधर है मुझे नहीं मालुम है। मेरे घर के सामने थोड़ा चौड़ा रास्ता है। वह रास्ता मेरे घर तक ही जाता है। मेरे घर से निकल कर 10 कदम चलने पर वह रास्ता दाहिने तरफ मुड़ता है कि नहीं मैं नहीं बता सकती।

यह कहना सही है कि वह रास्ता पुनः सात, आठ कदम चलने पर दाहिने मुड़कर पुनः सात आठ कदम चलने पर सीधा होता है। सीधा रास्ता लगभग 15, 20 कदम है। फिर बायें तरफ यह रास्ता मुड़ता है जो 25,30 कदम जाने के पश्चात मन्दिर पड़ता है जहां रानी घटना के रोज खेल रही थी। और मैं अपने कमरे में बैठी रानी को खेलते देख रही थी।"

24. In addition to above, P.W.-1 has also stated that the deceased had taken food at about 04.00 p.m. She has also stated that the intimation to Police about disappearance of her daughter was given to Police at 09:30 p.m.

25. P.W.-2 is the neighbour of P.W.-1 and has supported the prosecution case as

he joined search of the victim after P.W.-1 informed that she is missing and the fact with regard to the alleged recovery of dead body on the pointing out of the accused-appellant has been verified by him. Not much has been attracted from this witness in his cross-examination. He has accepted that he came to know about the accused-appellant 10 to 15 days only prior to the date of incident. He has stated that often the accused-appellant used to come to the temple and sit there. He has also stated that he too used to sit at the temple in the evening.

26. P.W.-3 is the other witness of fact, who happens to be the brother of P.W.-1 and has joined the search after he came to know that the victim had gone missing. He has supported the prosecution case with regard to the recovery of the dead body of the victim on the pointing out of the accused-appellant. In his cross-examination he has stated that written report was given in the Police Station at about 07:00 p.m. whereafter he came to Shiv Talkies along with Police. He has stated that when he left to Shiv Talkies looking for the accused-appellant, a Constable was present. This witness has further stated that he came to know at about 10:30 p.m. in the night that the accused-appellant has confessed his crime and the Police came to the girls college at about 11:00 p.m. in the night. The distance between school and the temple is stated to be around 200 metres. This witness has also stated that there are about four houses between the temple and his house.

27. We have carefully examined the testimony of the prosecution witnesses and the first aspect that requires our attention is as to whether the prosecution witness P.W.-1 has actually seen the incident from her house in which the victim was lured by the accused-appellant.

28. The prosecution has not prepared any site plan showing the existence of the temple and the situation of the house of the informant/P.W.-1 so that it could be ascertained whether the two falls in the straight line of sight and it was possible for someone sitting in the house to have seen the victim playing at the platform of the temple or being lured by the accused-appellant, as is alleged by the prosecution.

29. Though P.W.-1 had stated that temple situates at a short distance from her house and is visible being at a distance of 15 metres but has admitted that there are four houses between the temple and her house. However, in the cross-examination she has admitted that there is a passage coming right upto her house and if one moves 10 paces it turns towards the right and after moving for about 7-8 paces this passage straightens and if one moved 15 to 20 paces further, the passage turns to the left and the temple situates about 25 to 30 paces thereafter. This statement of P.W.-1 clearly shows that the temple claimed to be situated in front of the house of P.W.-1 is not on a straight path. One has to go straight then turn right and again turn left and after moving for about 50 paces arrives at the temple. There are four houses situated between the temple and the house of the first informant/P.W.1.

30. We find it difficult to believe that in the above positioning of the house vis-a-vis the temple, it would be possible for anyone sitting in the room of the house to see the children playing at the temple when it was not otherwise on the straight line of sight. The prosecution version that P.W.-1 saw the accused-appellant offering toffee

and biscuits to the minor victim who later lured her does not seem credible and reliable.

31. We otherwise find the prosecution version doubtful since P.W.-1 has stated that accused-appellant had bad image in the locality and therefore, the mother was expected to object to such allurement but no such objection was raised by the mother. P.W.-1 otherwise had come only for a few days to her parental house and as the accused-appellant was living in a different locality it was not clear as to how he couldbe identified by P.W.-1 when he is neither a friend of her family nor is related to her. The identity of accused-appellant apparently has been established by P.W.-3, who happens to be the brother of P.W.-1 and has stated that he found the accused-appellant coming and sitting in the temple only during the last 15 to 20 days.

32. The first part of the prosecution story that the first informant/P.W.-1 saw the victim in the close company of the accused-appellant, who lured her is therefore, not reliable on the basis of assessment of evidence available on record.

33. Coming to the second aspect relating to recovery of the dead body, we find that the absence of the victim was noticed by the informant/P.W.-1 who tried to locate her but failed. Her act of informing such absence to her brother and her close neighbour is therefore, natural and the three of them i.e. P.W.-1, P.W.-2 and P.W.-3 proceeded in search of the victim. The victim was not found nor the accused-appellant was at his home and ultimately could be located in the premises of Shiv Talkies. There is no difficulty in accepting the prosecution case on the second aspect upto this level.

34. The prosecution witnesses have stated that the information to police was given at this stage about the accused having been found in the Talkies premises. In the event such a report was given to police. It was expected that a report would be lodged in the matter or at least a missing report would be registered. None of this kind actually happened. The prosecution evidence is that the police personnels came to the premises of Talkies where the accused-appellant was present and on his interrogation, the accused-appellant made a confessional statement with regard the commissioning of the offence of rape and murder of the victim. This part of the prosecution evidence will have to be carefully scrutinised.

35. We find that neither any report had been lodged by then with the Police nor the accused-appellant was taken in custody when he allegedly made the confessional statement. The confessional statement was also not recorded at that stage nor was it possible to do so as no proceedings by then was registered and even the process of investigation had not commenced. As per the prosecution, the accused-appellant took them to the place where the dead body was lying and the recovery of dead body was made on the pointing out of the accused-appellant. It is only thereafter that the first information report has been lodged.

36. We have perused the original records which show that the first information report was actually lodged at 8:15 PM. In the absence of any first information report lodged no disclosure statement could be recorded of the accused-appellant nor any recovery memo could be prepared in respect of the dead body on the pointing out of the accused-appellant. Even

the statement of the accused-appellant was recorded under Section 161 Cr.P.C. much later after the confessional statement was made leading to recovery of the dead body of the victim. The statement under Section 161 Cr.P.C. of accused-appellant has been recorded on 28th of January, 2016 while the alleged confession was made on 27th itself leading to recovery of the dead body. This confessional statement and the recovery was thus made even prior to the lodgement of first information report or the accused having been taken into custody. The alleged confessional statement as well as the recovery of dead body is thus not backed by any document prepared by the investigating officer pursuant to any first information report lodged in the matter or taking of accused in the custody. The confessional statement, therefore, would at best a disclosure made to police which would clearly be inadmissible by virtue of Section 25 of the Indian Evidence Act.

37. The recovery moreover is not made while the accused-appellant was in custody after lodgement of the first information report, therefore, the provisions of Section 27 of the Indian Evidence Act also would not come into play and the alleged recovery cannot be treated to be a legal evidence nor can it be read in evidence at the stage of trial against the accused-appellant. The records otherwise reveal that statement of accused-appellant was recorded under Section 164 Cr.P.C. in which he has categorically denied his involvement in the commissioning of offence and recovery of the dead body on the pointing out of the accused-appellant.

38. Learned counsel for the appellant has placed reliance upon the celebrated decision of the Apex Court in the case of **Aghnoo Nagesia VS. State of Bihar** reported in *AIR 1966 SC 119* wherein the Apex Court has observed as under:

"..... We think that the separability test is misleading, and the entire confessional statement is hit by Section 25 and save and except as provided by Section 27 and save and except the formal part identifying the accused as the maker of the report, no part of it could be tendered in evidence.

We think, therefore, that save and except parts 1, 15 and 18 identifying the appellant as the maker of the first information report and save and except the portions coming within the purview of Section 27, the entire first information report must be excluded from evidence.

Section 27 applies only to information received from a person accused of an offence in the custody of a police officer. Now, the Sub Inspector stated that he arrested the appellant after he gave the first information report leading to the discovery. Prima facie, therefore, the appellant was not in the custody of a police officer when he gave the report, unless it can be said that he was the in constructive custody.

....."

39. This Court in **Criminal Appeal No. 2887 of 2018 (Ram Niwas vs. State of U.P.) vide judgment and order dated 1st December, 2022** has also examined the plea of recovery of dead body on the pointing out of an accused without there being any disclosure statement or recovery memo prepared during the course of investigation. The recovery was held inadmissible.

40. We may also note the submission of the learned counsel for the accused-appellant that the plea of recovery of dead

body on the pointing out of the accused-appellant otherwise cannot be read against him as the accused-appellant has not been confronted on this aspect at the stage of recording of his statement under Section 313 Cr.P.C. The statement of accused under Section 313 Cr.P.C. has been perused by us wherein 22 questions were put to him in the nature of incriminating material surfaced against him during the course of trial. None of the questions contains reference to the alleged recovery of dead body as being the incriminating material against the accused-appellant for recording of his statement under Section 313 Cr.P.C. Section 313 Cr.P.C.is not an empty formality and contains a substantive right in the accused to explain the circumstances arising against him at the stage of trial. Unless the incriminating material is specifically put to the accused for recording his statement under Section 313 Cr.P.C., the incriminating material itself cannot be read or relied upon against the accused for recording his conviction.

41. We, therefore, find substance in the contention of the learned Amicus Curiae that in the absence of there being any question put to accused-appellant in respect of alleged recovery of dead body such aspect could not have been relied upon against him.

In the case of **Ram Niwas (supra)** this Court also considered similar issue and observed as under in paragraph nos. 26 and 27:

"..... 26. It is by now well settled that Section 313 Cr.P.C. vests an important right in the accused to explain the adverse circumstances against him appearing in the matter. The manner of putting question has also been commented upon by the Supreme Court and the practice of putting entire evidence against the accused in a single question has been deprecated on the ground that it curtails the right of the accused to specifically explain each distinct and separate circumstance that appears in evidence against the accused.

27. In a recent judgment of the Supreme Court in Maheshwar Tigga Vs. State of Jharkhand (2020) 10 SCC 108, which has been relied upon by the counsel for the accused-appellant the Court has relied upon an earlier judgment in Naval Kishore Singh Vs. State of Bihar, (2004) 7 SCC 502 and observed as under:-

"9. It stands well settled that circumstances not put to an accused under Section 313 Cr.P.C. cannot be used against him, and must be excluded from consideration. In a criminal trial, the importance of the questions put to an accused are basic to the principles of natural justice as it provides him the opportunity not only to furnish his defence, but also to explain the incriminating circumstances against him. A probable defence raised by an accused is sufficient to rebut the accusation without the requirement of proof beyond reasonable doubt. This Court, time and again, has emphasised the importance of putting all relevant questions to an accused under Section 313 Cr.P.C. In Naval Kishore Singh v. State of Bihar, (2004) 7 SCC 502, it was held to an essential part of a fair trial observing as follows :-

"5.....The questioning of the accused under Section 313 CrPC was done in the most unsatisfactory manner. Under Section 313 CrPC the accused should have been given opportunity to explain any of the circumstances appearing in the evidence against him. At least, the various items of evidence, which had been produced by the

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

42. Upon evaluation of the evidence led by the prosecution on the aforesaid two aspects, we find that neither the statement of P.W.-1 with regard to her having observed the victim being lured by the accused-appellant is found reliable nor the circumstance relating to recovery of dead body on the pointing out of accused-appellant can be read in evidence. The circumstance relating to recovery of the dead body is otherwise admissible in the absence of such incriminating material having been put to the accused-appellant for recording of his statement under Section 313 Cr.P.C.

43. The trial court although has referred to the testimony of the prosecution witnesses and has relied upon the recovery but the evidence has not been carefully examined on the above two aspects inasmuch as the possibility of P.W.-1 having observed the incident while sitting at her home on account of non-availability of straight line of sight has been noticed nor the inadequacy of evidence on the aspect relating to recovery of the dead body on the pointing out of the accused-appellant has been appreciated in the context of legal position referred to above. We are, therefore, of the view that the conviction and sentence of the accused-appellant cannot sustain the test of judicial scrutiny and therefore, the conviction and sentence of accused-appellant is rendered unsustainable in the eyes of law.

44. Consequently, this appeal succeeds and is allowed. The judgment and order of conviction and sentence dated 1st November, 2019 passed by the Special Judge (POCSO Act)/Additional Sessions Judge-VII, Jaunpur, in Special Sessions Trial No. 12 of 2016 (State of U.P. Vs. Deepak Jaiswal), arising out of Case Crime No. 266 of 2016 under Sections 376, 302, 201 I.P.C., Sections 3/4 POCSO Act and Section 7 Criminal Law Amendment Act, Police Station-Madiyahoo, District-Jaunpur against the accused appellants, is set aside. The accused-appellant is held entitled to benefit of doubt.

45. The accused appellant-Deepak Jaiswal who is reported to be in jail since 28th January, 2016 shall be released forthwith, unless he is wanted in any other case on compliance of Section 437-A Cr.P.C.

46. We record our appreciation for the able assistance rendered to the Court by

Mr. Vindeshwari Prasad, learned Amicus Curiae, who would be entitled to his fee from the High Court Legal Service Authority quantified at Rs. 15,000/-.

47. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Jaunpur, henceforth, for necessary compliance.

(2023) 1 ILRA 1019
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.12.2022

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Appeal No. 1717 of 2019

Deepak Sharma ...Appellant
Versus
State of U.P. ...Opp. Party

Counsel for the Appellant:
Sri Mohit Singh

Counsel for the Opp. Party:
G.A.

Criminal Law- Indian Evidence Act, 1872- Sections 114(e) & 114(e) - provides that the court may presume that judicial and official acts have been regularly performed. There is nothing on these letters (two inland and one barong) to raise any suspicion on their authenticity- If any laxity has been made regarding non-verification of these letters during investigation, for that investigating officer is accountable and not the de-facto complainant. He did whatever he could, with regard to these letters. He had supplied it's photocopies to investigating officer as affidavit during investigation. He filed the originals during trial before the court and proved the writing of deceased on these letters as her father, who is supposed to be acquainted with her writing and signature, therefore, there is nothing contrary to law on the part of the learned trial court to have placed reliance on these letters.

Where the complainant has made all possible efforts to prove the authenticity of the letters, then the genuineness of the same cannot be disbelieved merely because of lapses by the investigating officer, since there is a presumption in law that judicial and official acts have been regularly performed.

Indian Penal Code, 1860- Sections 306 & 107- Section 498-A- Indian Evidence Act, 1872- Section 8- Conduct of accused-appellant was such that it amounts to abetment of commission of suicide by the deceased, who happened to be wife of the accused-appellant, although, there is no direct evidence of abetment against the appellant but on the basis of evidence of father and brother of the deceased as well as contents of letters sent by the deceased to her mother, this fact is proved beyond reasonable that she was subjected to cruelty for non-fulfillment of demand of Rs. 1,00,000/- by her husband and in-laws.

Even if direct evidence of abetment of suicide may not be available but the conduct of the accused would be a relevant fact, which would establish their abetment for committing suicide. (Para 27, 29, 30)

Criminal Appeal disposed off. (E-3)

(Delivered by Hon'ble Ram Manohar Narayan Mishra, J.)

1. Heard Sri Mohit Singh, learned counsel for the appellant and learned A.G.A. for the State and perused the lower court record as well as written submissions filed by learned counsel for the appellant.

2. Present appeal is directed against the judgment and order dated 17.1.2019 passed by Additional Session Judge, Court

No. 13, Moradabad in S.T. No. 1226 of 2015, arising out of Case Crime No. 191-C of 2015, P.S. Chandauli, District Sambhal, whereby appellant Deepak Sharma has been convicted for the offence under Section 498-A rigorous imprisonment for two years with fine of Rs. 5,000/- with default stipulation, for charge under Section 306 IPC seven years rigorous imprisonment and Rs. 20,000/- fine with default stipulation, for charge under Section 4 of D.P. Act one year rigorous imprisonment and Rs. 5,000/- fine with default stipulation. All the sentences were directed to run concurrently. It is also provided that total fine recovered from the accused, half of the amount of fine shall be payable to the informant (father of the deceased), as compensation in terms of Section 357 Cr.P.C..

3. Briefly, relevant facts as noted by the trial court for the disposal of the present appeal are reproduced as under.

4. Informant Sudhir Sharma S/o Girish Chandra Sharma moved an application under Section 156(3) Cr.P.C. before learned magistrate for registration of a case and investigation, whereupon by order of court, an F.I.R. was lodged on 24.4.2015 at 11:30 hours against accused-appellant Deepak Sharma and others at P.S. Chandauli. According to F.I.R. version, informant had married his daughter to accused-appellant Deepak Sharma on 16.1.2005 according to Hindu rituals and spent Rs. 2,50,000/- cash and Rs. 3,00,000/- in kind in the marriage. The husband and in-laws of her daughter began demanding further dowry through his daughter Kanchan Sharma and on non-fulfillment of their demand, they used to torture her and engaged in mar-peet with her. She informed these things to her parents through letters. On 3.12.2013 at around 9:36 hours (night) informant tried to communicate his daughter but her phone was reporting switched off. On 4.12.2013 at around 12:10 hours in noon, father-in-law of his daughter informed the informant and his son Gaurav Sutriya that Kanchan was suffering from headache and thereupon informant and his son rushed to the place of her in-laws and found that she was lying dead there. Her in-laws were in hurry to cremate her. Accused-persons Deepak Sharma (husband), Shivom Sharma (father-in-law), Nisha Rani (mother-in-law) and Sanchit Sharma @ Bittu (brother-in-law) killed his daughter conjointly due to non-fulfillment of demand of Rs. 1,00,000/- as dowry. F.I.R. was lodged under Section 498-A, 302 IPC and G.D. entry was made there of which carbon copy is filed as Ext. Ka-11 on record, however after investigation charge sheets were filed for offence under Section 306/498-A IPC and ¾ D.P. Act against accused persons.

5. Investigating officer carried out investigation in the offencee, prepared site plan as Ext. Ka-22, recorded statements of witnesses. Inquest of dead body of deceased was conducted by S.I. Ashok Kumar which was proved by PW-6 Smt. Santosh Bishnoi (S.I. Mahila Cell) due to his retirement which is marked as Ext. Ka-12. PW-3 Dr. Vijay Singh conducted post-mortem examination of the dead body of deceased and prepared post-mortem report, which is proved in evidence during trial and marked as Ext. Ka-9. Co-accused Smt. Nisha Rani (mother-in-law) died during investigation and therefore she was not charge sheeted.

6. Investigating Officer submitted charge sheet after investigation against accused Deepak Sharma (husband of the

deceased), Sanchit Sharma (brother-in-law of the deceased), under Sections 498-A, 306 IPC and Section 3/4 D.P. Act.

7. Learned trial court framed charge under Section 498-A IPC and 306 IPC and Section 4 of D.P. Act against accused Deepak Sharma and Sanchit Sharma and alternative charge under Section 302 IPC was also framed against both accused persons in the case in their respective sessions trial i.e. S.T. No. 1226 of 2015 and 793 of 2016. Accused Sanchit Sharma acquitted of all charges and accused Deepak Sharma has been acquitted of alternative charge under Section 302 IPC and convicted for remaining charges.

8. In session trial, prosecution examined PW-1 Sudhir Sharma (informant), PW-2 Gaurav Sutriya as witnesses of fact, PW-3 Dr. Vijay Singh, who conducted post-mortem of the deceased, PW-4 Jhajhan Lal, HCP who has proved the chick F.I.R. lodged on directions of learned C.J.M. under Section 156(3) Cr.P.C. as Ext. Ka-10 and also proved G.D. entries of registration of case at P.S. concerned as Ext. Ka-11, PW-5 Shriom Sharma is witness of fact, who is neighbour of accused persons. PW-7 Dr. Manish Malhotra has stated fact that deceased was produced before him for treatment on the date of incident on 4.12.2013 at 12:30 hours; she was referred by him for CT Scan as her condition was poor; she was again produced before him at around 2:00 pm after CT scan but her blood pressure and pulse were not realised and he referred her to higher centre but in the process of shifting her in ambulance, she was found to have died. In his opinion, she died due to cardiac arrest and obstruction in breathing. He proved medical certificate of the deceased as Ext. Ka-19 and her blood test and C.T. Scan report as Ext. Ka-20 and 21. PW-8 S.I. Shamshad Ali (Investigating Officer) has proved proceedings of investigation, site plan as Ext. Ka-22, charge sheet as Ext. Ka-24 and Ka-24. He has also proved viscera examination report of deceased submitted by FSL, Agra as Et. Ka-23 in which it is stated that in viscera of deceased, carbamate insecticide poison was found.

9. Statements of accused was recorded under Section 313 Cr.P.C. after conclusion of prosecution evidence in which it is stated that witnesses have testified against him due to enmity, however, he has not taken any specific defense case therein. At the stage of defense evidence, accused Deepak Sharma himself appeared as DW-1 and stated that his wife was suffering from depression. He never practised cruelty against his wife nor ever made any demand of dowry. He was living with his wife and children happily as out of the wedlock, two children were born namely Roshni and Chirag, who were taken by father-in-law after death of his wife with mutual understanding. On the date of incident, birthday of his daughter Roshni fell and for that reason he came to his home Chandausi at 7:00 AM after obtaining leave from his job and celebrations of birthday were on, however, his wife Kanchan felt headache and her conditions deteriorated. He took her to Dr. Manish Malhotra at Chandausi, however, she was conscious. Her pathology examination and CT Scan was conducted on directions of Dr. Manish Malhotra but thereafter her condition further deteriorated and when she was being kept on ambulance for moving her to higher centre, she died at around 2:30 PM.

10. Learned trial court after appreciation of evidence on record

acquitted Sanchit Sharma (father-in-law) of charges and convicted and sentenced the appellant as aforesaid.

11. Feeling aggrieved by the impugned judgment and order, appellant preferred present appeal under Section 374 Cr.P.C.

12. Learned counsel for the appellant submits that F.I.R. in the present case lodged belatedly after filing an application under Section 156(3) Cr.P.C. bearing date 19.2.2015 which implies that even application under Section 156(3) Cr.P.C. was filed by the informant after more than one month of the incident which is an afterthought and gives ample scope in deliberations, embellishment and concoction. Co-accused against whom similar allegations have been made in F.I.R. as well as in statements of witnesses of fact, who is brother of the appellant, has been acquitted by learned trial court on the basis of same evidence. No complaint regarding demand of dowry or ill treatment of deceased lodged for eight years of marriage. Accused-appellant is held in jail custody from the stage of investigation since 2.8.2015 and from report of Superintendent of Jail concerned, which is filed on record, he has suffered five years five months seven days actual punishment till 5.10.2022, thus he has suffered more than five years seven months actual imprisonment out of seven years imprisonment awarded to him in main offence under Section 306 IPC. According to the judgment under appeal, he has to suffer maximum period of imprisonment up to seven years imprisonment which includes period of remission also. Learned trial court did not appreciate the evidence available on record and wrongly convicted the appellant. Learned trial court did not pay heed to the fact that there was no motive on the part of the appellant to abet the deceased for committing suicide. The prosecution witnesses have deposed against the appellant under the influence of the informant. The sentence awarded to the appellant is excessive and stringent in the eye of law. Appellant has not committed any offence whatsoever and has been falsely implicated in the case at the behest of the informant. Informant has filed a case with ulterior motive through application under Section 156(3) Cr.P.C. Learned trial court has placed reliance on inland letters allegedly sent by the deceased to her mother from her matrimonial home, without the same being duly proved by expert. Marriage of the deceased and appellant took place eight years back of the date of incident and this inconceivable that demand of dowry of Rs. 1,00,000/- will be made and persist for so long period by the appellant and his family members. The deceased was possessed of mobile phone, therefore, there was no occasion for her to communicate with her parents by letters. No date has been mentioned on inland letters propounded by the letters which is used against the appellant. There is no direct or circumstantial evidence against appellant in support of the charge of abatement to commit suicide by the deceased. PW-5 Shriom Sharma who has been examined by prosecution as independent witness has not supported the allegations against appellant in his cross-examination.

13. Per contra, learned A.G.A. countered the statements of learned counsel for the appellant and submitted that there is no legal or factual error in impugned judgment passed by learned trial court which is based on evidence on record and all the evidence and material on record has

been duly discussed and the arguments of learned counsel for the parties are duly addressed therein. There is no infirmity in the judgment under appeal and thus, it requires no interference in present appal and same is liable to be affirmed in totality.

14. I have gone through the case of prosecution and evidence on record thoroughly and examined the judgment under appeal in the light of grounds taken in appeal memo as well as statements made by learned counsel for the appellant.

15. PW-1 Sudhir Sharma (father of the deceased) has stated in his sworn testimony that marriage of his deceased daughter Kanchan and accused Deepak Sharma was solemnized on 16.1.2005 and stated same fact, as mentioned in application under Section 156(3) Cr.P.C. moved by him for registration of case and investigation which found basis for lodging of F.I.R. Even PW-5, who is neighbour of the accused persons, has stated that Deepak Sharma was married with deceased Kanchan in the year 2005.

16. Section 498-A IPC provides as under:-

"Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.--For the purposes of this section, "cruelty means"--

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."

17. Similarly Section 306 IPC provides as under:-

"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."

18. Section 4 of D.P. Act provides that if any person demands, directly or indirectly from the parents or other relatives or guardian of a bride or bride groom, as the case may be, any dowry, he shall be punishable with imprisonment for a term which shall not be less than six months, but it may extend to two years and with fine which may extend to ten thousand. Provided that the court may, for adequate and special reasons to mention in the judgment, impose a sentence of imprisonment for a term of less than six months.

19. In present case from statement of PW-5 Shriom Sharma, PW-7 Dr. Manish Malhotra and DW-1 Deepak Sharma (accused), this fact stands proved that on 4.12.2013 deceased Kanchan Sharma got suddenly ill and she was produced before PW-7 Dr. Manish Malhotra at around 12:30 hours in noon by her in-laws. She was suffering convulsions. Her blood pressure was low and Dr. has referred her for her CT Scan and pathological examination. Deceased was brought back to doctor after CT Scan at around 2:00 PM but doctor found that her blood pressure and pulse

were missing. She was referred to higher centre but when he was shifting to ambulance, it was found that she died. Dr. who treated the deceased has stated that she died due to respiratory arrest and impediment in breathing. Dr. has also stated that if a person is under influence of poison, he/she may suffer respiratory problems and he or she may die due to respiratory arrest. In the blood test report, TLC was found abnormal and such TLC reflects any infection in the body which is marked as Ext. Ka-20. Dr. has also stated that in CT Scan report of deceased Kanchan, swelling was found in membrane of her brain for which MRI was suggested. CT Scan report is marked as Ext. Ka-21. Dr. has further stated that when the patient was brought before him, she was in some what position to speak but she had not told him that she had been administered poison by anyone. She had also not told that she had herself consumed poison. She only told that she was suffering from acute headache and vomiting. No smell of poison was emerging from her clothes. Dr. has admitted on defense suggestion that as TLC of the patient was increased, it shows a general infection and TLC increases due to long illness. He has also stated that husband and in-laws of patient of the deceased were present there throughout. They had told him that she remained ill, often and was weak. He cannot confirm any symptom of poison in the body of deceased. He had referred her to higher centre. In case of cardiac arrest or any other infection, swelling occurs on membrane of brain.

20. PW-6 S.I. Smt. Santosh Bishnoi had deposed that she was present along with S.I. Ashok Kumar who conducted an inquest of the deceased at the time of inquest proceeding on 5.12.2013. She was at that time HCP and she had inspected dead body of the deceased. No external injury or symptoms of poison appeared on dead body. No froth or saliva appeared to have came out from her mouth.

21. PW-3 Dr. Vijay Singh had conduced post-mortem examination of dead body of deceased and has stated that frothy secretion was present in windpipe. Post-mortem examination was conducted on 5.10.2013 and time of death was found to be one day back in post-mortem. In internal examination, 50 ml concentrated liquid was found. As cause of death could not be ascertained, viscera was preserved.

22. In cross-examination, this witness has stated that in stomach of the deceased, 50 ml concentrated liquid was present which was not meal. The carbamate insecticide poison was found in viscera of the deceased which used in crops and vegetables to save it from insects. He cannot tell what is vital dose of this poison. No internal or external injury was found on person of the deceased.

23. PW-1 and PW-2, who are witnesses of fact, have stated that husband and in-laws of the deceased were demanding Rs. 1,00,000/- for managing a job for accused Deepak Sharma in health department where his mother Smt. Nisha Rani (then co-accused) was employed. Witnesses had feigned ignorance on defense suggestion that deceased was operating a beauty parlor in a room at her matrimonial home in the name of Roshni Beauty Parlour.

24. PW-5 has also stated that appellant Deepak Sharma was engaged in some private job and whenever he would come back to home, there was altercation

with his wife Kanchan. The deceased used to tell him that these people would disturb her and did not provide money for expenses and would ask her to bring money from her parental home. In night of 3.12.2013, her condition became bad and froth was emanating from her mouth. There was panic in the home of accused. Next day, he came to know that she was produced before Dr. Manish Malhotra at Chandausi and subsequently died. People from her parental home reached in the evening, however, in cross-examination, he stated that deceased was operating a beauty parlour in some portion of home and was suffering from depression as she often remained sick. Her parents were present in her cremation. Her in-laws never demanded any dowry in his presence. The deceased was living in upper portion of the house which consisted of a kitchen and a bathroom.

25. The defense side has taken a case that deceased was suffering from some sickness and her condition became serious on the date of incident suddenly after headache and giddiness and died on the same day, whereas in viscera examination of the deceased Kanchan, a clear cut finding has been given by FSL Agra, which is admissible in evidence under Section 293 Cr.P.C. being report of a chemical examiner to Government, which clearly states that carbamate insecticide poison was found and there is no reason to disbelieve this report. No medical papers prior to the incident have been filed in support of the contention that she was suffering from some illness or lying in depression due to illness.

26. PW-1 has filed two inland letters and one barong letter posted by the deceased in the name of address of her mother through paper no. 15/3 and he had identified the writing of his daughter, the deceased which is marked as Ext. Ka-3, Ka-4 and Ka-5, although dates have not been mentioned by the writer of the letter but in one letter the endorsement of postal department is made on 2.2.2009. All the three letters were addressed to her mother Smt. Vimlesh Sharma on address of dairy shop of her father. In these letters, she had stated that her in-laws were demanding Rs. 1,00,000/- for managing a job in the department of her mother-in-law from her father and on one occasion, she was pushed by her mother-in-law from staircase and even thereafter she was hit by kicks on her stomach by her mother-in-law. She was not permitted by her father-in-law to use washing machine. She was warned by four accused persons to refrain from making any complaint to her parents otherwise she will be killed during treatment. She has also stated that her husband was also forcing her to bring Rs. 1,00,000/- from her father so that a job could be managed for him. Her mobile phone was not recharged by accused-persons and for that reason, she was unable to speak to her parents by mobile phone. No expert opinion had been obtained about the writing of the deceased on these letters but letters have been sent through postal agency which is a Government machinery.

27. Section 114(e) of Evidence Act provides that the court may presume that judicial and official acts have been regularly performed. There is nothing on these letters (two inland and one barong) to raise any suspicion on their authenticity. No date has been mentioned in these letters is not a ground to disbelieve it's genuineness. The letters have been produced from proper custody and this fact has come in evidence that he had supplied

the photocopies of these papers to investigating agency and subsequently filed the original before the court.

28. PW-8 Investigating Officer has also stated in his evidence that photocopies of these letters were provided by the informant along with his affidavit during investigation and the affidavit was verified by him, however, he did not get these letters examined by finger print expert. He had also not verified as to place from which these letters were posted.

29. If any laxity has been made regarding non-verification of these letters during investigation, for that investigating officer is accountable and not the de-facto complainant. He did whatever he could, with regard to these letters. He had supplied it's photocopies to investigating officer as affidavit during investigation. He filed the originals during trial before the court and proved the writing of deceased on these letters as her father, who is supposed to be acquainted with her writing and signature, therefore, there is nothing contrary to law on the part of the learned trial court to have placed reliance on these letters.

30. From perusal and analysis of evidence on record, it appears that conduct of accused-appellant was such that it amounts to abetment of commission of suicide by the deceased, who happened to be wife of the accused-appellant, although, there is no direct evidence of abetment against the appellant but on the basis of evidence of father and brother of the deceased as well as contents of letters sent by the deceased to her mother, this fact is proved beyond reasonable that she was subjected to cruelty for non-fulfillment of demand of Rs. 1,00,000/- by her husband and in-laws and for that reason, conduct of appellant amounted to abatement of suicide which was committed by the deceased, thus, I do not find any factual or legal error in appreciation of evidence in recording conviction of appellant for charges under Section 306 and 498-A IPC and Section 4 of D.P. Act. However, keeping in view the fact that appellant is in jail since the stage of investigation and he has suffered around five years seven months actual imprisonment so far (without remission), the period of sentence of imprisonment is liable to be reduced to period undergone in the light of totality and facts and circumstances of the case, therefore, the verdict of conviction of appellant for charge under Section 306, 498-A I.P.C. and Section 4 of D.P. Act is affirmed in the light of above discussion. The substantive sentence awarded in judgment under appeal is reduced to period already undergone. Appellant will be released from custody on payment of fine awarded in the judgment or sufferance of punishment awarded as default stipulation, as the case may be.

31. Criminal appeal stands disposed of in the manner.

32. Let a copy of this order be sent to the jail concerned for compliance through the court concerned. Court concerned shall ensure compliance of this order in accordance with law.

33. Let lower court record be sent back to the court concerned for further action.

(2023) 1 ILRA 1027
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.01.2023

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 4062 of 2008
connected with
Crl. Appeals No. 3081 of 2008, 3082 of 2008,
3083 of 2008 & 3274 of 2008

Ram Briksha Yadav ...Appellant
Versus
State of U.P. ...Opp. Party

Counsel for the Appellant:
Sri R.P. Srivastava, Sri Amit Kumar Singh, Sri Anubhav Trivedi, Sri Dilip Kumar, Sri G.S. Hajela, Sri H.K. Shukla, Sri Nitin Sharma, Sri R.P. Dubey, Sri Rajiv Lochan Shukla, Sri Ravindra Sharma, Sri S.K. Dubey, Sri Satish Trivedi, Sri U.S. Shah, Sri V.S. Mishra, Sri Vikrant Pandey

Counsel for the Opp. Party:
Govt. Advocate, Sri Jitendra Kumar Yadav, Sri P.C. Srivastava

Criminal Law- Indian Penal Code- Sections 302 & 149- It was from the Carbine of Prem Singh that the gunshot injury was caused to the deceased by the accused Ram Briksha Yadav after snatching the Carbine from his gunner-So far as the injuries caused to PW-1 Rakesh Kumar Yadav, Jai Prakash, Janardan Yadav are concerned the evidence of prosecution is not specific as to who assaulted them and what was the weapon of assault used by the accused. None of the accused have been assigned any specific weapon of assault. Existence of nearly 400 persons at the polling booth is otherwise admitted to the prosecution. Since no specific weapon of assault is assigned to any of the accused (other than Ram Briksha Yadav) we find it difficult to hold any specific individual guilty of assaulting Rakesh Kumar Yadav, Janardan Yadav and Jai Prakash Yadav. For arriving at such conclusion we also rely upon the fact that injuries were caused not only to informant side but also to the members of accused party.

Where a very large number of persons were present at the spot and neither any specific weapon has been assigned to the accused, nor any specific role of assault has been attributed to them and the accused side has also sustained injuries, then it cannot be said that the accused formed an unlawful assembly with a common object.

Indian Penal Code, 1860- Section 300- Sections 302 & 304 Part I- The incident occurred during the panchayat poll, at the spur of moment - A fight had erupted between supporters of two contestant leading to assault and it was in this heat of passion that the accused Ram Briksha Yadav snatched the Carbine of his gunner and fired upon the deceased. No evidence exists on record to show that there was a common object or intent on part of accused persons to commit the murder of the deceased Mahatam Yadav. The action of Ram Briksha Yadav in suddenly snatching the Carbine and firing at the deceased appears to be his individual act- at the spur of moment without any pre-meditation in which the deceased sustained gunshot injury at the hands of accused Ram Briksha Yadav. The act of firing with an intent to commit the murder of the deceased appears unlikely. Necessary ingredients to attract 4th Exception to section 300 IPC are clearly present in the facts of the present case inasmuch as death is caused; there existed no pre-meditation; it was a sudden fight; the offender has not taken undue advantage or acted in a cruel or unusual manner, therefore, the case in hand clearly falls under fourth exception to section 300 IPC.

As the accused had acted on the spur of the moment, without pre-meditation and in sudden heat of passion resulting in a solitary fire arm

injury to the deceased, hence the case would come within the ambit of culpable homicide not amounting to murder and will be punishable u/s 304 Part I, IPC. (Para 30, 32, 38, 39, 40, 41, 43, 46)

Criminal Appeal partly allowed. (E-3)

Case Law/ Judgements relied upon:-

St. of U.K Vs. Sachendra Singh Rawat, (2022) 4 SCC 227

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. The above appeals have been preferred by the accused appellants against the judgment and order dated dated 30.04.2008/02.05.2008, passed by Additional Sessions Judge/F.T.C., Court No.3, Basti, in Sessions Trial No.257 of 2006 (State Vs. Subhash Yadav and others) whereby they have been sentenced to life imprisonment alongwith fine of Rs.10,000/- each and in default of payment of fine to undergo one year additional imprisonment each under Section 302/149 IPC; three years rigorous imprisonment alongwith fine of Rs.1,000/- each and in default of payment of fine to undergo three months additional imprisonment each under Section 308/149 IPC; one year rigorous imprisonment each under Section 147 IPC; three months rigorous imprisonment each under Section 148 IPC; six months rigorous imprisonment each under Section 323/149 IPC. Accused Prem Singh has been convicted and sentenced to life imprisonment alongwith fine of Rs.10,000/- and in default of payment of fine to undergo one year additional imprisonment under Section 302 read with section 114 IPC. All the appeals have been heard together and are therefore being disposed of by this common judgment. Criminal Appeal No. 4062 of 2008 shall be treated as the leading case.

2. Panchayat elections were notified in Uttar Pradesh and 25th August, 2005 was the date fixed for cast of votes at Sant Kabir Nagar. Jai Narain Inter College, Maur, Sant Kabir Nagar was one of the polling centre (hereinafter referred to as "centre') in the district. An incident occurred at 2.15 pm at this centre in which one Mahatam Yadav was shot dead and several others sustained injuries. Two distinct versions have surfaced in respect of the incident. We are concerned in the present set of appeals with the first version of the incident based on the report of the deceased's son namely Rakesh Kumar Yadav.

3. The written report (Ex.Ka.-1) made by the informant Rakesh Kumar Yadav (PW-1) on 25.8.2005 states that informant's sister-in-law, namely Champa Devi w/o Jai Prakash Yadav was a candidate for the post of Pradhan while Hanuman Yadav, was one of the other candidate who tried to rig the polls. On being opposed, one Manoj Gupta started abusing the informant. A squabble ensued between informant and Manoj Gupta, who was supporting Hanuman Yadav. Hanuman Yadav then called Ram Briksha Yadav from Gaighat Polling Booth who arrived alongwith his gunner Prem Singh and other associates and started assaulting the informant's side by baton and sticks (lathi danda). Those present there tried to mediate but Ram Briksha Yadav and his supporters did not pacify, instead Ram Briksha Yadav exhorted his associates to eliminate Mahatam Yadav and his family and snatched his bodyguard's Carbine and fired at the deceased. The bullet hit the deceased on his chest; he fell and died. Supporters of Ram Briksha Yadav also

assaulted informant and his uncle Janardan Yadav, Jai Prakash Yadav and Onkar Yadav. On account of the injuries caused the informant became unconscious. This incident is alleged to have seen by large number of persons present at the polling centre. Enraged by the incident members of public chased the accused Ram Briksha Yadav and his associates and that is how the life of informant and his other family members could be saved. In this incident Ram Briksha Yadav, Ram Poojan Yadav, Subhash Yadav, Hanuman Yadav, Manoj Gupta, Virendra Yadav and gunner Prem Singh (appellants herein) are implicated as accused.

4. Pursuant to the above report a first Information Report (Ex.Ka-5) has been lodged at 4.20 pm on 25.8.2005 in respect of the incident occurred at 2.15 pm on the same date. Investigating Officer recovered bloodstained and plain earth vide Ex.Ka-3. Empty cartridge was recovered vide Ex.Ka-4.

5. Inquest was held in respect of the dead body of Mahatam Yadav on 25.8.2005 at 7.30 pm (Ex.Ka.-2) wherein cause of death is shown as gunshot injury. The dead body was sealed and sent for postmortem, which was conducted on the next day i.e. on 26.8.2005 at 4.00 pm wherein death was found to be due to shock and hemorrhage as a result of following ante-mortem injuries:-

"(1) wound of entry 1x1 cm, 6 cm medial to right nipple, 4 cm medial to the mid sternum cavity deep. Blackening present around wound under lying the 4th rib fractured. Margin of wound is inverted.

(2) wound of exit 1½ x 1½ cm cavity deep, 7cm lateral to the midline of back of 5cm distal to the inferior angle of left scapula, margin everted, between 4th & 5th rib, the track extending from wound of entry to right atrium to right lung to left lung to wound of exit.

(3) Contusion abraded contusion size 2x1 cm over left forearm 4cm around to wrist.

(4) contusion over left elbow posterior aspect size 4x2 cm

(4) contusion 4 x 2 cm over dorsum of right hand

(5) contusion 5x3 cm over anterior aspect of arm 8 cm proximal to right elbow

(6) contusion 5x2 cm in right leg 25 cm distal to right knee

(7) contusion 12x3 cm over back of side of chest extending right inferior angle of scapula to the middle of the posterior 13x2.5 cm extending inferior angle of left scapula to the middle line of the back

(9) contusion 4x2 cm on left scapula.

(10) contusion 5x3 post. aspect of left shoulder"

6. Janardan Yadav, Rakesh Kumar Yadav and Jai Prakash sustained injuries in the incident and have been medically examined. Their injury reports are contained in Ex.Ka-7, Ex.Ka-8 and Ex.Ka-9, which are extracted hereinafter:-

Injuries of Janardan Yadav

"(1) Contusion 4cm x 3cm x red colour over left side of head above ear.

(2) Contusion 10cm x 2cm x red colour over back of left side chest on upper ear.

(3) Contusion 5cm x 0.5 cm x red colour over left lateral side of chest below left axilla.

(4) Contusion 10cm x 4cm x red colour over outer side of dorsum of right hand and wrist."

Injuries of Rakesh Kumar Yadav

"(1) L.W. 3cm x 0.5cm x bone deep over left side of head above ear. Fresh bleeding.

(2) L.W. 4 cm x 0.5 cm x bone deep over back of head. Fresh bleeding.

(3) L.W. 5cm x 0.5 cm x bone deep x fresh bleeding over front of head at midline.

(4) Linear abrasion 5cm long, oozing fresh blood over left malar area of face.

(5) Abrasion 3cm x 1cm x oozing fresh blood over right side face near outer canthus of right eye.

(6) Contusion 7cm x 1cm x red colour over left side front of lower neck and upper chest.

(7) Contusion 6 cm x 2cm x red colour over front of right shoulder.

(8) Contusion 5cm x 3cm x red colour over front of left arm middle part.

(9) Abraded contusion 6cm x 2cm x red colour over back of middle of right arm."

Injuries of Jai Prakash Yadav

"(1) Abrasion 1cm x 0.5 cm x oozing fresh blood over right side of face near nose.

(2) Abrasion 1.5cm x 0.5 cm x oozing fresh blood over left side of face near nose. (3) C/o pain right side chest and both thighs."

7. Injuries have also been caused to accused Ram Briksha Yadav, Subhash Chandra Yadav, Prem Singh and Manoj Kumar who were examined by DW-1 (Dr. Yogendra Pratap Singh) then posted as Medical Officer at Primary Health Centre, Haisar Bazar. Injuries to accused Ram Briksha Yadav included two bone deep lacerated wound on his head, which was on his vital part and in the opinion of doctor his condition was critical. In addition, abraded contusion/contusion was present on his hand in addition to contusion on Subhash Chandra Yadav and abrasion on Manoj Kumar. Testimony of this witness clearly shows that members of accused party were also assaulted in the incident.

8. Investigating Officer recorded statements of various witnesses under Section 161 Cr.P.C. and ultimately submitted two chargesheets against the accused on 24.10.2005 and 25.1.2006. Ram Poojan Yadav and Virendra Yadav were shown as accused in the chargesheet submitted on 25.1.2006, whereas all others were implicated in the first chargesheet. Consequently, two separate sessions trial were registered i.e. Sessions Trial Nos.257 of 2006 and 257-A of 2006. Accused appellants were charged of offences under Sections 147, 148, 149, 308, 302, 323, 504, 506 IPC, Section 7 Criminal Law Amendment Act and Section 134-B and 135 of the Representation of the People Act, Police Station Dhanghata, District Sant Kabir Nagar. All the accused denied the charges levelled against them and demanded trial.

9. The prosecution in order to prove its case has relied upon the documentary evidence in the form of written report Ex.Ka-1; First Information Report as Ex.Ka-5; recovery memo of bloodstained and plain earth as Ex.Ka-3; recovery memo of empty cartridge as Ex.Ka-4; injury report of Janardan Yadav as Ex.Ka-7; injury report of Rakesh Yadav as Ex.Ka-8; injury report of Jai Prakash as Ex.Ka-9; inquest report as Ex.Ka-2 and postmortem as Ex.Ka-10.

10. The prosecution in addition to documentary evidence also produced oral testimony of following prosecution witnesses:

(i) PW-1 (Rakesh Kumar) is the first informant. In his examination-in-chief, he stated that 25th August, 2005 was the polling day for panchayat elections and his sister-in-law (Bhabhi) Champa Devi w/o Jai Prakash was a contestant for the post of Pradhan. Accused Hanuman Yadav was also a contestant for the same office. Votes were being cast at Jai Narain Inter College, Maur. It is alleged by the witness that Hanuman Yadav tried to rig the polls by casting bogus votes, which he opposed. Manoj Gupta, a supporter of Hanuman Yadav started abusing the witness. An altercation started between PW-1 and Hanuman Yadav. Hanuman Yadav left the booth and brought with him accused Ram Briksha Yadav from Gaighat Polling Booth. His brother Ram Poojan Yadav, nephew Subhash Yadav, Virendra Yadav, Gunner Prem Singh were also with Ram Briksha Yadav. They came to Jai Narain Inter College. As soon as they arrived they indulged in violence. Supporters of Ram Briksha Yadav were carrying batons and sticks (lathi danda). Those present at the booth tried to defuse but Ram Briksha Yadav in an infuriated state exhorted to finish the family of Mahatam Yadav and snatched the Carbine of his gunner and with an intent to kill Mahatam Yadav fired at him. The bullet hit on his chest. Mahatam Yadav fell on the spot and died. The supporters of Ram Briksha Yadav, namely Ram Poojan, Subhash Yadav, Virendra Yadav, Hanuman Yadav, Manoj Gupta assaulted PW-1 and his associates. In this violence PW-1, his uncle Janardan Yadav, elder brother Jai Prakash Yadav also sustained injuries. PW-1 also lost consciousness for few minutes. The members of public present at the booth acted in retaliation by throwing bricks and stones as well as chased the accused party with batons and sticks (lathi, danda) due to which the informant party could be saved. PW-1 has moreover stated that there was no enmity between him and Ram Briksha Yadav. However, in the previous elections Ram Briksha Yadav was annoyed with his father. PW-1 has verified the written report written in his own handwriting at police station Dhanghata on the basis of which the FIR was registered. PW-1 was medically examined after registration of FIR at Primary Health Centre. The incident was allegedly seen by Janardan Yadav, Onkar Yadav, Jai Prakash Yadav, Lakshman s/o Jhangur, Chandrajeet Pathak etc.

Statement of PW-1, on the aspect of casting of bogus votes, is extracted hereinafter:

"सुरक्षा कर्मियों से मैने इस बात की शिकायत कि हनुमान फर्जी वोट डलवा रहे है नही किया क्योंकि फर्जी वोट के समय मैं मौजूद नही था।

मुझे यह बात कि फर्जी वोट देने वाले पुरूष थे कि स्त्री, नही पता। फर्जी वोटर किस गांव के निवासी/निवासिनी थे, नही पता। फर्जी वोट के बारे में हनुमान फर्जी वोट डलवा रहे थे, यह बात एजेन्ट जनार्दन यादव जो मेरे चाचा भी है, से पता चली।

एजेन्ट जनार्दन यादव ने उक्त बात मुझे गेट के बाहर आकर नही बताई, अन्दर से ही आवाज दी।

आवाज सुनकर मेरे परिवार के 2-3 लोग अन्दर जाने लगे, पुलिस वाले उस समय हमे अन्दर नही जाने दिए।

फर्जी मत देने वाला वोटर पकडा गया कि नही, नही जानता।

घटना के बाद भी नही पता चला कि फर्जी वोट देने वाला पकडा गया कि नही। मैने पता ही नही किया।"

During cross examination PW-1 has admitted that cross case under sections 147/148, 308 IPC was registered against

him after 16 days in which he was in jail for a week. Onkar Yadav, Jai Prakash Yadav, Janardan Yadav, Amarjeet Yadav were also accused in this case. PW-1 claimed to be a constable in Indian Army and was called guardsman. At the time of incident he was posted at Baramula in 46 R.R. and was on 14 days casual leave. PW-1 has stated that Ram Briksha, Ram Poojan, Subhash, Virendra were residents of village Tikara, which was at a distance of 1 km from village Maur. The accused also had a house in village Karampur and its polling booth was at Gaighat. He has feigned ignorance about his father being accused of offence under sections 395/397. His father was also an accused under section 307 IPC in the case of State vs. Pahalwan Singh and others. He claims to be the original resident of village Kanchanpur and has agricultural field also in village Maur. He has stated that together with Prem Singh the number of associates of Ram Briksha Yadav was between 20-25. PW-1 recognized only 3-4 of them. Name of other persons who indulged in violence and had assaulted them were not ascertained. Janardan and father of PW-1, Mahatam Yadav, were the polling agents of Champa Devi. As per him the altercation took place at the poling booth and not at a distance of 200 mtr. He has denied having received permission to enter the polling booth. He has also denied the knowledge of two life threatening injuries caused to Ram Briksha Yadav or that he was admitted in hospital for long. PW-1 also admitted that no complaint was made to security personnel about cast of bogus votes.

Since PW-1 was not present at the time of cast of such votes he also had no knowledge whether bogus votes were of ladies or gents. He claims that information about cast of bogus votes was received from agent Janardan Yadav, who was his uncle. Janardan Yadav had informed him of this fact from inside the polling booth. He did not know whether person casting bogus votes were apprehended or not. He has denied the suggestion that the allegation of bogus votes was made so as to give colour to his complaint. PW-1 has clearly admitted that polling booth of village Tikara, to which Ram Briksha Yadav belonged, was also at Jai Narain Inter College, Maur and Ram Briksha Yadav and his family members were to cast their votes at Jai Narain Inter College, Maur. He has also seen Ram Briksha Yadav and his family members earlier in the day at the polling booth. He claims that they came to cast vote and left thereafter. He has however denied the suggestion that Ram Briksha Yadav had come to the polling booth to cast his vote at the time of incident. He has also denied the suggestion that Ram Briksha Yadav was beaten and that is why he could not cast vote. PW-1 has also stated that Ram Briksha Yadav had come to cast vote at 10.00. The witness, in his cross stated that at 10.00 only family members of Ram Briksha Yadav had come. The family members who came to the polling booth at 10 included wife of Ram Poojan and no male member from the family of Ram Briksha Yadav had come to cast vote at 10. He denied that Ram Briksha Yadav as well as none of his family members could cast vote on that day. PW-1 has also denied having knowledge of the persons who threw stones and bricks at the accused or assaulted them with lathi danda as he himself was injured. He denied that these persons were criminals, who had been called by him or that there was a plan not to allow Ram Briksha Yadav to cast vote. PW-1 lastly denied that he had assaulted Ram Briksha Yadav or his associates.

(ii) PW-2 (Janardan Yadav) has stated that wife of Hanuman Yadav was a

contestant for the post of Pradhan but her name was not known. He has stated that their opponents were trying to cast bogus votes. Seeing it he objected to cast of votes by relative of Hanuman Yadav, who had came from Gorakhpur. Accused Manoj Gupta, who was supporting Hanuman abused PW-2 and his elder brother Mahatam. Accused Hanuman claimed that he was going to Gaighat and would bring Ram Briksha Yadav with him. On the calling of Hanuman, Ram Briksha Yadav allegedly came with his associates. They came at 2 pm. Accused Ram Briksha Yadav allegedly exhorted to finish the family members of Mahatam Yadav. When Ram Briksha tried to enter from the gate he was stopped by the constable but Ram Briksha pushed him with baton and the constable returned. After opening the gate Ram Briksha entered and seeing Mahatam he snatched Carbine of his gunner Prem Singh and aimed at Mahatam Yadav and shot him dead. Supporters of Ram Briksha then assaulted PW-2 and his associates with lathi danda in which Jai Prakash and Rakesh sustained injuries. The members of public retaliated and chased away Ram Briksha and his associates with lathi danda.

During cross examination PW-2 stated that apart from the wife of Hanuman there were 12 other contestants for the post of Pradhan. Each contestant had three polling agents. None of the other polling agents objected to Hanuman because PW-2 and his associates had already objected to the cast of bogus votes. Polling agents of other candidates also protested but their names have not been disclosed. This witness has not produced any document to show that he was a polling agent. After information of incident was received, all senior officers including S.P., D.M., C.O. came on the spot and conducted investigation. PW-2 was also medically examined at about 05.00 PM alongwith Rakesh.

Statement of PW-2, on the aspect of cast of bogus votes is extracted hereinafter:

"गोरखपुर वाला जो वोटर वोट देने आया था, व जिसे मैने पहचाना वह 1 पी.एम. के करीब घटना थी।

इस फर्जी मतदान की शिकायत मैने मतदान अधिकारी से लिखित नहीं किया, मौखिक शिकायत किया।"

(iii) PW-3 (Jai Prakash) has stated that his wife Champa was contestant for the post of Pradhan and wife of Hanuman was also a contestant for the same post. He has stated that altercation regarding cast of bogus votes occurred with Manoj Gupta who was a supporter of Hanuman Yadav. He has supported the prosecution case that Hanuman after such altercation brought Ram Briksha Yadav and Ram Briksha Yadav snatched the Carbine of his gunner and shot dead Mahatam Yadav. He also claims to have sustained injury which was examined at about 05.00 PM.

(iv) PW-4 (Onkar) stated that 25.08.2005 was the date for casting of votes. His elder brother's daughter-in-law Champa was contestant for the post of Pradhan and wife of Hanuman was also contestant. On the polling day bogus votes were also casted. On account of it there was altercation between his brothers Mahatam & Janardan, who were polling agent, and Manoj Gupta, who was supporter of Hanuman. Hanuman then brought Ram Briksha Yadav from Gaighat. Ram Briksh Yadav came alongwith Ram Poojan Yadav, Subhash Yadav, Virendra Yadav, Hanuman and Gunner Prem Singh. Immediately after they arrived a scuffle began and Ram Briksha exhorted to kill family of Mahatam. Ram Briksha Yadav snatched the Carbine of his gunner and fired on the chest

of Mahatam, who fell and died. The accused also beat PW-4, his nephew Rakesh, Janardan and Jai Prakash.

(v) PW-5 is the Head Moharrir, who has proved the chik FIR in Case Crime No.498/05 and G.D. Entry therein.

(vi) PW-6 is Dr. Yogendra Pratap Singh, posted at C.H.C. Haisar Bazar. He has verified the injury reports of Janardan Yadav, Rakesh Kumar Yadav, Jai Prakash, Ram Briksha Yadav and Subhash Chand.

(vii) PW-7 is Dr. Rakesh Kumar Verma, who has conducted autopsy of deceased Mahatam and proved the postmortem report.

(viii) PW-8 is Sub Inspector, Vansh Bahadur Yadav, who was the Investigating Officer in Case Crime No.498/05. He has verified the inquest report as also other police papers. He has arrested Ram Briksha Yadav, Subhash, Hanuman, Manoj Gupta and gunner Prem Singh. He has also recovered the Carbine from gunner Prem Singh. No recovery memo, however, in respect of the Carbine was prepared and only endorsement was made in the case diary. The Carbine has been produced during the course of trial wherein 27 live bullets were found in it. This witness has denied that the gunner had given any other written report apart from the one existing on record. He admitted that similar bullet is used in .9 mm pistol and Carbine. He has also admitted that bullet was not sent for forensic report.

During cross examination PW-8 denied that the statement was given to him by PW-1 that Prem Singh was not involved in violence on the relevant date.

(ix) PW-9 (Arun Kumar Singh) is the S.H.O. who was entrusted investigation of present case after the proceedings were transferred from Sant Kabir Nagar to Gorakhpur. He has specified the dates when he had recorded the statement of witnesses.

11. On the basis of above incriminating material produced by the prosecution the statement of accused appellants were recorded under section 313 Cr.P.C. All the accused have denied the accusations made against them and have stated that informant Rakesh Kumar Yadav was close to Bhal Chandra Yadav, who was the then Member of Parliament from Bahujan Samaj Party and, therefore, due to his interference the accused have been falsely implicated. It is also alleged that papers have been prepared under the influence exercised by the Member of Parliament. The accused have also stated that they came to cast vote and as soon as they reached the polling booth they were attacked by Mahatam, Onkar, Janardan etc. in which they sustained injuries and as the public turned violent the Gunner Prem Singh fired to save them and the bullet accidentally hit the deceased.

12. On behalf of defence the accused have produced witnesses, namely, Yogendra Pratap Singh (DW-1), Ravindra Singh (DW-2), Moharrir Ram Ashish Bhartiya (DW-3), Ashok Kumar Singh (DW-4), Dharam Deo Singh (DW-5) and Shriram (DW-7).

13. On the basis of above evidence led during trial the court below has found the charges levelled against the accused appellants to be proved beyond reasonable doubt and consequently has convicted them under Section 302 IPC alongwith other sections and sentenced to life imprisonment with lesser punishments.

14. Learned counsel for the accused appellants submitted that the accused appellants have been falsely implicated in the matter on account of political enmity. It is urged that the allegation against them of

rigging the polls by cast of bogus votes is baseless since no complaint was made, in that regard, before the polling officials/security personnel and no details have otherwise been furnished at the stage of trial. It is then contended that Ram Briksha Yadav was a voter at Jai Narain Inter College, Maur and the entire story of his having been brought by Hanuman Yadav is nothing but figment of imagination. It is argued that the informant and his supporters actually attacked the accused appellants and the firing by the gunner was only in self defence, without any intention or knowledge to kill the deceased. Further submission is that no specific role has been assigned to anyone (except Ram Briksha Yadav) of assaulting the injured or the deceased. No weapon of assault is otherwise attributed to the appellants. It is lastly urged that there was no pre-meditation and the incident occurred at the spur of moment.

15. Smt. Archana Singh, A.G.A. for the State as well as Sri P. C. Srivastava, learned counsel for the informant states that the accused appellants have acted with deliberate intent to assault and kill the deceased in a broad day light incident. They submit that accused Hanuman tried to rig the polls and on being objected to by the informant brought Ram Briksha Yadav who snatched the Carbine of his gunner and shot dead the deceased. The accused were members of unlawful assembly who acted with common object in killing the deceased. Argument is that the court below has rightly appreciated the evidence led by the prosecution to convict and sentence the accused which merits no interference.

16. We have heard learned counsel for the parties and have perused the materials brought on record, including the original records of the court below.

17. From the evidence led by the prosecution and defence this much is clear that panchayat elections were being held and 25th August, 2005 was the polling date at Sant Kabir Nagar. The contestants on the post of Pradhan included daughter-in-law of the deceased, namely Champa Devi w/o Jai Prakash Yadav as well as wife of Hanuman Yadav. There was no prior enmity between the family of the deceased and the main accused Ram Briksha Yadav which fact is admitted to PW-1 Rakesh Kumar Yadav. No evidence of prior enmity is otherwise available on record. Although it is alleged that in the previous election differences had arisen between the deceased and accused Ram Briksha Yadav, but such differences are common amongst candidates and their family members/supporters at the time of poll, which cannot be equated with enmity.

18. The genesis of the incident as per prosecution is an altercation between Manoj Gupta (supporter of Hanuman Yadav) and the first informant as it was perceived that Hanuman Yadav is rigging the polls by casting bogus votes. This genesis needs to be scrutinized with reference to the evidence available on record.

19. PW-1 has admitted in his testimony that he had no personal knowledge of cast of bogus votes at the instance of Hanuman Yadav. The basis of information about cast of bogus votes is the information received from polling agent Janardan Yadav (PW-2). PW-1 claims that Janardan Yadav (PW-2) gave this information from within the polling booth.

20. So far as testimony of Janardan Yadav (PW-2) is concerned he has admitted that no protest or complaint was made to any election officer or security personnel present at the polling booth regarding cast of bogus votes. He alleges that one relative of Hanuman Yadav from Gorakhpur was trying to cast vote. However, neither his name has been disclosed nor his identity is established. No other evidence has otherwise surfaced on record to form an opinion that polls were being rigged. There were twelve other contestants also in the fray but none has come forward with such grievance. The evidence with regard to cast of bogus votes, therefore, does not seem reliable as material particulars in that regard are missing. There was no complaint otherwise made to the authorities. Evidence at best suggests that there were some apprehension in the minds of the informant or PW-2 about cast of bogus votes by the faction of Hanuman Yadav. However, the prosecution has failed to bring on record the evidence that bogus votes were attempted to be cast in the polls or that Hanuman Yadav tried to rig the polls.

21. The prosecution then alleges that upon being objected to by informant and his family members Hanuman Yadav left saying that he would bring Ram Briksha Yadav and that he actually returned to the polling booth with Ram Briksha Yadav and his supporters. As against this version of prosecution the other version is that Ram Briksha Yadav had come to cast his vote alongwith his family members.

22. There is also an issue on fact as to whether polling booth for accused Ram Briksha Yadav and his family was at Jai Narain Inter College, Maur or it was at Gaighat. This may help in understanding whether Ram Briksha Yadav had arrived with an intent to cast his vote or with an intent to take revenge for Hanuman Yadav from the informant side.

23. The Investigating Officer has not collected any evidence regarding the centre where accused Ram Briksha Yadav and his family members had to cast their vote.

24. The evidence of PW-1 is relevant in this context. In his cross examination PW-1 has clearly stated that polling booth of village Tikara of Ram Briksha Yadav was at Jai Narain Inter College, Maur. His version with regard to cast of votes by Ram Briksha Yadav and his family members is extracted hereinafter:

" रामवृक्ष यादव को गांव टिघरा का भी मतदान केन्द्र जयनरायन इंटर कालेज मौर में था।

मैं मतदान केन्द्र पर सुबह से था। रामवृक्ष व उनके परिवार वाले भी वोटर है, जिन्हे टिकरा मतदान केन्द्र पर वोट देना था।

इस मारपीट में घटना के पूर्व रामवृक्ष व उनके परिवार वालो को मतदान केन्द्र पर देखा था। वे वोट डालने आए थे। वोट डालकर वे चले गए थे।

यदि यह कहा जाय कि मैं झूठ बोल रहा हूँ गलत है। यह भी गलत है कि घटना के समय रामवृक्ष अपने परिवार के साथ वोट डालने आए थे, गलत है।

यह भी गलत है कि इसी दौरान हमने रामवृक्ष को मारा। यह भी गलत है कि इसी कारण रामवृक्ष व उनके परिवार के लोग वोट नही दे सके।

रामवृक्ष वोट करीब 10 बजे देने आए थे।

फिर कहा कि 10 बजे रामवृक्ष नही बल्कि उनके परिवार के लोग वोट देने आए थे। 10 बजे रामवृक्ष के परिवार में रामपूजन की औरत थी, उनके साथ एक लडकी थी, पुरूषों में रामवृक्ष

के घर का कोई व्यक्ति 10 बजे वोट देने नही आया।

यह कहना कि रामवृक्ष के घर का कोई व्यक्ति या औरत उस दिन वोट नही दे पाया था गलत है। "

25. Although the prosecution case is that polling booth for accused Ram Briksha Yadav was at Gaighat but the above extracted statement of PW-1 clearly shows that the polling booth for Ram Briksha Yadav was at Jai Narain Inter College, Maur. PW-1 moreover claims to have seen Ram Briksha Yadav and his family members coming to the booth earlier in the day for cast of their votes but they allegedly returned, thereafter. He then stated that Ram Briksha Yadav had come to cast vote at about 10 AM. However, PW-1 later stated that at 10 AM other members of family of Ram Briksha Yadav had come to cast vote including wife of Ram Poojan but no male member of the family of Ram Briksha Yadav had come to cast vote. The statement of PW-1, read as a whole, clearly gives an indication that Ram Briksha Yadav alongwith family members were to cast vote at Jai Narain Inter College, Maur. It has also come in evidence of PW-1 that ladies of the family of accused Ram Briksha Yadav had come to cast vote at about 10 AM in the morning but Ram Briksha Yadav had not come to Jai Narain Inter College to cast his vote. Once it is admitted to PW-1 that Ram Briksha Yadav had to cast his vote at Jai Narain Inter College and he had not cast his vote earlier, his arrival at the polling booth can be for the purpose of casting his vote. In such a situation his presence at Jai Narain Inter College, Maur cannot be frowned upon.

26. The prosecution case that Ram Briksha Yadav had to cast his vote at Gaighat has not been proved by adducing any cogent evidence in that regard. In such circumstances, the possibility of Ram Briksha Yadav and his family members coming to Jai Narain Inter College for casting their vote cannot be ruled out.

27. We are thus not inclined to accept the prosecution version that Ram Briksha Yadav was called at Jai Narain Inter College, Maur by Hanuman Yadav on account of his fight with the first informant due to cast of bogus votes. We have already observed that the prosecution has failed to establish that polls were being rigged by the faction of Hanuman Yadav due to cast of bogus votes. Once that be so, the very genesis of incident, as per prosecution, is not established.

28. It is a matter of common knowledge that atmosphere in villages remain usually charged during elections to the post of Pradhan and differences often arise due to varying perception about the manner of polls. The apprehension that the polls were being rigged could have been generated by one faction even without there being any actual basis for such apprehension. Usual altercations or differences is very common in such circumstances.

29. The differences in perception regarding fairness in holding of polls leading to heated arguments; hurling abuses; scuffle etc. are not very unusual. We may also note that about 400 persons were actually present at the polling booth. In response to a query, PW-1 in his cross-examination has stated that about 400 persons were present at the polling booth. He also stated that about 25 persons had assaulted them alongwith Ram Briksha Yadav but he recognized only 3-4 of them.

30. The evidence on record suggests that it is in the above charged atmosphere that a fight erupted, at the spur of moment, on spot, between the two factions on account of perceived attempt by the faction of Hanuman Yadav to rig the polls and its countering by the side of informant. In this fight members of both sides have sustained injuries in addition to Mahatam Yadav getting killed.

31. Counter versions have surfaced about which side was the aggressor. Evidence is not very specific on this aspect except the manner in which Mahatam Yadav got killed.

32. It transpires from the evidence available on record that in the presence of about 400 persons at the polling booth the supporters of two contestants to the office of Pradhan fought with each other resulting in injuries being caused to both the sides. It is in this charged atmosphere and at the spur of moment that the accused Ram Briksha Yadav apparently snatched the Carbine of his gunner and fired at the deceased.

33. The prosecution witnesses of fact, namely PW-1 to PW-4, have specifically stated that the deceased was shot at by the accused Ram Briksha Yadav. The presence of these witnesses at the spot is not seriously doubted. The prosecution case is also supported by the postmortem report in which a gunshot injury is shown to have been caused to deceased Mahatam Yadav, which led to his death. The Carbine available with gunner Prem Singh has been produced at the trial wherein 27 live bullets have been found intact. It has also come in evidence that 28 live bullets were loaded in the Carbine. This also supports the prosecution case that it was from the Carbine of Prem Singh that the gunshot injury was caused to the deceased by the accused Ram Briksha Yadav after snatching the Carbine from his gunner. The prosecution evidence in that regard is consistent and we find no reason to disbelieve the evidence of prosecution witnesses as also the statement of accused Prem Singh under section 313 Cr.P.C. that the fatal gunshot injury was caused to the deceased by Ram Briksha Yadav.

34. On behalf of accused Prem Singh his brother Ravindra Singh has entered the witness box as DW-2 and has stated that accused Prem Singh was threatened to own the responsibility of firing at the deceased or else his dead body would come out of jail. Complaints in that regard were allegedly sent to police authorities.

35. We have also considered the testimony of three other defence witnesses produced on behalf of accused Ram Briksha Yadav, namely Ashok Kumar Singh (DW-4), Home Guard Dharm Dev Singh (DW-5) and Sri Ram (DW-6) as per whom the accused was assaulted by the informant side as soon as he entered the polling booth to cast his vote and it was his gunner Prem Singh who fired to save Ram Briksha Yadav.

36. The defence version about Prem Singh having fired at the deceased does not appear trustworthy. DW-4 in his statement has virtually set out the defence version and has admitted that he not only knows the accused Ram Briksha Yadav since childhood but he has close relations with him. DW-5 has been confronted with his statement under section 161 Cr.P.C. wherein he had not stated about Prem Singh having fired to save the accused Ram Briksha Yadav. This witness was otherwise

on duty with the accused Ram Briksha Yadav. Similarly, DW-6 has been produced only at the stage of trial and his statement was not recorded by the Investigating Officer under section 161 Cr.P.C. He has virtually dittoed the defence version.

37. The court below has also not accepted the testimony of defence witnesses about the accused Ram Briksha Yadav not having fired at the deceased or Prem Singh having done so for cogent reasons with which we do not disagree in light of our discussions in the previous paragraphs.

38. So far as the injuries caused to PW-1 Rakesh Kumar Yadav, Jai Prakash, Janardan Yadav are concerned the evidence of prosecution is not specific as to who assaulted them and what was the weapon of assault used by the accused. None of the accused have been assigned any specific weapon of assault. Existence of nearly 400 persons at the polling booth is otherwise admitted to the prosecution. We have already observed that atmosphere was charged at the polling booth and a sudden fight erupted at the spot amongst supporters of two contestants on a perceived attempt at rigging the polls. Since no specific weapon of assault is assigned to any of the accused (other than Ram Briksha Yadav) we find it difficult to hold any specific individual guilty of assaulting Rakesh Kumar Yadav, Janardan Yadav and Jai Prakash Yadav. For arriving at such conclusion we also rely upon the fact that injuries were caused not only to informant side but also to the members of accused party.

39. Upon evaluation of the evidence on record we find that the incident occurred during the panchayat poll, at the spur of moment on a perceived attempt by one party at rigging the poll and the other objecting to it. About 400 persons were present at the polling booth. A fight had erupted between supporters of two contestant leading to assault and it was in this heat of passion that the accused Ram Briksha Yadav snatched the Carbine of his gunner and fired upon the deceased. The prosecution version that accused Ram Briksha Yadav was specifically brought by Hanuman Yadav to take revenge is not established.

40. No evidence exists on record to show that there was a common object or intent on part of accused persons to commit the murder of the deceased Mahatam Yadav. The action of Ram Briksha Yadav in suddenly snatching the Carbine and firing at the deceased appears to be his individual act. We have already disbelieved the prosecution case that Hanuman Yadav had brought Ram Briksha Yadav to avenge his fight. No other evidence exists to show that other accused acted with common object or intent for murdering Mahatam Yadav. The other injuries on the deceased Mahatam are in the form of bruises which were simple in nature. Accused appellants other than Ram Briksha Yadav, therefore, cannot be prosecuted under section 302 IPC with the aid of section 149 IPC.

41. In a charged atmosphere at the polling booth where 400 persons were present and sudden fight erupted between two rival factions and their supporters, the causing of injuries to either sides cannot be pin pointedly attributed to any individual when there is no evidence of any of these individual either carrying any weapon of assault or specific role of assault assigned to them.

42. Learned counsel for the accused appellant Ram Briksha Yadav strenuously submits that the accused Ram Briksha

Yadav himself had sustained serious injuries on his head and that the gunshot wound to deceased was caused due to fire by the gunner Prem Singh. In the alternative learned counsel submits that the incident occurred at the spur of moment without any pre-meditation to commit murder of deceased and, therefore, the offence on part of the accused appellant Ram Briksha Yadav could at best be under section 304 Part II I.P.C. and he has been illegally punished under section 302 IPC. He further submits that the accused appellant Ram Briksha Yadav is in jail since 2005 and the actual period of incarceration undergone by him is above 17 and a half year and with remission the period of incarceration would be well over 20 years. Learned counsel submits that continued incarceration of accused appellant Ram Briksha Yadav, in such circumstances, is wholly unsustainable in law.

43. We have carefully examined the evidence on record and we find that the incident leading to death of Mahatam Yadav occurred in a charged atmosphere at the polling booth due to a sudden fight amongst supporters of two factions in which injuries have been sustained by both sides. Even if we accept the prosecution version that injuries of Ram Briksha Yadav were caused as the public retaliated and threw stones and chased them with batons and sticks (lathi danda), yet, the assessment of evidence would clearly reveal that the incident occurred at the spur of moment without any pre-meditation in which the deceased sustained gunshot injury at the hands of accused Ram Briksha Yadav. The act of firing with an intent to commit the murder of the deceased appears unlikely.

44. Learned counsel for the accused appellants has urged that the incident in question would be covered under the fourth exception to section 300 IPC, which reads as under:-

"Exception 4. --Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

45. We may at this stage refer to the judgment of the Supreme Court in State of Uttarakhand v. Sachendra Singh Rawat, (2022) 4 SCC 227 wherein the Court examined Exception 4 to Section 300 IPC and observed as under:

"8. In Virsa Singh [Virsa Singh v. State of Punjab, AIR 1958 SC 465 : 1958 Cri LJ 818] , in paras 16 and 17, it was observed and held as under : (AIR p. 468)

"16. ... The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the

circumstances warrant an opposite conclusion. But whether the intention is there or not is one of fact and not one of law. Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question.

17. It is true that in a given case the enquiry may be linked up with the seriousness of the injury. For example, if it can be proved, or if the totality of the circumstances justify an inference, that the prisoner only intended a superficial scratch and that by accident his victim stumbled and fell on the sword or spear that was used, then of course the offence is not murder. But that is not because the prisoner did not intend the injury that he intended to inflict to be as serious as it turned out to be but because he did not intend to inflict the injury in question at all. His intention in such a case would be to inflict a totally different injury. The difference is not one of law but one of fact;...."(emphasis supplied)

9. In Dhirajbhai Gorakhbhai Nayak [Dhirajbhai Gorakhbhai Nayak v. State of Gujarat, (2003) 9 SCC 322 : 2003 SCC (Cri) 1809] , on applicability of Exception 4 to Section 300 IPC, it was observed and held in para 11 as under : (SCC pp. 327-28)

"11. The Fourth Exception of Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution (sic provocation) not covered by the first exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1, but the injury done is not the direct consequence of that provocation. In fact, Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused : (a) without premeditation, (b) in a sudden fight, (c) without the offenders having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight

is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage"."

10. In Pulicherla Nagaraju [Pulicherla Nagaraju v. State of A.P., (2006) 11 SCC 444 : (2007) 1 SCC (Cri) 500] , this Court had an occasion to consider the case of culpable homicide not amounting to murder and the intention to cause death. It was observed and held by this Court that the intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances:

(i) nature of the weapon used;

(ii) whether the weapon was carried by the accused or was picked up from the spot;

(iii) whether the blow is aimed at a vital part of the body;

(iv) the amount of force employed in causing injury;

(v) whether the act was in the course of sudden quarrel or sudden fight or free-for-all fight;

(vi) whether the incident occurs by chance or whether there was any premeditation;

(vii) whether there was any prior enmity or whether the deceased was a stranger;

(viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation;

(ix) whether it was in the heat of passion;

(x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner;

(xi) whether the accused dealt a single blow or several blows."

46. Necessary ingredients to attract 4th Exception to section 300 IPC are clearly present in the facts of the present case inasmuch as death is caused; there existed no pre-meditation; it was a sudden fight; the offender has not taken undue advantage or acted in a cruel or unusual manner, therefore, the case in hand clearly falls under fourth exception to section 300 IPC. Another aspect to be noticed is that the accused Ram Briksha Yadav was not carrying any firearm/weapon with him and it was only at the spur of moment that the accused snatched the Carbine of his gunner and fired at the deceased. This circumstance also shows that the act on part of the accused was neither pre-meditated nor there was any prior meeting of mind between the accused persons to commit the murder of Mahatam Yadav and the incident occurred in the heat of moment, suddenly. The offender has not taken undue advantage or acted in a cruel or unusual manner. We are, therefore, of the considered opinion that the accused appellant Ram Briksha Yadav could at best be punished under Section 304 Part I IPC and not under section 302 IPC.

47. The court below has proceeded to accept the prosecution case relying upon the testimony of prosecution witnesses i.e. PW-1 to PW-4 without subjecting it to careful scrutiny. Court below while holding the prosecution to have proved the guilt of accused appellants beyond reasonable doubt has not noticed the anomalies,

referred to above, in the prosecution story. The improbability of prosecution version regarding the genesis, events and the manner in which the events unfolded creates a doubt on the prosecution case which has not been examined by the court below in correct perspective. The finding of the court below that prosecution has established its case beyond reasonable doubt, therefore, cannot be sustained, except in the case of accused Ram Briksha Yadav in respect of whom the punishment is being altered to Section 304 (Part-I) as against Section 302 IPC.

48. For the reasons and discussions held above, the Criminal Appeal No.4062 of 2008 filed by the accused appellant Ram Briksha Yadav deserves to succeed and is therefore allowed in part. The conviction and sentence of accused appellant Ram Briksha Yadav vide judgment and order dated 30.04.2008/02.05.2008, under section 302 IPC, is altered and substituted under section 304 Part I IPC. Since the accused appellant has already undergone actual incarceration of over 17 years, and with remission the period of incarceration is more than 20 years, he shall be released on the sentence already undergone by him, from jail, forthwith, unless he is wanted in any other case, subject to compliance of section 437A Cr.P.C.

So far as the Criminal Appeal Nos. 3081 of 2008 (filed by accused appellant Prem Singh), 3082 of 2008 (filed by accused appellants Subhash Yadav, Ram Poojan Yadav & Virendra Yadav), 3083 of 2008 (filed by accused appellant Manoj Gupta) and 3274 of 2008 (filed by accused appellant Hanuman Yadav) are concerned, it is observed that none of these accused appellants have been specifically assigned any weapon of assault nor have been assigned the role of causing injuries to deceased Mahatam Yadav or the injured Rakesh Kumar Yadav, Janardan Yadav and Jai Prakash Yadav. Their appeals accordingly succeed and are allowed and conviction and sentence of accused Prem Singh, Subhash Yadav, Ram Poojan Yadav, Virendra Yadav, Manoj Gupta and Hanuman Yadav vide judgment and order dated 30.04.2008/02.05.2008 is set aside. If the abovenoted appellants are in jail, they shall be released forthwith or if they are on bail their sureties and bail bonds shall stand discharged and they shall be set at liberty, unless wanted in any other case, subject to compliance of section 437A Cr.P.C.

49. No order is passed as to costs.

(2023) 1 ILRA 1043
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.12.2022

BEFORE

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

Criminal Appeal No. 4666 of 2014

Surendra Kumar ...Appellant
Versus
State of U.P. ...Opp. Party

Counsel for the Appellant:
Sri S.P. Sharma, Sri Ajay Kumar Pandey, Sri Gaurav Kakkar, Sri Kartikey Saran, Sri Satish Trivedi(Senior Advocate), Sri Sheshadri Trivedi

Counsel for the Opp. Party:
Govt. Advocate, Km. Rachna Tiwari

Criminal Law- Indian Evidence Act, 1872- Section 32- Indian Penal Code, 1860- Section 302 & 304 (Part I)- Death of deceased was a homicidal death -Dying declaration on record, in which the

deceased has stated that fire was triggered all of sudden. There was no enmity or quarrel between the appellant and the deceased. Hence, it can be safely opined that the appellant did not want to do away with the deceased. Clearly the matter hinges on two aspect. One is dying declaration of the deceased by which it is not transpired that there was intention of appellant to murder the deceased as discussed above. The second aspect is that there was some quarrel with the son of the deceased earlier at the gate of the police station, where informant and appellant were posted- Offence would be punishable under Section 304 (Part I) because it appears that the death of the deceased was not premeditated and it is a case of single gun shot. This case falls within the purview of culpable homicide not amounting to murder.

Where, even as per the dying declaration, the act of the appellant was sudden and not pre-meditated and was a case of a single shot, hence there was no intention to commit the murder of the deceased, the case would fall within the purview of culpable homicide not amounting to murder.

Quantum of punishment- Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account- The judicial trend in the country has been towards striking a balance between reform and punishment- The criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system. As the accused has already served the sentence of 10 years and 7 months with remission as per jail report and also he would have lost his job because he was a police constable- The conviction of appellant u/s 302 IPC is converted into Section 304 (Part I) IPC and appellant is sentenced for the period already undergone by him with the fine.

As the Indian criminal jurisprudence is reformative and not retributive, hence punishment imposed should be proportionate to the gravity of the offence and should not be unduly harsh, hence as the offence is culpable homicide not amounting to murder, the appellant has lost his job and has spent more than 10 years in prison, hence sentence reduced to that already undergone by him. (Para 14, 16, 17, 21, 22, 24, 25)

Criminal Appeal partly allowed. (E-3)

Case Law/ Judgements relied upon:-

1. St. of U.P. Vs Mohd. Iqram & anr, (2011) 8 SCC 80

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

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

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

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

1. This appeal has been preferred against the judgement and order dated 27.11.2014 Sessions Judge, Hamirpur in Session Trial No.9 of 2009 (State Vs. Surendra Kumar) arising out of Case Crime No.02 of 2008 under Section 302, 323 IPC, Police Station- Chikasi, District- Hamirpur, whereby the accused-appellant was convicted under Section 302 IPC and sentenced to imprisonment for life with fine of Rs.20,000/- and in case of default of payment of fine, to undergo further imprisonment for two year and under Section 323 and sentenced to one year with fine of Rs.1,000/- and in case of default of payment of fine, to undergo further imprisonment of three months.

2. The brief facts as cull out from the record are that a first information report

was lodged by informant Sanjay Kumar at Police Station- Chikasi, District- Hameerpur on 02.01.2008. At about 7:15 pm, the informant was going to his quarter after having the tea at the gate of police station. At that time constable Surendra Kumar of the same police station- Chikasi came with the rifle in his hand and started abusing him. When he was stopped from abusing then he beat the informant with the butt of the refile. He ran inside the police station and fell down. His mother Maya Dubey came there and asked who has beaten him. At that very moment constable Surendra Kumar cake there and fired at the mother of the informant with his government rifle, which hit in the leg of his mother.

3. I.O. tookup the investigation, visited the spot, prepared site plan and mother of the informant was taken to the Government Hospital, Rath and got admitted there. Her dying declaration was recorded by Naib-Tehshildar on the same day. I.O. recorded the statements of witnesses u/s 161 and 164 Cr.P.C. Recovery memo of refile and live as well as empty cartridges were prepared. During the course of treatment the injured mother of the informant passed and the case was converted into Section 302 of IPC. Post mortem of the deceased was conducted and post mortem report was prepared by the doctor after inquest proceedings. After completion of investigation, charge sheet was submitted by I.O. against the appellant Surendra Kumar u/s 307/302, 323 and 409 IPC and under Section 29 Police Act.

4. The case being exclusively triable by court of sessions was committed to the sessions court.

5. The learned trial court framed charges against the appellant u/s 302 and 323 of IPC. The accused denied the charge and claimed to be tried. The prosecution so as to bring home the charge, examined five witnesses, who are as under:-

1	Sanjay Kumar Dwivedi	P.W.1
2.	Archana Dwivedi	P.W.2
3.	Deen Dayal	P.W.3
4.	Km. Parul	P.W. 4
5.	Dr. Arvind Kumar Jain	P.W. 5
6.	Umesh Kumar	P.W.6
7.	Asharam Verma	P.W.7
8.	Vivek Singh	P.W.8
9.	Salikram	P.W.9
10.	Dr. R.K. Verma	P.W.10

6. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1.	F.I.R.	Ext. Ka2
2.	Written report	Ext. Ka1
3.	Dying declaration	Ext.Ka16
4.	Recovery memo of rifle, live cartridges & empty cartridge	Ext. Ka5
5.	Recovery memo of blood stained and plain earth	Ext. Ka7
6.	Injury report	Ext.Ka17
7.	P.M. report	Ext. Ka4
8.	Report of Forensic Science Laboratory	Ext.Ka18
9.	Report of Forensic Science Laboratory	Ext.Ka19

10.	Report of Forensic Science Laboratory	Ext.Ka20
11.	Panchayatnama	Ext.Ka10
12.	Charge sheet	Ext. Ka8
13.	Site plan with Index	Ext. Ka6
14.	Site plan with Index	Ext. Ka9

7. After completion of prosecution evidence, the accused was examined under Section 313 Cr.P.C. The accused examined one witness in his defence.

8. Learned trial court after hearing both the sides convicted the accused appellant u/s 302, 323 IPC and sentenced accordingly. Hence this appeal.

9. Heard Shri Satish Trivedi, learned Senior Advocate, assisted by Shri Sheshadri Trivedi, learned counsel for the appellant and Shri Patanjali Mishra assisted by Shri N.K. Srivastava, learned AGA as well as perused the record.

10. Learned counsel for the appellant submitted that there is major contradictions in this matter, which goes to the root of this case because in first information report, the informant himself alleges that the bullet hit the leg of his mother while the post mortem report shows that the bullet was inserted in the stomach of the injured/deceased. The evidence of doctor PW5, who conducted the post mortem, also goes to show that injury No.1 is entry wound of gun shot in the stomach and injury No.2 is exit wound of the same entry wound. Hence, informant is not the eye witness. It is next submitted that there was no enmity between the appellant and the deceased.

11. After some length of arguments, learned counsel for the appellant submitted that he is not asking for clean acquittal but there is important aspect in this case that this is not the case of murder because there was no intention of appellant to do away with the deceased. The act was not premeditated nor there was any enmity between the deceased and the appellant. Moreover, in her dying-declaration also, the deceased has stated that fire was triggered all of sudden. Hence, if the prosecution case is admitted as true even then it does not travel beyond the scope of Section 304 of IPC. Learned counsel relied on the judgements of this Court in Criminal Appeal No.890 of 2002 (Javed Vs. State of U.P.) delivered on 02.08.2022 and Criminal Appeal No.4718 of 2018 (Niranjan Singh Vs. State of U.P.) delivered on 16.12.2021.

12. The finding of fact regarding the presence of witnesses at the place of occurrence cannot be faulted with. Death of deceased was a homicidal death. The fact that it was a homicidal death takes this Court to most vexed question whether it would fall within the four-corners of murder or culpable homicide not amounting to murder. Therefore, we are considering the question whether it would be a murder or culpable homicide not amounting to murder and punishable under Section 304 IPC.

13. In **State of Uttar Pradesh vs. Mohd. Iqram and another, [(2011) 8 SCC 80],** the Apex Court has made the following observations in paragraph 26, therein:

"26. Once the prosecution has brought home the evidence of the presence of the accused at the scene of the crime, then the onus stood shifted on the defence to have brought-forth suggestions as to what could have brought them to the spot in the dead of night. The accused were apprehended and,

therefore, they were under an obligation to rebut this burden discharged by the prosecution and having failed to do so, the trial-court was justified in recording its findings on this issue. The High Court committed an error by concluding that the prosecution had failed to discharge its burden. Thus, the judgment proceeds on a surmise that renders it unsustainable."

14. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellants. 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."

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

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

	any excuse for incurring the risk of causing death or such injury as is mentioned above.

16. In the case in hand, there was quarrel between the informant and the appellant at the gate of police station. Appellant and informant both are constable posted at the same police station. When the informant was beaten up by the appellant, the deceased, who was mother of the informant, came in between. Then the fire was triggered by the appellant, which hit the body of the deceased, there was dying declaration on record, in which the deceased has stated that fire was triggered all of sudden. There was no enmity or quarrel between the appellant and the deceased. Hence, it can be safely opined that the appellant did not want to do away with the deceased. Clearly the matter hinges on two aspect. One is dying declaration of the deceased by which it is not transpired that there was intention of appellant to murder the deceased as discussed above. The second aspect is that there was some quarrel with the son of the deceased earlier at the gate of the police station, where informant and appellant were posted. It is evident that the occurrence had taken place on the spur of the moment. Hence, the judgements relied by the appellant in Criminal Appeal No.4781 of 2018 and Criminal Appeal No.890 of 2002 (supra) apply in full force to the facts of this case. It is submitted by Shri Mishra, learned AGA that the accused is in jail since 27.01.2017.

17. On overall scrutiny of the facts and circumstances of this case coupled with dying declaration and other evidence on record, we are of the considered opinion that offence would be punishable under Section 304 (Part I) because it appears that the death of the deceased was not premeditated and it is a case of single gun shot. This case falls within the purview of culpable homicide not amounting to murder.

18. As far as the quantum of punishment is concerned, the period of sentence should be in conformity with the gravity of the offence.

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

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

20. 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP [(2004) 7 SCC 257]*** by observing that

Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

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

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

23. Since the learned counsel for the appellant has not pressed the appeal on its merit, however, after perusal of entire evidence on record and judgment of the trial court, we consider that the appeal is devoid of merit and is liable to be dismissed. Hence, the conviction of the appellant is upheld.

24. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose

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

25. As the accused has already served the sentence of 10 years and 7 months with remission as per jail report and also he would have lost his job because he was a police constable, we deem it proper to award the punishment of sentence already undergone by the appellant.

26. The conviction of appellant u/s 302 IPC is converted into Section 304 (Part I) IPC and appellant is sentenced for the period already undergone by him with the fine of Rs.5,000/-. The appellant shall undergo three months simple imprisonment in case of default of fine. Conviction and sentence for the offence u/s 323 of IPC has already been undergone by the appellant. Fine for the offence u/s 323 IPC and default sentence in the same shall remain intact.

27. Accordingly, the appeal is **partly allowed** with the modification of the sentence, as above.

28. Record and proceedings be sent back to the court below for compliance.

(2023) 1 ILRA 1050
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.01.2023

BEFORE

THE HON'BLE MAYANK KUMAR JAIN, J.

Crl. Appeal No. 6929 of 2017

Aslam & Anr. ...Appellants
Versus
State of U.P. ...Opp. Party

Counsel for the Appellants:
Sri V.P. Singh Kashyap, Sri Durvesh Kumar, Sri Manish Kumar Kashyap, Sri Sanjay Singh

Counsel for the Opp. Party:
G.A.

Criminal Law- Indian Penal Code, 1860- Sections 313 & 452 - Section 366- Section 376 D- The entire evidence adduced by PW-1 Victim with regard to the occurrence is full of contradictions and is not reliable because firstly no documentary evidence is available on record concerning the alleged miscarriage. Acquaintance with the accused Aslam indicates that there was no occasion for the appellants to commit house-trespass and abduction of the victim on 12.06.2014, when both the witnesses admitted that Aslam, the victim and the mother of the victim, all were well acquainted with each other.The medical report also does not corroborate the factum of rape with the prosecutrix-The evidence of PW-1, the victim does not inspire confidence since it is full of material contradictions and ignorance relating to material facts with regard to the incident of forceful miscarriage caused by the appellants/accused as well the incident of abduction and gang rape alleged to have happened on 12.06.2014. PW-1 the victim does not appear to be a sterling witness since her evidence conclusively does not corroborate the story of the prosecution.

Where the testimony of the prosecutrix has material contradictions and is uncorroborated by either the medical or any other evidence, then the same cannot be relied upon for the

purposes of securing the conviction of the appellant. (Para 23, 27, 34, 48)

Criminal Appeal allowed. (E-3)

Case Law/ Judgements relied upon:-

1. Rai Sandeep Vs St., (NCT of Delhi) (2012) 8 SCC 21

2. Hemraj Vs St. of Har., 2014 (2) SCC 395

3. Sadashiv Ramrao Hadbe Vs St. of Maha., (2006) 10 SCC 92

4. Krishnegowda Vs St. of Kar., (2017) 13 SCC 98

(Delivered by Hon'ble Mayank Kumar Jain, J.)

1. Challenge in this appeal is to the judgment and order dated 26.10.2017 passed by the learned Additional Sessions Judge/ Fast Track Court No. 1, Rampur in Sessions Trial No. 533 of 2014 arising out of Case Crime No. 187-C of 2014, under section 452, 366, 376-D, 314 IPC, police station Patwai, district Rampur whereby the accused-appellant no. 1 Aslam had been convicted and sentenced to three years rigorous imprisonment and a fine of Rs. 2000/- under section 452 IPC, five years rigorous imprisonment and a fine of Rs. 5000/- under section 366 IPC, ten years rigorous imprisonment and a fine of Rs. 5000/- under section 313 IPC and seven years rigorous imprisonment and a fine of Rs. 5000/- under section 376 IPC with default stipulation. The accused-appellant No. 2 Rafiq had been convicted and sentenced to three years rigorous imprisonment and a fine of Rs. 2000/- under section 452 IPC, five years rigorous imprisonment and a fine of Rs. 5000/- under section 366 IPC, ten years rigorous imprisonment and a fine of Rs. 5000/- under section 313 IPC with default stipulation. It was also directed that out of the fine amount so deposited by the accused-appellants, half of the amount shall be given to the victim after due verification. All the sentences were directed to be run concurrently.

2. Facts of the prosecution case are that the victim, Ms. "X', moved an application under section 156(3) Cr.P.C. before the court concerned mentioning therein that earlier on 09.04.2014 Aslam, her neighbour along with Hanif and Kalua enticed her and took her away. Regarding this incident, victim's mother lodged a case Crime No. 120 of 2014, under sections 363, 366 IPC. The accused Aslam made physical relationship with the victim on the pretext of getting married to her. Thereafter, the victim became pregnant for three months. The accused Aslam after pressurizing the victim and her mother got the victim's statement recorded under section 164 Cr.P.C. in his favour. On 05.06.2014, accused Rafiq, who is the brother-in-law of Aslam came to the house of the victim and asked her to accompany him to Milak Tiraha on the pretext that her marriage would be solemnized with Aslam at Milak. Believing this information, she accompanied Rafiq. On their way, Aslam also joined them and both of them took the victim instead to a private hospital and got her pregnancy terminated. Under the influence of the injection, pregnancy of the victim was aborted. Thereafter, both of the accused dropped the victim at her house. When the mother of the victim returned home, the victim narrated the incident to her. Her mother made a complaint to victim as to why the pregnancy of her daughter was terminated by him and that she would lodge a report against him to the police. On this, Aslam and Rafiq assured her that

Aslam would marry the victim. On the night of 12.06.2014 at around 10.00 p.m., Aslam and Rafiq jumped the wall and came inside the house of the victim and abducted her showing "Tamancha'. Both of them committed her rape. On raising an alarm, witnesses Islam, Ramzani, and other persons came there and witnessed the incident. The victim on same night went to the police station to lodge the first information report, but it was not registered, nor she was medically examined. Thereafter, she moved an application to S.P. Rampur on 13.06.2014, but no action was taken in the matter. Thereafter an application was moved under section 156(3)Cr.P.C.before the Court. On the basis of the orders of the Court passed on the aforesaid application, the first information report as Case Crime No. 187-C of 2014, under sections 452, 366, 376-D and 314 IPC was registered. The investigation was set to motion and the investigation was entrusted to Sub Inspector B.S. Bakshish.

3. The Investigating Officer after completing the preliminary formalities recorded the evidence of the witnesses and the statement of the victim was recorded under section 161 Cr.P.C. She was medically examined. The site plan of the place of occurrence was prepared and after the conclusion of the investigation, a charge sheet came to be filed against Appellants/accused under sections 452, 366, 376-D and 314 IPC.

4. After the committal of the case, it was registered as Sessions Trial No. 533 of 2014. Charges were framed against accused Aslam and Rafiq under sections 452, 366, 376-D and 314 IPC. The appellants denied the charges and claimed to be tried.

5. In order to prove its case, the prosecution produced PW-1, the victim, PW-2 Smt. Zaitoon (mother of the victim), PW-3 Islam and PW-4 Ramzani, (the eye witnesses, named in the FIR), PW-5 Dr. Amita Sharma and PW-6 Sub Inspector Mukesh Singh (the second Investigating Officer).

6. After the close of the prosecution evidence, statements of the accused were recorded under section 313 Cr.P.C., in which they denied the occurrence and their involvement in the crime. They further stated that witnesses have deposed falsely against them and they are innocent and they were implicated due to village enmity.

7. No evidence was produced on behalf of the accused appellants in their defence.

8. The learned lower court after vetting the evidence and hearing the counsel for the parties, convicted and sentenced the accused as mentioned above.

9. Feeling aggrieved the appellants have preferred the present criminal appeal.

10. I have heard Shri Durvesh Kumar, learned counsel for the appellant, learned Additional Government Advocate for the State-respondent and perused the record. I have re-appriciated the entire evidence available on record.

10. It is submitted by the learned counsel for the appellants that the trial court did not appreciate the evidence available on record in a rightful manner. The victim was the consenting party with the accused-appellant Aslam. No place has been mentioned either in the first information report or in the statement of the victim and her mother as to where or in which hospital the abortion of the victim was carried out. No medical evidence is available on record to

corroborate the fact that the victim was having a pregnancy of three months and it was terminated by the appellants under the impression of intoxication. It is also submitted that before the incident, the first information report was lodged against two other persons by the mother of the victim, and the case was withdrawn by the victim since she was the consenting party with the appellant Aslam. It is further submitted that the trial court arrived at the rightful conclusion that the accused-appellant Rafiq did not rape the victim. So far as the involvement of the appellant Aslam is concerned, the victim had herself admitted in her evidence that both of them were in love with each other and several times she went with the appellant Aslam, therefore the evidence of the victim belied the prosecution version about the allegation that the appellant Aslam raped the victim. It is further submitted that the occurrence dated 12.06.2014 is also not believable for the reason that on one hand, the victim alleged that the appellants aborted her foetus on 05.06.2014 while on 12.06.2014 i.e. after one week, she was raped by the appellants. The appellant Rafiq does not live with the appellant Aslam, therefore he has been falsely implicated merely due to him being the brother-in-law of Aslam. Since the prosecutrix is a consenting party, no offence is made out under sections 366 and 376 IPC. The medical report does not corroborate the version of the prosecution about rape with the victim. Likewise, there is no evidence available on record which may indicate that accused appellants forcibly caused the miscarriage of the victim. The alleged witnesses Islam and Ramzani are not eye-witnesses of the incident since on perusal of their evidence, it reflects that the incident was narrated to them by the victim, therefore their evidence cannot be relied upon. It is further added that there are material contradictions in the evidence of prosecutrix and her mother against the prosecution story therefore their evidence can not be relied upon. The appeal is liable to be allowed and appellants deserves to be acquitted.

11. Per contra, the learned Additional Government Advocate argued that since the medical examination of the victim took place 1-1/2 months after the alleged incident, therefore, there was no possibility of any kind of observation with regard to pregnancy or its termination. The witnesses have corroborated the prosecution version. The appellant Aslam took away the victim with him and induced her that he will marry her and made physical relations, therefore, it cannot be said that the victim was a consenting party. On raising an alarm, independent witnesses reached the spot and they corroborated the fact committed by the appellants. The victim had also given her statement before the doctor about the role of the appellants in the commission of the crime.

13. PW-1, the victim in her examination-in-chief stated that she knew accused appellants Aslam and Rafiq. Aslam is her neighbour and Rafiq is his brother-in-law of Aslam and she and Aslam were in love with each other. Aslam used to say that he will perform nikah with her and on this promise he made a physical relationship with her, and she became pregnant for three months. On 12.06.2014 when she was sleeping in her house, Aslam and Rafiq entered her house after jumping through the wall and took her to the house of Aslam pointing the pistol at her. They committed rape repeatedly. On raising alarm, Islam and Ramzani came there and on seeing them, Aslam ran away from the place of occurrence. The victim has proved the

application moved by her as **Exhibit Ka-1** and affidavit given by her as **Exhibit Ka-2** and the statement recorded under section 164 Cr.P.C. as **Exhibit Ka-3**.

14. PW-2 Smt. Zaitoon, who is the mother of the victim stated in her examination-in-chief that on the date of occurrence at about 10.00 p.m. Aslam and Rafiq entered her house and pointing a pistol, they took away her daughter and committed rape upon her. Ramzani and Islam and other persons came there and rescued her daughter. The report was not registered by the police.

15. PW-3 Islam Nabi has stated in his examination-in-chief that he knows the victim, who is his neighbour. He also knows Aslam and Rafiq. On 12.06.2014 at 10.00 p.m. when he was at his house, he heard the noise from the house of Nabi Khan. He along with Ramzani and other persons reached there and saw that the victim was in the house of Aslam in a naked position. He saw the incident in the light of Dibia. The victim narrated the whole story that Aslam and Rafiq committed rape upon her.

16. PW-4, Ramzani stated that on the date of occurrence at around 10.00 p.m. he heard the noise and reached the house of Mukim, the father of Aslam, and found that the victim was crying. They saw the incident in the light of a Lamp. No other person was present there with the victim. On asking, the victim narrated that Aslam and Rafiq committed rape upon her and took her at the spot on the point of a pistol.

17. PW-5 Dr. Amita Sharma stated in her examination-in-chief that she medically examined the victim. As per the medical examination report, the victim was over eighteen years. No positive evidence about sexual assault was present. No spermatozoa was seen in supplied smear slide.

18. PW-6 Sub-Inspector Mukesh Singh, the second Investigating Officer of the case, stated that on the basis of evidence collected during the investigation, he submitted the charge sheet under sections 452, 363, 376-D and 314 IPC against the appellants Rafiq and Aslam. The charge sheet is proved by him as Exhibit Ka-6.b This witness proved the document exhibited by the previous Investigating Officer S.I. B.S. Bakshish, such as the site plan as **Exhibit Ka-7**, the statement of witnesses recorded by the earlier Investigating Officer and the statement of the victim recorded under section 164 Cr.P.C. The chik report has been proved as **Exhibit Ka-8** and its entry in the Rapat 33, at 7.35 p.m. by Constable Poonam Rani as **Exhibit Ka-9.**

19. As per the prosecution version in the present case, the prosecution has mentioned two occurrences in the first information report. The first incident is alleged to have taken place on 05.06.2014 wherein it is alleged that the appellant accused Rafiq on the pretext of marriage with the other appellant-accused Aslam lured the victim and took her away on his motorcycle. On way to Milak accused-appellant Aslam met them and both of them under the impression of intoxication caused forceful abortion by injecting drugs. The second incident is alleged to have taken place on 12.06.2014 wherein it is alleged that on that day around 10:00 pm appellants Aslam and Rafiq jumped over the wall and came to the house of the victim, abducted her at the gunpoint against her will, and both of them raped her at gunpoint one after the other.

20. Under the aforesaid set of facts, it is required to be determined as to whether on 05.06.2014 accused appellants caused the miscarriage of the victim and whether on 12.06.2014 accused-appellant trespassed the house of the victim and abducted her to the house of Aslam and both of the appellants raped her.

21. Section 313 IPC reads thus:

"313. Causing miscarriage without woman's consent.--Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with 348[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

22. So far as the incident dated 05.06.2014 is concerned, PW-1 victim, in her examination in chief has stated that on 05.06.2014 accused Rafiq came to her and told her that he will ensure the marriage of the victim with the accused-appellant Aslam. She accompanied him to Milak. She was taken to a private hospital forcefully and her pregnancy of three months was terminated. PW-1 victim in her cross-examination stated that accused Rafiq came to her house on 12th, 2014 none was present at that time with her. She did not know the time when Rafiq came to her. She did not know when she started from her house. She did not know at what time she reached Milak. She did not know how many villages exist up to Milak. She did not inform her mother or any relative. She did not inform her mother about the pregnancy at the time of occurrence. At the time of occurrence she was having mobile with her but she did not make a call to her mother or any of her relatives. She never went to Milak before this incident. She did not know at what time she reached the crossing of Milak. She went with the accused Rafiq on her sweet will. She even did not know about the time of the journey from Milak to the destination. She did not know in which direction she was taken from the crossing while she was fully conscious. She did not know the name of the private hospital where she was taken. She did not know whether patients were there or not or how many persons were there. She did not know the number of injections administered to her. She did not know how long she remained unconscious and what time she reached her home. Even she did not know when she became conscious and anyone came to see her.

23. The entire evidence adduced by PW-1 Victim with regard to the occurrence alleged to have happened on 05.06.2014 is full of contradictions and is not reliable because firstly no documentary evidence is available on record concerning the alleged miscarriage. The victim in her statement expressed ignorance relating to material facts of the incident qua the name of the private hospital, the name of the doctor, the time and place of the incident of causing miscarriage, the distance from her house to the hospital, the duration of her unconsciousness, the treatment given to her prior to the alleged miscarriage or treatment received after the miscarriage, the time of reaching back to her home, even though she admitted that she had a mobile phone at the time of the incident when she left her house but she did not make a call to her mother or any relative. The prosecutrix stated in her evidence that she did not inform her mother about her pregnancy but contrary to this, PW-2 Smt. Jaitoon , the mother of the prosecutrix, stated in her

evidence that she was informed by her daughter that she was pregnant for three months. This conduct of the witness indicates that no such incident took place since on the material facts of the incident the witness did not depose in the Court cogently. The ignorance expressed by the victim renders her evidence to be unreliable relating to this incident.

24. PW-2 Smt. Jaitoon the mother of the victim stated about the allegation of causing the miscarriage of the victim on the basis of the information given to her by the victim only.

25. On the basis of appreciation of the above evidence available on record, I am of the opinion that the prosecution has not proved with the cogent evidence either oral or documentary, that on 05.06.2014 the appellants caused a forceful miscarriage of the victim.

(i) Now the second occurrence dated 12.06.2014 is to be examined.

Sections 452, 366 and 376-D IPC provides that :-

"452. House-trespass after preparation for hurt, assault or wrongful restraint.--Whoever commits house-trespass, having made preparation for causing hurt to any person or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

"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; 367[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 also be punishable as aforesaid"

376-D. Gang rape.--Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim."

26. So far the alleged incident dated 12.06.2014 is concerned, PW-1 victim admitted in her examination in chief that she was in love with Aslam and Aslam was also in love with her. The victim in her evidence stated that she was having good relations and well acquaintance with the accused Aslam. She frequently visited the

house of the accused Aslam and had relations with him and Aslam also used to visit her house frequently since one year prior to the incident but she never told this to her mother. She used to go to the forest with the accused Aslam without informing her mother. She used to go with the accused Aslam to the field to cut the crop of wheat, rice, and menthol. Aslam used to do labour work with her.

27. PW-2 Smt. Jaitoon also admitted the fact that the appellant Aslam was well acquainted with them and stated that her daughter was acquainted with the appellant Aslam for the last six months and she used to go with Aslam. Acquaintance with the accused Aslam indicates that there was no occasion for the appellants to commit house-trespass and abduction of the victim on 12.06.2014, when both the witnesses admitted that Aslam, the victim and the mother of the victim, all were well acquainted with each other.

28. PW-1 the victim stated in her evidence that on the night of 12.06.2014, she was sleeping in her house alone. The appellants jumped over the wall and came to her house and at gunpoint they abducted her to the house of Aslam and both of them raped her at gunpoint. PW-2 Smt. Jaitoon in her cross-examination stated that appellant Rafiq and Aslam "called' her daughter and took her away.

29. This is a very material contradiction in the evidence of prosecutrix and her mother with regard to the manner the prosecutrix was taken away. The case of the prosecution is that the appellants/accused abducted the proseuctrix at gunpoint after jumping over the wall while the mother of the prosecutrix stated that the appellants accused called her daughter and took her away. This contradiction makes the story of prosecution as doubtful.

30. PW-1 the victim in her statement stated that there was only one room in her house. She along with her mother and younger brother Jishan were living together in that room. PW-2 Jaitoon Jahan, the mother of the prosecutrix, stated in her evidence that on the night of the incident she was sleeping with her children. There were three cots. On one cot she was sleeping with his son, on second cot her another son and on the third cot her daughter were sleeping at a distance of 4 to 5 meters. However, on the contrary, the victim stated that on 12.06.2014 her mother along with her brother went to attend a marriage.

31. This also is very material contradiction. If the mother and siblings of the victim were sleeping next to the victim on that night in their house, therefore, the story of the prosecution that the appellants/accused jumped over the wall and abducted the victim at gunpoint and took her away creates a serious doubt about the version of the prosecution and bellies the theory of abduction. If the mother and the siblings of the prosecutrix were sleeping in the same room where the prosecutrix was also sleeping therefore, it appears to be doubtful that the appellants/accused abducted the prosecutrix at gunpoint and took her away and no alarm was raised by any member of the family.

32. PW-1 the victim in her cross-examination stated that when Rafiq and Aslam jumped the wall, Rafiq shut her mouth so she could not shout. This fact is first time narrated by her during her cross-

examination in the Court. Neither in the first information report nor in her examination in chief she stated that Rafiq shut her mouth and she could not shout. Likewise, the fact that the appellants took off her clothes is narrated by the victim during her cross-examination for the first time. Further, the victim expressed ignorance about the duration of intercourse committed by the appellants, while she stated that she was fully conscious at that time. The victim narrated that she raised an alarm but no one rescued her. This fact has been narrated first time by her in the court during her deposition.

33. PW-1 the victim stated that she stayed around one hour at the house of appellant/accused Aslam on the night of incident. Her clothes were not torn but they were thrown away. No blood oozed out. Her clothes were not stained with blood. She did not sustain any scratch over her body. She was conscious. PW-5 Dr. Amita Sharma in her evidence also stated that no external injury was found at the time of medical examination of the prosecutrix. Hymen was upset and old healed. No sign of sexual assault were noted by her.

34. The medical report also does not corroborate the factum of rape with the prosecutrix. Moreover, the clothes which prosecutrix was wearing at the time of incident were not given to Investigating Officer and no FSL report was available on the record which may indicate that the prosecutrix was gang raped by the appellants/accused. The aforesaid situation also creates doubt about the theory of gang rape as stated by the prosecution.

35. PW-2 Jaitoon mother of the victim stated in her examination in chief that his daughter told her that the appellants raped her and on raising the alarm, witnesses Ramzani, Islam and other persons came there but during her cross examination she stated that witnesses Ramzani and Islam told her about the incident after 2-3 hours. She further stated that on the next day of the incident she along with her daughter, Islam and Ramzani went to police station but the prosecutrix stated in her evidene that she went to the police station with her mother and none was with them. This is also a contradiction between the statement of prosecutrix and her mother.

36. P W-1 victim stated in her evidence that she used to go to the forest with Aslam without informing her mother while PW-2 Smt. Jaitoon denied about the statement and stated that her daughter used to go with Aslam after informing her.

37. PW-3 Islam Nabi and PW-4 Ramzani are named as eye witnesses of the incident dated 12.06.2014.

38. PW-3 Islam Nabi, in his examination-in-chief, stated that he reached along with Ramzani at the place of occurrence and he found the victim in a naked condition. Thereafter, he was told about the incident by the prosecutrix. In his cross examination he stated that prior to this incident, the prosecutrix went with the appellant-accused Aslam and he did not know as to whether any case was lodged or not. He reached the spot after hearing sound. He did not see any of the incidents. Investigating Officer never recorded his statement and his statement has been recorded first time in the Court.

39. On the basis of the statement of PW-3 Islam Nabi, it transpires that the incident was narrated to him by the prosecutrix only and he did not see any

incident by himself and moreover, he was not interrogated by the Investigating Officer during investigation, therefore, the evidence of PW-3 does not corroborate the prosecution version.

40. PW-4 Ramzani appears to be a chance witness since PW-1 the victim has stated in her evidence that this witness is the resident of village Ajeetpur and Ajeetpur is far away from her place. This witness has also stated himself to be the resident of Ajeetpur. He went to the village of the victim to see some land but he did not remember the date and month of his visit. He was staying at the house of Islam. It is important to mention here that PW-3 Islam did not mention anything about Ramzani staying with him on the date of occurrence.

41. Further, this witness stated that he reached the house of Aslam and saw that the victim was crying there and he was informed about the incident by the victim only, therefore, this witness has deposed on the basis of hearsay evidence and he is not the witness of any incident. He has also stated that when he reached the place of occurrence, the accused were not present there. He did not know as to whether it was dark or moon light night. When they reached the place of occurrence the accused had gone away. Other persons came there but he did not know their names. He did not go anywhere else but returned to his house. He was never inquired about this case by anyone. He only heard about the miscarriage of the victim. He stated that the height of the wall of the house of the victim is about 7 feet.

42. The evidence of PW-4 Ramzani does not corroborate the prosecution version because he appears to be a chance witness and he did not see any of the incidents himself and further more, according to him he was not inquired by the Investigating Officer during the investigation, therefore, the evidence of PW-4 is not reliable.

43. Another important aspect of this case is the time of the incident, which is alleged to have taken place at 10.00 p.m. No source of light has been shown by the Investigating Officer in the site plan exhibit Ka-7. PW-1 the victim, first time in her deposition before the Court stated that on 12.06.2014 at the time of incident a kerosene lamp was lit in his house but she did not tell anything about it to the Investigating Officer. Pertinent to note that, PW-2 Jaitoon Jahan, the mother of the prosecutrix did not say anything about the source of light available at the time of incident dated 12.06.2014 during her entire deposition. PW-3 Islam Nabi stated that the kerosene lamp was lit in the house of the prosecutrix. The existence of kerosene lamp at the time of incident is not mentioned in the first information report, not in the examination in chief of prosecution witnesses of fact, and not narrated to the Investigating Officer also. Even in her statement under Section 164 Cr.P.C. exhibit Ka-3, it is not referred. No such kerosene lamp was taken into possession by the Investigating Officer, therefore, in view of the above, the source of light at the time of incident is doubtful.

44. It shall not be out of place to mention here that the statement of the victim under Section 164 Cr.P.C. was recorded which is proved by her as Exhibit Ka-3. In this statement the prosecutrix did not say even a word about the incident dated 12.06.2014.

45. The Hon'ble Apex Court in ***Rai Sandeep Vs. State, (NCT of Delhi)*** (2012) 8 SCC 21 has eleborated the meaning of "Sterling Witness' as:-

"15. In our considered opinion, the ''sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a ''sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

46. On importance given to the testimony of the prosecutrix in rape cases, Hon'ble Supreme Court in ***Hemraj Vs. State of Haryana***, 2014 (2) SCC 395 reminded the Court of their duties in carefully scrutinizing the same in following words:-

"6. In a case involving charge of rape the evidence of the prosecutrix is most vital. If it is found credible; if it inspires total confidence, it can be relied upon even sans corroboration. The court may, however, if it is hesitant to place implicit reliance on it, look into other evidence to lend assurance to it short of corroboration required in the case of an accomplice. [See: State of Maharashtra v. Chandraprakash Kewalchand Jain[1]]. Such weight is given to the prosecutrix's evidence because her evidence is on par with the evidence of an injured witness which seldom fails to inspire confidence. Having placed the prosecutrix's evidence

on such a high pedestal, it is the duty of the court to scrutinize it carefully, because in a given case on that lone evidence a man can be sentenced to life imprisonment. The court must, therefore, with its rich experience evaluate such evidence with care and circumspection and only after its conscience is satisfied about its creditworthiness rely upon it."

47. In ***Sadashiv Ramrao Hadbe Vs. State of Maharashtra***, (2006) 10 SCC 92 the Hon'ble Apex Court observed that:-

"8. It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring of confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen."

48. In view of the above observations made by the Hon'ble Apex Court, the evidence of PW-1, the victim does not inspire confidence since it is full of material contradictions and ignorance relating to material facts with regard to the incident of forceful miscarriage caused by the appellants/accused as well the incident of abduction and gang rape alleged to have happened on 12.06.2014. PW-1 the victim does not appear to be a sterling witness since her evidence conclusively does not corroborate the story of the prosecution.

49. So far as the material contradictions and improvement made by the witness is concerned, the Hon'ble Supreme Court in ***Krishnegowda v. State of Karnataka***, (2017) 13 SCC 98 observed that:-

"Material contradiction in the testimony of prosecution witness creates serious doubt in the mind of the court about the truthfulness of the witnesses and hence it cannot be held that the prosecution has proved the guilt beyond reasonable doubt and the accused are entitled for benefit of doubt in such case. The Hon'ble Court held:-

"...26. Having gone through the evidence of the prosecution witnesses and the findings recorded by the High Court we feel that the High Court has failed to understand the fact that the guilt of the accused has to be proved beyond reasonable doubt and this is a classic case where at each and every stage of the trial, there were lapses on the part of the investigating agency and the evidence of the witnesses is not trustworthy which can never be a basis for conviction. The basic principle of criminal jurisprudence is that the accused is presumed to be innocent until his guilt is proved beyond reasonable doubt.

27. Generally in the criminal cases, discrepancies in the evidence of witness is bound to happen because there would be considerable gap between the date of incident and the time of deposing evidence before the court, but if these contradictions create such serious doubt in the mind of the court about the truthfulness of the witnesses and it appears to the court that there is clear improvement, then it is not safe to rely on such evidence.

The minor variations and contradictions in the evidence of the eyewitnesses will not tilt the benefit of doubt in favour of the accused but when the contradictions in the evidence of the prosecution witnesses proves to be fatal to the prosecution case then those contradictions go to the root of the matter and in such cases the accused gets the benefit of doubt."

50. On the basis of the above discussion and appreciation of documentary and oral evidence available on record, it is concluded that the prosecution has failed to bring home the charge u/s 452, 366, 376D and 313 IPC against the appellants. Material contradictions in the evidence of the witnesses of the fact render the theory of the prosecution to be doubtful. The witnesses have made material improvements and embellishments in their testimonies. The evidence of Prosecutrix examined as PW1, and other witnesses PW-2 Smt. Jaitoon, PW-3 Islam Nabi, and PW-4 Ramzani on reading as a whole do not inspire confidence and do not have any ring of truth. Appreciation of oral evidence of witnesses of fact raises doubt about the commission of the crime by the appellants. The Learned Trial Court has not appreciated the evidence available on record in a rightful manner and hence wrongly convicted the appellants.

51. In view of the above, the appellants are entitled to the benefit of the doubt since the prosecution has failed to prove the charges against the appellants beyond reasonable doubt. Thus, the appeal is liable to be allowed and the appellants deserve to be acquitted.

ORDER

52. The criminal appeal is accordingly allowed. The Judgement of conviction and order of sentence passed by the learned trial court dated 26.10.2017 passed in S.T. No. 533 of 2014 (State Vs. Aslam & Anr.) is hereby set aside. Accordingly, the appeallants Aslam and Rafiq are acquitted from the charges under sections 452, 366, 376-D and 313 IPC.

53. The Appellant Aslam is in jail. He be released forthwith if his detention is not required in any other case.

54. Appellant Rafiq is on bail. He need not surrender. His personal bonds is cancelled and sureties are discharged from their liability.

55. The trial court shall ensure that the appellants shall furnish bonds as required under Section 437A Cr.P.C. before the trial court within two weeks from the date of communication of this order to the trial court.

56. Let the certified copy of this order be transmitted to the trial court for compliance.

57. The lower court record be also transmitted to the trial court.

(2023) 1 ILRA 1062
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.09.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SUBHASH CHAND, J.

First Appeal From Order No. 795 of 2011

Smt. Anita Sinha & Ors. ...Appellants
Versus
Sri Prakash Dixit & Ors. ...Respondents

Counsel for the Appellants:

Sri D.K. Tiwari, Sri Shreesh Srivastava

Counsel for the Respondents:
Sri Amresh Sinha

(A) Civil Law – Motor Vehicles Act, 1988 - Sections 163-A, 168 & 173 - UP Motor Vehicles Rules, 1998 - Rules 220-A(3), 220-A(3)(ii) & 220-A(6): - claimant's Appeal - enhancement of compensation - appreciation of evidence & factum of accident - accident and accidental injuries are not in dispute - deceased was died due to accidental injuries - insurance Co. did not prove that there was any breach of policy conditions - Tribunal framed four issues - after considering documentary evidences - tribunal held that driver of truck was the sole author of the accident - tribunal decided all the issues in favour of the claimants except issue no. 4 regarding age of deceased. (Para - 3)

(B) Civil Law – Motor Vehicles Act, 1988 - Sections 163-A, 168 & 173 - UP Motor Vehicles Rules, 1998 - Rules 220-A(3), 220-A(3)(ii) & 220-A(6): - claimant's Appeal - quantum of compensation - determination of income & future prospectus - deceased at the age of 45 years and he was working in a Private Co. as an officer and was also working into the consultancy work - ITR shows that he was earning Rs. 1,67,855/- per annum - Tribunal has committed an error as it has not considered the income from the other sources - court held that, the income tax returned are the mirror of income of the deceased and therefore same has to be considered - future prospectus to be reckoned - which is determined in accordance with law laid down by the Hon'ble Apex court. (Para - 3, 5)

(C) Civil Law – Motor Vehicles Act, 1988 - Sections 163-A, 168 & 173 - UP Motor Vehicles Rules, 1998 - Rule 220-A(3), 220-A(3)(ii)& 220-A(6): - claimant's Appeal - quantum of compensation - determination - Multiplier & Deduction - deceased to be considered in the age bracket of 45 - 47 cannot be accepted - record shows that he was 45 years of age - post-mortem report also shows that the age of the deceased was 45 years - held - the multiplier would be '14' not 13 as granted by the tribunal as per the law laid down in case of Sarla Verma's. (Para - 4, 7)

(D) Civil Law – Motor Vehicles Act, 1988 - Sections 163-A, 168 & 173 - UP Motor Vehicles Rules, 1998 - Rules 220-A(3), 220-A(3)(ii) & 220-A(6): - **claimant's Appeal - quantum of compensation - has to be determined as per law laid down in Sarla Verma's case, Pranay Shethi' case, Smt. Sangita Arya's case, National Insurance Co. Ltd. Case - hence, compensation awarded by the tribunal, enhanced to Rs. 21,06,636/- with 7.5% rate of interest - Appeal allowed - impugned award modified accordingly.** (Para 4, 9, 10, 12)

Appeal is partly allowed. (E-11)

List of Cases cited:

1. Smt. Sangita Arya & ors. Vs Oriental Insurance Co. Ltd. & ors. (2020 (5) SCC 327),

2. Vimal Kanwar & ors. Vs Kishore Dan & ors. (AIR 2013 SC 3830),

3. National Insurance Co. Ltd. Vs Pranay Sethi & ors., (2017 (16) SCC 680),

4. Sarla Verma & ors. v. Delhi Transport Corp. & anr. (2009 (6) SCC 121),

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

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

7. A. V. Padma Vs Venugopal (2012 (1) GLH (SC) 442),

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. & Hon'ble Subhash Chand, J.)

1. Heard learned counsel for the parties and perused the judgment and order impugned.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 18.11.2010 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.10, Allahabad (hereinafter referred to as 'Tribunal') in M.A.C.T. Case No. 602 of 2008.

3. Brief facts necessary for our purpose, which relates to the litigation are that the accident occurred on 02.12.2007 at about 6.00 PM when the driver of the Truck drove the truck rashly and negligently and dashed the Maruti Car driven by the deceased, whereby the deceased was plying his car and going from Lucknow to Gorakhpur and the deceased died due to accidental injuries is not in dispute. The involvement of the truck is also not in dispute. The Insurance Company did not prove that there was any breach of policy conditions and they were directed to indemnify the legal heirs of the deceased. The owner and driver of the truck have absented themselves and have not entered into witness box. The respondents (owner and driver) filed written statement, which is one of denial. The Insurance Company also filed its reply one of denial and there is breach of policy conditions. The Tribunal framed four issues and held that as the charge-sheet was laid against the driver of the truck and as such post mortem showed that the injuries were sufficient to cause death, therefore, the Tribunal case to the conclusion that the death occurred due to accidental injuries. The Tribunal held that the driver of the truck was the sole author of the accident. The issue nos. 2 and 3 were also decided against the respondents. It is only the finding of facts of issue no.4, which has aggrieved the appellants herein. The deceased was 47 years of age as believed by the Tribunal. The deceased was working with Uptron India Limited as an officer and was also into the consultancy work. The Tribunal, according to the learned counsel for the appellant, did not consider the income of consultancy as no certificate was produced. The Tribunal, according to the counsel, considered the salary Rs. 75816/- per annum and granted multiplier of 13 and deducted 1/3 as personal expenses and added Rs. 9500/- as non pecuniary damages. It is admitted position that no amount was granted under the head of future loss of income despite the fact that ITR return showed that the deceased was earning Rs. 1,67,855/- which is bad.

4. Learned counsel for the appellants has submitted that in recent judgment of Apex Court in **Smt. Sangita Arya and others Vs. Oriental Insurance Company Limited and others 2020 5 SCC 327**, the income of the deceased has to be considered as per income tax return. It is apparent on the face of record that income was not considered on the ground that no certificate was produced. However, basic salary had to be computed along with other emoluments, which the deceased was receiving as per the judgment of Apex Court in **Vimal Kanwar and others Vs. Kishore Dan and others AIR 2013 SC 3830**. We cannot concur that the Tribunal had considered the income of the deceased at Rs. 75,816/- per annum in the year of accident and the date of judgment pronounced the principle of grant of future loss of income was invoked, therefore, as per judgment of **National Insurance Company Limited Vs. Pranay Sethi and others (2017) 16 SCC 680** as he was aged about 45 years, 30% would be admissible out of which 1/3 would be deducted as he was survived by wife and minor son. The multiplier would also be 14, not 13 as granted by the Tribunal, as per judgment of

Sarla Verma and others Vs. Delhi Transport Corporation and another (2009) 6 SCC 121. The non pecuniary damages would be Rs. 70,000/- + Rs. 30,000/- with interest of 7.5%.

5. We have perused the income tax return verification form for the assessment year 2008-09. It appears that the Tribunal has committed an error as it has not considered the income from other sources in column V and therefore, there being error apparent on this is corrected by us. The income tax return are the mirror of income of the deceased and therefore, same has to be considered.

6. We are unable to accept the submission of Anubhav Sinha, Advocate holding brief of Sri Amresh Sinha, learned counsel for the respondent that the tribunal has rightly considered the rational income and that the multiplier is just and proper as he was self employed person no question for grant of future prospects.

7. Submission that the deceased to be considered in the age bracket of 45-47 cannot be accepted that record shows that he was 45 years of age. Post mortem report also shows that the age of the deceased was 45 years.

8. The Tribunal has discarded the allowances from the income with the observation that it would be only payable if the deceased was alive, this aspect and this fact has been erroneously recorded so as to discard the income as reflected in the income tax return of the year 2008-09.

9. Hence, the total compensation payable to the appellants in view of the decision of the Apex Court in **Pranay Sethi (Supra)** is computed herein below:

i. Annual Income:- 1,67,855/-

ii. Percentage towards future prospects : 30% (Rs. 50,356/-)

iii. Total income : Rs. 2,18,211/-

iv. Income after deduction of 1/3rd : Rs. 1,45,474/-

v. Multiplier applicable : 14

vi. Loss of dependency: Rs. 1,45,474 x 14 = Rs. 20,36,633/-

vii. Amount under filial consortium and other non pecuniary heads : Rs. 70,000/-

viii. Total compensation : Rs. 21,06,636/-

10. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

11. No other grounds are urged orally when the matter was heard.

12. In view of the above, the appeal is partly allowed. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The amount be

deposited by the respondent-Insurance Company within a period of 12 weeks from today with interest at the rate of 7.5%. The amount already deposited be deducted from the amount to be deposited.

13. In view of the ratio laid down by Hon'ble Gujarat High Court in case of **Smt. Hansagori P. Ladhani Vs. The Oriental Insurance Company Ltd., reported in 2007 (2) GLH 291**, the total amount of interest, accrued on the principle 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 At, 1961 and if the amount of interest does not exceeds Rs. 50,000/- in any financial year, registry of the 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) and in First Appeal From Order No. 2871 of 2016 (Tej Kumari Sharma Vs. Chola Mandlam M.S. General Insurance Co. Ltd.) decided on 19.03.2021 while disbursing the amount.

14. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma Vs. Venugopal reported in 2012 (1) GLH (SC) 442**, the order of investment is not passed because respondents are neither illiterate nor rustic villagers.

15. This Court is thankful to both the counsels for getting this matter disposed of.

(2023) 1 ILRA 1066
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.12.2022

BEFORE

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

First Appeal From Order No. 1673 of 2004

New India Assurance Co. Ltd. ...Appellant
Versus
Smt. Hardei & Anr. ...Respondents

Counsel for the Appellant:
Sri S.C. Srivastava

Counsel for the Respondents:
Sri S.M. Khalid

Civil Law – The Employee's Compensation Act, 1923 - Section - 30 : - Insurers Appeal - against Award passed by the Workmen's compensation Commissioner - claim Application - Award - Substantial Question of Law - Insurance Co. taken plea on the basis of St.ment of owner of vehicle that death would not be taken to be caused arising out of his employment at the time of incident - the workman Compensation Commissioner is the last authority of fact - in the light of judgment of Hon'ble Apex Court rendered in case of *Golla Rajan's* & Mayan's - the High Court cannot enter into the arena of facts unless they are proved to be perverse as well as High court cannot interfere unless there is a question of law is involved - in the present appeal, so called substantial question of law framed are question of facts and the findings of the commissioner on the said issues are not perverse - hence, so called question of law framed by the insurance Co. are answered against - therefore, this appeal fails and dismissed - direction for disbursement of awarded amount, accordingly.(Para - 11, 12, 13, 16)

Both Appeals are partly allowed. (E-11)

List of Cases cited:

1. North East Karnataka Road Transport Corp. Vs Smt. Sujatha (Civil Appeal No.7470 of 2009, decided on Dt. 02.11.2018),

2. ESIC Vs S. Prasad (FAFO No. 1070 of 1993 Decided on Dt. 26.10.2017),

3. Golla Rajanna Etc. Etc. Vs Divisional Manager & anr. (2017 (1) TAC 259 (SC)),

4. Mayan Vs Mustafa & anr., 2022 ACJ 524,

5. Salim Vr. New India Assurance Co. Ltd. & anr., 2022 ACJ 526,

6. Shahajahan & anr. Vs M/s Shri Ram Gen. Insruance Co. Ltd. & anr. (2021 vol. 4 T.A.C. 687 SC),

7. Rita Devi Vs New India Assurance Co. Ltd., LAWS (SC) 2000 499,

8. Mukund Dewangan Vs Oriental Insurance Co. Ltd., AIR 2017 SC 3668.

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

1. Heard learned counsel for the appellant-New India Assurance Co. Ltd.

2. By way of this appeal, the appellant has challenged the judgment and award dated 31.3.2004 passed by Workmen's Compensation Commissioner, Bareilly, in Case No.156/ WCA/ 2002 awarding compensation of Rs.3,06,620/-.

3. Learned Counsel for the appellant - Insurance Company submits that according to the statement of the owner, deceased had taken the vehicle to the workshop for repairing and servicing but he had taken the vehicle in question to Delhi and Meerut with other five persons without his permission and as such his death would not be taken to be caused arising out of and in the course of his employment at the time of accident. The driver had licence to drive only motorcycle and LMV (Pvt.) whereas jeep was insured for taxi purposes and as such it was driven in violation of policy.

4. Learned Counsel for the claimant - respondent submits that the deceased Charan Singh Yadav was engaged as Driver with the vehicle no. UP-25-J/2228 owned by respondent no.2 and was murdered during course of his employment on 19.8.2002. The vehicle was insured with the company of appellant for which the learned Tribunal decided the issue no.4 recording that on the day of incident the vehicle was insured as the vehicle was insured since 20.3.2002 to 19.3.2003.

5. It is submitted by learned Counsel for appellant that on the day of incident the deceased was not having valid and effective driving license for which issue no.5 decided against appellant. The finding that deceased died during course of employment for which issue no.1 was decided in favour claimants is against the evidence led before the Commissioner.

6. It is further submitted by learned Counsel for the appellant that the learned Tribunal considering material evidence available on record partly allowed the claim of claimant by judgment and order dated 31.3.2004 awarding amount of Rs. 3,06,620/- with interest and erroneously fixed liability on the appellant. The learned Tribunal while partly allowing the claim of claimant - respondent no.1, came to the conclusion that the claimant was entitled for compensation as claimed by the widow.

7. On perusal of memo of appeal, this Court finds that following substantial questions of law have been framed by the

appellant. This Court while admitting the appeal did not stipulate on what question of law the appeal was admitted. This Court thinks it appropriate to decide the substantial question of law as framed by appellant. The substantial questions of law are as under:-

" (a) Whether the learned Commissioner has committed error of law in awarding compensation ignoring the statement of the owner of the vehicle (employer) to the effect that he had only permitted the decease to take the vehicle in question to the workshop for repairing and servicing and not for leisure tour of Delhi and Meerut etc. which was without his permission?

(b) Whether the death of the Driver was deemed to be arising out of and in the course of his employment?

(c) Whether the Driver had valid and effective driving licence at the time of the accident?

(d) Whether unless the bones found are proved in the criminal court belongs to the alleged deceased, no award could be passed in favour of the claimant?"

8. At the outset, it is relevant to discuss the scope of this Court to entertain appeal against the award of Workmen's Compensation Commissioner.

9. The Apex Court in **Civil Appeal No.7470 of 2009 North East Karnataka Road Transport Corporation Vs. Smt. Sujatha decided on 2.11.2018** has held as under :

"9. At the outset, we may take note of the fact, being a settled principle, that the question as to whether the employee met with an accident, whether the accident occurred during the course of employment, whether it arose out of an employment, how and in what manner the accident occurred, who was negligent in causing the accident, whether there existed any relationship of employee and employer, what was the age and monthly salary of the employee, how many are the dependents of the deceased employee due to injuries suffered in an accident, whether there was any insurance coverage obtained by the employer to cover the incident etc. are some of the material issues which arise for the just decision of the Commissioner in a claim petition when an employee suffers any bodily injury or dies during the course of his employment and he/his LRS sue/s his employer to claim compensation under the Act.

10. The aforementioned questions are essentially the questions of fact and, therefore, they are required to be proved with the aid of evidence. Once, they are proved either way, the findings recorded thereon are regarded as findings of fact."

10. The Apex Court further went on to hold as under :

"15. Such appeal is then heard on the question of admission with a view to find out as to whether it involves any substantial question of law or not. Whether the appeal involves a substantial question of law or not depends upon the facts of each case and needs an examination by the High Court. If the substantial question of law arises, the High Court would admit the appeal for final hearing on merit else would dismiss in limini with reasons that it does not involve any substantial question/s of law.

16. Now coming to the facts of this case, we find that the appeal before the High Court did not involve any substantial question of law on the material questions set out above. In other words, in our view, the Commissioner decided all the material questions arising in the case properly on

the basis of evidence adduced by the parties and rightly determined the compensation payable to the respondent. It was, therefore, rightly affirmed by the High Court on facts.

17. In this view of the matter, the findings being concurrent findings of fact of the two courts below are binding on this Court. Even otherwise, we find no good ground to call for any interference on any of the factual findings. None of the factual findings are found to be either perverse or arbitrary or based on no evidence or against any provision of law. We accordingly uphold these findings."

11. This Court, recently in **F.A.F.O. 1070 of 1993 (E.S.I.C. Vs. S. Prasad) decided on 26.10.2017** has followed the decision in Golla Rajana (Supra) and has held as follows:

"The grounds urged before this Court are in the realm of finding of facts and not a question of law. As far as question of law is concerned, the aforesaid judgment in Golla Rajanna Etc. Etc. Versus Divisional Manager and another (supra) in paragraph 8 holds as follows "the Workman Compensation Commissioner is the last authority on facts. The Parliament has thought it fit to restrict the scope of the appeal only to substantial questions of law, being a welfare legislation. Unfortunately, the High Court has missed this crucial question of limited jurisdiction and has ventured to re-appreciate the evidence and recorded its own findings on percentage of disability for which also there is no basis."

12. As far as present appeal is concerned, the so called substantial questions of law framed are questions of facts and the findings of the Commissioner on the said issues are not perverse. In view of the decision of the Apex Court in **North East Karnataka Road Transport Corporation Case (Supra) and Golla Rajanna Etc. Etc. Vs. Divisional Manager and Another, 2017 (1) TAC 259 (SC)**where also it has been held that under Section 30 of the E.C. Act, 1923, the High Court cannot enter into the arena of facts unless they are proved to be perverse.

13. A recent decision of the Apex Court in the case of **Mayan Vs. Mustafa and another, 2022 ACJ 524** also holds that the Court cannot interfere unless there is a question of law involved. In our case the injury was during the course of employment. The percentage of injury was decided by the Commissioner. The judgment of Apex Court in **Salim Versus New India Assurance Co.Ltd. and another, 2022 ACJ 526** will also not permit this Court to interfere in the well reasoned judgment of the Commissioner.

14. This Court is even fortified in its view in **Shahajahan and another Versus M/s Shri Ram Gen. Insurance Company Ltd. and another, 2021(4) T.A.C. 687 (S.C.)** as it is proved that the claimant was employee of the employer and was engaged as a driver.

15. As far as question of law at (a) is concerned, it is immaterial whether the deceased took the vehicle to the workshop for repairing. He was in employment and during the employment, death arose out of and in the course of his employment. This is a finding of fact based on the evidence led before the court below. Hence, this being question of fact in view of the judgment of the Apex Court where no perversity is pointed out as the owner did not dispute the fact that deceased was his employee. This Court under Section 30

cannot delve into this disputed question of fact which has been decided by the Commissioner which is first court of fact. The owner, who has been examined as DW1, had put the vehicle at the command of the deceased, who was in employment. Charan Singh was done to death being on duty which is proved before the court below. The first information report also mentions that on 19.8.2002 Charan Singh was driver of the vehicle and had taken the vehicle for getting it washed in the morning at 9:00 a.m. This fact is corroborated by the chargesheet also. The deceased was murdered as he was kidnapped is a finding of fact in issue no.1. In that view of the matter, these being questions of fact and proved that he was done to death by certain elements, the judgment of the Apex Court in ***Rita Devi Vs. New India Assurance Co. Ltd., LAWS (SC) 2000 499***, will apply to the facts of this case. As far as the question of breach of policy is concerned, the said driving licence whether had an endorsement or not is covered by the judgment in ***Mukund Dewangan Vs. Oriental Insurance Co. Ltd., AIR 2017 SC 3668***. It is nobody case that the vehicle was run as taxi quota vehicle. As far as issue no. (c) is concerned, the learned Commissioner while deciding issue no.5 has decided this factual data against the appellant. I concur with the same for the reasons assigned herein above and on the basis of the judgment of the Apex Court in Mukund Dewangan (supra). As in issue no.5, it is proved that the vehicle was insured and the driver was insured and the driver had a driving licence. They had even contended that the driving licence was valid but there was no endorsement. As far as substantial question of law is concerned, the post-mortem report and the F.I.R. categorically proves that it was Charan Singh dead-body and there is no need to wait for the decision of criminal court once the Commissioner was satisfied on the facts of the case that Charan Singh was done to death.

16. In that view of the matter this appeal fails and is dismissed. The so called questions of law framed by the Insurance Company are answered against it. In fact the substantial questions of law raised are the questions of fact.

17. Interim relief shall stand vacated forthwith. The Registry will forward this order to the W.C. Commissioner who shall immediately summon the claimants and disburse the amount kept in fixed deposit with interest accrued on the said amount till date within 30 days from today.

(2023) 1 ILRA 1070
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.11.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

First Appeal From Order No. 2239 of 2022

Smt. Shajia & Anr. ...Appellants
Versus
Munazir Ali & Ors. ...Respondents

Counsel for the Appellants:
Sri Ajay Kumar Singh Yadav, Sri Divyansh

Counsel for the Respondents:
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Civil Law – Civil Procedure Code, 1908 - Order 7 Rule 11 - Section - 96 - Limitation Act, 1963 - Article 59: - Appeals - against order of lower appellate court - Original suit for cancellation of sale-deed - wherein appellant filed an application contending suit is time barred since alleged sale deed was executed in year 2006 but he challenged in year 2012 - Trial court rejected the Suit being time barred by

three years under article 59 - Civil Appeal - lower appellate court allowed the Civil appeal - court finds that - in the plaint plaintiff's taken plea that he got knowledge of execution of the sale deed of 2006 only in the last week of Jan. 2012 - court held that, the question of limitation is not a pure question of Law but a mixed question of fact and law - and - question as to whether the averments made in plaint are true or not, can be adjudicated only after the evidence is led by the parties - hence, no any illegality in the order passed by the lower appellate court in setting aside the order of trial court - accordingly appeal lacks of its merit and hence dismissed. (Para - 26, 30, 34, 35)

Appeal is allowed. (E-11)

List of Cases cited:

1. Sukhbiri Devi & ors. Vs U.O.I. & ors. (Civil Appeal No. 10834 of 2010),

2. Raghwendra Sharan Singh Vs Ram Prasanna Singh (Dead) by LRs. (Civil Appeal No. 2960 of 2019),

3. C.S. Ramaswamy Vs V.K. Senthil & ors. (Civil Appeal No. 500 of 2022),

4. Md. Noorul Hoda Vs Bibi Raifunnisa & ors., (1996) 7 SCC 767),

5. Saranpal Kaur Anand Vs Praduman Singh Chandhok & ors., (2022) 8 SCC 401.

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

1. Heard Sri A.K.S. Yadav, learned counsel for the appellant.

2. The defendants/appellants have preferred the present appeal against the order dated 21.09.2022 passed by the lower appellate court setting aside the order of the trial Court dated 11.03.2019 by which the trial Court has rejected the plaint of Original Suit No.59 of 2012 instituted by the plaintiff/respondent no.1 for cancellation of sale deed with respect to the suit property on the ground that the suit is barred by limitation.

3. Brief facts of the case are that the plaintiff/respondent no.1 has instituted Original Suit No.59 of 2012 praying for cancellation of the sale deed alleged to have been executed on 05.12.2006 with respect to the suit property. The suit has been instituted by the plaintiff/respondent no.1 alleging that respondent no.2 Araish Ali (defendant no.2 in the suit) was the son of the plaintiff/respondent no.1 and appellant no.1 Smt. Shazia Khan (defendant no.1 in the suit) is the wife of respondent no.2 (hereinafter referred to as the 'wife of respondent no.2). Further allegation in the plaint is that respondent no.4 (defendant no.4 in the plaint) is the father of appellant no.1.

4. The marriage of respondent no.2, son of the plaintiff/respondent no.1, was solemnized with appellant no.1 on 30.04.2006. Thereafter appellant no.1 started living as the wife of respondent no.2 in the house of the plaintiff/respondent no.1. It is further pleaded that appellant no.1 has colluded with respondent no.2 to usurp the property of the plaintiff/respondent no.1. To achieve the said object, the appellant no.1 registered a false complaint against the wife and nephew (sister's son) of plaintiff/respondent no.1 under the Dowry Prohibition Act on 30.11.2006. Pursuant to the FIR dated 30.11.2006 the nephew of the plaintiff/respondent no.1 was arrested and had to remain in jail.

5. It is further stated that respondent no.4 in collusion with appellant no.1 had agreed to withdraw the FIR on the condition that the plaintiff/respondent no.1 transfer the house owned by him by way of

a sale deed in favour of appellant no.1. It was agreed that on the execution of sale deed, the FIR dated 05.12.2006 would be withdrawn.

6. Further case of the plaintiff/respondent no.1 is that because of the pressure tactics adopted by the appellant no.1, the plaintiff/respondent no.1 had no option but to execute the sale deed because of the false criminal case registered against his wife and nephew by appellant no.1 without getting any sale consideration with respect to the house owned by him. It is stated that he executed the sale deed only in respect to the house. The plaintiff/respondent no.1 has further stated that he had no knowledge about the execution of the sale deed date 05.12.2006 with respect to the agricultural land described in the plaint, which was got executed by appellant no. 1 by playing fraud.

7. It is the specific case of the plaintiff/respondent no.1 in the plaint that he has not executed any sale deed in respect of the agricultural land which is the suit property, nor he has received any sale consideration as alleged in the said sale deed. The plaintiff/respondent no.1 in para-8 of the plaint has categorically stated that the plaintiff/respondent no.1 was forced to execute the sale deed of the house and when he reached the Court for the execution of the sale deed, the sale deed was not read over to him and wherever he was asked to put his signature, he had put his signature as he was told that the papers are related to the sale deed in respect of the house.

8. It is the further case of the plaintiff/respondent no.1 that the consolidation proceeding was undertaken in the village in which a chak was carved out, in which the name of the plaintiff/ respondent no.1 is still recorded and the possession of chak has been handed over to the plaintiff/respondent no.1.

9. It is stated that the plaintiff/respondent no.1 came to know about the sale deed dated 05.12.2006 executed in the last week of January 2012 when the appellant interfered with the possession of the plaintiff/respondent no.1 which gave rise to the cause of action to the plaintiff/ respondent no.1to institute the present suit. Thereafter, the suit has been filed for cancellation of the sale deed dated 05.12.2006 with respect to the suit property described in para-1 & 2 of the plaint.

10. In the said suit, the appellant filed an application under Order 7 Rule 11 C.P.C. contending inter alia that the suit is barred by limitation since the sale deed is alleged to have been executed on **05.12.2006** whereas the suit has been instituted on **14.02.2012** after three years which is the period of limitation for a suit for cancellation of the sale deed as provided under Article 59 of the Indian Limitation Act.

11. The trial Court held that on the reading of the plaint, it is evident that the suit has been filed for cancellation of the sale deed dated **05.12.2006** whereas the suit has been instituted in February 2012 and as the period of limitation for filing the suit for cancellation of the sale deed is three years as provided under Article 59 of Limitation Act, 1963, therefore, the suit is barred by limitation.

12. The plaintiff/respondent no.1 preferred an appeal under Section 96 of the C.P.C. before the appellate Court,

registered as Civil Appeal No.28 of 2019 which came to be allowed by the appellate Court by order dated 21.09.2022 holding that the trial Court has framed Issue no.10 "whether the suit is barred by limitation". The trial Court on the said issue on 20.10.2013 passed an order that the counsel for both the parties, i.e., plaintiff and respondents have agreed to the disposal of issue no.10 after the evidence is led by the parties.

13. The appellate Court found that as there was an order dated **20.10.2013** wherein counsel for both the parties had agreed to the disposal of Issue no.10 after the evidence are led, therefore, the trial Court was bound by the order dated 20.10.2013 and until the order dated **20.10.2013** is reviewed, the application under Order 7 Rule 11 C.P.C. could not have been disposed of since both the counsel, i.e., counsel for the plaintiff and defendant had consented for disposal of Issue no.10 after the evidence are led by the parties.

14. Challenging the order, learned counsel for the appellants has contended that on a bare reading of the plaint, it is evident that the suit is barred by limitation. It is contended that it is admitted on record that the sale deed in respect to the suit property had been executed on **05.12.2006** whereas the suit has been instituted in February 2012 and thus, it is manifest that the period of three years has expired, therefore, the plaint is liable to be rejected on the ground that the suit is barred by limitation in view of Article 59 of the Act, 1963.

15. It is submitted that the Court is under obligation to appreciate the pleading in its true spirit and if on reading the plaint and other material enclosed with the plaint that the suit is barred by limitation, the clever drafting of the plaint to bring the suit within limitation cannot save the plaint from being rejected on the ground that it is barred by limitation.

16. He submits that it is evident from the plaint that the plaintiff/respondent no.1 has admitted the execution of the sale deed and only denies the contents of the documents, and thus, it is evident that he had knowledge about the execution of the sale deed dated **05.12.2006** on the date it was executed and as the suit has been instituted in the year 2012, therefore, it is evident that the suit is barred by limitation and the appellate Court has committed material irregularity in not appreciating the correct facts on record. It is further submitted that even the plaintiff/ respondent no.1 has admitted in the suit that consolidation proceeding had been undertaken in which an objection has been raised.

17. It is contended that after the execution of the sale deed, appellant no.1 had submitted an application for mutation of her name in the revenue records which was objected to by the plaintiff/respondent no.1 in the year 2007 and therefore, it is manifest that the plaintiff/ respondent no.1 had knowledge about the sale deed on the date of filing of the objection in the year 2007 and, therefore, the suit is even otherwise barred by limitation. In support of his case, he has placed reliance upon the judgement of the Apex Court passed in **Civil Appeal No.10834 of 2010, Sukhbiri Devi and Others Vs. Union of India ad Others, Civil Appeal No.2960 of 2019, Raghwendra Sharan Singh Vs. Ram Prasanna Singh (Dead) by LRs & Civil Appeal No.500 of 2022 C.S. Ramaswamy Vs. VK. Senthil and Others.**

18. I have considered the submissions advanced by the learned counsel for the appellant and perused the record.

19. Before appreciating the controversy in hand, it would be apposite to appreciate the facts on which the suit has been instituted.

20. The plaintiff/respondent no. 1 has stated in the plaint that he is the owner of the suit property described in paras-1 & 2 of the plaint. Further case of the plaintiff/respondent no.1 is that respondent no.2 was the son who was married to appellant no.1. The appellant no.1 took respondent no.2 in confidence and hatched a conspiracy to usurp the movable and immovable property of the plaintiff/respondent no.1, and to achieve this object, appellant no.1 registered FIR on **30.11.2006** against the wife and nephew (sister's son) of the plaintiff/respondent no.1. Thereafter, appellant no.1 and respondent no.4 had forced the plaintiff/respondent no.1 to execute a sale deed in respect of the house owned by him in favour of appellant no.1 on the condition that on the execution of the sale deed, FIR dated **30.11.2006** shall be withdrawn. It is also pleaded that after registration of the FIR dated **30.11.2006**, the nephew of the plaintiff/respondent no.1 was arrested and was in incarceration, in such circumstances, the plaintiff/respondent no.1 had no option but to execute the sale deed because of the pressure tactics adopted by the appellant no.1, and in such circumstances, he executed a sale deed only in respect to the house owned by him on 05.12.2006.

21. It is specifically pleaded in the plaint that when the plaintiff/respondent no.1 reached the Court for the execution of the sale deed, he signed all the papers as he was under pressure because of false FIR against the wife and nephew. It is also pleaded that the contents of the documents were not read over to him and he was under the bonafide belief that he had been signing documents only with respect to the house and not with respect to the suit property. It is also averred in the plaint that the plaintiff/respondent no.1 has not executed any sale deed in respect of the suit property, nor has received any sale consideration. He executed the sale deed in respect of the house because of pressure tactics adopted by appellant no.1 by lodging FIR. He signed all the documents under the bonafide belief that the documents are with respect to the house of the plaintiff/respondent no.1.The plaintiff/respondent no.1 has also stated that he is illiterate and he can merely sign his signature.

22. It is stated that he has not executed any sale deed in respect of the suit property and he came to know about the alleged execution of the sale deed in the last week of January 2012 when the appellant no.1 tried to interfere with the possession of the property and that gave rise him cause of action to institute present suit.

23. From the facts delineated above, it is evident that the plaintiff/respondent no.1 has pleaded a specific case that he has not executed any sale deed in respect to suit property and in this respect, it would be apt to reproduce paras-7 & 8 of the plaint:-

"7. यह की माह जनवरी 2012 के अन्तिम सप्ताह में प्रतिवादीगण नम्बर 1, 2 व 5 ने विवादित आराजी गाटा संख्या- 204 पर अवैधानिक रूप से जबरदस्ती बिना किसी अधिकार के कब्जा करने की कोशिश की

लेकिन वादी ने स्वयं व दीगर लोगों की मदद से उपरोक्त प्रतिवादीगण को उनके मकसद मे कामयाब नही होने दिया तभी उपरोक्त प्रतिवादीगण ने वादी की कथित मकान के बयनामे के समय प्रतिवादीगण नम्बर 1, 2 व 5 ने प्रतिवादीगण नम्बर 3 व 4 की मदद से उपरोक्त आराजी जिसकी तफसील वाद पत्र के पैरा नम्बर 2 में लिखी है, का भी कथित बयनामा करा लिया। वादी ने उपरोक्त आराजी का दिनांक- 5.12.06 को प्रतिवादनी नम्बर 1 के हक में कथित कोई बयनामा तहरीर, तकमील व रजिस्ट्री नही कराया और न ही वादी ने प्रतिवादनी नम्बर 1 से कथित बयनामे का कथित 4,00000 रूपये प्रतिफल प्राप्त किया। कथित बयनामा अकृत व शून्य है, धोखे व षडयन्त्र पर आधारित है और बिना प्रतिफल के है। वादी ने प्रतिवादनी नम्बर 1 से कथित मकान के बयनामें का भी एक रूपये प्रतिफल प्राप्त नहीं किया।

8. यह कि कथित मकान के बयनामे के समय वादी कथित बयनामा कराने के लिये मजबूर था और जब वादी तहसील पहुंचा तो कथित मकान के कागजात तैयार थे और वादी को यही बताया गया कि कथित कागजात मकान से सम्बन्धित हैं और वादी को कोई भी कागज पढ़कर नहीं सुनाया गया। जहाँ जहाँ चाहे कथित दस्तावेज लेखक ने कथित कागजात पर वादी के निशान अंगूठे लगवा लिये। वादी पढ़ा लिखा व्यक्ति नहीं है केवल वादी ने हस्ताक्षर करना सीख लिये हैं। वादी ने कथित कागजात पर मकान का बयनामा समझकर अपने निशान अंगूठे लगा दिये। कातिब ने या प्रतिवादीगण ने या सब रजिस्ट्रार के कार्यालय में किसी ने भी वादी को कोई कागजात पढ़कर नहीं सुनाये और वादी ने मकान के कागजात समझकर अपने निशान अंगूठे लगा दिये। यदि वादी को यह मालूम होता कि प्रतिवादीगण मकान के अलावा वादी की आराजी का भी कथित बयनामा करा रहे हैं तब कभी भी वादी कथित बयनामें पर अपने निशान अंगूठे नहीं लगाता। कथित बयनामा बाबत आराजी निजाई सरासर गलत, अवैधानिक व शून्य है और बिना प्रतिफल के है तथा वादी पर काबिले पाबन्दी नहीं है। कथित बयनामे के आधार पर प्रतिवादनी नम्बर 1 का नाम कभी भी राजस्व अभिलेखों में दर्ज नही हुआ और नही वादी ने कथित बयनामें के आधार पर विवादित आराजी पर प्रतिवादनी नम्बर 1 का कब्जा व दखल कराया। चकबन्दी के दौरान भी चक वादी के नाम बनाया गया है और वादी को ही चक पर कब्जा व दखल दिलाया गया है।

8 अ- यह कि मान्य न्यायालय के आदेशानुसार प्रतिवादी नं० 8 को फरीक मुकदमा बनाया जा रहा है प्रतिवादी नं०8"

24. There is a specific pleading of the plaintiff/respondent no.1 in the suit that he has never executed the sale deed dated 05.12.2006 in respect of the suit property. The plaintiff/respondent no.1 had denied the execution of the sale deed dated 05.12.2006 by him and, therefore, this Court is not inclined to accept the contention of learned counsel for the appellant that the plaintiff/respondent no.1 has admitted the execution of sale deed but has only denied the contents of the sale deed and, therefore, the suit is barred by limitation in view of Article 59 of the Act, 1963.

25. The law on the point that in considering the application under Order 7 Rule 11 C.P.C. is settled that the Court is required to see only the averments made in the plaint, and if on the reading of the plaint, a cause of action is made out, the plaint under Order 7 rule 11 C.P.C. cannot be rejected.

26. In the instant case, the plaintiff/respondent no.1 has denied the execution of the sale deed dated 05.12.2006 and has averred in the plaint that he came

to know about the execution of the sale deed dated 05.12.2006 only in the last week of January 2012 when the respondents started interfering with the peaceful enjoyment of the suit property.

27. The specific case of the plaintiff/respondent in the present case is not that he had executed the instrument (sale deed) dated 05.12.2006 and he did not know the contents of the sale deed, rather the plaintiff/respondent has denied the execution of the sale deed dated 05.12.2006 in respect to suit property and has further detailed in the plaint that under compelling circumstances, he signed all the documents as asked by the defendant/appellants believing it to be the document with respect to the sale of his house. Therefore, the question as to whether the averments made in paras 7 & 8 of the plaint are true or not, can be adjudicated only after the evidence is led by the parties. In case the averments of the plaint are found to be correct based on evidence on record, then the limitation would be counted from the date the plaintiff/appellant came to know about the alleged sale deed dated 05.12.2006 in respect of the suit property.

28. In a case where the instrument is alleged to have been got executed or obtained by fraud, the starting point of limitation to set aside or cancel such an instrument is the date of knowledge of the alleged fraud. In this respect, it would be useful to reproduce para-6 of the judgement of Apex Court in the case of Md. Noorul Hoda Vs. Bibi Raifunnisa and Others (1996) 7 SCC 767, which is reproduced herein-below:-

"6. The question, therefore, is as to whether Article 59 or Article 113 of the Schedule to the Act is applicable to the facts in this case. Article 59 of the Schedule to the Limitation Act, 1908 had provided inter alia for suits to set aside decree obtained by fraud. There was no specific article to set aside a decree on any other ground. In such a case, the residuary Article 120 in Schedule III was attracted. The present Article 59 of the Schedule to the Act will govern any suit to set aside a decree either on fraud or any other ground. Therefore, Article 59 would be applicable to any suit to set aside a decree either on fraud or any other ground. It is true that Article 59 would be applicable if a person affected is a party to a decree or an instrument or a contract. There is no dispute that Article 59 would apply to set aside the instrument, decree or contract between the inter se parties. The question is whether in case of person claiming title through the party to the decree or instrument or having knowledge of the instrument or decree or contract and seeking to avoid the decree by a specific declaration, whether Article 59 gets attracted? As stated earlier, Article 59 is a general provision. In a suit to set aside or cancel an instrument, a contract or a decree on the ground of fraud, Article 59 is attracted. The starting point of limitation is the date of knowledge of the alleged fraud. When the plaintiff seeks to establish his title to the property which cannot be established without avoiding the decree or an instrument that stands as an insurmountable obstacle in his way which otherwise binds him, though not a party, the plaintiff necessarily has to seek a declaration and have that decree, instrument or contract cancelled or set aside or rescinded. Section 31 of the Specific Relief Act, 1963 regulates suits for cancellation of an instrument which lays down that any person against whom a written instrument is void or voidable and

who has a reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, can sue to have it adjudged void or voidable and the court may in its discretion so adjudge it and order it to be delivered or cancelled. It would thus be clear that the word 'person' in Section 31 of the Specific Relief Act is wide enough to encompass a person seeking derivative title from his seller. It would therefore, be clear that if he seeks avoidance of the instrument, decree or contract and seeks a declaration to have the decrees set aside or cancelled he is necessarily bound to lay the suit within three years from the date when the facts entitling the plaintiff to have the decree set aside, first become known to him."

29. It is also pertinent to mention the judgement of the Apex Court in the case of ***Saranpal Kaur Anand Vs. Praduman Singh Chandhok and Others (2022) 8 SCC 401*** wherein Apex Court in paragraphs 11 & 12 has held as under:-

"11... The general principle, which also manifests itself in Section 17 of the Limitation Act, is that every person is presumed to know his own legal right and title in the property, and if he does not take care of his own right and title to the property, the time for filing of the suit based on such a right or title to the property is not prevented from running against him. The provisions of Section 17(1) embody fundamental principles of justice and equity viz. that a party should not be penalised for failing to adopt legal proceedings when the facts or the documents have been wilfully concealed from him and also that a party who had acted fraudulently should not be given the benefit of limitation running in its favour by virtue of such frauds. However it is important to remember that Section 17 does not defer the starting point of limitation merely because the defendant has committed a fraud. Section 17 does not encompass all kinds of frauds, but specific situations covered by clauses (a) to (d) to Section 17(1) of the Limitation Act. Section 17(1)(b) and (d) encompass only those fraudulent documents or acts of concealment of documents which have the effect of suppressing knowledge entitling the party to pursue his legal remedy. Once a party becomes aware of antecedent facts necessary to pursue legal proceedings, the period of limitation commences.

12. Therefore in the event the plaintiff makes out a case that falls within any or more of the four clauses to sub-section (1) to Section 17 of the Limitation Act, the period of limitation for filing of the suit shall not begin to run until the plaintiff or applicant has discovered the fraud/ mistake or could with reasonable diligence have discovered it or if the document is concealed till the plaintiff has the means of producing the concealed document or compelling its production a fortiori."

30. Thus, in the present case, the question of limitation is not a pure question of law but a mixed question of fact and law. Perhaps, keeping this fact in mind, learned counsel for the appellant has also consented before the trial Court which has been recorded in the order of the trial Court dated 21.09.02022 that Issue No.10 shall be decided after the parties lead their evidence.

31. Now, coming to the first judgement of the Apex Court relied upon by the learned counsel for the appellants in **Civil Appeal No.10834 of 2010, decided on 29.10.2022**, this Court may note that in the said case, the predecessor-in-interest of

the appellants, namely, Rama Nand, was the bhumidhar of certain extent of agricultural land situated in Village Naraina in Delhi. The said plot of agricultural land was acquired and an award was passed in relation to its acquisition on 09.01.1976. The predecessor-in-interest of the appellants, namely, Rama Nand died, leaving behind his widow, two sons, namely, Nahar Singh and Dhan Singh, and four daughters. The widow of the late Rama Nand also died. The policy provided that the bhumidhar was entitled to allotment of alternative residential plot in lieu of the acquired land. Late on, the alternative plot was allotted in the exclusive name of Dhan Singh, upon his production of the registered relinquished deed as per a letter dated 08.03.1991. The fact of allotment of the plot in favour of Dhan Singh came in the knowledge of his brother Nahar Singh, who filed an objection on 05.04.1991 with regard to the allotment of the plot in the exclusive name of Dhan Singh. Subsequently, Nahar Singh died on 14.05.1993. Thereupon, his widow and children stepped into his shoes. As per the plaint case, the original plaintiff no.1 submitted several representations to the authorities to refrain them from allotting the alternative plot in the exclusive name of Dhan Singh. Subsequently, they instituted suit No.410 of 2000 on 14.06.2000 seeking a decree for a declaration that the appellants be declared as joint co-owner of the residential plot allotted in the name of Dhan Singh. In the said suit, the defendant raised a plea that till the relinquished deed dated 21.10.1985 is held to be illegal, null, void, and not binding upon the plaintiff/appellants, they cannot be declared as co-owner of the suit. It is pleaded that in the instant case the relinquished deed dated 21.10.1985 came to the knowledge of the plaintiff on 08.03.1991 and the suit has been filed in the year 2000, therefore, the suit is barred by limitation. In such a factual backdrop, the Apex Court held that the question of limitation can be decided as a preliminary issue, and on consideration of the fact in the said case, the Apex Court was of the view that the Trial Court has rightly dismissed the suit on the ground of limitation.

32. In another judgement of the Apex Court relied upon by the learned counsel for the appellants in **Civil Appeal No.2960 of 2019, decided on 13.03.2019**, it may be noted that the facts of the said case are distinguishable from the facts of the present case. In the said case, the respondent filed T.S. Suit No.19 of 2003 against the appellant-original defendant in the Court of Munsif Danapur for a declaration that the deed of gift dated 06.03.1981 executed in favour of the appellant is showy and sham transaction and no title and possession with respect to the gifted property ever passed to the appellant -original defendant and the same is not binding on him. In the said case, an application was filed under Order 7 Rule 11 C.P.C. for rejection of the plaint on the ground that the suit is barred by law of limitation on the ground that the deed of the gift having been executed on 06.03.1981, the suit under Article 59 of the Limitation Act ought to have been filed within three years from the date of execution of gift deed, whereas the same has been filed after more than 22 years from the date of execution of the gift deed. In that case, the fact as emanates from the judgement are that the plaintiff/respondent had knowledge about the execution of the registered gift deed dated 06.03.1981, but they did not raise any objection till the year 2003 and in such factual backdrop, the Apex Court held that the suit is barred by limitation.

33. In another judgement of the Apex Court relied upon by the learned counsel for the appellants in Civil Appeal No.500 of 2022 decided on 20.09.2022, the Apex Court was considering a case where the original plaintiff/respondent instituted a suit for a decree of cancellation of the registered sale deed executed by the original plaintiff. The suit has been instituted in the year 2015/2016 i.e., after about a period of 10 years from the date of execution of the registered sale deed. The suit was instituted on the ground that the sale deed has been got executed by fraud and misrepresentation and the plaintiffs signed the said documents believing or treating it as a joint venture agreement and the plaintiffs did not go through the contents of the said documents and as in the year 2015, they came to know about such fraud and obtaining the documents of the sale deed by misrepresentation, therefore, considering Section 17 of the Act, the said suit cannot be said to be barred by limitation. In the said case, the Apex Court while considering the import of the pleading in the plaint of the suit found that only bald averments have been made with regard to the fraud and in such factual backdrop, the Apex Court held that mere stating in the plaint that fraud has been played is not enough and the allegation of fraud must be specifically averred in the plain, otherwise merely by using the word 'fraud', the plaintiffs would try to get the suits within the limitation, which otherwise may be barred by limitation. So, this judgment is also distinguishable on facts and law enunciated in the said judgement in the said judgment is not applicable in the present case. Therefore, this judgment also does not come in aid to the appellant.

34. Thus, for the reasons given above, this Court does not find any illegality in the order passed by the lower appellate court in setting aside the order passed by the trial Court rejecting the plaint on the ground of limitation.

35. Accordingly, the appeal lacks merit and is hereby ***dismissed*** with no order as to costs.

(2023) 1 ILRA 1079
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.01.2023

BEFORE

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

Second Appeal No. 172 of 2021

Ishlam ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Ramendra Asthana, Sri Vijay Kumar Ojha

Counsel for the Respondents:
Sri Devendra Dahma, Sri Girijesh Tripathi (S.C.)

Civil Law- Civil Procedure Code, 1908 - Sections 100 & 331 - Order VII Rules 11, - UP Panchayat Raj Act,1947 - Section 106, - Wakf Act, 1995 - Sections 85 & 85-A, - Constitution of India, 1950 -Articles 226 & 227 - UP Zamindari Abolition and Land Reforms Act,1950 - Sections 122-B, 122-B(3), 122-B(4-A), 122-B (4-D), 122-B(4-E), 122-B(4-F), 229-B(1), 229-B(2) & 229-B(3)- Second Appeal – arising out of a suit for declaration and permanent injunction - jurisdiction - held, if the court below finds that it has no jurisdiction to try the suit and the suit as framed can be tried by the court of competent jurisdiction, which is a Revenue Court, the Civil Court ought not to dismissed the suit in fact, issues on the merits of a party's case may not at all be gone into if the Civil Court thinks that the suit is not cognizable by it, but by the Revenue Court in view of the provisions of Section 331 of

the Act – Appeal allowed in part- directions, accordingly. (Para – 57, 59)

Second Appeal Allowed in part. (E-11)

List of Cases cited:

1. Rajendra Singh Vs St. of U.P. & ors., 2008 (4) ADJ 37 (DB),

2. Shiv Ram Vs St. of U.P. & ors., 2016(9) ADJ 366 (FB),

3. Kiran Devi Vs Bihar St. Sunni Wakf Board, (2021) 153 RD 56,

4. Premlata @ Sunita Vs . Naseeb Bee & ors., (2022) 6 SCC 585,

5. Ramesh Gobindram (dead) through LRs Vs Sugra Humayun Mirza Wakf, (2010) 8 SCC 726,

6. Punjab Wakf Board Vs Sham Singh Harike, (2019) 4 SCC 698,

7. Sewak Shankar Vs Additional Collector, Agra & ors., 1985 SCC OnLine All 165,

8. Shankar Saran & ors. Vs St. of UP & ors. (1987 SCC OnLine All 235),

9. Bansraj & ors. Vs Moti & ors., 2019 SCC OnLine All 4238.

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

1. This is a plaintiff's second appeal arising out of a suit for declaration and permanent injunction. The plaintiff-appellant's suit has been dismissed by both the Courts below.

2. *How could a man go without a remedy against a summary determination of his right to property, with no Court of determinative jurisdiction hearing him*, is a question of the most fundamental importance. It is this essential issue involved in the appeal, which led this Court to admit this appeal to hearing on two substantial questions of law formulated on one day and then add one more before hearing commenced. The following substantial questions of law are involved in this appeal:

1. Whether in view of the law laid down by this Court in Rajendra Singh vs. State of U.P. and others, 2008 (4) ADJ 37, holding that the remedy against an order of eviction under Section 122-B U.P.Z.A.& L.R. Act is a suit, the present suit is maintainable before the Civil Court?

2. Whether in a case where the Civil Court finds that the suit is not cognizable by it but the Revenue Court, the appropriate order to make is one for return of the plaint instead of dismissal of the suit?

03. Whether in a case where an order of eviction passed under Section 122-B of the U.P.Z.A. & L.R. Act is challenged in revision under Section 122-B(4-A) a suit before the court of competent jurisdiction under Section 122-B(4-D) would be barred under Section 122-B (4-E) of the Act?

3. The facts giving rise to this appeal are these: On 03.01.1993, according to the plaintiff-appellant, Ishlam son of Chand Khan (for short, 'the plaintiff', unless the context requires a different reference), the Halqa Lekhpal submitted a bogus report to the Tehsildar, Bah saying that the plaintiff's father, Chand Khan (now deceased) had illegally occupied plot No. 119/1 (Minjumla), admeasuring 1 bigha 10 biswa, situate at Village Derakh, Pargana Bah, District Agra. The Tehsildar, Bah drew proceedings against the plaintiff's father under Section 122-B of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (for short, 'the Act') and issued notice to him on 09.01.1993, asking him to show cause why an order of eviction etc. be

not made. The plaintiff's father submitted his objections before the Tehsildar on 07.01.1994. The defence taken was that the land aforesaid was his ancestral property, a bhumidhari that had come to his hands through his father. The plaintiff was in possession of the land, subject matter of the notice, as the bhumidhar thereof and that he had not encroached any land of the Gaon Sabha.

4. On 28.08.1995, the Halqa Lekhpal, who had made the report alleging encroachment of Gaon Sabha land by the plaintiff's father, testified before the Tehsildar, Bah in proceedings under Section 122-B of the Act. The Tehsildar on 26.06.1997 proceeded to pass an order, directing eviction of the plaintiff's father from plot No. 119/2, whereas the notice to show cause had been issued vis-a-vis plot No. 119/1. The plaintiff's father challenged the order of the Tehsildar dated 26.06.1997 in revision carried to the Collector of Agra under Section 122-B (4-A) of the Act. The Additional Collector (Administration), Agra, before whom the revision came up, dismissed it by an order dated 14.06.2001. According to the plaintiff, the order of eviction and its affirmation in revision are absolutely illegal and beyond jurisdiction. The plaintiff's father never encroached any land of the Gaon Sabha. The notice under Section 122-B (2) of the Act was based on incorrect facts and proceedings drawn on its basis were void.

5. The plaintiff asserted that his father and his co-sharers were in possession of the land, subject matter of the eviction proceedings. The Lekhpal's report is not proved by the evidence on record and the order of the Tehsildar/ Assistant Collector, Bah, District Agra, ordering the plaintiff's eviction and obliging him to pay compensation is manifestly illegal and without basis. The plaintiff's father challenged the orders of eviction and its affirmation in revision by the Collector by means of Civil Misc. Writ Petition No. 37440 of 2001 before this Court. Pending the writ petition, the plaintiff's father passed away. The plaintiff then prosecuted the writ petition. This Court dismissed the writ petition on ground that the plaintiff had an alternative remedy of filing a suit. Accordingly, the plaintiff has proceeded to institute the present suit. Pending suit, the Gram Panchayat Derakh, Pargana Bah, District Agra has proceeded to allot the land, subject matter of proceedings, under Section 122-B of the Act (for short, 'the suit property') in favour of one Chhotey Khan and another Munney Khan, both sons of Shaukat Ali. These allottees were arrayed as defendant Nos. 5 and 6 to the suit.

6. It was pleaded that the orders of the Tehsildar/ Assistant Collector and the Additional Collector dated 26.06.1997 and 14.06.2001, respectively, were void. These were made ex parte without affording any opportunity of hearing. The suit was instituted after service of notice under Section 80 CPC and Section 106 of the U.P. Panchayat Raj Act, 1947, claiming a declaration to the effect that the order dated 26.06.1997 passed by the Tehsildar/ Assistant Collector and the order dated 14.06.2001 passed by the Additional Collector are null and void and not binding upon the plaintiff. A consequential relief by way of a permanent injunction was claimed, restraining the defendants from interfering in the plaintiff's peaceful possession in the suit property or forcibly dispossessing him in any manner whatsoever

7. Two written statements were filed in the suit. One was a joint written

statement by defendant Nos. 1, 2 and 3, who are respondent Nos. 1, 2 and 3 to this appeal and the other by defendant Nos. 5 and 6, who are respondent Nos. 5 and 6 here. The Gaon Sabha who were arrayed as defendant No. 4 to the suit and are respondent No. 4 here, represented by the Pradhan, do not appear to have filed a written statement. The defendant-respondents aforesaid shall hereinafter be referred to as 'the defendants' according to their position in the array of parties in the plaint giving rise to the suit.

8. Defendant Nos. 1, 2 and 3 in their written statement denied the plaint allegations and asserted that the Lekhpal's report of 3rd January, 1993 was one made after doing a survey of plot Nos. 119/1 and 119/2 with reference to the measurement of each of these. The Tehsildar had taken proceedings under Section 122-B of the Act strictly in accordance with law after issuing notice to the plaintiff. The plaintiff's father did not hold title to the suit property and assertions to the contrary are incorrect. The plaintiff's father had encroached upon plot Nos. 119/1 and 119/2. The Tehsildar, finding it to be a case of unauthorized occupation, ordered the plaintiff's eviction.

9. It is further asserted that plot No. 119 of Village Derakh, *Pargana* Bah, District Agra has a total area of 3 bigha. There is no subdivision of plot No. 119 or a partition thereof. Out of plot No. 119, an area 1 bigha 10 biswa had been allotted to defendant No. 5 and an identical area to defendant No. 6. It is for the felicity of demarcation of parts of the land of plot No. 119 between defendant Nos. 5 and 6, after allotment in their favour, that there is a mention made of plot Nos. 119/1 and 119/2. It is emphasized that formally and in accordance with law, no subdivision or partition of plot No. 119 has ever taken place. It is the case of these defendants that the plaintiff's father having been found to be an unlawful occupant, had been dispossessed and actual physical possession delivered to defendant Nos. 5 and 6, who are allottees of their respective parts of land in plot No. 119. It is also the defendants' case that the plaintiff's father or the other co-sharers mentioned in plot No. 119 do not have their lands near or adjoining the said plot. According to the defendants, the plaintiff incorrectly asserts that his father was not given opportunity of hearing or to lead evidence before the Tehsildar. The defendants say that the plaintiff has deliberately not shown the plot number of his ancestral property in the plaint nor annexed a plaint map, which may facilitate identification of the land that the plaintiff claims to be his ancestral holding. Defendant Nos. 5 and 6 have been allotted land in plot No. 119, which is government land under the management of the Land Management Committee of Village Derakh. The plaintiff or his co-sharers have no right, title or interest in the suit property. There is further detail carried in the written statement jointly filed on behalf of defendant Nos. 1, 2 and 3, but those may not be very material.

10. Defendant Nos. 5 and 6 in their joint written statement have denied the plaintiff's allegations and asserted that the plaintiff's father was an encroacher and in unlawful occupation of the suit property. He filed objections to the proceedings under Section 122-B of the Act to protect his unlawful possession. When land carved out of plot No. 119 was allotted to defendant Nos. 5 and 6, the two plots were assigned plot Nos. 119/ 1 and 119/2. Earlier, the plot bore a single number. The plaintiff's father was never the recorded

tenure holder of the suit property and it is not his ancestral holding. Rather, the plaintiff's father had encroached upon Gaon Sabha land and was in occupation thereof. It is on this account that his eviction has been ordered. The plaintiff's father was given full opportunity of hearing. There is a plea that this Court by virtue of order made in the writ petition under reference had never permitted or asked the plaintiff to file a civil suit. The plaintiff has not instituted the suit before the Court of competent jurisdiction. Defendant Nos. 5 and 6 are in possession of the suit property and, as such, the plaintiff cannot be granted a permanent prohibitory injunction. The jurisdiction of the Civil Court to try the suit was questioned and it was pleaded on behalf of defendant Nos. 5 and 6 that the suit is barred under Section 331 of the Act.

11. On the pleadings of parties, the following issues were framed (translated into English from Hindi):

"1. Whether the order dated 26.06.1997 passed by defendant No.3 and the order dated 14.06.2001 passed by defendant No.2 are void and illegal? If yes, its effect?

2. Whether the suit is barred by the principle of res judicata?

3. Whether the Court has jurisdiction to try this suit?

4. Whether the suit is barred by the provisions of Section 331 of the Uttar Pradesh Zamindari Abolition Act?

5. Whether the suit is undervalued and the court-fee paid insufficient?

6. To what relief is the plaintiff entitled?"

12. On behalf of the plaintiff, the plaintiff examined himself as PW-1, besides another Natthi Lal, who testified as PW-2. The defendants in their oral evidence examined Vishambhar as DW-1. On behalf of defendant Nos. 5 and 6, defendant No. 5 testified as DW-2 and another Dharam Singh as DW-3.

13. The documentary evidence filed through a list, bearing paper No. 11-Ga, on behalf of the plaintiff, carries a copy of the notice, registered postal receipts and a photostat copy of this Court's order dated 09.09.2008. These were numbered as paper Nos. 12-Ga/1 to 12-Ga/8. On behalf of the defendants through a list, bearing paper paper No. 21-Ga, a notice, paper No. 22-Ga, an application, paper No. 23-Ga, copy of an order, paper Nos. 24-Ga to 26-Ga, copy of the khatauni, bearing paper No. 27-Ga and 28-Ga, were filed. No documentary evidence was produced on behalf of defendant Nos. 5 and 6.

14. The Trial Court held in favour of the defendants on Issue No. 1. Issue No. 2, which is a defendants' issue, was not pressed. Issues Nos. 3 and 4, which were dealt with together, led the Trial Court to the conclusion that the suit is barred by Section 331 of the Act and the Civil Court has no jurisdiction to try it. Issue No. 5 appears to have been disposed of as a preliminary much earlier and there was no controversy surviving about it by the time the Trial Court rendered judgment. On Issue No. 6, it was held that in view of the findings on Issue No. 1, the orders dated 26.06.1997 and 14.06.2001 were valid. It was further held that the Civil Court had no jurisdiction to try the suit. It is on these findings that the learned Trial Judge ordered the suit to be dismissed.

15. The plaintiff appealed the Trial Judge's judgment to the District Judge of Agra, where his appeal was number as

Civil Appeal No. 25 of 2017. It came up for determination before the Additional District Judge, Court No. 6, Agra on 10.02.2021, who dismissed the appeal and affirmed the Trial Court.

16. Dissatisfied, the plaintiff has preferred the present appeal from the appellate decree.

17. Heard Mr. Ramendra Asthana, learned Counsel for the plaintiff in support of this appeal, Mr. Girijesh Kumar Tripathi, learned Standing Counsel appearing on behalf of defendant Nos.1, 2 and 3 and Mr. Devendra Dahma, learned Counsel appearing for defendant Nos. 5 and 6. No one appears on behalf of defendant No.4.

18. The Lower Appellate Court has remarked that this Court while dismissing Civil Misc. Writ Petition No. 37440 of 2001 has done so on the ground of availability of an alternative remedy and refused to entertain the writ petition following the decision of the Division Bench in **Rajendra Singh v. State of U.P. and others, 2008(4) ADJ 37 (DB)**. It is further remarked by the Lower Appellate Court that this Court while dismissing the writ petition on the ground of alternative remedy had never said that the orders passed by the Authorities under Section 122-B of the Act could be challenged by the plaintiff before the Civil Court in a suit. The Lower Appellate Court has concluded in its reasoning on point of determination No. 1 that it found the orders passed by the Tehsildar and the Additional Collector not void or illegal. It is further held by the Lower Appellate Court in the next breath that the Civil Court had no jurisdiction to examine the legality of the orders passed by the Authorities of competent jurisdiction, bearing obvious reference to the Tehsildar and Additional Collector, exercising powers under Section 122-B of the Act. It has also been opined that it is for the plaintiff to institute a suit in the Court of competent jurisdiction to establish his rights.

19. Mr. Ramendra Asthana, learned Counsel for the plaintiff has drawn the attention of this Court to the fact that the plaintiff's writ petition was dismissed by this Court on the ground of availability of an alternative remedy following the Division Bench decision in **Rajendra Singh (supra)**, which held that Section 122-B of the Act afforded the person aggrieved a remedy against an order of eviction by way of a revision, and failing there, by suit before the Court of competent jurisdiction. The said Division Bench had held that a writ petition would not lie challenging orders of eviction passed by the Authorities under Section 122-B. Mr. Asthana points out that after the plaintiff's writ petition was dismissed by the learned Single Judge vide order dated 09.09.2008, following the Division Bench in Rajendra Singh. The correctness of the decision was doubted by another Single Judge of this Court, who made a reference of the matter to a Larger Bench, framing three questions of law for consideration. The Full Bench, that was constituted, held in **Shiv Ram vs. State of U.P. and others, 2016(9) ADJ 366 (FB)** in answer to Question Nos. 1 and 2, that the jurisdiction of this Court under Articles 226 and 227 of the Constitution cannot be taken away by legislation and it is open to this Court to examine the validity of orders to which finality is attached under the Statute.

20. Mr. Asthana submits that the decision in Rajendra Singh was, therefore, held not good law without expressly using those words. Since in the interregnum, that

is to say, between the decision of the Division Bench in Rajendra Singh on 18.03.2008 and the decision of the Full Bench in **Shiv Ram (supra)**, the plaintiff's writ petition was dismissed by the learned Single Judge on 09.09.2008 following the decision of the Division Bench in **Rajendra Singh**, the plaintiff instituted the present suit before the Civil Court, questioning the orders of the Statutory Authorities, ordering his eviction.

21. It is argued by Mr. Asthana that the plaintiff's writ petition was dismissed against the defendants upon objections by them that it was not maintainable in view of the holding in Rajendra Singh and that the plaintiff's remedy is by way of suit. It is submitted that once the defendants, who are respondents to the plaintiff's writ petition before this Court, had objected to this Court's jurisdiction to entertain the writ petition against the orders of the Statutory Authorities, saying that the plaintiff's remedy was by way of a suit, the plea was no longer open to the defendants that the suit before the Civil Court instituted by the plaintiff is not maintainable. Learned Counsel for the plaintiff urges that the principle is well acknowledged in law that if a party objects to the jurisdiction of one Court and says that the party applying has remedy before another Court, in a different jurisdiction, it is not open to the objecting party to question the proceedings before the other Court or Forum, where the party has been forced to go at the objecting party's instance. The other Court too cannot adversely hold on the question of jurisdiction for a party, who has been shunted out of another Forum to the Court of alternate resort.

22. It is urged that the aforesaid salutary principle has been devised to prevent a party being rendered remediless. In this connection, Mr. Asthana has drawn the Court's attention to each of the substantial questions of law, regarding which he has advanced his submissions together, the questions being ones involving common and overlapping propositions of the law. Mr. Asthana has drawn the Court's attention to the decision of the Supreme Court in **Kiran Devi v. Bihar State Sunni Wakf Board, (2021) 153 RD 56** and a later decision in **Premlata alias Sunita v. Naseeb Bee and others, (2022) 6 SCC 585**. It is pointed out by the learned Counsel for the plaintiff that both these decisions hold that the parties cannot be permitted to approbate or reprobate about the jurisdiction of Courts. Once one party forces the other to go to another Court on the question of jurisdiction, the objecting party in the other Court cannot be heard to say that the latter Court too does not have jurisdiction. It must be remarked here that these decisions have bearing on Substantial Question of Law No. 1 and would be considered during the course of this judgment.

23. It is next submitted by Mr. Asthana that if the Courts below were of opinion that the suit was not maintainable before the Trial Court, they ought not to have entered into the merits of the parties' case and dismissed the suit. Instead, the option available to them was to direct return of the plaint for presentation to the Court of competent jurisdiction. Mr. Asthana says that this course of action was pre-eminently advisable because of the remarks of the Lower Appellate Court that the remedy of the plaintiff was to establish his rights by suit before a Court of competent jurisdiction.

24. As regards the last question, Mr. Asthana submits that a suit to question the orders of Statutory Authorities under Section 122-B after the revisional order

would be barred under Section 122-B (4-E) of the Act, in view of the holding of the Full Bench in Shiv Ram. But, that would not prevent the Court to independently judge the rights of a party to the land that he claims and decided against him in summary proceedings by the Statutory Authorities under Section 122-B.

25. Mr. Devendra Dahma, learned Counsel appearing for defendant Nos. 5 and 6, on the other, has come up with a short submission that he says is a complete answer to all the questions. It is submitted that a reading of the provisions of Sections 122-B (4-D) and 122-B (4-E) conjointly, leads one to the inevitable conclusion that it is open to a party after an order of eviction is passed by the Tehsildar/ Assistant Collector to institute a suit in the Court of competent jurisdiction to establish his right that he claims, which the Assistant Collector has negatived in the statutory proceedings. But, a person aggrieved by the order of the Assistant Collector under sub-Section (3) of Section 122-B, that is to say, an order of eviction etc., who elects to prefer a revision to the Collector against that order under sub-Section (4-A) of Section 122-B, loses the right under sub-Section (4-D) of Section 122-B to institute a suit, envisaged therein, against the Assistant Collector's summary determination.

26. According to Mr. Dahma, once the person ordered to be evicted by the Assistant Collector in proceedings under Section 122-B, chooses to pursue his remedy of revision before the Collector where he fails, the order of eviction passed against him is rendered immune from challenge by way of a suit to establish his rights before the Court of competent jurisdiction. It is argued by Mr. Dahma that it is for the said reason that the Full Bench in Shiv Ram has held an order of eviction passed by the Assistant Collector, affirmed by the Collector in revision, open to challenge before this Court in a petition under Article 226 or 227 of the Constitution, overruling the contrary view of the Division Bench in **Rajendra Singh**.

27. Learned Counsel for the defendant Nos. 5 and 6 submits that the plaintiff having chosen to apply in revision to the Collector against the order of eviction passed by the *Tehsildar*, he cannot question the order or establish his rights to the contrary by a suit before the Court of competent jurisdiction.

28. Mr. Girijesh Tripathi, learned Standing Counsel appearing for defendant Nos. 1, 2 and 3, adding to the submissions of Mr. Dahma, says that a civil suit, in any case to establish a right to a *bhumidhari*, would not lie before the Civil Court in view of the bar under Section 331 of the Act.

29. Notwithstanding the very alluring proposition by Mr. Asthana that the substantial questions of law involved in this appeal being interconnected, may be dealt with all at once, this Court thinks that it would be more orderly to consider and answer each question separately.

30. So far as the first question is concerned, it is true indeed that the plaintiff was the victim of a warp in the law on account of the decision of the Division Bench in **Rajendra Singh**, that came to be overruled later by the Full Bench in **Shiv Ram.** The Division Bench in **Rajendra Singh** held:

"19. Therefore, according to us, having alternative and efficacious remedy

of suit under Section 122-B of the Act of 1950, there is no scope for the aggrieved person to invoke the writ jurisdiction of the Court either from the order of the Assistant Collector or from the order of the Collector. It is clarified hereunder that a self corrective process to invoke the jurisdiction of the Assistant Collector, then by way of revision before the Collector and thereafter by filing suit before the Court, is the integral part of the Act, which cannot be avoided. Thus, in our considered opinion, contentions of the writ petitioners, cannot be held to be sustainable, consequently, all the aforesaid writ petitions are dismissed without imposing any cost. Interim order, if any, stands vacated. However, aggrieved persons are at liberty to file civil suit for appropriate relief in accordance with law, if they are so advised.

20. So far as the conflicting judgments of learned single Judge in Sewak Shankar (supra) and in Shankar Saran (supra) are concerned, we find that the earlier says if revision is filed, suit cannot be filed, when the later says that the remedy of revision before the Collector would not deprive the remedy of suit, with a recommendation to the Legislature to make the necessary amendments. In our view, amendment or no amendment, the law is very clear from its plain reading. In case a revision from an order of Assistant Collector is filed before the Collector, it will not stand in the way of an aggrieved of a revisional order to file a suit before the Court. Incidentally later view is more acceptable. Hence, the conflict stands resolved by the view taken and interpretation of the Act given by us as above keeping in mind the intention of the Legislature."

31. The decision in **Rajendra Singh** is no longer good law in view of the decision of the Full Bench in Shiv Ram on the point that a writ petition against orders of eviction passed by the Statutory Authorities under Section 122-B of the Act can be challenged before this Court in a writ petition. A writ petition under Article 226 or a petition under Article 227 of the Constitution would lie to this Court in view of the decision in **Shiv Ram** against orders passed by the Statutory Authorities under Section 122-B. In **Shiv Ram**, the learned Single Judge, who doubted correctness of the holding by the Division Bench in Rajendra Singh, referred the following questions for consideration by a Larger Bench:

"(i) Whether the Division Bench in the case of Rajendra Singh (supra) is correct in holding that writ petition challenging the orders passed in proceedings under Section 122-B of the U.P. Zamindari Abolition & Land Reforms Act would not be maintainable in view of alternative remedy of suit provided by the Statute itself, against the orders passed by the Assistant Collector or the Collector in the said proceedings?

(ii) Whether the view expressed by the Division Bench in the case of Rajendra Singh (supra) that since a remedy by way of suit has been provided in sub Section (4-D) of Section 122-B, the writ petition challenging the order passed in proceedings under Section 122-B would be barred by principles of existence of alternative remedy requires reconsideration in view of Division Benches of co-ordinate jurisdiction in the case of K.H. Panjani v. State of U.P., AIR 1959 All. 26 (DB); Smt. Shanti Devi v. State of U.P., 1978 AWC 189 and Satyapal Singh Chauhan v. Chairman-cum-chief Executive Officer, 1984 UPLBEC 587 (DB) as well as Full Bench decisions in the case of Buddhu v. Municipal Board, AIR 1952 All 753 (FB)

and Bijli Cotton Mills Pvt. Ltd., Hathras v. Estate Officer/Secretary, National Textile Corporation, U.P. and others, 1977 AWC 191 (SB)?

(iii) Whether the Division Bench judgment in the case of Rajendra Singh (supra) holding that "civil suit' is the appropriate remedy to resolve every dispute under Section 122-B of U.P.Z.A. & L.R. Act, lays down the correct law, even though the legislature has used the words "suit in a Court of competent jurisdiction in sub Section "4-D', and Section 331 of the U.P.Z.A. & L.R. Act specifically bars the jurisdiction of civil Court, in respect of any suit, application or proceedings based on a cause of action in respect of which relief could be granted by Revenue Courts?"

32. Their Lordships of the Full Bench in **Shiv Ram** answered the questions referred to them, in Paragraph No. 17 of the report, thus:

"17. In view of the aforesaid discussions, we answer the questions referred to us as follows :

(i) Answer to question (i) is in negative. The jurisdiction of High Court under Article 226 and 227 of the Constitution are basic structure of the Constitution, it can neither be taken away nor be limited either by Constitutional amendments or by other

(ii) Answer to question (ii) is in negative. Finality attached to the orders passed by Statutory authority under the Act, also does not affect the jurisdiction of High Court under Article 226 and 227 of the Constitution to examine its illegality, irrationality and procedural impropriety.

(iii) Answer to question (iii) is in negative. In view of Proviso to Section 229-D of the Act, the suit before Revenue Court may not be efficacious alternative remedy in a given case. The suit in Civil Court may not be maintainable in every case in view of Section 331 of the Act. In the cases, where the Statutory Authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions, which are repealed, or when an order has been passed in total violation of the principles of natural justice, writ petition can be entertained.

The reference to the larger Bench stands answered accordingly. The writ petitions shall now be placed before Hon'ble Single Judge for disposal in the light of this judgment."

33. Although, it is settled that an order of eviction passed under Section 122-B (3) by the Tehsildar, affirmed in revision by the Collector under sub-Section (4-A) of Section 122-B, afford the person liable to be evicted under orders of the Statutory Authorities, a remedy to challenge the same before this Court by a writ petition under Article 226 or a petition under Article 227 of the Constitution, the Statute still speaks of the option of filing a suit before the Court of competent jurisdiction. It requires to be examined notwithstanding the overruling of the decision in **Rajendra Singh** on the point of maintainability of a writ petition against orders of eviction under Section 122-B, if the person ordered to be evicted by the Statutory Authorities, can maintain a suit to establish his right before the Civil Court. In short, what has to be examined is whether the Court of competent jurisdiction, where a person aggrieved by the order of the Assistant Collector may file a suit to establish his right to the property, from which he has been ordered to be evicted, is the Civil Court. Or, is it some other Court?

34. What has to be borne in mind is that the remedy with the *Gaon Sabha* or the State to evict a trespasser under Section 122-B is a summary remedy to rid the Gaon Sabha or a Local Authority's property of encroachment or save it from damage at the hands of a private person, who has trespassed. Bearing in mind the aforesaid object, a summary remedy has been provided. The laudable object of ridding public property vested in the Gaon Sabha or a Local Body of encroachment, trespass or damage by an unauthorized person cannot be construed in a manner that may exclude the right of a person, who says he has title to the property, but is unsuccessful before the Statutory Authorities to lose that right to the inherent and perceptible vagaries of a summary procedure.

35. What sub-Section (4-D) of Section 122-B of the Act, therefore, envisages is not the judicial review of the order passed by the Assistant Collector, directing eviction in the sense of a challenge being laid to it in the suit envisaged under sub-Section (4-F), but a suit to establish aliuende the right of the person ordered to be evicted to that property before a Court of competent jurisdiction. The said right or title if established before the Court of competent jurisdiction in the suit upon a trial being held, would efface the conclusion of the Assistant Collector recorded in summary proceedings. In substance, therefore, what an ousted person under an order of eviction passed by the Assistant Collector under sub-Section (3) of Section 122-B would have to do is to seek an independent declaration of his rights to the property, wherefrom he has been ordered to be evicted by the Authority.

36. The suit property here is claimed to be bhumidhari and a suit for declaration of rights in it would be cognizable by the Court mentioned in Column 4 of Schedule II to the Act. A suit for declaration of bhumidhari rights is one that is envisaged under sub-Section (3) of Section 229-B read with sub-Sections (1) and (2) thereof. A suit for that relief by virtue of Entry 34 of Schedule II would lie before the Assistant Collector, First Class; not before the Civil Court.

37. This Court finds that what sub-Section (4-D) of Section 122-B allows, is the right of a person to seek a declaration of his title etc. as a bhumidhar or asami notwithstanding a summary order of eviction passed against him by the Assistant Collector under Section 122-B (3).

38. In the present case, therefore, keeping aside the affirmation of the Assistant Collector's order directing eviction by the Additional Collector in a revision, if the plaintiff was non-suited before this Court because of the prevalent view of the law held at the time when his writ petition came to be dismissed, the Court of competent jurisdiction that the plaintiff could approach was the Revenue Court. It was not the Civil Court.

39. So far as the submission of Mr. Asthana regarding the principle of approbate and reprobate is concerned, forbearing the party defending the proceedings from objecting to the jurisdiction of the Court in a case where the party's objections have been accepted about jurisdiction of the Court, where the party applying first moved, preventing the objecting party from questioning the jurisdiction of the other Court also, the decision of the Supreme Court in **Kiran Devi** (supra) must be noticed. In Kiran Devi, it was held by the Supreme Court:

"13. We have heard learned counsel for the parties and find that it is not open to the appellant at this stage to dispute the

question that the suit filed before the learned Munsif could not have been transferred to the Wakf Tribunal. The plaintiff had invoked the jurisdiction of the Civil Court in the year 1996. It is the Wakf Board and the appellant who then filed an application for transfer of the suit to the Wakf Tribunal. Though, in terms of Ramesh Gobindram, the Wakf Tribunal could not grant declaration as claimed by the plaintiff, but such objection cannot be permitted to be raised either by the Wakf Board or by the appellant as the order was passed by the Civil Court at their instance and was also upheld by the High Court. Such order has thus attained finality inter-parties. The parties cannot be permitted to approbate and reprobate in the same breath. The order that the Wakf Tribunal has the jurisdiction cannot be permitted to be disputed as the parties had accepted the order of the civil court and went to trial before the Tribunal. It is not a situation where plaintiff has invoked the jurisdiction of the Wakf Tribunal.

14. The argument raised by the learned counsel for the appellant that there was no estoppel against the statute as consent could not confer jurisdiction upon the Authority which did not originally have jurisdiction. Hence, it was submitted that the decision of the Tribunal was without jurisdiction. It is to be noted that the plaintiff had filed proceedings before the Civil Court itself but the same was objected to by the appellant as well as by the Wakf Board. Thus, it is not conferment of jurisdiction by the plaintiff voluntarily but by virtue of a judicial order which has now attained finality between parties. The suit was accordingly decided by the Wakf Tribunal. We do not find that it is open to the appellant to raise the objection that the Wakf Tribunal had no jurisdiction to entertain the suit in the facts of the present case. Therefore, we do not find any merit in the first argument raised by the learned counsel for the appellant."

40. Again, in **Premlata alias Sunita** (supra) their Lordships of the Supreme Court applied the same principle of approbate and reprobate to repel an objection to the jurisdiction of the Court of alternate resort, where the first Court moved, also had its jurisdiction objected to by the defending party. In **Premlata alias Sunita**, it has been held:

"4. At the outset, it is required to be noted and it is not in dispute that the plaintiff instituted the proceedings before the Revenue Authority under Section 250 of the Mplrc. These very defendants raised an objection before the Revenue Authority that the Revenue Authority has no jurisdiction to deal with the matter. The Tahsildar accepted the said objection and dismissed the application under Section 250 of the Mplrc by holding that as the dispute is with respect to title the Revenue Authority would not have any jurisdiction under Mplrc. The said order passed by the Tahsildar has been affirmed by the appellate authority (of course during the pendency of the revision application before the High Court).

5. That after the Tahsildar passed an order rejecting the application under Section 250 of the Mplrc on the ground that the Revenue Authority would have no jurisdiction, which was on the objection raised by the respondents herein original defendants, the plaintiff instituted a suit before the civil court. Before the civil court the respondents -- original defendants just took a contrary stand than which was taken by them before the Revenue Authority and before the civil court the respondents took

the objection that the civil court would have no jurisdiction to entertain the suit.

6. The respondents -- original defendants cannot be permitted to take two contradictory stands before two different authorities/courts. They cannot be permitted to approbate and reprobate once the objection raised on behalf of the original defendants that the Revenue Authority would have no jurisdiction came to be accepted by the Revenue Authority/Tahsildar and the proceedings under Section 250 of the Mplrc came to be dismissed and thereafter when the plaintiff instituted a suit before the civil court it was not open for the respondents -- original defendants thereafter to take an objection that the suit before the civil court would also be barred in view of Section 257 of the Mplrc.

7. If the submission on behalf of the respondent-defendants is accepted in that case the original plaintiff would be remediless. The High Court has not at all appreciated the fact that when the appellant -- original plaintiff approached the Revenue Authority/Tahsildar he was non-suited on the ground that the Revenue Authority/Tahsildar had no jurisdiction to decide the dispute with respect to title to the suit property. Thereafter when the suit was filed and the respondent-defendants took a contrary stand that even the civil suit would be barred. In that case the original plaintiff would be remediless. In any case the respondents -- original defendants cannot be permitted to approbate and reprobate and to take just a contrary stand than taken before the Revenue Authority.

8. Therefore, in the facts and circumstances of the case, the learned trial court rightly rejected the application under Order 7 Rule 11 CPC and rightly refused to reject the plaint. The High Court has committed a grave error in allowing the application under Order 7 Rule 11 CPC and rejecting the plaint on the ground that the suit would be barred in view of Section 257 of the Mplrc. The impugned judgment and order passed by the High Court is unsustainable and is liable to be set aside."

41. To the understanding of this Court, the principle laid down by the Supreme Court in **Kiran Devi** would not be applicable to the facts here. In **Kiran Devi**, the facts were that the plaintiff instituted a suit for declaration before the Civil Court praying that it be declared that he is a tenant in the suit premises and entitled to continue holding the premises on payment of monthly rent. The declaration was sought on the ground that the plaintiff had succeeded to the tenancy from one Ram Sharan Ram, his great grandfather. The dispute about succession to the tenancy was within the tenant's family and the cause of action was said to arise on 21.03.1996 when the plaintiff's grandfather along with others broke into the suit premises and removed the plaintiff's belongings. The plaintiff's father had gone to the Police for lodging a report, but they refused to register it. The plaint before the Civil Court was amended to implead the appellant before the Supreme Court as defendant No. 5 to the suit with an allegation that the lease in her favour by the Wakf Board is forged, fabricated, antedated and collusive. The Wakf Board in its written statement had asserted that Md. Salimuddin was the duly appointed Mutawalli of the Wakf and the fifth defendant to the suit, the appellant before the Supreme Court was a duly inducted tenant by the managing committee. The other details of the fifth defendant's defence and that of the Wakf Board may not be necessary. However, what is of importance to note is that both the appellants, that is to say, defendant No.

5 to the suit and the Wakf Board filed applications before the Civil Court, seeking transfer of the suit for trial by the Wakf Tribunal, in accordance with the provisions of Sections 85 and 85-A of the Wakf Act, 1995. The said application was accepted by the Civil Court, transferring the suit to the Wakf Tribunal. The transfer order was challenged by the plaintiff in a revision preferred to the Patna High Court. The revision was dismissed. The cause was tried by the Tribunal on issues framed, where parties led evidence. The suit was dismissed by the Tribunal. The High Court on a writ petition by the plaintiff set aside the Tribunal's order with a direction to dispossess the fifth defendant from the suit premises and handover vacant possession thereof to the plaintiff. On appeal to their Lordships of the Supreme Court, one of the contentions advanced on behalf of defendant No. 5 to the suit, who was the appellant, was that the Tribunal had no jurisdiction to entertain the suit filed by the plaintiff in view of the judgment of the Supreme Court in **Ramesh Gobindram (dead) through LRs v. Sugra Humayun Mirza Wakf, (2010) 8 SCC 726.** After the aforesaid decision, the Wakf Act was amended by Act No. 27 of 2013. It was pointed out that the Supreme Court in **Punjab Wakf Board v. Sham Singh Harike, (2019) 4 SCC 698** had considered the amendment in the Act and held that proceedings instituted prior to the amendment were to continue, unaffected by the amendment. It was contended that the suit for declaration by the plaintiff as a tenant of the Waqf property was not maintainable before the Waqf Tribunal. It was urged that there was no estoppel against Statute and consent could not confer jurisdiction on the Waqf Tribunal, which the Tribunal never had. It was in the context of the aforesaid facts that in Kiran Devi, their Lordships held that the principle of approbate and reprobate prevented the defendant from questioning the Waqf Tribunal's jurisdiction. The objection based on the principle of 'no estoppel against Statute' was also repelled by their Lordships, holding as already referred to hereinabove.

42. Likewise, in **Premlata alias Sunita**, there was an objection by the opposite party before the Revenue Authority that proceedings under Section 250 of the MP Land Revenue Code, 1959 (for short, 'MPLRC') were not maintainable, which the plaintiff in the suit had earlier instituted before the Tehsildar/ Revenue Authority. The Tehsildar rejected the plaintiff's application, accepting the defendant's objections, the opposite party before the Tehsildar, holding that the issue involved related to title, which was beyond the scope of Section 25 of the MPLRC. The plaintiff appealed the Tehsildar's order before the S.D.O. under Section 44 of the MPLRC. Pending the appeal in the revenue jurisdiction, the plaintiff filed a suit before the Civil Court for recovery of possession and injunction. In the said suit, an application was made by the defendant that the plaint was liable to be rejected under Order VII Rule 11 CPC on ground that the suit before the Civil Court was barred by Section 257 of the MPLRC. The Civil Court rejected the said application and declined to reject the plaint under Order VII Rule 11 CPC. The said order was put in issue through a revision preferred by the defendant before the High Court. The High Court allowed the revision, set aside the order, allowed the application under Order VII Rule 11 CPC and rejected the plaint. It was held that the suit was barred under Section 257 of the MPLRC. It was in the context of the aforesaid facts that their

Lordships of the Supreme Court applied the principle of approbate and reprobate, holding that the defendant could not object both to the jurisdiction of the Revenue Authority and the Civil Court. The observations of their Lordships in this regard have already been extracted hereinabove.

43. In the present case, what transpires from the record is that Civil Misc. Writ Petition No. 37440 of 2001, that was preferred by the plaintiff was heard in the presence of the learned Standing Counsel, representing defendant Nos. 1, 2 and 3. The order dated 09.09.2008 passed by this Court in the writ petition does not record what objection was taken by the learned Standing Counsel. All that is said is that the writ petition arises out of proceedings under Section 122-B of the Act and that the matter is squarely covered by the Division Bench decision of this Court in Rajendra Singh, which holds that a writ petition cannot be maintained against orders passed under Section 122-B of the Act. The stand taken by defendant Nos. 1, 2 and 3, the other defendants, who were also respondents to the writ petition, not being heard at all, does not show that it was urged on their behalf that the plaintiff's remedy was by way of a civil suit. The Court dismissed the petition on the principle laid down by the Division Bench in Rajendra Singh that a writ petition against an order of eviction under Section 122-B was not maintainable. In Rajendra Singh, as already noticed, it was held that the order of eviction passed by the Assistant Collector could be challenged in revision or by way of a suit by the party evicted to establish his right. It was also held that the remedy of revision before the Collector would not deprive the party ordered to be evicted to establish his right by a suit before the Court. It was further held that the bar to a suit after the Collector's decision in revision would not exclude the remedy of a suit. A writ petition was, however, held not maintainable by the Division Bench against an order of eviction passed under Section 122-B of the Act.

44. In this Court's opinion, therefore, it was just the principle in **Rajendra Singh**, which led the Court vide order order dated 09.09.2008 to dismiss Civil Misc. Writ Petition No. 37440 of 2001 as not maintainable. The logical corollary of the said order is that the plaintiff was left free to pursue his remedy under the law. It is not a case where the defendants to the suit had taken a stand that the plaintiff's remedy was by way of a suit before the Civil Court and the Court had accepted the said plea while dismissing the writ petition. Had that been the case, the principle of approbate and reprobate would be attracted and the defendants not heard to say that the present suit before the Civil Court is not maintainable. In that case, the principle laid down by the Supreme Court in Kiran Devi and Premlata would apply. Here, as already noticed, there is no such stand on the defendants' part and the writ petition was dismissed as not maintainable going by the declaration of the law as it stood at the time. It was for the plaintiff to correctly elect his remedy under the law. If the plaintiff has, therefore, chosen a Court of incompetent jurisdiction to institute a suit, the principle of approbate and reprobate would not redeem him.

45. In view of what has been held above, Substantial Question of Law No. 1 is answered in the manner that notwithstanding the law laid down by this Court in Rajendra Singh holding that the remedy against an order of eviction under

Section 122-B is a suit, the present suit is not maintainable before the Civil Court.

46. It would be more convenient in the logical sequence of the controversy involved to take up Substantial Question of Law No. 3 before answering Question No. 2. The question is whether an order of eviction passed under Section 122-B of the Act, challenged in a revision under Section 122-B(4-A) afford the party aggrieved a right to institute a suit before the Court of competent jurisdiction, in accordance with sub-Section (4-D) of Section 122-B, or would the right of that party be barred by sub-Section (4-E) of Section 122-B of the Act?

47. It would be apposite to reproduce the provisions of Section 122-B of the Act for the felicity of understanding what this Court says. Section 122-B of the Act reads:

122-B. Powers of the Land Management Committee and the Collector.--(1) Where any property vested under the provisions of this Act in a Gaon Sabha or a local authority is damaged or misappropriated or where any Gaon Sabha or local authority is entitled to take or retain possession of any land under the provisions of this Act and such land is occupied otherwise than in accordance with the provisions of this Act, the Land Management Committee or Local Authority, as the case may be, shall inform the Assistant Collector concerned in the manner prescribed.

(2) Where from the information received under sub-section (1) or otherwise, the Assistant Collector is satisfied that any property referred to in sub-section (1) has been damaged or misappropriated or any person is in occupation of any land, referred to in that sub-section, in contravention of the provisions of this Act, he shall issue notice to the person concerned to show cause why compensation for damage, misappropriation or wrongful occupation as mentioned in such notice be not recovered from him or, as the case may be, why he should not be evicted from such land.

(3) If the person to whom a notice has been issue under sub-section (2) fails to show cause within the time specified in the notice or within such extended time not exceeding thirty days from the date of service of such notice on such person, as the Assistant Collector may allow in this behalf, or if the cause shown is found to be insufficient, the Assistant Collector may direct that such person may be evicted from the land and may for that purpose, use, or cause to be used such force as may be necessary and may direct that the amount of compensation for damage, misappropriation or wrongful occupation be recovered from such person as arrears of land revenue.

(4) If the Assistant Collector is of opinion that the person showing cause is not guilty of causing the damage or misappropriation or wrongful occupation referred to in the notice under sub-section (2) he shall discharge the notice.

(4-A) Any person aggrieved by the order of the Assistant Collector under sub-section (3) or sub-section (4) may, within thirty days from the date of such order, prefer a revision before the Collector on the grounds mentioned in clauses (a) to (e) of Section 333.

(4-B) The procedure to be followed in any action taken under this section shall be such as may be prescribed.

(4-C) Notwithstanding anything contained in Section 333 or Section 333-A, but subject to the provisions of this section--

(i) every order of the Assistant Collector under this section shall, subject to the provisions of sub-sections (4-A) and (4-D), be final,
(ii) every order of the Collector under this section shall, subject to the provisions of sub-section (4-D), be final.

(4-D) Any person aggrieved by the order of the Assistant Collector or Collector in respect of any property under this section may file a suit in a court of competent jurisdiction to establish the right claimed by him in such property.

(4-E) No such suit as is referred to in sub-section (4-D) shall lie against an order of the Assistant Collector if a revision is preferred to the Collector under sub-section (4-A).

(emphasis by Court)

48. There does appear to be some contradiction between the provisions of sub-Section (4-D) of Section 122-B of the Act on one hand and sub-Section (4-E) on the other. While sub-Section (4-C) makes an order of the Assistant Collector under Section 122-B (3), subject to the provisions of sub-Section (4-A) and (4-D) final, and the order of the Collector under Section 122-B (4-A) final, subject to the provisions of sub-Section (4-D), that is to say, a suit before the Court of competent jurisdiction, sub-Section (4-E) bars a suit at the instance of a person aggrieved, where the order of the Assistant Collector has been challenged in revision before the Collector under sub-Section (4-A). In other words, while the scheme of Section 122-B (3), (4), (4-A), (4-C) and (4-D) is consistent to the effect that the order of eviction passed by the Assistant Collector, whether challenged or not, in a revision before the Collector under sub-Section (4-A), would be subject to the outcome of a suit before the Court of competent jurisdiction, sub-Section (4-E) excludes the suit after a revisional affirmation by the Collector under sub-Section (4-A).

49. Sub-Sections (1) to (4-E) were substituted by U.P. Act No. 20 of 1982 for the existing provisions. Quite early, after amendment, the contradiction was brought to the notice of this Court in **Sewak Shankar v. Additional Collector, Agra and others, 1985 SCC OnLine All 165** and urged that the procedure was discriminatory in that, that a person, ordered to be evicted, who applied in revision to the Collector, had his remedy of establishing his right in a duly constituted suit curtailed. This Court in **Sewak Shankar (supra)** repelled the said contention holding:

22. It does appear that the dominant object of enacting Section 122-B and particularly Proviso to sub-section (4-E) of Section 122-B of the Act is to provide speedy, expeditious and effective remedy for, the ejectment of unauthorised occupants of the Gaon Sabha land. The procedure contemplated by sub-section (4-E) of Section 122-B was for avoiding unusual, dilatory process and with the object of achieving the purpose of recovering possession without recourse to prolonged litigation in a regular suit. It is common knowledge that a regular suit takes long time commencing with the trial court, first appellate court, second appellate court, and the leave petition being preferred before the Hon'ble Supreme Court. In pursuing revenue and civil suits several years could have elapsed before the possession could have been recovered. It is for this object that in case a person avails the remedy of preferring revision before the Collector, he has been deprived of the remedy of the suit. It was this mischief

which the Legislature intended to avoid by incorporating the Proviso to sub-section (4-E) of Section 122-B of the Act.

23. Section 122-C provides that the land in possession of the Gaon Sabha has to be earmarked for Abadi sites for the members of the Scheduled Castes and Scheduled Tribes, agricultural labourers and village artisans. The land thus obtained is for the welfare of downtrodden and under-privileged section of society. Ours is a welfare State.

24. It would not be out of place to mention that there is a maxim Salus Populist Suprema lex, which obviously means that the regard for public welfare is highest law. Individual welfare shall in case of necessity yield to that of the community and that his property, liberty and life shall, in certain circumstances, be placed in jeopardy or even sacrificed for public good.

25. In view of these discussions it is crystal clear that the Legislature in its wisdom thought it proper to lay down the procedure that in case revision was filed, the remedy of suit cannot be availed. I am, therefore, of the opinion that the provisions of sub-sections (4-A), (4-C), (4-D) and (4-E) of Section 122-B of the Act are not discriminatory nor are they violative of Article 14 of the Constitution of India.

50. Soon thereafter, the issue again engaged the attention of this Court in **Shankar Saran and others vs. State of U.P. and others, 1987 SCC OnLine All 235**. Here, the Court frowned upon the apparent contradiction and held that notwithstanding the provisions of sub-Section (4-E), the remedy of a suit even after the order in revision had been made against a party, would not be lost. K.P. Singh, J. in **Shankar Saran** (supra) expressed his disagreement with B.L. Yadav, J. in **Sewak Shankar**, where his Lordship had held that after a party had preferred a revision and failed, his remedy of a suit would be curtailed. The Court in Shankar Saran went on to suggest that the legislature ought to make necessary amendments to Section 122-B of the Act, so as to clarify the legislative intent in enacting sub-Section (4-E). It would be apposite to refer to the holding of this Court in Shankar Saran, which reads:

"17. It is necessary to observe that when a person files a revision petition the order in revision petition would be final between the parties and the order of the Trial court i.e. Assistant Collector shall merge into the order of revisional court. Therefore, after the decision in revision petition filed by the aggrieved party, the aggrieved party will be required to file a suit against the order of the revisional court and the remedy under sub-sec. (4-D) is against the order of the Collector.

18. I am unable to accept the contention of the learned counsel for the petitioners that the petitioners have no alternative remedy to establish their claim to the disputed land in view of provisions of S. 122-B(4-E) of the Act. I think, that the petitioners have an alternative remedy to seek their title to the disputed land because the order in revision has been passed by the Additional Collector and against his order a suit under sub-section (4- D) of S. 122-B of the Act has been provided.

19. In 1983 Rev Dec 32, Abdul Ghafoor v. Gaon Sabha a learned Member has made the following observations vide para 6:--

".....If a revision is filed, before the Collector regular suit will not be filed against the order of the Assistant Collector in view of the provisions of sub-sec. (4-E) but the remedy of regular suit will be available against the order passed by the Collector in revision. By the ordinance

revisions u/ss. 333 and 333-A of the Act are barred against the order of the Assistant Collector or Collector, but the remedy of regular suit is made available to the aggrieved party against the order of the Assistant Collector or Collector as the case may be. The order passed by the Assistant Collector, 1st Class and Collector under amended S. 122-B of the U.F.Z.A. and L.R. Act are not revisable u/s. 333 or S. 333-A of U.F.Z.A. and L.R. Act."

20. The bare reading of S. 122-B(4-D) and (4-E) of the Act indicates that there is some contradiction in the two provisions. The Collector is the revisional authority and against his order a suit has been contemplated under sub-sec. (4-D). Therefore, it is difficult to say that the order of the Assistant Collector which is merged in the order of the revisional court, cannot be challenged in a regular title suit. The suggestion by the learned Member, Board of Revenue, to the effect that no suit against the order of the Assistant Collector shall lie during the pendency of the revision petition before the revisional court cannot be readily accepted because of the wordings of the provisions of sub-sec. (4-E). Had the Legislature intended so it would have expressed itself as below:--

"No such suit as is referred to in sub-sec. (4D) shall lie against an order of the Assistant Collector if a revision is preferred to the Collector under sub-sec. (4-A) and is pending."

21. As I have indicated that the order of Assistant Collector would merge in the order of the revisional court, therefore, the aggrieved party would be required to file a suit against the order in revision, I am unable to agree with brother B.L. Yadava, J. that when an aggrieved party avails the remedy of preferring revision before the Collector, he would be deprived of the remedy of the suit. IT would be better for the Legislature to make necessary amendments in S. 122-B of the U.P.Z.A. and L.R. Act so as to clarify its intention in enacting sub-sec. (4-E) of S. 122-B of the Act."

51. Thus, the later decision in **Shankar Saran** held that notwithstanding a party availing his remedy against an order of eviction by preferring a revision to the Collector under sub-Section (4-A), sub-Section (4-E) would not curtail his right of instituting a suit to establish his right under sub-Section (4-D). To the understanding of this Court, the right to file a suit to establish one's right to property notwithstanding an affirmation of the eviction order by the Collector is clearly provided by both clauses (i) and (ii) of sub-Section (4-C) of Section 122-B. Sub-Section (4-E) seems to be not in keeping with the otherwise clear legislative intent to afford the party aggrieved by an order of eviction passed in summary proceedings, the remedy to establish his right by suit.

52. It may be that looking to the provisions of sub-Section (2) of Section 229-D of the Act in a suit brought under sub-Section (4-D) of Section 122-B, the person ordered to be evicted cannot secure interim relief. He would be evicted pursuant to an order of eviction passed under Section 122-B, retaining the right to establish in a suit his claim to the property, of which he has been dispossessed. In the event of success in the suit, he would recover lost possession. This provision may be intended to achieve the purpose that this Court in **Sewak Shankar** spoke of, that is to say, the provision of a speedy, expeditious and effective remedy for the ejectment of unauthorized person from Gaon Sabha land. But, that object could not be carried to the extent that a party who

says that the property of which he has been deprived in summary proceedings is his property, may be denied his right of establishing that claim in a duly constituted suit before a Court of competent jurisdiction. It was the latter consideration which led this Court to remark in Shankar Saran, the way it did, that has been noticed hereinabove, and the holding that the right to sue before a Court of competent jurisdiction to establish one's right to property, wherefrom a person has been evicted, would not be lost, notwithstanding that the remedy of revision was availed.

53. The question further fell for consideration of the Division Bench in **Rajendra Singh,** where after noticing the conflicting judgments of the learned Single Judges of this Court in **Sewak Shankar** and **Shankar Saran,** their Lordships held that the law is very clear on a plain reading thereof that in case a revision is carried from the Assistant Collector's order to the Collector, it would not bar the right of the person aggrieved by the revisional order to file a suit before the Court of competent jurisdiction. The decision of the learned Single Judge in **Shankar Saran** was approved by the Division Bench in **Rajendra Singh.** It was remarked that the conflict stands resolved in terms of the view that the Division Bench had adopted and the interpretation of the Act by the Division Bench, bearing in mind the legislative intent.

54. No doubt, the Full Bench in **Shiv Ram** overruled the Division Bench in **Rajendra Singh,** but the answers to the three questions that were referred shows that the Division Bench was overruled with regard to the principle that a writ petition would not be maintainable to challenge the order of eviction under Section 122-B of the Act. The holding of the Division Bench that a suit notwithstanding a revision would lie before the Court of competent jurisdiction has been left undisturbed by the Full Bench; nor was it in issue on a question for consideration before the Full Bench.

55. There is a remark in reference to Question No. 3 by the Full Bench that a suit in the Civil Court may not be maintainable in every case, in view of the provisions of Section 331 of the Act. But, that does not derogate from the principle that a suit before the Court of competent jurisdiction would be maintainable as held by the Division Bench, even after the revisional order by the Collector, notwithstanding the provisions of sub-Section (4-E) of Section 122-B.

56. In the opinion of this Court, Substantial Question of Law No. 3 is answered in the negative and it is held that a suit under sub-Section (4-D) of Section 122-B would not be barred, despite the order of eviction passed under Section 122-B being unsuccessfully challenged in revision under Section 122-B (4-A) of the Act.

57. This brings to the fore Substantial Question of Law No. 2. The question in substance is that in a case where the Civil Court finds that the suit is not cognizable by it, but the Revenue Court, what would be the appropriate order to make: a direction to return the plaint or dismissal of the suit. I had occasion to consider this question in **Bansraj and others v. Moti and others, 2019 SCC OnLine All 4238**. If the Court finds that it has no jurisdiction to try the suit and the suit as framed can be tried by a Court of competent jurisdiction, which is a Revenue Court, the Civil Court ought not to dismiss

the suit. In fact, issues on the merits of a party's case may not at all be gone into if the Civil Court thinks that the suit is not cognizable by it, but by the Revenue Court in view of the provisions of Section 331 of the Act. There is a provision under the Code of Civil Procedure entitling the Court, in case it comes to the conclusion that the suit is not cognizable by it but another Court, to direct a return of the plaint under Order VII Rule 10 of the Code.

58. Substantial Question of Law No. 2 is, therefore, answered in the affirmative and it is held that in a case where the Civil Court finds that the suit is not cognizable by it but the Revenue Court, the appropriate order to make is to direct a return of the plaint and not dismissal of the suit.

59. In the result, this appeal **succeeds** and is **allowed** in part. The decree passed by the Lower Appellate Court is set aside and an order made directing the Trial Court to return the plaint to the plaintiff for presentation to the Court of competent jurisdiction. Costs easy.

(2023) 1 ILRA 1099
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2023

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Second Appeal No. 676 of 1991

Union of India & Ors. ...Appellants
Versus
Ramdhani Prasad ...Respondent

Counsel for the Appellants:
Sri Amresh Singh, Sri Arvind Kumar Goswami, Sri Lalji Sinha, Sri Sidheshwari Prasad, Sri Tarun Verma, Sri Vivek Kumar Rai, Sri Swaraj Prakash

Counsel for the Respondents:
Sri Malik Syed Uddin, Sri R.K. Shahi, Sri S.K. Om

Civil Law- Civil Procedure Code, 1908 - Section 100 - Railway Protection Force Act, 1886 - Sections 6, 9 & 9(21)(i) - Railway Protection Force Rules, 1886 - Rules 20 & 43 - Constitution of India, 1950 - Articles 311 & 311(1): - Service – Removal - Original suit, challenging the order of removal - dismissal of suit - Civil Appeal - first appellate court reverse the judgment of Trial Court - Second Appeal - Substantial question of Law - 'Whether ASO/Adjutant has power to pass an order of removal from the services against the plaintiff-respondent who was appointed on the post of Rakshak by the order of CSO' - court finds that, in present case dismissing officer is different but is junior/subordinate to the appointing authority, this does not satisfy the protection afforded to an employee under Article 311 of the Constitution of India - Held, since the appellant was appointed by the Chief Security Officer and has been removed from service by an officer who was subordinate in rank to the Chief Security Officer on the date of appellant's appointment - it must be held that Assistant Security Officer/Adjutant had no power to remove the appellant from service - Second appeal dismissed.(Para – 6, 10, 12, 14)

Second Appeal Allowed. (E-11)

List of Cases cited:

1. U.O.I. & anr. Vs Chandra Pal Pandey, AIR 1993 SC 205,

2. Krishna Kumar Vs Divisional Assistant Electric Engineer & ors., (1979) 4 SCC 289,

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. By the present second appeal, the appellant is challenging the judgment and order dated 07.12.1990 passed by the learned Additional District Judge, Gorakhpur in Civil Appeal No. 30 of 1989 (Ramdhani Prasad and others vs. Union of India and Others).

2. Brief facts of the case are that the respondent in this second appeal was appointed to the post of "Rakshak' in Railway Police Force by the order dated 04.12.1979, under the warrant of the Chief Security Officer. The respondent was thereafter suspended by an order dated 15.11.1982, signed by Assistant Commandant No. 7 Battalion, Railway Protection Special Force, Lumding- Assam, without serving him any chargesheet. During the suspension, the respondent shifted to his village where he fell ill and had to be admitted to the Railway Hospital, Gorakhpur from 29.12.1982 to 07.03.1983. In the meantime, a departmental enquiry was initiated against the respondent in his absence on 01.01.1983. On 26.02.1983 a show cause notice was sent to the respondent which returned as unserved due to unavailability of the receiver. On 18.03.1983, the Adjutant/Assistant Commandant, Railway Protection Special Force, Lumding- Assam passed an order of removal of respondent from service. When respondent came to know about his removal order, he appealed it before the Commandent, Railway Protection Special Force, Lumding- Assam, which was dismissed on 07.11.1984.

3. Against the said orders, the respondent filed the original suit bearing No. 2662 of 1986 (Ramdhani vs. Union of India and two others) seeking relief that the order dated 18.03.1983 passed by the Adjutant, Railway Protection Special Force, Lumding- Assam and order dated 07.11.1984 passed by Assistant Commandant, Railway Protection Special Force, Lumding- Assam be set aside and he be declared a member of the Railway Protection Special Force. The suit by the plaintiff-respondent was dismissed. Against the judgment of the Trial Court, the plaintiff-respondent filed an appeal which is decided in his favour. Aggrieved by the order of the first Appellate Court, the defendants have filed this second appeal.

4. Learned Counsel for the defendant-appellant assails the judgment of the First Appellate Court on the ground that the Appellate Court was wrong in holding that the respondent could not be removed by the Assistant Commandant/Assistant Security Officer as the plaintiff-respondent is appointed by the order of Chief Security Officer. He supports the finding of the Trial Court that the respondent was appointed by the order of the Assistant Commandant and therefore he could be removed by the Assistant Commandant/Assistant Security Officer.

5. Heard Counsel for the parties and pursued the record with their assistance.

6. In this second appeal following substantial question of law is framed- "*Whether Assistant Security Officer/Assistant Commandant/Adjutant has power to pass an order of removal from the service against the plaintiff-respondent who was appointed on the post of "Rakshak' by the order of the Chief Security Officer ?"*

7. Counsel for the defendant-appellant contends that the Trial Court has given a finding that the plaintiff-respondent was appointed by the Assistant Commandant/Assistant Security Officer and therefore Assistant Security Officer is empowered to pass an order of dismissal however, the First Appellate Court has wrongly reversed it. A perusal of the case records shows that the Appellate Court has reversed the said finding of the Trail Court by referring to Paper No. 65 Ka, the

appointment letter of the plaintiff-respondent issued by the Chief Security Officer. Paper No. 26 Ga, which is held as the appointment letter by the learned Trial Court is infact a posting letter issued by the Assistant Commandant for posting of the plaintiff-respondent after the completion of his training. Learned Counsel for the appellant could not dispute the said documents.

8. Counsel for the defendant-appellant has placed before this court **Rule 20** and **Schedule 1** of the **Railway Protection Force Rules, 1959** (hereinafter referred as "the Rules, 1959"), which provides the appointing authority for different member/cadre of the Railway Protection Force. It reads,

*"**20. Powers of appointment.**- The powers of superior officers to appoint members of the Force shall be as specified in Schedule I."*

Schedule I
(Rule 20)
Powers of Superior Officers to make appointments to the Force

Chief Security Officer	**Security Officer**	**Assistant Security Officer**
All Members of the Force	*Sub-Inspectors, Assistant Sub-Inspectors, Head Rakshaks,Senior Rakshaks,Rakshaks*	*Senior Rakshaks, Rakshaks*

Learned counsel for the appellant submits that Assistant Security Officer/Adjutant is also empowered under the Rules, 1959 to appoint a Rakshak in the Railway Protection Force. He further relies on **Rule 43** and **Schedule II** of the Rules, 1959 which provide for the disciplinary authority empowered to impose penalty and pass disciplinary orders for specific cadre of members of the Railway Protection Force. Rule 43 and relevant portion of the Schedule II reads,

*"**43 Disciplinary Authority.-** The disciplinary authority in respect of a member of the Force for the purpose of imposing any particular penalty or the passing of any disciplinary order shall be the authority specified in this behalf in Schedule II in whose administrative control the member is serving and shall include any authority superior to such authority."*

Schedule II
(See rules 40 and 43)
Schedule of disciplinary authorities and their powers to pass different disciplinary orders in respect of different classes and grades and ranks of members of the Force.

Sl. No	Nature of Disciplinary Order	Inspector-General	Chief Security Officer	Security Officer	Assistant Security Officer
1.	Suspension	All Members of the Force		All Members of the Force	All Members of the Force of and below

					the Class of Sub-Inspectors
2.	(a)Dismissal	Do.	Do.	All members of the Force except Inspectors and Sub-Inspectors.	No powers.
	(b) Removal	Do.	Do.	Do.	Senior Rakshaks and Rakshaks.

Learned counsel for the appellant further submits that by joint reading of Rules 20 and 43 along with the Schedules I and II, it is clear that a Rakshak of Railway Police Force can be removed by an Assistant Security Officer/Adjutant even if the Rakshak was appointed under the hand and seal of a Chief Security Officer. He also relies upon the judgment of the Supreme Court in the case of **Union of India and another vs. Chandra Pal Pandey;AIR 1993 SC 205.**

9. Counsel for the plaintiff-respondent supports the judgment of the First Appellate Court. He argues that it is a settled law that order of dismissal/removal can only be passed by an authority equivalent to or superior to the appointing authority. Assistant Security Officer being subordinate to the Chief Security Officer can not pass an order of removal of the plaintiff-respondent. He relies upon the judgment of the Supreme Court in the case of **Krishna Kumar vs. Divisional Assistant Electric Engineer and Others; (1979) 4 SCC 289**.

10. Contention of the counsel for the appellant that the Assistant Security Officer is empowered to appoint a Rakshak, therefore, he can also pass an order for removal of any Rakshak does not paint a complete picture. No doubt an Assistant Security Officer can remove a Rakshak from service but it has to be first seen who was the appointing authority of such a Rakshak. Protection afforded to an employee by Article 311(1) of the Constitution provides that an order of removal/dismissal from service can only be passed by the appointing authority or any other authority senior to the appointing authority. In the present case the plaintiff-respondent was appointed by the Chief Security Officer and removed by the Assistant Security Officer, who is subordinate to the Chief Security Officer in the hierarchy of the Railway Police Force, this does not satisfy the protection afforded to an employee by the Article 311 of the Indian Constitution.

11. The judgment of the Supreme Court in **Chandra Pal Pandey (supra)** relied upon by the counsel for the appellant is distinguishable from the facts of the present case. In that case, the primary issue was, whether the Chief Security Officer alone was empowered to appoint Rakshaks

and therefore any appointment of Rakshak under the hand and seal of Assistant Security Officer was illegal. Relevant paragraph 14,15,16 and 19 of the aforesaid judgment reads as under,

"14. A bare reading of the Act, particularly Section 6, will show that the Act contemplates that the "appointment of members of the Force shall rest with the Chief Security Officer" who is supposed to exercise powers in accordance with the Rules made under the Act. The proviso to Section 6 contemplates other authorities being authorised for making the appointment as may be delegated to such officers by the Chief Security Officer. Therefore, there can be no doubt that the Act contemplates appointment of members of the Force not only by the Chief Security Officer but also by others. The question, therefore, arises is what is the meaning of the expression "appointment of members of the Force shall rest with the Chief Security Officer"? The expression "rest" in this Section conveys the idea of overall control of appointment resting with the Chief Security Officer subject to the provisions of the Rules. As we have stated earlier Section 6 of the Act contemplates appointment of the members of the Force by such authorities as may be authorised. The proviso to Section 6 contemplates specifically written order of delegation by the Chief Security Officer but this does not derogate from the power of the rule-making authority to confer the said power. The Section and the proviso in our opinion do not rest the power of appointment merely with the Chief Security Officer. What is contemplated is that the Chief Security Officer will have overall control in the matter of appointment and that control be exercised in accordance with the Rules. If the Rules provide for appointment by other superior officers, it cannot be said to be in derogation of the Act or the purposes of the Act.

15. A bare reading of Section 9 of the Act also shows that it is only subject to the provisions of Article 311 of the Constitution and to such rules as the Central Government may make under the Act, that any superior officer could exercise the powers mentioned in Section 9(1)(i) of the Act. If only the Chief Security Officer, who is one of the superior officers, alone has the powers of dismissal on the hypothesis that he alone was competent to appoint members of the Force then Section 9 of the Act would not have been worded in the manner it has been so enacted.

16. It is clear from Section 21 of the Act that the power of the Central Government for making the Rules is for carrying out the purposes of the Act. One of the purposes of the Act surely is recruitment of members of the Force and, therefore, the Rules could provide for the appointing authority so long as it is not in derogation of the express provisions of the Act. Section 6 does not contemplate that the order of appointment cannot be made by any other person other than the Chief Security Officer.

19. In this view of the matter we are of the view that since both the contesting respondents in the aforesaid two cases were appointed by the Assistant Security Officer who could also remove them and, therefore, their dismissal has not been in violation of Article 311 of the Constitution of India or the Act.

In Chandra Pal Pandey (Supra), the Rakshak whose service was dismissed by the Assistant Security Officer was also appointed by the Assistant Security Officer and therefore his dismissal was ordered by

the appointing authority. Unlike in the present case where not only the dismissing officer is different but is junior/subordinate to the appointing authority.

12. Furthermore, even if the power of appointment is later extended to subordinate officers, the constitutional protection to an employee under Article 311 was operational right from the date of his appointment. For finding out the appropriate authority eligible to pass an order of removal/dismissal, the state of affairs as they existed on the date of appointment are relevant. The law in this regard is settled by the Supreme Court in **Krishna Kumar (supra)**, in paragraph 6 and 7 it has been held as under,

"6. Besides, delegation of the power to make a particular appointment does not enhance or improve the hierarchical status of the delegate. An Officer subordinate to another will not become his equal in rank by reason of his coming to possess some of the powers of that another. The Divisional Engineer, in other words, does not cease to be subordinate in rank to the Chief Electrical Engineer merely because the latter's power to make appointments to certain posts has been delegated to him.

7. Since the appellant was appointed by the Chief Electrical Engineer and has been removed from service by an order passed by Respondent 1 who, at any rate, was subordinate in rank to the Chief Electrical Engineer on the date of appellant's appointment, it must be held that Respondent 1 had no power to remove the appellant from service. The order of removal is in patent violation of the provisions of Article 311(1) of the Constitution."

13. First Appellate Court was right in allowing the appeal of plaitiff-respondent. In its judgment, the First Appellate Court has rightly applied the protection extended to an employee inherent in Article 311(1) and reversed the judgment of the Trial Court.

14. In light of the above observation this second appeal is **dismissed**. Judgment dated 07.12.1990 by the First Appellate Court is affirmed.

(2023) 1 ILRA 1104
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.08.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Second Appeal No. 732 of 2016

Ureha ...Appellant
Versus
Bharose & Anr. ...Respondents

Counsel for the Appellant:
Sri Anand Kumar Srivastava

Counsel for the Respondents:
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Civil Law- Civil Procedure Code, 1908 - Section 100 - Order 41 Rule 11, 31 - UP Zamindari Abolition and Land Reforms Act,1950 - Section - 331: - Plaintiff's Second Appeal – challenging the Judgment & decree passed by court below respectively - Suit for permanent injunction and cancellation of Sale deed - both are rejected by court below - while examine the substantial question of law, court finds - on the date of institution of Civil Suit, neither the name of plaintiff-appellant was recorded in the revenue records nor they have possession over the said property in question - as such, Suit in question is barred by section 331 of CPC - hence, plaintiff-appellant cannot maintain a Civil Suit rather plaintiff can avail the remedy of Revenue Court for declaration of their rights and title - second appeal lacks merit and is dismissed under Order 41 Rules 11 of CPC. Para – 12, 16, 18)

Second Appeal Dismissed. (E-11)

List of Cases cited:

1. Shri Ram & anr. Vs 1st A.D.J. & ors., JT 2001 (2) SC 573,

2. Azhar Hasan & ors. Vs District Judge, Saharanpur & ors., (1998) 3 SCC 246,

3. Kamla Vs Smt. Gulabi Devi & anr., (2015) 127 RD 110,

4. Kamla Prasad & ors. Vs Krishnakant Pathak & ors., 2007 Allahabad Civil Journal 1275.

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

1. Heard Sri Anand Kumar Srivastava, learned counsel for the appellants.

2. This second appeal has been filed on behalf of the plaintiffs under Section 100 of the Code of Civil Procedure, against the judgment and decree dated 7.4.2016 and 16.4.2016 respectively, passed by the Additional District Judge, Court No.4, Basti, dismissing the Civil Appeal No.70 of 2013, arising out of Original Suit No.571/1988, wherein the trial court vide judgment and decree dated 28.10.2013 and 9.11.2013 respectively, dismissed the plaintiff's suit for permanent injunction and cancellation of sale deed.

3. The appellants have formulated the following substantial questions of law in the memorandum of the second appeal:-

(a) Whether the ancestral property inherited by the defendant no.1 can be disposed of by sale deed to his in-laws son in the life time of his wife (plaintiff)?

(b) Whether the issue nos. 1, 10 and 12 have wrongly been decided by the courts below against the weight on the evidence on the record?

(c) Whether the will dated 10.2.1994 once decided by the trial court valid, after examining the evidence of the parties and no appeal was preferred by the defendants against the same, therefore, the findings of the court that on the will the evidence is required by the parties?

4. Plaint case in brief is that plaintiff (Ureha) is wife of defendant no.1 (Bharose). There was no male issue from the wedlock of plaintiff and defendant no.1 rather 3 daughters from their wedlock who are married and are residing along with their family in their in-law's house. It has been further mentioned in the plaint that defendant no.2 has fraudulently got executed the sale deed from defendant no.1 in respect to disputed land, accordingly, suit for injunction was filed by plaintiff and subsequently the relief for cancellation of sale deed was also added in the plaint.

5. In the written statement, defendants denied the plaint allegations and in their additional statement, it has been mentioned that plaintiff has no cause of action to file the suit. It has been further mentioned that sale deed was rightly executed by defendant no.1 in favour of defendant no.2 as he was in the need of money. On the basis of the execution of registered sale deed, defendant no.2 is in possession of the disputed property, as such, the prayer was made that suit is liable to be dismissed.

6. In the suit, the following issues were framed before the trial court:-

1- क्या वादिनी प्रतिवादीगण को वाद पत्र में लिखित कथनों के आधार पर विवादित संपत्ति बेचने से मना करवा पाने की अधिकारी है?

2- क्या वादिनी को वाद दायर करने का अधिकार नही है?

3- क्या इस न्यायालय को प्रस्तुत वाद देखने का क्षेत्राधिकार प्राप्त नही है?

4- क्या वाद धारा 331 उ०प्र० जमींदारी विनाश एवं भूमि सुधार अधिनियम से बाधित है?

5- क्या वाद मौन स्वीकृति व विबंधन के सिद्धान्त से बाधित है?

6- क्या वाद अल्पमूल्यांकित है?

7- क्या प्रदत्त न्याय शुल्क अपर्याप्त है?

8- क्या वाद धारा 34 विशिष्ट अनुतोष अधिनिय से बाधित है?

9- क्या वादिनी किसी अन्य अनुतोष प्राप्त करने की अधिकारिणी है?

10- क्या रामदेव के पक्ष में किया गया बैनामा दिनांक- 21.5.88 मंसूख किये जाने योग्य है? 11- क्या प्रस्तुत वाद धारा 41 विशिष्ट अनुतोष अधिनियम से बाधित है?

12- क्या उरेहा ने ईश्वर देई के हक में वसीयतनामा दिनांकित- 10.02.94 को लिखा है, यदि हॉ तो प्रभाव?

13- क्या प्रस्तुत वाद प्रापर्ली प्रजेन्टेड व बेरीफाइड है?

14- क्या दावा वादी संशोधन के बाद अल्पमूल्यांकित है तथा प्रदत्त न्यायशुल्क अपर्याप्त है?

15- क्या दावा, वादी काल बाधित है?

16- क्या प्रतिवादिनी धारा 35 (अ) सी० पी० सी० स्पेशल कास्ट पाने की अधिकारिणी है?

7. Both parties adduced oral and documentary evidence in support of their cases. On behalf of the defendants', the revenue entries in form of documentary evidence were filed in order to demonstrate that plaintiff was not recorded in the revenue records rather defendant no.1 was recorded in the revenue records, as such, the suit for injunction and cancellation of sale deed at the instance of defendant no.1 was not maintainable. Trial court while deciding the issue no.1, has recorded finding of fact that plaintiff was recorded in the revenue records as owner of the disputed plot, as such, plaintiff was fully entitled to execute the sale deed of the plot in dispute. Trial court while deciding issue no.10, has recorded finding of fact that sale deed executed by defendant no.1 in favour of defendant no.2 on 21.5.1988 is not liable to be cancelled as at the time of execution of the alleged sale deed, defendant no.1 was in a healthy mental condition. The trial court while deciding issue nos. 3 & 4, has recorded clear finding of fact that issues nos. 3 and 4 are decided in favour of the plaintiff as plaintiff was not recorded in the revenue record nor plaintiff is in possession of the disputed property, as such, the suit is barred by Section 331 of the U.P. Z.A. & L.R. Act. The other issues were also decided accordingly and the trial court vide judgment and decree dated 28.10.2013 dismissed the plaintiff's suit.

8. Against the judgment and decree of the trial court, plaintiff filed Civil Appeal No.70/2013 in which the lower appellate court has formulated the point of determination as provided under Order 41 Rule 31 of the C.P.C. and while deciding the point of determination no.5, the lower appellate court has held that civil court has no jurisdiction to adjudicate the issue as plaintiff is not recorded in the revenue records nor there is any illegality in the execution of sale deed rather the sale deed is a mental act of defendant no.1. The civil appeal was dismissed by the lower appellate court vide judgment and decree dated 7.4.2016.

9. Counsel for the appellant submitted that property in dispute is ancestral property which is inherited by defendant no.1, as scuh, he cannot execute the sale deed in favour of his son-in-law without making any provision for the plaintiff who is wife of defendant no.1. He further submitted that issue nos.1, 10 & 12 have been wrongly decided by the trial court, the evidence of the plaintiff has not been taken into consideration while deciding issue nos. 1, 10 & 12, as such, the impugned judgment and decree is vitiated by error of law. He also submitted that once the will deed dated 10.2.1994 has been found to be valid by the trial court, the suit filed by plaintiff cannot be dismissed but the courts below have not considered the aforementioned aspect of the matter and dismissed the plaintiff's suit.

10. I have considered the arguments advanced by the learned counsel for the appellants as well as perused the records.

11. The substantial questions of law which have been framed by the learned counsel for the appellants in his memorandum of appeal as quoted above, has also been examined by this Court.

12. There is no dispute about the fact that on the date of institution of the civil suit, the plaintiff was not recorded in the revenue records rather defendant no.1 was recorded in the revenue records. The law on this point is well settled that if plaintiff is not recorded in the revenue record, he cannot maintain a civil suit rather plaintiff can avail the remedy of Revenue Court for declaration of their rights and title. The Apex Court in the case of **Shri Ram and Another vs. 1st Addl. District Judge and Ors., JT 2001(2) SC 573**, has held that recorded tenure holder, having prima facie title and possession, filing suit of cancellation of sale deed executed in favour of respondent can be decreed by the trial court but position would be different if the person is not recorded tenure holder. The paragraph no.7 of the judgment is as follows:-

"On analysis of the decisions cited above, we are of the opinion that where a recorded tenure holder having a prima facie title and in possession files suit in the civil court for cancellation of sale deed having obtained on the ground of fraud or impersonation cannot be directed to file a suit for declaration in the revenue court reason being that in such a case, prima facie, the title of the recorded tenure holder is not under cloud. He does not require declaration of his title to the land. The position would be different where a person not being a recorded tenure holder seeks cancellation of sale deed by filing a suit in the civil court on the ground of fraud or impersonation. There necessarily the plaintiff is required to seek a declaration of his title and, therefore, he may be directed to approach the revenue court, as the sale deed being void has to be ignored for giving him relief for declaration and possession."

13. The Apex Court in the case of **Azhar Hasan and Others vs. District Judge, Saharanpur and Others, (1998) 3 SCC 246** has held that civil court has no jurisdiction to entertain a suit where the plaintiff is not recorded in the revenue record.

14. This court in the case of **Kamla vs. Smt. Gulabi Devi and Another, (2015) 127 RD 110** has held that civil court has no jurisdiction in a case where plaintiff is not

recorded in the revenue records and files a suit for permanent injunction.

15. The lower appellate court has also considered the case reported in 2007 **Allahabad Civil Journal page 1275 (Kamla Prasad and Others vs. Krishnakant Pathak and Others)** where the Apex Court has held that suit in respect of abadi and agricultural land for cancellation of sale deed will lie in revenue court as plaintiff was not found to be recorded in the revenue records.

16. The trial court as well as lower appellate courts have thoroughly considered the evidence relied upon by the parties by deciding the issues and point of determination and have recorded finding of fact that plaintiff was not recorded in the revenue record, as such, the civil suit for permanent injunction and possession is barred by Section 331 of the U.P. Z.A. & L.R, Act. The courts below have also recorded finding of fact that plaintiff is not in possession of the disputed plot and the sale deed executed by defendant no.1 (recorded tenure holder) in favour of defendant no.2, was the healthy mental act of defendant no.1, as such, the suit and civil appeal filed by plaintiff was dismissed concurrently by the courts below.

17. After considering the findings recorded by the trial court on each and every issue as well as by the lower appellate court on each and every point of determination, no substantial questions of law as framed in the memorandum of appeal by the appellants as well as argued by him, are arises in the second appeal.

16. The second appeal lacks merit and the same is hereby dismissed under Order 41 Rule 11 C.P.C.

(2023) 1 ILRA 1108
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.12.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE SAURABH SRIVASTAVA, J.

Writ-A No. 8161 of 2022

Union of India & Ors. ...Petitioners
Versus
Central Admin. Tribunal, Lucknow & Anr. ...Respondents

Counsel for the Petitioners:
Sudhanshu Chauhan

Counsel for the Respondents:
Praveen Kumar

A. Service Law – Transfer – Scope of Interference u/Article 226 - It is well settled principle of law that any State action has to be free of arbitrariness and it should conform to the principles of fairness. The concept of fairness or non-arbitrariness in the administrative action is well recognized. (Para 16, 17)

Transfer is an exigency of service and it is the prerogative and the right of the employer, in this case is the railways, to transfer its employees or officers to any place on various grounds including the ground of public interest and administrative exigencies. **The scope of judicial scrutiny by this Court u/Article 226 of the Constitution of India in a matter relating to transfer of an employee is very limited.** Unless the court finds the transfer order having been effected on account of the malice or mala fide or if it is found to be infested with arbitrariness, Court would normally not interfere in the transfer order. (Para 15)

B. Circular dated 12.12.2018: Addendum to the Comprehensive Transfer Policy

Guidelines issued by Railway Board on 31.08.2015 - The circular clearly provides that **officers due for retirement within a span of two years should normally not be disturbed from their present posting.** (Para 12, 13)

Though the circular dated 12.12.2018 is only a part of comprehensive transfer policy guidelines and the same having not been issued by the Railway Board under any statutory authority vested in it by any enactment, is not statutory, however, the policy decisions taken by any authority, including the Railway Board, is normally to be followed.

Any action of the authorities of the Government or any other State instrumentalities is to be judged and tested on the basis of such guidelines issued by the authority/government/ State instrumentality concerned. After all any policy by the policy makers is formulated and issued not to be violated but for being followed and honoured and respected. It is clear that such circular or any other such transfer policy guidelines do not confer any right on the government servant to remain posted at his present posting even if he is due to retire within a span of two years. However, **the policy decision contained in the circular dated 12.12.2018 has to be normally followed by the authorities and in case of any deviation from such normal, there has to exist justifiable reasons before the authority concerned as to why it intends to deviate from normal as spelt out in the policy decision concerned.** (Para 14)

In the present case, it is not denied by the petitioners that the respondent No. 2-applicant has to retire on 31.12.2023. He was transferred by means of an order dated 17.02.2022. Admittedly, at the time he was transferred from Raebareli to Hajipur, period of less than two years was left prior to his retirement on his attaining the age of superannuation on 31.12.2023. **No reason in this case comes forth for the deviation from the said normal as contained in the circular dated 12.12.2018.** The purpose of such provision is that after rendering long services to an organization i.e. to his employer, if the employee/officer is to retire within a span of one or two years, he is in a state of mind where he intends to settle for rest of his life and accordingly he needs some time and energy to plan a peaceful and smooth life after retirement. (Para 18)

Writ petition dismissed. (E-4)

Precedent followed:

E.P. Royappa Vs St.of T. N. & anr., (1974) 4 SCC 3 (Para 16)

Present petition assails judgment and order dated 04.11.2022, passed by the Lucknow Bench of Central Administrative Tribunal.

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J. & Hon'ble Saurabh Srivastava, J.)

1. Heard Shri Shashi Prakash Singh, learned Additional Solicitor General of India assisted by Shri Sudhanshu Chauhan, learned counsel for the petitioners and Shri Praveen Kumar, learned counsel representing the respondent no.2. We have also perused the records available before us on this Writ Petition.

2. These proceedings under Article 226 of the Constitution of India lay a challenge to the judgment and order dated 04.11.2022 passed by the Lucknow Bench of Central Administrative Tribunal whereby Original Application bearing No.332/00084/2022 has been allowed and the transfer order dated 17.02.2022 which was under challenge therein has been quashed.

3. Learned Tribunal by the order under challenge before us has also directed that the respondent no.1-applicant shall be permitted to join at the same place of posting as immediately before the transfer

order even if he has been relieved or has joined at any other place.

4. By the said order since all the miscellaneous applications have also been disposed of, resultantly Execution Application No.332/00467/2022 filed by the respondent no.2-applicant seeking of execution of an interim order dated 22.02.2022 has also been disposed of.

5. Shri Shashi Prakash Singh, learned Additional Solicitor General of India vehemently arguing on behalf of the petitioners has submitted that the reasons given by the learned Tribunal, Lucknow while allowing the Original Application filed by the respondent no.2-applicant are not tenable. It has further been argued by Shri Singh that the circulars which have been relied upon by the Tribunal are not statutory and hence the same cannot be said to be binding. Shri Singh further urges that so far as the circular dated 12.12.2018 issued by the Railway Board is concerned, the same is also not binding for the reason that it has not been issued under any authority under some statute and the same, being only advisory in nature, could not be made the basis of the claim laid by the respondent no.2-applicant to challenge the transfer order. He has also stated that in case the respondent no.2-applicant was aggrieved by his transfer within a span of two years prior to his date of retirement/superannuation, he ought to have approached the authorities concerned bringing to their notice that he is to retire within two years as such in view of the provisions contained in the circular dated 12.12.2018 he ought not be transferred. Submission further is that it is not in dispute that the respondent no.2-applicant owes pan-India transfer liability and hence in the exigencies of administration and public interest he could be transferred and further that there is no illegality in the order of transfer.

6. On the basis of all the aforesaid submissions, it has been urged by the learned Additional Solicitor General of India that the judgment and order dated 04.11.2022 passed by the Central Administrative Tribunal is thus not sustainable and hence the same is liable to be set aside.

7. *Per contra*, Shri Praveen Kumar, learned counsel representing the respondent no.2-applicant has submitted that the circular dated 18.12.2018 issued by the Railway Board may not confer any right upon him to remain posted at the same place and not be transferred before two years prior to date of his retirement, however, the railway authorities have to act in accordance with the provisions made in the said circular. It has been argued that admittedly the respondent no.2-applicant is to attain the age of superannuation on 31.12.2023 hence subjecting him to transfer within two years prior to his date of superannuation cannot be said to be justified on any count not only because such transfer is violation of the provisions contained in the circular dated 12.12.2018 but also for the reason that the same has strong traces of arbitrariness on the part of the authorities.

8. Considered the submissions made by the learned counsel representing the respective parties.

9. Before delving into the rival submissions made by the learned counsel for the parties, we may note certain facts, which are necessary for proper adjudication of the issues involved in this petition. The

petitioner was transferred from Gorakhpur to Modern Coach Factory (hereinafter referred to as 'MCF') at Raebareli on 03.08.2018 and was posted at MCF Raebareli on the post of Chief Material Manager. He was promoted vide order dated 25.09.2020 to the post of Principal Executive Director (Stores) and simultaneously was required to join at Research Designs and Standards Organization (herein after referred to as 'RDSO') at Lucknow. The occasion to require the respondent no.2-applicant to be posted at RDSO Lucknow had arisen on account of the fact that at the relevant point of time i.e. at the time he was promoted to the post of Principal Executive Director (Stores), the said post was being occupied by an incumbent who worked on the said post till 31.07.2021 when he retired. It is also to be noticed that on the retirement of the earlier incumbent from the post of Principal Executive Director (Stores) at MCF Raebareli the respondent no.2-applicant was again posted at MCF Raebareli on the said post itself.

10. It is also to be noted that pursuant to the order dated 25.09.2020 whereby respondent no.2 was promoted to the post of Principal Executive Director (Stores) and was asked to join at RDSO Raebareli, he submitted his joining at RDSO Raebareli on 25.01.2021 and accordingly charge report was also sent to the authorities concerned on 28.01.2021. He remained posted at RDSO Lucknow till he was asked to join at MCF Raebareli on the retirement of the earlier incumbent at Raebareli from the post of Principal Executive Director (Stores) on 31.07.2022. The said transfer order requiring the respondent no.2-applicant to join at MCF Raebareli from RDSO was passed on 18.08.2021 pursuant to which he submitted his joining at MCF Raebareli, however, while working at MCF Raebareli, the transfer order dated 17.02.2022 was passed whereby the respondent no.2-applicant was transferred to East Central Railway, Hajipur, Bihar. It is this transfer order dated 17.02.2022 which was challenged by the respondent no.2-applicant by instituting Original Application No.332/00084/2022 in which initially an interim order was passed on 22.02.2022 whereby the learned Tribunal had stayed the operation of the transfer order and had further directed that the respondent no.2-applicant shall not be relieved from the place of his posting at MCF Raebareli and shall continue to work there till pendency of the Original Application. It was further directed by the learned Tribunal that even if the respondent no.2-applicant had been relieved he should be restored to earlier place of posting. This interim order dated 22.02.2022 in respect of which Execution Application No.332/00467/2022 was filed, which, too, has been disposed of by means of the order under challenge in this writ petition.

11. Apart from relying on other grounds, learned Tribunal has relied upon the circular issued by the Railway Board dated 12.12.2018. So far as the submissions made by the learned counsel for the respondent no.2-applicant which was advanced by him before the learned Tribunal in relation to his multiple transfers is concerned, we do not find any merit in the same for the reason that the petitioner-authorities were justified in posting him at RDSO on his promotion to the post of Principal Executive Director (Stores) as on the date he was promoted to the said post, no equivalent post at MCF Raebareli was vacant, rather it was being occupied by the earlier incumbent and accordingly he was rightly posted at RDSO, Lucknow. Since

the earlier incumbent retired on 31.07.2021 from his post at MCF Raebareli, the respondent no.2-applicant was again rightly posted at MCF Raebareli vide order dated 18.08.2021.

12. As observed above, amongst other reasons, one reason which we need to consider in this case as given by the learned Tribunal for quashing the transfer order is the provisions contained in the circular dated 12.12.2018. The said circular is an Addendum to the Comprehensive Transfer Policy Guidelines issued by the Railway Board on 31.08.2015. The circular dated 12.12.2018 states that the same was issued in partial modification of the Comprehensive Transfer Policy Guidelines issued by the Railway Board 31.08.2015. The Addendum, thus, issued vide circular dated 12.12.2018 inter alia provides as under:

"(iii) Officers due for retirement within the span of two years should normally not be disturbed from the present posting."

13. The aforequoted provision contained in the circular dated 12.12.2018 clearly provides that officers due for retirement within a span of two years should normally not be disturbed from their present posting.

14. Though the circular dated 12.12.2018 is only a part of comprehensive transfer policy guidelines and the same having not been issued by the Railway Board under any statutory authority vested in it by any enactment, is not statutory, however, the policy decisions taken by any authority, including the Railway Board, is normally to be followed. We are also of the opinion that any action of the authorities of the Government or any other State instrumentalities is to be judged and tested on the basis of such guidelines issued by the authority/ government/ State instrumentality concerned. After all any policy by the policy makers is formulated and issued not to be violated but for being followed and honoured and respected. Having said as above, we do not mean to say that the circular dated 12.12.2018 is binding in all circumstances on the authorities of the Railways. we are clear in our minds that such circular or any other such transfer policy guidelines do not confer any right on the government servant to remain posted at his present posting even if he is due to retire within a span of two years. However, the policy decision contained in the circular dated 12.12.2018 has to be normally followed by the authorities and in case of any deviation from such normal, there has to exist justifiable reasons before the authority concerned as to why it intends to deviate from normal as spelt out in the policy decision concerned.

15. We are also conscious that transfer is an exigency of service and it is the prerogative and the right of the employer, in this case is the railways, to transfer its employees or officers to any place on various grounds including the ground of public interest and administrative exigencies. The scope of judicial scrutiny by this Court under Article 226 of the Constitution of India in a matter relating to transfer of an employee is very very limited. Unless the court finds the transfer order having been effected on account of the malice or mala fide or if it is found to be infested with arbitrariness, Court would normally not interfere in the transfer order.

16. It is well settled principle of law that any State action has to be free of arbitrariness and it should conform to the

principles of fairness. The concept of fairness or non-arbitrariness in the administrative action is well recognized. Reference, at this juncture, may be made by us to one of the most celebrated judgments of Hon'ble Supreme Court in the case of **E.P. Royappa vs. State of Tamil Nadu and another**, reported in **(1974) 4 SCC 3,** where Hon'ble Supreme Court has clearly laid down that along with unjustness and unfairness, arbitrariness is also a facet of Article 14 of the Constitution of India. The said judgment contains one of the most famous legal doctrines evolved in the context of interpretation of Article 14 of the Constitution of India which is ***"in fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch."*** Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14.

17. If we consider the scope of judicial scrutiny in a matter of transfer of an employee in a situation where transfer policy guidelines provide that the officers who are due to retire within a span of two years normally not be displaced from their present posting, in the light of the law laid down by Hon'ble Supreme Court in the case of **E.P. Royappa (supra),** what we find is that in case of any deviation from the normal, the authority concerned needs to justify such administrative action. The scope of judicial scrutiny in such matters has to be confined only to see if there exists any justifiable reason for the authority concerned from deviating from the normal.

18. So far as this case is concerned, it is not denied by the petitioners that the respondent no.2-applicant has to retire on 31.12.2023. He was transferred by means of an order dated 17.02.2022. Admittedly, at the time he was transferred from Raebareli to Hajipur, period of less than two years was left prior to his retirement on his attaining the age of superannuation on 31.12.2023. The provisions contained in the circular dated 12.12.2018 clearly lay down the policy decision that officers who are due to retire within a span of two years should not normally be transferred. No reason in this case comes forth for the deviation from the said normal as contained in the circular dated 12.12.2018. We may also observe at this juncture that for formulating and issuing the guidelines relating to non-displacement of the officers from their present place of posting if they are to retire within a span of two years, has a purpose. After rendering long services to an organization i.e. to his employer, if the employer/officer is to retire within a span of one or two years, he is in a state of mind where he intends to settle for rest of his life and accordingly he needs some time and energy to plan a peaceful and smooth life after retirement.

19. It is with such a laudable purpose that such a provision is contained in the circular dated 12.12.2018. Disturbing a person at the fag end of his entire service career would thus not be in public interest unless there is something more impelling in public interest which may warrant transfer even in such a situation.

20. For the reason above, we are not inclined to interfere in this writ petition which is hereby **dismissed** and the order passed by the Central Administrative Tribunal, Lucknow, dated 04.11.2022 in Original Application No.332/00084/2022 is hereby affirmed.

21. At this juncture, learned counsel for the respondent no.2-applicant has

very fairly submitted that he will have no objection in case the railway authorities pass order transferring him either to RDSO or to Headquarters of Northern Eastern Railways at Gorakhpur or to the Headquarter of North Central Railways at Allahabad.

22. We, thus, provide that keeping in view the overall facts and circumstances of the case, specially the fact that now it is only a year is left when the respondent no.2-applicant shall retire on his attaining the age of superannuation on 31.12.2023, if the petitioners are not inclined to post the respondent no.2-applicant posted at MCF Raebareli, they shall be free to post him at either on the aforesaid three places, namely, RDSO Lucknow or Headquarters of North Eastern Railways at Gorakhpur or Headquarters of North Central Railways at Allahabad.

23. There will be no order as to cost.

(2023) 1 ILRA 1114
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.12.2022

BEFORE

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

Writ-A No. 8892 of 2022

Gyan Prakash Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pranesh Kumar Mishra, Sri Amit Kumar Tiwari

Counsel for the Respondents:
C.S.C., Sri Gagan Mehta

A. Education Law – Selection/Objection to provisional answer key - Uttar Pradesh Education Service Commission Act, 1980 - Uttar Pradesh Higher Education Service Commission (Procedure for Selection of Teachers) Regulations, 2014 - So far as revaluation of an answer sheet or script is concerned, the examining body has no right to revaluate, unless the statute provides for it. However, if the statute is silent about the power of revaluation or scrutiny of an answer sheet or a script, **the Court may permit revaluation or scrutiny, if the key answer is palpably and on the face of it, wrong or absurd, and that too, in exceptional cases. So far as the correctness of the key answers is concerned, there is a presumption about their correctness and the benefit of doubt regarding the key answers, goes to the examination authority, rather than the candidate.** (Para 10)

The Court should generally keep its hands off, where it is a question of the correctness of key answers based on expert opinion in matters of public examination. Key answers are to be presumed correct, particularly once affirmed upon objection by a panel of experts accomplished in the subject, appointed by a selection authority, invested with the power of selection by Statute. The Court cannot be led into becoming a Court of Appeal from the expert's opinion relating to the answer key, on which evaluation is to be done for a public examination. It is only in cases of palpable absurdity or manifest error demonstrable, without an elaborate process of technical reasoning in the relevant subject, that the Court may, in very rare cases, where convinced seek independent expert opinion to rectify an erroneous key. **There could still be a few subjects or matters where the key answer may be so palpably wrong that the Court cannot ignore it. Here, that is not the case.** The subject involved is an intricate science, that is to say, Physical Chemistry and lot of understanding of the subject would go into deciphering the error that the petitioner says exists, in the three impugned key answers. (Para 13)

B. Source of Objections - No basis or source of the objections to the three impugned key answers has been disclosed by the petitioner. If there were any seriousness about the objections that the petitioner takes, he would have annexed in the writ petition those authentic sources, which could be extracts from reputed treatises or textbooks on the subject, with their complete reference, to support his objections. (Para 14)

The petitioner accepts the fact that the material in support of the objections that he submitted online to the Commission is available on the website vis-Ã-vis the answer to Question No. 44 alone. There is no retrieval from the Commission's website of the material filed by the petitioner to support his objections to the key answers to Questions Nos. 37 and 38. The Court has to proceed on the premise that before the Commission, objections to Question No. 44 alone carried necessary material of whatever worth, in support. This Court finds that the objection to Question No. 37 has been accepted by the panel of experts and the answer given in the provisional answer key to Booklet Series 'A', being 'D' has been rectified to 'A'. The correct answer, upon due consideration of objections to question No. 37, besides 38 and 44 of Booklet Series-A, has been published in the revised and final answer key on 11.02.2022. The answer-sheets have been evaluated on the basis of the final answer key. (Para 15)

C. It is trite that the Commission cannot be held bound by the report of an outside expert committee unless the Commission itself, that is to say, their own experts are *ad idem* with the opinion of the outside expert appointed by the Court. Or else, the Court, if it be within the Court's understanding, a factor that would depend on many circumstances, is of opinion that the report of the outside experts shows the key answers approved by the Committee to be palpably wrong without a detailed process of reasoning, may extend relief by holding the answer key to be wrong. (Para 23)

D. The exigencies of an examination to select candidates to public posts cannot be kept indefinitely under the shadow of uncertainty nor can it be made to vary endlessly as that would impede timely selection to public posts with finality attached to the process. There is no reason for this Court to await the outcome of the Commission's response in another matter, may be involving the same issue with regard to one question. (Para 24)

There have been sufficient safeguards observed by the Commission in scrutinizing the probity of their answer key, on the basis of which selections have been held. These should not be exposed to a lingering uncertainty. It must be noted that even if there is some doubt about the key answer to one or the other of the impugned answers, on account of some material based on an outside expert's opinion, the doubt has to be resolved in favour of the examining body. (Para 25)

Writ petition dismissed. (E-4)

Precedent followed:

1. Ran Vijay Singh & anr. Vs St. of U. P. & anr., (2018) 2 SCC 357 (Para 10)

2. Uttar Pradesh Public Service Commission through its Chairman & anr. Vs Rahul Singh & anr., (2018) 7 SCC 254 (Para 11)

3. Kanpur University through Vice-Chancellor & anr. Vs Samir Gupta & anr., (1983) 4 SCC 309 (Para 11)

4. High Court of Tripura Vs Tirtha Sarthi Mukherjee & anr., (2019) 2 Scale 708 (Para 12)

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

The petitioner is aggrieved by his non-selection as an Assistant Professor in the subject of Chemistry by the Uttar Pradesh Higher Education Service Commission, Prayagraj ("the Commission" for short). Advertisement No. 50 dated 15.02.2021 was issued by the Commission inviting applications for selection of Assistant

Professors, who would be appointed to aided non-government colleges, engaged in imparting higher education. The petitioner, apparently eligible for the post, applied in response. The selection was to be made through a written examination, followed by an interview of those candidates selected there. The petitioner was allotted Roll No. 5007000283 by the Commission and called to write his written examination on 30.10.2001. The petitioner appeared and participated in the written examination on the scheduled date, time and venue. It is his case that Question Booklet Series 'A' was allotted to him. The petitioner says that after he had appeared in the written examination, the provisional answer key was published by the Commission on 10.12.2021 and objections were invited to the key answers by the candidates, on or before 18.12.2021. The date for objections to the key answers was extended. The provisional answer key has been placed on record by the petitioner.

2. The petitioner had objections with regard to the answers shown in the provisional answer key to Questions Nos. 37, 38 and 44 of Question Booklet Series 'A'. He submitted objections online to the Commission on 13.12.2021, that is to say, within time. The petitioner has also annexed his objections as Annexure No. 5 to the writ petition. The Commission issued a revised and final answer key on 11.02.2022, after considering objections by the candidates. Objections to two questions, that is to say, Questions Nos. 9 and 58 of Question Booklet Series 'A' were sustained and the questions, deleted. In consequence, common marks were allotted to all candidates, including the petitioner, in relation to the aforesaid Questions. But, the petitioner's grievance is that his answers at the written examination were evaluated without deleting the impugned key answers, to which he had objected, carried in Question Booklet Series 'A'. The result of the written examination was declared on 17.02.2022, wherein the petitioner was declared successful and called for interview. It is asserted that different cut-off marks for the purpose of interview category wise (i.e. Gen., OBC, SC etc.) were declared by the Commission. The petitioner participated in the interview on 26.03.2022 held by the Commission. The final select list (common list) was declared by the Commission on 13.05.2022 for the post of Assistant Professor in Chemistry (Subject Code 70). The final list was declared based on the marks earned in the written examination and the ensuing interview by the Commission, but the entire selection exercise was carried out without rectifying the three incorrect key answers, to which the petitioner had objected, to wit, key answers to Questions Nos. 37, 38 and 44 of Question Booklet Series 'A'.

3. It is the petitioner's case that he belongs to the Other Backward Class ("OBC" for short) Category and had applied in the relevant category for the post in question. The petitioner says that he had secured 138.72 marks in the written test in the OBC Category and the cut-off marks for the OBC Category, entitling a candidate to interview, was 134.64. It is urged that each of the questions carried two marks. The two questions that were acknowledged as wrong on objections by other candidates, led to an addition of 2.04 marks to the petitioner's score in the written examination. It is the petitioner's assertion that he calculated his score, as per the revised answer key, comparing it to his Optical Mark Recognition ("OMR" for short) Sheet for all that he had correctly answered. It shows that he answered 68

questions correctly, to which 2.04 marks for the wrong questions were added, leading him to earn 138.72 marks in the written examination. There is some grievance made to the effect that two candidates, to wit, Naveen Prakash Verma (Roll No. 5007001169) and Sanjeev Kumar (Roll No. 5007000563) who had also applied under the OBC Category, were selected and shown at Serial No. 36 and 37 of the impugned final selection list dated 13.05.2020. But, the petitioner was arbitrarily excluded. The petitioner says that in case the three impugned answers in the answer key, to which he had objected when the provisional key was published, were rectified, upon proper determination by experts, with the aid of renowned textbooks, it would entitle him to the addition of three marks. If that were done, he would be selected.

4. A counter affidavit has been filed on behalf of the Commission, where the entire procedure for selection adopted by the Commission has been spelt out. It is averred that 2002 posts of Assistant Professor in various private-aided colleges across the State have been advertised by the Commission vide Advertisement dated 15.02.2021. The Commission is a specialised body to undertake such selections, constituted under the Uttar Pradesh Education Service Commission Act, 1980 (for short "the Act of 1980"). The procedure for selection by the Commission applicable in this case is governed by the Uttar Pradesh Higher Education Service Commission (Procedure for Selection of Teachers) Regulations, 2014 (for short, "the Regulations of 2014") and the Uttar Pradesh Higher Education (Procedure and Conduct of Business) Rules, 2014 (for short, "the Conduct of Business Rules, 2014"). It is averred that to maintain impartiality of evaluation at the interview, the result of written examination is disclosed after preparation of the final examination result. It is not available to the Interview Board. The petitioner obtained 138.78 marks in the written examination and 24 marks in the interview. He, thus, got an aggregate of 162.78 marks. The last selected candidate in the OBC Category, Sandeep Kumar, secured 165.78 marks and the last waiting-list candidate in the OBC Category, Surjit Singh, secured 162.98 marks. It is emphasized that the Commission does not have any provision for the re-evaluation of answer sheets. Various provisions under the Regulations of 2014 and the Conduct of Business Regulations, 2014 have been mentioned in the counter affidavit, all of which are directed to show that the Commission selects those who set the question paper and moderate it from amongst men of high qualification and professional experience in the relevant subject. The panel of examiners and experts, whose services are secured by the Commission, are an independent body with high professional skills in the relevant subjects. Change to a tentative answer key is only possible after the experts of the Commission opine on the matter. The Commission do not have the power to revaluate or effect a change to the answer key of their own. It is also the Commission's case that deletion of incorrect answer(s) is done after the experts' opinion and benefit of the deleted question is given to all candidates. The formula to award marks to all candidates, after deletion of the question/ questions upon the experts' opinion, is as follows :

Total marks X total attempted right questions

Total questions - deleted questions

5. The aforesaid formula has been pleaded in Paragraph No. 24 of the counter affidavit. There is an illustration of the calculation also pleaded in Paragraph No. 25, which does need to be reproduced. It is the Commission's case that the tentative answer key was issued on 10.12.2021, to which objections were invited from the candidates. It is the Commission's further case in the counter affidavit that upon publication of the provisional answer key, candidates objected almost to every question in the booklet. The Commission have annexed the disposal of all the objections received from candidates relating to Question Booklet Series 'A' as Annexure CA-1. The opinions for accepting or rejecting an objection to the provisional key answers, are indicated in the fifth column of the report of experts, that is signed by a panel of three of them. The petitioner's objections to the three impugned answers carried in the provisional answer key have been rejected by the panel of experts appointed by the Commission vide their report dated 31.01.2022, have been rejected, which is on record. The reasons have been indicated in the report and also reproduced in Paragraph No. 43 of the counter affidavit.

6. It is also the Commission's case that the petitioner has nowhere demonstrated the source or material, on the basis of which he objects to the key answers to Questions Nos. 37, 38 and 44 of Question Booklet Series 'A'. It is emphasized that the entire selection process has been completed and the merit list forwarded to the Director, Higher Education, U.P. at Prayagraj for allotment of colleges.

7. In Paragraph No. 18 of the rejoinder affidavit, the petitioner has asserted that he has annexed the extract of reliable and authenticated books written by renowned authors on the subject, in support of objections to key answers relating to the three questions, the key answers to which he impugns, as Annexure RA-1. A perusal of Annexure RA-1 shows that objections to key answer relating to Question No. 37 is based on a book titled "Chemistry Part II Textbook for Class XII by the National Council of Educational Research and Training, 2022-23". The objection to the key answer relating to Question No. 38 is based on the authority of a book "Chemistry by Peter Atkins Julio Di Paula" and further, another book "Physical Chemistry Revised and Enlarged Seventh Edition by P.C. Rakshit". The objection to the key answer relating to Question No. 44 is based on the authority of a book titled "Textbook of Physical Chemistry Thermodynamics and Chemical Equilibrium (S.I. Units) Volume II by K.L. Kapoor". The objection to the last mentioned question is further sought to be buttressed on the authority of "Advanced Physical Chemistry [Textbook for B.Sc. (Part III and honours) and Postgraduate Courses of Indian Universities]" by D.N. Bajpayee and published by S. Chand Company Private Limited, New Delhi. In Paragraph No. 20 of the rejoinder affidavit, the petitioner has stated that though he has objected to all the three impugned key answers to Questions Nos. 37, 38 and 44, with material in support, that is to say, reliable and authentic books on the subject submitted online, but has proof about his objections being supported with regard to Question No. 44 alone. It is averred in Paragraph No. 20 that despite best efforts to secure copies of the material submitted online in support of his objections vis-a-vis the key answers to Questions Nos. 37 and 38, the petitioner could not succeed in retrieving it on the Commission's website.

8. Heard Mr. Pranesh Kumar Mishra along with Mr. Amit Kumar Tiwari, learned Counsel for the petitioner and Mr. Gagan Mehta, learned Counsel appearing for respondents nos. 2 and 3.

9. It would be apposite to refer to the provisional key answers relating to the three questions published by the Commission, the candidates' objection and the disposal thereof by the Commission's experts vide their report dated 31.01.2022. It would be convenient to extract the same, as shown in tabular form in Paragraph No. 43 of the counter affidavit, which, for the record of it, has not been denied in Paragraph No. 23 of the rejoinder affidavit. The questions to which key answers have been impugned, the objections thereto and the disposal of the objections by the expert committee, is shown below :

Sl. No.	Ques. Nos.	Ques.	Ans. as per key	Candidates Ans.	Expert opinion
1.	37	फेहलिंग बिलयन A एवं B से क्रिया कर ऐल्डिहाइड लाल रंग उत्पन्न करते हैं। लाल रंग की उत्पत्ति का कारण है? (A) Cu+1 आयन (B) Cu+2 आयन (C) Cu (D) Cu+1 एवं Cu+2 आयनों का असमानुपातन	D	A & B/ प्रश्न गलत	इस प्रश्न का आयोग द्वारा दिया गया उत्तर (D) गलत है। जबकि उत्तर (A) सही है । अभ्यर्थी की आपत्ति का संज्ञान लिया गया। स्रोत: Vogel's Textbook of Practical Organic Chemistry.
2.	38	निम्नलिखित में से किस अभिक्रिया हेतु ΔG^{o} का मान धनात्मक है? (A) प्रकाश संश्लेषण (B) आक्सीजन को ओजोनीकरण (C) अमोनि	D	A, B & C / प्रश्न गलत	इस प्रश्न का दिया गया उत्तर (D) सही है। अभ्यर्थी की आपत्ति का संज्ञान लिया गया। सम्बन्धित सभी आपत्ति निराधार है एवं निरस्त

		या का निर्माण (D) उपरोक्त सभी			किये जाने योग्य है। स्रोतः Explanation Attached.
3.	44	एक रासायनिक अभिक्रिया होने में एन्थैल्पी (ΔS) दोनों का मान कम होता है। यह क्रिया स्वेच्छ या गति करेगी यदि- (A) ΔH = TΔS (B) ΔH > TΔS (C) ΔH < TΔS (D) उपरोक्त सभी	C	A & B/ प्रश्न गलत	इस प्रश्न का दिया गया उत्तर (C) सही है। अभ्यर्थी की आपत्ति का संज्ञान लिया गया। सम्बन्धित सभी आपत्ति निराधार है एवं निरस्त किये जाने योग्य है। स्रोत: Dr. S. P. Jauhar book

10. It must be remarked that the law regarding revaluation of an answer booklet or script and the selection of an answer key is fairly well settled by now. So far as revaluation of an answer sheet or script is concerned, the examining body has no right to revaluate, unless the statute provides for it. However, if the statute is silent about the power of revaluation or scrutiny of an answer sheet or a script, the Court may permit revaluation or scrutiny, if the key answer is palpably and on the face of it, wrong or absurd, and that too, in exceptional cases. So far as the correctness of the key answers is concerned, there is a presumption about their correctness and the benefit of doubt regarding the key answers, goes to the examination authority, rather than the candidate. In this regard, reference may be made to the holding of the Supreme Court in **Ran Vijay Singh and others v. State of Uttar Pradesh and others, (2018) 2 SCC 357,** where it is observed:

"30. The law on the subject is therefore, quite clear and we only propose to highlight a few significant conclusions. They are:

30.1. If a statute, Rule or Regulation governing an examination permits the re-evaluation of an answer sheet or scrutiny of an answer sheet as a matter of right, then the authority conducting the examination may permit it;

30.2. If a statute, Rule or Regulation governing an examination does not permit re-evaluation or scrutiny of an answer sheet (as distinct from prohibiting it) then the court may permit re-evaluation or scrutiny only if it is demonstrated very clearly, without any "inferential process of reasoning or by a process of rationalisation" and only in rare or exceptional cases that a material error has been committed;

30.3. The court should not at all re-evaluate or scrutinise the answer sheets of a candidate--it has no expertise in the matter and academic matters are best left to academics;

30.4. The court should presume the correctness of the key answers and proceed on that assumption; and

30.5. In the event of a doubt, the benefit should go to the examination authority rather than to the candidate."

11. Again, the question arose before the Supreme Court in **Uttar Pradesh Public Service Commission through its Chairman and another v. Rahul Singh and another, (2018) 7 SCC 254.** Following the law laid down earlier by their Lordships in **Kanpur University, through Vice-Chancellor and others v. Samir Gupta and others, (1983) 4 SCC 309** and **Ran Vijay Singh (supra)** it was held in **Rahul Singh (supra):**

"12. The law is well settled that the onus is on the candidate to not only demonstrate that the key answer is incorrect but also that it is a glaring mistake which is totally apparent and no inferential process or reasoning is required to show that the key answer is wrong. The constitutional courts must exercise great restraint in such matters and should be reluctant to entertain a plea challenging the correctness of the key answers. In Kanpur University case [Kanpur University v. Samir Gupta, (1983) 4 SCC 309] , the Court recommended a system of:

(1) moderation;

(2) avoiding ambiguity in the questions;

(3) prompt decisions be taken to exclude suspected questions and no marks be assigned to such questions.

13. As far as the present case is concerned, even before publishing the first list of key answers the Commission had got the key answers moderated by two Expert Committees. Thereafter, objections were invited and a 26-member Committee was constituted to verify the objections and after this exercise the Committee recommended that 5 questions be deleted and in 2 questions, key answers be changed. It can be presumed that these Committees consisted of experts in various subjects for which the examinees were tested. Judges cannot take on the role of experts in academic matters. Unless, the candidate demonstrates that the key answers are patently wrong on the face of it, the courts cannot enter into the academic field, weigh the pros and cons of the arguments given by both sides and then come to the conclusion as to which of the answers is better or more correct."

12. Of much relevance, again, is guidance of the Supreme Court in **High Court of Tripura v. Tirtha Sarthi Mukherjee and others, (2019) 2 Scale 708**, where it has been opined by their Lordships:

"23. In this case we have already noted that the writ petition was filed challenging the results and seeking re-valuation. The writ petition came to be dismissed [Tirtha Sarathi Mukherjee v. High Court of Gauhati, 2012 SCC OnLine Gau 899 : (2014) 1 Gau LR 811] in the year 2012 by the High Court. The special leave petition was dismissed [Tirtha Sarathi Mukherjee v. High Court of Gauhati, 2013 SCC OnLine SC 1396] in the year 2013. The review petition is filed after nearly 5 years. In the interregnum, there were supervening development in the form of fresh selection. While it may be true that the delay in filing the review petition may have been condoned, it does not mean that the Court where it exercises its discretionary jurisdiction under Article 226 is to become

oblivious to the subsequent development and the impact of passage of time. Even in the judgment of this Court in Ran Vijay Singh v. Rahul Singh [Ran Vijay Singh v. State of U.P., (2018) 2 SCC 357 : (2018) 1 SCC (L&S) 297] which according to the first respondent forms the basis of the High Court's interference though does not expressly stated so, what the Court has laid down is that the Court may permit re-valuation inter alia only if it is demonstrated very clearly without any inferential process of reasoning or by a process of rationalisation and only in rare or exceptional cases on the commission of material error. It may not be correct to characterise the case as a rare or exceptional case when the first respondent approaches the Court with a delay of nearly 5 years allowing subsequent events to overtake him and the Court. We feel that this aspect was not fully appreciated by the High Court.

24. The review, it must be noted is not a re-hearing of the main matter. A review would lie only on detection without much debate of an error apparent. Was this such a case? It is here that we must notice the argument of the appellant relating to question in Paper III of the examination alone, engaging the attention of the Court for the reason that the first respondent pressed this aspect alone before the High Court. The judgment [Tirtha Sarathi Mukherjee v. High Court of Gauhati, 2012 SCC OnLine Gau 899 : (2014) 1 Gau LR 811] of the High Court in the writ petition appears to bear out this submission of the appellant. The issue relating to the anomaly in the evaluation of Paper III has been discussed threadbare in the judgment. The view of the High Court has not been disturbed by this Court. Despite this the High Court in the impugned judgment [Tirtha Sarathi Mukherjee v. High Court of Gauhati, 2018 SCC OnLine Gau 2060] has proceeded to take up the plea relating to questions in Part I and Part II and proceeded to consider the review petition and granted relief that too after the passage of nearly 5 years. This suffices to allow the present appeal.

25. Despite all this we would also make a few observations on the merits of the matter."

13. The above principles that have been laid down by the Supreme Court would show that the Court should generally keep its hands off, where it is a question of the correctness of key answers based on expert opinion in matters of public examination. Key answers are to be presumed correct, particularly once affirmed upon objection by a panel of experts accomplished in the subject, appointed by a selection authority, invested with the power of selection by Statute. The Court cannot be led into becoming a Court of Appeal from the expert's opinion relating to the answer key, on which evaluation is to be done for a public examination. It is only in cases of palpable absurdity or manifest error demonstrable, without an elaborate process of technical reasoning in the relevant subject, that the Court may, in very rare cases, where convinced seek independent expert opinion to rectify an erroneous key. There could still be a few subjects or matters where the key answer may be so palpably wrong that the Court cannot ignore it. Here, that is not the case. The subject involved is an intricate science, that is to say, Physical Chemistry and lot of understanding of the subject would go into deciphering the error that the petitioner says exists, in the three impugned key answers.

14. It is of utmost importance that in the writ petition, no basis or source of the objections to the three impugned key

answers has been disclosed by the petitioner. If there were any seriousness about the objections that the petitioner takes, he would have annexed in the writ petition those authentic sources, which could be extracts from reputed treatises or textbooks on the subject, with their complete reference, to support his objections. It is in response to the respondents' objection raised vide Paragraph No. 35 of the counter affidavit that the petitioner has not demonstrated the source of his objections to the impugned key answers, that in the rejoinder affidavit, some xerox copies of textbooks have been annexed by the petitioner to substantiate his objections.

15. The matter does not rest there. The petitioner accepts the fact that the material in support of the objections that he submitted online to the Commission is available on the website vis-à-vis the answer to Question No. 44 alone. There is no retrieval from the Commission's website of the material filed by the petitioner to support his objections to the key answers to Questions Nos. 37 and 38. This Court cannot go into this dispute whether, in fact, before the Commission, along with his objections to the three impugned key answers, the petitioner had annexed necessary material furnishing the academic basis for the objections. The Court has to proceed on the premise that before the Commission, objections to Question No. 44 alone carried necessary material of whatever worth, in support. From the disposal of the objections by the panel of experts shown in Paragraph No. 43 of the counter affidavit, this Court finds that the objection to Question No. 37 has been accepted by the panel of experts and the answer given in the provisional answer key to Booklet Series "A', being "D' has been rectified to "A'. The correct answer, upon due consideration of objections to question No. 37, besides 38 and 44 of Booklet Series-A, has been published in the revised and final answer key on 11.02.2022. The answer-sheets have been evaluated on the basis of the final answer key.

16. The submission of the learned Counsel for the petitioner that the opinion of the expert committee appointed by the Commission, on the basis of which the final answer key has been drawn up, is not supported by any reputed or authentic Textbook, or Treaties to judge the correctness of the three impugned key answers, does not appear to be tenable. A perusal of the report of the expert committee shows that the provisional answer key, upon publication, was scrutinized with reference to the candidates' objections, including the petitioner.

17. So far as the key answer to question No. 37 of Booklet Series-A is concerned, the expert committee has opined the answer given in the provisional answer key to be wrong and chosen the right answer as "A' instead of "D', given in the provisional key. The basis of the opinion is a certain Vogel's Textbook of Organic Chemistry. This correction to the provisional answer key by the Expert Committee does not uphold the petitioner's objection. The petitioner would, thus, be incorrect still.

18. In so far as questions Nos. 38 and 44 are concerned, the provisional key indicated the correct option for question No. 38 of Booklet Series-A as "D' and for No. 44 as "C'. The expert committee has rejected the objections to the answers indicated in the provisional answer key and affirmed the same. In case of question No.

38 of Booklet Series-A, the answer option given has been justified on the basis of an explanation attached by the committee of experts. A perusal of the expert committee's report dated 31.01.2022 annexed to the counter affidavit shows that the committee comprised of three Professors, to wit, Professor Indra Prasad Tripathi, Professor and Head Department of Chemistry, Faculty of Science, Mahatma Gandhi, Chitrakoot, Satna, Madhya Pradesh; Professor Rana Krishnapal Singh, Professor, Department of Chemistry and Vice-Chancellor, Dr. Shakuntala Mishra, Rastriya Punarvas Vishwa Vidyalaya, Lucknow and Professor Krishna Bihari Pandey, Former Professor, Vice-Chancellor. The name of Professor, Krishna Bihari Pandey's University, where he taught, or whereof he was the Vice-Chancellor, no doubt, does not appear in the report. But, given the profile of the three experts, this Court has no reason to doubt that they are experts in their field and upon their attention being drawn to fallacies in the provisional answer key, would have carefully scrutinized the objections to exclude wrong as well as ambiguous answers.

19. So far as the last answer impugned, that is to say, answer to question No. 44 of Booklet Series-A is concerned, the objection thereto has been rejected by the expert committee founding its opinion on a Textbook by Dr. S.B. Jauhar.

20. The learned Counsel for the petitioner has very persuasively argued and made an admirable effort to allure this Court into understanding a little bit of Physical Chemistry. He has elaborated upon scientific reasoning to prove the final key answers to questions Nos. 37, 38 and 44 of Booklet Series-A wrong. Unfortunately, for the petitioner, it is beyond this Court's ken to directly engage in the understanding of Advanced Physical Chemistry. The law, of much binding precedent, also does not permit us to undertake that inquiry. The petitioner's submission in this regard, therefore, cannot be accepted.

21. As a last ditch of effort, it was pointed out by the learned Counsel for the petitioner that in a similar matter in Writ-A No. 3372 of 2022, another learned Single Judge of this Court vide order dated 05.05.2022 at the instance of the eleven petitioners there, has referred for opinion the correctness of the final answer key vis-a-vis questions Nos. 38, 41, 44, 45, 82 and 84 of Booklet Series-A to two experts, who may be nominated by the Vice-Chancellor of the Banaras Hindu University from amongst the Senior Teachers of the Physical Chemistry Department. The Court had reserved judgment in this case on 10.06.2022, but noticing the aforesaid feature, the case was posted for further hearing on 01.12.2022. On 13.12.2022, it was brought to the Court's notice that experts from the Banaras Hindu University have submitted a report dated 01.12.2022, which is at variance with regard to the key answers approved by the expert committee of the Commission, vis-a-vis questions Nos. 38 and 84 of Booklet Series-A.

22. The attention of the Court has been drawn to the order passed by the learned Judge on 18.11.2022 in Writ-A No. 3372 of 2022, which records the aforesaid fact, granting time to the Commission to file a supplementary counter affidavit. At the further hearing on 13.12.2022, the learned Counsel for parties have placed an order dated 02.12.2022 passed in Writ-A No. 3372 of 2022, where it has been

remarked by the learned Single Judge that keeping in mind the principle that outside expert's opinion may not prevail over the expert's opinion of the Examining Body, the Counsel for the Commission may file a response within two weeks. The Commission has been required to refer the matter to its experts together with the report from the Banaras Hindu University, before a final stand was taken about the correctness of the key answers to the six questions involved in the aforesaid writ petition. It must be noted that here of all those questions, questions Nos. 38 and 44 are relevant; in fact, 38 alone, because the experts from the Banaras Hindu University have differed with the Commission's expert committee. The hearing of Writ-A No. 3372 of 2022 has been adjourned to 13.01.2023. In the circumstances, this Court did not find it feasible to adjourn the hearing of the matter and judgment was reserved.

23. It is trite that the Commission cannot be held bound by the report of an outside expert committee unless the Commission itself, that is to say, their own experts are ad idem with the opinion of the outside expert appointed by the Court. Or else, the Court, if it be within the Court's understanding, a factor that would depend on many circumstances, is of opinion that the report of the outside experts shows the key answers approved by the Committee to be palpably wrong without a detailed process of reasoning, may extend relief by holding the answer key to be wrong.

24. This course has not been adopted in this petition and there is no reason for this Court to await the outcome of the Commission's response in another matter, may be involving the same issue with regard to one question. This Court is of opinion that the exigencies of an examination to select candidates to public posts cannot be kept indefinitely under the shadow of uncertainty nor can it be made to vary endlessly as that would impede timely selection to public posts with finality attached to the process.

25. This Court is of opinion that in the overall circumstances, there have been sufficient safeguards observed by the Commission in scrutinizing the probity of their answer key, on the basis of which selections have been held. These should not be exposed to a lingering uncertainty. As a parting remark, it must be noted that even if there is some doubt about the key answer to one or the other of the impugned answers, on account of some material based on an outside expert's opinion, the doubt has to be resolved in favour of the examining body, as held in **Ran Vijay Singh.**

26. In the totality of circumstances, this Court finds no merits in the present writ petition. It **fails** and is **dismissed**.

(2023) 1 ILRA 1125
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.12.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Writ-A No. 18291 of 2021

Khushboo Saxena ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Udayan Nandan, Sr. Advocate

Counsel for the Respondents:
C.S.C., Sri Abhishek Srivastava, Sri Anubhav Singh, Sri Krishna Agarwal, Mrs. Usha Kiran

A. Service Law – Compassionate Appointment - U.P. State Electricity Board Dying in Harness Rules, 1975 - U.P. State Electricity Board Dying in Harness Rules, 1975 (11th Amendment) Rules, 2014 - U.P. Electricity Reforms Transfer Scheme, 2000 - Clause-6(1) - Compassionate appointment is an exception to the general rule of appointment in the public services and is in favour of the dependents of a deceased dying in harness and leaving his family in penury and without any means of livelihood, and in such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. **The whole object of granting compassionate employment is, thus, to enable the family to tide over the sudden crisis.** The object is not to give such family a post much less a post held by the deceased. (Para 18)

Petitioner claimed that she was dependant on her mother who died in harness and therefore, she needed compassionate appointment. In the Application Form, in the column which was relating to the details of persons dependent on the deceased-employee, the petitioner had mentioned the name of her father as Rajeev Saxena aged about 56 years, and also herself. However, under the column meant for "monthly income" and "income from other sources, if any", the petitioner has not written anything and left such column blank. The petitioner was born in 1992 and she filed the application in April, 2021. She was more than 28 years of age at the time of her application. She was well educated as she was B.Tech in (Information Technology). **A deliberate concealment of the annual income of the father who was shown as dependent on the mother, (i.e, the deceased-employee) had been resorted by the petitioner.** (Para 12)

It was only after the petitioner was appointed, she submitted a Verification form where for the first time she disclosed that her father was working in U.P. Police and was having an annual income of Rs. 12,20,000/-and that the petitioner and her family were living in Type-III quarter in Reserve Police Lines, Lucknow and that she was 26 years of age at the time of her filling up of the verification form. Her father while submitting his affidavit in response to the letter sent by KESKO stated that he was working as Inspector (Accounts) in U.P. Police Commissionerate, Lucknow, and the time of death of his wife, Smt. Kumkum Saxena and also for the past 10 years, their daughter Khushbu Saxena was for certain reasons relating to family circumstances completely dependent upon her mother who had raised her, and was responsible for her education also. In the affidavit filed by the father of the petitioner, there is no mention of any judicial separation or any decree of competent court saying that Smt. Kumkum Saxena was living with the petitioner separately from her father Rajeev Saxena. (Para 13)

B. U.P. State Electricity Board Dying in Harness Rules, 1975 – 2015 amendment - Even if the petitioner's contention that the amended Rules of 2015 were inapplicable to the employees of the KESCO is taken to be correct, this Court cannot close its eyes to the subterfuge to which the petitioner resorted while seeking compassionate appointment under Dying in Harness Rules, 1975 from the respondents. The petitioner had filled up the Application form showing her father and herself to be dependent upon her mother and deliberately not filling up column meant for monthly income and income from other sources. The Rules of 1974 are called Uttar Pradesh Rajya Vidyut Parishad Sewakal mein Mrit Sewakon Ke Ashriton Ki Bharti Niyamwali-1975. The petitioner was not a dependent on her deceased mother and therefore even the unamended Rules of 1975, were inapplicable to her. (Para 15)

Writ petition dismissed. (E-4)

Precedent followed:

Maharashtra & anr. Vs Madhuri Maruti Vidhate 2002 SCC Online SC 1327 (Para 17)

Present petition assails order dated 06.09.2021, passed by the Managing

Director, Kanpur Electricity Supply Company, Kanpur Nagar and also praying for a mandamus to be issued to the respondents not to interfere in the working of the petitioner as a Karyakari Sahayak (Executive Assistant) in KESCO, Kanpur Nagar.

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

1. Heard Sri Udayan Nandan, learned counsel for the petitioner and Sri Anubhav Singh, appearing for the respondent nos. 3 to 5 and Sri Krishna Agarawal, appearing for the U.P. Power Corporation Limited.

2. This petition has been filed by the petitioner challenging the order dated 6.9.2021 passed by the Managing Director, Kanpur Electricity Supply Company, Kanpur Nagar and also praying for a mandamus to be issued to the respondents not to interfere in the working of the petitioner as a Karyakari Sahayak (Executive Assistant) in KESCO, Kanpur Nagar pursuant to the impugned order.

3. It is the case of the petitioner that her mother was initially appointed in 1986 in U.P. State Electricity Board. Her services were transferred to KESCO on permanent basis by a government order 11.12.2008. She worked in KESCO for almost 10 years. She was later sent on deputation to U.P. Power Transmission Corporation Limited in 2019 and was working as Senior Officer Assistant in the Accounts Department. She died in harness on 18.05.2021. After the death of her mother, the petitioner applied for compassionate appointment as per provision of U.P. State Electricity Board Dying in Harness Rules, 1975. At the time of her application, she also submitted an affidavit on 14.6.2021. The application and the affidavit have been filed as Annexure-3 and 4 to the writ petition. After completion formalities, the petitioner was informed by a letter dated 15.6.2021 that a decision had been taken to offer appointment to the petitioner as Executive Assistant in the pay scale of Rs. 27,200-86,100/-. The petitioner was issued an appointment letter on 24.6.2021 subject to the condition that she obtained CCC qualification within one year from the date of appointment.

4. The petitioner joined and was working as Executive Assistant. She was asked to fill up verification form also on her appointment. The petitioner in her verification form clearly stated that her father was working in the U.P. Police Department with an annual income of Rs. 12,20,200/-. After the verification form was submitted by the petitioner on 6.7.2021, she received a communication on 22.7.2021 that as per the amended provision of the U.P. State Electricity Board Dying in Harness Rules, 1975, a person is entitled for appointment on compassionate ground only if no other family member of the deceased-employee is working in Central or State Government Department or any of the undertaking of the Government. The petitioner was directed to show cause and to file an affidavit within a period of three days. The father of the petitioner submitted an affidavit along with application dated 28.7.2021 that the petitioner was appointed after verification of her documents and that he is working as an Inspector (Accounts) in the Commissionerate of Police at Lucknow. However, the petitioner was asked to submit her own reply which she submitted thereafter on 12.8.2021 along with affidavit.

5. A show cause notice was issued to her on 17.8.2021 stating that as per the amendment carried out in Rule-5 of the

U.P. State Electricity Board Dying in Harness Rules, 1975, in 2015 a person cannot be appointed on compassionate grounds, in case any of his family member is in service under the Central or State Government Department or any of its undertakings. Therefore, no appointment could have been offered to the petitioner. The petitioner asked for relevant documents and thereafter sent a letter to the Chief Engineer, KESCO asking for further time to submit her reply to the show cause notice. She was not supplied any documents. She filed a First Appeal also under the RTI Act. However, no time was granted by the Managing Director, KESCO and the impugned order has been passed on 6.9.2021 terminating the services of the petitioner on the ground that her appointment was made in violation of U.P. State Electricity Board Dying in Harness Rules, 1975 as amended by notification vide notification dated 25.06.2015.

6. It has been submitted by the learned counsel for the petitioner that main ground for terminating the services of the petitioner is that as per U.P. State Electricity Board Dying in Harness Rules, 1975 (11th amendment) Rules, 2014, a family member of the deceased-employee was entitled to be appointed on compassionate ground, in case, he has not been appointed and working in the services of the Central or State Government Department or any of its undertakings. Later on, an amendment was carried out in the U.P. State Electricity Board Dying in Harness Rules, 1975, as approved in the 116th meeting of the Board of U.P. Power Corporation Limited with effect from 25.06.2015. Now, a family member of a deceased-employee can only be appointed, in case no other family member is previously working in Central or State Government or any other undertaking of the Government. The respondents have taken a ground that since the petitioner's father was working in U.P. Police, she could not have been appointed under the 2015 amendment. However, the respondents have misinterpreted the amended rules. Once the U.P. Electricity Reforms Transfer Scheme of 2000 came into effect, the services of the mother of the petitioner stood transferred to KESCO permanently in 2008. Any amendment carried out by the U.P. Power Corporation Limited in its Board meeting with regard to U.P. State Electricity Board Dying in Harness Rules, 1975, would not be applicable to employees of KESCO, Kanpur. Automatically, the employees of KESCO, Kanpur would be governed by the Rules in existence at the time of transfer. Any subsequent amendments made by U.P. State Electricity Board Dying in Harness Rules, 1975 would not be applicable to such employees. Since no separate rules or amendments have been made by KESCO, Kanpur after the Transfer Scheme was framed in 2000, the existing rules on the date of transfer would be applicable to such transferred employees. No subsequent amendments made in the Rules by the U.P. Power Corporation Limited would be applicable to them. Clause-6(1) of the U.P. Electricity Reforms Transfer Scheme of 2000 clearly states that the existing rules shall be applicable to the transferred employees. Since no fresh rules relating to the conditions of service were framed by KESCO, Kanpur, therefore, the existing rules at the time of such transfer /absorption would be applicable.

7. It has been submitted by the learned counsel for the petitioner that since amended Rules, 2015, which were adopted in 116th Board meeting of the U.P. Power

Corporation Limited, have come subsequently after the mother of the petitioner was transferred and absorbed permanently in KESCO, Kanpur and KESCO, Kanpur has not adopted such amended rules, the provision in amended rules would not be applicable in the case of the petitioner.

8. Sri Anubhav Singh, on the basis of the counter affidavit filed by the respondents states that the application form as was submitted by the petitioner on 1.6.2021, had not been properly filled up. She had concealed the fact that her father was earning more than Rs. 12,20,200/- per annum at the time she had applied for compassionate appointment indicating he and the petitioner were dependent upon her mother's salary. As per the amended Rule-5 of the Rules, 1975, if any member of family is already employed, she was not eligible to even apply for compassionate appointment. Also, in the affidavit filed by the petitioner, the petitioner had stated that she will look after her family in the same way as her mother was looking after her family before her death, and that she had not concealed anything and had stated the entire truth and in case any misappropriation or misconcealment is found later, the respondents were free to take appropriate action including termination of her services.

9. It has been argued that the petitioner having filed a false affidavit on 14.6.2021, the matter regarding the petitioner's father already being employed in U.P. Police came into light when the petitioner filed Verification Form showing her father to be employed as S.I./Inspector (Accounts) in U.P. Police, and place of residence as Reserve Police Lines, Lucknow. After the Verification Form was filled up and deposited by the petitioner, at least three times notices were issued to the petitioner regarding concealement/ misrepresentation in her Application Form and in the Affidavit filed by her. The petitioner did not file any affidavit in reply. Her father filed an affidavit and also sent an application that he is working in U.P. Police. The petitioner prayed for time and also filed an application for relevant documents to be given to her. The petitioner was given enough time and the show cause notice was eventually issued to her on 17.8.2021 and a reminder was sent on 25.8.2021. Only, thereafter, the respondents have passed the order dated 6.9.2021.W

10. With regard to arguments raised by the learned counsel or the petitioners regarding U.P. Electricity Reforms Transfer Scheme of 2000 and the transfer of service of the petitioner's mother and her absorption in KESKO, Kanpur in 2008, it has been submitted that the Rules as applicable to the mother of the petitioner regarding terms and conditions of her employment, would be the Rules of the UPSEB at the time of Transfer. However, the compassionate appointment sought by the petitioner was after the death of her mother, and the Rules existing at the time of submission of such application form would be taken into consideration for appointment on compassionate ground. It has been argued that the first and foremost thing to consider is whether petitioner was guilty of misrepresentation and concealment in her application form and in her affidavit. Since the petitioner had provided false information, her appointment was liable to be cancelled without getting into the controversy as to which Rules were applicable to her.

11. In the rejoinder affidavit filed by the petitioner, it has been again reiterated

that the amendment carried out in U.P. State Electricity Board Dying in Harness Rules, 1975 in the year 2015 was not adopted by KESCO, and since the mother of the petitioner was an employee of KESCO, the amended Dying in Harness Rules, 1975, would not be applicable to the petitioner. It has been reiterated that the petitioner had not submitted any false affidavit. She had not concealed any information and therefore, action taken by the respondents terminating her service, is liable to be set aside.

12. This Court having considered the arguments raised by the learned counsel for the petitioner and the learned counsel for the respondents, as also gone carefully through the pleadings on record and the application submitted by the petitioner for compassionate appointment. The very fact that the petitioner had submitted an application under the Dying in Harness Rules, 1975 called the उत्तरप्रदेश राज्य विद्युत् परिषद सेवाकाल में मृत परिषदीय सेवको के आश्रितों की भर्ती नियमावली १९७४ would show that the petitioner claimed that she was dependant on her mother who died in harness and therefore, she needed compassionate appointment. In the Application Form, in the column which was relating to the details of persons dependent on the deceased-employee, the petitioner had mentioned the name of her father as Rajeev Saxena aged about 56 years, and also herself. However, under the column meant for "monthly income" and "income from other sources, if any", the petitioner has not written anything and left such column blank. The petitioner was born in 1992 and she filed the application in April, 2021. She was more than 28 years of age at the time of her application. She was well educated as she was B.Tech in (Information Technology). A deliberate concealment of the annual income of the father who was shown as dependent on the mother, (i.e, the deceased-employee) had been resorted by the petitioner. In the declaration made in the Application form, she had stated that no other family member had been given appointment under the 1975 Rules and that all the information supplied by her in her Application form was true and in case it was not found true then her selection/appointment may be cancelled. In the affidavit filed by the petitioner on 14.6.2021, the petitioner stated that she intended to take care of the family members of the deceased-employee and therefore, had applied for compassionate appointment, and that she will take care of the family of the deceased-employee as her mother had done during her life time. She had also stated that all the contents of the affidavit had been filled up by her correctly and truthfully and that nothing had been concealed.

13. It was only after the petitioner was appointed, she submitted a Verification form where for the first time she disclosed that her father was working in U.P. Police and was having an annual income of Rs. 12,20,000/- and that the petitioner and her family were living in Type-III quarter in Reserve Police Lines, Lucknow and that she was 26 years of age at the time of her filling up of the verification form. Her father while submitting his affidavit in response to the letter sent by KESKO stated that he was working as Inspector (Accounts) in U.P. Police Commissionarate, Lucknow, and the time of death of his wife, Smt. Kumkum Saxena and also for the past 10 years, their daughter Khushbu Saxena was for certain reasons relating to family circumstances completely dependent upon her mother

who had raised her, and was responsible for her education also. In the affidavit filed by the father of the petitioner, there is no mention of any judicial separation or any decree of competent court saying that Smt. Kumkum Saxena was living with the petitioner separately from her father Rajeev Saxena.

14. This Court has also perused the reply of the father to the show cause notice. The reply submitted by the petitioner to the show cause notice issued to her stated that her father had already replied through affidavit on 22.7.2021 and since information which was being demanded from her was actually related to her father and her father had submitted his affidavit, there was no reason for a separate reply to be submitted by the petitioner.

15. Even if the petitioner's contention that the amended Rules of 2015 were inapplicable to the employees of the KESCO is taken to be correct, this Court cannot close its eyes to the subterfuge to which the petitioner resorted while seeking compassionate appointment under Dying in Harness Rules, 1975 from the respondents. The petitioner had filled up the Application form showing her father and herself to be dependent upon her mother and deliberately not filling up column meant for monthly income and income from other sources. The Rules of 1974 are called Uttar Pradesh Rajya Vidyut Parishad Sewakal mein Mrit Sewakon Ke Ashriton Ki Bharti Niyamwali-1975. The petitioner was not a dependent on her deceased mother and therefore even the unammended Rules of 1975, were inapplicable to her.

16. Additionally, the petitioner had been given appointment on 24.6.20221 and as soon as the Verification form was filled up by the petitioner, the concealment/ misrepresentation was discovered by the respondents and she was given a show cause notice and sufficient opportunity to place her case. She was not a confirmed employee, but only a probationer.

17. This Court finds no good ground to show interference in the order impugned more so in view of the observations made by the Hon'ble Supreme Court in the Case of State of **Maharashtra and Another Vs. Madhuri Maruti Vidhate 2002 SCC Online SC 1327**. The Supreme Court in the said case has made the following observations :-

*"9. In the recent decision, this Court in the case of **Director of Treasuries in Karnataka and Anr. Vs. V. Somyashree, 2021 SCC Online SC 704**, had occasion to consider the principle governing the grant of appointment on compassionate ground. After referring to the decision of this Court in **N.C. Santhosh Vs. State of Karnataka, (2020) 7 SCC 617**, this Court has summarised the principle governing the grant of appointment on compassionate ground as under:-*

(i) that the compassionate appointment is an exception to the general rule;

(ii) that no aspirant has a right to compassionate appointment;

(iii) the appointment to any public post in the service of the State has to be made on the basis of the principle in accordance with Articles 14 and 16 of the Constitution of India;

(iv) appointment on compassionate ground can be made only on fulfilling the norms laid down by the State's policy and/or satisfaction of the eligibility criteria as per the policy;

(v) the norms prevailing on the date of the consideration of the application should be the basis for consideration of claim for compassionate appointment.

10. As per the law laid down by this Court in catena of decisions on the appointment on compassionate ground, for all the government vacancies equal opportunity should be provided to all aspirants as mandated under Articles 14 and 16 of the Constitution. However, appointment on compassionate ground offered to a dependent of a deceased employee is an exception to the said norms. The compassionate ground is a concession and not a right.

11. In the case of ***State of Himachal Pradesh and Anr. Vs. Shashi Kumar reported in (2019) 3 SCC 653****, this Court had an occasion to consider the object and purpose of appointment on compassionate ground and considered the decision of this Court in the case of* ***Govind Prakash Verma Vs. LIC, reported in (2005) 10 SCC 289****, in paras 21 and 26, it is observed and held as under:-*

"21. The decision in Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289, has been considered subsequently in several decisions. But, before we advert to those decisions, it is necessary to note that the nature of compassionate appointment had been considered by this Court in Umesh Kumar Nagpal v. State of Haryana [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138]. The principles which have been laid down in Umesh Kumar Nagpal [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138] have been subsequently followed in a consistent line of precedents in this Court. These principles are encapsulated in the following extract: (Umesh Kumar Nagpal case [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138], SCC pp. 139-40, para 2)

"2. ... As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependants of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved viz. relief

against destitution. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned."

26. The judgment of a Bench of two Judges in ***Mumtaz Yunus Mulani v. State of Maharashtra [(2008) 11 SCC 384]*** *has adopted the principle that appointment on compassionate grounds is not a source of recruitment, but a means to enable the family of the deceased to get over a sudden financial crisis. The financial position of the family would need to be evaluated on the basis of the provisions contained in the scheme. The decision in* ***Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590]*** *has been duly considered, but the Court observed that it did not appear that the earlier binding precedents of this Court have been taken note of in that case."*

12. Thus, as per the law laid down by this Court in the aforesaid decisions, compassionate appointment is an exception to the general rule of appointment in the public services and is in favour of the dependents of a deceased dying in harness and leaving his family in penury and without any means of livelihood, and in such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is, thus, to enable the family to tide over the sudden crisis. The object is not to give such family a post much less a post held by the deceased.

13. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand, to appoint the respondent now on compassionate ground shall be contrary to the object and purpose of appointment on compassionate ground. The respondent cannot be said to be dependent on the deceased employee, i.e., her mother."

15. The writ petition stands **dismissed**. No order as to costs.

(2023) 1 ILRA 1133
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.12.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Writ-A No. 20984 of 2022

Vinay Kumar Yadav ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Daya Shanker Yadav, Sri Rakesh Prasad

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

A. Education Law – Constitutional validity of prescribing minimum qualification - The Minimum Qualification For Teachers in Pharmacy Institution Regulations,2014; Pharmacy Act, 1948: Section 10, 18.

The impugned clause of the Regulation 2014 is not violative of the principal Act, 1948 – Since the Act, 1948 empowers the Central Council to frame regulations prescribing the minimum standard of education, therefore, the regulation 2014 prescribing minimum standard as First class B. Pharm amongst others, is well within the powers conferred u/s 10 r/w S. 18 of the Act, 1948. (Para 13)

B. To prescribe essential qualifications for appointment to a post is essentially within the domain of the employer or the competent authority. The employer is best suited to decide the requirement that a candidate must possess according to the needs of the employer and the nature of work. **The court cannot lay down the conditions of eligibility and can not dwell into the issue with regard to the minimum standard prescribed by the competent authority by Regulation 2014.** (Para 14)

C. Prescribing "First Class B. Pharm" is not violative of Article 14 and 21 of the Constitution of India - Democracy depends for its own survival on a high standard of vocational and professional education. Therefore, in order to maintain standard of education in Institutions imparting education in the field of pharmacy, and to develop knowledge and skill of students, it is a basic requirement to recruit good quality and most suitable Teachers in order to maintain excellence and standard of teaching in the Institution. To achieve this object of the Act 1948, the impugned regulations provides for certain educational qualification for recruitment on the post of Principal, Professor, Associate Professor and Lecturer/Assistant Professors. One of the essential qualification for Associate Professor and Lecturer/Assistant Professor is "First Class B. Pharm" which cannot be said to be irrelevant or violative of Article 14 or 21 of the Constitution. (Para 15, 16)

The petitioner has not shown that how amongst equally situated persons, the impugned Regulations 2014 causes any discrimination, therefore cannot be said to be violative of Article 14 and no material could be placed to demonstrate that the impugned provisions violate fundamental rights of the petitioner guaranteed u/Article 21 of the Constitution of India. (Para 20 to 22)

D. If the essential educational qualification prescribed under the Regulation 2014 for recruitment to the post in question, is not satisfied by a person, then he shall not be eligible to apply for the post. The sole object of prescribing qualification that a candidate must have a consistently good academic record with first class Degree for appointment to the post of Associate Professor or Lecturer/Assistant Professor, is to select a most suitable person in order to maintain excellence and standard of teaching in the institution apart from administration. (Para 17)

E. In the absence of enabling provision for grant of relaxation, no relaxation can be made to relax the essential qualification. Even if such a power is provided under the Statute, it cannot be exercised arbitrarily. Such a power cannot be exercised treating it to be an implied, incidental or necessary power for execution of the statutory provisions. In the present set of facts even the regulation do not confer any power to relax the aforesaid essential qualification of "First Class B Pharm". (Para 18)

Writ petition dismissed. (E-4)

Precedent followed:

1. Maharashtra Public Service Commission Vs Sandeep Shriram Warade & ors. (2019) 6 SCC 362 (Para 14)

2. Zahoor Ahmad Rather & ors. etc. Vs Sheikh Imtiyaz Ahmad & ors. etc., Civil Appeal No. 11853 – 2018, decided by the Hon'ble Supreme Court by judgment dated 05.12.2018 (Para 14)

3. Prit Singh (Dr.) Vs S.K. Mangel, 1993 Supp (1) SCC 714 (Para 17)

4. U.O.I. Vs Dharam Pal & ors. (2009) 4 SCC170 (Para 18)

5. St. of Orissa Vs Mamta Mohanty, (2011) 3 SCC 436 (Para 19)

Present petition prays for writ order or direction in the nature of certiorari quashing -Clause (iv) of Table II of the Notification dated 11.11.2014 containing minimum qualification for teachers in Pharmacy Institutions 2014, issued by Registrar-cum-Secretary, Pharmacy Council of India, New Delhi.

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Mohd. Azhar Husain Idrisi, J.)

1. Heard Sri D.S. Yadav, learned counsel for the petitioner and Sri Vinay Kumar Singh, learned Central Government Standing Counsel for the respondents.

2. This writ petition has been filed praying for the following reliefs :

"A. Issue a writ order or direction in the nature of certiorari3 quashing the - Clause (iv) of Table II of the Notification dated 11.11.2014 contained in minimum qualification for teachers in Pharmacy Institutions 2014 of Notification issued by respondent no.3 (Annexure No.2 to the writ petition).

B. Issue a writ order or direction in the nature of mandamus directing the respondents to declare the embargo regulation as null and void being contrary to the provisions of Article 14, 16, 19 and 21 of the Constitution of India."

3. Briefly stated facts of the present case are that the petitioner has passed B. Pharm in 2nd Division in the year 2005 from U.P. Technical University, Lucknow and passed M. Pharm in the year 2009 from Dr. M.G.R. Medical University, Chennai.

4. **The petitioner has challenged the validity of prescribing the minimum qualification as "First Class B. Pharm" by** "The Minimum Qualification For Teachers in Pharmacy Institution Regulations, 2014 " (hereinafter referred to as "the Teachers Regulations, 2014").

Submissions on behalf of the Petitioner

5. Learned counsel for the petitioner submits that the petitioner is challenging the constitutional validity of the aforesaid regulation for reason that he is a prospective candidate and intends to apply for the post in the event any vacancy is advertised in future.

6. Learned counsel for the petitioner further submits that prescribing the minimum qualification as First Class in B. Pharm is violative of Articles 14 & 21 of the Constitution of India inasmuch as the embargo of First Class degree in graduation course has not been provided in the regulations framed by Medical Council of India providing for minimum qualification for teachers in medical education whereas for teachers in pharmacy institution the minimum qualification of First Class B. Pharm degree has been incorporated under the Regulations 2014.

7. No other submission has been made before us to challenge the constitutional validity of the minimum qualification "First Class B. Pharm" under Regulations 2014.

Submissions on behalf of the Respondents

8. Learned Central Government Standing Counsel supports the regulations.

Discussion & Findings

9. We have carefully considered the submissions of learned counsels for the parties.

10. The Regulation, 2014 has been framed by the Pharmacy Council of India with the approval of the Central Government in exercise of powers conferred under Sections 10 & 18 of the Pharmacy Act, 1948. Sections 10 and 18 of the Pharmacy Act, 1948 (hereinafter referred to as "the Act 1948") are reproduced below :

"Section 10. Education Regulations.--(1) Subject to the provisions of this section, the Central Council may, subject to the approval of the Central Government, make regulations, to be called the Education Regulations, prescribing the minimum standard of education required for qualification as a pharmacist.

(2) In particular and without prejudice to the generality of the foregoing power, the Education Regulations may prescribe--

(a) the nature and period of study and of practical training to be undertaken before admission to an examination;

(b) the equipment and facilities to be provided for students undergoing approved courses of study;

(c) the subjects of examination and the standards therein to be attained;

(d) any other conditions of admission to examinations.

(3) Copies of the draft of the Education Regulations and of all Subsequent amendments thereof shall be furnished by the Central Council to all State Governments, and the Central Council shall before submitting the Education Regulations or any amendment thereof, as the case may be, to the Central Government for approval under sub-section (1) take into consideration the comments of any State Government received within three months from the furnishing of the copies as aforesaid.

(4) The Education Regulations shall be published in the Official Gazette and in such other manner as the Central Council may direct.

(5) The Executive Committee shall from time to time report to the Central Council on the efficacy of the Education Regulations and may recommend to the Central Council such amendments thereof as it may think fit.

***Section 18. Power to make regulations**.--(1) The Central Council may, with the approval of the Central Government, [by notification in the Official Gazette,] make regulations consist with this Act to carry out the purposes of this Chapter.*

(2) In particular and without prejudice to the generality of the foregoing power, such regulations may provide for--

[(a) the management of the property of the Central Council;]

(b) the manner in which elections under this Chapter shall be conducted;

(c) the summoning and holding of meetings of the Central Council, the times and places at which such meetings shall be held, the conduct of business thereat and the number of members necessary to constitute a quorum;

(d) the functions of the Executive Committee, the summoning and holding meetings thereof, the times and places at which such meetings shall be held, and the number of members necessary to constitute a quorum;

(e) the powers and duties of the President and Vice-President;

(f) the qualifications, the term of office and the powers and duties of the [Registrar, Secretary], Inspectors and other officers and servants of the Central Council,

including the amount and nature of the security to be furnished by the [Registrar or any other officer or servant].

(g) the manner in which the Central Register shall be maintained and given publicity;

(h) constitution and functions of the committees other than Executive Committee, the summoning and holding of meetings thereof, the time and place at which such meetings shall be held, and the number of members necessary to constitute the quorum.

(3) Until regulations are made by the Central Council under this section, the President may, with the previous sanction of the Central Government, make such regulations under this section, including those to provide for the manner in which the first elections to the Central Council shall be conducted, as may be necessary for carrying into effect the provisions of this Chapter, and any regulations so made may be altered or rescinded by the Central Council in exercise of its powers under this section.

[(4) Every regulation made under this Act, shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the regulation or both Houses agree that the regulation should not be made, the regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that regulation.]"

11. Powers to frame regulations to carry out the purpose of the Act 1948, has been conferred upon the Central Council under Section 18 of the Act, 1948. Sub section (1) of Section 10 specifically confers power upon the Central Council, subject to approval of the Central Government, to make education regulations, **prescribing the minimum standard** of education required for qualification as a pharmacist. Sub section (2) of Section 10 empowers the Central Council to frame education regulation prescribing (a) the nature and period of study and of practical training to be undertaken before admission to an examination; (b) the equipment and facilities to be provided for students undergoing approved courses of study; (c) the subjects of examination and the standards therein to be attained; and (d) any other conditions of admission to examinations. Thus, to maintain standard of education, it is necessary to have good quality teachers.

12. By the Regulation 2014, to maintain the minimum standard of teaching, the minimum qualification and experience for appointment as teachers in various departments of pharmacy college or institution imparting diploma in graduate and post graduate education has been prescribed as mentioned in the Schedule appended to the Regulations. Clause (ii) of the Schedule is relevant for the purposes of the present case which alongwith notes is reproduced below :-

"B.Pharm/Pharm.D/Post graduate course in Pharmacy -

Director/ Principal / Head of Institution	***First Class B.Pharm*** *with Master's degree in Pharmacy (M Pharm) in appropriate branch of specialization in Pharmacy or Pharm.D (Qualifications must be PCI recognised) with PhD degree in any of Pharmacy subjects (PhD Qualifications must be PCI recognized)*	*<u>Essential</u> 15 years experience in teaching or research out of which 5 years must be as Professor/ HOD in a PCI approved/recognised pharmacy college. <u>Desirable</u> Administrative experience in a responsible position.*
Professor	*Master's degree in Pharmacy (M.Pharm) in appropriate branch of specialization in Pharmacy or Pharm.D (Qualifications must be PCI recognized) With PhD degree in any of Pharmacy subjects (Ph.D. Qualifications must be PCI recognized)*	*<u>Essential</u> 10 years experience in teaching in PCI Pharmacy approved/ recognized Pharmacy College or research experience out of which 5 years must be as Associate Professor in be PCI approved/recognized Pharmacy College.*
Associate Professor	***First Class B.Pharm*** *with Master's degree in Pharmacy (M.Pharm) in appropriate branch of specialization in Pharmacy (Qualification must be PCI recognized) A PCI recognized Pharm.D degree holder shall also be eligible for the posts of Associate Professor in the subjects of pathophysiology, pharmacology sand pharmacy practice*	*3 years experience in teaching or research at the level of Assistant Professor or equivalent in PCI approved/ recognized Pharmacy College.*
Lecturer/	***First Class***	A lecturer

Assistant Professor	***B.Pharm*** *with Master's degree in Pharmacy (M.Pharm) in appropriate branch of specialization in pharmacy (Qualification must be PCI recognised).* *A PCI recognised Pharm.D degree holder shall also be eligible for the posts of Lecturer/Assistant Professor in the subjects of pathophysiology, Pharmacology and pharmacy practice.*	will be re-designated as Assistant Professor after 2 years of teaching experience in PCI approved/recognised Pharmacy College.

Note:

(i) Notwithstanding anything contained in the Education Regulations, 1991, the Pharm.D Regulations. 2008 or any other documents approved by the PCI the minimum qualification and experience for the teaching faculty in pharmacy shall be as mentioned in these regulations w.e.f. the date of their publication in the Official Gazette.

(ii) The existing teaching faculty working on regular basis shall not be affected. However, promotions of such faculty will be governed by these regulations.

(iii) If a class or division is not awarded at Master level, a minimum of 60% marks in aggregate or equivalent cumulative grade point average shall be considered equivalent to first class or division, as the case may be.

*(iv) The existing teaching faculty working on regular basis can be appointed in any other Pharmacy College/ Institution on the same post from which such faculty member retired/relieved, however, promotions of such faculty member shall be governed by these regulations. *

ARCHNA MUDGAL. Registrar-cum-Secy.

[ADVT. III/4/Exty/101/14]"

13. Since the Act, 1948 empowers the Central Council to frame regulations prescribing the minimum standard of education, therefore, the regulation 2014 prescribing minimum standard as First class B. Pharm amongst others, is well within the powers conferred under Section 10 read with Section 18 of the Act, 1948. **Thus, the impugned clause of the Regulation 2014 is not violative of the principal Act, 1948.**

14. To prescribe essential qualifications for appointment to a post is essentially within the domain of the employer or the competent authority. The employer is best suited to decide the requirement that a candidate must possess according to the needs of the employer and the nature of work. The court can not lay down the conditions of eligibility and can not dwell into the issue with regard to the minimum standard prescribed by the competent authority by Regulation 2014. This settled position of law is also supported by the law laid down by Hon'ble Supreme Court in the case of **Maharashtra Public Service Commission Vs. Sandeep Shriram Warade and others, (2019) 6 SCC 362 (Para 9) and Civil Appeal No.11853 - 11854 of 2018 Zahoor Ahmad Rather and Ors. etc. Vs. Sheikh Imtiyaz Ahmad and Ors. etc.** decided by Hon'ble Suprme Court by judgment dated 05.12.2018.

15. The submission of learned counsel for the petitioner that prescribing "First

Class B. Pharm" is violative of Article 14 of the Constitution of India, has no leg to stand.

16. Education is necessary to develop the personality of a person as a whole and in totality as it provides the process of training and acquiring the knowledge, skills, developing mind and character by formal schooling. Therefore, it is necessary to maintain high academic standard and academic discipline along with academic rigour. Democracy depends for its own survival on a high standard of vocational and professional education. Therefore, in order to maintain standard of education in Institutions imparting education in the filed of pharmacy, and to develop knowledge and skill of students, it is a basic requirement to recruit good quality and most suitable Teachers in order to maintain excellence and standard of teaching in the Institution. To achieve this object of the Act 1948, the impugned regulations provides for certain educational qualification for recruitment on the post of Principal, Professor, Associate Professor and Lecturer/ Assistant Professors. One of the essential qualification for Associate Professor and Lecturer/Assistant Professor is "First Class B. Pharm" which can not be said to be irrelevant or violative of Article 14 or 21 of the Constitution.

17. In the case of **Prit Singh (Dr.) Vs. S.K. Mangal 1993 Supp (1) SCC 714 (Para 12 & 13)**, Hon'ble Supreme Court examined the case of a person who **did not possess the requisite percentage of marks** as per the statutory requirement and held that he cannot hold the post. **The sole object of prescribing qualification that a candidate must have a consistently good academic record with first class Degree for appointment to the post of Associate Professor or Lecturer/Assistant Professor, is to select a most suitable person in order to maintain excellence and standard of teaching in the institution apart from administration.** Thus, if the essential educational qualification prescribed under the Regulation 2014 for recruitment to the post in question, is not satisfied by a person, then he shall not be eligible to apply for the post.

18. In the absence of enabling provision for grant of relaxation, no relaxation can be made to relax the essential qualification. Even if such a power is provided under the Statute, it cannot be exercised arbitrarily, vide **Union of India v. Dharam Pal & Ors., (2009) 4 SCC 170**. Such a power can not be exercised treating it to be an implied, incidental or necessary power for execution of the statutory provisions. In the present set of facts even the regulation do not confer any power to relax the aforesaid essential qualification of "First Class B Pharm".

19. In the case of **State Of Orissa Vs. Mamata Mohanty 2011 3 SCC 436** (Para 20, 21 and 68) Hon'ble Supreme Court considered the challenge of essential qualification of certain percentage of marks in the recruitment of lecturer in affiliated colleges and held it to be valid. The relevant portion of the judgment in the case of **State Of Orissa Vs. Mamata Mohanty (supra)(Para 20, 21 and 68)** is reproduced below :

"20.The Government of Orissa, Education and Youth Services Department Resolution dated 5-9-1978 dealt with the subject, qualification for recruitment of Lecturers in affiliated colleges of the State

of Orissa and the relevant part reads as under:

"A consistently good academic record with at least first or high second class (B in the seven-point scale) at the Master's degree in a relevant subject. ***In other words, the University Grants Commission intended to determine high second class as average of minimum percentage of marks of second division and first division as (48+60) 54%....****"*

21. The Orissa State Gazette, 19-8-1983 published a Resolution dated 16-7-1983 prescribing the eligibility for appointment of teachers in affiliated colleges. The relevant part reads as under:

"(a) Candidate should have an MPhil degree or a recognised degree beyond Master's level with at least a second class Master's degree;

(b) A candidate not holding an MPhil degree should possess a high second class ***Master's degree i.e. 54% of marks and a second class Honours/Pass in the BA/BSc/BCom examination;*** *or*

(c) A candidate not holding an MPhil degree but possessing a second class Master's degree ***should have obtained a first class in the Honours/Pass in the BA/BSc/BCom examination***

68. From the aforesaid discussion, the following picture emerges:

(i) The procedure prescribed under the 1974 Rules has not been followed in all the cases while making the appointment of the respondents/teachers at initial stage. Some of the persons had admittedly been appointed merely by putting some note on the noticeboard of the College. Some of these teachers did not face the interview test before the Selection Board. Once an order of appointment itself had been bad at the time of initial appointment, it cannot be sanctified at a later stage.

(ii) At the relevant time of appointment of the respondents/teachers there has been a requirement of possessing good second class i.e. 54% marks in Master's course and none of the said respondents had secured the said percentage.

(iii) Their appointments had been approved after a long, long time. In some cases after 10-12 years of their initial appointment by the statutory authority i.e. Director of Higher Education.

(iv) A candidate becomes eligible to apply for a post only if he fulfils the required minimum benchmark fixed by the rules/advertisement. Thus, none of the respondents could even submit the application what to talk of the appointments.

(v) The so-called relaxation by Utkal University was accorded by passing a routine order applicable to a large number of colleges, that too after a lapse of long period i.e. about a decade.

(vi) Fixation of eligibility falls within the exclusive domain of the executive and once it has been fixed by the State authorities under the 1974 Rules, the question of according relaxation by Utkal University could not arise and, therefore, the order of condonation, etc. is a nullity.

(vii) The relaxation has been granted only by Utkal University though Rule 2(i) of the 1974 Rules defined "University" means Utkal University, Berhampur University, Sambalpur University and Shri Jagannath Sanskrit Vishwa Vidyalaya.

(viii) Granting relaxation at this stage amounts to change of criteria after issuance of advertisement, which is impermissible in law. More so, it is violative of the fundamental rights enshrined under Articles 14 and 16 of the Constitution of the similarly situated persons, who did not apply considering

themselves to be ineligible for want of required marks.

(ix) The exercise of condonation of deficiency had not been exercised by any university other than Utkal University.

(x) The post of the teachers i.e. the respondents is transferable to any college affiliated to any other university under the 1979 Rules.

(xi) The power to grant relaxation in eligibility had not been conferred upon any authority, either the university or the State. In the absence thereof, such power could not have been exercised.

(xii) This Court inDamodar Nayak[(1997) 4 SCC 560 : 1997 SCC (L&S) 979 : AIR 1997 SC 2071] has categorically held that a person cannot get the benefit of grant-in-aid unless he completes the deficiency of educational qualification. Further, this Court inBhanu Prasad Panda (Dr.)[(2001) 8 SCC 532 : 2002 SCC (L&S) 14] upheld the termination of services of the appellant therein for not possessing 55% marks in Master's course.

(xiii) The aforesaid two judgments inDamodar Nayak[(1997) 4 SCC 560 : 1997 SCC (L&S) 979 : AIR 1997 SC 2071] andBhanu Prasad Panda (Dr.)[(2001) 8 SCC 532 : 2002 SCC (L&S) 14] , could not be brought to the notice of either the High Court or this Court while dealing with the issue. Special leave petition inKalidas Mohapatra[SLPs (C) Nos. 14206-09 of 2001 decided on 11-3-2002] has been dealt with without considering the requirement of law merely making the reference to Circular dated 6-11-1990, which was not the first document ever issued in respect of eligibility. Thus, all the judgments and orders passed by the High Court as well as by this Court cited and relied upon by the respondents are held to be not of a binding nature. (Per incuriam)

(xiv) In case a person cannot get the benefit of grant-in-aid scheme unless he completes the deficiency of educational qualification, question of grant of UGC pay scale does not arise.

(xv) The cases had been entertained and relief had been granted by the High Court without considering the issue of delay and laches merely placing reliance upon earlier judgments obtained by diligent persons approaching the courts within a reasonable time.

(xvi) The authority passed illegal orders in contravention of the constitutional provisions arbitrarily without any explanation whatsoever polluting the entire education system of the State, ignoring the purpose of grant-in-aid scheme itself that it has been so provided to maintain the standard of education.

(xvii) The High Court granted relief in some cases which had not even been asked for as in some cases the UGC pay scale had been granted with effect from 1-6-1984 i.e. the date prior to 1-1-1986 though the same relief could not have been granted. Thus, it clearly makes out a case of deciding a case without any application of mind.

(xviii) In some cases the UGC pay scale has been granted by the High Court prior to the date of according the benefit of grant-in-aid scheme to the teachers concerned which was not permissible in law in view of the law laid down by this Court inDamodar Nayak[(1997) 4 SCC 560 : 1997 SCC (L&S) 979 : AIR 1997 SC 2071] .

(xix) The grievance of the respondents that not upholding the orders passed by the High Court in their favour would amount to a hostile discrimination is not worth acceptance for the reason that Article 14 of the Constitution envisages only positive equality.

(xx) Concept of adverse possession of lien on post or holding over are inapplicable in service jurisprudence.

(xxi) The submission on behalf of the respondents that government orders/ circulars/letters have been complied with, therefore, no interference is called for, is preposterous for the simple reason that such orders/circulars/letters being violative of statutory provisions and constitutional mandate are just to be ignored in terms of the judgment of this Court inRam Ganesh Tripathi[(1997) 1 SCC 621 : 1997 SCC (L&S) 186 : AIR 1997 SC 1446] ."

20. Thus, the essential qualification of "**First Class B. Pharm**" amongst other essential qualifications provided under the Regulation, 2014 for recruitment on the post of Associate Professor and Lecturer/Assistant Professor is wholly valid and does not violate fundamental rights of the petitioners under Article 14 and 21 of the Constitution of India.

21. The petitioner has not shown that how amongst equally situated persons, the impugned Regulations 2014 causes any discrimination. Therefore, the argument of learned counsel for the petitioner that prescribing "First Class B. Pharm" amounts to discrimination and thus violative of Article 14 of the Constitution of India, is wholly baseless and is hereby rejected.

22. Nothing could be pointed out nor any material could be placed by learned counsel for the petitioner before us to demonstrate that the impugned provisions of the Regulation 2014 violates fundamental rights of the petitioner guaranteed under Article 21 of the Constitution of India.

23. For all the reasons aforestated, we do not find any merit in this writ petition. Consequently, the writ petition fails and is hereby **dismissed.**

(2023) 1 ILRA 1143
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.11.2022

BEFORE

THE HON'BLE RAJIV JOSHI, J.

Writ- A No. 39898 of 2015

Uma Shanker Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Kumar Pandey, Sri J.S. Pandey

Counsel for the Respondents:
C.S.C.

A. Service Law – Pension - Uttar Pradesh Collection Amins Service Rules, 1974 - Fundamental Rule 56 - Substantive appointment is not a condition precedent for entitlement of pensionary benefit. The appointment has to be a regular appointment on the pensionable establishment of the Government to earn pension. (Para 12, 15)

In the present case, petitioner was initially appointed as Seasonal Collection Amin on 03.02.1978 in pay scale 200-320 and thereafter, was granted regular pay scale of Collection Amin from 1982, until his retirement on attaining the age of superannuation on 31.12.2012. Petitioner was granted increments, bonus, leave encashment and income tax was regularly deducted from his salary. The pay scale was revised from time to time. The petitioner came to be appointed in the year 1978 and retired in the year 2012, having rendered service for three decades as temporary employee appointed against a post. (Para 2, 3)

This Court is of the view that as the controversy involved in the present case has already been decided by this Court vide order dated 18.09.2019 passed in Writ-A No. 10116 of 2018, the present writ petition is allowed in the same terms. The petitioner is entitled to pension. (Para 16)

Writ petition allowed. (E-4)

Precedent followed:

1. Hari Shankar Asopa Vs St. of U.P. & anr. (Para 4)

2. Shakuntala @ Brahmo Devi (Smt.) Vs Director of Pension (Para 6)

3. Bench in Board of Revenue & ors. Vs Prasidh Narain Upadhyay (Para 8)

4. Yashwanti Hari Katakkar Vs U.O.I. & ors. (Para 9)

5. A.P. Srivastava Vs U.O.I. & ors. (Para 10)

6. Ram Pratap Vs St. of U.P. (Para 10)

7. Babu Singh Vs St.of U.P. (Para 10)

8. Kedar Ram-I Vs St. of U.P. (Para 10)

9. Ram Sajiwan Maurya Vs St. of U.P. & ors. (Para 10)

10. Kanti Devi Vs St. of U.P. (Para 10)

11. Kishan Singh Vs St. of U.P. (Para 10)

12. Awadh Bihari Shukla Vs St. of U.P. (Para 10)

13. St.of U.P. & ors. Vs Mahendra Chaubey (Para 11)

14. Prem Singh Vs St. of U. P. (Para 13)

15. Suresh Chandra Pandey Vs St.of U.P. & ors., Writ-A No. 10116 of 2018 (Para 15)

Present petition assails order dated 04.04.2015, rejecting the claim of the petitioner for regularization and order dated 07.03.2018, declining to grant post retiral benefits, as well as, pension, passed by the District Magistrate, Ballia,

(Delivered by Hon'ble Rajiv Joshi, J.)

1. Heard Shri Ashok Kumar Pandey, learned Counsel for the petitioner and Shri Govind Narain Srivastava, learned Standing Counsel for the respondents-State.

2. The petitioner was initially appointed as Seasonal Collection Amin on 03.02.1978 in pay scale 200-320 and thereafter, was granted regular pay scale of Collection Amin from 1982, until his retirement on attaining the age of superannuation on 31.12.2012. Petitioner was granted increments, bonus, leave encashment and income tax was regularly deducted from his salary. The pay scale was revised from time to time. During service, petitioner filed several petitions seeking regularization under 35% quota provided under the Uttar Pradesh Collection Amins Service Rules, 1974 (for short "the Rules 1974"). The petition being Writ- A No.20531 of 2010 came to be disposed of on 24.11.2014, directing the Collector, Ballia, to consider the claim of the petitioner for regularization on the post of Collection Amin under the Rules, 1974. The District Magistrate, Ballia, vide order dated 04.04.2015 rejected the claim of the petitioner on the ground that he was not found suitable, which is under challenge in this writ petition.

3. It is urged that by the learned counsel for the petitioner that the petitioner came to be appointed in the year 1978 and retired in the year 2012, having rendered service for three decades as temporary employee appointed against a post, therefore, is entitled to pension.

4. The Division Bench of this Court in **Hari Shankar Asopa Versus State of U.P. and another**, was considering as to whether a temporary government servant appointed against substantive post and continued as lecturer, reader and professor of surgery is entitled to retiring pension upon seeking to retire voluntarily. The Court upon considering the Articles 465 and 465A of the Civil Service Regulations read with Financial Hand Book Volume-II Part 2 to 4 made the following observation:-

"16. The requirement of employment being substantive and permanent, which is one of the three basis constituents of "qualifying service', envisaged in Articles 465 and 465-A has ceased to be sine qua non for earning a retiring pension by service under the Government of Uttar Pradesh after 7th June, 1975 with effect from which date the Uttar Pradesh Fundamental Rule 56 (amendment and Validation) Act, 1975 U.P. Act No. 24 of 1975), amending Rule 56 of the Rules and rescinding Articles 465 and 465-A of the Regulations, has been enforced. Now the source for attaining the right to retiring pension in R. 56.....

Clause (e) of Rule 56 unequivocally recognises, declares and guarantees retiring pension to every Government servant who retires on attaining the age of superannuation or who is prematurely retired or who retires voluntarily. To be precise, every Government servant (whether permanent or temporary) who retires under Cl. (a) or Cl. (b). or who is required to retire, or who is allowed to. Retire under Cl. (c) of R. 56, becomes entitled for a retiring pension, provided, of course, the first and third conditions stipulated in Article 361 of the Regulations are satisfied."

5. The Court accordingly held that person appointed temporarily against a substantive vacancy is entitled to retiring pension in view of Rule 56 of the Fundamental Rules.

6. In **Shakuntala @ Brahmo Devi (Smt.) Versus Director of Pension**, the learned Single Judge of this Court was called upon to consider whether a temporary government servant rendering 34 years of service upon being compulsory retired is entitled to pensionary benefit. While deciding the issue the Government Order dated 01.07.1989, provided that government servants not rendering ten years of regular service are not entitled for pensionary benefits. The Court taking note of the provisions of Articles 361, 424, 465 of the Civil Service Regulations and Fundamental Rule 56 observed as follows:

"10.....By Government order dated 1.7.1989, it was provided that temporary Government servants who have rendered ten years regular service are also entitled for the retirement benefits. The aforesaid Government order was issued with intent to extend the pensionary benefits to temporary Government servants, which is clear from the first paragraph of the Government order. Paragraph 2 of the Government order further provides that those temporary Government servants who have completed minimum ten years regular service on the date of retirement/superannuation or who have been declared invalid by the appointing authority will be entitled to the superannuation/invalid pension, gratuity, family pension as admissible to a permanent employee. Paragraph 3 further provides that this provision will also be applicable in those cases where permission has been granted for voluntary retirement in accordance with the fundamental Rule

56. The Government order does not specifically provide that the persons who are compulsorily retired will not be given the benefit.....

11..... Thus, the intendment of Rule 56 (e) is to provide retirement pension to every Government servant who retires or is required to retire under Rule 56. Thus the intendment of statutory Rule 56 (e) is to extend benefit of retiring pension to both category of persons, i.e., persons compulsory retired or persons voluntarily retired. From the above intendment of rule, it is clear that no distinction or discrimination has been maintained with regard to payment of retiring pension to persons voluntarily retired or compulsorily retired. Thus, by Government order dated 1.7.1989 the temporary Government servant compulsorily retired cannot be excluded from benefits of retiring pension. When the statutory Rule, i.e., 56 (e) does not maintain any distinction with regard to payment of retiring pension to persons compulsorily retired and voluntarily retired, no such classification can be created by a Government order, which is an executive order. The object of the Government order as noted above was to extend pensionary benefits to temporary Government servants who have rendered ten years regular service. Thus, the persons compulsorily retired cannot be excluded from the pensionary benefits and if it is accepted that the Government order dated 1.7.1989 creates such classification, then the said classification will be arbitrary and unreasonable. It is thus held that the benefit of Government order dated 1.7.1989, is also available to the temporary Government servants who are compulsorily retired. There is no rational basis for any such classification nor there can be any valid object for such classification."

7. The Court upon perusal of the Government order dated 01.07.1989 was of the opinion that the Government order refers to "regular service" and not "substantive service". The Court explained what was meant of regular service. Relevant portion of the order reads thus:

"12.....The words **nl o"kZ dh fu;fer lsok iw.kZ dj yh gks*A** used in the Government order dated 1.7.1989, means completion of ten years regular service. Words "regular service" has not been defined in the Government order. From a reading of the Government order, it is clear that the word "ten years regular service" has been referred to the service rendered and not to the status of employee, an employee substantively appointed and permanent is automatically entitled for pension. The Government order dated 1.7.1989 does not contemplate ten years substantive service. The word "regular service" used in the Government order is not anonymous to substantive service. Admittedly, the benefit by Government order is to be extended to temporary Government servants. The temporary Government servant cannot be said to have substantive or regular service. Thus, the word "regular service" used in the Government order dated 1.7.1989 has not been used as specifying the capacity or status of its holder rather. The word "regular service" has been used to denote and specify the nature of service rendered. The emphasis is that service should be "regular". While defining the word 'regular', the Apex Court in Mrs. Raj Kanta v. Financial Commissioner, Punjab and another, AIR 198O SC 1464, has held in paragraph 10 as under :

"To begin with, the word "regular" is derived from the word "regula" which means 'rule' and its first and legitimate signification, according to Webster, is conformable to a rule, or agreeable to an

established rule, law, or principle, to a prescribed mode. In Words and Phrases (Vol. 36A P. 241) the word "regular" has been defined as 'steady or uniform in course, practice or occurrence, etc., and implies conformity to a rule, standard, or pattern'. It is further stated in the said Book that 'regular' means steady or uniform in course, practice, or occurrence, not subject to unexplained or irrational variation. The word 'regular' means in a regular manner, methodically, in due order. Similarly, Webster's New World "Dictionary defines 'regular' as 'consistent or habitual in action', not changing, uniform, conforming to a standard or to a generally accepted rule or mode of conduct'."

13. From the above passage of the Apex Court's judgment, it is clear that service of a temporary employee should be in regular manner, methodically, in due order.

14. Government order dated 1.7.1989 meant ten years of temporary Government servant should be regular in nature meaning thereby that if the temporary Government servant has performed his duties irregularly, i.e, with gaps of years, his service may not be treated to be regular. ....."

8. The decision was considered by the subsequent Division **Bench in Board of Revenue and others Versus Prasidh Narain Upadhyay.** The issue before the Court was whether a seasonal collection peon subsequently confirmed is entitled to pension on rendering 36 years of the continuous service. The plea of the State-respondent that since the petitioner therein had not completed 10 years of substantive service after confirmation is not entitled to pension was rejected.

9. In **Yashwant Hari Katakkar v. Union of India and ors**, it was held that an employee who has served more than 20 years is entitled to pension and denial of retiring pension to the petitioner on the ground of not being permanent on any post clearly is violative of Clause (e) of Fundamental Rules, 56. The department cannot keep a person temporary or on daily wages indefinitely.

10. In A.P. Srivastava v. Union of India and Ors., the Supreme Court has clearly taken a view that in case of a temporary employee who has rendered 20 years of service is entitled to pension. In the expression 'substantive capacity' the emphasis imparted by the adjective 'substantive' is that a thing is substantive if it is essential part of the constituent or relating to what is essential. Therefore, when a post is vacant, however, designated in officilase, the capacity in which the person holds the post has to be ascertained by the State. The substantive capacity refers to capacity in which person holds the post and not necessarily to the nature and character of the post. Thus, a person is said to hold a post in a substantive capacity when he holds it for an indefinite period especially for a long duration in contradistinction to a person who holds it for a definite or a temporary period or holds it on probation subject to confirmation. ((**Refer Ram Pratap V. State of U.P.6, Babu Singh V. State of U.P.7, Kedar Ram-I v. State of U.P.8, Ram Sajiwan Maurya v. State of U.P. and others9, Kanti Devi v. State of U.P.10, Kishan Singh v. State of U.P.11, Awadh Bihari Shukla v. State of U.P.12)**

11. The Division Bench of this Court in **State of U.P. and others v. Mahendra Chaubey**, allowed the claim of pension of a seasonal collection amin whose temporary service was followed by

substantive appointment despite the petitioner therein having not rendered 10 years substantive service after regularization.

12. The principle that emerges from the spectrum of decisions is that a temporary employee appointed on the regular establishment of the Government is entitled to pension under Fundamental Rule 56.

13. A three Judge Bench of the Supreme Court in **Prem Singh vs. State of Uttar Pradesh** was considering the question, as to whether, Rule 3 (8) of the U.P. Retirement Benefits Rules, 1961 and Regulation 370 of the Civil Services Regulation of Uttar Pradesh should be struck down having regard to the fact that the Supreme Court had upheld the pari materia provision enacted in the State of Punjab which excluded computation of the period of work-charged services from qualifying service for pension.

14. The appellant before the Supreme Court was a work-charged employee having put in more than three decades of service, pension was declined as the appellant had not put in 10 years of regular service after regularization. The question posed was whether after regularization employees are entitled to count their past service. The Court made the following observations:

"29. 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. Payment used to be made monthly but the appointment was made in the pay scale of Rs.200-320. Initially, he was appointed in the year 1978 on a fixed monthly salary of Rs.205 per month. They were allowed to cross efficiency bar also as the benefit of pay scale was granted to them during the period they served as work-charged employees they served for three to four decades and later on services have been regularized time to time by different orders. However, the services of some of the appellants in few petitions/appeals have not been regularized even though they had served for several decades and ultimately reached the age of superannuation.

30. 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.

31. 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.

32. 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.

33. 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.

34. In view of the note appended to Rule 3(8), which we have read down, the provision contained in Regulation 370 of the Civil Services Regulations has to be struck down as also the instructions contained in Para 669 of the Financial Handbook.

35. 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 under the Government instructions and even as per the decision of this Court in Secretary, State of Karnataka and others vs. Uma Devi,

2006 (4) SCC 1. This Court in the said decision has laid down that in case services have been rendered for more than ten years without the cover of the Court's order, as one time measure, the services be regularized of such employees. In the facts of the case, those employees who have worked for ten years or more should have been regularized. It would not be proper to relegate them for consideration of regularisation as others have been regularised, we direct that their services be treated as a regular one. However, it is made clear that they shall not be entitled to claiming any dues of difference in wages had they been continued in service regularly before attaining the age of superannuation. They shall be entitled to receive the pension as if they have retired from the regular establishment and the services rendered by them right from the day they entered the work-charged establishment shall be counted as qualifying service for purpose of pension.

36. In view of reading down Rule 3(8) of the U.P. Retirement Benefits Rules, 1961, we hold that services rendered in the work-charged establishment shall be treated as qualifying service under the aforesaid rule for grant of pension. The arrears of pension shall be confined to three years only before the date of the order. Let the admissible benefits be paid accordingly within three months. Resultantly, the appeals filed by the employees are allowed and filed by the State are dismissed."

15. Learned Counsel for the petitioner submits the similarly situated persons challenged the order dated 04.04.2015, passed by the District Magistrate, Ballia, in Writ-A No.31488 of 2015, which came to be disposed of vide order dated 27.11.2017 and pursuant to the directions of this Court, they submitted a comprehensive representation for arrears of pension, retiral dues and assailed the order rejecting their claim for regularization and the District Magistrate, Ballia by order dated 07.03.2018 declined to grant post retiral benefits, as well as, pension on the ground that they are not entitled for pensionery benefits under the Rules, 1974, after retirement from service, which was challenged in Writ-A No.10116 of 2018 (**Suresh Chandra Pandey Vs. State of U.P. and three others**) and this Court has allowed the same vide order dated 18.09.2019. The operative part of order dated 18.09.2019 is quoted as under:-

"The short question that arises in the instant writ petition is as to whether the temporary Seasonal Collection Amin is entitled to post retiral benefits. It is evident from the material placed on record that the petitioner was appointed Seasonal Collection Amin in 1978, thereafter, was given regular pay scale of Collection Amin from 1982, income tax was regularly deducted from his salary. The regular pay scale of the petitioner came to be revised from time to time. In the service book, petitioner has been referred to as a temporary employee. In the circumstances, it is not open to the respondents to deny pension discarding past services rendered by the petitioner as a temporary employee in the regular establishment of the State Government. Substantive appointment is not a condition precedent for entitlement of pensionery benefit. The appointment has to be a regular appointment on the pensionable establishment of the Government to earn pension.

In the facts and circumstances of the instant case, the petitioner admittedly came to be appointed Seasonal Collection Amin in regular pay scale admissible to the post. The revised pay was paid from time to

time. Income tax was deducted from the salary of the petitioner. In the circumstances, the law declared in **Prem Singh (supra)** entitles the petitioner to pension and retiral dues.

In view thereof, the writ petition is allowed. The impugned orders dated 7 March 2018 and 25 May 2012, passed by the third respondent-District Magistrate, Ballia and fourth respondent-Up-Ziladhikari, Ballia, respectively, are set aside and quashed. Petitioner is entitled to pension. The arrears of pension shall be confined to three years before the date of order. The respondents to pay the admissible retiral benefits within three months from the date of communication of the order."

16. This Court is of the view that as the controversy involved in the present case has already been decided by this Court vide order dated 18.09.2019 passed in Writ-A No.10116 of 2018, the present writ petition is allowed in the same terms. The petitioner is entitled to pension. The respondents to pay the admissible retiral benefits within three months from the date of communication of the order.

17. No cost.

(2023) 1 ILRA 1151
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.12.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE SYED WAIZ MIAN, J.

Criminal Appeal No. 5070 of 2013

Gudda @ Rajman @ Raj Kumar @ Jhalla ...Appellant

Versus

State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri D.P. Singh, Sri Daya Nand Pandey, Sri I.K. Chaturvedi, Sri Mukesh Singh, Sri Neeraj Kumar Pandey, Sri P.K. Singh, Sri Rajendra Prasad Tiwari, Sri Rajrshi Gupta, Smt. Usha Srivastava, Sri Sushil Kumar Dwivedi, Sri Rijvaan Ahmad, Ms. Shambhavi Shukla

Counsel for the Opposite Party:
G.A.

Criminal Law- Indian Evidence Act, 1872- Section 27- Recovery without disclosure- No other evidence-Even if, on face value, recovery of the axe and other belongings on the pointing out of the appellants/ accused is accepted, even then on that strength, appellants/ accused cannot be convicted for want of substantial evidence. Even if, it is accepted, that after their arrest they had made discloser statement to the arresting police officer yet in theevent of their denial before the Court such disclosure statement cannot be relied and accepted. Merely, on the strength of the discovery of the skelton, weapon of offence axe with handle, clothes and other belongings of the deceased at the pointing out of Raju Kol, it cannot be suggested that he had done any act of concealment of the weapon of offence and body etc.,and it is not sufficient to infer authorship of concealment by Raju Kol, who got discovered assault weapon and dead body of the deceased.

Settled law that merely on the basis of recovery of alleged incriminating articles upon the pointing out of the deceased where no disclosure has been made and there is no other substantive evidence, conviction cannot be secured.

Criminal Appeal Allowed. (E-3)

Case Law/ Judgements relied upon:-

1. Shahaja @ Shahajan Ismail Mohd. Shaikh Vs St. of Mah.; 2022 Live Law (SC) 596

2. Hanumant Vs The St. of M. P., reported in 1975 AIR 1083

3. Jaharlal Das Vs St. Of Orissa, reported in 1991 AIR 1388

(Delivered by Hon'ble Syed Waiz Mian, J.)

1. This Appeal has been directed against the impugned judgment and order dated 18.10.2013, passed by Special Judge, D.A. Act/Additional Sessions Judge, Court No. 1 Chitrakoot, in connection with Session Trial No. 147 of 2007, State vs. Gudda @ Rajman @ Raj Kumar @ Jhalla @ Guddu Kol and others, whereby, the learned trial Court has convicted the appellants/ accused with multiple sentences, for offences under Sections-147, 148, 149, 364, 302, 201 I.P.C. and Section 14 of D.A. Act, Police Station-Raipura, District-Chitrakoot.

2. It has also been directed that all sentences shall run concurrently.

3. Heard Shri Rajrshi Gupta assisted by Shri Rijvaan Ahmad, Ms. Shambhavi Shukla, Shri D.P. Singh, learned counsels for the appellants and Shri Om Prakash Mishra, learned A.G.A. for the State and perused the record.

4. Brief facts of the prosecution story unfolds as under:

5. Informant Raghunandan Pathak, along with Ram Khilawan, came to village Hanumanganj, to purchase wheat. They came at the gate of Kamla in Kol Basti. In the village Hanumanganj, Daya Shankar Kol met them; Shankar Kol was also present, who made some conversation with Raghunandan. After a while, informant's brother, Rajjan Mishra, had also reached there and seen that Shankar Kol, Raghunandan, had some talk with him, Gudda Kol had also reached there and Shankar Kol, Gudda Kol and Jiya Lal caught the hand of his bother and took his brother towards Jungle; at some distance, 15-20 people were spotted sitting in two black four wheelers; Shankar Kol, Gudda and Jiya Lal took his brother near the persons who were sitting in two four wheeler vehicles and leaving their vehicles on spot, they all took his brother towards Jungle and after some time, both vehicles returned towards Lalta Road.

6. It is further alleged in the written First Information Report, Exhibit Ka 3 that on 22.05.2007 at around 10 p.m. Shankar Kol, Gudda Kol and Jiya Lal had visited his village and had forbidden to pluck Tendu leaves.

7. It is also alleged in the written First Information Report that on 23.05.2007 at around 4 a.m. wife of Gopi, and Rajjan had also went in the northern side of Jungle to pluck Tendu leaves, where Shankar, Gudda Kol and Jiya Lal were also present and all of them had forbidden the aforementioned women to pluck Tendu leaves. They had returned to their village; since then his brother Rajjan Mishra was missing. Shankar Kol, Gudda Kol, Jiya Lal and their 15-20 associates to whom he had, no acquaintance, kidnapped his brother with intention to kill him, from village-Hanumanganj. He and others made search of Rajjan Mishra, but could not get any information. Since the next day of the incident Raghunandan had also gone to an undisclosed place.

8. On the basis of written First Information Report, Exhibit Ka- 13, a

criminal case at Crime No. 46 of 2007 under Sections-147, 148, 149, 364, 302, 201 I.P.C. and 14 of D.A.A. Act, on 05.06.2007 at 13.30 p.m. was lodged against accused Shankar Kol, Gudda Kol and Jiya Lal and their 15-20 associates. Substance of the First Information Report was entered into G.D. No. 27 on 05.06.2007 at 1:30 p.m. and matter was investigated.

9. During investigation, accused Radhe @ Subedar was arrested. Investigating Officer took him on police remand for 48 hours and on his interrogation he stated that he can get recovered the voter I.D. and Ration card of Rajjan Mishra and the investigating officer, along with police team on 15.05.2008, accused Raju Kol, Sukhnandan, along with public witnesses, Dharmendra Pandey and Rajjan Mishra, went towards Giduraha (Bandhak) Jungle, at Hanuman Chauk. Accused Radhe @ Subdear Singh, took them in the east of Hanuman Mandir, Manikpur Range, near a deserted Kothri and accused Radhe informed them that near the roof of said Kothri in the heap of bricks he had concealed the I.D. card and ration card. Accused Radhe @ Subedar, entered into the deserted Kothri and from heap of bricks, lying near the roof, one polythene packet got recovered and the same was handed over to him. On opening this packet one voter identity card bearing No. CYQ 1410752, having been issued by the Indian Election Commission, in the name of Rajendra S/o Ram Pratap, male age 37 (on 01.01.2001) and on the back of the identity card House No. 144, Gram-Khandeha, Police Station-Mau, District-Chitrakoot, constituency No. 315, Manikpur, was marked. This identity card was having been issued on 14.10.2001, photo of Rajendra was also pasted thereon. From the said polythene packet, one ration card no. 45585 in the name of Rajednra Prasad Mishra, S/o Ram Pratap Mishra, village Kandaila, Post Singwa, Police Station-Manikpur, District-Chitrakoot was also got recovered. In the ration card name of three members of his family were noted. Both the papers were connected to Rajjan Mishra, therefore, both these papers were taken in possession by Investigating Officer and his team and these two papers were put in a polythene packet and the said packet was wrapped up in a piece of cloth which was sealed on the place of recovery in the presence of all the witnesses and a memo of recovery of aforesaid papers was written; after reading over the same to the witnesses, it was got signed by them.

10. During investigation the Investigating Officer also took Raju Kol in police custody for 48 hours on 14.05.2008 and on his interrogation, he had informed that they had killed Rajjan Mishra by assaulting him with axe. On 15.05.2008, the Investigating Officer with police personnel and also with other co-accused Sukhnandan and Radhe @ Subedar came to their camp office situated at town-Manikpur. Investigating Officer with police team along with above noted accused proceeded from their office in the hope of recovery of axe (weapon of offence); they along with the co-accused, as well as, public witnesses Dharmendra Pandey and Rajal Mishra reached near Garhit Nala (Channel) situated in the Jungle. Raju Kol pointed out that in east-west side of the channel he and co-accused Jiya Lal had killed the deceased Rajjan Mishra assaulting him with two axes and after killing him they washed the blood stained axes in the running water of the channel. They thereafter concealed both the axes beneath the stones in the bushes. Accused

Raju Kol, got recovered an axe from the said place and handed over the axe to Investigating Officer in the presence of Police personnel and public witnesses. The recovered weapon "axe' was sealed in a piece of cloth. Memo of recovery of axe, Exhibit-Ka-3 was prepared by the Investigating Officer in the presence of the witnesses and the same was also signed by them.

11. During investigation, the officer incharge of Police Station- Raipura, District-Chitrakoot, in the presence of the witnesses Pradhumn Lal Kol, Chunni Lal, in connection with the incident, the belongings of deceased Rajjan Mishra i.e. (1) Saafi (Tericot cotton mix) green checked colour, border black (2) a torn red black yellow checked full slieve shirt (3) one white sandow vest, (Amul gold, 85 c.m.) (4) Green Colour torn pant of Tericot (5) one brown colour brief, were also recovered.

12. All the aforementioned belongings of the deceased were blood stained. One pair of white colour fibre slippers was also taken in possession by the police and all the belongings of the deceased were put in a piece of cloth; memo of recovery of the said articles was prepared by Hari vansh Singh, Sub Inspector, on the dictation of Sachindra Prasad Shukla, incharge of the police station.

13. During investigation accused Radhe @ Subedar was again taken in police custody on 13.05.2008 and on the following date i.e. 14.05.2008, Station House Officer, Rishikesh Yadav, with police personnel came at Rampuriya under the territorial jurisdiction of police Station Manikpur, District-Chitrakoot. At the instance of accused Radhe @ Subedar, they reached at the house of Shiv Poojan @ Dilli, who was not found at his house however, in the presence of public witnesses and Daya Ram, house of Shiv Poojan @ Dilli, was got searched but no contraband was found. Memo, exhibit Ka-15 was accordingly prepared and the same was got signed by Smt. Sunita w/o Shiv Poojan @ Dilli and other witnesses.

14. Informant Ram Gopal Mishra, also reached at the police station on 16.07.2007 and presented an application paper no. 18- Ka, the informant averred in the application that the skeleton of his brother Rajjan Mishra was lying in the bushes grown in the channel. In the presence of informant, noted in application no. 18 Ka; the Investigating Officer with police force, along with the informant and others, reached at the said place where Skelton, clothes and slippers of the deceased were lying. Investigating Officer Sachindra Prasad Shukla, inspected the place and prepared a site plan, paper no. 20 Ka, Exhibit Ka11; people were present on the said place had apprised him that these articles were the belongings of Rajjan Mishra because on that date deceased had worned them. In the front of head of the skelton his hairs had disappeared.

15. Investigating Officer Sachindra Prasad Shukla, in the presence of Panchan, an inquest report of the skelton was prepared and skelton, pair of slipper, blood stained Safi, full sleeves checked shirt, one sandow west, one torned green colour pant and one brown colour brief, were took in the possession and memo Exhibit Ka -12 and other necessary papers on the spot were prepared by the Investigating Officer, Sachindra Prasad Shukla.

16. During investigation, Gudda @ Rajman was arrested on 22.07.2007 who disclosed to Investigating Officer that the

deceased was taken in Thick Jungle and near Garhit Nala (Channel), Rajjan Mishra, was done to death by the blows of axe.

17. During investigation, the present case was transferred to A.T.S. Lucknow. Investigating Officer, Abhay Kant Singh, took up the remaining investigation on 29.07.2007, he recorded the statements of accused and witnesses and during investigation names of accused Shankar Kol, V.M. Lal, Gotar @ Rajam @ Halla @ Raj Kumar @ Gudda Kol came in the light. Statements of Santosh Kumar Vishwakarma, Satyanarayan, Abhilash, Umesh Dwivedi, and other witnesses were also recorded. Investigating Officer collected the incriminating evidence for the offences under Section 147, 148, 149, 364, 302 and 201 I.P.C.

18. During investigation, the Investigating Officer, Abhay Kant Singh, also recorded the statements of Smt. Meena, Jamindar, and Jhadi @ Bhola @ Kamru and on the basis of evidence Section 14 of D.A. Act was also added.

19. During the course of investigation statement of Aditya Nath Tiwari, and additional statement of Santosh, Satya Narayan, and accused were also recorded.

20. During investigation to ascertain real cause of death the skelton of the deceased, inquest report and other necessary papers were forwarded to District Mortuary through police constables.

21. Dr. R.K. Rao, had conducted the autopsy over the skelton on 16.06.2007 at 3.30 p.m. and he prepared post mortem report, in his writing, Exhibit-Ka1.

22. On medical examination of the skelton Dr. R.K. Rao, could not ascertain the cause of death of the deceased. He could also not ascertain the nature of weapon by which deceased was killed. He also failed to note the approximate time of the death of the deceased.

23. After due deliberations and completion of investigation charge sheet was filed before the competent Court of criminal jurisdiction; since the matter was under the jurisdiction of Sessions Court, same has committed to it. In the District and Sessions Court Criminal case was registered as S.T. No. 148 of 2007.

24. Charges were framed, vide order dated 27.11.2007, by the Special Court, under Sections 147, 148, 364, 302, 201 read with Section 14 D.A. Act, against accused Gudda Kol and 14 others.

25. Trial Court vide its order dated 13.08.2008 also has framed charges against co-accused Subedar @ Radhe and Jiya Lal under Sections 147, 148, 364, 302 read with Sections 149, 201, 302, 364 I.P.C. and also Section 14 D.A.Act.

26. All the accused absurd their guilt and claimed complete innocence.

27. In order to prove the charges against the accused, the prosecution examined, P.W.-1 Anil Kumar Shukla, P.W.-2 Jagdish Prasad, P.W.-3 Satya Narayan, P.W.-4 Santosh Kumar Vishwakarma, P.W.-5 Umesh Chandra Dwivedi, P.W.-6-Jhari Lal, P.W.-7 Chunni Lal, P.W.8-Dr. R.K. Rao, P.W.-9/C.W.9 Rajul, P.W.10 C.P. Narendra Singh, P.W.-11 Babbu Ram, P.W.-12 Smt. Nirasha Devi, P.W.-13 Smt. Sunita, P.W.-14 Shachindra Prasad Shukla, P.W.15-Ram Gopal, P.W.-16 Smt. Meena Devi, P.W.17-Abhay Kant Singh, P.W.-18-Rishikesh

Yadav, Police Inspector, posted in S.T.F. on 30.01.2008, P.W. 19-|Ram Abhilash P.W.-20 Aditya Tiwari, P.W.-21, Ram Dayal Tiwari, P.W.-22 Dharmendra Pandey, P.W.-23-Ram Sewak, and P.W.-24-Constable Kamlesh Kumar.

28. Statements of the accused under Section 313 Cr.P.C. were recorded in which they have denied the charges and evidence against them and they have said that they have been falsely implicated due to animosity.

29. Accused in their statements under Section 313 Cr.P.C. have also stated that they shall adduce evidence in their favour. However, they have not examined any witnesses.

30. Learned trial Court after appreciating and analyzing the evidence of the witnesses and other materials available on record has convicted the appellants for aforesaid offences and also awarded punishment as mentioned in para no. 35 and 36 of the impugned judgment and order.

31. By means of instant appeal, appellants/accused have assailed the impugned judgment inter alia on the grounds that the judgment and order is illegal arbitrary and against the evidence on record; there is no direct evidence against the appellants; instant case rests upon circumstantial evidence but the chain is missing; dead body of the deceased was not recovered; as per prosecution case the skelton was recovered which was not of a human being; D.N.A. test report was found negative; recovery of axe, voter I.D. card, Ration Card etc. were false and the witnesses have turned hostile as they have not supported the prosecution case. There is also inordinate delay in lodging the First Information Report; statement of P.W-15, informant is categorical that he has not moved any application to the higher authority; he has not disclosed the name of any accused to the police; he has also stated that he has no fear of any one; his brother was a man of criminal activities and also was inimical to several persons; he was also a member of a gang and an award of 3,000/- was imposed upon him; appellants/accused have been falsely implicated at the behest of Daddu Prasad, the then Minister of the ruling party as the appellants were supporters of Samajwadi Party. It is prayed that the impugned order dated 18.10.2013, passed by the learned trial Court in connection with trial No. 148 of 2007 State vs. Gudda @ Rajman @ Raj Kumar @ Jhalla @ Guddu Kol and others under Sections-147, 148, 149, 364, 302, 201 I.P.C. and 14 D.A. Act, Police Station-Raipura, District-Chitrakoot, be set aside.

32. Informant-P.W.-15, Ram Gopal has stated in his deposition that the deceased Rajjan Mishra was his brother. On 23.05.2007 at about 9 to 9.15, he was abducted while he was in front of the house of Kamla at Hanumanganj by Shankar Kol and his two associates. One of the accused Raghunandan had suggested him and his brother to purchase wheat from Hanumanganj, in pursuance thereof he and Raghunandan departed from his house to Hanumanganj; his brother had told him that after having meal he would reach there; at the time of abduction of the deceased he (P.W.-15), Raghunandan Pathak had just reached at the house of Kamla Pokhariya, at Hanumanganj; they saw that three miscreants Shankar and his two associates, were sitting there; Raghunandan had some conversation with all three miscreants; at this stage his brother, deceased-Rajjan

Mishra also had reached there and all three miscreants abducted him towards forest. Thereafter, his brother did not return; his report at the police station was not lodged; police had lifted him from his house and also kept him in the police station lock up for five days.

33. On the request of prosecution, P.W.15 Ram Gopal was declared hostile; he has denied his statement under Section 161 Cr.P.C. and has also feigned ignorance as to how it came to be recorded by the Investigating Officer. He has further stated that he did not disclose the name of the accused to the investigating officer and how such statement came to be recorded is not known to him.

34. In cross examination-P.W.-15, Ram Gopal, brother of the deceased has not supported the allegations made in the First Information Report and with regard to accused Shakar Kol, he has contradicted in his cross examination that he had not disclosed his name to the investigating officer.

35. P.W.-16, Smt. Meena, wife of the deceased Rajjan Mishra has stated in her examination in chief that when her husband had gone to Hanumanganj to purchase wheat, he was having Rs. 100/-, betel nut, Batua and Kuraula. In the evening, her Jeth and Raghunandan Pathak had come at her house, but her husband did not return.

36. A day earlier her husband had gone to Hanumanganj, three miscreants came along with Raghunandan Pathak; she had come to know that her husband has been done to death. It is her belief that her husband Rajjan Mishra was killed at the instance of Dadua Gang, by Shankar Kol, Jiya Lal Kol and Gudda Kol. No person was coming forward to disclose the name of the miscreants due to fear.

37. In the cross examination, P.W.-16, has stated that on the date of occurrence, Raghunandan and her Jeth Ram Gopal had departed and on the same day both had returned to their house, on their way to Hanumanganj, miscreants had met and her husband was caught and abducted. After four to six days on her visit to village Hanumanganj, wherein, she was apprised that three miscreants had abducted her husband and took him towards the forest.

38. It is the case of the prosecution that deceased had departed from his house all alone and the statement of P.W.16 Smt. Meena is based on hear-say which needs corroboration but her Jeth, P.W.- 15, Ram Gopal has not supported the allegations made in the First Information Report, nor, his statement under Section 161 Cr.P.C., therefore, her indirect evidence has not been corroborated by her Jeth, P.W.-15-Ram Gopal.

39. P.W.16, Smt. Meena Devi, has also stated in her examination in chief that on the date of occurrence her brother Ram Abhilash and nephew Umesh had visited her house and after taking meal they had departed.

40. P.W.19 Ram Abhilash, has stated in his examination in chief that on 23.05.2017, he had not visited the house of her brother in law at village Kota Kadaila and he knew that his brother-in-law was killed but he has not witnessed the incident. P.W.19 Ram Abhilash has also been declared hostile and he has not supported the prosecution case in his cross examination also.

41. P.W.-20, Aditya Tiwari has deposed on 27.04.2013 stating that incident had occurred 6-7 years earlier. He along with his uncle Ram Lal Tiwari, Jimindar and Jhari Kol from village Kota Kadaila were going to their village through forest; they had heard the sound of 1-2 fire arm shots, but he has not seen the incident, nor, he had seen as to who had murdered deceased Rajjan Mishra.

42. P.W.-20, Aditya Tiwari has also been declared hostile as he has not supported the prosecution story, nor, statement under Section 161 Cr.P.C. attributed to him.

43. This witness has also admitted in his cross examination that his house from village Kota Kadaila is situated at the distance of 15 Kilometers.

44. P.W.-21 Ram Dayal Tiwari, has deposed on 27.04.2013, that the incident had occurred 6-7 years before at 10 to 10.30 A.M. when he along with Jimindar, Jhadi Kol and Aadil, were returning from village Kota Kadaila to their house at Mau Gurdari, they heard the sound of fire shots and out of fear they had hidden themselves but they did not see the incident.

45. P.W.-21 Ram Dayal Tiwari, has also been declared hostile and he has not supported his statement under Section 161 Cr.P.C. nor, the prosecution story.

46. P.W.-22 Dharmendra Pandey, deposed in his examination in chief that on 13.05.2008 police had taken Raju Kol, Radhy and Jiya Lal in their custody but he had not accompanied the police.

47. P.W.-1 Anil Kumar Shukla, stated in his testimony that Raghunandan Pathak and Jagdish were known to him. He and Jagdish, while sitting in their house, in the morning, were talking to each other, in the meantime, Raghunandan Pathak, came and said to him that he wants to speak to him in isolation to which he said that since Jagdish is his friend, therefore, he can speak in his presence, whereupon, Raghunandan Pathak had told him that in the murder of Rajjan Mishra, police were implicating him; he requested him, since police were familiar to him, therefore, to save him; he had asked Raghunandan Pahtak about the incident to which he had told him that Rajjan Mishra, has been murdered.

48. P.W. 19 Ram Abhilash, P.W. 20 Aditya Tiwari, P.W.-21 Ram Dayal Tiwari, P.W. 22 Dharmendra Pandey, in their testimonies have not whispered against the appellants/accused, nor, have supported the allegations against them. On the contrary, they have denied prosecution story and also their statements recorded under Section 161 Cr.P.C., by the investigating officer, during investigation.

49. P.W.-1, Anil Kumar Shukla has not stated in his statement that accused Raghunandan Pathak had confessed to have killed the deceased or participated in the alleged incident.

50. P.W.-2 Jagdish Prasad, in his examination in chief has stated that appellant/accused Ankaj Kumar, Ramashankar Singh and Surajpal, were known to him but rest of the accused were not known to him. He also knew Anil Kumar Shukla but he does not know the accused Raghunandan nor he has ever seen him. He further stated that he also does not know the deceased Rajjan Mishra. This witness has also denied the statement recorded under Section 161 Cr.P.C. and has

expressed his ignorance as to how his statement came to be recorded by the investigating officer.

51. P.W. 3-Satya Narayan has stated that he does not know all the accused who were present in the Court during his deposition. He has also stated that Phool Chandra was also not known to him. He refuted his statement recorded under Section 161 Cr.P.C. and deposed his ignorance as to how his statement came to be recorded by the Investigating Officer.

52. P.W.-4 Santosh Kumar Vishwakarma has also stated in his examination in chief that Rajjan Mishra, the deceased, Balkumar, Veer Singh, Radhe @ Subedar, Sotu Patel, Munna Singh, Kuldeep, Ramshankar Patel, Mahesh Kumar Narayan, Sharban Patel, Ramlal Patel, Surajbhan Patel, Girja Shankar, Munshi and Raju Kol were not known to him. On 23.05.2007 he had not seen Rajjan Mishra surrounded and was being abducted. On the contrary, he has stated that on the said date he was not present in his village as he was present in Ahmedabad.

53. P.W.-5 Umesh Chandra Dwivedi, has also stated in his examination that he knew Rajjan Mishra and he has heard about his murder but he does not know the killers. This witness has also denied his statement under Section 161 Cr.P.C.

54. P.W.-6-Jhadi Lal has also stated in his examination in chief that he knew Rajjan Mishra who was native of his village but he does not know as to how he came to be killed.

55. P.W.-7 Chunni Lal has stated in his examination in chief that he knew Rajjan Mishra, who was native of his village but he does not know as to how he came to be killed.

56. P.W.-7 Chunni Lal has stated in his examination in chief that since deceased Rajjan Mishra was a native of his village, therefore, he was known to him. In rest of his deposition he has not supported the prosecution case.

57. P.Ws.-2 to 7 have been declared hostile and also were put to cross examination on behalf of the prosecution but the sequence of denial of prosecution story has also continued in their cross examinations and thus they have not given any evidence in their respective statements in support of the prosecution story.

58. P.W.-11 Babbu Ram has stated in his examination in chief that deceased Rajjan Mishra was his brother; he was abducted on 23.05.2007 but he does not know the date of his killing. Further he has stated that his brother was killed by dacoit Dadua @ Shiv Kumar who was known to him. Dadua @ Shiv Kumar was killed in police encounter.

59. P.W.-12 Nirasha Devi, has stated in her examination in chief that on 21.02.2009, she had gone in the jungle to pluck beetle leaves; since Shankar Kol used to visit her village, hence, he was known to her but he had not met her, nor, he had forbidden her from plucking beetle leaves.

60. P.W.-13 Sunita has stated in her examination in chief, recorded on 21.02.2009 in the Court that about 4-8 months earlier, while she was plucking beetle leaves in the forest, Shankar Kol and his two associates had not prevented her from doing so. She has also expressed her

ignorance about the character of deceased Rajjan Mishra.

61. It is manifested from the testimonies of P.W.-2 to P.W.-7 and P.W.-11 to 13 that neither they have supported the prosecution story nor their statements recorded under Section 161 Cr.P.C., therefore, these witnesses P.W.-1 to P.W.-7 have been declared hostile but in their cross examinations too there is no iota of evidence against the appellants/accused.

62. P.W.-1 Anil Kumar Shukla has also denied his affidavit, paper no. 83 Ka/17, however, he has identified his photo thereon but he has stated in his testimony that he had told the investigating officer that he did not know who had killed Rajjan Mishra.

63. P.W.-2 Jagdish, has also denied paper no. 83 Ka 10 and 11 83 Ka 10-13, however, he has admitted signature on this piece of paper but, he has stated that he did not appear before the police officers to submit his affidavit.

64. P.W. 4, Santosh Kumar Vishwakarma, has also stated in his cross examination that STF personnel had got his signature on plain papers and he had not stated anything with regard to the incident.

65. P.W.-6 Jhadi Lal, has also stated in his cross examination that affidavit 83/Ka/22 on the record was not having been sworn by him. S.T.F. personnel had got his signatures on blank papers, therefore, there is no evidence on record to show the involvement of the appellants/ accused in the incident.

66. It is also the case of the prosecution that the voter identity card, ration card, one pair slipper, blood stained clothes of the deceased were recovered on 13.05.2008 and 16.07.2008 in the presence of public witnesses, Dharmendra Pandey, Rajal Mishra. They have not supported the alleged recovery of aforementioned belongings of the deceased.

67. P.W.-22 Dharmendra Pandey, has stated in his examination in chief that on 13.05.2008 police had not taken him into their custody, nor, he was taken to jungle. He did not see whether voter identity card and ration card were recovered at the instance of the accused. Further, he has stated that he was not shown Voter I.D. card and ration card.

68. Weapon of the offence is also stated to have been recovered by the police party in connection with the instant case on 15.05.2008 at the instance of the Raju Kol @ Raghunandan. It is also the case of prosecution that accused Raju Kol @ Raghunandan had also made disclosure statement with regard to the weapon of crime and also stated that he had killed the deceased by the recovered blood stained axe.

69. Accused Raju Kol @ Raghunandan, in his statement under Section 313 Cr.P.C has denied his admission and disclosure statement before the police. P.W.-22 Dharmendra Pandey has denied the recovery of blood stained axe at the instance of accused Raju Kol. Further, he has stated that recovery memo paper no. 34 Ka-3 (Exhibit-Ka-3) was not having been signed by him. On the contrary, his signature by the police was taken on piece of plain paper.

70. It is specifically denied that no writing, in his presence was made on the

said paper, therefore, witness P.W.-22 has also not supported the recovery of weapon of crime i.e. blood stained axe and has also denied the recovery of other belongings of the deceased in his presence.

71. P.W. 9 Rajul, has stated in his examination in chief that he had visited police station-Manikpur on 15.05.2008, with regard to his missing vehicle. At the police station his signature was taken on plain paper and due to fear of the police he had signed the paper. Further, he has deposed that neither the axe, nor Voter I.D. Card or ration card was recovered in his presence, nor he has any knowledge of its recovery.

72. P.W.-9, Rajul, like P.W.22 Dharmendra Pandey, was declared hostile but both these witnesses have not only denied the statements under Section 161 Cr.P.C. but also expressed their ignorance about the papers 134Ka/2 and 134 Ka/3 as to how they came to be written.

73. It is evident from the above analysis that the incident came to be registered on the basis of written First Information Report, paper no. 5Ka/Exhibit Ka-13. In this connection P.W.-15 Ram Gopal, who happens to be elder brother of the deceased has stated in his examination in chief that the case, at the police station was not registered as per his account of the incident, but the police, at the police station, had given him a written draft of the First Information Report and he was asked to sign the same and as such he had signed the written First Information Report, paper no. 5 Ka.

74. P.W. 15, Ram Gopal was also been declared hostile and he has stated in his examination against the police, at whose instance, he had signed the draft First Information Report, has not made any complaint to any higher police officer against them. As such P.W.- 15 Ram Gopal has also not supported the allegations in the First Information Report. It is also evident that any of the public witnesses who were examined before the trial Court has not adduced evidence against the appellants/accused. Moreover, the recovery of the belongings of the deceased and weapon of the crime has also been denied by all the aforestated witnesses and since they have not supported the prosecution case, therefore, they were declared hostile on behalf of the prosecution, but in their cross examination, they have further denied their statements recorded by the investigating officer under Section 161 Cr.P.C.

75. P.W.-15 Ram Gopal/ informant has stated in his examination in chief that inquest of the Skelton was conducted in his presence. In view of scattered clothes, he had identified the Skelton of deceased. He has further stated that his brother deceased Rajjan Mishra, was a criminal and he was associated with Dasyu gang but was not its active member. Due to enmity of the deceased with the miscreants of the area, he was killed. As such, the brother of the deceased, P.W.-15 Ram Gopal has shifted the killing of his brother from the appellants/accused to the miscreants of the area who were inimical to the deceased.

76. P.W.-16, Smt. Meena W/o deceased Rajjan Mishra, has stated in her examination in chief that after two months of the incident in the by-lane of Garihan hill, Skelton of her husband was found and near the Skelton, shirt, vest, and slipper and other belongings of the deceased were recovered and in view of the belongings

she had identified Skelton being that of her husband.

77. P.W.8-Dr. R.K. Rao, has stated in his examination in chief that on 16.07.2007 at 3.30 p.m. he had conducted autopsy over the skelton of the deceased. On the basis skull, liver, Scapula, spine bone, humerus, wrist, he could not come to any conclusion about the cause of death of the deceased; he had recommended for Forensic Science Examination of the skeleton, by Forensic Science Laboratory. He has also stated that on the basis of the skull, identification of the deceased was not possible.

78. P.W.-8 Dr. R.K. Rao, in his cross examination stated that from the study of the post mortem during autopsy, it was difficult to specify the age of the deceased and it was also not possible to say with certainty that the skeleton was of a male or female; it could have been established only by D.N.A. test, but D.N.A. report is negative. However, Smt. Meena, P.W.-16 has identified the skelton as being that of her husband on the basis of the head of deceased and his other belongings recovered. We have no reasonable ground to disbelieve her.

79. P.W. 8-Dr. R.K. Rao, has also stated in his examination in chief that he was not in a position to opine as to how the deceased came to be killed. He also stated that he was unable to say by which weapon the deceased was killed. Further, he has deposed that he cannot express his opinion about the time of death.

80. Therefore, P.W.-8, Dr. R.K. Rao, would not ascertain the cause of death of the deceased nor it could be established, by his deposition, the weapon used in killing the deceased, and also it could not be ascertained as to how many days before the autopsy, he was killed.

81. P.W.10- C.P. Narendra Singh Sengar, has proved First Information Report Chik No. 4K/5, Exhibit Ka-4, and he has proved the copy of the G.D. No. 17 as Exhibit-Ka5. Initially a criminal case at Crime No. 46 of 2007 had been registered under Section 307 I.P.C. but on the basis of paper No. 18-Ka, it was altered to Sections 147, 148, 149, 364, 302 and 201 I.P.C. and in this connection P.W.10 Narendra Singh Sengar, has made entry to this effect in the G.D. No. 11 on 23.07.2007 at 8.00 a.m.. He has also proved the said G.D. as Exhibit Ka-7 and further he has also proved paper no. 135 Ka/ 2, G.D. No. 20 dated 15.05.2008 at 13.30 by his secondary evidence because the entry in the said G.D. was having been made by constable 240 Amar Nath.

82. P.W.14, S.O. Shri Sachindra Prasad Shukla, has stated in his examination in chief that initially he had conducted the investigation and at the instance of the informant he had sketched the map of the spot, which is paper no. 15-Ka, Exhibit-Ka-10. During investigation he had also recorded the statements of the witnesses and had recovered the skeleton and other belongings of the deceased in the presence of public witnesses.

83. During investigation, P.W.-14, Shri Sachindra Prasad Shukla, has also stated that on 16.07.2007, he had appointed Panchan Ram Gopal, Durga Prasad, Kaushal Kishor, Dinesh Chandra Tiwari, Pradhumn Lal Kol, including, Chuuni Lal and others as Panchan and at his direction S.I. Harbansh Singh had prepared the inquest report of the skeleton of the deceased and also belonging of the

deceased were taken into custody; these were sealed and brought to the police station and were kept in the record room, thereafter, the investigation was transferred to C.D.F.D.

84. P.W.-18, Inspector Rishikesh Yadav, has stated in his examination in chief that on 30.01.2008, he was posted as Inspector in S.T.F.

85. P.W.-23, Ram Sewak, has stated in his examination in chief that on 16.07.2007 he was posted as Home guard at Police Station- Mau, Chitrokoot. On 16.07.2007 Constable Kamlesh Yadav was also accompanying him. S.P. Shukla had prepared inquest report and inquest report along with other necessary papers and also with skeleton he and constable Kamlesh Yadav took the same to mortuary for post mortem of the deceased.

86. P.W. 24, Constable Kamlesh, in his statement corroborated the statement of P.W.-3 Ram Sewak Home guard.

87. P.W.18, Rishikesh Yadav, has also stated that after transfer of investigating officer, Abhay Pratap, he had taken over the remaining investigation of this matter. During investigation names of accused Radhe and other had come into light, consequently, Radhe and Raju Kol were apprehended by the Satna Police on 19.02.2008. In the lock up, he had recorded the statement of accused Jiya Lal Radhe, Raju, Kol and Subedar @ Radhe. Accused Subedar @ Radhe had admitted that he had killed Rajjan Mishra. He had also recorded the statement of Raju Kol during his incarceration in jail.

88. P.W.-18 Rishikesh Yadav, Investigating Officer has admitted in his examination in chief that black colour Scorpio, which was used in the commission of crime could not be recovered. However, at the instance of Raju Kol, axe, weapon of crime with handle was recovered. He has next stated that gun could not be recovered, however, in the presence of public witnesses Dharmendra Pandey and Rajul, Voter Identity Card and Ration Card of the deceased, at the instance of accused Radhe & Raju Kol had been recovered on 15.05.2008. These witnesses has also deposed about the recovery of other belongings of the deceased.

89. It is evident from the above discussions that public witnesses Dharmendra Pandey and Rajul, have not supported the recovery of the belongings of the deceased at the instance of accused Radhe and Raju Kol, however, about recovery of Voter Identity Card and ration card, clothes; slippers etc. and other belongings of the deceased, there is other evidence on record. It has been denied that the said recovery was made at the instance of the accused, therefore, ration card or voter identity card and other belongings of the deceased has not been linked to the accused.

90. P.W.-18, Rishi Kesh Yadav, has also stated that the Investigating Officer, Abhai Pratap Inspector, S.T.F. Lucknow, has forwarded the charge sheet against the accused on 22.10.2007.

91. In view of the above discussions, it is evident that in support of charges against the appellants/ accused, P.W.-15, Ram Gopal, who is elder brother of the deceased has not supported the written First Information Report, and has also admitted in his testimony that the deceased himself was a criminal and has also expressed his

suspicion that his brother could have been murdered by miscreants who were inimical to the deceased.

92. P.W.-16, Smt. Meena Devi, wife of the deceased, her brother and nephew, have not given any trustworthy evidence against the appellants/accused. Confession alleged to have been made before police officer/ investigating officer, in presence of the witnesses, by one of the accused does also not find support. Further, witnesses of recovery of weapon of crime i.e. blood stained axe with handle, Voter Identity Card, Ration Card, clothes and other belongings have also not been supported by the witnesses.

93. P.W.-8, Dr. R.K. Rao, could not tell the approximate time of death of the deceased. As per P.W.-16, Meena Devi, the skeleton and other belongings of the deceased were recovered after more than two months of his abduction, but there is no credible evidence to prove that the deceased was abducted by the appellants/accused, nor, there is any evidence on record to show that any of the witnesses had seen the appellants/ accused abducting and killing the deceased.

94. Home guard/ Police Constable, and Investigating Officers have supported formalities they had completed but the same has not been corroborated by the public witnesses.

95. Even if, on face value, recovery of the axe and other belongings on the pointing out of the appellants/ accused is accepted, even then on that strength, appellants/ accused cannot be convicted for want of substantial evidence.

96. Apex Court in ***Shahaja @ Shahajan Ismail Mohd. Shaikh Vs. State of Maharashtra; 2022 Live Law (SC) 596*** has outlined the conditions necessary for applicability of Section 27 of the Evidence Act:

"that the appellant stated before the panch witnesses to the effect that "I will show you the weapon concealed adjacent the shoe shop at Parle". This statement does not suggest that the appellant indicated anything about his involvement in the concealment of the weapon. Mere discovery cannot be interpreted as sufficient to infer authorship of concealment by the person who discovered the weapon. He could have derived knowledge of the existence of that weapon at the place through some other source also. He might have even seen somebody concealing the weapon, and, therefore, it cannot be presumed or inferred that because a person discovered the weapon, he was the person who had concealed it, least it can be presumed that he used it. Therefore, even if discovery by the appellant is accepted, what emerges from the substantive evidence as regards the discovery of weapon is that the appellant disclosed that he would show the weapon used in the commission of offence."

97. Appellants have denied in their statements under Section 313 Cr.P.C to have made disclosure statement to the investigating officer. Even if, it is accepted, that after their arrest they had made discloser statement to the arresting police officer yet in the event of their denial before the Court such disclosure statement cannot be relied and accepted.

98. In view of above referred judicial pronouncement, ***Shahaja @ Shahajan Ismail Mohd. Shaikh Vs. State of Maharashtra;*** merely, on the strength of

the discovery of the skelton, weapon of offence axe with handle, clothes and other belongings of the deceased at the pointing out of Raju Kol, it cannot be suggested that he had done any act of concealment of the weapon of offence and body etc., and it is not sufficient to infer authorship of concealment by Raju Kol, who got discovered assault weapon and dead body of the deceased. This case rests upon circumstantial evidence.

99. Supreme Court in ***Hanumant vs The State Of Madhya Pradesh, reported in 1975 AIR 1083,*** has held that ;

"In dealing with circumstantial evidence the rules specially applicable to such evidence must be borne in mind. In such cases there is always the danger that conjecture or suspicion may take the place of legal proof and therefore it is right to recall the warning addressed by Baron Alderson to the jury in Reg v. Hodge (1) where he said :--

"The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to over- reach and mislead itself, to supply some little link that 'is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved."

100. Supreme Court in ***Jaharlal Das vs State Of Orissa, reported in 1991 AIR 1388,*** has held that ;

"It may not be necessary to refer to other decisions of this Court except to bear in mind a caution that in cases depending largely upon circumstantial evidence there is always a danger that the conjecture or suspicion may take the place of legal proof and such suspicion however so strong cannot be allowed to take the place of proof. The Court has to be watchful and ensure that conjectures and suspicions do not take the place of legal proof. The Court must satisfy that the various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. Bearing these principles in mind we shall now consider the reasoning of the courts below in coming to the conclusion that the accused along has committed the offence."

101. Having regard to the facts and circumstances of the case, and for reasons stated herein above, we find that there is no cogent and clinching evidence against the appellants to hold them guilty.

102. In our opinion the impugned judgment and order dated 18.10.2013, passed by the Special Judge (D.A.A. Act)/ Additional Session Judge, Court No. 1-, Chitrakoot in Special Session Trial No. 148

of 2007, State vs. Gudda @ Ramman @ Raj kumar @ Jhalla @ Guddu Kol & Ors., under Sections- 147, 148, 149, 364, 302, 201 I.P.C. & 14 of D.A.A. Act, Police Station-Raipura, District-Chitrakoot, deserves to be set aside and is hereby set aside, accordingly, all the accused/appellants are acquitted of the charges levelled against them.

103. Appeal is allowed.

104. Appellants/accused No. 1 and 2, namely Gudda @Rajam @Raj Kumar @ Jhalla @ Guddu Kol and Raghunandan Pathak, who are on bail need not surrender. Their bail bonds and sureties are discharged.

105. The appellants no. 3 and 4, namely, Jiya Lal Kol and Subedar Singh @ Radhey, who are in jail stand acquitted of the charges against them and shall be released forthwith, if not wanted in any other case.

106. In view the provisions of Section 347-A Cr.P.C. the appellants no. 3 and 4, namely Jiya Lal Kol and Subedar Singh @ Radhey, are directed to forthwith furnish personal bonds in the sum of Rupees Twenty Five Thousand and two reliable sureties each in the like amount before the trial Court (which shall be effective for a period of six months) to the effect that in the event of filing of Special Leave Petition against the instant judgment or for grant of leave, the appellants on receipt of notice thereof shall appear before the Hon'ble Supreme Court.

106. Let a copy of this judgment along with lower court record be sent back to the court concerned for immediate compliance.

107. Office to inform the concerned Jail Superintendent through C.J.M. concerned to ensure compliance of the order.

(2023) 1 ILRA 1166
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.12.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE SYED WAIZ MIAN, J.

Jail Appeal No. 5202 of 2012

Ram Singh ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Ajay Kumar Srivastava, Sri Chandra Bhushan Tiwari(A.C.)

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

Criminal Law- Indian Penal Code, 1861- Section 84 - Onus lies on the accused to prove that at the time of alleged incident, due to unsoundness of his mind he was incapable of knowing the nature of his act or that what he was doing was either wrong or contrary to law- Evident from the medical reports that after the alleged incident, accused for his mental illness was treated after the lapse of about seven and half months. However, he was reported vide paper no. 111 Kha, Exhibit Kha-1, on 29.01.2000, within the normal limits of his mental condition. Soon before and soon after the incident, accused was not mentally suffering to such an extent that he could be said to be incapable to know about the nature and consequences of his act.

Where the plea of insanity is adopted by the accused then he has to prove that from before

the occurrence, during course of the occurrence and after the same, he was incapable of understanding the nature and consequences of his act due to his mental suffering.

Indian Penal Code, 1861- Section 8 - Section 84 - Indian Evidence Act, 1872- It appears from the conduct of the accused that just after the incident, he to screen himself from legal punishment, knowing that he has committed an offence, has it not been so, he would not have tried to escape from the place of occurrence with weapon of crime. It is evident that there is no documentary evidence regrading the treatment of mental illness of the appellant, before or soon after the incident.

The fact that after committing the offence the accused tried to escape from the scene of crime shows that the accused was not suffering from insanity at the time and after committing the offence.

Indian Penal Code, 1861- Section 84 - There is no medical evidence on record to show that before or soon after the incident, accused was suffering from Psychotic disorder that it could be assumed that accused was unable to understand the nature of his act. Further, it has not been proved that the act itself was result of his mental disorder. Accused has not been able to demonstrate, by means of evidence, that at the time of incident he was influenced by mental disorder.

Where the accused has failed to discharge the onus proving his insanity by leading documentary and other evidence, then such plea of insanity cannot be accepted. (Para 25, 81, 82)

Criminal Appeal rejected. (E-3)

Case Law/ Judgements relied upon:-

1. Bapu Gajraj Vs St. of Raj. 2007, Vol.8 SCC 66

2. Sudhakaran Singh Vs St. of Ker. 2010 ,Vol. 10, SCC 582

3. Sherall Walli Mohammad Vs St. of Maha., 1972 Cr. LJ 1523 (SC)

4. Sumer Singh Vs Surajbhan Singh & ors, (2014) 7 SCC 323

5. Sham Sunder Vs Puran, (1990) 4 SCC 731

6. St. of M.P. Vs Saleem, (2005) 5 SCC 554

7. Ravji Vs St. of Raj., (1996) 2 SCC 175

(Delivered by Hon'ble Syed Waiz Mian, J.)

1. This Jail Appeal has been filed by appellant Ram Singh, through Superintendent, District Jail, Lalitpur, under section 383 Cr.P.C. against judgment of conviction and sentence dated 28.3.2011 passed by Additional Sessions Judge (Ex Cadre), Lalitpur in Session Trial No. 44 of 2007, State vs. Ram Singh, arising out of Case Crime No. 1089 of 2007, under Section 302 I.P.C., whereby appellant was convicted for offence punishable under section 302 I.P.C. to life imprisonment with fine of Rs. 25,000/- and in default of payment of fine undergo three years' additional imprisonment.

2. Brief facts of the case in nutshell are as under:

3. Informant-None Raja, has stated in the written First Information Report that his brother Ram Singh was suffering from mental illness/ disorder, since last ten years. On 22.03.2007, at around 1 p.m. his wife Smt. Guddi Raja, Badi Raja w/o appellant Ram Singh, his daughter and son, aged about 5 and 1 years, respectively, were present in the house. All of a sudden appellant-Ram Singh, lost his mental balance and assaulted all the aforesaid persons with axe causing injuries and all the injured succumbed to the injuries. 2

4. Bodies were lying in the courtyard of the house and the incident was seen by many villagers. Appellant-Ram Singh, while running from the house was caught by the villagers Narendra Singh, Mulayam Singh, Mansingh and Govind Das.

5. On the strength of the First Information Report, case at Crime No. 1089 of 2007, under Section 302 I.P.C. came to be registered on 22.03.2007, at Police Station-Kotwali, District- Lalitpur.

6. P.W.-4, Sub Inspector, Kallu Prasad Yadav, written the First Information Report, Chik at 2.30 p.m. and he also entered the substance of the First Information Report in the G.D. No. 33 of 22.03.2007. Investigation was entrusted to the P.W.-7, N.H. Farooqui, who took the investigation at the direction of Station House Officer and reached at the place of occurrence and saw that dead bodies of Smt. Guddi Raja w/o Naune Raja, Smt. Badi Raja w/o Appellant-Ram Singh, Kumari Mandavi and Mangal Singh daughter and son of appellant-Ram Singh, were lying in the courtyard of the house. Thereafter, Station House Officer, Kotwali, Raj Bahadur Sahu and S.I. Shri Ram Ratan Verma, along with police personnel also reached on the spot. In the presence of Panch, inquest reports of the bodies of the deceased, on the dictation of S.H.O. Raj Bahadur Sahu, and other necessary papers in connection with the inquest of the bodies of the deceased, were prepared by Sub Inspector N.H.Farooqui.

7. P.W.9-, Raj Bahadur Sahu, Sub Inspector, has prepared site plan of the place of occurrence, paper no. 66 Ka. He in the presence of Mahesh Prasad and Virendra Singh, collected the blood stained and plain earth and same were put in two separate small containers and both containers were sealed.

8. P.W.-9, Raj Bahadur Sahu, had also collected the blood stained axe in the presence of the witnesses and memo, paper No. 7-ka was prepared and signed by accused Ram Singh, who was caught on the spot; Ram Singh had worn blood stained shirt and the accused was asked to strip off his shirt. It was also taken into possession and memo, in the presence of Virendra Singh and Mahesh Prasad was prepared and signed.

9. Inquest report of the dead bodies of the deceased and other necessary papers were forwarded to district mortuary to conduct autopsy to ascertain real cause of death of the deceased.

10. Dr. M.C. Gupta, posted in District Hospital, Lalitpur, conducted the autopsy over the bodies of the deceased and he in his writing and signatures, prepared autopsy reports of the deceased.

11. Ram Ratan Verma, who had also reached on the place of occurrence accompanying Station House Officer, together with N.H. Farooqui, S.I. had conducted the inquest over the bodies of the deceased. On the strength of the collected incriminating evidence, during investigation, Investigating Officer has submitted charge sheet, paper no. 3 Ka, against Ram Singh under Section 302 I.P.C.

12. Learned Chief Judicial Magistrate, vide order dated 18.05.2007 committed the case for trial of the accused to District and Sessions Judge. In the trial Court a criminal case was registered as S.T. No. 44 of 2007.

13. Charge under Section 302 I.P.C. against the accused was framed on 24.03.2009 but the accused has denied the charge and claimed trial.

14. Prosecution in order to prove charge under Section 302 I.P.C. against the appellant/accused Ram Singh examined, P.W.-1 Naune Raja, P.W.2-Narendra Singh, P.W.3-Govind Das, P.W.-4 Kallu Prasad Yadav S.I., P.W.5-Dr. M.C. Gupta, P.W.-6 Ramesh, P.W.-7 N.H.Farooqui, S.I. P.W.-8 Ram Ratan Verma, Sub Inspector (retired) P.W.9- Raj Bahadur.

15. Learned trial Court examined, Dr. Amrendra Kumar C.W.-1 consultant, psychiatrist as court witness.

16. Statement of accused under Section 313 Cr.P.C. was recorded. Accused Ram Singh, admitted in his statement that before and at the time of incident he was in the state of unsoundness of his mind and in that state of mind, injuries to the deceased were caused. Deceased Smt. Guddi Raja, was wife of his brother Naune Raja whereas, Smt. Badi Raja, Kumari Mandavi and Managal Singh, were his wife, daughter and son respectively.

17. With regard to the evidence that villagers Narendra Singh, Mulayam Singh, Mansingh and Govind Das, had caught him with assault weapon axe on the spot, accused has stated feigned ignorance, saying that he had gone mad.

18. Accused in his statement under Section 313 Cr.P.C. has lastly stated that 10 years, prior to the incident, he was under medical treatment of Dr. Rajiv Jain, for his mental illness. For the same, he was also treated in Gwalior and M.P. Incident had occurred because of his madness. Subsequently his brother was called at the police Station by Daroga Ji and on his direction his brother got written the First Information Report.

19. On behalf of appellant-accused-D.W.-1 Dr. Rajiv Jain was examined.

20. Learned trial Court heard the rival contentions of the learned counsel for the parties and on the strength of the evidence on record convicted the appellant/accused for offence under Section 302 I.P.C. and sentenced him with life imprisonment and also imposed fine of Rs. 25,000/- and in default of payment of such fine he was directed to undergo three years additional imprisonment.

21. Heard Shri Chandra Bhushan Tiwari, Amicus Curiae, for the appellant and Ms. Manju Thakur, learned A.G.A.-Ist, for the State and perused the record.

22. Appellant/accused in his statement under Section 313 Cr.P.C. has not denied the incident. He has admitted that in the alleged incident his Bhabhi (Sister-in-law) his wife Smt. Badi Raja, his daughter Kumari Mandavi and his son Mangal Singh had been killed. The accused has also expressed his ignorance regarding the evidence on record. However, he has further stated that his trial was based on wrong facts. Accused has also admitted in his statement that due to his loss of mental balance, at the time of incident, injuries to the deceased were having been caused. He has taken defence that at the time of incident he was suffering from mental disorder.

23. At the time of statement, under Section 313 Cr.P.C., on 28.04.2011, the accused has admitted that after the

treatment at Varanasi he has become normal.

24. In this case the commission of alleged incident has not been denied by the accused and also the manner of death of the deceased has not been disputed. The accused before the learned trial Court had claimed the benefit of Section 84 of I.P.C. Section 84 stipulates that : " Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

25. In the Indian Penal Code, Section 76 to Sections 106 are general exceptions. Onus lies on the accused to prove that at the time of alleged incident, due to unsoundness of his mind he was incapable of knowing the nature of his act or that what he was doing was either wrong or contrary to law. If, accused succeeds to establish that at the time of incident, he was suffering by a mental disorder of such magnitude that he was incapable to know his act and succeeds to establish to bring his case under Section 84, he would be entitled to the benefit of Section 84, of the Code.

26. This Court has to consider the circumstances that proceeded, attended or followed the crime, but it is equally true that such circumstances must be established by credible evidence.

27. In ***Bapu Gajraj Vs. State of Rajsthan, reported in 2007, Vol.8 SCC 66*** Apex Court has held as follows:

"10. Section 84 embodies the fundamental maxim of criminal law, i.e., actus non reum facit nisi mens sit rea" (an act does not constitute guilt unless done with a guilty intention). In order to constitute an offence, the intent and act must concur; but in the case of insane persons, no culpability is fastened on them as they have no free will (furios is nulla voluntas est).

11. The section itself provides that the benefit is available only after it is proved that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or that even if he did not know it, it was either wrong or contrary to law then this section must be applied. The crucial point of time for deciding whether the benefit of this section should be given or not, is the material time when the offence takes place. In coming to that conclusion, the relevant circumstances are to be taken into consideration, it would be dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime. It is only unsoundness of mind which naturally impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility. Stephen in 'History of the Criminal Law of England, Vo. II, page 166 has observed that if a persons cut off the head of a sleeping man because it would be great fun to see him looking for it when he woke up, would obviously be a case where the perpetrator of the act would be incapable of knowing the physical effects of his act. The law recognizes nothing but incapacity to realise the nature of the act and presumes that where a man's mind or his faculties of ratiocination are sufficiently dim to apprehend what he is doing, he must always be presumed to intend the consequence of the action he

takes. Mere absence of motive for a crime, howsoever atrocious it may be, cannot in the absence of plea and proof of legal insanity, bring the case within this section This Court in ***Sherall Walli Mohammad v. State of Maharashtra, 1972 Cr. LJ 1523 (SC)*** , held that the mere fact that no motive has been proved why the accused murdered his wife and child or the fact that he made no attempt to run away when the door was broken open would not indicate that he was insane or that he did not have necessary mens rea for the offence. Mere abnormality of mind or partial delusion, irresistible impulse or compulsive behaviour of a psychopath affords no protection under Section 84 as the law contained in that section is still squarely based on the outdated Naughton rules of 19th Century England. The provisions of Section 84 are in substance the same as that laid down in the answers of the Judges to the questions put to them by the House of Lords, in M Naughton's case. (1843) 4 St. Tr. (NS) 847. Behaviour, antecedent, attendant and subsequent to the event, may be relevant in finding the mental condition of the accused at the time of the event, but not that remote in time. It is difficult to prove the precise state of the offender's mind at the time of the commission of the offence, but some indication thereof is often furnished by the conduct of the offender while committing it or immediately after the commission of the offence. A lucid interval of an insane person is not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficiently to enable the person soundly to judge the act; but the expression does not necessarily mean complete or prefect restoration of the mental faculties to their original condition. So, if there is such a restoration, the person concerned can do the act with such reason, memory and judgment as to make it a legal act ; but merely a cessation of the violent symptoms of the disorder is not sufficient."

28. In ***Sudhakaran Singh vs. State of Kerala, reported in 2010 , Vol. 10, SCC 582,*** the plea taken was that the appellant was suffering from "paranoid schizophrenia". The term has been defined in Modi's Medical Jurisprudence and Toxicology1 as follows: *"Paranoia is now regarded as a mild form of paranoid schizophrenia. It occurs more in males than in females. The main characteristic of this illness is a well-elaborated delusional system in a personality that is otherwise well preserved. The delusions are of persecutory type. The true nature of this illness may go unrecognised for a long time because the personality is well preserved, and some of these paranoiacs may pass off as a social reformers or founders of queer pseudo- religious sects. The classical picture is rare and generally takes a chronic course.*

Paranoid Schizophrenia, in the vast majority of case, starts in the fourth decade and develops insidiously. Suspiciousness is the characteristic symptom of the early stage.

29. P.W.-1 Naune Raja, in his ocular has evidence has stated that on his dictation, First Information Report was having been written by Virendra Singh and after the same was read over to him, he had signed the report. P.W.-1 has recognized and proved written First Information Report as Paper No. 5 Ka as exhibit Ka-1.

30. P.W.-1, Naune Raja, has admitted in his cross examination that at the time of alleged incident he was not present at the

spot and when he had reached at the place of occurrence the alleged incident had already been occurred. He has also said that with regard to the alleged incident he was informed by Raghvendra Singh but he (Raghvendra Singh) has not been examined, therefore, the above statement of P.W.-1 Naune Raja, that he was informed by Raghvendra Singh and upon such information he had reached on the place of occurrence has not been corroborated by Raghvendra Singh.

31. In the First Information report, Exhibit Ka-1, the alleged incident is said to have been witnessed by many villagers but none of them has been indicated in the written First Information Report. In the First Information Report it is alleged that when he had reached on the spot, he saw that accused was caught hold by the villagers Narendra Singh, Mulayam Singh, Mansingh and Govind Das. It is also alleged, that accused was caught by the villagers while he was running from the house.

32. P.W.-2, Narendra Singh, an eye witness, has deposed in his testimony that he does not remember the date of the incident. On the date (day) of the incident, by axe accused Ram Singh, had assaulted his wife and two children wife of P.W.-1 Naune Raja. The incident occurred at around 1-1.30 p.m., when he had reached at the place of occurrence many villagers of his village had reached there. Villagers Rajpal Singh, Mulayam, Takhat, Govinda who had reached on spot. Next-P.W.1 has stated that the dead bodies were lying scattered; he had seen that Ram Singh had tried to run from his granary (Bakhari); he was wielding blood stained axe; he and other people had caught him. At the time of incident, parents and brother of accused Ram Singh, were not present. However, he did not see Ram Singh to commit the incident of killing the deceased.

33. P.W.-2 Narendra Singh, has been declared hostile and he has also been cross examined by the prosecution. He has stated in his cross examination that accused Ram Singh intermittently used to suffer from mental dis balance. He was also got treated by his father.

34. P.W.-2 Narendra Singh, in his cross examination, done on behalf of the accused, has stated that Ram Singh was also treated for his ailment in Lalitpur and Gwalior.

35. However, at the time of his marriage he was not in such a mental state. After the marriage, during his mental loss, he had run two to three times from his house; Once he went missing for about a year and he was found in shabby condition near a temple; he was brought back to his house. Ram Singh, on his main gate, was caught by him and other villagers.

36. At the time when he saw Ram Singh, he was abusing and his eyes had turned red. The parts of the dead bodies of the deceased were scattered in the granary (Bakhari); Virendra Singh had collected the parts of the bodies of the deceased and put them in the gran (Bakhari) from the gate of house; Granary (Bakhari) was situated at the distance of 4-5 steps.

37. He has also corroborated the evidence of P.W.-1 Naune Raja to the effect that Ram Singh was treated for his ailment at Gwalior and Lalitpur.

38. P.W.-2 Narendra Singh has also stated in his deposition that Ram Singh

used to lose control over his mind intermittently. Since the marriage until the alleged occurrence, he had suffered occasionally from his mental loss.

39. P.W.-3 Govind Das, on 05.12.2009, in his ocular evidence has said that about two years, eight and half months before the incident, at 1.00 p.m. had occurred; he was staying back at his home; he heard the screams of children and he rushed to the spot and he witnesses at the gate, he saw Virendra Singh, Rajpal Singh Havansh Singh, Mulayam Singh, Malkhan Singh and Indal Singh, and other 10-12 persons had already reached at the house of Naune Raja; Ram Singh was having blooded axe in his hand; he had killed his wife, children and wife of Naune Raja; all the dead bodies of the deceased were lying scattered in the courtyard. Ram Singh had axed all the deceased to death. On challenge by him and other persons, accused with axe followed them; they hidden themselves; when Ram Singh, threw his axe to run from the spot, they caught and tied him with tree.

40. P.W.-3, Govind Das, has stated in his examination in chief that after the accused having been tied with the tree, they went in the courtyard of the house and witnessed that the dead bodies of Smt. Badi Raja, Smt. Guddi Raja, Kumari Mandavi and Mangal Singh, were lying there. Bodies of the deceased were cut by axe to pieces. Police had also been informed.

41. P.W.-3, Govind Das in his examination in chief has not deposed about the arrival of the informant Naune Raja and his parents on the place of occurrence.

42. P.W.-3 in his cross examination has stated that in respect of murder of the deceased the villagers had informed the police; any member of the family had not informed the police; from his house, Ram Singh's house is situated at the distance of 500 meters. He and other persons had caught and tied the accused with tree; he had tried to run from his house. At about 200 steps, Ram Singh was caught; he was not caught at the gate of his house. P.W.-3 has further stated in his cross examination that none had went to inform Naune Raja in respect of the incident; Naune Raja on hearing noise had reached on the spot; he did not know as to whether Raghvendra Singh had gone to inform Naune Raja or not.

43. P.W.-3 Govind Das, has also stated that Ram Singh had thrown the axe near the dead bodies in the courtyard; the clothes worn by him were blood stained; on catching hold of the accused blood on their clothes had not transferred; Ram Singh was not in a state of his mental loss; he did not know whether Ram Singh was medically treated or not; he has also admitted in his cross examination that Ram Singh, before the incident had absconded from his house and had returned to his house after the lapse of one month; Since he (P.W.-3) did not remain at his house therefore, he does not know about treatment of Ram Singh; Ram Singh, before the alleged incident, had not absconded in his presence nor during his presence, Ram Singh had returned to his house; he was working as labour. He did not stay at one place permanently; It would be wrong to suggest that on the date of the incident, he was not present in the village; it would also be wrong to suggest that due to any police pressure he has deposed; He has come voluntarily to lend evidence.

44. From the depositions of P.W.-1 Naune Raja, P.W.-2 Narendra Singh, P.W.-

3 Govind Das, it is reflected that at the time of incident none of these witnesses were present at the place of occurrence. The incident has admittedly been committed by the accused. All these witnesses had reached at the spot after the deceased having been killed. However, there is minor discrepancies in evidence of P.W.-1 to P.W.-3 in the face of admission of incident by accused in his statement under Section 313 Cr.P.C.

45. P.W.-1 to P.W.-3 have also not been confronted on behalf of the accused to the effect that Ram Singh had not axed the deceased to death. In this case, killing of the deceased by accused by the assault of axe is admitted to him.

46. It is a defence of the accused that at the time of the commission of the incident he was in the state of mental disorder. On behalf of the accused, the plea of insanity, at the time of commission of crime, has been setup, therefore, onus to prove insanity at the the time of commission of the crime lies on him.

47. To ascertain whether accused was suffering from insanity at the time of commission of offence, his previous behaviour, behaviour at the time of incident and just thereafter has to be evaluated/examined.

48. Learned trial Court has concluded that the accused Ram Singh was not suffering from mental disorder at the time of commission of incident and thus he was not found incapable of knowing the nature of his act or that he was doing what either was wrong or contrary to law. This finding of the learned trial court in respect of the mental state of the accused at the time of the commission of the incident, is under challenge in the present appeal.

49. On behalf of the accused D.W.-1 Dr. Rajiv jain, in his cross examination on 29.07.2011, has stated that on 29.01.2000, at about 12 p.m. he had conducted EEG (Electroencephalogram) (Mental examination) of Ram Singh at his Clinic Mahabir psychiatrist Center, at Lalitpur, and he had diagnosed him as "normal".

50. D.W.-1, Rajeev Jain, in sequence of his evidence has stated that the family members of Ram Singh had informed him about the symptoms and accused on the basis of narration of symptoms he (DW-1) was of opinion that he could be afflicted with disease mainly "Mania' and in his view the said illness may be persisting since last two years. In this disease, symptoms appear suddenly and after some time they are disappeared. However, in EEG examination of the patient, any swelling etc was not found in the brain of the accused. Other symptoms of disease "Mania' are excessive anger, staying awake day in and day out, to run, not to have meal punctually, non maintenance of hygiene, intermittently to take medicine causing it recurrence and also doing abnormal activities. All these symptoms were also having been told to him (D.W.-1 Dr. Rajiv Jain) by the members of the family of the accused.

51. D.W.-1 Dr. Rajeev Jain, has further stated, in his occular evidence that at the time of examination of patient, in view of the symptoms of patient he had opined that accused was afflicted with chronicle disease. This illness is bound to recur. The main reason for the illness to recur in future could be due to non taking

of medicine regularly. If, medicines are not taken punctually, then there is possibility of its aggravation and the said illness may turn to psychosis in humans.

52. It is also stated in the testimony of D.W. 1, Dr. Rajeev Jain, that "Chronical disease' may reappear after few years and the symptoms of the patient may also be aggravated. If a patient is so inflicted, he may not be able to identify a person and on aggravation, such a person can also assault.

53. Dr. Jain-DW-1, has proved EEG report, paper no. 111 Kha, and also EEG book 112 Kha, as Exhibit Kha-1 and Exhibit Kha-2. He has further stated that the papers have been signed by him. He has clarified that EEC report Exhibit Ka-1, is based on the basis of EEC book Exhibit Ka-2.

54. D.W.-1, Dr. Rajiv Jain, in his cross examination has stated that he had privately practised in Lalitpur from the year 1994 to January, 2010; in his clinic he has rendered his services until 2005; name of the persons, who brought accused Ram Singh is not mentioned in his report. Symptoms of patient were told by the family members of the accused and few symptoms were found on the basis of his examination. He had delivered all the treatment papers to the patient and he does not remember as to how many times patient Ram Singh had come to his clinic for his treatment.

55. He has next stated that at the time of examination of the patient, he was found normal. Such patients are advised to take continuous treatment for 2-3 years. He has also expressed his inability to recall as to how long Ram Singh had come at his clinic for his treatment. At the instance of the family members of the patient he had recorded the name accordingly. Normally he does not identity his patients if they again appear before him, therefore, he cannot say that the accused, who was present in the Court, was Ram Singh or not. It would be wrong to suggest that he had not treated Ram Singh and he had prepared a false medical report of the accused at his instance.

56. From the evidence of D.W.-1 Dr. Rajiv Jain, it is reflected that he had examined Ram Singh at his clinic, on 29.11.2000 at 12 noon and on his examination based on the EEG, he was found normal.

57. Having regard to his remaining evidence, it is academic in nature, because of the fact that he had expressed his opinion about the disease on the narration of symptoms as having been told to him by the family members of the accused. D.W.-1, Dr. Rajiv Jain has expressed his opinion in the given circumstances. However, upon examination of the accused, he had found him mentally normal. As such, the testimony of Dr. Rajiv Jain, does not help the accused in his plea of insanity. Dr. Jain, has also expressed his inability to remember how many times accused had visited his clinic for his treatment. Further, Dr. Jain was consulted on 29.21/2000, whereas, incident is stated to have occurred on 22.03.2007.

58. In the report 111-Kha, Dr. Rajiv Jain, Neuro Psychiatrist has also conclusively opined that EEG of Ram Singh was within normal limits.

59. Accused vide O.P.D. No. 17704 dated 16.11.2007, on his (Ram Singh) reference to ascertain his mental status

examination, no history regarding his illness was available with the Doctor concerned, therefore, Doctor vide his report has stated, in paper No. 11 Kha, that it was not possible for him to arrive at any conclusion regarding the mental status of Ram Singh.

60. Doctor advised accused Ram Singh, that he would be put under observation to ascertain his mental status for at least 14 days. He had referred Ram Singh to mental hospital, Varanasi for further treatment.

61. Shri Amrendra Kumar, Medical Officer/ Psychiatrist, in mental hospital, Banaras, in compliance of Court order dated 11.12.2007, examined Ram Singh; during admission in the hospital on 17.12.2007 and 02.01.2008, medical officer observed that he suffered from "unspecified, Non Organic Pshchotic Disorder (F-29).' Ram Singh was medically examined on 17.11.2007 and 201.2000, whereas, incident had occurred on 20.03.2007.

62. The Medical Officer, vide report dated 02.01.2008, paper no. 16 Kha/2 one column and B-pertaining to other facts about the insanity, communicated to him by other medical officer did not find anything "significant".

63. Director and Chief Superintending Medical Hospital Varanasi, vide letter dated 28.02.2008, addressed to the District and Session Judge, Lalitpur, who had conducted the trial of the accused, stated that in compliance of his (District and Sessions Judge, Lalitpur), letter no. 6 dated 22.01.2008, prisoner-accused's mental status was examined by Shri Amrendra Kumar, Medical Officer/ Psychiatrist, in mental hospital, Banaras, and stated that his mental condition found was better; he took his meal and also slept; he was maintaining his hygiene and also he had complied the directions; accused was giving most of the right answers to the questions put to him; he often smiled; mumbled without reason. Ram Singh, vide letter dated 19 Kha, dated 28.02.2008, was not found fully healthy. It was averred in the letter that as per the advice of medical officer/ psychiatrist he was being treated.

64. Director and Chief Superintendent Medical Hospital Varanasi, vide letter No. 2008/507/Ram Singh/dated March 15th 2008, form no. 21 Kha/ to Jail Superintendent Officer Prison, Lalitpur, was informed about the treatment, better condition of Ram Singh; he 19 was being treated for his illness and regarding his fitness his matter would be discussed in the forthcoming quarterly meeting of the Board.

65. Director and Chief Superintendent Mental Hospital, Varanasi, vide letter 2008/September 24/08, regarding mental state of prisoner Ram Singh, Superintendent District Jail, Lalitpur, was informed that in the visitors Board meeting dated 12.09.2008, Ram Singh was declared mentally unhealthy and it was also advised to continue his (Ram Singh's) treatment.

66. Chief Medical Superintendent, Mental Hospital, Varanasi, vide his report no. 2009 dated 26.02.2009, paper no. 38 Kha to learned trial Court Judge, Lalitpur, with regard to mental status of Ram Singh, in connection with his trial in the instant case, it was reported that in the half yearly meeting of visitors Board, held on 17.02.2009, Ram Singh, was declared mentally healthy and Ram Singh was also

recommended to be transferred from the hospital to Jail concerned.

67. There is also treatment card dated 15.03.2009 of accused by Dr. Shri Amrendra Kumar, Medical Officer/ Psychiatrist, who had prescribed two tablets and another capsule for Ram Singh, to be continued for at least three months and to be stopped on the advise of a Psychiatrist.

68. Alleged incident is said to have occurred on 22.03.2007, whereas, other medical reports, regarding medical status of accused pertains, between the period 16.11.2007 to 17.02.2009. It is also evident from the above referred medical reports that after the alleged incident dated 22.03.2007, accused for his mental illness 20 was treated after the lapse of about seven and half months. However, he was reported vide paper no. 111 Kha, Exhibit Kha-1, on 29.01.2000, within the normal limits of his mental condition.

69. P.W.-1, Naune Raja, in his cross examination, with regard to mental status of the accused before the alleged incident, has stated that one day before the incident, the accused was mentally fit he was suffering from mental illness and he occassionly had fits and during fits, he would sit in isolation and he would not take his meal regularly and also upon persuation he would not have meal; he would eat at will but he did not stay hungry for a couple of days. During illness his eyes would turn red; he would flee from the house, but since 5-6 years he had not fled from the house. He had fled about 10 years earlier from the house and had returned on his own. Though attempted to trace him, by his father and family members was made but they did not come to know about his whereabouts. Ram Singh had fled from his house five years before the incident. Accused was married to the daughter of Brijraj Singh. Accused at the time of his marriage was not mentally ill but at that time also he would suffer from fits.

70. P.W.-1, Naune Raja, has also further stated that he has no dispute with accused with regard to property, however, due to the illness of the accused, he did not meet him; he and accused are living in one house and share common courtyard; there is same main gate to their house; he was not on bad terms with accused. He would not abuse him or his wife nor he (Ram Singh) had ever beaten his wife.

71. P.W.-2, Narendra Singh, has turned hostile. He, in his cross examination done on behalf of the accused has stated that Ram Singh after marriage had absconded 2-3 times and he went missing for a year; his family members on search found him near a temple in shabby condition. He was brought back to the house in disturbed mental state, he would not have his meal regularly.

72. P.W.-2 Narendra Singh, is not family member of the accused. He lives at half a kilometre distance from house of the accused. Deposition of P.W.-2 that Ram Singh after his marriage had absconded 2-3 times and upon search by his family members, he was found near the temple has not been supported by the P.W.-1 Naune Raja. In this connection, Naune Raja, has stated that accused had absconded 10 years before the day of his deposition before the Court (i.e. 28.07.2000) and had returned of his own after lapse of one year; he was not traced by his father. As such, statement of P.W.-2 Narendra Singh, is inconsistent with the evidence of P.W.-1 Naune Raja.

P.W.-1 Naune Raja, has categorically stated in his statement that accused Ram Singh after his marriage had fits and therefore, he was treated by Dr. Rajiv Jain at his Clinic, Lalitpur, and also at Gwalior, by Dr. Malhotra. Accused went there along with his father and uncle; his father had incurred the expenses of his treatment.

73. P.W.-1 Naune Raja, has expressed his ignorance about the treatment of Ram Singh's mental illness at Banaras, during his incarceration in jail.

74. P.W.-2 Narendra Singh, who turned hostile has also stated in his testimony that accused was treated at Lalitpur and Gwalior.

75. P.W.-3, Govind Das, has said that Ram Singh for his mental illness was treated at Gwalior or not, was not known to him. He also does not know whether Ram Singh suffered fits or not. However, before the incident Ram Singh had not gone mad and before the incident Ram Singh had neither absconded nor returned to this house in his presence.

76. P.W.-3, Govind Das has categorically stated that at the time of incident he was staying in the village but before the incident, he had gone to Jhansi to do labour work. He does not work as labour at any permanent place. P.W.-3-Govind Das, before the alleged incident had not stayed in the village and had remained out of the village to earn his livelihood, therefore, it appears that he was not knowing about the mental illness of the accused before the occurrence. It is clear, that there is evidence that accused Ram Singh, soon before the incident was mentally sound.

77. It is admitted to P.W.-1 Naune Raja, that accused was treated at Lalitpur, and Gwalior by Dr. Malhotra, but there is no documentary evidence on record about the treatment of the accused at Gwalior. However, regarding the treatment of accused at Lalitpur, Jhansi and Varansi, documentary evidence is on record.

78. Accused Ram Singh, was treated at Varanasi, for his mental illness, during his incarceration from 2007-2009, he was also treated for his mental illness at Dr. Rajiv Jain's Clinic at Lalitpur.

79. Documentary evidence with regard to the treatment of mental illness of the accused at Jhansi, Lalitpur and Varanasi is also not pertaining to soon after the incident, as such, it is found that soon before and soon after the incident, accused was not mentally suffering to such an extent that he could be said to be incapable to know about the nature and consequences of his act.

80. It is also reflected from the appraisal of the oral evidence of the witnesses that the accused Ram Singh at the time of incident had emerged in public view from his house and was seen to have weilding blood stained axe and also his cloths were stained with blood. He had tried to escape, but he was caught hold by the witnesses, it has come in evidence that at the time of being caught, his eyes were turn red and he was behaving wildly.

81. It appears from the conduct of the accused that just after the incident, he to screen himself from legal punishment, knowing that he has committed an offence, has it not been so, he would not have tried to escape from the place of occurrence with weapon of crime.

82. From the forgoing discussion it is evident that there is no documentary evidence regrading the treatment of mental illness of the appellant, before or soon after the incident. However, it had come in the evidence that occasionaly his behaviour has becomes wild. P.W.-1 Naune Raja, who is the elder brother of the applicant and also permanently resides in the same courtyard of their house is the best person to know about the behaviour of the accused, and also about his mental illness. He has deposed that since past 5 years of the occurrence, Ram Singh did not have fits. However, he has also admitted in his evidence that during the said period, accused had intermittently fits. But, there is no evidence with regard to the duration of the fits. P.W.-1 Naune Raja, has categorically stated in his testimony that before the incident the accused was normal. It also transpires from above discussion that in 2007 he had contacted Dr. Rajeev Jain at his Clinic at Lalitpur, who had diagnosed him normal. Thereafter, during his incarceration in jail, and during treatment, he was found unhealthy but after treatment he became normal.

83. Dr. Rajeev Jain, has also stated in his evidence that he was not fully sure whether at the time of the alleged incident accused has had fits.

84. In our opinion, Ram Singh has had fits but it cannot be construed that he was suffering from such mental illness at the time of incident that he could be assumed to be incapable to know the nature of his act at the time of incident.

85. It is also transpires from the above analysis of the evidence on record that there is no such evidence to believe that soon before the incident, or at the time of incident or soon after the incident, magnitude of his mental illness was such whereunder he could be accepted to be incapacitated to understand the nature of his act.

86. Insanity is solely a legal and sociological concept, has no technical meaning in law or in medicine and does not connote any definite medical entity. Insanity is seen to be a social inadequacy and medically it takes the form of a mental disease. In other words, insanity implies a degree of mental disturbance so menacing and so disabling that the person may be considered from the legal point of view to be immune from certain responsibilities, may disallow him certain privileges that may require a degree of competence such as a decision to marry, make business contracts or manage property but may be enough criteria for compulsory hospitalisation. Another term, which is often used but not defined is unsoundness of mind and is used as a synonym with other terms such as insanity, lunacy, madness or mental derangement or disordered state of mind due to which an individual loses the power of regulating his actions and conduct according to the rules of the society to which he belongs.

87. Reasons may be of several types. In our view, the accused may be occasionally in depressive phase. In such phase a patient may look tired and self concerned. Sadness of mood reflects in posture, movements and facial expressions. There is diminished capacity for normal affective response and the past, present and future look dark and gloomy. Suicide or suicidal attempt is often the first and the last symptom of depressive illness. Suicide is well planned and is of great danger to the patient. In the instant case, there is no

evidence on record to show that the accused has ever tried to commit suicide or suicidal attempt, therefore, in typical cases , there is early morning wakening and sleep is not freshening. This is associated with loss of appetite and libido. In a reactive depression there is some external event in the environment.

88. Author "Jaisingh P Modi' in his text "Medical Jurisprudence and Toxicology' had defined "Epileptic Psychosis' as: " Epilepsy usually occurs from early infancy, though it may occur at any period of life. Individuals, who have had epileptic fits for years, do not necessarily show any mental aberration, but quite a few of them suffer from mental deterioration. Such patients are peevish, impulsive and suspicious and are easily provoked to anger on the slightest cause. The disease is generally characterised by short transitory fits of uncontrollable mania followed by complete recovery. The attacks, however, become more frequent. There is a general impairment of the mental faculties with the loss memory and self control.
Epileptic psychosis is that which is associated with epileptic fits. This may occur before or after the fits, or may replace them, and is known as preepileptic, post epileptic and masked or psychic phases'. Feigned Mental Ill Health has also been defined as follows: There is always some motive for feigning mental ill health. For instance, a criminal pretends mental ill-health to escape sentence of death or a prolonged term of imprisonment for a very grave offence, such as murder, especially when he is placed on trial."

89. The detection of feigned mental ill-health is one of the responsible duties of a medical officer. Ordinarily, it is easy to detect the fraud, but at times it becomes very difficult. An individual should be detained under observation, before a definite opinion is given. It should be remembered that such person cannot be kept under observation for more than 10 days in the first instance but with the permission of the Court he may be detained for further period of 10 days up to a maximum of 30 days. During this period, the medical officer has to watch him and make a careful note of all the symptoms exhibited by him.

90. In view of the above discussion, we have seen that there is no medical evidence on record to show that before or soon after the incident, accused was suffering from Psychotic disorder that it could be assumed that accused was unable to understand the nature of his act. Further, it has not been proved that the act itself was result of his mental disorder.

91. Accused has not been able to demonstrate, by means of evidence, that at the time of incident he was influenced by mental disorder. It has not come in the evidence that before the incident he had fits, further there is no evidence that before or soon after the incident he had suffered fits .

92. Hon'ble Supreme Court in ***Sherall Walli Mohammad v. State of Maharashtra, 1972 Cr. LJ 1523 (SC)*** had held that:

"The law presumes that every person of the age of discretion to be sane unless the contrary is proved. It would be most dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime, the mere fact that no motive has been proved why

the accused murdered his wife and child or, the fact that he made no attempt to run away when the door was broke open, would not indicate that he was insane or, that he did not have the necessary mens rea for the commission of the offence."

93. Learned trial Court in the impugned judgment and order has apparised the entire evidence on record, relevant case laws, and has discussed all the aspects of the case, including, insanity, therefore, we do not find that the impugned judgment and order is not based on sound reasons, or principle of law has not been followed, hence, we have no reason to disagree with the findings of the learned trial court.

94. In view of above discussion, we are clearly of the view that Trial Court has rightly found appellant guilty of offences with which the appellant was charged and prosecution has successfully proved its case beyond doubt against the appellant, hence, he has been rightly convicted and sentenced.

95. So far as sentence regarding appellant is concerned, it is always a difficult task requiring balancing of various considerations. The question of awarding sentence is a matter of discretion to be exercised on consideration of circumstances aggravating and mitigating in the individual case.

96. It is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. It is obligation of the Court to constantly remind itself that right of victim, and be it said, on certain occasions persons aggrieved, as well as, society at large can be victims, never be marginalised. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving above object of law. Further, it is expected that Courts would operate the sentencing system so as to impose such sentence which reflects conscience of the society and sentencing process has to be stern where it should be. The Court will be failing in its duty if appropriate punishment is not awarded for a crime, which has been committed not only against individual victim but also against society to which criminal and victim belong. Punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with the crime has been perpetrated, enormity of crime warranting public abhorrence and it should 'respond to society's cry for justice against the criminal'. [Vice Sumer Singh Vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder Vs. Puran, (1990) 4 SCC 731, M.P. Vs. Saleem, (2005) 5 SCC 554, Ravji Vs. State of Rajasthan, (1996) 2 SCC 175].

97. Hence, applying the principles laid down by the Hon'ble Apex Court in the aforenoted judgments and having regard to the totality of facts and circumstances of case, nature of offence and the manner in which it was executed or committed, we find that punishment imposed upon the appellant by Trial Court in impugned judgment and order is not excessive or exorbitant and no question arises to interfere in the matter on the point of punishment imposed upon the accused.

98. In view of the facts and circumstances, impugned judgment and

order dated 28.03.2011, deserves to be affirmed and appeal is liable to be dismissed.

99. In the result, the Criminal Appeal is dismissed. Impugned judgment and order dated 28.03.2011 is hereby confirmed/affirmed. The appellant, who is in jail, shall serve out the sentence awarded to him by the Trial Court.

100. Copy of this order along with lower Court record be sent to Court concerned forthwith.

101. A copy of this order be also sent to Appellant through concerned Jail Superintendent.

(2023) 1 ILRA 1182
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.01.2023

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Special Appeal Defective No. 2 of 2018

Devesh Verma ...Appellant
Versus
Christ Church College & Ors. ...Respondents

Counsel for the Appellant:
Sri Ramesh Chandra Saxena, Sri Gaurav Saxena

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

A. Education Law – Removal from post - U.P. Intermediate Education Act, 1921 - Section 16G(3).

Maintainability - While a body may be discharging a public function or performing a public duty and thus its actions becoming amenable to judicial review by a Constitutional Court, its employees would not have the right to invoke the powers of the High Court conferred by Article 226 in respect of matter relating to service where they are not governed or controlled by the statutory provisions. An educational institution may perform myriad functions touching various facets of public life and in the societal sphere. While such of those functions as would fall within the domain of a "public function" or "public duty" be undisputedly open to challenge and scrutiny under Article 226 of the Constitution, **the actions or decisions taken solely within the confines of an ordinary contract of service, having no statutory force or backing, cannot be recognised as being amenable to challenge under Article 226 of the Constitution.** In the absence of the service conditions being controlled or governed by statutory provisions, the matter would remain in the realm of an ordinary contract of service. (Para 25)

B. Approval u/s 16-G(3)(a) of U.P. Intermediate Education Act, 1921 - Since no appropriate guidelines have been provided for exercise of power u/s 16-G (3)(a) of the Act, it must be held that such an uncanalised power on the Inspector or the Inspectress would tantamount to an inroad into the power of disciplinary control of the Managing Committee of the minority institution over its employees and as such the said provision would not apply to the minority institution.

The legislature never intended to subject the order of termination of an employee of a minority institution to the approval/ disapproval of the Selection Board. In this view of the matter, it is difficult for us to hold that an order of termination of an employee of a minority institution cannot be given effect to, unless approved by either the Inspector/Inspectress, as provided in Section 16-G (3)(a) or by the Selection Board, as provided under U.P. Act 5 of 1982. Under the provisions, the conclusion is that the **question of prior approval of the competent authority in case of an order of**

termination of an employee of a minority institution does not arise. (Para 26)

Therefore, the employees of a private educational institution would not have the right to invoke the powers of the High Court conferred by Article 226 in respect of matters relating to service where they are not governed or controlled by the statutory provisions. And, the provisions of Section 16 G (3) of the U.P. Intermediate Education Act are not applicable to the teachers employed in private minority institutions. There is no other Statutory provision, which is alleged to have been violated in the instant case. Therefore, the WP filed by a former teacher against the private unaided minority institution challenging the order of his termination and seeking restitution of his service, is not maintainable. (Para 27)

C. Several disputed questions of fact - The appellant claims that he had been duly selected and appointed, but he has not filed a copy of the appointment letter or a contract of appointment from which his service conditions may be ascertained. The college has contended neither any advertisement had been issued nor any selection was held and on a personal request made by the appellant, he had been orally engaged to work and after he had worked merely for about 4 months, he misbehaved with the Principal of the college and the Principal had filed a FIR against him on 31.03.1992. The appellant did not perform his duties since thereafter. Whether or not the appellant was duly selected and appointed, and what were his service conditions, are facts which are in dispute and regarding which no material is available on record. For this reason also, the WP would not be maintainable. (Para 28)

Special appeal dismissed. (E-4)

Precedent followed:

1. Committee of Management, St. John's Inter College Vs Girdhari Singh & ors. (2001) 4 SCC 296 (Para 5)

2. Committee of Management, La Martinere College, Lucknow Vs Vatsal Gupta & ors. Civil Appeal No. 7030 of 2016, decided on 26.07.2016 (Para 5)

3. Abu Zaid & ors. Vs Principal, Madrasa-Tul-Islah Saraimir, Azamgarh & ors. AIR 1999 All 64 (Para 7)

4. Sandeep Chauhan & ors. Vs Respondent: St. of U.P. & ors. 2001 (2) LBESR 644 (Para 7)

5. Harold James Vs U.O.I., (2004) 22 LCD 1649 (Para 7)

6. Ramesh Ahluwalia Vs St. of Pun., (2012) 12 SCC 331 (Para 7)

7. Roychan Abraham Vs St. of U.P., (2019) 2 UPLBES 1148 (FB) (Para 7)

8. Marwari Balika Vidyalaya Vs Asha Srivastava, (2020) 14 SCC 449 (Para 7)

9. St. Mary's Educational Society and another Vs Rajandra Prasad Bhargava & ors. 2022 SCC OnLine 1091 (Para 7)

10. Committee of Management, La Martiniere College, Lucknow Vs Vatsal Gupta & ors. S.L.P. (Civil) No. 3182 of 2016, decided on 26.07.2016 (Para 8)

11. Satimbla Sharma Vs St. Paul' Senior Secondary School, (2011) 13 SCC 760 (Para 8)

12. Dr. S.N. Tripathi Vs St. of U.P., 2010 SCC OnLine All 1965 (Para 8)

13. Bhavnagar University Vs Palitana Sugar Mill (P) Ltd., (2003) 2 SCC 111 (Para 10)

14. Escorts Ltd. Vs CCE, (2004) 8 SCC 335 (Para 10)

15. Bharat Petroleum Corp. Ltd. Vs N.R. Vairamani, (2004) 8 SCC 579 (Para 11)

Precedent distinguished:

Andi Mukta Sadguru Shree Muktajee Vandas Sawmi Suvarna Jayanti Mahotsava Smarak Trust & ors. Vs V.R. Rudani & ors. (1989) 2 SCC 691 (Para 7, 14, 15)

Present intra court appeal challenges the judgment and order dated 12.09.2017

passed by an Hon'ble Single Judge dismissing Writ Petition No. 6630 (S/S) of 1996, in which appellant challenged his removal from a post of Lecturer in Christ Church College, Lucknow, on the ground of being in violation of S. 16 G (3) of the U.P. Intermediate Education Act, 1921.

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

(**Order on C.M.An.782 of 2018 (Application for Condonation of delay): -**

1- This is an application seeking condonation of delay in filing appeal.

2- We have gone through the affidavit filed in support of the application.

3- The cause shown for the delay is sufficient.

4- The application is allowed.

5- Delay in filing appeal is hereby condoned.

Order On the Special Appeal

1- By means of the instant intra court appeal, the appellant-petitioner has sought to challenge the judgment and order dated 12.09.2017 passed by an Hon'ble Single Judge dismissing Writ Petition No. 6630 (S/S) of 1996, which was filed by the appellant challenging his removal from a post of Lecturer in Christ Church College, Lucknow (which will hereinafter be referred to as "the college'), on the ground that the removal was done in violation of Section 16 G (3) of the U. P. Intermediate Education Act, 1921.

2- Briefly stated, the facts of the case are that the appellant had filed the Writ Petition pleading that he had been duly selected and was appointed as a Lecturer in Physics in the College and he had joined his duties on 07.10.1991. On 31.03.1992, the Principal of the College had lodged a First Information report against the appellant, bearing Case Crime No. 380 /92 under Sections 504/506 of the Indian Penal Code in Police Station Hazaratganj, Lucknow, and the appellant was arrested on 16.07.1992. The appellant was granted bail on the same day but the Principal of the College did not permit him to resume his duties and said that he would not permit the appellant to resume his duties until he was acquitted of the charges. Ultimately the appellant was acquitted by means of a judgment dated 24.05.1996, but when he went to join his duties, the Principal of the college told him that another person had been appointed in place of the appellant and the appellant's services had come to an end automatically with effect from 17.07.1992.

3- The appellant challenged the oral termination of his services mainly on the ground that before dispensing with his services, no approval required under Section 16 G (3) of the U. P. Intermediate Education Act was obtained.

4- The college filed a counter affidavit pleading that it is a minority institution recognized by the Indian Council for Secondary Education. It is a private institution which does not receive any financial assistance from the State Government and the State Government has no role to play in it. The provisions of the U. P. Intermediate Education Act are not applicable to the college. It was also stated in the counter affidavit that no selection was held for making appointment on the post of Lecturer and the petitioner

personally made a request for his engagement and he was orally allowed to work temporarily on his personal request. The petitioner worked only for about four months and after he misbehaved with the Principal on 31.03.1992, he did not perform his duties even for a single day.

5- The Hon'ble Single Judge has relied upon the judgment of Hon'ble Supreme Court in case of ***Committee of Management, St. John's Inter College v. Girdhari Singh & Ors, (2001) 4 SCC 296*** in which the Hon'ble Supreme Court has held that the provisions of Section 16 G (3) of the U. P. Intermediate Education Act, 1921 are not applicable to the minority institutions. The Hon'ble Single Judge also relied upon a decision of the Hon'ble Supreme Court in the case of ***Committee of Management, La Martinere College, Lucknow v. Vatsal Gupta & Ors., Civil Appeal No. 7030 of 2016*** decided on 26.07.2016, wherein the Hon'ble Supreme Court declined to interfere in a judgment passed by this Court declining to entertain the writ petition filed against unaided minority private institution.

6- The Hon'ble Single Judge dismissed the Writ Petition as not maintainable, taking into consideration the plea taken in the counter affidavit that the College, Lucknow is a private minority institution recognized by Indian Council of Secondary Education and the writ petition filed against a private minority institution is not maintainable.

7- Sri R. C. Saxena, Advocate, the learned Counsel for the appellant has submitted that the College is engaged in imparting education to the children, which is a public duty and the writ petition filed against such an institution would be maintainable. In support of his contention, the learned Counsel for the appellant has placed reliance upon the following decisions: -

I - Andi Mukta Sadguru Shree Muktajee Vandas Sawmi Suvarna Jayanti Mahotsava Smarak Trust & Ors. v. V.R. Rudani & Ors., (1989) 2 SCC 691

II - Abu Zaid and Ors. vs. Principal, Madrasa-Tul-Islah Saraimir, Azamgarh and Ors. AIR 1999 All 64

III - Sandeep Chauhan and Ors. Vs. Respondent: State of U.P. and Ors. 2001 (2) LBESR 644

IV - Harold James versus Union of India, (2004) 22 LCD 1649

V - Ramesh Ahluwalia v. State of Punjab, (2012) 12 SCC 331

VI - Roychan Abraham versus State of U. P., (2019) 2 UPLBES 1148 (FB)

VII -Marwari Balika Vidyalaya v. Asha Srivastava, (2020) 14 SCC 449,

VIII - St. Mary's Educational Society and another versus Rajandra Prasad Bhargava and others, 2022 Scc OnLine SC 1091

8- Per contra, Sri Jai Pratap Singh, the learned counsel representing the college has submitted that the institution in question being a private unaided minority institution, the Hon'ble Single Judge had rightly held that the writ petition is not maintainable. He has placed reliance upon the following judgments: -

I - Committee of Management, La Martiniere College, Lucknow versus Vatsal

Gupta and others, S.L.P. (Civil) NO. 3182 of 2016, decided on 26.07.2016,

II - Satimbla Sharma v. St Paul's Senior Secondary School, (2011) 13 SCC 760

III - Dr. S. N. Tripathi versus State of U. P. 2010 SCC OnLine All 1965

IV - Committee of Management, St. John Inter College v. Girdhari Singh, (2001) 4 SCC 296

9- We have considered the aforesaid submissions made by the learned counsel for the parties.

10- In **Bhavnagar University v. Palitana Sugar Mill (P) Ltd.,** (2003) 2 SCC 111, the Hon'ble Supreme Court held that: -

"A decision, as is well known, is an authority for which it is decided and not what can logically be deduced therefrom. It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision."

11- In **Escorts Ltd. v. CCE**, (2004) 8 SCC 335 and **Bharat Petroleum Corpn. Ltd. v. N.R. Vairamani,** (2004) 8 SCC 579, the Hon'ble Supreme Court held that: -

"8. 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 neither to be read as Euclid's theorems nor as provisions of a statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. 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 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 (1951) 2 All ER 1 (HL), Lord MacDermott 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,..."

9. *In Home Office v. Dorset Yacht Co. (1970) 2 All ER 294, Lord Reid said (All ER p. 297g-h),*

"Lord Atkin's speech ... is not to be treated as if it were a statutory definition. It will require qualification in new circumstances."

Megarry, J. in Shepherd Homes Ltd. v. Sandham (No. 2)4 observed: (All ER p. 1274d-e) "One must not, of course, construe even a reserved judgment of even Russell, L.J. as if it were an Act of Parliament;" And, in Herrington v. British Railways Board5 Lord Morris said: (All ER p. 761c)

"There is always peril in treating the words of a speech or a judgment as though they were words in a legislative

enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case."

10. 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."

12- In the light of the aforesaid principles, we proceed to examine the ratio of decisions relied upon by the learned Counsel for the parties in light of the factual background in which the ratio was laid down.

13- In **Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani**, (1989) 2 SCC 691, the teachers of a private institution had filed a Writ Petition claiming payment of their dues upon termination of their services consequent to closure of the institution. The Hon'ble Supreme Court proceeded to decide the questions involved after noting that: -

*"**5. As is obvious from these reliefs, the retrenched persons were not agitating for their continuance in the service.** They seem to have made a trust with the destiny and accepted the closure of the college. They demanded only the arrears of salary, provident fund, gratuity and the closure compensation which are legitimately due to them.*

* * *

13. The decision in Vaish Degree College (1976) 2 SCC 58 was followed in Deepak Kumar Biswas case (1987) 2 SCC 252. There again a dismissed lecturer of a private college was seeking reinstatement in service. The Court refused to grant the relief although it was found that the dismissal was wrongful. This Court instead granted substantial monetary benefits to the lecturer. This appears to be the preponderant judicial opinion because of the common law principle that a service contract cannot be specifically enforced.

14. But here the facts are quite different and, therefore, we need not go thus far. There is no plea for specific performance of contractual service. The respondents are not seeking a declaration that they be continued in service. They are not asking for mandamus to put them back into the college. They are claiming only the terminal benefits and arrears of salary payable to them. The question is whether the trust can be compelled to pay by a writ of mandamus?

*15. If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied. **It has to be appreciated that the appellants trust was managing the affiliated college to which public money is paid as government aid. Public money paid as government aid plays a major role in the control, maintenance and working of educational institutions. The aided institutions like government institutions discharge public function by way of imparting education to students. They are subject to the rules and regulations of the affiliating University. Their activities are closely supervised by the University***

authorities. Employment in such institutions, therefore, is not devoid of any public character. So are the service conditions of the academic staff. When the University takes a decision regarding their pay scales, it will be binding on the management. The service conditions of the academic staff are, therefore, not purely of a private character. It has super-added protection by University decisions creating a legal right-duty relationship between the staff and the management. When there is existence of this relationship, mandamus cannot be refused to the aggrieved party.

* * *

20. The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists mandamus cannot be denied."

(Emphasis supplied)

14- It cannot be lost sight of that the aforesaid proposition was laid down after taking note of the facts that the retrenched persons were not agitating for their continuance in the service and They had demanded only the arrears of salary, provident fund, gratuity and the closure compensation which were legitimately due to them. There was no plea for specific performance of contractual service. The respondents were not seeking a declaration that they be continued in service. They were not asking for mandamus to put them back into the college. They were claiming only the terminal benefits and arrears of salary payable to them and the question was whether the trust could be compelled to pay by a writ of mandamus. The Court held that if the management of the college is purely a private body with no public duty mandamus will not lie. The appellant trust was managing an affiliated college to which public money was paid as government aid and public money paid as government aid plays a major role in the control, maintenance and working of educational institutions. The aided institutions like government institutions discharge public function by way of imparting education to students. The Court held that employment in such institutions is not devoid of any public character and so are the service conditions of the academic staff. When the University takes a decision regarding their pay scales, it will be binding on the management. The service conditions of the academic staff are, therefore, not purely of a private character.

15- In the present case, the college is a private minority institution which does not receive any financial aid from the Government and the grievance raised is against termination of services of a teacher and the prayer made is for restitution of the appellant in service. Therefore, the aforesaid principles laid down in Andi

Mukta after specifically highlighting that the petitioners in that case were not challenging the termination of their services and they were not seeking restitution in service, will not apply to the present case.

16- **Abu Zaid and Ors. vs. Principal, Madrasa-Tul-Islah Saraimir, Azamgarh and Ors.** AIR 1999 All 64, was a petition filed by the students who had been debarred from taking up their studies in the institution on account of their involvement in a criminal case and it was also not a case in which the legality of order of termination of services of a minority institution was in issue. It was submitted before the Court that "The respondents have illegally and without affording any opportunity of hearing or of showing cause, prevented them from attending their classes though no specific orders have been passed. The petitioners have, of necessity, to file the present writ petition as the respondents are bent upon to deprive the petitioners from their lawful right to continue their studies In the respondent-institution". While deciding the Writ Petition, the Single Bench held that: -

"10. The respondent Madrasa-Tul-Islah, Saraimir, Azamgarh admittedly is an institution duly recognised under the Societies Registration Act and its affairs are regulated by the approved bye-laws and scheme of administration. The institution even though a minority one, is discharging a public duty of imparting education, which has been held to be a fundamental right. Therefore, in view of the law discussed above, the petitioners are entitled to approach this Court for issuing appropriate direction and orders in the nature of writ."

17- In **Sandeep Chauhan and Ors. Vs. Respondent: State of U.P. and Ors**. 2001 (2) LBESR 644, a Division Bench of this Court held that writ petition against Central Board of Secondary Education, Shiksha Kendra. Preet Vihar, New Delhi, is maintainable.

18- In **Ramesh Ahluwalia v. State of Punjab**, (2012) 12 SCC 331, the Hon'ble Supreme Court held that: -

"12. We have considered the submissions made by the learned counsel for the parties. In our opinion, in view of the judgment rendered by this Court in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust there can be no doubt that even a purely private body, where the State has no control over its internal affairs, would be amenable to the jurisdiction of the High Court under Article 226 of the Constitution, for issuance of a writ of mandamus. Provided, of course, the private body is performing public functions which are normally expected to be performed by the State authorities.

* * *

16. We are of the considered opinion that since the writ petition clearly involves disputed questions of fact, it is appropriate that the matter should be decided by an appropriate tribunal/court."

(Emphasis supplied)

19- In **Roychan Abraham versus State of U. P.,** (2019) 2 UPLBES 1148 (FB), a Full Bench of this Court held that: -

"Private Institutions imparting education to students from the age of six years onwards, including higher education, perform public duty primarily a State

function, therefore are amenable to judicial review of the High Court under Article 226 of the Constitution of India."

20- In **Marwari Balika Vidyalaya v. Asha Srivastava,** (2020) 14 SCC 449, the Hon'ble Supreme Court held that a writ application is maintainable even as against the private unaided educational institutions.

21- In **Satimbla Sharma v. St Paul's Senior Secondary School,** (2011) 13 SCC 760 the Hon'ble Supreme Court held that: -

"unaided private minority schools over which the Government has no administrative control because of their autonomy under Article 30(1) of the Constitution are not State within the meaning of Article 12 of the Constitution. As the right to equality under Article 14 of the Constitution is available against the State, it cannot be claimed against unaided private minority schools."

* * *

25. Where a statutory provision casts a duty on a private unaided school to pay the same salary and allowances to its teachers as are being paid to teachers of government-aided schools, then a writ of mandamus to the school could be issued to enforce such statutory duty. But in the present case, there was no statutory provision requiring a private unaided school to pay to its teachers the same salary and allowances as were payable to teachers of government schools and therefore a mandamus could not be issued to pay to the teachers of private recognised unaided schools the same salary and allowances as were payable to teachers of government institutions."

22- In **Dr. S. N. Tripathi versus State of U. P.** 2010 SCC OnLine All 1965, this Court held "that a Government aided private society constituted under the Societies Registration Act, shall not be "State' within the meaning of Article 12 of the Constitution of India. Hence the writ petition is not maintainable." The Court further held that: -

"15. However, it does not mean that the petitioner or the employees of the Government added College are remediless. In the event of Intermediate College, the District Inspectors of Schools or Deputy Director of Region or the Director of Education has got ample powers to interfere in accordance with the provisions contained in the statute or under the Payment of Salaries Act. In case a degree college is affiliated to University, then under the U.P. Universities Act and its statutes, the employees have got right to approach the appropriate authority like Vice-Chancellor/Director of Higher Education, to ventilate their grievance.

16. Accordingly, while holding that the present writ petition as not maintainable, we give liberty to the petitioner to approach the Director Higher Education with regard to payment of salary in question or the Vice-Chancellor as the case may be. In case the petitioner represents his cause, it shall be considered and decided expeditiously say, within three months from the date of receipt of a certified copy and communicate the decision."

23- In Committee of Management, La Martinere College, Lucknow v. Vatsal Gupta & Ors., Civil Appeal No. 7030 of 2016 decided on 26.07.2016, the Hon'ble Supreme Court declined to interfere in a judgment passed by this Court declining to entertain the writ petition filed against

unaided minority private institution and held that: -

"Appellant No.1 is an unaided minority private institution. We see no reason how a writ petition against that institution could be entertained. The High Court was clearly in error in entertaining the writ petition and passing subsequent directions."

24- After taking into consideration numerous previous decisions, in a recent decision of the Hon'ble Supreme Court in **St. Mary's Educational Society and another versus Rajandra Prasad Bhargava and others**, 2022 SCC OnLine SC 1091, the Hon'ble Supreme Court has decided the following two questions: -

"(a) Whether a writ petition under Article 226 of the Constitution of India is maintainable against a private unaided minority institution?

(b) Whether a service dispute in the private realm involving a private educational institution and its employee can be adjudicated in a writ petition filed under Article 226 of the Constitution? In other words, even if a body performing public duty is amenable to writ jurisdiction, are all its decisions subject to judicial review or only those decisions which have public element therein can be judicially reviewed under the writ jurisdiction?"

25- The Hon'ble Supreme Court has been pleased to answer the questions in the following words: -

"69. We may sum up our final conclusions as under:--

(a) An application under Article 226 of the Constitution is maintainable against a person or a body discharging public duties or public functions. The public duty cast may be either statutory or otherwise and where it is otherwise, the body or the person must be shown to owe that duty or obligation to the public involving the public law element. Similarly, for ascertaining the discharge of public function, it must be established that the body or the person was seeking to achieve the same for the collective benefit of the public or a section of it and the authority to do so must be accepted by the public.

(b) Even if it be assumed that an educational institution is imparting public duty, the act complained of must have a direct nexus with the discharge of public duty. It is indisputably a public law action which confers a right upon the aggrieved to invoke the extraordinary writ jurisdiction under Article 226 for a prerogative writ. Individual wrongs or breach of mutual contracts without having any public element as its integral part cannot be rectified through a writ petition under Article 226. Wherever Courts have intervened in their exercise of jurisdiction under Article 226, either the service conditions were regulated by the statutory provisions or the employer had the status of "State" within the expansive definition under Article 12 or it was found that the action complained of has public law element.

(c) It must be consequently held that ***while a body may be discharging a public function or performing a public duty and thus its actions becoming amenable to judicial review by a Constitutional Court, its employees would not have the right to invoke the powers of the High Court conferred by Article 226 in respect of matter relating to service where***

they are not governed or controlled by the statutory provisions. *An educational institution may perform myriad functions touching various facets of public life and in the societal sphere. While such of those functions as would fall within the domain of a "public function" or "public duty" be undisputedly open to challenge and scrutiny under Article 226 of the Constitution,* ***the actions or decisions taken solely within the confines of an ordinary contract of service, having no statutory force or backing, cannot be recognised as being amenable to challenge under Article 226 of the Constitution.*** *In the absence of the service conditions being controlled or governed by statutory provisions, the matter would remain in the realm of an ordinary contract of service."*

(Emphasis supplied)

26- In **Committee of Management, St. John Inter College v. Girdhari Singh,** (2001) 4 SCC 296, the Hon'ble Supreme Court held that: -

"Since no appropriate guidelines have been provided for exercise of power under Section 16-G(3)(a) of the Act, it must be held that such an uncanalised power on the Inspector or the Inspectress would tantamount to an inroad into the power of disciplinary control of the Managing Committee of the minority institution over its employees and as such the said provision would not apply to the minority institution, as was held by this Court in Frank Anthony case (1986) 4 SCC 707.

* * *

The legislative intent is thus apparent that the legislature never intended to subject the order of termination of an employee of a minority institution to the approval/disapproval of the Selection Board. In this view of the matter, it is difficult for us to hold that an order of termination of an employee of a minority institution cannot be given effect to, unless approved by either the Inspector/Inspectress, as provided in Section 16-G(3)(a) or by the Selection Board, as provided under U.P. Act 5 of 1982. Under the provisions, as they stand, the conclusion is irresistible that the question of prior approval of the competent authority in case of an order of termination of an employee of a minority institution does not arise."

27- From a reading of the aforesaid judgments, the law as summarized in St. Mary's (Supra) is that the employees of a private educational institution would not have the right to invoke the powers of the High Court conferred by Article 226 in respect of matters relating to service where they are not governed or controlled by the statutory provisions. In light of St. John Inter College (Supra), the provisions of Section 16 G (3) of the U. P. Intermediate Education Act are not applicable to the teachers employed in private minority institutions. There is no other Statutory provision, which is alleged to have been violated in the instant case. Therefore, we find ourselves in agreement with the view taken by the Hon'ble Single Judge that the Writ Petition filed by a former teacher against the private unaided minority institution challenging the order of his termination and seeking restitution of his service, is not maintainable.

28- The Writ Petition would not maintainable for one more reason that there are several disputed questions of fact

involved in the case. The appellant claims that he had been duly selected and appointed, but he has not filed a copy of the appointment letter or a contract of appointment from which his service conditions may be ascertained. The college has contended neither any advertisement had been issued nor any selection was held and on a personal request made by the appellant, he had been orally engaged to work and after he had worked merely for about 4 months, he misbehaved with the Principal of the college and the Principal had filed a First Information Report against him on 31.03.1992. The appellant did not perform his duties since thereafter. Whether or not the appellant was duly selected and appointed, and what were his service conditions, are facts which are in dispute and regarding which no material is available on record. For this reason also, the Writ Petition would not be maintainable.

29- In view of the aforesaid discussion, we find ourselves in agreement with the view taken by the Hon'ble Single Judge that the Writ Petition filed by the appellant was not maintainable and we do not find any reason to interfere in the Judgment of the Hon'ble Single Judge.

30- The Special Appeal lacks merits and, accordingly, it is dismissed.

31- However, there will be no order as to costs.

(2023) 1 ILRA 1193
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.01.2023

BEFORE

THE HON'BLE RAMESH SINHA, J.

THE HON'BLE SUBHASH VIDYARTHI, J.

Special Appeal. No. 16 of 2023

Rafiq Ahamad ...Appellant
Versus
Jalil Ahmad & Anr. ...Respondents

Counsel for the Appellant:
Sri Gyanendra Singh

Counsel for the Respondents:

A. Civil Law – Contempt Jurisdiction - Civil Procedure Code, 1908 - Order VI Rule 17 - The court cannot, in the guise of exercising contempt jurisdiction, grant substantive relief not covered by the order which is subject matter of the proceedings and that a substantive relief not covered by the initial order could not be considered in contempt proceedings. The directions issued by the contempt judge which virtually amounts to supplementing the directions contained in the original order is beyond jurisdiction and cannot be countenanced. (Para 6, 7)

The primary contention of the appellant is that the direction of the Writ Court, while dismissing the application filed by the appellant u/s 482 Cr.P.C., was to proceed with the trial expeditiously and decide the same, without accommodating request for adjournment made either on behalf of plaintiff or defendant within a period of one year, but the Contempt Court, while adjudicating the contempt application filed by the appellant, has gone beyond the directions of the Writ Court and erred in observing that in case any adjournment is given under compelling circumstances, then, the same shall not be granted without heavy cost. Therefore, the same is liable to be set-aside. (Para 5)

As per the aforesaid proposition of law and the facts and circumstances of the instant case, the directions issued by the Contempt Judge while passing the impugned order to the extent that 'in case any adjournment is given under compelling circumstances, then the same shall

not be granted without heavy cost.', are virtually amounted to supplementing the directions contained in the original order passed by the Writ Court, which is beyond jurisdiction of the Contempt Court. (Para 8)

Aforesaid direction set aside. Appeal disposed of. (E-4)

Precedent followed:

1. Jhareshwar Prasad Paul & anr. Vs Tarak Nath Ganguly & ors., (2002) 5 SCC 352 (Para 6)

2. Sudhir Vasudeva, Chairman & Managing Director, Oil and Natural Gas Corporation & ors. Vs M. Goerge Ravishekaran & ors., (2014) 3 SCC 373 (Para 7)

Present special appeal assails the judgment and order dated 13.12.2022 passed by the learned Single Judge in Contempt Application (Civil) No. 2857 of 2022.

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

(1) This *intra Court* appeal has been filed by the appellant, **Rafiq Ahamad,** questioning the legality of the judgment and order dated 13.12.2022 passed by the learned Single Judge in Contempt Application (Civil) No. 2857 of 2022, whereby the

"... In case, any adjournment is given under compelling circumstances, then, the same shall not be granted without heavy cost."

(2) The genesis of the aforesaid contempt application is a judgment and order dated 13.07.2022 passed in Application U/S 482 No. 3369 of 2022 : *Rafiq Ahamad Vs. State of U.P. and others*. The operative portion of the said judgment and order dated 13.07.2022 is required to be noticed and is set-out here-in-below:-

"9. This Court is of the considered view that two orders, impugned in the present application, do not suffer from any illegality or perversity, which requires interference by this Court in extra-ordinary jurisdiction under Section 482 Cr.P.C. In view thereof, the present application is **dismissed**. However, the learned trial Court should proceed with the trial expeditiously and, decide the same, without accommodating request for adjournment made either on behalf of plaintiff or defendant,, say within a period of one year from the date certified copy of this order is served/submitted as the plaintiffs are enjoying the temporary injunction.

(3) A bare perusal of the operative portion of the said judgment and order dated 13.07.2022, clearly reveals that there was a mandatory direction upon the learned trial Court (being the respondent no.2 before us) to proceed with the trial expeditiously and decide the same without accommodating request for adjournment made either on behalf of plaintiff or defendant, within a period of one year from the date certified copy of the order is served/submitted.

(4) It appears that the aforesaid judgment and order dated 13.07.2022 was placed before the respondent no.2 on 19.07.2022. Thereafter, on 27.07.2022, the respondent no.2 had framed two issues, bearing issue nos. 6 and 7 regarding valuation of suit and Court, as preliminary issues, which were decided by the respondent no.2 vide order dated 19.09.2022. Thereafter, on 27.09.2022, the respondent no.1 preferred an amendment application under Order VI Rule 17 of the Code of Civil Procedure to add some new contents regarding Court fees, which was

rejected by the respondent no.2 vide order dated 30.09.2022. Feeling aggrieved, respondent no.1 had preferred a revision before the District Judge, Pratapgarh, which was dismissed by the District Judge, Pratapgarh vide order dated 09.11.2022. The learned Contempt Judge, after appreciating the facts that due to pendency of the revision, the respondent no.2 had not proceeded with the suit and after dismissal of the revision, suit was listed on 11.11.2022, 17.11.2022 and 24.11.2022 and after applying mind, the respondent no.2 had passed on every date and the suit has been listed for 14.12.2022, dismissed the contempt application vide order dated 13.12.2022 and further observed that it was expected to the Civil Judge (Senior Division), Pratapgarh to decide the suit in question, expeditiously, without giving unnecessary adjournment to either of the parties and in case any adjournment is given under compelling circumstances, then, the same shall not be granted without heavy cost.

(5) The primary contention of the learned counsel for the appellant is that the direction of the Writ Court, while dismissing the application filed by the appellant under Section 482 Cr.P.C., was to proceed with the trial expeditiously and decide the same, without accommodating request for adjournment made either on behalf of plaintiff or defendant within a period of one year, but the Contempt Court, while adjudicating the contempt application filed by the appellant, has gone beyond the directions of the Writ Court and erred in observing that in case any adjournment is given under compelling circumstances, then, the same shall not be granted without heavy cost. Therefore, the same is liable to be set-aside.

(6) Having heard learned Counsel for the appellant and gone through the impugned judgment as well as material brought on record, it is required to be noticed here that the basic parameters governing the exercise of contempt jurisdiction were examined in **Jhareswar Prasad Paul and another vs. Tarak Nath Ganguly and others :** *(2002) 5 SCC 352* by the Apex Court and it was held that the court cannot, in the guise of exercising contempt jurisdiction, grant substantive relief not covered by the order which is subject matter of the proceedings and that a substantive relief not covered by the initial order could not be considered in contempt proceedings. In this case also, the contempt court had proceeded on the basis of the allegation that the respondent authorities had not complied with the initial order, "effectively" and "in appropriate manner". In the aforesaid background, the observations made in the judgment are as follows :-

"11. The purpose of contempt jurisdiction is to uphold the majesty and dignity of the courts of law, since the respect and authority commanded by the courts of law are the greatest guarantee to an ordinary citizen and the democratic fabric of society will suffer if respect for the judiciary is undermined. The Contempt of Courts Act, 1971 has been introduced under the statute for the purpose of securing the feeling of confidence of the people in general for true and proper administration of justice in the country. The power to punish for contempt of court is a special power vested under the Constitution in the courts of record and also under the statute. The power is special and needs to be exercised with care and caution. It should be used sparingly by the courts on being satisfied regarding the true effect of contemptuous conduct. It is to be kept in mind that the court exercising the

jurisdiction to punish for contempt does not function as an original or appellate court for determination of the disputes between the parties. The contempt jurisdiction should be confined to the question whether there has been any deliberate disobedience of the order of the court and if the conduct of the party who is alleged to have committed such disobedience is contumacious. The court exercising contempt jurisdiction is not entitled to enter into questions which have not been dealt with and decided in the judgment or order, violation of which is alleged by the applicant. The court has to consider the direction issued in the judgment or order and not to consider the question as to what the judgment or order should have contained. At the cost of repetition, be it stated here that the court exercising contempt jurisdiction is primarily concerned with the question of contumacious conduct of the party, which is alleged to have committed deliberate default in complying with the directions in the judgment or order. If the judgment or order does not contain any specific direction regarding a matter or if there is any ambiguity in the directions issued therein then it will be better to direct the parties to approach the court which disposed of the matter for clarification of the order instead of the court exercising contempt jurisdiction taking upon itself the power to decide the original proceeding in a manner not dealt with by the court passing the judgment or order. If this limitation is borne in mind then criticisms which are sometimes levelled against the courts exercising contempt of court jurisdiction "that it has exceeded its powers in granting substantive relief and issuing a direction regarding the same without proper adjudication of the dispute" in its entirety can be avoided. This will also avoid multiplicity of proceedings because the party which is prejudicially affected by the judgment or order passed in the contempt proceeding and granting relief and issuing fresh directions is likely to challenge that order and that may give rise to another round of litigation arising from a proceeding which is intended to maintain the majesty and image of courts.

12. Judging the case in hand on the touchstone of the principles noted above, we find that the directions issued by the Division Bench in the impugned judgment in effect granted substantive reliefs not covered by the judgment/order passed in the original proceeding. In the judgment, no direction was issued by the High Court that the writ petitioners will be admitted to the cadre of Upper Division Clerks/Assistants in the Directorate. As noted earlier, they have all along been holding the posts of Clerk-cum-Cash Collector which are ex cadre posts. Entry of such persons into the cadre of Upper Division Clerks/Assistants has to be considered taking into account various aspects of the matter. It is one thing to say that the benefits under the government order may be extended to the writ petitioners also and extending benefits of the government order to the writ petitioners is one thing and directing their entry into the existing cadre of Office Assistants is a different thing. Such a dispute can only be determined on consideration of all relevant aspects of the matter and cannot be and should not be ordered in the summary proceeding for taking action for contempt of court. If the High Court felt that the grievance of the writ petitioners relating to the question of their entry into the cadre of Upper Division Clerks/Assistants has not been dealt with by the Court and specific direction has not been issued while

disposing of the writ petitions/appeals then the appropriate course was to leave it to the parties (writ petitioners) to agitate the matter before the competent forum. Further the question of entry of holders of ex cadre posts, like the writ petitioners, into an existing cadre is a matter of policy which the Government has to decide. Be it noted here that on consideration of the matter the High Court held that no action for contempt of court need be taken against the respondents in the writ petition for deliberate disobedience of the judgment or order passed by the High Court. Thereafter it was not open to the court to pass any order granting substantive relief to the applicants (writ petitioners) on the plea that the question raised was also a part of their grievance in the writ petition.

13. In the facts and circumstances of the case, we are constrained to hold that the judgment/order passed by the High Court was without jurisdiction. In the result, the appeals are allowed. The judgment/order under challenge is set aside. The petition filed by the writ petitioners for taking action for contempt of court against the respondents is dismissed."

(7) The question as to whether a Court exercising contempt jurisdiction could pass supplementary order to the main order passed in the writ petition was taken up in the case of **Sudhir Vasudeva, Chairman and Managing Director, Oil and Natural Gas Corporation and others Vs. M.George Ravishekaran and others :** (2014) 3 SCC 373 by the Apex Court and it was held that the directions issued by the contempt judge which virtually amounted to supplementing the directions contained in the original order was beyond jurisdiction and could not be countenanced. The observations made in the judgment are as follows :-

"19.The power vested in the High Courts as well as this Court to punish for contempt is a special and rare power available both under the Constitution as well as the Contempt of Courts Act, 1971. It is a drastic power which, if misdirected, could even curb the liberty of the individual charged with commission of contempt. The very nature of the power casts a sacred duty in the Courts to exercise the same with the greatest of care and caution. This is also necessary as, more often than not, adjudication of a contempt plea involves a process of self-determination of the sweep, meaning and effect of the order in respect of which disobedience is alleged. The Courts must not, therefore, travel beyond the four corners of the order which is alleged to have been flouted or enter into questions that have not been dealt with or decided in the judgment or the order violation of which is alleged. Only such directions which are explicit in a judgment or order or are plainly self-evident ought to be taken into account for the purpose of consideration as to whether there has been any disobedience or wilful violation of the same. Decided issues cannot be reopened; nor can the plea of equities be considered. The Courts must also ensure that while considering a contempt plea the power available to the Court in other corrective jurisdictions like review or appeal is not trenched upon. No order or direction supplemental to what has been already expressed should be issued by the Court while exercising jurisdiction in the domain of the contempt law; such an exercise is more appropriate in other jurisdictions vested in the Court, as noticed above. The above principles would appear to be the cumulative outcome of the precedents cited

at the Bar, namely, Jhareswar Prasad Paul v. Tarak Nath Ganguly [(2002) 5 SCC 352, V.M. Manohar Prasad v. N.Ratnam Raju [(2004) 13 SCC 610], Bihar Finance Service House Construction Coop. Society Ltd. v. Gautam Goswami [(2008) 5 SCC 339] and Union of India v. Subedar Devassy PV[(2006) 1 SCC 613].

20. Applying the above settled principles to the case before us, it is clear that the direction of the High Court for creation of supernumerary posts of Marine Assistant Radio Operator cannot be countenanced. Not only the courts must act with utmost restraint before compelling the executive to create additional posts, the impugned direction virtually amounts to supplementing the directions contained in the order of the High Court dated 2-8-2006...the direction to create supernumerary posts at the stage of exercise of the contempt jurisdiction has to be understood to be an addition to the initial order passed in the writ petition. The argument that such a direction is implicit in the order dated 2-8-2006 [M. George Ravishekeran v. ONGC Ltd., WP No. 21518 of 2000, order dated 2-8-2006 (Mad)] is self-defeating. Neither is such a course of action open to balance the equities i.e. not to foreclose the promotional avenues of the petitioners, as vehemently urged by Shri Rao. The issue is one of jurisdiction and not of justification. Whether the direction issued would be justified by way of review or in exercise of any other jurisdiction is an aspect that does not concern us in the present case. Of relevance is the fact that an alternative direction had been issued by the High Court by its order dated 2-8-2006 [M. George Ravishekeran v. ONGC Ltd., WP No. 21518 of 2000, order dated 2-8-2006 (Mad)] and the appellants, as officers of the Corporation, have complied with the same. They cannot be, therefore, understood to have acted in wilful disobedience of the said order of the Court. All that was required in terms of the second direction having been complied with by the appellants, we are of the view that the order dated 2-8-2006 passed in M. George Ravishekeran v. ONGC Ltd. [M. George Ravishekeran v. ONGC Ltd., WP No. 21518 of 2000, order dated 2-8-2006 (Mad)] stands duly implemented. Consequently, we set aside the order dated 19-1-2012 passed in Contempt Petition No. 161 of 2010, as well as the impugned order dated 11-7-2012 passed in Sudhir Vasudeva v. M. George Ravi Shekeran [Contempt Appeal No. 2 of 2012, decided on 11-7-2012 (Mad)] and allow the present appeal."

(8) Taking into consideration the aforesaid proposition of law and also considering the facts and circumstances of the instant case, we are of the view that the directions issued by the Contempt Judge while passing the impugned order to the extent that "in case any adjournment is given under compelling circumstances, then the same shall not be granted without heavy cost.', are virtually amounted to supplementing the directions contained in the original order passed by the Writ Court, which is beyond jurisdiction of the Contempt Court.

(9) We, therefore, set-aside the direction contained in last paragraph of the impugned judgment and order dated 13.12.2022 i.e. *"in case, any adjournment is given under compelling circumstances, then the same shall not be granted without heavy cost.'*

(10) With the aforesaid direction, the instant intra Court appeal stands **disposed of,** accordingly.

(2023) 1 ILRA 1199
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.11.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Special Appeal No. 101 of 2022

Smt. Archana Paliwal ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Jai Prakash Prasad

Counsel for the Respondents:
C.S.C.

A. Service Law – Voluntary Retirement - U.P. Fundamental Rule 56 - Clause (d) of Rule 56 prescribes the notice period as three months but, by clause (ii) of the Proviso to clause (d) of Rule 56, the appointing authority is empowered to allow a Government servant to retire without any notice or by a shorter notice without requiring him/ she/it to pay any penalty in lieu of notice. The appointing authority could allow a Government servant to retire voluntarily even if the notice period is shorter than three months albeit subject to fulfillment of other conditions enabling exercise of the right to seek voluntary retirement. (Para 9)

In the instant case, application was submitted on 06.04.2008 and voluntary retirement was sought from 30.06.2018. Admittedly, the notice period was less than three months therefore, the appointing authority was required to accept the request to allow the petitioner to retire. Notably, **the Rule does not prescribe the time limit for acceptance of the retirement notice.** (Para 10)

In the present circumstances, the issue whether acceptance was required before 30.06.2018 would have to be addressed on the same principles which govern acceptance of an offer, that is, whether there was any indication from the petitioner that the offer to retire was acceptable up to 30.06.2018 and not later. The affidavit, dated 06.04.2018, filed by the appellant along with the voluntary retirement application/notice spells out an unqualified offer/desire to retire without specifying a date by which it should be accepted. There is no indication either in the application or in the affidavit that if the offer is not accepted by a certain period it be treated as withdrawn. Thus, the notice seeking voluntary retirement extended a standing offer to retire with effect from 30.06.2018 which could have been accepted by the appointing authority till such time it was withdrawn with the permission of the appointing authority as per the provisions of the second proviso to clause (ii) of Rule 56 (d) of the Fundamental Rules. (Para 10)

B. As by the second proviso to clause (ii) of Rules 56 (d) of the Fundamental Rule **a voluntary retirement notice cannot be withdrawn save with the permission of the appointing authority, there can be no implied withdrawal of the notice by rendering service beyond 30.06.2018 simply for the reason that the notice period was less than three months, hence an acceptance of the offer was required to terminate the employer-employee relationship.** Till such time that relationship subsisted, the incumbent was obliged to serve the employer and, therefore, taking such service would not amount to waiver of employer's right to accept the standing offer. For the reasons above, we are of the considered view that there **existed no legal impediment for the appointing authority to accept the voluntary retirement notice after the date from which retirement was sought.** (Para 10)

The learned Single Judge has clarified in its order that any salary for the subsequent period, if paid to the petitioner, shall not be recovered/ withdrawn from her and, further, the authority shall ensure that retiral benefits are released to the petitioner by treating her to have

superannuated with effect from 30.06.2018. (Para 11)

Special appeal dismissed. (E-4)

Present intra court appeal assails judgment and order of the learned Single Judge dated 09.11.2021 passed in Writ A No. 20146 of 2019 whereby appellant sought quashing of the order accepting the prayer of the writ petitioner for voluntary retirement from service w.e.f. 30.06.2018 and a direction upon the opposite party to decide petitioner's representation for cancellation of the acceptance order (dated 09.05.2019), has been dismissed.

(Delivered by Hon'ble Manoj Misra, J.
&
Hon'ble Vikas Budhwar, J.)

1. Heard Sri Jai Prakash Prasad for the appellant and the learned Standing Counsel for the respondents.

2. This intra court appeal is against the judgment and order of the learned Single Judge dated 09.11.2021 passed in Writ A No. 20146 of 2019 whereby the writ petition of the appellant seeking quashment of the order accepting the prayer of the writ petitioner for voluntary retirement from service with effect from 30.06.2018 and a direction upon the opposite party to decide petitioner's representation for cancellation of the acceptance order, has been dismissed.

3. The facts of the case have been succinctly narrated in paragraph 2 of the impugned judgment therefore instead of restating those facts we deem it appropriate to reproduce the said paragraph below:-

"2. Facts, as have been pleaded in the writ petition, are that petitioner was a staff nurse and was posted in District Bijnor. After the State of Uttarakhand was created, she was permitted to opt for State of Uttar Pradesh vide order dated 26.12.2008. The petitioner, consequently, joined on 18.2.2009 at Saharanpur. She submitted an application for voluntary retirement alongwith which she also submitted an affidavit clearly stating that she is no longer desirous of serving the State and her application for voluntary retirement be accepted. The application form annexed alongwith the affidavit made a request to retire the petitioner voluntarily w.e.f. 30.6.2018. No orders apparently were passed on this application and the petitioner was allowed to continue till the month of October. It is by the order impugned that petitioner's voluntary retirement has been accepted w.e.f. 30.6.2018. It is after passing of the impugned order that petitioner who was residing in State of Uttarakhand made a request to recall the order on the ground that she be permitted to serve the employer. "

4. Before the learned Single Judge, two grounds were pressed, namely, (a) that an application, under Fundamental Rule 56(c), seeking voluntary retirement would require a minimum three month's notice whereas the application submitted by the writ petitioner on 06.04.2008 sought voluntary retirement from 30.06.2018, which was less than three months, therefore, the same was defective and could not have been acted upon; and (b) that the acceptance order dated 09.05.2019 could not have directed retirement with effect from 30.06.2018.

5. The state-respondents contested the petition by claiming that no prayer was made to withdraw the application seeking

voluntary retirement before its acceptance therefore, once the application was accepted, there was no occasion for the writ petitioner (the appellant herein) to have a grievance in respect thereof.

6. The learned Single Judge upon noticing the provisions of Fundamental Rule 56 (c) and (d) observed that the period of notice provided in Fundamental Rule 56(c) is for the benefit of the appointing authority whereas, by virtue of sub clauses (i) and (ii) of clause (d) of Rule 56 of the Fundamental Rules, the appointing authority is empowered to retire the Government servant on a shorter notice or forthwith and, for the period by which such notice is short, the Government servant is entitled to pay plus allowances at the same rates at which he was drawing immediately before his retirement. Thus, even if the notice period was shorter than three months it did not make it defective. The learned Single Judge also noticed the second proviso to sub-clause (ii) of clause (d) of Rule 56 of the Fundamental Rules which provided that the notice once given by a Government Servant under clause (c) seeking voluntary retirement can not be withdrawn except with the permission of the appointing authority. Having noticed those provisions, the learned Single Judge held that as there existed no dispute with regard to service of retirement notice on the appointing authority and there existed no material to indicate that a prayer to withdraw the notice was made before its acceptance, there was no merit in the writ petition, particularly, when the writ petitioner was not made to refund salary received for the period she worked after 30.06.2018.

7. The learned counsel for the appellant has not questioned the contents of the Fundamental Rule 56 (c) and (d) quoted by the learned single Judge though he claimed that the learned Single Judge overlooked that the voluntary retirement application dated 06.04.2018 sought retirement with effect from 30.06.2018 and if it was not accepted till 30.06.2018, and the writ petitioner was allowed to work and receive salary thereafter, the same could not have been accepted. In the alternative, it was argued that since the petitioner rendered her services after 30.06.2018, by her conduct, she withdrew her notice/application seeking voluntary retirement and, by accepting work from the petitioner and making payment of salary to her, the appointing authority impliedly granted permission to withdraw the notice and waived its right to act upon the notice.

8. To appropriately appreciate the above submission, it would be useful to notice the relevant provisions of UP Fundamental Rule 56. Clause (a) of Rule 56 deals with the age of superannuation of a Government servant; clauses (a-1) and (a-2) deals with extension of service; clause (b) has been omitted; clauses (c) & (d) of Rule 56 are relevant for the case, hence they are being reproduced 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 notice to the appointing authority voluntarily retire at any time after attaining the age of forty five years or after he has completed qualifying service of twenty years.

(d) -- The period of such notice shall be three months:

Provided that --

(i) any such Government servant may by order of the appointing authority, without such notice or by a shorter notice, be retired forthwith at any time after attaining the age of fifty years, and on such retirement the Government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowance, if any, for the period of the notice or, as the case may be, for the period by which such notice falls short of three months, at the same rates at which he was drawing immediately before his retirement;

(ii) it shall be open to the appointing authority to allow a Government servant to retire without any notice or by a shorter notice without requiring the Government servant to pay any penalty in lieu of the notice:

Provided further that such notice given by the Government servant against whom a disciplinary proceedings is pending or contemplated shall be effective only if it is accepted by the appointing authority, provided that in the case of a contemplated disciplinary proceeding the Government servant shall be informed before the expiry of his notice that it has not been accepted;

Provided also that the notice once given by a Government servant under clause (c) seeking voluntary retirement shall not withdrawn by him except with the permission of the appointing authority."

9. A plain reading of clause (c) of Rule 56 would reflect that it has two parts. In its first part, it empowers the appointing authority to compulsorily retire a Government servant, whereas, in its second part, it confers a right on the Government servant to seek voluntary retirement subject to certain conditions. As we are dealing with a case where the petitioner (the appellant herein) had sought voluntary retirement, we are concerned with the second part. In respect thereof, the Rule provides that a Government servant may by notice to the appointing authority seek voluntary retirement at any time after he/she/it has attained the age of forty five years or completed qualifying service of twenty years. Clause (d) of Rule 56 prescribes the notice period as three months but, by clause (ii) of the Proviso to clause (d) of Rule 56, the appointing authority is empowered to allow a Government servant to retire without any notice or by a shorter notice without requiring him/ she/it to pay any penalty in lieu of notice. Meaning thereby that the appointing authority could allow a Government servant to retire voluntarily even if the notice period is shorter than three months albeit subject to fulfilment of other conditions enabling exercise of the right to seek voluntary retirement. The proviso to clause (ii) of the proviso to clause (d) of Rule 56 throws a hint as to from which date the notice seeking voluntary retirement will be effective by providing that where a disciplinary proceeding is pending or contemplated, the notice shall be effective only if it is accepted by the appointing authority, provided that in a case of contemplated disciplinary proceeding the Government servant shall be informed before the expiry of his notice that it has not been accepted. Meaning thereby that where disciplinary proceeding is neither pending nor contemplated, the notice would become effective on expiry of the period provided in Rule 56(d), which is of three months. If the period provided by the notice is less than three months then, by

virtue of clause (ii) of the first proviso to clause (d) of Rule 56, the appointing authority may have to pass an order allowing the Government servant to retire within that shorter period.

10. In the instant case, admittedly, the notice period was less than three months therefore, the appointing authority was required to accept the request to allow the petitioner to retire. But whether the order of acceptance had to be passed within that period and not later, needs to be determined. Notably, the Rule does not prescribe the time limit for acceptance of the retirement notice. Although, where disciplinary proceedings are pending against the retirement seeker, the notice would become effective only when accepted provided that in the case of contemplated disciplinary proceeding, the notice giver would have to be informed within the period of the notice that it has not been accepted. In this case, it is not shown that any disciplinary proceeding was either pending or contemplated against the writ petitioner. Consequently, the appointing authority was not under an obligation to inform the petitioner about non-acceptance of the notice within the period provided therein. In these circumstances, the issue whether acceptance was required before 30.06.2018 would have to be addressed on the same principles which govern acceptance of an offer, that is, whether there was any indication from the petitioner that the offer to retire was acceptable up to 30.06.2018 and not later. In that context, on perusal of the record, we find that the retirement application/notice is silent in that regard. It only seeks voluntary retirement with effect from 30.06.2018. The affidavit, dated 06.04.2018, filed by the appellant along with the voluntary retirement application/notice spells out an unqualified offer/desire to retire without specifying a date by which it should be accepted. There is no indication either in the application or in the affidavit that if the offer is not accepted by a certain period it be treated as withdrawn. Thus, the notice seeking voluntary retirement extended a standing offer to retire with effect from 30.06.2018 which could have been accepted by the appointing authority till such time it was withdrawn with the permission of the appointing authority as per the provisions of the second proviso to clause (ii) of Rule 56 (d) of the Fundamental Rules. As by the second proviso to clause (ii) of Rules 56 (d) of the Fundamental Rule a voluntary retirement notice cannot be withdrawn save with the permission of the appointing authority, there can be no implied withdrawal of the notice by rendering service beyond 30.06.2018 simply for the reason that the notice period was less than three months, hence an acceptance of the offer was required to terminate the employer-employee relationship. Till such time that relationship subsisted, the incumbent was obliged to serve the employer and, therefore, taking such service would not amount to waiver of employer's right to accept the standing offer. For the reasons above, we are of the considered view that there existed no legal impediment for the appointing authority to accept the voluntary retirement notice after the date from which retirement was sought.

11 . In view of the discussion above, we do not find any error in the judgment and order of the learned Single Judge. More so, because the learned Single Judge has clarified in its order that any salary for the subsequent period, if paid to the petitioner, shall not be recovered/

withdrawn from her and, further, the authority shall ensure that retiral benefits are released to the petitioner by treating her to have superannuated with effect from 30.06.2018.

12. Before parting, we may notice that the learned Single Judge in paragraph 14 of the judgment, which remains un-rebutted, has found another reason to non-suit the petitioner. The said paragraph is reproduced below:-

"14. At this stage, learned Standing Counsel points out that petitioner has also filed a subsequent Writ Petition No.63782 of 2019, in which she was permitted to make representation and the same has also been rejected on 26.10.2020. This subsequent order is not under challenge. Once the claim of petitioner for voluntary retirement is found to have been accepted for valid reasons, any subsequent attempt to seek its recall would otherwise not be permissible in law. "

13. We are in respectful agreement with the above view and for this reason also, the appellant is not entitled to any relief in this appeal.

14. The special appeal is **dismissed.**

(2023) 1 ILRA 1204
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.12.2022

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ-A No. 167 of 2014

Bhawani Prasad Sahu & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Durga Prasad Dwivedi, Sri Ashutosh Shahi, Sri Sharad Dwivedi

Counsel for the Respondents:
C.S.C.

A. Service Law – Discrimination of pay scale - If two departments are under control of one Government and employees are having similar duty, no discrimination can be made in their salary and both sets of employees would be governed by principal of 'equal pay for equal work.'

Irrigation Department and PWD are the department of State of U.P., having equal status headed by the Principal Secretary appointed by the State Government. Petitioners as well as generator operator of Irrigation Department are performing same duty of running the generator of over and above of 50 KVA. There is also no difference in appointment procedure and nature of work of petitioners and generator operators of Irrigation Department. (Para 12)

B. While considering the case of 'equal pay for equal work', mode of recruitment, qualification for the post, nature of work, value of work & responsibilities involved and various other factors have to be taken into consideration and Court can only interfere where there is discrimination between two sets of employees appointed by the State Government. (Para 14)

Here, there is no dispute that both the departments have equal status. Once the employer is same, mode of recruitment, qualification for the post, nature of work and other responsibilities are same, Court has full authority to interfere in the matter and such employees shall be governed by principal of 'equal pay for equal work', and there cannot be any denial of similar pay scale on any ground. (Para 16)

Writ petitions allowed. (E-4)

Precedent followed:

1. Randhir Singh Vs U.O.I.& ors., (1982) 1 SCC 618 (Para 7)

2. State of Punjab & ors. Vs Jagjit Singh & ors., (2017) 1 SCC 148 (Para 8)

3. St. of M. P. Vs Seema Sharma, Civil Appeal No. 3892 of 2022 (Para 9)

4. St. of Har. & anr. Vs Haryana Civil Secretariat Personal Staff Association, (2022) 6 SCC 72 (Para 10)

Present petition assails orders dated 07.04.2011, 08.12.2010, 22.09.2009, 07.10.2010, 11.03.2011, 30.12.2011, 01.04.2012.

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

1. Heard learned counsel for the petitioners and learned Standing Counsel for the State-respondents.

2. Present petition has been filed with the following prayers:-

"(i) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 7.4.2011, 8.12.2010, 22.9.2009, 7.10.2010, 11.3.2011, 30.12.2011, 1.4.2012 passed by the opposite parties as contained at Annexure No.1, 2, 3, 4, 5, 6 & 7/

(ii) Issue a writ, order or direction in the nature of mandamus commanding the opposite parties to fix the pay scale of the petitioners equal to the pay scale of generator operator of Irrigation Department i.e. Rs. 4000-100-Rs.6000 with effect from 1.1.1996."

3. Learned counsel for the petitioners submitted that present controversy is arising due to discrimination of pay scale of the similarly situated employees in two departments of State of U.P., i.e. Public Works Department (in short PWD) and Irrigation Department.

4. Learned counsel for the petitioners submitted that petitioners were initially appointed as daily wager in PWD. Services of petitioners were regularized on 2.7.2003 (wrongly typed as 2.7.2013). He next submitted that petitioner nos. 1 to 6 were selected and appointed from the post of Helper to Generator Operator by the Selection Committee whereas petitioner nos. 7, 8 & 9 were working on the post of Generator Operator since their initial appointment. Presently, all petitioners were working on the post of Generator Operator in different divisions of PWD. He further submitted that petitioner nos. 1, 3 & 5 are operating the generators of 100 KVA whereas petitioner nos. 2 & 4 are operating generator of 320 KVA & 140 KVA respectively. Further, petitioner nos. 8 & 9 are operating generator of 180 KVA & 100 KVA. Petitioner nos. 6 & 7 are operating generator of 125 KVA and 62.5 KVA.

5. He next submitted that like petitioners, there are also daily wagers employees in Irrigation Department, later on who have been given appointment on the post of Generator Operator with identical nature of work. He further submitted that Irrigation Department bifurcated their work in two parts depending upon the capacity of generator, which they are operating. The operators, who are operating generator of 50 KVA have been given pay scale of Rs.3050-4590/- whereas other operators, who are operating generator over and above of 50 KVA are given pay scale of Rs.4000-6000/-. He next submitted that petitioners as well as generator operator of Irrigation

Department are performing same duty, but petitioners were deprived from the pay scale of Rs.4000-6000/- and being paid the pay scale of Rs.3050-4590/-.

6. Considering this fact that matter was considered by the Chief Engineer, PWD and vide letter dated 31.7.2012 recommendation has been made to respondent no.2 to grant similar pay scale as given to the generator operator of Irrigation Department, but the same has not been granted. Again, Chief Engineer, PWD vide letters dated 25.4.2013 & 1.5.2013 had made recommendation with similar request to PWD, but no action has been taken. He firmly submitted that Irrigation Department and PWD, both are department of State of U.P. and petitioners as well as generator operators of Irrigation Department are performing same work and duty, therefore, petitioners are also entitled for same pay scale as given to generator operators of Irrigation Department running the generators of over and above of 50 KVA.

7. In support of his contention, he has placed reliance upon the judgment of the Apex Court in the case of ***Randhir Singh vs. Union of India and others*** reported in ***(1982) 1 SCC 618,*** where Apex Court has held that if two departments are under control of one Government and employees are having similar duty, no discrimination can be made in their salary and both sets of employees would be governed by principal of 'equal pay for equal work' and entitled for same salary.

8. He next submitted that the same ratio of law was again followed by the Apex Court in the matter of ***State of Punjab and others Vs. Jagjit Singh and others*** reported in ***(2017) 1 SCC 148.***

9. Learned Standing Counsel vehemently opposed the submission and submitted that petitioners cannot claim parity of pay scale as a matter of right. He next submitted that merely similarity of designation or quantum of work cannot be a ground for equality of pay scale. In support of his contention, he has placed reliance upon the judgment of Apex Court in the matter of ***State of Madhya Pradesh vs. Seema Sharma*** passed in ***Civil Appeal No. 3892 of 2022.***

10. He further submitted that fixation of pay scale and determination of parity in duties is the function of the executive and scope of judicial review is very limited. In support of this contention, he has also placed reliance upon the judgment of the Apex Court in the case of ***State of Haryana and another vs. Haryana Civil Secretariat Personal Staff Association*** reported in 2022 6 SCC 72.

11. Being confronted by the Court, learned Standing Counsel appearing for the State could not dispute this fact that Irrigation Department and PWD are the department of State of U.P. with equal status headed by Principal Secretary. He also could not point out any difference about the nature of appointment of petitioners in PWD and other employees in Irrigation Department. Other Factual submissions so argued by the learned counsel for the petitioners could also not be disputed by the learned Standing Counsel.

12. I have considered the rival submissions advanced by the learned counsel for the parties and perused the records. I have also gone through the judgments relied upon by the leaned counsel for the parties. Facts of the case are undisputed. Irrigation Department and

PWD are the department of State of U.P., having equal status headed by the Principal Secretary appointed by the State Government. Petitioners as well as generator operator of Irrigation Department are performing same duty of running the generator of over and above of 50 KVA. There is also no difference in appointment procedure and nature of work of petitioners and generator operators of Irrigation Department. Similar matter came before the Apex Court in the case of ***State of U.P. vs. Randheer Singh (supra)*** and Apex Court has taken clear cut view that if two departments are under control of one Government and employees are having similar duty, no discrimination can be made in their salary and both sets of employees would be governed by principal of 'equal pay for equal work.' Relevant paragraph nos. 8 & 9 of the said judgment are quoted hereinbelow:-

"8. It is true that the principle of 'equal pay for equal work' is not expressly declared by our Constitution to be a fundamental right. But it certainly is a Constitutional goal. Art.39(d)of the Constitution proclaims 'equal pay for equal work for both men and women" as a Directive Principle of State Policy. 'Equal pay for equal work for both men and women' means equal pay for equal work for everyone and as between the sexes. Directive principles, as has been pointed out in some of the judgments of this Court have to be read into the fundamental rights as a matter of interpretation. Art. 14of the Constitution enjoins the state not to deny any person equality before the law or the equal protection of the laws and Art.16 declares that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. These equality clauses of the Constitution must mean some thing to everyone. To the vast majority of the people the equality clauses of the Constitution would mean nothing if they are unconcerned with the work they do and the pay they get. To them the equality clauses will have some substance if equal work means equal pay. Whether the special procedure prescribed by a statute for trying alleged robber-barons and smuggler kings or for dealing with tax evaders is discriminatory, whether a particular Governmental policy in the matter of grant of licences or permits confers unfettered discretion on the Executive, whether the takeover of the empires of industrial tycoons is arbitrary and unconstitutional and other questions of like nature, leave the millions of people of this country untouched. Questions concerning wages and the like, mundane they may be, are yet matters of vital concern to them and it is there, if at all that the equality clauses of the Constitution have any significance to them. The preamble to the Constitution declares the solemn resolution of the people of India to constitute India into a Sovereign Socialist Democratic Republic. Again the word 'Socialist' must mean something. Even if it does not mean 'To each according to his need', it must atleast mean 'equal pay for equal work'. The principle of 'equal pay for equal work' is expressly recognized by all socialist systems of law, e.g, Section 59 of the Hungarian Labour. Code, para 2 of Section 111 of the Czechoslovak Code, Section 67 of the Bulgarian Code, Section 40 of the Code of the German Democratic Republic, para 2 of Section 33 of the Rumanian Code. Indeed this principle has been incorporated in several western labour codes too. Under provisions in Section 31 (g. No. 2d) of Book I of the French Code du Travail, and according to Argentinian law, this

principle must be applied to female workers in all collective bargaining agreements. In accordance with Section 3 of the Grundgesetz of the German Federal Republic, and clause 7, Section 123 of the Mexican Constitution, the principle is given universal significance (vide: International Labour Law by Istvan Szaszy p. 265). The preamble of the Constitution of the International Labour Organisation recognises the principle of 'equal remuneration for work of equal value' as constituting one of the means of achieving the improvement of conditions "involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled". Construing Articles 14 and 16 in the light of the Preamble and Art.39(d)we are of the view that the principle 'Equal pay for Equal work' is deducible from those Article and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though these drawing the different scales of pay do idential work under the same employer.

9. There cannot be the slightest doubt that the drivers in the Delhi Police Force perform the same functions and duties as other drivers in service of the Delhi Administration and the Central Government. If anything, by reason of their investiture with the 'powers, functions and privileges of a police officer', their duties and responsibilities are more arduous. In answer to the allegation in the petition that the driver-constables of the Delhi Police Force perform no less arduous duties than drivers in other departments, it was admitted by the respondents in their counter that the duties of the driver-constables of the Delhi Police Force were onerous. What then is the reason for giving them a lower scale of pay than others ? There is none. The only answer of the respondents is that the drivers of the Delhi Police Force and the other drivers belong to different departments and that the principle of equal pay for equal work is not a principle which the Courts may recognise and act upon. We have shown that the answer is unsound. The clarification is irrational. We, therefore, allow the Writ Petition and direct the respondents to fix the scale of pay of the petitioner and the drivers-constables of the Delhi Police Force atleast on a par with that of the drivers of the Railway Protection Force. The scale of pay shall be effective from 1st January, 1973, the date from which the recommendations of the Pay Commission were given effect."

13. In the matter of ***State of Punjab and others Vs. Jagjit Singh (supra),*** same factum of law is expressed in detail by the Apex Court. Relevant paragraph no. 42.3 & 60 of the said judgment are quoted hereinbelow:-

"The principle of "equal pay for equal work', applies to cases of unequal scales of pay, based on no classification or irrational classification (see - the Randhir Singh case1). For equal pay, the concerned employees with whom equation is sought, should be performing work, which besides being functionally equal, should be of the same quality and sensitivity (see - the Federation of All India Customs and Central Excise Stenographers (Recognized) case3, the Mewa Ram Kanojia case5, the Grih Kalyan Kendra Workers' Union case6 and the S.C. Chandra case.

57. Having traversed the legal parameters with reference to the

application of the principle of "equal pay for equal work', in relation to temporary employees (daily-wage employees, ad-hoc appointees, employees appointed on casual basis, contractual employees and the like), the sole factor that requires our determination is, whether the concerned employees (before this Court), were rendering similar duties and responsibilities, as were being discharged by regular employees, holding the same/corresponding posts. This exercise would require the application of the parameters of the principle of "equal pay for equal work' summarized by us in paragraph 42 above. However, insofar as the instant aspect of the matter is concerned, it is not difficult for us to record the factual position. We say so, because it was fairly acknowledged by the learned counsel representing the State of Punjab, that all the temporary employees in the present bunch of appeals, were appointed against posts which were also available in the regular cadre/establishment. It was also accepted, that during the course of their employment, the concerned temporary employees were being randomly deputed to discharge duties and responsibilities, which at some point in time, were assigned to regular employees. Likewise, regular employees holding substantive posts, were also posted to discharge the same work, which was assigned to temporary employees, from time to time. There is, therefore, no room for any doubt, that the duties and responsibilities discharged by the temporary employees in the present set of appeals, were the same as were being discharged by regular employees. It is not the case of the appellants, that the respondent-employees did not possess the qualifications prescribed for appointment on regular basis. Furthermore, it is not the case of the State, that any of the temporary employees would not be entitled to pay parity, on any of the principles summarized by us in paragraph 42 hereinabove. There can be no doubt, that the principle of "equal pay for equal work' would be applicable to all the concerned temporary employees, so as to vest in them the right to claim wages, at par with the minimum of the pay-scale of regularly engaged Government employees, holding the same post."

14. Respondents have also relied upon the judgment of Apex Court in the matter of ***State of Madhya Pradesh vs. Sushma Sharma (supra).*** Apex Court held that while considering the case of 'equal pay for equal work', mode of recruitment, qualification for the post, nature of work, value of work & responsibilities involved and various other factors has to be taken into consideration and Court can only interfere where there is discrimination between two sets of employees appointed by the State Government. Here, there is no dispute that both the department are having equal status, mode of recruitment, qualification for the post, nature of work, value of work and responsibilities etc., are also same, therefore, Court has full authority to interfere in the matter. In fact, this judgment is in favour of petitioner. Relevant paragraph nos.18 & 23 of the same are quoted hereinbelow:

"18. In Ramesh Chandra Bajpai (supra), this Court further held that it was well-settled that the doctrine of equal pay for equal work could only be invoked when the employees were similarly circumstanced in every way. Mere similarity of designation or similarity or quantum of work was not determinative of equality in the matter of pay scales. The Court had to consider all the relevant

factors such as the mode of recruitment, qualifications for the post, the nature of work, the value of work, responsibilities involved and various other factors.

23. The fixation of scales of pay is a matter of policy, with which the Courts can only interfere in exceptional cases where there is discrimination between two sets of employees appointed by the same authority, in the same manner, where the eligibility criteria is the same and the duties are identical in every aspect."

15. Respondents have also relied another judgment of Apex Court in the matter of ***State of Haryana and another vs. Haryana Civil Secretariat Personal Staff Association (supra)*** and this judgment is also in favour of petitioners. In the said judgment, Apex Court has held that ordinarily courts will not enter upon the ask of job evaluation which is generally left to expert bodies like the Pay Commissions, etc., but that is not to say that the Court has no jurisdiction and the aggrieved employees have no remedy, if they are unjustly treated by arbitrary State action or inaction. Here the facts are undisputed that the status of both the employees are equal, therefore, Court has full right to intervene in the matter. Relevant paragraph nos. 9 & 10 are quoted hereinbelow:-

"This Court in the case of Secretary, Finance Department vs. West Bengal Registration Service Association and Ors., [1993] Supp I SCC 153, dealing with the question of equation of posts and equation of salaries of government employees, made the following observations :

"We do not consider it necessary to traverse the case law on which reliance has been placed by counsel for the appellants as it is well settled that equation of posts and determination of pay scales is the primary function of the executive and not the judiciary and, therefore, ordinarily courts will not enter upon the ask of job evaluation which is generally left to expert bodies like the Pay Commissions, etc. But that is not to say that the Court has no jurisdiction and the aggrieved employees have no remedy if they are unjustly treated by arbitrary State action or inaction. Courts must, however, realize that job evaluation is both a difficult and time consuming task which even expert bodies having the assistance of staff with requisite expertise have found difficult to undertake sometimes on account of want of relevant data and scales for evaluating performances of different groups of employees. This would call for a constant study of the external comparisons and internal relativities on account of the changing nature of job requirements. The factors which may have to be kept in view for job evaluation may include (i) the work programme of his department (ii) the nature of contribution expected of him (iii) the extent of his responsibility and accountability of the discharge of his diverse duties and functions (iv) the extent and nature of freedoms/ limitations available or imposed on him in the discharge of his duties (v) the extent of powers vested in him (vi) the extent of his dependence on superiors for the exercise of his powers (vii) the need to co-ordinate with other departments, etc. We have also referred to the history of service and the effort of various bodies to reduce the total number of pay scales to a reasonable number. Such reduction in the number of pay scales has to be achieved by resorting to broadbanding of posts by placing different posts having comparable job

charts in a common scale. Substantial reduction in the number of pay scales must inevitably lead to clubbing of posts and grades which were earlier different and unequal. While doing so care must be taken to ensure that such rationalization of the pay structure does not throw up anomalies. Ordinarily a pay structure is evolved keeping in mind several factors, e.g., (i) method of recruitment, (ii) level at which recruitment is made, (iii) the hierarchy of service in a given cadre, (iv) minimum educational/technical qualifications required, (v) avenues of promotion, (vi) the nature of the duties and responsibilities, (vii) the horizontal and vertical relativities with similar jobs, (viii) public dealings, (ix) satisfaction level, (x) employer's capacity to pay, etc. We have referred to these matters in some detail only to emphasise that several factors have to be kept in view while evolving a pay structure and the horizontal and vertical relativities have to be carefully balanced keeping in mind the hierarchical arrangements, avenues for promotion, etc, Such a carefully evolved pay structure ought not to be ordinarily disturbed as it may upset the balance and cause avoidable ripples in other cadres as well. It is presumably for this reason that the Judicial Secretary who had strongly recommended a substantial hike in the salary of the Sub-Registrars to the Second (State) Pay Commission found it difficult to concede the demand made by the Registration Service before him in his capacity as the Chairman of the Third (State) Pay Commission. There can therefore, be no doubt that equation of posts and equation of salaries is a complex matter which is best left to an expert body unless there is cogent material on record to come to a firm conclusion that a grave error had crept in while fixing the pay scale for a given post and Court's interference is absolutely necessary to undo the injustice.

It is to be kept in mind that the claim of equal pay for equal work is not a fundamental right vested in any employee though it is a constitutional goal to be achieved by the Government. Fixation of pay and determination of parity in duties and responsibilities is a complex matter which is for the executive to discharge. While taking a decision in the matter several relevant factors, some of which have been noted by this Court in the decided case, are to be considered keeping in view the prevailing financial position and capacity of the State Government to bear the additional liability of a revised scale of pay, It is also to be kept in mind that the priority given to different types of posts under the prevailing policies of the State Government is also a relevant factor for consideration by the State Government. In the context of complex nature of issues involved, the far reaching consequences of a decision in the matter and its impact on the administration :of the State Government courts have taken the view that ordinarily courts should not try to delve deep into administrative decisions pertaining to pay fixation and pay parity. That is not to say that the matter is not justiciable or that the courts cannot entertain any proceeding against such administrative decision taken by the government. The courts should approach such matters with restraint and interfere only when they are satisfied that the decision of the government is patently irrational unjust and prejudicial to a section of employees and the government while taking the decision has ignored factors which are material and relevant for a decision in the matter. Even in a case where the court holds the order passed by

the government to be unsustainable then ordinarily a direction should be given to the State Government or the authority taking the decision to reconsider the matter and pass a proper order. The court should avoid giving a declaration granting a particular scale of pay and compelling the government to implement the same. As noted earlier, in the present case 'the High Court has not even made any attempt to compare the nature of duties and responsibilities of the two sections of the employees, one in the State Secretariat and the other in the Central Secretariat. It has also ignored the basic principle that there are certain rules, regulations and executive instructions issued by the employers which govern the administration of the cadre."

16. In light of facts mentioned hereinabove as well as law laid down by Apex Court, this Court is of the view that once the employer is same, mode of recruitment, qualification for the post, nature of work and other responsibilities are same, such employees shall be governed by principal of 'equal pay for equal work', and there cannot be any denial of similar pay scale on any ground.

17. In the present case, there is no dispute on the point that mode of recruitment of petitioners as well as employees of Irrigation Department i.e. generator operators is the same. Further, they are having same nature of work i.e. running generators over and above of 50 KVA. Their principal employer is also same i.e. State Government having full control over both the departments i.e. PWD and Irrigation Department headed by Principal Secretary.

18. Therefore, the writ petition is **allowed** and impugned orders dated 7.4.2011, 8.12.2010, 22.9.2009, 7.10.2010, 11.3.2011, 30.12.2011, 1.4.2012 are hereby quashed. A writ of mandamus be issued to the respondents to pay the same pay scale i.e. Rs.4000-6000/- to the petitioners also as given to generator operators of Irrigation Department from the date on which it has given to them.

19. They shall also be entitled for the interest at the bank rate from due date to the date of actual payment.

20. No order as to costs.

(2023) 1 ILRA 1212
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.11.2022

BEFORE

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

Special Appeal No. 470 of 2021

Sant Lal Yadav ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Radha Kant Ojha (Sr. Adv.), Sri Shashank Sharma

Counsel for the Respondents:
Sri Gajendra Pratap Singh(Sr. Adv.), Sri Jitendra Kumar Srivastava, Sri Ramanand Pandey (A.C.S.C.)

A. Education Law – Election to Committee of Management - *Locus Standi* - The writ petitioner, while challenging the earlier attestation of the fifth respondent's election held by the Authorized Controller on 22.01.2018 vide Writ-C No. 19219 of 2019, did not challenge the order dated 30.12.2017 passed by the Authorized Controller, on the basis of which the

elections dated 22.01.2018 were held, wherein the fifth respondent was elected. (Para 17)

The order of this Court dated 30.07.2019 passed in Writ-C No. 19219 of 2019 would show that the order of attestation of signatures of the fifth respondent alone dated 25.01.2018 (based on the elections dated 22.01.2018) were alone challenged. **The order dated 30.12.2017, which was the foundation of the elections dated 22.01.2018 or the said elections itself were never challenged by the writ petitioner.** The writ petition was not pressed with liberty to move the Regional Level Committee for relief. Thus, the order dated 30.12.2017 has attained finality between parties. It is in consequence of the decision taken by the Regional Level Committee on the writ petitioner's application that he made after withdrawal of Writ-C No. 19291 of 2019 to the Regional Level Committee, that the writ petitioner commenced fresh and almost collateral proceedings in the garb of assailing the order dated 03.02.2020 passed by the Regional Level Committee. (Para 17)

B. Collateral Proceedings - In Writ-C No. 1285 of 2021, the writ petitioner challenged the order of 03.02.2020 passed by the Regional Level Committee and attempted to question the order of the Authorized Controller dated 30.12.2017 that had already attained finality. It is for the said reason that the learned Judge while allowing the WP dated 08.02.2021, permitted objections to be filed against the order dated 30.12.2017, but expressed no opinion on its validity. In fact, not much could be said against the said order, either before this Court or before the Authorized Controller, except something very fundamental or on wider ground. The Authorized Controller rightly concluded that he had nothing to say on merits against what was held by the Authorized Controller earlier, vide order of 30.12.2017. **The order of 30.12.2017 had held that the writ petition had no locus to question the determination of the electoral college of the Society or the College, because vide order dated 03.03.2009, the Founder Trustees had removed 32 members, including the writ petitioner, from membership of the Society in exercise of powers under Clause 10(Gha) of the By-laws of the Society. The order of 30.12.2017 further records the fact that the order dated 03.03.2009 had never been challenged before any forum, Court or Authority and it was, thus, final.** (Para 18)

Before the Authorized Controller, when the matter came on a remit from the learned Single Judge in terms of the judgment and order dated 08.02.2021 passed in Writ-C No. 1285 of 2021, the writ petitioner could not show anything that may dispel the finding earlier recorded by the Authorized Controller vide order dated 30.12.2017 to the effect that the writ petitioner's membership of the Society stood terminated in terms of the order dated 03.03.2009, passed by the Founder Trustees, under the By-laws of the Society. (Para 19)

Since the writ petitioner has apparently lost his status as a member of the general body of the Society, in terms of a resolution of removal passed by the Founder Trustees on 03.03.2009, which has not been challenged anywhere, his right to question the determination of the electoral college is decidedly without any right; or as the learned Single Judge says, without *locus standi*. All this is about consideration of the writ petitioner's case and it is fallacious to say that there was anything else to be considered by the Authorities at the instance of the writ petitioner, relating to the validity of the electoral college, once the writ petitioner's membership of the Society and *a fortiori* the general body of the institution is non-existent. (Para 19)

Special Appeal dismissed. (E-4)

Present special appeal assails judgment and order dated 16.11.2021, passed by Hon'ble Mr. Justice Abdul Moin, J. in Writ Petition No. 25754 of 2021.

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

1. This Special Appeal by the writ petitioner is directed against an order of the

learned Single Judge dated November 16, 2021, dismissing Writ-C No. 25754 of 2021. This appeal has been preferred by Sant Lal Yadav, who claims to be the elected Manager of the Committee of Management of Sri Yadvesh Inter College, Naupedwa, District Jaunpur.

2. The writ petitioner instituted Writ-C No. 25754 of 2021, challenging the order of the Authorized Controller, Sri Yadvesh Inter College dated March 24, 2021, determining the electoral college for holding elections to the Committee of Management of the said College. He has further challenged the consequential order dated June 22, 2021 passed by the District Inspector of Schools, Jaunpur, attesting the signatures of respondent no.5 as the elected Manager of the Institution pursuant to the elections held in terms of the order dated March 24, 2021 passed by the Authorized Controller. The result of the elections declared by the Authorized Controller on June 14, 2021 has been questioned too.

3. Sri Yadvesh Inter College is a recognized Inter College under the provisions of the Uttar Pradesh Intermediate Education Act, 1921. It is in receipt of Government grant-in-aid. The aforesaid College, which shall hereinafter be referred to as "the College', has been established and managed by a Society, going by the name of Sri Yadvesh Vidya Mandir Society, Naupedwa, a Society registered under the Societies Registration Act, 1860. It appears to be common ground between parties that Murli Dhar Yadav functioned as the elected Manager of the Committee of the Management of the Society as well as the Manager of the Committee of Management of the College between 1974 to 2007. The writ petitioner-appellant, Sant Lal Yadav is a son of Murli Dhar Yadav and claims to be a life member of the Society, entitling him to vote in the elections of the Management of the College and also stake his claim to office on the Committee of Management of the College.

4. It appears that the elections to the Committee of Management of the College, that were held on September 6, 1998, wherein again Murli Dhar Yadav was elected, led to eruption of an election dispute with the rival claim being staked in the year 1999. Thereafter, litigation regarding the validity of elections, held from time to time, has been perennial. It has vacillated between the Authorities and this Court with never a quietus to it. The authority of an undisputed management has not been established after the year 2007. An Authorized Controller is managing the affairs of the College since the year 2007 till date and all elections that have been held by the Authorized Controller, with an elected management returned to office, have been unsettled by rivals challenging it, either before this Court or the Education Authorities. Those elections have been set aside by the Authorities as well as by this Court with repeat directions to the Authorized Controller to determine the electoral college, in accordance with the By-laws of the Society and the scheme of administration of the College. Each determination of the electoral college by the Authorized Controller has led to a fresh challenge by one faction or the other, with a re-determination being directed again, and the elections held set at naught.

5. It would not be of much profit to refer to the long course of litigation with the history of it being etched for every detail of it. It would be apposite to pick-up the thread of the managerial dispute midway in the course of its long and

chequered history. It appears that the Authorized Controller vide his order dated June 22, 2013 finalized the list of 35 members and held elections on June 29, 2013. The Regional Level Committee recognized the said elections, wherein respondent no.5, Smt. Malti Devi, was declared elected as the Manager of the Committee of Management. This was questioned by the writ petitioner-appellant through Writ-C No.14099 of 2014 on ground that earlier a list of 36 members stood approved and there was no dispute. However, the list carried both life members and ordinary members. The Authorized Controller had been directed to find out, if any, ordinary members had ceased to be competent electors. The exercise was completed under orders of this Court dated January 29, 2013 and a list of 36 members finalized. So far as the list 67 members submitted by the rival faction was concerned, this Court said that it had to be proved through a suit before a Civil Court.

6. This contention on behalf of the writ petitioner-appellant was questioned on behalf of Malti Devi saying that the list of 36 members was never finalized, but the matter was entrusted to the Authorized Controller to determine the electoral college by the Division Bench in Special Appeal, which the Authorized Controller would do on the basis of evidence produced before him. This Court opined that the 36 members could not be eliminated and replaced by another 35 by the Authorized Controller. On the aforesaid reasoning, the orders of the Authorized Controller dated June 22, 2013 finalizing the list of 35 members of the electoral college and the order dated January 28, 2014, recognizing the elections of the fifth respondent on the basis of the said electoral college were stayed. The Authorized Controller was ordered to continue managing the affairs of the Institution.

7. Pending the aforesaid writ petition, another election was privately held on June 15, 2016, which the District Inspector of Schools appears to have recognized by an order dated May 23, 2017. The order dated May 23, 2017, recognizing the management elected in the private elections, was impugned before this Court in Writ-C No.34865 of 2017. This Court, by an interim order dated August 8, 2017 passed in Writ-C No. 34865 of 2017, stayed the order of the District Inspector of Schools dated May 23, 2017, recognizing the elections. The matter was carried in Special Appeal to the Division Bench against the interim order of this Court dated August 8, 2017 by respondent no.5. The Division Bench disposed of Special Appeal (D) No. 491 of 2017 as well as Writ-C No. 34865 of 2017, out of which the appeal arose, with a direction to the Authorized Controller managing the College, to ensure fresh elections to the Committee of Management, strictly in accordance with the scheme of administration, after determination of the electoral college by a reasoned order, within the period of two months.

8. In compliance with the directions of the Division Bench in Special Appeal (D) No. 491 of 2017, the Authorized Controller of the College determined the electoral college afresh vide order dated December 30, 2017 and declared a general body of 32 members and an observer was duly appointed for the conduct of elections. And, on January 22, 2018 elections to the Committee of Management were held in the observer's presence. In the said elections, respondent no.5 was returned elected to the office of Manager again. Her

elections were approved by the District Inspector of Schools, Jaunpur vide order January 25, 2018 and signatures attested. The order dated January 25, 2018 was again challenged before this Court by the writ petitioner vide Writ-C No.19219 of 2019, which was decided on July 30, 2019.

9. A reading of the order dated July 30, 2019 shows somehow that the order of the District Inspector of Schools dated January 25, 2018 alone was challenged. At least, it does not show that the determination of the electoral college by the Authorized Controller vide order December 30, 2017 was scrutinized by the learned Single Judge, before whom Writ-C No.19219 of 2019 came up for hearing. The learned Single Judge virtually declined to interfere with the order dated January 25, 2018, attesting the fifth respondent's signatures. The writ petitioner did not press the relief that he sought in Writ-C No.19219 of 2019 and instead submitted before the learned Single Judge hearing the aforesaid writ petition that he may be permitted to make an application before the Regional Level Committee, Varanasi Division, Varanasi, which may be decided within a stipulated period of time. The learned Judge directed the Regional Level Committee, Varanasi Division, Varanasi to decide the application that the writ petitioner may move before it within a stipulated period of time. It is of importance to reproduce the relevant part of the learned Judge's order passed in Writ-C No.19219 of 2019. It reads:

"The petitioner, has challenged the order dated 25.01.2018 passed by the respondent No.4-District Inspector of Schools, Jaunpur, upholding the election claim set up by the respondent No.5. The petitioner, submits that the election claim set up by the respondent No.4, is invalidated. Admittedly, the elections have been taken place, and the signatures of the newly elected manager has attested.

The relief sought for cannot be granted.

At this stage, learned counsel for the petitioner, recasts his relief. He does not press the relief sought in the writ petition, at this stage. He submits, that the petitioner, shall make an application before the respondent No.2-Regional Level Committee, Varanasi Division, Varanasi and the same may be decided in a stipulated period of time.

In case the petitioner, moves an application before the respondent No.2-Regional Level Committee, Varanasi Division, Varanasi, the same shall be decided, preferably, within a period of six months, from the date of, receipt of, a certified copy of this order along with a fresh copy of the representation, after giving opportunity to concerned parties, including the respondent No.4.

It is clarified that this Court has not gone into the veracity of the assertions made in the writ petition, nor has judged the claim of the petitioner on merits. It is for the competent authority, to do so, with an independent application of mind."

10. Upon the matter going before the Regional Level Committee, they proceeded to pass an order dated December 3, 2020, setting aside the order of the District Inspector of Schools dated January 25, 2018 and also held that the elections convened on January 22, 2018 were ones without duly examining the validity of membership of the electoral college/ general body. The Authorized Controller

was directed to determine afresh the electoral college in accordance with the various directions of this Court, earlier issued and examining the earlier list of the general body. The elections were directed to be held afresh in accordance with the amended scheme of administration. The said order was questioned in Writ-C No. 1285 of 2021 before this Court by respondent no.5, Smt. Malti Devi, who had been declared elected as the Manager in terms of the elections held on January 22, 2018 with her signatures attested on January 25, 2018, all set at naught by the Regional Level Committee, through the order dated February 3, 2020.

11. This Court upon hearing parties was of opinion that the Regional Level Committee had faulted the elections solely on the basis of the interim order passed in Writ-C No. 14099 of 2014. It was further opined that the Regional Level Committee had failed to take into consideration the orders of the Division Bench in Special Appeal (D) No. 491 of 2017, an appeal that arose out of a later writ petition, which required the Authorized Controller to finalize the electoral college. It was also opined by the learned Judge deciding Writ-C No. 1285 of 2021 that the Regional Level Committee failed to take into consideration the exercise undertaken by the Authorized Controller to finalize the electoral college, which was determined by him by his order dated December 30, 2017. The learned Judge has remarked that the order dated December 30, 2017 is under challenge in pending Writ-C No. 7779 of 2018, but no interim orders have been passed there. This Court held that the pendency of Writ-C No. 7779 of 2018 or the interim orders passed in earlier Writ-C No. 14099 of 2014, could not have materially impacted the determination of the electoral college by the Authorized Controller. Accordingly, the learned Judge allowed Writ-C No. 1285 of 2021 and quashed the order of the Regional Level Committee dated December 3, 2020. The Authorized Controller was directed to determine the electoral college upon hearing objections by the parties to the determination of the electoral college as decided in terms of his order dated December 30, 2017. It was clarified that the aforesaid issue shall be decided by the Authorized Controller, uninfluenced by the interim order passed in Writ-C No. 14099 of 2014 or the pendency of Writ-C No. 7779 of 2018.

12. It is in compliance with the aforesaid orders that the Authorized Controller has passed the impugned order dated March 24, 2021, determining an electoral college of 28 members, on the basis of which elections have now been held and the fifth respondent declared elected as the Manager of College and her signatures attested. The order dated March 24, 2021, now passed by the Authorized Controller and the consequential orders are the subject matter of challenge in the writ petition giving rise to this appeal.

13. The Authorized Controller while passing the order impugned held that the writ petitioner had no *locus standi* to question the determination of the electoral college or the elections held, because vide order dated December 30, 2017 earlier passed by the Authorized Controller, he was held not to be a member of the general body of the Society or the College, since his membership had been terminated for gross misconduct by the Founder Trustees of the Society, under By-law 10(Gha) of the By- laws, through a resolution dated March 3, 2009. It was opined by the Authorized Controller that this Court vide

judgment and order dated February 8, 2021 after quashing the order dated December 3, 2020 passed by the Regional Level Committee had permitted the writ petitioner to file objections to the order dated December 30, 2017. It was, therefore, open to the writ petition to show how the order of the Authorized Controller dated December 30, 2017 was wrong, but the writ petitioner could not point out how that order was bad. The reason, according to the Authorized Controller, was that the order dated December 30, 2017 held the petitioner to be not a member of the general body, because his membership had been terminated by the Founder Trustees of the Society for gross misconduct vide order dated March 3, 2009.

14. The Authorized Controller recorded a finding that there is nothing to show that the order dated March 3, 2009, terminating the membership of the writ petitioner by the Founder Trustees for gross misconduct, had been challenged before any competent Court or Authority. It has become final. In fact, the Authorized Controller has recorded in the order dated March 24, 2021 that the Founder Trustees have terminated the membership of the writ petitioner, besides another 35 members of the Society. It was opined, therefore, that assuming that in the year 2007-08, the writ petitioner was a member of the Society/ general body of the College, his membership did not survive the termination dated March 3, 2009, which has since become final. This is what the Authorized Controller earlier held by the order dated December 30, 2017.

15. The writ petitioner upon objections preferred against the order dated December 30, 2017 in terms of the orders of this Court dated February 8, 2021 passed in Writ-C No. 1285 of 2021, could not demonstrate how he would regain his lost membership that the Authorized Controller had held he did not have after March 3, 2009.

16. The learned Single Judge, before whom a grievance was made that the judgment of this Court dated February 8, 2021 passed in Writ-C No. 1285 of 2021, had set aside the order dated December 3, 2020 passed by the Regional Level Committee and remitted the matter to the Authorized Controller to consider the objections which the parties may choose to prefer, was not complied with, because the Authorized Controller threw out the writ petitioner's claim on the ground of his locus standi. The learned Single Judge held that locus standi is also a part of consideration of the writ petitioner's claim and if the writ petitioner could not establish that, no fault could be found with the impugned order passed by the Authorized Controller dated March 24, 2021 and the consequential orders under challenge in the writ petition.

17. Before us, Mr. R.K. Ojha, learned Senior Advocate submits that the learned Single Judge has committed a grave error of law in failing to appreciate that the learned Judge, while sending the matter to the Authorized Controller, had required him to decide the vexed issue of composition of the general body, but the Authorized Controller rejected the writ petitioner's objections solely on the ground of *locus standi.* We may note here that the writ petitioner, while challenging the earlier attestation of the fifth respondent's election held by the Authorized Controller on January 22, 2018 vide Writ-C No. 19219 of 2019, did not challenge the order dated December 30, 2017 passed by the Authorized Controller, on the basis of

which the elections dated January 22, 2018 were held, wherein the fifth respondent was elected. The order of this Court dated July 30, 2019 passed in Writ-C No. 19219 of 2019 would show that the order of attestation of signatures of the fifth respondent alone dated January 25, 2018 (based on the elections dated January 22, 2018) were alone challenged. The order dated December 30, 2017, which was the foundation of the elections dated January 22, 2018 or the said elections itself were never challenged by the writ petitioner. The writ petition was not pressed with liberty to move the Regional Level Committee for relief. Thus, the order dated December 30, 2017 has attained finality between parties. It is in consequence of the decision taken by the Regional Level Committee on the writ petitioner's application that he made after withdrawal of Writ-C No. 19291 of 2019 to the Regional Level Committee, that the writ petitioner commenced fresh and almost collateral proceedings in the garb of assailing the order dated February 3, 2020 passed by the Regional Level Committee.

18. We say collateral proceedings, because in Writ-C No. 1285 of 2021, the writ petitioner challenged the order of February 3, 2020 passed by the Regional Level Committee and attempted to question the order of the Authorized Controller dated December 30, 2017 that had already attained finality. It is for the said reason that the learned Judge while allowing the writ petition dated February 8, 2021, permitted objections to be filed against the order dated December 30, 2017, but expressed no opinion on its validity. In fact, not much could be said against the said order, either before this Court or before the Authorized Controller, except something very fundamental or on wider ground. The Authorized Controller while hearing the writ petitioner's objections, in our considered opinion, rightly concluded that he had nothing to say on merits against what was held by the Authorized Controller earlier, vide order of December 30, 2017. The order of December 30, 2017 had held that the writ petition had no locus to question the determination of the electoral college of the Society or the College, because vide order dated March 3, 2009, the Founder Trustees had removed 32 members, including the writ petitioner, from membership of the Society in exercise of powers under Clause 10(Gha) of the By-laws of the Society. The order of December 30, 2017 further records the fact that the order dated March 3, 2009 had never been challenged before any forum, Court or Authority and it was, thus, final.

19. Before the Authorized Controller, when the matter came on a remit from the learned Single Judge in terms of the judgment and order dated February 8, 2021 passed in Writ-C No. 1285 of 2021, the writ petitioner could not show anything that may dispel the finding earlier recorded by the Authorized Controller vide order dated December 30, 2017 to the effect that the writ petitioner's membership of the Society stood terminated in terms of the order dated March 3, 2009, passed by the Founder Trustees, under the By-laws of the Society. Since the writ petitioner has apparently lost his status as a member of the general body of the Society, in terms of a resolution of removal passed by the Founder Trustees on March 3, 2009, which has not been challenged anywhere, his right to question the determination of the electoral college is decidedly without any right; or as the learned Single Judge says, without *locus standi*. All this is about consideration of the writ petitioner's case and it is fallacious to say that there was anything else to be

considered by the Authorities at the instance of the writ petitioner, relating to the validity of the electoral college, once the writ petitioner's membership of the Society and a fortiori the general body of the institution is non-existent.

20. We, therefore, see no reason to interfere with the impugned order passed by the learned Single Judge.

21. The Special Appeal fails and is dismissed.

(2023) 1 ILRA 1220
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.01.2023

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE JASPREET SINGH, J.

Writ-A No. 3074 of 2021

Anoop Kumar Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rishi Raj, Sri Vinay Kumar Singh

Counsel for the Respondents:
C.S.C.

A. Service Law – Suspension/Punishment - U.P. Government Servant Conduct Rules, 1956 - Rule 3 - Disciplinary proceedings can be initiated against an employee in respect of the action, even if it pertains to exercise of judicial or quasi-judicial powers. If a servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service, it is misconduct which justifies immediate dismissal. (Para 13, 14)

It is not necessary that a member of the service should have committed the alleged act or omission in the course of discharge of his duty as a servant of the Government in order that it may form the subject matter of disciplinary proceedings. In other words, if the act or omission is such as to reflect the reputation of the officer for his integrity or good faith or devotion to duty, there is no reason why disciplinary proceedings should not be taken against him for that act or omission. (Para 12)

In the instant case, it is not in dispute that the assessment so made by the petitioner for the assessment year 2014-15 vide order dated 20.09.2018 upon which he was subjected to inquiry was challenged by the trader, namely, Shashi Sales, in the Court of Additional Commissioner Grade-2 (Appeal), Lucknow and the Appellate Authority, vide order dated 05.10.2018, allowed the appeal and quashed the order of assessment dated 20.09.2018 and remitted the matter to the assessing officer for re-assessment of tax. Thus, it appears that no revenue loss has incurred to the government. (Para 17)

B. Due and proper opportunity of hearing - The impugned order passed by the Tribunal indicates that the issue was raised before it but it came to a contrary finding by holding that since the enquiry was based on the basis of quasi-judicial order passed by the petitioner, hence there was no requirement to hold a full-fledged enquiry. **Where the charge-sheet has been served on the petitioner and major punishment is proposed, which has been awarded to the petitioner, in such circumstances, a proper enquiry ought to have been held and it cannot be skirted by saying that there was no need for holding the same as it was based on documents.** Even if, at all, the said enquiry was based on documents, the least that could have been done, was to prove the said documents inasmuch as **it has been noticed that it was not the legality of the order which was in issue rather it was the manner in which the order was passed, upon which the charge-sheet was issued and was the subject matter of the enquiry against the petitioner.** This aspect of the matter has been completely lost sight off by the enquiry officer as well as disciplinary authority and has also

been noted appropriately noticed by the Tribunal. (Para 18, 19)

As per the principles laid down by the Apex Court in *Union of India & Ors.* Vs *K.K. Dhawan* (*Infra*) and the facts and circumstances of the case, findings recorded by the Inquiry Officer are totally vitiated for want of any legally acceptable or relevant evidence to support the charges of misconduct and in absence of any evidence, the conclusion reached by the inquiry officer affirmed by the disciplinary authority also stand vitiated. (Para 20)

Writ petition allowed. Matter remitted to enquiry officer. (E-4)

Precedent followed:

1. S. Govinda Menon Vs U.O.I., AIR 1967 SC 1274 (Para 12)

2. Pearce Vs Foster, (1966) 7 QBD 536 (Para 14)

3. U.O.I. Vs K.K. Dhawan, AIR 1993 SC 1478 (Para 15)

4. St. of U. P. & ors. Vs Saroj Kumar Sinha, (2010) 2 SCC 772 (Para 9)

Present petition assails judgment and order dated 22.10.2020, passed by the State Public Services Tribunal, Indira Bhawan, Lucknow in Claim Petition preferred by the petitioner against the punishment order dated 04.09.2019 as well as order dated 02.03.2020, by which petitioner's representation to His Excellency, the Governor of U.P. on 01.10.2019, was rejected.

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

(1) Feeling aggrieved and dissatisfied with the judgment and order dated 22.10.2020 passed by the State Public Services Tribunal, Indira Bhawan, Lucknow (hereinafter referred to as "the Tribunal") in Claim Petition No. 1886 of 2019 : *Anoop Kumar Singh Vs. State of U.P. and another*, by which the said claim petition preferred by the petitioner against the punishment order dated 04.09.2019 was dismissed, instant writ petition has been preferred by the petitioner.

(2) The facts leading to the instant appeal, in a nutshell, are as under :-

Initially, the petitioner was appointed on the post of Commercial Tax Officer in the year 2002. Later on, his post was designated as Assistant Commissioner, Commercial Tax and while working as such, the petitioner was placed under suspension vide order dated 22.10.2018 on the ground of alleged irregularities committed by him while passing tax assessment order in regard to M/s Shashi Sales, Lucknow for the assessment year 2014-15. A charge-sheet dated 22.10.2018 was served upon the petitioner, levelling seven charges against him. The Joint Commissioner, Commercial Tax Officer's Training Institute, Lucknow was appointed as Enquiry Officer, who, after completion of enquiry, submitted its report dated 22.01.2009, wherein it has been stated that charge nos. 5 and 6 levelled against the petitioner was not proved, whereas charge nos. 1, 2, 4 and 7 were proved and charge no.3 was partly proved. Thereafter, the Disciplinary Authority had issued a show cause notice dated 12.02.2019 to the petitioner along with the copy of the enquiry report dated 22.01.2019, to which the petitioner had submitted his reply. After that the Disciplinary Authority had passed the punishment order dated 04.09.2019, withholding three increments with cumulative effect and a censure entry.

(3) Against the aforesaid punishment order dated 04.09.2019, the petitioner has

preferred claim petition No. 1886 of 2019 before the Tribunal, which was dismissed by the Tribunal vide judgment and order dated 22.10.2020. Feeling aggrieved, the instant writ petition has been filed by the petitioner.

(4) Heard Shri Rishi Raj, learned Counsel for the petitioner and Shri Abhiyudya Mishra, learned Standing Counsel for the State/respondents and perused the impugned judgment passed by the Tribunal as well as material brought on record.

(5) Challenging the impugned judgment and order dated 22.10.2020 passed by the Tribunal, learned Counsel for the petitioner has contended that on the basis of any tax assessment order, the concerned tax assessment officer cannot be punished as he performed the quasi judicial function. He further argued that if there is any objection against the assessment order passed by the Assessing Officer, the appeal can be filed before the appellate authority against that said assessment order. He further argued that against the order of assessment dated 20.09.2018 passed by the petitioner, the trader had filed first appeal before the appellate authority, which was allowed by the appellate authority and quashed the assessment order dated 20.09.2018 and remanded the matter to the assessing officer for re-assessment of the tax liability vide order dated 05.10.2018, a copy of which has been annexed as Annexure No.12 to the writ petition.

(6) Elaborating his submission, learned Counsel for the petitioner has contended that on the basis of passing any tax assessment order, the concerned officer cannot be punished as he performed the quasi judicial function while passing the assessment order and if any negligence is being committed, he shall not be inflicted with the major punishment in the manner as the petitioner has been subjected to. His submission is that the Tribunal, without considering the aforesaid aspect of the matter, erred in dismissing the claim petition preferred by the petitoner.

(7) Learned Counsel for the petitioner has next argued that the departmental proceedings have been concluded against the petitioner in violation of principles of natural justice and without providing the evidence against him inasmuch as the Inquiry Officer has not associated the trader against which the assessment order was passed by the petitioner. The request of the petitioner for producing evidence in his support was not entertained by the Inquiry Officer. The Disciplinary Authority, before passing the punishment order, has failed to consider the fact that the petitioner has performed a quasi judicial function for which he could not be held guilty and punished. His submission is that the Tribunal has not considered the aforesaid aspect of the matter while passing the impugned order.

(8) Lastly, learned Counsel for the petitioner has submitted that on 25.06.2020, the Departmental Promotion Committee for the purpose of promotion to the post of Deputy Commissioner, Commercial Tax was held and the similarly situated Trade Tax Officers of 2002 batch have been promoted on the post of Deputy Commissioner, Commercial Tax Department but the petitioner is still stagnant on the post of Assistant Commissioner due to the impugned action of the respondents.

(9) To strengthen his submission, learned Counsel for the petitioner has placed reliance upon the judgment of the

Apex Court in **State of Uttar Pradesh and others Vs. Saroj Kumar Sinha** : (2010) 2 SCC 772, wherein in para-28, the Apex Court observed that an enquiry officer acting in a quasi judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/ disciplinary authority/ Government. His function is to examine the evidence presented by the department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. 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.

(10) Learned Standing Counsel, on the other hand, has submitted that while posted as Assistant Commissioner, Commercial Tax, Lucknow, the petitioner was kept under suspension vide order dated 22.10.2018 for irregularity committed by him in disposal of Tax Assessment Order for the year 2014-15 with respect to the firm namely, Shashi Sales Lucknow and disciplinary proceeding was initiated against the petitioner and charge-sheet was issued to the petitioner, levelling seven charges against him. On receipt of the charge-sheet, the petitioner has submitted the reply to the charge-sheet on 10.12.2018. The Inquiry Officer conducted the inquiry by fixing the date, time and place and the petitioner was given full opportunity of hearing in the enquiry proceedings. The Inquiry Officer after conclusion of the inquiry submitted the inquiry report dated 22.01.2019 to the disciplinary authority. The said inquiry report dated 22.1.2019 was supplied to the petitioner through the letter dated 12.02.2019 keeping in view sub-rule 4 of Rule 9 of the U.P. Government Servant (Discipline and Appeal) Rules, 1999, seeking his reply on the inquiry report. In response thereof, the petitioner submitted his reply to the show cause notice dated 12.02.2019 through his letter dated 26.02.2019. After receipt of the reply of the petitioner through letter dated 26.02.2019, the U.P. Public Service Commission was consulted and after the advice of the U.P. Public Service Commission dated 19.08.2019, the punishment order dated 04.09.2019 was passed against the petitioner, withholding his three increments with cumulative effect as well as censure entry was also given, keeping in view the fact of not adhering to the departmental procedures, violating the Government Orders and also for violating Rule 3 of the U.P. Government Servant Conduct Rules, 1956. Against the aforesaid punishment order dated 04.09.2019, the petitioner submitted his representation to His Excellency, the Governor of U.P. on 01.10.2019 which was rejected by means of the order dated 02.03.2020. Feeling aggrieved, the petitioner has preferred the claim petition before the Tribunal, which was dismissed by means of the impugned order. His submission is that there is no illegality or perversity in the impugned order and the instant writ petition is liable to be dismissed.

(11) We have examined the submissions advanced by the learned Counsel for the parties and gone through the impugned judgment and material brought on record.

(12) Before proceeding further, it would be apt to mention here that in **S. Govinda Menon Vs. Union of India** : AIR 1967 SC 1274, the Apex Court has held as under:-

" ..... It is not necessary that a member of the service should have

committed the alleged act or omission in the course of discharge of his duty as a servant of the Government in order that it may form the subject matter of disciplinary proceedings. In other words, if the act or omission is such as to reflect the reputation of the officer for his integrity or good faith or devotion to duty, there is no reason why disciplinary proceedings should not be taken against him for that act or omission.... The test is whether the act or omission has some reasonable occasion with nature and condition of his service or where the act or omission has caused any reflection upon the reputation of the member of the service for integrity or devotion of duty as a public servant.... The proposition put forward was that quasi-judicial orders, unless vacated under the provisions of the Act, are final and binding and cannot be questioned by the executive government through disciplinary proceedings..... The charge is, therefore, one of misconduct and recklessness disclosed by the utter disregard of the relevant provisions..... But in the present proceedings what is sought to be challenged is not the correctness or the legality of the decision of the Commissioner but the conduct of the appellant in the discharge of his duty as Commissioner. The appellant was proceeded against because in the discharge of his function, he acted in utter disregard of the provisions of the Act and the Rules. It is the manner in which he discharges his function that brought up in these proceedings.....It is manifest, therefore, that though the propriety and legality of the sanction to the leases may be question in appeal or revision under the Act the Government is not precluded from taking disciplinary act if there is proof that the has acted in gross recklessness in the discharge of his duties or that he failed to act honestly or in good faith or that he omitted to observe the prescribed conditions which are essential for the exercise of the statutory power."

(13) Thus, the aforesaid judgment is an authority that disciplinary proceedings can be initiated against an employee in respect of the action, even if it pertains to exercise of judicial or quasi-judicial powers.

(14) In **S. Govinda Menon (supra)**, the Apex Court had relied upon the judgment in **Pearce Vs. Foster,** (1966) 17 QBD 536, wherein it had been held as under:-

"If a servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service, it is misconduct which justifies immediate dismissal."

(15) The Supreme Court in **Union of India & Ors. Vs. K.K. Dhawan**, AIR 1993 SC 1478, relied upon its earlier judgment in **S. Govinda Menon (supra)** and observed that the officer who exercises judicial or quasi-judicial powers, acts negligently or recklessly or in order to confer undue favour on a person, is not acting as a Judge, and in the disciplinary proceedings, it is the conduct of the officer in discharge of his official duties and not the correctness or legality of his decisions or judgments which are to be examined, as the legality of the orders can be questioned on appellate or revisional forum. In such a case the Government cannot be precluded from taking the disciplinary action for violation of the Conduct Rules. The Apex Court summarised some circumstances in which disciplinary action can be taken, which are as under:-

"(i) Where the Officer had acted in a manner as would reflect on his

reputation or integrity or good faith or devotion of duty;

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

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

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

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

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

(16) The Apex Court further observed that the said instances were not exhaustive. However, it was further observed by the Apex Court that each case would depend upon the facts and circumstances of that case, and no absolute rule can be postulated.

(17) In the instant case, it is not in dispute that the assessment so made by the petitioner for the assessment year 2014-15 vide order dated 20.09.2018 upon which he was subjected to inquiry was challenged by the trader, namely, Shashi Sales, in the Court of Additional Commissioner Grade-2 (Appeal), Lucknow in Appeal No. 410 of 2018 and the Appellate Authority, vide order dated 05.10.2018, allowed the appeal and quashed the order of assessment dated 20.09.2018 and remitted the matter to the assessing officer for re-assessment of tax. A copy of the appellate order dated 05.10.2018 has been annexed with the instant writ petition. Thus, it appears that no revenue loss has incurred to the government.

(18) That once it is noticed that the departmental enquiry can proceed against a delinquent employee relating to the discharge of its duty in service and not confining to the correctness of the order, hence in the aforesaid circumstances, the contention of the learned Counsel for the petitioner that he was not given a due and proper opportunity of hearing is to be examined. It has been specifically urged by the Counsel for the petitioner that no date, time and place of the enquiry was fixed.

(19) From perusal of the impugned order passed by the Tribunal also indicates that the issue was raised before it but it came to a contrary finding by holding that since the enquiry was based on the basis of quasi-judicial order passed by the petitioner, hence there was no requirement to hold a full-fledged enquiry. This aspect could not be disputed by the learned Standing Counsel nor it could be demonstrated that the petitioner was granted due opportunity. Where the charge-sheet has been served on the petitioner and major punishment is proposed, which has been awarded to the petitioner, in such circumstances, a proper enquiry ought to have been held and it cannot be skirted by saying that there was no need for holding the same as it was based on documents. Even if, at all, the said enquiry was based on documents, the least that could have been done, was to prove the said documents inasmuch as it has been noticed that it was not the legality of the order which was in issue rather it was the manner

in which the order was passed, upon which the charge-sheet was issued and was the subject matter of the enquiry against the petitioner. This aspect of the matter has been completely lost sight off by the enquiry officer as well as disciplinary authority and has also been noted appropriately noticed by the Tribunal.

(20) Taking note of principles laid down by the Apex Court in **Union of India & Ors. Vs. K.K. Dhawan** (Supra) and considering the facts and circumstances of the case, we find that findings recorded by the Inquiry Officer are totally vitiated for want of any legally acceptable or relevant evidence to support the charges of misconduct and in absence of any evidence, the conclusion reached by the inquiry officer affirmed by the disciplinary authority also stand vitiated.

(21) In view of the aforesaid, the instant writ petition succeeds and is **allowed.** The impugned judgment and order dated 22.10.2020 passed by the Tribunal, punishment order dated 04.09.2019 and the order dated 02.03.2020 are hereby quashed. The matter shall stand remitted to the enquiry officer, who, shall after giving due opportunity of hearing to the petitioner, providing all the documents and considering the legally admissible evidence, shall proceed with the enquiry and endeavour be made that the same is taken to its logical conclusion within six months from the date a copy of this order is produced before the authority concerned. It is also directed that the petitioner shall not seek any unnecessary adjournments and if he does not co-operate in the early conclusion of the enquiry, the enquiry officer shall be well within his rights to proceed in the matter in accordance with law.

(2023) 1 ILRA 1226
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.11.2022

BEFORE

THE HON'BLE VIKRAM D. CHAUHAN, J.

Writ-A No. 39214 of 2017

Mohd. Arif Khan ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Parvez Alam, Sri Namit Srivastava

Counsel for the Respondents:
A.S.G.I., Sri Anil Kumar Pandey, Sri Arvind Kumar Goswami

A. Service Law – Disciplinary Proceedings – Punishment – Indian Penal Code: Section 302, 201; CRPF Act: Section 11(1) - Unauthorized absence from duty - If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence cannot be held to be wilful. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a government servant. **In a departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is wilful, in the absence of such finding, the absence will not amount to misconduct**. (Para 27)

It is to be seen that the petitioner has remained on unauthorized absence from duty primarily on account of pendency of criminal case against

petitioner. When petitioner went to his native place after duly sanctioned leave being obtained, a FIR was lodged on 21.07.2015 and, thereafter, a warrant of arrest was issued against petitioner on 25.07.2015 i.e. during the currency of sanctioned leave. After issuance of warrant, petitioner was searching for legal remedies and was evading from arrest as according to the petitioner he has been falsely implicated in the criminal case. Petitioner was in jail when disciplinary proceedings were being carried out against him. (Para 28, 29)

B. The reason explained by the employee/petitioner during disciplinary proceedings are required to be considered by the employer prior to passing order on the punishment. Disciplinary authority has only taken into consideration, inquiry report and thereafter, has passed the impugned order without recording any finding whether the absence of petitioner was wilful or whether petitioner was forced by the facts and circumstances, to remain absent from duty. Such an approach by the disciplinary authority is not warranted under law. (Para 30, 33)

C. Proportionality of the punishment has to be considered by the disciplinary authority as the same is within the domain of the disciplinary authority. The disciplinary authority has not considered the peculiar facts and circumstances, where the petitioner was evading his arrest and ultimately sent to jail because of a criminal case against him. A person who is in judicial custody cannot be expected to join his duty unless he has been released by the court of law on bail. The employer has deferred the punishment in respect of Charge no.2 w.r.t. involvement of the petitioner in the criminal case. These circumstances might have mitigated the petitioner's misconduct and a different view could have been taken by disciplinary authority warranting a lesser punishment. (Para 32)

The disciplinary authority while considering the punishment to be imposed on employee even if employee has admitted the charge is required to decide the proportionality of the punishment on the facts and circumstances of the case and a punishment which is disproportionate may entail injustice to the employee. (Para 33)

Writ petition allowed. Matter remanded back for a fresh decision on the quantum and nature of punishment to be awarded by disciplinary authority. (E-4)

Precedent followed:

1. Jai Bhagwan Vs Commissioner of Police & ors., 2012 (3) SCC 178 (Para 14)

2. Krushnakant B. Parmar Vs U.O.I. & ors., 2012 (3) 178 (Para 14)

3. Mirja Barkat Ali Vs. Inspector General of Police, Allahabad & ors., 2002 (2) UPLBEC 1871 (Para 14)

Present petition challenges the order dated 30.09.2016, passed by Commandment, 101, Battalion. R.A.F./C.R.P.F., District Allahabad, order dated 25.01.2017, passed by Deputy Inspector General of Police, R.A.F./C.R.P.F., R.K. Puram, New Delhi and order dated 25.04.2017, passed by Inspector General of Police, R.A.F./C.R.P.F., R.K. Puram, New Delhi.

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

1. Heard learned counsel for the petitioner and Sri Arvind Kumar Goswami, learned counsel for the respondents.

2. It is submitted by the learned counsel for the petitioner that the petitioner was working on the post of Constable in RAF/CRPF, Allahabad. Petitioner was granted leave by respondents from 20th July, 2015 to 29th July, 2015 for attending Eid festival with family at his native place and petitioner was required to report for duty on 29th July, 2015 (A/N).

3. When petitioner was on leave, a first information report dated 21st July,

2015 being Case Crime No.453 of 2015 was lodged at Police Station Nawabganj under Section 302, 201 of Indian Penal Code against unknown persons. In pursuance to the aforesaid first information report, investigation was carried out by the police authorities and the petitioner was found to have been involved in the criminal case. A warrant of arrest was issued against the petitioner on 25th July, 2015. Petitioner was placed under suspension by the respondents for having been indulged in a criminal case and warrant being issued against him. Petitioner being afraid of arrest did not report back to his place of employment after the sanctioned leave was over. It is submitted that petitioner was searching for legal remedies in criminal prosecution.

4. On 10th September, 2015, petitioner has surrendered before the court of Chief Judicial Magistrate and was sent to Naini Central Jail, Allahabad on the same day. Petitioner was initially placed under suspension by order dated 25th July, 2015. On 18th August, 2015 a notice was issued to the petitioner to immediately join his duties. Suspension of petitioner was cancelled by respondents on 20th August, 2015. On 21st August, 2015 an order was passed by respondent no.4 to stop payment of salary and allowance of petitioner.

5. On 17th October 2015 and 4th January, 2016, petitioner informed the respondent authorities that he is confined in jail in respect of the abovementioned first information report. Thereafter, petitioner was again placed under suspension on 8th November, 2015. Subsequently, petitioner has remained in jail and was enlarged on bail on 28th March, 2017 by this Court.

6. Inquiry Officer was appointed by respondents and a charge sheet dated 4th February, 2016 was served on petitioner levelling two charges against him in departmental proceedings. First charge against petitioner pertains to petitioner was granted leave from 20th July, 2015 to 29th July, 2015 and was required to report back for duty on 29th July, 2015 (A/N), however, he has not reported for duty after completion of his sanctioned leave. In the meantime, the petitioner has been arrested in a criminal case and is in jail since 10th September, 2015. The aforesaid is a misconduct under section 11(1) of the CRPF Act. The second charge against the petitioner pertains to the petitioner being arrested in a criminal case and was in jail for an offence under Section 302 and 201 of Indian Penal Code which is a misconduct under section 11(1) of the CRPF Act.

7. On 23rd May, 2016 and 27th May, 2016, Inquiry Officer came to Naini Jail and recorded the statement of petitioner. On 17th August, 2016 statement of petitioner was recorded by Inquiry Officer in jail. Inquiry Officer submitted his report dated 29th August, 2016 before the respondent authorities. Petitioner accepted the Charge no.1 as he has remained unauthorisely absent from duty as he was detained in jail in a criminal case but denied the Charge no.2. Inquiry Officer in his report dated 29th August, 2016 concluded that the Charge no.1 against the petitioner stands proved and in respect of Charge no.2, Inquiry Officer held that the criminal case is pending consideration before the criminal court as such any decision in respect of Charge no.2 can be taken after completion of criminal case before the court concerned.

8. Thereafter, respondent no.4 has passed the impugned order dated 30th September, 2016 imposing major penalty of removal from service against the petitioner. Petitioner being aggrieved by order dated 30th September, 2016 passed by respondent no.4, preferred an appeal from jail under Rule 28 of the Central Reserve Police Force Rules before the Deputy Inspector General of Police, R.A.F/C.R.P.F, R.K. Puram, Sector-1, East Block-02, New Delhi. Appeal of petitioner was rejected by respondent no.3 by order dated 25th January, 2017. Petitioner being aggrieved by the above-mentioned order dated 30th September, 2016 and 25th January, 2017 preferred revision before respondent no.2. The aforesaid revision was rejected by order dated 25th April, 2017 by respondent no.2.

9. The present writ petition is filed challenging the order dated 30th September, 2016 passed by respondent no.4, order dated 25th January, 2017 passed by respondent no.3 and order dated 25th April, 2017 passed by respondent no.2.

10. Learned counsel for the petitioner urges that during the disciplinary proceedings, petitioner was in jail and petitioner participated in disciplinary proceedings from jail itself. On 4th February, 2016 a chargesheet was submitted against petitioner with two charges. The first charge against the petitioner was that the petitioner has remained for unauthorize absence on duty from 30th July, 2015 till initiation of the disciplinary proceedings. The second charge against the petitioner was to the effect that petitioner was involved in a criminal case and has surrendered before law and is in jail which is a misconduct. Statement of petitioner was recorded by Inquiry Officer, which is at page 66 of the writ petition, where the petitioner has explained to the Inquiry Officer, the circumstances under which petitioner was alleged to be involved in the criminal case, how petitioner has surrendered before court of Chief Judicial Magistrate. Inquiry Officer, after completion of inquiry proceedings, has submitted inquiry report on 29th August, 2016 wherein Charge no.1 against petitioner was found to be proved. However, in respect of the Charge no.2, Inquiry Officer recommended that since the matter pertains to criminal case against petitioner, decision on the aforesaid may be taken after the decision of the court concerned.

11. The disciplinary authority-respondent no.4 by order dated 30th September, 2016 has thereafter, proceeded to consider the inquiry report and, on Charge no.1 has directed removal of the petitioner from service and further the disciplinary authority has directed the period from 10th September, 2015 till the passing of the order i.e. 30th September, 2016 be treated as the period under suspension and only subsistence allowance would be paid to the petitioner. Petitioner's medal and other honours have also be confiscated by the respondents by means of impugned order.

12. It is submitted by the learned counsel for the petitioner that petitioner has been removed from service on Charge no.1, which is unauthorized absence from duty. The punishment of removal from service is disproportionate in the facts and circumstances of the case, specifically when the petitioner, who went on leave was subjected to criminal proceedings while on leave and as such the petitioner being involved in a criminal case could not join

back his duties nor could inform the respondent-authorities, which the petitioner has admitted in the inquiry proceedings. It is submitted that in respect of criminal proceeding petitioner surrendered before the court concerned and was sent to jail. The impugned order of removal from service has been passed against the petitioner as the petitioner has admitted the Charge no.1 during inquiry proceedings.

13. It is further submitted by learned counsel for the petitioner that admission of charge by petitioner in respect of Charge no.1 would not ipso facto amount to admission of quantum of punishment imposed by the respondents. He submits that the respondents in the facts and circumstances of case ought to have considered the peculiar facts and circumstances, which has visited the petitioner while he went on leave and thereafter, considering the statement of petitioner during inquiry proceedings ought to have passed the order against the petitioner.

14. In support of his submissions, learned counsel for petitioner has placed reliance upon following judgments:-

1. Jai Bhagwan Vs. Commissioner of Police and others, AIR 2013 SC 2908

2. Krushnakant B. Parmar Vs. Union of India and others, 2012 (3) SCC 178

3. Mirja Barkat Ali Vs. Inspector General of Police, Allahabad and others, 2002 (2) UPLBEC 1871.

15. On the strength of aforesaid judgments, learned counsel for petitioner submits that unauthorize absence from duty in all cases will not warrant removal from service, specifically when the employee can show from facts and circumstances that unauthorized absence was not wilful. He submits that unauthorized absence has been duly explained in the statement made to the Inquiry Officer. The aforesaid statement of the petitioner has not been considered by the punishing authority while passing the impugned order. It is further submitted that criminal prosecution against petitioner is not in respect of occurrence connected with service of the petitioner.

16. It is further submitted that it was imperative on part of disciplinary authority while considering punishment against petitioner on Charge no.1 to have considered statement of petitioner recorded during inquiry proceedings and the case of petitioner that he was involved in a criminal case and was searching for legal remedies in furtherance whereof has surrendered before court of Chief Judicial Magistrate. Such facts have not been considered by disciplinary authority while passing the impugned order and as such the impugned order is not tenable under law.

17. Learned counsel for the petitioner submits that the proportionality of punishment has to be considered by the disciplinary authority after taking into consideration the stand of petitioner even though, petitioner has admitted the charge. However, explanation given by petitioner for unauthorized absence ought to have been considered while imposing punishment. He submits that such process has not been adopted in present case and as such the impugned order is liable to be set aside.

18. Sri Arvind Kumar Goswami, learned counsel appearing on behalf of

respondents submits that the petitioner was unauthorisely absent from duty. Petitioner was granted ten days leave to visit his native place. However, he did not return back and thereafter, communications were sent to the petitioner for joining his duty. However, he has not honoured those communications and, thereafter, he has been found to be involved in a criminal case and was in jail as such he has been placed under suspension and disciplinary proceedings were initiated against the petitioner.

19. It is further submitted by learned counsel for the respondents that the chargesheet was submitted against the petitioner for two charges and Inquiry Officer has submitted the inquiry report where the Charge no.1 is proved against the petitioner and in so far as Charge no.2 is concerned, Inquiry Officer has recommended that any action may be taken after decision of the court concerned.

20. It is further submitted by learned counsel for the respondents that the disciplinary authority thereafter considering the report of the Inquiry Officer and admission of petitioner that he was absent from duty in an unauthorized manner, has passed the order of removal from service.

21. Learned Counsel for the respondents further submits that the petitioner belongs to a disciplined force and was required to join back his duty after the leave period was over. Once he has not joined his duties, after completion of leave disciplinary authority was justified in taking disciplinary action against the petitioner.

22. Learned counsel for the respondents submitted that the disciplinary authority has passed the order of removal under Section 11 of the Central Reserve Police Force Act, 1949 and as such there can be no fault in passing of the impugned order.

23. It is to be noted that the petitioner was posted as a Constable in the RAF/CRPF, Allahabad. He proceeded on leave for his native place from 20th July, 2015 to 29th July, 2015. When the petitioner reached his native place, a first information report was lodged on 21st July, 2015 under Section 302 and 201 I.P.C. Petitioner was not named in first information report. However, his name was surfaced during the investigation and a warrant of arrest was issued against petitioner on 25th July, 2015. According to petitioner, he was searching for legal remedies and evading the arrest and ultimately surrendered before the court of Chief Judicial Magistrate on 10th September, 2015.

24. It is also to be noted that the petitioner had informed respondents about the criminal case and his arrest on 17th October, 2015. On account of pendency of the criminal case against petitioner, petitioner was initially placed under suspension on 25th July, 2015 and thereafter, aforesaid suspension order was thereafter, revoked on 20th August, 2015. However, when petitioner surrendered before the court of Chief Judicial Magistrate and was sent to jail, he was again placed under suspension on 8th November, 2015.

25. It is also to be noted that the petitioner was granted bail by this Court on 28th March, 2017. Respondents initiated disciplinary proceedings against the petitioner and chargesheet was issued

against petitioner on 4th February, 2016. Against petitioner two charges were framed in disciplinary proceedings. Charge no.1 pertains to unauthorized absence from duty from 30th July, 2015 and Charge no.2 pertains to the pendency of a criminal case and as such the same was construed to be a misconduct by disciplinary authority. When the disciplinary proceedings were being carried out petitioner was in jail. However, his statement was recorded by the Inquiry Officer, which is at page 66 of the paper book. Relevant portion of the aforesaid statement is extracted hereunder:-

"प्रश्न 4- आप सेन्ट्रल जेल नैनी इलाहाबाद में किस लिए एवं कब से कैद में है?

उत्तर- श्रीमान घर वालो ने कारण पूछा तो पुलिस ने थाना नवावगंज इलाहाबाद में हुई दो हत्या में आरोपी बताया। जिस समय पुलिस घर आई मै और मेरा भाई सुबह घर से बाहर टहलने गये थे। तथा प्रार्थी के घर पर खडी सफारी गाडी पुलिस उठा ले गयी और हत्या में शामिल दिखाया । जबकि प्रार्थी का इस हत्या से कोई लेना-देना नहीं है। प्रार्थी के बड़े भाई मो० नसीम खान जो केन्द्रीय रिजर्व पुलिस बल से हवलदार/जीडी पद से रिटार्ड थे कि हत्या सुबह 06.00बजे के करीब समूह केन्द्र सी०आर०पी०एफ० इलाहाबाद के नजदीक उदयचन्दपुर गॉव में बम एवं गोली से मार कर हत्या कर दी गयी। प्रार्थी ने अपने भाई के हत्या में शामिल दो लोगो को नाम जद आरोपी बनाया था पप्पु पुत्र आजाद व पप्पु उर्फ अनवर पुत्र लतीफ व तीन अज्ञात के खिलाफ थाना सोरॉव में मुकदमा दर्ज कराया। मुकदमें की विवेचना में पुलिस ने रामकुमार उर्फ विमल को आरोपी बनाया था। जिन व्यक्तियों कि थाना नवाबगंज में हत्या हुई उनमें से एक रामकुमार उर्फ विमल यादव था। पुलिस ने मेरे भाई की हत्या से जोडकर मुझे एवं मेरे भाई को दो हत्याओ में आरोपी बनाया जबकि मेरा इस हत्या से कोई सम्बन्ध नही है। मै उपरोक्त कारणो से काफी भयभीत हो गया था और पुलिस की गिरफतारी से बचने के लिए छिप रहा था और अवकाश से डयूटी पर समय से उपस्थित नही हो सका। मै व मेरे भाई ने अपने को निर्दोश शावित करने के लिए दिनॉक 10/09/2015 को सी०जी०एम० कोर्ट इलाहाबाद में सरेण्डर किया और सी०जे०एम० कोर्ट इलाहाबाद ने मुझे दिनॉक 10/09/2015 को सेन्ट्रल जेल नैनी इलाहाबाद में भेज दिया दिया। और मै दिनॉक 10/09/2015 से अभी तक सेन्ट्रल जेल नैनी इलाहाबाद में कैद में चल रहा हूँ।

प्रश्न-5 - सभी अभियोजन गवाहों का बयान आपकी उपस्थिति में लिया गया है और आप अभियोजन गवाहों के बयानों को पढ़ और समझ लिया है। क्या आप कमाण्डेंट कार्यालय के ज्ञापन संख्या-पी०आठ-01/2016 स्था-दो-101 दिनॉक 04/02/2016 में लाये गये आरोपों के मद एक और दो के लिए अपने आप को दोषी मानते हैं?

उत्तर- श्रीमान कमाण्डेंट कार्यालय के ज्ञापन संख्या-पी०-आठ-01/2016-स्था-दो-101 दिनॉक 04/02/2016 में लाये गये आरोपों के मद एक में लगाये गये आरोप के लिए अपने आप को दोषी मानता हूँ। श्रीमान मद दो में लगाये गये आरोप के प्रति मैं अपने आप को दोषी नहीं मानता हूँ क्योंकि पुलिस द्वारा मेरे विरूद्ध लगाये गये आरोप निराधार है। इस सम्बन्ध में मामला न्यायालय में विचार हेतु लम्बित है।"

26. Inquiry Officer after conducting inquiry has submitted inquiry report dated 29th August, 2016 and concluded that the Charge no.1 against the petitioner is proved. So far as Charge no.2 is concerned, Inquiry Officer has recommended that proceedings may be undertaken after decision of court concerned where criminal

case is pending against petitioner. The disciplinary authority thereafter, has passed impugned order dated 30th September, 2016 and has recorded finding that the Inquiry Officer has found Charge no.1 as correct against the petitioner and aforesaid charge has been admitted by the petitioner and as such has inflicted the punishment of removal from service. Petitioner being aggrieved by the aforesaid order dated 30th September, 2016, had preferred an appeal before the Appellate Authority which has been rejected by order dated 25th March, 2017. Thereafter, petitioner has preferred a revision before the revisional authority and same has also been rejected by order dated 25th April, 2017.

26. In ***Krushnakant B. Parmar v. Union of India, (2012) 3 SCC 178 :-***

"16. In the case of the appellant referring to unauthorised absence the disciplinary authority alleged that he failed to maintain devotion to duty and his behaviour was unbecoming of a government servant. The question whether "unauthorised absence from duty" amounts to failure of devotion to duty or behaviour unbecoming of a government servant cannot be decided without deciding the question whether absence is wilful or because of compelling circumstances.

17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence cannot be held to be wilful. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a government servant.

18. In a departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is wilful, in the absence of such finding, the absence will not amount to misconduct."

27. It is to be seen that the petitioner has remained on unauthorized absence from duty primarily on account of pendency of criminal case against petitioner. When petitioner went to his native place after duly sanctioned leave being obtained, a first information report was lodged on 21st July, 2015 and, thereafter, a warrant of arrest was issued against petitioner on 25th July, 2015 i.e. during the currency of sanctioned leave. After issuance of warrant of arrest, petitioner was searching for legal remedies and was evading from arrest as he was an innocent person, according to the petitioner he has been falsely implicated in the criminal case.

28. Petitioner by his communication dated 17th October, 2015 has informed the department with regard to pendency of the criminal case and petitioner has surrendered before the court of Chief Judicial Magistrate on 10th September, 2015. Petitioner was in jail when disciplinary proceedings were being carried out against him. Disciplinary authority while passing impugned order has taken into consideration report of Inquiry Officer and admission of petitioner to Charge no.1 as the basis for imposing the punishment of removal from service. The disciplinary

authority has not recorded any independent finding with regard to wilful absence from duty while passing the order of punishment. Absence from duty without authorised leave may amount to unauthorised absence, but it does not always mean wilful absence from duty. There may be different eventualities due to which an employee may not report back to duties/abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a government servant.

29. The reason explained by the employee/petitioner during disciplinary proceedings are required to be considered by the employer prior to passing order on the punishment. The reasons specified by the employee for unauthorised absence even though the unauthorised absence may have been admitted by the employee are important factors to be considered by the employer while deciding the nature of punishment to be given to the employee concerned for unauthorised absence.

30. Where the circumstances are beyond the control of the employee and the employee was prevented by justifiable cause then it is the duty of the employer to weigh the circumstances and impose a punishment which is proportionate with the nature of misconduct imputed in the facts and circumstances of a particular case.

31. The proportionality of the punishment has to be considered by the disciplinary authority as the same is within the domain of the disciplinary authority. The disciplinary authority has not considered the peculiar facts and circumstances which has visited the petitioner by lodging of a criminal case where the petitioner was evading his arrest and ultimately send to jail. A person who is in judicial custody cannot be expected to join his duty unless he has been released by the court of law on bail. The employer has deferred the punishment in respect of Charge no.2 with regard to involvement of the petitioner in the criminal case. These circumstances might have mitigated the petitioner's misconduct and a different view could have been taken by disciplinary authority warranting a lessor punishment.

32. All these factors were required to be considered by the disciplinary authority while passing the impugned order. However, disciplinary authority has only taken into consideration, inquiry report and thereafter, has passed the impugned order without recording any finding whether the absence of petitioner was wilful or whether petitioner was forced by the facts and circumstances which has visited to petitioner, to remain absent from duty. Such an approach by the disciplinary authority is not warranted under law. The disciplinary authority while considering the punishment to be imposed on employee even if employee has admitted the charge is required to decide the proportionality of the punishment on the facts and circumstances of the case and a punishment which is disproportionate may entail injustice to the employee.

33. Such an approach has not been considered by the employer concerned, as such impugned order dated 30th September, 2016 is not tenable under law and is hereby set aside. The writ petition is allowed and the matter is remanded back to the respondent no.4 to pass appropriate order afresh after taking into account the circumstances which is visited to the

petitioner, specifically the statement of the petitioner, which is at page 66 of the writ petition, after giving opportunity of hearing to the petitioner. The consequential orders dated 25th January, 2017 and 25th April, 2017 passed by the appellate authority as well as the revisional authority respectively are also hereby set aside. The disciplinary authority-respondent no.4 shall pass a fresh order within a period of four months from the date of production of a certified copy of this order.

34. Learned counsel for both the parties agree that the matter may not be remanded for fresh inquiry, however, may only be remanded for a fresh decision on the quantum and nature of punishment to be awarded by disciplinary authority. Accordingly, respondent no.4 while passing the decision a fresh, will consider on the question of the nature of punishment to be awarded considering the facts and circumstances under which petitioner was absent from duty.

(2023) 1 ILRA 1235
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.01.2023

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Special Appeal Defective No. 466 of 2022

Lalit Kumar ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Prabhakar Awasthi

Counsel for the Respondents:
C.S.C.

A. Service Law – Recruitment/Selection – Cancellation of candidature - Irrespective of the fact whether the dispute is of trivial nature or not, it is the credibility/creditworthiness of a particular employee which matters most when it comes to a public employment. There should not be any mechanical or rhetorical incantation of moral turpitude to deny appointment in a government service simplicitor which would depend on the facts of each case. The judicial philosophy flowing through the mind of the judges is that every individual deserves an opportunity to improve, learn from the past and move ahead in life for self-improvement. To make past conduct, irrespective of all considerations, may not always constitute justice. (Para 18, 19)

B. The learned Single Judge dismissed the writ petition of the petitioner-appellant merely observing that **the impugned order was passed on 31.01.2019 whereas the order of acquittal was passed a day thereafter on 01.02.2019 and thus, the petitioner was facing trial as on the date of the impugned order dated 31.01.2019. This view to uphold the order dated 31.01.2019 cannot be sustained**. (Para 21)

C. When the accused is acquitted after full consideration of the prosecution case and the prosecution miserably fails to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted. (Para 18)

If it is found by the Screening Committee that the person against whom a serious case involving moral turpitude is registered is discharged on technical grounds or is acquitted of the same charge but the acquittal is not honourable, the Screening Committee would be entitled to cancel his candidature. Stricter norms need to be applied while appointing persons in a disciplinary force because public interest is involved in it. (Para 18)

The learned Single Judge has recorded that the allegations against the petitioner were of

matrimonial dispute of committing cruelty with his wife and demand of dowry which were not only against one person but against public at large. But, here the petitioner-appellant was acquitted in the aforesaid criminal case u/s 498A etc. not on the basis of compromise or the witnesses turned hostile but after due consideration of facts and appreciation of evidences led by the parties, i.e. the prosecution and the defence. (Para 21)

The petitioner-appellant is in service of the GOI since the year 2002 and his credibility/creditworthiness in public employment was never found doubtful. He after taking permission from his parent department, appeared in the Assistant Prosecution Officer Examination, 2015 and fully disclosed pendency of the criminal case. He was acquitted as prosecution failed to prove allegations beyond reasonable doubt. There was absence of logical chain in the story set up by the prosecution and the allegations made against the petitioner were of general nature. (Para 12, 20)

Special appeal and Writ petition are allowed. (E-4)

Precedent followed:

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

2. Satish Chandra Yadav Vs U.O.I. & ors., 2022 SCC Online SC 1300, judgment dated 26.09.2022 (Para 18)

Precedent distinguished:

1. St. of Raj. Vs Chetan Jeff, 2022 SCC Online SC 597 (Para 14)

2. U.O.I. & ors. Vs Methu Meda, (2022) 1 SCC 1 (Para 17)

Present special appeal assails judgment and order dated 22.07.2022, in Writ-A No. 679 of 2020, passed by the learned Single Judge and to allow the writ petition which was filed for quashing the impugned order dated 31.01.2019 passed by the Secretary, Home (Police), Govt. of U.P., Lucknow as well as order dated 06.11.2019 passed by Joint Secretary, Home (Police), Govt. of U.P., Lucknow.

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Prabhakar Awasthi, learned counsel for the petitioner-appellant and Sri Satish Kumar Srivastava, learned Additional Chief Standing Counsel for the State-respondents.

2. The petitioner-appellant has filed the present special appeal praying to set aside the judgment and order dated 22.07.2022 in Writ-A No.679 of 2020 (Lalit Kumar vs. State of U.P. and others) passed by the learned Single Judge and to allow the writ petition.

3. The petitioner has filed the aforesaid Writ-A No.679 of 2020 praying for the following relief:

*"i) **Issue** a writ, order or direction in the nature of certiorari, quashing the **impugned order dated 31.01.2019** passed by the respondent no.2 (Annexure No.6 to this writ petition) as well as **order dated 06.11.2019 passed by respondent no.3** (Annexure no.12 to this writ petition).*

*ii) **Issue** a writ, order or direction in the nature of mandamus commanding/ directing the respondents to give appointment to the petitioner on the post of Assistant Prosecution Officer."*

Facts of the Present Case:-

4. Briefly stated, facts of the present case are that the petitioner-appellant was already working as Upper Divisional Clerk in the office of the Director General (Meteorology), Ministry of Earth Sciences,

Government of India, New Delhi. An advertisement inviting applications for recruitment on the post of Assistant Prosecution Officer was issued. The appellant-petitioner applied for the aforesaid post after obtaining permission from his aforesaid parent department to appear in the aforesaid selection process. The Uttar Pradesh Public Service Commission, Allahabad issued provisional admit card to the petitioner for appearing in Assistant Prosecution Officer Examination, 2015. The petitioner appeared in the examination and was declared successful in the preliminary examination. Thereafter, the petitioner appeared in the main examination of the aforesaid recruitment process and was declared successful. He was called for interview by the Commission vide interview letter dated 21.08.2017. He was finally selected for the post of Assistant Prosecution Officer. He was directed to appear for medical examination before the Uttar Pradesh Medical Board vide letter dated 15.12.2017 and the petitioner appeared for medical examination on 26.12.2017. In his application form, the petitioner-appellant had already declared that there is matrimonial dispute in the shape of a Criminal Case No.1459 of 2008 under Section 498A, I.P.C., yet, even after selection, the candidature of the petitioner was cancelled by the respondent No.2 vide order dated 31.01.2019. The petitioner was acquitted in the aforesaid Criminal Case No.1459 of 2008 vide judgment dated 01.02.2019 passed by the Additional Chief Judicial Magistrate, Court No.3, Ghaziabad. In the aforesaid criminal case, the court of Additional Chief Judicial Magistrate, after detail discussion and appreciation of evidences, concluded as under:

"उपरोक्त परिचर्चा से स्पष्ट है कि जहां एक ओर अभियोजन द्वारा बताये गये घटनाक्रम में तार्किक तार्तम्य का अभाव है वहीं दूसरी ओर अभियुक्तगण के विरूद्ध लगाये गये आरोप सामान्य प्रकृति के हैं तथा जिन घटनाओं का उल्लेख अभियोजन द्वारा किया जा रहा है, उनके तिथियों में सामन्जस्य का अभाव उपरोक्त पैराग्राफ की परिचर्चा से दृष्टिगोचर होता है। स्पष्ट रूप से अभियोजन अभियुक्तगण के विरूद्ध लगाये गये आरोपों को युक्तियुक्त संदेह से परे सिद्ध करने में असफल रहा है। तदनुसार अभियुक्तगण दोषमुक्त किये जाने योग्य है।"

5. Aggrieved with the cancellation of his candidature, the petitioner preferred a Writ-A No.3794 of 2019, which was disposed of by order dated 11.03.2019 directing the respondent No.2 to reconsider and re-evaluate the suitability of the petitioner for appointment in accordance with law and in the light of the principles enunciated in the case of **Avtar Singh vs. Union of India and others, (2016) 8 SCC 471**. Thereafter, the respondent No.2 passed an order dated 06.11.2019 rejecting the representation of the petitioner holding as under:

"8- रिट याचिका संख्या-ए-3794/2019 ललित कुमार बनाम उत्तर प्रदेश राज्य व अन्य में मा० न्यायालय द्वारा पारित उक्त आदेश दिनांक 11.03.2019 के क्रम में श्री ललित कुमार ने अपने प्रार्थना पत्र दिनांक 18.03.2019 द्वारा शासन के कार्यालय-ज्ञाप दिनांक 31.01.2019 द्वारा उनके सहायक अभियोजन अधिकारी के पद पर किये गये चयन से निरस्त किये गये अभ्यर्थन पर पुनर्विचार किये जाने का अनुरोध किया है।

9- अवगत कराना है कि किसी अभ्यर्थी के अभ्यर्थन निरस्त होने के बाद में उसे मा० ***न्यायालय द्वारा दोषमुक्त किये जाने के प्रकरण में पुनः सेवा में लिये जाने की कोई व्यवस्था नहीं है।*** *अतः मा० उच्चतम न्यायालय*

द्वारा अवतार सिंह बनाम यूनियन आफ इण्डिया एवं अन्य एस०एल०पी० (सी०) नं०-20525/2011 में पारित निर्णय/मार्गदर्शक सिद्धांत दिनांक 21.07.2016 के आधार पर मा० उच्च न्यायालय, इलाहाबाद में योजित रिट याचिका संख्या-ए-3794/2019 ललित कुमार बनाम उत्तर प्रदेश राज्य व अन्य में मा० न्यायालय द्वारा पारित निर्णय दिनांक 11.03.2019 के अनुपालन में याची श्री ललित कुमार के ***प्रत्यावेदन दिनांक 18.03.2019 पर उनकी उपयुक्तता पर समग्र रूप से पुनर्विचार एवं पुनर्मूल्यांकन किया गया****, जिसमें उपरोक्त वर्णित तथ्यों के दृष्टिगत याची श्री ललित कुमार को सेवा में लिये जाने का कोई अवसर नहीं बनता है।*

10- अतः सम्यक् विचारोपरान्त मा० उच्च न्यायालय, इलाहाबाद में योजित रिट याचिका संख्या-ए-3794/2019 ललित कुमार बनाम उत्तर प्रदेश राज्य व अन्य में मा० न्यायालय द्वारा पारित निर्णय दिनांक 11.03.2019 के अनुपालन में याची श्री ललित कुमार के प्रत्यावेदन दिनांक 18.03.2019 को एतद्द्वारा निस्तारित करते हुए निरस्त किया जाता है।"

6. Aggrieved with the aforesaid order dated 06.11.2019, the petitioner filed Writ-A No.679 of 2020, which was dismissed by the impugned order dated 22.07.2022. Aggrieved with the impugned order, the petitioner has filed the present special appeal.

Submissions on behalf of the petitioner-appellant:-

7. Learned counsel for the petitioner-appellant submits as under:-

(i) The impugned judgment has been passed on misreading of the judgment of the acquittal dated 01.02.2019 in Criminal Case No. 1459 of 2008 (State Vs. Braj Singh Ken and others), under Sections 498A, 323, 504 I.P.C. and Section 3/4 Dowry Prohibition Act, Police Station Sihanigate, District Ghaziabad.

(ii) The impugned judgment of the learned Single Judge is based on misreading of judgment of Hon'ble Supreme Court in Avtar Singh Vs. Union of India and others [(2016) 8 SCC 471].

(iii) The petitioner was in government employment working as Upper Divisional Clerk in the office of Director General (Meteorology), Ministry of Earth Sciences, Government of India, New Delhi and applied for Assistant Prosecution Officer after obtaining permission from his parent department. He appeared in the Assistant Prosecution Officer Examination-2015 and was declared successful. He appeared in the interview before the Uttar Pradesh Public Service Commission pursuant to the interview letter dated 21.08.2017 and was finally selected for the post of Assistant Prosecution Officer. When the petitioner himself has disclosed about the aforesaid criminal case in which he was acquitted by judgment dated 01.02.2019 passed by the Additional Chief Judicial Magistrate, Court No. 3, Ghaziabad in Criminal Case No. 1459 of 2008. Despite this fact, the respondent no. 1 passed the order dated 06.11.2019 observing that in light of principles laid down by the Hon'ble Supreme Court in Avtar Singh case (supra), the representation of the petitioner is rejected. Thus, the representation of the petitioner was rejected by order dated 06.11.2019, against which, the petitioner filed Writ-A No. 679 of 2020, which has been dismissed by the impugned judgment without proper appreciation of facts, evidences and the law laid down by the Hon'ble Supreme Court.

Submissions on behalf of the State-respondents:-

8. Learned Additional Chief Standing Counsel supports the impugned judgment. He refers to paragraphs 10 and 11 of the impugned judgment and submits that candidature of the petitioner was rejected on the ground of pendency of criminal case, however, on the next day i.e. 01.02.2019 trial court acquitted him. Since the petitioner was not acquitted gracefully, therefore, there is no illegality in the orders dated 31.01.2019 and 06.11.2019.

9. Paragraphs 10-11 of the impugned judgment of the learned Single Judge as heavily relied by the learned Additional Chief Standing Counsel in his aforenoted submissions, are reproduced below:

"10. In the above referred facts and the rival submission, it would be apposite to quote paragraph 32 of State of Rajasthan & Ors. Vs. Chetan Jeff, 2022 SCC OnLine SC 597:

"32. In State of M.P. vs. Abhijit Singh Pawar, (2018)18 SCC 733, when the employee participated in the selection process, he tendered an affidavit disclosing the pending criminal case against him. The affidavit was filed on 22.12.2012. According to the disclosure, a case registered in the year 2006 was pending on the date when the affidavit was tendered. However, within four days of filing such an affidavit, a compromise was entered into between the original complainant and the employee and an application for compounding the offence was filed under Section 320 Cr.P.C. The employee came to be discharged in view of the deed of compromise. That thereafter the employee was selected in the examination and was called for medical examination. However, around the same time, his character verification was also undertaken and after due consideration of the character verification report, his candidature was rejected. The employee filed a writ petition before the High Court challenging rejection of his candidature. The learned Single Judge of the High Court of Madhya Pradesh allowed the said writ petition. The judgment and order passed by the learned Single Judge directing the State to appoint the employee came to be confirmed by the Division Bench which led to appeal before this Court. After considering a catena of decisions on the point including the decision in Avtar Singh Vs. Union of India, (2016) 8 SCC 471, this Court upheld the order of the State rejecting the candidature of the employee by observing that as held in Avtar Singh (supra), even in cases where a truthful disclosure about a concluded case was made, the employer would still have a right to consider antecedents of the candidate and could not be compelled to appoint such candidate."

(emphasis added)

11. In the light of State of Rajasthan & Ors. Vs. Chetan Jeff, (supra), considering the facts and circumstances of present case, rival submissions as well as the material available on record, it is not in dispute that at the time of submitting the verification/attestation form, petitioner disclosed that he was facing a trial for the offence as referred above and by the impugned order, candidature of the petitioner was rejected on the ground of pendency of said criminal case, however on the next date i.e. 1.2.2019, learned trial court passed the judgment and acquitted the petitioner. It is also not in dispute that nature of acquittal was not "clean or honorouable' as the prosecution was failed to prove case against the petitioner beyond reasonable doubt."

Discussion and Findings:-

10. We have carefully considered the submissions of the learned counsels for the parties and perused the record of the special appeal.

11. Undisputedly, the petitioner was working as Upper Divisional Clerk in the office of the Director General (Meteorology), Ministry of Earth Sciences, Government of India, New Delhi when he applied for the post of Assistant Prosecution Officer and accordingly appeared in the Assistant Prosecution Officer, Examination, 2015. Also undisputedly he made true and full disclosure of the aforesaid pendency of Criminal Case No.1459 of 2008. The aforesaid criminal case was the result of Case Crime No.93 of 2007 lodged by the wife against him, his father Sri Braj Singh ken, his mother Smt. Sita Devi and his younger brother Praveen Kumar under Section 498A, 323, 504 I.P.C. and Section 3/4, Dowry Prohibition Act.

12. We have perused the judgment dated 01.02.2019 in the aforesaid Criminal Case No.1459 of 2008 and we find that the informant made merely general allegations against the petitioner. Even the prosecution witnesses including the informant could not make any specific allegation nor could prove any incident nor could prove demand of dowry by the petitioner. Therefore, after detailed discussion and appreciation, the trial court held that there is absence of logical chain in the story set up by the prosecution, that the allegations made against the petitioner are of general nature and that clearly the prosecution has failed to prove allegations beyond reasonable doubt. Consequently, the petitioner and his family members were acquitted.

13. The trial court in its aforesaid judgment in Criminal Case No.1459 of 2008 has recorded three definite findings which we have noted above. The allegations against the petitioner was found to be general in nature. His acquittal was not by giving benefit of doubt but on account of absence of logical chain of story set up by the prosecution and allegation against the accused including the petitioner were of general nature . That apart, the petitioner was already in service in the office of Director General (Meteorology), Ministry of Earth Sciences, Government of India, New Delhi and he was not ousted from service by the Government of India on account of the aforesaid criminal case. Therefore, merely on account of lodging of a criminal case in which the petitioner was ultimately acquitted; neither it can be said that the petitioner has become unsuitable for appointment in another government job, i.e. on the post of Assistant Prosecution Officer nor a view adverse to the petitioner can be taken on the basis of the judgment of Hon'ble Supreme in the case of Avtar Singh (supra) (SCC) on the facts of the present case.

14. Reliance placed by the learned standing counsel upon Paragraph-32 of the judgment in the case of **State of Rajsthan vs. Chetan Jeff, 2022 SCCOnline SC 597**, is totally misplaced on facts of the present case. In the case of Chetan Jeff (supra), the facts were that the employee came to be discharged in view of the deed of compromise. In the present set of facts, the petitioner has been acquitted not on the basis of compromise but on merits of the case.

15. In the case of **Avtar Singh (supra) (paras-29 to 38.11)**, Hon'ble Supreme Court held as under:

"29. The verification of antecedents is necessary to find out fitness of incumbent,

in the process if a declarant is found to be of good moral character on due verification of antecedents, merely by suppression of involvement in trivial offence which was not pending on date of filling attestation form, whether he may be deprived of employment? There may be case of involving moral turpitude/serious offence in which employee has been acquitted but due to technical reasons or giving benefit of doubt. There may be situation when person has been convicted of an offence before filling verification form or case is pending and information regarding it has been suppressed, whether employer should wait till outcome of pending criminal case to take a decision or in case when action has been initiated there is already conclusion of criminal case resulting in conviction/acquittal as the case may be. The situation may arise for consideration of various aspects in a case where disclosure has been made truthfully of required information, then also authority is required to consider and verify fitness for appointment. Similarly in case of suppression also, if in the process of verification of information, certain information comes to notice then also employer is required to take a decision considering various aspects before holding incumbent as unfit. If on verification of antecedents a person is found fit at the same time authority has to consider effect of suppression of a fact that he was tried for trivial offence which does not render him unfit, what importance to be attached to such non-disclosure. Can there be single yardstick to deal with all kind of cases?

30. The employer is given "discretion' to terminate or otherwise to condone the omission. Even otherwise, once employer has the power to take a decision when at the time of filling verification form declarant has already been convicted/acquitted, in such a case, it becomes obvious that all the facts and attending circumstances, including impact of suppression or false information are taken into consideration while adjudging suitability of an incumbent for services in question. In case the employer come to the conclusion that suppression is immaterial and even if facts would have been disclosed would not have affected adversely fitness of an incumbent, for reasons to be recorded, it has power to condone the lapse. However, while doing so employer has to act prudently on due consideration of nature of post and duties to be rendered. For higher officials/higher posts, standard has to be very high and even slightest false information or suppression may by itself render a person unsuitable for the post. However same standard cannot be applied to each and every post. In concluded criminal cases, it has to be seen what has been suppressed is material fact and would have rendered an incumbent unfit for appointment. An employer would be justified in not appointing or if appointed to terminate services of such incumbent on due consideration of various aspects. Even if disclosure has been made truthfully the employer has the right to consider fitness and while doing so effect of conviction and background facts of case, nature of offence etc. have to be considered. Even if acquittal has been made, employer may consider nature of offence, whether acquittal is honourable or giving benefit of doubt on technical reasons and decline to appoint a person who is unfit or dubious character. In case employer comes to conclusion that conviction or ground of acquittal in criminal case would not affect the fitness for employment incumbent may be appointed or continued in service.

31. Coming to the question whether an employee on probation can be

discharged/refused appointment though he has been acquitted of the charge/s, if his case was not pending when form was filled, in such matters, employer is bound to consider grounds of acquittal and various other aspects, overall conduct of employee including the accusations which have been levelled. If on verification, the antecedents are otherwise also not found good, and in number of cases incumbent is involved then notwithstanding acquittals in a case/cases, it would be open to the employer to form opinion as to fitness on the basis of material on record. In case offence is petty in nature committed at young age, such as stealing a bread, shouting of slogans or is such which does not involve moral turpitude, cheating, misappropriation etc. or otherwise not a serious or heinous offence and accused has been acquitted in such a case when verification form is filled, employer may ignore lapse of suppression or submitting false information in appropriate cases on due consideration of various aspects.

32. No doubt about it that once verification form requires certain information to be furnished, declarant is duty bound to furnish it correctly and any suppression of material facts or submitting false information, may by itself lead to termination of his services or cancellation of candidature in an appropriate case. However, in a criminal case incumbent has not been acquitted and case is pending trial, employer may well be justified in not appointing such an incumbent or in terminating the services as conviction ultimately may render him unsuitable for job and employer is not supposed to wait till outcome of criminal case. In such a case non disclosure or submitting false information would assume significance and that by itself may be ground for employer to cancel candidature or to terminate services.

33. The fraud and misrepresentation vitiates a transaction and in case employment has been obtained on the basis of forged documents, as observed in M. Bhaskaran's case (supra), it has also been observed in the reference order that if an appointment was procured fraudulently, the incumbent may be terminated without holding any inquiry, however we add a rider that in case employee is confirmed, holding a civil post and has protection of Article 311(2), due inquiry has to be held before terminating the services. The case of obtaining appointment on the basis of forged documents has the effect on very eligibility of incumbent for the job in question, however, verification of antecedents is different aspect as to his fitness otherwise for the post in question. The fraudulently obtained appointment orders are voidable at the option of employer, however, question has to be determined in the light of the discussion made in this order on impact of suppression or submission of false information.

34. No doubt about it that verification of character and antecedents is one of the important criteria to assess suitability and i ***t is open to employer to adjudge antecedents of the incumbent, but ultimate action should be based upon objective criteria on due consideration of all relevant aspects.***

35. Suppression of "material' information presupposes that what is suppressed that "matters' not every technical or trivial matter. The employer has to act on due consideration of rules/instructions if any in exercise of powers in order to cancel candidature or for terminating the services of employee. Though a person who has suppressed the material information cannot claim unfettered right for appointment or continuity in service but he has a right not to be dealt with arbitrarily and exercise of power has to be in reasonable manner with

objectivity having due regard to facts of cases.

36. What yardstick is to be applied has to depend upon the nature of post, higher post would involve more rigorous criteria for all services, not only to uniformed service. For lower posts which are not sensitive, nature of duties, impact of suppression on suitability has to be considered by concerned authorities considering post/nature of duties/services and power has to be exercised on due consideration of various aspects.

37. The "McCarthyism' is antithesis to constitutional goal, chance of reformation has to be afforded to young offenders in suitable cases, interplay of reformative theory cannot be ruled out in toto nor can be generally applied but is one of the factors to be taken into consideration while exercising the power for cancelling candidature or discharging an employee from service.

38. We have noticed various decisions and tried to explain and reconcile them as far as possible. In view of aforesaid discussion, we summarize our conclusion thus:

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

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

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

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

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

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

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

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

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

38.7 In a case of deliberate suppression of fact with respect to multiple

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

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

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

38.10 For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for.

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

(Emphasis supplied by us)

16. As per law settled by the Supreme Court in the case of **Avtar Singh (supra)**, it was open for the respondent to adjudge antecedents of the petitioner to assess his suitability but ultimate action should be based on objective criteria of due consideration of all relevant aspects. Perusal of the impugned orders dated 31.01.2019 and 06.11.2019 passed by the respondent No.2 shows that although the respondent No.2 has noted certain facts including the fact that the petitioner is posted as Upper Divisional Clerk in a department of Government of India since the year 2002, and has no criminal history/ background and has been acquitted in the aforesaid criminal case and yet rejected his representation without objective criteria and without due consideration of all relevant aspects. It is further relevant to mention that by the judgment and order dated 11.03.2019 in Writ-A No.3794 of 2019 (Lalit Kumar vs. State of U.P. and 2 others), the learned Single Judge noted the contention of the State-respondents that "the ends of justice would merit the matter being remitted to the second respondent for reconsideration and re-evaluation of the suitability of the petitioner for appointment in accordance with law .....". The writ petition was disposed of by the learned Single Judge in the light of the statement of the State-respondents as noted above. **But perusal of the impugned order dated 06.11.2019 shows that the respondent No.2 neither reconsidered nor re-evaluated the suitability of the petitioner based on any objective criteria but arbitrarily rejected the representation of the petitioner.**

17. The judgment of Hon'ble Supreme Court in the case of **Union of India and others vs. Methu Meda, (2022) 1 SCC 1** relied by learned Additional Chief Standing Counsel is distinguishable on the facts of the present case inasmuch as in the said case, there was accusation of kidnapping and acquittal was because the complainant turned hostile. In the present set of facts, the accusation was made by the wife of the petitioner against him, his father, mother

and brother which could not be proved by the prosecution. The trial court found that accusation against the petitioner were of general nature. Thus, the judgment in the case of **Methu Meda (supra)** is of no help to the respondents.

18. In a recent judgment in the case of **Satish Chandra Yadav vs. Union of India and others** reported in **2022 SCCOnline SC 1300 (judgment dated 26.09.2022) (paras-75, 86, 88, 89 and 90),** Hon'ble Supreme Court has held, as under:

"75. This Court before settling the issues in the case of Avtar Singh v. Union of India and Others, (2016) 8 SCC 471, discussed the said principles extensively in the matter of Commissioner of Police, New Delhi and Another v. Mehar Singh, (2013) 7 SCC 685. In this case, a candidate for the post of constable in the Delhi Police had disclosed his involvement in a criminal case, wherein he was acquitted on technical grounds. The candidate had his candidature for the post rejected by the Standing Committee. The candidate argued that as he had been acquitted, the Standing Committee by rejecting his candidature had overreached the decision of the competent Authority. This Court, while deciding on the issue and whether the respondent was honourably acquitted, held as under:

"25. The expression "honourable acquittal" was considered by this Court in S. Samuthiram 2013 (1) SCC 598. In that case this Court was concerned with a situation where disciplinary proceedings were initiated against a police officer. Criminal case was pending against him under Section 509 IPC and under Section 4 of the Eve-Teasing Act. He was acquitted in that case because of the non-examination of key witnesses. There was a serious flaw in the conduct of the criminal case. Two material witnesses turned hostile. Referring to the judgment of this Court in RBI v. Bhopal Singh Panchal (1994) 1 SCC 541 where in somewhat similar fact situation, this Court upheld a bank's action of refusing to reinstate an employee in service on the ground that in the criminal case he was acquitted by giving him benefit of doubt and, therefore, it was not an honourable acquittal, this Court held that the High Court was not justified in setting aside the punishment imposed in the departmental proceedings. This Court observed that the expressions "honourable acquittal", "acquitted of blame" and "fully exonerated" are unknown to the Criminal Procedure Code or the Penal Code. They are coined by judicial pronouncements. It is difficult to define what is meant by the expression "honourably acquitted". This Court expressed that when the accused is acquitted after full consideration of the prosecution case and the prosecution miserably fails to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted.

26. In light of the above, we are of the opinion that since the purpose of the departmental proceedings is to keep persons, who are guilty of serious misconduct or dereliction of duty or who are guilty of grave cases of moral turpitude, out of the department, if found necessary, because they pollute the department, surely the above principles will apply with more vigour at the point of entry of a person in the police department i.e. at the time of recruitment. If it is found by the Screening Committee that the person against whom a serious case involving moral turpitude is registered is discharged on technical grounds or is acquitted of the same charge but the acquittal is not honourable, the Screening Committee

would be entitled to cancel his candidature. Stricter norms need to be applied while appointing persons in a disciplinary force because public interest is involved in it.

x x x x x x x x x

34. The respondents are trying to draw mileage from the fact that in their application and/or attestation form they have disclosed their involvement in a criminal case. We do not see how this fact improves their case. Disclosure of these facts in the application/attestation form is an essential requirement. An aspirant is expected to state these facts honestly. Honesty and integrity are inbuilt requirements of the police force. The respondents should not, therefore, expect to score any brownie points because of this disclosure. Besides, this has no relevance to the point in issue. It bears repetition to state that while deciding whether a person against whom a criminal case was registered and who was later on acquitted or discharged should be appointed to a post in the police force, what is relevant is the nature of the offence, the extent of his involvement, whether the acquittal was a clean acquittal or an acquittal by giving benefit of doubt because the witnesses turned hostile or because of some serious flaw in the prosecution, and the propensity of such person to indulge in similar activities in future. This decision, in our opinion, can only be taken by the Screening Committee created for that purpose by the Delhi Police. ***If the Screening Committee's decision is not mala fide or actuated by extraneous considerations, then, it cannot be questioned.***

35. The police force is a disciplined force. It shoulders the great responsibility of maintaining law and order and public order in the society. People repose great faith and confidence in it. It must be worthy of that confidence. A candidate wishing to join the police force must be a person of utmost rectitude. He must have impeccable character and integrity. A person having criminal antecedents will not fit in this category. Even if he is acquitted or discharged in the criminal case, that acquittal or discharge order will have to be examined to see whether he has been completely exonerated in the case because even a possibility of his taking to the life of crimes poses a threat to the discipline of the police force. The Standing Order, therefore, has entrusted the task of taking decisions in these matters to the Screening Committee. The decision of the Screening Committee must be taken as final unless it is mala fide. In recent times, the image of the police force is tarnished. Instances of police personnel behaving in a wayward manner by misusing power are in public domain and are a matter of concern. The reputation of the police force has taken a beating. In such a situation, we would not like to dilute the importance and efficacy of a mechanism like the Screening Committee created by the Delhi Police to ensure that persons who are likely to erode its credibility do not enter the police force. At the same time, the Screening Committee must be alive to the importance of trust reposed in it and must treat all candidates with even hand."

[Emphasis supplied]

86. Thus, this Court took the view that irrespective of the fact whether the dispute is of a trivial nature or not, ***it is the credibility/ trustworthiness of a particular employee which matters the most when it comes to public employment. This Court took the view that if a particular employee supresses*** *something important or makes any false declaration with a view to secure public employment then such employee could be said to have exhibited a tendency which is likely to shake the confidence of*

the employer. In such circumstances, it would be within the discretion of the employer whether to continue or not to continue such an employee who has exhibited a tendency which reflects on his overall character or credibility.

88. Thus, this Court took the view that although employment opportunity is a scarce commodity in the present times being circumscribed within a limited vacancies yet by itself may not suffice to invoke sympathy for grant of relief where the ***credentials of a candidate may raise any question regarding his suitability, irrespective of eligibility. However, at the same time, this Court observed that there should not be any mechanical or rhetorical incantation of moral turpitude to deny appointment in a government service simplicitor which would depend on the facts of each case. The judicial philosophy flowing through the mind of the judges is that every individual deserves an opportunity to improve, learn from the past and move ahead in life for self-improvement. To make past conduct, irrespective of all considerations, may not always constitute justice. It would all depend on the fact situation of the given case.***

89. The only reason to refer to and look into the various decisions rendered by this Court as above over a period of time is that the principles of law laid therein governing the subject are bit inconsistent. ***Even after, the larger Bench decision in the case of Avtar Singh (supra) different courts have enunciated different principles.***

90. In such circumstances, we undertook some exercise to shortlist the broad principles of law which should be made applicable to the litigations of the present nature. ***The principles are as follows:***

a) ***Each case should be scrutinised thoroughly by the public employer concerned, through its designated officials****-more so, in the case of recruitment for the police force, who are under a duty to maintain order, and tackle lawlessness, since their ability to inspire public confidence is a bulwark to society's security. [See Raj Kumar (supra)]*

b) Even in a case where the employee has made declaration truthfully and correctly of a concluded criminal case, the employer still has the right to consider the antecedents, and cannot be compelled to appoint the candidate. The acquittal in a criminal case would not automatically entitle a candidate for appointment to the post. It would be still open to the employer to consider the antecedents and examine ***whether the candidate concerned is suitable and fit for appointment to the post.***

c) The suppression of material information and making a false statement in the verification Form relating to arrest, prosecution, conviction etc., has a clear bearing on the character, conduct and antecedents of the employee. If it is found that the employee had suppressed or given false information in regard to the matters having a bearing on his fitness or suitability to the post, he can be terminated from service.

d) The generalisations about the youth, career prospects and age of the candidates leading to condonation of the offenders'conduct, should not enter the judicial verdict and should be avoided.

e) The Court should inquire whether the Authority concerned whose action is being challenged acted mala fide.

f) Is there any element of bias in the decision of the Authority?

g) Whether the procedure of inquiry adopted by the Authority concerned was fair and reasonable?"

(Emphasis supplied by us)

19. Thus, irrespective of the fact whether the dispute is of trivial nature or not, it is the credibility/ creditworthiness of a particular employee which matters most when it comes to a public employment. There should not be any mechanical or rhetorical incantation of moral turpitude to deny appointment in a government service simplicitor which would depend on the facts of each case. The judicial philosophy flowing through the mind of the judges is that every individual deserves an opportunity to improve, learn from the past and move ahead in life for self-improvement. To make past conduct, irrespective of all considerations, may not always constitute justice.

20. It is necessary to mention at the cost of repetition that the petitioner appellant is in service of the Government of India since the year 2002 and his credibility/ creditworthiness in public employment was never found doubtful. He after taking permission from his parent department, appeared in the Assistant Prosecution Officer Examination, 2015 and fully disclosed pendency of the criminal case. He was acquitted for reasons which we have already mentioned above.

21. The learned Single Judge dismissed the writ petition of the petitioner-appellant merely observing that the impugned order was passed on 31.01.2019 whereas the order of acquittal was passed a day thereafter on 01.02.2019 and thus, the petitioner was facing trial as on the date of the impugned order dated 31.01.2019. The view taken by the learned Single Judge in paragraph-13 of the impugned judgment so as to uphold the order dated 31.01.2019 cannot be sustained being in conflict with the settled principles of law discussed in foregoing paragraphs of this judgment. The finding of the learned Single Judge in paragraph-16 of the impugned judgment that the allegations against the petitioner were of matrimonial dispute of committing cruelty with her wife and demand of dowry which allegations were not only against one person but against public at large. We are unable to agree with the reasons recorded in paragraph-16 inasmuch as the petitioner appellant was acquitted in the aforesaid criminal case under Section 498A etc. not on the basis of compromise or the witnesses turned hostile but after due consideration of facts and appreciation of evidences led by the parties, i.e. the prosecution and the defence. Learned Single Judge also lost sight of the fact that the petitioner appellant is in service of Government of India since the year 2002 and there is nothing on record to show that any adverse inference was drawn or action was taken against him or his credibility was doubted due to his implication in the aforesaid criminal case along with his entire family members. The finding in paragraphs-18 and 19 of the impugned judgment that since allegations cannot be construed to be pity or trivial and the acquittal granted was not a clean acquittal, cannot be sustained for detailed discussion and reasons recorded in the forgoing paragraphs as well as conclusions reached by the trial court in the matrimonial case which are not being mentioned again so as to avoid repetition.

22. For all the reasons afore-stated, we set aside the impugned judgment and order dated 22.07.2022 passed in Writ-A No.679 of 2020 and quash both the orders impugned in the writ petition passed by the respondent No.2 and 3. **The special appeal and the writ petition, both are allowed**.

However, there shall be no order as to costs.

(2023) 1 ILRA 1249
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2023

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ-A No. 9410 of 2022
alongwith other connected cases

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

Counsel for the Petitioner:
Sri O.P. S. Rathore, SrI Prabhakar Awasthi

Counsel for the Respondents:
C.S.C., Archana Singh

A. Service Law – Seniority – Transfer - U.P. Basic Education (Teachers) Services (20th Amendment) Rules, 2017 - U.P. Basic Education (Teachers) Service Rules, 1981 - Rule 21, 22 - Transfer from one place to other is generally a condition of service and the employee has no choice in the matter. Transfer is necessary in public interest and to maintain efficiency. No government servant or employee of public undertaking has legal right for being posted at any particular place. According to Rule 4 there shall be separate cadres of service for each local area as defined in Rule 2(1)(i) of Rules, 1981, meaning thereby, strength of the cadre is district wise. (Para 26)

There can be no inter district transfer except as provided u/Rule 21. Rule 21 provides two conditions, namely, "except on the request" or "with the consent of the teacher himself". **Rule 22(1) provides for counting of the seniority of the Assistant Teacher from the date of his appointment in the substantive capacity.** Rule 22(2) provides the seniority of the Assistant Teacher on transfer shall place him at the bottom of the list of teachers of the corresponding class or category pertaining to the local area to which he has been transferred. (Para 28)

In the present case, none of the petitioners have asked for their transfer rather they have approached the Court against the arbitrary action of the Board. Hence, in the opinion of the Court **the case of the petitioners shall be governed by Sub-Rule (1) of Rule 22** and not by Sub-Rule (2) of Rule 22 of Rules, 1981. (Para 29)

B. Relinquishing the claim of seniority in case of fresh district allocation - The contention of the Respondent Board that once the petitioners have given an affidavit relinquishing their seniority in fresh district allocation and accepted all the conditions with open eyes and as such now the petitioner cannot claim the seniority from back date, cannot be accepted. (Para 30)

It is settled that once the appellants want to retain the benefit of transfer to the districts of their choice, they cannot be permitted to take the benefit and rid themselves of the disadvantage that is coupled with it. If appellants want to continue in the district of their choice after securing a transfer, to which they are otherwise not entitled as of right, they cannot claim restoration of their status or pay in the cadre to which they originally belonged. **This would verily violate the firmly established principle that a party cannot be permitted to approbate and reprobate.** (Para 32)

In the present case, the facts are different. The petitioners have approached this Court against arbitrary action of the Officers of the Board and in these circumstances the undertaking given by the petitioners would not have binding effect and Court finds that **the affidavits were given under compulsion to secure joining and not in anxiety to secure transfer to the districts of their choice.** (Para 33)

Writ petition allowed. (E-4)

Precedent followed:

1. St. of Punj. Vs Dhanjit Singh Sandhu, (2014) 15 SCC 144 (Para 23)

2. Shikha Singh & ors. Vs St. of U.P. & ors., Writ-A No. 19737 of 2018 (Para 7)

3. Amit Shekhar Bhardwaj Vs St. of U.P. & ors., Special Appeal No. 274 of 2020 (Para 8)

4. Board of Basic Education Vs Shikha Singh & ors., Special Appeal (Defective) No. 865 of 2020 (Para 11)

Precedent distinguished:

Vipin Kumar & ors. Vs St. of U.P. & ors., Special Appeal No. 296 of 2019 (Para 30)

Present petition assails order dated 25.06.2022, passed by the Secretary, Board of Basic Education, U.P., Allahabad, whereby the petitioner has been asked to submit an affidavit declaring therein that he will not claim for his seniority of service in future. A further prayer in the nature of mandamus commanding the respondent to ensure the joining in the newly allotted district Meerut with his seniority from 17.09.2018.

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

1. These bunch of writ petitions involve common questions of law and fact and are thus being decided by a common order.. The facts of Writ (A) No.9410 of 2022 (Dinesh Singh Vs. State of U.P. & others) is being considered for deciding the controversy involved.

2. Heard Sri Ashok Khare, learned Senior Counsel assisted by Sri O. P. S. Rathore, learned counsel for the petitioner, learned Standing Counsel for the State Respondents and Smt. Archana Singh, learned counsel for the Respondent No.2.

3. The challenge in this writ petition is to an order dated 25.06.2022 passed by the Secretary, Board of Basic Education, U.P., Allahabad, whereby the petitioner has been asked to submit an affidavit declaring therein that he will not claim for his seniority of service in future. A further prayer in the nature of mandamus commanding the respondent to ensure the joining of the petitioner in the newly allotted district Meerut with his seniority from 17.09.2018 i.e. first date of joining as Assistant Teacher in district Aligarh has also been claimed.

4. The fact in brief leading to the filing of the instant writ petition are that the petitioner was selected as an Assistant Teacher, Primary School against the 68500 vacant posts in pursuance to the advertisement published by the State Government vide Government Order dated 09.01.2018. The vacancies were advertised district-wise. The selection of the Assistant Teacher was to be made on the basis of Quality Point comprised of 60% of weightage on Assistant Teacher Recruitment Examination, 10% on High School, 10% on Intermediate, 10% on Graduation and 10% on training qualification. An additional weightage of 2.5 marks per completed teaching year upto a maximum 25 marks, whichever is less was made applicable to Shiksha Mitras as per U.P. Basic Education (Teachers) Services (20th Amendment) Rules, 2017. The petitioner obtained 90 marks in the ATRE-2018 and as per the existing formula secured 67.61 quality point marks.

5. The Secretary, Board of Basic Education issued an advertisement on 19.08.2018 inviting online applications from the selected candidates for appointment and also sought the preferences of districts from the candidates. The petitioner as per his quality point

marks was allotted district Aligarh and he appeared before the selection committee in his allotted district. The petitioner was issued an appointment letter on 05.09.2018 by the District Basic Education Officer, Aligarh and he joined at the allotted institution i.e. Primary School, Nagla Kurawali, Development Block Gangiri, District Aligarh. Though the ARTE-2018 was conducted for 68,500 vacancies the Board of Basic Education vide Notification dated 19.8.2018 reduced the vacancies from 68500 to 41556. On account of the reduced vacancies almost 6127 candidates who had cleared the ARTE-2018 were denied selection at first place. The unselected candidates agitated the matter and the Board issued 2nd list of 6127 selected candidates and allotted them districts of their choice without considering their respective merits.

6. The writ petitioner through belonged to reserved (OBC) category but was selected against unreserved vacancy because of his higher merit and as such, is to be treated as MRC (Meritorious Reserved Category) candidate.

7. The arbitrary action of the Board of Basic Education in proceeding to allot the districts to the selected candidates as per their choice without considering their respective merits was assailed by the petitioner in Writ-A No.26132 of 2018 (Naveen Kumar and 52 others versus State of U.P and others) which was decided along with the writ petitions filed by similarly circumstanced candidates leading amongst them being ***Writ-A No. 19737 of 2018 (Shikha Singh & 48 others versus State of U.P. and others)***. The leading writ petition of ***Shikha Singh (supra)*** was disposed of vide judgment and order dated 29.8.2019 in the following terms:-

"58. In view of the law laid down by the Apex Court, the allotment of district made by the respondents cannot be sustained in so far as it relates to MRC candidates and to that extent, it is quashed.

59. The respondent no. 3 is directed to carry on process of allotment of district to MRC candidates only, treating them to be reserved category candidates only for the purposes of allotment of district of their preference. It is further directed that the MRC candidates who alleged that they have not been allotted district of their preference despite being MRC candidates, may file their applications before the respondent no. 3 within a period of 3 months from today and the respondent no. 3 is directed to consider and pass necessary order, as per law stated hereinabove within next 3 months.

60. The order passed by the respondent no.3 shall be given effect from next academic session, i.e., 2020-21, so that the teaching of students is not suffered.

61. With the aforesaid directions the writ petition is disposed off. "

8. The judgment and order dated 29.08.2019 was assailed in Special Appeals before the Division Bench of this Court leading amongst them, being ***Special appeal No.274 of 2020 (Amit Shekhar Bhardwaj versus State of U.P. and others)***. The Division Bench disposed of the Special Appeals by passing the following order on 14.09.2021:-

"26. We have given a thoughtful consideration to the argument advanced from both the sides and looking to the facts that examination was conducted in the year 2018, and, placement/posting being given in the said year and candidates having joined at their respective place of posting in 2018 itself, with the consensus arrived at

between the counsels of both the sides as well as consent of the Board, we are proposing to pass the following order :

I. The candidates already selected/posted and working in the respective district of any category, shall not be disturbed.

II. The judgment in favour of the Meritorious Reserved Caste Candidates is not interfered. The petitioners-appellants belonging to Reserved Caste category would submit an application before the Board for change of posting pursuant to the judgment of the learned Single Judge within a period of two months of this judgment. The Board would thereupon process the case and post them as per their choice within two months. This direction would not be applicable in general but limited to the petitioners-appellants whose writ petitions were allowed by the learned Single Judge.

III. The appellants and Intervenors belonging to Open General category shall give option of three districts for their posting which would be considered by the Board within two months. They would be posted in any of the district of their choice subject to availability of the vacancy in the district concerned.

27. The directions given hereinabove are with the consent of the parties thus, it would not be treated to be precedence. If fresh litigation comes, it would not be driven by this judgment.

28. With the aforesaid, the judgment of the learned Single Judge dated 29.08.2019 is modified and the special appeals are disposed of. "

9. In compliance of the decision dated 14.09.2021 of the Division Bench rendered in Special Appeal No.274 of 2020 the Board issued notice dated 01.04.2022 inviting the online application and the petitioner submitted his online application form on 03.04.2022. The Board thereafter on 10.05.2022 issued the District Allocation list of 2908 candidates/ Assistant Teachers in which the name of the petitioner finds place at Sr. No.198 against the District Meerut. Thereafter, the Board has issued the impugned order requiring the petitioner to submit the affidavit.

10. Learned counsel for the petitioner contends that the allocation of the District pursuant to the direction of the Division Bench of this Court cannot be treated to be a case of transfer under the Rules so as to entail the requirement of filing of an affidavit. The provisions of Rule 21 and Rule 22 of the Rules cannot be said to be attracted in the case at hand.

11. The writ petition has been resisted by the respondent No. 2 by filing counter affidavit. Smt. Archana Singh, learned counsel representing the respondent No. 2 contends that in the ***Special Appeal (Defective) No.865 of 2020 (Board of Basic Education versus Shikha Singh and others)*** there is no direction of the Court to recon the seniority of the candidates from the back date, rather there is a direction not to disturb the candidate who have already joined which order had been passed with the consent of the parties. Besides the petitioner has himself given an undertaking prior to his joining on the post of Assistant Teacher that he shall not raise any claim for seniority from the back date. In the wake of the above, it is submitted that there is no merit in the writ petition and it is liable to be dismissed.

12. On the basis of the pleadings the question for consideration in the bunch of the writ petitions is that:-

(1) Whether the District allocation under the directions issued by the Court would fall within the ambit of transfer under Rule 21 of the U. P. Basic Education (Teachers) Service Rules, 1981 and resultantly their seniority would be governed by Rule 22 of the aforesaid Rules?

(2) Whether the "undertaking" given in the form of an affidavit relinquishing the claim of seniority in case of fresh district allocation pursuant to the direction issued by this Court would have binding effect?

13. The factual matrix in brief is that the petitioners have knocked the doors of the Court assailing the order/circular dated 25.06.2022 issued by the secretary, Basic Shiksha Parishad, Prayagraj, pursuant to directions issued by the Division Bench of this Court in **Special Appeal No. 274 of 2020 (Amit Shekhar Bhardwaj Vs. State of UP and 2 others).**

14. The petitioners herein are the selected candidates of Assistant Teacher Recruitment Examination-2018 (herein after referred to as "ATRE-2018.")

15. After being selected in ATRE-2018, the petitioners were allotted different districts through counselling. Being aggrieved by the discrimination in the district allocation the candidates approached this Hon'ble Court by means of ***Writ-A No.19737 of 2018 (Shiksha Singh and 48 others Vs. State of UP and others)*** along with other connected matters. The writ petition (supra) came to be decided by this Court vide judgement and order dated 29.08.2019. The operative portion is quoted below:-

57. The allocation of district and appointment and joining of the teachers in their respective districts had been completed in academic year 2018-19. The said posting and allocation of district being contrary to law and in violation of Articles 14 and 16(1) of the Constitution of India, cannot be sustained.

58. In view of the law laid down by the Apex Court, the allotment of district made by the respondents cannot be sustained in so far as it relates to MRC candidates and to that extent, it is quashed.

59. The respondent no. 3 is directed to carry on process of allotment of district to MRC candidates only, treating them to be reserved category candidates only for the purposes of allotment of district of their preference. It is further directed that the MRC candidates who alleged that they have not been allotted district of their preference despite being MRC candidates, may file their applications before the respondent no. 3 within a period of 3 months from today and the respondent no. 3 is directed to consider and pass necessary order, as per law stated hereinabove within next 3 months.

60. The order passed by the respondent no.3 shall be given effect from next academic session, i.e., 2020-21, so that the teaching of students is not suffered.

16. The judgement and order dated 29.08.2019 passed by the writ court was subjected to challenge in ***Special Appeal No.274 of 2020 (Amit Shekar Bhardwaj) (Supra)***. The judgement and order dated 29.08.2019 passed by the the writ court was modified vide judgement and order dated 14.09.2021. The operative portion is quoted below.

26. We have given a thoughtful consideration to the argument advanced from both the sides and looking to the facts that examination was conducted in the year

2018, and, placement/posting being given in the said year and candidates having joined at their respective place of posting in 2018 itself, with the consensus arrived at between the counsels of both the sides as well as consent of the Board, we are proposing to pass the following order :

I. The candidates already selected/posted and working in the respective district of any category, shall not be disturbed.

II. The judgment in favour of the Meritorious Reserved Caste Candidates is not interfered. The petitioners-appellants belonging to Reserved Caste category would submit an application before the Board for change of posting pursuant to the judgment of the learned Single Judge within a period of two months of this judgment. The Board would thereupon process the case and post them as per their choice within two months. This direction would not be applicable in general but limited to the petitioners-appellants whose writ petitions were allowed by the learned Single Judge.

III. The appellants and Intervenors belonging to Open General category shall give option of three districts for their posting which would be considered by the Board within two months. They would be posted in any of the district of their choice subject to availability of the vacancy in the district concerned.

27. The directions given hereinabove are with the consent of the parties thus, it would not be treated to be precedence. If fresh litigation comes, it would not be driven by this judgment.

28. With the aforesaid, the judgment of the learned Single Judge dated 29.08.2019 is modified and the special appeals are disposed of.

17. Pursuant to the directions contained in the judgement and order dated 14.09.2021 passed in case ***Amit Shekar Bhardwaj (Supra)*** the respondents issued the notice/instructions dated 01.04.2022 for online application for allocation of districts.

18. In response to the notice/instructions dated 01.04.2022, the writ petitioners submitted their online application forms for district allocation. Thereafter, the Board proceeded vide publication dated 10.05.2022 to publish district allocation list in respect of 2908 candidates. Further on 25.06.2022 the Secretary, UP Basic Education Board proceeded to issue circular to all the District Basic Education Officers alleging inter-alia that the seniority of the teacher who has been transferred from one local area to another in accordance with the provisions of Rule 21 shall be placed at the bottom of the list of teachers of the corresponding class or category pertaining to the local area to which he has been transferred, such a person shall not be entitled to any compensation and calling upon them to obtain an affidavit from the respective Assistant Teacher, who is the beneficiary of the district allocation and wants to relieved to join his place of posting to the effect that he/she would not claim seniority at his new place of posting.

19. The circular dated 25.06.2022 issued by the Secretary, U. P. Basic Shiksha Parishad, Respondent No.2, has been impugned in the present bunch of writ petitions.

20. In this backdrop, the learned Senior Counsel contended that the district allocation exercise was undertaken by the Respondent Board pursuant to the directions contained in the judgement and order dated 14.09.2021 passed in case of ***Amit Shekhar bhardwaj (Supra)*** thus the

Board cannot impose irrational and arbitrary conditions that the petitioners would lose their seniority at the new place of joining.

21. Learned Senior Counsel further contended that the Court found the allotment of district to the teachers selected in ATRE-2018 as de-hors the Rules applicable and directed for fresh allocation of districts and then he contended that this is not the case of inter district transfer and provisions contained in Rule 21 and 22 of the U.P. Basic Education (Teachers) Service Rules, 1981 are not applicable in the present case. The learned Senior Counsel further contended that this is a case of posting and not transfer and thus the petitioners are entitled for seniority in the new district from the first date of their joining in their respective districts. The Learned Senior counsel contended that the rider contained in the order impugned dated 25.06.2022 compelling the petitioners to submit an undertaking in the form of an affidavit relinquishing the seniority in the new place of posting is arbitrary and needs to be quashed.

22. Per contra, Smt. Archana Singh, learned counsel for the Respondent Board submitted that in ***Special Appeal No.865 of 2020 (Board of Basic Education Vs. Shiksha Singh and Others)***, the Board took the grounds that the order passed by the writ court would affect the seniority, but the Division Bench of this Court proceeded to dispose of the Special Appeal on consent directing the board not to disturb the candidates who have already joined.

23. The learned counsel for Respondent Board further contended that petitioners themselves accepted the condition and have given an "Undertaking" prior to their joining on the post of Assistant Teacher that they shall not claim seniority from the back date and thus the petitioners are restrained from claiming the seniority from back date. To buttress her submission the learned counsel has relied upon the judgement and order dated 11.03.2022 passed by this Court in ***Special Appeal No.296 of 2019*** and on the case of ***State of Punjab Vs. Dhanjit Singh Sandhu reported in (2014) 15 SCC 144***.

24. Having heard the counsels and having perused the record, this Court finds that the Board was subjected to undertake the fresh exercise of district allocations in respect of the writ petitions subject matter of ***Special Appeal No.274 of 2020 Amit Shekhar Bhardwaj (Supra)*** and connected matters after observing that

21. Learned Single Judge while arriving at a finding that Board failed to take into consideration that MRC being higher in merit were not given district of their choice in the reserved category, extended benefit, but overlooked to extend benefit to the candidates of the Open General Category, who were also entitled for the same treatment. Once it is not disputed that the original notified vacancies of 68,500 being reduced to 41,556 after declaration of result, no question arose for allotting districts to candidates of higher merit strictly as per available seats in the first round of counselling and then by releasing the rest of the 26000 and odd seats giving choice to the candidates of second counselling to avail benefit and get district of their choice.

22. Where in a recruitment drive State proceeds to appoint teachers on such mass scale, it is expected from authority like Uttar Pradesh Board of Basic Education to be fair and transparent while making

appointments. It is painful to note the way officers of the Board had conducted the recruitment drive, who were entrusted with responsibility of appointment of Assistant Teacher throughout the State of U.P. to have come up by providing/placing the candidates selected at their place of preference as far as possible. Though, only less than three-fourth candidates had qualified against the notified vacancies, the Board even then could not appoint the meritorious candidates at their place of choice.

23. The argument of Sri Ojha that there was no occasion for varying the district-wise vacancies and also increasing vacancies of certain districts disproportionately has force. Once vacancies were notified and was not subsequently varied by any Government Order, no occasion arose to disturb the arrangement made for which recruitment was going to take place.

24. The candidates of Open General Category cannot be denied the benefits which has already been extended to MRC as well as the candidates who were allotted the first choice of their preference, who appeared in the second counselling on the strength that the candidates had already joined at the place of posting and the rules does not permit for transfer.

25. This Court has not only to balance the equity with MRC but also with the candidates having higher merit of the Open General Category, as by denying them their due injustice would be done with them which will legalize the arbitrary action of the officers of the Board.

26. We have given a thoughtful consideration to the argument advanced from both the sides and looking to the facts that examination was conducted in the year 2018, and, placement/posting being given in the said year and candidates having joined at their respective place of posting in 2018 itself, with the consensus arrived at between the counsels of both the sides as well as consent of the Board, we are proposing to pass the following order :

I. The candidates already selected/posted and working in the respective district of any category, shall not be disturbed.

II. The judgment in favour of the Meritorious Reserved Caste Candidates is not interfered. The petitioners-appellants belonging to Reserved Caste category would submit an application before the Board for change of posting pursuant to the judgment of the learned Single Judge within a period of two months of this judgment. The Board would thereupon process the case and post them as per their choice within two months. This direction would not be applicable in general but limited to the petitioners-appellants whose writ petitions were allowed by the learned Single Judge.

III. The appellants and Intervenors belonging to Open General category shall give option of three districts for their posting which would be considered by the Board within two months. They would be posted in any of the district of their choice subject to availability of the vacancy in the district concerned.

27. The directions given hereinabove are with the consent of the parties thus, it would not be treated to be precedence. If fresh litigation comes, it would not be driven by this judgment.

25. This Court finds that it would be treated as appointment under Rule 19 and 20 of the Rules 1981 and it is not a case of transfer as contended by the counsel for the Respondent Board. Rule 21 of Rules 1981 are quoted here under:-

*[21. **Procedure for transfer** - There shall be no transfer of any teacher from the rural local area to an urban local area or vice versa or from one urban local area to another of the same district or from local area of one district to that of another district except on the request of or with the consent of the teacher himself and in either case approval of the Board shall be necessary.]*

26. Transfer from one place to other is generally a condition of service and the employee has no choice in the matter. Transfer is necessary in public interest and to maintain efficiency. No government servant or employee of public undertaking has legal right for being posted at any particular place. According to Rule 4 there shall be separate cadres of service for each local area as defined in Rule 2(1) (i) of Rules, 1981, meaning thereby, strength of the cadre is district wise.

27. There can be no inter district transfer except as provided under Rule 21. Rule 21 provides two conditions, namely, "except on the request" or with the consent of the teacher himself". Rule 22 provides for seniority and is quoted here under:-

*"[22. **Seniority.**- (1) The seniority of a teacher in a cadre shall be determined by the date of his appointment in a substantive capacity :*

Provided that, if two or more persons are appointed on the same date their seniority shall be determined in which their names appear in the list referred to in Rule 17 or 17-A or 18, as the case may be.

Note. - A candidate selected by direct recruitment may lose his seniority, if he fails to join without valid reasons when a vacancy is offered to him whether the reasons in any particular case are valid or not shall be decided by the appointing authority.]

(2) The seniority of a teacher who has been transferred from one local area to another in accordance with the provisions of Rule 21 shall be placed at the bottom of the list of teachers of the corresponding class or category pertaining to the local area to which he has been transferred, as on the date of orders for transfer are passed, such a persons shall not be entitled to any compensation."

28. Sub-Rule (1) of Rule 22 provides for counting of the seniority of the Assistant Teacher from the date of his appointment in the substantive capacity. Sub-Rule (2) of Rule 22 provides the seniority of the Assistant Teacher on transfer shall places him at the bottom of the list of teachers of the corresponding class or category pertaining to the local area to which he has been transferred.

29. In the present case, none of the petitioners have asked for their transfer rather they have approached the Court against the arbitrary action of the Board. Hence, in the opinion of the Court the case of the petitioners shall be governed by Sub-Rule (1) of Rule 22 and not by Sub-Rule (2) of Rule 22 of Rules, 1981. The first question is answered accordingly.

30. Now coming back to the next question regarding the giving of undertaking in the form of affidavit relinquishing the claim of seniority in case of fresh district allocation. On the perusal of the records this Court is not impressed by the contentions of the counsel of the Respondent Board that once the petitioners have given an affidavit relinquishing their seniority in fresh district allocation and accepted all the conditions with open eyes

and as such now the petitioner cannot claim the seniority from back date. The judgement relied upon by the counsel of the Respondent Board is not coming to their aid for the reason that the facts involved in the ***Special Appeal No.296 of 2019 (Vipin Kumar and others Vs. State of UP. and others)*** are entirely different.

31. In ***Vipin Kumar's Case (Supra)***, the appellants awaited the benefit of the transfer policy introduced by the State Government, permitting transfer of teachers to the district of their choice. The Government Order under which the appellants applied for transfer, was in a nature of a concession, to enable the teachers to go to a local area or district of their choice in accordance with Rule 21 of the Rules, 1981. One of the conditions of the transfer policy provided that in the case of inter district transfer of teachers which is not a matter of right under rule 21 of the Rules, 1981, made on the request of the teacher, the transfer would be allowed, depending on the availability of the vacancies in the district of choice, meaning thereby, that if no post of that grade was available, the transfer could not be permitted. The common feature of the case was that the request of transfer made by the appellants therein could not be considered, because no vacancy existed on the post of Headmaster of a Primary Pathshala or Assistant Teachers, Senior Basic School in the district of choice to which the appellants applied for transfer. In their anxiety to secure a transfer to a district of their choice, the appellants made an application, seeking reversion from their substantive post of Assistant Teacher, Primary Pathshala from their promotional posts in their parent cadres where they were working in different districts in the specified local area.

32. Thereafter, after being transferred and having joined at the transferred place the appellants challenged the undertaking on which the Court observed that the appellants cannot approbate and reprobate and the appellants who had secured benefit under the transfer policy, voluntarily giving up rights, cannot turn around and regain what they had given up. The Court observed as under :

16. In the circumstances, once the appellants want to retain the benefit of transfer that they have secured in terms of the Government Order dated 23.06.2016 to the districts of their choice, they cannot be permitted to take the benefit and rid themselves of the disadvantage that is coupled with it. The appellants cannot have the cake and eat it too. As the rights of the appellants stand, since they want to continue in the district of their choice after securing a transfer under the transfer policy carried in the Government Order dated 23.06.2016, to which they are otherwise not entitled as of right, they cannot claim restoration of their status or pay in the cadre to which they originally belonged. To permit the appellants to do so, would verily violate the firmly established principle that a party cannot be permitted to approbate and reprobate. This principle has been applied by the learned Single Judge in the judgment impugned in the leading appeal, particularly, relying on the decision of the Supreme Court in State of Punjab and others vs. Dhanjit Singh Sandhu, (2014) 15 SCC 144; and in our opinion, rightly so.

33. In the present case, the petitioners have approached this Court against arbitrary action of the Officers of the Board and in these circumstances the undertaking given by the petitioners would not have

binding effect and Court finds that the affidavits were given under compulsion to secure joining and not in anxiety to secure transfer to the districts of their choice. The second question is answered accordingly.

34. The writ petition is **allowed**. The order dated 25.06.2022 passed by the Respondent No.2, is hereby quashed. The respondents are directed to prepare the seniority list according to Sub-Rule (1) of Rule 22 of Rules, 1981 determining the seniority from the date of joining of the petitioners.

35. No order as to costs.

(2023) 1 ILRA 1259
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.12.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-A No. 4533 of 2022

Devendra Pal Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Shivendu Ojha, Sri Akhilesh Kumar Singh, Sri Sneh Pandey, Sr. Advocate

Counsel for the Respondents:
C.S.C., Sri Ashish Mishra, Sri Namit Srivastava, Mrs. Parul Srivastava, Sri Parvez Alam

A. Service Law – Promotion - Interpretation of Rule 8 - Allahabad High Court Officer and Staff (Conditions of Service and Conduct) Rules,1976: Rule 2(m), 3(iv), 8; The Allahabad High Court Officer and Staff (Conditions of Service and Conduct) (Amendment) Rules, 2021; U.P. Secondary Education Services Selection Board Rules, 1998.

Points for determination that arises is as to **what qualification should be possessed by the candidates eligible for being considered for promotion in terms of Rule 8 of the Rules 1976** and what would be the cut-off date fixed for consideration. (Para 23)

To interpret Rule 8, which provides for the necessary qualification to be possessed for being considered for promotion, Rule 8 (ii) clearly stipulates that the persons eligible for being promoted should have completed five years continuous satisfactory service as on 1st July of the year of recruitment and should also possess the minimum educational qualification of Intermediate alongwith CCC certificate/ Diploma/Degree in Computer Science from recognized Institute established by law in India. **The use of the word 'and' as used, on its plain interpretation would clearly mean that the candidate should have completed five years of continuous satisfactory service 'and' should possess the minimum educational qualification.** (Para 26)

The Rule has to be interpreted on its plain and grammatical reading unless it leads to inference. One of the basic principles of interpretation of statutes is to construe them according to plain, literal and grammatical meaning of the words. If that is contrary to, or inconsistent with, any express intention or declared purpose of the Statute, or if it would involve any absurdity, repugnancy or inconsistency, the grammatical sense must then be modified, extended or abridged, so far as to avoid such an inconvenience, but no further. The onus of showing that the words do not mean what they say lies heavily on the party who alleges it. He must advance something which clearly shows that the grammatical construction would be repugnant to the intention of the Act or lead to some manifest absurdity. (Para 21)

B. The next question for determination is as to **whether the possession of minimum educational qualification as prescribed in Rule 8 (2) should be on the date of year of recruitment i.e. 1st July or the same can be date when the advertisement is issued.** (Para 15, 28)

The date of year of recruitment have only relevance only in respect of the eligibility of the eligible candidates and it has nothing to do with the acquisition of the CCC Certificate. The Rule in question being Rule 8 has to be interpreted by taking recourse to the 'Rule of last antecedents'. (Para 17, 18)

In the present case the requirement of possession of additional qualification in terms of Rule 8 (iii) was within the discretion of the High Court and the High Court in its discretion permitted the candidates who had completed five years of continuous satisfactory service as on 1st July of the year of recruitment and possess the minimum education qualification of having a CCC certificate/Diploma/Degree in Computer Science on the date of issuance of the advertisement. (Para 35)

That being the case, **no fault can be found with the High Court in permitting the eligible candidates, who possessed the requisite qualification on the date of advertisement.** The petitioners and the intervenors who have filed an intervention application, admittedly did not possess the additional educational qualification on the date of advertisement, thus they had no claim to be considered for consideration for appointment through promotion. (Para 36)

C. The Rule of the Last Antecedent, as per the Black's Law Dictionary, is an interpretative principle by which a court determines that qualifying words or phrases modify the words or phrases immediately preceding them and not words or phrases more remote, unless the extension is necessary from the context or the spirit of the entire writing. The lexicon exemplifies the canon: in the phrase 'Texas courts, New Mexico courts, and New York courts in the federal system,' the words 'in the federal system' might be held to modify only New York courts and not Texas courts or New Mexico courts. This canon is variably termed 'the doctrine of the last antecedent'; 'the doctrine of the last preceding antecedent." (Para 18)

Writ petition dismissed. (E-4)

Precedent followed:

1. St. of H.P. & ors. Vs Raj Kumar & ors., Civil Appeal No. 9746 of 2011, decided on 20.05.2022 (Para 17)

2. Anoop M.S. Manelil House, Valayanchirangara Po, Perumbavoor Vs St. of Kerala represented by Principal Secretary, Department of Taxes, Secretariat, & ors., Kerala High Court, judgment dated 12.01.2017 (Para 18)

3. Rakesh Kumar Sharma Vs St. (NCT of Delhi) & ors., (2013) 11 SCC 58 (Para 19)

4. St. of Andhra Pradesh Vs Linde India Ltd. (Formerly BOC India Limited), (2020) 16 SCC 335 (Para 21)

Precedent distinguished:

Smt. Sadhna Vs St. of U.P. & ors., 2017 6 ADJ 418 (Para 16)

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

1. Heard Shri Radha Kant Ojha, learned Senior Advocate assisted by Shri Shivendu Ojha, learned counsel for the petitioners, Shri Sameer Sharma, learned Senior Advocate assisted by Mrs. Busra Mariyam, learned counsel for respondent nos. 2 and 3, Shri Namit Srivastava, who appears for the selected candidates and whose impleadment application was allowed on 05.12.2022, Shri Akhilesh Kumar Singh, who appears for the Intervener who had also appeared in the written examination and Shri Parvez Alam, who appears and has filed an impleadment application on behalf of candidates who had not been selected, however, their marks have not been disclosed only on account of the pendency of the writ petition.

2. The issue that arises for consideration is confined to the interpretation of Rule 8 of the Allahabad

High Court Officer and Staff (Conditions of Service and Conduct) Rules 1976 as amened in the year 2021 notified on 27.03.2021.

3. The facts, in brief, are that the petitioners claimed to be working as Class-IV employees in the High Court of Judicature at Allahabad and claim that their service conditions are governed by the 1976 Rules. It is claimed that in pursuance to the amendment carried out in Rule 8 of the 1976 Rules, the petitioners were entitled for being considered for promotion and the petitioners ought to have been given the benefit of their having the CCC Certificate prior to consideration of the candidature and prior to finalization of the results.

4. It is argued that the High Court by means of a notification dated 21st December, 2020 had issued an advertisement calling for applications for appointment to 17 posts of Computer Assistant by way of promotion amongst Class-IV employees. The said advertisement is annexed as Annexure-3 to the writ petition. In terms of the said advertisement, it was incumbent upon the the candidate who desirous for consideration to file an application on or before 16.01.2021. The advertisement, as issued, is quoted hereinbelow:-

"HIGH COURT OF JUDICATURE AT ALLAHABAD
ESTABLISHMENT SECTION
NOTICE
No. 6127/Establishment: Dated: Allahabad: December, 21, 2020

Applications are invited from Class IV employees of the High Court, Allahabad & Lucknow Bench having minimum qualification of High School or equivalent examination recognized by the U.P. Government and five years continuous satisfactory service in Class IV on or before 01.07.2020 for filling up 17 vacant posts in the cadre of Computer Assistant.

The promotion shall be made on the basis of merit through competitive examination. The Mode, Date and Venue of examination shall be notified later on.

The desirous candidates are required to fill up Application Form as per enclosed format and submit the same before the Registrar (J) (S&A/Establishment) through the Nazarat Section on or before 16.01.2021. Applications received after the last date will not be entertained.

Sd
Registrar General
Enclosure- As Above"

5. It is argued that the advertisement was in pursuance to the conditions as prescribed in the Amendment Rules of 2021. The amended Rules of 2021 particularly Rule 8 is concerned, is quoted hereinbelow:-

"The Allahabad High Court Officers and Staff (Conditions of Service and Conduct) (Amendment Rules, 2021)

1. Short title and commencement :- *(1) These rules may be called the Allahabad High Court Officers and Staff (Conditions of Service and Conduct) (Amendment) Rules, 2021.*

(2) These Rules shall come into force from the date of publication in the official Gazette.

2. Definition :- In these Rules, unless the context otherwise requires, "Rules" mean the Allahabad High Court Officers and Staff (Conditions of Service and Conduct) Rules, 1976.

3. Amendment of Rule 8 :- Clause (ii) of Rule 8 (a) (i) of the Rules shall be amended as follows :-

Existing Provision	***Amendment***
(ii) 40% by promotion from Class IV employees *who have completed five years continuous satisfactory service as on 1st July of the year of recruitment on merit through competitive examination.*	***(ii) 40% by promotion on merit through competitive examination*** *from Class IV employees who have completed five years continuous satisfactory service as on 1st July of the year of recruitment* ***and possess the minimum educational qualification of Intermediate along with CCC Certificate/ Diploma / Degree of Computer Science from recognized Institute established by law in India.***

6. It is stated that the petitioners moved a representation on 27.09.2021 before the Registrar General, High Court, stating that they had attained the qualification of CCC subsequent to the dates specified in the advertisement and they should be permitted to appear in the departmental examination on the basis of seniority. The said representation did not find favour and the names of the petitioners do not appear in the list of candidates, who are eligible for departmental examination, which lead to the petitioner to file present writ petition being Writ-A No. 4533 of 2022.

7. When the writ petition was filed, one of the averments made by the petitioners is that they were entitled to appear in the departmental examination by virtue of their seniority and they have been acquired the CCC qualification with the permission of the High Court and thus they should be permitted to appear in the departmental examination.

8. In the present writ petition, an interim order came to be passed by this Court on 08.04.2022, whereby 11 candidates out of the total petitioners were permitted to appear in the written examination on their producing the CCC Certificates. The writ petition in respect of petitioner nos. 1, 2, 3, 7, 13 and 14 was dismissed by this Court and the interim order was confined to the other petitioners.

9. Aggrieved against the said interim order, a Special Appeal came to be preferred, which was heard and decided by judgment dated 27.04.2022, whereby the order passed by the learned Single Judge was modified with a further direction that in respect of the petitioners, who were permitted to undergo the examination on 10.04.2022 in pursuance to the order passed by the learned Single Judge on 08.04.2022, the result shall not be declared and shall abide by the outcome of the writ petition. The other results to be declared were also be subject to the outcome of the writ petition. A request was made for disposal of the writ petition on merits. While deciding the appeal, the Appellate Court had made reference to the judgments as referred in the said order.

10. It is on record that subsequent to the decision of the Special Appeal Court on 27.04.2022, applications were moved for review of the said order, which was decided on 24.05.2022 holding that the observations made in the writ petition would not influence the learned Single Judge, who shall to proceed to decide the writ petition

without being influenced by any observations made by the Special Appeal Court in its judgment dated 27.04.2022.

11. In the light of the said, Shri Radha Kant Ojha, learned Senior Advocate argues that the observations made in the Special Appeal Court have lost their relevance and this Court is to decide the issue on merits without being influenced by any of the observations made by the Special Appeal Court.

12. Shri Sameer Sharma, learned Senior Advocate informs that in pursuance to the advertisement, the selections have already been made and the appointment letters have issued to as many as 17 persons.

13. The said selected candidates are represented by Shri Namit Srivastava, Advocate, who argues that in terms of the selection, the candidates have also joined w.e.f. 25.05.2022.

14. Shri A.K. Singh, Advocate who has filed an intervener application argues on behalf of candidates, who are similar to the one who have filed the petition that they were also permitted to appear in the departmental examination by the High Court itself without there being any order in their favour by the Court and as such outcome of the writ petition could have an effect on their candidature also.

15. Considering the submissions made at the bar, the main submission for consideration is as to whether the candidates who had the qualification as was prescribed in the Amended Rules would be from the year of recruitment i.e. 01.07.2020 or on the date when the advertisement was issued.

16. The said issue basically arises on account of submission of Shri Ojha that with regard to the recruitment by promotion, the law is well settled that the eligibility should be crystallized on the date of the year of recruitment when the vacancies are ascertained and no leverage can be exercised by the Appointing Authority to take a different view from the year of recruitment. He further argues that if the said benefit is granted to the persons who have acquired the qualification subsequent to the date of recruitment i.e. 1st July, 2020, the same benefit ought to have been extended to the petitioners also, who had acquired the qualification of CCC before the date of written examination although subsequent to date of advertisement. Shri Ojha places reliance on the Full Bench judgment of this Court in the case of ***Smt. Sadhna Vs. State of U.P. and Others; 2017 6 ADJ 418.***

17. Shri Sameer Sharma, Senior Advocate on the basis of the interpretation of the Rules argues that the date of year of recruitment have only relevance only in respect of the eligibility of the eligible candidates and it has nothing to do with the acquisition of the CCC Certificate. He placed reliance on the judgment of the Supreme Court in the case of ***State of Himachal Pradesh & Others Vs. Raj Kumar and Others, Civil Appeal No. 9746 of 2011, decided on 20th May, 2022*** and particularly emphasises paragraph no. 36, which is quoted hereinbelow:-

"36. A review of the fifteen cases that have distinguished Rangaiah would demonstrate that this Court has been consistently carving out exceptions to the broad proposition formulated in Rangaiah. The findings in these judgments, that have

a direct bearing on the proposition formulated by Rangaiah are as under:

1. There is no rule of universal application that vacancies must be necessarily filled on the basis of the law which existed on the date when they arose, Rangaiah's case must be understood in the context of the rules involved therein.

2. It is now a settled proposition of law that a candidate has a right to be considered in the light of the existed rules, which implies the "rule in force" as on the date consideration takes place. The right to be considered for promotion occurs on the date of consideration of the eligible candidates.

3. The Government is entitled to take a conscious policy decision not to fill up the vacancies arising prior to the amendment of the rules. The employee does not acquire any vested right to being considered for promotion in accordance with the repealed rules in view of the policy decision taken by the Government. There is no obligation for the Government to make appointments as per the old rules in the event of restructuring of the cadre is intended for efficient working of the unit. The only requirement is that the policy decisions of the Government must be fair and reasonable and must be justified on the touchstone of Article 14.

4. The principle in Rangaiah need not be applied merely because posts were created, as it is not obligatory for the appointing authority to fill up the posts immediately.

5. When there is no statutory duty cast upon the State to consider appointments to vacancies that existed prior to the amendment, the State cannot be directed to consider the cases."

18. Shri Sameer Sharma next proceeds to argue that the Rule in question being Rule 8 has to be interpreted by taking recourse to the "Rule of last antecedents' as was interpreted by the Kerala High Court in its judgment dated 12.01.2017 in the case of ***Anoop M.S. Manelil House, Valayanchirangara Po, Perumbavoor Vs. State of Kerala represented by Principal Secretary, Department of Taxes, Secretariat, and Others***. He particularly places reliance on para 50 of the said judgment, which is quoted hereinbelow:-

"50. The Rule of the Last Antecedent, as per the Black's Law Dictionary, is an interpretative principle by which a court determines that qualifying words or phrases modify the words or phrases immediately preceding them and not words or phrases more remote, unless the extension is necessary from the context or the spirit of the entire writing. The lexicon exemplifies the canon: in the phrase 'Texas courts, New Mexico courts, and New York courts in the federal system,' the words 'in the federal system' might be held to modify only New York courts and not Texas courts or New Mexico courts. This canon is variably termed 'the doctrine of the last antecedent'; 'the doctrine of the last preceding antecedent."

19. He also places reliance on the judgement of the Supreme Court in the case of ***Rakesh Kumar Sharma Vs. State (NCT of Delhi) and Others; (2013) 11 SCC 58*** and draws my attention to the judgment considered by the Supreme Court in the said judgment to argue that the requisite qualification required can be on the date as specified in the advertisement.

20. Shri Ojha, learned Senior Advocate, on rejoinder argues that the judgment cited by Shri Sameer Sharma relates to direct recruitment and not to

recruitment through promotion and as such there is no relevance of the said judgments. He again emphasis on the Full Bench judgement in the case of ***Smt. Sadhna (Supra).***

21. Shri Sameer Sharma further argues that the Rule has to be interpreted on its plain and grammatical reading unless it leads to inference. For the said proposition, he places reliance on the judgment of the Supreme Court in the case of ***State of Andhra Pradesh Vs. Linde India Limited (Formerly BOC India Limited); (2020) 16 SCC 335*** and emphasis on paragraph nos. 18 to 21 of the said judgment, which is quoted hereinbelow:

"18. Similarly, Craies on Statute Law states:

"One of the basic principles of interpretation of statutes is to construe them according to plain, literal and grammatical meaning of the words. If that is contrary to, or inconsistent with, any express intention or declared purpose of the Statute, or if it would involve any absurdity, repugnancy or inconsistency, the grammatical sense must then be modified, extended or abridged, so far as to avoid such an inconvenience, but no further. The onus of showing that the words do not mean what they say lies heavily on the party who alleges it. He must advance something which clearly shows that the grammatical construction would be repugnant to the intention of the Act or lead to some manifest absurdity."

19. The words of a statute should be first understood in their natural, ordinary or popular sense and phrases and sentences should be construed according to their grammatical meaning, unless that leads to some absurdity or unless there is something in the context, or in the object of the statute to suggest the contrary. Where a word has a secondary meaning, the assessment is whether the natural, ordinary or popular meaning flows from the context in which the word has been employed. In such cases, the distinction disappears and courts must adopt the meaning which flows as a matter of plain interpretation and the context in which the word appears.

20. In State of H.P. v. Pawan Kumar, it was contended that the safeguards provided in Section 50 of the Narcotics Drugs and Psychotropic Substances Act 1985 regarding search of any person would also apply to any bag, briefcase or any such article or container, which is being carried by the person. The word "person" was not defined in the Act. A three judge Bench of this Court, having regard to the scheme of the Act and the context in which the word — "person" has been used, rejected the contention and held thus:

"8. One of the basic principles of interpretation of statutes is to construe them according to plain, literal and grammatical meaning of the words. If that is contrary to, or inconsistent with, any express intention or declared purpose of the statute, or if it would involve any absurdity, repugnancy or inconsistency, the grammatical sense must then be modified, extended or abridged, so far as to avoid such an inconvenience, but no further. The onus of showing that the words do not mean what they say lies heavily on the party who alleges it. He must advance something which clearly shows that the grammatical construction would be repugnant to the intention of the Act or lead to some manifest absurdity."

The above canon of statutory interpretation has been consistently followed by this Court in State of Himachal Pradesh v Pawan Kumar, State of Haryana v Suresh, State of Rajasthan v Babu Ram

and Commissioner of Customs (Import), Mumbai v Dilip Kumar and Company.

21. The word "medicine" is defined in Black's Law Dictionary thus:

"Medicine - the science and art dealing with the prevention, cure and alleviation of diseases; in a narrower sense that part of science and art of restoring and preserving health which is the province of the physician as distinguished from the surgeon and obstetrician."

Collins Dictionary for Advanced Learners defines "medicine" thus:

"Medicine is the treatment of illness and injuries by doctors and nurses; is a substance that you drink or swallow to cure an illness"

Cambridge Dictionary defines "medicine" as:

"A drug that is used to treat illness or injury; the science dealing with the preserving of health and with preventing and treating disease or injury." The ordinary or popular understanding of the term medicine is characterized by its curative properties in general andspecifically, its use for or in diagnosis, treatment, mitigation or prevention of any disease or disorder."

22. Shri Ojha controverts the same by saying that interpretation of Rules in service jurisprudence cannot be the same as interpretation of statute relating to taxation where the interpretation has to be strict whereas in the case of service jurisprudence the Court has to adopt purposive interpretation.

23. On the basis of the argument raised at the bar, as recorded above, this Court is to interpret the Rules and the points for determination that arises is as to what qualification should be possessed by the candidates eligible for being considered for promotion in terms of Rule 8 of the Rules 1976 and what would be the cut-off date fixed for consideration. It is relevant to quote Rule 2 (m) of the Rules of 1976, which defines year of recruitment, which is as under:-

"(m)"Year of Recruitment' means the period of twelve months commencing from the first day of July of a calendar year;"

24. Rule 3 which provides for strength of establishment is also relevant for the present case and is quoted hereinbelow:-

*"**3. Strength of the establishment** (I) The strength of the service and of each category of posts therein shall be such as may be determined by the Chief Justice from time to time with the approval of the Governor of Uttar Pradesh.*

(II) The ratio between the number of posts in various categories shall be such as prevailing in the corresponding categories of officers and subordinates in the Uttar Pradesh Civil Secretariat.

(III) The strength of the service and of each category of posts therein shall, until ordersvarying the same are passed under subrule (I), be as given below

Name of Post	No. of Post
Computer Assistant	40
Assistant Review Officer	336
Review Officer	833
Section Officer	225
Assistant Registrar	79
Deputy Registrar	42
Joint Registrar	18
Registrar	07

(IV) Provided that:

I. The appointing authority may leave unfilled or the Chief Justice may hold in abeyance any vacant post without thereby entitling any person to compensation; or

II. The Chief Justice may create such additional permanent or temporary posts as he may consider proper with the approval of the Governor."

25. Rule 8 of the said Rules is already quoted hereinabove.

26. To interpret Rule 8, which provides for the necessary qualification to be possessed for being considered for promotion, Rule 8 (ii) clearly stipulates that the persons eligible for being promoted should have completed five years continuous satisfactory service as on 1st July of the year of recruitment and should also possess the minimum educational qualification of Intermediate alongwith CCC certificate/Diploma/Degree in Computer Science from recognized Institute established by law in India. The use of the word "and' as used, on its plain interpretation would clearly mean that the candidate should have completed five years of continuous satisfactory service "and' should possess the minimum educational qualification.

27. The submission of Shri Ojha that the possession of minimum educational qualification should also be on 1st July of the year of recruitment merits rejection as on the plain meaning of the Rule, it does not transpire that the possession of minimum educational qualification should also be on the 1st July of the year of recruitment. It is well settled that a Rule should be interpreted on its plain meaning unless the same results in absurdity. On a plain reading of the said Rules, as recorded, I have no hesitation in holding that the requirement stipulated in the Rules is that the persons should have completed five years of continuous satisfactory service as on 1st July of the year of recruitment and/plus should also possess the minimum educational qualification as specified under the Rules.

28. The next question for determination is as to whether the possession of minimum educational qualification as prescribed in Rule 8 (2) should be on the date of year of recruitment i.e. 1st July or the same can be date when the advertisement is issued.

29. Shri Ojha would argue that the prescription of minimum qualification in terms of Rule 8 (2) should be interpreted to mean that the additional minimum educational qualification should be possessed by the candidate on the 1st July of the year of recruitment is based upon the interpretation of Full Bench judgment of this Court in the case of **Sadhna (Supra).**

30. The Full Bench in the said case by majority of 4 to 1 decided that the qualification should be possessed from the 1st day of the year of recruitment. While interpreting the provisions of U.P. Secondary Education Services Selection Board Rules 1998, the Full Bench was interpreted the Rules in view of there being specific mandate cast upon the Management of the Institutions to notify the vacancy in the proforma given in Appendix-A. The Full Bench recorded the following in paragraph no. 34:-

"34. The Commission was conferred powers to require the Inspector to notify the vacancies, where the Management has failed to do so."

31. The Full Court noticed the mandate cast upon the Management for notifying the vacancy and while interpreting the Rules, the Court was swayed by the fact that the Management of an Institution is bound to determine the number of vacancy in terms of Section 15 (1) of the Act and to notify them through the Inspector to the Commission for appointment. The Court was of the view that any leverage given to the Management can lead to misuse of power by the Management. The Full Court recorded in paragraph nos. 44 and 48 as under:-

"44.The amendments, which had been made in the Act, 1982 and the Rules from time to time had following effect:

Under Section 10 of the Parent Act, the Management had to notify the vacancies to the Commission for making appointment of teachers specified in Schedule while in respect of teachers other than those specified in Schedule, the Management had to notify the vacancies to the Selection Board as is clear from Section 15 of the Parent Act.

For the first time under the U.P. Act 1 of 1993 the concept of determination of vacancies by the Management of the institution, was provided for, with a direction that the vacancies likely to fall vacant during year of recruitment shall be included in such determination.

48. This determination by the management in respect of direct recruitment is to be made under Rule 11 of the 1998 Rules quoted herein above. The statement of the vacancies so determined by the management has to be sent to the District Inspector of Schools by 15th of July of the year of recruitment in proforma given in Appendix "A", and the Inspector, after verifying it from the records of his office, has to prepare a consolidated statement of the vacancies of all the institutions in the district subject-wise and group-wise in respect of Trained Graduate Grade posts. The statement so prepared by the Inspector must be sent by 31st of July of the year of recruitment with a copy thereof to the Joint Director of Education. The State Government has however, been given the power to fix other dates for notification in respect of any particular year of recruitment."

32. The reasoning which weighed in the mind of the Court for interpreting the said Rules are indicated in paragraph nos. 68 and 74, which are quoted as under:-

"68. We are also of the opinion that the view of the Full Bench in the case of Raeesul Hasan (Supra), while holding that the purpose for deletion of the words "by promotion" in Rule 11 of Rules 1998 in juxtaposition with Rule 11 (2) of Rules, 1995, is that no time limit has been fixed in the matter of intimation of vacancies for which promotion is to be made, is not correct. Rule 10 provides for two sources of appointment only i.e by direct recruitment and promotion only, determination of number of vacancies for direct recruitment in a recruitment year would necessarily entail the determination of the vacancies which would fall for promotion in the same recruitment year. Once the vacancies for direct recruitment are determined, remaining vacancies, if any, would fall within the promotion quota.

It has escaped the attention of Full Bench that there had been a departure in the matter of procedure to be adopted for direct recruitment/promotion as per Rules of 1995, vis-a-vis, the procedure for promotion under Rule 12 of Rules, 1998. This change was necessitated because of amendments made in Section 10 and

addition of Chapter III which includes Section 12 by the Act, 1998. Under Rule 11 (2) of Rules, 1998 intimation of the vacancies is to be ultimately communicated to the Selection Board for advertisement for direct recruitment in the proforma given in Appendix 'A' while list of teachers eligible for promotion is to be communicated to the Joint Director of Education in the proforma given in Appendix 'A'. It is for this reason that the determination and intimation of vacancies for promotion quota to the Selection Board, as provided under Rule 11 (2) of Rules, 1995 was done away. The authority for promotion has been identified as Regional Selection Committee of which the Joint Director of Education is the Chairman in place of Selection Board as provided earlier.

So far as the judgment of the Apex Court in the case of Balbir Singh & Another versus U.P. Secondary Education Services Selection Board, Allahabad & Others reported in 2008 (3) ESC 409 (SC) relied upon by the Full Bench in the case of Raeesul Hasan (Supra) is concerned, it may be noticed that in the judgment of the High Court in the case of Anand Narain Singh versus Uttar Pradesh Secondary Education Service, Selection Board reported in 2003 (2) UPLBEC 899, giving rise to the appeal before the Apex Court itself in the case of Balbir Singh (Supra), there is a specific recital in paragraph nos. 64 and 129 (iv) to the following effect:

"64. The facts here are different than the two cases previously mentioned in paragraph 58. These cases are of direct appointment unlike cases cited by the petitioners (paragraph 58) on this point. Those cases related to promotion. The vacancies in case of direct appointments are notified by an advertisement and all the vacancies as mentioned in the advertisement have to be filled up. They are not required to be filled up year-wise: at least there is nothing in the Act or in the Rules to warrant this.

.....

129. My conclusions and directions are as follows:

.....

(iv) In the present case, the appointments are being made by direct recruitment and not by promotion:

Vacancies need not be marked separately for any particular recruitment year;

They could be clubbed together.

While filling these vacancies, the law as applicable on the occurrence of vacancy need not be applied.

....."

74.Even otherwise fixation of a particular date i.e. when a candidate from feeding cadre is to be judged to be eligible or not has to be fixed rather than being kept fluid at the whims and fancies of the private Management."

33. In the present case, the judgment of the Full Court may not have any relevance in interpreting the Rules at hand as there is no peri materia provisions in the 1976 Rules and such requirement mandates the Chief Justice or any one to inform the number of vacancies, which fall due, a mischief that was apprehended to be played by the Management of the Institution in the judgment of the Full Bench in the Case of **Sadhna (Supra)**, I take the said view also in view of the provisions of Rule 3 (iv) of the 1976 Rules, which leave to the discretion of the Chief Justice to hold the post in abeyance and also to create additional permanent or temporary post as may be considered by the Chief Justice to be proper with the approval of the Governor.

34. That being the case, the submission of Shri Ojha deserves to be rejected.

35. In the present case the requirement of possession of additional qualification in terms of Rule 8 (iii) was within the discretion of the High Court and the High Court in its discretion permitted the candidates who had completed five years of continuous satisfactory service as on 1st July of the year of recruitment and possess the minimum education qualification of having a CCC certificate/Diploma/Degree in Computer Science on the date of issuance of the advertisement.

36. That being the case, no fault can be found with the High Court in permitting the eligible candidates, who possessed the requisite qualification on the date of advertisement. The petitioners and the intervenors who have filed an intervention application, admittedly did not possess the additional educational qualification on the date of advertisement, thus they had no claim to be considered for consideration for appointment through promotion.

37. The second argument of Shri Ojha that the petitioners as well as the intervenors should be granted the benefit as was granted to the candidates who were found to be eligible is misfounded as the persons who were found eligible possessed the qualification on the date of advertisement whereas the petitioners and intervenors admittedly did not possess the qualification on the date of advertisement. Thus, they have no right to be considered for promotion clearly because they did not possess the minimum qualification on the date of advertisement. Thus, to that extent the claim of the petitioners as well as the intervenors deserves to be rejected and is, accordingly, rejected.

38. The mere fact that the petitioners and the intervenors were permitted to appear in the examination by virtue of order of learned Single Judge passed on 08.04.2022 in the case of the petitioners and the intervenors being permitted to appear in the examination despite there being no order in their favour would not confer any rights upon the petitioners and intervenors.

39. The writ petition is **dismissed** for all the reasonings as recorded above. However, the respondents are directed to declare the results of all the candidates who had appeared in the examination and had the requisite qualification on the date of advertisement.

40. To further clarify the results of all candidates other than the petitioners and intervenors shall be declared.

(2023) 1 ILRA 1270
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.12.2022

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ A No. 5390 of 2022

Kamal Nayan Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Shantanu Khare, Ms. Neha Roy Chaudhary, Sri Kauntey Singh, Sri Siddharth Khare, Sri Ashok Khare (Sr. Adv.)

Counsel for the Respondents:

C.S.C., Sri M.N. Singh, Sri Nisheeth Yadav, Sri Siddharth Singhal

A. Service Law – Selection/Appointment - All India Council for Technical Education Pay Scales, Service Conditions and Minimum Qualifications for Appointment of Teachers and Other Academic Staff such as Library, Physical Education and Training & Placement Personnel in Technical Education – (Degree) Regulation, 2019; Uttar Pradesh Technical Education (Teaching) Service Rules, 2021: Rule 3(i).

The issue before the Hon'ble Court is **whether the requisition made by the State Government and acted upon by the UPSSSC upon issuance of the advertisement dated 26.11.2016 developed an incurable defect as may not have allowed the UPSSSC to continue or complete the process of selection undertaken by it, either upon issuance of Notification dated 01.03.2019 (by the AICTE) or upon enforcement of the UP Rules on 09.06.2021.** (Para 15)

The law on the date of occurrence of vacancy is not the law on which fresh selection may be made. At the same time, any and every change made to the law during an ongoing selection process does not automatically attach or govern that selection process, unless the change/amendment to the law is specifically made with retrospective effect. (Para 16)

There is no doubt - the advertisement issued was wholly consistent to the law that then existed. Though the Regulation framed by the AICTE & published vide Notification dated 01.03.2019 are statutory law and therefore enforceable as such, yet neither the AICTE nor the State Government seek retrospective enforcement of that law. Rather, the State Government considered the same and framed its own Rules i.e., UP Rules. Those were published on 09.06.2021 and enforced prospectively. (Para 11, 17)

B.(i) Under Clause 1.4 (e) & (f) of the Notification, the AICTE itself did not enforce that law, retrospectively. Rather, under Clause 1.4 (e), it first specifically protected all pending selections that had crossed the stage of interview. Those selections were completely insulated from the effects of the change to the law made by the Notification. (Para 18)

U/Clause 1.4 (f), in case/s where interview stage had not been conducted, the AICTE directed all institutes/employers to first 'publish corrigendum' and process the pending applications (for selection), according to the amended law. Thus, a conditional enforcement of the amended/changed law was contemplated by the AICTE. Only, after the State Government published a 'corrigendum' to the Advertisement, the changed law would become applicable to the pending selection process, for the advertised posts and not otherwise. (Para 20)

Therefore, in the present case, though selection process was pending before the stage of interview, the changed eligibility prescribed under the Notification could not be enforced on its own. Before it could be enforced and applied to the impugned selection process (already underway), the employer i.e., the State Government was required to decide to apply it to the pending selection process and publish its decision through a corrigendum advertisement, to that effect. That was never done. Hence, Regulation 1.4 (f) did not become enforceable to the impugned selection process. (Para 21)

B.(ii) Mere enforcement of the UP Rules also had no adverse effect on the impugned selection process. Those being statutory Rules, they contain no recital or intent to enforce them retrospectively. Plainly, they are wholly prospective. (Para 22)

Though the Writ Court may not enforce equity against the plain letter of statutory law, yet it may always recognize equity in that statutory law. The Notification did not treat any ongoing selection process (under the unamended law), inherently or fundamentally or incurably defective. Rather, it sought to protect those selection processes. That **equitable**

principle, legislatively incorporated into the Notification, must be given full effect. Its consequences cannot be avoided or lightly brushed away. (Para 24)

By virtue of the amendments made by the Notification and the UP Rules, it is not a more stringent condition being imposed, to restrict the zone of consideration amongst the (selected candidates), but a complete change of eligibility conditions, has been made. (Para 26)

C. Once, the law stood amended, it was for the State authorities to consider its effect and impact on the ongoing selection. Merely because the cadre under which the post may have been advertised would become a dying cadre, it may not automatically defeat the selection process (on such post for such dying cadre), a conscious decision making was required by the administrative authorities' vis-à-vis the claim of the petitioners, after evaluating the impact of that decision. (Para 30)

Even if the old cadre (under which posts were advertised), were a dying cadre yet, by virtue of prior issuance of the Advertisement, the selection process once underway had to be taken to its logical end. Posts upgradation etc. could be applied to such posts, at the appropriate stage. (Para 11)

D. The UPSSSC is an autonomous body. There are limits to its authority and work. It acts on engagement sought by the State agencies. It could not have acted of its own. The State authorities issued the requisition and thus created the embryo of the selection process, together with all its genetic attributes as to post, grade, pay band and eligibility conditions. (Para 33)

Thereafter, the cycle of development of that embryo incubated with the UPSSSC. It is at that stage and in the context of the requisition thus received, the advertisement was published by the UPSSSC. The selection process completed its cycle upon declaration of the result. It is the result that the UPSSSC has delivered to the State for the purpose of grant of appointment to the posts requisitioned. (Para 34)

While the selection process incubated with the UPSSSC, the State authorities did not have any statutory right to require the UPSSSC to place the same in abeyance or to otherwise interfere with the same, except as permitted u/Clause 1.4(f) of the Notification. It was never resorted to. (Para 35)

The UPSSSC never became obligated to comply with or show subservience to the communication dated 16.02.2018 etc. and to place in abeyance the selection process, underway. The only other event that may have led to disruption of the process of selection (that was incubating with the UPSSSC) could be if the State Government had itself aborted the incubation process, by cancelling the requisition made. That power has remained not exercised by the State Government. (Para 36)

E. It is true, a mere selection does not vest any right in the selected candidate to seek appointment and this Court may not readily issue a positive writ in that regard yet, the selection process cannot be allowed to be stalled or wasted on its own for reason of mere administrative inefficiency or incompleteness of administrative action. (Para 29)

There is no rationale to allow the State authorities, the discretion to stall the selection processes mid-way, for good or other reasons. An autonomous expert body such as the UPSSSC was not at the mercy of the State Government to conduct the selection process at the latter's dictates. To allow the UPSSSC to do that would be to introduce another uncertainty in the selection process as may allow for more inefficiencies, *adhocism* and therefore, corruption. (Para 38)

F. Scope of interference in administrative decisions - Administrative decisions are to be taken by authorized authorities. Often, they offer limited scope for interference in judicial review. In the present case, though the State Government has a constitutionally recognized right to declare the whole result still born, yet it may remain mindful of the fact that result may arise, by way of consequence of its own conduct. That unfortunate result would arise

neither by way of operation of law nor any fundamental defect in the selection process. (Para 42, 43)

Writ petition allowed. (E-4)

Precedent followed:

1. St. of H.P. & ors. Vs Raj Kumar & ors., 2022/INSC/605; (2023) 3 SCC 773 (Para 11, 12, 16)

2. Ramjit Singh Kardam & ors. Vs Sanjeev Kumar & ors., (2020) 20 SCC 209 (Para 11)

3. Y.V. Rangaiah Vs J. Sreenivasa Rao, (1983) 3 SCC 284 (Para 12)

4. St. of Bihar Vs Mithilesh Kumar, (2010) 13 SCC 467 (Para 16)

5. Assam Public Service Commission Vs Pranjal Kumar Sarma, (2020) 20 SCC 680 (Para 18)

Precedent distinguished:

1. Tej Prakash Pathak & ors. Vs Rajasthan High Court & ors., Civil Appeal No. 2634 of 2013, dated 20.03.2013 (Para 12)

2. Gyan Prakash Chaubey Vs St. of U.P. & ors., Writ – A No. 4570 of 2022, decided on 25.07.2022 (Para 12)

3. Shankarsan Dash Vs U.O.I., (1991) 3 SCC 47 (Para 12)

Present writ petition primarily seeks a direction upon respondent no. 2 - Director, Technical Education, Uttar Pradesh to grant appointment to the petitioners, pursuant to the select list 10.12.2021 published by the UPSSSC, pursuant to Advertisement No. 22-Examination/2016. The other prayer is for protection of their rights under select list dated 10.12.2021 published pursuant to the Advertisement - qua 69 posts of Librarian, Grade C, advertised thereunder.

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. Heard Sri Ashok Khare, learned Senior Advocate, assisted by Ms. Neha Roy Chaudhary, learned counsel for the petitioners; Sri Siddharth Singhal, learned counsel for the Uttar Pradesh Subordinate Services Selection Commission/respondent no.3; Sri Nisheeth Yadav, learned counsel for the Uttar Pradesh Public Service Commission/respondent no.4 and, Sri Gopal Chandra Saxena, learned Standing Counsel for the State-respondents.

2. Present writ petition has been filed primarily to seek a direction upon respondent no.2 - Director, Technical Education, Uttar Pradesh to grant appointment to the petitioners (13), pursuant to the select list 10.12.2021 published by the Uttar Pradesh Subordinate Services Selection Commission (hereinafter referred to as "UPSSSC'), pursuant to Advertisement No. 22-Examination/2016 (hereinafter referred to as the "Advertisement'). The other prayer made in the writ petition against Advertisement No. A-7/E-1/2021 dated 15.09.2021, is largely consequential. The petitioners seek protection of their rights under select list dated 10.12.2021 published pursuant to the Advertisement - *qua 69* posts of Librarian, Grade C, advertised thereunder.

3. Earlier, the UPSSSC published the Advertisement. Amongst others, 69 posts of Librarian, Grade C, at Government Polytechnics, in Grade Pay 2800/-, were advertised (hereinafter referred to as the advertised posts). The prescribed qualification for appointment on those posts (as then existed), was graduation with diploma in Library Science. The cut-off date prescribed under the above advertisement was 19.12.2016. The petitioners had applied thereunder.

4. While that selection process was underway, the All-India Council for Technical Education ('AICTE' in short), came out with "All India Council for Technical Education Pay Scales, Service Conditions and Minimum Qualifications for Appointment of Teachers and Other Academic Staff such as Library, Physical Education and Training & Placement Personnel in Technical Institutions and Measures for the Maintenance of Standards in Technical Education - (Degree) Regulation, 2019", vide Notification dated 01.03.2019 (hereinafter referred to as the 'Notification'), proposing to amend, the eligibility conditions, pay-band as also the nomenclature etc. of advertised posts, amongst others pertaining to Librarian, applied for by the petitioners. Mainly, that post was proposed to be upgraded from Group C to Group B, from Grade Pay Rs. 2800/- to pay scale Rs. 56100/-. At the same time, under Clause 1.4 of the Notification, it was provided as under:

*"**1.4 Effective date of application of Service Conditions***

(a) All other service conditions including Qualifications, Experience, Recruitment, Promotions etc. shall come into force with effect from the date of this Gazette Notification.

b) The Qualifications, Experience, Recruitment and Promotions etc. during 01-01-2016 till the issue of this Gazette Notification shall be governed by All India Council for Technical Education Pay Scales, Service Conditions and Qualifications for the Teachers and other Academic Staff in Technical Institutions (Diploma) Regulation, 2010 dated 5th March 2010 and subsequent notifications issued from time to time.

c) Those who are eligible for promotions after the date of publication of this gazette, shall have to meet the necessary conditions such as additional qualification, undergoing industrial training, pedagogical training, faculty induction program, publishing research papers etc. However, these requirements shall be permitted to be fulfilled till 31st July, 2022 so as to enable faculty members in equipping them for requisite mandatory requirements of this gazette to avail the benefit of promotion retrospectively from the date of eligibility.

d) It may be noted that no further extension would be given beyond 31st July, 2022 and those who do not meet the essential criteria despite the above grace period, shall lose an opportunity for getting promotion retrospectively. However, they will be eligible for promotion from the date they meet these criteria thereafter.

e) In cases, wherein interviews are already conducted either for direct recruitment or for promotions but candidates did not join, such candidates may be allowed to join. Their further up-gradation will be governed by this notification.

f) In cases, where advertisement was published, applications invited but interviews have not been conducted till publication of this notification, the institutes/employers are required to publish corrigendum and processing of applications must be done in accordance with the provisions given in this notification."

5. Thereafter, the State Government formulated the "Uttar Pradesh Technical Education (Teaching) Service Rules, 2021" (hereinafter referred to as the 'UP Rules'), in exercise of powers vested under Article 309 of the Constitution of India. Those Rules were published and thus came into force on 09.06.2021. Under Part III of the

UP Rules, Rule 5 (Category - VI) - for appointment on the post of Librarian at Government Polytechnics etc., the source of recruitment is as under:

"100% Direct recruitment by Commission. All the conditions of eligibility and academic qualifications laid down by the AICTE shall be applicable for direct recruitment of Librarian."

6. Under Part - IV of Rule 8 of the UP Rules, the qualification for recruitments were specified as those mentioned in Appendix-II to the UP Rules. Under Clause 6 of Appendix-II thereto, the following eligibility conditions came to be prescribed for appointment on the post of Librarian at Government Polytechnics etc.:

"1. Master's Degree in Library Science with at least First Class or equivalent and a consistently good academic record, having the knowledge of computer.

2. Qualifying in the National Level Test conducted for the purpose by UGC or other equivalent test as approved by the UGC.

For Diploma Level Institutions:

Librarians who have been recruited between 01-01-1996 and 15-03-2000 in the Diploma level Institutions, with the existing recruitment rules to be considered for up-gradation under CAS in the next higher grade of Senior Scale only. However, for further upward movement under CAS, they are required to acquire minimum educational qualification in a manner similar to that as laid down in AICTE notification 2000 (Degree) and in subsequent Clarifications/Notifications.

(b) For Degree level Institutions: same as above."

7. Similarly, under Rule 3(i) of the UP Rules, service was defined as service falling under group "A" and "B" posts in the Directorate of Technical Education, Government Polytechnics etc. Again, under Appendix-I Category - VI thereto, the pay-scale for the post of Librarian at Government Polytechnics etc. was described as Entry Pay: Rs. 56,100.

8. While the Notification issued by the AICTE came in force on 01.03.2019 and the UP Rules also came to be published and thus enforced w.e.f. 09.06.2021 yet, the recruitment process undertaken for the advertised posts continued, under the unamended law, in terms of the Advertisement and the pre-existing norms prescribed by the AICTE (of year 2010). Thus, written examination was conducted by the UPSSSC on 28.07.2019; its result declared on 13.10.2020; interviews held in December 2020 and, select list published on 10.12.2021.

9. By means of the counter affidavit filed by the State of U.P., it has been asserted, on 18.01.2018 the Secretary Technical Education, Government of Uttar Pradesh wrote to the Secretary, UPPSC (not UPSSSC), to not conduct any further examinations till enforcement of new Rules (that may have become necessary to the Government), in view of the AICTE Notification dated 01.03.2019. At the same time, it does appear, the Director, Technical Education wrote to the Secretary, UPSSSC on 16.02.2018, to place in abeyance the ongoing selection. However, it may be noted, at that stage, the AICTE had yet not issued Notification dated 01.03.2019.

10. Plainly, the letter dated 16.02.2018 appears to have been issued in anticipation of change of law, likely to be made by the AICTE. Nevertheless, it is not in dispute, the earlier stipulations made by the AICTE (of 2010), had neither ceased to operate nor had been amended or modified, at any earlier point in time. After declaration of the result (of the written examination), by the UPSSSC on 10.10.2021, the Director, Technical Education wrote to the Secretary, UPSSSC on 23.10.2021 to cancel the requisition for appointment on 69 Group - C posts of Librarian at Government Polytechnics etc. This communication though not annexed to the counter affidavit, has been relied by the learned Standing Counsel, at the time of hearing. The existence of that communication is also admitted to the UPSSSC, in the counter affidavit filed by that respondent.

11. In such facts, it has been strenuously urged by learned Senior Counsel appearing for the petitioners, the selection process undertaken was not derailed or concluded as incomplete, upon issuance of the Notification and/or enforcement of the UP Rules that changed the law pertaining to selection on such posts. That principle is stated to be time tested and consistently applied by Courts. The law that existed on the date of issuance of the Advertisement, was the only law applicable to the selection process. There is no doubt - the advertisement issued was wholly consistent to the law that then existed. To that extent, reliance has been placed on a recent decision of the Supreme Court in **State of Himachal Pradesh & Ors. Vs. Raj Kumar & Ors. (Civil Appeal No. 9746 of 2011),** decided on 20.05.2022 (paragraph nos. 13.1 and 13.2). Second, it has been urged, the reasoning given in the counter affidavit citing dying cadre of Librarian, Group C, posts, is non-existent, in law. Relying on yet another decision of the Supreme Court in **Ramjit Singh Kardam & Ors. Vs. Sanjeev Kumar & Ors., (2020) 20 SCC 209,** it has been submitted, even if the old cadre (under which posts were advertised), were a dying cadre yet, by virtue of prior issuance of the Advertisement, the selection process once underway had to be taken to its logical end. Posts upgradation etc. could be applied to such posts, at the appropriate stage.

12. On the other hand, learned Standing Counsel would submit, once the AICTE had issued Notification dated 01.03.2019 and upgraded the post advertised (Librarian) to a Group - B post while simultaneously making quantitative change in the prescribed qualifications as also pay condition etc., of the upgraded posts, it became impossible for the State to complete the selection process for the advertised posts. It therefore required the UPSSSC to withdraw the requisition made and, to disband the selection. That communication having been made much earlier, the UPSSSC should have aborted the selection process, then. In any case, mere taking forward the selection process and declaration of the result did not create any right in favour of the petitioners as may allow a writ to be issued - to grant them appointment. Reliance has been placed on a co-ordinate bench decision of this Court in **Gyan Prakash Chaubey Vs. State of U.P. & Ors.,** (Writ - A No. 4570 of 2022, decided on 25.07.2022). Relying on that order, learned Standing Counsel would contend, with respect to the same recruitment process and for the same posts of Librarian, Group C, that writ petition was dismissed, occasioned by the fact - the

requisition for the advertised posts was required to be withdrawn. He has also relied on a reference order made by three judge bench of the Supreme Court in **Tej Prakash Pathak & Ors. Vs. Rajasthan High Court & Ors. (Civil Appeal No. 2634 of 2013),** dated 20.03.2013. That reference is stated to be pending. It has been further stated, the same is likely to be decided at an early date. Therefore, it was permissible to alter the selection process, upon change made to the law by the Notification and the UP Rules. Referring to the decision in **State of Himachal Pradesh & Ors. Vs. Raj Kumar & Ors. (supra),** it has been further submitted, the ratio in **Y.V. Rangaiah Vs. J. Sreenivasa Rao, (1983) 3 SCC 284,** has been declared - not good law. The law as it existed on the date of vacancy having arisen, is not the law to be enforced for the purpose of making fresh recruitment. In the present case, the law stood changed on 01.03.2019 itself. Referring to the Notification, it has been submitted, no rights ever vested in the petitioners to seek appointment under the pre-existing/unamended law. In any case, upon enforcement of the UP Rules, the recruitment must be conducted and completed in terms of those Rules. Last, learned Standing Counsel has relied upon the decision of the Supreme Court in **Shankarsan Dash Vs Union of India, (1991) 3 SCC 47,** to submit successful candidates do not acquire an indefeasible right to appointment. It remains within the domain of the competent authority to cancel the requisition and/or the selection process as has been done in the present case.

13. Learned counsel for the UPSSSC would submit, the Commission had no jurisdiction or authority to withdraw the requisition. Once the requisition had been received by the Commission, it was under a statutory duty and obligation to conduct the examination and publish its results. The Commission was not obligated to do anything further.

14. Sri Nisheeth Yadav, learned counsel for the UPPSC would submit, the UPPSC has yet not come into the picture, since that expert body has not taken any steps under the fresh/second advertisement i.e. Advertisement No. A-7/E-1/2021.

15. Having heard learned counsel for the parties and having perused the record, a fundamental aspect that may be first addressed is - whether the requisition made by the State Government and acted upon by the UPSSSC upon issuance of the advertisement dated 26.11.2016 developed an incurable defect as may not have allowed the UPSSSC to continue or complete the process of selection undertaken by it, either upon issuance of Notification dated 01.03.2019 (by the AICTE) or upon enforcement of the UP Rules on 09.06.2021.

16. There may be no quarrel to the principle invoked by learned Standing Counsel on the strength of the decision of the Supreme Court in **State of Himachal Pradesh & Ors. Vs. Raj Kumar & Ors. (supra)** - the law on the date of occurrence of vacancy is not the law on which fresh selection may be made. At the same time, any and every change made to the law during an ongoing selection process does not automatically attach or govern that selection process, unless the change/amendment to the law is specifically made with retrospective effect. That principle is clearly laid down by the Supreme Court in **State of Bihar Vs. Mithilesh Kumar (2010) 13 SCC 467.**

There, the post advertised was Assistant Instructor, to train persons with different abilities. Immediately upon interview being held, an administrative decision was taken to engage professionally trained NGOs/institutions to impart such training, instead of hiring Assistant Instructors. Accordingly (as in the present case), despite a request letter sent to the Bihar Public Service Commission, the latter recommended to engage Mithilesh Kumar. Upon rejection of his claim, he approached the High Court in writ jurisdiction. That writ petition was allowed. While affirming the decision of the High Court, the Supreme Court reasoned - during an ongoing selection process, amendment made to the selection norms would not apply to it, unless such amendment is specifically made with retrospective effect. Thus, it was discussed and reasoned as below:

"15. Reference was also made by the learned counsel to the decision of this Court in N.T. Devin Katti v. Karnataka Public Service Commission [(1990) 3 SCC 157 : 1990 SCC (L&S) 446 : (1990) 14 ATC 688] , wherein it was reiterated that where selection process was initiated by issuing advertisement inviting applications, selection normally should be regulated by the rules and orders then prevailing. It was also emphasised that service jurisprudence provides that normally amendments effected during the pendency of a selection process operate prospectively, unless indicated to the contrary by express language or by necessary implication.

16. The learned counsel lastly referred to the decision of this Court in A.P. Public Service Commission v. B. Swapna [(2005) 4 SCC 154 : 2005 SCC (L&S) 452] , wherein while considering the norms for recruitment/selection for filling up vacancies which had been initially advertised, this Court was of the view that such norms of selection cannot be altered after commencement of the selection process and rules prescribing qualification, which were amended during the continuation of the selection process, have prospective operation unless something to the contrary is indicated expressly or by necessary implication.

17. ...

18. We have carefully considered the submissions made on behalf of the parties and we are not impressed with the stand taken by the petitioner State of Bihar, that the Bihar Public Service Commission ought not to have recommended the name of the respondent for appointment after the Assistant Director, Social Welfare had requested the Commission not to recommend any further names in view of the decision taken by the State to have disabled persons trained through professionally established NGOs/institutions in place of Instructors/Assistant Instructors for which advertisements had already been issued by the Commission.

19. Both the learned Single Judge as also the Division Bench rightly held that the change in the norms of recruitment could be applied prospectively and could not affect those who had been selected for being recommended for appointment after following the norms as were in place at the time when the selection process was commenced. The respondent had been selected for recommendation to be appointed as Assistant Instructor in accordance with the existing norms. Before he could be appointed or even considered for appointment, the norms of recruitment were altered to the prejudice of the respondent. The question is whether those altered norms will apply to the respondent.

20. The decisions which have been cited on behalf of the respondent have clearly explained the law with regard to the applicability of the rules which are amended and/or altered during the selection process. They all say in one voice that the norms or rules as existing on the date when the process of selection begins will control such selection and any alteration to such norms would not affect the continuing process, unless specifically the same were given retrospective effect.

17. Though the Regulation framed by the AICTE & published vide Notification dated 01.03.2019 are statutory law and therefore enforceable as such, yet neither the AICTE nor the State Government seek retrospective enforcement of that law. Rather, the State Government considered the same and framed its own Rules i.e., UP Rules. Those were published on 09.06.2021 and enforced prospectively.

18. More fundamentally, if that effort (by the State Government) be ignored, it can never be ignored - under Clause 1.4 (e) & (f) of the Notification, the AICTE itself did not enforce that law, retrospectively. Rather, under Clause 1.4 (e), it first specifically protected all pending selections that had crossed the stage of interview. Those selections were completely insulated from the effects of the change to the law made by the Notification. In **Assam Public Service Commission v. Pranjal Kumar Sarma, (2020) 20 SCC 680,** a similar clause 12.2 (in the Assam Public Service Commission (Conduct of Business) Procedure, 2019, reads as below :

"12.2. ... and any proceeding in relation to interviews, selections or competitive examination pending on the date of commencement of these Procedures may be continued and completed in accordance with the provisions of the Rules in force prior to such commencement."

19. It was interpreted by the Supreme Court, as protecting ongoing selection. It was reasoned:

"17. One must also be conscious of Savings Clause 12.2 incorporated in the 2019 Procedure which makes it abundantly clear that the interviews/selection or competitive examinations pending on the date of commencement of the 2019 Procedure should be continued and completed, in accordance with the 2010 Rules."

20. Second, under Clause 1.4 (f), in case/s where interview stage had not been conducted, the AICTE directed all institutes/employers to first 'publish corrigendum' and process the pending applications (for selection), according to the amended law. Thus, a conditional enforcement of the amended/changed law was contemplated by the AICTE. Only, after the State Government published a "corrigendum' to the Advertisement, the changed law would become applicable to the pending selection process, for the advertised posts and not otherwise.

21. Therefore, even to the present case, though selection process was pending before the stage of interview, the changed eligibility prescribed under the Notification could not be enforced on its own. Before it could be enforced and applied to the impugned selection process (already underway), the employer i.e., the State Government was required to decide to apply it to the pending selection process and publish its decision through a corrigendum advertisement, to that effect.

That was never done. In absence of publication of the corrigendum by the State Government, the pre-condition prescribed to be fulfilled to apply the amended law (under the Notification), to pending/impugned selection process was never fulfilled. Hence, Regulation 1.4 (f) did not become enforceable to the impugned selection process.

22. Mere enforcement of the UP Rules also had no adverse effect on the impugned selection process. Those being statutory Rules, they contain no recital or intent to enforce them retrospectively. Plainly, they are wholly prospective.

23. Though the Writ Court may not enforce equity against the plain letter of statutory law, yet it may always recognize equity in that statutory law. Here, while bringing the amendment (to its norms), through the Notification, the AICTE acted mindful of ongoing selection processes, at various stages of completion. Being conscious of that, it first completely protected such selection process where stage of interview may have been crossed. Second, it allowed for other (less complete) selection process to be altered (in terms of the law amended by the Notification), subject to condition of such alteration being first adopted by the concerned "institutes/employers' and decimation of that information, through publication of corrigendum.

24. Thus, the Notification did not treat any ongoing selection process (under the unamended law), inherently or fundamentally or incurably defective. Rather, it sought to protect those selection processes, as noted above. That equitable principle, legislatively incorporated into the Notification, must be given full effect. Its consequences cannot be avoided or lightly brushed away. Consequently, in absence of any inherent defect in the law (as per the amended law), shown to exist in the selection process, the Court may not rush to recognize such defect to treat annulled, the selection process though, the State Government has not taken any step to apply that amended law to the impugned selection process. To that extent, the equitable principle contained in clause 1.4(f) of the Notification is being recognized in favour of the petitioners.

25. The principle relied upon by the learned Standing Counsel on the strength of the other order of the Supreme Court in **Tej Prakash Pathak & Ors. Vs. Rajasthan High Court & Ors. (supra),** is clearly not applicable to the present case. The only question that appears to have been referred to a larger bench of the Supreme Court by the three-judge bench order of that Court appears to be - whether the principle "rules of the Commission stipulating the procedure for selection may not be changed pending a selection process" would apply to a case "where change sought is to impose a more rigorous scrutiny for selection". Clearly, that question does not arise in the present case.

26. Here, by virtue of the amendments made by the Notification and the UP Rules, it is not a more stringent condition being imposed, to restrict the zone of consideration amongst the (selected candidates), but a complete change of eligibility conditions, has been made. Not only the nomenclature of the post but its group classification, pay-band have been changed along with the prescribed qualifications. Under the unamended law, graduation with diploma in Library Science was the prescribed qualification whereas

under the amended law, a Masters' degree in Library Science, with at least first class or equivalent and consistently good academic record together with knowledge of computer have been prescribed as the educational qualification along with National Level Test, conducted by the University Grants Commission. In any case, that being an order to refer the issue to a larger bench, it causes no legal effect, to dilute the pre-existing precedent, at present.

27. In **Ramjit Singh Kardam & Ors. Vs. Sanjeev Kumar & Ors. (supra)**, the selection sought to be made was on the post of Physical Training Instructor (PTI in short). That selection was advertised vide Advertisement No. 6 of 2006 dated 20.07.2006, issued by the Haryana Staff Selection Commission. Amongst others, the following question was framed for consideration, by the Supreme Court, in that case:

"Whether no fresh selection can be held as directed by the learned Single Judge since as per 2012 Rules, the post of PTI has been declared as a dying cadre and the post has merged into the post of TGT Physical Education ?"

28. There, the original selection held under the unamended law was found to be contrary to law by a learned single judge of the Punjab & Haryana High Court. Fresh selection made pursuant to the original advertisement led to a further challenge. The Supreme Court found, there was no defect in the fresh selection held under the original Advertisement No.6 of 2006. In fact, it was specifically observed, the same ought to have been taken to its logical end.

29. Here, it must be noted, learned Standing Counsel has not been able to establish - the State authorities withdrew the requisition at any stage of the proceedings. It is true, a mere selection does not vest any right in the selected candidate to seek appointment and this Court may not readily issue a positive writ in that regard yet, the selection process cannot be allowed to be stalled or wasted on its own for reason of mere administrative inefficiency or incompleteness of administrative action.

30. Once, the law stood amended, it was for the State authorities to consider its effect and impact on the ongoing selection. Inasmuch as there exists a principle, duly recognized by the Supreme Court in **Ramjit Singh Kardam & Ors. Vs. Sanjeev Kumar & Ors. (supra),** whereunder merely because the cadre under which the post may have been advertised would become a dying cadre, it may not automatically defeat the selection process (on such post for such dying cadre), a conscious decision making was required by the administrative authorities' vis-a-vis the claim of the petitioners, after evaluating the impact of that decision.

31. Plainly, not only the State authorities failed to take that decision and publish the corrigendum, unfortunately and unwittingly, they unsuccessfully attempted to shift that responsibility and function on the UPSSSC and or/the UPPSC. The letters written by the state authorities namely the Secretary to the Director Technical Education and the letter written by the Director Technical Education to the Secretary UPSSSC are to the effect that the said expert examination body may itself withdraw the requisition. That function jurisdiction or authority, it did not have. It was never exercised by the State Government - the authority vested with such jurisdiction.

32. As noted above, in face of specific legal obligation cast on the State Government to publish the corrigendum of Regulation 1.4(f) and, in absence of any delegation or sub-delegation of that essential function on the UPSSSC, the latter was never authorised or enabled to do cancel the requisition or to modify it. Therefore, there is no inherent or other defect in the conduct of the UPSSSC, in having continued and completed the selection process.

33. Undisputedly, the UPSSSC is an autonomous body. Also, there are limits to its authority and work. It acts on engagement sought by the State agencies. It could not have acted of its own, either to determine the number of vacancies in various services that were to be filled up at any point in time, nor it could proceed to initiate any selection process on such post, nor it could prescribe or amend the eligibility conditions to be applied, to such selection. To that limited extent, it always remained dependent on the State authorities. The State authorities issued the requisition and thus created the embryo of the selection process, together with all its genetic attributes as to post, grade, pay band and eligibility conditions.

34. Thereafter, the cycle of development of that embryo incubated with the UPSSSC. It is at that stage and in the context of the requisition thus received, the advertisement was published by the UPSSSC. The selection process initiated by the UPSSSC, completed its cycle upon declaration of the result. It is the result that the UPSSSC has delivered to the

35. While the selection process incubated with the UPSSSC, the State authorities did not have any statutory right to require the UPSSSC to place the same in abeyance or to otherwise interfere with the same, except as permitted under Clause 1.4(f) of the Notification. It was never resorted to. Also, the UP Rules were not enforced retrospectively to the impugned selection process.

36. The only other event that may have led to disruption of the process of selection (that was incubating with the UPSSSC) could be if the State Government had itself aborted the incubation process, by cancelling the requisition made. That power has remained not exercised by the State Government. Consequently, the UPSSSC never became obligated to comply with or show subservience to the communication dated 16.02.2018 etc. and to place in abeyance the selection process, underway. That document carried no legal force.

37. It is not a mere technical construction that is being made by the Court. The process of selection by an expert body consumes time and requires dedicated deployment of energy and resources. Those are not available in abundance. Also, often numerous similar selection processes are undertaken simultaneously, by such expert bodies. Therefore, a time schedule is created, and it exists with such expert bodies to conduct various stages of different examinations, for the purposes of making varied recruitments.

38. In the context of law that clearly exits - selection does not give right to appointment, there is no rationale to allow the State authorities, the discretion to stall the selection processes mid-way, for good or other reasons. In short, an autonomous expert body such as the UPSSSC was not at

the mercy of the State Government to conduct the selection process at the latter's dictates. To allow the UPSSSC to do that would be to introduce another uncertainty in the selection process as may allow for more inefficiencies, *adhocism* and therefore, corruption.

39. The decision of the co-ordinate bench of this Court in **Gyan Prakash Chaubey Vs. State of U.P. & Ors. (supra)** clearly proceeds on the statement made by the learned counsel for the UPSSSC before the Court (in that matter) - that the requisition had been withdrawn. Here, upon opportunity granted, learned counsel for the UPSSSC would submit, no communication was issued by the State Government withdrawing the requisition. Learned Standing Counsel is also not able to contradict that statement. Clearly, it must be accepted, the requisition had not been withdrawn, in accordance with law.

40. Merely because the State Government wrote to the Secretary UPSSSC to withdraw the requisition and/or to keep the selection process in abeyance, it did not cause the legal effect as was represented to the Court in the case of **Gyan Prakash Chaubey Vs. State of U.P. & Ors. (supra).** Suffice to note, that statement of fact was not contradicted by the petitioner in that case. Apparently, that decision proceeds on a wrong statement of fact, made before the Court. Insofar as that statement is not shown to be correct and no legal effect is shown to have been caused as may allow the Court to infer that as the selection process was aborted by the State Government, the said decision is found to be a decision reached in the own facts of that case. It does not lay down any law.

41. As to the submission of learned Standing Counsel on the strength of the decision of the Supreme Court in **Shankarsan Dash Vs Union of India (supra),** in view of the above, if required, it is for the State Government to act in the manner permitted by law and it is not for the State Government to either shift that responsibility to UPSSSC or to look to the Court in that regard.

42. Administrative decisions are to be taken by authorized authorities. Often, they offer limited scope for interference in judicial review. However, while taking that decision, in the present facts, amongst others, the State Government would have to remain mindful of the purpose of that exercise; the context in law; the timing of the action as also, consequences of its action. It would also have to weigh the pros and cons of its decision and its impact on its citizens involved.

43. Here, it may also be kept in mind, there is no allegation of foul play in the selection process, that is otherwise complete. Though the State Government has a Constitutionally recognized right to declare the whole result still born, yet it may remain mindful of the fact that that result may arise (in facts of the present case), by way of consequence of its own conduct. That unfortunate result would arise neither by way of operation of law nor any fundamental defect in the selection process.

44. Accordingly, the respondent may proceed to grant the appointments, pursuant to the result declared by the UPSSSC dated 10.12.2021 within a month (as there is no legal impediment to that). If however, the State authorities are of another view, such decision may be made within the same time, keeping in mind the observations made above. In that event, rights of the parties shall abide by the decision to be

made by respondent no.1. The writ petition is **allowed**, in terms of the direction issued above. No order as to costs.

(2023) 1 ILRA 1284
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.12.2022

BEFORE

THE HON'BLE OM PRAKASH SHUKLA, J.

Writ-A No. 19409 of 2020
with other connected cases

Vijay Gupta ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Surya Prakash Singh

Counsel for the Respondents:
C.S.C.

A. Education Law – Recruitment – Disparity in declaration – Rectification of error in the application form - No candidate should be permitted to rectify any mistake committed by him/her while filing up online application form so as to have an impact on the smooth conducting of the selection process and to avoid any alteration or change in the inter se merit of the candidates which would eventually lead to a change in the final merit/select list. (Para 7)

B. Wherever a candidate had put himself at a disadvantageous position, his candidature is not to be cancelled but if the candidate had been placed at an advantageous position which is beyond his right to claim, his candidature is to be cancelled. (Para 9)

In case a candidate furnishes some information in his/her online application form which, although not in commensurate to the actual information, but does not put him/her to any advantageous position, such misinformation, in seclusion, may not be treated as a ground for rejecting the candidature. (Para 10)

Wherever the candidate was not claiming any advantage and as a matter of fact, had put himself in a disadvantaged position, his candidature will not stand cancelled but the candidate will have to remain satisfied with what was quoted or projected in the application form. (Para 12)

C. Wherever undue advantage can enure to the candidate if the discrepancy were to go unnoticed, regardless whether the percentage of advantage was greater or lesser, the candidature of such candidate must stand cancelled. (Para 12)

The controversy in these present writ petitions is concerning some discrepancies/error mentioned in the application form relating to "Shiksha Mitra", wherein in some petitions the weightage marks for working as shikha Mitra had not been given appropriately, whereas in some cases the petitioners have been erroneously considered as Shiksha Mitra and were although initially given appointment, however, subsequently their appointment were cancelled and consequential recovery orders were issued against them. These discrepancies/error have crept either due to non-mentioning or clicking the wrong key/code, leading to erroneous weightage given for working as Shiksha Mitra or erroneously opting for BTC through regular channel or BTC through correspondence. (Para 11)

Hon'ble Court has observed that it is evident that the issue has not been examined by the competent authority in terms of the observations made by the SC. Therefore,

- All impugned orders rejecting the candidature of the candidates on account of the error committed by them relating to Shiksha Mitra are set-aside;

- It is made clear that candidates, whose names do not find place in the select list dated 12.5.2020, will not get any benefit with the change of marks as their merit position will not be changed for the reason that in case this is allowed to happen at this stage, it will open the entire selection process which is not the spirit of the order passed by this Court;

- These cases are remitted to the authority of the district concerned for re-examination thereof (v) The entire process shall be completed by the competent authority within a period of eight weeks from the date of receipt of a copy of this order, considering the respective writ petition as representation of the candidate concerned;

- It is further directed that in case any candidate is found entitled for appointment and is offered appointment on review of his/her case in terms of the aforesaid directions, he/she shall get all the benefits from the date, he/she joins the service.

- Any recovery proceedings, initiated, by the concerned authority shall be kept in abeyance and shall be subject to the decision/outcome of competent authority of the district concerned. (Para 16)

It is made clear that this Court has not expressed its view on the merits of any individual case and the competent authority of the district concerned is at liberty to take an independent decision. (Para 17)

Writ petitions disposed of. (E-4)

Precedent followed:

1. Jyoti Yadav & anr. Vs The St. of U.P. & ors., Writ Petition No. 322 of 2021, decided on 08.04.2021 (Para 8)

2. Rahul Kumar Vs St. of U.P. & ors., Writ Petition No. 378 of 2021, 29.06.2021 (Para 9)

3. Archana Chauhan Vs St. of U.P. & ors., Civil Appeal No. 3068/2020 (Para 10)

4. Ashutosh Kumar Srivastava & ors. Vs St. of U.P. & ors., Special Appeal Defective No. 302 of 2020 (Para 14)

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

1. Heard Shri Abhishek Khare, Ms. Aahuti Agarwal, Shri Virendra Kumar Dubey, Shri Deepak Singh, Shri P.K. Mishra, Advocates as learned counsel for their respective petitioners and Shri Ran Vijay Singh, learned Additional Chief Standing Counsel for U.P. Basic Education Board and perused the record.

2. The present bunch of writ petitions engaging the attention of this Court has been filed by petitioners, whose candidature for the post of Assistant Teachers in primary school in pursuance of the advertisement issued by the State of Uttar Pradesh in the year 2019 were either not found proper due to inaccuracy and/or discrepancy between the online application and the actual status of the said candidate, or, even if the candidature of these petitioners were considered and these petitioner's found their way to the final selection list, however subsequently, the department, finding disparity in the declaration made in the online application and the actual status of the said candidate, their recruitment were cancelled and consequent recovery were directed by the respondent.

3. Both the sides have relied on various judgments/orders of this court as well as the Hon'ble Apex Court to buttress their point of submission and drive home their own respective cases and each of them have tried to convey that the present case is a covered matter and as such the same can be finally decided.

4. The common and germane background to the deciding of the issues involved in these writ petitions lie in a narrow compass.

5. The state of Uttar Pradesh issued a notification to fill up 69000 posts of Assistant Teachers in Primary Schools in various districts of the state, pursuant to which an Assistant Teacher Recruitment Examination, 2019 was conducted by the

Examination Regulatory Authority, Prayagraj. As per the recruitment process, candidates were to apply online, who were allotted registration number and assigned roll number for appearing in the examination, for which the results were declared on 12.05.2020. After declaration of result, the U.P. Basic Shiksha Parishad invited online applications from successful candidates for counselling and appointment.

6. Pertinently, the aforesaid ambitious recruitment scheme of the state of Uttar Pradesh was mired with litigations having been filed before this Court as well as the Hon'ble Supreme Court, which led to issuance of Government order dated 4th of December, 2020 in clarification and another letter dated 05.03.2021 issued by the Additional Chief Secretary, Government of Uttar Pradesh, relating to the appointment of assistant Teachers.

7. A harmonious reading of both the Government orders would lead one to an impeccable conclusion that both these orders have been issued with a purpose, which inter-alia state that no candidate should be permitted to rectify any mistake committed by him/her while filing up online application form so as to have an impact on the smooth conducting of the selection process and to avoid any alteration or change in the inter se merit of the candidates which would eventually lead to a change in the final merit/select list.

8. Although various orders and judgements of this Court have been cited by both the parties, however this Court finds that apparently there are two judgments of the Hon'ble Apex Court, which holds the ground as on today. The communication dated 05.02.2021 was a subject matter of interpretation before the Hon'ble Apex Court in the case of Jyoti Yadav & Anr. V/s The State of Uttar Pradesh & Ors. (Writ Petition No. 322 of 2021) decided along with 8 other writ petitions, wherein the Hon'ble Court vide its order dated 8th of April, 2021 held as follows:

"14. Wherever the mistakes committed by the candidates purportedly gave additional marks or weightage greater than what they actually deserved, according to the Communication dated 05.03.2021, their candidature would stand rejected. However, wherever mistakes committed by the candidates actually put them at a disadvantage as against their original entitlement or the variation could be one attributable to the University or issuing authority, an exception was made by said Communication. The reason for treating these two categories of candidates differently cannot thus be called irrational.

In the first case, going by the marks or information given in the application form the candidate would secure undue advantage whereas in the latter category of cases the candidate would actually be at a disadvantage or where the variation could not be attributed to them. The candidates in the latter category have been given a respite from the rigor of the declaration. The classification is clear and precise. Those who could possibly walk away with the undue advantage will continue to be governed by the terms of the declaration, while the other category would be given some relief

15. Having considered all the rival submissions, in our view, the Communication dated 05.03.2021 made a rational distinction and was designed to achieve a purpose of securing fairness while maintaining the integrity of the entire

process. If, at every juncture, any mistakes by the candidates were to be addressed and considered at individual level, the entire process of selection may stand delayed and put to prejudice. In order to have definiteness in the matter certain norms had to be prescribed and prescription of such stipulations cannot be termed to be arbitrary or irrational. Every candidate was put to notice twice over, by the Guidelines and the Advertisement.

16. Having found the Communication dated 05.03.2021 to be correct, the cases of the petitioners must be held to be governed fully by the rigors of the said Communication.

17. We, therefore, see no reason to interfere in these petitions and no opportunity beyond the confines of the Communication dated 05.03.2021 can be afforded to the petitioners to rectify the mistakes committed by them. We, therefore, reject the submissions and dismiss all these petitions."

9. Thus, the Hon'ble Apex Court held that wherever a candidate had put himself at a disadvantageous position, his candidature is not to be cancelled but if the candidate had been placed at an advantageous position which is beyond his right to claim, his candidature is to be cancelled. To the same effect is the judgment dated 29th of June, 2021 passed by the Hon'ble Apex Court in the case of Rahul Kumar vs. State of Uttar Pradesh and others, (Writ Petition No. 378 of 2021). It would be profitable to quote the relevant paragraph nos. 7, 8 and 9 of the aforesaid judgment, which read as under:

"7. We need not consider individual fact situation as the reading of the G.O. and the Circular as stated above is quite clear that wherever a candidate had put himself in a disadvantaged position as stated above, his candidature shall not be cancelled but will be reckoned with such disadvantage as projected; but if the candidate had projected an advantaged position which was beyond his rightful due or entitlement, his candidature will stand cancelled. The rigour of the G.O. and the Circular is clear that wherever undue advantage can enure to the candidate if the discrepancy were to go unnoticed, regardless whether the percentage of advantage was greater or lesser, the candidature of such candidate must stand cancelled. However, wherever the candidate was not claiming any advantage and as a matter of fact, had put himself in a disadvantaged position, his candidature will not stand cancelled but the candidate will have to remain satisfied with what was quoted or projected in the application form. These petitions are, therefore, disposed of in the light of what is stated above.

8. It must however be stated here that the authorities are not strictly following the intent of the G.O. and the Circular. For example, the Office Order dated 28.03.2021 issued by the Basic Teacher Education Officer, District Hardoi, shows cancellation of the candidature of one Raghav Sharan Singh at Serial No.4, though the projection of marks by way of mistake by said candidate was to his disadvantage. Logically, said candidate would be entitled to have his candidature considered and reckoned at the disadvantaged level. The record shows that even with such disadvantage, the candidate was entitled to be selected.

9. We have given this illustration only by way of an example. The authorities shall do well to consider every such order issued by them and cause appropriate corrections or modifications in the light of conclusions stated above. "

10. From the facts of the bunch of cases listed before us and as has been pointed by some of the counsels, it is evident that the issue has not been examined by the competent authority in terms of the observations made by the Supreme Court in the aforesaid two judgments which relate to the selection process in question. In fact, in some of the cases, the rejection of the candidature, is prior to the aforesaid judgments."

10. Both the judgements, succinctly, denote that, in case a candidate furnishes some information in his/her online application form which, although not in commensurate to the actual information, but does not put him/her to any advantageous position, such misinformation, in seclusion, may not be treated as a ground for rejecting the candidature. As a matter of fact, the judgment passed by the Hon'ble Apex Court in Archana Chauhan V/s State of Uttar Pradesh & ors. (Civil Appeal No. 3068/2020) also directs the rectification of the mistake keeping in view that the error on the part of the said candidate did not, in any way, enure to her advantage but was to her detriment.

11. The aforesaid judgments of the Hon'ble Supreme Court relate to discrepancy in the marks mentioned in the online application filled by the candidates and their urge to rectify the same, which has been interpreted by the Apex Court in the aforesaid terms. However, the controversy in these present writ petitions is concerning some discrepancies/error mentioned in the application form relating to "Shiksha Mitra", wherein in some petitions the weightage marks for working as shikha Mitra had not been given appropriately, whereas in some cases the petitioners have been erroneously considered as Shiksha Mitra and were although initially given appointment, however, subsequently their appointment were cancelled and consequential recovery orders were issued against them. These discrepancies/error have crept either due to non-mentioning or clicking the wrong key/code, leading to erroneous weightage given for working as Shiksha Mitra or erroneously opting for BTC through regular channel or BTC through correspondence.

12. This Court finds that the issue relating to any kind of rectification of error in the application form by any candidate of Assistant Teacher Recruitment Examination, 2019, stands settled by the aforesaid judgments of the Hon'ble Apex Court. The Hon'ble Apex Court have clearly interpreted the Government orders and have drawn a Lachman Rekha for considering any kind of error, by holding that the rigour of the G.O. and the Circular made it clear that;

(a) wherever undue advantage can enure to the candidate if the discrepancy were to go unnoticed, regardless whether the percentage of advantage was greater or lesser, the candidature of such candidate must stand cancelled.

(b) However, wherever the candidate was not claiming any advantage and as a matter of fact, had put himself in a disadvantaged position, his candidature will not stand cancelled but the candidate will have to remain satisfied with what was quoted or projected in the application form.

13. From the facts of the bunch of writ petitions, as has been rightly pointed by some of the counsels, it is evident that the issue has not been examined by the competent authority in terms of the

observations made by the Supreme Court in the aforesaid two judgments which relate to the selection process in question. In fact, in some of the cases, the rejection of the candidature as in Writ Petition-A No. 16122/2021 (Shipra Yadav v/s State of U.P), is prior to the aforesaid judgments.

14. This Court further finds that a Division Bench of this court in similar circumstances, having arrived at a decision that the candidature of the petitioners have been rejected without giving due regard to the judgements of the Hon'ble Apex Court, the Hon'ble Division Bench in a bunch of 24 matters, the lead case being Ashutosh Kumar Srivastava & Others V/s State of Uttar Pradesh & Ors. (Special Appeal Defective No. 302 of 2020), has inter-alia given the following directions:

"11. As we find that the issues have not been examined by the competent authority in the light of the observations made by the Supreme Court in the aforesaid judgments interpreting the Government Orders dated 04.12.2020 and 05.03.2021, the matter needs to be re-examined.

12. While setting aside the impugned orders rejecting the candidature of the candidates on account of the error committed by them, we remit the matter to the authority of the district concerned for re-examination thereof in light of the aforesaid judgment of the Supreme Court and to take a final decision thereon.

13. It is made clear that candidates, whose names do not find place in the select list dated 12.5.2020, will not get any benefit with the change of marks as their merit position will not be changed for the reason that in case this is allowed to happen at this stage, it will open the entire selection process which is not the spirit of the order passed by this Court.

14. The entire process shall be completed by the competent authority within a period of one month from the date of receipt of a copy of this order

15. It is further directed that in case any candidate is found entitled for appointment and is offered appointment on review of his/her case in terms of the aforesaid directions, he/she shall get all the benefits from the date, he/she joins the service.

16. The order passed in this bunch of appeals/writ petitions may not be treated to be an order in rem rather it is an order in personam limited to the candidates before the Court who were vigilant enough to place their grievance before the Court."

15. In view of the authoritative decision passed by the Hon'ble Division Bench, this Court does not find any reasons as to why the benefit extended by the Division Bench to the petitioners in that matter, should not be extended to the petitioners of the present bunch of matters.

16. In view of the above, the present bunch of matters are **disposed of** with the following directions:

(i) The issue relating to Shiksha Mitra be re-examined by the competent authority in the light of the observations made by the Supreme Court in the aforesaid judgments;

(ii) All impugned orders rejecting the candidature of the candidates on account of the error committed by them relating to Shiksha Mitra are **set-aside**;

(iii) It is made clear that candidates, whose names do not find place in the select list dated 12.5.2020, will not get any benefit with the change of marks as their merit position will not be changed for the reason that in case this is allowed to happen at this stage, it will open the entire selection

process which is not the spirit of the order passed by this Court;

(iv) These cases are remitted to the authority of the district concerned for re-examination thereof considering the aforesaid judgment of the Supreme Court and to take a final decision thereon.

(v) The entire process shall be completed by the competent authority within a period of eight weeks from the date of receipt of a copy of this order, considering the respective writ petition as representation of the candidate concerned;

(vi) It is further directed that in case any candidate is found entitled for appointment and is offered appointment on review of his/her case in terms of the aforesaid directions, he/she shall get all the benefits from the date, he/she joins the service.

(vii) Any recovery proceedings, initiated, by the concerned authority shall be kept in abeyance and shall be subject to the decision/outcome of competent authority of the district concerned.

17. With the aforesaid directions, the writ petitions are **disposed of**. It is made clear that this Court has not expressed its view on the merits of any individual case and the competent authority of the district concerned is at liberty to take an independent decision within the parameters fixed by the Judgment of the Hon'ble Apex Court as well as the Division Bench of this Court.

18. In the peculiar facts of the present case, there shall be no order as to cost.

(2023) 1 ILRA 1290
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.12.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE JAYANT BANERJI, J.

Writ Tax No. 1511 of 2022

M/S Jaiprakash Thekedar ...Petitioner
Versus
Commissioner, Commercial Taxes & Anr. ...Respondents

Counsel for the Petitioner:
Ms. Pooja Talwar

Counsel for the Respondents:
C.S.C.

Civil Law - Uttar Pradesh Goods & Services Tax Act, 2017- Registration of petitioner-firm was cancelled - Show cause notice was given without the date of appearing - Ex parte decision held illegal, void and a nullity in the eyes of law- Petitioner allowed to the Revenue to proceed. (E-9)

List of Cases cited:

Pushpam Reality & ors. Vs St. Tax Officer & ors.

(Delivered by Hon'ble Manoj Kumar Gupta, J. & Hon'ble Jayant Banerji, J.)

1. Heard Ms Pooja Talwar, learned counsel for the petitioner and Sri Ankur Agarwal, learned counsel for the revenue.

2. The petitioner is aggrieved by cancellation of the registration of the petitioner-firm under the provisions of the Uttar Pradesh Goods and Services Tax Act, 2017 and the coercive action sought to be taken against the petitioner as a result of cancellation of the registration.

3. The petitioner was given a show cause notice on 31.08.2019 requiring the petitioner to submit reply within seven working days from the date of service of the notice. The notice further mentions that if the petitioner fails to furnish reply within

the stipulated date or fail to appear for personal hearing on the appointed date and time, the case will be decided ex parte on the basis of available records on merits. It was followed by impugned cancellation order dated 21.09.2019 which reads as below :

"This has reference to your reply dated 10/09/2019 in response to the notice to show cause dated 31/08/2019 whereas no reply to notice to show cause has been submitted.

The effective date of cancellation of your registration is 21/09/2019

Determination of amount payable pursuant to cancellation :

Accordingly, the amount payable by you and the computation and basis thereof is as follows :

The amounts determined as being payable above are without prejudice to any amount that may be found to be payable you on submission of final return furnished by you.

You are required to pay the following amounts on or before 01/10/2019 failing which the amount will be recovered in accordance with the provisions of the Act and rules made thereunder.

Head	Central Tax	State Tax/UT Tax	Integrated Tax	Cess
Tax	0	0	0	0
Interest	0	0	0	0
Penalty	0	0	0	0
Others	0	0	0	0
Total	0.0	0.0	0.0	0.0

Place : Uttar Pradesh
Date : 21/09/2019

JAI PRAKASH
Assistant Commissioner
Mahoba, CTO"

4. Learned counsel for the petitioner submitted that the service of show cause notice on the petitioner was not sufficient, as it was not sent by registered post. It is urged that the uploading of the aforesaid notice on the common portal is not sufficient in view of the technical glitches being faced in respect thereto. In this regard, reliance has been placed on a judgement of Madras High Court in ***Pushpam Reality and Others Vs. State Tax Officer & Others*** decided on 04.02.2022. It is further submitted that show cause notice although mentions that in case the petitioner does not appear on the appointed date and time fixed for personal hearing, ex parte order would be passed but the notice does not specify any date and time and thus leaving the petitioner in dark about the date and time on which the petitioner had to appear for personal hearing. It amounts to violation of statutory requirement of according hearing to the person against whom action is proposed to be taken for cancellation of the registration and also breach of principles of natural justice.

5. Learned counsel appearing on behalf of the revenue submits that service of notice via common portal is recognized mode of service under Section 169 of the Act, and therefore, no exception can be taken to the mode of service. However, he is not in a position to dispute that show cause notice does not mention date and time on which the petitioner was supposed to appear for personal hearing.

6. Under first proviso to sub Section (2) to Section 29 of the Act, the person concerned has to be given an opportunity of being

heard. Rule 22(1) of the U.P. Goods and Service Tax Rules, 2017 provides that where the proper officer has reasons to believe that the registration of a person is liable to be cancelled under Section 29 of the Act, he shall issue a notice to such persons in Form GST REG-17 requiring him to show cause within a period of seven working days from the date of service of such notice as to why such registration be not cancelled. Form GST REG-17 reads as follows :

"Form G.S.T. REG-17
[See Rule 22 (1)]
Reference Number- <
To
Registration Number (GSTIN/UIN)
(Name)
(Address)

Show Cause Notice for Cancellation of Registration

Whereas on the basis of information which has come to my notice, it appears that your registration is liable to be cancelled for the following reasons :

1.
2.
3.

...

You are hereby directed to furnish a reply to this notice within seven working days from the date of service of this notice.

You are hereby directed to appear before the undersigned on DD/MM/YYYY at HH/MM.

If you fail to furnish a reply within the stipulated date or fail to appear for personal hearing on the appointed date and time, the case will be decided ex parte on the basis of available records and on merits.

Signature
Designation
Jurisdiction
Place :
Date :

7. The show cause notice given to the petitioner was as follows :

"Form GST REG-17
[See Rule 22(1)]
Reference Number : ZA090819157466S Date : 31/08/2019
To
JAY PRAKASH KHEWARIYA
KABRAI, KABRAI, KABRAI, Mahoba, Uttar Pradesh, 210424

Show Cause Notice For Cancellation of Registration

Whereas on the basis of information which has come to my notice, it appears that your registration is liable to be cancelled for the following reasons :

1. Any Taxpayer other than composition taxpayer has not filed returns for a continuous period of six months.

You are hereby directed to furnish a reply to the notice within seven working days from the date of service of this notice.

If you fail to furnish a reply within the stipulated date or fail to appear for personal hearing on the appointed date and time, the case will be decided ex parte on the basis of available records and on merits.

Place : Uttar Pradesh
Date : 31/08/2019
JAI PRAKASH
Assistant Commissioner"

8. The show cause notice which has been given to the petitioner is not in prescribed format as it is conspicuous by absence of the date and time on which the noticee was to appear for personal hearing. It is also clear from the prescribed format that the noticee has to be afforded opportunity of personal hearing and for that purpose he has to be informed in advance,

the date and time on which hearing will take place. Since in the instant case, the show cause notice does not mention the date and time appointed for personal hearing, therefore, in our opinion, the proceedings held in pursuance thereof are rendered illegal, void and a nullity in the eyes of law. Resultantly, the impugned order is hereby quashed.

9. The petition succeeds and is **allowed** to the above extent with liberty to the Revenue to proceed in accordance with law.

(2023) 1 ILRA 1293
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.01.2023

BEFORE

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

Writ (Tax) No. 167 of 2021

Vinay Rai ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nishant Mishra, Sri Tanmay Sadh, Sri Yashonidhi Shukla

Counsel for the Respondents:
Sri Nimai Dass, A.C.S.C.

Tax-Petitioner seeks quashing of an order – Rejecting the request of the tax deposited - The petitioner, not a director or shareholder in three companies subjected to tax demands, deposited ₹ one crore as a precondition for hearing an appeal – Tribunal allowed the appeal and sought a refund - The impugned order rejected the refund claim prompting the present writ petition - Despite a delay of 1766 days, the respondent's challenge to the Tribunal's order was dismissed – Court noticing the delay directs to refund with interest. (E-9)

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

1. Present writ petition has been filed praying for quashing of the order dated September 17, 2020 passed by respondent No. 3 vide which the prayer of the petitioner for issue of refund of the amount of tax deposited by the petitioner, in terms of the order dated October 1, 2007 passed by a Division Bench of this Court in Civil Misc. Writ Petition No. 1260 of 2007 titled as, Sri Anil Rai v. State of U.P. & others, was rejected. Vide aforesaid order, the petitioner was relegated to avail of his statutory remedy and as a precondition for hearing of appeal, an amount of ₹ one crore was directed to be deposited.

2. As pleaded in the writ petition, in the year 2003 ex parte orders were passed under the U.P. Trade Tax Act, 1948 (for short, ' the Act of 1948') for the assessment years 1999-2000 and 2000-2001 against three different companies namely, M/s Shristi Agencies (Pvt.) Limited, M/s Rudder Steels (Pvt.) Ltd. and M/s Shivalik Ispat and Fabricators Private Ltd., raising a demand of ₹ 20,80,00,000/-, ₹ 6,08,40,000/- and ₹ 6,44,00,000/-, respectively. The petitioner was not a director or the shareholder in the aforesaid three companies. The recovery was sought to be made from M/s Usha India Ltd. and M/s Malvika Steel Pvt. Ltd. being debtor of aforesaid companies. In the later companies, the petitioner was a director and shareholder.

3. The recovery notices issued to the petitioner in individual capacity was

challenged by him by filing a writ petition being Writ Tax No. 782 of 2007. The same was disposed of in terms of detailed order passed in Civil Misc. Writ Petition No. 1260 of 2007 titled as 'Sri Anil Rai v. State of U.P. & others'. The petitioner was relegated to avail of his remedy of appeal and as a condition for hearing the appeal on merits, a sum of ₹ one crore was directed to be deposited vide order dated October 1, 2007. The petitioner as well as his brother preferred appeals before the Commercial Tax Tribunal, Ghaziabad. The same were allowed vide order dated June 9, 2016. The impugned demand raised against the petitioner was quashed and matter was remitted back to the Assessing Officer to continue with the proceedings initiated under Section 8(3) of the Act of 1948 for recovery of the trade tax dues, outstanding against M/s Shristi Agencies (Pvt.) Limited, M/s Rudder Steels (Pvt.) Ltd. and M/s Shivalik Ispat and Fabricators Private Ltd. from M/s Usha India Ltd. and M/s Malvika Steel Pvt. Ltd.

4. After passing of the aforesaid order by the Tribunal, the petitioner filed an application for refund of the amount on August 25, 2017, which was followed by a reminder dated July 23, 2020. It was on the aforesaid application that the impugned order dated September 17, 2020 was passed by respondent no. 3, stating that the Tribunal in its order having not directed for refund of the amount deposited by the petitioner after acceptance of the appeal filed by him, the petitioner should approach the Tribunal for clarification of the order. The application for refund was rejected.

5. After filing of the present writ petition, the respondents challenged the order passed by the Tribunal by filing Sales/Trade Tax Revision Defective No. 28 of 2021 after a delay of 1766 days. The same was dismissed by this Court vide order dated September 2, 2021, as there was no satisfactory explanation available for condonation of inordinate delay of 1766 days in filing the revision. Despite this development, the petitioner has not been refunded the amount deposited in terms of the direction issued by this Court for hearing of the appeal by the Tribunal.

6. The prayer is for a direction to the respondents to refund the amount deposited by the petitioner. The prayer is also for grant of interest in terms of Section 29(2) of the Act of 1948.

7. Learned counsel for the State fairly submitted that after setting aside of the order raising demand against the petitioner by the Tribunal vide order dated June 9, 2016, the petitioner would be entitled to refund of the amount deposited by him in terms of the direction issued by this Court for hearing of the appeal on merits.

8. Though after hearing learned counsel for the respondents, we could have disposed of the writ petition simply with a direction to the respondents to refund the amount deposited by the petitioner as a precondition for hearing of the appeal in terms of the direction issued by this Court but, certain facts need to be noticed, which clearly establish high-handedness on the part of the officers of the Trade Tax Department in dealing with the assessees/persons, who are treated to be in default for payment of any amount due to the department.

9. The facts as have been noticed briefly above, certain amount of tax due from three companies namely, M/s Shristi Agencies (Pvt.) Limited, M/s Rudder Steels

(Pvt.) Ltd. and M/s Shivalik Ispat and Fabricators Private Ltd., was sought to be recovered from M/s Usha India Ltd. and M/s Malvika Steel Pvt. Ltd. in which the petitioner along with his brothers Anil Rai were the shareholders and directo₹ M/s Usha India Ltd. and M/s Malvika Steel Pvt. Ltd. are said to be debtors of the companies, from whom amount of tax is due. The amount was sought to be recovered from them in their individual capacity. The order was challenged by them by filing writ petitions before this Court. They were relegated to avail of their remedy of appeal before the Tribunal, which was to be heard on merits, subject to deposit of ₹ one crore by both the brothe₹ Undisputedly, the petitioner deposited ₹ one crore. Both the appeals preferred by the petitioner and his brother were allowed by the Tribunal vide order dated June 9, 2016 and demand against them was quashed with liberty to the Department to deal with the recovery from the companies. An application for refund was filed by the petitioner on August 25, 2017, which remained pending. A reminder was sent on July 23, 2020 on which the order dated September 17, 2020 was passed, rejecting the claim for refund on the flimsy ground that the Tribunal while accepting the appeal had not directed for refund of the amount.

10. We are not required to deal with that order on merits for the reason that learned counsel for the State has fairly submitted that after the order of demand was set aside by the Tribunal, the petitioner will be entitled to refund of the amount deposited as pre-condition for hearing of appeal on merits. Still further, what is required to be noticed is that the order of the Tribunal dated September 17, 2020 was not challenged by the Department immediately when the same was passed. But, when the petitioner filed the present writ petition in this Court, impugning the order rejecting his prayer for refund, Sales/Trade Tax Revision Defective No. 28 of 2021 was filed, after a delay of 1766 days. The same was dismissed on September 2, 2021 as the delay could not be satisfactorily explained .

11. More than a year has elapsed thereafter, but the refund has still not been given to the petitioner. Still further, a counter affidavit has been filed by respondent Nos. 3 and 4 in this Court on September 19, 2021, which is silent on the fact regarding challenge to the order passed by the Tribunal.

12. There is a specific averment made in paragraph No. 19 of the writ petition by the petitioner that the order passed by the Tribunal on June 9, 2016 was not challenged by the respondents and the same attained finality. To this, in the counter affidavit filed, there is no response, except a bald statement that the contents are not admitted. It is not mentioned that the aforesaid order was challenged before this Court by filing Sales/Trade Tax Revision Defective No. 28 of 2021, which already stood dismissed vide order dated September 2, 2021 before filing of the counter affidavit dated September 19, 2021. To that extent, there is concealment of facts in the counter affidavit filed by the respondents. From the facts of the present case, what is established is that retention of the amount deposited by the petitioner as a precondition for hearing of appeal on merits would be a direct violation of Article 265 of the Constitution of India, as the State has no authority to retain the amount after the demand raised was set aside by the Tribunal and the revision against the same was dismissed by this Court.

13. Let the amount of refund due to the petitioner be now paid within a period of four weeks along with interest due in terms of Section 29(2) of the Act of 1948. The interest shall be calculated from January, 2018 onwards at the rates specified in Section 29(2) of the Act of 1948.

14. As apparently in the case in hand the delay in grant of refund to the petitioner is patently illegal in view of the order passed by respondent no. 3, the State shall be at liberty to recover the amount of interest to be paid to the petitioner from the officer(s) concerned, as public exchequer should not be burdened on account of illegal action by the officer(s) of the Department.

15. The writ petition is allowed with costs of ₹ 10,000/- to be paid along with the amount of refund.

(2023) 1 ILRA 1296
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.01.2023

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Sale/Trade Tax Revision No. 486 of 2011
alongwith
Sale/Trade Tax Revision No. 490 of 2011

M/s Shree Gorakhnath Food(P) Ltd. ...Applicant

Versus

The Commissioner, Commercial Taxes, U.P., Lko. ...Respondent

Counsel for the Applicant:
Sri Aditya Pandey, Sri Bharat Ji Agarwal, Sri Shubham Agrawal

Counsel for the Respondents:
C.S.C.

Civil Law - U.P. Value Added Tax Act, 2008 - Sections 58 & 21- Challenge to order dismissing second appeal and rejecting books of accounts on grounds of excessive electricity consumption - Assessing Authority's finding on increased consumption without corresponding production rise - Precedents establish excessive electricity use alone insufficient for book rejection.

Revision dismissed. (E-9)

List of Cases cited:

1. Mahabir Prasad Jagdish Prasad Vs Commissioner of Sales Tax, U.P., 1971 U.P.T.C. 43

2. M/s Mahashakti Oil Mills, Bisheshargani, Varanasi Vs The Commissioner of Sales Tax, U.P., Lucknow, 1972 U.P.T.C. 361

3. M/s Sunita Ispat Pvt. Ltd. Vs Commissioner, Commercial Tax, U.P., VSTI 2016 (27) B-1272

4. M/s Abhinav Steels Pvt. Ltd. Vs The Commissioner, Commercial Tax, U.P. Lucknow, 2017 U.P.T.C. 344

5. M/s Melton India, Gautambudh Nagar Vs The Commissioner, Trade Tax, U.P. Lucknow 2005 NTN (26) 507

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

1. Heard Sri Shubham Agrawal, learned counsel for the revisionist and Sri Rishi Kumar, learned Standing Counsel for the State.

2. These revisions under Section 58 of the U.P. Value Added Tax Act, 2008 (*hereinafter called as "Act of 2008"*) have been filed assailing the order dated 12.05.2011 passed by the Tribunal dismissing the second appeal of the Assessee being Second Appeal No.104 of

2011 and allowing Second Appeal No.38 of 2011 and Second Appeal No.47 of 2011 filed by the Revenue.

3. The revision No.486 of 2011 was admitted on 07.07.2011 on the question, "*whether on account of higher consumption of electricity during the period 01.01.2008 to 31.03.2008, the books of account of Assessee-revisionist could be rejected?*"

4. Revision No.490 of 2011 was admitted on the question "*whether on account of higher consumption of electricity during the Assessment Year 2008-09, the books of account of Assessee-revisionist could be rejected?"*

5. The Assessee before this Court had established a factory for manufacturing of Flour, Maida and Sooji. The matter relates to Assessment Year 2007-08 for the period 01.01.2008 to 31.03.2008, and Assessment Year 2008-09. The Assessee had disclosed total purchase of Rs.99,80,498/- and sale of Rs.1,20,78,303/- for the period 01.01.2008 to 31.03.2008. During the assessment period of 2007-08, a show cause notice was issued to the Assessee and the same was replied on 28.04.2010. The Assessing Authority rejected the books of accounts vide order dated 15.06.2010 and enhanced the turn over on the ground of excessive consumption of electricity. Aggrieved by the order, a first appeal was preferred before the Additional Commissioner, Grade-II (Appeals), Commercial Tax, Gorakhpur. The appeal was allowed vide order dated 15.11.2010 and the quantum of tax was reduced. Against the order dated 15.11.2010, the Department filed Second Appeal No.38 of 2011. The Tribunal allowed the appeal of the Department while rejected the appeal of the Assessee. During the assessment proceedings for the year 2008-09, the Assessing Authority found that there was consumption of 26.351 units of electricity for production of 1 quintal of flour against the disclosed consumption of 8.840 unit of electricity by the Assessee. The first Appellate Authority reduced the tax liability imposed by the Assessing Authority in the first appeal relying upon the consumption of electricity for the earlier year 2007-08 at 20.887 units per quintal. Against the order of first Appellate Authority, one appeal was filed by the Assessee being Second Appeal No.104 of 2011 and the other appeal filed by the Revenue being Second Appeal No.47 of 2011. Hence the present revisions.

6. Both the revisions are being heard together with the consent of counsel for the parties and are being decided by the common order.

7. Sri Shubham Agrawal, learned counsel for the revisionist submitted that the Assessing Authority as well as Tribunal could not have rejected the books of accounts only on the ground of excessive consumption of electricity. He submitted that no adverse inference was drawn by the Assessing Authority with regard to filing of monthly return. According to learned counsel, books of accounts cannot be rejected simplicitor on the ground of excessive consumption of electricity. The Assessee had furnised an explanation that due to the fact that plants and machineries were sufficiently old and maintenance and repairing of the plants and machineries was not done, and also the electricity of residential quarter of the officials of the Company was supplied through factory premises, where Air Conditioners were installed and due to which, the consumption of electricity was higher. Reliance has been placed upon Division

Bench judgment of this Court in **M/s Mahashakti Oil Mills, Bisheshargani, Varanasi vs. The Commissioner of Sales Tax, U.P., Lucknow, 1972 U.P.T.C. 361; Mahabir Prasad Jagdish Prasad vs. Commissioner of Sales Tax, U.P. 1971 U.P.T.C. 43** and decision of co-ordinate Bench of this Court in **M/s Abhinav Steels Pvt. Ltd. vs. The Commissioner, Commercial Tax, U.P. Lucknow, 2017 U.P.T.C. 344 and M/s Sunita Ispat Pvt. Ltd. vs. Commissioner, Commercial Tax,** U.P., VSTI 2016 (27) B-1272.

8. Per contra, learned Standing Counsel while opposing the revision, submitted that the Assessing Authority had recorded a finding that for the period 01.4.2007 to 31.12.2007, the electricity consumption of revisionist's Unit was 8,55,375 units. Further, during this period, the Assessee had purchased 96728.21 quintals of wheat and the total wheat grinded was 96760.05 quintals. Thus, electricity consumed per quintal of wheat was 8.840 units. On the other hand, for the period 01.01.2008 to 31.03.2008, the total electricity consumed was 1,83,625 units and total grinding of wheat, which was done, was 8791.14 quintals. Thus, the electricity consumed for each quintals of wheat was 20.887 units. He further contended that the Tribunal had rightly rejected the appeal of the Assessee for the Assessment Year 2008-09 and allowed the appeal of the Tribunal as during the period the Assessee had disclosed lessor turn over in spite of higher consumption of electricity.

9. According to learned Standing Counsel, the Assessing Authority as well as Tribunal after recording a finding that for the period 01.04.2007 to 31.12.2007, the consumption per quintal for grinding wheat was 8.840 units while for the period 01.01.2008 to 31.03.2008 was 20.887 units which is more than double and it cannot be believed that such high electricity consumption was because of the Air Conditioners working at the residential quarters of the officials. Emphasis was laid that no Air Conditioners are used during the winter season especially in the city of Gorakhpur where it is an extreme cold climate. Reliance has been placed upon a decision of this Court in **M/s Melton India, Gautambudh Nagar vs. The Commissioner, Trade Tax, U.P. Lucknow 2005 NTN (26) 507,** which was affirmed by Hon'ble Apex Court in **Civil Appeal No.373 of 2007 (Melton India vs. Commissioner Trade Tax, U.P.) reported in 2007 N.T.N. (33) 169.**

10. Having heard the respective counseld for the parties and from perusal of record, it transpires that the sole question, which needs to dealt with is, *"whether the books of accounts can be rejected by the Assessing Authority on the basis of excessive consumption of electricity?"*

11. This question has been directly and indirectly under consideration of this Court as well as Hon'ble Apex Court for a long time. The Division Bench of this Court in Mahabir Prasad Jagdish Prasad (supra) was of the view that high consumption of electricity may be a circumstance justifying action under Section 21 of U.P. Sales Tax Act, 1948 (*hereinafter called as "Act of 1948*"), but, the Court was of the view that high consumption of electricity by itself is no material for rejecting the books of accounts of the Assessee. The judgment of **Mahabir Prasad Jagdish Prasad (supra)** was followed by another Division Bench in M/s Mahashakti Oil Mills, **Bisheshargani,**

Varanasi (supra) wherein the proceedings were under Section 21 of Act of 1948 and the Court was of the view that if no material was brought by the taxing authorities on record, there was no justification for rejecting the books of accounts.

12. The said judgment was subsequently followed in **M/s Sunita Ispat Pvt. Ltd. (supra)** and the Court found that excessive electricity consumption cannot be a ground for rejection of books of accounts.

13. In **M/s Abhinav Steels Pvt. Ltd. (supra)** also the coordinate Bench of this Court, following the earlier decisions, had found that the books of accounts cannot be discarded only on the ground of excessive use of electricity. The Court further held that excess consumption of electricity, can at best given rise to suspicion so as to warrant examination of other materials.

14. In both the judgments of M/s Sunita Ispat Pvt. Ltd. (supra) and M/s Abhinav Steels Pvt. Ltd. (supra), no material was brought before the Tribunal or the Court so as to demonstrate that the production was not commensurate with the use of electricity and the Court in general held that excessive use of electricity cannot be a ground for rejection of books of accounts.

15. The Division Bench of this Court was also of the view that only when the material has been brought on record to justify the rejection of books of accounts then only the high consumption of electricity can be considered.

16. In the case in hand, there is no denial of the fact that for nine months starting from 01.04.2007 to 31.12.2007, the total electricity consumption was 8,55,375 and total grinding of wheat, which was done, was 96760.05 quintals, while for the remaining period i.e. 01.01.2008 to 31.03.2008, only 8791.14 quintals of wheat was grinded consuming 1,83,625 units of electricity, which comes to 20.887 units of electricity per quintal compared to the earlier period, where the consumption was 8.840 units per quintal. The difference between consumption of electricity for the period 01.4.2007 to 31.12.2007 and 01.01.2008 to 31.03.2008 is about 2.5 times high, for which justification given by the Assessee to the extent of electricity being consumed by the officials at their residential premises for running Air Conditioners, fans and light, cannot be accepted, as the period for which explanation has been given is the winter time when there is no use of Air Conditioners and the domestic consumption cannot be believed on such a higher side.

17. In **Melton India (supra),** the Apex Court while considering the case of excessive consumption of electricity, when compared to production, found that when electricity consumption goes up, a reasonable inference can be drawn that production have gone up. If the electricity consumption is going up, but the production is seen to be going down, a reasonable inference can, prima facie, be drawn that there was suppression of production and consequently suppression of sales in order to avoid sales tax. Relevant paras 9, 10 and 12 of the judgment are extracted hereas under :

"7. In this connection we may refer to the electricity consumption and production in the appellant's factory for the three

assessment years in question, which are as follows:

Assessment Year	*Production*	*Electricity consumed*
2001-01	*402 MT*	*5,13,596*
2001-02	*268 MT*	*6,38,164*
2002-03	*314 MT*	*6,68,736*

10. A perusal of the above figures shows that while the electricity consumption has clearly been going up, the production has gone down from 402 MT to 314 MT. Ordinarily, when electricity consumption goes up, a reasonable inference can be drawn that the production will also have gone up. If the electricity consumption is going up but the production is seen to be going down, a reasonable inference can, prima facie, be drawn that there was suppression of production and consequently suppression of sales in order to avoid sales tax.

11. ....

12. In view of the above, we agree with the High Court that excessive power consumption, prima facie, establishes the assessee's intention to suppress the production and the turn over."

18. Reliance placed by the Assessee counsel on the report of M/s Flour Mill Engineers and Consultants dated 20.06.2010 before the first Appellate Authority wherein it was stated that an inspection of the factory was done on 10.06.2010 and it was found that machinery was old and there was fault in the electricity being supplied to the factory. This report is of the year 2010 filed before the first Appellate Authority and that too by a private person. The report cannot be taken into account as the relevant period is 01.01.2008 to 31.03.2008. Subsequent report after two and a half years cannot be taken into account and the findings recorded by the first Appellate Authority relying upon said report was rightly negated by the Tribunal.

19. Thus, in the light of the constant view of this Court and Hon'ble Apex Court, it is apparent that the Assessing Authority had rightly rejected the books of accounts on the basis of high consumption of electricity after dealing with each aspect of the case and recording a categorical finding as to the production of flour made from the wheat during the relevant period of assessment year in question. The earlier Division Bench and coordinate Bench of this Court had only held that rejection of books of accounts cannot be done on the basis of high consumption when there was no material on record. However, in the present case, the Assessing Authority has demonstrated how the electricity was consumed by the Assessee during the period 01.04.2007 to 31.12.2007 and 01.01.2008 to 31.03.2008 when the production did not increase but only the consumption was high.

20. In **M/s Melton India, Gautambudh Nagar (supra)**, the Apex Court had held that where the production does not increase with the high consumption of electricity, inference is drawn as to the evasion of sales tax by the Assessee by not disclosing the sale.

21. Considering the facts and circumstances of the case, I find that no ground for interference is made out in the order of Tribunal. Both the revisions lack merits and are hereby dismissed.

22. The question of law stands answered in favour of the Revenue and against the Assessee.

(2023) 1 ILRA 1301
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 10.01.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No. 103 of 2023

Museebat @ Rahat Ali ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Gopesh Tripathi

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Section 111-Prayer for quashing a notice issued under Section 110(G) Cr.P.C (citing the possibility of a breach of peace) – Notice required the applicant to furnish a personal bond of Rs. 2 lac and two sureties of the same amount – Challenges the legality of the notice as it lacks with the requirements of Section 111 Cr.P.C - finds the impugned notice to be deficient in substance and lacking a judicious application.

Notice is quashed. (E-9)

List of Cases cited:

Baleshwar S/o Ram Saran & ors. Vs St. of U.P., 2008 (63) ACC 374

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

1. Heard Sri Gopesh Tripathi, learned counsel for applicant as well as Sri Diwaker Singh, learned A.G.A. for State and perused the record.

2. This application under section 482 Cr.P.C. has been filed to quash the Notice under Section 110 (g) Cr.P.C. dated 20.12.2022, Police Station Shivgarh, Raibareli, issued by Sub Divisional Magistrate, Mahrajganj, Raibareli and proceedings arising therefrom.

3. Record shows that Police of Police Station Shivgarh submitted a challan report dated 30.11.2022 against applicant Museebat @ Rahat Ali, whereby he has been challaned under sections 110 (G) Cr.P.C. It is alleged in aforesaid report that there is possibility of breach of peace. In order to prevent same, aforesaid person has been callaned under section 110 (G) Cr.P.C. In the interest of Justice, requisite amount of personal bond and surety bond be obtained from above named persons.

4. After aforesaid report was forwarded by S.H.O. P.S. Shivgarh, Sub Divisional Magistrate, Mahrajganj, Raibareli issued notice dated 20.12.2022 under sections 110 (G) Cr.P.C asking applicant to furnish personal bond of Rs. 2 lac and two sureties of the same amount.

5. Feeling aggrieved by aforesaid notice dated 20.12.2022, applicant namely Museebat @ Rahat Ali has now approached this Court by means of present application under section 482 Cr.P.C.

6. Learned counsel for applicant contends that notice dated 20.12.2022, issued by Sub Divisional Magistrate, Mahrajganj, Raibareli is patently illegal. Same does not contain full particulars nor the full substance of Police Report, on the basis of which aforesaid notice has been issued. It is thus urged that impugned notice does not fulfill the requirement of Section 111 Cr.P.C. In support of above, reliance is placed upon **Baleshwar S/o Ram Saran and Others Vs. State of U.P.,**

2008 (63) ACC 374, wherein a learned Single Judge has observed as follows in paragraphs 6, 7 and 8:

"6. Having given my thoughtful consideration to the rival submissions made by parties Counsel and after going the impugned notice, I find force in the aforesaid contention of the learned Counsel for the applicants that the impugned notice is wholly illegal and void. Annexure 1 is the copy of the impugned notice, which was issued by SDM Mawana (Meerut) to the applicants, whereby they were called upon to appear on 10.12.2004 and show cause as to why they be not ordered to execute a personal bond for Rs. 30,000/- and furnish two sureties each in the like amount to keep peace for a period of one year. In this notice it is only mentioned by the SDM concerned that he is satisfied with the report of S.O. of P.S. Mawana that due to old litigation, there is enmity between the parties, due to which there is likelihood of the breach of peace. It is not mentioned in this notice that what type of litigation is going on between the parties and in which Court the said litigation is pending. Number of the case and other details of the said litigation have also not been mentioned in the impugned notice. As such the impugned notice issued by the learned SDM Mawana is vague and it does not fulfil the requirements of Section 111, Cr.P.C. This type of notice has been held to be illegal by this Court in the case of Ranjeet Kumar v. State of U.P. (supra).

7. Making an order under Section 111 of the Code is not an idle formality. It should be clear on the face of the order under Section 111, Cr.P.C. that the order has been passed after application of judicial mind. If no substance of information is given in the order under Section 111, the person against whom the order has been made will remain in confusion. Section 114 of the Code provides that the summons or warrants shall be accompanied by a copy of the order made under Section 111. This salutary provision has been enshrined in the Code to give notice of the facts and the allegations which are to be met by the person against whom the proceedings under Section 107, Cr.P.C. are drawn.

8. It should be borne in mind that the proceedings under Section 107/116 of the Code some times cause irreparable loss and unnecessary harassment to the public, who run to the Court at the costs of their own vocations of life. Unless it is absolutely necessary, proceedings under Section 107/116, Cr.P.C. should not be resorted to. Experience tells that proceedings like the one under Section 107/116 of the Code are conducted in a most lethargic and lackadaisical manner by the learned Executive Magistrate causing harassment to public beyond measure."

7. Learned counsel for the applicant has placed further reliance upon judgments of this Court reported in **2004 (5) ACC 734 Aurangzeb and others Vs. State of U.P. and another, 2002 (45) ACC 627 Ranjeet Kumar and others Vs. State of U.P. and others and 2008 (61) ACC 540 Har Charan Vs. State of U.P. and another** in support of his contention.

8. In view of aforesaid, this Court has examined the impugned notice dated 20.12.2022, issued by Sub Divisional Magistrate, Mahrajganj, Raibareli under sections 110(G) Cr.P.C. The Court finds that impugned notice contains a bare recital that there is apprehension of commission of cognizable offence. Impugned notice does not contain full substance of information given by concerned Police Officer.

Consequently, concerned Magistrate has not acted judiciously while issuing the impugned notice dated 20.12.2022. The notice under Section 110G Cr.P.C. has been issued only on the basis of one case the impugned notice does not contain the substance of allegation which has been made against the applicant and has been issued in a routine manner on a printed format.

9. In view of above, the impugned notice dated 20.12.2022, issued by Sub Divisional Magistrate, Mahrajganj, Raibareli, cannot be sustained. Accordingly, the same is liable to be quashed.

10. Consequently, present application succeeds and is liable to be **allowed.** It is accordingly allowed. Impugned notice dated 20.12.2022 is quashed. Sub Divisional Magistrate, Mahrajganj, Raibareli, shall issue a fresh notice after undertaking requisite exercise in the light of observations made herein above and in accordance with law, if deem fit under the circumstances of the case.

(2023) 1 ILRA 1303
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.01.2023

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application U/S 482 No. 216 of 2023

Brijeash Saurabh Mishra @ Brijesh Mishra ...Applicant

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Manoj Kumar Misra

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure - Section 273-The impugned order closed the opportunity for the applicant to cross-examine PW-11, Uma Shankar Tripathi, in a case under Section 2/3 U.P. Gangster Act – Violation of Section 273 Cr.P.C - Trial court's exercise improper.

Application allowed. (E-9)

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

1. Heard Sri Manoj Kumar Misra, learned counsel for the applicant and Sri Rajesh Kumar Singh, learned AGA for the State.

2. By means of this application filed under Section 482 Cr.P.C., the applicant has prayed following main reliefs:-

"For the facts, reason and circumstances as stated in accompanying affidavit it is most respectfully prayed before this Hon'ble Court that it may kindly be pleased to set aside the order dated 17.11.2022 passed in Session Trail no.70/2015 State Vs. Brijesh Saurabh Mishra and others, arising out Crime No.237/2013, Under Section 2/3 U.P. Gangester Act concerning police station Antu District Pratapgarh pending in the Court of Additional Session Judge Court No.05, Pratapgarh by means of which he has closed the opportunity of cross examination for the applicant and also set aside the order dated 25.11.2022 passed by Additional Sessions Judge, court no.05 Pratapgarh in aforesaid case and direct Leaned Court below to recall the witness and allow the applicant to cross examine him in the interest of justice.

It is further prayed before this Hon'ble Court that it may kindly be pleased to stay further proceeding in aforesaid case, during the pendency of this case in interest of justice."

3. The precise contention of the learned counsel for the applicant is that the learned trial court vide order dated 17.11.2022 recorded the chief statement of one PW-11, Uma Shankar Tripathi. On that, particularly at that point of time, counsel for the applicant was busy in another court, therefore, one application was filed on his behalf to adjourn the case as his counsel was not able to cross-examine PW-11 Uma Shankar Tripathi. Learned trial court rejected the said application for the reason that the counsel for the present applicant had not indicated about the court where he was busy.

4. Since no adjournment of any kind whatsoever was sought earlier to cross-examine PW-11, rather the chief-examination of the said witness was recorded on 17.11.2022, therefore, at least, one short time should be given to the counsel for the applicant in terms of Section 273 Cr.P.C., which clearly provided that except as otherwise expressly provided, all evidence taken in the court of the trial or other proceedings shall be taken in the presence of the accused or when his personal attendance is dispensed with, in the presence of his pleader. On the strength of aforesaid legal proposition, the present applicant has filed an application dated 25.11.2022 (Annexure No.5) under Section 311 Cr.P.C. to recall the order dated 17.11.2022 and to provide one opportunity to cross-examine PW-11. By means of order dated 25.11.2022 (Annexure No.6), learned trial court rejected the said application indicating therein that the cases relating to MP/MLA should be disposed of with expedition in terms of directions being issued by the Hon'ble High Court and said matter was old, therefore, adjournment was not possible. Learned trial court has also indicated that the counsel had not indicated in his application about the court where he was busy. Therefore, the ground of business of any Advocate on particular date may not be a good ground to adjourn the case.

5. Sri Misra has sated that had this case been in a nature that frequent adjournment had been sought from the side of the present applicant, the observation of the learned trial court would have been appropriated but in the present case, admittedly, on the date when the chief-examination of PW-11 was recorded, the opportunity of cross-examination of such witness has been closed by the learned trial court. The aforesaid exercise is violative of Section 273 Cr.P.C. Therefore, he has requested that quashing the orders dated 17.11.2022 and 25.11.2022, the present applicant may be afforded an opportunity to cross-examine PW-11.

6. Learned AGA has opposed the aforesaid request and has submitted that PW-11 has only proved chik FIR and if he has not been cross-examined by the applicant, the applicant might have not suffered any irreparable loss and that may not be considered as miscarriage of justice to the present applicant, therefore, the orders dated 17.11.2022 and 25.11.2022 passed by the learned trial court need no interference.

7. Heard learned counsel for the parties and perused the material available on record.

8. This is trite law as well as it has got statutory prescription under Section 273 Cr.P.C. that all evidences taken in the court of trial or other proceedings shall be taken

in the presence of the accused or if his personal attendance is dispensed with, in the presence of his pleader. That statutory prescription may not be avoided. Besides, this is not a case where the frequent adjournments have been sought from the side of the present applicant, rather it was the first application for adjournment filed on 17.11.2022 when the chief-examination of PW-11 has been recorded and on the same date, such opportunity has been closed without giving any short adjournment, therefore, the same may not be considered as a proper exercise being carried out by the learned trial court. Learned counsel might have been busy in another court at particular point of time and if such application was filed before the learned court below, that application should have been considered properly in the light of statutory prescription of Section 273 Cr.P.C. vis-a-vis in the light of the fact that the cross-examination of a witness is a right of the other side. Such right may be denied only in exceptional circumstances or in such circumstances where the order sheet reveals that the other side/ party is habitual in seeking adjournments for one reason or another.

9. Therefore, in view of the facts and circumstances, considered above, I am of the considered opinion that the impugned orders dated 17.11.2022 and 25.11.2022 have not been passed properly, therefore, both the orders are set aside.

10. Learned trial court is directed to provide one opportunity to the present applicant/ his counsel to cross-examine PW-11 fixing a single date, may be a short date, and if on that date, said prosecution witness could not be examined for any lapse on the part of the present applicant, any appropriate orders may be passed indicating the reason. Since the trial in question is of 2015, therefore, the precaution to that effect, which has been taken by the learned trial court, is appreciated, but in the light of such precaution, a single opportunity to cross-examine PW-11 may not be denied.

11. Accordingly, the application is **allowed.**

(2023) 1 ILRA 1305
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.11.2022

BEFORE

THE HON'BLE DR. GAUTAM CHOWDHARY, J.

Application u/s 482 No. 27577 of 2022

Sumit Agarwal & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Sheshadri Trivedi, Sri Ashish Dutt Dubey, Sri Satish Trivedi (Sr. Advocate), Sri Gopal S. Chaturvedi (Sr. Advocate)

Counsel for the Opp. Parties:
G.A., Sri Deepak Dubey, Sri Rajesh Pachauri, Sri Shiv Bahadur Singh

Criminal Law - Indian Penal Code, 1860 - Sections 498A, 304-B, 323, 506 & 313 - Section 3/4 of Dowry Prohibition Act ,1961 – SC directs CBI to investigate and Asides his bails - The C.B.I. submitted a closure report asserting the allegations were unsubstantiated - Magistrate had already taken cognizance before – Applicant moved to court U/S 482 Cr.P.C – Asked for interim bail by applicants counsel as per findings of CBI – Oppose, as incident and ,report is of 17 months later – court acknowledged that both reports must be considered cumulatively to determine if grounds exist to presume guilt - court declined to quash summoning order- applicants given the

option to raise their concerns -Application disposed - interim orders discharged. (E-9)

List of Cases cited:

1. Vinay Tyagi Vs Irshad Ali @ Deepak reported in 2012 SCC 903

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

1. The facts giving rise to the instant application are that a first information report dated 07.08.2020 was lodged with regard to the incident dated 03.08.2020 in Case Crime No. 623 of 2020 under Section 498A, 304-B, 323, 506, 313 I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station Tajganj, District Agra with the averments that marriage of the daughter of the opposite party no.2 namely, Deepti was solemnised with the applicant no.1 in which more than Rs. 1.5 crores were spent, inspite of the same, the applicants were not happy with the marriage and they started making demand of dowry and due to non-fulfilment of the same, she was tormented. It is also averred that in the year 2017, the applicants assaulted her, due to which she sustained injuries and her medical examination was done in the Government Hospital, Vrindawan. Again on 03.08.2020, the applicant no.2, who is the father in law of deceased telephonically demanded dowry and she was brutally assaulted and to save their skin, the deceased was admitted in Sarvodaya Hospital, Faridabad, where she died on 06.08.2020. Thereafter inquest report and post mortem was conducted on 06.08.2020 and the doctor opined the cause of death was shock and septicaemia and the matter was entrusted for investigation. The statements of the first informant/opposite party no.2 as well as maid and caretaker of the daughter of the applicant no.1 and deceased were recorded under Section 161 Cr.P.C.. In the meantime, the applicant no. 2 filed a Criminal Misc. Anticipatory Bail Application No. 5457 of 2020 (Smt. Anita Agarwal and two others Vs. State of U.P. and another) whereas the applicant nos. 3, 4 and 5 filed a separate anticipatory bail application no. 5460 of 20220 (S.C.Agarwal Vs. State of U.P. and another) and both the anticipatory bail applications were decided by a common order dated 29.09.2020, whereby the applicant nos. 2, 3, 4, 5 were granted anticipatory bail, till conclusion of the trial. Against the order dated 29.09.2020 passed by the co-ordinate Bench of this Court, the opposite party no.2 approached the Hon'ble Supreme Court by way of Criminal Appeal No.872-873 of 2020 arising out of S.L.P. (Cri) Nos. 4935-4936 (Dr. Naresh Kumar Mangla Vs. Smt. Anita Agarwal and others) which was allowed vide Judgement and order dated 17.12.2020, setting aside the order dated 29.09.2020, further directing the C.B.I. to conduct further investigation of the case arising out of Case Crime No. 0623 of 2020 registered as Police Station Tajganj, District Agra. Pursuant to the order passed by Hon'ble Apex Court, the C.B.I. registered F.I.R. No. RCO5320215001 at Police Station SCB, Lucknow. The applicant no.1, who happens to be the husband of the deceased, filed Criminal Misc. Bail Application No. 39500 of 2022 (Sumit Agarwal Vs. State of U.P.) before this Court, which came up for consideration before this Court on 07.04.2021 and the co-ordinate Bench of this Court vide order dated 07.04.2021 had rejected the bail prayer of the applicant no.1, however, the applicant no.1 approached the Hon'ble Apex Court by way of filing Special Leave to Appeal No. 3975 of 2021 (Sumit Agarwal Vs. State of Uttar Pradesh and another) and the Hon'ble Apex

Court considering the fact that three year old daughter of the applicant no.1 suffering from acute bacillary Dysentery granted interim bail to the applicant no.1 for a period of six weeks. Later on, the interim bail of the applicant was confirmed, vide order dated 18.07.2022, copy of which order has been produced before this Court and taken on record. In the meantime, the investigating officer conducted investigation and after investigation, charge sheet was submitted against the applicants vide charge sheet no. 705 of 2020 dated 24.10.2020 arising out of Case Crime No. 623 of 2020 under Sections 498A, 304B, 323, 506 I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station Tajganj, District Agra upon which cognizance/summoning order was passed vide order dated 05.11.2020 by the learned Chief Judicial Magistrate, Agra and the case was registered as Criminal Case No. 37339 of 2020 (State Vs. Sumit Agarwal and others). It is this summoning order as well as proceedings of criminal case which is under challenge before this Court.

2. Sri Satish Trivedi learned Senior Advocate along with Sri Gopal S. Chaturvedi, learned Senior Advocate, assisted by Sri Sheshadri Trivedi, learned counsel for the applicants argued that pursuant to the order dated 17.12.2020 passed by Hon'ble Apex Court, the investigation by the C.B.I. was carried out, which culminated in closure report dated 28.06.2022 with the observations that the allegations against the accused persons have not been substantiated, copy of which is annexed as Annexure-27 to the affidavit accompanying the instant 482 Cr.P.C. application. He further submits that even Hon'ble Apex Court while confirming the interim bail of the applicant no.1 had observed that the C.B.I., after investigation, submitted final closure report under Section 173 (8) Cr.P.C. Learned counsel further submits while passing the order dated 17.12.2020, the Hon'ble Apex Court had observed to entrust the investigation of the case to the C.B.I. as the conduct of Investigating authorities from the stage of arriving at the scene of occurrence till filing of charge sheet had not inspired confidence in the robustness of the process with respect to the veracity of the suicide note, medical examination of injuries and the post miscarriages of the deceased, therefore the Hon'ble Apex Court had directed for further investigation by the C.B.I.and the C.B.I. after investigation submitted closure report and that once the closure report submitted by C.B.I., the charge sheet under Section 173 (2) Cr.P.C. lost its significance and effect, thus the learned Magistrate, prior to proceeding with the case must have gone through the closure report, whereas in the instant case, the learned Magistrate in a routine manner took the cognizance and proceeded with the case without considering the closure report as well as other material available on the face of record and had the Magistrate gone through the report, instead of proceedings against the applicants, would have dropped the proceedings against the applicants but by not doing so, the learned Magistrate has committed an illegality thus, the impugned cognizance/summoning order as well as proceedings are liable to be quashed by this Court.

3. On the other hand, Sri S.B.Singh and Sri Rajesh Pachauri, learned counsel for the opposite party no.2 submits that in the instant case, cognizance was taken on 05.11.2020, whereas C.B.I. submitted the closure report on 28.06.2022 i.e. after a lapse of more than 19 months and therefore there is no illegality or perversity in the

summoning order. He next submits that Hon'ble Apex Court while passing the order for further investigation to be conducted by the C.B.I., has not annulled the earlier investigation conducted by the U.P.Police. He next submits that after cognizance, the applicants applied for anticipatory bail which was allowed by this co-ordinate Bench of Court but that order has been set aside by Hon'ble Apex Court directing the matter to be further investigated by the C.B.I. and thus the Hon'ble Apex Court was fully conscious and instead of annulling the earlier investigation, ordered for further investigation to be conducted by the C.B.I. and that the C.B.I. was confined only to further investigate the matter and submit its report and the CB.I. was not entrusted to lodge the F.I.R. He next submits that the learned Magistrate has not committed any illegality in passing the order impugned and therefore the impugned order calls for no interference by this Court in exercise of powers conferred under 482 Cr.P.C. jurisdiction.

4. Per contra, learned A.G.A. too has opposed the application and argued that there is no illegality or impropriety in the order impugned and thus the the same is liable to be affirmed by this Court and the instant 482 Cr.P.C. is liable to be dismissed.

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

6. The Hon'ble Apex Court in a decision of ***Vinay Tyagi Vs. Irshad Ali @ Deepak reported in 2012 SCC 903*** has observed in paragraph no. 32 as under:-

"32 Both these reports have to be read conjointly and it is the cumulative effect of the reports and the documents annexed thereto to which the Court would be expected to apply its mind to determine whether there exist grounds to presume that the accused has committed the offence. If the answer is in the negative, on the basis of these reports, the Court shall discharge an accused in compliance with the provisions of Section 227 of the Code."

7. In the instant case, cognizance was taken on 05.11.2020, whereas the closure report was filed on 28.06.2022 which makes abundantly clear that the learned Magistrate has taken cognizance long back. It goes without saying that the Hon'ble Apex Court while passing the order for further investigation to be conducted by the C.B.I. has not set aside the investigation already conducted by the police. Significant feature of the further investigation is that it does not have effect of wiping out directly or impliedly the initial investigation conducted by the investigating agency, it is a kind of continuation of the previous investigation. It is necessary for the Magistrate to have due regard to both the reports- the initial report which was submitted under Section 173 (2) as well as the report under Section 173 (8) Cr.P.C. but where there is a contradictory reports, then the Magistrate has to read both the reports conjointly and if it reaches a conclusion that the accused has not committed offence, the Court shall discharge the applicants in view of provisions of Section 227 of the Code.

8. After considering arguments raised by the learned counsel for parties, as well considering the entire facts and circumstances of the case and the material placed before this Court, this Court does not find it to be a fit case to exercise its jurisdiction under Section 482 Cr.P.C. for

quashing of the impugned summoning order as well as proceedings of the impugned case.

9. Accordingly, the reliefs sought by the applicants is refused.

10. However, it is open for the applicants to raise their grievance in view of provisions under Section 227 of the Code, at appropriate stage.

11. Application is accordingly **disposed of.**

12. Interim order, if any, stands discharged.

(2023) 1 ILRA 1309
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.01.2023

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482 No. 24 of 2023

Sanni @ Nitish @ Nitish Agrahari & Ors.
...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Raghvendra Singh, Anil Kumar Tiwari

Counsel for the Opposite Parties:
G.A.

Criminal Law - Indian Penal Code - Sections 323 & 307 - Arms Act, 1959 - Section 30-Application for quashing of charge sheet - Charged under sec 323 and 307 of ipc and sec 30 of arms act -Act involved firing gun shots in broad day light hitting two persons - offence was treated as crime against society and was heinous and serious offence - Proceeding cannot be quashed by compromise.

Application dismissed. (E-9)

List of Cases cited:

1. Gian Singh Vs St. of Pun., (2012) 10 SCC 303

2. Narinder Singh & ors. Vs St. of Pun. & anr., (2014) 6 SCC 466,

3. Gold Quest International (P) Ltd. v. St. of T.N., (2014) 15 SCC 235,

4. St. of M. P. Vs Laxmi Narayan & ors. (2019) 5 SCC 688

5. Arun Singh Vs St. of U. P. Through its Secretary & ors. (2020) 3 SCC 736

6. Daxaben VsThe St. of Gujarat & ors. 2022 SCC OnLine SC 936

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

1. Heard Sri Raghvendra Singh, learned counsel for the applicants, Sri Tilak Raj Singh, learned AGA-I on behalf of the State and Sri Ramendra Kumar, learned counsel for the opposite parties no. 2 to 4.

2. By means of the instant application the applicants are seeking quashing of the charge sheet dated 26.03.2015 filed in respect of Case Crime No. 511/2014, under Sections 307, 323 IPC, Police Station Kotwali Akbarpur, District Ambedkar Nagar and proceedings of Session Trial No. 111/2015 titled State v. Sunni @ Nitish & Ors. pending in the Court of IIIrd Additional District and Session Judge, Ambedkar Nagar arising out of the aforesaid charge sheet on the ground that on 09.12.2022 a compromise has been entered into between the parties settling the dispute and now the opposite parties no. 2 to 4 do not want to pursue the matter.

3. The aforesaid case was initiated on the basis of an FIR bearing Case Crime No.

511/2014 lodged on 19.12.2014 by the opposite party no. 2 Ram Prasad against the petitioners stating that the petitioner no. 2 Narendra Kumar was raising construction of a wall on a land in dispute. The informant asked him not to raise any construction till the decision of the court whereupon the petitioner no. 1, who is son of petitioner no. 2, started beating the informant. When the informant's sons came to intervene, the petitioner no. 2 Narendra shot at the informant's son Sanjeev and another accused person shot at Umesh, another son of the informant. The petitioner no. 1 Sanni assaulted the informant with a rod causing injury in his head. The informant's youngest son Santosh was also shot at but he was not hurt.

4. After investigation, the police submitted a charge sheet against the petitioner no. 1 Sunni under Sections 323 and 307 IPC and against the petitioner no. 2 Narendra for offences under Section 30 of the Arms Act and on 08.11.2015, the learned court passed an order summoning the petitioner nos. 1 & 2 for being tried for the aforesaid offences.

5. The injury form of Sanjeev Kumar mentions a firearm entry wound on the right side of his chest and exit wound on the shoulder, however, his X-ray examination did not reveal any bonny injury.

6. The injury form of Umesh Kumar also mentions a firearm injury on the right side of his chest and his X-ray examination too did not reveal any bonny injury.

7. In his statement recorded under Section 161 Cr.P.C., the informant had stated that the petitioner no. 2 had fired at his son Sunni and the petitioner no. 3 Sushil had fired a shot at his second son Umesh. Sunni had assaulted the informant with the iron rod causing injury on his head and a shot was fired towards his youngest son Santosh also he he was not hurt.

8. The injured Sanjeev also stated that the petitioner no. 2 Narendra had fired a shot at him. The other injured Umesh Kumar stated that the petitioner no. 2 had fired a shot at Sanjeev and the petitioner no. 3 Sushil, son of Jamuna had fired a shot which hit him.

9. As per the averments made in support of the application, the parties have entered into a compromise. A copy of the compromise has been annexed with the affidavit, which does not bear any date. It has been mentioned in the compromise that the accused persons and the injured persons have entered into a compromise and the injured persons have pardoned the accused persons and they do not want any proceedings to continue against the accused persons.

10. In **Gian Singh v. State of Punjab,** (2012) 10 SCC 303, the Hon'ble Supreme Court summarized the legal position regarding power of the High Court in quashing criminal proceedings on the basis of a compromise, in the following words: -

61. The position that emerges from the above discussion can be summarised thus : the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it

has to be exercised in accord with the guideline engrafted in such power viz. : (i) to secure the ends of justice, or (ii) to prevent abuse of the process of any court. ***In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime.*** *Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc.; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding.* (Emphasis supplied)

11. In **Narinder Singh and Others Vs. State of Punjab and Another,** (2014) 6 SCC 466, the Hon'ble Supreme Court has been pleased to sum up and lay down the principles by which the High Court would be guided in giving adequate treatment to the settlement between parties and exercising its power under Section 482 Cr.P.C. while accepting the settlement and quashing the proceedings or refusing to accept the settlement in the following words:-

"29.1 Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2 When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any Court.

While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

29.3 Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4 On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5 While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6 ***offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor.*** *On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.*

29.7 While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those

cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime."

(Emphasis supplied)

12. In **Gold Quest International (P) Ltd. v. State of T.N.,** (2014) 15 SCC 235, the Hon'ble Supreme Court held that: -

"8. In view of the principle laid down by this Court in the aforesaid cases, we are of the view that in ***the disputes which are substantially matrimonial in nature, or the civil property disputes with criminal facets, if the parties have entered into settlement, and it has become clear that there are no chances of conviction, there is no illegality in quashing the proceedings under Section 482 CrPC read with Article 226 of the Constitution. However, the same would not apply where the nature of offence is very serious*** *like rape, murder, robbery, dacoity, cases under the Prevention of Corruption Act, cases under the Narcotic Drugs and Psychotropic Substances Act and other similar kind of offences in which punishment of life imprisonment or death can be awarded."*

(Emphasis supplied)

13. The aforesaid decision in **Narinder Singh** (supra) has been followed by the Hon'ble Supreme Court in **State of Madhya Pradesh vs. Laxmi Narayan & Others** (2019) 5 SCC 688 and in that case the Hon'ble Supreme Court has held that:-

"15.1 that the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

15.2 such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;

15.3 similarly, such power is not to be exercised for the offences under the special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender;

15.4 ***offences under Section 307 IPC and the Arms Act etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc.*** *However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paragraphs 29.6 and 29.7 of the decision of this Court in the case of Narinder Singh (supra) should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;"* (Emphasis supplied)

14. In **Arun Singh v. State of Uttar Pradesh Through its Secretary & Ors.** (2020) 3 SCC 736, the Hon'ble Supreme Court has held:--

"14. In another decision in Narinder Singh v. State of Punjab (2014) 6 SCC 466 it has been observed that in respect of offence against the society it is the duty to punish the offender. Hence, even where there is a settlement between the offender and victim the same shall not prevail since it is in interests of the society that offender should be punished which acts as deterrent for others from committing similar crime. On the other hand, there may be offences falling in the category where the correctional objective of criminal law would have to be given more weightage than the theory of deterrent punishment. In such cases, the court may be of the opinion that a settlement between the parties would lead to better relations between them and would resolve a festering private dispute and thus may exercise power under Section 482 CrPC for quashing the proceedings or the complaint or the FIR as the case may be.

15. Bearing in mind the above principles which have been laid down, ***we are of the view that offences for which the appellants have been charged are in fact offences against society and not private in nature. Such offences have serious impact upon society and continuance of trial of such cases is founded on the overriding effect of public interests in punishing persons for such serious offences. It is neither an offence arising out of commercial, financial, mercantile, partnership or such similar transactions or has any element of civil dispute thus it stands on a distinct footing. In such cases, settlement even if arrived at between the complainant and the accused, the same cannot constitute a valid ground to quash the FIR or the charge-sheet.***

16. Thus the High Court cannot be said to be unjustified in refusing to quash the charge-sheet on the ground of compromise between the parties."

(Emphasis supplied)

15. In **Daxaben v. The State of Gujarat & Ors.** 2022 SCC OnLine SC 936 the Hon'ble Supreme Court has held as under:-

"50. In our considered opinion, the Criminal Proceeding cannot be nipped in the bud by exercise of jurisdiction under Section 482 of the Cr. P.C. only because there is a settlement, in this case a monetary settlement, between the accused and the complainant and other relatives of the deceased to the exclusion of the hapless widow of the deceased. As held by the three-Judge Bench of this Court in Laxmi Narayan (supra), Section 307 of the IPC falls in the category of heinous and serious offences and are to be treated as crime against society and not against the individual alone. On a parity of reasoning, offence under section 306 of the IPC would fall in the same category. An FIR under Section 306 of the IPC cannot even be quashed on the basis of any financial settlement with the informant, surviving spouse, parents, children, guardians, care-givers or anyone else. It is clarified that it was not necessary for this Court to examine the question whether the FIR in this case discloses any offence under Section 306 of the IPC, since the High Court, in exercise of its power under Section 482 CrPC, quashed the proceedings on the sole ground that the disputes between the accused and the informant had been compromised."

16. From a perusal of the aforesaid decisions of the Hon'ble Supreme Court, the principles governing quashing of criminal proceedings on the basis of compromise are that there is no thumb rule in this regard and each case has to be decided on the facts and circumstances of its case. Before exercising such power, the High Court must have due regard to the nature and gravity of the crime and the power to quash is to be exercised sparingly and with caution. Such a power is not to be exercised in cases involving heinous and serious offences, which include offence under Section 307 IPC.

17. In the present case, the FIR allegations are that a land dispute is existing between the parties regarding which a case was pending. In spite of pendency of the civil dispute, the accused persons started raising a wall at about 10 a.m. and upon being objected by the informant and his sons, the petitioner no. 2 fired a shot which hit the informant's sons Sanjeev on hischest and the petitioner no. 3 fired another shot which hit Umesh, another son of the informant, on his chest. The medico-legal examination report of Sanjeev and Umesh are available on record, which support the FIR allegations. The statements of the informant and his injured sons Sanjeev and Umesh also support the FIR allegations. The police had submitted a charge sheet against the petitioners no. 1 & 2 and thereafter the name of the petitioner no. 3 has been added on 25.10.2021 on an application filed under Section 319 Cr.P.C.

18. Since there was an old property dispute between the parties, the accused persons were known to the informant and his sons. The incident took place in broad day light and there is no reason to doubt the identity of the persons who caused the incident.

19. The accused persons have sought quashing of the charge-sheet and the

proceedings merely on the ground that on 09.12.2022 the parties have entered into a compromise stating that the informant and the injured persons have pardoned the accused persons and they do not want any further proceedings in the matter and the accused persons may get the proceedings terminated in terms of the compromise. The acts allegedly committed by the petitioners involve firing gun shots in broad day light hitting two persons in their chests and such offence is a very serious offence and the material on record, namely, the medico legal examination report of the injured persons and the statements recorded during investigation, fully support the FIR allegations. The offence alleged has to be treated as a crime against the society and not against the injured sons of the informant alone and, therefore, this Court is of the view that the informant and his sons have no authority to pardon the accused persons.

20. Keeping in view the aforesaid discussion, this Court is of the considered view that the proceedings of the case against the petitioners cannot be quashed on the basis of a compromise entered into between the parties. The application under Section 482 Cr.P.C. praying quashing of the charge sheet and the entire proceedings initiated on the basis thereof, on the sole ground that the parties have entered into a compromise, lacks merits and, accordingly, the same is ***dismissed.***

(2023) 1 ILRA 1316
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.12.2022

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Civil Revision No. 467 of 2012

Kesheri Nandan Agrawal ...Revisionist
Versus
Smt. Indu Bajpayee ...Opposite Party

Counsel for the Revisionist:
Sri Arvind Srivastava, Sri Pushkar Srivastava

Counsel for the Opposite Parties:
Sri S.K. Chaturvedi

The Provincial Small Cause Courts Act, 1887-Section 25- Civil revision challenges the order – Rejecting revisionist's application under Section 10 of the Civil Procedure Code, 1908 - stay proceedings in SSC Suit No.9 of 2011 - Defendant is a defaulter tenant - Defendant contends that the relationship is that of a seller and buyer due to an alleged oral agreement for sale – Filed **injunction** against Plaintiff - revisionist moves the court to stay citing the pendency of the earlier suit – Court holds that Section 10 CPC is not applicable .

Dismissed. (E-9)

List of Cases cited:

1. Kanhaiya Lal Vs Draupadi, AIR 1992 MP 88

2. Lachaman Vs Badan Kayalu, AIR 1989 Orissa 154

3. Karri Satya Narayana Vs Pichika, 1996 AIHC 2642 (AP)

4. Aspi Jal & anr. Vs Khushroo Rustom Dadyburjor, (2013) 4 SCC 333

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

1. Heard Sri Arvind Srivastava, learned counsel for the revisionist and perused the record. None appears for the opposite party. Since service of notice upon the opposite party has been presumed to be

sufficient on 26.11.2012 this Court is proceeding to decide the matter.

2. The defendant-revisionist has instituted this civil revision under Section 25 of the Provincial Small Cause Courts Act, 1887 (in short "the Act, 1887') to quash the order dated 28.07.2012 passed by Sri A.K. Pundir, ADJ, Court No.1, Jhansi in SSC Suit No.9 of 2011 by which he rejected the application 32(C) moved under Section 10 of Civil Procedure Code, 1908 (in short "CPC') to stay the proceeding of the said suit.

3. In brief, facts of the case are that the plaintiff Smt. Indu Bajpayee filed an SCC Suit No.9 of 2011 against the revisionist-defendant on the ground that he is a defaulter tenant of house no.251 (present no.388) situated at Mohalla Itwari Ganj, Jhansi at the rate of Rs.1,500/- monthly rent. He has not paid the rent in spite of repeated demand since 12.11.2006. Nar Narayan Das Srivastava son of Sri Thakur Prasad @ Thakur Das was the owner of the house in suit from which she purchased land for a consideration of Rs.40,000/- and had obtained possession thereon and started payment of house tax etc. Rashan Card was also issued at the address of the house in question. Plaintiff's father-in-law had also died in this house and the plaintiff had also taken loan and repaid it. Later on plaintiff constructed her residential house in the area of Jar Pahad and had given the house in suit at the monthly rate of rent of Rs.1,500/- to the defendant. Sometimes defendant paid the rent but since 12.11.2006 he stopped to pay the rent. Hence, a notice on 11.12.2009 for demand of money and termination of tenancy was given and was sent and served upon the defendant which was replied mentioning false facts. At the time of issuance of notice there was arrears of four months' rent upon the defendant and he did not pay any rent to the plaintiff within one month from the date of receipt of notice. Apart from this the defendant refused to accept the plaintiff as owner of the house in suit. Thus, the defendant has committed the offence under Section 20(A) and (F) of the UP Act No.13 of 1972. Since the defendant has not paid rent and is a defaulter and has also refused the plaintiff to be land-lord, therefore, the defendant is liable to be evicted.

4. According to the plaintiff since 12.11.2006 to 11.12.2009, the rent of more than three years have become time barred and Rs.76,500/- rent for 51 months is due against the defendant. According to the plaintiff since 12.01.2011 Rs.2,000/- per month as damages is also liable to be recovered from the defendant. On the basis of cause of action valuing the suit and after giving court fees, the plaintiff has filed the suit for eviction and realization of unpaid amount of rent and for illegal use and occupation of house after expiry of the period of notice.

5. The defendant filed written statement and almost denied the averments made in the plaint and in addition to that has said that plaintiff is neither the owner of the house in suit nor the defendant is tenant at the rate of Rs.1,500/- per month of the house in suit. There is no relation of land-lord and tenant between the parties. The defendant is as owner and in possession since 2003. Earlier it was the house in dilapidated condition upon which plaintiff had taken loan and had pledged the house. Plaintiff and her husband said to the defendant to sell the house in suit. In furtherance to that the parties entered into an agreement to sell the house in suit for

Ra.2,35,000/- out of which the defendant provided Rs.1,35,000/- in cash on 06.04.2003 and under the alleged oral agreement for sale he got the possession of the house in suit.

6. It was settled between the parties that plaintiff shall repay the loan of the bank and after taking the house back and after getting the rest of the amount i.e. Rs.1,00,000/- she will execute sale deed in favour of the defendant. Since the defendant was in the need of residence, therefore, with the permission of the plaintiff, defendant expended Rs.2,00,000/- to renovate the house in suit and constructed latrine, bathroom and kitchen and started living therein with his family as owner of the house. The defendant has always been ready to get the sale deed executed according to the oral agreement for sale. Since there is no relation of land-lord and tenant between the parties but the relation is as seller and buyer, hence the court has no jurisdiction to try the case. Plaintiff's husband, Brijendra is necessary party and the case is barred by non-joinder of necessary party. When plaintiff and her husband threatened on 24.02.2011 to forcefully dispossess the defendant, he filed an Original Suit No.150 of 2011 (Kesheri Nandan Agrawal Vs. Smt. Indu Bajpayee and others) in the Court of Civil Judge (Junior Division), Jhansi, therefore, this case being subsequent to the case of the defendant is barred and is liable to be stayed under Sections 10 and 151 CPC. The case is also barred by estoppel and acquiescence and is liable to be dismissed.

7. During the course of hearing defendant moved an application 32(C) to stay the proceeding of this case under Section 10 CPC on the grounds mentioned in the written statement. After hearing both the parties the court below concluded that the case of the defendant i.e. Original Suit No.150 of 2011 is for permanent injunction. The matter in issue is not the same in both the cases. Both the cases relate to the courts of different jurisdiction. This case is not liable to be stayed under Section 10 CPC and accordingly rejected the application.

8. Being aggrieved the petitioner has preferred this revision.

9. The opposite party land-lord filed a counter affidavit dated 16.12.2012 and denied the allegations mentioned in the revision. In addition to that the averments of the plaint has been reiterated and denied that there has been an oral contract for sale of the house. It is absolutely false and incorrect. The answering respondent did not take a single penny as advanced from the revisionist for sale of the house in question. No question of any part performance arises.

10. It is further stated that with an evil motive the revisionist filed the suit i.e. Suit No.150 of 2011 for permanent injunction to harass the land-lord. That case has no concern with the present suit for eviction and payment of rent and house tax. The revisionist had tried to misguide this Court. The application filed by the revisionist under Section 10 CPC was misuse of process of law. Both the cases are different in nature and have no connection with each other. Both suits are different and triable by the different courts and in both the cases the prayer is not the same. The trial court had rightly rejected the application under Section 10 CPC. There is no infirmity in the impugned order. The interim ex parte order dated 20.09.2011 passed by this Court be vacated. Examination-in-chief of

the respondent has been recorded in the court below. Copy of the evidence produced as affidavit has been annexed as annexure-CA-1. The defendant has requested to dismiss the revision.

11. Contrary to that the revisionist has filed rejoinder affidavit dated 24.12.2013 and has reiterated the contents of his suit and the revision and has said that the decree passed in the earlier suit will operate as res judicata. Hence, the subsequent suit is liable to be stayed. The opposite party is no more remains land-lord after the agreement. The impugned order is not in consonance with the provisions of Section 10 CPC. No ground for vacating the interim order passed by this Court arises. Hence, the revision be allowed.

12. It is admitted that the property in suit is an immovable property which can only be transferred through registered deed as envisaged in Section 54 of Transfer of Property Act and Section 17 of the Indian Registration Act. About the immovable property no oral agreement or sale is permissible. Prima facie no case of title appears to be involved between the parties. The defendant revisionist neither filed any suit for specific performance of contract nor any oral transaction or agreement for sale is permissible in respect of immovable property. Original Suit No.150 of 2011 has been filed under the Specific Relief Act by the defendant whereas this suit has been filed under the Act, 1887. Hence, the jurisdiction of both the courts are quite different. It is to be ascertained that if a suit is for permanent injunction and another suit is SCC suit whether in that case subsequent suit can be stayed under Section 10 CPC. Section 10 CPC reads as under:-

*"**10. Stay of suit.**--No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India have jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.*

***Explanation.**--The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action."*

13. In **Kanhaiya Lal Vs. Draupadi, AIR 1992 MP 88** it is held that stay of a later suit until decision in earlier suit is a mere rule of procedure.

14. In **Lachaman Vs. Badan Kayalu, AIR 1989 Orissa 154** it is held that suit for eviction of tenant cannot be stayed till disposal of suit for specific performance of contract between the tenant and the land-lord's predecessors-in-interest.

15. In **Karri Satya Narayana Vs. Pichika, 1996 AIHC 2642 (AP)** it is held that Section 10 CPC cannot be invoked in two suits, one for specific performance of contract and another by the adversary for ejectment and damages.

16. In **Aspi Jal and another Vs. Khushroo Rustom Dadyburjor, (2013) 4 SCC 333** it is held that for application of the provisions of Section 10 of the Code, it is further required that the Court in which the previous suit is pending is competent to grant the relief claimed.

17. In this case it is not so. There is no evidence to establish that the court in which Original Suit No.150 of 2011 is pending is also competent to try with the cases of small cause courts. The proceeding of small

cause courts is summary in nature. Hence, this Court is in conformity with the finding recorded by the lower court that on the basis of pendency of Original Suit No.150 of 2011 the SCC suit is not liable to be stayed under Section 10 CPC.

18. The option was open to the revisionist to move an application under Section 23 of the Act, 1887 that since the question of title is involved, therefore, before deciding the question of title this SCC suit cannot be prosecuted any more. He may also produce evidence and may establish that there was no relation of land-lord and tenant between the parties or it had been broken after entering into the agreement and if the SCC Court finds that the serious question of title is involved, it may drop the proceeding but so far as the applicability of Section 10 CPC is concerned, this Court is of the considered view that this SCC revision cannot be stayed on account of pendency of an original suit previously instituted by the defendant.

19. On the basis of above, this Court is of the view that this revision lacks merit and is liable to be dismissed.

20. Accordingly, this revision is dismissed with costs.

21. A copy of this order be sent to the Court of ADJ-I, Jhansi who shall proceed with the SCC suit in accordance with law.

(2023) 1 ILRA 1320
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.12.2022

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Civil Revision No. 444 of 2012

Smt. Shakuntala Soni ...Revisionist
Versus
Devendra Kumar Rawat ...Opposite Parties

Counsel for the Revisionist:
Sri Gulrez Khan, Sri J.H. Khan

Counsel for the Opposite Parties:
Smt. Abha Gupta, Sri S.R. Gupta

Civil Law - Code of Civil Procedure,1908 - O.XV Rule 5-Striking off defence-Civil revision - Rent payment – Order XV Rule 5 CPC- Striking off defence for failure to deposit admitted rent- Section 30 of the UP Act No.13 of 1972- plaintiff failed to prove that she paid rent - Revision lacks merit.

Dismissed. (E-9)

List of Cases cited:

1. Ashik Ali Vs 8th ADJ, 2001 (444) ALR 524.

2. Pradyuman Ji Vs Special/ADJ, Ballia & ors., 2008 (2) ARC 19

3. Kailash Shukla Vs ADJ, Deoria & ors., 2004 (1) ARC 615

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

1. This civil revision has been preferred by the tenant defendant against the order dated 29.05.2012 passed by ADJ, Court No.1, Banda by which the plaintiff's suit was decreed on merit after striking off the written statement of the defendant.

2. In brief facts of the case are that revisionist Smt. Shakuntala Soni plaintiff filed an SCC suit in the Court of Judge, SCC Court, Banda on 04.11.2009 for eviction of the defendant tenant from the shop in suit and for realization of rent from

04.11.2006 to 17.12.2006 at the rate of Rs.650/- per month amounting Rs.958/- and for damages for use and occupation of the shop in suit since 18.12.2006 to 03.11.2009 at the rate of Rs.22.990/- and also for the payment of water tax and house tax at the rate of Rs.84/- per month each since 04.11.2006 to 03.11.2009 alongwith Rs.500/- as expenses for notice.

3. In brief facts of the case are that the plaintiff is the owner and land-lord of a shop at first floor in Shri Ram Market, Chowk Bazar City Banda in which defendant was the tenant since December, 2004 at the monthly rate of rent of Rs.550/- as per condition since 2005 the rate of rent became Rs.650/- per month which had to be increased Rs.100/- per month after every 5 years.

4. There was dues arrears of rent on the defendant from July, 2004 to December, 2004 for six months at the monthly rate of Rs.500/- amounting to Rs.3,00/- and since January, 2005 to October, 2006 at the rate of Rs.650/- per month amounting to Rs.14,300/- and also water tax since 2004 to 2006 at the rate of Rs.1012/- per year amounting to Rs.3036/- and house tax from the year 2004 to 2006 at the rate of Rs.675/- per year. The tenancy was month to month and the provisions of UP Act No.13 of 1972 were not applicable in spite of the repeated request and demand, the defendant did not pay the rent. Hence, a registered notice through advocate Ashutosh Nigam was sent on 07.11.2006 under Section 106 of Transfer of Property Act to the defendant and a demand was made to repay the rent and house tax and water tax by the said notice. The tenancy was also terminated after 30 days. The registered notice was served upon the defendant on 16.11.2006. In spite of service of notice neither the defendant paid the rent, water tax and house tax nor vacated and delivered the possession to the plaintiff. Since 17.12.2006 the defendant lost the character to be tenant. The plaintiffs are entitled to receive the aforementioned rent, damages and tax amount and a decree of eviction.

5. The defendant tenant has filed written statement denying the allegations of the plaint alongwith the affidavit. A copy of the order dated 12.08.2010 is on record which shows that application 21(c) moved by the plaintiff was allowed and the defence of the defendant was struck off on account of non-deposition of admitted rent in the court. The deposit made under Section 30 of the UP Act No.13 of 1972 was not accepted by the court because defendant appeared in the court and filed written statement on 03.04.2010 but she had not deposited the admitted rent, therefore, Order XV Rule 5 CPC played the role which is as under:-

"5. Striking off defence for failure to deposit admitted rent.--(1) *In any suit by a lessor for the eviction of a lessee after the determination of his lease and for the recovery from him of rent or compensation for use and occupation, the defendant shall, at or before the first hearing of the suit, deposit the entire amount admitted by him to be due together with interest thereon at the rate of nine per cent. per annum and whether or not he admits any amount to be due, he shall throughout the continuation of the suit regularly deposit the monthly amount due within a week from the date of its accrual, and in the event of any default in making the deposit of the entire amount admitted by him to be due or monthly mount due as aforesaid, the Court may, subject to the*

provisions of sub-rule (2) strike of his defence.

Explanation 1.- The expression "first hearing" means the date for filing written statement or for hearing mentioned in the summons or where more than one of such dates are mentioned, the last of the dates mentioned.

Explanation 2. The expression "entire amount admitted by him to be due" means the entire gross amount whether as rent or compensation for use and occupation, calculated at the admitted rate of rent for the admitted period of arrears after making no other deduction except the taxes, if any, paid to a local authority in respect of the building on lessor's account and the amount, if any, deposited in any Court.

Explanation 3. (1) The expression "monthly amount due" means the amount due every month, whether as rent or compensation for use and occupation at the admitted rate of rent, after making on other deduction except the taxes, if any, paid to a local authority, in respect of the building on lessor's account.

(2) Before making an Order for striking off defence, that Court may consider any representation made by the defendant in that behalf provided such representation is made within 10 days of the first hearing or, of the expiry of the week referred to in sub-section (1) as the case may be.

(3) The amount deposited under this rule may at any time be withdrawn by the plaintiff:

Provided that such withdrawal shall not have the effect of prejudicing any claim by the plaintiff disputing the correctness of the amount deposited:

Provide further that if the amount deposited includes any sums claimed by the depositor to be deductible or any account, the Court may require the plaintiff to furnish the security for such sum before he is allowed to withdraw the same."

6. The revisionist has taken grounds that since her residential house was sealed/attached in the year 2005 hence she could not produce the receipt of payment of rent. There was no arrears of rent from the year 2004 but the rent had been paid till July, 2006 and the land-lord refused to accept the rent from August, 2006. After refusal the payment of rent was sent through money order but it was returned with the endorsement "not found out of station". It amounts to refusal. Application of the revisionist under Section 30 was illegally dismissed even after knowing the pendency of proceedings under Section 30 the plaintiff deliberately did not contest the same. Court below erred in law in assuming the date 01.12.2009 to be the first date of hearing when adjournment application was moved for filing written statement in future. The said date could not be treated as the first date of hearing and the lower court erred in law in striking off the defence. The revisionist never defaulted in payment of rent. The notice dated 07.11.2006 is liable to be waived as in August, 2006 the payment of rent was sent through money order. If the application under Section 30 would have been allowed to deposit the rent in the court there would not have been arrears of rent due upon the revisionist defendant. The suit is barred by limitation and no decree could have been granted by the court below. There was no water connection hence the court below erred in decreeing the arrears of water tax hence the revision be allowed and the impugned order be set aside.

7. In this case the first date of hearing was 01.12.2009 on that date defendant

appeared and applied for time to file written statement. On 23.12.2009, 19.01.2010, 08.02.2010, 04.03.2010 and 27.03.2010 the case was adjourned and the written statement was filed on 03.04.2010. Even after filing an application under Order XV Rule 5 CPC.

8. The Court noted that on 15.04.2010 the defendant had not deposited the admitted rent but the defendant has stated in her objection 30(c) that the plaintiffs were not interested in receiving the rent as they refused to receive the rent. Consequently she sent money order on 12.11.2006 which was returned with false report. According to her she had also moved an application for deposit of the rent before the Civil Judge (Junior Division) which was rejected and the revision was also rejected by the ADJ-II on 27.08.2009. After that this SCC suit was filed. It was noticed by the court that the defendant was continuously attending the court but she did not comply with the provisions of Order XV Rule 5 CPC.

9. Besides accepting the judicial precedents **Ashik Ali Vs. 8th ADJ, 2001 (444) ALR 524.** The trial court relied on the precedent **Pradyuman Ji Vs. Special/ADJ, Ballia and others, 2008 (2) ARC 19** in which it was held that on the first date of hearing if the tenant did not deposit the entire amount admitted by him, his defence should be struck off under Order XV Rule 5 CPC and deposit under Section 30(1) cannot be taken into consideration for the purpose of deposit to be made under second part of Order XV Rule 5 CPC. The trial court has also relied on judicial precedent **Kailash Shukla Vs. ADJ, Deoria and others, 2004 (1) ARC 615** in which similar principles have been laid down.

10. Since this order remain intact hence the written statement filed by the defendant was not considered and the defendant was not permitted to adduce the evidence though she was permitted to cross-examine the plaintiff's witness and to advance the argument. Since no written statement was available in the eyes of law hence the trial court has not framed the points for determination though it has discussed the necessary aspect of the case.

11. In this case the tenancy is admitted. The plaintiff has proved the notice, registry receipt and acknowledgement. Since the defence of the defendant has been struck of, therefore, the averments of the written statement would not be considered and would not be taken into consideration.

12. From the order dated 12.08.2010 it is established that the defendant had not deposited the admitted rent in the court and it is established law that the deposits under Section 30(1) would not be considered for the purposes of this suit. More so, the application of the defendant tenant under Section 30 has been dismissed and its revision has also been dismissed.

13. PW-1, Devendra Kumar Rawat has proved the case and his testimony is unrebutted. The defendant could not prove that she has paid any rent or other charges. In cross-examination PW-1 has deposed that there are total 7 shops in the house in which there are separate electric connections in all shops. Besides making suggestion which have been denied by the witness even no proper cross-examination has been done from the side of the defendant and whatsoever cross-examination has been done, therefrom the defendant is not getting any benefit. The

defendant was miserably failed in establishing its defence and creating any doubt in the case and evidence of the plaintiff land-lord. The trial court has decreed the suit in toto as prayed in the memo of revision the defendant has taken plea that since the residential house of the defendant was sealed since 2005, therefore, she could not produce the receipts of payment of rent. For this neither the court nor the plaintiff are responsible. It does not appear to be a true fact that instead of keeping the records of payment in shop in suit, the same would be kept in the residential house. If it was so, the defendant could have moved an application to direct the plaintiff to produce the counter file of the receipt. Mere sending rent money through money order which could not be received by the plaintiff as he was out of station, it cannot be said that the defendant tried to make the payment in bona fide manner. The defendant should have sent rent amount again or she could have tendered the payment personally. There is no defect regarding dismissal of the application of the defendant under Section 30 of the UP Act No.13 of 1972. It is established law that deposit under Section 30 would not be taken into consideration for the purposes of SCC suit and it cannot be permitted where the Act No.13 of 1972 has no applicability.

14. Thus this Court is of the view that the order passed by the trial court does not suffer from any infirmity. The revision lacks merit and is liable to be dismissed.

ORDER

15. This revision is dismissed with costs.

(2023) 1 ILRA 1324

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.01.2023

BEFORE

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

Civil Revision No. 57 of 2022

Nauman Ali ...Revisionist
Versus
Mazahar Hasan & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Mahboob Ahmad, Sri Irfan Alim Siddiqui, Sri Umesh Vats

Counsel for the Opposite Parties:
Sri Anurag Yadav, Sri Gulrez Khan, Sri Javed Husain Khan, Sri Punit Kumar Gupta

UP Waqf Tribunal Rules -Rule 3(4)-Revision challenges the Waqf Tribunal's order - raised issue of Tribunal benches comprising two members - Rule 3(4) of UP Waqf Tribunal Rules - against the statutory mandated - Waqf Act Section 83(4) - A three-member composition - Judgment emphasizes the statutory framework - Tribunal's constitution defined in Section 83 cannot be altered through rules. (E-9)

List of Cases cited:

1. Naushad Raza & ors. Vs Waqf Prabandhak, Committee of Waqf Qabristan & ors.

2. Faez Aftab Vs Zafar Ali Khan & ors.

3. Abrar Husain Vs U.P. Waqf Tribunal, Lucknow & anr., 2017 SCC OnLine All 4081

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

This revision under the proviso to sub-Section (9) of Section 89 of the Waqf Act, 1995 is directed against the order of the Waqf Tribunal dated 28.02.2022 passed in Case No. 286 of 2017, rejecting the

revisionist's application under Order VII Rule 11 of the Code of Civil Procedure, 1908.

2. Amongst other grounds raised in challenge to the impugned order, there is an objection of seminal importance. On the basis of that objection, this Court, while reserving orders on 14.10.2022, framed the following question for consideration :

Whether the Waqf Tribunal, constituted under Section 83(1) of the Waft Act, 1995 can be said to be in valid quorum, with a membership of two, including the Chairman, or three members, including the Chairman, envisaged under sub-Section (4) of Section 83 of the Act, is essential ?

3. A further question that would arise is :

Whether given the mandatory composition of the Tribunal under sub-Section (4) of Section 83 of the Waqf Act, 1995 comprising three members with distinct qualifications and office specified, can the Tribunal sit through benches of two members, irrespective of their qualifications and office by virtue of sub-Rule (4) of Rule 3 of the Uttar Pradesh Waqf Tribunal Rules, 2017?

4. Heard Mr. Mahboob Ahmad, learned Counsel for the revisionist, Mr. Javed Hussain Khan, learned Counsel appearing for respondent no. 1 and Mr. Punit Kumar Gupta, learned Counsel for respondent no. 2.

5. The impugned order has been passed by the Uttar Pradesh Waqf Tribunal, Lucknow, comprising the Chairman of the Tribunal and one member. It is argued by the learned Counsel for the revisionist that by virtue of sub-Section (4) of Section 83 of the Waqf Act, 19951 the Tribunal must comprise of the Chairman and two other members, who are to be persons of specified office and qualifications.

6. On the other hand, learned Counsel for the respondents have brought to the notice of this Court the fact that the State Government, in exercise of powers under Section 109 of the Act, has made rules called The Uttar Pradesh Waqf Tribunal Rules, 2017. These rules have been made by notification published in the official gazette dated 14th December, 2017. The notification bears number 1468/LII-2-2017-2(279)-2013 T.C. Rule 3 of the Uttar Pradesh Waqf Tribunal Rules, 20172 is quoted below :

3 (1) Any mutawalli, person interested in a waqf property or any other person aggrieved by an order made under this Act, or rules made thereunder, may make an application within the time specified in the Act or the rules for resolution of any dispute, question or other matter relating to the waqf.

(2) Where any application made under sub-rule (1) relates to any waqf property which falls within the territorial limits of the jurisdiction of the Tribunals, such application may be made to the Tribunal within the local limits of whose jurisdiction the mutawalli or any one of the mutawallies of the waqf actually and voluntarily resides, carries on business or personally works for gain, and, where any such application is made to the Tribunal as aforesaid, the other Tribunals shall not entertain any application for the determination of such dispute, question or other matter.

(3) Every application, plaint or memorandum of appeal or an application for execution or recovery of possession shall be accompanied by Court fee as prescribed in Schedule I and II of Court Fees Act, 1870 (Act No. VII of 1870) as amended from time to time.

(4) The Chairman of the Tribunal will constitute three benches comprising of two members each. The bench will be competent to decide a case. In case of disagreement between the two members of a bench, the matter will be decided by the full tribunal comprising of the three members with the majority decision.

(5) The decision of the Tribunal shall be final and binding upon the parties to the application and it shall have the force of a decree made by a civil court.

(6) the Tribunal will generally sit in Lucknow. However, in the public interest, the Chairman may fix sittings of a bench at divisional level, by issuing a quarterly calendar well in advance.

7. Learned Counsel for the respondents submit that in view of sub-Rule (4) of Rule 3 of the Rules, in the State of Uttar Pradesh, the Waqf Tribunal is in valid quorum, sitting in a bench of two members constituted by the Chairman of the Tribunal. It is argued that the exigencies of work and its volume in the State of Uttar Pradesh require the Tribunal to sit through different benches, rather than as a single bench comprising the Chairman and two members, envisaged under sub-Section (4) of Section 83 of the Act. It is submitted that the State Government is enabled, by virtue of Section 109(1) of the Act, to make rules by a notification published in the gazette to carry out the purposes of the Act, other than those that are part of Chapter III. It is further submitted that under sub-Section (2) of Section 109, there are specific matters enumerated, with reference to particulars sections of the Act, regarding which, the State Government may make rules to effectuate the purpose of the Act. Clause (xxv) of sub-Section (2) of Section 109 of the Act enables the State Government to frame rules regarding any other matter, which is required to be or may be prescribed. According to the learned Counsel, going by the definition of "prescribed' clause (l) of Section 3 of the Act, "prescribed' means prescribed under the Rules, except as regards Chapter III of the Act.

8. The submission of the learned Counsel for the respondents is that the State Government has wide powers to make rules in order to effectuate the objects and purpose of the Act. The rules here, including the one making provision for the Tribunal to sit through two-member benches, is also to make adjudication of disputes by the Tribunal constituted under the Act, effective. In short, it is said that it is the purpose of sub-Rule (4) of Rule 3 of the Rules that the Tribunal becomes a viable forum for adjudication of all disputes that are required to be decided by the Waqf Tribunal, constituted under Section 83 of the Act.

9. This Court has considered the submissions made by learned Counsel for parties.

10. Sub-Section (1) of Section 83 of the Act may be quoted with profit :

83. Constitution of Tribunals, etc.-- 3[(1) The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to

a waqf or waqf property, eviction of a tenant or determination of rights and obligations of the lessor and the lessee of such property, under this Act and define the local limits and jurisdiction of such Tribunals.]

11. A reading of sub-Section (1) of Section 83 would show that the Act envisages that it is within the province of the State Government, by notification in the Official Gazette to constitute such number of Tribunals as it thinks fit for the decision of disputes, questions and other matters relating to a Waqf or Waqf property. Eviction of a tenant has also been brought within the jurisdiction of these Tribunals. The State Government has the power to define the local limits and jurisdiction of the Tribunals that it constitutes. It is envisaged as a three-member body, comprising a Chairman and two members. The Chairman is mandated to be a member of the State Judicial Services, holding a rank not below than that of a District and Sessions Judge or Civil Judge Class I; one person who is an officer from the State Civil Services equivalent in rank to that of an Additional District Magistrate; and, one person having knowledge of Muslim law and jurisprudence.

12. What appears from a reading of sub-Section (1) and sub-Section (2) of Section 83 *prima facie* is that in the hearing and decision of disputes relating to Waqf or Waqf property, including eviction of tenants in such property, the State Government has been empowered by the Act to constitute such number of Tribunals as it thinks fit. The number of Tribunals that the State Government thinks fit would depend upon the nature, and more than that, the quantum of business before the Tribunal. There is no hurdle in the way of the State Government to constitute more Tribunals than one defining their jurisdiction, with reference to territory, or may be the nature of causes to be dealt with by each constituted Tribunal. There is no hurdle in the State Government's way to constitute a Tribunal at every headquarters, or, may be more than one in a revenue district. It would all depend upon the State Government's wisdom, considering the number of causes arising in a particular area, the nature of those causes, the distance that the litigants have to travel to the seat of the Tribunal and other relevant factors.

13. However, a reading of sub-Section (4) of Section 83 of the Act, together with sub-Section (1) does not seem to confer upon the State Government, the power to prescribe by rules made under Section 109 of the Act, the number of members who would constitute valid quorum for a Tribunal. The composition of the Tribunal is spelt out by sub-Section (4) of Section 83 of the Act, and, *prima facie*, it cannot be modified or tinkered with, in exercise of the rule-making power under Section 109 by the State Government. The composition of the Tribunal statutorily prescribed by sub-Section (4) of Section 83 cannot be disturbed through a rule made by the State Government, prescribing the competent quorum. In fact, a reading of sub-Section (4) *prima facie* appears to spare little doubt that each Tribunal's composition has been purposely spelt out. It is not only about numerical membership, but also about the education, professional training and background of members constituting it. The Chairman is mandated to be a member of the State Judicial Service, whereas the two members envisaged are also distinct and different by their qualifications and professional training. One has to be an

administrative officer of the State Civil Services carrying a specified rank, that is to say, of an Additional District Magistrate, whereas, the other member has to be a person knowledgeable in the Muslim law and jurisprudence. Each member of the Tribunal is, therefore, distinctive by his education, professional training and background; and the Tribunal, once constituted *prima facie* has to comprise of all the three members, as envisaged under sub-Section (4) of Section 83. The Tribunal envisaged by the statute *prima facie* is to comprise of a presiding member and his associates, all with dissimilar training and background. Therefore, it does not seem to be part of the statutory scheme for the composition of the Tribunal that it should be a multi-membered body of more than three members, with a Chairman who may allocate work to benches of two members like a Court where the Presiding Member or the Chief Member or the Chief Judge, amongst Members or Judges of uniform training and background, may be authorised to allocate business to different benches constituted by him. Under the scheme of the statute, there does not appear to be *prima facie* any power with the State Government that may be exercised under Rule 109 to provide, through any mechanism, a Tribunal with a different composition than that envisaged by sub-Section (4) of Section 83 of the Act.

14. Decisions of this Court in **Naushad Raza and others v. Waqf Prabandhak, Committee of Waqf Qabristan** and **others4 and Faez Aftab v. Zafar Ali Khan and others5** have been brought to the notice of this Court, where it has been held that the Tribunal cannot sit through two members. Another decision taking a similar view that has been brought to the Court's notice is **Abrar Husain v. U.P. Waqf Tribunal, Lucknow and another6**, which, though not laying down the number explicitly, seems to have followed the view that the Tribunal cannot be in valid quorum through two members. But, all these decisions have been rendered before the rules were notified. The Court in those cases, was, therefore, not confronted with the rules; or the anomalous situation that these present. It is a salutary principle that if there be conflict between subordinate legislation and the statute, the Court may ignore the subordinate legislation as *ultra vires* the Act. The principle, as aforesaid, has been laid down by the Supreme Court in **Bharathidasan University and another v. All India Council for Technical Edudcation and others7** *vis-à-vis* the statutes of the Universities and the University Grants Commission in the matter of approval for starting a new technical course and introduction of a new programme.

15. In **Bharathidasan University** *(supra)* it has been held by their Lordships:

14. The fact that the Regulations may have the force of law or when made have to be laid down before the legislature concerned does not confer any more sanctity or immunity as though they are statutory provisions themselves. Consequently, when the power to make regulations is confined to certain limits and made to flow in a well-defined canal within stipulated banks, those actually made or shown and found to be not made within its confines but outside them, the courts are bound to ignore them when the question of their enforcement arises and the mere fact that there was no specific relief sought for to strike down or declare them *ultra vires*, particularly when the party in sufferance is a respondent to the lis or proceedings

cannot confer any further sanctity or authority and validity which it is shown and found to obviously and patently lack. It would, therefore, be a myth to state that Regulations made under Section 23 of the Act have "constitutional" and legal status, even unmindful of the fact that any one or more of them are found to be not consistent with specific provisions of the Act itself. Thus, the Regulations in question, which AICTE could not have made so as to bind universities/UGC within the confines of the powers conferred upon it, cannot be enforced against or bind a university in the matter of any necessity to seek prior approval to commence a new department or course and programme in technical education in any university or any of its departments and constituent institutions.

16. Since in this case, the issue is about the *vires* of sub-rule (4) and Rule 3 of the Rules framed by the State Government in exercise of power of power Section 109 of the Act, this Court is of opinion that the matter ought to be heard and determined by a Division Bench.

17. List this matter before the appropriate Bench, after seeking nomination from his Lordship the Hon'ble The Chief Justice.

(2023) 1 ILRA 1329
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.01.2023

BEFORE

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

Civil Revision No. 49 of 2022

Ishwar Sharan @ Ishwar Sharan Das ...Revisionist

Versus

Bharat Kumar & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Bhola Nath Yadav, Sri Prem Singh

Counsel for the Opposite Parties:
Sri Rahul Sahai, Sri Aman Sharma

Civil Law - Code of Civil Procedure, 1908 - Sections 105 & 115 -Revision challenging three orders - Revisionist contested rejection of an application to bring a registered will on record - the non-acceptance of a proposed scheme of administration- the striking off of execution in full satisfaction- Preliminary objection on maintainability was raised - That three separate revisions should be file- Revisionist argued challenging interlocutory orders with the final order is permissible- The court deeming the objection unsustainable. **Revision maintainable.** (E-9)

List of Cases cited:

1. Rajendra Prasad Gupta Vs Prakash Chandra Mishra & ors. (2011) 2 SCC 705

2. Achal Misra Vs Rama Shanker Singh & ors. (2005) 5 SCC 531

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

This revision is directed against three distinct orders passed by the Additional District Judge, Court No. 9, Budaun in Execution Case No. 1 of 2012, arising out of the decree passed by the learned Additional District Judge, Court No. 8, Budaun in Original Suit No. 2 of 2001, Bharat Kumar and others v. Ishwar Sharan, a suit under Section 92 of the Code of Civil Procedure, 19081. The first order impugned is one dated 24.01.2022, rejecting the application, Paper No. 54ग made in the execution by one Gaurav Das, claiming to bring on record a registered will dated 21.12.2016 in his favour, executed by the the late Ishwar Sharan, the former

sarvarakar of the temple subject matter of the decree passed in the suit under Section 92 of the Code. The second is an order dated 03.03.2022, by which, the scheme of administration submitted by the revisionist, claiming to be the legal representative of the deceased judgment-debtor, Ishwar Sharan Das has not been accepted, whereas that submitted by the decree holder, Paper No. 9ग has been accepted. The last is an order dated 05.03.1992, by which the execution proceedings have been ordered to be struck off in full satisfaction.

2. Mr. Rahul Sahai, learned Counsel appearing for respondent no. 1 has raised a preliminary objection regarding the maintainability of this revision. He submits that the three orders impugned have been passed on three different applications, and, may be, a case decided within the meaning of Section 115 of the Code. But, each would give rise to a distinct and separate right to the revisionist to prefer a revision to this Court. It is Mr. Sahai's submission is that the revisionist cannot prefer a single revision against the three orders impugned.

3. In answering the aforesaid objection, Mr. Bhola Nath Yadav, learned Counsel for the revisionist has placed reliance upon a decision of the Supreme Court in **Rajendra Prasad Gupta v. Prakash Chandra Mishra and others2**. He has drawn the attention of this Court to Paragraphs Nos. 5, 6 and 7 of the report in **Rajendra Prasad Gupta** *(supra)* where it has been held :

5. In *Narsingh Das v. Mangal Dubey* [ILR (1883) 5 All 163], Mahmood, J. the celebrated Judge of the Allahabad High Court, observed:

"Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibition cannot be presumed."

6. The above view was followed by a Full Bench of the Allahabad High Court in *Raj Narain Saxena v. Bhim Sen* [AIR 1966 All 84] and we agree with this view. Accordingly, we are of the opinion that the application praying for withdrawal of the withdrawal application was maintainable. We order accordingly.

7. In the result, the impugned judgment of the High Court is set aside and the appeal is allowed. No costs. The suit shall proceed and to be decided on merits, expeditiously.

4. He submits that the objection raised is no more than a technicality or something to do with rules or procedure. He has emphasized that rules of procedure are hand-maid of justice and so long as a substantially wrong order is there on record, this Court has ample jurisdiction to correct those wrong orders, in exercise of powers of revision, even if more than one orders are challenged in a single revision. Mr. Yadav has placed further reliance upon the decision of the Supreme Court in **Achal Misra v. Rama Shanker Singh and others3.** Attention of the Court is drawn to the holding in Paragraphs Nos. 12 and 13 of the report, that read :

13. This principle is recognised by Section 105(1) of the Code of Civil Procedure and reaffirmed by Order 43 Rule 1-A of the Code. The two exceptions to this rule are found in Section 97 of the Code of Civil Procedure, 1908, which provides that a preliminary decree passed in a suit could

not be challenged in an appeal against the final decree based on that preliminary decree and Section 105(2) of the Code of Civil Procedure, 1908 which precludes a challenge to an order of remand at a subsequent stage while filing an appeal against the decree passed subsequent to the order of remand. All these aspects came to be considered by this Court in *Satyadhyan Ghosal v. Deorajin Debi* [(1960) 3 SCR 590 : AIR 1960 SC 941. Ed. : See also(1981) 2 SCC 103, (2004) 12 SCC 754 and (2005) 3 SCC 422] wherein, after referring to the decisions of the Privy Council, it was held that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay, an appeal was not taken, can be challenged in an appeal from a final decree or order. It was further held that a special provision was made in Section 105(2) of the Code of Civil Procedure as regards orders of remand where the order of remand itself was made appealable. Since Section 105(2) did not apply to the Privy Council and can have no application to appeals to the Supreme Court, the Privy Council and the Supreme Court could examine even the correctness of an original order of remand while considering the correctness of the decree passed subsequent to the order of remand. The same principle was reiterated in *Amar Chand Butail v. Union of India* [AIR 1964 SC 1658] and in other subsequent decisions.

14. It is thus clear that an order notifying a vacancy which leads to the final order of allotment can be challenged in a proceeding taken to challenge the final order, as being an order which is a preliminary step in the process of decision-making in passing the final order. Hence, in a revision against the final order of allotment which is provided for by the Act, the order notifying the vacancy could be challenged. The decision in Ganpat Roy case[(1985) 2 SCC 307] which has disapproved the ratio of the decision in *Tirlok Singh and Co.* [(1976) 3 SCC 726] cannot be understood as laying down that the failure to challenge the order notifying the vacancy then and there, would result in the loss of right to the aggrieved person of challenging the notifying of vacancy itself, in a revision against the final order of allotment. It has only clarified that even the order notifying the vacancy could be immediately and independently challenged. The High Court, in our view, has misunderstood the effect of the decision of this Court in Ganpat Roy case[(1985) 2 SCC 307] and has not kept in mind the general principles of law governing such a question as expounded by the Privy Council and by this Court. It is nobody's case that there is anything in the Act corresponding either to Section 97 or to Section 105(2) of the Code of Civil Procedure, 1908 precluding a challenge in respect of an order which ultimately leads to the final order. We overrule the view taken by the Allahabad High Court in the present case and in *Kunj Lata v.Xth ADJ*[(1991) 2 RCJ 658] that in a revision against the final order, the order notifying the vacancy could not be challenged and that the failure to independently challenge the order notifying the vacancy would preclude a successful challenge to the allotment order itself. In fact, the person aggrieved by the order notifying the vacancy can be said to have two options available. Either to challenge the order notifying the vacancy then and there by way of a writ petition or to make the statutory challenge after a final order of allotment has been made and if he is aggrieved even thereafter, to approach the High Court. It would really be a case of election of remedies.

5. It is submitted that in the revision filed from a final order in any proceedings, it is open to question interlocutory orders or consequential orders, all of which may be challenged in the same revision on the analogy of Section 105 of the Code. It is further emphasized that all that is required is that the main order should be challenged, along with the consequential orders. In support of this principle, the learned Counsel for the revisionist has placed reliance upon **Bussa Overseas and Properties Private Limited and another v. Union of India and another4**. Attention of the Court has been drawn to Paragraphs Nos. 6 and 26 of the report in **Bussa Overseas and Properties Private Limited** *(supra)* :

30. .....if the basic judgment is not assailed and the challenge is only to the order passed in review, this Court is obliged not to entertain such special leave petition. The said principle has gained the authoritative status and has been treated as a precedential principle for more than two decades and we are disposed to think that there is hardly any necessity not to be guided by the said precedent. .....

6. Reliance has also been placed upon the decision in **Bhagwanji and Kalyanji v. Punjabhai Hajabhai Rathod5.** Here, the learned Counsel for the revisionist has drawn the Court's attention to Paragraph Nos. 7 and 8 of the report, which read :

7. So far as the first question is concerned, I must immediately answer the same in favour of the appellant. Section 105 of the Code of Civil Procedure provides that unless otherwise expressly provided, no appeal shall lie from any order made by a Court in exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal. As sub-section (2) is not relevant for our purpose, I am not referring the same. Section 105 in its clear terms provides that against some particular order if an appeal is not provided, then such an order can be challenged in an appeal which is filed against the final judgment and decree. The reason behind Section 105 is that a party is not required to rush to the revisional Court every time and at the same time does not allow the party to say that though against the impugned order appeal was provided but he did not file the appeal.

8 Undisputedly an order accepting or rejecting a document would not be an appealable order therefore, correctness, validity and propriety of the order can be challenged before the appellate Court with the help and assistance of Section 15 of Code of Civil Procedure. The learned first appellate Court was absolutely unjustified in holding that in absence of a revision challenging the correctness of the order passed by the trial Court, it would not be open to the appellate Court to examine the validity/correctness of the order.

7. Relying on the said decision, Mr. Bhola Nath Yadav submitted that an order accepting or rejecting a document may be challenged in a revision carried against the final order. It is argued that here, the final order is the one striking off the execution in full satisfaction, without hearing the revisionist as the deceased *sarvarakar's chela,* appointed on the basis of the will. It is next submitted by the learned Counsel for the revisionist that the objection by Mr. Sahai is founded on the decision of this

Court in **Khurjawala Buckles Manufacturing Company, Tatanpara v. Commissioner, Sales Tax, U.P., Lucknow and another6** which has been overruled by a Full Bench of this Court in the case of **Mall Singh and others v. Smt. Laksha Kumar Khaitan and others7.** The following holding in **Mall Singh** has been brought to this Court's notice :

69. In *Khuriawala Buckles Manufacturing Co. v. Commissioner Sales Tax, U.P.* [A.I.R. 1965 Alld. 517.] it has, however, been held by a Division Bench of this Court that the provisions of Civil Procedure Code do not govern a proceeding under Article 226 of the Constitution. It is pointed out therein that what is laid down in Sec. 141 of the Civil Procedure Code is that the procedure laid down in the Code in regard to suits is to be followed, so far as it can be, in all proceedings is any court of Civil jurisdiction. A High Court when exercising jurisdiction under Article 226, according to the view expressed by that Bench, cannot be held to be a court of civil jurisdiction. That jurisdiction is not ordinary jurisdiction, but it is extraordinary jurisdiction which means that it is neither civil nor criminal.

70. This view, with respect, will no longer hold good in view of the two Supreme Court decisions referred to above. The jurisdiction may be extraordinary jurisdiction, but that does not mean that it is not civil just as the ordinary jurisdiction of the High Court may either be civil or criminal, the extraordinary jurisdiction as opposed to ordinary jurisdiction may also either be civil or criminal. The classification into "ordinary" and "extraordinary" jurisdiction is different from the classification between "civil and criminal" jurisdiction for both the civil and criminal jurisdiction may be ordinary or extraordinary. The jurisdiction with respect to a petition under Article 226 of the Constitution may be extraordinary jurisdiction, but if the impact of the decision is on the civil rights of a party, it would be exercised under its civil jurisdiction, if its impact is on criminal rights it is exercised under its criminal jurisdiction.

8. Mr. Sahai, on the other hand, submits that the decisions relied upon by the learned Counsel would not help him in maintaining a single revision against the three distinct orders impugned. He submits that **Khurjawala Buckles Manufacturing Company** *(supra)* is still good law and attention of the Court has been drawn to the holding of the Division Bench, which reads :

7. There are a number of decisions laying down that one petition impugning sevaral orders is not maintainable; vide AIR 1980 All 366 *(supra)*, Revenue Patwaris Union v. State of Punjab, AIR 1982 Punj 55, Inder Singh v. State of Rajasthan, AIR 1954 Raj 185 and AIR 1953 Mad 626 *(supra)*. In Calcutta Discount Co. Ltd. y. Income Tax Officer, AIR 1961 SC 372, one petition was filed to impugn three notices issued under S. 31 of the Income-Tax Act in respect of three years' assessment orders and was entertained. It was granted by a single Judge but rejected by a Bench. The Supreme Court on appeal restored the order of single Judge issuing prohibition but without deciding that a single petition was maintainable. It was not argued before it that one petition was not maintainable and so it did not decide this matter. The Division Bench of the High Court had dismissed the petition but not on the ground

that it was not maintainable. It has not been argued before it also that it was not. Hence this decision of the Supreme Court does not help the petitioner. In Chandra Bhan v. State of Orissa, Civil Mis. Petn. No. 1398 of 1962 decided by the Supreme Court on 5-4-1963 (SC) the Supreme Court did not decide whether one petition impugning two or mote assessment orders could validity be filed or not; all that it decided was that when one petition was filed one appeal arose out of the order and not two or more appeals.

8. ..... In a petition under Art. 226 the opposite party generally is the State Government and if a petitioner or petitioners were allowed tin benefit of Order II Rule 3 all kinds of different orders under different Acts having no connection whatever with one another would be liable to be joined in one petition causing confusion and embarrassment and this cannot be permitted. Then the principle that one proceeding maybe instituted combining a number of cases in which common questions of law or fact arise is not of universal application. Nobody yet has thought of filing one appeal against several orders or of filing one revision application against several appellate orders, on the ground that common questions of fact or law arise. If there are two proceedings and, therefore, two orders Courts have always insisted upon two appeals and two revision applications regardless of whether they are by the same appellant or applicant or against the same respondent or opposite party or not. There is no reason why one writ petition should be entertained simply on the ground that common questions of law or fact arise or that they are by or against the same person.

9. It is pointed out that this decision was overruled by the Full Bench in **Mall Singh** *(supra)* on another point, but not that a single petition or a single revision against multiple orders can be maintained. In this connection, he has drawn the attention of the Court to the questions that were referred to the Full Bench in **Mall Singh**, which appear to be related to joinder of more than one parties as petitioners in a single petition and the applicability of Order I Rule 1 of the Code to a petition under Article 226 of the Constitution. The questions that were precisely referred to the Full Bench in **Mall Singh** are :

1. Whether an application under Article 226 of the Constitution is a proceeding in a court of civil jurisdiction and as such the provision of Or. 1, R. 1 of the Code of Civil Procedure would be applicable to such a proceeding?

2. If the answer to the first question is in the affirmative, then whether persons more than one can join together in a petition under Article 226 of the Constitution in the circumstances in which persons more than one can join together as plaintiffs in a suit in accordance with the provisions of Or. 1, R. 1 of the Code of Civil Procedure?

10. These were answered by their Lordships of the Full Bench thus :

Question No. 1--An application under Article 226 of the Constitution involving civil rights is a proceeding in a Court of civil jurisdiction. So, the provision of Or. 1. R. 1, C.P.C. is applicable to such a proceeding.

Question No.--2 Even if we assume that a writ petition is not a proceeding in a Court of civil jurisdiction, and Or. 1, R. 1, C.P.C. in terms does not apply to such a proceeding, more persons than one can join in a petition under Article

226 of the Constitution under circumstances in which persons more than one can join as plaintiffs in a suit in accordance with the provisions of Or. 1, R. 1, C.P.C.

11. Mr. Sahai appears to be in right in his submission that the decision in **Khurjawala Buckles Manufacturing Company** on the point about the impermissibility of challenge to multiple orders was not the subject matter of consideration in **Mall Singh** or overruled there. At the same time, what cannot be disputed is that the principle in **Khurjawala Buckles Manufacturing Company** appears to be that distinct and different orders in different proceedings, may be against same party, cannot be challenged in a single appeal or revision. In fact, in **Khurjawala Buckles Manufacturing Company** the issue arose in the context of two separate assessment orders under the Uttar Pradesh Sales Tax Act, 1948 passed against the petitioner, one for the Assessment Year 1960-61 and the other for the year 1961-62, both of which were challenged in a single writ petition. That was held impermissible.

12. Here, the issue is about the maintainability of a single revision under Section 115 of the Code from three successive orders passed in the same execution. The last order, that is to say, the one dated 05.03.2022 strikes off the execution in full satisfaction. The order dated 24.01.2022 is an order that was passed on an application filed by the revisionist with a prayer that the former *Sarvarakar* Ishwar Sharan is dead and the revisionist, being his *Chela*, has been nominated as the *Sarvarakar* by Ishwar Sharan. The nomination has been done through a registered Will dated 11.12.2016. The prayer in the application was that the Will be accepted on record. This application was rejected by the order dated 24.01.2022. Apparently, the application to bring on record the Will left by the former Sarvakar, the judgment debtor, was to represent the *Sarvarakar* by the revisionist, claiming to be his *Chela*. if the the Will were accepted on record, the revisionist would assert that he is entitled to represent the interest of the deceased *Sarvarakar* on behalf of the temple in further proceedings for execution. This application being rejected, prejudiced the revisionist's right.

13. The other application 45-Ga was also made on behalf of the revisionist, Bharat Kumar, saying that the scheme of administration filed on behalf of the decree holder may not be accepted by the Court, and instead, the scheme of administration proposed on behalf of the judgment debtor, the deceased *Sarvarakar*, now represented by Bharat Kumar, his *Chela*, be accepted. This application has been rejected by means of the impugned order dated 03.03.2022 and the proposed scheme of administration filed on behalf of the decree holder has been accepted. All this having been done, by the order dated 05.03.2022, also impugned in the revision, the execution has been struck off in full satisfaction.

14. The question is, is it not in keeping with the mandate of Section 105 of the Code, applied *mutatis mutandis* to the execution of a decree that erroneous or defective orders, prejudicing a party, passed in the course of proceedings be permitted to be challenged against the final order made. By virtue of Section 141 of the Code, the procedure provided in regard to suits is mandated to be followed, *mutatis mutandis* in all proceedings in any Court of civil

jurisdiction. The proceedings for execution of a decree are not excepted. The provisions of Section 105(1) of the Code would, therefore, apply, and, in any case, would apply on principle, if not *proprio vigore*.

15. The principle behind Section 105(1) of the Code is to enable a party to challenge interlocutory orders passed during the course of a suit or other proceedings against the final order or the decree, which the party against whom these orders are made, thinks are erroneous, defective or irregular and further prejudices his interest. By enabling a party to challenge such interlocutory orders while challenging the final decree or order, the inevitable delay that would be caused in laying challenges to all kinds of prejudicial orders, that are passed during the course of proceedings, can be obviated. The purpose of it all is to eschew delay and speed up conclusion of the trial or other proceedings. But, at the same time, orders passed during the course of proceedings, that are prejudicial to a party, are still left open to be challenged in an appeal or revision from the final order, if that also goes against the party suffering interlocutory reverses. The provision balances the competing interest of an expeditious conclusion of proceedings on the one hand, with rectification of errors committed during the course of it, on the other.

16. In our opinion, therefore, looking to the nature of the impugned orders 24.01.2022, 03.03.2022 and 05.03.2022, a single revision can be maintained by the revisionist.

17. There is another pragmatic angle of looking at the worth of the respondent's objection. By the order dated 05.03.2022, the execution has been struck off in full satisfaction. If the revisionist were asked to file separate revision from all the three orders, any of these cannot be individually heard or may even be maintainable unless all the three orders are challenged through separate revisions and all the revisions heard together. The orders impugned are all but part of one challenge by the revisionist, arising out of the same execution.

18. In the considered opinion of this Court, therefore, the objection regarding maintainability raised by Mr. Sahai, cannot be sustained. The revision is, accordingly, held to be maintainable.

19. Considering the fact that the revision has not been heard on merits, let it be listed for admission on **06.01.2023 at 2:00 p.m.** Liberty to mention is granted to the revisionist.

(2023) 1 ILRA 1336
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.01.2022

BEFORE

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

Civil Revision No. 48 of 2022
And
Civil Revision No. 66 of 2022

Radhey Shyam ...Revisionist
Versus
Nagina Devi & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Prakhar Saran Srivastava

Counsel for the Opposite Parties:
Sri Ankur Mehrotra

Motor Accident Claim-Orders from Motor Accident Claims Tribunals - Not classified as appealable awards - Revisions questions the

maintainability of invoking Section 115 of the C.P.C against these orders - Civil Revision No. 66 Challenges the refusal to set aside an ex-parte award - Civil Revision No. 48 contests the condonation of delay in restoring a dismissed claim - The court examines conflicting opinions on whether a Motor Accident Claims Tribunal is a Court subordinate to the High Court, concluding that the Full Bench decision in Kamla Yadav is binding precedent, rendering the revisions maintainable - Court declines to reconsider Kamla Yadav, emphasizing its principled reasoning - The Civil Revisions are held maintainable, and further proceedings are scheduled.

List of Cases cited:

1. Orissa Co-operative Insurance Comp. (now) New India Assurance Company Limited Vs Subashini Pradhan & ors.

2. Beeran Vs Rajappan

3. Barkat Singh & ors. Vs Hans Raj Pandit & ors.

4. Satish Chandra & ors. Vs St. of U. P. through the Collector, Farrukhabad

5. Smt. Afsari Begum Vs Oriental Fire and General Insurance Company & ors.

6. Kamla Yadav Vs Smt. Sushma Devi & ors.

7. Om Prakash & anr. Vs Rukmani Devi & ors.

8. Mussamant Afsari Begum Vs Oriental Fire and General Insurance Co.

9. U.O.I., represented by its Secretary, Railway Board, New Delhi & ors. Vs Mysore Paper Mills Ltd., Bhadravathi, Karnataka St. & ors.

10. Oriental Insurance Comp. Ltd. through Divisional Manager, Meerut Vs Smt. Manju & ors.

11. New India Assurance Comp. Ltd. Vs Rakesh Kumar & ors.

12. U.P. St. Road Transport Corp. Vs Lajwat

13. Sandhya Vaish & ors. Vs New India Insurance Com. Ltd. & ors.

14. ICICI Lombard General Insurance Company Vs Smt. Ramawat

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

These Civil Revisions arise out of orders passed by the Presiding Officers of the Motor Accident Claims Tribunals at Ballia and Chandauli that are not awards amenable to appeal under Section 173 of the Motor Vehicles Act, 19881. The revisions were not formally connected, but since both involve an identical question about maintainability, the issue is being dealt with by a common order.

2. Civil Revision No. 66 of 2022 preferred under Section 115 of the Code of Civil Procedure, 19082 challenges an order passed by the Presiding Officer, Motor Accident Claims Tribunal, Ballia in Misc. Case No. 22 of 2019, refusing to set aside the ex-parte award dated 22.12.2018 passed in Motor Accident Claims Petition No. 44 of 2022.

3. By the order impugned in Civil Revision No. 48 of 2022, the revisionist has invoked this Court's jurisdiction under Section 115 of the Code to set aside the order dated 18.10.2021 passed by the Presiding Officer, Motor Accident Claims Tribunal, Chandauli in Misc. Case No. 93 of 2018, whereby the Tribunal has condoned a delay of four years and nine months by the claimants in making an application to restore Motor Accident Claims Petition No. 104 of 2010, that was dismissed in default on 10.12.2013. This Court, noticing some conflict of opinion about the maintainability of a civil revision under Section 115 of the Code against an order passed by Motor Accident Claims

Tribunal constituted under the Act, asked the learned Counsel appearing for the revisionists in both matters to address us on the issue of maintainability.

4. Mr. Vikrant Pandey, learned Counsel for the revisionist has been heard in Civil Revision No. 66 of 2022 and Mr. Prakhar Saran Srivastava, learned Counsel for the revisionist in Civil Revision No. 48 of 2022. Both the learned Counsel have been heard only on the question of maintainability.

5. In yesteryears and in different Courts, there has been conflict of opinion whether a Motor Accident Claims Tribunal constituted under the Act or the Tribunal functioning under the Motor Vehicles Act, 1939 is a Court subordinate to the High Court within the meaning of Section 115(1) of the Code, so as to make an order passed by the Tribunal amenable to the High Court's jurisdiction in a Civil Revision. Much of the reasoning in those decisions has centered around the distinction between a Court and a Tribunal. It has also been considered in those decisions what subordination of a Court means in the context of Section 115 of the Code. In particular, notice has been taken of Section 3 of the Code, which defines the subordination of Courts.

6. Amongst older decisions holding that the Tribunal constituted under the Act is not a Court subordinate to the High Court for the purpose of Section 115 of the Code are those of a Division Bench of the **Orissa High Court in Orissa Co-operative Insurance Company (now) New India Assurance Company Limited v. Subashini Pradhan and others3;** a Division Bench of the Kerela High Court in **Beeran v. Rajappan4** and of the Punjab and Haryana High Court in **Barkat Singh and others v. Hans Raj Pandit and others5.** In our Court also, there is a decision by a learned Single Judge, holding that under the Motor Vehicles Act, 19396, the Motor Accident Claims Tribunal is not a Civil Court subordinate to the High Court, within the meaning of Section 115 of the Code. The said decision is **Satish Chandra and others v. State of Uttar Pradesh through the Collector, Farrukhabad7.** In **Smt. Afsari Begum v. Oriental Fire and General Insurance Company and others8** a Division Bench of this Court opined that the Claims Tribunal being a Civil Court was amenable to the revisional jurisdiction under Section 115 of the Code. In **Kamla Yadav v. Smt. Sushma Devi and others9** a learned Single Judge of this Court opined that the Division Bench in **Afsari Begum** *(supra)* had not noticed the provision of Section 3 of the Code and Section 110-C (2) of the Act of 1939 while holding that the Tribunal under the Act of 1939 is a Court subordinate to the High Court. The learned Single Judge, accordingly, referred the matter to a Full Bench. In due course, the matter came up before a Division Bench for consideration. The Division Bench noticed that the learned Single Judge had not considered the later Bench decision of this Court in ***Om Prakash*** **and another v. Rukmani Devi and others10.** The Division Bench in *Om Prakash (supra)* held that the Tribunal is not a Court and is a creature of a special statute. It does not enjoy the status of a Civil Court and its orders are, therefore, not amenable to appeal under Order XLIII of the Code. The Division Bench, before whom the reference by the learned Single Judge in **Kamla Yadav** *(supra)* came up, directed the matter to be laid before a Full Bench to resolve the conflict of opinion between the Division Bench in **Afsari**

Begum and the Division Bench in **Om Prakash.** The following questions were referred for opinion of the Full Bench, as would appear from the report of the decision in **Kamla Yadav** :

Whether Claims Tribunal constituted under the Motor Vehicles Act is a subordinate Civil Court within the meaning of Section 115 of the Code of Civil Procedure?

Whether in view of the provision of Section 3 of the Code of Civil Procedure for the purposes of the Civil Procedure Code only the Courts referred to in Section 3 are the Civil Courts subordinate to the High Court and the District Court as the case may be and no other i.e. the authorities and that Tribunals such as one constituted under Motor Vehicles Act do not come within the framework of expression "Courts subordinate to High Court" for the purpose of Section 115 of the Code?

Whether the view expressed by the Division Bench in Mussamant Afsari Begum v. Oriental Fire and General Insurance Company, reported in (1979 ALJ page 1168) to the effect that Claims Tribunal constituted under Motor Vehicles Act is a Court subordinate to High Court and its orders are amenable to revisional jurisdiction of the High Court under Section 115 of the Code is in consonance with the letter and spirit of provisions of Section 115 read with Section 3 of the Code of Civil Procedure as well as provisions of Motor Vehicles Act and in particular Section 110-C(2) Motor Vehicles Act, if not, is the present revision maintainable in this Court? If not, is it open to this Court to entertain, hear and dispose of the same under Article 227 of the Constitution?

7. Their Lordships of the Full Bench answered the questions referred, in Paragraph No. 32 of the report thus :

Our answer to question No. 1 is in affirmative, that a revision lies against an order of the Motor Accidents Claims Tribunal. Our answer to question No. 2 is that the Courts mentioned in Section 3 CPC are not the only Civil Courts, other Courts and Tribunals can also be Civil Courts subordinate to the High Court, for the purposes of Section 115 CPC. Our answer to question No. 3 is that the judgment rendered in the case of Mussamat Afsari Begum v. Oriental Fire & General Assurance Company. 1979 ALJ 1168, has been rightly decided and is approved. Hence, the question of invoking Article 227 of the Constitution of India does not arise.

8. The issue was settled by the Full Bench of this Court in the year 1997 and the controversy ought to have come to a quietus8. A Full Bench of the Karnataka High Court in **Union of India, represented by its Secretary, Railway Board, New Delhi and others v. Mysore Paper Mills Limited, Bhadravathi, Karnataka State and others11** was confronted with the question whether a Tribunal constituted under the Act was a Court subordinate to the High Court within the meaning of Section 115 of the Code. Their Lordship of the Full Bench of the Karnataka High Court in **Mysore Paper Mills** *(supra)* held that the Motor Accident Claims Tribunal established under the Act is not a Court subordinate to the High Court for the purpose of Section 115 of the Code. Noticing the said decision, a Division Bench of this Court in **Oriental Insurance Company Limited through Divisional Manager, Meerut v. Smt. Manju and others12** of course, for added reasons, but without noticing the Full Bench decision of our Court in **Kamla Yadav** *(supra)* noted with approval, the view of the Full Bench of the Karnataka High Court that the

Tribunal was not a Court subordinate to the High Court for the purpose of Section 115 of the Code. The decision of the Division Bench in **Smt. Manju** *(supra)* was not as such about the maintainability of a civil revision, but about the maintainability of a First Appeal From Order from an order of the Tribunal that was not an award and appealable under Section 173 of the Act. Nevertheless, the point was discussed and the decision of the Full Bench of the Karnataka High Court referred to with approval.

9. Drawing inspiration from the decision of the Division Bench in **Smt. Manju** and the Full Bench of the Karnataka High Court in **Mysore Paper Mills,** a learned Single Judge of this Court in **Virendra Yadav v. Ramesh and another13** proceeded to hold :

19. In the light of recent apex court judgement *(supra)*, and keeping in view the apex court judgements relied upon in the five-Judge judgement, the Division Bench judgement leaves no scope for revisional jurisdiction to be invoked under Section 115 CPC against interlocutory orders passed by the Tribunals unless prescribed under the Special Act. The view taken seems to be a good law for more than one reason. Firstly, restricting the remedy against the judgements passed by Motor Accident Claims Tribunal to appeal under Section 173 of the Act implies that other remedies are barred particularly when Section 169 read with Rule 221 framed thereunder narrow down the application of the provisions of CPC. Secondly, if the intention of legislation on the aspect of remedies before this court is understood on the criteria of treating the Tribunal to be a "court' then in that event, the requirement of specifying the remedy of appeal under Section 173 of the Act would stand obliterated and the provisions of Section 96 CPC will automatically apply.

(emphasis by Court)

10. The same view was taken by a learned Single Judge in **Prabhakar Tiwari v. Shiv Ram and others14** holding a revision against an interlocutory order of the Motor Accident Claims Tribunal not maintainable under Section 115 of the Code. At the same time, there were other decisions where the Full Bench in **Kamla Yadav** was followed and orders of the Motor Accident Claims Tribunal that were not appealable were held amenable to the revisional jurisdiction of this Court under Section 115 of the Code. These are decisions of learned Single Judges of this Court in **New India Assurance Company Limited v. Rakesh Kumar and others15; U.P. State Road Transport Corporation v. Lajwati16; and Sandhya Vaish and others v. New India Insurance Company Limited and others17.** Some conflict of opinion appears to have emerged post decision of the Full Bench in **Kamla Yadav** on account of the decision of the Division Bench in **Smt. Manju** following the Full Bench of the Karnataka High Court in **Mysore Paper Mills,** and some conflicting opinions of learned Single Judges about the issue whether an interlocutory order of the Motor Accident Claims Tribunal constituted under the Act is amenable to the revisional jurisdiction of this Court, or so to speak, whether the Tribunal established and constituted under the Act is a Court subordinate to the High Court for the purpose of Section 115 of the Code. A reference on this issue in the form of two questions was made to a larger Bench by a learned Single Judge at the Lucknow Bench of this Court in **ICICI**

Lombard General Insurance Company v. Smt. Ramawati18. The questions referred to the larger Bench in **ICICI Lombard General Insurance Company** *(supra)* read :

31. In the background stated above and to settle the position, the following questions are framed for reference to the Larger Bench/Full Bench:

"(i) Whether in absence of an enabling provision, the Full Bench judgement in the case of **Kamla Yadav** v. Shushma Devi and others, 2004 (22) LCD 40, would hold the field in contradiction to the Apex Court judgements relied upon in the Division Bench judgement rendered in the case of Oriental Insurance Co. Ltd. v. Manju and others, 2007 (2) AWC 1927; and as to whether the view taken by this Court in the case of Virendra Yadav v. Ramesh and another (Civil Revision No. 102 of 2016) and similar view expressed in Prabhakar Tiwari v. Shiv Ram was rightly obliterated by the learned Single Judge in the case of U.P. State Road Transport Corporation v. Lajwati by holding that the Full Bench view taken in the case of **Kamla Yadav** v. Sushma Devi would alone be applicable and followed.

(ii) Whether the exercise of jurisdiction under Section 115 of the Code of Civil Procedure by this Court in absence of an enabling provision under the Motor Vehicles Act, 1988 is permissible treating the Tribunal to be a sub-ordinate Court within the meaning of Section 3 CPC".

11. Before the said questions could be placed before a larger Bench, the revision, wherein the order was made, came to be decided by the Court. The questions were never laid before a larger Bench. These facts appear from the order dated dated 14.07.2017 passed on C.M. Application No. 95241 of 2017 in Civil Revision No. 49 of 2015, which was an application for modification/clarification of the judgement and order dated 06.04.2017, making the reference to a larger Bench.

12. The result was that the reference made in **ICICI Lombard General Insurance Company** was not answered. The question before this Court is : Whether the view of the Full Bench in **Kamla Yadav** that a Motor Accident Claims Tribunal constituted under the Act is a Court subordinate to the High Court within the meaning of Section 115 of the Code requires reconsideration? This Court does not think that it would be in keeping with the settled principles regarding adherence to binding precedent about making a reference to a larger Bench for reconsideration, if the issues settled by the Full Bench in **Kamla Yadav** were again referred. Much doubt could be thrown up regarding the correctness of the decision in **Kamla Yadav** and the Full Bench of the Karnataka High Court in Mysore Paper Mills may be a strong inspiration to do that. But, it can be nothing more than an inspiration. A reading of the statute also, particularly the provisions of Section 3 of the Code and Rule 221 of the Rules framed under the Act, which applies only certain provisions of the Code to proceedings before the Tribunal, may present an alluring proposition to think that the Full Bench decision in **Kamla Yadav** ought to be reconsidered. But, on principle, nothing appears to this Court to be so fundamentally wrong about the reasoning of the Full Bench to persuade this Court to make a reference to a larger Bench on the lines it was done by the learned Single Judge in **ICICI Lombard General Insurance Company**. In the opinion of this

Court, the Full Bench decision of this Court in **Kamla Yadav** is binding precedent. There is nothing for this Court not to go by it.

13. The Civil Revisions are, accordingly, held maintainable.

14. Since orders were reserved in these revisions on the point of maintainability, when these came up before the Court as fresh causes, lay both these matters as **fresh** on **13.01.2023.**

15. The interim orders passed in both the revisions shall continue to remain in operation till the next date of listing.

(2023) 1 ILRA 1342
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.12.2022

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Civil Revision No. 36 of 2017

Smt. Ratni Devi & Ors. ...Revisionist
Versus
Smt. Asha Hans ...Respondents

Counsel for the Revisionist:
Sri Rakesh Kumar Gupta

Counsel for the Respondents:

Civil Law - Code of Civil Procedure, 1908 - Revision challenging declaratory suit - nullifying a sale deed - Issues of improper valuation and insufficient court fees - Emphasized valuation based on land revenue - Criticized rejection of amendment application - Directing lower court to reconsider application.

Revision allowed. (E-9)

List of Cases cited:

1. Ran Vijay & anr. Vs Board of Revenue & anr. 2017 (1) C.A.R 815 Alld

2. Indal Kumar Kushwaha & anr. Vs Rajesh Kumar Gupta & ors. 2008 A.C.J. 838

3. M/S Laxmi Sugar & Oil Mills Ltd. Hardoi & ors. Vs St. of U.P. & anr. 2010 (111) RD 617

4. Anuruddha Kumar & anr. Vs Chief Controlling Revenue Authority & anr. 2000 A.C.J 1397

5. Ganga Vs Vijay A.I.R 1974 S.C. 1126

6. Pirgonda Vs Kalgonda A.I.R. 1957 S.C 363

7. Ram Chandra Sakharam Vs Damodar (2007) 6 S.C.C 737

8. Rajesh Vs K.K. Modi, A.I.R 2006 SC 1647

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

1. This civil revision has been filed against the judgement and order dated 23.11.2016 passed by the Additional Civil Judge (Senior Division), Court No.6, Meerut in Original Suit No.846 of 2014 *(Smt. Ratni Devi Vs. Smt. Asha Hans).*

2. In brief facts of the case are that revisionist, Smt. Ratni Devi filed a suit for declaratory decree to declare the sale deed dated 07.05.2014 null and void registered in the office of Sub-Registrar, Mawana, District Meerut and to send its information to the concerned Sub-Registrar.

3. According to the plaint and the revision, Smt. Ratni Devi (now deceased) was the owner and *Bhumidhar* with transferable rights of khasra no.460 area 0.5060 hectare and khasra no.462 area 0.4430 hectare situated in Village Himaunpur, Pargana Hastinapur, Tehsil

Mawana, District Meerut. She was an old and ill lady. Her cardiac treatment was going on. Respondent defendant is the daughter of the revisionist-plaintiff. The plaintiff was getting pension after death of her husband who was working in MCD, Delhi. When for the purposes of purchasing fertilizers she took a copy of *khatauni* on 19.07.2014, she came to know that defendant had got executed a sale deed in her favour of her land. The plaintiff obtained a certified copy through advocate on 07.05.2014 then she came to know that it is shown that in lieu of Rs.7,50,000/- she has sold 0.1145 hectare and 0.6707 hectare land to the defendant in which husband of the defendant and one Anil Kumar Sharma, advocate, Tehsil Mawana have been shown marginal witnesses.

4. The petitioner had neither proposed to sell her land to the defendant nor ever executed any sale deed in her favour. On 07.05.2014 in the garb of increase of pension she was taken by the defendant and in good faith defendant got signed some papers telling it to be the pension papers which she had not read over. By playing fraud the defendant has shown the execution of sale deed. There was no necessity of sale of property in suit. The plaintiff neither sold the land nor obtained any consideration.

5. During pendency of the case the plaintiff died. Her three sons namely Dinesh Kumar, Dev Kumar and Anand Kumar were her heirs and she had executed sale deed on 20.08.2014 about complete movable and immovable property in their favour. Dev Kumar died on 18.03.2015, therefore, his heirs have been arrayed as plaintiff. When the matter was reported to the defendant she accepted her fault and assured to get the sale deed cancelled but later on clearly refused to do so. Hence, cause of action arose and suit had been filed.

6. During the course of hearing on 19.04.2016, issue no.2 regarding improper valuation of the suit and payment of insufficient court fee, issue no.3 were decided. So far as issue no.2 is concerned the court assumed that the plaintiff has properly valued the suit but about the payment of court fee the lower court held that since the property has been valued at Rs.7,50,000/-, and the plaintiff was party to the sale deed, therefore, under Section 7(IV)-A of the Court Fees Act, 1870 the plaintiff would pay ad *valorem* court fee at the market value of the case property.

7. Instead of complying with the order regarding issue no.3, the plaintiff moved 41-Ka amendment application, in which the plaintiff proposed to value the suit for relief 'A' at Rs.600/- (thirty times of the annual rent of RS. 20/-) and proposed to pay the court fees Rs. 87.50/-and for proposed relief 'B' regarding permanent injunction valuing the growing crops at Rs. 6 lacs proposed to pay maximum Court fee Rs. 500/-.

8. Objection was filed by the defendant and after hearing it was held that by way of amendment application the facts proposed to be inserted in paragraph-13 of the plaint would nullify the order dated 19.04.2016. Hence, the amendment application was not maintainable. Though an option was given to the plaintiff to move separate amendment application regarding the rest facts proposed to be inserted by way of amendment. Accordingly, the amendment application was rejected and the plaintiff was directed to pay the additional court fees as per order dated 19.04.2016.

9. Being aggrieved the revisionist-plaintiff has filed this revision.

10. None appeared from the side of either party. Since the revision should be decided on merit, hence this revision is decided on merit as per law.

11. Admittedly, the suit has been filed for cancellation of registered sale-deed, in which the revisionist is the party to the deed. It is also admitted that the property in suit is land revenue payable agricultural land and the purpose of buying the land is mentioned as cultivation. Though, as per the market value of the property in suit was Rs. 17,17,000/- upon which the stamp duty for a sum of Rs. 76,000/- has been paid but Rs.7,50,000/- is shown as consideration money. It is also noteworthy that plaintiff and defendant are the real mother and daughter. In the plaint, the plaintiff has valued the suit at Rs. 7,50,000/- but had paid maximum court fee Rs.200/- for relief (A) stating that the plaintiff had prayed for a declaratory decree to declare the sale-deed dated to be null and void.

12. First of all the nature of the land in suit is to be seen. Admittedly it is a land revenue paying agricultural land and no declaration for conversion of its nature has been made. For the purpose of this revision it would be proper to place some relevant citations in this regard which are given below.

13. In ***Ran Vijay & Anr. Vs. Board of Revenue & Anr. 2017 (1) C.A.R 815 Alld,*** the petitioner was using the agricultural land as Aabadi. The petitioner's plea was that since the land in dispute has been used as Aabadi Revenue Court ceases to have jurisdiction to entertain the suit under Section 209 of the U.P.Z.A & L.R. Act. The court held that the plea of the petitioner is not tenable because unless declaration under Section 143 for change, in use of land is obtained by the S.D.O, it will remain to be agricultural land and revenue court will have jurisdiction to entertain the suit. The court further clarified that even Civil Court or High Court can not act as competent authority under Section 143 to grant such permission.

14. In this case the property in suit is still an agricultural land and no declaration under Section 143 has been made. Hence, the land in suit shall be deemed to be land revenue paying agricultural land.

15. In ***Indal Kumar Kushwaha and another vs. Rajesh Kumar Gupta and others 2008 A.C.J. 838,*** it is again held that unless agricultural land is notified under Section 143, it can not be treated as residential land.

16. In ***M/S Laxmi Sugar & Oil Mills Ltd. Hardoi And Ors. Vs. State of U.P. and Anr, 2010 (111) RD 617,*** it is held that if the land is occupied for agricultural purposes or connected with such purposes, it will continue to be an agricultural land even if *Bhumidhar* builds house in a agricultural holding or on form unless a declaration under Section 143 is obtained.

17. In ***Anuruddha Kumar & another Vs. Chief Controlling Revenue Authority & another 2000 A.C.J 1397,*** it is held that since there was no declaration under Section 143 of changing the nature of the land into residential plot, it would be only agriculture land and not a residential plot. It is presumption that the plot sold was residential plot on the basis of its potential in future, is not reasonable.

Thus, on the basis of aforementioned judgements and on the basis of documents available on record, it is

concluded that the property in suit is an agricultural land and if any deed of transfer has been executed and registered in respect of an agricultural land and a suit for cancellation of such instrument is filed, it will be valued on the basis of land revenue and not on the basis of consideration money or the market value.

18. Section 7 **(IV-A) of the Court Fee Act** is as under:-

(iv-A) For cancellation or adjudging void instruments and decree.-

(iv-A) In suits for or involving cancellation of or adjudging void or voidable a decree for money or other property having a market value, or an instrument securing one or other property having such value:

(1) where the plaintiff or his predecessor-in-title was not a party to the decree or instrument, according to one-fifth of the value of the subject-matter,

(2) where he or his predecessor-in-title was not a party to the decree or instrument, according to one-fifty of the value of the subject-matter, and such value shall be deemed to be--

If the whole decree or instrument is involved in the suit, the amount for which or value of the property in respect of which the decree was passed or the instrument executed, and if only a party of the decree or instrument is involved in the suit, the amount or value of the property to which such part relates.

Explanation.- The value of the property for the purposes of this sub-section shall be the market-value, which in the case of immovable property shall be deemed to be the value as computed in accordance with sub-section (v), (v-A) or (v-B), as the case may be.

(iv-B) For easement. - In suits -

(a) for a right to some benefit (not herein otherwise provided for) to arise out of land;

(b) For an injunction. - to obtain injunction;

(c) To establish an adoption.- to establish an adoption or to obtain a declaration that an alleged adoption is valid;

(d) To set aside an adoption.- to set aside an adoption or to obtain a declaration that an alleged adoption is invalid or never, in fact, took place;

(e) To set aside an award other than awards mentioned in Section 8.- to set aside an award not being an award mentioned in Section 8; according to the amount at which the relief sought is valued in the plaint:

Provided that such amount shall not be less than one-fifth of the market value of the property involved in or effected by the relief sought or Rs. 200 whichever is greater:

Provided further that in the case of suits falling under clauses (a) and (b), the amount of court-fee leviable shall in no case exceed Rs. 500.

Explanation 1.- When the relief sought is with reference to any immoveable property the market-value of such property shall be deemed to be the value computed in accordance with sub-section (v), (v-A) or (v-B) of this section, as the case may be.

(v) For possession of lands, buildings or gardens.- In suits for the possession of land, buildings or gardens-

according to the value of the subject-matter; and such value shall be deemed to be-

(I) Where the subject-matter is land, and-

(a) where the land forms an entire estate or definite share of an estate paying

annual revenue to Government, or forms part of such an estate, and is recorded in the Collector's register as separately assessed with such revenue and such revenue is permanently settled-

thirty times the revenue so payable;

(b) where the land forms an entire estate or a definite share of an estate paying annual revenue to Government, or forms part of such estate and is recorded as aforesaid and such revenue is settled but not permanently-

ten times the revenue so payable;

19. In this case, the plaintiff is the party to the deed, and the land in suit is land revenue payable land, therefore, the suit would be valued on the market value and the market value would be 30 times of the land revenue and if the land revenue is permanently settled, the court fee would be paid 30 times of the the revenue so payable and if the land revenue is not permanently settled the court fee would be 10 times of the land revenue so payable. In this case it has been concluded and also admitted to the parties that the property in suit is a land revenue payable agricultural land, therefore, the suit would be valued on 30 times of the land revenue so payable as the plaintiff is party to the impugned sale-deed and the Court fee would be paid considering the fact as to whether the revenue is permanently settled or not.

20. Normally in U.P. the land revenue are not permanently settled, therefore, even if a person party to the deed institutes a suit for adjudging the instrument to be null and void, he would value the suit at 30 times of the revenue so payable, but shall pay the court fee on 10 times of the revenue so payable.

21. In this case, it is not denied to the defendant-respondent that the annual revenue of the property in suit is not Rs. 20/- annual.

22. In the proposed amendment the plaintiff had multiplied the annual land revenue Rs. 20/- x (into) 30 times which becomes Rs.600/- upon which, he has proposed to pay Rs. 87.50 as court fee. Here what is important to note that if the land revenue of the property in suit is not permanently settled, the plaintiff has to pay the Court Fee ten times of the land revenue so payable while he has proposed to pay the Court fee more than that, treating it to be land revenue permanently settled, thus the proposed amendment in respect of relief "A", is found to be true and correct and also in accordance with law.

23. The plaintiff has also proposed some factual amendments in amendment application stating that since 06.08.2016 the defendant had started obstacles in plaintiff's use and occupation over the property in suit and is trying to cut and damage the crops standing over the property in suit for which he has valued the suit at Rs. 6 lacks and has proposed to pay the maximum court fee Rs. 500/- for the proposed relief of permanent injunction.

24. In ***Rajendra Prasad Yadav Vs. Ravindra Nath Singh and Others,*** decided on 20.12.2013, this Court referring the cases- 1949 AWR 67(DB) (All) (Para 10),(2010)5 SCC 622 (Para 13), 2006 (100) RD 568 (Uttra) (Para 18), (2013) 1 SCC 579 (Para 7), 1972 AWR 808 (All) (Para11) has held that *in case when a prayer has been made to declare the sale-deed null and void and to send the information to the concerned Sub-Registrar and if the property in suit is an agricultural land*

whereupon land revenue is payable, the suit shall be valued at the market-value and the market-value would be decided in view of the Section 7 (v), (v-A) or (v-B).

Therefore, the view expressed in the aforementioned judgement is in support of the view expressed by this Court.

25. The proposed amendment dated 16.08.2016 was rejected by the Civil Judge (Senior Division) VI, Meerut, on the ground that if the proposed amendment is allowed, the order dated 19.04.2016 passed on issue nos. 2 and 3 would be redundant.

26. From perusal of the record, it transpires that when the property in suit was an agricultural land, it had to be valued on the basis of land revenue so far as the relief for declaration of sale-deed to be null and void is concerned. It was fault of the advocate that he valued the suit at the consideration money instead of valuing the suit on the basis of 30 times land revenue payable to the Government. It appears that later on considering the mistake to correct the same, the proposed amendment application was moved and which was rejected on 23.11.2016. Since the Court was also knowing that the property in suit is an agricultural land whereupon land revenue is payable to the Government, therefore, it was also duty of the Court to point out the defects and to instruct the plaintiff to remove it through proper amendment besides deciding issue no. 3 in respect of court fee against the plaintiff and directing her to pay the ad-*valorem* court fee according to the consideration money. It appears that the lower court was apprehending that if the amendment is allowed, the order passed on 19.04.2016 in respect of issue nos. 2 & 3 would be nullified. Virtually the lower Court should have discarded such apprehension, mindset and fear while deciding the amendment application. According to this Court, the amendment should be decided in accordance with law enumerated under Order 6 Rule 17 C.P.C. If the amendment would have been allowed, the wrong committed by the plaintiff's counsel and the Court would have also been rectified. Even after accepting the amendments by amending issue nos. 2 & 3, the question regarding valuation and court fee could be decided again.

27. The Order 6 rule 17 C.P.C. is as under :

Order VI Rule 17 Code of Civil Procedure :

17. **Amendment of pleadings-** *The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.*

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

28. In this case till now the trial has not commenced, hence the proviso of Rule 17 does not apply and was no bar in allowing the amendment application. By the proposed amendment the nature of the suit, cause of action or the basis of suit was not going to be changed and no irreparable injury/damage was to be caused to the defendants. No such admission was

proposed to be withdrawn on which basis any right had been accrued in favour of the defendant.

29. In ***Ganga Vs Vijay A.I.R 1974 S.C. 1126,*** it is held that the power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation not withstanding "amendment is permissible for determination of the real controversy between the parties".

30. In ***Pirgonda Vs. Kalgonda A.I.R. 1957 S.C 363,*** it is held that amendment should normally be allowed if it does not cause injustice to the opposite party and is necessary for determination of real issues.

31. Probably the lower court would have thought that the proposed amendment is mala-fide but considering the facts from all four corners this Court is of the view that the proposed amendment was not mala-fide and if it would have been allowed later on the issues with regard to insufficiency of court fee and valuation could have been amended and re-framed even by way of additional written statement, the defendant had an opportunity to take a plea that even after the amendment the suit is under valued and the court fee paid is insufficient. Thus no injustice would have been caused to the defendant.

32. In ***Ram Chandra Sakharam vs. Damodar (2007) 6 S.C.C 737,*** it is held that no amendment petition shall be rejected solely on the ground that there has been delay in applying for amendment. Because the delay could be compensated by awarding costs to the defendant. Amendment seeking to make claim more precise so as to enable the court to adjudicate upon it more satisfactorily should be allowed.

33. In ***Rajesh Vs. K.K. Modi, A.I.R 2006 SC 1647,*** it is held that while considering an amendment petition the Court should not go into the correctness or the falsity of the case in the amendment, nor should it record a finding on the merits of the amendment sought to be incorporated by way of amendment.

34. On the basis of the above discussions, this Court is of the view that the proposed amendment ought to have been allowed. Although, it was affecting the order passed by the lower court earlier about the issues no. 2 & 3, but in spite of that after filing of additional written statement the issues regarding valuation and payment of court fee would have been amended and the issues regarding valuation and court fee would have been open to decide again.

35. The plaintiffs had also remedy to challenge the order dated 19.04.2016 passed in respect of issue nos. 2 and 3. It is also noteworthy that the issue of valuation and payment of court fee is between the plaintiff and the court, therefore it was duty of the court to consider that when the property in suit is land revenue payable agricultural land, why it was not valued as per section 7(IV-A) and why the court fee was not paid as per the existing law. The court cannot take benefit of it's own wrong and if the plaintiff later on tried to correct the valuation clause, the court should not have create hurdle in it.

36. On the basis of the aforementioned discussions, this Court is of the opinion that

the revision deserves to be allowed and the order dated 23.11.2016 is liable to be quashed.

37. The revision is **allowed.** The order dated 23.11.2016 passed in Original Suit No. 846 of 2014 (Smt. Ratni Devi Vs. Smt. Asha Hans), is hereby set-aside.

38. Learned lower court is directed to decide he amendment application afresh after affording opportunity to both the parties in light of the observations mentioned above. A copy of this Judgement be sent to the Additional Civil Judge (Senior Division)-6th Meerut, through the District Judge, Meerut, for immediate compliance.

39. The stay order dated 08th February, 2017, regarding stay of further proceedings of O.S. No. 846 of 2014, stands vacated.

(2023) 1 ILRA 1349
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.01.2023

BEFORE

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

Civil Revision No. 18 of 2008

Star Paper Mills Limited, Saharanpur
...Revisionist
Versus
Smt. Anisa Begum & Ors.
...Opposite Parties

Counsel for the Revisionist:
Sri Kshitij Shailendra, Sri Ravi Kiran Jain

Counsel for the Opposite Parties:
Sri Pankaj Agarwal

Civil Law - The Indian Stamp Act, 1899- Section 2(14-A) - Challenged rejection of defendant's application to impound "yaddasht hiba" - Document recording oral gift - Amendment clarified memorandum of oral gift or hiba - now taxable to stamp duty- No costs awarded.

Revision succeeded. (E-9)

List of Cases cited:

1. Mohammad Shamim Akhtar Vs St. of U.P. & ors., 2012(11) ADJ 698

2. Hafeeza Bibi & ors. Vs Shaikh Farid (Dead) by LRs. & ors., 2011 (2) ARC 218

3. Inspector General of Registration and Stamps, Govt. of Hyderabad Vs Smt. Tayyaba Begum, AIR 1962 AP 199

4. Nasib Ali Vs Wajed Ali, AIR 1927 Cal 197

5. Sukhdeo Prasad, AIR 1934 All 1052

6. Hanuman Prasad Vs The St. of Rajasthan, AIR 1958 Raj 291

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

This revision is directed against the order of the Additional District Judge, Court No.2, Saharanpur, rejecting the defendants' application under Order XIII Rule 8 CPC read with Rule 60 of the General Rules (Civil), 1957 and Sections 31, 32, 33, 38 and 40 of the Indian Stamp Act, 1899 (for short, 'the Act of 1899) asking the Court to impound the document bearing paper No. 354-Ka filed by one Farid Ahmad, a third party, seeking impleadment, in support of his impleadment application.

2. The facts in a nutshell leading to this revision are that Smt. Anisa Begum, a resident of Kori Tilla, Saharanpur, instituted O.S. No. 317 of 1991 in the ex-Court of the Civil Judge, Saharanpur [now Civil Judge (Sr. Div.)] against the two defendants, who are substantially the same

party, that is to say, Star Paper Mills Pvt. Ltd. through its Managing Director and the General Manager of the said company, claiming a mandatory injunction in terms hereinafter indicated.

3. The plaintiff's case is that the suit property, admeasuring 7940 square yards, *Khasra No.* 538, *Khewat No.* 13, Mahal Gher, Daiyan Mohammad Hasan Khan, Village Pathanpura, is the plaintiff's property, of which she is the owner in possession. She is recorded as such in the revenue record. The aforesaid property shall hereinafter be called 'the suit property'. It is the plaintiff's case that the suit property is abadi and located within the city of Saharanpur. As such, *zamindari* relating to the said land has not been abolished and the plaintiff continues to be its *zamindar* with all rights attached to the estate. After pleading her chain of title and the manner of acquisition of the suit property through sale deeds by the plaintiff's father, Nisar Ahmad, it is asserted that the plaintiff has inherited the said property from her father. Her father was in possession of the suit property as *zamindar* along with other properties that he had purchased. His name was mutated in the revenue records.

4. Shorn of details that are not relevant for the purpose of the limited issue that arises in this revision, the plaintiff's case in the suit appears to be that though she continues to be the *zamindar* of the suit property, wherein the defendants have, through a chain of successive transfers, acquired a limited right to the use of a grove etc., the defendants, that is to say, Star Paper Mills Pvt. Ltd. are ignoring the *zamindar*'s rights and threatening to fell trees, some of which have already been cut away. The efforts to prevent the defendants have failed. The defendants are also threatening to raise constructions over the suit property after felling the various trees there in derogation of the *zamindar*'s rights that the plaintiff holds. Accordingly, the suit was instituted by Smt. Anisa Begum, praying that a mandatory injunction be issued, directing the defendants to remove all their effects, like goods, building materials etc., whatsoever, from the suit property shown in the schedule to the plaint, within time fixed by the Court, failing which the Court may cause these materials and effects to be removed through the Court's process.

5. The suit was instituted on behalf of Smt. Anisa Begum through the holder of her general power of attorney, Jalil Ahmad. He has been rather peculiarly described in the array as plaintiff No. 1/1. He is not an LR of Anisa Begum, substituted in her stead. Jalil Ahmad has signed and verified the plaint, describing himself as the holder of general power of attorney from Smt. Anisa Begum, who has been shown as the plaintiff, acting through her attorney in the verification clause. In the cause title of the plaint, Anisa Begum and her attorney, Jalil Ahmad have been rather awkwardly described with Jalil Ahmad, as already said, being shown on the plaintiff's side as plaintiff No. 1/1, below Anisa Begum's name.

6. Pending suit, one Farid Ahmad, a third party, made an application, seeking impleadment on 23.08.2007 under Order XXII Rule 10 CPC. It was alleged by Farid Ahmad, who is opposite party No. 2 and, in fact, the contesting opposite party, that the plaintiff, Jalil Ahmad, by oral gift dated 16.05.2006, had gifted him the suit property, that is to say, the *zamindar*'s estate, which Smt. Anisa Begum held. Farid

Ahmad accepted the oral gift (*hiba*) and acting on the oral gift, took possession of the suit property. Later on, on 23.07.2006, Jalil Ahmad wrote a memorandum of oral gift, meant to serve as a record of the antecedent *hiba*. It was also asserted that Jalil Ahmad being ill was unable to properly prosecute the suit. On the said assertion, Farid Ahmad prayed that he may be impleaded as a plaintiff along with Jalil Ahmad and permitted to prosecute the suit. This application by Farid Ahmad bears paper No. 347-C.

7. Apparently, Farid Ahmad did not file the document dated 23.07.2006, the memorandum of oral gift, on the basis of which he sought impleadment. Later on, he brought on record the document dated 23.07.2006, which is described in vernacular as *"yaddasht hiba"*. A copy of the said document is on record as Annexure No. 2 to the affidavit in support of the stay application.

8. Jalil Ahmad filed objections to the application made by Farid Ahmad, seeking impleadment, wherein he said that after making the oral gift, he had ceased to have any interest in the suit property. It was mentioned that the said fact be noted. The defendant-revisionist filed objections to the application seeking impleadment by Farid Ahmad with a case that the latter had no *locus standi* to move the application or seek impleadment. The basis of the objection was that the document bearing paper No. 354-Ga relied upon as evidence of the oral gift was a waste paper and did not confer any right, title or interest upon Farid Ahmad. It was urged that Fariid Ahmad sought impleadment on the basis of the memorandum of oral gift, bearing paper No. 354-Kha to establish his right to the suit property as an oral gift.

9. It was further urged through the objection preferred by the defendant-revisionist that the document was unregistered and insufficiently stamped. It was, therefore, required to be impounded under Section 33 of the Act of 1899. The defendant-revisionist referred to the provisions of Sections 30, 32, 33, 38 and 40 of the Act of 1899 and the amended definition of an instrument of gift under sub-Section (14-A) of Section 2, introduced in the Act of 1899, in its application to the State of Uttar Pradesh vide U.P. Act No. 38 of 2001. It was impressed upon the Trial Judge that a memorandum of oral gift carrying a declaration about the making or acceptance of an oral gift would also be taxable to stamp duty. The Trial Judge by the impugned order rejected the revisionist's application under Order XIII Rule 8 CPC, seeking to impound the instrument, bearing paper No. 354-Ga/ the memorandum of oral gift.

10. Aggrieved, this revision has been instituted.

11. Heard Mr. Kshitij Shailendra, learned Counsel for the revisionist and Mr. Pankaj Agrawal appearing on behalf of opposite party No. 2. No one appears on behalf of the heirs and LRs of the plaintiff-opposite party Nos. 1/1/1, 1/1/2, 1/1/3 and 1/1/4.

12. Mr. Kshitij Shailendra, learned Counsel for the revisionist and Mr. Pankaj Agarwal, learned Counsel appearing for contesting opposite party No. 2 are at sharp variance about the proposition that a memorandum of oral gift (*hiba*), which does not by itself bring about a transfer of immovable property or create, extinguish or enlarge rights, but merely records an antecedent oral transaction, accompanied

by acceptance and delivery of possession, is neither compulsorily registerable nor taxable to stamp duty. While Mr. Kshitij Shailendra submits that it is both compulsorily registerable and taxable to stamp duty, Mr. Agarwal says that it does not require either. Mr. Agarwal has supported the order impugned passed by the learned Trial Judge, refusing to impound the instrument.

13. Since this revision arises out of the defendant's application under Order XIII rule 8 CPC read with Sections 31, 32, 33, 38 and 40 of the Act of 1899, seeking to impound the document, paper No. 354-Ka, the issue whether the document is compulsorily registerable or not, does not arise in this case. All that is to be examined is: whether the document is required to be taxed to stamp duty or it can be received in evidence, without any stamp duty being paid thereon, or even if insufficiently stamped? It is interesting that the learned Counsel appearing for both parties have relied upon the decision of this Court in **Mohammad Shamim Akhtar v. State of U.P. and others, 2012(11) ADJ 698** to canvass their diametrically opposite submissions. In **Mohammad Shamim Akhtar** *(supra),* it was held:

"8. The definition of the instrument under Section 2(14) of the Act is very wide and it includes every document or record which purports to create, transfer, limit, extend, extinguish or record the right or liability of a party in respect of any property.

9. Recently, the Apex Court in **Hafeeza Bibi** and others v. Shaikh Farid (Dead) by Lrs. and others, 2011 (2) ARC 218, has dealt with gift under the *Mohammedan* Law and has ruled as under:

'In our opinion, merely because the gift is reduced to writing by a Mohammadan instead of it having been made orally, such writing does not become a formal document or instrument of gift. When a gift could be made by Mohammadan orally, its nature and character is not changed because of it having been made by a written document."

10. The Apex Court in the aforesaid decision distinguishing the decision of the Full Bench of Andhra Pradesh High Court in the case of Inspector General of Registration and Stamps, Govt. of Hyderabad v. Smt. Tayyaba Begum, AIR 1962 AP 199, approved the view of the Calcutta High Court in the case of Nasib Ali v. Wajed Ali, AIR 1927 Cal 197, holding that a deed of gift by *Mohammedan* is not an instrument effecting, creating or making the gift but a mere piece of evidence. Such writing is not a document of title but a piece of evidence only.

11. In view of the above decision of the Supreme Court, though the Court therein has not considered the impact of definition of the instrument as contained in the Act, clearly ruled that the nature and character of the gift made by the *Mohammedan* does not change merely for the reason that it has been written down and that a gift by the *Mohammedan* is not an instrument effecting, creating or making the gift in writing but only a piece of evidence.

12. In addition to the above, the definition of 'instrument' under Section 2(14) of the Act contemplates a document or a record creating or extinguishing rights and liabilities which means existence of a document in some form or the other. Therefore, where an oral gift is permissible

and made there happens to be no document or record of rights and liabilities which could be subjected to stamp duty. Liability of payment of stamp duty arises only on the execution of an instrument. (Reference: AIR 1934 All 1052 Sukhdeo Prasad). The subsequent writing it out on a paper would not make it a gift deed as the gift stood completed in the past by making an oral declaration, its acceptance and delivery of possession. His Lordship of the Rajasthan High Court in Hanuman Prasad v. The State of Rajasthan, AIR 1958 Raj 291, ruled that a document which is not an instrument of gift but only a record of the past transaction does not require to be stamped under the Act.

13. In the above situation neither the gift made by a *Mohammedan* orally nor its reduction in writing subsequently would amount to execution of an instrument which could be subjected to payment of stamp duty. Thus, I am of the opinion that the authorities below grossly erred in law in subjecting the above memorandum of gift dated 8.5.2002 to stamp duty."

14. There is little doubt, particularly, in view of the holding of the Supreme Court in **Hafeeza Bibi and others v. Shaikh Farid (Dead) by LRs and others, 2011 (2) ARC 218,** that an oral gift made by a *mohammedan*, which is subsequently reduced to writing 'does not become a formal document or instrument of gift', as observed by their Lordships of the Supreme Court.

15. The remarks of this Court in **Mohammad Shamim Akhtar** based on **Hafeeza Bibi** *(supra)* that a deed of gift by a *Mohammedan* is not an instrument effecting, creating or making a gift, but a mere piece of evidence and that such a writing is not a document of title, but a mere evidence of it, is trite exposition of the law, so far as the position goes under the Central Statute. This Court may only add that under the Central Statute also, if a deed of gift were made in writing conveying thereby the donor's interest to the donee in an immovable property, it would be taxable to stamp duty, like any other instrument of gift. It is only in cases where oral gift under the *Mohammedan* law is made and concluded by acceptance with delivery of possession, and a record of it, is subsequently drawn up, often called a memorandum of oral gift, or a record made of the antecedent and concluded transaction of *hiba* that it is not chargeable to stamp duty. But, this position obtains under the Central Statute. In **Mohammad Shamim Akhtar**, the U.P. State Amendment brought in vide U.P. Act No. 38 of 2001, adding sub-Section (14-A) to Section 2 of the Act of 1899 as applicable in the State of U.P. was noticed, but the Court did not consider or pronounce upon it, because in that case the oral gift had been made on 17.12.2001, of which a memorandum was drawn up on 08.05.2002, whereas U.P. Act No. 38 of 2001 came into force w.e.f. 20.05.2002.

16. Here, the oral gift was admittedly made on 16.05.2006 in the presence of witnesses, where the donee accepted the oral gift and took ownership possession of the suit property. The memorandum of oral gift was drawn up on 23.07.2006 recording the antecedent transaction done orally on 16.05.2006. The memorandum of oral gift, described as *'yaddasht hiba*' is not taxed to any stamp duty. The memorandum of oral gift here is one that was drawn after coming into force of the U.P. State Amendment to the Act of 1899 vide U.P. Act No. 38 of 2001. Also, the oral gift, that the memorandum records, was one made

after enforcement of the U.P. State Amendment under reference. Section 2(14-A) introduced vide U.P. Act No. 38 of 2001 amends sub-Section 14 of Section 2 of the Act of 1899 as follows:

"2. In section 2 of the Indian Stamp Act, 1899, hereinafter referred to as the principal Act, -

(a) for sub-section (14), the following sub-section shall be substituted, namely : -

"(14) 'Instrument'-'Instrument' includes every document and record created or maintained in or by an electronic storage and retrieval device or media by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded,"

(b) after sub-section (14), the following sub-section shall be inserted, namely : -

"(14-A) 'Instrument of Gift'-'Instrument of Gift' includes and instrument whether by way of declaration or otherwise, for making or accepting an oral gift," (emphasis by Court)

17. An instrument of gift is taxable to stamp duty on the value of the property as set-forth in the instrument, that is to say, at the same rate as a conveyance under Item No. 33 of Schedule I to the Act of 1899. It is not the rate of the stamp duty at which an instrument of gift is taxable, but the fact that it is taxable to stamp duty that is in issue here. Now, what is to be seen is whether by virtue of sub-Section (14-A) of Section 2 of the Act of 1899, as amended in its application to the State of U.P., a memorandum of oral gift, which records a concluded oral gift or *hiba* by a *mohammedan* is taxable to stamp duty. But, for the provision of sub-Section (14-A) of Section 2, a memorandum of oral gift, which did not by itself create any right and merely recorded an antecedent, oral transaction of gift or *hiba*, has always been held to be not taxable to stamp duty. It is on that principle that this Court acted in **Mohammad Shamim Akhtar** following the Supreme Court in **Hafeeza Bibi**.

18. Here, the statutory context has changed because sub-Section (14-A) of Section 2 of the U.P. State Amendment has defined an instrument of gift, which the Central Statute does not. The definition of an instrument of gift in sub-Section (14-A) of Section 2 is an inclusive definition and expressly says that it includes an instrument of gift whether by way of declaration or otherwise, for making or accepting an oral gift. The express words employed by the Amendment extend the sweep of the Act to cover not only those instruments of gift that by themselves convey the property donated, but also include declarations of gifts made or accepted orally. A conveyance by oral gift of immovable property is not known to the *corpus juris* in India except under the *Mohammedan* Law, for which the Transfer of Property Act makes allowance. In all other cases, the Transfer of Property Act mandates *vide* Section 123 as follows:

"123. Transfer how effected.-- For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery. "

19. Section 129 of the Transfer of Property Act makes allowance for oral

gifts under the Mohammedan Law and death bed gifts of movable property alone for other citizens. Section 129 reads:

129. Saving of donations mortis causa and Muhammadan law.--Nothing is this Chapter related to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law.

20. This being the substantive law relating to disposition by gift and given the terms of the State Amendment *vide* sub-Section (14-A) of Section 2 of the Act of 1899, there is not the slightest doubt that after enforcement of the State Amendment, a memorandum of oral gift recording an antecedent transaction of *hiba*, howsoever described and in whatever kind of words couched, is taxable to stamp duty as an instrument of gift. The order impugned holding to the contrary passed by the learned Additional District Judge cannot be countenanced.

21. This revision **succeeds** and is **allowed**. The impugned order dated 07.12.2007 is hereby **set aside** and the application bearing paper No. 357-Ga-2 restored to the file of the Trial Court, to be decided afresh, after hearing parties, in accordance with the guidance in this judgment. Needless to add that orders on the said application shall be passed within a month of receipt of this order by the Trial Court.

22. There shall be no order as to costs.

23. The Registrar General is directed to circulate a copy of this order to all the learned District Judges, and the Chief Controlling Revenue Authority, Uttar Pradesh.

(2023) 1 ILRA 1355
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.12.2022

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Civil Revision No. 465 of 2012
with
Civil Revision No. 486 of 2012

Ramesh Kumar Singh ...Revisionist
Versus
Virendra Singh & Ors. ...Respondents

Counsel for the Revisionist:
Sri Sumit Daga, Sri Vikrant Pandey

Counsel for the Respondents:
Sri Abhijit Banerjee

Rent and eviction-Dispute over unpaid rent and eviction -Legal disputes ensued, covering notice validity, monthly rent amount, and default - trial Court ruled in favor of landlords - denied eviction relief - High Court reversed the notice finding- compliance with the amended Section 106- reduced notice to 15 days - affirmed the rent amount and default- decreeing eviction against the tenant.

Revision dismissed. (E-9)

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

1. Since both the revisions have been preferred by the defendant-tenant and the plaintiffs-landlords, respectively, against the judgment and order dated 22.8.2012 passed by Judge Small Causes Court/Additional District Judge, Court No.1, Hathras. Therefore, both the revisions are being decided by this common judgement.

2. In brief, facts of the case are that Virendra Singh and others are the owner

and the landlord of the house in suit in which the opposite party-defendant is a tenant from 1994 @ 1,000/- per month apart from 10 % water and house tax.

3. Since the plaintiffs stay out of Hathras for a long time in connection to their job hence their mother Smt. Shanti Devi used to live with minor grand son Raju alias Arvind Kumar. Smt. Shanti Devi died in the year 2001, thereafter plaintiffs are the owner and landlords of the house in question and are entitled to receive the rent. The defendant is a great defaulter in payment of rent and has not paid the rent of the said house since 1.10.1999. When plaintiffs demanded the rent, he preferred false case against the plaintiffs for permanent injunction for unnecessarily harassing the plaintiffs.

4. Plaintiffs through their counsel sent legal notice dated 11.8.2022 and offered to pay the rent and taxes within 30 days from receiving the notice. In spite of service of notice, defendant did not pay the rent and the amount of taxes but a false and fabricated reply alleging himself to be the tenant @ Rs. 200/- per month and also did not accept that the amount was due against him. The tenancy of the defendant has been terminated. Since 1.10.1999 to 31.18.2002 there is arrears of rent of Rs. 25,000/-, Rs. 3,500/- each for house and water tax along with Rs. 3,00/- expense towards notice. Total Rs. 42,300/- is due which has not been paid by the defendant in spite of notice, hence the defendant is liable to be evicted and the due amount of the rent is liable to be recovered and the defendant-tenant is also liable to pay Rs. 2,500/- per month for use and occupation of the shop in suit. Valuing the suit and after paying the sufficient court fee, the plaintiffs had preferred the suit.

5. In written statement 11 C defendant admitted the plaintiffs to be the owner and landlords of the shop in suit and has said that no cause of action arises to the plaintiffs; they are not entitled for any relief; the defendant-tenant had taken the shop in suit on rent from 10.2.1992 @ Rs. 2,00/- per month along with house and water tax from Smt. Shanti Devi; he has been paying the rent regularly to Smt. Shanti Devi but she never provided any receipt, however, she used to note the receiving on a diary; Shanti Devi died in the year 2001, thereafter the tenant paid the rent to Dharmendra Kumar till November 2001; Dharmendra Kumar also passed away on 20.11.2001, thereafter plaintiffs demanded the rent from him separately and served notice through their counsel in the month of February, 2002 and thereafter with mutual consent received the rent from the defendant without giving receipt of rent but noted the payment in diary and also got the signature of the defendant; the said diary is in the possession of the plaintiffs.

6. On receiving of notice dated 11.8.2002 defendant came to know about the malafide intention of the plaintiffs and prepared reply on 4.9.2002 and sent through his counsel on 5.9.2002. Defendant-tenant also sent the reasonable rent from 11.6.2002 to 10.9.2002 which was not received by the plaintiffs. The notice is completely illegal and the illegitimate on which basis the tenancy never ends. On the date of notice dated 11.8.2002, there was only arrears of two months rent which was not received intentionally by the plaintiffs. In the notice, the plaintiffs have wrongly endorsed that the rent is due since 1.10.1999. The tenancy commenced from 11th of the month, not from the first day of the month. The plaintiffs have not filed any document,

hence the suit is barred by Order 7 Rule 14 CPC, Section 106 of Transfer of Property Act and Section 20 (2) (A) of U.P. Act No. 13 of 1972. Raju s/o Dharmendra Kumar is a major person and not the minor, in the plaint he has wrongly been shown to be minor.

7. The defendant instituted original suit no. 492 of 2002 (Ramesh Kumar Vs. Raju) in the Court of Civil Judge (J.D.) Hathras, for permanent injunction in which interim injunction has been issued in favour of the defendant. The house in suit is situated at the outskirt of Hathras at Madhugari where there is no market and the rent of shop is not more than Rs. 200/- monthly. Therefore, the suit is liable to be dismissed with cost.

8. The plaintiffs filed replica 12C1 and denied the contents of the written statement and reiterated the version of the plaint.

9. From the side of plaintiffs, P.W.-1, Virendra Singh and P.W.2, Om Prakash had been examined. In documentary evidence papers from list 18 C1 notice, postal receipt, acknowledgment and alleged diary had been filed.

10. From the side of defendant-tenant, he himself examined as D.W.-1 and one Komal Singh as D.W.2. In documentary evidence defendant-tenant had filed chalani form, tender receipts; notice dated 20.2.2002, registry receipt, copy of the reply dated 4.9.2022 and other tenders.

11. After hearing, the learned trial Court framed the following points for determination:

(1) Whether the notice dated 11.8.2002 given by the plaintiffs is against the law and this notice does not terminate the tenancy of the defendant-tenant?

(2) Whether the rate of the shop was Rs. 1000/- per month apart from house and water tax as alleged by the plaintiffs or the rate of the shop was Rs. 200/- per month including house and water tax as alleged by the defendant-tenant?

(3) Has the defendant-tenant made any default in paying the rent of the shop in question, if so, the effect?

(4) Are the plaintiffs entitled to any relief? If yes, then how?

12. In this case the trial Court has decided point nos. 2 & 3 in favour of the landlord but has decided point no. 1 against the plaintiffs/landlords and accordingly point no. 4 has been decided partially in favour of the defendant-tenant and had declined the relief of eviction.

13. Against the observations made by the trial Court in respect of issue no. 1 and accordingly regarding partially allowing the relief through point no.4, the plaintiffs have preferred the revision bearing no. 486 of 2012. Being aggrieved by the observations made in respect of point no. 2 & 3 accepting the rate of Rs. 1,000/- per month plus house and water tax and not admitting the version of the defendant-tenant and treating the defendant-tenant to be defaulter and directing him to pay the arrears of the rent and taxes as per the version of the plaintiffs, the defendant has preferred revision bearing no. 465 of 2012.

14. This Court is deciding the veracity of the findings given by the trial Court on the basis of evidence and the relevant law. Therefore, both the revisions are being decided as under.

15. ***Point for determination no. 1;***

This point has been decided against the plaintiffs and the trial Court has recorded the finding that on perusing the notice, he found that after the expiry of 30 days, tenancy has not been terminated however it has been mentioned therein to provide possession within 30 days hence notice in question is found to be contrary to the principles enunciated in Section 106 of the Transfer of Property Act, 1882. The trial court concluded that the notice is defective, therefore, the tenancy of the defendant-tenant can not be terminated in accordance with law and he can not be evicted.

In this case, notice has been given on 11.8.2002, the defendant admits that on 4.9.2002 he had prepared the reply of notice and had sent it to the plaintiffs on 5.9.2002. The record of trial Court is not available with this Court. However, some relevant papers have been annexed by the tenant as annexures to the revision. Perusal of the plaint shows that the plaint had been instituted on 29.10.2009 while in the judgment the trial Court has written it to be presented on 21.10.2002 which may be a typographical mistake.

For proper adjudicating this point, it would be proper to mention Section 106 of the Transfer of Property Act 1882.

Section 106 in The Transfer of Property Act, 1882;

1 [106. Duration of certain leases in absence of written contract or local usage.

(1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice.

(2) Notwithstanding anything contained in any other law for the time being in force, the period mentioned in sub-section (1) shall commence from the date of receipt of notice.

(3) A notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.

(4) Every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.]

By the amendment Act 3 of 2002, Section 106 has been amended w.e.f. 31.12.2002 by which now Section 106 contains four sub-sections and the period of notice is now 15 days where the lease is for any other purpose other than the agricultural and manufacturing, if the tenancy is month to month but where the tenancy is from year to year, the period of notice would be 6 months as it was prior to the amendment. Since in this case the notice was given before amendment on 11.8.2002, therefore, in this case the notice should have been given prior to 30 days. Amended sub-section 3 of the aforesaid Section is important. According to which notice shall not be deemed to be invalid

merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section. In this case the notice was given on 11.8.2002, the notice was sent through registered post within the city hence it would have been received by the defendant-tenant within three or four days. Though the receipt/acknowledgment is not on record to conclude that when and on which date the defendant-tenant had received notice but he admits that he had prepared reply of the notice on 4.9.2002 and had sent the same to the plaintiffs through his counsel on 5.9.2002. If days are calculated, it comes out that even from 4.9.2002, the suit was instituted after 30 days i.e. 29.10.2002. Thus, it can not be said that 30 days period was not provided to the defendant-tenant to comply with the notice.

The notice is not on record, copy of the notice has not been filed by either party but the trial Court has noted the 'second paragraph of the notice' in which it is written that after receiving the notice within 30 days, defendant had to pay the arrears of rent and to evict the possession of the shop in suit and to provide the actual possession to the plaintiffs.

The learned trial Court referring the judicial precedent Prabhakari Adhikari Devasthan Vibhag Jodhpur and Others Vs. Jamshed Ali and Others, 1999 AIHC 225 (Rajasthan High Court), concluded that if in the notice it is not written that the tenancy would be terminated after the expiry of 30 days, the said notice is illegal and by such notice the tenancy can not be terminated. The notice was given on 11.8.2002 while the suit was instituted on 29.10.2002 after expiry of two months and 18 days, therefore, it can be concluded that notice given by the plaintiffs-landlords is legal hence finding given by the trial Court regarding point no.1 treating the notice to be not legal in respect of eviction of the defendant-tenant is reversed and it is concluded that the notice under Section 106 of Transfer of Property Act, is legal for the purposes of the suit. This finding finds support from the clause 3 of the amendment Act 2002 which is as under:

"The provisions of Section 106 of the principal Act, as amended by Section 2 shall apply to, (a) all notices in pursuance of which any suit or proceeding is pending at the commencement of this Act."

Thus, the notice of only 15 days is sufficient.

16. ***Point for determination no. 2:***

On the basis of the averments of the plaint and the written statement, this point for determination had been framed as to whether monthly rent of the shop in suit is Rs. 1,000/- per month plus water and house tax or is only Rs. 2,00/- per month including water and house tax, as alleged by the defendant-tenant.

This issue has been decided by the trial Court in favour of the owner landlord on the basis of evidence. The trial Court has admitted that there is no weakness or admission in the evidence of the plaintiffs' witnesses on which basis it is concluded that the rate of rent is not less than 1,000/- per month and house and water tax in addition to that. P.W.1 and P.W.2 have proved the diary and it has been accepted by the trial Court. Defendant-tenant could not produce any cogent and reliable evidence that the rate of rent was only Rs.

2,00/- per month and also including the house and water taxes. Though the defendant-tenant had mentioned the property to be situated at the outskirt of the city but in examination he had admitted that shop in suit is situated 10-15 steps away from the main post-office. He has also admitted that behind the shop in suit, there is Gover Hospital and Hathras Kotwali is also situated at a distance of stone's throw. It is also admitted to the defendant that Kotwali and head office both are situated in the middle of the city. On the basis of said evidence the trial Court concluded that in such a posh area, the rate of shop in suit can not be less than Rs. 1,000/- per month plus house and water taxes.

The trial Court has also imposed responsibility on the defendant-tenant to prove this fact and found that the defendant-tenant could not discharge his duty.

It is settled law that the burden to prove the payment of rent is on the tenant. In this respect the learned trial Court has cited following rulings-

a) Suresh Chandra and Others Vs. Special Judge (E.C. Act)/Additional District Judge, Jalaun- Urai, 2005 A.L.J.(N.O.C.) 1062 (Allahabad).

b) Md. Siddiqui Vs. Second Additional District Judge Unnao and Ohters, 1997 (15) L C D-751.

c) Smt. Sulocharani Jain and Others Vs. Eighth Additional District Judge, Saharanpur and Others, 2002 (20) LCD 785 (All. High Court).

d) Balram Vs. Baikunthi Devi, 1988 AWC 1528.

e) Laxmi Narain Gupta Vs. Smt. Shanti Nigam, 2003 (21) L.C.D. 1301.

f) Smt. Shanti Devi Mishra Vs. Sri Gopal Narain Mishra and Others, 1983, ALJ, 839.

On the basis of the principles laid down in the aforementioned judicial precedents, the learned trial Court concluded that the burden to prove the payment of rent is on the tenant. This Court is also in conformity with the trial Court about this finding.

In Balram (supra), it has also been held that as per Section 7 of the U.P. Act 13, 1972, the burden to pay the water and house tax is on the tenant if contrary to that there is no any agreement. In this case the defendant could not establish that there was any agreement between the landlords and the tenant that water and house taxes would be paid by the plaintiffs-landlords or it has also been included in the rent.

In Smt. Shanti Devi (supra), it has been held that if the amount under Section 20 (4)of the U.P. Act No. 13, 1972, the rent is not deposited, the tenant would be liable to be evicted. It has also been propounded that the arrears of water tax has to be deposited by the tenant. In this respect it is noteworthy that the trial Court has concluded that U.P. Act, 13, 1972 does not apply as the house was built prior to the cut of date i.e. April 26, 1985, for application of the U.P. Act, 13, 1972. In this respect the relevant portion of Section 2 is reproduced herein:

[*Provided that where any building is constructed substantially out of funds obtained by way of loan or advance from the State Government or the Life Insurance Corporation of India or a bank or a co-operative society or the Uttar Pradesh Avas Evam Vikas Parishad, and the period of*

repayment of such loan or advance exceeds the aforesaid period of ten years then the reference in this sub-section to the period of ten years shall be deemed to be a reference to the period of fifteen years or the period ending with the date of actual repayment of such loan or advance (including interest), whichever is shorter.]:

[Provided further that where construction of a building is completed on or after April 26, 1985 then the reference in this sub-section to the period of ten years shall be deemed to be a reference to a period of 6 [forty years] from the date on which its construction is completed.]

Explanation I. [For the purposes of this section], -

(a) the construction of a building shall be deemed to have been completed on the date on which the completion thereof is reported to or otherwise recorded by the local authority having jurisdiction, and in the case of building subject to assessment, the date on which the first assessment thereof comes into effect, and where the said dates are different, the earliest of the said dates, and in the absence of any such report, record or assessment, the date on which it is actually occupied (not including occupation merely for the purposes of supervising the construction or guarding the building under construction) for the first time:

Provided that there may be different dates of completion of construction in respect of different parts of a building which are either designed as separate units or are occupied separately by the landlord and one or more tenants or by different tenants;

(b) construction includes any new construction in place of an existing building which has been wholly or substantially demolished;

(c) where such substantial addition is made to an existing building that the existing building becomes only a minor part thereof the whole of the building including the existing building shall be deemed to be constructed on the date of completion of the said addition.

This Court is of the considered view that the rate of rent was Rs. 1,000/- per month plus house and water tax which has also been proved from the evidence of P.W.1 and P.W.2 who have also proved the diary in which the payment of rent made by the defendant-tenant has been entered. Thus on the basis of the oral and documentary evidence and also considering the locality of the shop in suit, this Court concludes that the findings recorded by the trial Court on this point is correct.

17. **Point for determination no. 3**, has been framed as to whether the defendant-tenant has defaulted in payment of rent. This point has also been decided against the defendant-tenant and in favour of the landlord. From the evidence of P.W.1 and P.W.2 and also on the basis of diary, it is proved that the defendant-tenant has not paid the rent and he has wrongly taken the defence that he had paid up to date rent and when the rent was not accepted by the plaintiffs, he sent the rent amount through money order.

It has also been proved that the rent was Rs. 1,000/- per month and the tenant was also liable to pay 10 % of the house and water taxes. Certainly the payment has not been made by the tenant and he has defaulted in paying the rent. As documentary evidence, defendant-tenant had filed some tenders which were perused by the trial Court and the trial Court found that some amount through five tenders have been deposited by the tenant but he has not deposited the house and water taxes in addition to the rent and he has not

deposited the rent @ 1,000/- per month after service of notice. The defendant-tenant has not deposited the admitted rent in the Court, hence, it is concluded that the defendant-tenant has defaulted in making payment of the rent. Thus, point for determination no. 3 goes against the defendant-tenant and in this regard the finding recorded by the trial Court is affirmed.

18. ***The point for determination no. 4;***

On the basis of the aforesaid discussions, it has been proved that the defendant-tenant is the defaulter, he has not paid the rent and taxes, there is no defect in notice, hence, the trial Court has wrongly dismissed the suit in respect of relief of eviction. Since it is found that the suit was not bad under Section 106 of the Transfer of the Property Act, therefore, the suit had to be decreed in toto for the reliefs claimed by the plaintiffs-landlords.

19. Both the revisions are decided accordingly.

Order

(i). Civil Revision No. 465 of 2012 is dismissed with cost.

(ii). Civil Revision No. 486 of 2012 is allowed and the decree of eviction from the shop in suit is also passed against the defendant-tenant (Ramesh Kumar Singh) in addition to the other reliefs already granted by the trial Court.

(iii). Let a copy of this order be placed on the record of Civil Revision No. 486 of 2012 (Virendra Singh and Others Vs. Ramesh Kumar Singh).

(iv). A copy of this judgment be sent to the Court of Judge Small Causes Court/Additional District Judge Court No. 1, Hathras, for keeping on the concerned file.

(2023) 1 ILRA 1362
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.12.2022

BEFORE

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

Criminal Appeal No. 5737 of 2013

Ajayraj @ Raja ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri A.C. Srivastava, Sri Uttar Kumar Goswami (A.C.)

Counsel for the Respondent:
G.A., Sri S.K. Dubey

Criminal Law- Indian Evidence Act, 1872- Section 3- There is no doubt that when an occurrence takes place inside the house, only the family members and the relatives are eye witnesses but in this case in hand, the testimony of alleged eye witnesses do not inspire confidence-Informant has admitted that he had not seen the occurrence. PW-4 and PW-5 are other alleged eye witnesses but there are several material contradictions in their evidence which go to the root of the case.

Although testimony of family members of the deceased cannot be doubted merely on the ground that they are family members of the deceased, but where there are material contradictions in the testimony of the alleged eye witnesses which go to the root of the case of the prosecution then such testimony is rendered doubtful and unreliable.

Criminal Law- Indian Evidence Act, 1872- Section 3- There is no doubt that

antemortem injury shown in the postmortem report could be inflicted by fire arms but prosecution has to prove beyond reasonable doubt that fire arm was used by accused - appellant. The testimony of PW-6 is not wholly reliable and not corroborated by any other evidence. The accused can be convicted on the basis of sole testimony of eye witness but his testimony should be wholly reliable. In our case, no testimony of any alleged eye witness is found reliable.

Where the testimony of the eye witnesses is wholly unreliable then the accused cannot be convicted merely because the ante mortem injury in the post mortem report corroborates the ocular allegation. (Para 16, 19, 21)

Criminal Appeal allowed. (E-3)

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

1. Heard Sri Uttar Kumar Goswami, learned counsel Amicus Curiae for appellant and Sri Patanjali Mishra, learned A.G.A. for the state.

2. This appeal challenges the judgment and order dated 16.11.2013 passed by Additional Sessions Judge, Court No.12, District Meerut, in Session Trial No.664 of 2010(in Case Crime No.665 of 2009) (State of U.P. Vs. Ajayraj @ Raja and others) convicting accused-appellant, under Section 302 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and sentenced the accused-appellant to undergo imprisonment for life with fine of Rs.50,000/- and in case of default of payment of fine, further to undergo imprisonment for a period of one year.

3. Brief facts as culled out from the record are that P.W.1, Vinod Kalanjari, gave first information the police authority stating therein that at around 6:15 in the morning of 1.12.2009, three unknown young persons barged in his house at Kalanjari Gaon and fired indiscriminately with the intention to cause death of his younger brother Subodh Kumar, as a consequence of which his brother received grievous injuries and accused persons escaped firing aerial shots. He carried his injured brother with the help of his family members and villagers to K.M.C. Hospital for treatment and got him admitted where his treatment is going on and he continues to be critical.

4. The then Constable Clerk PW-3 at P.S. Jani had prepared Chik First Information Report Ex Ka-4 for the offence under Sec. 307 at 8:05 in the morning itself of 1-12-09 on the basis of aforesaid written complaint. Entry of the aforesaid was done by constable clerk PW-12 posted at P.S. Jani in report no. 14 of the G.D. on the same day at 8.05 in the morning as Ex Ka-13. Case was comitted u/s 302 of IPC after the death of injured during treatment, postmortem was done.

5. On being summoned, the accused-person pleaded not guilty and wanted to be tried. The offence for which accused was charged was triable by the Court of Sessions, hence, the accused-appellant was committed to the Court of Sessions. The learned Sessions Judge framed charge under Section 302 of IPC.

6. The Trial started and the prosecution examined 12 witnesses who are as follows:

1	Vinod Kumar	PW1
2	Dr. Sanjay Sharma	PW2
3	Pradeep Kumar	PW3
4	Radha	PW4
5	Abhimanyu	PW5
6	Seema	PW6

7	Satyapal Singh	PW7
8	Pratap Singh	PW8
9	Dr. Sanjeev Lalwani	PW9
10	Rajveer Sharma	PW10
11	Chandra Prakash Chaturvedi	PW11
12	Gyandas	PW12

7. In support of ocular version following documents were filed:

1	F.I.R.	Ex.Ka.4
2	Written Report	Ex.Ka.1
3	Application	Ex.Ka.10
4	Supurdginama of dead body	Ex.Ka.9
5	Recovery Memo	EX.Ka10
6	Recovery memo of empty cartridges and cartridge	Ex.Ka.6
7	Letter of CMO	Ex.Ka.6A
8	Medical examination report	Ex.Ka.3
9	Statement	Ex.Ka.8
10	Letter to Autopsy Surgeon	Ex.Ka.7
11	Postmortem report	Ex.Ka.11
12	Panchayatnama	Ex.Kal6B
13	Charge sheet	Ex.Ka.12

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

9. Learned amicus curiae for appellant first of all submitted that there is no eye witness in this case. All the witnesses of fact are planted. PW-1 (Vinod Kumar) informant has admitted in his testimony that he was not present at the place of occurrence when the alleged occurrence had taken place. P.W.-4(Radha) is the wife of the deceased, she has narrated the incident in her examination-in-chief. In her examination-in-chief she has deposed that she and her husband together came out of gate. If it was so how she could further depose that on the date of occurrence, she did not see his Jeth and her son Kabya because in her examination-in-chief she has specifically stated that her son Kabya also had reached to the place of occurrence. In her cross examination, she has also stated that she has given contradictory statement that after two or three months of incident, she had seen Kabya and Vinod and on the date of occurrence, she did not see Kabya and Vinod. She has stated that both the aforesaid statements, are correct but it cannot be so. Hence, the testimony of PW-4 (Radha) goes to show that she had not seen the occurrence and her testimony is hearse evidence.

10. PW-1 (Vinod Kumar) informant has admitted in his testimony that he was not present at the place of occurrence when the incident had taken place. P.W-5(Abhimanyu) is the son of brother of the deceased. He has stated in his cross examination that after the fire, he did not go near the deceased and hide herself behind the pillar. This is very unnatural conduct of PW-5. In his cross examination, he has stated that he did not tell to his father that accused had murdered his uncle. This is also very unnatural and cannot be believed. His testimony also does not inspire confidence. He has also stated that after departure of accused person, his father and cousin brother(son of the deceased) also came at the spot on hearing the sound of firing. This statement is very much in contradiction with the statement given by PW-4.

11. These aforesaid contradictions have argued by learned amicus curiae and after that he vehemently submitted by PW-6 is daughter of the brother of deceased and she is star witness of the prosecution. Her testimony is also goes to show that she has not seen any occurrence. Even the Investigating Officer has not recorded her statement during the investigation.

12. It is further submitted by learned amicus curiae for appellant that only the appellant- accused is charge-sheeted by the Investigation Officer and no weapon is recovered from him. The Trial Court has wrongly convicted the accused and the impugned judgment is liable to be set aside. The Investigating Officer has recovered the empty cartridge of different bore from the place of occurrence but no weapon was ever recovered from the accused. Hence, the prosecution also failed to connect that the fires have been opened by the accused - appellant. Hence, the connecting evidence is also missing in this case.

13. Learned counsel appearing on behalf of State opposed the aforesaid submission made by learned amicus curiae for appellant and contended that PW-6 is the family member of the deceased and she has told the name of accused in her statement. It is also submitted that the Investigating Officer has recovered two empty cartridge of 32 bore and one empty cartridge of 315 Bore along with bullet from the courtyard of house of the deceased.

14. Antemortem injuries in the postmortem report are fire arm injuries which could be inflicted by the weapon of the aforesaid bore. It is vehemently submitted that PW-6 has identified the accused- appellant in Court during her testimony. Hence, there is no infirmity and illegality in the impugned order/ judgment which calls for any interference by this Court.

15. We have considered the submission made by learned Amicus Curiae for appellant and learned AGA for State and perused the record.

16. Learned Trial Court has opined that the occurrence of this case had taken place inside the house of deceased. Hence, in such situation only the family member can be the eye witness. There is no doubt that when an occurrence takes place inside the house, only the family members and the relatives are eye witnesses but in this case in hand, the testimony of alleged eye witnesses do not inspire confidence.

17. Informant has admitted that he had not seen the occurrence. PW-4 and PW-5 are other alleged eye witnesses but there are several material contradictions in their evidence which go to the root of the case. PW-6 is also the family member and the learned AGA has contended that she had identified the appellant at the time of her testimony but in her opinion the conduct of this witness is highly unnatural. She has stated in her cross examination that at the time of occurrence, her father was not present in the house and after returning also her father did not ask from her or other family members regarding the incident. She has further stated that nobody in the family told to the police authority that as to who had fired on the decease. It is also pertinent to note that Investigating Officer did not record the statement of this witness, during the course of investigation under Section 161 Cr.P.C. as stated by learned Amicus Curiae for appellant.

18. Moreover, according to her, all other family members were also in the

house at the time of occurrence but their testimony is not found liable as discussed above.

19. There is no doubt that antemortem injury shown in the postmortem report could be inflicted by fire arms but prosecution has to prove beyond reasonable doubt that fire arm was used by accused - appellant. The testimony of PW-6 is not wholly reliable and not corroborated by any other evidence. The learned Trial Court has convicted the appellant by placing reliance on the testimony of alleged eye witnesses who are family members of the deceased but their evidence is not found reliable.

20. In our considered view, as discussed above, their testimony is not found reliable and prosecution have failed to prove that the offence is committed by accused - appellant. It is also pertinent to mention that the FIR of this occurrence as alleged is exaggerated because in the FIR, it is mentioned that there were three persons who had indiscriminately fired at the deceased. While during the course of investigation the evidence was found only against the appellant as per Investigating Officer and only the appellant was charge-sheeted. This fact goes to show that there is exaggerated version of the incident in the FIR and the informant has not seen the occurrence because in his testimony as PW-1, he has admitted this fact that he had not seen the incident and he was not present at the house when the incident took place. It is mentioned in the FIR that there were three unknown persons who had committed offence and the informant did not know their names. No identification parade was done.

21. The accused can be convicted on the basis of sole testimony of eye witness but his testimony should be wholly reliable. In our case, no testimony of any alleged eye witness is found reliable by us and we are of the considered opinion that the accused - appellant has wrongly been convicted and sentenced by the learned Court below as he was entitled to be acquitted on the basis of doubt created by the prosecution evidence, hence, we upturn the impugned judgment and the accused-appellant is entitled to be given benefit of doubt as prosecution has failed to prove the case against him beyond reasonable doubt.

22. Appeal is liable to be allowed and is, accordingly, allowed. The conviction and sentence of the accused- appellant is set aside. He is acquitted of the charge framed against him. The amount of fine be refunded to the appellant, if already deposited. The appellant be set free forthwith, if not wanted in any other cases.

23. The record and proceedings be sent back to the Trial Court forthwith.

24. We direct the High Court Legal Service Committee to disburse a sum of Rs.15,000/- to Sri Uttar Kumar Goswami, learned Amicus Curiae for his well assistance.

(2023) 1 ILRA 1366
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.11.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Contempt Appeal (D) No. 2 of 2022

Sanjay Kumar ...Appellant
Versus
Santosh Kumar Srivastava ...Respondent

Counsel for the Appellant:
Sri Sunil Kumar Mishra

Counsel for the Respondent:
Sri Ajay Kumar Srivastava, Sri Sameer Sharma (Senior Adv.)

Contempt Appeal-Challenge maintainability of the Appeal-the contempt court issued a direction in-to revisit its order and take decision-in case, no decision is taken by the Board-Court to proceed against the officers concerned-contempt court has held the officers to be totally in contempt. Therefore, the appeal would be maintainable -but the impugned order contains a directions for revisit and pass a fresh order-which could not have been issued.

Appeal allowed. (E-9)

List of Cases cited:

1. Midnapore Peoples' Coop. Bank Ltd.Vs Chunilal Nanda (2006) 5 SCC 399

2. S.M.A. Abdi & anr. Vs Private Secretary Brotherhood & anr., 2009 (4) UPLBEC 3106

3. Tarun Kumar Agrawal Vs The Executive Engineer U.P. Avas Neutral Citation No. - 2022:AHC:195807-DB 2 Evam Vikas Parishad Meerut 2013 (101 ALR 46)

4. Subhawati Devi Vs R.K. Singh & ors. (Special Appeal No. 553 of 2003 decided on 19.03.2004)

5. Modi Telefibres Ltd. & ors. Vs Sujit Kumar Choudhary & ors. (2005) 7 SCC 40

6. Purshotam Dass Goel Vs Justice B.S. Dhillon, 1978 (2) SCC 370

7. State of Maharashtra Vs Mahboob S. Allibhoy, (1996) 4 SCC 411

8. Tamilnad Mercantile Bank Shareholders Welfare Assc. (2) Vs S.C. Sekar & ors., (2009) 2 SCC 784

9. ECL Finance Ltd. Vs Harikishan Shankarji Gudipati & ors., (2018) 13 SCC 142

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Rajendra Kumar-IV, J.)

1. Heard Sri S.K. Mishra, learned counsel for the appellant and Sri Sameer Sharma, learned Senior Advocate assisted by Sri Ajay Kumar Srivastava, learned counsel

Submissions :-

2. Learned counsel for the respondent has raised a preliminary objection of maintainability of the present appeal on the ground that the order impugned is not an order, punishing the appellant for contempt, therefore, the appeal under Section 19 of the Contempt of Courts Act, 1971 is not maintainable in view of law settled by Hon'ble Supreme Court in **Midnapore Peoples' Coop. Bank Ltd. v. Chunilal Nanda (2006) 5 SCC 399 (Paragraph 11)**. He also relied upon the two Division Bench judgement of this Court in **S.M.A. Abdi and another vs. Private Secretary Brotherhood and another, 2009 (4) UPLBEC 3106** and **Tarun Kumar Agrawal vs. The Executive Engineer U.P. Avas Evam Vikas Parishad Meerut 2013 (101 ALR 46**. He also supports the impugned order on merit.

3. Sri S.K. Mishra, learned counsel for the appellant submits that the appeal is maintainable and he relied upon a Division Bench judgement of this Court in **Subhawati Devi vs. R.K. Singh and others (Special Appeal No. 553 of 2003 decided on 19.03.2004)** and in view of law laid down in **Modi Telefibres Ltd. and Ors. vs. Sujit Kumar Choudhary and Ors. (2005) 7 SCC 40 (Paragraph 4 and 5)**. He submits that the impugned order records of finding. He submits that once an order in compliance to the order of the writ

court has been passed it was not open for the competent court to direct the appellant to revisit the order. Hence, on merit the impugned order deserves to be set aside.

4. Brief facts of the present case are that in Civil Misc. Writ Petition No.30057 of 2016 (Santosh Kumar Srivastava vs. State of U.P. and others) was filed by the respondent herein which was allowed by the writ court by judgement dated 04.12.2017, directing as under :-

"In view of the above, we direct the respondents ***to consider the petitioner for grant of promotion on the post of Assistant Regional Manager (Technical) w.e.f. 09.06.2016 the date on which the persons junior to him have been promoted on the said post ignoring the entry dated 30.03.2012*** *in accordance with law within a period of three months and to accord all monitory benefits admissible as such to the petitioner."*

5. Thereafter, Managing Director of the U.P. Transport Corporation passed an order dated 06.11.2018 concluding as under :-

"मा० उच्च न्यायालय के निर्णय दिनांक 04.12.2017 के अनुपालन में इनके प्रकरण पर चयन समिति की होने वाली आगामी बैठक में विचार किया जाना था, किन्तु भ्रष्टाचार निरोधक दल द्वारा दिनांक 01.12.2017 को पुलिस अभिरक्षा में भ्रष्टाचार के आरोप में निरूद्ध किये जाने संबंधी गम्भीर आरोपों के संबंध में अनुशासनिक कार्यवाही वर्तमान में लम्बित है।

विगत में प्रोन्नति हेतु विभागीय चयन समिति की बैठक दिनांक 13.04.2018 में इनका प्रकरण प्रोन्नति पर विचार हेतु प्रस्तुत किया गया था जिसमें इनके विरूद्ध दिनांक 04.08.2014 के पूर्व की अनुशासनिक कार्यवाहियों के प्रकरणों में दिये गये दण्ड को चयन समिति द्वारा विचार में नहीं लिया गया। किन्तु इनके विरूद्ध अनुशासनिक कार्यवाही गतिशील होने के दृष्टिगत चयन समिति द्वारा सम्यक् विचारोपरान्त इनकी प्रोन्नति की संस्तुति बन्द लिफाफे में रखे जाने का निर्णय लिया गया। आगामी विभागीय चयन समिति की बैठक में इनके द्वारा पारित प्रतिकूल प्रविष्टि दिनांक 30.03.2012 को Washed-off मानकर अन्य विवरणों सहित पुनः प्रोन्नति के संबंध में विचार हेतु रखा जायेगाए जिस पर चयन समिति द्वारा नियमानुसार निर्णय लिया जायेगा।

तद्नुसार मा० उच्च न्यायालयए इलाहाबाद के निर्णय दिनांक 04.12.2017 के अनुपालन में याची श्री संतोष कुमार श्रीवास्तवए सीनियर फोरमैन ग्रेड. 1 द्वारा प्रस्तुत पत्यावेदन दिनांक 07.02.2018 एवं 08.10.2018 का अन्तिम रूप से निस्तारण किया जाता है।"

6. Thereafter, the respondent herein filed the aforesaid Contempt Application (Civil) No.5916 of 2018 in which the impugned order dated 14.09.2022 has been passed, as under : -

*"**On 07.09.2022,** time was granted to the counsel representing the opposite party to go through the matter. Today, when the case was taken up, further time was sought by the counsel for the opposite party.*

This Court finds that the officers are totally in contempt of the order passed by the writ Court dated 04.12.2017 as the Court had required to consider grant of promotion to the applicant with effect from 09.06.2016, the date on which the persons junior to him were promoted.

According to counsel appearing for the opposite party, certain irregularities were committed by the applicant in the year 2017 and in view of Government Order, ***the benefit could not be extended though the D.P.C. had recommended for promotion of the applicant.***

This Court finds that the ***decision is in totally in the teeth of the order passed by the writ Court on 04.12.2017.***

As a last opportunity, three weeks' further time is granted to the opposite party ***to revisit its order and take decision complying the order dated 04.12.2017.***

List this matter on 12th October, 2022.

In case no decision is taken by the Board till that date, ***the Court will be compelled to proceed against the officers concerned."***

7. Aggrieved with the aforesaid quoted order dated 14.09.2022, the opposite party / appellant herein has filed the present appeal under Section 19 of the Contempt of Courts Act, 1971 (hereinafter referred to as the "Act, 1971")

Discussion and Finding:-

8. The submission made by learned counsel for the parties in the afore-noted appeal raises the following questions :

(a) Whether under the facts and circumstances of the case, the present appeal under Section 19 of the 1971 Act is maintainable?

(b) Whether under the facts and circumstances, the impugned order is valid?

Question (a)

9. Section 19(1) of the Act, 1971 provides that an appeal shall lie as of right from any order or decision of High Court in the exercise of its jurisdiction to punish for contempt--

(a) where the order or decision is that of a single Judge, to a Bench of not less than two Judges of the Court;

(b) where the order or decision is that of a Bench, to the Supreme Court; Provided that where the order or decision is that of the Court of the Judicial Commissioner in any Union territory, such appeal shall lie to the Supreme Court.

10. In **Purshotam Dass Goel vs. Justice B.S. Dhillon, 1978 (2) SCC 370** (Para 3), the Hon'ble Supreme Court held as under :-

"The contempt proceeding is initiated under Section 17 by issuance of a notice." Thereafter, there may be many interlocutory orders passed in the said proceedings by the High Court. It could not be the intention of the legislature to provide for an appeal to this Court as a matter of right from each and every such order made by the Court. ***The order or the decision must be such that it decides some bone of contention raised before the High Court affecting the right of the party aggrieved. . .. . "***

11. In **State of Maharashtra vs. Mahboob S. Allibhoy, (1996) 4 SCC 411** (Para 4), the Hon'ble Supreme Court held as under :-

*"As sub-section (1) of Section 19 provides that an appeal shall lie as of right from any order, an impression is created that an appeal has been provided under the said sub-section against any order passed by the High Court while exercising the jurisdiction of contempt proceedings. T****he words 'any order'*** *has to be read with the expression 'decision' used in said sub-section which the High Court passes in exercise of its jurisdiction to punish for contempt. '****Any order' is not independent of the expression 'decision'. They have been put in an alternative form saying 'order' or 'decision'. In either case, it must be in the nature of punishment for contempt.*** *If the expression 'any order' is*

read independently of the 'decision' then an appeal shall lie under sub-section (1) of Section 19 even against any interlocutory order passed in a proceeding for contempt by the High Court which shall lead to a ridiculous result."

12. In the case of **Midnapore Peoples' Coop. Bank Ltd. v. Chunilal Nanda (2006) 5 SCC 399** (Para 11), the legal position has been summarized as under :-

(i) An appeal under section 19 is maintainable only against an order or decision of the High Court passed in exercise of its jurisdiction to punish for contempt, that is, an order imposing punishment for contempt.

(ii) Neither an order declining to initiate proceedings for contempt, nor an order initiating proceedings for contempt nor an order dropping the proceedings for contempt nor an order acquitting or exonerating the contemnor, is appealable under Section 19 of the CC Act. In special circumstances, they may be open to challenge under Article 136 of the Constitution.

*(iii). In a proceeding for contempt, the High Court can decide whether any contempt of court has been committed, and if so, what should be the punishment and matters incidental thereto. I**n such a proceeding, it is not appropriate to adjudicate or decide any issue relating to the merits of the dispute between the parties.***

*(iv). **Any direction issued or decision made by the High Court on the merits of a dispute between the parties,** will not be in the exercise of 'jurisdiction to punish for contempt' and therefore, not appealable under section 19 of CC Act. **The only exception is where such direction or decision is incidental to or inextricably connected with the order punishing for contempt, in which event the appeal under Section 19 of the Act, can also encompass the incidental or inextricably connected directions.***

(v). If the High Court, for whatsoever reason, decides an issue or makes any direction, relating to the merits of the dispute between the parties, in a contempt proceedings, the aggrieved person is not without remedy. Such an order is open to challenge in an intra-court appeal (if the order was of a learned Single Judge and there is a provision for an intra-court appeal), or by seeking special leave to appeal under Article 136 of the Constitution of India (in other cases).

13. In the case of **Tamilnad Mercantile Bank Shareholders Welfare Association (2) vs. S.C. Sekar and others, (2009) 2 SCC 784** (Para 39 to 40), the Hon'ble Supreme Court held as under :-

"39. It may a different matter, if the court while passing an order decided some disputes raised before it by the contemnor asking it to drop the proceedings on one ground or the other. Thus, in a given situation, an appeal would be maintainable even against a notice to show cause. Here even such a notice has not been issued and thus the question of satisfying the court by showing cause that the contemnors / respondents had not committed any contempt did not arise. Allegations had not been made against the Chairman of the meeting. The contempt proceedings had been initiated only against the Managing Director of the Bank.

40. Although we need not go into the larger question of maintainability of the appeal in view of the fact that the matter has been referred to the Three Judge Bench

*in Dharam Singh v. Gulzari Lal and others (SLP (Civil) No. 18852 of 2005), but prima facie, in view of the decision of this Court in Purshottam Das (supra) t**here cannot be any doubt that in a situation where order has been passed adverse to the interest of the alleged contemnor an appeal would be maintainable particularly where a judgment has been passed by a court which is beyond its jurisdiction."***

14. In **ECL Finance Limited vs. Harikishan Shankarji Gudipati and others, (2018) 13 SCC 142**, the Hon'ble Supreme Court reiterated the afore-noted principles of law on the question of maintainability of appeal under Section 19 of the Act, 1971, as laid down in its earlier decisions in **Tamilnad Mercantile Bank Shareholdrs Welfare Association (2) (supra) and Midnapore Peoples' Coop. Bank Ltd.** (supra).

15. Thus, **the legal position on the point of maintainability of an appeal under Section 19 of the Act, 1971**, as per law settled by Hon'ble Supreme Court; may be summarized as under :-

(i) An appeal under section 19 is maintainable only against an order or decision of the High Court passed in exercise of its jurisdiction to punish for contempt, that is, an order imposing punishment for contempt

(ii)Neither an order declining to initiate proceedings for contempt, nor an order initiating proceedings for contempt nor an order dropping the proceedings for contempt nor an order acquitting or exonerating the contemnor, is appealable under Section 19 of the Contempt of Courts Act, 1971. In special circumstances, they may be open to challenge under Article 136 of the Constitution.

(iii). In a proceeding for contempt, the High Court can decide whether any contempt of court has been committed, and if so, what should be the punishment and matters incidental thereto. In such a proceeding, it is not appropriate to adjudicate or decide any issue relating to the merits of the dispute between the parties.

*(iv). Any direction issued or decision made by the High Court on the merits of a dispute between the parties, will not be in the exercise of 'jurisdiction to punish for contempt' and therefore, not appealable under section 19 of Contempt of Courts Act, 1971. **The only exception is where such direction or decision is incidental to or inextricably connected with the order punishing for contempt, in which event the appeal under Section 19 of the Act, can also encompass the incidental or inextricably connected directions. The order or decision must be such that it decides some bone of contention raised before the High Court affecting the right of the party aggrieved.***

(v). If the High Court, for whatsoever reason, decides an issue or makes any direction, relating to the merits of the dispute between the parties, in a contempt proceedings, the aggrieved person is not without remedy. Such an order is open to challenge in an intra-court appeal (if the order was of a learned Single Judge and there is a provision for an intra-court appeal), or by seeking special leave to appeal under Article 136 of the Constitution of India (in other cases).

(vi) If the court while passing an order decided some disputes raised before it by the contemnor asking it to drop the proceedings on one ground or the other, then, in a given situation, an appeal would be maintainable even against a notice to show cause.

(vii) There cannot be any doubt that in a situation where order has been passed adverse to the interest of the alleged contemnor, an appeal would be maintainable particularly ***where a judgment has been passed by a court which is beyond its jurisdiction.***

(viii) The exercise of jurisdiction to punish for contempt commences with the initiation of a proceeding for contempt and if the order is passed not discharging the rule issued in contempt proceedings, it would be an order or decision in exercise of its jurisdiction to punish for contempt. Against such order, appeal would be maintainable."

16. Having summarized the settled legal position on the question of maintainability of appeal under Section 19 of the Act, 1971, we now proceed to examine the impugned order dated 14.09.2022.

17. We have perused the impugned order and we find that the court below has recorded a finding in the second paragraph of the order that the **Officer is totally in contempt** of the order passed by the writ court dated 04.12.2017. In the **fourth paragraph** of the impugned order, the contempt court has again recorded a finding that without commenting upon the decision dated 06.11.2018 whereby the representation of the respondent was disposed of by the Managing Director; the Contempt court observed **such decision to be totally in the teach of the order passed by the writ court** on 04.12.2017. Thereafter, the contempt court has issued a direction in **fifth paragraph** of the impugned order that **last opportunity is granted to the opposite party to revisit its order and take decision**. Thereafter, in the **last paragraph**, the contempt court observed that in case, no decision is taken by the Board till that date, the Court will be compelled to proceed against the officers concerned.

18. The findings recorded, direction issued and the observation made in the order dated 14.09.2022 as noted above, leaves no manner of doubt that the contempt court has held the officers to be totally in contempt. Therefore, the appeal would be maintainable in view of law summarized in para 15 (i) and (iii) above.

19. That apart, the Managing Director had taken a decision dated 06.11.2018 which could have been challenged by the respondent / contempt applicant before appropriate forum. We have specifically asked learned counsel for the respondent to apprise us as to whether the order dated 06.11.2018 passed by Managing Director has been challenged by the respondent? and he replied that it has not been challenged as yet and the respondent proposes to challenge it by filing a writ petition or before appropriate forum.

20. Under these circumstances, the contempt court traveled beyond its power to issue directions to the authorities concerned to revisit its order and to take a decision. Hence, the appeal is maintainable in view of the settled legal position summarized above.

21. In view of discussion made above, **we reject the preliminary objection raised by the learned counsel for the respondent and we hold that present appeal under Section 19 of the Act, 1971, is maintainable.**

22. At this stage, learned Senior Advocate appearing for the respondent

states that the respondent proposes to challenge the order dated 06.11.2018 by filing a writ petition and therefore, liberty may be granted to him to file a writ petition.

23. In our view, if the respondent is aggrieved with the order dated 06.11.2018 passed by the Managing Director, it is well within his rights to challenge that order by filing writ petition or to challenge it before appropriate forum.

24. So for as the impugned order is concerned, it would be suffice to observe that in the impugned interlocutory order, the findings have been recorded that the Officers are totally in contempt. Therefore, the impugned order is unsustainable.

25. That apart, the impugned order contains a directions for revisit and pass a fresh order, which in our humble view could not have been issued. Therefore, the impugned order dated 14.09.2022 cannot be sustained.

26. For all the reasons aforestated, the impugned order dated 14.09.2022 is set aside.

27. The contempt court may proceed in accordance with law. The contempt Application (Civil) No. 5916 of 2018 shall be listed before the contempt court in **second week of January, 2023.**

28. The appeal is **allowed** to the extent indicated above.

(2023) 1 ILRA 1373
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.12.2022

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Civil Revision No. 341 of 2016

Smt. Meena Devi ...Revisionist
Versus
Babu Ram & Ors. ...Respondents

Counsel for the Revisionist:
Sri Murli Dhar Mishra

Counsel for the Respondents:
Sri Raghuvansh Misra, Sri Sachida Nand Tiwari

Civil Law - Impleadment-Indian Trust Act-Section 74-Impugned order-impleadment allowed-applicant impleaded as defendants-Suit filed u/s 74 of the Act-certain questions to be considered only after impleadment is allowed.

Revision dismissed. (E-9)

List of Cases cited:

1. Balasaheb Vs Venkat, (2006) SCC 530

2. Amit Kumar Vs Farida, AIR 2005, SC 2209

3. Anil Kumar Vs Shiv Nath (1995), 3 SCC 147

4. S.T.C. Vs Chittoor Co-operative, AIR 1990 Del, 142

5. Ratan Muni College Vs Additinal Civil Judge, AIR 1995 Allahabad 7

6. Udit Vs Additional Member Board of Revene AIR 1963, SC, 786

7. Kasturi Vs Iyyamperumal, AIR (2005) 6 SSC 733

8. Basanligappa Vs Nagamma, AIR 1969 Mys 313

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

1. This civil revision has been instituted against the order dated 15.9.2016 passed by Additional District & Sessions

Judge/ Fast Track Court, Court No.-2, Kannauj, in original suit no. 01 of 2014 (Smt. Meena Devi Vs. Babu Ram).

2. By the impugned order, the learned Court below allowed the application 25 C2 and directed the plaintiff to implead the applicants as defendants.

3. In brief, facts of the case are that Meena Devi filed an original suit no. 1 of 2014 under Section 74 of the Indian Trust Act in the Court of District & Sessions Judge Kannauj stating therein that one Ram Prasad, who was the trustee and occupant of the properties A, B & C mentioned in the foot of the plaint, constructed a Shiv Mandir in village Balarpur, District Kannuaj, over the land of list 'A' which was known as Mahadev Mandir. He also constructed Thakur Gi Temple and some other temples over the land of list B and vested the land of list 'C' for the maintenance of temples made over the land of list 'A' & 'B'. He also constructed one room in the plot A & B. In this regard he executed a deed on 2.12.1959 and appointed Swami Ram Charan disciple Bhagwandas as the Sarvarakar (priest). The aforesaid Ram Charan died during the life time of Ram Prasad, therefore, he executed another deed on 29.4.1982 appointing Jageshwar Prasad (plaintiff's husband) as the Sarvarakar of the temple and also authorized him to appoint Sarvarakar of his choice. Apart from being appointed by Jageshwar Prasad the plaintiff is also his legal representative being his wife. Thus she has become Sarvarakar of the impugned trust. Jageshwar Prasad executed a will deed dated 8.2.2014 appointing the plaintiff as Sarvarakar and after their death their heirs by way of inheritance for the time immemorial.

4. After death of Jageshwar Prasad on 5.4.2015, on the basis of deed executed by him, the plaintiff became Sarvarakar. She was also given right to appoint Sarvarakar being legal representative of Jageshwar Prasad. Jageshwar Prasad had also constructed Dharmshala over the land of list A & B from the income of the property of list 'C' and with his own income. The defendant has no concern with the property of list A, B & C. The defendant saying himself to brother of Jageshwar Prasad is not ready to get the name of the plaintiff mutated. The defendant Babu Ram, is not ready to get the name of the plaintiff recorded in the revenue record, therefore, it was prayed to appoint the plaintiff as Sarvarakar of the temple through Court. This Court has jurisdiction to try the suit hence it was prayed to appoint the plaintiff as Sarvarakar of the property A, B & C of the plaint.

5. During the pendency of the case, an application under Order 1 Rule 10 CPC was moved by Anil Srivastava and Shiv Nath stating that the suit is based on false and fabricated facts. The defendant is real brother in law (Devar) of the plaintiff. The temple was constructed by original trustee Ram Prasad and he had gifted his Bhumidhari property situated in the village Sahajhapur and Balarpur vide registred deed dated 2.12.1959. He had also executed an amendment agreement dated 29.4.1982 and appointed Jageshwar Prasad Katiyar his manager and trustee of the trust and also authorized him to appoint manager and trustee during his lifetime.

6. During lifetime of Jageshwar Prasad, he neither appointed any manager nor executed alleged deed dated 8.2.2014 in favour of the plaintiff. The alleged unregistered deed is forged and fictitious which bears no signature of Jageshwar Prasad. The plaintiff is not the sarvarakar of the impugned trust nor she can be.

7. Jageshwar Prasad had jointly executed an affidavit dated 8.9.2012 whereupon his original signature are present. Apart from that he had also signed on declaration as guarantor. The original signature is totally different from the signature that has been made on the alleged deed dated 8.2.2014. The plaintiff has no concern with the trust. She is not in possession over the trust property. In fact the trust is a public trust and the defendant/applicants who are the residents of village Balarpur, perform worship in the temple and look after its property and they are the beneficiary and necessary party to the suit, therefore, plaintiff be directed to implead the applicants as defendants so that the correct facts through the written statement/objections may be presented. Plaintiff and defendants are in collusion and have concealed the facts. They want a decision from the court to grab the trust property.

8. After hearing both the parties the learned Additional District and Sessions Judge allowed the application and directed the plaintiff to implead the applicants as defendants on the ground that it is true that the plaintiff and defendants are the real Devar and Bhabhi, the facts of the suit were admitted by the defendants and they wanted the case to be decided accordingly. There is apprehension of grabbing the property of the trust and hence the Court below found that applicants must be impleaded as defendant to bring the true facts before the Court.

9. Being aggrieved by the aforesaid order, the present revision has been preferred by the revisionist-plaintiff on the ground that the Court below has exercised its jurisdiction illegally and has allowed the application under Order 1 Rule 10 CPC after recording the finding that the papers relied upon by the plaintiff is forged and fictitious without giving an opportunity to prove its genuineness which will cause failure of justice and irreparable loss to the revisionist. The Court below has failed to consider that the trust is a private trust and not a public trust. The Court has also failed to consider that the applicants have no connection with Ram Prasad, the creator of the trust or with Jageshwar, the trustee appointed by Ram Prasad. The Court below has also failed to consider that the document dated 8.2.2014 is a will deed and need not be registered and is a valid document unless its execution appears to be in suspicious circumstances. The Court below has also failed to consider that the conditions under Order 1 Rule 10 CPC are not satisfied.

10. Heard learned counsel for the revisionist, learned counsel of opposite party and perused the record.

11. Learned counsel for the revisionist submits that the impugned trust is a private trust and after death of revisionist's husband, Jageshwar Prasad, she moved an application under Section 74 of the Indian Penal Code making her brother-in-law (Devar) as defendant to appoint her as Sarvarakar on the basis of alleged will deed executed by her husband Jageshwar Prasad on 8.2.2014 and also on the basis of being legal representative of the deceased Jageshwar Prasad.

12. The facts of the case have already been mentioned earlier. The deed executed by Ram Prasad is annexed as annexure no. 1 with the revision wherein he admits that there is a temple of Shri Shiv Ji built on the

Thatiya road in his viallge for which there is no land for the arrangement of worship, yoga etc.

13. From the perusal of the aforesaid documents it transpires that the Shiv Ji Mandir in Thathiya road in the concerned village was not built by Ram Prasad. Later on he being issueless, wished to dedicate his property, details of which have been mentioned in the deed, for all kinds of expenses, repair and colour, yoga etc of the said temple. Accordingly he had dedicated his property to the said temple and also imposed the condition that he will be manager of the said temple and attached his property to it and after his death Shri Swami Ramcharan Chela Bhagwandas will be the priest of Shivji temple. It has also been mentioned that during lifetime of Ram Prasad, Swami Ramcharan Chela Bhagwanadas died and later on another deed was executed by Ram Prasad on 29.4.1982 in which contrary to the averments of the previous deed, he has stated that Shiv Ji Mandir was built by him at Thatia road and he had gifted his property for the purposes of worship, Arti, Yoga, festival and repair etc. He has also admitted that he has become very old and now he is unable to perform the work of the temple. Jageshwar Prasad Katiyar son of Ram Das Katiyar, does help him in his work and also keeps proper arrangement for his food and lodging etc. Thus he amended initial waqfnama dated 2.12.1959 and appointed Jageshwar Prasad as manager and trustee and also given him right to appoint any person as manager and trustee in his lifetime.

14. As per the contention of the learned counsel for the revisionist, Jageshwar Prasad died in the month of April, 2014 and before his death he had executed will deed dated 8.2.2014 wherein he has referred the deed executed by Ram Prasad. He also mentioned that Ram Prasad had appointed him Sarwarakar through letter of authority dated 29.4.1982 and he was also given right to appoint Sarwarakar because there is no one in the family of Ram Prasad, therefore, under the right he appointed his wife as Sarwarakar after his death and also that after the death of his wife his sons will be Sarwarakar and after them, their sons shall be Sarwarakar and it shall be continued generation to generation.

15. In this case no proceedings under Section 73 of the Indian Trust Act has been adopted but an application has been filed for appointing the applicant-revisionist as Sarvarakar, under Section 74 of the aforesaid Act, making brother-in-law as defendant who has although denied the averments of the application in written statement but it is very precise wherein no complete facts have been mentioned. It has also been noticed that when in the year of 1959 initially the trust was created by Ram Prasad, Shivji Temple was already into existence at Thatiya Road. It appears that the temple was built for pubic at large and Dharmshalas were made for the benefit of public at large and for proper maintenance, properties of list C were donated to the temple. Admittedly Ram Prasad had no issue, therefore, it appears that his intention was to create the trust for the benefit of public in general and only maintenance right was provided to Jageshwar Prasad. It is also noteworthy that both the deeds of 1959 and 1982 were registered deeds. The question arises as to whether the Sarwarakary rights could be created by way of an unregistered will or any registered instrument is required.

16. Certainly the applicant Smt. Meena Devi and the opposity party Babu Ram are the family members. The trust was

not created for the benefit of their family. Therefore, a burning question arises as to whether the said trust is private or public in nature. If the property in suit is a public property for public charities then Section 92 CPC would come into picture and the provisions of Indian Trust Act would not apply.

17. The opposite party has also denied the execution and signature of Jageshwar Prasad on the alleged will deed. According to the revisionist the alleged will deed had been executed by Jageshwar Prasad in the month of February 2014 and just thereafter in the month of April, 2014, Jageshwar Prasad had died. The question arises as to whether at the time of execution of the alleged will deed, Jageshwar Prasad was a person of sound mind and health or not. The burning question also arises as to whether the alleged deed is in consonance to the deed executed by initial trustee Shri Ram Prasad or not. It appears that it was not the intention of Ram Prasad that the property should go to a particular race or the family. No restriction was imposed by Ram Prasad regarding entry of any person of Hindu community in the aforesaid temples. The opposite parties have come with the case that the alleged will deed dated 8.2.2014 is forged and fictitious which bears no signature of Jageshwar Prasad. It is also a question that it is an unregistered deed on which basis whether the plaintiff can be appointed as Sarwarakar. Primafacie the impugned trust appears to be a public trust and the applicants are the original residents of village Balarpur, they worship in the temple and according to them, they also look after its property, therefore, they are the beneficiary. According to the applicants both the parties are in collusion so they can usurp the trust property, therefore, applicants be arrayed as party to bring the correct fact before the Court.

18. The learned Court below considering the applicants to be necessary party, allowed the application. Being aggrieved, the revisionist has preferred this revision.

Order 1 Rule 10 CPC is as under:

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 thought 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 copes 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.

Order 1 Rule 10 CPC enables the court to add any person as party at any stage of the proceedings, if the person whose presence before the court is necessary in order to enable the court effectively and completely adjudicate upon and settle all the questions

19. In **Balasaheb Vs. Venkat, (2006)** SCC 530, it is held that-

"in application for impleadment under Order 1 Rule 10 CPC, the only question that comes to be decided as whether the presence of the applicant before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle all the disputes involved in the proceedings."

In **Amit Kumar Vs. Farida, AIR 2005, SC 2209,** it is held that-

"a person can be added as a party in two cases, viz (a) if he ought to have joined as a party to the suit and has not been so joined; (b) if the suit can not be decided without his presence."

In **Anil Kumar Vs. Shiv Nath (1995), 3 SCC 147**, it is held that-

"out of several tests for deciding the question if a third person should be allowed to be added as a party in a suit, the important tests are; (1) whether the result of the suit will affect the third party applicant; (2) whether the court will be required to answer any issue other than those arising or would arise from the suit from the pleadings of parties to the suit; and (3) whether the presence of the party will facilitate effective and complete adjudication of all questions involved in the suit. A party may be added although no relief has been claimed against him. His presence is necessary for a complete and final adjudication. He is thus a proper party."

In **S.T.C. Vs. Chittoor Co-operative, AIR 1990** Del, 142, it is held that-

'there may be cases when some person has to be impleaded as party defendant for proper adjudication of the dispute although no relief can be claimed against him.

In **Ratan Muni College Vs. Additinal Civil Judge, AIR 1995 Allahabad 7**, it is held that-

"theory of dominus litis should not be over stretched. The Court may order that a party be joined at any stage of the proceeding to completely and effectively adjudicate the dispute even if a party to the suit does not choose to implead."

In ***Udit Vs. Additional Member Board of Revene AIR 1963, SC, 786*** it is held that

"Court can suo-motu or on the application of a party can add or implead a proper party for completely settling the dispute".

In ***Kasturi Vs. Iyyamperumal, AIR (2005) 6 SSC 733***, it is held that-

" for determining whether a party is a necessary party or not, the following two facts are to be satisfied;

(1) there must be a right to some relief against such party in respect of conditions involved in the proceeding; and

(2) no effective decree can be passed in the absence of such a party."

In ***Basanligappa Vs. Nagamma, AIR 1969 Mys 313***, it is held that-

"the provisions of this rule shall be applicable in so far as they are not inconsistent with the provisions of a special statute."

20. Thus it can be said that even in the proceeding of Indian Trust Act order 1 Rule 10 CPC is applicable.

21. On the basis of above discussion, this Court is of the opinion that the Court below has correctly allowed the application of the applicants and directed the revisionist to implead them as defendants. It is also noteworthy that several questions have been arisen out from the above discussions which could only be decided by impleading the applicants/opposite parties in the application moved by the revisionist under Section 74 of the Indian Trust Act. Thus, the impugned order does not suffer from any error or illegality and the revision is liable to be dismissed.

22. Accordingly, the revision is dismissed with cost. Stay order dated 5.10.2016 is hereby vacated. Let a copy of this order be sent to the Court below for proceeding further.
